MASTER'S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

LGB Asylum and Family Reunification in the EU

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Master's Programme in International Law and Human Rights

Åbo Akademi University

2023

ÅBO AKADEMI UNIVERSITY – Faculty of Social Sciences, Business and Economics, and Law
Abstract for Master's Thesis

Subject: Public International Law, Master's Degree Programme in International Human Rights Law	
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Title: LGB Asylum and Family Reunification in the EU	
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Abstract:
This thesis focuses on the effects on the refugee determination process when the characteristic prompting persecution is one that might not be externally detected or possible to hide. The thesis will focus solely on asylum claims based on sexual orientation. It will not encompass the whole SOGI concept including gender identity in the equation. Gender identity is often, although not exclusively, a characteristic that is more commonly expressed in a way visible to others. This puts gender identity outside the scope of this thesis. The thesis is written using dogmatic methodology and retaining a legal focus throughout. I aim to research the topic through the following questions. In what way can sexual orientation be viewed as a basis for asylum? What are the challenges of the current methods used to determine this type of claims? How is credibility determined in asylum claims? To what extent are rainbow families able to access family reunification in the EU?

The thesis will explore the topics of asylum based on sexual orientation, as well as family reunification in a lgb context through a timeline of stages constituting of before, during and after the processing of the asylum claim. Chapter two will examine the refugee concept from three different inter-related perspectives. It will explore the legal background for this thesis through the refugee concept. The refugee concept will be explored from an international angle, a European Union angle, and an International Human Rights law angle. Legal material will be used from all three areas of law. This part of the thesis will embody the before part. Chapter three focuses on the specific challenges relating to the processing of asylum claims based on sexual orientation, focusing especially on the challenges related to a narrative-based approach to evidence assessment and the credibility assessment. This chapter will embody the during part. Chapter four will discuss issues arising after a possible successful asylum claim from the perspective of sexual orientation – related claim where the claimant has family. It will discuss to what extent a refugee in the European Union has access to family reunification, as well as some relevant case law on the matter. This chapter will embody the after part.

Hallmark ECtHR and CJEU cases related to lgb family reunification are discussed. The high level of burden of proof for establishing whether the relationship in question in fact exceeds the threshold for being considered a long-term relationship qualifying for family reunification makes the situation increasingly difficult in a refugee setting. It is concluded that it is reasonable to assume that a refugee applying for family reunification for their rainbow family would face significant hurdles in getting their right to family reunification realised.

Keywords:
Refugee Law, Sexual orientation, Credibility, Family Reunification.

Date: 21.5.2023	Number of pages: 77

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Abbreviations and Acronyms

EASO - European Union Agency for Asylum

ECtHR - European Court of Human Rights

ECHR – European Convention on Human Rights - Convention for the Protection of Human Rights and Fundamental Freedoms

EU- European Union

CJEU – Court of Justice of the European Union

Family Reunification Directive- Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

OHCHR - Office of the United Nations High Commissioner for Human Rights

UDHR- Universal Declaration for Human Rights

UNCRC- Convention on the Rights of the Child

UNHCR - United Nations High Commissioner for Refugees

SOGI - Sexual orientation or gender identity

IHRL – International human rights law

ICCPR - International Covenant on Civil and Political Rights

QD – Qualification Directive

ICTY - International Tribunal for the former Yugoslavia

The 1951 Refugee Convention - The Convention Relating to the Status of Refugees

The Citizens' Rights Directive - Directive 2004/38/EC

The Family Reunification Directive - Directive 2003/86/E

1.Introduction

1.1.Background

Human rights violations based on sexual orientation or gender identity (SOGI) forms the base of a growing number of asylum claims within the European Union.[1] Identifying as LGB, as well as acts relating to this is still to this date illegal in dozens of countries the world over.[2] In addition to criminalizing homosexuality, some countries even apply the death sentence in these situations.[3] Even in countries not explicitly penalizing being LGB, there might be so called morality laws in place *de facto* penalizing acts relating to this.[4] These laws may in turn encourage, or lead to, violence against LGB persons both from state- and private actors.[5] Research has shown a clear correlation between violence against LGB persons from non-state actors when homosexuality is criminalized.[6] Sexual orientation-based asylum claims do however face a certain amount of distrust.[7]

As with any kind of asylum applications, also those having their base in sexual orientation will need to be investigated based on facts and assessed towards legal provisions. On an international level the relevant legal provisions consist of the 1951 Refugee Convention, on a European level The Qualification Directive and further domestic legislation on the domestic level. Compared to asylum applications based on other persecution grounds, such as e.g. torture, where logic states that there often might be physical evidence available, asylum applications based on sexual orientation faces a different reality. How

[1] The SOGICA Project, available at https://www.sogica.org/en/ (last visited on 14 September 2022).
[2] Human Dignity Trust, available at https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/ (last visited 4 October 2022); Janna Wessels, *The concealment controversy : sexual orientation, discretion reasoning and the scope of refugee protection*, Cambridge: Cambridge University Press, 2021, pp.24.
[3] Wessels, 2021, pp.24
[4] Choi, 2010, pp. 241
[5] Amnesty International, 2008, pp. 5
[6] Wessels, 2021, pp.24
[7] Sabine Jansen, *Pride or shame? Assessing LGBTI asylum applications in the Netherlands following the XYX and ABC Judgments*, COC Netherlands, 2019, pp. 167.

do you investigate such an inherently subjective element? When physical, external evidence becomes impossible to standardise to an extent that it can be used as an assessment tool, one must turn towards more abstract forms of evidence. This naturally results in a situation where the narrative of the applicant takes a central role in the assessment of an asylum application based on sexual orientation resulting in persecution. How is an application then presumably to be investigated if the narrative of the applicant is the only available evidence? This results in a situation where the relevant question morphs into whether the narrative is credible.

If the narrative of the applicant would prove credible, and the asylum application successful as a result of this, the now refugee might have family they would wish to cohabit with. This in turn would trigger the question of family reunification.

1.2. Aim and Purpose

I aim to start my research with researching the legal basis for asylum claims of this type. I then aim to move forward to how these claims are investigated. I will then discuss challenges which arises from these types of investigations. I will focus on the credibility assessment as that tends to be the most commonly relevant way of investigating this type of asylum applications. Finally, I will discuss the realisation of the right to family life in case of a successful asylum claim.

I aim to research the topic through the following questions. In what way can sexual orientation be viewed as a basis for asylum? What are the challenges of the current methods used to determine this type of claims? How is credibility determined in asylum claims? To what extent are rainbow families able to access family reunification in the EU?

1.3.Limitations, Method & Sources

This thesis will begin exploring the topics through a timeline of stages constituting of *before, during* and *after* the processing of the asylum claim. Chapter two will examine the refugee concept from three different inter-related perspectives. It will explore the legal background for this thesis through the refugee concept. The refugee concept will be explored from an international angle, a European Union angle, and an International Human Rights law angle. This part of the thesis will embody the *before* part. Chapter three will focus on the specific challenges relating to the processing of asylum claims based on sexual orientation, focusing especially on the credibility assessment. This chapter will embody the *during* part. Chapter four will discuss issues arising after a possible successful asylum claim from the perspective of sexual orientation – related claim where the claimant has family. It will discuss to what extent a refugee in the European Union has access to family reunification, as well as some relevant case law on the matter. This chapter will embody the *after* part.

This thesis will focus solely on asylum claims based on sexual orientation. It will not encompass the whole SOGI concept including gender identity in the equation. This thesis focuses on the effects on the refugee determination process when the characteristic prompting persecution is one that might not be externally detected or possible to hide. Gender identity is often, although not exclusively, a characteristic that is more commonly expressed in a way visible to others. This puts gender identity outside the scope of this thesis.

I will retain a legal focus throughout my thesis. I will not discuss to any greater extent issues relating to the credibility assessment that belong to other disciplines, such as interpretation, mental health, etc., as those topics are outside the scope of a Master's thesis in Public International Law and Human Rights.

I will use a dogmatic method when conducting my research. My Material will consist of The Convention Relating to the Status of Refugees, case law from the Court of Justice of

the European Union and the European Court of Human Rights, as well as scientific articles, reports, books, and relevant websites. In addition to this I will use international and European guidelines for the processing of asylum claims relating to sexual orientation produced by influential international intergovernmental organizations such as UNHCR and EASO (European Asylum Support Office). This is motivated by the strong influence these organizations have over the actual practical work being carried out by the Immigration offices. I will also examine European Union legislation, mainly Directives, in its relation to the topics of my thesis. European Union Directives is of especially great importance in this case as it gets incorporated into national legislation *de facto* in force in the Member States of the European Union.

2. Sexual Orientation in Relation to Refugee Law

2.1. The 1951 Refugee Convention, UDHR & Qualification Directive

The right to apply for asylum, as well as being granted asylum if meeting the criteria, is established in the Universal Declaration of Human Rights (UDHR). According to the Universal Declaration of Human Rights, art. 14(1), "Everyone has the right to seek and to enjoy in other countries asylum from persecution."[8] Although it remains non-binding, being in the form of a Declaration, it is often incorporated in some form into domestic or regional legislation, and therefore often *de facto* becomes binding. The right can e.g., be found in the EU Charter of Fundamental Rights where Article 18 states that "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees…".[9]

When examining the concept of asylum based on sexual orientation the most important international legal frameworks to consider are the United Nation's Convention Relating

[8] UN General Assembly, Universal Declaration of Human Rights, 1948, Article 14(1).
[9] European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 2007, C 303/1, Article 18.

to the Status of Refugees, hereafter the 1951 Refugee Convention, as well as the Universal Declaration for Human Rights. The 1951 Refugee Convention being the one of greatest relevance when discussing the issue of asylum on the grounds of sexual orientation. The 1951 Refugee Convention defines a refugee as a person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[10]

Essentially, in order to meet the definition defining a refugee, a person must have a well-founded fear of persecution based on one of the convention grounds, and be unable to receive protection from said persecution from their home country or country of residence.[11] However, not only does the 1951 Refugee Convention present us with the fundamentally important definition of the concept of a refugee. Its importance is also emphasized by the fact that as a convention, it has a binding character for those states by who it is ratified. Furthermore, the convention has a high number of state parties, including a total sum of 146 state parties to the actual convention[12]. Due to the high number of state parties to the convention, as well as its binding nature, the convention remains of significant importance.

The Universal Declaration of Human Rights, even though not binding, is also an important source when discussing LGB related refugee claims. The Universal Declaration of Human Rights Article 1 states that: "all human beings are born free and equal in dignity and rights"[13]. OHCHR, the Office of the United Nations High Commissioner for Human Rights, interprets this as a statement that affirms the equal rights of LGB people.[14] Read

[10] 1951 Convention Relating to the Status of Refugees, Article 1 (A) (2).
[11] Moira Dustin & Nuno Ferreira, Improving SOGI asylum adjudication: Putting persecution ahead of identity. Refugee Survey Quarterly, 40(3), 315–347, 2021, pp. 316
[12] United Nations Treaty Collection, ' Convention Relating to the Status of Regugees' (13 October 2021) < https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en > accessed 13 October 2021
[13] UN General Assembly, Universal Declaration of Human Rights, 1948, Article 1.
[14] OHCHR, *'Born Free and Equal' Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law: Second Edition*, 2019, pp. vii.

together with Article 2:"everyone is entitled to all the rights and freedoms set forth in this Declaration"[15], this interpretation is further affirmed.

2.1.1. Membership of a Particular Social Group

Membership of a particular social group is mentioned in the UNHCR's Guidelines on Claims to Refugee Status based on Sexual Orientation and/or Gender Identity as a possible Convention ground for asylum claims based on sexual orientation. It is currently the most commonly used Convention ground for this type of claims.[16]

The idea that social factors can be grounds for persecution is a widely recognized hypothesis in international law.[17] Apart from the 1951 Refugee Convention where it can be found as the ground of membership of a particular social group in Article A(2)[18], the same notion can be found in other international instruments.[19] The 1948 Universal Declaration of Human Rights forbids in Article 2 the distinction of persons based on grounds such as "national or social origin, property, birth or other status".[20] The same prohibition can also be found in the Covenant on Economic, Social and Cultural Rights in Article 2(2)[21] and in the Covenant on Civil and Political Rights in Article 26[22]. It is thus clear that different forms of social factors need to be considered when assessing the need for international protection. Hathaway and Foster considers the ground of membership of a particular social group to be the vaguest of the convention grounds.[23] According to Goodwin-Gill and McAdam there is little information in the *travaux préparatoires* of the 1951 Refugee Convention as to what was originally intended as

[15] UN General Assembly, Universal Declaration of Human Rights, 1948, Article 2.
[16] Braimah, 2015, pp. 481
[17] Goodwin-Gill & McAdam, 2007, pp. 73-74.
[18] The Convention Relating to the Status of Refugees, 1951, Article A(2).
[19] Goodwin-Gill & McAdam, 2007, pp. 74.
[20] The Universal Declaration of Human Rights, 1948, Article 2.
[21] International Covenant on Economic, Social and Cultural Rights, 1966, Article 2(2).
[22] International Covenant on Civil and Political Rights, 1966, Article 26.
[23] Hathaway & Foster, 2002, pp. 477.

being encompassed in the category of membership of a particular social group.[24] Due to this lack of precision regarding the original intention of the participants of the conference, which outcome was the 1951 Refugee Convention, the concept has evolved into a fairly liberal interpretation of the concept. According to Hathaway and Foster the historical vagueness of how the concept should be interpreted has also led to varying interpretations of the meaning of membership of a particular social group between contracting parties to the convention. [25] It can be assumed, that this vagueness of the convention ground's actual meaning has led to a situation where it is increasingly often invoked by asylum seekers in asylum claims as a persecution ground.[26]

According to Goodwin-Gill and McAdams the concept of membership of a particular social group should be considered as to encompass a group fulfilling certain characteristics.[27] The UNHCR handbook also describes members of a particular social group as to having similar characteristics regarding their "background, habits or social status. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees also describes members of a particular social group as to having similar characteristics regarding their "background, habits or social status.[28] Some scholars and judges, such as former High Court of Australia judge Kirby, are of the opinion that one should be careful with defining too clearly what membership of a particular social group should mean on such a general level. He puts forward the following:

> [C]ourts and agencies should turn away from attempts to formulate abstract definitions. Instead, they should recognise 'particular social groups' on a case by case basis. This approach ... accepts that an element of intuition on the part of decision-makers is inescapable, based on the assumption that they will recognize persecuted groups of particularity when they see them ...The development and expression of such categories ... is the province of administrators and review tribunals with experience of refugee claims.[29]

[24] Goodwin-Gill & McAdam, 2007, pp. 74.
[25] Hathaway & Foster, 2002, pp.477.
[26] Ibid, 2002, pp.477.
[27] Goodwin- Gill & McAdam, 2007, pp. 75
[28] The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 2019, Paragraph 77.
[29] Applicant "A" and Anor v. MIMA, 190 CLR 225 (Aust. High Ct., Feb. 24, 1997), per KirbyJ, cited in Hathaway & Foster, 2002, pp. 477-478.

According to Judge Kirby it is important to keep the interpretation of the meaning of the concept of membership of a particular social group on a very individual level. It is possible that an attempt to define and interpret the concept too comprehensively might limit the ways in which it can be used. This in turn could create a protection gap.

The UNCHR Handbook explains why membership of a particular social group should be considered as a possible persecution ground in the following way:

> Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.[30]

This means that there is a risk for persecution if the particular social group can be seen as a threat to the society or the Government and if there exists certain non-conformity with societal norms. This can in certain countries mean that there is a risk for persecution for people identifying with a different sexual orientation than the vast majority. A sexual orientation that does not conform to societal norms, and in some countries' laws, might put people identifying with this sexual orientation at risk for persecution.

Membership of a particular social group can be seen as being a combination of two dimensions. The group membership consists partly of an internal dimension, and partly of an external dimension. The internal dimension refers to characteristics which the person recognises him- or herself.[31] This characteristic should be of such a nature that the person cannot change it, e.g. sexual orientation, or that it would be unreasonable to expect them to try to change it, e.g. human rights activism. It is often considered that the characteristics should be relevant to non-discrimination or human rights. The perceived group membership can also be due to historical reasons.[32] The external dimension refers to the external situation that affects the group or how it is treated. There should be both an internal dimension and an external dimension to the reason for persecution.[33] It can often even be a requirement that both the internal and external dimension exists in order for the group to be considered a particular social group. An example of this can be found

[30] The UNHCR Handbook, 2019, Paragraph 78.
[31] Goodwin-Gill & McAdam, 2007, pp.75
[32] Ibid., 2007, pp.78
[33] Ibid., 2007, pp.75

in the *Ward* judgement in *Ward v. Canada* where the group of people indeed viewed themselves as former capitalists, but where the main point was that they were also viewed as a group, and as such as a threat to the government, by the authorities.[34] Essentially the ground for persecution often consists of several different elements over which the victim of the persecution has a varying degree of control, some elements may consist of something the victim has chosen, some of elements over which he or she has little or no control over.[35]

In addition to the uniting characteristics of the individuals, the fact that the group is perceived to be exactly that by others, is also of paramount importance when determining whether the group can constitute a particular social group within the context of the Convention grounds. The way the authorities views the group is especially important.[36] One can say that a particular social group is a group within the society that is persecuted within that society's social context.[37] The fact that the group is viewed as a group by the authorities is of particular importance, since the authorities are the ones that should provide protection for the group if needed, and intervene if persecution occurs.

These different theories have gained varying degrees of significance in different countries. Countries prefer different approaches regarding how to define the criteria for membership of a particular social group. Most common law countries do however use a similar approach, with the exception of Australia. Most common law countries tend to favour an approach that focuses on non-discrimination. Australia on the other hand uses the approach of social perception. The social perception approach focuses strongly on whether the group can be regarded as a group by society in their country of origin. This variation regarding what is considered membership of a particular social group leads to different outcomes in asylum claims in different countries for similar claims.[38] This can be considered the downside of a loosely defined concept. In an attempt not to limit the

[34] Goodwin-Gill & McAdam, 2007, pp.78
[35] Ibid., 2007, pp. 75
[36] Ibid., 2007, pp. 75
[37] Ibid., 2007, pp.86
[38] Braimah, 2015, pp. 483

application in a negative way that could create protection gaps, the consequence has become an incoherent application that can be considered unjust in some instances. An applicant that might be granted protection in one country might not have the same right to protection in another.

Goodwin-Gill and McAdam stresses the importance of taking into account the individual circumstances when evaluating whether the applicant can be considered to belong to a particular social group. In addition to the criteria the person needs to fulfil in order to be considered a member of a particular social group, one also need to evaluate the risk of persecution in his or her individual circumstances.[39] This consideration of individual risk for persecution is a factor that pervades the whole process of refugee status determination. This includes the process of determining whether the individual is part of a particular social group, and whether that person is at risk due to such a group membership.

To conclude, the meaning of the Convention ground of membership of a particular social group is interpreted and applied in different ways int different countries. It is the most commonly used Convention ground for asylum claims that are related to sexual orientation.

2.1.2. Religion

The Convention ground of religion is another possible ground of asylum for claims based on sexual orientation according to the UNHCR Guidelines on Claims to Refugee Status based on Sexual Orientation and/or Gender Identity, hereafter the SOGI Guidelines. [40] The idea that religion could be a Convention ground for asylum in LGB claims comes

[39] Goodwin-Gill & McAdam, 2007, pp. 85
[40] Braimah, 2015, pp.481

from the notion that LGB individuals often face hostile attitudes from religious authorities, which could lead to persecution.[41]

Basis for this argument can be found in both the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, hereafter the UNHCR Handbook, and in the SOGI Guidelines.[42] The UNHCR Handbook does not explicitly mention a right to freedom of discrimination from religious authorities. It does however say:

> 71. The Universal Declaration of Human Rights and the Human Rights Covenant proclaim the right to freedom of thought, conscience and religion, which right includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance.[43]
>
> 72. Persecution for 'reasons of religion' may assume various forms, e.g. prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community.[44]

This means the UNHCR Handbook guarantees everyone freedom of religion. According to Musalo it has been argued that it can be interpreted from these paragraphs that the Convention is intended to be interpreted in the light of international norms regarding freedom of religion, thought and conscience.[45] This theory is supported by the fact that the Universal Declaration of Human Rights actually is explicitly mentioned in paragraph 71. Paragraph 72 also indicates that groups who deviate from the norm, e.g. minority religions, should be protected from persecution.[46]

A more explicit reference to the dynamics of religion and sexual orientation can be found in the SOGI Guidelines paragraph 42:

> Where an individual is viewed as not conforming to the teachings of a particular religion on account of his or her sexual orientation or gender identity, and is subjected to serious harm

[41] Braimah, 2015, pp. 487
[42] Ibid., 2015, pp. 486
[43] UNHCR Handbook, Paragraph 3(c)71
[44] Ibid., Paragraph 3(c)72
[45] Musalo, Karen. 2004. *Claims for Protection Based on Religion or Belief*, 16 IJRL 165. Cited in Braimah, 2015, pp.486
[46] Braimah, 2015, pp. 486

> or punishment as a consequence, he or she may have a well-founded fear of persecution for reasons of religion.[47]

This clearly indicates that religion could be viewed as a possible ground for persecution of LGB people in certain circumstances. According to Braimah countries where LGB people faces persecution tend to be conservative countries where religion has a strong position, the persecution is also often linked to religious reasons in some way.[48] It could therefore in such cases be suitable to base the asylum claim on the Convention ground of religion.

Although there is some basis for invoking the Convention ground of religion in certain kinds of LGB claims for asylum, the arguments does not stand on very solid ground. There is no indication in the *travaux préparatoires* of the possibility to use the Convention ground of religion as a basis for LGB claims. The original intention has been for the ground to apply to persons applying asylum on the basis of faith and persecution caused by it. Persecution due to religious conviction is the only circumstance that was discussed when the Convention was created. It was intended for circumstances such as people adhering to minority religions or persons converting to a minority religion facing hostile reactions from authorities or society. In addition to this, UNHCR released in 2004 the UNHCR Guidelines on International Protection No 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees. These Guidelines are in direct contradiction with the later SOGI Guidelines from 2012 as the Guidelines from 2004 indicates that religious-based claims only can be based on the Convention ground of religion when there is persecution due to religious belief.[49] There has also been situations where a claimant claiming to flee persecution due to sexual orientation has reported that he is also religious. This has in some cases led to mistrust towards the claimant's credibility regarding his sexual orientation since there is a conflict between his religiousness and his sexual orientation.[50]

[47] SOGI Guidelines, paragraph 41.
[48] Braimah, 2015, pp. 487
[49] Ibid., 2015, pp. 488
[50] Ibid., 2015, pp. 489

To conclude, even though there is some basis for using the Convention ground of religion as the basis for an LGB claim, the arguments can still be considered slightly far-fetched. There is also a risk that it might affect the claimant's credibility in an adverse way in certain circumstances. The more conventional Convention ground of membership of a particular social group remains a stronger candidate for LGB claims than that of religion.

2.1.3. Political Opinion

According to the SOGI Guidelines it is also possible for people fleeing persecution due to their sexual orientation to be granted asylum under the Convention ground of political opinion.[51]

Goodwin- Gill and McAdam defines the quintessential refugee fleeing political persecution in the following way:

> The typical 'political refugee' is one pursued by the government of a state or other entity on account of his or her opinions, which are an actual perceived threat to that government or its institutions, or to the political agenda and aspirations of the entity in question.[52]

Considering this it is possible that a person acting in conflict with the government's policies might place themselves at risk of political persecution if the circumstances are right. The Convention ground of political opinion might be especially relevant for an applicant who comes from a country where e.g. same-sexuality is criminalised. In such countries it would mean that the person is going against a government policy and might put him or her at risk for persecution due to going against government policy.[53] The same notion is echoed in the SOGI Guidelines:

> The expression of diverse sexual orientation ... can be considered political in certain circumstances, particularly in countries where such non-conformity is viewed as challenging government policy or where it is perceived as threatening prevailing social norms and values.[54]

[51] SOGI Guidelines
[52] Goodwin-Gill & McAdam, 2007, pp.87
[53] Braimah, 2015, pp. 492
[54] SOGI Guidelines, paragraph 50

The SOGI Guidelines does not define how a diverse sexual orientation should be expressed in order for the criteria to be fulfilled. This has been interpreted as providing room for a broad interpretation, the person does not need to explicitly express their sexual orientation. In fact, it might in some countries be enough that you are even suspected of being LGB. Applying for asylum under the Convention ground of political opinion might even be needed for persons being perceived as LGB, regardless of their actual sexual orientation, if they face persecution for it.[55]

Although processing an asylum claim under the Convention ground of political opinion might be suitable in some cases, it is not suitable for all types of sexual orientation related claims. Political opinion as a ground for asylum might be more relevant in cases where the claimant is an activist, or in another way a prominent person in society, in a country where same sexuality is criminalised. There is also less historical precedent regarding sexual orientation as a basis for a political opinion-based claim. [56]

To conclude, the Convention ground of political opinion might be relevant in certain types of sexual orientation-based claims. These include when the claimant comes from a country that has criminalised same sexuality. It also includes situations where the claimant is an activist or a prominent person in society.

2.1.4. The Qualification Directive

From a regional European Union perspective, The Qualification Directive becomes the most important legal source. When examining the wording of the Qualification Directive, it is apparent that it is based on the 1951 Refugee Convention. Article 2 (c) QD has almost the same exact wording as the 1951 refugee convention, with the addition of a mentioning

[55] Braimah, 2015, pp. 493
[56] Ibid., 2015, pp. 494

of stateless persons: "…or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it… [57]. As a result, the refugee definition in the Qualification Directive is essentially an adaptation and further development of the definition found in the 1951 Refugee Convention Article 1 (A) (2). In essence, this makes the 1951 Refugee Convention the main authoritative legal instrument for the refugee definition, supported through the Qualification Directive by the more robust legal environment of EU law.

As earlier mentioned, sexual orientation is not explicitly mentioned in the 1951 Refugee Convention, and membership of a particular social group remains the most natural ground for asylum for these types of claims when basing the asylum adjudication on the 1951 Refugee Convention. Where the 1951 Refugee Convention falls short, in mentioning sexual orientation as a ground, the Qualification Directive provides. Article 10 (1) (d) QD explicitly mentions sexual orientation:

> a group shall be considered to form a particular social group where in particular:
>
> - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
> - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;
>
> depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article;[58]

Evidently, Article 10 (1) (d) QD essentially comprises of a further developed definition of who can be considered a member of a particular social group, including sexual orientation in the wording in line with common legal practice and case law.

[57] Council Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L. 337/9-337/26, 2011/95/EU, 2011.
[58] Council Directive 2011/95/EU, Article 10 (1) (d).

Additionally ensuring that the refugee definition set out in the Qualification Directive also applies to sexual orientation- based claims, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), prohibits discrimination within Europe:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[59]

While not part of EU law, the prohibition of discrimination in ECHR still comprises of human rights that needs be taken into account in Europe, including in the processing of EU asylum claims.

2.1.5. The UNHCR Guidance Note & SOGI Guidelines

The UNHCR Guidance Note has been an important milestone in sexuality-based refugee claims being more widely accepted as facing specific issues when applying for asylum.[60] It is the UNHCR's first attempt at addressing sexuality-based and gender-based refugee protection.[61] As supervising the 1951 Convention relating to the Status of Refugees is UNHCR's mandate, it is of particular importance that the UNHCR specifically addresses the particularities of these types of claims.[62] This, as UNHCR having that mandate can be considered to be the most authoritative organization to supervise in the interpretation of the convention.

The Guidance Note was a soft law tool intended to supervise decisionmakers and other stakeholders in the specific set of challenges sexuality-based refugee claims poses.[63]

[59] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 1950, ETS 5, Article 14.
[60] La Violette, 2010, pp. 180.
[61] Ibid., 2010, pp.177.
[62] Ibid., 2010, pp. 176.
[63] Ibid., 2010, pp. 176.

According to UNHCR, the Guidance Note "do not necessarily follow the same extensive drafting process as the Guidelines on International Protection".[64] The Guidance Note was therefore meant to be an addition to the "Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees"[65] and the "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees".[66].[67] The Guidance Note had therefore more of a complimentary nature and is not all-encompassing.

Following the Guidance Note, the UNHCR has issued the SOGI Guidelines in 2012, the Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. According to UNHCR the SOGI Guidelines are also meant to be read in conjunction with the other UNHCR soft law instruments that have previously been made on questions closely related to the topic. The SOGI Guidelines essentially replaced the Guidance Note of 2008.[68] This means that as of the SOGI Guidelines, they are together with the UNHCR Handbook the single most important UNHCR instruments when processing sexual orientation-based asylum claims. These guiding instruments can be considered especially important in sexual orientation-related claims as the reason for the asylum claim is one that is not explicitly mentioned in the 1951 Refugee Convention. This is also mirrored by Dustin & Ferreira who claims that the SOGI Guidelines sets out the most balanced and comprehensive framework to date on the theme, providing asylum adjudicators crucial guidance on how to, from both a substantive and procedural standpoint, process SOGI asylum claims in a sensitive way.[69] The SOGI Guidelines provides guidance on all the

[64] UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, Guidance Note*, hereafter Guidance Note, 2008.
[65] UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, hereafter Gender Guidelines, 2002.
[66] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 2019
[67] La Violette, 2010, pp.176.
[68] UNHCR, 2012.
[69] Dustin & Ferreira, 2021, pp. 322

important aspects of sexual orientation-related asylum claims. These aspects include e.g. how to deal with situations where there exist laws criminalizing same-sex relationships in the country of origin, concealment, relevant well- founded fear assessment, relevant convention grounds, internal relocation issues, credibility assessment, as well as other issues relating to evidence assessment.[70]

2.2. The Human Rights Paradigm

Due to the complexity of LGB asylum claimants' vulnerability, it is apparent that merely applying refugee law when analyzing sexual orientation-based asylum claims can be considered insufficient. LGB minorities can be considered to have a dual vulnerability. They face vulnerability both from the perspective of their sexual orientation, as well as from the perspective of being asylum claimants.[71] Through combining refugee law with international human rights law, hereafter IHRL, a more comprehensive overview of the theme can be achieved.[72]

The basis for the human rights paradigm can be found in the first two paragraphs of the 1951 Refugee Convention:

> Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,
>
> Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,[73]

The human rights paradigm is by Storey defined as an approach to the 1951 Refugee Convention through which one tries to interpret one or several concepts of the refugee

[70] UNHCR, 2012.
[71] Carmelo Danisi, Moira Dustin, Nuno Ferreira & Nina Held*, Queering Asylum in Europe Legal and Social Experiences of Seeking International Protection on Grounds of Sexual Orientation and Gender Identity*, Springer International Publishing AG, 2021, pp. 53.
[72] Danisi, et al., 2021, pp. 51-52.
[73] 1951 Convention Relating to the Status of Refugees, preamble (Paragraph 1 & 2).

definition using IHRL.[74] From a human rights perspective Danisi et al. describes International Refugee Law as guided by an exclusionary rationale, while IHLR is described as driven by an inclusionary rationale. This difference contributes to the human rights paradigm giving a more inclusive interpretation of refugee law when leaning on human rights law as a background for the interpretation, taking into account the distinct vulnerabilities affecting sexual- orientation related asylum claims. Danisi et al. asserts however, that while the two branches of law are interrelated, they remain distinct from each other.[75] In being interpreted together with each other, IHRL and the 1951 Refugee Convention has the possibility to create a more inclusive refugee definition.[76] The human rights paradigm is currently the dominating paradigm through which the refugee definition is interpreted. The human rights paradigm is the preferred paradigm for interpretation of the convention grounds by both the UNHCR and the European Union through the Qualification Directive. Adding to its success, the paradigm has also been endorsed by notable academics such as James C Hathaway, Michelle Foster, and Guy S Goodwin-Gill, as well as various members of the judiciary.[77] It is worth noting that works by these authors are also included in this thesis in different sections, indirectly incorporating the interpretations of the human rights paradigm into the analysis taking place in this thesis. According to Danisi et al. the earlier mentioned possibility of creating a more inclusive refugee definition through adopting the human rights paradigm, or approach, is one of the main reasons why the approach is so widely endorsed.[78] In creating a more inclusive approach to the refugee definition it can better correspond to the complex reality that is sexual orientation-related asylum adjudication. As previously mentioned, merely applying international refugee law can often fall short of the challenges posed by situations where a claimant needs to apply for asylum as a result of their sexual orientation.

[74] Hugo Storey, The Human Rights Approach to the Refugee Definition: Rising Sun or Falling Star?, *International journal of refugee law*, Vol.33 (3), p.379-404, 2021, pp. 383.
[75] Danisi et al., 2021, pp.53.
[76] Ibid., pp.58
[77] Storey, 2021, pp. 383.
[78] Danisi et al., 2021, pp.58

The most direct reference to the human rights paradigm can be found in the EU Qualification Directive. Article 9 (1) states that acts of persecution must:

> (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).[79]

As the Qualification Directive is binding law in 24 Member States, it can be considered an especially important argument for the relevance of the human rights paradigm. In addition to the Member States where the Qualification Directive exists as binding law, some other European countries that are not part of the EU have also chosen to use the Qualification Directive as a model for their own legislation. The human rights paradigm is also endorsed by the Court of Justice of the European Union, hereafter the CJEU. [80] When it comes to sexual orientation, IHRL suffers from the same impairment as the 1951 Refugee Convention. Both were developed at a time when sexual orientation was not widely discussed, and so IHRL does not contain precise references to sexual orientation.[81] References to LGB in IHRL in a European context can however be found in The European Court of Human Right's case law, hereafter ECtHR. This was established e.g. already in the 1980s in the case of *Dudgeon v. United Kingdom*. In *Dudgeon v. United Kingdom* where sexual orientation is established as a "most intimate" characteristic of human personality, with the court deeming that anti-homosexuality laws constitutes a breach of the right to private life. [82]

The human rights paradigm has however not escaped criticism. The approach is argued to e.g. be incompatible with articles 31 and 32 of the Vienna Convention on the Law of Treaties[83].[84] . The approach has also been criticized for not being used all over the

[79] Council Directive 2011/95/EU, Article 9 (1) (a&b).
[80] Storey, 2021, pp. 385.
[81] Danisi et al., 2021, pp. 58
[82] *Dudgeon v. United Kingdom*, ECtHR, application no. 7525/76, 22 October 1981, paragraph 52.
[83] 1969 Vienna Convention on the Law of Treaties, articles 31 & 32.
[84] Storey, 2021, pp. 387.

world, but mainly in western countries, an issue that is considered to lessen the legitimacy of the approach.[85]

3. Credibility as the ultimate determiner

3.1. Evidence Assessment in LGB-related Claims

In the strife for a coherent Common European Asylum System, common practices in evidence assessment can be considered to be of utmost importance[86]. When attempting to streamline asylum procedure within the EU, it is important to take into account that a streamlined way of assessing evidence results in greater coherence in asylum decisions across the EU, which certainly is a desirable target if aiming for a coherent and just system.

Evidence assessment plays a crucial part in the processing of asylum claims. According to Noll, the evidence assessment used in the processing of asylum claims contains elements of both penal and administrative practice. This results in the processing of asylum claims being a hybrid procedure. The hybrid nature of the procedures then in turn restricts legal coherence within the area. This results in evidence assessment being thoroughly difficult to regulate internationally in a comprehensive way. Another issue in evidence assessment with regards to asylum procedure, is the effect of the person processing the claim's subjectivity. Asylum procedure lacks similar universal rules of evidence that exists in other areas of law in order to minimise the effect of subjectivity of the person processing the claim.[87] However, attempts have been made within the EU to streamline evidentiary assessment and standards of proof through e.g. the European Asylum Support Office's, hereafter *EASO, Judicial Analysis- Evidence and Credibility*

[85] Storey, 2021, pp. 388.
[86] Ida Staffans, *Evidence in European Asylum Procedures* (Martinus Nijhoff Publishers 2012) pp.5.
[87] Gregor Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden/Boston: BRILL, 2005) pp. 3.

assessment in the context of the Common European Asylum System from 2018.[88] According to Noll and Staffans, another challenge is posed by the fact that the narrative usually is recounted in a language that is not familiar to the person processing the claim.[89] This increases the risk for something to be lost in translation. These types of translation mistakes can naturally have very substantial consequences when it comes to the asylum decision.

The two most important pieces of evidence in asylum procedure are usually the narrative of the applicant and the country of origin information produced by national immigration authorities. In addition to these, the applicant's narrative can be backed up by medical reports by a doctor commissioned by the immigration authorities or documents provided by the applicant to prove certain elements of the applicant's narrative.[90] Medical reports could be especially useful in cases where the persecution has left physical marks on the applicant's body, e.g., when it comes to torture victims. According to Noll, linguistic testimonials from experts are also common.[91] These testimonials would be useful in cases where there is doubt regarding an applicant's place of origin or membership of a certain ethnic group. According to Noll, the quality of mediators' work used in asylum interviews, such as interpreters and translators, is difficult to scrutinize and review.[92] This makes it increasingly difficult for the person tasked with processing the claim to make a well-informed decision. Misinformation and lack of proof of identity are also common issues in asylum interviews as many applicants have arrived in the country through the use of human smugglers. Asylum seekers are often advised by smugglers to destroy or hide proof of identification if they have one, and possibly to use a forged one. Asylum seekers might also be advised by smugglers to disclose a false and standardised narrative of persecution. This might reflect the applicant's credibility in a negative light if the truth is exposed.[93]

[88] EASO, *Judicial Analysis- Evidence and Credibility assessment in the context of the Common European Asylum System,* 2018.
[89] Noll, 2005, pp. 4; Staffans, 2012, pp.2
[90] Ibid., pp. 4
[91] Ibid., pp. 4
[92] Ibid., pp. 4.
[93] Ibid., pp. 5.

In accordance with the UNHCR Handbook, all evidence assessment of the claim should be considered against the backdrop of the principle of "the benefit of the doubt". The UNHCR Handbook states in paragraph 203:

> After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. … it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.[94]

This application of the principle of the benefit of the doubt is however not always actualized. Indeed, Jubany argues that in contrast to what is prescribed in the UNHCR Handbook, a so-called culture of disbelief is actually what more often exists.[95]

3.2. Discretion

The concept of discretion is a theme that frequents the refugee law discussion surrounding asylum claims that finds their basis in the 1951 Refugee Convention ground of membership of a particular social group. [96] There has historically existed a requirement for discretion in asylum claims which has had their base in the claimant's sexual orientation.[97] This practice has been especially notable in common law countries such as the United Kingdom[98] and Australia[99]. The discretion reasoning has long been related to high rates of unsuccessful asylum claims based on sexual orientation.[100]

[94] UNHCR Handbook, 2019, paragraph 203.
[95] Olga, Jubany, Asylum Screening from Within. In: Screening Asylum in a Culture of Disbelief, Palgrave Macmillan, Cham, 2017.
[96] Wessels, 2021, p. 4-5.
[97] Ibid., p.4.
[98] Millbank, 2005, p.133-134.
[99] Millbank, 2004, p. 227.
[100] Sabine Jansen, 'Fleeing homophobia, asylum claims related to sexual orientation and gender identity' in Thomas Spijkerboer (ed) *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Taylor & Francis Group 2013), pp. 38

In accordance with the discretion reasoning the claimant is expected to conceal his or her sexual orientation in their home country. A relocation within the home country might be suggested if the claimant's sexual orientation has already been exposed in their place of residence.[101] This makes the discretion reasoning closely linked to the internal relocation alternative. The internal relocation alternative is a principle often applied in asylum adjudication.[102] The internal relocation alternative labors under the idea that there exists an area within the claimant's country of origin where that person can re-establish their life and live a normal life without the fear of persecution.[103] The internal relocation alternative has been applied most often in situations where the persecution is at the hands of non-state actors, e.g. family members or non-state actors in the community. This is due to the fact that the internal relocation alternative essentially labors under the presumption that there is not a complete failure of state protection.[104] Resulting in a possibility to receive state protection in a location void of the persecutors. According to Jansen, when applying the discretion reasoning, claimants might then be expected to be able to relocate within their country of origin to a place where their sexual orientation is unknown, or to continue to conceal their sexual orientation if that is not yet exposed.[105] The assumption here is that if the sexual orientation remains secret, the person remains safe and is not at risk of persecution.[106] Jansen argues that this is not a realistic expectation, and that this expectation completely ignores the future focused analysis for persecution. Concealment is unlikely to be successful for the rest of the claimant's whole life. Jansen also argues that many LGB persons, when unable to be open about their sexuality, compartmentalizes their lives and is still often likely to tell someone at some point, this resulting in a risk that the truth is exposed. [107]

[101] Jansen, 2013, pp. 37.
[102] UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* (HCR/GIP/03/04), 2003, pp.2.
[103] UNHCR, 2003, pp.3.
[104] Jonah Eaton, The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive*, International journal of refugee law*, Vol.24 (4), p.765-792, 2012, pp.768.
[105] Jansen, 2013, pp. 37.
[106] Wessels, 2021, pp.27
[107] Jansen, 2013, pp.37–38.

In its Guidelines on the Internal Relocation Alternative, UNHCR does point out to asylum adjudicators the fact that refugee law does not require claimants to first exhaust all available options within their country of origin before seeking asylum in another country.[108] This is an interesting comment that can be found rather contradictory. The requirement to first seek help against the persecution in the country of origin is a principle that has its basis in the wording of the refugee definition[109]. Dustin & Ferreira has also established that this is a requirement that very often is applied in practice.[110] As a result, asylum is in effect usually considered a last resort-method as protection against persecution, regardless of the intention.

A turning point with regards to the discretion reasoning begun to form in as a result of the widely discussed UK Supreme Court case of *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*[111], which sparked a wide array of responses by refugee law scholars both agreeing and disagreeing with the judgement[112]. The jurisprudence of the UK Supreme Court, being a national court, is naturally not binding in any other of the European Union Member States, even though the UK still was an EU Member State at the point of the judgement. It did however influence the climate of the discussion with regards to the so-called discretion reasoning.[113] On a European level, this judgement was followed by, most notably, the CJEU, judgement of *X, Y, and Z v. Minister voor Immigratie en Asiel*[114] in 2013. The judges of the CJEU there concluded that:

> When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation.[115]

[108] UNHCR, 2003, pp.2
[109] See ch 2.1.
[110] Dustin & Ferreira, 2021, pp.316.
[111] *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom: Supreme Court, 2010.
[112] James C. Hathaway & Jason Pobjoy, Queer Cases Make Bad Law, N. Y. U. J. Int'l L. & Pol., Vol. 44 (2), pp. 315-388, 2012, pp. 328-331.
[113] Wessels, 2021, pp.21.
[114] *X, Y, Z v Minister voor Immigratie en Asiel*, C-199/12 - C-201/12, European Union: Court of Justice of the European Union, 2013.
[115] *X, Y, Z v Minister voor Immigratie en Asiel,* 2013.

This statement is also in line with UNHCR's Resettlement tool for LGBTI refugees declaring that a person applying for asylum on the grounds of sexual orientation should not be expected to conceal their identity or sexual orientation in their home country in order to avoid persecution.[116] The reasoning in the *X, Y, and Z v. Minister voor Immigratie en Asiel* case is based on the understanding that sexual orientation falls under the membership of particular social group convention ground. The reasoning then follows the understanding that the convention grounds of the 1951 Refugee Convention in turn represents such fundamental parts of any person's identity that no one can be expected to change, conceal, or forego these.[117] Even though the judgement *X, Y, and Z v. Minister voor Immigratie en Asiel* ruled that there is no requirement to so-to-say be discreet and conceal one's sexuality, and the court rejected the principle, there was still left opportunity to use the concept in certain situations.[118] The discretion reasoning could after the ruling e.g. still be used in situations where the claimant was still successful in concealing their sexual orientation, on the argument that it would be reasonable to expect the claimant to be able to continue the concealment.[119] According to Wessels this results in a paradox within the discussion surrounding the discretion reasoning.[120] Wessels claims that while it is now apparent that an asylum claimant for the most part cannot be expected to conceal their sexual orientation, this does not mean that the claimant has the same set of freedoms and rights in their country of origin as they would elsewhere, e.g. in the country they are applying for asylum in.[121] In effect, if the claimant's sexual orientation still remains concealed, the claimant could be considered to not have the right to live as freely in their country of origin as they would in the host country, and could be required to continue to conceal their sexual orientation.[122] This transition from an easily applied discretion reasoning towards one that might only be applicable in certain less common cases, considerably narrows down the opportunity for asylum adjudicators to use the discretion reasoning. Indeed, as a consequence of this development, a trend is

[116] UNHCR, Resettlement Assessment Tool: Lesbian, Gay, Bisexual, Transgender and Intersex Refugees, 2013a, p. 7.
[117] Wessels, 2021, pp. 198
[118] *X, Y, Z v Minister voor Immigratie en Asiel*, 2013.
[119] Wessels, 2021, pp. 163
[120] Ibid., pp.166
[121] Ibid., pp. 26
[122] Ibid., 2021, pp. 166.

visible where the focus in sexual orientation-based asylum claims has started to move away from the discretion reasoning towards the credibility assessment of the account.[123]

3.3. Credibility of the Account

As discussed in chapter 2.1., only persons who find themselves in situations matching the description brought forth in the refugee definition of the 1951 Refugee Convention, or regional or national instruments mirroring this, can be considered a refugee.[124] According to UNHCR, before making a decision on whether a claim fulfils the refugee definition however, the credibility of the facts of the case needs to be assessed.[125] Some of the most common reasons an asylum claim might not be successful are either that the situation of the claimant does not match the refugee definition, or that the claim is not considered credible.[126] Both practice and research indicates that an assessment of the credibility of a claimant's account constitutes a central element of the adjudication of asylum claims.[127] The UNHCR defines the credibility assessment in the following way:

> "…the process of gathering relevant information from the applicant, examining it in the light of all the information available to the decisionmaker, and determining whether the statements of the applicant relating to material elements of the claim can be accepted…"[128]

Based on this, one can say that the credibility assessment constitutes an attempt to assess whether the presented facts of the claim are credible or not. According to the UNHCR, this makes the credibility assessment a vital part of the processing of any asylum claim.[129] As a result, the credibility assessment becomes the first step in the determination of an

[123] Andrea Gustafsson Grønningsæter, Establishing a sexual identity: The Norwegian immigration authorities' practice in sexuality-based asylum cases, *Out & proud? LGBTI asylum in Europe* (pp. 1–17, 2017 pp. 6.
[124] See chapter 2.1.
[125] UNHCR, *Beyond proof. Credibility assessment in EU asylum systems*, https://www.unhcr.org/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylumsystems.html, 2013b. Pp. 27.
[126] Hedayat Selim, Julia Korkman, Elina Pirjatanniemi and Jan Antfolk, ´Asylum claims based on sexual orientation: a review of psycho-legal issues in credibility assessments´, *Psychology, Crime & Law*, 2022, pp. 2.
[127] UNHCR, 2013b, pp.13.
[128] Ibid., pp.27.
[129] Ibid., pp.27

asylum claim. Before checking whether the facts match the refugee definition, one must first check whether the facts are credible and should be accepted as presented.

As stated by the UNHCR, in the processing of any refugee claim, the credibility assessment of the account, as well as any physical evidence, are key elements of evidence given by the claimant[130]. In certain types of asylum claims the outcome of the claim might even rely primarily on the credibility of the applicant's narrative[131]. When considering different types of evidence that can be given in different types of claims, it is apparent that this would be typical in claims based on circumstances that cannot be detected externally. A credibility assessment would be especially important in claims where the applicant's narrative would be the only significant piece of evidence. Indeed, UNHCR states in its Guidelines on International Protection No. 9 that "Ascertaining the applicant's LGB background is essentially an issue of credibility."[132]

Sexual orientation is an intangible characteristic, not easily visible or provable. Especially when trying to avoid stereotyping, which of course should be the case. Due to the abstract nature of sexual orientation, the account given by the claimant with regards to said faced persecution, takes a central role in the processing of the asylum claim. Since the characteristic giving rise to the persecution is so intangible, the account is often the single most important piece of evidence. Indeed, UNHCR states "The applicant's own testimony is the primary and often the only source of evidence, especially where persecution is at the hands of family members or the community."[133] . However, Dustin & Ferreira stresses the point of reliable and up-to date country of origin information as being very important too.[134]

[130] UNHCR, 2013b, pp. 13
[131] Gregor, Noll, 2005, pp. 1
[132] UNHCR, 2012, pp.15.
[133] UNHCR, Guidelines on international protection no. 9: Claims to refugee status based on sexual orientation and/or gender identity within the context of article 1(A)2 of the 1951 Convention and/or 1967 Protocol relating to the status of refugees. https://www.unhcr.org/509136ca9.pdf, 2012, pp.17
[134] Dustin & Ferreira, 2021, pp.324

According to the survey Queering Asylum in Europe: A Survey Report, conducted for the SOGICA Project by Andrade et al., the issue of credibility assessments is considered the main challenge faced in the assessment of asylum claims based on sexual orientation.[135] This is further strengthened by the result of Jansen's study showing that 85 % of the unsuccessful sexual orientation-related asylum claims made in the Netherlands included in her study were rejected on credibility grounds.[136]. Other challenges stated by Andrade et al., in decreasing percentual amounts, includes stereotyping, the earlier mentioned so-called discretion reasoning, the alternative of relocating internally, as well as claimants not being aware of the fact that sexual orientation may constitute a possible ground for asylum. [137] Not being aware of the fact that sexual orientation might form a ground for asylum might result in the claimant unintentionally omitting important parts of the account, accidentally resulting in a worse outcome of the asylum process from the claimant's point of view.[138] The claimant might also feel that they cannot identify with common labels of sexuality or might not be familiar with them:

> Not all applicants will self-identify with the LGBTI terminology and constructs as presented above or may be unaware of these labels. Some may only be able to draw upon (derogatory) terms used by the persecutor. Decision makers therefore need to be cautious about inflexibly applying such labels as this could lead to adverse credibility assessments or failure to recognize a valid claim.[139]

Other aspects that might affect the claimant's ability to recount their narrative in a way deemed credible in accordance with the credibility assessment include shame and guilt for their sexual orientation, as well as concealment strategies used in the past. [140] Claimants may also be afraid to speak freely for the fear that the asylum interview is not confidential, and e.g. the interpreter might leak their LGB status to someone in the claimant's home country.[141]

[135] Andrade, Vítor Lopes, Danisi, Carmelo, Dustin, Moira, Ferreira, Nuno & Held, Nina, ´Queering Asylum in Europe: A Survey Report´, 2020, Pp.32
[136] Jansen, 2019, pp. 120
[137] Andrade et al., 2020, Pp.32.
[138] Selim et al., 2022, pp. 3-4.
[139] UNHCR, 2012,pp.5.
[140] Berg & Millbank, 2009, pp. 198.
[141] Mulé, 2020, pp. 214.

3.4. Credibility Indicators

The Qualification Directive gives very little instruction on how the credibility of a claimant's account should be assessed in practice. Article 4 (5) (c) QD states that "the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;"[142]. This is the only instruction which is given in the Qualification Directive with regards as to how specifically the credibility of the claimant's account should be assessed, as a part of general instructions on the assessment of circumstances and facts. According to UNHCR, it has noted that many European Union Member States have similarly adopted a common trend where asylum claims get rejected on the basis of lack of credibility and that Member States lacks a common approach with regards to how credibility should be assessed.[143] In the report *Beyond proof. Credibility assessment in EU asylum systems,* and projects related to the report, UNHCR offers advice on the subject, in an attempt to remedy this situation.[144]

The UNHCR proposes that the credibility assessment should be based on credibility indicators. This tool is designed to be the way an asylum adjudicator can determine whether a claimant's account is credible or not. The first credibility indicator identified by the UNHCR is *sufficiency of detail and specificity*.[145] The idea being, that have you actually experienced something you should be able to give specific details on the issue. The UNHCR does however remind asylum adjudicators that several factors that might affect the ability to know details about the issues at hand need to be taken into account when assessing this, factors such as age and gender, as well as social constraints need to be noted.[146]

[142] Council Directive 2011/95/EU, Article 4 (5) (c).
[143] UNHCR, 2013b, pp. 13.
[144] Ibid.
[145] Ibid., pp. 138.
[146] Ibid., pp. 142.

The second credibility indicator is *consistency*, which can be considered as to be split into an internal and external part.[147] *Internal consistency* of the account requires the narrative given by the claimant to be consistent throughout.[148] I.e. in accordance with this way of measuring credibility, a narrative that changes through the course of the account, or is inconsistent, should be an indication of the account being false or improbable. According to Noll, the applicant's ability to remember what has happened in a detailed manner might also affect the perceived credibility of the narrative. This can be rather problematic considering that asylum processes often can be long and slow, and things that have happened a long time ago can be difficult for the applicant to remember in a detailed way. There is a risk that the applicant's narrative might change in detail during the interviewing process due to memories being less clear after some time, this might then often impact the perceived credibility of the account in a negative manner.[149] UNHCR means that research within the field of psychology also indicates that simply the action of retelling an account several times may lead to inconsistencies.[150] Herlihy, Scragg & Turner found similar discrepancies in memory recollection of traumatic events in their research.[151] Inconsistencies should however not always be considered an absolute indication of credibility, e.g. in the International Tribunal for the former Yugoslavia (ICTY) case *Prosecutor v. Anto Furundzija* inconsistencies were not considered to impact the credibility of a witness negatively, but rather indicate truthfulness in a traumatic situation.[152] Therefore, *internal consistency* should only function as a part of the assessment and the situation as a whole should be what determines the credibility of the account.

External consistency as a credibility indicator finds its basis both in the UNHCR Handbook[153], as well as in the previously mentioned Qualification Directive[154]. The UNHCR Handbook states the following in paragraph 42:

> "…The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the

[147] Selim et al., 2022, pp. 3.
[148] UNHCR, 2013b, pp. 149.
[149] Noll, 2005, pp. 5.
[150] UNHCR, 2013b, pp. 151.
[151] Jane Herlihy, Peter Scragg & Stuart Turner, Discrepancies in autobiographical memories--implications for the assessment of asylum seekers: repeated interviews study, *BMJ*, 2002.
[152] *Prosecutor v. Anto Furundzija* (Trial Judgment), IT-95-17/1-T, 10 December 1998.
[153] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 2019.
[154] Council Directive 2011/95/EU (recast).

> applicant's country of origin –while not a primary objective – is an important element in assessing the applicant's credibility…"[155]

When it comes to the EU, the relevant legal basis for this is then found in Article 4 (5) (c) QD: "…do not run counter to available specific and general information relevant to the applicant's case."[156] This then means that when assessing the *external consistency* of an account for an asylum claim, the facts in the account needs to be compared to all relevant existing background information available. UNHCR has done a case review where it has been able to confirm that this is something that is indeed being put into practice. UNHCR confirmed that practices such as age assessments, language analysis, verification of documents, as well as country of crigin information was taken into account in a when assessing the *external consistency* of the account.[157]

The final credibility indicator presented by the UNHCR is the *plausibility* of the account.[158] Similarly to the *external consistency, plausibility* also finds its basis in the wording of Article 4 (5) (c) QD.[159] The concept is also mentioned in Paragraph 204 of the UNHCR Handbook "The applicant's statements must be coherent and plausible, and must not run counter to generally known facts."[160] The concept of *plausibility* lacks a common agreed upon definition throughout different asylum systems, and variation may even occur between Member States within the EU.[161] This shortfall of a commonly agreed upon definition leaves room for a great deal of subjectivity from the asylum adjudicator's side.[162] This, even though the Asylum Procedures Directive Article 10 (3) (a) stipulates that "applications are examined and decisions are taken individually, objectively and impartially;"[163] It is apparent that the objectivity and individuality set forth in the Asylum Procedures Directive is not always easily consolable with the credibility indicators. The *plausibility*- indicator can be considered especially problematic in this light. This is a notion that is also pointed out by

[155] UNHCR, 2019, paragraph 42.
[156] Council Directive 2011/95/EU, Article 4 (5) (c).
[157] UNHCR, 2013b, pp.173.
[158] Ibid., pp. 176.
[159] Council Directive 2011/95/EU, Article 4 (5) (c).
[160] UNHCR, 2019, paragraph 204.
[161] UNHCR, 2013b, pp.176.
[162] Millbank, Jenni, 'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations, International Journal of Refugee Law, Vol.21(1), pp.1-33, 2009.
[163] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013, p. 60–95.

Millbank, who deems plausibility assessments highly problematic as they often force the asylum adjudicator to subjectively make assumptions and speculate as to what may be likely or real in an, to them, unfamiliar environment.[164]

3.5. Stereotyping

As mentioned in chapter 3.2., another major challenge faced by claimants in the asylum interview, as well as the process itself, is stereotyping.[165] As La Violette puts it, no universal qualities, or characteristics exists that would be common to all persons within a sexual minority. This notion is echoed in the SOGI Guidelines:

> The experiences of LGBTI persons vary greatly and are strongly influenced by their cultural, economic, family, political, religious and social environment. The applicant's background may impact the way he or she expresses his or her sexual orientation and/or gender identity, or may explain the reasons why he or she does not live openly as LGBTI. It is important that decisions on LGBTI refugee claims are not based on superficial understandings of the experiences of LGBTI persons, or on erroneous, culturally inappropriate or stereotypical assumptions.[166]

All person's experiences and characteristics are unique. [167] Even more so, claimants applying for asylum based on sexual orientation all come from diverse cultural backgrounds affecting them in varying ways.[168]

Western stereotypes are often seen to affect the asylum decision. When conforming to western stereotypes of how a lesbian, gay or bisexual person should look and act, claims were more often successful. On the other hand, not conforming to these stereotypes can affect the claim negatively. [169] Claimants may also feel forced to display proof of these stereotypes even though they may not want to. Bennett & Thomas describes a situation where lesbian women who had children did not want to openly display characteristics

[164] Millbank, 2009, pp. 17.
[165] Topel, 2017, pp.2359; Andrade et al., 2020, pp. 32.
[166] UNHCR, 2012, pp.2.
[167] Nicole La Violette, Sexual Orientation, Gender Identity and the Refugee Determination Process in Canada, *Journal of Research in Gender Studies*, vol. 4(2), pp. 68-123, 2014, pp. 89.
[168] La Violette, 2014, pp. 89-90.
[169] Claire Bennett & Felicity Thomas, Seeking asylum in the UK: lesbian perspectives, *Forced migration review* (42), p.25-28, 2013, pp.26.

associated with lesbian stereotypes. The women were concerned that an open display of lesbian stereotypical looks might put their children's safety at risk and might negatively impact their relationship with other asylum seekers.[170] In contrast to this, there have also been instances where LGB persons have been unsuccessful in asylum interviews as a result of stereotypes with a reversed effect. An asylum claimant in Norway was unsuccessful in this asylum claim based on a negative outcome in the credibility assessment of his claim. The reason his claim was not considered credible, was that he apparently according to the authorities acted in a too stereotypical way.[171] Overall, evidence points to stereotyping being a major factor behind unsuccessful sexual orientation- based asylum claims. Personal biases may easily affect the outcome of the claim, often unintentionally.[172]

According to CJEU in its judgement *A, B and C* however, sometimes stereotypes can be useful when designing questions in the interviewing process, but this should be utilized sparingly and mindfully:

> While questions based on stereotyped notions may be a useful element at the disposal of competent authorities for the purposes of the assessment, the assessment of applications for the grant of refugee status on the basis solely of stereotyped notions associated with homosexuals does not, nevertheless, satisfy the requirements of the provisions referred to in the previous paragraph, in that it does not allow those authorities to take account of the individual situation and personal circumstances of the applicant for asylum concerned.[173]

As per the reference, the court also clarifies that stereotypes should not be a deciding factor in the determination of the claim.

According to UNHCR, the result of the credibility assessment should never be based on stereotypes.[174] Experiences and feelings of difference, around shame and stigma etc. are themes UNHCR instead encourages adjudicators to include in the credibility assessment. UNHCR also highlights the importance of dealing with these themes in a sensitive and individualized manner. Open-ended questions are also encouraged in order to avoid

[170] Bennett & Thomas, 2013, pp.28.
[171] Gustafsson Grønningsæter, 2017, pp. 1.
[172] ICJ, *Refugee Status Claims Based on Sexual Orientation and Gender Identity*, 2016, pp. 36
[173] *A, B and C,* C-148/13 to C-150/13, European Union: Court of Justice of the European Union, 2014, paragraph 62.
[174] UNHCR, 2012, pp.5

stereotypes.[175] This type of questioning follows Chelvan's DSSH model of questioning. This way of questioning is encouraged by UNHCR and is also used by EASO. As mentioned in the SOGI Guidelines, it uses open-ended questions and questions based in Difference, Stigma, Shame, and Harm. An important part of the model is to avoid stereotypes and 'stereotypical recipes' for the questioning.[176] Using a more standardized way of questioning has both positives and negatives. On the one hand, standardization of the process ensures in theory a more equal process with less room for subjectivity. On the other hand, when dealing in such complex matters as someone's sexual orientation in an asylum setting, standardization can also be a risk due to earlier in chapter mentioned factors. With standardization comes also a risk of less individualized questions, even though the model stresses the importance of individualized questioning. According to Dustin & Ferreira one issue with the model is the fact that LGB- persons' experiences varies so greatly. The themes used in the model are all related to very negative feelings, it is not a given that an LGB-person naturally must have these negative feelings, and even though being mindful of this fact, there is a risk that this would give the claim the wrong result.[177] Some countries have also chosen to only implement parts of the model, this sometimes leading to the effects of avoiding stereotyping being incomplete.[178]

4. LGB Family Reunification in the EU

4.1. The Base in Human Rights

This thesis has in previous chapters discussed challenges in the process of determining an asylum claim based on sexual orientation. In the case where an asylum claim becomes

[175] UNHCR, 2012, pp.15
[176] Dustin & Ferreira, 2021, pp.328
[177] Ibid., pp. 329-330.
[178] Ibid. pp.330.

successful despite these challenges, the question of family reunification might become relevant in cases where the claimant e.g. has a partner or children. The following part of the thesis will discuss what happens after the successful asylum claim from the viewpoint of a situation where the claimant, or now refugee, has family.

There is no mentioning of a state obligation to allow family reunification for refugees in the 1951 Refugee Convention, even on a general level.[179] The Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons did however issue the following recommendations:

> RECOMMENDS Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:
>
> (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country:
>
> (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."[180]

These recommendations have been considered the first instrument to promote family reunification in international refugee law.[181] Following these recommendations, other instruments that are considered to support the concept of family reunification includes The Human Rights Committee's statement [182] in 1990 based on the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (UNCRC)[183], both affirming the importance of family unification for refugees.

On a European level family reunification finds its human rights basis in the human rights instruments of the European Convention on Human Rights[184], in Article 8, and the EU

[179] 1951 Refugee Convention.
[180] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, recommendation IV (B).
[181] Mark Klaassen & Gerrie Lodder, 'The (Limited) Role of Children's Rights in EU Family Reunification Law for Beneficiaries of International Protection' in Mark Klaassen, Stephanie Rap, Peter Rodrigues & Ton Liefaard (eds) *Safeguarding Children's Rights in Immigration Law,* Cambridge University Press, 2020, pp. 85.
[182] UNHRC, *CCPR General Comment No. 19: Article 23 (Th e Family) Protection of the Family, the Right to Marriage and Equality of the Spouses* ,1990, paragraph 5.
[183] 1990 Convention on the Rights of the Child, Article 10 (1).
[184] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8.

Charter of Fundamental Rights[185], in Article 7. These Articles' both protect the individual's right for private and family life. Even though there is no precise mentioning of specifically the right to family reunification, the ECtHR has interpreted the right to private and family life to encompass this in its judgements, some of these cases will be discussed in chapters 4.3 and 4.4.

4.2. Family Reunification Directive & Lack of Harmonization

The basis for family reunification in EU law can be found in the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification[186], hereafter the Family Reunification Directive. As earlier mentioned in chapter 4.1. the right to family reunification is not explicitly mentioned in the European human rights framework. The European Commission does however express that the Family Reunification Directive is based on the provisions in the framework affirming that there exists a right to private and family life.[187] In effect, the Family Reunification Directive takes upon itself the role of being an executive tool for the right to family and private life mentioned in the European human rights framework. Therefore, The Family Reunification Directive's purpose is to implement the right to family reunification which can be found in the previously mentioned international human rights instruments of the European Convention on Human Rights and the EU Charter of Fundamental Rights.[188] In the form of a directive the right to family reunification becomes legally binding for EU member states, as directives must be introduced into domestic legislation in a way that achieves the goal set out by the directive.[189]

[185] Charter of Fundamental Rights of the European Union (2012) OJ C 326/391.
[186] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12.
[187] European commission, *Family reunification,* available at: https://home-affairs.ec.europa.eu/family-reunification_en , accessed on 26 November 2022
[188] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12.
[189] Consolidated Version of the Treaty on European Union (2016) OJ C 202/171, Article 288.

When exploring the Family Reunification Directive, it is essential to first examine how the Directive discusses the concept of family. The core family concept is defined in Article 4 (1) of the Family Reunification Directive in the following way: "The Member States shall authorise the entry and residence…of the following family members: (a) the sponsor's spouse; (b) the minor children of the sponsor and of his/her spouse, including children adopted…"[190]. However, the option to adopt a more extensive concept of family is left to the discretion of the Member States in Article 4(3):

> "The Member States may, by law or regulation, authorise the entry and residence, … , of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons.
>
> Member States may decide that registered partners are to be treated equally as spouses with respect to family reunification."[191]

This results in a situation where the Family Reunification Directive sets a minimum standard for who Member States should consider part of a family, while still allowing for broader definitions of the concept.

4.3. Same-sex Parenting Rights and Freedom of Movement

An interesting case regarding parenting rights includes the CJEU's judgement in the case of *V.M.A. v Stolichna obshtina, rayon „Pancharevo"* The case involves a same-sex couple and their daughter. The case involves V.M.A., K.D.K. and their daughter S.D.K.A. V.M.A. is a Bulgarian national, while K.D.K. is a national of the United Kingdom, born in Gibraltar. The couple were also married in Gibraltar, but have since moved to Spain where they were living with their daughter. Their daughter was born in Spain. Both V.M.A. and her partner K.D.K. were marked as mothers on their daughter's birth certificate.[192] The situation leading up to the case started with V.M.A. attempting to apply

[190] Council Directive 2003/86/EC, Article 4 (1) (a) & (b).
[191] Council Directive 2003/86/EC, Article 4 (3).
[192] CJEU Case C-490/20 *V.M.A. v Stolichna obshtina, rayon „Pancharevo"* , EU:C:2021:1008, 2021, para. 18-19.

for a birth certificate for her daughter in Bulgaria, to provide S.D.K.A. with a necessary Bulgarian identity document.[193]

Article 25(1) of the Konstitutsia na Republika Bulgaria (Constitution of the Republic of Bulgaria) ('the Bulgarian Constitution') determines that a person with a Bulgarian parent will become a national:

> A person is a Bulgarian national if at least one of the parents is a Bulgarian national or if the person was born in the territory of the Republic of Bulgaria and provided that he or she does not acquire any other nationality by parentage. Bulgarian nationality may also be acquired by naturalisation.[194]

Article 8 of the Zakon za balgarskoto grazhdanstvo (Law on Bulgarian nationality) of 5 November 1998 (DV No 136 of 18 November 1998, p. 1) also decides that "a person is a Bulgarian national by parentage if at least one of the parents is a Bulgarian national".[195] In effect, it is obvious that S.D.K.A. qualifies for Bulgarian nationality based on being the daughter of a Bulgarian national.

V.M.A. provided the relevant Bulgarian authorities with a translated and legalised translation of her daughter's Spanish birth certificate to support the application for a birth certificate. [196] Following the application, the Bulgarian authorities requested a clarification on the identity of S.D.K.A.'s biological mother, as the procedure was only possible to move forward with one person marked a s the biological mother.[197] V.M.A. refused this request, stating that she was not obliged to provide any such information.[198] Following this refusal, the Bulgarian authorities took the decision to reject V.M.A.'s application for a birth certificate for her daughter due to not being provided the requested information. The Bulgarian authorities based the necessity for this information on the fact that a Bulgarian birth certificate cannot state two persons as mothers, and that in accordance with Bulgarian national legislation a same-sex couple's marriage is not

[193] CJEU Case C-490/20 *V.M.A. v Stolichna obshtina, rayon „Pancharevo"* , EU:C:2021:1008, 2021, para.20.
[194] Ibid., para. 15.
[195] Ibid., para. 16.
[196] Ibid., para. 20.
[197] Ibid. para.21.
[198] Ibid, para. 22.

recognized.[199] When V.M.A. appealed the decision to the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia), the Administrative court recognized the conflict on one hand with regards to the rights of the child, and on another hand the national and constitutional identity of Bulgaria.[200] Essentially, a conflict was recognized in the case where EU law on the one hand guarantees the child the right to free movement and private life, but on the other hand Bulgarian policy does not recognise the family situation the child is living in. The Administrative court did indeed point out that when it came to the matter of S.D.K.A.'s nationality, there were no legal issues at hand, and that she did indeed have the legal right to enjoy Bulgarian nationality as a result of fulfilling the requirements ser forth in the earlier mentioned Article 25(1) of the Bulgarian Constitution. The issue at hand was related to the procedural challenges surrounding the issuing of a birth certificate.[201] Faced with this legal conflict the Administrative court decided to request a preliminary ruling on the matters at hand from the CJEU.[202] In essence the Administrative court wanted a preliminary ruling on whether the Bulgarian authorities were required to issue the birth certificate so that S.D.K.A. could obtain her identity document in a way where both mothers would appear on the birth certificate in the capacity of mothers.[203]

According to Article 21(1) of the TFEU "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."[204] As the Bulgarian Administrative court had already established that S.D.K.A. does indeed hold Bulgarian nationality based on Bulgarian domestic legislation, it can be deduced that S.D.K.A. does indeed hold the right to citizenship of the European Union, and effectively have the right to enjoy the right to freedom of movement associated with it mentioned in Article 21(1) of the TFEU.

[199] CJEU Case C-490/20 *V.M.A. v Stolichna obshtina, rayon ,,Pancharevo"* , EU:C:2021:1008, 2021, para. 23.
[200] Ibid., para. 29.
[201] Ibid., para. 25.
[202] Ibid., para. 32.
[203] Ibid., para. 36.
[204] Consolidated version of the Treaty on the Functioning of the European Union, TFEU, 13 December 2007, 2008/C 115/01, Article 21(1).

Relating to this, Article 4 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, here after the Citizens' Rights Directive, provides:

> 1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.
>
> 3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.
>
> 4. The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States. Where the law of a Member State does not provide for identity cards to be issued, the period of validity of any passport on being issued or renewed shall be not less than five years.[205]

With the case of V.M.A. v Stolichna obshtina, rayon „Pancharevo" in mind, Article 4 essentially obligates the Bulgarian authorities to be able to provide S.D.K.A. with the possibility to obtain the required identity documentation she would need in order to be able to freely move within the European Union. This is also the opinion of the CJEU.[206] Adding to this argument, the CJEU refers to previous case-law from the Coman case from 2018, which will be more closely examined in chapter 4.5., where the court establishes that included in Article 21(1) TFEU "The rights which nationals of Member States enjoy under that provision include the right to lead a normal family life, together with their family members, both in the host Member State and in the Member State of which they are nationals when they return to that Member State".[207] The CJEU here links the issuing of identity documentation and effectively S.D.K.A.'s ability to move freely within the

[205] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, Article 4.
[206] CJEU Case C-490/20 *V.M.A. v Stolichna obshtina, rayon „Pancharevo"* , EU:C:2021:1008, 2021, para. 43-44.
[207] CJEU Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, EU:C:2018:385 (the Coman Case), 2018, para.32

European Union to her ability to lead a normal family life together with her family members.[208]

The Bulgarian authorities' argument for not providing S.D.K.A. with a Bulgarian birth certificate can be crystallised in having its base in a reluctancy to interfere with established national identity and public policy in Bulgaria. As Bulgarian family law do not allow for the concept of same-sex parents, the Administrative court fears issuing the birth certificate would have negative effects on Bulgarian public policy. Supporting this, Article 4(2) TEU states the following:

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.[209]

Even though Article 4(2) TEU states national identity should be respected by the European Union, and following this naturally also the CJEU, the CJEU's case-law has clearly established that the protection of national identity cannot be completely removed from EU law and the fundamental rights associated with it. While matters such as the concept of family and who has the right to be a national of that country are indeed left to the jurisdiction of national legal systems and the self-determination of the Member states, these Member states do still need to compatible and compliant with EU law and European fundamental human rights. The only situation where an exception to this might be possible, would be a situation where a severity-assessment of the situation would exceed a threshold with regards to for example national security. This essentially means that in order for a Member state to be able to derogate from this duty, adhering to the fundamental right must result in a situation which would seriously impact society negatively in a fundamental way. In other words, the threshold for this kind of situation would be very high.[210] This is also a point where CJEU further strengthens its case-law from the Coman case:

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[208] CJEU Case C-490/20 *V.M.A. v Stolichna obshtina, rayon „Pancharevo*" , EU:C:2021:1008, 2021, para. 47.
[209] Consolidated Version of the Treaty on European Union, TEU, (2016) OJ C 202/171
[210] CJEU Case C-490/20 *V.M.A. v Stolichna obshtina, rayon „Pancharevo"* , EU:C:2021:1008, 2021, para. 55.

> Moreover, the Court has repeatedly held that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society…[211]

It is apparent that CJEU wants to establish case law where these types of situations would create situations where EU law in a way overrides national legislation in order to nurture equal treatment and ensure the enjoyment of European fundamental human rights also for rainbow families within the specific context of freedom of movement. The CJEU states that the issuing of a birth certificate to a child with same-sex parents in order for her to be able to get identity documentation and exercise her right to free movement does not exceed that earlier mentioned threshold.[212] The CJEU does not consider it necessary for the issuing of the birth certificate and identity documentation for the Bulgarian authorities to recognise the marriage of the parents, or set any similar precedents that would have any major consequences for public policy in Bulgaria. There would not be any need to for example change laws or on a general level recognize same-sex marriages or parenthood in the country.[213] Furthermore, as Article 7 of the Charter of Fundamental Rights of the European Union states that: "Everyone has the right to respect for his or her private and family life, home and communications."[214], the issuing of the birth certificate and identity documentation to can be considered necessary for S.D.K.A. to be able to enjoy her right to family life. The CJEU also supports their argument here with the fact that Article 7 of the Charter of Fundamental Rights of the European Union has the same content as Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[215] The CJEU chooses to support it argument through the fact that there exists a fair amount of case-law from the European Court of Human Rights that "the existence of 'family life' is a question of fact depending upon the real existence in practice of close personal ties, and that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life". [216] The CJEU's own *Coman*

[211] CJEU Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, EU:C:2018:385 (the Coman Case), 2018, para.44.
[212] CJEU Case C-490/20 *V.M.A. v Stolichna obshtina, rayon „Pancharevo"* , EU:C:2021:1008, 2021, para. 57.
[213] Ibid., para.58.
[214] Charter of Fundamental Rights of the European Union (2012) OJ C 326/391, Article 7.
[215] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), ECHR, Article 8.
[216] CJEU Case C-490/20 *V.M.A. v Stolichna obshtina, rayon „Pancharevo"* , EU:C:2021:1008, 2021, para. 61.

case also underlines the possibility of same-sex relationships having the ability to fall under the concepts on "family life" and "private life".[217] Interpreting the case of *V.M.A. v Stolichna obshtina, rayon „Pancharevo"* against this background, the CJEU interpreted that S.D.K.A.'s relationship with both her parents do indeed fall under Article 7 of the Charter of Fundamental Rights of the European Union.[218]

As S.D.K.A. is a minor Article 24, on The rights of the child, of the Charter of Fundamental Rights of the European Union is also of relevance:

> 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
>
> 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
>
> 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.[219]

The CJEU highlights the importance of always keeping the best interest of the child in mind whenever dealing with situations affecting minors. The court also highlights the child's right to be in close contact with their parents and maintain those relationships.[220] Article 24 essentially integrates the Convention on the rights of the child into EU law and is therefore an especially important article not to overlook whenever dealing with minors in the context of EU law.[221] These are both highly relevant points in the case of *V.M.A. v Stolichna obshtina, rayon „Pancharevo"*. The CJEU also states that in the Charter of Fundamental Rights of the European Union

> …Article 2 of that convention establishes, for the child, the principle of non-discrimination, which requires that that child is to be guaranteed the rights set forth in that convention, which include in Article 7 the right to be registered immediately after birth, the right to a name and the right to acquire a nationality, without discrimination against the child in that regard, including discrimination on the basis of the sexual orientation of the child's parents.[222]

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[217] CJEU Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, EU:C:2018:385 (the Coman Case), 2018, para.50.
[218] CJEU Case C-490/20 *V.M.A. v Stolichna obshtina, rayon „Pancharevo"* , EU:C:2021:1008, 2021, para. 62.
[219] Charter of Fundamental Rights of the European Union (2012) OJ C 326/391, Article 24.
[220] CJEU Case C-490/20 *V.M.A. v Stolichna obshtina, rayon „Pancharevo"* , EU:C:2021:1008, 2021, para. 57.
[221] Ibid., para. 63.
[222] CJEU Case C-490/20 *V.M.A. v Stolichna obshtina, rayon „Pancharevo"* , EU:C:2021:1008, 2021, para. 64.

Especially pointing out that a child should not be discriminated against based on their parents' sexual orientation.

The CJEU concluded that the Bulgarian authorities should accept the legalised and translated version of S.D.K.A.'s birth certificate provided by her mother V.M.A. The Bulgarian authorities should also issue S.D.K.A. a identity document based on the provided birth certificate. This preliminary decision marks a continuation of the case-law the CJEU has established most notably in the *Coman case* (which will be more thoroughly discussed in chapter 4.5.). Even though the two cases have their similarities, both essentially concerning topics of freedom of movement and family ties within a same-sex context, the *V.M.A. v Stolichna obshtina, rayon „Pancharevo"* case is unique in that it involves a minor, adding particular vulnerability to the case.

4.4. Non-Discrimination, the Concept of Family Life & *Pajić v. Croatia*

The ECtHR case of *Pajić v. Croatia* in 2016 became a major development with regards to same sex couples' family rights in a migration context in Europe. The case is especially noteworthy when it comes to ECtHR addressing discrimination in a same-sex context in a migration context, as well as the court addressing the concept of family life in the same context.

The applicant Danka Pajić, a citizen of Bosnia-Herzegovina, alleged being discriminated against by the Croatian authorities when trying to secure a residence permit to join her partner living in Croatia. For this situation relevant norms of the Aliens Act (Zakon o strancima, Official Gazette nos. 79/2007 and 36/2009) states:

> Section 43
>
> "(1) Temporary stay is stay of an alien for a period of 90 days ...(2) An alien who does not need a visa to enter the territory of the Republic of Croatia can stay [on its territory] for a maximum period of 90 days in a period of 6 months, which starts to run from the day of the first entry. (3) An alien referred to in paragraph 2 of this section who has stayed for 90 days before the expiry of the six-

month time-limit, can again enter and stay in the Republic of Croatia after the expiry of the time-limit of 6 months, which starts to run from the day of the first entry."

Section 51

"Temporary residence may be granted for the following purposes: 1. family reunification; ..."

Section 52

"Temporary residence shall be granted to an alien if… 5. he or she has justified the purpose of the temporary residence."

Section 56

"(1) Temporary residence for the purpose of family reunification may be granted to an alien who is an immediate family member of: - a Croatian national; ... (3) Immediate family members are:

1. spouses,

2. persons who live in an extramarital relationship in accordance with Croatian legislation,

...

(4) Exceptionally to the provision of paragraph 3 of this section, an immediate family member of a Croatian national ... can be also another relative if there are specific personal or serious humanitarian reasons for a family reunification in Croatia.

Pajić was applying for the residence permit based on grounds of family reunification mentioned here in the Croatian Aliens Act. Same-sex family reunification is also explicitly made legally possible through the Same-Sex Partnership Act (Zakon o životnom partnerstvu osoba istog spola, Official Gazette no. 92/2014, Section 73:"... [T]he same-sex partners living in an informal partnership, which has lasted for at least three years, have the right to submit a request for temporary residence in the Republic of Croatia, as provided under the special legislation."[223] Pajić expressed in the application the history of the relationship, as well as the couple having common plans for the future. She herself also had a history of living and studying in the country. The couple planned to live together in Croatia as Pajić's partner owned a house there. The couple's plans were also confirmed by Pajić's partner. When investigated by the local police in Croatia, the couple's relationship, as well as them staying together recently, was confirmed. [224]

The residence permit application of Pajić was rejected based on the argument that the couple did not meet the criteria for family reunification. This was based on the conclusion

[223] Croatian Same-Sex Partnership Act (Zakon o životnom partnerstvu osoba istog spola, Official Gazette no. 92/2014, Section 73.
[224] *Pajić v. Croatia*, Application no. 68453/13, Council of Europe: European Court of Human Rights, 2016.

that, as a same sex couple, Pajić and her partner did not meet the definition of a spouse referred to in the Croatian Aliens Act. The length of the couple's relationship was also not deemed long enough. This decision was made by the local Police Department for the place of residence for the applicant's partner. Pajić appealed this decision to the Croatian Ministry of the Interior as discriminatory.[225] The Croatian Ministry of the Interior concurred with the decision of the local Police Department. The applicant lodged a complaint against this decision to the Zagreb Administrative Court, also based on discrimination due to the same-sex nature of the applicant and her partner's relationship. The complaint was dismissed in the Zagreb Administrative Court. The applicant further lodged her complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*), which was also dismissed.[226]

Following the dismissal by the Constitutional Court Pajić complained to the ECtHR, having exhausted all domestic judicial instances.[227] The applicant's complaint was based on the following provisions of the European Convention on Human Rights:

Article 8

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[228]

Article 14

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[229]

[225] *Pajić v. Croatia*, Application no. 68453/13, Council of Europe: European Court of Human Rights, 2016.
[226] Ibid.
[227] Ibid.
[228] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), ECHR, Article 8.
[229] Ibid., art 14.

Essentially the provisions referred to by the applicant consists of the right to private and family life, as well as the prohibition against discrimination.[230] ECtHR has on numerous occasions, e.g., in *Genovese v. Malta,* determined that Article 14 of the ECHR has a complementary nature.[231] This results in a situation where whether Article 14 is relevant or not relies on whether another right is fulfilled or not. As Pajić lodged the complaint based on Article 8 and Article 14 in this case, it stands to reason that the relevance of Article 14 in this case would be reliant on the complain based on Article 8. Based on the court's case-law, discrimination as intended in Article 14, is based in an identifiable characteristic, in addition to this, discrimination would only arise when there is the possibility to show that there is a discrepancy in the treatment compared to other, at least somewhat, similar situations.[232] Examples of this can be found in the cases of *Eweida and Others v. the United Kingdom* and *X and Others v. Austria*, both from 2013.[233] The ECtHR also clarified in *Pajić v. Croatia* that another criterion for something to be considered discriminatory includes that there must be no reasonable justification or objective for the difference in treatment.[234] It is important to note that the state's sovereignty and through that a state's right to decide who enters and stays on its territory is not something that is discussed or infringed upon by neither ECtHR or the ECHR. The question on hand discussed concerns solely whether there has been discrimination based on the applicant's sexual orientation, either through the legislation itself or in the processing of the application.[235] The case is also supported by Article 7, 20 and 21 of the Charter of Fundamental Rights of the European Union (2000/C 364/01). Article 7 states that "Everyone has the right to respect for his or her private and family life, home and communications."[236] Article 20 ensures equality before the law "Everyone is equal before the law."[237] Read in conjunction with Article 21 on non-discrimination "1. Any

[230] *Pajić v. Croatia*, Application no. 68453/13, Council of Europe: European Court of Human Rights, 2016.
[231] *Genovese v. Malta*, ECtHR, application no. 53124/09, 2011, para. 32.
[232] *Pajić v. Croatia*, Application no. 68453/13, Council of Europe: European Court of Human Rights, 2016, para.54-55.
[233] *Eweida and Others v. the United Kingdom*, ECtHR, application no. 48420/10, 2013, para 86 & *X and Others v. Austria* [GC], ECtHR, application no. 19010/07, 2013, para. 98.
[234] *Pajić v. Croatia*, Application no. 68453/13, Council of Europe: European Court of Human Rights, 2016, para.55.
[235] Ibid., para. 79.
[236] Charter of Fundamental Rights of the European Union (2012) OJ C 326/391, Article 7.
[237] Ibid., Article 20.

discrimination based on any ground such as ... sexual orientation shall be prohibited. …"[238] these provitions gives further, more robust, substance to human rights instrument's prohibition of discrimination. The main legal question in the *Pajić v. Croatia* being that of discrimination.

ECtHR has on numerous previous occasions established that same-sex relationships, as well as gender related matters fall within the scope of "private life" mentioned in Article 8 of the ECHR.[239] The question at hand in *Pajić v. Croatia* is however family-related. As earlier mentioned, Pajić's main complaint was related to the fact that her and her partner were not considered to fall under the family concept, and considered this discriminatory, based on the Croatian authorities' main argument being that they as a same-sex couple did not fall under the concept of family in domestic legislation. In order to process Pajić's complaint, it was consequently necessary for ECtHR to cover the question whether the applicant and her partner's relationship could be considered to also be encompassed by the concept of "family life" enshrined in Article 8. [240]

Even though ECtHR in many cases have established that the concept of "family life" is not exclusively reserved for situations where the partners are married, but also able to include other forms of established relationships, the court has previously been very reluctant in including same-sex relationships in the concept.[241] E.g., in the 2010 case of *Schalk and Kopf v. Austria* the ECtHR crystallized that the couple's relationship was covered by the concept of "family life" even though they were not married, but living together.[242] Even though same-sex relationships have been considered to be covered under the concept of "private life", the court have previously been very reluctant to include same-sex relationships in the concept of "family life". The ECtHR has previously motivated this reluctancy with the lack of consensus and very varying views of the

[238] Charter of Fundamental Rights of the European Union (2012) OJ C 326/391, Article 21.
[239] Ibid., para.61.
[240] *Pajić v. Croatia*, Application no. 68453/13, Council of Europe: European Court of Human Rights, 2016, para.62.
[241] Ibid., para.63.
[242] *Schalk and Kopf v. Austria*, ECtHR, application no. 30141/04, 2010, para. 91.

concept of family between states. This situation has previously resulted in ECtHR deciding to leave it up to the individual states to decide which relationships fall under the category of family.[243] Due to more recent developments in EU law, attitudes, as well as recognition rates of same-sex couples in European states however, ECtHR considered it prudent to change its stance on this. The ECtHR now considers same-sex couples in long-term relationships to fall under the category of "family life".[244]

When it comes to the case of *Pajić v. Croatia,* ECtHR notes that all parties involved agrees that the applicant and her partner can be considered to be in a stable long-term relationship ever since 2009, this is not disputed by any party.[245] In essence, the hard facts of the case are not the reason for the dispute in this case. The dispute essentially concerns whether the couple can be considered to have family ties or not. ECtHR states that even though the couple is not living together, they have shown real intent of creating a life together. The couple has planned to start a business together in Croatia and have spent time together consistently over an extended time period.[246] The ECtHR considers the fact that the couple is not living together to be a mere consequence of Pajić's immigration status, and therefore not something that should be able to affect whether the couple should be considered to have family ties, and in the context of ECHR, whether the situation falls under the scope of the concept of "family life".[247] In conclusion, ECtHR is of the opinion that the criteria for the situation falling under the scope of both "family life" and "private lite" in Article 8 of ECHR are met in the case of *Pajić v. Croatia*.[248]

As earlier mentioned, Article 14 of ECHR consisting of the prohibition against discrimination, is of a complementary nature. It needs to be examined in conjunction with another right in order to be relevant. Article 14 formed the foundation of Pajić's

[243] *Pajić v. Croatia*, Application no. 68453/13, Council of Europe: European Court of Human Rights, 2016, para.63.
[244] Ibid., para. 64.
[245] Ibid., para. 66.
[246] *Pajić v. Croatia*, Application no. 68453/13, Council of Europe: European Court of Human Rights, 2016, para., 66.
[247] Ibid., para.67.
[248] Ibid., para. 68.

complaint, as the main argument of her complaint was based on her application being discriminated against based on the fact that she and her partner were in a same-sex relationship, and thus considered to not be included in the wording of the Croatian Aliens Act.[249]

EctHR addressed the complaint through first establishing that same-sex relationships were included in Croatian domestic legislation through the Family Act.[250] The court did however note that the wording in the, for the case relevant, Croatian Aliens Act, only expressed the right to family reunification for different-sex couples. This wording, in effect, created a discriminatory situation where same-sex couples were excluded based on their sexual orientation from the right to family reunification based on the Croatian Aliens Act.[251] Sexual orientation has on several occasions been established as a ground that can give rise to a violation of Article 14 of ECHR.[252] Furthermore, the Croatian Aliens Act poses a prerequisite for family reunification stating that the relationship has to have lasted for an excess of three years.[253] The time period for the applicant and her partner's relationship was also a point of dispute in the case. ECtHR did however dismiss this argument from the Croatian government's side as this was an argument not even investigated in the lower instances of the court proceedings. Instead, the Administrative Court had relied on an argument of legal impossibility based on the fact that the couple in question was same-sex, another indication of the discriminatory nature of the wording in the Croatian Aliens Act. Furthermore, the in the Aliens Act referred to minimum of three years relationship duration was fulfilled when it comes to the applicant and her partner's relationship during the time the case was moving through the domestic instances.[254] In effect, ECtHR found that the applicant had been treated differently based on her sexual orientation.[255] The ECtHR also found that there did not exist any reasonable

[249] See pp. 41.
[250] *Pajić v. Croatia*, Application no. 68453/13, Council of Europe: European Court of Human Rights, 2016, para.72.
[251] *Pajić v. Croatia*, Application no. 68453/13, Council of Europe: European Court of Human Rights, 2016, para., 74.
[252] Ibid., para. 69.
[253] Ibid., para. 75.
[254] *Pajić v. Croatia*, Application no. 68453/13, Council of Europe: European Court of Human Rights, 2016, para.76.
[255] Ibid., para.77.

justification for, in effect, excluding all same-sex couples from being covered by the definition of family set forth in the Croatian Aliens Act allowing for family reunification.[256]

These considerations resulted in the ECtHR deciding in Pajić´s favor that the applicant's and her partner's situation did indeed fall withing the scope of the concepts of "private life" and "family life" of Article 8.[257] This being a prerequisite for examining whether there had been a breach of Article 14, the prohibition against discrimination, then leading to the ECtHR being able to address whether there in fact had been any discrimination based on the applicant's sexual orientation. Based on the previously mentioned arguments, the ECtHR did indeed decide that there had been a violation of Article 14 of ECHR and that the applicant had been discriminated against based on her sexual orientation.[258]

4.5. Same- sex Family Members and the Coman Case

Another hallmark judgement in the frame of reference for same-sex family rights in a migration context consists of the CJEU preliminary ruling in the CJEU Case C-673/16 *Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* from 2018, the so called *Coman case*. The case concerns Directive 2004/38/EC, the Citizens' Rights Directive, earlier mentioned in chapter 4.2. in the context of the CJEU Case C-490/20 *V.M.A. v Stolichna obshtina, rayon ,,Pancharevo"*. The articles the CJEU was requested to interpret includes articles 2(2)(a), 3(1) and (2)(a) & (b), as well as Article 7(2) of the directive.[259] The parties to the case consisted of Romanian and American citizen (holding dual citizenship) Relu Adrian Coman and his American partner Robert

[256] *Pajić v. Croatia*, Application no. 68453/13, Council of Europe: European Court of Human Rights, 2016, para.84.
[257] Ibid., para. 68.
[258] *Pajić v. Croatia*, Application no. 68453/13, Council of Europe: European Court of Human Rights, 2016, para., 86.
[259] CJEU Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, EU:C:2018:385 (the Coman Case), 2018, para.1.

Clabourn Hamilton *versus* the Ministerul Afacerilor Interne (Ministry of the Interior of Romania) as well as Inspectoratul General pentru Imigrări (General Inspectorate for Immigration, Romania). The latter will hence forth be referred to as the Inspectorate. The dispute of the case concerned Coman's partner Hamilton's right to stay in Romania longer than the standard three months.[260]

In addition to the previously mentioned relevant articles, Recital 31 of the Citizens' Rights Directive is of importance in the present case. Recital 31 states the following:

> This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation.[261]

As stated above, Recital 31 essentially forbids discrimination when it comes to any of the above-mentioned characteristics when applying the directive. When it comes to the Coman Case, the fact that sexual orientation is specifically mentioned in the recital is of utmost relevance. This results in the situation that discrimination based on sexual orientation is explicitly forbidden in the text of the Citizens' Rights Directive. Parallels can here be drawn to European Human Rights law, specifically the above in *Pajić v. Croatia* discussed Article 14 of ECHR.[262]

The couple met while both living in New York in 2002. They then lived together in New York between 2005 and 2009. Coman later moved to Brussels for work, and the couple were married there a year later.[263] This timeline establishes that the couple were in a committed long-term relationship. According to Coman and Hamilton, Coman

[260] CJEU Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, EU:C:2018:385 (the Coman Case), 2018, para. 2.
[261] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, Recital 31.
[262] See chapter 4.3.
[263] CJEU Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, EU:C:2018:385, 2018, para. 9

ceased to work in Brussels leading to the couple looking into moving to Coman's home country Romania.[264] When the couple applied for family reunification, Hamilton being a third country national, the couple were faced with the situation that their marriage was not recognized by Romanian family law.[265]

Article 2 of the Citizens' Rights Directive, paragraph 2 (a) and (b):

> (2) "family member" means:
>
> (a) the spouse;
>
> (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage, and in accordance with the conditions laid down in the relevant legislation of the host Member State;[266]

Article 2 essentially defines who is supposed to be considered a family member in the context of the Citizens' Rights Directive. This definition is essential for the outcome of the interpretation of the directive, and following that, the interpretation of the Romanian legislation in the light of this, relevant to the case at hand. The CJEU points out in *the Coman case* that the term "spouse" mentioned in Article 2(a) is gender-neutral, and in effect can be interpreted to include a spouse of the same sex, as long as the couple is actually married.[267]

The beneficiaries are defined in Article 3 of the Citizens' Rights Directive:

> 1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
>
> 2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

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[264] CJEU Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, EU:C:2018:385, 2018, para.10-11.
[265] Ibid., para. 12.
[266] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, Article 2(a) &(b).
[267] CJEU Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, EU:C:2018:385, 2018, para. 35.

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people. [268]

As stated above in Article 3 of the directive, the right to reside and move freely within the European Union is granted explicitly to the EU-citizen.[269] This results in the situation where the right is not transferred to a family member. The family member holds the right to reside with the EU citizen only in their role as a family member, in conjunction to the EC citizen. This interpretation is also seconded by the CJEU, the court has on numerous occasions established in its case-law that the purpose of the Citizens' Rights Directive is to guarantee the EU citizen's right to reside and move freely within the European Union.[270]

The right to stay in the country for more than three months is defined in Article 7:

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

[268] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC , Article 3 para.1 & 2(a) &(b).
[269] CJEU Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, EU:C:2018:385, 2018, para. 18.
[270] Ibid., para.18

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.[271]

Article 7 is what essentially in the *Coman case* stipulates the conditions to what in the case is discussed as family reunification. Article 7 essentially extends the right held by the EU citizen to stay together with the EU citizen for an extended period in the country of the EU citizen's choosing, as long as the conditions in Article 7 are met in a satisfactory way.

Marriage is defined in the following way in Articles 259(1) and (2) of the Romanian Civil Code (Codul Civil):

1. Marriage is the union freely consented to of a man and a woman, entered into in accordance with the conditions laid down by law.

2. Men and women shall have the right to marry with a view to founding a family.[272]

As seen in Articles 259(1) and (2) of the Romanian Civil Code (Codul Civil), the Romanian definitions of who can be considered a family member is not gender neutral. The right to marry is also explicitly reserved to couples made up by a man and a woman. Same-sex couples are in effect excluded from marrying according to Romanian family law.

[271] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, Article 7 para.1(a-d), 2, 3(a-d) & 4.
[272] CJEU Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, EU:C:2018:385, 2018, para. 7.

Same-sex Marriage is explicitly prohibited in Article 227(1), (2) and (4) of the Romanian Civil Code:

> 1. Marriage between persons of the same sex shall be prohibited.
>
> 2. Marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners shall not be recognised in Romania. …
>
> 4. The legal provisions relating to freedom of movement on Romanian territory by citizens of the Member States of the European Union and the European Economic Area shall be applicable.[273]

As seen in Article 227(1), (2) and (4) of the Romanian Civil Code, it is not only the case that the right to marry have been reserved exclusively to heterosexual couples, but same-sex marriages have expressly been prohibited by law in Romanian family law. The *Coman case* finds its legal base line here. As seen above, Article 227(2) clearly states that same-sex marriages entered into abroad will not be recognized by Romanian authorities.

While the CJEU still holds that the status of a person is a matter left to the competence of national legislation, the court holds that it is still essential for national legislation to be compatible with EU law. [274] With the right to freely choose one's residence, and freely move within the European Union playing such an important role in EU law, and the Citizens' Rights Directive particularly, logic follows that this division of competences and hierarchy might cause some friction. The CJEU does also address this possible conflict of norms in the *Coman case*. The court states that in the case of Coman and his partner, the interpretation of domestic Romanian family law applied to their case, creates a situation where the current interpretation forms an obstacle to Coman's ability to freely move and reside within the European Union. [275] The court states that there exists no obstacle for Coman and Hamilton's marriage to be recognized for the sole purpose of allowing family reunification due to the circumstances of the case where the family life has already been established previously in a country where their marriage is recognized. Not recognizing the marriage would

[273] CJEU Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, EU:C:2018:385, 2018., para. 8.
[274] Ibid., para. 37-38.
[275]CJEU Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, EU:C:2018:385, 2018 , para. 40.

impose unreasonable obstacles to Coman's freedom of residence and movement.[276] The court decides that the situation in its entirety triggers a derived right to reside in Romania for more than three months for Coman's partner Hamilton.[277]

4.6. A Direction-change in Policy for EU-citizens

In the Council of Europe Recommendation 1470 (2000) on the situation of gays and lesbians and their partners in respect of asylum and immigration in the member States of the Council of Europe of 30 June 2000, underlined that:

> 2. The Assembly is concerned by the fact that immigration policies in most Council of Europe member states discriminate against lesbians and gays. In particular, the majority of them do not recognise persecution for sexual orientation as a valid ground for granting asylum, nor do they provide any form of residence rights to the foreign partner in a bi-national same-sex partnership. ...
> 7. Therefore the Assembly recommends that the Committee of Ministers: ... ii. urge the member states: ... e. to take such measures as are necessary to ensure that bi-national lesbian and gay couples are accorded the same residence rights as bi-national heterosexual couples; ...[278]

Despite this recommendation, the hurdles to obtain residence rights for a same-sex partner in an immigration setting, or even asylum setting, remains highly challenging. Even though the earlier discussed cases of *V.M.A. v Stolichna obshtina, rayon „Pancharevo"*, *Pajić v. Croatia* and the *Coman Case* all concerned situations where one party in the relationship or family is an EU-citizen, these cases constitute an important signal from both ECtHR and CJEU when it comes to same-sex family reunification. These cases have definitely had a major impact on rainbow families where at least one party in the family holds EU-citizenship. All the cases mentioned here in chapter four illustrates what Meeusen describes as a struggle between national self-determination, as well as, the protection of fundamental rights.[279] This struggle

[276] CJEU Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, EU:C:2018:385, 2018 , para. 51.
[277] Ibid., para. 56.
[278] Council of Europe: Parliamentary Assembly, Recommendation 1470 (2000) *Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe*, 30 June 2000, Rec 1470 (2000)
[279] Johan Meeusen, *Functional recognition of same-sex parenthood for the benefit of mobile Union citizens – Brief comments on the CJEU's Pancharevo judgment,* available on: https://gedip-egpil.eu/en/2022/functional-recognition-of-same-sex-parenthood-for-the-benefit-of-mobile-union-citizens-brief-comments-on-the-cjeus-pancharevo-judgment/ (accessed 9 May 2023).

was also recognized by the CJEU in chapter 4.3. in the case of *V.M.A. v Stolichna obshtina, rayon „Pancharevo”.*

As mentioned in chapter 4.2. there have been a certain reluctancy from the EUs side to infringe on Member States' self-determination when it comes to the concept of family. This reluctancy have also been mirrored by the courts in all of the previously in this chapter mentioned cases[280]. These cases have according to Meeusen however been remarkable in the way that they have parted from the by the courts previously held policy of leaving family related matters completely to the discretion of EU's Member States.[281] The courts have in these cases adhered to a new kind of policy, which has a more compromising nature than what has previously been presented as the opinion of the court. Instead of leaving the concept of family completely up to each individual Member State, the courts have started to dissect the concept, and even going as far as establishing it as *de facto* more inclusive than assessed by the member states. This, as an effect of the prohibitions against discrimination existing in both EU law and European Human Rights law. According to Meeusen, there does still however prevail a certain reluctancy to interfere with national family legislation in the EU from the courts' side. The courts did not in either case imply that there was a need for either country to make changes to their domestic family legislation, which in both cases were found to be discriminatory towards same-sex couples. Quite the contrary, the courts were very careful in their phrasing as to apply the decisions to the specific cases heard, and focusing on the prohibition against discrimination and the right to free movement on a more general level. This approach to the hearings did however establish a closer relationship between domestic family law and EU law. The decisions let us know that EU law and domestic family law can no longer be read separately to the extent previously possible, and this is one aspect that makes these specific cases so significant.[282] The ECtHR motivated this direction-change policy wise with the fact that attitudes and views on family are changing significantly in society

[280] *Pajić v. Croatia*, the Coman Case, and *V.M.A. v Stolichna obshtina, rayon „Pancharevo”.*
[281] Meeusen, 2022.
[282] Ibid.

and that this needs to be reflected by the ECtHR.[283] As mentioned in chapter 4.3. in the context of *V.M.A. v Stolichna obshtina, rayon „Pancharevo"* the court chose to focus less on the fact that these matters have traditionally been seen as exclusively being withing the jurisdiction of the national legal systems. Instead, the court repeatedly brought the focus towards the fact that domestic legislation cannot be in conflict with the Citizens' Rights Directive's right to freedom of movement, or European fundamental rights.

Keeping this in mind, the fact still remains that these cases are characterized by a situation where one of the parties to the family reunification process is a citizen of an EU Member State. It is continuously apparent throughout the hearings that the rights the applicants and their partners are enjoying the benefits of, are rights specific to them as EU nationals, such as the right to freedom of movement for example. As Meeusen mentions, there is still, due to obvious political considerations, a certain reluctancy to get involved in domestic policy on family law and infringe on Member States' self-determination.

Given the degree of difficulties rainbow families face in family reunification matters, even in situations where one party is a citizen of an EU Member state, it can be considered unlikely that someone merely enjoying refugee status would be successful in a same-sex family reunification application, at least in countries that have family legislation discriminatory towards same-sex couples. The high level of burden of proof for establishing whether the relationship in question in fact exceeds the threshold for being considered a long-term relationship qualifying for family reunification makes the situation increasingly difficult in a refugee setting. If a person has been granted asylum based on persecution for their sexual orientation, it is highly likely that they have not been able to live openly in the relationship. Adding to this the probability that it most likely also has not been possible for the couple to in any official way register their partnership or get married, in a country where it is possible for the persecution based on their sexual orientation to amount to such a degree, that it triggers the right to asylum and government

[283] *Pajić v. Croatia*, Application no. 68453/13, Council of Europe: European Court of Human Rights, 2016, para. 64

protection have not been available. Based on these considerations, it is reasonable to assume that a refugee applying for family reunification for their rainbow family would face significant hurdles. One can even venture to assume that family reunification for a same-sex couple where both are third country nationals, would be close to impossible from a practical standpoint, even though it in theory should be possible. This would be especially true in a country which is characterized by family law that is excluding towards same-sex couples. Would the refugee at some point later meet the requirements for citizenship in an EU Member State, it could be possible that the refugee might be able to access family reunification. Most likely, this would however depend a lot on the attitude of the country in question towards same-sex couples.

The cases of *V.M.A. v Stolichna obshtina, rayon „Pancharevo"*, *Pajić v. Croatia* and the *Coman Case* are all characterized by very robust evidence on the relationships of the partners when it comes to both the length and the nature of them, as can be seen in chapters 4.3, 4.4 and 4.5. In *V.M.A. v Stolichna obshtina, rayon „Pancharevo"* the parents were officially married, and their daughter held an official Spanish birth certificate stating both parents officially as mothers of the child. In *Pajić v. Croatia* the couple had already lived in the country for shorter periods of time, and they had proof to establish both the length and seriousness of their relationship, as well as plans for a common future. In the *Coman case* there was again the situation that the couple was officially married in a country part of the European Union, and there was also robust evidence of a long-term relationship.

On the whole, it is safe to assume that as a third country national having obtained refugee status in a country in the European Union, the road to obtaining citizenship would be a long one. Even if it in theory might be possible for such a refugee to apply for family reunification for a family member part of a rainbow family after acquiring citizenship in a Member state, it is safe to assume that the process would be too long for this to succeed in practice. It is however possible to speculate that an exception to this could be a situation where the person having obtained refugee status based on their sexual orientation has a biological child. It is however likely that this family reunification then would concern

biological children only, in which case the sexual orientation of the applicant would be irrelevant, rendering the reunification a typical family reunification-situation between parent and child.

5. Conclusion

As established in chapter two, sexual orientation is not explicitly mentioned in any of the convention grounds. On an international level the relevant convention ground for asylum based on sexual orientation can be considered either political opinion, religion, or part of a particular social group. The convention ground of particular social group is however the one most commonly applied, and it has become common practice in international refugee law to associate asylum applications having their base in sexual orientation with this particular ground. This is however on an international level, and a as the main focus of this thesis is on a European Union level, the Qualification Directive ends up as being our most relevant source.

Due to the complexity of LGB asylum claimants' vulnerability, merely applying refugee law when analyzing sexual orientation-based asylum claims can be considered insufficient. As established, persons applying for asylum based on sexual orientation face vulnerability both from the perspective of their sexual orientation, as well as from the perspective of being asylum claimants. A more comprehensive discussion of the subject is achieved when involving Human Rights law in the discussion. This has been attempted through applying the Human Rights Paradigm to get a more complete discussion. The Human Rights Paradigm has, as mentioned in chapter 2.2., not however been well received by everyone. The paradigm has faced critique for being westernized and only applied in wester countries, while a more comprehensive solution has been sought after and required as an effective remedy to the situation.

As discussed, when it comes to the earlier widely used discretion reasoning, there is an obvious trend apparent. The focus in sexual orientation-based asylum claims has started to move away from the discretion reasoning towards the credibility assessment of the account as a result of international case-law developing over time. As established, one of the major challenges faced in the processing of asylum claims based on sexual orientation remains the nature of the matter at hand. The claim needs to be investigated in somehow, in the same way any type of asylum claim needs to be investigated. There needs to be presented some type of evidence or facts which can be assessed in as objective of a manner as possible. This is where asylum claims based on sexual orientation faces their main challenge. How is such an abstract matter as sexuality to be investigated and proved. These types of claims are characterized by a lack of physical evidence available. This then leads the way to the credibility assessment as the main focus of evidence assessment in sexuality-based claims. When physical evidence cannot be assessed, the credibility of the facts presented by the claimant becomes the main focus. On an international level the UNHCR has attempted to streamline the way credibility is assessed and determined. On an European level this task has been taken care of by the EASO, taking into account guidelines by the UNHCR of course. Despite international and European guidelines, there still exists a fair amount of discrepancy between countries when it comes to how this is done in practice. The Qualification Directive itself gives very little instruction on how the credibility of a claimant's account should be assessed in practice. Credibility indicators are also are used as a tool to determine the credibility of accounts in a standardised way.

The Family Reunification Directive takes upon itself the role of being an executive tool for the right to family and private life mentioned in the European human rights framework. The Family Reunification Directive sets a minimum standard for who Member States should consider part of a family, while still allowing for broader definitions of the concept. There have been a certain reluctancy from the EUs side to infringe on Member States' self-determination when it comes to the concept of family. The ECtHR has in recent years made a slight direction-change policy wise when it comes to its stance on family reunification related issuer of rainbow families. The ECtHR motivates this change with the fact that attitudes and views on family are changing significantly in society and that this needs to also be reflected by the ECtHR.

The cases of *V.M.A. v Stolichna obshtina, rayon ,,Pancharevo", Pajić v. Croatia* and the *Coman Case* are all characterized by very robust evidence on the relationships of the partners when it comes to both the length and the nature of them, as can be seen in chapters 4.3, 4.4 and 4.5. In *V.M.A. v Stolichna obshtina, rayon ,,Pancharevo"* the parents were officially married, and their daughter held an official Spanish birth certificate stating both parents officially as mothers of the child. In *Pajić v. Croatia* the couple had already lived in the country for shorter periods of time, and they had proof to establish both the length and seriousness of their relationship, as well as plans for a common future. In the *Coman case* there was again the situation that the couple was officially married in a country part of the European Union, and there was also robust evidence of a long-term relationship.

Given the degree of difficulties rainbow families face in family reunification matters, even in situations where one party is a citizen of an EU Member state, it can be considered unlikely that someone merely enjoying refugee status would be successful in a same-sex family reunification application. The high level of burden of proof for establishing whether the relationship in question in fact exceeds the threshold for being considered a long-term relationship qualifying for family reunification makes the situation increasingly difficult in a refugee setting. Even if it in theory might be possible for a refugee to apply for family reunification for a family member part of a rainbow family after acquiring citizenship in a Member state, it is safe to assume that the process would be too long for this to succeed in practice. Based on these considerations, it is reasonable to assume that a refugee applying for family reunification for their rainbow family would face significant hurdles in getting their right to family reunification realised.

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