

A Requirement of Shame: On the Evolution of the Protection of LGB Refugees

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ABSTRACT

The particular difficulties that lesbian, gay, and bisexual refugees face when applying for asylum are in constant flux. As one issue is removed, another takes its place. This article provides a historical overview of these developments and shows how attempts to include lesbian, gay, and bisexual people and their experiences have transformed shame into an implicit legal requirement in certain countries, in particular, Sweden and the Netherlands. While the implementation of the Difference, Stigma, Shame, and Harm (DSSH) model aimed to promote open-ended conversations about the fluidity of sexual orientation, in the contexts examined in this study, it has arguably led to a set of legal requirements that emphasize suffering and internalized homophobia. Further, the article argues that, as developments in refugee law have centred the procedural focus on the credibility of the applicant and have formulated sexual orientation as a fixed identity, this identity has become a decisive requirement in the bureaucracy of border control. In addition, the understanding of this lesbian, gay, or bisexual refugee identity has, in turn, been influenced by colonial perceptions of homophobia and sexuality.

1. INTRODUCTION

The first asylum claims based on sexual orientation were recorded in the late 1970s.¹ Since then, lesbian, gay, and bisexual refugees have gone from being perceived as outside the scope of the 1951 Convention relating to the Status of Refugees (Refugee Convention)² to being widely recognized as a particular social group. In parallel with the growing acceptance of non-heteronormative sexual orientations, there have been ongoing debates about how to approach various aspects of sexual orientation asylum claims. As one issue is solved, the next appears. Contemporary discussions revolve around credibility and the complexity faced by asylum

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1 'ELENA Research Paper on Sexual Orientation as a Ground for Recognition of Refugee Status' (European Council on Refugees and Exiles 1997) 10.

2 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

seekers when attempting to prove their sexual orientation. As the border is crossed and the asylum procedure begins, in the blink of an eye, what has long been concealed has suddenly to be brought to the fore; what has been incoherent has to be made consistent.

A relatively new actor on the stage of solutions is the Difference, Stigma, Shame, and Harm (DSSH) model, developed in 2011 by United Kingdom (UK) barrister Dr S Chelvan. In short, the model aims to provide a framework that allows the asylum seeker to discuss their experiences of living with a non-heterosexual sexual orientation, with questions on themes such as difference, stigma, shame, and harm. The model gained rapid and widespread acceptance, was endorsed by the United Nations High Commissioner for Refugees (UNHCR), and is today implemented in numerous countries, including the UK, New Zealand, Cyprus, and Finland.³ Despite this, and with a few exceptions,⁴ the model has not been subject to substantial scholarly legal analysis. This article examines the history leading up to widespread acceptance of the model and analyses its implementation in two countries: Sweden and the Netherlands. These countries were chosen because the DSSH model has been applied there for several years, and there is sufficient case law for substantial analysis. This examination finds that a 'shame requirement' has begun to take shape, whereby asylum seekers who express joy and pride in their sexual orientation struggle to be perceived as credible by asylum decision makers. In addition to presenting this requirement, the article aims to examine how it has come into being and to discuss the factors that may have been instrumental in its development.

As appropriate labels for sexual orientation are constantly debated, the terminology of this article is addressed here at the start. 'Sexual orientation' refers to an individual's enduring physical, romantic, and/or emotional attraction to members of the same and/or opposite sex, drawing on the Media Reference Guide of the Gay and Lesbian Alliance Against Defamation.⁵ 'Gay man' refers to same-sex attracted men and 'lesbian' to same-sex attracted women.⁶ 'Bisexual' or 'bi' is used to refer to individuals attracted to people of the same gender or another gender.⁷ Throughout this article, these three groups are discussed under the umbrella term 'LGB people'. The term 'homosexual' is largely avoided as it is considered outdated and derogatory by many.⁸ Nevertheless, since the article includes numerous quotations from case law and writings, the term occasionally appears for accuracy. It should also be noted that terms such as 'lesbian', 'gay', and 'bisexual' are identities commonly used by countries in the global North and may not be applied by asylum seekers themselves.

Although much of the material in this field concerns not only LGB people, but also transgender and intersex people, this article focuses solely on sexual orientation. While acknowledging the connection between sexual orientation and gender identity, the two are not the same. Transgender people can be straight, gay, lesbian, or bisexual. To systematically equate the two can therefore often be an erroneous association.⁹ Transgender and intersex people face

3 UNHCR, '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', HCR/GIP/12/09 (23 October 2012) (Guidelines on International Protection No 9) paras 62–63; Gábor Gyulai and S Chelvan, 'Asylum Claims Based on Sexual Orientation or Gender Identity' in Gábor Gyulai and others (eds), *Credibility Assessment in Asylum Procedures: A Multidisciplinary Training Manual*, vol 2 (Hungarian Helsinki Committee 2015) 77.

4 Jasmine Dawson and Paula Gerber, 'Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?' (2017) 29 *International Journal of Refugee Law* 292.

5 Gay and Lesbian Alliance Against Defamation, 'Media Reference Guide' (10th edn, 2016) 6.

6 *ibid.*

7 *ibid.*

8 *ibid.*

9 Amnesty International, 'Love, Hate and the Law: Decriminalizing Homosexuality' (2008) <<https://www.amnesty.org/en/documents/POL30/003/2008/en>> accessed 7 June 2021.

different, and often worse, issues in asylum procedures, as well as in society as a whole.¹⁰ In addition, sexual orientations that have not generally been accepted as grounds for asylum (such as asexuality) are beyond the scope of this article.¹¹

Part 2 provides a historical account of how the international protection of LGB people has developed over the last 40 years, primarily in the global North. This overview provides the backdrop to one of the most problematic contemporary issues in this area: credibility assessments based on an idea of sexual orientation as a troubling and burdensome identity. Part 3 then explores the DSSH model in detail and analyses how it has been implemented in Sweden and the Netherlands.¹² In part 4 of the article, the development of a requirement of shame in credibility assessments of sexual orientation is further examined and discussed against the background of bureaucracy, borders, and colonial perceptions.

2. SEXUAL ORIENTATION ASYLUM CLAIMS: A HISTORY OF HURDLES

This part sets out the key legal developments in LGB asylum claims from the late 1970s onwards. It seeks to show how sexual orientation has been understood over time, and what, in essence, has actually been protected. It is hoped that this explanation will clarify further why the DSSH model came into play, as well as provide a context for the analysis of this development in part 4. For the sake of structure, the historical development is divided into three phases according to the issue most prominent at the time. The analysis begins by examining the discussion as to whether LGB people constitute a particular social group under the Refugee Convention. It then turns to the problem of discretion reasoning, and lastly it addresses credibility issues. For clarity, it should be noted that, in practice, these three constantly overlap. There are instances of discretion reasoning even before LGB people were recognized as a particular social group¹³ and, as Wessels and Grønningssæter have shown, this reasoning is still present in national case law, despite being prohibited in many countries around the millennium.¹⁴ In the same vein, while credibility issues appear to have increased as discretion reasoning has become less accepted,¹⁵ credibility has of course always been a central factor in the assessment of sexual orientation-based asylum claims, as it is in all asylum cases.¹⁶

10 See eg Laurie Berg and Jenni Millbank, 'Developing a Jurisprudence of Transgender Particular Social Group' in Thomas Spijkerboer (ed), *Fleeing Homophobia* (Routledge 2013); Jhana Bach, 'Assessing Transgender Asylum Claims' (2013) 42 *Forced Migration Review* 34.

11 See eg Dutch Council of State, Judgment of 21 March 2018, No 201703038/1/V1, overturning a previous decision by the District Court of The Hague.

12 Material relating to the Swedish jurisprudence is based on personal research by the author, while material relating to the situation in the Netherlands is based on secondary literature. English translations of Swedish case law are provided by the author.

13 See eg *R v Secretary of State for the Home Department, ex parte Binbasi* [1989] Imm AR 595.

14 Janna Wessels, *The Concealment Controversy: Sexual Orientation, Discretion Reasoning and the Scope of Refugee Protection* (Cambridge University Press 2021); Andrea Vige Grønningssæter, 'Establishing a Sexual Identity: The Norwegian Immigration Authorities Practice in Sexuality-Based Asylum Cases' (Out & Proud? LGBTI Asylum in Europe Conference, Amsterdam, October 2017).

15 Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 *International Journal of Human Rights* 391; Sabine Jansen, *Pride or Shame: Assessing LGBTI Asylum Applications in the Netherlands following the XYZ and ABC Judgments* (COC Netherlands 2018; English edn 2019); Grønningssæter (n 14) 6.

16 However, it is notable that, in Erik D Ramanathan, 'Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence' (1996) 11 *Georgetown Immigration Law Journal* 1, where he discusses issues for LGB people in 1993, the question is barely given one page. Ramanathan merely mentions that '[t]he objective element is best satisfied by documentation of past persecution or by evidence of human rights abuses against queers in the asylum seeker's home country': at 14.

Although not without complication, the legal protection of LGB refugees is today in place in countries on all continents.¹⁷ While aiming to provide a full picture, this overview focuses primarily on the global North. It is often stated that refugees travel to countries that are more tolerant towards sexual minorities.¹⁸ Looking at present-day Europe, for example, indications are that there are still remarkably fewer LGB asylum applicants in Eastern and Central Europe than in other European countries, even in relation to the total number of asylum applications.¹⁹ However, there is also reason to believe that this is not the complete picture as each flight is influenced by myriad factors. A major challenge is that, in the literature, countries in the global South are primarily discussed in terms of countries of origin, despite being the countries that host the most refugees. Here, refugee protection is granted on a group basis with assistance from UNHCR, rather than through an individual rights approach. LGB refugees thus face other issues in these environments. They are present in this context but may be forced to live in hiding.²⁰

2.1 Phase one: LGB people as a particular social group

The earliest recorded cases of people claiming asylum for reasons of sexual orientation began to appear in the late 1970s and early 1980s. While many were granted residence permits for humanitarian reasons,²¹ the initial distinctive issue was whether LGB people constituted a ‘particular social group’ under the Refugee Convention. Some of the early cases were, in fact, based on other Convention grounds, such as political opinion or religion.²²

One of the earliest cases was in the Netherlands in the late 1970s, where a lobbying campaign was launched on behalf of three LGB asylum seekers. This resulted in a parliamentary resolution that recognized persecution on the basis of sexual orientation as grounds for asylum.²³ Two years later, in 1981, the Dutch Council of State confirmed that it would consider asylum claims by LGB people under the Convention ground ‘particular social group’.²⁴ However, in this particular case, concerning a gay man from Poland, the treatment suffered was found not to amount to persecution but merely discrimination, and for this reason the applicant’s claim for refugee protection was denied.

In 1988, the Federal Administrative Court of West Germany delivered a landmark case in which the plaintiff was granted asylum because of his sexual orientation.²⁵ In that case, the court did not directly assess the particular social group condition under article 1A(2) of the Refugee Convention; rather, it interpreted the term ‘political persecution’ in the German Constitution²⁶ by relying heavily on the grounds in the Refugee Convention. Referring to Convention protection for reasons of race and nationality, the court stated that the point of granting asylum on these grounds was for asylum to be enjoyed by those who fear persecution since they, due to

17 See eg Andrew Wolman, ‘Asylum for Persecuted Homosexuals in the Republic of Korea’ (2013) 42 *Forced Migration Review* 30; Henrique Rabello de Carvalho, ‘LGBTI Refugees: The Brazilian Case’ (2013) 42 *Forced Migration Review* 19.

18 James C Hathaway and Jason Pobjoy, ‘Queer Cases Make Bad Law’ (2012) 44 *New York University Journal of International Law and Politics* 315, 318.

19 Anna Śledzińska-Simon and Krzysztof Śmiszek, ‘LGBTI Asylum Claims: The Central and Eastern European Perspective’ (2013) 42 *Forced Migration Review* 16.

20 Siobhan Yorgun, ‘Other Women in Flight’ (PhD thesis, University of British Columbia 2020); Nicholas Hersh, ‘Enhancing UNHCR Protection for LGBTI Asylum-Seekers and Refugees in Morocco: Reflection and Strategies: Persecution, Asylum and Integration’ in Arzu Güler, Maryna Shevtsova, and Denise Venturi (eds), *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective* (Springer 2019); Organization for Refuge, Asylum and Migration (ORAM), ‘Unsafe Haven: The Security Challenges Facing Lesbian, Gay, Bisexual and Transgender Asylum Seekers and Refugees in Turkey’ (2011).

21 Hélène Lambert, *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (Martinus Nijhoff 1995).

22 *Dykon v Canada (Minister of Employment and Immigration)* (1994) 25 Imm LR (2d) 193; *Otchere v Secretary of State for the Home Department* [1988] Imm AR 21.

23 ELENA Research Paper (n 1) 10.

24 *Afelling Rechtspraak* (Judicial Commission of the Council of State) Judgment of 13 August 1981, No A-2.1113.

25 Bundesverwaltungsgericht (Federal Administrative Court), Judgment of 15 March 1988, 9 C 278.86.

26 Grundgesetz 1949 (Basic Law, Federal Republic of Germany).

unchangeable characteristics, are disliked or despised by the persecutors. Noting the historical background of the treatment of LGB people in the Third Reich,²⁷ the court concluded that, for the plaintiff, his sexual orientation:

is not a matter of mere inclination, with the plaintiff having more or less discretion in following it or not, but in his person, an inescapable fateful fixation on homosexual behaviour is to be found, in the sense of an irreversible conditioning, which determined the plaintiff's emotional life and sexual behaviour from the age of 15 or 16.²⁸

This was the first time a person was granted international protection by a high instance court on the grounds of sexual orientation,²⁹ and the precedent was legitimized by an understanding of sexual orientation as an unquestionably stable part of identity and behaviour, something from which the plaintiff could not abstain.

This German case was followed in 1990 by the *Toboso-Alfonso* case, in which the United States (US) Board of Immigration Appeals granted refugee status to a Cuban national, finding that 'homosexuals' constituted a particular social group under the Refugee Convention.³⁰ In general, most countries saw their first legislative changes and high instance cases of recognized LGB refugees in the mid-1990s.³¹ After the Netherlands, Germany, and the US, the next countries to assure international protection for refugees on the grounds of sexual orientation were Australia, Denmark, Canada, Finland, and New Zealand (in 1992–93). For Portugal, Spain, Switzerland, Bulgaria, Romania, and South Africa, this change began in the late 1990s when these countries received their first LGB asylum claims.³²

2.2 Phase two: discretion reasoning

While discretion reasoning was present in some of the earliest cases of LGB asylum seekers, discussion and criticism of the concept peaked in the years around the millennium.³³ 'Discretion' (sometimes referred to as 'concealment') is the idea that applicants should avoid persecution in their country of origin by adapting their appearance and behaviour in order not to be read as LGB people by their surroundings.

It would appear that the discretion argument was already in play before the issue concerning particular social groups was settled. In *R v Secretary of State for the Home Department, ex parte Binbasi*, in 1989, the UK High Court noted that:

it was unnecessary for the Secretary of State to decide whether homosexuals can be considered as a particular social group, because it is clear that in Cyprus there is no discrimination against homosexuals who are not active. Therefore, for there to be a well-founded fear of being persecuted, the social group would have to be restricted to active homosexuals.³⁴

27 As the Refugee Convention was drafted as a response to the displacement of the Second World War, the treatment of LGB people by the Nazis was a recurring point in the legal argumentation of the time: see *Golchin v Secretary of State for the Home Department* (1991) 5 Immigration and Nationality Law and Practice 97.

28 9 C 278.86 (n 25) para 18 (English translation provided by the author).

29 A second instance court, the Administrative Court of Wiesbaden, had already recognized gay men in Iran as a particular social group in 1983: see Verwaltungsgericht Wiesbaden (Wiesbaden Administrative Court) Judgment of 26 April 1983, IV/IE 06244/81.

30 *Matter of Toboso-Alfonso* (1990) 20 I&N Dec 819, 822–23 (Chairman Milhollan, Members Dunne and Heilman).

31 For an overview of relevant jurisprudential developments in Australia, Belgium, Canada, Denmark, Finland, France, and New Zealand and relevant legislative developments in Ireland, Sweden, and South Africa, see ELENA Research Paper (n 1).

32 *ibid.*

33 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; *Refugee Appeal No 74665/03* [2004] NZRSAA 228; *Karouni v Gonzales* 399 F 3d 1163 (9th Cir 2005); *Fosu v Minister of Citizenship and Immigration* [2008] FC 1135.

34 *Binbasi* (n 13) 599 (Kennedy J.).

As an 'inactive' gay man, the applicant thus had nothing to fear in Cyprus as long as he exercised self-restraint. When brought before the European Commission of Human Rights the following year, this verdict was confirmed, as the case was found to be manifestly unfounded.³⁵ However, the opinions of the time were far from unanimous. In a low instance case in Germany from 1983, the Administrative Court of Wiesbaden found the idea absurd, and held that telling an applicant that he could avoid persecution by living a hidden, inconspicuous life was as unacceptable as suggesting that someone should deny and hide their religious beliefs or try to change the colour of their skin.³⁶

The approach to discretion reasoning appears to have varied greatly between countries and regions. In New Zealand and Canada, it was banned as early as 1995. Approaching sexual orientation as a human right,³⁷ the New Zealand Refugee Status Appeals Authority (RSAA) held that to expect the applicant to hide his sexual orientation would be both 'inappropriate and unacceptable'.³⁸ The Canadian Immigration and Refugee Board was even more forthright, stating that:

At the heart of the Convention definition of a refugee is the concept that no person should face a reasonable chance of persecution because of her or his race, religion, nationality, membership in a particular social group or political opinion. To deny refugee status to someone who cannot or will not conceal one of these immutable or fundamental attributes, on the grounds that by such a concealment he or she could remove the fear of persecution, would make a mockery of the Convention.³⁹

A few years later, in 2003, basing a decision on discretion reasoning was also prohibited in Australia.⁴⁰ In the years following, the approach taken in these cases was echoed in other common law countries,⁴¹ as well as in UNHCR guidelines requiring an end to discretion reasoning.⁴²

Despite a few very early cases in which discretion reasoning was perceived as nonsensical in an asylum procedure, it appears to have taken much longer for the practice to lose legitimacy in Europe. Moreover, the early European abandonment of discretion reasoning was merely partial and relied on a division between discretion for different reasons. In the landmark 2010 case of *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*,⁴³ the UK Supreme Court held that the Refugee Convention aims to protect the right of gay men to live freely and openly, thus it is only reasonable to return an applicant to their country of origin if they would

35 *B v United Kingdom* App No 16106/90; (1990) 64 DR 278.

36 IV/I E 06244/81 (n 29). See also James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014) 151: 'Such political expression is a core human right, the claimant must enjoy a reasonable expectation of tolerance of peacefully articulated views. It is therefore inappropriate simply to discount the risk of harm on the ground that the claimant could avoid detection by keeping silent ... This reasoning [that a person could refrain from expressing their political views] is at odds with the human rights context within which refugee law was established, and is inexplicably unsympathetic to persons who demonstrate the courage to challenge the conformism of authoritarian states. Since the purpose of refugee law is to protect persons from abusive national authority, there is no reason to exclude persons who could avoid risk only by refraining from the exercise of their inalienable human rights'.

37 Eric Heinze, *Sexual Orientation: A Human Right* (Springer 1995) 157–62.

38 *Refugee Appeal No 1312/93* (RSAA, 30 August 1995) para 136.

39 *Re XMU* [1995] CRDD No 146 (QL) paras 100–02.

40 *Appellant S395/2002* (n 33).

41 In 2004, in *Refugee Appeal No 74665/03* (n 33) para 114, the NZRSAA ruled: 'By requiring the refugee applicant to abandon a core right the refugee decision-maker is requiring of the refugee claimant the same submissive and compliant behaviour, the same denial of a fundamental human right, which the agent of persecution in the country of origin seeks to achieve by persecutory conduct. The potential complicity of the refugee decision-maker in the refugee claimant's predicament of "being persecuted" in the country of origin must be confronted: cf similar rulings in *Karouni* (n 33) and *Fosu* (n 33).'

42 UNHCR, 'Note on Refugee Claims relating to Sexual Orientation and Gender Identity' (21 November 2008) paras 25–26.

43 *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596.

choose to be discreet as a result of social pressure, not in order to avoid persecution. As explained by Lord Rodger:

If ... the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.

If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, eg, not wanting to distress his parents or embarrass his friends, then his application should be rejected. ...

If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted.⁴⁴

This approach was later adopted in other European countries.⁴⁵

Despite being prohibited in all European Union (EU) Member States in 2013, when the Court of Justice of the European Union (CJEU) held in *X, Y and Z v Minister voor Immigratie en Asiel* that asylum applicants cannot reasonably be expected to 'conceal their homosexuality in their country of origin',⁴⁶ discretion reasoning still lingers in Europe. A 2021 analysis by Wessels finds numerous examples of the practice in Germany, Spain, and France.⁴⁷ According to Wessels, discretion reasoning persists because there is:

a fundamental tension between two competing principles of refugee law: the notion that claimants cannot be required to hide the characteristic they are persecuted for, and the principle that the purpose of refugee protection is to protect from persecution and not to provide full human rights protection.⁴⁸

There is an inherent gap, she argues, between the level of oppression tolerated between the two principles. While it cannot be expected that an applicant should hide their sexual orientation, the applicant is, at the same time, not entitled to fully manifest their sexuality openly due to the required severity of persecution.⁴⁹

2.3 Phase three: credibility assessments

After the controversies about the particular social group requirement and discretion reasoning, the discussion of what should be protected had virtually been settled. LGB people had been recognized as a group that deserved protection against persecution, not only for their acts but also for who they were. The next question was how to recognize and distinguish those with 'real', genuine LGB identities from those who were merely 'faking'.

Millbank's 2009 study of Australian practice illustrated that credibility had become a core consideration in asylum claims based on sexual orientation after discretion reasoning was

44 *ibid* para 82. This approach was later developed further by the UK Upper Tribunal (Immigration and Asylum Chamber): see *SW (Lesbians: HJ and HT Applied) Jamaica CG* [2011] UKUT 00251, para 107.

45 Norway Supreme Court, HR-2012-00667-A, (sak nr 2011/1688), Judgment of 29 March 2012; Finland Supreme Administrative Court, HFD:2012:1, Judgment of 13 January 2012; Swedish Migration Agency, 'Rättschefens rättsliga ställningstagande angående metod för utredning och prövning av den framtidsytande risken för personer som åberopar skyddsskäl på grund av sexuell läggning' [The Director-General of Legal Affairs Legal Guidelines on Methods for Investigating and Trying the Future Risks for People Who Claim International Protection on the Basis of Sexual Orientation] (RCI 03/2011). For similar reasoning in Italy, see Sabine Jansen and Thomas Spoijkerboer, *Fleeing Homophobia: Asylum Claims related to Sexual Orientation and Gender Identity in Europe* (Vrije Universiteit Amsterdam 2011) 38.

46 Joined Cases C-199/12, C-200/12, and C-201/12 *X, Y and Z v Minister voor Immigratie en Asiel* (2013) ECLI:EU:C:2013:720, para 71.

47 Wessels (n 14).

48 *ibid* 234.

49 *ibid* 238.

prohibited in 2003. There was a marked increase in the number of decision makers disbelieving an applicant's sexual orientation, rising from 16 per cent of relevant cases before discretion reasoning was banned to 38 per cent of relevant cases between 2004 and 2007.⁵⁰ Millbank suggested that instead of applying discretion criteria, decision makers were increasingly disbelieving an applicant's identity or sexual orientation. As such, the dismissal of discretion reasoning had not had a demonstrable positive effect on the outcomes of sexual orientation-based claims; rather, there had been a shift from 'discretion towards disbelief'.⁵¹ Similarly, in a 2018 report looking at Dutch practice, Jansen found that, while 85 per cent of all rejected asylum applications by LGBTI people are decided on credibility issues, 'it is remarkable that of LGBTI asylum seekers from countries where homosexuality or same-sex sexual acts have *not* been criminalised, the sexual orientation is believed in the large majority of cases'.⁵² It seems that when other avenues for rejecting an asylum claim have been exhausted, credibility remains.

Prior to the 2010s, credibility assessments relied heavily on acts deemed to be connected with certain sexual orientations. As such, the representation of LGB people present in this decision making was heavily sexualized. Asylum applicants could, for example, be asked intimate questions about their sex lives.⁵³ In response to the need to prove the genuineness of their sexual orientation, applicants also submitted photographic or video evidence of same-sex sexual activities to the authorities.⁵⁴ This development received considerable criticism from scholars and non-governmental organizations (NGOs).⁵⁵ As Dawson and Gerber recount, one scholar argued at the time that such 'performance of group membership' through documentation of sexual activities would increase the standard of proof required and worsen issues of credibility for future claims relating to sexual orientation.⁵⁶ In other words, as a clear model for proving an asylum seeker's sexual orientation was lacking, the evidence that was provided in practice set a new bar for other LGB asylum applicants.

UNHCR's 2012 Guidelines on International Protection No 9 relating to sexual orientation and gender took a strong stand against this practice, stating that conclusions should not be based on 'stereotypical, inaccurate or inappropriate perceptions of LGBTI individuals',⁵⁷ and that the use of 'detailed questions about the applicant's sex life should be avoided'.⁵⁸ In the EU, the practice lost legitimacy in December 2014, when the CJEU held that it violated the individual's right to privacy and human dignity.⁵⁹

This historical reflection on the protection of LGB people shows that it has been built upon a presumption of sexual orientation ontologically constructed as a stable, solid, and central part of the individual's identity. As such, the legal understanding differs greatly from that of many queer theorists and empirical researchers on sexual behaviour, who approach sexual orientation as fluid.⁶⁰ Like all legal requirements, sexual orientation in asylum procedures must be assessed

50 Millbank (n 14) 399.

51 *ibid* 391.

52 Jansen (n 15) (2019 edn) 120 (emphasis in original).

53 Dawson and Gerber (n 4) 299, citing Diane Taylor and Mark Townsend, 'Gay Asylum Seekers Face "Humiliation"' *The Guardian* (London, 9 February 2014).

54 Claire Bennett, 'Lesbians and United Kingdom Asylum Law: Evidence and Existence' in Efrat Arbel, Catherine Dauvergne, and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014).

55 *SZTYN v Minister for Immigration and Border Protection* [2015] FCA 418, paras 3, 13; *ibid*.

56 Dawson and Gerber (n 4), citing Rachel Lewis, "'Gay? Prove It': The Politics of Queer Anti-Deportation Activism' (2014) 17 *Sexualities* 958, 962.

57 UNHCR, 'Guidelines on International Protection No 9' (n 3) para 60(ii).

58 *ibid* para 63(vii).

59 Joined Cases C-148/13, C-149/13, and C-150/13 *A, B, C v Staatssecretaris van Veiligheid en Justitie* [2014] ECLI:EU:C:2014:2406. This case was followed by a judgment of the court on psychological tests: see Case C-473/16 *F v Bevándorlási és Állampolgársági Hivatal* [2018] ECLI:EU:C:2018:36.

60 Eithné Luibhéid, 'Queer/Migration: An Unruly Body of Scholarship' (2008) 14 *GLQ: A Journal of Lesbian and Gay Studies* 169, 172; Lisa Diamond and others, 'Who Counts as Sexually Fluid? Comparing Four Different Types of Sexual Fluidity in Women' (2020) 49 *Archives of Sexual Behaviour* 2389.

and categorized, which requires that it must be perceivable by an outside observer. For the legal procedure to be capable of operating, the phenomenology of 'sexual orientation' must be possible to translate into themes of proof. This requires that certain actions or characteristics are pinpointed and agreed upon as constituting the protected identity. As Lewis pointed out, this 'becomes, quite literally, an impossible task'.⁶¹

3. THE DSSH MODEL: NOT 'GAY' AS IN 'HAPPY'

Following the criticism of asking intrusive questions about sexual acts, several scholars of refugee and queer studies focused upon finding themes that could replace such questions. Often, the proposed alternative was centred on the claim that the only common denominator among LGB people is their deviation from the heterosexual norm and exposure to homophobia. Berg and Millbank observed that 'perhaps the one universal in the experience of lesbian[s] and gay men around the world other than the actual experience of homosexual sex ... [is] the hegemonic nature of heterosexuality which forces one to develop a sense of lesbian or gay identity in opposition to this norm'.⁶² Similarly, LaViolette claimed that the 'one aspect of the lives of lesbians and gay men that is universal is the pervasive societal rejection of their sexual orientation ... most lesbians and gay men will struggle with their sexual identity at some point in their lives'.⁶³

The earlier practice of asking intrusive questions focusing on sexual acts was also criticized by Herlihy as increasing the experience of shame and stigmatization for the asylum seeker. Instead, she recommended the DSSH model, which 'suggests a promising approach to the legal categorization of identity, which is necessarily fluid and changing over time'.⁶⁴

As noted above, the DSSH model was developed in 2011 by UK barrister Dr S Chelvan. It is centred on certain themes (difference, stigma, shame, and harm) which, according to the model's philosophy, form part of the LGB experience. As such, it aims to capture the actual lived experience of LGB people and thereby move interviewers and decision makers away from stereotypical or explicitly sexual questions.⁶⁵

Rather than expecting 'correct' replies to standard questions, the model proposes certain 'conversation triggers' that should enable decision makers to elicit relevant information about the applicant. These triggers are designed to allow the asylum seeker to provide a detailed account of the circumstances surrounding their claim for international protection. Preferably, the first question should be 'when did you know you were different?' rather than 'when did you realize you were gay/lesbian/bisexual?' Thereafter, the conversation should follow a pattern that stimulates further discussion of the applicant's experiences of stigma, shame, and harm. Examples of proposed questions that have been used in UNHCR training on the DSSH model include:

- Do you know people like you in your home country? Can you describe how they are treated?
- Have you been in a relationship?
- Have you told anyone you are different? If so, how did they react?

61 Lewis (n 56) 963, as cited by Dawson and Gerber (n 4) 300.

62 Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2007) 22 *Journal of Refugee Studies* 195, 206, as cited by Dawson and Gerber (n 4) 300.

63 Nicole LaViolette, 'Sexual Orientation and the Refugee Determination Process: Questioning a Claimant about Their Membership in the Particular Social Group' in Sydney Levy (ed), *Asylum Based on Sexual Orientation: A Resource Guide* (International Gay and Lesbian Human Rights Commission 1996) 16.

64 Jane Herlihy, 'Psychological Barriers to Fair Refugee Status Determination related to Our Understanding and Expression of Gender' in Arbel, Dauvergne, and Millbank (eds) (n 54) 131.

65 Dawson and Gerber (n 4) 293.

- How has difference, stigma, shame, or harm affected your daily life, with regards to employment, education, family relations, etc?
- What do you think would happen if it became known in your community that you are [the individual's self-identified sexual orientation]?
- You indicated that you were harmed because you are [the individual's self-identified sexual orientation]. Can you please tell me more about that?
- What was the reaction of people realizing that you were [the individual's self-identified sexual orientation]? How did that make you feel?⁶⁶

In addition to concerns about the practice that required the documentation of intimate situations, the DSSH model also grew out of a general critique against asylum interviews, the so-called 'plea for narrative'. Dawson and Gerber note that scholars such as Shuman and Bohmer contended that the evidence-based methods being used to assess credibility through a search for 'truth' were not effectively recognizing genuine asylum seekers.⁶⁷ As such, for decision makers required to assess credibility when faced with constant uncertainty, the search for 'truth' should be replaced by the search for a consistent and coherent narrative.⁶⁸ For LGB people, this narrative should be one of difference.⁶⁹ The DSSH model does not directly claim to provide answers about an individual's sexual orientation; rather, the main 'issue is not that the applicant is gay, but that they do not conform to a specific heterosexual stereotype held by the potential prosecutor, ie [that] they are not "straight" enough'.⁷⁰

The DSSH model was endorsed by UNHCR in its 2012 Guidelines on International Protection No 9 relating to sexual orientation and gender. The passages that outline how to assess an applicant's credibility and establish their sexual orientation begin as follows:

Ascertaining the applicant's LGBTI background is essentially an issue of credibility. The assessment of credibility in such cases needs to be undertaken in an individualized and sensitive way. Exploring elements around the applicant's personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision maker ascertain the applicant's sexual orientation or gender identity, rather than a focus on sexual practices.⁷¹

The guidelines explain, in line with the DSSH model, that questioning should be carried out in a non-judgmental manner, and that 'there is no magic formula of questions to ask and no set of "right" answers in response'.⁷² Rather, questions should revolve around certain themes or areas, such as:

66 Jennifer Rumbach, 'Module 02: Conducting Interviews' (International Organization for Migration and UNHCR 2015).
67 Amy Shuman and Carol Bohmer, 'Gender and Cultural Silences in the Political Asylum Process' (2014) 17 *Sexualities* 939, as cited in Dawson and Gerber (n 4) 301.
68 Audrey Macklin, 'Canada (Attorney-General) v Ward: A Review Essay' (1994) 6 *International Journal of Refugee Law* 362, as cited in Dawson and Gerber (n 4) 301. It should be noted that this approach is in stark contrast to findings relating to cognitive research on memory and credibility assessments: see eg Hilary Evans Cameron, 'Refugee Status Determination and the Limits of Memory' (2010) 22 *International Journal of Refugee Law* 469; Jane Herlihy, 'Evidentiary Assessment and Psychological Difficulties' in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff 2005).
69 Amanda Gray and Alexandra McDowall, 'LGBT Protection in the UK: From Discretion to Belief?' (2013) 42 *Forced Migration Review* 22.
70 S Chelvan, 'The Assessment of Credibility of Women, Victims of Torture within the Decision Making Process and Whether This Is Reflected in Appeal Outcomes' (Home Affairs Committee 2013) <https://publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71vw32008_HC71_01_VIRT_HomeAffairs_ASY-35.htm> accessed 9 June 2021.
71 UNHCR, 'International Guidelines on Protection No 9' (n 3) para 62.
72 *ibid* para 63.

Non-conformity: LGBTI applicants may have grown up in cultures where their sexuality and/or gender identity is shameful or taboo. As a result, they may struggle with their sexual orientation or gender identity at some point in their lives. This may move them away from, or place them in opposition to their families, friends, communities and society in general. Experiences of disapproval and of 'being different' or the 'other' may result in feelings of shame, stigmatization or isolation.⁷³

Following UNHCR's endorsement, the DSSH model is today in use in many countries, including the UK, New Zealand, Sweden, Germany, Finland, and Cyprus.⁷⁴

The rest of this part examines more closely how the DSSH model has been applied at the national level, focusing in particular on Sweden and the Netherlands. To examine the situation in Sweden, the article relies upon the author's case study of second instance judgments from Sweden's four Migration Courts (the Administrative Courts of Stockholm, Gothenburg, Malmö, and Luleå) to which negative decisions by the Swedish Migration Agency are appealed. Swedish authorities do not record the grounds for asylum claims, so that cases can only be searched for by the case number, the name of the applicant, or the name of the legal representative. The cases examined here were collected from 10 lawyers or other legal representatives who specialize in LGBTI asylum law and were asked to provide details of cases in which they represented asylum seekers. It is therefore relevant to keep in mind that, in all the cases studied, the asylum seeker had a legal representative who is an expert in LGBTI asylum law. In total, 50 cases were examined, all of them decided during the period between 2015 and 2020. All are cases where the credibility of the applicant's sexual orientation is disputed. As the cases concern whether the applicant's sexual orientation is genuine or not, cases of imputed sexual orientation have been excluded. However, a few cases have been included that concern people who are transgender, intergender, or gender fluid, as the courts (wrongly) assessed the applicants' gender identities as sexual orientations.

In Sweden, the DSSH model was recognized in national case law in a 2013 judgment by the Swedish Migration Court of Appeal,⁷⁵ the highest instance court on migration cases. This decision is one of the few high instance cases on LGB asylum claims and the only one dealing with how to assess the credibility of sexual orientation. It is often referred to in case law by the lower courts in relation to credibility issues. The case concerned a Nigerian man, A, who lived in Sweden as an irregular migrant for a year. When his deportation was imminent, he claimed to be gay and applied for asylum. As well as his interview account with the Migration Agency, A submitted additional evidence, such as membership cards from an LGBTI organization at his university.

In this case, the approach taken in the UNHCR Guidelines on International Protection No 9, as well as in the *A, B, C* judgment of the CJEU,⁷⁶ was summarized as follows: 'The assessment of credibility has to be carried out in an individual and considerate manner, by examining the circumstances of the applicant's personal opinion, emotions and experiences of difference, stigma and shame, rather than focusing on sexual activities.'⁷⁷ Against this backdrop, the Swedish Migration Court of Appeal found that the applicant:

has to a noteworthy extent been able to answer general questions about his sexual orientation and how it has affected his life. He has however during the procedure provided remarkably

73 *ibid* para 63(v).

74 Dawson and Gerber (n 4) 294.

75 Swedish Migration Court of Appeal, Judgment of 19 December 2013, MIG 2013:25.

76 *A, B, C* (n 59).

77 MIG 2013:25 (n 75) para 32.

vague information about his personal opinion about and emotions related to his sexual opinions, which appears strange considering that sexual orientation must be perceived as a basic characteristic of an individual (cf UNHCR's above-mentioned Guidelines ...). In this case it is particularly peculiar taking into account the information provided by the applicant about the general attitude towards homosexuals in Nigeria.⁷⁸

For these reasons, A was denied asylum. The DSSH model was not discussed further in the court's reasoning, apart from the reference to the UNHCR Guidelines on International Protection No 9. However, that mention, taken together with the last sentence of the above passage, has proved detrimental for LGB asylum seekers in Sweden.

Turning to the cases from the second instance courts, the 2013 judgment appears to have influenced these assessments towards a stronger focus on emotions and inner struggles. In only four of the 50 cases examined was the applicant found to be credible. Most often, the negative decisions were due to a lack of detail or vagueness regarding the applicant's own feelings. The formulation below advising how to conduct the assessment appeared frequently in different cases:

In this assessment, weight should primarily be given to what extent A has been able to account for how she gained insight into her sexual orientation, her emotions related to her sexual orientation and how it affects her life.⁷⁹

Looking closely at the assessments of these emotions, one stands out clearly as particularly essential: shame. In those cases where the court elaborated its reasoning about which feelings were missing, shame was almost always mentioned. In some cases, stigma was mentioned together with shame, but it was rarely given attention on its own. Difference was explicitly discussed in only one of the cases examined, but could be considered to be implicitly included in the expectation that the applicant should have undergone a 'self-realization process' by which they discovered and came to terms with their (inherent) sexual identity.⁸⁰ Harm was primarily discussed under the assessment of whether the treatment experienced by the applicant amounted to persecution and was not taken into account as support of the applicant's credibility regarding their sexual orientation.

Few courts chose to refer directly to the UNHCR Guidelines on International Protection No 9, relying instead on the interpretation taken in the 2013 judgment. Since the Swedish Migration Court of Appeal took the quotation out of context, without clarifying that questions about difference, shame, and stigma are merely a possible avenue by which to extract evidence and also result in denying asylum to the applicant, it appears in the cases studied that many second instance judges have interpreted this as a necessary condition. The result has been a strict requirement that the applicant express and reason about negative emotions, particularly about shame.

Despite this being acknowledged in the Swedish Migration Agency legal guidelines⁸¹ and being raised in many cases by the applicants and their defenders, only in one instance did the court recognize that not all LGB people may experience feelings of shame. For example, in another case, the court explicitly rebutted this argument, even though it was provided by a national expert on LGB asylum cases. The court held:

⁷⁸ *ibid* para 47.

⁷⁹ See eg the Migration Court at the Administrative Court in Malmö, UM 2941-16.

⁸⁰ The author is indebted to Andrea Vige Grønningsæter for pointing this out.

⁸¹ Swedish Migration Agency, 'Rättsligt ställningstagande angående utredning och prövning av den framåtsyftande risken för personer som åberopar skyddsskäl på grund av sexuell läggning, könsöverskridande identitet eller könsuttryck' [Legal Guidelines on Investigating and Trying the Future Risk for People Who Claim Asylum for Reasons of Sexual Orientation, Transgender Identity or Gender Expression] (SR 38/2015).

At the oral hearing, witness Stig-Åke Petersson has stated that one cannot assume that a gay person originating from an area where his orientation is not accepted will always question his emotions, or experience stigma and social exclusion. Despite this, the Migration Court holds that if an applicant has claimed that he or she risks persecution because of his or her sexual orientation, and that same-sex acts or relationships are neither socially accepted nor legal in the country of origin, it is reasonable to expect that the applicant has, at some point, questioned him- or herself or his or her sexual orientation, as well as worried about the future. The fact that A, according to his given account, has always been certain how he wants to live and felt that he has a right to do so, and has not allowed the attitude towards gays in Lebanese society to make him doubt himself, is therefore a circumstance that in this case contradicts his need for international protection. Similarly, the statement by A made at the oral hearing that he was happy with his life in Lebanon and would never have left if he had not been discovered by his uncle is another factor that contradicts his need for protection.⁸²

In a 2020 report carried out for the Swedish Federation for Lesbian, Gay, Bisexual, Transgender, Queer and Intersex Rights (RFSL), Gröndahl assessed a total of 2,006 LGBTI asylum cases between 2012 and 2020.⁸³ The report made similar findings concerning requirements of shame and stigma in order that applicants be found credible. In cases where the applicants expressed only joy regarding their sexual orientation, the authorities systematically asked for 'other emotions' and rejected the application if this was not provided.⁸⁴

The requirement of internalized homophobia – the direction of negative social attitudes towards the self⁸⁵ – is consistent in the cases studied. In general, there is a strong focus on negative emotions. Accounts of fear, risk assessments, and even experiences of perceiving themselves as 'wrong', or as carrying a disease, are systematically viewed as strengthening the applicant's claim. Optimistic outlooks and self-acceptance, on the other hand, are perceived as inconsistent with the applicant's story, and may risk harming their general credibility. In one case, the court noted that 'it is remarkable that the applicant claims that he experiences his sexual orientation as his "state of normality"'.⁸⁶ The message is clear: no shame, no credibility, no protection.

In recent years, many countries have seen a development whereby LGB asylum seekers are rejected as not credible if they cannot provide a detailed account of their emotions about their sexual orientation.⁸⁷ While asylum seekers may perceive their sexual orientation as something one *does* – a common view in many countries and cultures⁸⁸ – decision makers have begun to emphasize feelings, identities, and inner processes. As has been pointed out, this is likely a consequence of the DSSH model.⁸⁹ It remains unclear whether other countries are facing the particular issue of a shame requirement.

82 Migration Court at the Administrative Court in Malmö, UM342-16.

83 Aino Gröndahl, 'Avslagsmotiveringar i HBTQI-ärenden: En rättsutredning av Migrationsverkets, migrationsdomstolarnas och Migrationsöverdomstolens prövning av sexuell läggning, könsidentitet och könsuttryck' [Reasons for Rejection in LGBTQI Asylum Cases: A Legal Investigation of the Migration Agency, the Migration Courts and the Migration Court's Examination of Sexual Orientation, Gender Identity and Gender Expression as Grounds for Protection] (Swedish Federation for Lesbian, Gay, Bisexual, Transgender, Queer and Intersex Rights 2020) 36–37.

84 *ibid* 54.

85 Ian Meyer and Laura Dean, 'Internalized Homophobia, Intimacy, and Sexual Behavior among Gay and Bisexual Men' in Gregory Herek (ed), *Stigma and Sexual Orientation: Understanding Prejudice against Lesbians, Gay Men, and Bisexuals* (Sage Publications 1998) 160.

86 Migration Court at the Administrative Court in Gothenburg, UM838-15.

87 Gröningsæter (n 14); European Union Agency for Fundamental Rights, 'Current Migration Situation in the EU: Lesbian, Gay, Bisexual, Transgender and Intersex Asylum Seekers' (2017) 6; Dawson and Gerber (n 4); Berg and Millbank (n 62); Mengia Tschaefer, 'Between Queer Liberalisms and Muslim Masculinities: LGBTQI+ Muslim Asylum Assessment in Germany' (2020) 43 *Ethnic and Racial Studies* 1265.

88 Sonia Katyal, 'Exporting Identity' (2020) 14 *Yale Journal of Law and Feminism* 98.

89 Gröningsæter (n 14).

In the Netherlands, however, similar findings were made by Jansen in a 2018 report, in which she examined over 40 case files and the related case law decided between 1 October 2015 and 1 April 2016.⁹⁰ Having evaluated Dutch legal practice relating to LGBTI asylum claims for many years, Jansen considers that the major issue today is the expectation that LGBTI people who originate from countries hostile to LGBTIs always go through a process of awareness and self-acceptance.⁹¹ She concludes:

In this present day and age, LGBTIs in Dutch asylum procedure cannot yet live in a way that can be characterised as *Out & Proud*. The idea that life in the closet is actually quite acceptable, has still not disappeared altogether. In addition, it appears from this study that an asylum seeker who is ashamed about their sexual orientation or gender identity has better chances of recognition and understanding in the Netherlands and therefore o[f] recognition as a refugee than someone who states they are proud of who they are.⁹²

Jansen traces this development to a policy of the State Secretary that has been sanctioned by the Dutch Council of State. This policy, Working Guidelines 2015/9,⁹³ sets out how decision makers in the Dutch Immigration and Naturalisation Service (IND) should assess asylum claims based on sexual orientation or gender identity. It outlines certain themes and focal points that should be involved in the interview and the credibility assessment of asylum seekers who claim to be LGBT people. These guidelines largely focus on the applicant's relationships with family and friends, their outlook regarding the future, and their feelings about themselves. The guidelines state:

In the assessment of the credibility of the sexual orientation, the IND does not use as a starting point that in all cases there must have been an internal struggle before the alien accepted his LGBT orientation. It can be expected, though, that an alien from a country where LGBT orientation is not accepted and where this may be criminalised, has experienced a process of awareness. In this respect, the alien, among other things, will face the question of what it means to be different from what is expected/demanded in society. In assessing the credibility of the LGBT orientation, the process of discovering the orientation and the way in which the alien states he has dealt with this will be taken into account and considered. These elements will weigh heavier, if the alien is from a country of origin where an LGBT orientation is not accepted.⁹⁴

While the policy frequently stresses that this is a framework rather than a checklist, and that an internal struggle is not required, Jansen's findings seem to indicate that the absence of shame is indeed to the asylum seeker's disadvantage. She argues that the policy:

is based on a stereotypical point of view: LGBTIs are presumed to struggle with their sexual orientation and to have internalised the homophobia and transphobia of their country of origin. If they are not ashamed but say they are 'glad to be gay', if they are happy and relieved,

90 Jansen (n 15) (2019 edn).

91 *ibid* 121.

92 *ibid* 172 (emphasis in original).

93 Immigratie en Naturalisatiedienst (IND), 'Werkinstructie 2015/9: Horen en beslissen in zaken waarin LHBT-gerichtheid als asielmotief is aangevoerd' [Interviews and Decision-Making in Cases in Which LGBT Orientation Has Been Put Forward as an Asylum Motive] (7 October 2015). Today, these guidelines have been replaced by *Werkinstructie 2019/17*.

94 IND WI 2015/9, cited in Jansen (n 15) (2019 edn) 27.

and certain components of religion fall within the former, while political opinion and 'active religion' belong to the latter. Grahl-Madsen identified a difference between expressing and merely holding an opinion, and argued that expressions hold different legitimacy, depending whether they fall within human rights protection.⁹⁹

In several landmark cases on this matter, the protection of LGB people as refugees has been argued for by referring to a parallel development of the growing protection of LGB people under human rights law.¹⁰⁰ However, the particular human right taken as the basis for the protection of LGB refugees has varied and has sometimes been obscure.¹⁰¹ For example, in *X, Y and Z*, the CJEU compared sexual orientation to freedom of religion,¹⁰² while in *HJ (Iran) and HT (Cameroon)*, the UK Supreme Court mentioned various diffuse rights, such as the 'right to dignity'¹⁰³ and the 'right to live openly without fear',¹⁰⁴ but made clear that the case indeed concerned a 'fundamental human right'.¹⁰⁵ In *Refugee Appeal No 74665/03*, the New Zealand RSAA pinned down the issue, noting that '[s]exual orientation is not explicitly recognised or mentioned as a human rights category in any of the human rights instruments to which reference has been made'.¹⁰⁶ While human rights law primarily protects certain actions or situations, rather than identities, sexual orientation has been recognized as a discrimination ground, both in itself and in relation to other human rights provisions.¹⁰⁷

Legal scholarship has repeatedly pointed out that, for group-based legal protection to be available, the legal procedure tends to require and create a particular identity for the person concerned. For instance, Brown noted, in relation to a legislative act in her town prohibiting discrimination on account of race, religion, sexual orientation, gender, and age, that:

Indeed, through the definitional, procedural, and remedies section of this ordinance (eg, 'sexual orientation shall mean known or assumed homosexuality, heterosexuality, or bisexuality'), persons are reduced to observable social attributes and practices; these are defined empirically, positivistically, as if their existence were intrinsic and factual, rather than effects of discursive and institutional power.¹⁰⁸

In other words, the legal protection of LGB people (as well as of other subaltern groups) often requires that the protected characteristics be integrated in the protected person, and reshaped into a stable, measurable identity. In order for the identity to be legible to the decision maker, it has to be solid, demarcated, and spatially and temporally stable.¹⁰⁹

To summarize, this field of law appears to be affected by a longstanding tendency to protect identities rather than conduct, since the latter is perceived as voluntary and the former as inherent, despite certain difficulties in separating the two. However, the practical implementation

99 Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol 1 (AW Sijthoff 1966) 220–53.

100 In this article, refugee law and human rights law are approached as two historically distinct fields of law which have, in recent decades and as a result of interpretation, begun to overlap. On this, see Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014) 20.

101 On this question, see especially John Tobin, 'Assessing GLBTI Refugee Claims: Using Human Rights Law to Shift the Narrative of Persecution within Refugee Law' (2012) 44 *New York University Journal of International Law and Politics* 447.

102 *X, Y and Z* (n 46) para 74.

103 *HJ (Iran) and HT (Cameroon)* (n 43) para 657 (Sir John Dyson).

104 *ibid* para 641 (Lord Rodger).

105 *ibid* para 644 (Lord Rodger).

106 *Refugee Appeal No 74665/03* (n 33) para 92.

107 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 2(1); European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5, art 14.

108 Wendy Brown, 'Wounded Attachments' (1993) 21 *Political Theory* 390, 399.

109 Maja Herthogs and Willem Schinkel, 'The State's Sexual Desires: The Performance of Sexuality in the Dutch Asylum Procedure' (2018) 47 *Theory and Society* 691.

of this protection through law requires a translation of this identity into attributes that are empirical and observable. The earlier parts of this article have shown how the development through which LGB refugees came to enjoy protection under the Refugee Convention has had two main effects. First, in order that LGB refugees be perceived as a particular social group with the right to live openly, being lesbian, gay, or bisexual had to be constructed as a fixed and stable identity. Secondly, as the formal legal requirements were interpreted in an LGB-inclusive manner, the legal assessment of the asylum claim became concentrated on the question of credibility. As part 3 of this article showed, in the cases examined, the credibility assessment was carried out by applying the DSSH model, leading to a situation where being LGB was primarily proven by expressing emotions of shame relating to the individual's sexuality. This leads to the second issue: how can this translation of LGB sexual orientations into shame be understood?

This approach may stem from a general confusion between the persecution requirement and the Convention ground requirement, in particular, an approach where the former requirement is perceived as more important than the latter. As Price has shown, today many refugee law scholars consider that the main purpose of the Refugee Convention is to prevent persecution and human rights violations. As this purpose is perceived as overarching, it may in practice affect the understanding of requirements, such as the Convention grounds, that are aimed at narrowing the group of people eligible for protection against such persecution or human rights violations.¹¹⁰

The DSSH model provides a clear example of this confusion. Its last component – harm – is central to the assessment of persecution, but under this model it also becomes part of the particular social group requirement. Moreover, the other components – shame, stigma, and difference – can be indicative of group membership as well as of a type of discrimination that might reach the threshold of persecution. In other words, in the DSSH-inspired asylum procedure, the same factors become evidence under both criteria. Herein lies a clue as to how the DSSH model has become a list of strict requirements. If the evidence is the same, it is easy to come to believe that the requirements it proves are also the same. However, this would mean that the requirement of membership in a particular social group could be reduced to persecution in the context of LGB people, which would negate the purpose of having two separate requirements to begin with. For decision makers, the solution then is to transform difference, stigma, shame, and harm into strict criteria that can be met and thereafter sorted under each requirement. As seen in the Swedish case law presented above, harm is barely mentioned when the DSSH model is applied to the applicant's story. This 'criterion' has been removed from the particular social group assessment, and its elements are instead sorted under the persecution assessment, owing to the similarities between the two requirements.

Previous studies have shown how LGB asylum seekers are expected to subscribe to Western (urban, middle-class) norms of how to be LGB. This includes attending gay bars, joining LGB organizations, coming out, or considering sexuality to be an identity (rather than a conduct).¹¹¹ In this case, however, something different appears to happen. Instead of being expected to resemble the 'ideal' LGB person, LGB people from the global South appear to be constructed as their submissive opposite.

Spijkerboer has described how the practice of asylum builds on a dichotomy between, on the one hand, 'an idealized notion of Europe as a site characterized by human rights' and, on the other hand, a view of non-European countries demonized as 'sites of oppression'.¹¹² As such, the asylum seeker needs to submit to this world view and contribute to it by positioning themselves

110 Matthew Price, *Rethinking Asylum: History, Purposes and Limits* (Cambridge University Press 2009).

111 Caroline Kobelinsky, 'L'asile gay: jurisprudence de l'intime à la Cour nationale du droit d'asile' (2012) 3 *Droit et Société* 583, 599.

112 Thomas Spijkerboer, 'Gender, Sexuality, Asylum and European Human Rights' (2018) 29 *Law and Critique* 221, 221.

as the outcast in a land of oppressors. In order to be granted asylum, Spijkerboer argues, an applicant must depict themselves as a holder of a human right at risk of violation, and their country of origin as a place of cruelty and violence, in accordance with European stereotypes.¹¹³ The treatment of asylum seekers thereby becomes a reflection of the country of asylum's self-image. If the country of asylum perceives itself as LGB-friendly, it should grant asylum to LGB people fleeing homophobia in order to stay consistent.¹¹⁴

Departing from this perspective of refugee protection provides a possible explanation as to why such importance is attributed to shame in the asylum procedures examined in this study. Unlike the early proposers of the DSSH model, who saw shame as a universal trait of all LGB people, Swedish courts directly connect the requirement of shame to the persecution and conditions in the country of origin. Repeatedly, arguments about the diversity of emotions and self-perception among LGB people are rebutted by referring to the persecution and intolerance in the country of origin. Here is one example:

Even if A himself has not experienced for example stigma and shame, it can be presumed that a person who has lived in a society where homosexuality is prohibited and who considers himself to belong to this group would have reflected upon these emotions or at least would have been able to provide a more nuanced and personal depiction than the one provided by A.¹¹⁵

Gröndahl also discusses this tendency, noting that the greater the social stigma of being LGB in the country of origin, the more the applicant is expected to provide an account of an inner struggle.¹¹⁶ A similar link is made to religion, where more reflections are required in cases where the applicant is religious.¹¹⁷

The same pattern is found in the IND policy guidelines:

In general, it can be stated that the focal point is located in the answers to questions about the applicants' own experiences (including awareness and self-acceptance) with regard to his/her own sexual orientation, what this has meant for him and his environment, what the situation is for people with that sexual orientation in the country of origin of the applicant and how his experiences, also according to his reasons for asking for asylum, fit into the general picture. This is even more important if an applicant comes from a country where homosexuality is socially unacceptable or considered a criminal act.¹¹⁸

What follows from these quotations is a view of the refugee as the 'exceptional' in an uncivilized country. The country of origin is characterized by intolerance of sexual difference and, as such, different from the sexually liberal countries of Europe. The LGB refugee is also perceived as different from this intolerant and uncivilized land, and facing oppression. Because the applicants are not only LGB people, but also originate from the global South, they must relinquish their ties to their country of origin during the asylum procedure so that they can be perceived, not as part of intolerance and stagnation, but instead as one of its victims.¹¹⁹ Requiring shame not only entails requiring an emotional break with the home society, but also conditions protection on a surrendering of pride, and thus of empowerment. Pride, the decision makers imply, is for LGB

113 *ibid* 224.

114 *ibid.*

115 Migration Court at the Administrative Court in Stockholm, UM7420-15.

116 Gröndahl (n 83) 37.

117 *ibid* 59.

118 IND (n 93) 3 (English translation provided by the author).

119 cf Deniz Akin, 'Discursive Construction of Genuine LGBT Refugees' (2019) 23 *Lambda Nordica* 21, 26–30.

asylum claims.¹²² If anything, there are indications that success rates have declined.¹²³ How can this be?

This article proposes that the legal history of LGB refugees lays bare an underlying issue with these types of inclusive reforms. As the sovereign right to deny entry is the norm in the global North, the border is primarily excluding.¹²⁴ When exclusion is the norm, the legal procedures require a means to exclude. While it is possible to think of solutions to the issue of requiring stable, stereotypical identities (for example, self-identification¹²⁵ and post-categorical law¹²⁶), the border would lose its function if the inclusion procedures were to become too flexible. As such, broadening the requirements for inclusion, as has been done in the field of LGB refugees, does not necessarily change this, but merely risks relocating the tipping point to a different stage or condition.

In essence, the progressive reform (in this case, the DSSH model) is absorbed by the (excluding) rationality of the border.¹²⁷ The attempts to heal what is perceived as unjust within this system without approaching this underlying border rationality have a tendency to repeat the following cycle: (1) a problem is identified; (2) a new, 'fair' solution is presented and implemented; (3) the solution is integrated in the legal border procedure, hardened, and becomes perceived as 'unfair'; and (4) researchers, political activists, and NGOs draft texts and make public statements about the unfairness of the new solution, that is, (1) a problem is identified. The new solution may seem just at face value, but it is soon reshaped into another bureaucratic process. A clear example of this is the transformation of shame from a point of discussion into a strict requirement. In this case, the DSSH model was proposed as an LGB-friendly alternative to more repressive forms of assessment and won institutional acceptance. When implemented, decision makers began to search for elements in this replacement that could be effectively applied in a dichotomic legal context, that is, one dealing with negative and positive emotions. Sexual orientations, with their fluidity, and with the variety of expressions that 'attraction' can take among different human beings, destabilize the asylum procedure, and the authorities must struggle to restabilize it. The DSSH model was clearly launched as a means to start conversations but these were soon turned into necessary conditions by decision makers acting within an environment of expectations, pressuring them to exclude asylum seekers.

This article has presented a historical development in which actors working in refugee law try to settle the question of what the Refugee Convention protects. Are LGB people protected, and, if so, what does it mean to be an LGB person? Over the years, LGB people have been defined by their sexual actions, clothes, culture and, now, their shame and self-loathing. This article has defined LGB people on the basis of attraction, in line with a contemporary common understanding of what sexual orientation is. What does this mean for the future? Will this and others' criticism of the DSSH model create a new trend whereby LGB people are questioned about emotions of attraction? It appears that the changes towards more LGB-inclusive refugee law, although carried out with the best intentions, have primarily fixed leaks within the same faulty

122 Nuno Ferreira and Carmelo Danisi, 'Queering International Refugee Law' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021).

123 Jenni Millbank, 'Sexual Orientation and Gender Identity in Refugee Claims' in Costello, Foster, and McAdam (eds) (n 122) 762.

124 *Chae Chan Ping v United States*, 130 US 581 (1889) 609; *Abdulaziz v United Kingdom* (1985) 7 EHRR 471; Marie-Bénédicte Dembour, *When Humans Become Migrants* (Oxford University Press 2015).

125 Jansen (n 15) (2019 edn) 123.

126 Susanne Baer, 'Geschlecht und Recht: Zur Diskussion um die Auflösung der Geschlechtergrenzen' [Gender and Law: On the Discussion about the Dissolution of Gender Boundaries] [2014] RZ-EÜ 1, 5–11; Lauren Sudeall Lucas, 'Identity as Proxy' (2015) 115 Columbia Law Review 1605, 1642.

127 For other examples of how progressive changes are watered down to become ineffective in legal practices, see Karl Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941' (1978) 62 Minnesota Law Review 265; Duncan Kennedy, *A Critique of Adjudication* (Harvard University Press 1998) 180–212.

paradigm. As already mentioned, the acceptance rates of LGB-related asylum applications appear to be declining, and attempts to change the interpretation of formal requirements have merely concentrated the assessment on the credibility assessment, well known for its arbitrariness.¹²⁸ While the issue of LGB refugees has attracted much scholarly and political attention in recent decades, it is argued here that this is a time when evaluation of these changes is necessary in order to understand why the same issues keep occurring. Where does the problem lie, and how can it be addressed?

5. CONCLUSION

This article has shown how a requirement of shame has begun to appear in asylum decisions relating to LGB refugees in Sweden and the Netherlands, and how this development can be connected to legal categorization and colonial tendencies. When international protection on the grounds of sexual orientation began to take shape in Europe in the 1980s and 1990s, it was built on a perception of sexual orientation as something stable and anchored in the human being. Since then, the understanding of how to perceive sexual orientation has shifted from the physical to the psychological, from assessing expressions of sexual orientation to observing emotions and inner experiences. The DSSH model has played a central part in this development. It asserts that LGB people are united by a common experience of being outsiders, often manifested in feelings of difference, stigma, and shame, or experiences of harm. The model aims to persuade national authorities to listen to individual stories, rather than request proof of sexual acts and answers to precise and stereotypical questions. However, in the implementation of the model in Sweden and the Netherlands, this conversation starter has been transformed into hard criteria, requiring the asylum seeker to express shame in order to be considered a 'genuine' LGB person.

This analysis has discussed how this situation came to be by separating its development into two steps: first, the requirement for a particular LGB identity (rather than LGB conduct), and secondly, the practice of defining the LGB refugee on the basis of shame. With respect to the first step, it was argued that refugee law has a long tradition of separating acts from identities, where the latter are perceived as more deserving of protection due to being involuntary. A consequence of this tendency to protect identities is that such identities have to be perceived as fixed and inherent and possible to prove in an observable manner by legal decision makers. With respect to the second step, the emphasis on shame in LGB asylum cases was connected with two contemporary approaches to refugee law. First, it was argued that this practice might stem from a confusion between the persecution and the particular social group requirements, based on an idea of asylum as primarily aiming to prevent persecution. According to this perspective, the persecution requirement takes precedence and affects the interpretation of the particular social group requirement, resulting in the two being met by the same evidence. Secondly, the emphasis on shame echoes colonial notions of the global North as the civilized defender of human rights and the global South as intolerant and homophobic. From this perspective, asylum aims to compensate for the suffering in the global South in cases where the asylum seeker submits to this world view and presents themselves as a victim of it. Finally, the article discussed why the same issues appear to recur in LGB refugee law despite all these developments, and suggested that the core problem lies in the excluding rationality of the border itself. On this matter, more research is required on the historical development of these types of reforms.