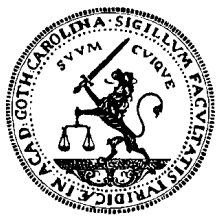

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Somewhere Over the Rainbow: Sexuality and Refugee Law

- A case study on proof, credibility and the legal requirements on members of sexual minorities in international refugee law

LAGM01 Master Thesis

International Human Rights Law
30 higher education credits

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Contents

Summary

A common issue of applications of international protection is the lack of physical evidence to substantiate the applicant's claim. This issue is even more prevalent in cases concerning LGBTQ+ refugees since the requirement to prove ones membership to a particular social group is generally a request to substantiate the unverifiable. Therefore, the credibility assessment becomes a very important element when making decisions on international protection in LGBTQ+ cases.

This thesis examines the legal requirements of being recognized as a refugee under international law, issues of evidentiary assessment and assessment of credibility as well as issues prevailing from each of these fields. Finding that the standards of proof used for LGBTQ+ applicants are high, and in part these applicants are expected to substantiate something unverifiable.

However, as the main part of this study is to examine these requirements and standards from the perspective of the European Court of Human Rights, a case study, presenting a few LGBTQ+ cases, will be done in chapter 4. The analysis of these cases will consist of how the standards of proof are applied by the ECtHR in relation to the particularities of LGBTQ+ refugee claims found in the previous chapters. The main findings of this chapter is that the assessment of credibility has been very prevalent in the Courts decisions and that this assessment is largely based on expectations of the applicant's behavior that have little or no certain basis in scientific research. Additionally, issues can be found in the Court not understanding the context in which the applicant made their statement, therefore arguing that certain indicators show that the applicant is not credible, even though the same indicators could support the applicant's credibility.

Sammanfattning

Ett vanligt förekommande problem vid ansökningar om asyl är bristen på handfast bevisning för att styrka den sökandes utsaga. Ännu mer träffande är detta problem när det gäller HBTQ+ flyktingar eftersom vissa krav på att styrka exempelvis tillhörandet till en viss samhällsgrupp i praktiken är ett krav att bevisa det obevisbara. Av den anledningen är trovärdighetsbedömningen ett väldigt viktigt instrument när beslut om internationellt skydd fattas.

Detta examensarbete utforskar kraven enligt internationell rätt för att bli erkänd som flykting, problem inom bevisvärdering och uppskattningen av den sökandes trovärdighet. Arbetet når resultatet att det finns ett flertal olika problem inom dessa områden som försvårar bedömningen av ansökningar om internationellt skydd.

Huvudsakligen söker detta examensarbete att slå fast dessa standard från Europadomstolens perspektiv genom att granska ett antal domar som i princip alla rör HBTQ+ flyktingar. Resultatet av detta kapitel är framförallt att en del av de indikationer som går att hitta genom informationen om ett land, t.ex. om homosexuella handlingar är förbjudna, används för restriktivt som stödbevisning av domstolen. Utöver detta fastslås att den trovärdighetsbedömning som görs av domstolen i mycket bygger på stereotypa uppfattningar om homosexuella personer eller förutfattade meningar om vad som är ett logiskt beteende för den sökande när denna uppfattning nödvändigtvis inte är logisk enligt den sökandes uppfattning enligt dess personliga omständigheter som asylsökande.

Preface

I want to start this thesis of by saying thank you to a few but very important people who have all been instrumental to the process of writing this thesis.

Firstly, I want to thank my friends and family for being there for me, being patient with me and for, at times, literally feeding me during the process of writing this thesis.

I would also like to thank my colleagues, both those who I share office spaces with and the many activists, fighters and overall badasses who work tirelessly to support people in need.

But most importantly I would wish to dedicate this thesis, this piece of work that I have poured countless hours into, and that in the end turned into a labor of love, to all the LGBTQ+ refugees and asylum applicants, but most importantly, wonderful people who I have met during the course of these last 5 months. It is your resilience, strength and dedication to your right to your life and identity that has brought me the inspiration to write and finish this work, while also reminding me of what is most important.

We were served lemon, but we made lemonade.

With much love,

Erik

Abbreviations

APD	Asylum Procedures Directive
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
COI	Country of origin information
EAC	European Asylum Curriculum
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Committee
LGBTQ	Lesbian, gay, bisexual, transgender and queer
RFSL	The Swedish Federation for Lesbian, Gay, Bisexual, Transgender and Queer rights (*Riksförbuded för homosexuellas, bisexuellas, transpersoner och queeras rättigheter)*
QD	Qualifications Directive
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UDHR	Universal Declaration of Human Rights

1. Introduction

1.1. Presentation on chosen topic

> *"Queer quests for refuge are regarded as easily made and impossible to prove."*[1]

Being gay is criminalized in approximately 80 countries in the world where sexual relations between two persons of the same sex can result in extensive prison sentences, torture, physical and mental abuse by authorities and death. As a result of this persecution, many LGBTQ+ persons leave their country of origin in order to apply for international protection as asylum seekers.

The right to seek international protection is recognized as an international human right under Article 14 of the United Nations (hereafter the UN) Universal Declaration of Human Right (hereafter the UDHR). The European Union Charter expresses that the right to international protection is guaranteed as expressed in the 1951 Refugee Convention[2] (hereafter the Refugee Convention). A core principle of the Refugee Convention is the principle of non-refoulment, which asserts that a refugee should not be returned to a country where they face a serious threat to their life or freedom.

It has been argued that the decisions on asylum applications are made on the basis of evidentiary assessment rather than on legal issues. Since a common issue in refugee law is the lack of physical or documented evidence to

[1] Johannes Lukas Gartner, (In)credibly Queer: Sexuality-based Asylum in the European Union", published in Translantic Perspectives on Diplomacy and Diversity (Humanity in Action Press), 2015.
[2] ohannes Lukas Gartner, (In)credibly Queer: Sexuality-based Asylum in the European Union", published in Translantic Perspectives on Diplomacy and Diversity (Humanity in Action Press), 2015.

substantiate the applicant's statements, the assessment of the applicant's credibility becomes prevalent.[3]

Additionally, studies have shown that refugee status determination is generally a highly complex adjudication process where legal, as well as linguistic, cultural and psychological factors must be taken into account. These considerations must be made in the political context of the applicant's country of origin. The main source of the information therefore relies on the applicant, where it is up to them to provide as much information as possible to substantiate their claim.

The 1951 Refugee Convention does not explicitly mention sexual orientation and gender identity as grounds for protection under the 'nexus' requirement[4]. However, recognition of these groups as legitimate grounds for international protection explicitly or into the category of a particular social group as mentioned in the Refugee Convention has been given within various legal systems.[5] The 2004 Qualifications Directive, which is binding EU-law, explicitly provides that sexual orientation is a relevant persecution ground. Gender identity was added in the 2011 recast of the Directive.[6] Within the Common European Asylum System (hereafter the CEAS) it has clarified that sexual minority members definitely constitute members of a particular social group for the purposes of the member states' asylum procedures. This was further clarified by the Court of Justice of the European Union (CJEU) in November 2013 in the case of X, Y and Z, which will be reviewed later in this thesis.[7]

[3] Professor Gregor Noll on the evidentiary assessment in asylum procedure. Quote taken from Gregor Noll, Proof, *Evidentiaty Assessment and Credibility in Asylum Procedures*, 2005, p. 1.
[4] More on the nexus requirement will follow later in this thesis under the subsection 2.1.4.
[5] Johannes Lukas Gartner, (In)credibly Queer: Sexuality-based Asylum in the European Union", published in Translantic Perspectives on Diplomacy and Diversity (Humanity in Action Press), 2015.
[6] EU Directive 2004/83 and EU Directive 2011/95. See Article 10/1)(d).
[7] Joined Cases C-199 to C-201/12, Minister voor Immigrantie en Asiel, Judgment of the CJEU (Fourth Chamber) of 7 November 2013.

However, the above-mentioned recognition of LGBTQ+ refugees as members of a particular social group has only "created the condition for protecting LGBTQ+ applicants".[8] This means that the applicant basing their claim for international protection on their sexual orientation and/or gender identity has to prove their sexuality and/or gender identity, a well-founded fear of persecution on the basis of this identity, and that their country of origin is unwilling or unable to offer them protection. Mainly two categories of evidentiary hurdles can be identified in LGBTQ+ cases. The first one being the requirement of the applicant to prove their identity, their queerness, where credibility and stereotyping may be distinguished problems. And secondly, evidence to prove the persecution of LGBTQ+ in the country of origin, where misrepresentative or non-existent country of origin information causes issues. This thesis seeks to identify and review the specifics of these evidentiary hurdles and discuss how they particularly affect LGBTIQ refugees.

1.2. Purpose

The purpose of this thesis can be divided into two main parts. Firstly, the purpose is to review the legal and evidentiary requirements, the legal requirements of being recognized as a refugee and the standards of proof, and how these requirements affect LGBTQ+ applicants in particular. By doing this, the thesis seeks to identify and clarify key concepts within international refugee law as well as international guidelines on evidentiary assessment and credibility in relation to the particular circumstances of claims for international protection made on the ground of sexual orientation and/or gender identity. It should be mentioned that the requirements set out in art. 1A(2) of the Refugee Convention are general and not destined to particularly affect individuals making claims based on their sexual orientation and/or gender identity.[9] However, in regards to being required to

[8] Sabine Jansen, Introduction: Fleeing homophobia, asylum claims related to sexual orientation and gender identity in Europé, in Thoma Spijkerboer (ed.), Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum, Oxon: Routledge, 2013, at 1.

[9] queer cases make bad law – p. 319

find evidence to support their claim in order to fulfil the requirements of the Refugee Convention, this thesis' purpose is to analyse how the requirements of evidence affects a LGBTIQ refugee's claim for refugee status in practice. Here, the thesis' focus will be on the general requirements of international refugee law but more specifically of the CEAS and the principle of non-refoulment as expressed in Article 3 of the European Convention on Human Rights (hereafter the ECHR). In other words the thesis hopes to provide a further clarification how the concepts within the credibility assessment affects these cases specifically.

The second part of the purpose is to analyze the considerations and methods used by the European Court of Human Rights (hereafter the ECtHR) when assessing evidence and credibility in complaints lodged by LGBTQ+ applicants under Article 2 and 3 of the ECHR. The cases selected are all on the issue of expulsing the applicant to a country where, according to the applicant's claim, they would be subjected to treatment contrary to Article 2 and/or 3. In other words, the cases selected all relate to the principle of non-refoulment. Here, the purpose is also to review the reasoning of the Court in these cases and analyze how this affects the LGBTQ+ applicants in particular. For the purpose of the thesis, the analysis of the cases will draw from the discussion on the requirements discussed in the previous two chapters and conclude whether how LGBTQ+ applicants are specifically affected by the standard of proof required particularly by Article 2 and 3 of the ECHR and how this affects LGBTQ+ complaints of non-refoulment.

1.3. Research question and delimitations

Research questions as to the requirement of international refugee law and the guidelines on evidentiary assessment and credibility in general.

- What are the general requirements on LGBT-refugees/asylum applicants in international refugee law?
- In cases of LGBTQ+ asylum seekers, to what degree are they protected under the regional Directives and Article 3 of the ECHR.

Research questions as to the evidentiary assessment and credibility of the European Court of Human Rights in cases regarding LGBTQ+ persons lodging complaints under Article 2 and/or 3 of the European Convention of Human Rights.

- What issues in the ECtHR's method of assessing evidence, as well as the assessment of credibility, in LGBTQ+ cases can be found?
- Within the scope of the discussion of the previous research questions, are LGBTQ+ cases more difficult to substantiate?

Delimitations

Due to the limited time for producing this thesis, the limitations of space as well as the limited amount of material on some areas of research for this thesis, it has been limited in the following areas:

- The thesis will focus only on a selected handful of aspects of the credibility assessment. There are a copious amount of aspects that can be considered when analyzing the assessment of credibility in the asylum procedure. After close consideration by the author, the scope of this thesis encompasses selected aspects that the author found would be most relevant to the discussion and analysis of the cases presented in chapter 4.
- The thesis does not either include a detailed analysis of the use of country of origin information (hereafter COI) and the impact of country guidance on evidentiary matters.
- Lastly, the thesis does not analyze the methodology, expert and forensic evidence, quality and/or standards for certain methods of credibility testing such as age assessments and medical reports.
- The review of LGBTQ+ cases of the ECtHR have been limited to a handful that the author found to be most relevant. When making the selection the author reviewed articles, blogs and the references made in judgments by the ECtHR.

1.4. Material and Methodology

The material that has been used in writing this thesis is a collection of legal frameworks of international, regional and domestic law, as well as academic articles, reports, guidelines and cases all relevant to the subject of this thesis.

For the second main chapter of the thesis, on the legal requirements of being considered a refugee, the key material used is legal instruments, the 1951 Refugee Convention and legal framework relating to the Common European Asylum System, as well as domestic Swedish Law. In order for a more comprehensible view of the 1951 Refugee Convention, the review of the legal provisions are guided by James C. Hathaway and Michelle Fosters 'The Law of Refugee Status'[10]. This material is complemented by a selected few cases from the ECtHR.

For the chapter 3, the material used mainly consists of UNHCR reports and guidelines on evidentiary and credibility assessment. Additionally, academic writing relating to the concepts of evidentiary assessment and credibility has been used, mainly 'Proof, Evidentiary Assessment and Credibility in Asylum Procedures'[11] edited by Gregor Noll, which collects a number of academic articles discussing the assessment of proof and the asylum procedure.

Lastly, for the fourth chapter a selected number of cases from the European Court of Human Rights as well as the Court of Justice of the European Union.

During the period of working on this thesis the author has simultaneously worked as a legal council, working in cases where LGBTQ+ persons have applied for asylum in Sweden. The author has also worked and been contacted by LGBTQ+ persons and given legal advice to them through the work of the LGBTQ+ refugee-organization RFSL Newcomers. Through

[10] James C Hathaway, Michelle Foster, *The Law of Refugee Status,* Second Edition, Cambridge University Press, 2014.
[11] Gregor Noll, Proof, *Evidentiaty Assessment and Credibility in Asylum Procedures*, 2005.

talking with these individuals, themes of discrimination, harassment and violence as well as the procedure of their asylum cases confirms certain aspects of the credibility assessment also discussed in the academic writing. The direct contact with these refugees has also offered insight of aspect of the credibility and evidentiary assessment that needs to be reviewed.

When it comes to case law, cases on sexual orientation as claimants for international protection and especially gender identity claims have despite their practical and legal uniqueness continued to be subject of a limited body of jurisprudence and academic writing. However, a number of cases from the ECtHR will be reviewed in this thesis. The author tried to make an as exhaustive review as possible of the ECtHR case law, also including cases that were deemed inadmissible by the ECtHR.

1.5. Structure

The second chapter of the thesis is structured be according to the different steps in assessing an application for international protection on the ground of the persons sexual orientation and/or gender identity. Assessing whether the claimant is at risk of being persecuted as well as the evidence put forth to support this claim. The chapters will tie into each other as each part is presented and discussed.

The third chapter will discuss the principles of evidentiary assessment and credibility and will analyze and discuss the requirements presented in the second chapter in the light of evidentiary assessment and credibility.

The fourth chapter will offer analyses of a selected number of cases from the ECtHR and the CJEU. The discussion of the cases will draw from the conclusions of the previous chapters.

The analysis of the material presented in the light of the research questions will run through the thesis continuously through concluding chapters at the

end of each section and sub-section. The core findings of the thesis will then be presented in a conclusive chapter.

Lastly, in the fifth chapter, the conclusions of the previous chapters will be presented more briefly as well as be discussed directly in relation to the research questions.

1.6. Previous research

There has been an extensive development in the amount of academic material produced on the topic over the last decade. However, only little guidance exists on the credibility assessment in the asylum procedure, and even less in direct relation to how these assessments are made in LGBTQ+ cases. It should also be mentioned that there is an exceptionally small amount of research made on transgender applicants for international protection under refugee law. This might be explained in that there are virtually no cases from the ECtHR as regards to Article 3 or the CJEU. This lack of material has made it difficult to substantiate the discussion and conclusions on the research question as far as it relates to 'gender identity'.

An essential source of this thesis as to the discussion on evidentiary assessment and credibility has been the UNHCR report "Beyond Proof", and the academic articles compiled in 'Proof, Evidentiary Assessment and Credibility in Asylum Procedures'. The report however only focuses on the assessment of credibility in the asylum procedure in general terms and notes that it does not address the specific considerations linked to claims based on sexual orientation and/or gender identity as well as claims based on religious conversion.

The thesis has drawn source material for research on these specific considerations mostly from guidance-material produced by the UNHCR and academic research. However, despite the guidance offered by the UNHCR and academic writings, there is a need of an analysis of the specific

considerations linked to claims based on sexual orientation and/or gender identity.

There is also research available on claims of international protection on sexual orientation and/or gender identity and the concepts within the criteria of a membership of a social group. It should be noted again that the emphasis here is on applications on sexual orientation. Additionally, there is a need of a deeper analysis directly applying the concepts of the assessment of credibility on claims on the grounds of sexual orientation or sexual identity in order to research, clarify and analyze how these concepts relate and affect each other.

Research in areas not directly related to the area of law is also of importance, most particularly in the fields of neurobiology, psychology, gender and cultural studies, sociology etc. These areas are being discussed briefly in some of the source material of this thesis.

1.7. Terminology

The legal terminology used in this thesis is selected from the terminology used in the Qualifications Directive (hereafter QD) and the Asylum Procedures Directive (hereafter APD). For example, instead of using 'burden of proof' the terms ' substantiate' and 'duty to substantiate' is being used in line with the language used in Article 4, QD. Since the scope of this thesis mainly is focused on the theoretical practice of the Swedish authorities the use of the terms drawn from these directives are for the purpose to simplify the terminology of this thesis.

Additionally, core elements of the terminology used in this thesis is drawn from the UNHCR report 'Beyond Proof '. The following terms have been selected for use in this thesis:

The term 'determining authority' is used to refer to the administrative body of a Member State that has the authority and is responsible to make decisions, assess, and examine an application for international protection on

a first instance level. For example, the Swedish Migration Agency will be referred to as the determining authority.

The term ‘decision-maker’ refers to the personnel of the determining authority who is responsible for determining and assessing an application for international protection. The term ‘ interviewer’ is reserved in this thesis to refer to the personnel of the determining authority responsible for interviewing the applicants for international protection.

The term ‘refugee’ is reserved to being used only as expressed in the Refugee Convention.

The term ‘evidence’ is used in this thesis as encompassing al types of evidence – oral and written statements, documentation, COI and other graphic, written, audio- and visual materials. The term is therefore used without being qualified.

The term ‘country of origin’ is used to refer to the state where the applicant is a citizen or otherwise has had their habitual residence, and where the risk of persecution that the applicants claim for international protection is based on originates.

When it comes to the terminology selected when referring to the applicant, this thesis will use gender-neutral pronouns to the largest extent possible, such as they/their even when referring to a singular applicant.

When referring to a LGBTQ+ applicant the material in this thesis refers to a person who has lodged an application for international protection on the ground of their sexual orientation and/or gender identity. LGBTQ+ is an abbreviation for lesbian, gay, bisexual, trans, and queer persons. The + indicates that additional groups such as intersex and asexual person are included in the abbreviation while at the same time simplifying it.

When reviewing some of the material used for this thesis it is clear that the harassment or discrimination against persons of this group does not differentiate much, as to why LGBTQ+ will be used in this thesis as a collective term when referring to the experience of lesbian, gay, bisexual, trans, intersex and queer person in broader terms. Even though not all of these sexual minorities have been expressively recognized as grounds for international protection in all legal systems, as well as not expressively discussed in the articles or case law reviewed for this thesis, they all have been included consciously in respect of persons who are gender non-conforming and who for example might identify as queer but are perceived as being gay and persecuted thereafter. The word transsexual is excluded from use in this thesis and replaced by ‘transgender’ or simply ‘trans’.

It is also important to mention that when mentioning bisexual, homosexual or trans specifically these terms are not to be read synonymously.

2. Legal Framework: Who is a LGBTQ+ Refugee?

2.1 The 1951 Refugee Convention and the definition of a refugee: What are the core requirements of being recognized as a LGBTQ+ refugee?

The primary instrument governing refugee status under international law is the 1951 Refugee Convention[12] (hereafter the Refugee Convention), the reach of which, both temporal and geographic, is extended by the Protocol Relating to the Status of Refugees[13]. The Convention, which currently has 146 state parties, sets a binding and non-amendable definition of which persons are entitled to recognition as refugees, in other words, it defines who has the right to enjoy international protection through the substitute national protection of an asylum state. Article 1A(2) of the Refugee Convention sets out the definition of who is to be recognized as a refugee by providing that a refugee is a person who has a '*well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, or membership of a particular social group*'.[14]

Additionally, the individual making the claim of refugee status must also be outside of the territory of their country of origin and in need as well as deserving of protection according to Articles 1A(2), 1(D)-1(F). When the requirements of the refugee definition of Article 1A(2) are met, the person is to be recognized as a refugee and entitled to protections provided by the Refugee Convention, such as the principle of non-refoulment found in Article 33.[15]

[12] Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 139 (hereafter the Refugee Convention)
[13] Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (hereafter the Refugee Protocol)
[14] James C Hathaway, Michelle Foster, *The Law of Refugee Status,* Second Edition, Cambridge University Press, 2014. p. 2.
[15] Queer cases make bad law – p. 319

The assessment of whether a person to be recognized as a refugee is divided into several steps. Firstly, the requirement of a '*well-founded fear of being persecuted*' upon return to the applicant's country of origin. Secondly, a risk of being subjected to a risk of '*serious harm'* needs to be present. Thirdly, the requirement of the '*failure of state protection'* from the state of the applicant's country of origin. Lastly, the '*nexus requirement'*, which entail that there has to be a connection between the risk of serious harm and one of the persecution grounds set out in the Refugee Convention. Most relevant for the purpose of this thesis is the ground '*membership of a particular social group*' where sexual orientation and gender identity has been recognized in some systems as will be mentioned below. In order to give a structured view of the requirements of Article 1A(2), each requirement will be discussed separately below.

2.1.1. '*Well-founded fear'* and introduction to the issue of concealing one's sexual orientation

The first requirement to be analyzed is the requirement of '*well-founded fear of being persecuted'*. The '*well-founded fear*' requirement reflects the element that there has to be a genuine risk that the applicant will be subjected to persecution for a reason within the scope of the Refugee Convention, if the applicant is sent back to their country of origin. Secondly, '*being persecuted'* entail a presence of a risk of serious harm as well as a failure of state protection. Each of which will be discussed in the following subchapter. Only persons able to show a future or forward-looking risk of persecution or serious harm can establish a '*well-founded fear'* required to qualify as refugees.[16]

Generally, '*well founded fear'* entails two requirements. Firstly, the subjective requirement, that the applicant perceives themselves as to stand

[16] James C Hathaway, Michelle Foster, *The Law of Refugee Status,* Second Edition, Cambridge University Press, 2014, p. 91-93.

in '*terror of persecution*'[17]. Secondly, this subjective fear and perception of risk must be consistent with available information of the situation in the country of origins relevant to the person's individual claim. This second criterion is to fulfill the requirement that only those who have a reasonable fear can be considered as being in need of international protection.[18] However it has been found that a presence of a subjective fear is not relevant to the recognition of refugee status.[19]

As in regards to credibility and the subjective fear, Hathaway and Foster mention a growing practice of equating an absence of visible subjective fear with a lack of credibility, thereby a disqualification from refugee status. Credibility is not a per se requirement of refugee status, and exists separately from the actual risk of persecution.[20] However, as will be seen further into this thesis, the lack of evidence to substantiate the applicant's statements often leads to the decision-makers reliance on the applicant's credibility.

The assumption of the possibility to conceal one's sexual orientation

When it comes to the requirement of '*well-founded fear'* there have been cases, in particular from Australia and the United Kingdom, where the requirement has not been considered as met if the applicant, can reasonably be expected to 'conceal ones sexual orientation' or 'tolerate' a degree of internalized repression in order to avoid a risk of persecution by their country of origin.[21] In 2011, this kind of 'discretion reasoning' by courts have been reported to still occur in several European civil jurisdictions.[22] The reason for this being that it has been considered by some courts that a

[17] Y. Shimada, The Concept of the Political Refugee in International Law, 1975, 19 Jap. Ann. Intl. L.
[18] James C Hathaway, Michelle Foster, *The Law of Refugee Status,* Second Edition, Cambridge University Press, 2014. p. 91-93.
[19] James C Hathaway, Michelle Foster, *The Law of Refugee Status,* Second Edition, Cambridge University Press, 2014. p. 105.
[20] James C Hathaway, Michelle Foster, *The Law of Refugee Status,* Second Edition, Cambridge University Press, 2014. p. 100.
[21] See for example Karouni v. Gonzales, 399 F.3d 1163, 1170 (9th Cir. 2005)
[22] Including Finland, Norway, Austria, Belgium, Hungary, The Netherlands, Spain etc. See Sabine Jansen & Thomas Spijkerboer, Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europé, p. 33-39 (2011).

persons sexual orientation, to an extent, can be hidden, similarly to a persons political opinion or religious views that also constitute protective grounds. The issue has then been settled in several judgments within the European regional system as regards to concealing one's sexual orientation permanently. However, as will be seen in chapter 4, the Chamber of the ECtHR has been considering a temporal test of this issue. Therefore the risk of '*serious harm'* would be considered as eliminated and in extension the fear being '*well-founded'*. This issue has been considered as generally settled within the through the cases of HJ & HT that were processed by the UK Supreme Court.[23] However, arguments that allude to the idea of being able, and in some cases required, to conceal one's sexual orientation will be show in the case study in chapter 4.

Conclusion:

Briefly, the requirement of the presence of a '*well-founded fear'* alludes to the necessity of the international protection. The possible subjective fear, which might rather be translated into the presence of a risk for persecution, has to be recognized through available information of the situation in the applicant's country of origin, and thereby assessed as a reasonable fear. This information, or COI, must also substantiate that the situation in the applicant's country of origin, or in the applicant's personal circumstances, are to be considered as reaching a certain magnitude in order to constitute a risk of serious harm. These criteria will be discussed next.

2.1.2. '*Serious harm'* and the agent of persecution: What degree of harm would constitute fulfilling the requirement of '*serious*'? Is psychological harm and harassment legitimate forms of harm to fulfill the requirement?

According to article 1A(2) of the Refugee Convention, one of the requirements for an applicant to be considered a refugee is that there has to be a risk of the applicant '*being persecuted'*. The term '*persecution*' in this

[23] HJ (Iran v. Secretary of State for the Home Department (HJ and HT) (2010) UKSC 31, (2011) 1 A.C. 596.

instance is a risk of a form of '*serious harm'* the applicant is being subjected to either by the active persecution of by the state authorities, or by a failure of protection by these authorities in the applicant's country of origin.[24]

The first requirement that has to be met in order for a person to be a refugee according to the Refugee Convention, is that there needs to be present a risk of persecution. A key term when determining if there is a risk of persecution is to assess whether there is present a level of risk of serious harm that the claimant must apprehend. In other words, for the claimant to be recognized as a refugee they have to face a level of risk of harm that amounts to a risk of '*being persecuted'*. The harm might consist of arbitrary arrests, police beatings, torture, and imprisonment, as well as not as directly violent forms of harm against LGBTQ+ persons such as a denial of the right to work, medical treatment or public housing; harm that courts have found sufficiently serious to satisfy the criteria of "serious harm".[25] However, the Refugee Convention does not hold a definition of the meaning of '*being persecuted'* as a concept. There is however a need for this requirement to be flexible since there are innumerable ways an individual could be subjected to ill-treatment that would make this individual in need of international protection.[26] It can however be concluded that, judging by the 'strong human rights language' in the Preamble to the Refugee Convention, the UNHCR has stated that the purpose of the drafters was to incorporate human rights values when identifying the ill-treatment of of refugees. Thereby, human rights and the violations of these can be seen as guidance for the interpretation of what the requirement of 'serious harm' entail.[27]

Additionally, the risk of serious harm must be of an unrelenting or inescapable character since it is also a requirement that there should be no

[24] James C. Hathaway and Jason Pobjoy, Queer Cases Make Bad Law, available at: http://nyujilp.org/wp-content/uploads/2010/06/44.2-Hathaway-Pobjoy.pdf
[25] James C. Hathaway and Jason Pobjoy, Queer Cases Make Bad Law, available at: http://nyujilp.org/wp-content/uploads/2010/06/44.2-Hathaway-Pobjoy.pdf p. 322
[26] James C Hathaway, Michelle Foster, *The Law of Refugee Status,* Second Edition, Cambridge University Press, 2014, 182-184.
[27] UNHCR, The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, 2001, 20(3) Ref. Survey Q. 77, at. 78.

domestic remedies available to escape this risk.[28] The failure of state protection will however be discussed under the next subchapter.

Conclusion:

It is clear that a criminalization of for example 'homosexual acts', where these prohibited acts are severely punished with longer prison sentences, torture or death and where the general situation for LGBTQ+ persons in that country is very difficult, may amount to persecution and thereby making the applicant entitled to international protection, but does not always do so. The criminalization might substantiate that the national protection of the country of origin is exhausted, even when the applicant themself has not actively tried to request protection from the national agencies in the country of origin. It can not however, not be considered reasonable to expect of the applicant to contact the same state agencies to gain protection, which criminalize sexual acts between persons of the same sex or gender non-conforming expressions, referring to the requirement of the applicant to substantiate that they can not be protected within the borders of the country of origin.

2.1.3. Failure of state protection

The second half of *'being persecuted'* requires that the applicant show that either the state itself is the agent of harm, in other words, the persecuting actor, or if the state is unwilling or unable to effectively protect the applicant from the threat emanating from non-state agents.[29]

Non-governmental agents of persecution

Persecution can originate from both private or non-state actors and state actors. In the case of non-state actors being the actors of persecution, there needs to be a lack of protection offered by the state in that country. The country of origin state has the primary obligation of protecting the

[28] Hathaway and Foster, Refugee law, p. 185.
[29] James C Hathaway, Michelle Foster, *The Law of Refugee Status,* Second Edition, Cambridge University Press, 2014. P. 292-294.

individual. When this protection fails, either by the state being unable or unwilling to protect the individual, and this fact can be shown, the applicant is eligible for international protection as a substitute of this national protection. In other words, when the actor of the persecution is a non-state actor it also has to be shown that the state actor is unable or unwilling of protecting the individual from the threat posed by the non-state actor. In these cases it has to be evidenced that the State is either unwilling or unable to provide protection.[30]

Of the circumstance that LGBTQ+ persons are being threatened by non-state actors, it has been generally recognized that the absence of a meaningful state response to the non-state threat is what is required to justify asylum. [31]

State officials being the agents of persecution

In the case where the state of the applicant's country of origin is the agent of persecution, the applicant will not need to substantiate as many facts in order to be eligible for international protection. Since there is no requirement of any other entity within a state to protect the individual from persecution, there is also no requirement for the applicant to find protection within the borders of their country of origin when the state itself is the agent of persecution.[32]

The failure of state protection might arise either by the threat of serious harm being used by the state itself by governmental or state agent action, or by a non-governmental group from which actions the state fails to protect the applicant.[33] The protection offered by the state must be effective, meaning that it cannot only consist of the existence of a law that protects the

[30] UNHCR, Agents of Persecution – UNHCR Position, publication date 14 March 1995. Available at: http://www.refworld.org/docid/3ae6b31da3.html
[31] See for example Horvath v. Sec'y of State for the Home Dep't (2000) UKHL 37, (2001) A.C. 489, 497 (Lord Hope)
[32] UNHCR, Agents of Persecution – UNHCR Position, publication date 14 March 1995. Available at: http://www.refworld.org/docid/3ae6b31da3.html
[33] James C. Hathaway and Jason Pobjoy, Queer Cases Make Bad Law, available at: http://nyujilp.org/wp-content/uploads/2010/06/44.2-Hathaway-Pobjoy.pdf , p. 319

member of an oppressed group. There also needs to be present a practical enforcement of the law showing that the protection is used in practice to protect this group.

Conclusions:

An applicant for international protection can in principle only be referred to the national protection of the country of origin if the actor of persecution is a non-governmental agent. It should be mentioned that the obligation to substantiate (also referred to as the burden of proof) will be less burdensome in the overall case in the instance where the applicant has substantiated that the persecution was undertaken by a state-actor since the applicant only has to show that the state is the actor of the persecution.

Also, the risk of persecution must be (casually) connected to one of the five forms of civil or political status, one of them being membership o a particular social group. This criteria will be explained below.[34]

2.1.4. The '*nexus requirement'* and the Membership of a particular social group

> " Put succinctly, refugee law requires that there be a nexus between who the claimant is or that she believes and the risk of being persecuted in her home state."[35]

Another core element of being granted international protection under the Refugee Convention is that the risk of being persecuted must be "*for reasons of*" one of the convention grounds explicitly mentioned in the Refugee Convention. In other words, a link needs to be established between the risk of being persecuted and the one of the Convention grounds. It is not necessary that only one of the grounds need to substantiate enough of a risk

[34] James C. Hathaway and Jason Pobjoy, Queer Cases Make Bad Law, available at: http://nyujilp.org/wp-content/uploads/2010/06/44.2-Hathaway-Pobjoy.pdf. 319
[35] Michelle Foster, James C Hathaway, *The law of Refugee Status*, second edition, 2014, Cambridge University Press, p. 362.

of a serious harm as to amount to persecution. Instead, several grounds can correlate in order to result in a risk of serious harm substantive enough to amount to persecution.[36] A LGBTIQ claimant will satisfy the requirement of being a member in a particular social group (the nexus requirement) so long as their sexual identity is a contributing element in the production of the risk.[37]

This list of grounds may be extended either on a regional level or by national law. However, the scope of the Refugee Convention's refugee definition can never be limited or reduced. This requirement is the Refugee Convention's '*nexus requirement*' or '*nexus criterion'*. The definition covers persecution for reasons of race, religion, nationality, and membership of a particular social group or political opinion.[38] In terms of LGBTQ+ applicants, they have been widely recognized to be categorized as being members of a particular social group, thereby bringing themselves within the scope of the Refugee Convention's protection.[39]

It should be made clear that the nexus requirement is not to be interpreted as constituting that the Convention ground has to be the only, or even the dominant, cause for the risk of being persecuted. It is possible to satisfy the requirement by showing that the Convention ground is a contributing element as to why the applicant is of a risk of being persecuted.[40]

The interpretation made that LGBTIQ refugees constitute a social group is predominantly based on two different analyses. The analysis dominating in North American jurisprudence, which has also influenced the Swedish jurisprudence as will be seen below, is the notion that sexuality is a

[36] James C Hathaway, Michelle Foster, *The Law of Refugee Status,* Second Edition, Cambridge University Press, 2014, p.382-384
[37] James C. Hathaway and Jason Pobjoy, Queer Cases Make Bad Law, available at: http://nyujilp.org/wp-content/uploads/2010/06/44.2-Hathaway-Pobjoy.pdf, p. 324
[38] Hathaway and Foster, Refugee Law, p. 362-365
[39] See for example HJ (Iran) (UKSC, 2010), 393-94
[40] Cf. Zhou v. Ashcroft, 85 F. 566, 568 (9th Cir. 2003) (stating that the asylum statute covers persecution where the "protected ground" constitutes one of the motives for the persecution in qquestion).

fundamental aspect of an individual that cannot be expected to forsake.[41] The Australian analysis, developed in the country's case law, is the notion that in order for a particular social group to exist, its members must be united by a common characteristic that is perceived as differentiating them from (and in) their society at large.[42]

2.1.5. Article 3 of the ECHR: Non-refoulment and its affect on evidentiary assessment

The principle of non-refoulment is an overarching principle within international refugee law set out in Article 33 of the Refugee Convention and recognized under Article 3 of the ECHR. As regards to the wording principle in Article 3, to put it simply, the principle prescribes that no person should be extradited to their country of origin if the expulsion of the person exposes them to a serious risk of inhuman or degrading treatment. Non-refoulment has been included in Article 3 of the ECHR where a violation of the principle would equal a violation of the obligation on the member state provided by Article 3. As opposed to the wording of the principle in Article 33 of the Refugee Convention, Article 3 does not explicitly require the inhuman or degrading treatment to be for reasons of one of the convention grounds (the nexus requirement).[43] When assessing claims relating to Article 3, the European Court of Human Rights continuously that Contracting States have the right to control the entry, residence and expulsion of aliens. Stating that the right to asylum is not protected under the Convention or its Protocols. However, cases of expulsion of an alien by a Contracting State may give rise to an issue under Article 3 and thereby engage the responsibility of that State under the Convention if substantial grounds supporting the belief that the person in question would face a real risk of being subjected to treatment contrary of Article 3 in the country of

[41] UNHCR, Guidelines on International Protection No. 2: "Memebership of a particular social group". Within the Contect of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relationg to the Status of Refugees' (UNHCR, HCR/GIP/02/02, 7 May 2002), at para. 6.
[42] UNHCR (2002), above no. 41, at para 7.
[43] Gregor Noll, Proof, *Evidentiary Assessment and Credibility in Asylum Procedures*: Chapter 7 – *Evidentiary Assessment and Psychological Difficulties,,* p. 142-143.

origin. If a real risk of such ill-treatment has been shown, the provision implies an obligation for the Contracting State not to expel the person in question to that country.[44] The ECtHR has stated ever since the decision in the case of *Vilvarajah v. UK*[45] that in view of the absolute character of Article 3, as well as having regards to the fact that the provision enshrines one of the most fundamental values of a democratic society, the Court must undertake a 'rigorous examination' of the existence of a risk of ill-treatment.[46] For the ECtHR this 'rigorous examination' is done on the basis of all material submitted by the parties and, if necessary, material obtained *proprio motu*, or 'on his own impulse'.[47]

Additionally, in the case of *Jabari v. Turkey*[48] where the Court took one step further and stated that the national courts of the Contracting States where under the same obligation of 'rigorous scrutiny'. The Court stated that if 'substantial grounds have been shown' that the applicant would face a real risk of being subjected to ill-treatment contrary to Article 3 if expelled, the Contracting State is under the same obligation of "rigorous examination". In the case, the applicant had failed to submit her application for asylum within the five-day registration requirement and had therefore been denied a review of her fears for being removed to Iran. She had been denied an interview and had instead been interview by the UNHCR where she had claimed that she would face death by stoning if she would return to Iran as a punishment for adultery. The ECtHR found that on the basis of the oral claim in addition to the country of origin information provided by Amnesty International, that the applicant had substantiated that there would be a real risk of her being subjected to treatment contrary to Article 3 of she would be forced to return to Iran.[49] As to Article 13 of the ECHR[50], the Court also found that due to

[44] See for example I.N.N. v. The Netherlands (application no. 2035/04)
[45] Vilvarajah and Others v. The United Kingdom, 45/1990/236/302-306, Application nos. 3163/87 13164/87 13165/87 13447/87 13447/87
[46] Vilvarajah and Others v. The United Kingdom, paragraph 108.
[47] See for example I.N.N. v. The Netherlands (application no. 2035/04)
[48] Jabari v. Turkey, Application no. 40035/98
[49] Jabari v. Turkey, Application no. 40035/98, paragraph 38-42.
[50] Article 13 of the ECHR encompasses the right to an effective remedy and states that 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have

the irreversible nature of the harm that might occur if the applicant would have been forced to return to Iran requires an independent and rigorous examination of the claim with substantial grounds for a real risk of treatment contrary to Article 3.[51]

2.1.5.1. Soering v. the United Kingdom (Application no. 14038/88)

In the case, the applicant Soering had been indicted with capital murder in the state of Virginia, United States. After the murder, Soering had fled to Europe and had then been arrested in England, United Kingdom. Following the indictment, the United States requested that Soering would be returned in order to face trial where he would risk being convicted of the crime and that it was likely that the death penalty would be applied.

Soering complained to the European Commission of Human Rights, hereafter the Commission, that he would face inhuman and degrading treatment contrary to Article 3 of the ECHR if returned to the United States. The Commission decided that the extradition would not result in inhuman or degrading treatment contrary to Article 3. However, as to the findings of the European Court of Human Rights, the Court found unanimously that Article 3 of the ECHR could be engaged by an expulsion order, and that the extraditing state could be responsible for a violation of Article 3 if it was aware of the real risk that the individual may be subjected to treatment contrary to this provision. The Court noted that the determination of whether there is a 'real risk' that the individual will be subjected to such treatment was not to be decided on the execution through the death penalty in itself, but rather the individual's personal circumstances as well as the treatment of the individual when in death row.

Conclusion:

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an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

[51] Jabari v. Turkey, Application no. 40035/98, paragraph 50.

The case is significant to the material of this thesis since the Court's findings in the case expands the scope of the obligations and responsibilities of the Contracting States to the ECHR, more specifically in regards to breaches of Article 3 of the ECHR. The case clarified that the Contracting State must consider the consequences of the expulsion of an individual to a third country where the individual would be at real risk of being subjected to inhuman or degrading treatment.

It is very clear from these two cases that Article 3 places a positive obligation on both the Court and the Contracting States to investigate persons claims of treatment contrary to the purpose of Article 3 when such claims are 'substantially grounded'. This positive obligation is established by the absolute nature of Article 3 as mentioned in the case of *Jabari*. A claim provided by an applicant that their deportation would result in a violation of Article 3 of the ECHR puts an obligation on the Court and the domestic determining authority to rigorously examine the claim if substantial claims have been shown. As mentioned by Thomas Spijkeboer, whose writing on credibility and evidentiary assessments will be discussed in chapter 3, the ECtHR has not excepted the issue of credibility from this obligation. Thereby, the principle of non-refoulment set out in Article 3 of the ECHR shifts the burden of proof when the applicant has 'substantiated' their claim. In the case of *Jabari v. Turkey*, the applicant had not even been interviewed by the Turkish authorities and only submitted country of origin information in addition to the oral claim. The Court was satisfied with the fact that the UNHCR which conducted the interview, made its own assessment on applicant's claim and the credibility. The applicant could in other words not be blamed for the short period of time within which she had to substantiate her claim and that the UNHCRs decision to support her claim after interviewing her was enough to make her claim credible.

It should also be noted that the Court also discussed Article 13 in regards to the case of Jabari v. Turkey. This could be seen as the Court stressing that the shift of the burden of proof as regards to the principle of non-refoulment

in Article 3 also encompass the right to an effective remedy in Article 13 due to the irreversibility of the risked harm when making a claim under Article 3. So due to the absolute nature of Article 3 a Contracting State cannot prescribe short time frames for the application to be made and then disregard the evidence presented on formal grounds when the application was not made within this prescribed period. Since *Jabari* had made an oral claim and with country of origin information supporting this claim, the Court found that her claim had reached the level of substantiating her claim enough for the positive obligation of the Turkish authorities to carry out a rigorous examination of her claims had become active. It is therefore the obligation of the Turkish authorities to interview the applicant or otherwise find information to contest the applicant's claim and/or credibility.

2.2. The Common European Asylum System (CEAS)

Since the Qualifications Directive, hereafter the QD, is constructed on the basis of the Refugee Convention and must be interpreted in the light of its general purpose, containing the same system of requirements in order for the applicant to receive international protection, there is no need to discuss each requirements to be recognized as a refugee as already done above.[52] An exception here is the 'nexus requirement' since the QD expressively mentions sexual orientation as a possible ground. However, for the sake of clarity, the contents of the provisions relevant to the two cases of the CJEU reviewed in chapter 4 will be reviewed under subsection 2.2.2.

2.2.1. The EU Qualification Directive

Article 10(1)(d) of the QD state that in order for a group to be considered a '*particular social group*', a membership of which could give rise to a genuine fear of persecution, two requirements must be met. Firstly, members of the group must share a characteristic or belief that is fundamental to their identity or conscience. Under the second subparagraph of Article 10(1)(d) of the QD, it is explicitly stated that depending on the

[52] See for example ABC v. The Netherlands

applicant's country of origin, a particular social group '*might include a group based on a common characteristic of sexual orientation'*. And secondly, the members of the group must have a 'distinct identity' because they are perceived as being different by the surrounding society. In the case of XYZ v. Minister voor Immigratie en Asiel, the CJEU found that the second requirement was met by virtue of '*the existence of criminal laws… which specifically target homosexuals'*[53].

According to Article 9(1)(a) of the QD, the relevant acts of persecution must be '*sufficiently serious'* by the nature of the acts of the repetition of them in order to constitute a '*severe violation of basic human rights'*. In the case of XYZ as mentioned above, the CJEU stated that the provision must be interpreted as meaning that the criminalization of homosexual acts cannot per se constitute an act of persecution. However, if the criminalization is followed up in practice by arrest and prosecution that result in imprisonment, such legislation must be regarded as being punishment, which is to be seen as disproportionate or discriminatory and therefore constitutes an act of persecution.[54]

As to the duty to substantiate the claims, Article 4(1) of the QD states that it is the duty of the applicant to submit 'all elements needed to substantiate the application for international protection'. Additionally, Article 5(c) state that where the 'applicant's statements are not supported by documentary or other evidence' those aspects of the claim shall not need to be confirmed if 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'. Further, the general credibility of the applicant is also taken into consideration under Article 5(e).

Conclusion:

[53] XYZ v. Minister voor Immigratie en Asiel, at paragraph 48.
[54] XYZ v. Minister voor Immigratie en Asiel.p. 63

As to the use of COI, Article 5(c) of the QD state that the applicant's statements should not contradict the COI relevant to the case. It is however, difficult to frame the result of the credibility assessment, what is to be found credible, based on the content of the applicant's statement. Clearly, this statement should not be interpreted as an argument that a statement could be found not credible based on its content when the statement is so profound that it cannot be supported by any known facts or COI. More specifically, it will always be possible and sometimes plausible that statements that are not supported by the COI and in some cases to some degree contradict this information. For example, the situation in the country of origin might change and in extreme cases very quickly become more serious for LGBTQ+ persons. Additionally, the COI available might not be applicable to certain regions of a country. Therefore, when reviewing a statement in the light of the available COI, the review of the COI must be nuanced and not stringent in its applicability.

3. How does one substantiate the unverifiable? The principles and standards of evidentiary assessment and credibility

> "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. Where there is a lack of country of origin information, the decision-maker will have to rely on the applicant's statements alone."[55]

In order to assess whether an applicant is entitled to the international protection they have applied for, it is necessary to decide whether the applicant's grounds for the claim has been proven.[56] Given the fundamental

[55] UNHCR, Guidelines No. 9, para 64.
[56] Beyond Proof, p. 27

issue in LGBTQ+ cases that certain fact, for example the actual and not perceived membership of a particular social group, is impossible to prove, a number of issues are raised regarding how the determining authority assesses the case. The following sub-chapters will analyze some of the normative standards being used in state practice, reports and academic writing while drawing conclusions from what the applicant is required to prove, how and when this requirement of proof is fulfilled.

3.1. Introduction to the assessment of evidence and credibility

It should be noted that the term 'credibility assessment' is in this thesis used to refer to the process of gathering and information from the applicant, examining this information in the light of the information available to the decision-maker as well as determining whether the information presented by the applicant relating to material elements of the claim can be accepted as credible in support of the determination of whether the applicant qualifies for refugee and/or subsidiary protection status.[57] Or as its described by the European Asylum Curriculum (EAC) module on evidence assessment:

3.1.1. Proof and assessment of risk: what is the difference?

The process of determining refugee status is a distinct process in regards to the evidentiary assessment as a ground for the risk assessment. Unlike the more traditional idea of decision-making, where the facts of the past are used to fulfill a requirement under the relevant norm, the decisions in cases of refugee status are based on the assessment of a future risk of persecution. It is thereby possible to take the level of risk and the intensity of the risked persecution into account when fixing the required standard of proof for the conditions for recognition of refugee status. It is important to note the difference of here between assessing proof and calculating the risk, where both could be a review of past facts but the calculation of the risk is a forward-looking assessment of the probability of persecution in the future.

[57] Beyond Proof, p. 27

In other words, since there is at least a theoretical difference between the elements of proof and risk, these elements could be separated. The element of proof is in principle and practice separable from the forward-looking, prognostic analysis of the assessment of risk.[58]

3.2. Commonly invoked proof in LGBTQ+ cases

3.2.1. Criminalization of homosexual acts as evidence

Criminalization of LGBTQ+ activities or identities can be used to support an application for international protection in LGBTIQ cases. The criminalization indicates that the society of the applicant's country of origin is generally hostile towards LGBTIQ persons, where the harshness of the punishment connected may indicate the general risk of persecution upon return. In some cases, the punishments by themselves are so severe that they in themselves amount to persecution.

It is important to mention that there is a difference made between persecution because of criminalization of an act and being punished for a crime. According to paragraph 57 of the UNHCR Handbook on Procedures[59] it is stated by the UNHCR that persons who are escaping being prosecuted for a crime can generally not be considered as refugees. However, being proportionally punished of certain acts might amount to persecution.[60] In order to assess whether a prosecution implies persecution, a review of the laws of the country of origins, where laws that incriminate or violate widely recognized human rights, or if the enforcement of the law is discriminating towards a societal group, might be seen as indications that the criminal system in the country of origin is in practice a nationally lawful tool of persecution.[61] The UNHCR has also stated that the prohibition of

[58] Jens Vedsted-Hansesn Chapter 4, Gregor Noll ed. p. 62
[59] *UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.*
[60] UNHCR Handbook, paragraph 57
[61] Gröndahl, Aino, Flyktingskap, p. 15

homosexuality in a country, and where severe criminal punishments for 'homosexual acts' exist, can amount to persecution.[62]

As discussed above, persecution can originate from both state actors and non-state actors. Generally, the persecution conducted by state actors can be considered posing a more serious risk as this eliminates the requirement of showing that the government of the country of origin is unwilling and/or unable to fulfill its primary obligation of protecting the individual from persecution. When it comes to criminalization, the prohibitions of, for instance 'homosexual acts', related punishments and the current situation in the country of origin for LGBTQ+ are used as an indicator that the state actors are unwilling or unable to protect persons of this group from persecution.

3.2.2. Case law relating to criminalization as evidence

In the case in Dudgeon v. the United Kingdom[63] the Court found that the 'very existence' of laws prohibiting 'gross indecency' between men where the prohibition would lead to a 'potential custodial sentence', this prohibition 'continuously and directly affected the applicant's private life'. Additionally, in the case of Norris v. Ireland[64] it was held by the Court that the mere 'statutory existence' of similar offences as those in Dudgeon, despite the prosecution being 'minimal', resulted in the applicant acquiring victim status and could complain of a violation of their rights. In paragraph 33 of the judgment the Court reasoned that:

> "A law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example there is a change of policy. The applicant can therefore be said to "run the risk of being directly affected" by the legislation in question."

[62] UNHCR protocol 9
[63] Application no. 7525/76
[64] Application no. 10581/83

In more recent case law from both the ECtHR and the CJEU, it has however not been found that criminalization in itself is enough for it to be generally accepted that the state actor can be considered as unable or unwilling of protecting the individual. There also needs to be a presence of enforcement of the law in practice. However, the enforcement does not need to be undertaken on a strict basis, even when the criminalization is enforced in a few cases it can be enough to substantiate that the state actor is unable or unwilling to protect the individual, therefore not requiring the applicant to seek national protection or relocate within the borders of the country of origin.[65] This will be discussed further in the case study in chapter 4.

Conclusion:

As mentioned above, the criminalization and the punishment connected to the criminalization have in some cases been recognized as so severe that they are considered as amounting to persecution in themselves. This lowers the obligation to substantiate the individual risk the applicant would face upon return. However, recent case law has been clearer on the fact that an element of active enforcement of the law is necessary in order for the circumstances to amount to persecution. It is however, not entirely clear if the new case law is to be considered as having extinguished the findings in the case of Dudgeon since the ECtHR has not commented on the discrepancy from the older case law.

As discussed in chapter 1, in cases where the applicant is being persecuted by a non-state actor, the applicant has to show that the agencies of the country of origin is unable or unwilling to protect the applicant from the risk of serious harm from non-state actors. This is done by to an acceptable degree showing that the applicant has tried to use the protection offered by the national agencies. In the cases where homosexual acts are criminalized or otherwise prohibited according to law, it should be presumed that the state actors are unwilling or unable to protect the applicant from persecution. Depending on the severity of the punishment, it should also be

[65] Gröndahl, Aino*, Flyktingskap,* p. 13.

assessed if the prohibitions in themselves amount to persecution, thereby entitling the applicant to refugee status.

3.3. The Assessment of Credibility

> "To show that a statement is credible is not the same as to show that it is true."[66]

The term 'credibility assessment' is in the context of this thesis used to refer to the process of gathering relevant information from the applicant that in order to assess whether the applicant is truthful regarding the grounds submitted in support of their claim of international protection.

In many cases where national authorities are to assess an application on international protection, written evidence supporting the individual claim is difficult to find. As mentioned in Article 4 of the QD, when documented evidence can not be found to support the applicant's claims, the determining authority has to decide in the case on the applicant's credibility as to their statement.

Credibility is a central and complex part of the assessment of applications for international protection. In a report by the UNHCR it is mentioned that it has been shown through research and practice that credibility is a core element of the adjudication of asylum applications and that the assessment of credibility plays a central role when determining an applicant's need for international protection. It has also been noted by the UNHCR that a common trend across the European Union Member States is that where negative decisions on applications for international protection have been made, they often seem to be made on credibility grounds rather than through applying the criteria of the QD of the facts of the application.[67]

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[66] J A Sweeney, *Credibility, Proof and Refugee Law*, International Journal of Refugee Law, vol. 21, no. 4, 2009, p. 700-26, at p. 719.
[67] UNCHR, *Beyond Proof*, p. 13

When finding whether a statement made by an applicant is credible, the statement must not be inconsistent. Tomas Spijkerboer writes that the applicant may provide conflicting statements about details such as dates, places and persons, mistakes that are easily made either by miscommunication, loss of memory as a result of emotional trauma or that the applicant is afraid of officials or simply nervous.[68]

Conclusions:

One fundamental challenge of the credibility assessment within the asylum procedure is the great lack of information in order to support an assessment of whether the assessment made as to the credibility of the applicant is correct. Additionally, the lack of nuanced treatment of COI when comparing the findings of these to the applicant's statement, as discussed briefly in relation to the requirement of well-founded fear, is an additional issue. Credibility assessments should not be made on the basis of the content of the applicant's statement but rather be done on the how the story is told. In other words, there must be an understanding that an unlikely event happens to a person and that this event might be exactly the reason as to why the person has been forced to escape their country of origin.

Additionally as to the COI, this is not a flaw free system either. Comparing COI to the statements told by the applicant is not a very efficient way of assessing a person's credibility. The process of updating the COI is usually tedious to the point that the latest reports might be an analysis of the current state of a group in a country from at least a year before the taking place of the events that forced the applicant to leave the country. There will also always be cases where the applicant has experienced a reality that differentiates from the relevant COI. Therefore, these reports cannot be used as a yardstick when assessing the credibility of the applicant's statements.

There must also be a patient understanding that not all of the decisions made by the applicant when escaping their country of origin are reasonable,

[68] Spijkerboer, p. 68

logical decisions. During the time, the applicant was under intense stress. Additionally, a core element of being human is making mistakes and being unreasonable. Therefore the facts and contents of the applicants statements are important but rather how these statements are presented

A recurring theme according to the large number of LGBTQ+ refugees the author has spoken to during the writing of this thesis, mention that they seem to be expected to describe their emotions when they realized their sexual orientation and/or gender identity, having an inner conflict of dealing with their emotions regarding the fact that they are LGBTQ+ and the knowledge of how LGBTQ+ persons are being treated or looked upon. Therefore, an element of emotional description of their life experiences in their country of origin is expected by during the interview.

3.4. Privacy and psychological harm

As will be discussed in the joined cases of A, B and C, the EU Charter provides protections for applicant's of asylum within the EU as to how they are to be treated during the procedure. For instance the applicant's integrity is protected when it comes to what kind of evidence can be used for review by the determining authority when assessing the applicant's claim for international protection.

By definition, most refugees are likely to have experiences that are to be defined as traumatic. By definition, refugees have a well-founded fear of persecution Additionally, this persecution has been allowed by the state they in the country the applicant originates from, if not directly sanctioned by the state. There is a large body of research that show that memories of traumatic events are initially held within the persons mind in a significantly different form than from our normal memories of past events.[69]

[69] Heerlihy, Jane (Noll, Gregor ed.), Proof, *Evidentiary Assessment and Credibility in Asylum Procedures*: Chapter 7 – *Evidentiary Assessment and Psychological Difficulties,,* p. 123-124.

Post Traumatic Stress Disorder (PTSD) and Depression are two of the most common diagnoses noted in refugees and asylum seekers. Jane Heerlihy notes in her study article that it is significantly more difficult for applicants who are diagnosed with PTSD to talk about their experiences, as they actively try to avoid visiting the traumatic memories.[70] Additionally where Depression is diagnosed, the applicant has a persistent feeling of low mood, as well as symptoms that may include guilt, worthlessness and a '*diminished ability to think or concentrate, or indecisiveness'*.[71] These as well as many other psychological difficulties and diagnoses can have an influence over whether applicants are able or willing to present a complete and coherent statement over their personal circumstances, as to why the mental health of the applicant also needs to be taken into consideration when assessing the claim.[72]

Conclusion:

Many other diagnoses such as psychosis, dissociation etc. are also common among refugees and may have an impact on the applicant's ability to give evidence in the form of coherent and plausible statements as required by international law.

3.5. Stereotyping

> "Because of time pressure, interviewers, decision makers ad lawers will be more prone to have recourse to stereotypes because stereotyping is helpful in allowing for quick decision."[73]

When assessing proof, deciding which statements need to be proven, when these statements are to be considered as proven and when the deliverance of these statements are to be deemed credible, there is a necessity to use certain

[70] Heerlihy, Jane (Noll, Gregor ed.), Proof, *Evidentiary Assessment and Credibility in Asylum Procedures*: Chapter 7 – *Evidentiary Assessment and Psychological Difficulties,,* p. 131.
[71] American Psychiatric Association, p. 35
[72] Heerlihy, Jane (Noll, Gregor ed.), Proof, *Evidentiary Assessment and Credibility in Asylum Procedures*: Chapter 7 – *Evidentiary Assessment and Psychological Difficulties,,* p. 135.
[73] Thomas Spijkerboer, Professor of migration law, Vrije Universiteit Amsterdam, Stereotyping and acceleration, p. 67

normative standards in order to create a uniform application of the law.[74] The issue of stereotyping was also discussed in the case of A, B and C which will be reviewed under chapter 4. In the case the CJEU found that stereotyping was a practice that could be usable for the determining authorities. However, stereotyping should never be used as to try and force an answer out of a person because of the preconceived notions of the interviewer or decision-maker.

As will also be mentioned in the case of A, B and C sexual orientation is considered as being an integral part of the individual's identity. Therefore it is expected that the applicant is able to describe and discuss the "inner" or emotional process when realizing[75] their sexual orientation and/or gender identity.

Conclusion:

Stereotyping is problematic of many reasons when it comes to the procedure of asylum applications. Firstly, it is problematic from the perspective that each and every case should be assessed individually. As learnt from the discussion above under chapter 2, the shared attribute or experiences of for example homosexual persons is the attraction to persons of the same sex. The reason as to why LGBTQ+ persons constitute a particular social group is also because in some countries, they are persecuted because of their real or perceived sexual orientation and/or gender identity. It is therefore problematic to expect a similar way of discussing ones sexual orientation and/or gender identity when assessing the applicant's credibility. Expecting conflicting emotions within the applicant then they came to a "realization" of their sexual orientation. It can not, on the basis of the fact that the applicant grew up and in a country where people are being persecuted for reasons of their sexual orientation, be expected that every applicant has a similar inner emotional process of "realizing", coming to terms with their

[74] Ch 5, Gregor Noll ed. stereotyping and acceleration, Thomas Spijkerboer, p. 67
[75] The word 'realizing' is here used despite the author being aware that most LGBTQ persons describe that they have always been aware of their sexual orientation and/ot gender identity. The word is used to reflect and describe the language used in the legal reasonings on the subject in order to simplify the language used in the thesis.

sexual orientation and then fully accepting it to the level where they cannot go back to their country of origin. Naturally, since every applicant is an individual with their own experiences, it is not realistic for every applicant to show that they have had their own emotional inner battle to come to terms with their sexual orientation. Granted, an outside pressure from society where the applicant realizes that they are at risk of serious harm because of their sexual orientation and/or gender identity, this does however not determine how the applicants deals with their emotions. It must be fully possible for the determining authority to accept that an applicant is credible even as to an applicant who has accepted their sexual orientation and/or gender identity as a reality without complex thoughts

In other words, the determining authority expects the applicant to have made an active decision on how to position themselves in relation to the persecutory society, as well as complex thoughts as to this decision. For example, the applicant is expected to have chosen as to how to identify themselves, whether if this is bisexual, homosexual, transgender or otherwise gender non-conforming. This can also be very difficult to discuss with a case officer who is otherwise unknown to the applicant.

3.6. The procedure of determining refugee status: Possible issues and how it affects the assessment of evidence and credibility

3.6.1. The interview

As mentioned in the introduction, the main source of the information in an application for international protection is the applicants themselves. The written report of the applicant's interview will circulate through various organizations and used as a starting point for immigration officers and judges for their own assessment of the applicant's case. Thereby, the oral statement of the applicant is given a central role in the overall assessment of the claim for international protection. And, since documentation and physical evidence to support the applicant's oral statements is scarce, the

interview becomes a central element the assessment of the case. Additionally, the assessment on the applicant's credibility is mainly also made during this step of the procedure. Nienke Doornbos[76] mentions that it is of crucial importance that the applicant's interview by the determining authorities are conducted in a profound, patient and objective manner.[77] Additionally, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereafter the Handbook on Procedures) states that special attention must be paid to the vulnerable situation of the applicant when being interviewed by the immigration officers.[78]

The Handbook on Procedures acknowledges the fact that some asylum seekers might feel reluctance towards state officials based on their experiences with authorities in their country of origin. This might also have an affect on the interview where many feel tired, anxious and inhibited.[79]

In an interdisciplinary Canadian study[80] it was found that the results of the study indicated numerous issues affecting the role and behavior of all actors of the interview: among other issues, the study found problems in coping with uncontrolled emotional reactions and traumatization, poor knowledge of the political context and cultural misunderstandings or insensitivity. The study also mentions a major overlap in the legal, psychological and cultural problems.

[76] University of Nijmegen, Institute of Sociology of Law/Centre for Migration Law, The Netherlands.
[77] Doornbos, Nienke (Noll, Gregor ed.), Proof, Evidentiary Assessment and Credibility in Asylum Procedures: Chapter 6 – On Being Heard in Asylum Cases, Evidentiary Assessment Through Asylum Interviews, p. 103-104.
[78] Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR, paragraph 190.
[79] Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR, paragraph 198 and 199.
[80] R.F. Barsky, Constructing a Productive Other. Discourse Theory and the Convention Refugee Hearing, (John Benjamins Publishing Company, Amsterdam/Philadelphia, 1994); C. Rousseau, F. Crépeau, P. Focen and F. Houle, The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board, 15/1 Journal of Refugee Studies (2002) pp. 43-70.

In Doornbos article, she finds that case officers in some cases blame the applicant for making shallow statements or seemingly avoiding a question. Thereby also making the applicant seem less credible. However, Doornbos also notes that this perception of the applicant could be due to the applicant not understanding the question if the case officer is too ambiguous in the formulation of the questions.[81]

As to the assessment of credibility, Doornbos finds that there are two main assumptions that underlie the evidentiary assessment of credibility testing. Firstly, the 'genuine' applicant should be able to present their case without any inconsistencies at any time during the asylum process.[82] There is however several psychological and medical reports that present reports that contradict this assumption. In one of these reports, it is stated that people have a great difficulty of reporting events in a consistent manner repeatedly, even under normal conditions.[83] The second assumption is that the interviews are conducted under the same conditions. Doornbos mention that the observations of asylum interviews presented in her article show that some applicants were treated more patiently and were given space to tell their story as opposed to others who were cut short. The observations also show that some case officers made assumptions on the applicant's sex, age and country of origin.[84]

3.6.2. Interpreters

Interpreters also play an important role as to the communication between the applicant and the case officer, and thereby how the case officer perceives the applicant and their statements. As mentioned above, the linguistic gap

[81] Doornbos, Nienke (Noll, Gregor ed.), Proof, Evidentiary Assessment and Credibility in Asylum Procedures: Chapter 6 – On Being Heard in Asylum Cases, Evidentiary Assessment Through Asylum Interviews, p. 117.
[82] Ibid. p. 118.
[83] J. Cohen, Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers, 13/3 International Journal of Refugee Law (2002) pp. 293-209.
[84] Doornbos, Nienke (Noll, Gregor ed.), Proof, Evidentiary Assessment and Credibility in Asylum Procedures: Chapter 6 – On Being Heard in Asylum Cases, Evidentiary Assessment Through Asylum Interviews, p. 119.

between the case officer and the applicant is one of the main areas where issues of misunderstanding and miscommunication might arise, and thereby, a risk that the case officer will find the applicant incredible. The presence of a third person in a conversation between two persons might complicate communication.

Joined conclusion on the interview and the role of the interpreter:
As mentioned in the previous chapter by Doornbos, a determining element of whether the applicant will be found credible or not is the consistency of the statement given by the applicant. However, as was also mentioned briefly in that chapter and developed further in the current subchapter is that psychological difficulties have a great influence on the ability to deliver a "by the book" credible statement.

The fact in itself that traumatic memories are held in a different form than that of normal memories naturally in itself has an influence firstly on how the applicant delivers their statement, and secondly, on how the applicants statement is perceived by the case officer and decision maker.

As mentioned in this chapter, many refugees have a degree of mistrust towards state officials in many cases by default based on their experiences from their country of origin where the state was either a direct actor of the persecution or allowed the applicant to be persecuted by being unwilling or unable to protect the applicant. This can be difficult to understand for the interviewer as these experiences of mistrust towards the government in ones country differentiates from the experiences in most European countries. In other words, because of the different political context the interviewer and the applicant have grown up in and survived in, issues of understanding and thereby issues of communication may arise.

All of these issues stated above are very intricate and sensitive that is very difficult to handle and improve through guidelines or legal documents. As was mentioned in Doornbos' article, even when there are guidelines that

clearly state that the interviews should be conducted in a uniform way, case officers and interviewers have different styles, experiences, preconceived notions or attributes of being more or less judgmental towards the applicant, all of these elements affect the mood of the interview and creates an environment that is more or less inviting towards the applicant to make their statements freely and fully. As a result of this environment and the interviewers attributes, the decision maker will receive a report of the interview that is then used to assess the credibility of the applicant's statements. However intricate and unimportant these elements might seem, the credibility assessment is equally as intricate and therefore these elements have a great influence over this assessment.

Case officers and decision-makers have to be aware of the fact that these conditions have an affect on the applicant and might result in inconsistencies and contradictions in the applicants' accounts. Simultaneously the case officer has to identify fabricated stories told by applicants and therefore has to distinguish fact from fiction.

Nieke Doornbos writes in an article in the book '*Proof, Evidentiary Assessment and Credibility in Asylum Procedures'* that she has found that beyond verbal communication, emotions also play a role in the assessment of credibility. She notes that:

> "In some cases, the IND[85] officers considered the applicant's emotional reactions to be a sign of veracity, whereas in other cases, in which officers expected emotions to appear, they perceived the absence of emotions as a sign of incredibility."[86]

[85] An abbreviation for the Dutch Immigration and Naturalization Department of the Ministry of Justice. For the purpose of simplifying this thesis, the findings of Doornbos study as regard to the IND officers will be interpreted as relevant to the domestic asylum procedures within of Member States of the European Union since these Member States share a common asylum system. Therefore, when Doornbos refers to INDs in her article, this will be "translated" to case officer or interviewer in this thesis when referring to Doornbos' article.

[86] Doornbos, Nienke (Noll, Gregor ed.), Proof, Evidentiary Assessment and Credibility in Asylum Procedures: Chapter 6 – On Being Heard in Asylum Cases, Evidentiary Assessment Through Asylum Interviews, p. 106-107.

However, as Doornbos also notes[87], it is difficult to know how these notes on these emotional outbursts or lack of emotions actually affect the judgment of decision makers since decision where the applicant is found incredible are usually not detailed as to the procedure of the credibility assessment.

As to the role of the interpreter, a common fear among many of the LGBTQ+ applicants the author has met during the course of the months writing this thesis, is that the interpreter will not be truthful in their interpretation. This might be because the interpreter originates from the same country as the applicant and shares the views on LGBTQ+ persons that exist in that country. This is a difficult issue to monitor because of the linguistic gap between the applicant and interviewer. To put it simply, the applicant usually does not know the language spoken in the country where they have lodged their application, and the interviewer usually does not know the language of the applicant as to why an interpreter is used, there is therefore no way for each party to control whether the interpreter is truthful and fair when communicating the statements given by the applicant.

[87] Doornbos, Nienke (Noll, Gregor ed.), Proof, Evidentiary Assessment and Credibility in Asylum Procedures: Chapter 6 – On Being Heard in Asylum Cases, Evidentiary Assessment Through Asylum Interviews, p. 107.

4. Cases from the European Court of Human Rights and the CJEU

Below, a number of cases in which LGBTQ+ persons are applicants,[88] homosexual men exclusively

4.1. F. v. the United Kingdom (application no. 17341/03)

4.1.1. Facts of the case

The cases concerned a homosexual man and the alleged risk of treatment contrary to the purposes of Article 3 of the ECHR upon his return to Iran. The applicant in the case was an Iranian man who had claimed asylum in the United Kingdom in 2001 on the basis that he feared persecution based on his sexual orientation. The applicant claimed that he, his partner as well as his cousin and his partner had been arrested and detained by police for having a satellite dish. The police had been become suspicious of the men's relationships since they had two double beds in their house. The applicant's partner had then confessed that he was homosexual after which they were held in prison for three months and four days. After being released as a result of the applicant's family's payment of bribe, the applicant feared he would face a death sentence because of his sexual orientation and left Iran.

The domestic adjudicator had found that the applicant's account was lacking in credibility in the aspect of the applicants claim that he had been arrested and subjected to beatings and threats of persecution.

4.1.2. The Courts decision and reasoning

The Court found the applicant's complaint inadmissible. When presenting the grounds for this decision, the Court referred to the available COI at the

[88] The applicant's in the cases selected are exclusively considered by the courts as homosexual men. The selection of the cases was made on the issues discussed in the cases, the presentation of evidence in the cases and how the courts responded to the applicant's arguments. The selection sought not to be repetitive as to these criteria.

time, pointing out that the material did not disclose a situation of active prosecution by the authorities of adults involved in consensual and private homosexual relationships. The Court also noted that the high burden of proof in Iran (four eye-witnesses) was a reason why there had been no recent substantiated instances solely on the basis of same-sex relationships. The Court also noted that the sources referring to trials and executions for homosexual offence in recent times before the judgment appeared vague and unspecific to the Court.

As to the credibility of the applicant, the Court stated that the domestic authorities must be given some weight as to their findings they reached on the basis of the witness evidence before them, which is not available as directly to the Court, and their general experience.

4.1.3. Conclusion

As mentioned, the Court found that homosexual acts are criminalized in Iran. However, this criminalization was not even enough to substantiate F's claim enough for his claim to even be admissible.

Interesting in this case is the use of the fact that homosexuality is criminalized in Iran as evidence supporting the applicants claim under Article 3. It is an interesting fact that the Court finds this claim inadmissible on the grounds that it is 'manifestly ill-founded' despite the fact that homosexuality is criminalized in Iran. Thereby, it was so clear to the Court that the applicant did not have a substantive case, despite the criminalization, to even have his case fully reviewed and decided by the Court. The Court refers to the fact that homosexuality is tolerated, or at least not punished, when it takes place within the private sphere. The fact of criminalization of being gay is therefore not seen as evidence enough. An assessment of under what circumstances and how many are being prosecuted for "sodomy". In regards to Article 3 the Court clearly accepts a smaller

The Court also mentions that the requirement of the burden of proof in Iran is high. Thereby the Court accepts the practical criminalization of homosexuality by arguing that being punished under the law is fairly difficult. The Court fails to comment on how the criminalization, however low the rate is of using the law in practice, is affecting the situation for LGBTQ+ persons outside of the legal system. The criminalization naturally causes a negative perspective on LGBTQ+ persons even if the legislation is not used in practice.

Lastly, it is of relevance to mention the pending application in the case of A.T. v. Sweden (no.78701/14) where the applicant, an Iranian national, has lodged a complaint under Article 2 and 3 of the ECHR, claiming that he would be exposed to a real risk of being sentenced to death or subjected to torture or other ill-treatment because of his sexual orientation if returned to Iran. At the present moment the case is pending but the Court has put two questions to the parties, one relating directly to the issue of if he would be subjected to treatment contrary of Articles 2 and/or 3 of the ECHR if returned.

4.2. I.I.N. v. The Netherlands, application no. 2035/04

4.2.1. Facts of the case

The case is very similar to that of F. v. the United Kingdom as the case also concerned a homosexual man from Iran. The applicant claimed that he had been caught by a policeman kissing a male friend in an alley. Thereafter he had been forced to return to the police station every day to report to the policeman. The same policeman had raped him on three different occasions. Thereafter, a good friend of his had been found dead shortly after they had attended a protest meeting at which photos and video were taken.

4.2.2. The Courts decision and reasoning

Echoing the Courts findings in the case of F. v. the United Kingdom, the Court found that the application was manifestly ill-founded and therefore inadmissible since the applicant was not considered as have established that there were substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention on grounds of his sexual orientation. The Court stated that the materials submitted to the Court did not disclose a situation of active persecution by the authorities of adults involved in consensual and private homosexual relationships. The Court went on to note that:

> "There are no recent, substantiated instances of trials solely on the basis of such relationships (concrete examples relate to rape of minors or political activists)… the Islamic law is more concerned with public immorality and not what goes on in the privacy of the home."

The Court acknowledged the fact that homosexual persons may be vulnerable to abuse in the general situation in Iran and that it is not disputed that very draconian punishment could be imposed for homosexual acts. However, the Court noted that despite the applicant claiming that he had been arrested after having been caught kissing his male friend, there was no indication that any criminal charges had been brought against the applicant.

4.2.3. Conclusion

There are some noteworthy parts of the Courts reasoning in this case that will be brought up in this conclusive analysis. In regards to the credibility of the applicant the Court did not explicitly discuss the credibility of the applicant. In other words, the Court found the applicant credible as to the material he had provided to be examined by the Court but was not persuaded by these circumstances to find that the applicant had shown that he was at a real risk of being subjected to ill-treatment upon return. The assessment is therefore done on applying the applicant's statements within the context of the COI available about the situation of LGBTQ+ persons in Iran. The result of this assessment was that the Court found that the applicant had not established in his case that there were substantial grounds

for believing that he will be exposed to a real risk of being subjected to ill-treatment.

4.3. M.K.N v. Sweden, application no. 72413/10

4.3.1. The national proceedings

4.3.1.1. Facts of the case

In 2013 the ECHR dismissed the complaint in M.K.N. v. Sweden. The complaint regarded a refusal for asylum by the Swedish Migration Board. The applicant was a man native in northern Iraq who had claimed that he was at risk of persecution by the Mujahedin for reasons of his sexual orientation. The applicant presented that, upon return to Iraq, he was at risk of being persecuted by the Mujahedin since the group had found out that he was in a homosexual relationship. His partner had been stoned to death as a consequence of this relationship. The applicant had initially claimed that he faced persecution due to his Christian beliefs but had made the information about his sexual orientation available when appealing his initial rejection.

4.3.1.2. The Courts reasoning as to the credibility

The applicant claimed that he had not revealed the information about his sexual orientation sooner in the proceeding since he had not been aware that homosexual relationships were accepted in Sweden. The Swedish Migration Court found him not credible since it found that he had not given a reasonable explanation as to why he had made his claim based on his sexual orientation so late in the proceedings.

4.3.2. Complaint to the ECtHR

4.3.2.1. Facts of the case

The applicant complained that a return to Mosul or other parts of Iraq would be a violation of Article 3 of the ECHR since he would face a real risk of

being subjected to treatment in breach of Article 3. The grounds for his complain was based on his sexual orientation and stated that, contrary to the finding of the Swedish Migration Court, he had given a reasonable explanation for him not invoking his sexual orientation as part of his application earlier in the asylum proceedings.

4.3.2.2. The Courts decision and reasoning

The ECtHR found by five votes to two that the implementation of the deportation order would not give rise to a violation of Article 3 of the ECHR. Thereby, the Court rejected the complaint.

As to the credibility in regards to the applicants claim grounded on his sexual orientation, the Court discusses this in paragraph 43 of the judgment. The Court found that the applicant was not credible, mainly because he had not made his claim based on his sexual orientation until after he had received the Migration Agency's negative decision on his asylum application. Additionally, he had failed to mention the homosexual relationship he had had in Iraq except from the replies to the Government's observations, almost a year and a half after the application to the Court was lodged. The Court also noted that the applicant had expressed the intention of living with his wife and children. Lastly, the Court found it noteworthy that in that application, he had stated that the threats emanated from Al-Tawahid an Al-Jihad, and that he has not mentioned the Mujahedin as he had done in the national proceedings.

4.3.3. Conclusion as to both decisions:

Firstly, as regard to the Courts comment on the fact that the applicant had expressed the intention of living with his wife and children the Court stated:

> "… the Court is aware of the very difficult situation for real or perceived homosexuals in Iraq and that these difficulties are present also in the Kurdistan Region. It notes, however, that the applicant has expressed the intention of living with his wife and children."

This comment is left without clarification of how it is to be interpreted, whether this fact is to be seen as an additional reason to not find the applicant credible and/or to use this fact in the risk assessment to find that the risk of persecution is not as serious since he will be perceive as heterosexual. This can be connected and analyzed in the light of the discussion on concealing ones sexual orientation. It has been mentioned above that the question if the applicant is able and/or willing to conceal their sexual orientation, and thereby not be at risk of persecution upon return, is settled as to the point that this argument is irrelevant. However, as seen in this case, similar themes of concealing is present in the Courts reasoning in this case. Based on the fact that the Court rejected the complaint, as well as how the argument is worded as a counterargument to the COI presented that shows that real or perceive "homosexuals" face serious difficulties in Iraq.

It should also be noted that the Court puts the main weight of the credibility assessment on the activity of the applicant during the proceedings in relation to the time passed. I can therefore be concluded that the Court in this case applied a temporal instrument to assess the applicant's credibility. This instrument or tool can be problematic depending on how it is used, as in the present case where the Court did not show an understanding towards the facts that the applicant has legitimate reasons as to why he would not want to disclose the homosexual relationship at the time of the first interview.

Secondly, It can be concluded that the Court seems to expect as certain amount of urgency from the applicant when invoking a new ground for their application late in the proceedings. In this case, another of the Courts main points of argument was that the applicant had not mentioned the relationship in question until he had replied to the Government's observations. Therefore, the Court seems to reward that the applicant is proactive in providing as much information as possible in order to support the new ground invoked.

An issue when reviewing the reasoning of the Swedish Migration Court is that it did not substantiate its decision to not find the applicant credible other than that his explanation was not reasonable. In order to be able to contest the findings of the credibility assessments it needs to be substantially presented in what parts and how the applicant was not credible.

The applicant in this case not being aware that homosexual relationships are accepted was not a reasonable explanation for making this claim later in the process according to the Swedish Migration Court. Thereby, the Swedish Migration Court assessed that the applicant's credibility in regards to the information disclosed about his sexual orientation was low. It should be mentioned that the Swedish Migration Court is the second instance in the Swedish asylum proceedings. The fact that the applicant did not disclose this information during the first step of the process was detrimental to the assessment of his credibility.

The Swedish Migration Court noted that he had been informed that civil servants of the Migration Agency and all other people present were bound by professional secrecy. However, this does not inform the applicant had homosexuality is not punishable in Sweden and that it can be used as a ground for a claim for refugee status. There is also no certainty that the personnel at the Migration Agency or the legal council assigned to the applicant had informed him about this. Granted, that information could be regarded as a very basic form of knowledge, which to a certain degree can be expected to reach the applicant.

If he arrived in Sweden together with his wife and children, it is not surprising that the ground of his sexual orientation was not invoked during the first interview. An applicant may have several different reasons as to why they have been forced to leave their country of origin and apply for asylum. It is possible that the applicant in this case had hoped that only invoking the political grounds would be enough to be granted asylum. And that he felt unwillingly forced to disclose his sexual orientation when he got

the negative decision. It is also possible that the applicant's wife was not aware of the relationship he had had with another man in Iraq, and therefore highly credible that the applicant was afraid that she would find out. Especially since he had expressed a wish to continue the relationship. Thereby, it can be argued that both courts were unable to accept the social norm for men and women not to disclose that they have been in homosexual relationships for fear of persecution. These reasons where not explicitly stated by the applicant and where therefore not discussed by either of the courts. It is however easy to find reasons to understand why these kinds of psychological processes would result in the applicant not revealing his previous homosexual relationships to the authorities. Especially in cases where the applicant originates from a country where there is well-documented violence and persecution of homosexual persons.

The issue is complex since persons who have left their countries of origin because they fear being subjected to serious harm for reasons of their sexual orientation have on one hand actively tried to find protection in another country from this persecution. It would not be a completely reasonable decision to apply for international protection in another country where LGBTQ+ persons are also being persecuted. However, in the present case the applicant did not disclose his sexual orientation until he was aware that it was safe for him to do so. On the other hand, being brought up in a country where there are strict laws against for instance homosexual acts as well as a culture that is hostile towards the LGBTQ+ community where the applicant lives under a constant risk of being subjected to serious harm, can create the perception that there are similar laws and views in the rest of the world. The fact that the applicant did not disclose his sexual orientation in the primary step of the proceedings can therefore not be seen as reason enough to not find him credible.

It should be concluded that the Court's reasoning and decision suggests that it interpreted the circumstances of the case and the facts given by the applicant as evidence of deception: the fact that the applicant was married in

a heterosexual relationship and had expressed that he wished to stay in this relationship, the fact that the applicant did not disclose of the homosexual relationship immediately and urgently, as well as the explanation he provided for the delay in providing these details where all interpreted as reasons to not find him credible. However, as the above discussion suggests, these circumstances could as well be reasons to explain why the details had not been disclosed in the primary step of the procedure.

It should also be added that, even though the applicant had not made a claim that he for example in fact was bisexual or that he was heterosexual 'in reality' and that his homosexual relationship in Iran had resulted in him being assigned being homosexual. These issues are not discussed in neither one of the courts decisions. However, since the ECtHR has claimed that the Contracting States and the Court itself has an obligation of 'rigorous scrutiny' when a claim under Article 3 is substantiated. The lack of discussing these issues and assessing the risk emanating from these possible circumstances should therefore not only be seen as the applicant's fault. It should instead be considered that both the Court and the contracting State has obligations to review whether these possible conditions and circumstances in the case could explain the few circumstances the Court and the domestic court found not to be credible. The credibility can also be considered as a factor. In the case of Jabari v. Turkey for example, the applicant had made an oral statement with the UNHCR that was consistent with the COI in the case. The credibility and the COI in the case of M.K.N. are definitely also contributing factors why M.K.N was not granted a more in depth analysis and review of these claims, is that he was not found credible to begin with. Taken together with the COI that did not show an active persecution that would result in a real risk of treatment contrary to Article 3 of the ECHR, there was not enough material to reach the requirements of Jabari v. Turkey, as to why M.K.N.'s claim was not substantiated.

4.4. F.G. v. Sweden (Application no. 43511/11)

4.4.1. Facts of the case

The case regarded an Iranian man who had applied for asylum in Sweden. The applicant based his application primarily on the risk of him being persecuted because of his political opinions and work in Iran. He mentioned but declined to invoke his conversion to Christianity as an asylum ground in the original proceedings, since he considered it a personal matter, as to why the authorities did not carry out a thorough examination of this ground. After being refused asylum on political grounds, the applicant requested to stay on his deportation order, basing it on his conversion to Christianity, arguing that it was a new circumstance. The authorities denied his request, on the ground that it was not a "new circumstance" which could justify a new examination of the proceedings.

4.4.2. The reasoning and decision by the ECtHR

The Grand Chamber unanimously reached the decision that the Swedish authorities had violated Article 2 and 3 of the ECHR by not carrying out a thorough examination of the applicants conversion to Christianity; the seriousness of his beliefs, the way he manifested his faith, how he intended to manifest it in Iran if the removal order was to be executed, since he had declined to invoke the conversion as an asylum ground. By not reopening the proceedings and re-examining his case, the Swedish authorities had never made an assessment of the risk that the applicant could encounter as a result of his conversion, if returned to Iran. The Court stated that, given the absolute nature of Articles 2 and 3 of the Convention, and regardless of the applicant's conduct, the national authorities would now be under an obligation to make a fresh assessment of all the information brought to their attention before making a decision on his removal. Moreover, the applicant had submitted two statements to the Court; one that stated how he manifested his Christian faith in Sweden and how he intends to manifest his faith if returned to Iran; and secondly a statement from the former pastor of the applicant's church. The Court concluded that these statements, as well as

the material previously presented by the applicant, was sufficient for the applicants claim to warrant an assessment by the national authorities.

The Court concluded that there would be a violation of Articles 2 and 3 of the ECHR if the applicant were to be returned to Iran without a fresh and up-to-date assessment being made by the Swedish authorities of the consequences of his conversion.

4.4.3. Conclusion

Generally, when the Court assesses the circumstance that the applicant has disclosed of their sexual orientation late in the process, this circumstance is seen as something that lowers the credibility of that ground. Granted, the circumstance that sets the case is that F.G. apart from the other cases mentioned is that the applicant did disclose that he had conversed to Christianity and made an audible decision to decline the conversion as a ground for his application.

Sexual orientation and identity is to be considered as a more private and personal matter than religious belief, it is something that is not discussed even in spaces that are considered as accepting and open. Religious belief could be considered as an active choice; of course there is a philosophical and religious discussion behind this statement which can not be fitted in this thesis or be very relevant in a legal context as this experience is highly personal. However, sexual identity and orientation is not chosen. How a person manifests or expresses their identity and orientation could be an active choice, but beyond the expression, the very core of a person's sexual identity and orientation is not chosen. The point here is that since it is such a fundamental attribute as mentioned earlier in the thesis, this identity can be more difficult to accept for a person and therefore more difficult to disclose, also taking into account the stigma and taboo that this attribute carries in the applicant's country of origin. Also, it should be noted that in the case the applicant had presented the Court and the national authorities with documents on how he currently had manifested his Christian faith and a letter from the former pastor at the applicant's church. This is evidence that

cannot be presented in the cases of LGBTQ+ applicants. To what degree one manifests or expresses ones sexual identity or orientation is not a deciding factor or evidence on whether a person actually belong to this group. Not acting stereotypically gay does not mean that the applicant won't face a risk of persecution upon return when the entire group is being persecuted or discriminated towards. Being, for instance, a more private person and not going to gay clubs is a personal preference and not an expression of this person's sexual orientation as opposed to attending church activities for a highly religious person. Granted, religious belief also manifests in highly personal ways but there is a system of expression of religious beliefs.

To the contrary, for example in Sweden, joining the country's largest center for LGBTQ+ people (RFSL) and being active in the organizations activates is not considered as substantive evidence to make a persons sexual orientation credible, since RFSL does not discriminate and has activates open for heterosexual people.

The case can be compared to the case of M.K.N. and the findings of the Court in each case. The cases are similar as to the fact that the circumstances of one of the grounds for asylum (sexual orientation in one and religion in the later) were invoked late as a ground for the application. The main difference of the cases is that F.G. had mentioned the ground at the primary interview and instance of the procedure but had chosen to not invoke religion as a ground for his application. However, the Court stated that the state authorities of the Contracting states are obliged to examine these grounds.

Another difference is the ground for the application. However, the nature of these grounds that have a similarities. One similarity is the expectation of having a conviction of something that is such an important attribute of the person that they cannot be expected to hide this upon return to the country of origin. The difference is that as much of a private and personal concern religious belief is, the religious conviction can to a certain degree be

measured by for example asking questions of what the religious belief is important to the person, when the conviction was born, how one practices their religion, if a question of conversing.

In cases of sexual orientation, these cases instead risk violating the applicant's integrity or stereotyping since there really is no way of "practicing" ones sexual orientation or gender identity without this going into details that are prohibited according to the ruling in A, B and C.

Another difference is the assessment of credibility in each case. F.G. was found to be credible in his conviction and conversion to Christianity. However, it is important here to mention the core issue that this thesis wants to address, and that is the availability and ability of presenting evidence in support of a claim on the grounds of sexual orientation. The applicant in the case of F.G. had mentioned the ground but not invoked the ground of his religion in the primary step of the proceeding.

However, the factor of the opportunity for each applicant to actually invoke all their claims is also important. In the case of M.K.N he had most likely his wife and kids with him during the interview, not in the room when being interviewed but in the same building which might be incriminating to the applicant. Additionally, when he did disclose of his homosexual relationship in Iraq, he also expressed a wish to stay with his wife and children. There is an inability of the Court here to understand this concept, instead interpreting this expression as making the applicant less credible. Thereby the Court failed to recognize that the applicant in the case might identify as bisexual, or heterosexual who had one homosexual relationship, was caught and therefore is perceived as homosexual.

Overall as seen in the above discussion on the conduct of the interviews, and how intricate the insterviews are in order to create a space where the applicant is able to fully and completely make their statements. These intricate elements could have been an integral part as to why the applicant in

M.K.N was not able to disclose and invoke the information of his homosexual relationship in the primary procedure.

4.5. A, B, C v. Staatsecretaris van Veiligheid en Justitie (2014, CJEU)[89]

Case of A, B and C v. The Netherlands

The Grand Chamber judgment in the case provides guidance on the prohibited steps in determining an asylum claim based on sexual orientation and/or gender identity.

4.5.1. Facts of the case

The case regards three third country nationals, referred to as A, B and C, who had each lodged an application for a temporary residence permit in the Netherlands. They had all stated that they feared persecution in their respective countries of origin on the basis of their homosexuality.

Each of the applicants had been rejected by the domestic authorities in the Netherlands, all of them on the grounds that they had not made their statements credible as to their sexual orientation. A's application had been rejected on the grounds that the determining authority not finding A credible. A then lodged a second application stating to be prepared to take part in a 'test' that would prove their homosexuality, or to perform a homosexual act to demonstrate the truth of their stated sexual orientation. In the case of B, the determining authorities had found that they were not credible since they had not been able to give a detailed statement about their emotions and internal awareness of their sexual orientation, despite being from a country where homosexuality is not accepted. As regarding to C, they were not found credible as to the statement on their sexual orientation. After the rejection and lodging of a second application, C had given the responsible authority carrying out the assessment f the application a video of intimate acts with a person of the same sex. Both A and C had made

[89] Joined cases C-148/13 to C-150/13.

previous asylum claims which were not based on their sexual identity, and had then made second claims where they invoked their sexual identity. Further applications by A, B and C were rejected and were then referred to the Raad van State which in turn decided to refer the following wuestion to the CJEU:

'What limits do Article 4 of (Directive 2004/83) and the (EU Charter), in particular Articles 3 and 7 thereof, impose on the method of assessing the credibility of a declared sexual orientation, and are those limits different from the limits which apply to assessment of the credibility of the other grounds of persecution and, if so, in what respect?'

4.5.2. The Courts decision and reasoning

To answer the question referred to it, the CJEU raised that although self-identification is the starting point according to Article 4 of the QD, it stated that this self-identification can be subject to an assessment procedure. This assessment however, must not violate rights guaranteed by the Charter, specifically the right to human dignity of Article 1 and the right to respect for private and family life of Article 7. Therefore the CJEU concluded that the assessment must not be based on:

1. Stereotypes – The assessment should be based on the individual and personal circumstances of the applicant according to Article 4(3)(c) and the personal interview should be conducted in such a way as to take into account the personal circumstances of the applicant according to Article 13(3)(a) of the Procedures Directive, hereafter the APD. The CJEU go on to state that questions based on stereotyped notions do not satisfy the requirement of those provisions. Therefore, the inability to answer these questions cannot, in itself, provide sufficient ground to conclude that the applicant is not credible.[90]

[90] See paragraphs 60-63 of the CJEU's judgment.

2. Questions on sexual practices – The CJEU found that questions of this nature are not to be asked since this would violate the right to respect private and family life according to Article 7 of the EU Charter.[91]
3. "Gay tests" – The CJEU stated that there should be no submission of the applicant to tests that would demonstrate their sexual identity, for example through the production of video evidence of sexual acts. The CJEU found that such requirements would infringe human dignity in violation of Article 1 of the EU Charter even where the applicant had consented to the review of such materials.[92]
4. Delay in not declaring one's sexual identity – The CJEU found that a delay in declaring one's sexual identity cannot be found to be an argument against the applicant's credibility. The CJEU stated that sexuality is an intimate aspect of sexual identity and that, due to the vulnerability of gay applicants, relying on delay would be a violation of both Article 4 of the QD and Article 13 of the APD.[93]

4.5.3. Conclusion

A few statements of the CJEU are worthy of pointing out for discussion.

As regarding to the discussion on the assessment of an application for international protection not being based on stereotyped assumptions, the CJEU noted that the assessment should be conducted in a manner as to include the individual and personal circumstances of the applicant's statement. Additionally, an inability of the applicant to answer questions based on stereotyped notions, can not constitute a ground that is sufficient to conclude that the applicant lacks credibility. However, the CJEU does not in its findings prohibit use of stereotyped notions, or rule out its usability during the assessment procedure, in the light of Article 1 and 7 of the EU Charter. Instead the CJEU finds that assessments made solely on the basis of stereotypes are ruled out.

[91] See paragraphs 64-65 of the CJEU's judgment.
[92] See paragraphs 65-66 of the CJEU's judgment.
[93] See paragraphs 67-71 of the CJEU's judgment.

Importantly, the CJEU finds that questions on the sexual practices are not allowed during the procedure of assessing an application. It needs to be noted that questions on the sexual practices of the applicant, as well as the review of material with sexual contents is not only a violation of the right to privacy and integrity as noted by the CJEU, it is also not relevant to the assessment of these cases overall. Firstly, there is no need to know the details of the applicant's sexual practices. The fact that the applicant is being persecuted because of the real or perceived notion that they did have sexual relations with someone of the same sex in a country where homosexual acts are prohibited is usable information since this could constitute persecution. The details of the actual sexual act is however not relevant. Secondly, a sexual act can as well as cannot be used as proof of a membership to LGBTQ+ group. It is important to note the difference between sexual orientation and sexual behavior, where the second one may indicate that a person identifies as heterosexual while have had sex with a person of the same sex. However, as mentioned under the discussion on the nexus requirement above, the perceived sexual orientation is also relevant when assessing whether an applicant belongs to a particular social group. The identification of oneself does therefore not determine whether being member of a particular social group or not.

Regarding the CJEU's finding on the question of invoking sexual orientation as a ground for the application later during the procedure, the CJEU found that the circumstances of the delay cannot be used as sole grounds for a rejection of the applicant's claims. This statement relates to the intimate aspects of an individuals sexual identity.

4.6. X, Y, Z v. Minister voor Immigratie en Asiel (2013, CJEU)

The question of concealing one's sexual orientation and criminalization of homosexual acts as evidence.

Case of X, Y and Z v. The Netherlands

4.6.1. Facts of the case

The case concerned three asylum applicants in the Netherlands. The country of origin of the applicants where Sierra Leone, Uganda and Senegal respectively where homosexual acts are criminal offences punishable by imprisonment. It should also be added that none of the applicants had substantially shown that they had already been persecuted or threatened with persecution on account of their sexual orientation.

4.6.2. The Courts decision and reasoning

The Court of Justice of the European Union (CJEU) initially found that the 'existence of criminal laws… which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group'[94], according to Article 10(1)(d) of the QD.

Additionally the CJEU found that LGBTQ+ applicants cannot be reasonably expected to 'conceal their homosexuality if returned to their country of origin', neither should they be required 'to exercise reserve in the expression of their sexual orientation' in order to reduce the risk of persecution.

One of the key findings of the CJEU in the case is that 'criminalization of homosexual acts per se does not constitute an act of persecution'[95]. In order for persecution to be found, the authorities of the country of origin have to be active in the application of the criminalization. In other words, there needs to be some actual prosecution and punishment as an effect of the criminalization.

In relation to the requirement that the acts must be '*sufficiently serious',* the CJEU found that 'not all violations of fundamental rights suffered by a

[94] See paragraph 48 of the CJEU's judgment.
[95] Para. 56 of the judgment.

homosexual asylum seeker will necessarily reach that level of seriousness'[96] Therefore, the Court found that the mere existence of criminal prohibitions of homosexual acts was not enough to substantiate a claim since it could not be considered to affect the applicant so significantly that it '*reaches the level of seriousness necessary for a finding that it constitutes persecution'*.[97]

Additionally, the CJEU found that an applicant for asylum cannot be reasonably expected to '*conceal their homosexuality in their country of origin, or to exercise reserve in the expression of his sexual orientation'*[98]. Here, the CJEU also stated that 'requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the person concerned cannot be required to renounce it'[99].

4.6.3. Conclusion

As in the case of F v. the United Kingdom, the where the ECtHR found that the mere criminalization of homosexual acts is not enough to substantiate a claim under Article 3, the CJEU drew the same conclusion. However, as seen above, earlier case law from the ECtHR suggests that criminalization of homosexual acts in themselves can constitute persecution or at least victim status enough for the ECtHR to seriously review the applicant's complaint.

4.7. Strike-out decision - M.E. v. Sweden (application no. 71398/12),

Seven months after the decision in the case of XYZ, the ECtHR gave judgment in the case of M.E. v. Sweden.

4.7.1. Facts of the case

[96] See paragraph 53 of the CJEU's judgment.
[97] See paragraph 55
[98] See paragraph 71
[99] See paragraph 75

The case regarded an asylum seeker who had received a decision from the Swedish Migration Agency that he was forced to return to Libya temporarily to apply for family reunion with his partner in Sweden. The Swedish authorities claimed that the reunification process would take four months. The applicant argued that he would be at real risk of persecution and ill-treatment upon return to Libya, primarily because of his homosexuality but as well due to previous problems with the Libyan military authorities. He argued that this risk would entail even if this return would last no longer than four months.

4.7.2. The Courts decision and reasoning

The Chamber found that an expulsion of the applicant to Libya would not result in a violation of Article 3 of the ECHR. The Chamber stressed that the expulsion of the applicant was not of a permanent character but only a temporary return while the Swedish Migration Agency (then called the Migration Board) considered his application for family reunification, a process that would take approximately four months. The Court noted that the applicant previously had made an active choice to live discreetly due to private considerations rather than fear of persecution. Additionally, the Chamber found that homosexual acts in fact is criminalized in Libya, however, the Chamber was not convinced that this criminalization resulted in an active persecution of homosexual persons by Libyan authorities. The Chamber stated that this time period has to be considered as reasonably short and that it would not require the applicant to conceal or suppress an important part of his identity permanently or for a longer period of time. The Chamber concluded that such a short term of discretion 'cannot by itself be sufficient to reach the threshold of Article 3' of the ECHR.

However, after the Courts decision, the applicant made a request for referral to the Grand Chamber. While the case was pending the decision of the Grand Chamber, the Swedish Migration Agency's decision to grant the applicant a permanent residence permit due to the deterioration of the

security situation in Libya. The Grand Chamber therefore decided to strike out the application in line with Article 37 para 1 of the ECHR, since there no longer was a risk of expelling the applicant from Sweden.

The dissenting opinion of Judge Power-Forde in the case argued that:

> "what counts is the fact of having to exercise greater restraint and reserve than would be required of a heterosexual in the expression of sexual orientation – and not the length of time for which the discriminatory restrain and reserve would have to be endured."[100]

4.7.3. Conclusion

As Judge Power-Forde notes, the Chamber decision is to be seen as a departure from the CJEU decision in the case of X, Y and Z since it introduces a new temporal test of whether discretion of the applicant's sexual orientation can be requested in order for the applicant to avoid inhuman or degrading treatment.

A similarity with the case of F. v. the United Kingdom as previously discussed, is the disregard of criminalization in itself as substantial evidence of persecution. The Court requires, as seen in a number of cases similar to F. v. the United Kingdom where the Court has decided the complain inadmissible, that there is proof of "active persecution" of the authorities in the applicant's country of origin. This "active persecution" entail that the criminalization of for example homosexual acts, has to be followed up by arrests, prison sentences and overall physical ill-treatment by the authorities in order for the claim to be substantiated. However, it should be noted that a criminalization of 'homosexual acts' do not exist in a vacuum even when a small number of individuals or none are actively arrested and sentenced in direct relation to this prohibition. As mentioned above, Article 3 also

[100] Judge Power-Forde's dissenting opinion on the case of M.E. v. Sweden (Application no. 71398/12)

encompasses a mental or psychological form of ill-treatment. Reasonably, it can be expected that the criminalization of 'homosexual acts' create a stigma, a taboo and a fear of disclosing of ones

The Court's decision in advocating that the applicant has a possibility of concealing his sexual orientation implies an assumption that sexual orientation is only, or at least primarily, a matter of sexual conduct. In other words, that if the applicant actively chooses not to have sex with or otherwise show sexual interest in anyone of the same sex, the applicant's sexual orientation will be hidden successfully. However, a persons sexual identity may be expressed in a great number of ways, and additionally, this reasoning only applies to cases of real and not perceived sexual orientation. For example stereotypical views on homosexual men may contain femininity or flamboyance, these character traits must therefore also be successfully restrained in order not to risk persecution when there is already a risk of harm on the basis of the persons sexual orientation.

The Court is reluctant in applying the CJEU's findings in the joint cases of X, Y, Z that a homosexual person cannot be required to conceal their own sexual orientation in order to avoid persecution. As mentioned by Power-Forde in his dissenting opinion in the case of M.E. what is relevant in the case is the fact that the applicant has to exercise a greater restraint in expressing their sexual orientation than a heterosexual person. The purpose of Article 3 is clearly not only to be applied when this greater restraint has to be undertaken in relation to the actions of the authorities in the applicant's country of origin, but also in relation to the civil sphere. In other words, as opposed to the findings by the CJEU in X, Y and Z, if the fact alone that homosexuality is criminalized in a country, no matter if this criminalization results in an active persecution through arrests and imprisonment, should be considered a strong indicator that the

applicant would have to conceal their sexual orientation and/or gender identity in order to avoid inhuman or degrading treatment through physical or emotional abuse by civil society that would be contrary to Article 3.

Another complexity of the this temporal test is that the Court has to assess the risk of the temporary expulsion being extended to a longer time period where it is no longer reasonable for to request the applicant's discretion, and the risk of the expulsion being permanent. It should also be noted that the expulsion of the applicant was not considered as being of a permanent nature, therefore excusing the request for discretion. However, there were no guarantees that the applicant would be granted a permission to return to his partner in Sweden. The four month period was for the Migration Agency to consider his application for family reunification and then make a decision whether the grounds for his application was adequate for him to be permitted back to Sweden. In the case that the applicant's request for family reunification would have been denied, the decision of his expulsion would instead have been permanent.

However, since the Grand Chamber first granted the request for referral to try the case, the Grand Chamber then decided to strike it out of its list. Therefore, it is unclear whether the first decision of the court would stand.

Even in the case of M.E. v. Sweden, where the applicant made a specific request for the Grand Chamber to try the case and clarify issues relating to LGBTQ+ refugees. The Court however, denied the request citing that the Swedish Migration Agency had taken the circumstances of his sexual orientation and the current security situation in Libya into account when reassessing his application.

A number of cases where the factual circumstances has changed during the proceedings in the ECtHR. In most cases the applicant has been granted

residence permits during the proceedings as to why the Court has found there not being reasons for trying the case. It should be noted that the reason for why the Contracting States have granted the applicant residence permits during the proceedings could be because losing a case before the ECtHR would be a loss of prestige and would result in much more work for the Contracting State authorities to harmonize its systems in accordance with the judgment than accepting the applicant's request in the individual case.

5. Conclusions, Ending Remarks and Discussion

> *"Even more than in cases of political, religious or ethnic persecution, however, the outcome of their (queer refugees) claims is largely dependent on the existence of usually non-existent evidence."*[101]

For the purpose of simplifying the comprehension of this thesis for the reader, the research questions will be repeated.

- What are the general requirements on LGBTQ+-refugees/asylum applicants in international refugee law?
- In cases of LGBTQ+ asylum seekers, to what degree are they protected under the regional Directives and Article 3 of the ECHR.
- What issues in the ECtHR's method of assessing evidence, as well as the assessment of credibility, in LGBTQ+ cases can be found?
- Within the scope of the discussion of the previous research questions, are LGBTQ+ cases more difficult to substantiate?

5.1. The legal requirements

The initial research question is of a descriptive nature. The answer to this question was discussed in the first chapter of this thesis where the requirements of the Refugee Convention were described very briefly. The finding in this chapter was that the legal requirements on LGBTQ+ applicants do not differentiate much from the standard procedure. This might be because, at the drafting of the Convention, many countries in the

[101] Johannes Lukas Gartner, (In)credibly Queer: Sexuality-based Asylum in the European Union", published in Translantic Perspectives on Diplomacy and Diversity (Humanity in Action Press), 2015.

world still criminalized or at least found homosexuality to be a sickness. As found in chapter 1, LGBTQ+ persons are not explicitly recognized as a group within the scope of the Refugee Conventions grounds. However, in the last two decades the group has received wider recognition. Also within the European regional system through the QD where persecution on the bases of sexual orientation was explicitly mentioned first in the 2004 version of the QD.

5.2. Protection of LGBTQ+ applicants under Article 3 of the ECHR

The subject of the thesis becomes more complex when discussing the findings of the second research question. As all applicants for international protection within the jurisdiction of the ECtHR's jurisdition, Article 3 of the ECHR offers protection when there is a risk of the applicant being returned to a country where there is a real risk that the applicant will be subjected to ill-treatment contrary to the purpose of Article 3, in the way that a Contracting State is prohibited from extraditing a person who would risk such treatment and would as a result violate Article 3. This protection extends to the treatment the applicant would suffer in the third country if the applicant has shown substantive grounds for their complaint. When making a complaint under Article 3 of the ECHR it has also been found that this puts an obligation on the Contracting State to review the claims through a 'rigorous examination' resulting in the burden of proof, or duty to substantiate being shared with the Contracting State to a greater extent.

5.3. The assessment of evidence and credibility of the ECtHR

The main part of this thesis however, is the findings of the case study done in chapter 4 where the assessment and considerations on evidence by the ECtHR as well as two cases from the CJEU were reviewed.

5.3.1. Criminalization of LGBTQ+ persons

It has been found in cases from the European Court of Human Rights that criminalization of LGBTQ+ persons is in itself not evidence enough to substantiate a claim for protection for reasons of a real risk of being subjected to ill-treatment contrary to Article 3 of the ECHR. In this thesis, the Courts reasoning and decision of inadmissibility in the case of I.I.N. v. The Netherlands showed that the criminalization not being used to an extensive level in practice, as well as the fact that there was some tolerance of homosexuality if affection between to persons of the same sex is not shown in public.

The author of this thesis would argue that even though there is a low level of enforcement and punishment of these prohibitions, the presence of such laws are a clear sign of the intentions and standing point of the state government of the country of origin. A low enforcement rate is also no guarantee that this rate will continue being low, rather, the existence of such prohibitions can only indicate that there is a risk of that members of the group affected will be subjected to serious harm in the future as long as the those prohibitions are enforceable, since state agents are places under a general obligation of enforcing the law. To conclude, the mere existence of an enforceable prohibition of for example “homosexual acts”, no matter the lever of enforcement of these prohibitions, can only be seen as an indicator that there is a risk of persecution for the applicant. The low enforcement levels should not be considered as an indicator that the applicant’s country of origin is safer for the applicant than the prohibitions might prescribe since the risk of serious harm is constant as long as the law is enforceable.

Additionally, earlier case law of the Court provided clear considerations that the mere criminalization of homosexual acts could amount to such treatment contrary to Article 3. However, the more recent case law is uniform but does take a very different stance than that of the Court in the earlier judgments. The Court has neither expressively commented on the shift of its considerations.

As a result, judging by the wide protection that Article 3 offers, both in regard to the risk of ill-treatment and the shared burden of the substantiating a claim under Article 3, the consideration of the Court to find both the case of F. v. the United Kingdom and I.N.N. v. the Netherlands as inadmissible partly on the grounds that mere criminalization of homosexual acts is not enough to substantiate a claim.

5.4. Credibility

As regards to the findings of this thesis in relation to possible issues within the assessment of credibility and the assessment done by the ECtHR the following findings can be presented.

5.4.1. Assessment as to the international guidelines and academic articles

It is easily assessed that misconceptions in the communication between the applicant and the decision-maker might arise, which could, in turn be harmful for the applicants credibility. There are several issues and intricacies that can be found when assessing an applicant's credibility, some of these being the mental health of the applicant, the manner in which the interview is conducted, the level of communication between the interviewer and the applicant as well as the ability of the interviewer or decision-maker to understand the applicant, thereby asking relevant questions that the applicant also understands.

Additionally, stereotyping is an especially difficult issue in LGBTQ+ cases since the questions during the interview as well as the expected answers may be built on preconceived and stereotyped notions, resulting in finding the applicant non-credible, not on the ground of what the applicant said but rather what the interviewer expected.

5.4.2. The assessment made by the ECtHR and CJEU

Differences in the applicability and reasoning of the law in similar circumstances can be found between the CJEU and the ECtHR. For example in the cases of XYZ the CJEU did not make a similar consideration as to the cases of Norris and Dudgeon. This could raise the issue of the fundamental principle of the universality of human rights, that the reasoning and considerations when applying principles of human rights, such as the principle of non-refoulment, that these principles should be universally applied in a coherent and uniform manner. However, as seen in the case of F. v. the United Kingdom and other cases mentioned in this study, criminalization alone of homosexual acts has now a wide, seemingly unquestioned recognition as not sufficiently substantiating that the applicant is at a real risk of being persecuted upon return to their country of origin. This despite the earlier considerations by the ECtHR.

5.5. Are LGBTQ+ claims harder to substantiate and ending remarks.

As to the last research question the obvious answer is that more research is needed in order to make a clear statement to the question. However, the findings of the thesis show that many of the Courts reasonings and findings when assessing the applicant's credibility are reasons and findings that could be explained differently. As to the case of M.K.N. were the applicant was not found credible even though many of the circumstances pointed towards the fact, according to the material presented in this thesis, that the applicants decision to not disclose of his sexual orientation until after the first negative decision does not even indicate that this ground was untrue when reviewing the other circumstances in his case. On the contrary, based on the personal circumstances of his case, his actions were reasonable.

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