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WHAT IS QUEER ENOUGH? CREDIBILITY ASSESSMENT
OF LGBT ASYLUM APPLICANTS IN THE EU – THE CASE
OF CROATIA

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Izjava o izvornosti

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LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
EU	European Union
LGBT	Lesbian, Gay, Bisexual, Trans
SOGI	Sexual Orientation and Gender Identity
UNHCR	United Nations High Commissioner for Refugees

Other abbreviations

art.	article
<i>ibid</i>	<i>ibidem</i> , in the same place
n.	number
p.	page
para.	paragraph

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1. INTRODUCTION

With a lack of data accounted for and provided by the EU's Member States (hereinafter: MSs), queer refugees and asylum seekers prove to be the 'invisible' group.¹ Only in 2021 over half a million applications were lodged in the EU.² However, we do not know how many of those applications were lodged based on belonging to a certain social group, specifically the LGBT community. This is due to the fact that out of 27 EU MSs only Belgium systematically collected and published 'the number of queer asylum applications'.³ Unfortunately, the last annual report of the Belgium Office for refugees and stateless persons that included sexual orientation and gender identity (hereinafter: SOGI) in its data was from 2013.⁴ According to that annual report, there were 1,125 asylum claims based on sexual orientation and gender identity out of the combined 15,840 applications, which was at the time the highest number of such cases in the span of five years.⁵ If we take into account the rise in asylum claims overall in the EU since 2015, we can reasonably assume that there is a high number of SOGI applicants arriving in the EU. However, as stated, these numbers are not collected, which results in a lack of recognition of queer refugees in EU migration policies and research.

The aim of this paper is to address the difficulty of SOGI-related asylum claims, specifically the credibility assessment of asylum seekers. As sexual orientation and gender identity are one of the most difficult grounds for asylum to prove,⁶ this paper will focus on the methods used in the assessment of an applicant's claim.

¹ See 'Suffering in silence: The invisibility of LGBTI refugees' (*Amnesty International UK*, 19 June 2018) <<https://www.amnesty.org.uk/blogs/lgbti-network/suffering-silence-invisibility-lgbti-refugees>>

² 'Statistics on migration to Europe' (*European Commission*, 25 April 2022) <https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en>

³ Johannes Lukas Gartner, '(In)credibly Queer: Sexuality-based Asylum in the European Union' (*Humanity in Action*, February 2015) <https://www.humanityinaction.org/knowledge_detail/incredibly-queer-sexuality-based-asylum-in-the-european-union/> accessed 23 May 2022

⁴ 'Publications' (*Commissariat General aux Refugies et aux Apatrides*) <<https://www.cgra.be/fr/publications>> accessed 23 May 2022

⁵ Commissariat General aux Refugies et aux Apatrides, *Rapport Annuel* [2013] <https://www.cgra.be/sites/default/files/jaaverslagen/ra2013_cgra_fr.pdf> p20.

⁶ Valerie De Bruyckere, 'Somewhere Over the Rainbow: On the Use of Psychological Tests to Determine Asylum Seekers' Sexual Orientation and the Impact on the Right to Private Life (Case C-473/16, 25 January 2018)' [2018] vol 14 (1), 255-272 *Croatian Yearbook of European Law & Policy* <<https://hrcak.srce.hr/217634>> p256.

Therefore, this thesis will consist of two hypotheses. The first research question is that credibility assessment of SOGI cases is more difficult to conduct compared to other asylum cases. As SOGI and its persecution are primarily a private matter, the author of this paper expects that decision makers face more issues in SOGI cases than in most other credibility assessments.

Second, this paper aims to address the adequacy and suitability of the methods being used to assess credibility while focusing on the practises applied by the Croatian justice system. The author expects to find that Croatian decision makers do not use forbidden methods in the assessment of SOGI asylum seekers. However, the question remains how adequate and fair the methods used by Croatian authorities are.

1.1. Methodology of the paper

This study consists of a qualitative analysis of 31 cases of SOGI applicants, whose claim for asylum was submitted between 2007 and 2020.⁷ The judgments in these cases were made by the Croatian Administrative Courts in Rijeka and Zagreb and by the High Administrative Court of Croatia as the second and third instances of asylum proceedings. First instance proceedings, in the Croatian asylum system, are conducted by the Ministry of Interior. However, this paper will not touch upon first instance decisions. It is important to note that Croatia, like other EU MSs, does not collect data on SOGI applications and does not publish its rulings in such cases. Due to the lack of publication, the number of cases is limited, thus this study is restricted to qualitative analysis as there is not a sufficient number for quantitative analysis.

These cases will be evaluated with regard to two main objectives. The first objective is the applications of refugee law, the CEAS and human rights standards in the assessment of the applicants' claims. The second objective is the use of different methods in the credibility assessment of the SOGI claims. Moreover, this study will not focus on different variables such as class, gender and race when examining these cases due to the limited amount of information stemming from these decisions. Nonetheless, the author strongly believes that such variables can and do affect asylum applications and the practices used in their assessment.

⁷ Croatia joined the EU in 2013 and therefore, before that, was not bound by EU regulations. However, the cases decided before the accession had to be in accordance with the 1951 Refugee Convention. Discrepancies between pre and post accession cases are beyond the scope of this thesis.

Furthermore, to test the hypothesis of this thesis, the author conducted multiple semi-structured interviews with stakeholders that possess different knowledge and experience regarding this topic. The interviews were conducted with a judge from the High Administrative Court of Croatia; a judge from the Administrative Court in Zagreb; and an LGBTQIA+ activist. The conclusions drawn from the conducted interviews will be presented in Chapter Four of this thesis, while the transcripts of the interviews are attached as an appendix at the end of this thesis.

Lastly, the author will analyse existing CJEU case law related to SOGI asylum claims as well as EU legislation and guidelines created by the UNHCR. The research will be supported by the insights of scholars published in academic journals and books.

1.2. Structure of the paper

The thesis is structured as follows. In the second chapter, the author will present how EU legislation concerning asylum affects SOGI asylum seekers. Specifically, this chapter will address how SOGI applicants fit into substantive and procedural laws that regulate the asylum process. The third chapter introduces the methods used in the assessment of SOGI asylum applications, as well as the case law that has shaped the current practices of individual MSs. After the second and third chapters, which introduce some of the main issues in credibility assessment, the fourth chapter will focus on Croatia's second and third instance cases of asylum applications on the grounds of SOGI. In this chapter the author will analyse the practices and methods used by Croatian authorities in SOGI cases, using the information presented in the previous chapters. In the fifth chapter, the author will present the interviews conducted with actors from various backgrounds. Their views on the credibility assessment of SOGI claims and the asylum process of SOGI applicants will be presented and analysed. This will lead to a concluding chapter where the author will present her final remarks.

1.3. Terminology

As this paper will use various terms such as sexual orientation, gender identity, queer and others, the author finds it important to include a sub-chapter that explains the terms used and why those specific terms are used and not others.

The central concepts of this thesis are sexual orientation and gender identity. Sexual orientation is 'understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with,

individuals of a different gender or the same gender or more than one gender'.⁸ Gender identity is 'understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (...) and other expressions of gender, including dress, speech and mannerisms'.⁹

This paper will use terms such as lesbian, gay, bisexual and trans, under the acronym LGBT.¹⁰ As national persecution mainly addresses lesbian, gay, bisexual and trans individuals, this paper will not focus on other types of sexual orientation and gender identity (e.g. asexual, aromantic, non-binary). Additionally, even though intersex individuals are also persecuted for their identity, the credibility assessment of intersex persons is beyond the scope of this paper, as the author did not come across asylum claims on this ground before Croatian courts. Lastly, the term queer will be used as an umbrella term for all sexual and gender identities.

Furthermore, it is important to address that not all communities or individuals are aware of or identify with these terms. Some countries only use derogatory terms¹¹ to describe people with different sexual or gender identities. For example, in Jamaica, 'a gay man is referred to as a *battyman* and a lesbian as a *sodomite*'.¹² While in some communities, queer people may refuse to be referred to as gay 'as they feel that this describes a political group and/or effeminate men'.¹³ Hence why they give preference to terms such as men who have sex with men.¹⁴ Moreover, some cultures recognise a third gender. For example, in India, transgender and intersex people are included in the term *hijra*.¹⁵ These are only some of the examples of different views on sexual and gender identity. However as they are important parts of an individual's identity, national authorities, organisations and others dealing with SOGI refugees should be aware of and respect these differences

⁸ 'Yogyakarta Principles: The Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' <<https://yogyakartaprinciples.org>> p6.

⁹ *ibid.*

¹⁰ For the definitions of other terms see: 'List of LGBTQ+ terms' (*Stonewall*) <<https://www.stonewall.org.uk/help-advice/faqs-and-glossary/list-lgbtq-terms>> accessed 24 June 2022

¹¹ As explained in the Credibility Assessment Manual (n 12), the term derogatory here does not only refer to political correctness but an offensive and stigmatizing attitude towards queer individuals

¹² Gabor Gyulai (edr), Debora Singer, S. Chelvan and Zoe Given-Wilson, 'Credibility assessment in asylum procedures – A multidisciplinary training manual' [2015] vol 2 <<https://www.refworld.org/docid/5253bd9a4.html>> p66 (Credibility Assessment Manual)

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ Jeffrey Gettleman, 'The Peculiar Position of India's Third Gender' (*The New York Times*, 17 February 2018) <<https://www.nytimes.com/2018/02/17/style/india-third-gender-hijras-transgender.html>> accessed 24 June 2022

2. QUEER REFUGEES IN THE CONTEXT OF EU ASYLUM LAW AND POLICY

Over the last three decades, the EU has gradually increased its influence on MSs' asylum law and policies, and as of today, the EU has a 'well-developed asylum policy'.¹⁶ In 1999, the EU established the Common European Asylum System (hereinafter: CEAS).¹⁷ That system currently consists of the following Directives: the Reception Conditions Directive, the Procedures Directive, the Qualification Directive, the Returns Directive, and the Temporary Protection Directive. This paper will only touch upon the Qualification Directive¹⁸ and the Procedures Directive¹⁹ since they are the only two that make direct reference to SOGI asylum claims. Additionally, while the Commission is proposing to reform the Qualification²⁰ and Procedures Directive²¹ into Regulations, this will not be addressed in this paper.²² This chapter will consider how the current EU legislation and policy framework regulate claims for international protection on the grounds of SOGI. Moreover, as EU policies relating to asylum must be consistent with the 1951 Refugee Convention and its Protocol, this Chapter will also use the UNHCR Guidelines on claims based on SOGI within the context of the 1951 Convention and its Protocol relating to the Status of Refugees (hereinafter: UNHCR Guidelines), when defining SOGI refugees.

¹⁶ Nuno Ferreira, 'Reforming the Common European Asylum System: enough rainbow for queer asylum seekers?' [2018] (2), 25-42 *GenIUS - Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere* <<https://osf.io/preprints/socarxiv/xag5u/>> p1.

¹⁷ 'Common European Asylum System' (*European Commission*) <https://ec.europa.eu/home-affairs/pages/glossary/common-european-asylum-system-ceas_en>

¹⁸ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337

¹⁹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180

²⁰ Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2016] COM/2016/0466

²¹ Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU [2022] COM/2020/611

²² See Ferreira (n 16).

2.1. LGBT as a particular social group

It is clear to assume that in 1951 when the Refugee Convention was first drafted, it did not have in mind that sexual orientation and gender identity would be grounds for asylum. Nevertheless, over the last seventy years, refugee law has changed and now it is widely accepted²³ that most SOGI refugees and asylum seekers qualify as ‘members of a particular social group’.²⁴

Unlike the 1951 Refugee Convention, the Qualification Directive²⁵ gives an explanation of what a ‘particular social group’ entails, and goes even further by explicitly naming sexual orientation and gender identity as possible reasons, depending on circumstances in the country of origin, why an asylum seeker belongs to a particular social group.²⁶

2.1.1. Common characteristics and distinct identity

According to the Qualification Directive, the key reasons why a person would be considered a member of a particular social group are ‘common characteristics’²⁷ and a ‘distinct identity’.²⁸ Regarding the common characteristics, in the *X, Y and Z*²⁹ case, the CJEU found that sexual orientation is a characteristic so fundamental to a person’s identity that one should not be forced to renounce it.³⁰ Regarding the ‘distinct identity’, the CJEU explicitly gave importance to criminal laws that target queer people as their existence can result in queer individuals being seen as different from the rest of the surrounding society.³¹ However, the existence of such laws ‘is not a requirement to establish a distinct identity related to SOGI’. In countries with a culture of intolerance, queer people can still be perceived as different, even without laws that target them.³²

²³ ‘LGBTIQ+ persons’ (UNHCR) <<https://www.unhcr.org/lgbtiq-persons.html>> assessed 25 June 2022

²⁴ Some MS have explicitly recognised SOGI as grounds for asylum, see Maria Guadalupe Begazo, ‘The Membership of a Particular Social Group Ground in LGBTI Asylum Cases Under EU Law and European Case-Law: Just Another Example of Social Group or an Independent Ground?: Persecution, Asylum and Inegration’ in Arzu Guler, Maryna Shevtsova, Denise Venturi (eds), *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective* (Springer Charm 2019) p176.

²⁵ Qualification Directive art 10

²⁶ Qualification Directive art 10(1)(d)

²⁷ See ‘EASO Guidance on membership of a particular social group’ [2020] European Asylum Support System p19-20.

²⁸ Qualification Directive art 10(1)(d)

²⁹ Judgment in *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel*, Joined Cases C-199/12 to C-201/12, EU:C:2013:720.

³⁰ Judgment in *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel*, Joined Cases C-199/12 to C-201/12, EU:C:2013:720 para 46.

³¹ *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel* para 48-49.

³² ‘EASO Guidance on membership of a particular social group’ (n 27) p20.

Moreover, it should be noted that it is irrelevant whether the asylum applicant actually possesses the characteristics that attract persecution, as long as such characteristics are attributed to the applicant by the actor(s) of persecution.³³ This means that it is sufficient that the applicant proves that they are perceived as LGBT.³⁴

Consequently, if these criteria were met, a queer refugee would be considered a member of a particular social group.³⁵ However, being considered a member of a particular social group will not necessarily guarantee refugee protection, as other criteria have to be met, beyond the mentioned ones.³⁶ Specifically, there has to be a causal link between the asylum seeker's membership to a particular social group and well-founded fear of persecution, or absence of protection against such persecution.³⁷ Therefore, to be granted asylum, SOGI refugees need to prove to immigration authorities and judiciaries of the receiving country that they are queer or perceived to be, that they fear persecution on the grounds of their SOGI, and that this fear is well-founded.³⁸

2.2. LGBT fearing persecution

Persecution is considered to involve both serious human rights violations and 'lesser forms of harm that may cumulatively constitute persecution'.³⁹ With 71 countries criminalising individuals based on their SOGI and 6 out of those countries imposing the death penalty,⁴⁰ it is expected that many LGBT individuals face different forms of persecution. One of the most common experiences for many queer individuals is discrimination, which can amount to persecution 'if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned'.⁴¹ In many non-friendly LGBT countries and communities, queer individuals may face physical,

³³ Qualification Directive art 10(2)

³⁴ Ferreira (n 16) p20.

³⁵ For more information on LGBTI refugees as a particular social group see Maria Guadalupe Begazo, 'The Membership of a Particular Social Group Ground in LGBTI Asylum Cases Under EU Law and European Case-Law: Just Another Example of Social Group or an Independent Ground?: Persecution, Asylum and Inegration'

³⁶ Begazo (n 24) p167-168.

³⁷ 'EASO Guidance on membership of a particular social group' (n 27) p 20.

³⁸ Gartner (n 3).

³⁹ 'Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' [2012] UNHCR p6 para 16. (UNHCR Guidelines)

⁴⁰ 'Map of Countries that Criminalise LGBT People' (*Human Dignity Trust*)

<<https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/>> accessed 25 June 2022

⁴¹ 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' [1992] UNHCR para 54.

psychological and sexual violence.⁴² Some of these violations include forced conversion therapies, forced detention and institutionalisation in psychological or medical institutions, forced treatment or surgery, rape, forced marriage, all of which may constitute torture, inhuman or degrading treatment.⁴³

Nevertheless, it is not only the mentioned measures that cause serious harm to queer individuals. While it is not uncommon in any country for queer individuals to face disapproval and rejection from families and communities, if such actions manifest themselves ‘in threats of serious physical violence or even murder’, it would certainly be considered as persecution on the grounds of SOGI.⁴⁴ Moreover, cumulative effects of restrictions in the form of economic, social, and employment rights can in a given case constitute as persecution.⁴⁵

These are only some of the forms of harm that cause queer individuals to seek refuge in other countries. While it is not possible to address every violation and harm toward LGBT people, the next sub-chapters will present factors that can be seen in most SOGI cases.

2.2.1. State persecution

State persecution most often involves the existence of laws that criminalise LGBT individuals. As previously stated, 71 countries in the world criminalise consensual same-sex relationships between adults. In some cases, both sexes are criminalised and in others, only male-male sexual contacts are considered.⁴⁶ Even though these laws do not explicitly mention trans, non-binary, intersex and other gender-diverse people, they are still affected due to a very restricted notion of sex and gender. Meaning that, for example, a trans woman can be persecuted for ‘same-sex’ sexual acts due to their perceived gender and sex.⁴⁷ Additionally, trans and non-binary identities can also be targeted through the criminalisation of cross-dressing⁴⁸ or ‘other transgressions of gender specific rules’.⁴⁹ It is

⁴² UNHCR Guidelines (n 39) p7 para 20.

⁴³ *ibid*, p7 paras 21-22.

⁴⁴ *ibid*, p7 para 20.

⁴⁵ *ibid*, p8 paras 24-25.

⁴⁶ For example the Uzbekistan 1994 Criminal Code that criminalized consensual intercourse between two men, see Sabine Jansen and Thomas Spijkerboer, ‘*Fleeing Homophobia – Asylum Claims related to Sexual Orientation and Gender Identity in Europe*’ [2011] p21.

⁴⁷ ‘Arrests and Prosecutions of LGBT and Gender-Diverse Persons continue Worldwide – New Report Showd’ (*ILGA World*, 15 December 2021) <<https://ilga.org/our-identities-under-arrest-prosecutions-lgbt-gender-diverse-persons>> accessed 23 May 2022

⁴⁸ 15 countries criminalise gender identity, see ‘Map of Countries that Criminalise LGBT People’ (*Human Dignity Trust*) <<https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/>> accessed 25 June 2022

also important to note that sometimes this criminalisation is not explicit in its wording but uses ‘public morality’ or ‘indecent behaviour’ provisions to criminalise its queer population.⁵⁰

Unfortunately, in most MSs,⁵¹ the existence of criminalisation is not seen as enough to be considered as a well-founded fear of persecution. In other words, there needs to be an existence of enforcement of such provisions. However, even if criminal laws that prohibit same-sex relations are irregularly, rarely or never enforced, they still create a climate of homophobia and transphobia, which enables State agents and non-State agents ‘to persecute or harm’ queer people with impunity.⁵² This can also hinder queer people from seeking and obtaining State protection.⁵³

2.2.2. Non-State persecution and State protection

It is not only State persecution that causes queer asylum seekers to flee their home countries. It is also the persecution and ill-treatment from non-State actors, such as families, neighbours, and other surroundings. The question that is posed in these situations is whether the home state can offer effective protection. Therefore, international protection can only be granted where the State is ‘unable or unwilling to provide protection against such harm’.⁵⁴

Art 7 of the Qualification Directive states that only the State or other parties and organisations, controlling a part or the whole State, can provide protection. However, as pointed out by the UNHCR, criminal sanctions for queer activity can impede access to State protection, especially considering that the queer individual ‘may be regarded as an offender instead of a victim’.⁵⁵ Therefore, asylum seekers should not have to show that they ‘approached the authorities for protection before flight’, but instead should demonstrate that the protection ‘was not or unlikely to be available or effective upon return’. Nonetheless, in Jansen’s and Spijkerboer’s research from 2011, Austria, Finland,

⁴⁹ Sabine Jansen and Thomas Spijkerboer, ‘*Fleeing Homophobia – Asylum Claims related to Sexual Orientation and Gender Identity in Europe*’ [2011] p21.

⁵⁰ UNHCR Guidelines (n 39) p9 and Jansen and Spijkerboer (n 49) p21.

⁵¹ The only exception being Italy, see Sabine Jansen and Thomas Spijkerboer, ‘*Fleeing Homophobia – Asylum Claims related to Sexual Orientation and Gender Identity in Europe*’ [2011] p22.

⁵² Jansen and Spijkerboer (n 49) p21.

⁵³ UNHCR Guidelines (n 39) p8 para 27.

⁵⁴ *ibid*, p10 para 35.

⁵⁵ Jansen and Spijkerboer (n 49) p27.

Spain and others did expect applicants to first request aid from their State's authorities, even if that State criminalised queer people.⁵⁶

Even if the MS' authorities accept the applicant's claim regarding the fear of persecution, the authorities can still deny asylum if they believed that the applicant could 'live safely in another part of his country of origin'. This is supported by the Qualification Directive, which states that the relocation and protection in the applicant's countries of origin are to be taken into consideration when assessing the need for international protection.⁵⁷ However, it becomes highly unlikely that countries, with laws that criminalise queer people or do not protect them from State or non-State actors would be able to offer its queer citizens a better life in another part of its territory. Such relocation should not be reduced to a move to a major city or the capital where the asylum seeker would be living in anonymity. Instead, national authorities should assess whether the asylum seeker is able 'to access State protection in a genuine and meaningful way'.⁵⁸

2.3. *Sur place* claims

The last criteria that a person has to fulfil for them to be considered a refugee is for them to be outside of their country of origin. Considering that the asylum applications are submitted in countries of refuge, this criterion is fulfilled. However, while the applicant has to be outside his country of origin, they do not have to experience persecution while residing in the home country. Specifically, a person may be granted refugee status 'based on international protection needs which arose *sur place*'.⁵⁹

Art 5 of the Qualification Directive recognises *sur place* claims and states that such claims can be 'based on activities which the applicant has engaged in since they left the country of origin'.⁶⁰ What is unique about *sur place* SOGI claims is that such claims may also arise 'due to changes in the personal identity or gender expression of the applicant after [their] arrival in the country of asylum'.⁶¹ Such cases may happen when a queer individual engages in political activism, queer culture, media work or by the non-consensual disclosure of their SOGI (also known as 'outing'). An example of this would be 'an international student exploring their sexuality whilst abroad, posting on social

⁵⁶ *ibid*, p27-28.

⁵⁷ Qualification Directive art 8.

⁵⁸ Jansen and Spijkerboer (n 49) p41.

⁵⁹ 'Refugee *sur place*' (*European Commission*) <https://ec.europa.eu/home-affairs/pages/glossary/refugee-sur-place_en> accessed 25 June 2022

⁶⁰ Qualification Directive, art 5.

⁶¹ UNHCR Guidelines (n 39) p14 para 57.

media about their participation at queer events or a new same-sex partner, and then being unable to return to the country of origin owing to family threats or unsafe community environment'.⁶²

Nonetheless, Art 5(3) of the Qualification Directive establishes that MSs can reject such an application if they found that the applicant attracted attention and voluntarily created the circumstances from which 'fear of persecution' may arise. Such provisions create a catch-22 for the SOGI applicants, where e.g. the participation in queer activities can be perceived as 'attracting fear of persecution' but at the same time not expressing ones SOGI can also 'damage' an applicant's credibility for asylum in the eyes of the decision-makers.

2.4. SOGI asylum seekers in procedural law

As the previous sub-chapters examined EU's substantive law, this part will focus on the only other directive that explicitly mentions SOGI applicants, which is the Procedures Directive.

Recital 29 of the Procedures Directive states that certain applicants may warrant special procedural guarantees due to their specific circumstances, amongst which are sexual orientation and gender identity.⁶³ It is for the MSs to identify the applicants in need of special procedural guarantees 'before a first instance decision is taken'.⁶⁴ Such applicants are entitled to adequate support, including sufficient time to ensure effective access to procedures and to present the elements needed to support their asylum claim.⁶⁵

Furthermore, the Procedures Directive acknowledges SOGI as personal and general circumstances that interviewers need to take into account.⁶⁶ Additionally, SOGI applicants are allowed to request interpreters and interviewers of a certain sex.⁶⁷ The national authorities should provide, if possible, unless they have reasons to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of [their] application in a comprehensive manner'.⁶⁸

⁶² Ferreira (n 16) p21.

⁶³ Procedures Directive, recital no 29.

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ *ibid.*, art 15(3)(a).

⁶⁷ *ibid.*, art 15(3)(b).

⁶⁸ *ibid.*

3. CREDIBILITY ASSESSMENT OF SOGI APPLICATIONS

While it is for the applicant of asylum to disclose their sexual orientation and gender identity,⁶⁹ those applications can be subject to assessment processes, as stated in Art 4 of the Qualification Directive.⁷⁰ Nevertheless, the methods used to assess the credibility of a claimant's asylum application must be in line with fundamental rights guaranteed by the Charter.⁷¹ Unfortunately, it is for the competent authorities of individual MSs to determine what methods will be use when assessing applications based on SOGI,⁷² creating a non-harmonised and sometimes dangerous practice.

This chapter will focus on the different methods used when assessing an applicant's credibility, while taking into account asylum seekers rights enshrined in the Charter, Directives and CJEU case-law.

From the viewpoint of credibility assessment, asylum applications based on SOGI are considered extremely challenging due to their sensitive and intimate matter.⁷³ During the asylum process, SOGI applicants have to discuss their private life and emotions that relate to their sexuality or gender identity. In many cases, that sexuality and gender identity are interlinked with the views of their society, which due to religious and political views create a taboo, stereotypical and prejudicial notion on SOGI. This results in many SOGI asylum seekers having feelings of stigma, shame or self-denial.⁷⁴ Additionally persecutions in these cases most often happen in a private sphere, which 'may limit the availability of documentary evidence and country information, as compared to other cases'.⁷⁵ Thus, the key evidence in the asylum procedure is the applicant's testimony.⁷⁶ All of these challenges⁷⁷ are reasons why methods used in these cases should be mindful of both difficulties all refugees go through but also the special circumstances related to SOGI asylum seekers.

⁶⁹ Judgment in *A and Others v Staatssecretaris van Veiligheid en Justitie*, Joined Cases C-148/13 to C-150/13, EU:C:2014:2406, para 52.

⁷⁰ Qualification Directive, art 4.

⁷¹ Judgment in *A and Others*, para 53.

⁷² *ibid*, para 54.

⁷³ Credibility Assessment Manual (n 12) p61.

⁷⁴ *ibid*.

⁷⁵ *ibid*.

⁷⁶ Gregor Noll, 'Credibility, Reliability, and Evidential Assessment' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) p607.

⁷⁷ See example in Credibility Assessment Manual (n 12) p61.

In *A and Others*, the Court stated that an asylum seekers' declaration of SOGI constitutes merely the starting point 'in the process of assessment of the facts and circumstances'.⁷⁸ According to Art 4(3) of the Qualification Directive, assessments are made on an individual basis while taking into account all relevant information on the country of origin, the statements and documentation given by the applicant, the personal circumstances of the applicant (such as background, age, and gender). Nevertheless, if relevant documentation or other evidence cannot be given, the applicant's statements will not need confirmation when the general credibility of the applicant is established, when the applicant made genuine effort to substantiate their application, when the statements are found to be coherent and plausible, and other conditions are met. However, due to the specific nature of SOGI claims, such cases can often be characterised by 'late disclosure, lack of detail and inconsistencies', even with the most genuine protection claims.⁷⁹

3.1. Interviews and questioning methods

One of the methods most used in all asylum cases, is the process of interviewing the asylum applicant. Art 15(3)(a) of the Procedures Directive states that MSs shall ensure that the interviewers are competent to take into account the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability.⁸⁰ Generally, the interviewing process consists of a two-tier investigation. The first one consists of open questions that are asked about the applicant's SO to establish the facts of the case. The second part consists of general questions that establish overall credibility.⁸¹ It is crucial to note that in any interview, the interviewer should focus on the applicant perspective.⁸² The authorities processing the application should take into consideration the cultural background of the asylum seekers, especially since not every person relates to 'westernised' ideas of what queer people are. Therefore, not all applicants will see themselves as queer or will have a 'coming of age' experience with their queerness. Another matter that should be taken into consideration is 'the characteristics of interviewers and interpreters'⁸³ Art 15(3)(b) mentions that applicants can request, if possible, interviewers of a certain sex.⁸⁴ However,

⁷⁸ Judgment in *A and Others*, para 49.

⁷⁹ Credibility Assessment Manual (n 12) p61.

⁸⁰ Procedures Directive, 15(3)(a).

⁸¹ De Bruyckere (n 6) p258.

⁸² Jansen and Spijkerboer (n 49) p56.

⁸³ Ferreira (n 16) p15.

⁸⁴ Procedures Directive, 15(3)(b).

there is no mention of ethnicity or religion, which can create a difference to SOGI applicants because some may find it difficult to open and express their experience of SOGI-related persecution ‘in front of certain (often their own) ethnicity or religion’.⁸⁵

Even though the EU prides itself on a liberal and progressive view on LGBT+ rights, it is not unknown for SOGI refugees to face stereotypes in the receiving country and during the asylum process. Regarding the credibility assessment process, the CJEU ruled that ‘[...] the assessment of applications for the grant of refugee status on the basis solely of stereotyped notions associated with homosexuals does not [...] satisfy the requirements of [EU law] in that it does not allow those authorities to take account of the individual situation and personal circumstances of the applicant for asylum concerned’.⁸⁶ Nevertheless, the Court did accept questions based on stereotyped characteristics as a useful element at the disposal of ‘competent authorities’.⁸⁷ As to the use of stereotypes, the author believes that relying on stereotypes can hurt asylum seekers and the asylum outcome. If a stereotype is based on assumptions on what a queer person might look like or act in a certain way, this can lead to incorrect conclusions even if they only form ‘part’ of the questioning. For example, if we believe that a queer person would always be aware of their sexuality and thus would not have children, it would be extremely difficult for an asylum seeker to prove their claim if they were married and had children.⁸⁸

These are not the only assumptions that are made by interviewers and decision makers in SOGI cases. Beyond the notion that gay men are feminine and that lesbian women are masculine, there is other assumed knowledge and behaviours that can be quite harmful. As seen in *A and Others*, one of the men in question was asked by the Dutch authorities if he knew of any organisations dedicated to the rights of homosexual men. This was flagged by the Court as wrong, however there is still an idea to how a ‘true’ queer person behaves or what they know. These assumptions can include a familiarity with gay scenes in the country of origin and in the country of refuge, or an existence of marriage with a person of a different gender and parenthood.⁸⁹

The act of concealment of one’s sexual orientation or gender identity (staying ‘in the closet’) is not unknown in many parts of the world, especially in environments where queer individuals are harmed and discriminated against. In 2013, the CJEU ruled that,

⁸⁵ Ferreira (n 16) p15.

⁸⁶ Judgment in *A and Others*, para 60.

⁸⁷ *ibid*, para 62.

⁸⁸ See example in Jansen and Spijkerboer (n 49) p58.

⁸⁹ *ibid*, (n 49) p57-58.

amongst others, ‘an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution’.⁹⁰ While it is not clear if countries still use this possibility to reject an applicant’s asylum claim, before this decision it was not uncommon for MSs to expect such behaviour from the SOGI applicant. Even though, it goes against the Qualification Directive, 9 countries used to require asylum seekers to conceal their SOGI identities⁹¹. However, this notion that a person’s SOGI is merely a sexual act goes against that person’s fundamental rights as well as the progress made by queer activists to recognise SOGI as an important part of an individual’s identity and life.

Nevertheless, a practice in reverse can also be seen. According to Jansen and Spijkerboer,⁹² the French National Asylum Court did require LGB applicants to have fully disclosed their SO in their country of origin. Considering that if a person is not ‘out’, they cannot be considered as a ‘particular social group’ as defined in the Qualification Directive.⁹³ While it is not clear if France or other MSs still use this practice, it is obvious that such expectations are unreasonable and highly dangerous to queer people in their country of origin.

Lastly, regarding the questions asked and evidence used, the Court stated in *A and Others* that ‘[...] questions regarding details of the sexual practices of the applicant are contrary to the fundamental rights guaranteed by the Charter and, in particular, to the right to respect for private and family life’.⁹⁴ Moreover, the Court forbade any use of evidence showing sexual activities, as they do not necessarily have probative value and by accepting such evidence from one applicant, this would incite others to do the same, creating a *de facto* requirement for such evidence.⁹⁵

3.1.1. Late disclosure

Late disclosures pose a major issue for SOGI cases as not every queer person feels comfortable to disclose their SOGI to officers or they might not be aware that SOGI could be a ground for asylum. By disclosing their SOGI at a later stage, asylum seekers risk being seen as unreliable or it might cast other doubts on their claim. Such practice is not uncommon in many MS as most countries either distrust claims given later on in the

⁹⁰ Judgment in *Minister voor Immigratie en Asiel v X and Y and Z*, para 71.

⁹¹ Jansen and Spijkerboer (n 49) p36.

⁹² *ibid.*

⁹³ *ibid.*

⁹⁴ Judgment in *A and Others*, para 64.

⁹⁵ *ibid.*, para 65-66.

asylum process or have a strict practice of *res judicata* that hinders the possibility of taking SOGI claimed into account if they are not declared at an early stage of the procedure.⁹⁶

3.2. Medical examinations

Both physical and psychological exams have been used in SOGI cases, and even though the CJEU has acknowledged that expert report may be used if they do not infringe the applicant's human rights, the author believes that most medical methods are not suitable and are even dangerous to SOGI applicants.

It should be noted that in 1990 the World Health Organisation removed 'homosexuality from their list of mental disorders'.⁹⁷ Thus, there is no medical or psychiatric expert with relevant expertise that can determine someone's SO. On the other hand, someone identifying with a gender different than one's biological sex is still considered as a mental disorder.⁹⁸ Nevertheless, many trans people and 'a growing number of experts support the declassification of gender identity disorder as a mental disorder'.⁹⁹ The author of this paper shares the opinion of many that no medical or psychiatric expert should be entitled to determine a person's SOGI.

However, an important distinction should be made when it comes to the work of medical experts with LGBT individuals. While medical experts have expertise as to the problems queer people face, this paper only focuses on the 'determination' of an asylum seeker's SOGI by medical professionals, which as stated should not be used.

Even if we do not take into consideration that SOGI is not a medical issue, we should consider the intrusiveness of medical exams. A medical examination 'falls into the scope of the concept of privacy'.¹⁰⁰ Therefore, even a 'minor' compulsory medical intervention can be considered as an interference with the right to privacy.¹⁰¹ In addition, Principle 18 of the Yogyakarta Principles states that 'no person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a

⁹⁶ Judith Ruderstaller, 'Comparison of decisions in asylum procedures in relation with LGBTI persons on EFAL' [2014]

<https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/J%20Ruderstaller%20LGBTI-practice_EDAL_korrAG%202.pdf> p6.

⁹⁷ Ferreira (n 16) p67.

⁹⁸ Also known as gender dysphoria.

⁹⁹ Ferreira (n 16) p67.

¹⁰⁰ Jansen and Spijkerboer (n 49) p49.

¹⁰¹ *ibid.*

medical facility, based on sexual orientation or gender identity'.¹⁰² A prevalent word in the above Art 18 is the word 'forced', meaning that the medical treatment or examination can only be conducted with consent. However, it can hardly be considered that an asylum seeker voluntarily consented if the motivations for granting consent stem from a place of fear regarding the refusal of their asylum application.

3.2.1. Phallometric testing

One of the most controversial examinations conducted by a refuge country's authorities is 'phallometric testing'. This 'test' measures changes 'in genital blood flow in response to sexually explicit visual and audio stimuli using electrodes attached to the genitalia'.¹⁰³ It was most often used in the Czech Republic in criminal law, civil cases,¹⁰⁴ but most importantly for this research, in asylum cases where the asylum seeker is a gay man. According to the information obtained by the Fundamental Rights Agency (hereafter: FRA), phallometric testing was used to 'assess the credibility of (an asylum seeker's) claim to be homosexual, where inconsistencies appear in his interview'.¹⁰⁵ If the applicant shows no reaction to the visuals, their allegations regarding SOGI are considered proven.¹⁰⁶ This practice was criticised by FRA as it violated Art 3 and 8 of the European Convention on Human Rights (hereafter: ECHR). While such practice is presumed to have stopped in 2009, it is still important to showcase how medical examinations can raise feeling of shame and suffering to asylum seekers. Furthermore, beyond its infringement of fundamental rights, its usage as evidence should hold no value, as it is highly inaccurate and speculative.¹⁰⁷

3.2.2. Assessing SO through experts' reports

In 2018, the CJEU found that it is not contrary to EU Law for MSs' authorities to commission expert reports in SOGI asylum cases. Nonetheless, if used such reports need to respect the asylum seekers fundamental rights, especially their right to dignity, private

¹⁰² Yogyakarta Principles (n 8) p23.

¹⁰³ 'UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation' [2011] UNHCR, p1.

¹⁰⁴ *ibid.*

¹⁰⁵ 'Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity' [2010] European Union Agency for Fundamental Rights p59.

¹⁰⁶ *ibid.*

¹⁰⁷ De Bruyckere (n 6) p262.

and family life. However, projective personality tests,¹⁰⁸ such as the ones used in the case *F*, are contrary to EU law.¹⁰⁹ Moreover, the Court in *F* found that the test at hand should not be used in SOGI cases as it only gives an indication of the applicant's sexual orientation, instead of determining it.¹¹⁰ In other words, the CJEU does not forbid in its entirety the use of psychological tests in the determination of sexual and gender identity.

3.3. Witness statements

While there are no explicit provisions that define the use of witness statements in SOGI related asylum cases, there is no reason why such evidence cannot be taken into account when considering all facts and circumstances under Art 4 of the Qualification Directive¹¹¹. The witnesses' statements and declarations at hand can be made by LGBTIQIA+ organisations, social workers, former or current partners, and others. However, such evidence should focus on whether the asylum seeker has a 'well-founded fear of being persecuted on account of an actual or perceived membership of a particular social group' and should be evaluated in the wider context of the case.¹¹² Meaning that, witness statements can be used for both the assessment of SOGI and fear of persecution, but authorities should be careful when using witnesses to determine someone's SOGI as not everyone perceives sexual or gender identity in the same manner.¹¹³

3.4. The DSSH model

While the previous parts of this chapter focused on methods or aspects of certain methods that can harm SOGI applicants, this sub-chapter will focus on a relatively newer model for assessing SOGI claims. The Difference, Stigma, Shame, and Harm Model (hereafter DSSH Model) starts with the 'basic characteristics or elements that are likely to be common' to all queer refugees.¹¹⁴ The model was developed in 2011 and seeks to help interviewers and decision makers in asylum cases 'move away from sexually explicit or

¹⁰⁸ Projective test is a 'loosely structured psychological test containing many ambiguous stimuli that require the subject to reveal feelings, personality, or psychopathology in response to them', see <https://medical-dictionary.thefreedictionary.com/Projective+personality+test>

¹⁰⁹ See Federico Ferri, 'Assessing Credibility of Asylum Seekers' Statements on Sexual Orientation: Lights and Shadows of the *F* Judgment' [2018] vol 3 (2), 875-884 European Papers <<https://www.europeanpapers.eu/en/europeanforum/assessing-credibility-of-asylum-seekers-statements-on-sexual-orientation>> p879.

¹¹⁰ Judgement in *F v Bevdorlasi es Allampolgarsagi Hivatal*, C-473/16, EU:C:2018:36, para 69

¹¹¹ Qualification Directive, art 4.

¹¹² Jansen and Spijkerboer (n 49) p54.

¹¹³ *ibid.*

¹¹⁴ Credibility Assessment Manual (n 12) p77.

inappropriate questions by focusing on the narrative of difference in the lived experience of asylum seekers'.¹¹⁵ The DSSH model has been endorsed by the UNHCR and used in countries such as the United Kingdom, New Zealand, Sweden, Germany, Finland, and Cyprus.¹¹⁶

The DSSH model starts with the idea that LGBTI people discover they are different compared to the rest of their heteronormative environment.¹¹⁷ In other words, they recognise a 'difference' that sets them apart. After having identified the 'difference', the DSSH Model assumes that the next step is the recognition and experience of stigma.¹¹⁸ This includes the realisation that close family members, friends and community disapprove of LGBTI conduct or identity, or the recognition of 'state, cultural and religious mores or laws' directed towards queer people.¹¹⁹ With stigma usually arrives shame. Shame usually presents itself as internalised oppression,¹²⁰ which can manifest itself in varying ways such as self-disgust and self-hatred. 'Difference, stigma and shame exist in the majority of narratives' of queer people, even in countries where there is no risk of persecution. However, what sets a refugee apart is the harm or the fear of suffering the same because of their SOGI.¹²¹ As previously explained, harm can come from various types of actors, including State actors, non-State actors and family. The model is, therefore, intended to 'operate as a set of conversation "triggers" to enable a detailed narrative [...] on the experiences surrounding [SOGI] claims within a detailed statement and/or interview'.¹²² With this in mind, the DSSH model proposes that the first question posed to SOGI asylum seekers should be 'when did you start feeling different'.¹²³ The following questions should address the feelings of stigma, shame and harm central to the asylum claim.¹²⁴

Even though this model proves to be a step in the right direction, it should be noted that there is no 'single way of recognising and acting upon sexual or gender

¹¹⁵ Jasmine Dawson and Paula Gerber, 'Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?' [2017] vol 29 (2), 292-322 International Journal of Refugee Law <<https://academic.oup.com/ijrl/article-abstract/29/2/292/4034811>> p293.

¹¹⁶ *ibid*, p294.

¹¹⁷ Credibility Assessment Manual (n 12) p77.

¹¹⁸ *ibid*, p80.

¹¹⁹ 'Module 02 – conducting interviews' (Free & Equal UN)

¹²⁰ 'Internalised Homophobia' (*Rainbow Project*) <<https://www.rainbow-project.org/internalised-homophobia/>>

¹²¹ Credibility Assessment Manual (n 12) p83.

¹²² Dawson and Gerber (n 115) p301.

¹²³ *ibid* and 'Module 02 – conducting interviews' (n 119)

¹²⁴ Dawson and Gerber (n 115) p301.

identity'.¹²⁵ Considering that neither sexuality nor gender identity is a straight line, decision makers and interviewers should not expect a universal experience, reaction or feelings regarding SOGI. Thus, we should not expect that a 'Western, white, middle-class gay men's experience of sexual identity formation' is the 'right' and universal one.¹²⁶

4. SOGI CASES IN CROATIA

In this chapter, I will conduct a qualitative overview of 30 cases related to SOGI asylum claims in Croatia. This paper will only focus on the decisions made by second and third instance courts. With Croatia being considered a transit country, it does not get a considerable amount of asylum applications, especially SOGI based asylum applications. According to the Ministry of Interior, in the year 2021, only 3,039 people applied for asylum.¹²⁷ Additionally, in the first three months of 2022, only a little over one thousand people applied.¹²⁸ Considering that even a smaller number of cases reach second and third instance courts, it is clear that the number of SOGI cases is limited. Even so, the author finds that an overview of Croatia's SOGI cases is needed due to the invisibility of such claims across all of the EU and especially in the eastern parts of the Union.

The procedure for granting international protection in Croatia is 'an administrative procedure' that falls under the responsibility of the Ministry of Interior.¹²⁹ If the Ministry of Interior rejects an asylum application, the asylum applicant can file a lawsuit before an administrative court.¹³⁰ Further along the process, an asylum seeker can lodge an appeal before the High Administrative Court. Moreover, it is also possible to lodge a complaint before the Constitutional Court in cases where the applicant claims a violation of a right guaranteed by the Croatian Constitution.¹³¹ Therefore, this paper will only focus on the administrative courts and the High Administrative Court where the asylum applicants lodged a lawsuit after the Ministry of Interior rejected their applications.

¹²⁵ *ibid*, p303.

¹²⁶ *ibid*, p305.

¹²⁷ 'Statistical indicators of persons granted international protection in the Republic of Croatia until 31.03.2022' (*Ministry of Interior*) <<https://mup.gov.hr/UserDocsImages/statistika/2022/Statisticki-pokazatelj-trazilja-medjunarodne-zastite-do-31-03-2022.pdf>>

¹²⁸ *ibid*.

¹²⁹ 'Short overview of the asylum procedure – Croatia' (*AIDA*, 22 April 2022) <<https://asylumineurope.org/reports/country/croatia/asylum-procedure/general/short-overview-asylum-procedure/>> accessed 3 June 2022

¹³⁰ Law on International and Temporary Protection (NN 127/17) art 51.

¹³¹ 'Short overview of the asylum procedure – Croatia' (n 129)

Out of 30 cases, 1 was decided by the Administrative Court in Rijeka, 24 by the Administrative Court in Zagreb and 5 by the High Administrative Court. No cases were found where the decisions were brought by the Administrative Court in Split or the Administrative Court in Osijek. Twenty-nine of the claims before the second and third instances were rejected and only two were upheld. As to the citizenship of the asylum seekers, 6 were from Nigeria, 5 from Algeria, 3 from the Russian Federation, 2 from Bangladesh, 2 from the Republic of Turkiye and 2 from Senegal. The rest of the 11 applicants came from Ghana, Iraq, Azerbaijan, Sierra Leone, Latvia, Cuba, Iran, Uganda, Zimbabwe and Morocco.

All but one decision was made in the period from 2012 to 2021, with only one made in 2008. Furthermore, 24 of the applicants claimed they were gay, three men claimed they were bisexual, one woman identified as a lesbian, and one case involved a trans woman. Additionally, there was only one case where the applicant claimed that he was allegedly persecuted, among other reasons, for being part of a specific social group (LGBTI community).¹³²

Regarding the methods used to assess the credibility of the asylum seekers, even if the cases do not go into detail on them, it can be seen that both the courts and the Ministry of Interior base their decisions on statements given by applicants and files collected by the Ministry of Interior regarding the country of origin. Applicants are allowed to propose additional evidence, such as medical proof of any alleged attack or witness statements. In the case of an Iraqi man, the questions posed were limited to his experience with persecution by the hands of his former partner's family and information about his current and past partners (e.g. couple photographs, names).¹³³ Moreover, it was interesting to note that in the two cases where the applicants had been married previously with children, the national authorities did not use this fact to disprove their SOGI claim.¹³⁴

Furthermore, regarding medical examinations, no treatments were conducted in any of the 30 cases. Only in the case of a lesbian woman from Sierra Leone,¹³⁵ did the applicant express the wish for a medical exam that would prove inflicted wounds that were given to her by her father after her SO was disclosed. Thus, the author concludes

¹³² Case 9 UsI-418/19-9, Administrative Court in Zagreb, p2.

¹³³ Case UsI-2930/17-7, Administrative Court in Zagreb, p2-3.

¹³⁴ Case UsI-3043/14-15, Administrative Court in Zagreb and Case UsI-1980/17-7, Administrative Court in Zagreb p2.

¹³⁵ Case UsI-1624/20-11, Administrative Court in Zagreb, p2.

that Croatia's authorities do not use explicitly forbidden and/or rejected methods, such as questions of sexual practices or psychological tests.

While the overall analysis did show that Croatia does not use forbidden methods that could have been seen in other countries,¹³⁶ individual cases did show inconsistent practices that can harm SOGI applicants.

In the case of an alleged bisexual man from Ghana,¹³⁷ the applicant only applied for asylum on the ground of SOGI after spending 10 years in the EU. While his overall statement seemed inconsistent and while the author does not dispute the rejection of his application, the Administrative Court used his religion as one of the arguments against his claim. According to the applicant's statement, at the time of the decision, he was a practicing Muslim who believed that LGBTI individuals had no place in Islam. Hence, the Ministry of Interior concluded that his statements were inconclusive. However, in an earlier case, a gay man from Bangladesh stated that he considered himself Muslim but that his religion and sexual orientation were two separate things, which the Administrative Court accepted. With different communities having different interpretations regarding SOGI and religion, it is expected that queer individuals would face shame and conflicting feelings as to their SOGI if their religious communities did not accept non-heteronormative characteristics. Therefore, in the author's opinion, religion, regardless of the applicant's belief, should not be relevant to a person's sexual orientation nor to their asylum application in SOGI cases.

Further inconsistencies were found in a case from 2017 of a gay man from Nigeria.¹³⁸ The Ministry of Interior stated in their response to the lawsuit that the situation in Nigeria would not endanger the asylum seeker's life or liberties. Such a statement is contradictory to previous a case that acknowledged Nigeria's stance on LGBTI individuals.¹³⁹ Specifically, queer individuals are 'frequently subject to arrest, individual or en masse, often accompanied by police violence and brutality'.¹⁴⁰ Furthermore, in the same case, the fact that the applicant disclosed his sexual orientation in Croatia, and not in Greece where he was located before that, was seen in a negative light. While the CJEU, in 2014, found that decision makers should not consider an applicant unreliable simply

¹³⁶ See for example Sophia Zisakou, 'Credibility Assessment in Asylum Claims Based on Sexual Orientation by the Greek Asylum Service: A Deep-Rooted Culture of Disbelief' [2020] *Frontiers in Human Dynamics* <<https://www.frontiersin.org/articles/10.3389/fhumd.2021.693308/full>>

¹³⁷ Case UsI-4531/18-9, Administrative Court in Zagreb.

¹³⁸ Case Usz-1258/17-2, High Administrative Court.

¹³⁹ Case UsI-2882/16-10, Administrative Court in Zagreb, p7.

¹⁴⁰ 'Nigeria' (*Human Dignity Trust*) <<https://www.humandignitytrust.org/country-profile/nigeria/>>

because of late disclosure, the author argues that this interpretation of late disclosures is not sufficient as the reasons why the applicant did not disclose his SOGI should be considered. It should be taken into account that SOGI asylum seekers might find it hard to talk about such intimate parts of their lives to complete strangers. Additionally, they might fear to disclose such information or even suffer from internalised homophobia or transphobia.¹⁴¹ A similar circumstance can be seen in another case of a gay man from Nigeria in which he stated that he feels, at the time, like he might be gay (while with a man), but that that is something he does not want to be and that he wants to change.¹⁴² Moreover, he did not disclose his sexuality while in Greece, but only later on when he requested asylum in Croatia.¹⁴³ The stated facts were seen as unreliable and, according to both the Ministry of Interior and the Administrative Court in Zagreb, further proved that he was not gay.

Concerning the relevant information of the country of origin, in the cases of three Algerian men, the Ministry of Interior responded to their lawsuits saying that the applicants were given the opportunity to present contrary evidence that Algeria was not a safe country for them.¹⁴⁴ Since 2016, Croatia has considered Algeria a safe third country.¹⁴⁵ However, it should be considered that Algeria criminalises same-sex relationship and enforces such provisions.¹⁴⁶ According to the Humanity Dignity Trust, there have been consistent reports ‘of discrimination and violence committed against LGBT people’, which includes the denial of basic rights, services and murder.¹⁴⁷ Therefore, Algeria should not be deemed as a safe-third country for queer individuals or individuals deemed queer.

When assessing country of origin information, MS authorities take into consideration the state of different parts of the asylum seekers country, as discussed in Chapter 1. Such practice can also be seen in the case of a gay men from Senegal,¹⁴⁸ where both the Ministry of Interior and later the Administrative Court stated that the applicant lived in a major city in Senegal unharmed for two years after leaving his hometown due

¹⁴¹ Jansen and Spijkerboer (n 49) p67.

¹⁴² Case UsI-642/16-11, Administrative Court in Zagreb p4.

¹⁴³ *ibid.*

¹⁴⁴ Case UsI-1031/19-9, Administrative Court in Zagreb p2, Case UsI-1031/19-4, Administrative Court in Zagreb p1 and Case UsI-743/17-8, Administrative Court in Zagreb p2.

¹⁴⁵ ‘Odluka o listi sigurnih zemalja podrijetla u postupku odobrenja međunarodnje zaštite’ [2016] Ministry of Interior (NN 45/2016-1166)

¹⁴⁶ ‘Algeria’ (*Human Dignity Trust*) <<https://www.humandignitytrust.org/country-profile/algeria/>> accessed 16 June 2022

¹⁴⁷ *ibid.*

¹⁴⁸ Case UsI-3256/16-7, Administrative Court in Zagreb, p3.

to prosecution on the grounds of his SO. Considering that both bodies acknowledged that the applicant could live safely in another part of his country, we can assume that internal protection in the country of origin in the form of relocation was considered in this case, which as previously stated is allowed under the Qualification Directive.¹⁴⁹

Out of 30 cases only two actions were upheld, after which the applicants received asylum in Croatia. The cases at hand concern two gay men from Bangladesh who came to Croatia together after fleeing persecution for their relationship. Both of their cases were rejected in the first instance proceedings before the Ministry of Interior due to ‘general unreliability’.¹⁵⁰ However in the second instance proceedings before the Administrative Court, both of their appeals were accepted, with the Administrative Court stating that the statement given by one of the men was ‘clear, logical, life-convincing and credible’,¹⁵¹ contrary to what the Ministry of Interior concluded. When asked why his first statement did not include an incident where the couple was followed and beaten, the first man stated that due to high emotions, he was scared and embarrassed of such accidents happening in his home country.¹⁵² While it is not known from the facts of the cases what were the circumstances relating to the first instance interviews, this reaction, the author believes, is quite expected and justified due to the traumatic experience that SOGI applicants go through in their country of origin. Beside the given statements, it is clear from both cases that the applicants had strong supporting documents and evidence. Both applicants had medical proof of treatments conducted after the above-mentioned attack and witness statements from back home that proved their sexual orientation and the attack. Such documentation and evidence are not easy to acquire in SOGI cases considering, in this specific case, that Bangladesh criminalises homosexuality with 10 years of prison because of which not many people will feel safe to get medical treatment after psychological attacks motivated by hate-crimes nor would people from their community willingly offer aid in the form of witness statements due to the view on homosexuality.

Lastly, as to the asylum claims based on gender identity, the author was only able to come across one case in which a trans woman from Cuba was seeking asylum. Although her case did not present any legal shortcomings, it should be noted that the authorities at hand, the Ministry of Interior and the Administrative Court in Zagreb, were

¹⁴⁹ Qualification Directive, art 8(2).

¹⁵⁰ Case UsI-266/18-8, Administrative Court in Zagreb p1 and Case UsI-265/18-8, Administrative Court in Zagreb p2.

¹⁵¹ Case UsI-266/18-8, Administrative Court in Zagreb p2.

¹⁵² *ibid.*

using he/him pronouns and not she/her or they/them, which are most commonly used with trans women.¹⁵³

4.1. Concluding remarks

While the number of SOGI cases examined is limited, out of the ones available, it can be argued that Croatia has an adequate practice of methodologies¹⁵⁴ used when addressing the credibility of SOGI claims, with some drawbacks. This MS still encounters many of the same issues found in SOGI cases in other European countries. Late disclosures, assumed knowledge and behaviour, lack of evidence are just some of the issues that arise in SOGI cases. As one of the biggest issues in such cases, based on the analysis of Croatia's cases, is the credibility of the statements given by the applicants. The majority of the cases that were rejected were rejected due to the unreliability of their claims. Considering the sensitivity of these cases, it becomes increasingly difficult to differentiate genuine claims, where the applicant is having difficulty talking about his SOGI, and claims that are based on wrong pretences. While it is impossible to know which of those rejected cases were genuine and which were not, we know with certainty that at least one of the claims was based on false information and was therefore rightfully rejected. Specifically, an Iraqi man that applied for asylum, due to his alleged homosexuality, later on withdrew his statement and admitted to it being false.¹⁵⁵ Due to disingenuous SOGI claims, a reasonable precaution appears amongst decision makers in the asylum process. Since SOGI and its persecution are predominantly private matters, they assessment relies on statements. Thus, decision makers expect consistency and realibility in those statements. However, such precautions can ultimately end up harming SOGI applicants that are queer and that do fear persecution but are found not credible due to a difficulty recounting and disclosing details about their SOGI and persecution.

5. INTERVIEWS

In Croatia, with the overall lack of asylum applications, compared to other MSs, SOGI asylum applicants are practically invisible. As seen in Chapter 3, there are not a

¹⁵³ 'Use of pronouns' (*Scottish Trans*) <<https://www.scottishtrans.org/trans-equality/use-of-pronouns/>> accessed 20 June 2022

¹⁵⁴ The methodologies in question are: statements given by asylum seekers and information on the country of origin.

¹⁵⁵ Case UsI-1980/17-7, Administrative Court in Zagreb, p2.

significant number of SOGI cases that go before Croatian courts. Hence why, research on asylum seekers does not focus on SOGI applicants.

Considering that the aim of this paper is to increase the visibility of queer asylum seekers in Croatia, the author of this paper finds it necessary to not only look into cases of such applicants but also to conduct and present interviews with different actors that had different experiences with asylum seekers, specifically SOGI seekers.

For the interviews, a semi-structured interview method was used, where the interviewees were asked to provide answers to pre-set open-ended questions. The interviews were conducted with a judge from the High Administrative Court, judge Lidija Prca from the Administrative Court in Zagreb and LGBTQIA+ rights activist, Daniel Martinović.

5.1. Judge from the High Administrative Court

The Judge¹⁵⁶ interviewed from the High Administrative Court was selected as the first interview due to their years-spanning experience working in administrative courts and especially the last instance in asylum cases, the High Administrative Court. While visiting the judge on two separate occasions, they were able to fill in the gaps that could not be seen by only reading the cases presented in Chapter 3. The author, at the time, found that a major issue with the said cases, was their lack of detail of the methods used, which, when explained, was due to the fact that the decisions, given by either the administrative courts or the High Administrative Court, were based research conducted by the Ministry of Interior on individual cases. The Judge believed that the Ministry of Interior was doing well in its role, that the decisions makers were professionally trained and equipped which is why the administrative courts felt comfortable to rely on their research. Additionally, the author was told that the sources used by the Ministry of Interior and the ones used by administrative courts are identical. Due to such circumstances, administrative courts rarely engage in examining allegations on their own. Hence, only if the statements of the parties indicate the need for further examinations will the administrative courts have the obligations to establish the relevant facts. In other words, the administrative courts do not conduct this procedure *ex officio* due to the administrative law of Croatia that puts the burden of proof on the plaintiff.

¹⁵⁶ In this interview, conducted on 2 June 2022, the author will use they/them pronouns for the Judge when expressing their opinion and experiences, as the interviewee wanted to remain anonymous.

While the Judge could not say with certainty about the specific training the officials of the Ministry of Interior undergo, they believed, based on their experience with the Ministry and its files on individual cases, that the Ministry is specially trained in handling such delicate cases. Regarding the expertise of the judges that decide in SOGI cases, the Judge explained how judges participate in various lectures and workshops that specifically train them on international protection issues. These workshops are conducted by experts in this field and professors from various universities. Moreover, judges in the High Administrative Court who decide these cases are specialised judges who understand the severity and sensitivity of such cases.

Furthermore, the Judge believes that the EU institutions provide good support in asylum cases, but also in other cases in Croatia. They stated that the European Judicial Training Network contributes a lot to the education of asylum judges.¹⁵⁷ The Judge then gave an example of how judges from many EU countries participate in this programme, by sharing their experiences, which significantly contributes to the knowledge of domestic judges in asylum cases.

Regarding the specific work and methods used in SOGI cases, according to the interviewee, administrative courts use experts only to determine the age of the applicant and whether the applicant has gone through sexual harassment or abuse. Additionally, it was pointed out that Croatia did not use medical or psychological experts in the case of SOGI asylum applicant to determine their sexual orientation or gender identity. When examining SOGI cases, Croatian authorities mostly rely on information on the country of origin and the statements given by the applicant. The Judge explained how information on the country of origin is obtained from official websites and documentation of organisations, such as UNHCR. In addition, according to their current knowledge, Croatian authorities have not so far used experts to examine the situation in the country of origin. Consequently, when examining whether an asylum seeker has justified fear of returning to their home country, judges start with information on the country of origin, after which they take into consideration the position that queer individuals have in that environment. Therefore, as previously stated, Croatia does not use forbidden methods to determine the credibility of SOGI asylum seekers. However, the Judge believes that, as the CJEU case-law has expanded in this area so has the knowledge of domestic judges.

¹⁵⁷ The EJTN is the principal platform and promoter for the training and exchange of knowledge of the European Judiciary. For more information see: 'EJTN' (*EJTN*) < <https://www.ejtn.eu/en/> > accessed 2 June 2022

Domestic judges have taken CJEU judgments and practices of other countries as an orientation as to which methods would be as effective without putting asylum seekers through degrading treatments and at the same time, respecting their integrity.

Lastly, as to the biggest issue that administrative courts face when deciding on SOGI cases, it was stated that a great responsibility rests with domestic judges, especially considering that they apply both EU law and domestic law. Namely, judges evaluate the conditions of both the country of origin and the first country of entry on the basis of the Dublin regulation.¹⁵⁸ This includes determining the conditions of accommodation, assessing the situation in these countries and others. It is also important to note that judges must constantly know the most up-to-date information that are relevant to these cases, which can prove demanding, especially as the situation in each country changes from day to day. Furthermore, the Judge argues that judges have a responsibility to resolve a certain number of cases per month and if they go below this norm they can be disciplined. This particularly affects demanding cases that can take a long time.

5.2. Judge Lidija Prica from the Administrative Court in Zagreb

In contrast to the High Administrative Court, Judge Prica¹⁵⁹ explained, that asylum procedures are considered urgent and that is why they go to every judge, meaning there is no specialisation in asylum cases at the Administrative Court in Zagreb. Any specialisation is a personal choice. Judge Prica points out that judges do not prefer asylum procedures due to their difficult nature. Moreover, as was stated by the Judge from the High Administrative Court, judges have monthly quota to fulfil. Specifically, they have to write 25 decisions, and as asylum cases tend to be more complex and time consuming, judges do not like to work on them.

Concerning the process of SOGI asylum cases before the Administrative Court in Zagreb, Judge Prica stated that, since the administrative courts only concern themselves with what is disputed in the first instance, they mostly deal with credibility of the applicant's statement regarding his fear of persecution. With this, Judge Prica states that they do not question whether the asylum seeker is a member of the LGBT community. She even states that the Ministry of Interior usually does not dispute their claim

¹⁵⁸ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180

¹⁵⁹ The interview was conducted on 14 June 2022.

concerning their SOGI, but about the fear of persecution. Therefore, SOGI asylum seekers are questioned about their statements, especially in the parts where it is considered unreliable or inconsistent. When it comes to such questioning, Judge Prica notes how asylum seekers usually state that there was a misunderstanding or a translation error during the first interview.

As was the opinion of the Judge from the High Administrative Court, Judge Prica also states that neither the Ministry nor the administrative courts use any other methods except statements made by applicants and information on the country of origin. Given that in Croatia the parties propose certain evidence, if they have not proposed it, it will not even be considered. Nevertheless, Judge Prica states that the parties in most cases do not even have concrete evidence other than their statement.

When determining the fear of persecution, judges usually rely on previous criminal persecution of asylum seekers or medical records. However, according to Judge Prica, such cases do not reach administrative courts because they would already be granted asylum in the first instance. Therefore, before administrative courts usually come cases where the credibility of the statements needs to be determined. During this assessment, it is not enough that in the country of origin exists a law that persecutes LGBTI+ individuals; the enforcement is also needed to indicate that such provisions are being used. Therefore, the frequency and systematic enforcement of laws that persecute LGBTI individuals are taken into account.

While discussing the problems that arise in SOGI cases, Judge Prica stated that she believes that the problem with asylum seekers is that, in the second instance procedure, they are not always ready to provide all the information, where judges have to extract information out of them, which indicates that their statement is unreliable and inconsistent. According to Judge Prica, this problem occurs across all parts of international protection, and not just in SOGI cases.

When it comes to the problems that arise with judges, Judge Prica notes how the further education of judges is a big problem. As training is on a voluntary basis and due to a lack of time, judges are not always willing to attend them. Judge Prica states that she knows from personal experience that these workshops would significantly contribute to judges and contribute to a quicker resolution of asylum cases. Therefore, basic education on asylum issues should be mandatory.

5.3. LGBTQIA+ rights activist Daniel Martinović

Daniel Martinović,¹⁶⁰ an activist with a long history of work with LGBTQIA+ individuals, was a project coordinator at Zagreb Pride in 2013/2014,¹⁶¹ when the Centre for Peace Studies contacted Zagreb Pride with the possibility of aiding a young man from Nigeria who was seeking asylum based on his SOGI. As Zagreb Pride had experience with a similar case before hand,¹⁶² they were able to help. After Zagreb Pride accepted to aid the young man from Nigeria, Daniel was given power of attorney. Although the boy had already had several interviews with the Ministry of Interior, the procedure was not completely clear to him. The young man considered that the Ministry's officials were fair. However, previous experience did show that the Ministry of Interior treated asylum seekers more fairly if they had a person accompany them to the interviews. Additionally, the applicants themselves may feel more comfortable if someone else was with them.

During the process, the Ministry's officers focused solely on the young man's statements and information on the country of origin. After one of the interviews, Daniel remembered that the officer told him how the most important thing to them was that his story was consistent. Because of this, the young man was questioned about his background and his life in Nigeria. He had fled Nigeria due to the fear that his community would kill him because of his sexual orientation, as another boy was killed for the same reason.

While the Ministry of Interior did not ask why he did not move to another part of Nigeria or why he did not seek help from the State first, the boy shared that the local police do not interfere with the decisions made by local communities. Thus, if he had contacted the police, he would have been returned to his community.

Furthermore, Daniel stated that due to previous workshops in which they participated, they did not expect much from the police when working with asylum seekers. However, the two female officer's that worked on the case, who although completely professional, showed compassion towards the boy. They also stated that the officers did not use any stereotypes when questioning the young man. Daniel believes that officers are mostly divided according to their experience and knowledge of certain

¹⁶⁰ In this interview, conducted on 14 June 2022, the author will use they/them pronouns for Daniel when expressing their opinion and experiences.

¹⁶¹ For more information on Zagreb Pride see: 'Zagreb Pride' (*Zagreb Pride*) <<https://zagreb-pride.net/en/zagreb-pride-en/>>

¹⁶² See: 'Spašen od doživotne robije - Mladiću iz Ugande prvi politički azil u Hrvatskoj jer je gay' (*Jutarnji List*, 19 March 2014) <<https://www.jutarnji.hr/vijesti/hrvatska/spasen-od-doživotne-robije-mladicu-iz-ugande-prvi-politicki-azil-u-hrvatskoj-je-je-gay-876085>> accessed 19 June 2022

topics during their work. Although they have no knowledge on the current situation with SOGI asylum claims, as they do not work in this area anymore, they believe that the political climate at the time, which was much more liberal, could have influenced the approach taken by the Ministry of Interior's officers. At the time, a judgment of the ECtHR, where Croatia excluded all same-sex couples from the possibility of obtaining family reunification, was issued in which Croatia lost,¹⁶³ and the Same-Sex Partnership Act was entering into force, which all pointed to a much more open climate.

As for Daniel's opinion on any possible abuses that might have happened after the two successful cases of SOGI asylum claims, Daniel stated that both of the young men reported that asylum seekers in reception centres believed that asylum was easier to gain on the grounds of SOGI, especially after they saw how fast those two cases were decided. It is possible that there were attempts of abuse, but they do not know of them, as they do not work in this specific field anymore. However, Daniel stated that after the cases of the two young men from Nigeria and Uganda, a man came claiming that he was also persecuted on grounds of his sexual orientation. However, the Ministry's officers quickly rejected his applications because the man had changed his story multiple times. The first time he stated that he was persecuted due to his religion, the second time due him belonging to another tribe and the last time due to him being gay. Afterwards, the man added Daniel on Facebook, where they saw pictures of his with his female partners, which means that the man either was not aware of the term 'bisexual' or he was actually lying to get asylum.

5.4. Interview analysis

Following the interview with Judge Prica and the High Administrative Court's Judge, the author concluded that the interviewees share many views on the issue of asylum and SOGI asylum cases. Even though they work in two separate courts both face many of the same problems. Compared to the High Administrative Court, the Administrative Court in Zagreb does not have a division of work. Thus, every judge works on and decides on asylum cases. Although this lack of division has its drawbacks, it seems to be the only possibility for Croatian courts. Unlike other MSs, Croatia's courts do not have many asylum cases that come before them. Therefore, there lacks a need for a

¹⁶³ 'ECTHR: Same-sex couples must be equally eligible for family-based migration' (*International Justice Resource Center*, 8 March 2016) <<https://ijrcenter.org/2016/03/08/ecthr-same-sex-couples-must-be-equally-eligible-for-family-based-migration/>> accessed 19 June 2022

specialised court that decides on asylum cases, which some MS do have,¹⁶⁴ or specialised judges that only decide on asylum cases. This can result in a lack of specialisation as judges decide on any matters for which their court has jurisdiction. This can especially be seen in Croatia where judges do not have the incentive to specialise in asylum cases. Even though many judges, as pointed out by the interviewees, advance their knowledge on asylum issues, there are still crucial problems that further disincentive judges. The quota system that requires judges to write 25 decisions per month is especially troublesome for asylum cases. When this factor is combined with the expectation of judges to act as psychologists, social workers, geopoliticians and judges in one, it is clear why judges would rather avoid such cases. Thus, judges have no incentive to either work on asylum cases or further specialise in international protection issues. This problem, it seems, can only be solved by adjusting the quota system to better suit cases which are more demanding than others. More precisely, if quotas were to be adjusted depending on the issue of the case, judges would have more incentive to work on such cases and specialise in them.

From the interview conducted with Daniel, the author will like to underline one main point. As pointed out in the interview with Daniel as well as the other two interviews, consistent retellings and statements are elements that play a decisive role in the asylum process. Considering the lack of other evidence in most asylum applications, it is evident why authorities rely on statements. However, it is also easy to understand the problem that arises with this method, factors such as stress and inexperience with asylum procedures can lead to inconsistent retellings of accounts, which result in the rejection of asylum applications.¹⁶⁵ Therefore, the author emphasises the importance of persons accompanying asylum applicants to interviews. Specifically, individuals who have experience and/or knowledge of the asylum process and therefore can help the seeker during this process. Moreover, the presence of these individuals can give additional security as they can prevent the use of any forbidden methods and questionings.

Even though the problems mentioned in this analysis do not solely relate to SOGI asylum seekers, they are still important issues that any asylum seeker can face if seeking asylum in Croatia. Therefore, their eradication would benefit SOGI asylum seekers but also all other asylum seekers.

¹⁶⁴ For example the French National Court of Asylum, see ‘Cour Nationale du Droit d’Asile’ (*CNDA*) <<http://www.cnda.fr>> accessed 28 June 2022.

¹⁶⁵ Noll (n 76) p608.

6. CONCLUSION

Queer migration is not a new concept.¹⁶⁶ Fleeing oppressive communities, cultural standards, persecution and/or social ostracisation is not a new phenomenon amongst queer people. Escaping to a bigger city or even a new country in order to live as oneself is, unfortunately, a big part of many queer peoples' identities. However, for some, it is only called free movement (internal or external), while others face many obstacles, such as 'legal restrictions, homophobic immigration policies, cultural barriers, racial and anti-LGBT discrimination' to reach a safer environment.¹⁶⁷ And for many of those fleeing, the EU is seen as a safe and final destination.

With a rise in migration across Europe, it is safe to assume that the inflow of queer refugees does as well. Thus, explicit recognition by MS of SOGI in asylum law¹⁶⁸ seems to be enough. While other elements need to be included and implemented in the SOGI asylum process, the first step in raising the visibility of SOGI refugees needs to be the collection of data. The existence of data on certain groups of refugees and migrants raises the recognition of those groups in migration policies and research. This idea applies to SOGI refugees whose existence is not acknowledged by data in almost any MSs.

By collecting official data in every MS and therefore having an exact number of SOGI refugees, the EU and national bodies will be more motivated to focus policies and research on issues that are specifically faced by SOGI asylum seekers and refugees.

In this thesis, the author focused on Croatia and its practices in the credibility assessment of SOGI asylum seekers, and in that research, the author came to the conclusion that Croatia only uses two types of methods in the assessment process. These two methods are; interviewing the asylum seeker and relying on the information on the country of origin. Any additional methods, such as medical proof, or witness statements can be used in the process, but it falls on the applicant to request it. Nonetheless, it should be noted that relevant documentation is often sparse, hence decision-makers heavily focus on the credibility of the statements given. Consequently, none of these methods has been directly flagged as dangerous, however, some inconsistencies can be found in SOGI

¹⁶⁶ Ahmed Elmi, 'LGBT refugees are part of a long history of queer migration – and they need our support' (*IMIX*, 21 February 2022) <<https://imix.org.uk/lgbt-refugees-are-part-of-a-long-history-of-queer-migration-and-they-need-our-support/?cn-reloaded=1>>

¹⁶⁷ *ibid.*

¹⁶⁸ 'Open minds are needed to improve the protection of LGBTI asylum seekers in Europe' (*Commissioner for Human Rights*, 11 October 2018) <<https://www.coe.int/en/web/commissioner/-/open-minds-are-needed-to-improve-the-protection-of-lgbti-asylum-seekers-in-europe>> accessed 28 June 2022.

cases. Considering that Croatia uses statements and country of origin information as central sources in most asylum cases, it seems that there is no difference in the assessment of the credibility of SOGI claims and other asylum claims. Therefore, it is hard to examine if the credibility of SOGI applications can be deemed harder to prove than other asylum claims. Thus, the first hypothesis, which was whether it is more difficult to conduct assessments of credibility in SOGI cases compared to other asylum cases, while not disproven, cannot be proven in this thesis.

Regarding the second research question, which is whether the methods used by the Croatian justice system are adequate and suitable, the author found that late disclosure, assumed knowledge and behaviour are among the issues that arise in the analysed cases. These issues are not uncommon to SOGI asylum applications, therefore it is not surprising that Croatia faces the same problems as other countries when assessing the credibility of SOGI applications. The author believes that to avoid these factors, more attention should be given to SOGI cases, and such can be accomplished by encouraging decision-makers to further specialise in SOGI-related issues. As was addressed in this thesis, SOGI-related issues are specific to them due to the private nature of both the asylum ground and the persecution. Therefore, decision-makers should be aware of the cultural aspects behind queer identities, the difference in experience between different sexual and gender identities, as well as the existence of other variables (e.g. gender, race, class) that play a role in the outcome of asylum cases.

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All errors remain mine.

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10. APPENDIX

I. Interview with the Judge from the High Administrative Court

1. Da li suci na Upravnom sudu/Visokom upravnom sudu provode vlastita ispitivanja kredibiliteta tvrdnje tražitelja azila ili se pouzdaju na ona koje provodi MUP u prvostupanjskom postupku?

Odluke suda se baziraju na postupcima i istraživanjima koje provodi MUP. Sutkinja vjeruje da MUP dobro odradi svoju ulogu te su osobe koje provode ispitivanja kredibiliteta stručno opremljene i obučene. Također tvrdi da su metode koje bi koristio MUP te metode koje bi koristio sud identične. Sutkinja navodi da se sud rijetko sam upušta u ispitivanju tvrdnji. Slučaj u kojem sud sam provodi postupak ispitivanja je ako navodi stranaka zahtijevaju daljnje ispitivanje nakon čega sud ima obavezu sam utvrditi relevantne činjenice. Naglašava da sud ne provodi ovaj postupak *ex officio* jer zakoni koji uređuju upravni postupak u RH teret dokaza stavljaju na tražitelja azila. Posljedično, suci posredno utvrđuju činjenice, tj. istinitost činjenica utvrđenih u prvostupanjskom postupku.

2. Tko provodi te postupke ispitivanja? Da li osobe koje provode takva ispitivanja posjeduju određeno stručno znanje?

Iako sutkinja nema u potpunosti saznanja o konkretnim obukama koje prolaze djelatnici MUP -a, navodi da na temelju svog iskustva s MUP-om i spisima MUP-a o pojedinim slučajevima, zaključila da je MUP posebno obučen za takve slučajeve.

Vežano uz suce koji odlučuju o odobravanju SORI aplikacija za azil, Sutkinja je objasnila kako suci sudjeluju na različitim predavanjima i radionicama koje ih posebno obučavaju o različitim aspektima međunarodne zaštite. Navedene radionice provode stručnjaci u ovom području te profesori s različitih priznatih fakulteta. Posljedično, suci koji odlučuju u ovim slučajevima posebno su obučeni i razumiju osjetljivost SORI slučajeva.

3. Da li sud koristi određene stručnjake u postupku? Ako da tko su oni tj. u kojem su zvanju? (sudski vještaci, osobe izvan sudskog sustava)

Sudovi u RH, prema znanju sutkinje, koriste vještake jedino kako bi utvrdili dob tražitelja te da li je tražitelj prošao kroz spolno uznemiravanje ili oblik zlostavljanja. Sutkinja ističe kako Hrvatska ne koristi medicinske ili psihološke vještake u ovakvim slučajevima.

4. Koje metode ispitivanja kredibiliteta koriste sudovi/MUP? Kako utvrđuju 'strah od progona' tj. povratka u matičnu državu?

Hrvatska se prilikom ispitivanja navedenih slučajevima većinom bazira na informacijama o zemlji porijekla i iskazu tražitelja azila prilikom čega ocjenjuju sve okolnosti. Sutkinja objašnjava kako informacije o zemlji porijekla stječu sa službenih stranica i dokumenata organizacija kao što je UNHCR. Također, prema trenutačnom znanju sutkinje, Hrvatska do sad nije koristila vještake prilikom ispitivanja stanja u zemlji podrijetla.

Prilikom ispitivanja da li tražitelj azila ima opravdan strah za povratak u matičnu državu, suci započinju s informacijama o zemlji porijekla te nakon toga uzimaju u obzir stavove okoline u kojoj se te osobe nalaze vezane uz SORI.

5. Da li se praksa suda promijenila otkako su izašle presude Suda EU o provođenju određenih testova?

Sutkinja navodi kako Hrvatska nikad nije koristila takve metode kako bi utvrdili kredibilitet tražitelja azila. Međutim smatra da su suci itekako uzeli te presude i praksu drugih država kao orijentaciju koje metode bi bilo što učinkovitije. Također, vodi se računa i o tome da b tražitelji azila ne prolaze kroz ponižavajuć postupak te da se poštuje njihov integritet.

6. Koji je po Vama najveći problem u radu suda?

Sutkinja iznosi da je velika odgovornost na sucima koji provode EU pravo i domaće pravo. Naime suci ocjenjuju uvjete kako zemalja porijekla tako i prvih zemalja ulaska na temelju Dublin propisa. Ovo uključuje utvrđenje uvjeta smještaja te ocjenjivanje stanja u navedenim državama. Međutim važno je napomenuti da suci moraju konstantno poznavati najaktualnije podatke koji su relevantni za ove slučajeve što se može pokazati zahtjevno pogotovo jer se činjenice o sigurnosti pojedinih država mijenjaju iz dana u dan. Nadalje, suci se suočavaju s problemom rješavanja određenog broja predmeta po mjesecu zbog čega mogu biti sankcionirani ako odu ispod norme. Ova činjenica utječe na posebno zahtjevnije slučajeve koji mogu dugo trajati i imaju posebnu težinu. Štoviše, problem s kojim se suočavaju svi suci u ovakvim slučajevima je način dokazivanja kredibiliteta te činjenica da pristup ovakvim slučajevima mora biti drugačiji nego u ostalim upravnim predmetima.

7. Da li EU institucije pružaju neku vrstu podrške? (stručno opremanje, edukacije i slično)

Sutkinja smatra da EU institucije pružaju dobru podršku sucima u navedenim slučajevima, kao i u ostalim slučajevima u RH. Navodi da *European judicial training network* dosta doprinosi edukaciji sudaca koji se bave azilom. Sutkinja daje primjer kako u ovom programu sudjeluju suci iz mnogih EU zemalja koji dijele svoja iskustva te tako doprinose edukaciji domaćih sudaca.

II. Interview with Judge Lidija Prica from the Administrative Court in Zagreb

Za razliku od Visokog Upravnog suda, postupci azila na Upravnom sudu u Zagrebu se smatraju hitni te zbog toga oni svima idu, tj. na US nema specijalizacije za predmete azila. Bilo kakva specijalizacija jest lični odabir. Sutkinja Prica ističe da suci ne preferiraju slučajeve azila zbog njihove teške prirode. Štaviše, suci moraju ispuniti mjesečnu kvotu. Naime, suci moraju da napišu 25 odluka, a kako su predmeti azila

složeniji i traže više vremena, suci ne vole raditi na njima.

1. U kojim slučajevima sami provodite postupak?

Upravni sud se bavi samo onim što je sporno u slučajevima koji dođu pred sud. Tako da se većinom bave vjerodostojnošću progona tj. izjave tražitelja azila o strahu o progonu. Sutkinja Prica navodi da sudovi ne ulaze u pitanje da li je osoba pripadnik LGBT zajednice te navodi da MUP-u najčešće uopće nije sporna tvrdnja tražitelja azila o SO već o progonu. U tom slučaju dolazi do saslušanja tražitelja azila ako se njegova izjava smatra nevjerodostojnom ili nekonzistentnom. Sutkinja objašnjava da u ovakvim slučajevima tražitelji azila najčešće tvrde da je došlo do nesporazuma ili do pogreške u prevodu.

2. Da li sud koristi određene stručnjake u postupku? Ako da tko su oni tj. u kojem su zvanju? (sudski vještaci, osobe izvan sudskog sustava)

Sutkinja navodi kako ni MUP niti Upravni sud ne koriste takve stručnjake. S obzirom da u Hrvatskoj stranke predlažu izvođenje određenih dokaza, ako takav način izvođenja dokaza stranke ne predlože, oni se neće niti provesti.

3. Kako Upravni sud utvrđuje 'strah od progona' tj. povratka u matičnu državu?

Strah od progona se može utvrditi na osnovu prijašnjeg kaznenog progona tražitelja azila ili medicinske dokumentacije. Međutim, kako sutkinja navodi, ovakvi slučajevi uopće ne dolaze do Upravnog suda jer se oni već odobre u prvom stupnju s obzirom na to da je progon očit. Stoga, pred sud dolaze slučajevi gdje se vjerodostojnost iskaza utvrđuje tj. da li ima straha od progona ili ne.

4. Da li se mijenjala praksa otkako su počeli veliki valovi migracija?

Sutkinja smatra kako nije bilo značajne promjene zbog povećanja priljeva migranata. Navodi kako Hrvatska nije odredišna zemlja te da tražitelji azila ne žele tražiti azil u RH jer ih se onda po Dublin regulaciji vraća u zemlju gdje su prvo bili procesirani. Najčešće će tražiti azil u RH tek kad im se zaprijeti deportacijom. Međutim, ističe kako je Hrvatska imala dosta slučajeva vezano za protjerivanje iz države.

5. Da li je u RH dovoljno postojanje zakona države koja progona LGBT osobe ili je potrebna određena praksa?

U Hrvatskoj nije dovoljno samo postojanje zakona, potrebna je praksa koja ukazuje da se ti propisi koriste. Uzima se u obzir učestalost i sistematičnost korištenja propisa koji progone LGBT osobe. Uz to se naravno uzima u obzir osoba koja traži azil i njen iskaz. Sutkinja također navodi da se prvotno razmatraju sve informacija o državi porijekla te se onda gleda položaj osobe koja traži azil u toj državi.

6. Koji su po Vama najveći problemi (poteškoće) ovog postupka?

Sutkinja smatra da je jedan od problema što tražitelji azila, u drugom stupnju, često nisu spremni iznijeti sve podatke te je ponekad nužno informacije izvlačiti iz njih - što ukazuje na nevjerodostojnost i nedosljednost iskaza tražitelja azila. Sutkinja pojašnjava kako se ovaj problem pojavljuje u svim područjima međunarodne zaštite, ne samo u SORI slučajevima.

Kad su u pitanju suci, sutkinja navodi da je edukacija sudaca veliki problem. Naime, edukacije su dobrovoljne te zbog manjka vremena, suci nisu u mogućnosti prisustvovati im. Sutkinja nalaže kako iz ličnog iskustva zna da bi te edukacije znatno doprinijele sucima i olakšalo rješavanje slučajeva međunarodne zaštite. Zaključno navodi da bi barem osnovne edukacije trebale biti obavezne.

7. Da li je dolazilo do slučaja zlorabotrebte SORI temelja za azil?

Sutkinja smatra kako u ovom području nije bilo zlorabotrebte jer se tražitelji azila najčešće pozivaju na vjeroispovijest kao temelj za azil dok seksualna orijentacija i rodni identitet nisu toliko česti temelji.

III. Interview with Daniel Martinović, LGBTQIA+ rights activist

1. Predstavljanje sugovornika:

Daniel je 2013. i 2014. bio koordinator projekta udruge PRIDE Zagreba. U tom periodu kontaktirali su ga iz Centra za mirovne studije (dalje u tekstu: CMS) u vezi dečka iz Nigerije koji im se obratio za pravno savjetovanje. Spomenuti dečko je započeo postupak azila u Hrvatskoj na temelju seksualne orijentacije. Danijel smatra kako su me se iz CMS-a obratili zbog njegovog iskustva s dečkom iz Ugande koji je tražio azil na temelju istog razloga. Nakon toga je PRIDE Zagreb preuzeo slučaj tražitelja azila iz Nigerije te je Daniel dobio ulogu njegovog punomoćnika u navedenom procesu.

2. Od čega se Vaša uloga sastojala kao punomoćnika?

Iako je tražitelj azila iz Nigerije već imao nekolicinu razgovora s MUP-om, javio se CMS-u jer mu taj postupak nije bio najjasniji. Smatrao je da su djelatnici MUP-a bili korektni. Međutim Daniel ističe kako je čuo od drugih da djelatnici MUP-a mogu imati drugačiji pristup prema tražiteljima azila ako imaju osobu koja ih prati na razgovore te da samim tražiteljima može biti lakše i ugodnije ako je neko još tu s njima. Također ističe kako je na početku dečko iz Nigerije bio skeptičan prema njemu, ne znajući da li je povezan na neki način s policijom, ali je na kraju razumio da je Danijelova uloga da mu pomogne.

3. Koje metode su se koristile prilikom tih intervjuja kako bi utvrdili njegov kredibilitet?

Djelatnici MUP-a su se samo bazirali na izjavu tražitelja azila iz Nigerije te na

informacije o zemlji podrijetla. Prilikom jednog razgovora s djelatnicom koja je vodila navedeni slučaj, Daniel je saznao kako je MUP-u od presudna važnosti bila konzistentnost priče. Kako bi to utvrdili, ispitali su ga o njegovoj prošlosti i životu u Nigeriji te došli do spoznaje da je dečko pobjegao iz Nigerije u strahu da će ga njegova zajednica ubiti zbog seksualne orijentacije (znao je za slučaj da su drugog dečka iz zajednice ubili zbog seksualne orijentacije).

4. Da li su djelatnici MUP-a tražili od tražitelja azila da se prvo obratio Nigerijskoj policiji ili da se samo odselili u drugi kraj Nigerije?

MUP nije uopće pitao zašto se nije preselio u drugi dio Nigerije niti zašto nije prvo tražio pomoć od države. Međutim, Daniel naglašava kako je dečko iz Nigerije iznio da tamošnja policija ne ulazi u odluke lokalnih zajednica (tribe-a) te da bi ga najvjerojatnije samo vratili da se obratio policiji. Uz to je isticao kako je policija u Nigeriji korumpirana te da dosta ljudi ima loše iskustvo s policijom.

5. Kakav je bio pristup MUP-a prema tražitelju azila iz Nigerije?

Daniel je iznio da je zbog prijašnjih edukacija na kojima je sudjelovao imao negativan dojam o radu policije s azilantima, međutim slučaj dečka iz Nigerije bio mu je pokazatelj pozitivnog iskustva. Navodi da su na slučaju ovog dečka radile dvije policajke koje su bile potpuno profesionalne te su iskazivale empatije prema dečku. Smatra kako je moguće da se djelatnici MUP-a dijele prema iskustvu i poznavanju određenih tema prilikom rada. Uz to navodi kako se policajke nisu koristile stereotipima prilikom preispitivanja njegove seksualne pripadnosti. Iako trenutačno nema iskustva u sadašnjoj situaciji, Daniel smatra da je tadašnja politička klima, koja je bila dosta liberalnija, mogla utjecati na pristup koji su imali djelatnici MUP-a. Naime, u to vrijeme je upravo izašla presuda Evropskog suda - u kojoj je Hrvatska izgubila - o državljanke BiH koja je bila vraćena u BiH, iako je bila u vanbračnoj vezi s pripadnicom istog pola. Osim toga na snagu je stupao i Zakon o životnom partnerstvu što sve ukazuje na dosta otvoreniju klimu u periodu 2013 i 2014. godine.

6. Da li je nakon tih slučajeva došlo do više zahtjeva na temelju SORI-a te da li smatra da je dolazilo do zloupotrebe navedenih zahtjeva za azil na temelju SORI-a?

Daniel navodi da su i dečko iz Nigerije i Ugande govorili kako se među tražiteljima azila prenosilo da je lakše dobiti azil na temelju SORI nakon što su vidjeli brzinu donesene odluke u njihovim slučajevima. Također, smatra da je moguće da je bilo pokušaja zloupotreba, no ne zna za njih jer više ne radi na toj temi. Međutim iznosi kako je nakon slučaja ova dva dečka, došao muškarac koji je također tvrdio da je proganjan na temelju SO, no djelatnici azila su odbili njegovu tvrdnju jer je to bilo treći put da je promijenio svoju priču. Prvo je iznosio da je proganjan zbog pripadnosti drugog vjeroispovjesti, nakon čega je tvrdio da je pripadnik drugog tribe-a te na posljetku da je gej. Uz to navodi kako ga je nakon toga navedeni muškarac dodao na *Facebook*-u gdje je vidio slike s djevojkama te zbog tako nije siguran da li možda nije znao za termin biseksualnosti ili je u stvari lagao kako bi dobio azil.

7. Koje je bilo iskustvo dečka iz Nigerije u prihvatilištu za izbjeglice?

Daniel navodi kako je dečko tokom cijelog postupka bio u Porinu te da tamo nije imao drugačiji tretman zbog njegove SO, no navodi da se tamo nije previše razgovaralo o osnovama azila između tražitelja.

10. SUMMARY

Karla Žeravčić

WHAT IS QUEER ENOUGH? CREDIBILITY ASSESSMENT OF LGBT ASYLUM APPLICANTS IN THE EU – THE CASE OF CROATIA

Lesbian, Gay, Bisexual and Trans (LGBT) people claiming asylum under the *membership of a particular social group* based on sexual orientation and gender identity have been accepted by International Refugee Law for a long time. However, sexual orientation and gender identity claims remain one of the hardest to prove. Thus, this paper aims to analyse the credibility assessment of LGBT asylum seekers and the methods used in the assessment in Croatia. As LGBT applicants remain the ‘invisible’ group among refugees and asylum seekers, this paper aims to fill in the gap and examine the adequacy and suitability of the methods used to assess credibility while focusing on the practices applied by the Croatian justice system. In order to accomplish this, the author has analysed 30 sexual orientation and gender identity-related cases, decided by second and third instances in Croatia and has conducted semi-structured interviews with stakeholders that possess different knowledge and experience regarding this topic.

Key words: LGBT asylum seekers, Queer refugees, European asylum system, Croatian asylum system.

SAŽETAK

Karla Žeravčić

ŠTA JE DOVOLJNO “QUEER”? PROCJENA KREDIBILITETA LGBT TRAŽILACA AZILA U EU – SLUČAJ HRVATSKE

Lezbijke, Gej, Biseksualne i Trans (LGBT) osobe koje traže azil temeljem pripadnosti određenoj društvenoj skupini zbog svoje seksualne orijentacije i rodnog identiteta već dugo su priznate od strane Međunarodnog prava o izbjeglicama. Međutim, tvrdnje o seksualnoj orijentaciji i rodnom identitetu su i dalje među najtežim za dokazati u procesu azila. Stoga je cilj ovog rada analizirati procjenu kredibiliteta LGBT tražitelja azila i metode koje se koriste prilikom te procjene u Hrvatskoj. S obzirom da su LGBT podnositelji zahtjeva azila i dalje ‘nevidljiva’ skupina među izbjeglicama i tražiteljima azila, ovaj rad ima za cilj popuniti prazninu i ispitati primjerenost i prikladnost metoda koje se koriste za procjenu kredibiliteta s fokusom na praksu koja se primjenjuje u hrvatskom pravosudnom sustavu. Kako bi to postigla, autorica je analizirala 30 slučajeva vezanih za seksualnu orijentaciju i rodni identitet o kojima su odlučivali drugostupanjske i trećestupanjske instance u Hrvatskoj te je provela polustrukturirane intervju s relevantnim subjektima koji posjeduju različita znanja i iskustva o ovoj temi.

Ključne riječi: *LGBT podnositelji zahtjeva za azil, Queer izbjeglice, EU sistem azila, hrvatski sistem azila.*