Asylum decision-making, gender and sexuality

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The refugee definition in Article 1A(2) Refugee Convention does not explicitly refer to gender or sexuality. From the early 1980s, feminist and subsequent LGBTQI critiques have pointed out that this results in the practice of privileging straight men.[2] This has resulted in a rethinking of the concept of refugee and asylum procedures at the international level,[3] as well as on specific provisions of EU law.

1. Refugee definition

1.1 Persecution grounds

A first issue to be addressed was whether the five persecution grounds (race, religion, nationality, membership of a particular social group, and political opinion) can be interpreted so as to include the experiences of women persecuted as a result of their gender or of LGBTQI people. Article 10(1)(d) Directive 2011/95 gives a definition of particular social group which accumulates the *ejusdem generis* approach[4] and the social perception approach;[5] this is problematic because the approaches are intended as alternative. Although the provision specifically mentions sexual orientation and gender, there are differences in the ways in which these concepts are approached: a particular social group can be based on sexual orientation,[6] whereas gender merely "shall be given due consideration" when identifying a particular social group. The EU Court of Justice has

[1] I am grateful to Heaven Crawley and Sabine Jansen for their critical feedback to an earlier version of this text.

[2] For overviews see Thomas Spijkerboer (ed.), *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Routledge 2013); Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law. From the Margins to the Centre* (Routledge 2014); Carmelo Danisi, Moira Dustin, Nuno Ferreira and Nina Held (eds), *Queering asylum in Europe : legal and social experiences of seeking international protection on grounds of sexual orientation and gender identity* (Springer 2021).

[3] UNHCR, *Guidelines on International Protection no.1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/01, 7 May 2002); UNHCR, *Guidelines on International Protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/12/09, 23 October 2012).

[4] James C Hathaway and Michelle Foster: *The Law of Refugee Status* (2nd edn, Cambridge University Press) 426 ff.

[5] T Alexander Aleinikoff, 'Protected characteristics and social perceptions: an analysis of the meaning of 'particular social group ''in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press) 263-311.

[6] *See* Case C-199/12, C-200/12 and C-201/12 *X, Y and Z v. Minister voor Immigratie en Asiel* [2013] ECLI:EU:C:2013:720 [41]-[49].

not yet ruled on gender and particular social group;[7] the UK House of Lords ruling in *Shah and Islam*, which holds that groups that are the object of discrimination (including women in a particular country) can form a particular social group, is the most prominent European precedent on the issue.[8]

1.2 Persecution

Article 9(1) Directive 2011/95 defines persecution as, essentially, a severe violation of basic human rights. Paragraph 2 gives a non-exhaustive enumeration of examples of such violations, including sexual violence, various forms of discrimination, and acts of a gender-specific nature. It is evident that female genital mutilation (FGM) constitutes severe bodily harm amounting to persecution.

In *X, Y and Z v. Minister voor Immigratie en Asiel*, the EU Court of Justice ruled that criminalization of homosexual acts does not by itself constitute persecution, but that a prison term which is actually applied to an individual in response to his or her sexuality does constitute persecution.[9] It is unclear how the Court's ruling that criminalization does not by itself constitute persecution can be reconciled with Article 9(2)(b), which provides that persecution can take the form of "legal . . . measures which are in themselves discriminatory". Likewise, it is unclear how this can be reconciled with the finding of the European Court of Human Rights that even criminalization of homosexual acts which is systematically not enforced results in anxiety, which falls within the scope of inhuman or degrading treatment.[10] As Judge De Gaetano remarked in a separate opinion, the Court of Justice's position "could be seen as somehow undermining the standards set by the Court as far back as the 1980s in connection with the criminalization of homosexual acts and the resulting violation of Article 8".[11] The Court of Justice's position is furthermore contrary to a judgment of the Italian Supreme Court, which held that the criminalization of homosexual acts constitutes deprivation of a fundamental right.[12] See more on this issue *infra*, para. 2.1.

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[7] At the moment of writing, a preliminary reference on 'westernisation' is pending, Case C-456/21 *E and F v Staatssecretaris van Justitie en Veiligheid*.

[8] *Islam v. Secretary of State for the Home Department; Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah* [1999] UKHL 20, [1999] 2 AC 629; [1999] 2 All ER 545 (25 March 1999).

[9] *X, Y and Z v Minister voor Immigratie en Asiel*, n. 6 [50]-[61].

[10] Thomas Spijkerboer, 'Gender, Sexuality, Asylum and European Human Rights' [2017] *Law and Critique* 221-239; also *infra* para. 2.2.

[11] *M.E. v Sweden* App no 71398/12 (ECtHR 26 June 2014) *separate opinion De Gaetano.*

[12] *Ordinanza n. 15981 del 2012,* Corte Suprema di Cassazione (20 September 2012).

1.3. Concealment

In many jurisdictions, refugee status determination of lesbian, gay and bisexual asylum claimants has been influenced by the notion of concealment or discretion.[13] Following a similar ruling on concealment in religion-based cases,[14] the EU Court of Justice held in *X, Y and Z v. Minister voor Immigratie en Asiel*, para. 70, that "requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it".

Although this seems to be an unequivocal rejection of the notion of concealment, domestic courts implementing this line of case law have in some cases ruled that it is still relevant whether, as a factual matter, asylum applicants will conceal their sexual orientation which then could result in the conclusion that, because of this, they do not have a well-founded fear of being persecuted.[15] In cases based on religion, this has resulted in an open conflict between lower German courts and the Bundesverwaltungsgericht which has yet to be resolved.[16]

The relation between the Court of Justice's rejection of the requirement of concealment and the European Court of Human Rights is unclear, see below para. 2.2.

1.4 Actors of protection

In the context of the refugee definition, there has been an extensive debate in legal doctrine on the actors of protection, i.e. on the sources of protection against potential persecution.[17] European law provides that only state authorities or de facto authorities with effective territorial control can be relevant actors of protection.[18] Article 7 Directive 2011/95 applies both to refugee status and to subsidiary protection.

Despite the clear wording of Article 7 Directive 2011/95, in many cases women fleeing domestic violence, forced marriage FGM or other forms of gender specific violence are expected to seek

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[13] Janna Wessels, *The Concealment Controversy. Sexual Orientation, Discretion Reasoning and the Scope of Refugee Protection* (Cambridge University Press 2021).
[14] Case C-71/11 and C-99/11 *Bundesrepublik Deutschland v. Y and Z* [2013] ECLI:EU:C:2012:518.
[15] Case 10 C20.12, *Bundesverwaltungsgericht* (20 February 2013) ECLI:DE:BVerwG:2013:200213U10C20.12.0; Case 201012342/1/V2, *Afdeling bestuursrechtspraak van de Raad van State* (18 December 2013) ECLI:NL:RVS:2013:2423. Predating the CoJ judgment, but similar is *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31.
[16] See the reference for a preliminary ruling from the Sächsisches Oberverwaltungsgericht (Germany) lodged on 30 March 2015, *Federal Commissioner for Asylum Affairs v N* (Case C-150/15). The case was solved because the authorities granted asylum.
[17] Guy S Goodwin-Gill and Jane MacAdam, *The Refugee in International Law* (3d edn, Oxford University Press) 100; James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press) 289-92.
[18] Article 7 Directive 2011/95.

protection from family members, from their clan or from NGO's.[19] For these and similar cases, the EU Court of Justice's ruling in the case of *State Secretary for the Home Department v. O.A.* will be very important. In its judgment, the Court ruled that "any social and financial support provided by private actors, such as the family or the clan of a third country national concerned, falls short of what is required" under Article 7 of Directive 2011/95 "and is, therefore, of no relevance either to the assessment of the effectiveness or availability of the protection provided by the State within the meaning of Article 7(1)(a) of that directive, or to the determination, under Article 11(1)(e) of that directive, read together with Article 2(c) thereof, of whether there continues to be a well-founded fear of persecution."[20] This means that the option to approach relatives, clan members or NGOs in order to diminish the risk of harm is "of no relevance." This follows from the nature of protection in refugee law, which is quintessentially protection from the state.[21]

2. Subsidiary protection

Through the concept of serious harm,[22] the case law of the European Court of Human Rights on the risk of inhuman treatment upon removal to the country of origin is relevant for European asylum law.[23] This case law raises a number of questions concerning gender and sexuality.

2.1 Inhuman or degrading treatment

There is no doubt that gendered harms such as sexual violence and FGM qualify as inhuman or degrading treatment in the sense of Article 3 ECHR.

In addition to the tension between the EU Court of Justice in *X, Y and Z v. Minister voor Immigratie en Asiel* and the European Court of Human Rights on the criminalisation of homosexual acts,[24] there is internal tension within the case law of the European Court of Human Rights on the same point. In two Iranian asylum cases, the European Court of Human Rights declared the application inadmissible because it found no risk of ill-treatment of gay men in Iran,[25] even though male homosexual acts at the time were (and still are) punishable by death, and female by lashing and (the fourth time) by death;[26] compare a similar judgment in a Libyan case,[27] where homosexual

[19] On forced marriage see Younous Arbaoui, *Deux Poids, Deux Mesures: A Critical Frame Analysis of the Dutch Debate on Family-related Asylum Claims* (Dissertation Vrije Universiteit Amsterdam 2019), 110-155

[20] Case C-255/19 *State Secretary for the Home Department v. O.A.* [2021], ECLI:EU:C:2021:36.

[21] See Hathaway and Foster, n. 17, 289-292.

[22] Article 15 Directive 2011/95.

[23] See more extensively elsewhere in this volume, ***.

[24] *Supra*, para. 1.2.

[25] *F. v the United Kingdom* App no 17431/03 (ECtHR 22 June 2004, decision); *I.I.N. v the Netherlands* App no 2035/04 (ECtHR 20 December 2004, decision).

[26] Daniel Ottoson, *State-Sponsored Homophobia. A world survey of laws prohibiting same sex activity between consenting adults*, ILGA 22-23; Aengus Carroll and Lucas Ramón Mendos, *State-Sponsored Homophobia. A world survey of of sexual orientation laws: criminalisation, protection and recognition* (12th edition) ILGA 126-127.

[27] n 11.

acts are punishable by imprisonment of up to five years.[28] It is unclear how these decisions relate to the Article 8 European Convention on Human Rights (ECHR) case law finding the mere existence of legislation criminalising same sex sexual conduct a continuing and direct violation of human rights, resulting in anxiety, guilt feelings and on occasion in depression.[29] According to settled case law of the ECHR, treatment can be degrading in the sense of Article 3 ECHR when it may arouse "feelings of fear, anguish and inferiority capable of humiliating and debasing".[30] In the context of asylum law, the fear and anguish which spouses may experience when the other spouse is exposed to a real risk of inhuman or degrading treatment has itself been characterized as inhuman or degrading treatment.[31] It seems plausible to argue that legislation resulting in "anxiety, guilt feelings and on occasion depression" constitutes a treatment arousing "feelings of fear, anguish and inferiority capable of humiliating and debasing" the people targeted by such legislation.

Another internal tension concerns forced marriage. Whereas forced marriage clearly constitutes a violation of Article 3 or 4 ECHR,[32] the European Court of Human Rights has failed to label being subjected to forced marriage as a violation of these provisions, and has essentially trivialized the likelihood of being subjected to the same forced marriage again upon removal. The contradiction was noted by Judge Power-Forde in her dissent to *A.A. and others v Sweden*. [33]

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[28] Aengus Carroll and Lucas Ramón Mendos, *State-Sponsored Homophobia. A world survey of sexual orientation laws: criminalisation, protection and recognition* (12th edition) ILGA 92.
[29] *Norris v Ireland* App no 10581/83 (ECtHR 26 October 1988 PC); *Dudgeon v United Kingdom* App no 7525/76 (ECtHR 22 October 1981 PC) [41].
[30] *Soering v UK* App No 14038/88 (ECtHR, 7 July 1989) [100].
[31] *Bader and Kanbor v Sweden* App no 13284/04 (ECtHR, 8 November 2005) [43]-[49]; *D. et autres c Turquie* App no 24245/03 (ECtHR, 22 June 2006) [55]-[58].
[32] *See* Directive 2011/36, preambular paragraph 11, assuming forced marriage under the notion of trafficking in human beings; Article 37 of the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS 210; Committee of Ministers Recommendation No. R (91) 11 on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults; and Recommendation No. R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation; Parliamentary Assembly Recommendation 1325 (1997) on traffic in women and forced prostitution in Council of Europe member states; Recommendation 1523 (2001) on domestic slavery; Recommendation 1526 (2001) on a campaign against trafficking in minors to put a stop to the east European route: the example of Moldova; Recommendation 1545 (2002) on a campaign against trafficking in women; Recommendation 1610 (2003) on migration connected with trafficking in women and prostitution; and PACE Recommendation 1663 (2004) on domestic slavery: servitude, au pairs and mail-order brides; Resolution 1468 (2005) – Forced marriages and child marriages; Resolution 1740 (2010) – The situation of Roma in Europe and relevant activities of the Council of Europe. The CEDAW Committee mentions forced marriage as a form of gender-based violence, General Recommendation No 19, [11].
[33] *A.A. and others v Sweden* App no 14499/09 (ECtHR 28 June 2012). Comp. Arbaoui 2019, n. 19.

2.2 Concealment

Concealment is an issue not only in the context of the refugee definition (*supra*, para. 1.3), but also in case law on Article 3 ECHR. Concealment of characteristics, behaviour, convictions or opinions which might trigger inhuman or degrading treatment is routinely expected and required in the case law of the European Court of Human Rights. The Court has given such rulings in the context of religion,[34] "playing the game" in Somalia,[35] gender,[36] and sexual orientation.[37] In their opinions, Zupančič and De Gaetano (in *M.E. v Sweden*) and Power-Forde (in *R.H. v Sweden*) have objected to the Court's approach in the context of gender and sexual orientation. In a recent admissibility decision, the Court rejected concealment reasoning in categorical terms by considering: "Par ailleurs, la Cour estime que l'orientation sexuelle constitue un aspect fondamental de l'identité et de la conscience d'un individu et qu'il ne saurait dès lors être exigé de personnes déposant une demande de protection internationale fondée sur leur orientation sexuelle qu'elles dissimulent cette dernière".[38] This position reflects that of the EU Court of Justice in the context of the refugee definition (*supra*, para. 1.3).

2.3 Actors of protection

Until now, the European Court of Human Rights has used a wider notion of agents of protection than is permitted under the Qualification Directive (*supra* para. 1.4):

- It considers *asylum applicants themselves* as potential actors of protection where they are supposed to ward off the risk of inhuman treatment by concealing their sexual orientation or religion, "playing the game", abiding by patriarchal norms, and such;[39]

[34] *Z. and T. v United Kingdom* App no 27034/05 (ECtHR 28 February 2008, decision).
[35] *Sufi and Elmi v United Kingdom* App no 8319/07 and 11449/07 (ECtHR 28 June 20112011) [275].
[36] *A.A. and others v Sweden* App no 14499/09 (ECtHR 28 June 2012); *R.H. v Sweden* App no 4601/14 (ECtHR 10 September 2015); *N. v Sweden* App no 23505/09 (ECtHR 20 July 2010).
[37] Explicitly in *M.E. v Sweden* App no 71398/12 (ECtHR 8 April 2014); implicitly in *F. v the United Kingdom* App no 17431/03 (22 June 2004, decision); *I.I.N. v the Netherlands* App no 2035/04 (20 December 2004); *M.B. v. the Netherlands*, App no 63890/16 (28 November 2017).
[38] *I.K. c Suisse* App no 21417/17 (ECtHR 19 December 2017, decision) [24].
[39] *Supra* para. 2.2.

- It considers *relatives* as potential actors of protection where asylum applicants are supposed to turn to them for protection from forced marriage and domestic violence,[40] from the risks that inhere in being a single woman,[41] or from FGM;[42]

- It considers NGOs as potential actors of protection in cases concerning FGM[43] and forced marriage and domestic violence.[44]

In an FGM case, the Committee for the Rights of the Child has explicitly rejected the line of reasoning adopted by the European Court of Human Rights. It considered that "the rights of the child . . . cannot be made dependent on the mother's ability to resist family and social pressure, and that State parties should take measures to protect the child from all forms of physical or mental violence, injury or abuse in all circumstances, even where the parent or guardian is unable to resist social pressure".[45]

While the European Court of Human Rights is not bound by Directive 2011/95, EU Member States are bound by both the ECHR and the Directive. It is therefore arguable that EU Member States act in violation of Article 7 Directive 2011/95 when they rely on the wide notion of actors of protection used by the European Court of Human Rights.

3. Asylum procedures

The Procedures Directive (Directive 2013/32) contains provisions taking into account the specificities of gender, sexual orientation and gender identity on three points.

3.1 Expertise of civil servants

Gender and sexuality have specific consequences for the expertise required of civil servants involved in asylum decision making. These are specified in a number of provisions.

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[40] For example *A.A. and others v Sweden* App no 14499/09 (ECtHR 28 June 2012); *but see* the dissenting opinion of Power-Forde.
[41] For example *R.H. v Sweden* App no 4601/14 (ECtHR 10 September 2015) *but see* the dissenting opinion of Zupančič and De Gaetano in *N. v Sweden* App no 23505/09 (ECtHR 20 July 2010).
[42] *Collins and Akaziebie v Sweden* App no 23944/05 (ECtHR 8 March 2007, decision); *Izevbekhai and Others v Ireland* App no 43408/08 (ECtHR 17 May 2011, decision); *Ameh and Others v the United Kingdom* App no 4539/11 (ECtHR 30 August 2011, decision); *R.W. and Others v Sweden* App no 35745/11 (ECtHR 12 April 2012, decision).

[43] *R.W. and Others v Sweden* App no 35745/11 (ECtHR 12 April 2012, decision); *Ameh and Others v the United Kingdom* App no 4539/11 (ECtHR 30 August 2011, decision); *Izevbekhai and Others v Ireland* App no 43408/08 (ECtHR 17 May 2011, decision).
[44] For example *A.A. and others v Sweden* App no 14499/09 (ECtHR 28 June 2012).
[45] I.*A.M. v Denmark* Comm 3/2016 (CRC 25 January 2018).

Article 10(3)(d) Directive 2013/32 requires Member States to ensure that personnel examining asylum applications and taking decisions have the possibility to seek advice, whenever necessary, from experts on, among other things, gender. The term gender can be reasonably interpreted here as covering gender identity as well. The Directive further provides that Member States must ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability (Article 15(3)(a) Directive 2013/32). The term 'ensure' in both provisions makes clear that these provisions are not aspirational in nature, but have the nature of guarantees which are binding on Member States and can be invoked by asylum applicants.

3.2 Privacy of applicants

Privacy is important for all asylum seekers, but gender as well as sexual orientation and gender identity have specific consequences on this point. These are specified in a number of provisions.

Article 11(3) Directive 2013/32 provides that, in cases where an asylum application has been made on behalf of dependants or minors, a single decision on the family as a whole will not be taken if that would lead to the disclosure of particular circumstances of an applicant which could jeopardize his or her interests, in particular in cases involving gender, sexual orientation, gender identity or age based persecution. In such cases, a separate decision must be issued to the person concerned. A problem with this provision is that the existence of a separate decision flags to outsiders (including the other family members) that there are sensitive circumstances, while the point of the separate decision is to protect confidentiality. This could be addressed by routinely issuing separate decisions for everyone who has been interviewed (and may have disclosed information which needs to remain confidential).

Article 13(2)(d) Directive 2013/32 provides that, where applicants or the items they are carrying can be searched, this search is carried out by a person of the same sex with full respect for the principles of human dignity and of physical and psychological integrity. This guarantee does not apply to any search carried out for security reasons.

Article 15(3)(b) and (c) Directive 2013/32 address the sex of the interviewer and the interpreter. Both provide that, whenever possible, an interviewer or interpreter of the same sex will be provided if the applicant so requests. This provision is binding ("To that end, Member States *shall*", article 15(3)), but subject to two conditions (if requested and if possible).

3.3 Vulnerable applicants

The Reception Conditions Directive (Directive 2013/33) stipulates that, when implementing that Directive, Member States must take into account "the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation"

(Article 21 Directive 2013/33). Although this provision does not strictly apply to the asylum procedure, the same general principle is at work in the Asylum Procedures Directive.

Article 24(1) Directive 2013/32 obliges Member States to assess whether an applicant is in need of special procedural guarantees. If so, Member States must ensure that they are provided with adequate support (Article 24(3) Directive 2013/32). Accelerated border or transit procedures (as provided for in Article 31(8) Directive 2013/32) and border procedures (as provided for in Article 43 Directive 2013/32) may not be applied to applicants with special needs if adequate support cannot be provided within the framework of these procedures, in particular where Member States consider that the applicant is in need of special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence. In these cases, suspensive effect of an appeal procedure can only be withheld (Article 46(6) Directive 2013/32) if the conditions of Article 46(7) are fulfilled (i.e. interpretation, legal aid, and at least one week to argue for suspensive effect; and the negative asylum decision is examined in fact and in law). It is to be noted that the guarantees of Article 24 Directive 2013/32 are premised on the Member State considering an applicant as having special needs. It is an open question to what extent courts can supervise the application of this article, and for example quash a decision because the guarantees of this provision were not granted while the applicant arguably was in need of them.

Article 31(7)(b) Directive 2013/32 gives as one of the grounds for prioritizing the examination of an asylum application that the applicant is vulnerable in the sense of Article 22 Directive 2013/33, or in need of special procedural guarantees, in particular unaccompanied minors.

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5. Credibility assessment

Credibility issues require particular attention in asylum cases based on or related to gender and sexuality.

4.1 Sexual orientation

In two judgments, the Court of Justice has ruled on the manner in which it is to be established whether an asylum seeker is lesbian, gay or bisexual. In Case C-148/13, C-149/13 and C-150/13 (*A, B & C*), the Court held that this assessment is not to be based on questions based only on stereotypical notions concerning homosexuals. Furthermore, it detailed questioning as to the sexual practices of the asylum applicant is precluded. Examining authorities are not to accept evidence such as the performance by the applicant of homosexual acts; apply 'tests' with a view to establishing his or her sexual orientation, or require the production of films of such acts. Furthermore, a finding against credibility cannot be made merely because the applicant did not rely on sexual orientation on the first occasion for setting out the ground for persecution.

In Case C-473/16 (*F v Bevándorlási és Állampolgársági Hivatal*), the Court elaborated further on the 'tests'. Where in *A, B and C* the Court struck out the use of "phallometry" (i.e. measuring the physical response to pornography), in *F* it also banned the use of a psychologist's expert report

on the basis of projective personality tests to provide an indication of the sexual orientation of an applicant. In both cases, the Court's position was based on both human dignity (these 'tests' are intrusive and humiliating, and in violation of Article 1 of the Charter) and their – to say the least – uncertain reliability.

In *A, B and C*, the Court of Justice held that the statements of the applicant and the evidence are to be subjected to an assessment by the authorities. It rejected the proposition that the declared sexual orientation of an applicant must be held to be an established fact (para. 49). Obvious as this ruling may seem in the asylum context, it is problematic from the perspective of the right to respect for private life. In its *Van Kück* judgment, the European Court of Human Rights addressed the refusal to reimburse the expenses of medical treatment related to gender reassignment. A German court had upheld that refusal because Van Kück's transsexuality was found not to be credible. The European Court of Human Rights ruled that, in doing so, the German court "thereby required the applicant not only to prove that this [transgender] orientation existed and amounted to a disease necessitating hormone treatment and gender reassignment surgery, but also to show the 'genuine nature' of her transsexuality although, as stated above . . . the essential nature and cause of transsexualism are uncertain".[46] It considered that gender identity touches upon "one of the most basic essentials of self-determination",[47] and found a violation of Article 8 ECHR. There is no reason to find these considerations not equally applicable to sexual orientation. Sexual orientation is a quintessential element of self-determination, and its essential nature and cause is uncertain. As in the Van Kück situation, asylum applicants are required to show the 'genuine nature' of their sexual orientation. However, the Court of Justice denies them the two forms of evidence which they can provide: their own statement as to their sexual orientation, and evidence of the fact that they have performed same sex sexual activities through, for example, visual material. Instead, the applicant's statements are not considered as evidence of sexual orientation, but as a proposition in need of proof. While it is clear why the Court finds it problematic to consider the sole statement of an applicant as determinative of sexual orientation, the human rights problems of leaving the decision essentially in the hands of the determining authority are equally clear.

4.2 Traumatised applicants

A general credibility problem, which deserves specific attention in the context of gender and sexuality, is credibility assessment of statements of traumatised asylum applicants. Many asylum seekers, and in particular people who do qualify for international protection, have gone through traumatising experiences which may interfere with their ability to recollect relevant facts or to state relevant facts.

A seldom acknowledged reality is that people working with asylum seekers, including decision makers, judges and lawyers, may suffer from secondary traumatisation (i.e. traumatisation as a

[46] *Van Kück v Germany* App no. 35968/97 (ECtHR 12 September 2003) [81].
[47] ibid [73].

consequence of interacting with traumatised persons). The ways in which people with secondary trauma deal with their problems may interfere with their professional behaviour. These coping skills may include denial (potentially leading to adverse findings of credibility) and normalization (potentially leading to finding acts of persecution insufficiently severe).[48]

Both issues have not yet been explored in case law or regulation.

6. Concluding observation

The feminist critique of refugee law dates to the early 1980s. It led to the adoption of policy documents and to case law addressing gender specific aspects of refugee law. The LGBTQI critique of refugee law was developed a decade later in the slipstream of the feminist critique. Presently, however, there is a gap between achievements in LGBTQI cases and in gender specific cases. In LGBTQI cases, the discretion requirement and the idea that people can be protected by relatives, friends or NGOs have been abandoned. In women's cases, to the contrary, "playing the game" is still required, and protection against domestic violence as well as FGM is purported to come from relatives and NGOs (but see the EU Court of Justice's judgment in *A.O.*, *supra* para. 1.4). In addition to the internal tensions in legal doctrine pointed out above (for example between case law of the Court of Justice and of the European Court of Human Rights), this tension between policy and practice in LGBTQI cases on the one hand, and women's cases on the other, merits further research.

[48] Cécile Rousseau, François Crépeau, Patricia Foxen and Francé Houle, 'The Complexity of Determining Refugeehood : A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' [2002] *Journal of Refugee Studies* (15), 43-70.