Chapter 4

The Policy and Guidance

...rather dead here than a deportation....

(Zouhair, Germany)

...i only knew i could live freely in Europe as a Gay person but i didnt know how different country operate on the basis of their LGBT right. so, when i first got here. that was when i was told that i have to apply for asylum.

(C63, claimant, Italy)

...winning an asylum claim is like running up an escalator backwards, it is possible but you need to try really hard.

(Deirdre, lawyer, UK)

4.1 Introduction

The contours of international protection in EU member states are mainly determined by three elements: the 1951 Refugee Convention and the EU Common European Asylum System (CEAS), alongside international human rights law, including the 1950 ECHR (Chap. 3). While Germany and Italy are bound by the CEAS recast instruments,¹ the UK has remained only bound by the 2003 Reception Directive, 2004 Qualification Directive and 2005 Procedures Directive.² Yet, this and other type of legislative options do not, in themselves, necessarily produce considerable variations across the EU (Querton 2019), as many other factors contribute to different degrees of policy variation between EU member states. Amongst

¹Especially Directive 2011/95/EU (Qualification Directive), Directive 2013/32/EU (Procedures Directive) and Directive 2013/33/EU (Reception Conditions).

²Council Directive 2003/9/EC, Council Directive 2004/83/EC and Council Directive 2005/85/EC respectively. At the time, the UK government stated, for example, that it had ‘grave concerns about the way in which the provisions in the amended Reception Directive would allow asylum seekers to work after 6 months if a decision at first instance has not been reached and would place stringent restrictions on Member States’ ability to detain asylum seekers in exceptional circumstances’ (UK Government 2011). While Denmark obtained an ‘opt-out’ from the recast CEAS instruments, Ireland and the UK have negotiated an optional ‘opt-in’.

these factors, it is worth considering in particular geographical location, political context and internal governance structure, further contextualised by the statistics available.

First, geographical location influences to a considerable degree how countries choose to design their asylum legal and policy framework. Italy, being one of the EU frontline member states, is under pressure – internally and externally – to adhere to minimum standard solutions and to adopt a ‘closed door policy’ towards non-EU citizens. Together with Greece and Spain, Italy is the place of arrival of migrants headed to Europe by sea and the country where the EU ‘hotspot’ system has been established (Anci et al. 2016; European Commission 2015).³ The main consequence of continuous arrivals is a permanent emergency situation, where people in need of international protection risk seeing their specific needs disregarded. The policy of the Lega Nord / M5S Italian government of closing Italy’s harbours to the NGO-managed boats rescuing people from the Mediterranean hampered continuous arrivals in Italy, but with the consequence of raising the number of deaths at sea and increasing the suffering of people prevented from reaching a ‘safe harbour’ as soon as possible (Danisi 2018; UNHCR 2019).

Second, the political context also plays a key role in shaping countries’ asylum systems. An obvious example is Germany, which has taken a leading role in what is often referred to as Europe’s ‘refugee crisis’, processing more asylum claims than any of the other 27 EU member states and receiving 1.3 million refugees between 2015 and 2017 alone (Deutsche Welle 2017). In September 2015, Angela Merkel, the Chancellor of Germany and leader of the CDU at the time,⁴ made a decision that will be remembered for years to come: she decided against protecting the country’s border with Austria and preventing hundreds of thousands of refugees from coming into the country, and instead insisted on ‘letting them in’ (Merkel 2016). Merkel’s ‘generous’ asylum politics were met with an increase in anti-immigrant sentiments, led by the far-right party Alternative for Germany (Alternative für Deutschland, AfD), with a far-right political movement playing a key role in German politics for the first time since the Nazi movement in the 1930s (Die Welt 2016). In the 2017 general election, the AfD gained 12.6% of the votes and 94 seats in the Bundestag (German Federal Parliament) (Der Bundeswahlleiter 2017). In 2018, the AfD managed for the first time to have seats in all of the parliaments of the 16 federal states (Die Welt 2018). People seeking asylum and refugees in Germany thus find themselves in a country full of contradictions: a (one-time) generous border politics and

³ Hotspot centres can be defined as ‘locations in which irregularly arriving refugees and migrants could quickly be identified, primarily through obligatory fingerprinting, screened to identify any protection needs, and subsequently filtered for the purposes of the processing of asylum applications or return to their countries of origin’ (Amnesty International 2016). SOGI asylum claimants and, more generally, members of vulnerable groups are not excluded from this process, and no adequate specific procedures apply. NGOs and associations have also highlighted the lack of respect for human rights standards in the new hotspot centres (Oxfam, ASGI & A Buon Diritto 2015).

⁴ Christlich Demokratische Union Deutschlands – Christian Democratic Union of Germany.

welcome culture ('Willkommenskultur'), but also an increasingly hostile environment. In Italy, as well, the political environment has become increasingly hostile towards refugees and migrants. Instances of racism have increasingly been reported in the media, including murders (Catozzella 2018), with the UN High Commissioner for Human Rights, Michelle Bachelet, denouncing this trend and pointing to the need for a UN task force in Italy to monitor this phenomenon (Corriere della Sera 2018). This is likely to be driven by the government's anti-immigration policies, which have had significant consequences on the general asylum system of the country.

Similarly, migration debates in the UK have been marked by the then Home Secretary Theresa May's comment in 2012 that the government wished to 'create here in Britain a really hostile environment for illegal migration' (Kirkup and Winnett 2012). This led the Council of Europe's Commissioner for Human Rights to express concern about the effect of negative public rhetoric towards migrants, particularly irregular migrants, and state that '[f]or many years now there has been a dominant political debate in the UK characterised by alarmism' (Commissioner for Human Rights 2016). This alarmism, it is fair to say, persists to this day, even if there are also some signs that public attitudes have changed on the theme of immigration (The Economist 2019). In the light of its centrality in public debates, the UK asylum and immigration processes have been subjected to frequent scrutiny by public bodies and officials in recent years, including through the Parliament (Home Affairs Committee 2019a, b; House of Commons Home Affairs Committee 2013a), the Independent Chief Inspector of Borders and Immigration (ICIBI 2014, 2016), and civil society organisations (Quertel 2012; Stonewall and UKLGIG 2016). This bleak scenario was compounded by the result in the 2016 EU referendum, with a spike in racist and homo/transphobic hate crime discernable at the time and since (Marsh et al. 2019). These developments across the three countries under comparison suggest that increasing right wing populism in Europe targets *all* marginalised groups – including SOGI minorities and SOGI claimants – and suggests that individuals who are minoritised on more than one basis, such as SOGI claimants, will be particularly disadvantaged. The symbiosis between homophobia, transphobia, racism and xenophobia is all too apparent in this context.

Third, internal governance structures shape to a large extent variations within a single country. All countries under comparison are illustrative in this regard, as they have strong municipality variations (in the case of Italy), a federal structure (in the case of Germany) or even countries that benefit from devolved powers (in the case of the UK). To use Germany as an example of these internal variations, the administration of asylum is not homogeneous across the country, despite Germany adhering to all CEAS instruments. Bavaria, in particular, is often cited as 'the trial balloon for all these bad things that are happening now, such as deportation camps and AnkER [asylum reception] centres' (Sofia and Emma, NGO workers). Conversely, in the UK, Scotland was particularly supportive of Syrian refugees, taking 40% of those received by the UK before Christmas 2015 (Scottish Government News 2016), reflecting differences between the four nations that make up the UK. Following dispersal of people seeking asylum throughout the UK to ease pressure on the South

East of England (Chap. 8), Glasgow, Scotland's biggest city, was estimated to be home to 10% of the UK's asylum claimant population (Scottish Government 2013) and the inequitable distribution of asylum claimants through the UK's dispersal policy is recognised (Home Affairs Committee 2018), with the poorest regions receiving most asylum claimants (Lyons and Duncan 2017). The municipal, federal or devolved structure of political systems influences how asylum policies are implemented, and differences in implementation exist between different municipalities/states/countries, as will be explored throughout subsequent chapters.

A better understanding of the role of geographical location, political context and internal governance structures is given by also looking at domestic statistics, as these are instructive in uncovering the range of differences and similarities across and within EU member states' asylum policy. According to the German Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge, BAMF), in 2016 Germany received the highest number of applications in its history: 745,545 (BAMF 2016). In fact, Germany received and processed more asylum requests in the first 9 months of 2016 than the rest of the EU combined, and produced 420,000 decisions (Deutsche Welle 2017). By 2018, and in the sequence of the EU-Turkey migration deal,⁵ the numbers of asylum applications had gone down to 185,853 (BAMF 2018a). The top five countries of origin in 2018 included Syria, Iraq, Iran, Nigeria and Turkey (BAMF 2018a), all countries with poor records of treatment of SOGI minorities (Ramón Mendos 2019). In 2018, BAMF granted international protection to 35% of the claimants, the refusal rate thus being 65% (BAMF 2018a). The BAMF does not produce statistics with regard to SOGI claims, recording only age, gender, religion and, for Syrian and Afghan claimants, also ethnicity (BAMF 2018b).

In Italy, according to the Italian Minister of Internal Affairs, 53,596 international protection claims were lodged in 2018. Pakistan, Nigeria and Senegal were amongst the top four countries of origin, all countries where same-sex conduct is criminally punished (Ramón Mendos 2019). Despite various positive elements in the Italian asylum system that will be explored throughout this chapter and the rest of these volumes, the rate of successful applications is only 33%, with 7% of claimants granted refugee status in 2018 and 67% refused any form of international protection (Dipartimento Libertà Civili e Immigrazione 2019).

Although UK officials and leaders frequently emphasise the country's proud history of supporting refugees and commitment to continuing to do so (Home Office 2017b; May 2015, 2016), in practice, even within Europe, the UK takes a relatively small number of people claiming asylum (Sturge 2019, p. 3). While having a much smaller number of asylum applications in 2018 (29,380) than other countries, the rate of refusal of initial claims in the UK was 67% – exactly the same as in Italy and close to the one in Germany (Sturge 2019). Similarly to Italy, the top four countries from which asylum claimants originated in 2017 – Iran, Iraq, Eritrea and Pakistan – are jurisdictions where same-sex conduct is criminalised (Ramón Mendos 2019;

⁵ <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf>.

Sturge 2019). In response to the crisis in Syria, and rather than participating in a common EU initiative to accept more refugees, the UK government launched the Syrian Vulnerable Persons Resettlement Scheme, to take people identified as vulnerable by the UNHCR (including persons at risk due to their SOGI), and which was expanded to resettle 20,000 Syrians by 2020 (Home Office 2017c).

Against this background, in this chapter we explore key aspects of policy and guidance in place in Germany, Italy and the UK in relation to SOGI, asylum, and SOGI asylum, thus setting the context for the subsequent chapters in which we explore our findings relating to a range of aspects of SOGI asylum. A country's SOGI asylum policy does not exist in a vacuum. In fact, it is developed in the context of broader SOGI and asylum policies, and these may operate in ways that reinforce each other or foster tensions. The choice of the countries under comparison, as explored in Chap. 2, is informed by the need to research how those broader SOGI and asylum policies influence – or not – a country's approach to SOGI asylum. Consequently, we proceed in Sect. 4.2 by discussing social and legal dimensions of SOGI, offering a broad picture of the protection of SOGI-related rights and the social environment in this context. In Sect. 4.3, we offer an outline of the national asylum systems, including the domestic overall policy frameworks and key political developments. In Sect. 4.4 the focus shifts to the domestic SOGI asylum systems, including consideration of statutory instruments, guidance and degree of compliance with international and supranational obligations. Finally, in Sect. 4.5 we look at how policy shapes the life of claimants after the granting or denial of international protection, and conclude in Sect. 4.6 with some final remarks.

4.2 Social and Legal Dimensions of SOGI

The manner in which SOGI are (legally) regulated and (socially) experienced varies considerably from country to country and within each country. Despite globalising trends and international and supranational developments, the identities and lived realities of non-heterosexual and non-cisgender people across Europe are still considerably dependent on where they grow up and live, constrained by a range of legal and socio-cultural factors.

One obvious, albeit generic, starting point to this discussion is ILGA-Europe's European Rainbow Map, an index that attempts to measure the legal protection and social climate affecting SOGI minorities in Europe by using a scale between 0% (gross violations of human rights and discrimination) and 100% (respect for human rights and full equality) (ILGA-Europe 2019). While Italy has scored 27% in this exercise, Germany has scored 59% and the UK has scored 81%. EU-wide comparative research has confirmed that stark differences subsist between countries in relation to: SOGI-related discrimination in employment and other areas; access to and legal recognition of one's preferred gender; and freedom of assembly and expression; abuse, hatred and violence (FRA 2015). It is important, however, to zoom in,

and see how the specific context of the countries on which we are focussing has developed in recent times.

Discrimination on grounds of SOGI in the field of employment is prohibited across all EU member states, in the light of the EU Framework Employment Directive,⁶ and jurisprudence developed by the CJEU throughout decades on sex discrimination, including people who have undergone sex reassignment (Ellis and Watson 2015). In the UK, for example, the Employment Equality (Sexual Orientation) Regulations 2003 extended workplace equality rights to cover sexual orientation. The Equality Act 2010 then extended protection from discrimination to several fields and on an extensive range of grounds, including SOGI, and required public bodies to promote equality on the same range of grounds – a level of anti-discrimination legislation that does not find a parallel in Germany or Italy.

In relation to family-related rights, the scenario is more fragmented, with each EU member state retaining widely different legal frameworks. The UK, for example, introduced civil partnership for same-sex couples in 2005 through the Civil Partnership Act 2004, and same-sex marriage through the Marriage (Same Sex Couples) Act 2013 (in England, Wales and Scotland) and the Northern Ireland (Executive Formation etc) Act 2019 (in Northern Ireland). Equal adoption rights were also granted in England and Wales through the Adoption and Children Act 2002. Germany has also for a long period only recognised same-sex registered life partnerships,⁷ but introduced same-sex marriage and adoption rights in 2017.⁸ Despite still lagging behind most other Western European countries, Italy eventually also adopted an act on same-sex civil unions in 2016.⁹ The legislator carefully avoided equating same-sex civil unions with opposite-sex marriage, and civil unions afford the bare minimum of the rights necessary to respect the right to respect for family life as enshrined in Article 8 ECHR. Interestingly, significant regional differences have emerged in respect of the use made of this legal status, with same-sex couples in the north of Italy making considerably more use of it than in the south (AGI 2018), which reinforces the idea of the south of Italy as a social environment less open or friendly towards SOGI minorities. Child adoption and surrogacy by same-sex couples remain outside the boundaries of legality, with judicial bodies filling the legislative gap by ruling on a case-by-case basis on grounds of the principle of the best interests of the child.¹⁰

Similarly, in relation to gender identity one sees wide variations in the legal framework across the three countries under comparison. In the UK, transgender rights have been a particular focus for policy since the early 2000s, and the Gender Recognition Act in 2004 recognised people's right to change their gender.

⁶Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22.

⁷Act on Registered Life Partnerships, 16 February 2001, Federal Law Gazette I p. 266.

⁸Act to Allow Persons of the Same Sex to Marry, 20 July 2017, Federal Law Gazette I p. 2787.

⁹Law no. 76, 20 May 2016.

¹⁰See, among others, Supreme Court, judgment of 26 May 2016, No. 12962.

Subsequently, the government launched an Action Plan in 2011 (Government Equalities Office 2011), there was a parliamentary inquiry in 2016 (House of Commons Women and Equalities Committee 2016), and a consultation on the Reform of the Gender Recognition Act was carried out in 2018 (Government Equalities Office 2018b). In Italy, however, it took judicial intervention to ensure that transgender individuals could amend their personal data without having to undergo sex reassignment surgery,¹¹ and could remain married when choosing to undergo sex reassignment surgery.¹² Germany again stands somewhere in the middle, with the rights of people undergoing sex reassignment being regulated since 1980,¹³ but framed in very restrictive terms that had to be gradually challenged in courts and amended by the legislature. Crucially, German law now recognises non-binary gender, by allowing people to choose ‘diverse gender’ or no gender marker at all, both at birth and throughout life.¹⁴

While no particular issues arise in relation to freedom of assembly or reunion in any of these countries (for example, in relation to having the right to hold Pride events), not all of them consider homophobia or transphobia an aggravating circumstance in criminal conduct. While in the UK and Germany the law recognises the concept of ‘hate crime’ and ‘hate speech’ for homophobia and transphobia-motivated criminal acts,¹⁵ there is no equivalent in Italy. Considering the significant number of homophobic and transphobic attacks reported by the media (Bovo 2018) and the recurrence of statements against SOGI minorities, even from key figures in the government (Arachi 2018), the social environment appears increasingly less friendly towards SOGI minorities in Italy.

Although SOGI are clearly recognised and protected to some extent by the law in all three countries under comparison, including at constitutional level,¹⁶ the levels of protection are often insufficient and inadequate, most strikingly in Italy. Even in the UK, where the legal framework appears to be robust, people from SOGI minorities continue to face discrimination, harassment, disadvantage and inequality in a number of different policy areas. In education, for example, homophobic, biphobic and transphobic bullying, harassment and language remain a major problem (Hudson-Sharp and Metcalf 2016, p. 11). Furthermore, SOGI minorities in the UK are still at greater risk of being victim of hate crime compared to heterosexual and cis-gendered people, with recorded incidences increasing over time (Home Affairs Committee 2016). Mainstream services also often remain inaccessible to SOGI

¹¹ See, among others, Tribunal of Rovereto, judgment no. 194, 3 May 2013.

¹² Constitutional Court, judgment no. 170, 11 June 2014.

¹³ Act on the change of first name and determination of gender identity in special cases (Transsexual law – TSG), 10 September 1980, Federal Law Gazette I p. 1654.

¹⁴ Act on Change of Information in Birth Certificate, 21 December 2018, Federal Law Gazette I, no. 48, p. 2635.

¹⁵ UK Criminal Justice and Immigration Act 2008 and UK Legal Aid, Sentencing and Punishment of Offenders Act 2012; Section 46 of the German 1998 Criminal Code, as amended in 2015.

¹⁶ See, for example, Italian Constitutional Court, judgment no. 138, 14 April 2010, regarding sexual orientation, and judgment no. 170, 11 June 2014, regarding gender identity.

minorities because of heteronormative assumptions and the fear of discrimination (Hudson-Sharp and Metcalf 2016, p. 64). All of this takes place in the context of ‘austerity’ measures, cuts in public spending and obstacles in access to justice that have been recognised as increasing poverty and inequality in the UK for many people, including SOGI minorities, asylum claimants and – of course – SOGI claimants (EHRC 2018; Special Rapporteur on extreme poverty and human rights 2019). This points to the need for feminist, intersectional, queer and human rights approaches in this field, along the lines explored in Chap. 3.

These insufficient levels of legal protection and social respect have potential implications for the adjudication of SOGI asylum claims and how broader asylum policy issues affect these claimants. In Italy, for example, most of our participants, including claimants of international protection, connected issues of social integration with the lack of equal rights for SOGI minorities, compounded by an increasingly negative social attitude towards migrants and widespread hate crime and speech on ethnic origin grounds. Even when good work is being carried out in the field of SOGI and social justice, those involved in such initiatives and policies are often unable to influence decisions and developments in the field of asylum and refugees, owing to structural and organisational divides (Finn, representative of a municipality, Germany). Yet, as subsequent chapters will reveal, these different standards do not prevent the rise of good practices in SOGI asylum where the legal and social protection of SOGI minorities remains problematic.

We will turn to specific issues affecting SOGI asylum claimants in Sect. 4.4 and subsequent chapters. Before we do that, it is necessary to understand better how the asylum legal and policy framework operates in Germany, Italy and the UK.

4.3 The National Asylum Systems

4.3.1 *The Key Legal Instruments and Actors*

All three countries under analysis are signatories of the Refugee Convention and members of the CEAS, making it natural to start our analysis of these countries’ asylum systems with an overview of the types of international protection that the Refugee Convention and the Qualification Directive offer. Under the Refugee Convention, people seeking international protection can claim refugee status (Chap. 1). This is a status that, depending on each country signatory to the Convention, can be determined by either domestic authorities or the UNHCR itself. In the case of Germany, Italy and the UK, it is the role of domestic authorities to adjudicate asylum claims internally. Where the requirements to grant refugee status are not met, domestic authorities in EU member states can instead grant subsidiary protection, a legal status recognised by the EU Qualification Directive and defined in its Article 2 as a form of protection for a:

third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

Finally, and as a ‘residual’ form of protection left to the discretion of states, domestic authorities can also grant humanitarian protection when a person does not fulfil the criteria either for refugee status or subsidiary protection. This is a form of protection that is mainly suitable for those claimants who, in order to respect the principle of non-refoulement and Article 3 ECHR, cannot be deported. Yet, it is not regulated at EU level, but solely at national level. It generally entails less comprehensive protection than refugee status or subsidiary protection, and it ceases once the situation of danger leading to the protection comes to an end. Despite all three countries under comparison having a history of making this range of forms of international protection available to claimants and possessing many other similarities owing to the CEAS standards, each national asylum system has developed in starkly different ways.

In both Germany and Italy, the right to asylum has constitutional standing. In Germany, it is enshrined in Article 16a(1) of the Basic Law (Grundgesetz, GG). Although this norm only refers to ‘political persecution’, German courts have assumed that this norm conforms to the Refugee Convention and have therefore used it to decide on any asylum claim (Markard 2015). Still, refugee status in accordance with the Refugee Convention is now more commonly granted under §3(1) of the Asylum Act (Asylgesetz, AsylG).¹⁷ Furthermore, subsidiary protection is granted under §4(1) of the Asylum Act, and a prohibition of deportation (‘Abschiebungsverbot’, akin to what is generally understood as humanitarian protection) can be granted under §60(5)(7) of the Residence Act (Aufenthaltsgesetz, AufenthG). A wide-ranging legal reform came into force in August 2019, mainly affecting the quality of legal advice and representation, extending the length of stay in initial reception centres, further regulating the access to employment, limiting access to social benefits, and facilitating the deportation of claimants to countries of origin (including by using pre-removal detention) (AIDA and ECRE 2019). The wish to make the German asylum system more restrictive is clear.

In Italy, the right to asylum has also been enshrined constitutionally, in Article 10(3) of the Constitution, which provides that foreigners ‘who see denied the enjoyment of democratic freedoms granted by the Constitution’ should be given protection in Italy. This provision has a broad potential application, being more generous than the Refugee Convention’s definition of refugee or than EU asylum provisions, as ‘the denial of the enjoyment of fundamental freedoms’ could be sufficient for the recognition of asylum, the reason for persecution, for instance, being irrelevant (Benvenuti 2010, p. 36; Bonetti 2011, p. 35). However, although courts have asserted

¹⁷ An English version of the Asylum Act is available online: https://www.gesetze-im-internet.de/englisch_asylvfg/index.html.

that asylum can be granted directly on the basis of this constitutional norm,¹⁸ it has generally not been applied in such broad terms, with external sources (EU law and other international obligations) playing the key role in the field of asylum. Legislative decree no. 251/2007 constitutes the key asylum statute in Italy, but attempts to regulate migration flows have translated into significant and restrictive legislative reforms in 2017 and 2018.¹⁹

Conversely, in the UK, the right to asylum does not have constitutional standing. Asylum is a part of broader immigration policy, and asylum and immigration are often conflated (Casey 2016). UK legislation includes the Immigration and Asylum Act 1999, the Nationality, Immigration and Asylum Act 2002, and the Immigration Acts 2014 and 2016. The details of asylum policy are contained in section 11 of the Immigration Rules.²⁰ New legislation and continuous updating of the immigration rules have made this area increasingly complex and at points impenetrable (Singer 2019).

The institutional framework that implements the asylum statutory framework also varies considerably across the three countries under comparison. In Germany, the Federal Office for Migration and Refugees (BAMF) is the body responsible for the implementation of asylum procedures and refugee protection, as well as migration research and the nationwide promotion of integration.²¹ The BAMF thus decides whether asylum claimants are entitled to constitutional asylum, refugee status or any other form of protection such as subsidiary protection or prohibition of deportation. Decision-making practices by the BAMF have been scrutinised since the ‘BAMF scandal’ in 2018, where the regional BAMF office in Bremen was accused of fraud and granting people status who did not have genuine claims, but this could not be proved as no systematic irregularities were found (NDR 2019).

The model adopted in Italy is radically different. The Italian authorities responsible for adjudicating asylum claims are the ‘territorial commissions’ (‘commissioni territoriali’), which carry out the individual interview and individual assessment for each claim.²² Until 2018, these commissions comprised: one representative of the local municipality/authority; two representatives of the central government / Ministry of Internal Affairs, including a (local) police officer; and one representative of the UNHCR. The representatives of the UNHCR seem to enjoy particular

¹⁸ Supreme Court, judgments no. 11441, 18 June 2004; no. 8423, 4 May 2004; and no. 4674, 26 May 1997.

¹⁹ Decree Law no. 13/2017 (converted into Law no. 46, 13 April 2017), so-called ‘Decreto Minniti’; Decree Law no. 113/2018 (converted into Law no. 132, 1 December 2018), so-called ‘Decreto Salvini’. On the latter, see CILD (2018).

²⁰ <https://www.gov.uk/guidance/immigration-rules>.

²¹ <http://www.bamf.de>.

²² Law No. 189/2002 (Modifica alla normativa in materia di immigrazione e di asilo); Presidential Decree (Regolamento relativo alle procedure per il riconoscimento dello status di rifugiato) [Regulation on the functioning of the asylum system]. A short history of the Italian system is also available here: www.interno.gov.it/it/ministero/dipartimenti/dipartimento-liberta-civili-e-immigrazione/commissione-nazionale-diritto-asilo.

respect and professional esteem in this context, owing to their expertise and full-time commitment to refugee matters (Titti, decision-maker). If we exclude the UNCHR staff, before 2018, asylum requests were evaluated by people who were not experts in the field of asylum or migration. Furthermore, the fact that most commissions' members were nominated by local authorities had consequences:

they are a reflection of the best and the worst of the territories. So, in my experience, if I had to tell you about the police officers of the South, they usually tend to be much less racist than the northern police headquarters, maybe because they have more experience in the fight against organised crime, in a police force that does not just deal with small drug trafficking, petty crime sometimes related to immigrant youth, so they have a different notion of safety (Roberto, decision-maker).

The need for professional staff with expertise in asylum was recognised by the 2018 reform, which changed the composition of the territorial commissions to: one representative of the central government, with the role of president; two professional officers with a higher education degree, who have substituted the police officers and the representatives of municipalities / local authorities; and a representative of the UNHCR.²³ This change has been generally evaluated positively by our participants, on the basis that more qualified staff might lead to fairer evaluations and better-founded decisions (Silvana and Maurizio, judges). This positive assessment also relates to the relatively young age of the new staff, which some participants hope will translate into more 'open minds' and fewer prejudices about specific groups of claimants. These opinions are also based on the idea that the new staff replaced police officers and local authorities' representatives who, irrespective of their background, were mainly perceived as pursuing security or locally-based interests and, often, as being the members of the territorial commissions most influenced by bias and prejudices (Maria Grazia, decision-maker). The fact that the UNHCR remains represented in these commissions is a unique feature of the Italian system, setting it apart in the European context (Chap. 6). While generally seen as a positive feature, for some of our participants the involvement of the UNHCR should not be seen as entirely positive, because a 'EU-based national asylum system' may also have interests independent from the UNHCR and which may not always correspond to the UNHCR vision (Daniele, decision-maker). These local territorial commissions are coordinated by the National Commission for the Right to Asylum (Chap. 6).

Finally, in the UK, asylum is the responsibility of the Home Office, with the Home Secretary being the responsible minister. The department responsible for immigration and asylum has had a troubled history: in 2006 it was declared 'not fit for purpose' by its own minister and a large backlog of outstanding asylum claims was identified (House of Commons Home Affairs Committee 2013b). Within the Home Office, asylum applications are now managed by UK Visas and Immigration (UKVI). Prior to 2013, this was the task of the UK Border Agency (UKBA), but this agency was split up by the Home Secretary to end its 'closed, secretive and

²³ The professional dynamics within territorial commissions are further explored in Chaps. 6 and 7.

defensive culture' (Barrett 2013). Problems are far from having been completely solved (Hill 2019). The Home Office is still considered to be 'extremely flawed (...) just faceless. And, extremely elusive and you will be on the phone for hours and you won't get anywhere and they only write letters and put fake names at the end of it' (Chloe, NGO worker) (Chap. 2). One Home Office staff member also asserted that the Home Office is:

very cynical as an organisation (...) [it has a] culture of cynicism as opposed to outright disbelief (...) I think the decision-making in the Home Office the last two to three years has... gone a lot worse. I don't think I have seen in my 12 years decisions as poor as this, across the board, asylum and non-asylum (Bilal, presenting officer).

At the same time it was suggested that there are serious issues of lack of communication, poor team work and insufficient learning strategies amongst the Home Office staff:

there was a disconnect [between first decision-makers and presenting officers, representing the Home Office in judicial appeals] and there wasn't really that sort of learning sort of loop that you might expect. And, you know, there has been attempts to try to bring it together a bit more, but there was still too much of a gap between the people who were managing the case, the litigation cases, and the sort of first line decision-makers. And the same was true I think of the, of the country of origin information, too much of a gap between the people producing it, and the people who were using it (Daniel, official).

The UK has an Independent Chief Inspector of Borders and Immigration, a post established to monitor and inform Home Office borders and immigration work (ICIBI 2019), which is also informed by stakeholders gathered in a Refugee and Asylum Forum, and an Independent Advisory Group on Country Information (IAGCI), which consists of a panel of experts and practitioners that supports the work of the Independent Chief Inspector, a system lauded for its transparency and merit by one panel member (Wilf, independent advisor). The substance and detail of Home Office asylum activity is therefore regularly and independently scrutinised. Asylum and immigration policy is reviewed and challenged by civil society, through the work of NGOs such as the Refugee Council and legal forums such as the Immigration Law Practitioners Association's Refugee Working Group. Yet, despite these mechanisms, reform and improvements are frustratingly slow:

[even] when there has been an acceptance that the change that I have recommended should be made (...) nothing seems to have happened. And it is not always obvious why; whether it has got to ministers and there is pushback or whether it has been overtaken by something else which is a higher priority. There is not always clarity about why things are taking such a long time (David, official).

The overall assessment of the Home Office is thus quite critical, as one of our survey participants explained:

There often appears to be inconsistency, and a wide variation in the quality of HO decisions and refusal letters. These documents can be incoherent, badly written, non-sensical and contradictory. The entire system often gives the impression of being driven by targets, by racism and by the need to placate misplaced public hysteria about immigration. For LGBT people these deep flaws are exacerbated by the fact that many decision makers seem to be

unable to comprehend the realities of homophobia, internalised homophobia and discrimination – both in the UK and elsewhere (S110, NGO volunteer, UK).

After this brief discussion, and in anticipation of many discussions in subsequent chapters, one question requires consideration: in general, can the asylum systems of the three countries under comparison be considered consistent with international and European law and policy?

4.3.2 Degree of Compliance with Supranational and International Obligations

While superficially it may appear that the protection offered by these countries to asylum claimants is in line with their international (including Refugee Convention, the ECHR and relevant UN human rights treaties) and EU law obligations, a more detailed consideration raises serious doubts.

It is clear that EU law is much more influential than international law in these domestic asylum systems. This is mostly due to the supranational nature of EU law and the principle of supremacy of EU Law (Avbelj 2011). Participation in the EU framework seems to push these countries to adhere to ‘minimum standard solutions’. In other words, the necessity to comply with EU standards in the field of asylum has progressively meant setting aside other possible solutions, more respectful of the rights of asylum claimants and refugees. The consequences of this can be felt not only in relation to the rules that apply to reception conditions or the applicable procedures, where EU standards influence considerably the domestic legal frameworks, but also in relation to aspects of the RSD process. Yet, not even EU standardisation efforts are fully effective, as national and even regional standards and practices have considerable influence as well. In the words of Terry, member of the European Parliament:

there was a resistance to, you know, having any kind of functioning system, for asylum, in place altogether. So, I mean, that's kind of what we are up against at the moment, an absolute resistance to make anything work. And it is not about taking in... a couple of hundred refugees; it is a very ideological fight that is happening right now (...) And that is why there is so much resistance and so many problems actually implementing legislation that we already have. Because in some fields, I mean, I think in some fields we really need to work legislatively, but in some things we also already have decent legislation and if it was properly implemented and enforced, the situation of many people would improve massively, but it is just not being enforced.

Thomas, a German NGO volunteer, also expressed this idea by saying:

My experience is that, no matter what the laws are, in the administrative implementation by [German] federal states the differences are so great that the influence of European legislation would not be so great now. Because we are experiencing that many things that are normal in all other federal states are not going on in Bavaria, just because a Minister of the

Interior simply instructs his authorities to do things one way or another. No matter what the laws are.

And the same problem presents itself in Italy:

On the subject of international protection, the lack of homogeneity of the decisions taken by the [territorial] commissions and the courts is a very serious problem. If it is serious at the level of the European Union, since it has directives but then the [recognition] rates vary between 10 and 90% according to the country that examines the claim (...). Something similar, not at those levels, exists between [territorial] commissions and courts. Not only regarding how some questions are analysed, but also regarding certain countries [of origin] (...) the relevance of social integration for the purpose of issuing humanitarian permits, for example, is a very big problem of lack of homogeneity (Livio, lawyer).

This lack of homogeneity and adherence to legislative standards across Europe may well worsen with ‘Brexit’. While UK governments have not questioned the UK’s membership of the UN and related commitments (Braithwaite 2016), the UK’s relationship with European bodies is uncertain. The decision by the UK government in 2016 to leave the EU following the referendum did not lead to any immediate withdrawal from EU asylum instruments and the UK is already not bound by some EU-wide measures: the UK is not part of the Schengen Zone, has not opted into the recast 2011 Qualification Directive or 2013 Reception Directive, and has said it will not opt into the proposed Dublin IV Regulation (Goodwill 2016). However, it is unclear the extent to which leaving the EU will reduce protection for people claiming asylum in the UK. On the one hand, ‘[m]ost proposals for further reform both within the UK and at an EU level have been largely regressive and are expected to become more so, as pressure to deal with the migrant crisis increases’; against that, ‘without a commitment to a shared European System, in the current environment, a race to further reduce protection to a lowest common denominator of standards could ensue’ (Patrick 2016). At any rate, some UK decision-makers already discount the relevance of any European jurisprudence: ‘Strasbourg court doesn’t bind us, it is only guidance. The only decisions that bind us in this [SOGI asylum] area are the Supreme Court[’s], it is not an area that the CJEU, which is in Luxembourg, really deals with’ (Adrian, judge). This is despite the fact that both the Strasbourg and Luxembourg Courts do have a significant bearing on SOGI asylum matters at a domestic level (Danisi et al. 2019; Ferreira 2021).

Even more worrying is the simultaneous likelihood that the UK government will seek ‘opt-outs’ from the ECHR, thus allowing it to ignore a range of human rights obligations of the ECHR system – a proposal that goes much further than the commitment to repeal the UK’s Human Rights Act 1998 under the previous Prime Minister David Cameron (BBC News 2017). It is true that UK courts are not the keenest followers of Strasbourg jurisprudence (Ferreira 2015), but leaving the ECHR would mean asylum claimants in the UK would no longer benefit from the decisions of the Strasbourg Court, no matter how insufficiently or reluctantly applied they may be at times. If the UK were also not bound by decisions of the CJEU, there would be far greater scope for arbitrary decision-making in the UK in response to political and media pressures to control borders.

The UN framework, however, plays a role as well. The UNHCR, specifically, is influential in Italy, owing to its role in contributing to the decision-making in the administrative asylum adjudication bodies. This is something unique in comparison to other countries in Europe, where the UNHCR does not have this primary role owing to domestic asylum authorities controlling the RSD process themselves. Yet, the UNHCR representative is only one of the four members of these bodies, so the final decision on granting asylum is a collective one. Still, the UNHCR representative may influence the decision-making positively, considering that their mission is to protect claimants (while the state's primary aim is patently to protect its borders). It may therefore be important to retain this role for the UNHCR in the Italian context, ensuring its power and resources.

A final point is in order: the alleged existence of 'refusal quotas' or 'deportation rates'. Indeed, in relation to Germany, we were told that:

the immigration office that is dealing with a client of ours, they recently again told me and the lawyer that they just get pressure from the government of Upper Bavaria, because they do not meet the deportation quota. (...) that fits with what Seehofer [Bavaria's internal affairs minister] so proudly said, on his 69th birthday 69 people were deported. And so, well, I think, it's also things that are partly unknown to the public, but I have the feeling that some things really happen there, at the level of immigration offices and district offices, where other forms of pressure are exerted because the political wind is changing (Sofia and Emma, NGO workers).

In the context of the UK, we were also told that 'the Home Office has targets of numbers of refusals expected (I believe this is currently around 80%). These quotas mean that the scales are heavily weighted against those seeking asylum' (S130, NGO volunteer, UK). Whether such quotas are official or mythical, enforced or indicative, they remain ingrained in people's consciences, and do nothing to enhance people's trust in the asylum system. Moreover, they run against international refugee law, which relies on humanitarian and human rights requirements (Chap. 3), and cannot depend on quotas or numerical thresholds.

Bearing in mind the concerns discussed in this section, we are now better able to understand the key aspects of the SOGI dimension of the asylum systems in Germany, Italy and UK.

4.4 SOGI Dimensions of Domestic Asylum Systems

The domestic treatment of asylum claimants – including SOGI claimants – is plagued by complex internal webs of factors that supersede EU harmonisation efforts. In some countries, such as the UK, some decision-makers are convinced that SOGI asylum adjudication 'is not an issue':

things have moved on so much... I think that there will always be homophobia in the system, whether that is in the Home Office, or even amongst certain judges, but I think that the ethos overall in the Home Office and here [judiciary] actually is such that no one would ever, ever... express that [homophobia] or... in their work or in their speech without some-

thing happening (...). And someone would be immediately pulled up because it is so unusual (Harry, senior judge).

Yet, Amanda, an NGO worker in Brussels, also highlights how SOGI asylum domestic adjudication seems to be to some extent resistant to European developments:

interesting how the French case law and Italian case law has stuck to the grounds [for persecution] or to their own interpretation even when CJEU case law has come along and said “no, criminalisation [is not enough for persecution to be found], legislative measures criminalising sexual orientation needs to actually be implemented and for it to be persecutory”. So, so there is kind of like a stubbornness in certain countries for the better (...) in other countries (...) eastern European countries, it is still an issue and for example in Bulgaria after *X, Y and Z* and *A, B and C*, there were still flagrant violations of human dignity and not taken on board what the Court had said in *X, Y and Z* and a lack of transparency as to how decision-makers and judges were processing SOGI claims.

Often, member states make an effort to follow legally binding developments, but may lack resources and quality control mechanisms, as pointed out by Helena, an EASO staff member. Here, we explore the main SOGI dimensions of the German, Italian and UK asylum systems, with a focus on particular milestones and the use of the notion of vulnerability.²⁴

4.4.1 *Milestones in Policy and Guidance*

In all three countries under comparison, it is currently accepted that SOGI asylum claims fall within the remit of domestic refugee law. In Germany, that has been clear since a landmark decision of the Federal Administrative Court (Bundesverwaltungsgericht) in 1988,²⁵ where it was decided that persecution on grounds of sexual orientation could fall under the right to asylum for political persecution (‘*asylberechtigenden Merkmalen*’), enshrined in Article 16a of the Basic Law. The Federal Administrative Court decided that, under specific circumstances, the persecution of gay men in Iran could be accepted as ‘political persecution’. However, this judgment, which still stands today in relation to constitutional asylum, was based on a problematic understanding of homosexuality. As Hübner (2016) argues, considering when the decision was made, in some ways it was progressive, as it drew on an understanding of sexuality as *not* ‘curable’, but as ‘irreversible’, ‘inescapable’ and ‘fateful’. However, the Court’s decision pathologised gay men in other ways, namely as not being able to control their sexual urges (‘*triebhaft*’). Moreover, criminalisation of same-sex sexual activities was not sufficient for granting asylum, and the Court specified that criminalisation was not a sufficient ground if such norms existed to protect ‘public morality’ (Hübner 2016; Kalkmann 2010). In the

²⁴ For a succinct comparative overview of the SOGI asylum systems in Germany, Italy and the UK, refer to the table at <http://www.sogica.org/en/case-studies/>.

²⁵ BVerwGE, 15 March 1988, C 278.86.

case of Iran, however, the Court found that the death penalty was a very harsh punishment and disproportional to keeping public morality.²⁶

This decision, on which many others have subsequently been based, introduced a distinction between homosexuals whose sexual orientation was ‘irreversible’ and those whose sexual orientation was only ‘latent’ (and who were therefore able to choose whether to be gay or not). For the latter, it implicitly denied one’s right to live one’s sexual orientation openly, and forced them to live ‘in the closet’ (Markard 2013, p. 75). The consequence of this decision was that, up to 2012, some courts based their decisions on an assessment of the ‘intensity’ of the irreversibility of homosexuality, and often commissioned medical and sexual ‘scientific’ reports to assess this (Hempel 2014, p. 42). This led to rather obscure decisions in the administrative courts (Chap. 7).²⁷

The path to legal recognition of SOGI asylum claimants in Italy took a different course. Despite its potential application, Article 10(3) of the Italian Constitution has never been used in SOGI asylum cases. A joint reading of Articles 3 (on the right to equality) and 10 of the Constitution could provide for a sufficient basis to use the Constitution to grant asylum to SOGI claimants. Nonetheless, territorial commissions and judges have never adopted such an approach and, instead, have awaited statutory recognition of SOGI asylum claims, as we will discuss below.²⁸ In the UK, it was neither a constitutional text nor a statute that offered legal standing to SOGI asylum claims. Instead, it was the House of Lords that recognised that women in Pakistan constituted a particular social group,²⁹ with the same approach subsequently being applied to SOGI asylum claims.³⁰

Statutory recognition of the legal standing of SOGI asylum claims across the board (as opposed to a constitutionally protected form of political asylum) can now be found in all three countries under comparison. In Germany, the granting of refugee status on the Refugee Convention ground of PSG is a fairly recent phenomenon and only took place in 2005, when Article 10(1) of the 2004 Qualification Directive was transposed into German law through the Residence Act. This also established a sounder foundation for the recognition of claims of persecution on grounds of SOGI, a move held to be ‘very important’ by German lawyers to overcome asylum being seen as merely connected to ‘race’, religion and political opinion (Gisela,

²⁶ It is worth noting that West Germany had also criminalised homosexuality for over 20 years and legalised it only in 1969 (it was decriminalised in East Germany in 1968). Moreover, in West Germany, it was argued that these laws were in place to protect morality and judgments by the Federal Administrative Court contributed to maintaining this. So, in this judgment the Court might have tried to defend its own previous jurisprudence (Hempel 2014, p. 47).

²⁷ For a table of SOGI asylum case law in Germany, see <http://www.sogica.org/database/held-sogica-table-of-german-sogi-case-law-1988-2018-september-2018/>.

²⁸ For a table of SOGI asylum case law in Italy, see <http://www.sogica.org/database/danisi-italian-sogica-case-law-table-2019/>.

²⁹ *Shah and Islam v Secretary of State for the Home Department*, House of Lords, 2 A.C. 629, 1999.

³⁰ See The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, 6(e), and UKVI 2011, p. 11. For a table of SOGI asylum case law in the UK, see <http://www.sogica.org/database/9513/>.

lawyer). Since then, the fear of persecution by non-state actors has also been accepted in refugee claims (Hempel 2014; Kalkmann 2010). Statutory reference to SOGI in asylum law in Italy was also a consequence of the transposition of CEAS instruments, which increased considerably the ‘legal consciousness’ of the notion of PSG including SOGI claims (Livio, lawyer).³¹ In relation to both sexual orientation and gender identity, the Italian legislator simply copied the content of the EU Qualification Directives, affirming that SOGI may be relevant for the identification of a PSG under the Refugee Convention. Finally, UK statutes also recognise the notion of PSG as enshrined in EU instruments, including a specific reference to sexual orientation.³²

Asylum adjudication authorities sometimes develop guidelines to strengthen their decision-making in relation to certain types of claims (Sect. 4.5). Gender-related asylum guidelines were generally the precursor for SOGI-related ones. Initially developed in Canada (Aberman 2014, p. 61) and then in other countries and at UNHCR level (UNHCR 2002), gender-related asylum guidelines have thus played an important role in the absence of SOGI-specific asylum guidelines, for example, in terms of the role of private actors in persecution and social norms in the constitution of a PSG, and are still believed to be of relevance for SOGI claims, especially those made by women claimants (Neilson 2005). SOGI-specific asylum guidelines have, however, increasingly made their appearance in the international arena, and can now be found at domestic level, for example, in Canada (Dustin and Ferreira 2017) and at an international level, developed by the UNHCR (UNHCR 2012).

Neither in Germany nor in Italy is there domestic policy guidance regarding SOGI claims specifically, making international and/or gender-related asylum guidelines – where available – of value. Germany does not have any guidelines for assessing SOGI claims (BMI 2019, p. 7) and has also not generally ‘implemented any gender guidelines for assessing and considering refugee claims’ (Center for Gender & Refugee Studies 2014, p. 30). However, the BAMF has ‘internal instructions on asylum procedure – persecution on grounds of belonging to a particular social group’ (BAMF 2017). Perhaps to compensate for the lack of guidelines, the BAMF has officers who specialise in SOGI claims (Mariya, NGO worker). In Italy, despite the absence of SOGI-specific guidance, the involvement in territorial commissions of UNHCR representatives with decision-making powers seems, in practice, to have increased the application of the UNHCR SOGI guidelines. UNHCR Italy does, indeed, dedicate much attention to these claims, giving rise to good practices in some territorial commissions and organising specific trainings on this topic on behalf of the National Commission of Asylum (Chap. 6). This does not in itself afford any special protection to SOGI claims, but ensures a certain visibility to SOGI claimants in Italy. This may explain why criminalisation of same-sex conduct

³¹ Sexual orientation was introduced by Article 8 of Legislative decree no. 251/2007 and gender identity was introduced by Article 1(f) of Legislative decree no. 18/2014 (Balboni 2012, Chapter III).

³² Section 6, The Refugee or Person in Need of International Protection (Qualification) Regulations 2006.

in countries of origin has been seen as persecution in itself (Chap. 7). To complement UNHCR standards, Italian lawyers and decision-makers follow closely CJEU jurisprudence on SOGI asylum (Daniele, decision-maker).

Conversely, the UK Home Office has produced guidance specific to SOGI claims, consisting of the 2011 guidance on gender identity and 2016 guidance on sexual orientation (Home Office 2011, 2016a). In addition, there is a growing number of SOGI-specific Country Policy Information Notes.³³ Both sets of documents tend to show a high degree of sensitivity to the particular issues likely to affect SOGI claimants. The sexual orientation guidance, in particular, has been found to be concise, clear and sensitive (ICIBI 2014), as well as appreciated more generally: ‘I quite like the guidance. In terms of [what] it does, it has actually made me learn things’ (Umar, legal advisor). Admittedly, some concerns subsist with these guidance documents, such as the problematic application of ‘discretion logic’ (Chap. 7), the lack of a clear obligation to record SOGI asylum claims as such, and insufficient understanding of the internal nature of gender identity (Bach 2013, p. 35; ICIBI 2014, p. 11). Nonetheless, if the Home Office guidance – on SOGI and all aspects of asylum – were applied consistently to SOGI claims, in particular in light of the low threshold of proof, it is unlikely that there would be the numbers and kinds of refusals that have been reported by campaigners, journalists and advocates (APPG on Global LGBT Rights 2016, p. 54; UKLGIG 2018). This suggests a gap between Home Office guidance and its implementation by caseworkers (ICIBI 2014). On a positive note, the production of Home Office guidance is a relatively transparent process, with officials consulting on both new Asylum Policy Instructions and Country Policy Information Notes, as well as coordinating stakeholder groups with senior members of NGOs working on asylum and LGBTIQ+ protection and rights. Furthermore, lawyers make use of the UNHCR SOGI guidelines, including in the context of appeals (Upper Tier tribunal observation, London 2018).

Against this background, we will now consider how the domestic asylum systems under comparison have dealt with the notion of ‘vulnerability’ in the context of SOGI claims.

4.4.2 *Vulnerability and SOGI Asylum*

The way asylum claimants are treated throughout the asylum process depends to a great extent on whether they meet the (variable) definition of a ‘vulnerable person’, something we started exploring in Chap. 2. Article 21 of the Reception Directive does not offer an abstract definition of ‘vulnerability’, but clarifies that it includes individuals:

such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious ill-

³³<https://www.gov.uk/government/collections/country-policy-and-information-notes>.

nesses, 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.³⁴

Although SOGI asylum claimants are not expressly mentioned in this provision, they will fall within its remit at least when – as it is often the case – they have been victims of human trafficking, have serious illnesses or mental disorders, or have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence. A doctor who provides medico-legal reports in asylum cases in the UK involving torture or abuse, estimated that 90% of the women and more than 50% of the men he saw had been raped in circumstances connected to the basis of their asylum claim; he also estimated that 25% of his clients were LGBTIQ+ (Carl, doctor with an organisation providing medico-legal reports, UK).

The reform of the CEAS instruments has prompted a discussion about replacing the notion of ‘vulnerability’ with that of ‘specific needs’, thus avoiding the risk of being perceived as ‘favouring’ certain claimants and focusing on tailoring the asylum system to individual needs (Ferreira 2018). This was explained by Alfred, a European Parliament member of staff, as follows:

I think the whole notion of vulnerability is a bit left behind, because it wasn’t appropriate for what we are talking about. It is about vulnerability, but it is about... it is individual assessment and sometimes you need to take a closer look at stuff.

For the time being, however, ‘vulnerability’ is still the legal notion used.

In Germany, apart from unaccompanied children, there is no ‘requirement in law or mechanism in place to systematically identify vulnerable persons in the asylum procedure’ (ECRE et al. 2019, p. 49). A medical examination takes place in the reception centres and medical staff might inform the BAMF of symptoms of trauma, but there is no specific screening and systematic procedure in place with regard to vulnerabilities. Although in 2016 the Asylum Act was amended to include the identification of vulnerability, it still fails to adequately transpose the Procedures Directive, as it only requires the BAMF to carry out the interview in an appropriate manner but not to provide specific support throughout the asylum procedure (AIDA 2017, p. 42). As there is no systematic process, it is down to the federal states to decide how they deal with the identification of vulnerabilities, and also how they define vulnerable groups. Some federal states, such as Berlin for instance, have introduced pilot schemes for the identification of vulnerabilities, so that vulnerable claimants are referred to specialised institutions (AIDA 2017, p. 43). According to information from our participants, Berlin and Mainz include SOGI claimants in the group of vulnerable claimants (Joachim, NGO worker; Frank S., legal advisor). There is no comprehensive information available on which federal states have specific procedures with regard to the identification of vulnerabilities and which include SOGI claimants (BMI 2019). Only the federal state of Rhineland-Palatinate has procedures and guidelines in place that conform to EU legislation with regard to

³⁴This definition is repeated in Article 20(3) of the Qualification Directive (further discussion of ‘vulnerability’ in the context of the CEAS can be found in Brandl and Czech 2015; ECRE 2017).

identification and housing of vulnerable claimants (ECRE et al. 2019, p. 50). Yet, the BAMF does have some guidance in place to handle certain cases in a particularly sensitive manner, if necessary by especially trained decision-makers (Chap. 6). This includes unaccompanied children, victims of torture and traumatised asylum claimants, and victims of gender-specific persecution, which includes SOGI claimants. In a response to a parliamentary request, the government stated that the BAMF has implemented ‘a concept for the identification of vulnerable persons in the asylum procedure’ since 2015; however, it is not clear what this entails, apart from the fact that the ‘concept serves to identify particular needs during the entire asylum procedure by all employees of the BAMF who come into contact with applicants’ (BMI 2019).

In Italy, statutory norms have transposed the recast CEAS directives mentioned above, but have not gone beyond them. This means that SOGI asylum claimants are not comprehensively identified and treated as members of a vulnerable group, except if, upon individual assessment, they are recognised as victims of torture, rape or serious violence. A careful individual assessment is, however, not done systematically, owing to the large number of individuals arriving to Italy, as we heard from several participants (Chap. 5).

In the UK, the notion of vulnerability is particularly evident in relation to the Syrian Vulnerable Persons Resettlement scheme, which prioritises vulnerable people on the basis of the UN vulnerability criteria (Home Office 2017c). These include women and girls at risk, but not explicitly SOGI minorities. However, the government confirmed that ‘[p]ersons who are at risk due to their sexual orientation or gender identity are usually referred for resettlement using the category “Legal and Physical Protection Needs”’ (Home Office 2016b).

Vulnerability, as a label, is also relevant in relation to detention. The UN Working Group on Arbitrary Detention has stated that ‘[d]etention of migrants in other situations of vulnerability or at risk, such as pregnant women, breastfeeding mothers, elderly persons, persons with disabilities, *lesbian, gay, bisexual, transgender and intersex persons*, or survivors of trafficking, torture and/or other serious violent crimes, must not take place’ (UN Working Group on Arbitrary Detention 2018, our emphasis). Yet, there are clear violations of this guidance in the European context. While Germany and Italy are bound by the current Reception Directive, which restricts the use of detention, the UK is only bound by the original Reception Directive, which does not refer to detention.

In Germany, although detention rates have been traditionally low, there are no statistics available on detention of asylum claimants, as federal states do not disaggregate data for detained foreigners and claimants for international protection (ECRE et al. 2019, pp. 96–97).

In Italy, asylum claimants are generally not detained, but their liberty may be restricted if, on the basis of an individual assessment, it is believed that there is a risk of escape from Italy.³⁵ Yet, this seems to happen rarely: none of the SOGI

³⁵ Article 6(d) of Legislative decree no. 142, 18 August 2015.

claimants we interviewed had been detained and none of our other participants mentioned cases of detention. Moreover, emergency situations due to the flow of people arriving to Italy have led to rethinking some aspects of the Italian reception system, with the establishment of a number of centres of identification and expulsion.³⁶ In line with the 2015 EU ‘European Agenda on Migration’ (European Commission 2015), the aim has been to accelerate as much as possible returns of ‘irregular immigrants’, as well as of those people whose request for international protection is rejected. The 2018 Italian reform increased the maximum period of deprivation of liberty allowed for immigrants in repatriation centres from 90 to 180 days. Running the risk of violating Italy’s international human rights obligations, this reform also introduced the possibility of detaining people claiming asylum in ‘hotspots’ for 30 days, in order to ascertain their identity and nationality.

Finally, the UK does detain migrants and asylum claimants, and currently stands out as the only EU member state to detain migrants indefinitely, something which is the focus of campaigning by asylum and human rights advocates.³⁷ The UK has one of the largest networks of detention centres – or Immigration Removal Centres – in Europe and, within them, people claiming or who have claimed asylum are the largest group of detainees (Singer 2019, pp. 6–7). The government-commissioned, but independent, Shaw Report found that ‘[t]he time that many people spend in detention remains deeply troubling’ (Shaw 2016, p. viii). The Parliamentary Joint Committee on Human Rights recommended the introduction of a 28-day time limit ‘to end the trauma of indefinite detention’ (Joint Committee on Human Rights 2019, p. 3), but the Home Office rejected this recommendation by arguing that ‘an immigration detention time limit of 28 days would severely constrain the ability to maintain balanced and effective immigration control, potentially incentivise significant abuse of the system, and put the public at risk’ (Nokes 2019).

Following the Shaw Report, transgender and intersex – but not LGB – people were identified as being ‘particularly vulnerable to harm in detention’ (Home Office 2018a; UKVI 2016). As the Home Office points out in its policy on the processing of asylum claims in detention, the High Court ‘did not find sexual orientation or those with claims based on sexual orientation to be unsuitable for detention or for asylum consideration in detention’ (Home Office 2017d, sec. 3.8.3). Against this, the Equal Treatment Bench Book states that ‘[t]here is substantial evidence that LGB asylum seekers are particularly vulnerable while held in detention, experiencing discrimination, harassment and violence from other detainees and members of staff’ (Judicial College 2018, p. 223). The report on asylum accommodation by the Independent Chief Inspector in 2018 also identified LGBTIQ+ people as ‘particularly vulnerable’ and on that basis recommended that the government keep data on them and review the appropriateness of providing ‘no choice’ accommodation and

³⁶ The plan has been announced under the motto ‘zero tolerance’ for irregular third-country nationals (Tgcom24 2016).

³⁷ For example, campaigns by Liberty (<https://www.libertyhumanrights.org.uk/campaigning/oppose-indefinite-detention>) and Detention Action (<https://detentionaction.org.uk/get-involved/end-indefinite-detention/>).

forced bedroom-sharing (ICIBI 2018, p. 14). In its response, the Home Office accepted all these recommendations (Home Office 2018c, p. 6), but in 2019 a parliamentary committee inquiry into immigration detention again identified particular concerns for LGB people in detention who are not recognised as ‘adults at risk’ and urged the government to do more in implementing Equality/LGBTIQ+ Officers in detention centres:

We recommend that the Government should recognise that LGBTIQ+ people are vulnerable in immigration detention, thereby extending the recognition that it already affords to trans and intersex people to all LGBTIQ+ individuals. Secondly, the Home Office should monitor and publish statistics on the number of LGBTIQ+ people it detains (House of Commons Home Affairs Committee 2019, pp. 20–21).

However, in a report published the following year, the Independent Chief Inspector found ‘inconsistencies across the Home Office in understanding vulnerability and the impact on certain groups, particularly LGBTIQ+ detainees’ (Bolt 2020, p. 31). The same report noted the creation in 2016 of the Detention Gatekeeper function, which included protecting ‘potentially vulnerable individuals from being detained when it is not appropriate to do so’, while also stating that that data on the number of LGBTIQ+ persons detained was not centrally recorded on Home Office systems (Bolt 2020, pp. 34 and 40). This shows firstly a lack of clarity about which individuals within the LGBTIQ+ group are defined as vulnerable and should therefore not be detained, and secondly a failure to record the information that would make it possible to apply any such criteria.

Despite these efforts, striking differences between the countries under comparison are patent, as it will be explored in Chap. 8. Striking differences can also be observed in the life of claimants after the RSD process is concluded, as we will now consider.

4.5 Refugee Status Determination (RSD) Outcomes and Life After the Decision on a SOGI Asylum Claim

The standards adopted in substantive decision-making are strikingly different between and within the countries under comparison. A more detailed analysis of these differences is given in Chap. 7. Here, we explore more generally the different potential outcomes of the RSD process, as well as whether guidance is available to decision-makers in reaching those outcomes.

In terms of outcomes of the asylum claim, it is worth noting from the outset that, although Germany, Italy and the UK have a history of granting refugee status, subsidiary protection or humanitarian protection (‘prohibition of deportation’ in Germany) to claimants, this triad is under threat. Humanitarian protection in Italy constituted a domestic form of international protection meant as a residual possibility at authorities’ disposal to offer a ‘permit to stay’ (‘permesso di soggiorno’) to those claimants who could not satisfy the requirements to be granted refugee status

or subsidiarity protection. It was granted to foreign citizens who showed ‘serious reasons, in particular of a humanitarian nature or resulting from constitutional or international obligations of Italy’,³⁸ and it allowed for a permit between 6 months and 2 years (usually a 1 year, renewable permit). The Italian 2018 reform removed the possibility of granting humanitarian protection, and this is in potential violation of the asylum constitutional norm (Curi 2019).³⁹ The 2018 reform has, nonetheless, introduced a special residence permit for specific cases based on similar humanitarian considerations (for those in need of medical care, victims of domestic violence or serious labour exploitation, those coming from a country that is in a temporary situation of disaster and those who have performed acts of ‘high civil value’).

The triad of refugee status / subsidiarity protection / humanitarian protection still holds, however, in other EU member states. In the UK, for example, positive determinations by UKVI will either consist of refugee status, humanitarian protection (generally under Articles 3 or 8 ECHR), discretionary or other leave to remain. As an alternative to refugee status, humanitarian protection may be granted in situations where refugee protection is refused, but it would be unsafe to return claimants to their country of origin. This effectively covers subsidiary protection as well, and is less common (Home Office 2017a).

Differences between the asylum systems in the countries under comparison are also obvious in terms of the existence and use of policy guidance, produced and used to reach RSD decisions. The UK Home Office, for example, has developed a range of policy documents that guide decision-making in relation to a range of ‘categories’ of claimants and countries of origin. Although these Home Office policy documents are generally perceived as being of good quality, including by decision-makers in other countries, in fact:

... you have these products which, are often quite sort of complex and nuanced and... then you have within those products something which says policy, and so you have a relatively junior, relatively inexperienced caseworker trying to make a decision usually under time pressure, and they come across this thing which says “policy”, which effectively pares down to the basics a much more complex set of issues, and, essentially, in many instances, [it] is an argument for safe return. So... so the caseworker goes straight to that and thinks “ok, it is obviously safe to return.” (David, official)

On the other hand, some countries, like Italy, do not produce any such policy guidance. Somewhere in-between, as in relation to many other matters explored above, in Germany the BAMF does produce some internal instructions. Importantly, these take intersectionality into account to a certain extent, by explaining that

³⁸ Article 19, Testo Unico Immigrazione – Law 25 July 1998, no. 286. There is no exact definition of the circumstances that may lead to the recognition of this protection, but it should be viewed as a ‘remedial solution’ for asylum claimants who, despite not satisfying the criteria for the recognition of refugee status or subsidiarity protection, are nonetheless in a vulnerable position (for example, HIV-positive asylum claimants, or people arriving from seriously unstable countries or with serious human rights violations).

³⁹ This reform cannot, however, be applied retrospectively, so any asylum claim lodged before the entry into force of this reform can still benefit from humanitarian protection: Supreme Court, judgment no. 4890, 23 January 2019.

asylum decisions should take ‘into account the individual situation as well as the personal circumstances of the applicant, including factors such as family and social background, gender and age’ (BAMF 2017).

From the three countries where we focused our research, the UK was the first (and so far the only one) to produce statistics on the number of SOGI asylum applications, grants and refusals. Following pressure to do so dating back to 2009 (Bell and Hansen 2009, p. 65), in 2011 Home Office staff were instructed to flag claims based on sexual orientation (not gender identity) on the Home Office database, but the Vine report in 2014 found a ‘woefully poor level of compliance’ in this matter, with only 36% of the 116 sexual orientation asylum cases identified by John Vine, the Chief Inspector of Borders and Immigration, flagged as such (ICIBI 2014, p. 43). Based on the gap between the number of sexual orientation cases flagged by the Home Office and the number identified by the Vine report research, the Chief Inspector estimated in 2014 that 3.9% of asylum claims may be on sexual orientation grounds – three times higher than the 1.4% suggested by the Home Office (ICIBI 2014, p. 43). The Home Office first published ‘experimental’ statistics for asylum claims based on sexual orientation – but not gender identity – in November 2017 and again a year later (Home Office 2018b). Although these statistics do not show whether sexual orientation was the sole basis of an application or indicate whether sexual orientation had any bearing on the final determination, these figures are illuminating. First, they show the countries with the highest number of applications where sexual orientation was raised as a factor, namely Pakistan, Nigeria and Bangladesh, thus again countries where same-sex conduct is criminalised (Ramón Mendos 2019). Second, they show fluctuations, with a significant drop in the number of sexual orientation based grants of international protection compared to other asylum claims: from 39% to 22% during the 3-year period (2015–2017), while the overall fall in grants was proportionately less, from 40% to 32%. This period also saw an increase in claims with a sexual orientation component from 5.4% to 7.3% of all claims.

Despite their weaknesses, these ‘experimental’ statistics for the first time provide legal practitioners, advisors and academics with a baseline for assessing discrepancies in decision-making in cases involving claimants’ sexual orientation and show the need to publish similar statistics for gender identity-based claims.

Despite the lack of statistics, it is clear that in Germany and Italy there is a significant number of SOGI asylum claimants as well, something clearly suggested by the overall number of participants in our own fieldwork (Chap. 2) and their testimonies explored throughout these volumes. In Germany, we were told that a survey of 150 asylum claimants in 2017 indicated that 40% received a positive decision from the BAMF, that is, at the administrative level (Leon, LGBTIQ+ community project staff). Other participants also estimated that about around a quarter of lesbian asylum claimants they assist obtain some form of international protection (Sofia and Emma, NGO workers). In Italy, participants also offered some estimates, namely that two out of ten asylum appeals relate to sexual orientation (Silvana, Judge), and that 50% of SOGI asylum claims are successful at appeal level (Nazarena, lawyer).

Even in the absence of reliable statistics, it is evident that a number of SOGI asylum claimants will be successful and a number will not. It is apposite to look briefly here at the kinds of international protection that SOGI asylum claimants tend to receive and what kind of rights are connected to these, as well as to what happens when all avenues are exhausted and claimants are left without any protective legal status.

If the outcome of an asylum claim is eventually positive, the decision may lead to the recognition of refugee status or what materially are subsidiary protection or humanitarian protection (in the case of Italy post-2018 reform, special residence permit, and in the case of the UK, also discretionary or other leave to remain).

In Germany, when granted international protection, SOGI claimants seem to be mostly granted refugee status. Nonetheless, even if claimants are granted refugee status, that status initially only lasts for 3 years, which – compared to Italy and the UK – fosters greater instability. In the UK, as previously stated, there is no official data on gender identity-based applications and the ‘experimental statistics’ for LGB decisions give no breakdown of the form of protection granted, distinguishing only between ‘grants’ and ‘refusals’. However, in the UK, overall the vast majority of positive decisions of all asylum claims are grants of refugee status, generally entailing leave to remain for 5 years initially, before then leading to indefinite leave. A smaller proportion of claimants are granted humanitarian protection and an even smaller proportion granted discretionary leave to remain.⁴⁰

In Italy, despite an overall rate of recognition of refugee status of only 7% (Sect. 4.1), the legal status that seems to be most commonly granted to SOGI claimants is also refugee status. Moreover, even if of dubious legal correctness, subsidiary protection seems to be favoured in cases of reduced credibility of claimants from countries where there is homo/transphobic legislation (Maurizio, judge; Mara, lawyer). Humanitarian protection seems to be favoured for SOGI claimants by some territorial commissions (Nicola and Giulio, LGBTIQ+ group volunteers), in particular regarding trans claimants from Latin American (where legislation often protects SOGI minorities, but rates of violence against them are high), who have worked in Italy as sex workers for several years (Roberto, decision-maker; Valentina, social worker). In these ways, rather than being doctrinal and uniform, international protection decisions in Italy seem to be entirely contextual (Mara, lawyer). With the 2018 reform and removal of humanitarian protection, decisions are likely to become even less favourable and more contextual.

Some pre-2018 reform asylum decisions in Italy did grant humanitarian protection to SOGI claimants, perhaps as a compromise – when in doubt – between offering full-fledged refugee protection and returning SOGI claimants to their countries of origin. In the case of refugee status, and in line with the rights already provided by the Refugee Convention, the Italian legislation grants to refugees a broad

⁴⁰ In 2018, 33% of initial decisions were positive, of which 26% were refugee status and the other 7% were for humanitarian protection, discretionary or other leave to remain; 67% of decisions were refusals (Refugee Council 2019).

protection, which is wider when vulnerable people are involved.⁴¹ This entails (even if only on paper, as we will see in Chaps. 8 and 10): a renewable 5-year permit to stay; the right to work without discrimination in comparison to Italian citizens; the right to access the education system, and the social and health care systems without discrimination of any kind; and the right to family reunification.

From a social integration perspective, some strides have been made in the countries under comparison, but far from enough. In Germany, the Integration Act was introduced in 2016,⁴² ‘which on the one hand promotes the integration of people into society and the labour market and on the other hand commits them to their own integration efforts (“promote and demand”)’ (BMW 2019). The Act aims to give refugees better training opportunities and a clearer framework, and facilitates companies that want to train and employ refugees. It includes the ‘3 + 2’ regulation, which gives claimants who only have a ‘Duldung’ (‘tolerated stay’) the opportunity to do a 3-year apprenticeship and are allowed two more years of stay if they stay in the same occupation. When claimants obtain refugee status, they are entitled to full benefits and are obliged to find their own accommodation (however, they can usually stay in the asylum accommodation until they have found a place). The Integration Act also introduced the ‘Wohnsitzauflage’ (residence regulations), which require refugees to live in a particular federal state, and even in a particular area for 3 years if they, or their spouse, are not in training, working or studying (Deutscher Bundestag 2019). With this regulation, the federal government in fact takes away freedom from refugees and further increases their social isolation. This can be particularly negative for SOGI claimants, for whom social isolation is often a significant problem, as they have to live in very remote areas without any access to LGBTIQ+ communities and groups (Chap. 8).

In Italy, life after being granted international protection is very often no easier than before. Support can be very limited, and the accommodation enjoyed as asylum claimant may no longer be available. Refugee integration policies are of limited reach, and do not specifically address SOGI refugees. Only in 2007 was there a serious attempt to introduce a refugee integration strategy.⁴³ Italian authorities are now obliged to produce, at least every 2 years, a National Plan with guidelines for interventions in areas where refugee integration measures have greater chances of success. These interventions should include specific programmes for access to employment, health services, housing and education, as well as for improving knowledge of Italian language and combating discrimination that refugees may suffer. Representatives of the UNHCR and of the Italian Equal Opportunities Office are involved in these new initiatives, with the prospect of significant developments benefitting SOGI refugees. Yet, no strategic plan has yet been drawn up. This lack of strategic plan may also have contributed to private actors playing a significant role in this area. Although Catholic-led entities are generally dominant in refugee

⁴¹ At least on paper: Article 19, Legislative decree no. 251, 27 November 2007.

⁴² 5 August 2016, Federal Law Gazette I, no. 39, p. 1939.

⁴³ Article 29, Legislative decree no. 251, 27 November 2007.

support, LGBTIQ+ associations are also increasingly involved in the development of specific projects aimed at helping SOGI refugees in the post-RSD stage (Chaps. 8 and 9).

Similarly, in the UK, once claimants are granted refugee status or some form of leave to remain, they are often confronted with entirely new problems. Newly recognised refugees have a ‘move on’ or grace period of only 28 days before their asylum support ends, at which point many become homeless and have to turn to friends and family – something which may be harder for SOGI minorities, leaving them more dependent on food banks and charities (Basedow and Doyle 2016; House of Commons Home Affairs Committee 2017, p. 43). Integration is the point at which policy differences across the UK are clearest. The UK consists of England, Scotland, Wales and Northern Ireland. Asylum and immigration policy is reserved – meaning it is the responsibility of the UK government and the application and decision-making process is the same across the UK.⁴⁴ However, the Scottish, Welsh and Northern Irish legislatures and executives have responsibility for integration. There is no data on where claimants granted international protection eventually settle, nor on individuals whose applications are refused but do not leave the UK. Nor is there any overarching UK refugee integration strategy, except for those accepted as part of the Syrian Vulnerable Persons Resettlement Scheme (Doyle 2014, pp. 6 and 10). The UNHCR has called for a national strategy for refugee integration (UNHCR 2017, p. 27), regardless of how individuals arrive in the UK, as has the All Party Parliamentary Group on Refugees, which also called for the post of ‘Minister for Refugees’ to be created (APPG on Refugees 2017, p. 56). A government-commissioned report on integration in general in 2016 did discuss asylum and immigration. However, this was not in relation to how new people can be supported in integrating, but rather viewing them as a factor relevant to the *lack* of integration in British society, with asylum claimants’ accommodation through dispersal in poorer areas cited in relation to the increase in ‘local feelings of unfairness over pressure on housing and other resources and can exacerbate community tensions’ (Casey 2016, p. 35). Moreover, the Home Affairs Committee has pointed to the discrepancy between people’s treatment depending on whether they arrive through the Syrian Vulnerable Persons Resettlement Scheme or not:

The introduction of the Syrian Vulnerable Persons Resettlement Programme means that the UK now has a system which differentiates between refugees in terms of the services they receive based on the country of origin and the process through which they arrived in the country. We believe that this is inappropriate and that the same support should be available for refugees who transfer from the asylum system as those who arrive under a resettlement programme (House of Commons Home Affairs Committee 2017, p. 44).

In contrast to the UK overall or England, both the Welsh and Scottish governments have introduced refugee integration strategies or policies. The Welsh plan makes no mention of SOGI refugees, but it has a commitment to support survivors

⁴⁴With minor differences – for example, the Court of Session in Scotland replaces the Court of Appeal in England and Wales.

of sexual violence (Welsh Government 2019). The Scottish strategy identifies concerns in relation to SOGI claimants and makes a commitment to ‘[s]tart dialogue with LGBTI organisations in regard to particular issues faced by LGBTI refugees and asylum seekers, and raised through the New Scots engagement process in relation to accommodation and issues of safety’ (Scottish Government 2013, p. 42). Scotland has also played a leading role in welcoming Syrian refugees. In Northern Ireland, a Refugee Integration Strategy – separate to Northern Ireland’s Race Equality Scheme – was recommended and a draft for consultation was reported to be in development (Office of the First Minister and Deputy First Minister 2015, p. 15). However, no strategy has been published and integration is seen to be a particular challenge in Northern Ireland in light of its history as a divided society (Potter 2014, p. 14).

A priority for claimants granted international protection is often bringing family members to join them, using their right to family reunification. Although often neglected – and even detrimental to their claims (Chap. 7) – SOGI claimants often have (same- or opposite-sex) partners and children, with whom they wish to reunite. EU CEAS instruments recognise the right to family reunification with ‘family members’.⁴⁵ ‘Family members’ categorically include spouses and (unmarried and ‘under age’) children, but only include unmarried partners ‘in a duly attested stable long-term relationship’ and registered partners upon member states’ discretion.⁴⁶ This degree of discretion translates into different legal rights for SOGI asylum claimants in different EU member states and a disadvantaged position compared with heterosexual and cis-gender asylum claimants. This is the case even if it is recognised that EU member states must ensure the maintenance of family unity and must therefore give residence permits to family members (de Schutter 2009, p. 94). The current legal framework has thus been considered inadequate, because it relies on the nuclear, heteronormative model of families, and children are the proof of a stable relationship in many member states, which may be less applicable for same-sex relationships (Helena, EASO staff member). In any case, there is no clear data on whether and to what extent the right to family reunification is enjoyed by SOGI refugees.

In Germany, family reunification rights have been restricted in the case of subsidiary protection, which is the status most commonly granted to Syrian refugees (Nina, legal advisor). Family reunification for beneficiaries of subsidiary protection was suspended between March 2016 and July 2018 and then curtailed to 1000 visas a month to be decided on humanitarian grounds (AIDA 2017, pp. 22 and 100). In Italy too, the right to family reunification is respected, entailing the possibility for family members to obtain a permit to stay, but the limited recognition of same-sex relationships compared to other EU member states clearly translates into a more precarious position of SOGI claimants in relation to heterosexual and cis-gender

⁴⁵ Articles 9 ff, Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 03/10/2003 P. 0012–0018 (Family Reunification Directive).

⁴⁶ Articles 4 and 10 of the Family Reunification Directive.

asylum claimants (Giuseppe, lawyer). Conversely, the UK, possessing the broadest legal framework for SOGI minorities of the three countries under comparison, also frames the right to family reunification in broader terms. That means that the UK government allows same-sex spouses to join individuals granted refugee status (but not subsidiary protection), and allows the same right to same-sex partners when they are civil partners or have lived together in a relationship akin to marriage or a civil partnership for two or more years.⁴⁷ Yet, given that most SOGI asylum claims are made because an individual was not or would not be able to establish a durable same-sex relationship in the country of origin, SOGI minorities are invariably treated less favourably than heterosexual and cis-gender asylum claimants in relation to family reunification. To address this to some extent, Home Office guidance states that when the standard requirements for family reunification are not met, the application must be refused, but:

[c]onsideration must then be given to the family exceptional circumstance guidance or any compassionate factors which may warrant a grant of leave outside the rules, including whether the requirement to live together would have put a same-sex or unmarried couple in danger (Home Office 2019, p. 16).

Despite this statement, none of our participants had been granted refugee status and subsequently been given family reunion with a partner. Securing family reunification rights has, in any case, been made more difficult by the removal of legal aid from family reunion cases (APPG on Refugees 2017, p. 56). The Refugees (Family Reunion) Bill [HL] introduced in 2018 includes a ‘civil or unmarried partner’ in the definition of family member, but without addressing the particular evidentiary problems that exist in establishing such family relations for SOGI refugees.

For individuals who have been denied any form of international protection and reached the end of the legal road, individual experiences vary and are also enormously difficult to research. Claimants may be detained – in particular in the UK – and returned to their country of origin. Or, if substantial grounds exist for believing that they may be at risk of torture or ill-treatment in their country of origin, they may be given some form of leave to remain, in light of the jurisprudence of the Strasbourg Court on Article 3 ECHR and the principle of non-refoulement (Ferreira 2021), and domestic constitutional provisions (Salerno 2010). In none of the countries under comparison are there figures giving a breakdown of the number or proportion of SOGI asylum claims that exhaust their legal avenues or information about what happens to people in that situation – whether they remain in the country supported by friends, family or community organisations, become destitute, try to reach another European country or are returned.

⁴⁷ Part 11, paragraph 352A, of the Immigration Rules HC 395.

4.6 From Policy to Law, from Law to Practice

This chapter has allowed us to map out the key instruments and guidelines that affect SOGI asylum claimants, including in the fields of general SOGI, general asylum and specific SOGI asylum matters. A good degree of similarity was expected, in light of the EU CEAS, but against this expectation, we found significant and striking differences. Governmental policies have translated into different legal frameworks, and law and policy options are implemented in different ways, out of political choice and/or resource limitations. The next chapters will bring out in stark ways how practice differs from country to country (regardless of similarities on ‘paper’) and even within the same country (depending on the governance system, actors involved and a range of other circumstances).

The insufficient human and material resources invested in the asylum system play a key role in this debate. Asylum systems tend to be massively under-resourced at all levels (Noah, NGO social worker, Germany). The incredible pressures on asylum systems prompt some participants to suggest that many claimants in the system should be re-directed to other paths, such as work permits, educational visas, etc. (Filippo, senior judge). Such suggestions – no matter how sensible – would undoubtedly be met by many policy-makers across Europe with strong resistance, for fear of creating ‘pull factors’.

The situation is further complicated by the ongoing Brexit process. While this may represent an opportunity for CEAS to be strengthened without the reluctant presence of the UK, it may also translate into the loss of an ally of SOGI rights. As Terry, member of the European Parliament, told us:

on the one side Britain has actually been a very problematic... player in the whole question of... asylum policies, so has been very hesitant to adopt any kind of progressive asylum policies, not really wanting to be part of the whole system to start with (...) and not really wanting any common European standards that are, you know, founded on human rights, for example. (...) but when it comes to SOGI and when it comes to, you know, a more broader discussion about sexual orientation and gender identity, I have the impression that (...) many of the [UK European Parliament] members are more progressive than the average. So when it comes, for example, [to] pushing for giving special status for people because of sexual orientation and gender identity... we have met a lot of support (...) And that's why now with Brexit (...) this might actually impact... also the power division in the Parliament, and I guess in the Council, as well, on this kind of questions, which has positive and negative impacts...

This resonates with what scholars have argued (Danisi et al. 2019). Jean, also member of the European Parliament, was of a similar view, stating that:

I am worried that the UK asylum policy will become more restrictive (...) That said, I mean, I know there is quite a degree of criticism about the way in which the UK's system has worked on SOGI claims, but I do think that it's moved further forward than a number of other EU member states, and because I think the UK (...) are actually quite willing to stand up for rights in that area. I think they are also quite important in the European asylum system as a whole. (...) there is quite an important sort of progressive voice there, which is potentially going to be missing from the European asylum discussion generally and that, I think, is worrying.

What is also clear is that Brexit may bring about the end of the involvement of the UK with the Dublin system (Chap. 6).⁴⁸ As suggested by a European Commission staff member we interviewed, leaving the Dublin system would make it more difficult for the UK to limit the overall number of asylum claimants reaching its territory. This may also translate into more SOGI asylum claimants reaching the UK, which may play in their favour, if for a particular reason they favour presenting their claim in the UK as opposed to another EU member state.

While administrative asylum backlogs seem to be diminishing owing to reduced arrival of claimants in Europe, there is a high number of appeals against negative decisions, which increases courts' and tribunals' backlogs; additionally, the high rate of successful appeals seem to indicate poor decision-making standards (AIDA 2017, p. 11). Some will counter-argue, in the case of the UK, for example, that:

the Home Office, the sort of knee jerk response from the Home Office in relation to the success rates is that essentially the majority are all about new evidence. So, it is not that we made a mistake or we made a misjudgement in the process, everything along the way was correct at the time that it was decided, and then at the last minute somebody chucks something else in and that is what turns the decision. (...) I don't know whether it is true or not, but I don't think the department does either, because I don't think there is any real analysis going on with that to, to get, to take comfort from that being the case (Daniel, official).

Importantly, decision-making standards are ever-changing. For example, as Barbara (lawyer, Germany) shared with us, while CJEU jurisprudence may have initially prompted a more responsive and generous approach to SOGI claims in Germany, the BAMF soon started to worry that there might be too many claims, so they changed their approach again to focus on 'asylum relevance'.

More generally, local conditions remain powerful determinants of SOGI asylum adjudication, influenced by different degrees of societal tolerance, awareness of the authorities and domestic policies on SOGI matters. As Alfred, staff member of the European Parliament, put it, 'we feel that among Western European member states... there is much less of a problem with this [protection of SOGI asylum claimants in CEAS] than some Eastern European member states'. Although the overall picture may be more complex, this points to significant differences within the EU on this matter:

if you have a group of member states that doesn't even want to acknowledge the fact that there is something in the notion of gender, it is very hard to push a progressive agenda when it comes to sexual orientation and gender identity (Terry, member of the European Parliament).

In some cases, xenophobia, misogyny and homo/bi/transphobia also combine with toxic results:

⁴⁸ 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, OJ L 180, 29.6.2013, p. 31–59.

some of the member states which are more resistant to actually having a more welcoming policy towards asylum seekers... will also be the ones that may tend to be more resistant as well to the whole, the whole gender and sexual orientation sort of dimension too (Jean, member of the European Parliament).

Rising populism and political extremism across Europe have rendered the experiences of people seeking asylum more and more difficult, affecting SOGI claimants in particular ways, for example, when translated into homophobic and transphobic crimes. There are some attempts to address this increasing hostility: the UK government's 2018 LGBT Action Plan included a commitment to 'continue our work to ensure that the needs of all LGBT claimants are met in the asylum process, regardless of whether their claim was lodged on this basis' (Government Equalities Office 2018a, p. 17). There is, however, no reference to SOGI asylum claimants in the 2019 annual progress report (Government Equalities Office 2019), which was published in the context of charges of hypocrisy against the Home Office for publicly supporting Pride while deporting a gay rugby player to a country where he faced an extensive prison sentence.⁴⁹ Moreover, this 'LGBT-friendly' rhetoric does not tally with policies hostile to migrants and refugees:

because of Brexit, you know most people don't want to think about migration, asylum seekers, do they. So, I think there is a lot of hostility, because they can say "well, we are representing popular opinion". Governments will chase the poll... (Gary and Debbie, NGO workers, UK)

More generally, there is still (and perhaps increasingly) a divide between the treatment offered to SOGI asylum claimants and 'native' SOGI minorities, leaving us very far from an asylum system informed by the human rights, feminist, queer and intersectional approaches delineated in Chap. 3. The overlaps between the fights for rights by these two groups are barely acknowledged, and alliances are still the exception, which leaves many synergies unexplored. As the remaining chapters in these volumes show, this leaves SOGI claimants exposed to abuse and injustice, perpetrated both by public and private actors across Europe. The fact that humanitarian visas – allowing people to flee for safety by travelling documented, for example, through 'humanitarian corridors' facilitated by the Community of Sant'Egidio (Valentina, social worker, Italy) – are not regulated at a European level or generally issued by domestic authorities, makes people's journeys to Europe all the more perilous. To this we now turn in Chap. 5.

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⁴⁹ http://www.sogica.org/en/life_stories/kens-story-when-my-asylum-application-was-denied-i-felt-cold-and-hopeless-as-though-my-life-were-over/.

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