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Carmelo Danisi  
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# Queering Asylum in Europe

Legal and Social Experiences of Seeking  
International Protection on grounds of  
Sexual Orientation and Gender Identity

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Carmelo Danisi • Moira Dustin • Nuno Ferreira  
Nina Held

# Queering Asylum in Europe

Legal and Social Experiences of Seeking  
International Protection on grounds of Sexual  
Orientation and Gender Identity

 Springer



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*Carmelo dedicates these volumes to Marta,  
Maria and Mario.*

*Moirira dedicates these volumes to Ben.*

*Nuno dedicates these volumes to Giuseppe,  
Codie and Kayden.*

*Nina dedicates these volumes to all the  
wonderful human and non-human beings in  
her life.*

*We dedicate these volumes to all those who  
participated in our fieldwork, by offering  
their time and sharing their experiences with  
us, and all SOGI asylum claimants and  
refugees in the world – may your strength  
never falter.*

# Preface for Volume 1

These volumes are the main output of the project ‘Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA’ ([www.sogica.org](http://www.sogica.org)). This project has been funded by the European Research Council (ERC) under the European Union’s Horizon 2020 research and innovation programme (grant agreement No 677693).

Although these volumes are a collective work, each co-author has taken the lead in producing the first draft of a selection of chapters and sections, as follows: Carmelo Danisi led on Chaps. 3 (Sect. 3.2), 5 and 6; Moira Dustin led on Chaps. 3 (Sects. 3.1, 3.3 and 3.5), 9 and 10; Nuno Ferreira led on Chaps. 1, 4, 7 and 11; and Nina Held led on Chaps. 2, 3 (Sect. 3.4) and 8. All material originally in a language other than English – including primary and secondary sources – has been translated into English by the authors (sometimes with the assistance of online tools), unless otherwise indicated.

Further to these volumes, during the project’s lifetime we have published a range of other outputs on the theme of sexual orientation and gender identity (SOGI) asylum. Here we provide a comparative analysis of SOGI asylum in the three countries selected (Germany, Italy, UK), while other project publications cover subjects that emerged as important in our fieldwork but that did not fit with the structure of these volumes or which we wanted to discuss in greater detail than would be possible in these volumes taking a broad, pan-European perspective.<sup>1</sup> These volumes should be seen as part of that broader body of work, as an overall contribution to the debate on SOGI asylum in Europe and beyond.

Throughout the life of the SOGICA project, we worked with NGOs, lawyers and policy-makers, amongst others, to facilitate improvements in SOGI asylum, in

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<sup>1</sup>All other relevant publications can be found at <http://www.sogica.org/en/publications/>. Many of these have been presented at public events throughout the life of the SOGICA project: <http://www.sogica.org/en/events/>. One can also find in the project’s website tables of case law regarding each one of the case studies adopted in this project, which besides the country case studies also include the European Union (EU) and Council of Europe (CoE) (<http://www.sogica.org/en/case-studies/>).

particular by developing a database of resources,<sup>2</sup> as well as creating a network of individuals working or with an interest in this field. We hope these resources will survive the formal life of our project. Many events took place after this project was conceived, such as the Brexit referendum and subsequent negotiations, and the further rise of right-wing populist movements in several European countries and beyond. Such developments have important implications for the quality and consistency of asylum standards across Europe, which we hope to continue to analyse in future publications.

Within the life of the SOGICA project, we have benefitted from the generous input of a range of people who deserve recognition and our utmost gratitude. We would like to thank in particular the members of our Advisory Board, namely Giorgio dell'Amico (Italy), Rute Caldeira (Germany), Prossy Kakooza (UK), Maggie Merhebi (Germany), Vitit Muntarbhorn (Thailand), Barry O'Leary (UK) and Anbid Zaman (Germany), for their valuable support.<sup>3</sup> We would also like to thank all those who became Project Friends throughout the life of the project, including individual asylum claimants and refugees, researchers involved in asylum, human rights, socio-legal studies and SOGI, as well as lawyers, NGO representatives and service providers.<sup>4</sup> Thanks are also due to the Department of Political and Social Sciences, University of Bologna, and Marco Balboni for co-hosting a SOGICA conference in Forlì (Italy), and to the Cornelia Goethe Centre at the Frankfurt Goethe University and Uta Ruppert for co-hosting a SOGICA conference in Frankfurt (Germany). Finally, our sincere thanks to all organisations and individuals that in one way or the other supported our fieldwork, especially by facilitating the use of certain spaces and helping us to recruit participants.

We are also very thankful for the time and dedication offered by all those who undertook placements with SOGICA, namely Ibrahim Abdella (co-founder of the online initiative 'Solidarity with Egypt LGBTQ+'), Valentina Canepa (University of Sussex), Silvia Ciacchi (University of Trento), Elif Dama (University of Istanbul), Federico Di Persio (University of Bologna), Rose Gordon-Orr (Goldsmiths, University of London), Melody Greaves (Wilfrid Laurier), Oscar Kennedy (Dorothy Stringer School), Marita Haakonsen (University of Sussex), Lisa Harrington (University of Sussex), Ssu-Chi Ho (Goldsmiths, University of London), Alessandro Pigoni (University of Sussex / University of Bologna), Marie Pritchard (University of Sussex), Isabel Soloaga (University of Sussex), and Alba Trabandt (University of Sussex / Freie Universität Berlin), as well as others who preferred to remain anonymous. Thanks are also due to: our supportive research assistants Rosa Jones, Vítor Lopes Andrade, Natalie Pearson and Anbid Zaman; Giuseppe Mascia, who created our project logo and did other design work; and Silan Anil, Ammar Cheema, Shahrzad Fouladvand, Roberto Gangemi, Ali Kassem and Khalid Khan for the

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<sup>2</sup>The database contains a range of items that relate specifically to SOGI asylum (<http://www.sogica.org/en/sogica-database/>).

<sup>3</sup><http://www.sogica.org/en/the-project/the-advisory-board/>.

<sup>4</sup><http://www.sogica.org/en/the-project/project-friends/>.

support with translations into languages besides English, German and Italian. We would also like to thank all colleagues at the University of Sussex for their support for this project, in particular Eleanor Griggs, Rachael Phelps and Charlotte Shamoon, for their help in producing SOGICA resources as well as assistance in organising our final conference, Liz McDonnell, for her support on ethical guidance, and Jo Bridgeman, Bal Sokhi-Bulley and Samantha Velluti, for their feedback on earlier drafts of this work. Many thanks, equally, are owed to colleagues and reviewers at IMISCOE and Springer for their feedback and support throughout this journey. Finally, our deepest gratitude goes to all SOGICA participants – without you, this project would not have been possible. We hope that we have reflected your experiences and views adequately.

A couple of last notes: these volumes discuss issues and contain language that – by their very nature – some readers may find offensive or disturbing. While acknowledging this, we believe that a thorough and serious analysis of our subject-matter could not circumvent such issues or avoid the language in question.

All information is correct to the best of our knowledge as of January 2020.

Brighton, UK  
January 2020

Carmelo Danisi  
Maira Dustin  
Nuno Ferreira  
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## Preface for Volume 2

This is Vol. 2 of *Queering Asylum in Europe*, which constitutes the main output of the project ‘Sexual Orientation and Gender Identity Claims of Asylum: A European Human Rights Challenge – SOGICA’ ([www.sogica.org](http://www.sogica.org)). This project has been funded by the European Research Council (ERC) under the European Union’s Horizon 2020 research and innovation programme (grant agreement No 677693). For an extensive preface to both volumes, please refer to Vol. 1.

These volumes are constituted by 11 chapters. Vol. 1 gathered Chaps. 1, 2, 3, 4, 5 and 6 and Vol. 2 gathers Chaps. 7, 8, 9, 10 and 11. Chapter 1 offered an introduction to both volumes; Chap. 2 discussed the methodology used in the research underlying these volumes; Chap. 3 set out the theoretical underpinnings of our research; Chap. 4 explored the legal and policy framework that applies to SOGI asylum in the case study jurisdictions; Chap. 5 considered the lives of individuals before fleeing persecution, the journey and arrival in Europe; and Chap. 6 analysed SOGI asylum in the context of decision-making procedures.

Volume 2 goes on considering the legal treatment of SOGI asylum claims in the country case studies and then dissects as well the broader social experiences of SOGI asylum claimants and refugees. Chapter 7 considers how the substance of SOGI asylum claims is dealt with, Chap. 8 explores the lived experiences of SOGI asylum claimants in relation to housing and accommodation, and Chap. 9 analyses SOGI claimants’ and refugees’ access to healthcare services, the labour market and educational provision.

This volume is concluded with Part III, which presents our vision for a better future for SOGI asylum in Europe. Chapter 10 discusses legal and social experiences of harassment, isolation and oppression of SOGI claimants and refugees, focusing on four key themes: identities, discrimination, space and agency. Finally, Chap. 11 offers a range of policy recommendations addressed to decision-makers, policy-makers, NGOs and service providers, for improving the socio-legal framework that applies to SOGI asylum.

As forewarned in Vol. 1, this work discusses issues and contains language that – by their very nature – some readers may find offensive or disturbing. While

acknowledging this, we believe that a thorough and serious analysis of our subject-matter could not circumvent such issues or avoid the language in question.

All information is correct to the best of our knowledge as of January 2020.

Brighton, UK  
January 2020

Carmelo Danisi  
Moirá Dustin  
Nuno Ferreira  
Nina Held

# Foreword: On the Importance of Intersectionality Within Policy and Research

As the United Nations Independent Expert on sexual orientation and gender identity, I hold the protection of the rights of LGBT asylum seekers, migrants, and refugees at the core of my mandate's work. It's hard to imagine a population of persons who reunite in their body a greater simultaneous intersection of both marginalized identities and far-too-often challenged rights. The plight of LGBT asylum seekers is then further compounded by the fact that their successful (or unsuccessful) navigation of a complex, foreign, and often unfriendly bureaucratic asylum process will impact the trajectory of the rest of their life. We owe this community our deepest admiration, support, and most importantly, our strongest advocacy.

For LGBT asylum seekers, diversities of gender identity, race, ethnicity, socio-economic status, religion, disability, health, language, documentation status, and age *all* intersect and interplay with a number of rights which, unfortunately, are far too often ill-considered or outright rejected by state authorities.

From the right to have one's gender identity properly noted on state documents to the right to safe and inclusive temporary housing; from a fair and respectful interview process to the basic principle of non-refoulement, asylum agencies owe LGBT asylum seekers no "special" or "new" rights, but rather to simply extend the same basic rights afforded to them under the letter of the law with due consideration to LGBT persons unique and individual context.

As the current COVID-19 pandemic has shown, when state authorities fail to consider the underlying structural issues and barriers affecting marginalized groups like the LGBT community – even when enacting seemingly "neutral" policies – there can be dire unintended consequences. That is why, within those contexts, it is more important than ever that academe and civil society work to exhaustingly highlight and investigate all possible intersections of rights with identities, as well as always use data that is grounded directly in input from stakeholders who will be impacted by any proposed policy.

This fact makes applying the principle of intersectionality to all stages of the policy formulation process, especially during the early research and data collection stage, all the more important. Intersectionality is absolutely essential to creating asylum and migration policies that are not just inclusive, but ultimately also



effective in the long run for all stakeholders involved. The colorful yet complex intersection of identities with and within the LGBT community requires civil society, academia, and state authorities to not only identify how to protect the most basic of their rights under the law, but to also take into consideration the numerous other identities that members of the LGBT community may also simultaneously hold and navigate life through with which may require additional forward-thinking in order to safeguard everyone's interests.

The sad reality is that we still live in a world where 69 countries criminalize the expression of LGBT persons' lives, love, and identities. In countless more jurisdictions, prevailing socio-cultural attitudes towards LGBT persons make their lives (whether they live openly or not) a de-facto internal prison sentence. Until the scourge of both criminalization and pervasive discrimination is ended around the world, LGBT persons must always be guaranteed the right to a safe and fair asylum process.

The work that all at SOGICA have done to study these issues from an intersectional and wide a perspective as possible is not only commendable, but also crucial to fixing what many believe is a broken asylum system in Europe. The research done so far in support of vulnerable LGBT persons around the world is of fundamental importance, and I exhort all stakeholders to continue it while bringing in as many new voices and perspectives into this discussion as possible.

We are all stronger when we fight this fight together.

Victor Madrigal-Borloz

United Nations Independent Expert on the prevention of violence and discrimination on the basis of sexual orientation and gender identity

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# List of Acronyms and Abbreviations

AASC	Asylum Accommodation and Support Services Contracts
AIDA	Asylum Information Database
APPG	All Party Parliamentary Group
ARE	Appeal Rights Exhausted
ASGI	Associazione Studi Giuridici sull'Immigrazione
BAMF	Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees)
BMI	Bundesministerium des Innern, für Bau und Heimat (Federal Ministry of the Interior, Building and Community)
CEAS	Common European Asylum System
CFR	Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COI	Country of Origin Information
COMPASS	Commercial and Operational Managers Procuring Asylum Support Services
CPIN	Country Policy Information Notes
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
FGM	Female Genital Mutilation
FOI	Freedom of Information
FRA	European Union Agency for Fundamental Rights
GG	Grundgesetz (German Basic Law)
GIC	Gender Identity Clinic
GOT	Giudici onorari (Honorary Judges)
GP	General Practitioner
HRC	Human Rights Council
HRW	Human Rights Watch

ICIBI	Independent Chief Inspector of Borders and Immigration
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRL	International Human Rights Law
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
IO	Immigrazioni e Omosessualità
IOM	International Organization for Migration
IRL	International Refugee Law
LeTRa	Lesbentelefon e.V.
LGBTIQ+	Lesbian, Gay, Bisexual, Trans, Intersex, Queer and Others
LISG	Lesbian Immigration Support Group
MIT	Movimento Identità Transessuale
MSM	Men Who Have Sex with Men
MSF	Médecins sans Frontières
NGO	Nongovernmental Organisation
ORAM	Organization for Refuge, Asylum and Migration
PSG	Particular Social Group
PTSD	Post-Traumatic Stress Disorder
RSD	Refugee Status Determination
SOGI	Sexual Orientation and/or Gender Identity
TGEU	Transgender Europe
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKBA	United Kingdom Border Agency
UKLGIG	UK Lesbian and Gay Immigration Group
UKVI	United Kingdom Visas and Immigration
UN	United Nations
UNHCR	UN High Commissioner for Refugees
USA	United States of America
VCLT	Vienna Convention on the Law of the Treaties



**Part I**  
**Contextualising SOGI Asylum Research**

# Chapter 1

## Why Sexual Orientation and Gender Identity Asylum?



*I'm here, stuck. I'm invisible in this country, nobody sees me,  
nobody sees my accomplishments, I am invisible.*

*(Marhoon, Germany)*

*(Throughout these volumes, asylum claimant and refugee participants will be referred to only by first name/pseudonym and host country to safeguard their anonymity; references to other categories of participants will specify the capacity in which they were interviewed. Survey participants will be referred to by codes: C corresponds to claimants and S to supporters. More details about our methodology can be found in Chap. 2.)*

*The situation [for SOGI claimants] is disastrous...*

*(Maria Grazia, decision-maker, Italy)*

*Where to start! The whole system is broken and not fit for purpose, so of course this affects LGBTQI+ people along with everyone else.*

*(S110, NGO volunteer, UK)*

### 1.1 Seeking Asylum: Why Focus on Sexual Orientation and Gender Identity

Forced migration – no matter how we wish to define it – has been high in the political agendas and debates across the world for several decades. Forced migrants become claimants of international protection, or ‘asylum claimants’,<sup>1</sup> and then find themselves trapped in convoluted, constraining and highly politicised systems. Often accused of being ‘bogus’ asylum claimants, they are also regularly accused of abusing the hospitality of the host country, violating countries’ borders and

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<sup>1</sup> ‘Asylum’ will be used throughout these volumes as encompassing both those claims for refugee status on the basis of the 1951 Refugee Convention and those claims for subsidiary protection and humanitarian protection, where available.

territorial sovereignty, and simply seeking economic benefits (Ford 2009; UNHCR 2007). Conversely, asylum legal instruments have been repeatedly criticised for inadequately addressing the rights and needs of asylum claimants, therefore preventing those with legitimate claims from being granted protection. These debates have more recently been rehashed in the context of the negotiations behind the Global Compact for Safe Orderly and Regular Migration, a non-legally binding agreement negotiated under the aegis of the United Nations (UN) and endorsed by the UN General Assembly.<sup>2</sup> In this atmosphere of permanent politicised and humanitarian ‘crisis’ (McAdam 2014), a group warranting specific attention is constituted by those asylum claimants presenting a claim based on their sexual orientation or gender identity (SOGI).<sup>3</sup>

The precariousness affecting asylum claimants’ legal and social experiences, in general, affects SOGI asylum claimants in very particular ways. This should come as no surprise, as queer migration studies have long revealed sexuality and gender to interact with several other characteristics to be key elements in the power relationships that shape migration (Luibhéid 2004, 2008). A key aspect in this context can be found in rights discourses. Human rights have been increasingly recognised irrespective of one’s SOGI both at an international (Human Rights Council 2011; Various 2017) and domestic level. Yet, the legal frameworks of European and other countries, the European Union (EU), and the Council of Europe (CoE) have been slow in tackling the violation of such rights. Members of SOGI minorities across the world often find themselves trapped within borders of territories where they cannot vindicate their rights or secure minimum levels of safety and well-being.<sup>4</sup> Such state borders are compounded by legal, social and economic borders that further isolate and marginalise SOGI minorities.

It is thus entirely predictable that these minorities often see no alternative to leaving their countries of origin and seeking protection in other countries, where they frequently continue to endure various degrees of harassment, discrimination and violence, perpetrated by both private and public actors (IOM and UNHCR 2016; Luibhéid 2008, p. 170; Muntarbhorn 2017; UNHCR 2015, p. 27). As Terry, a member of the European Parliament, puts it:

I think there is more awareness today around the problems, that there is persecution because of sexual orientation and gender identity, and that this should actually lead to people having the possibility to find safe haven inside of the European Union. At the same time, we also see that there is a general trend in asylum policies, for the European Union and also the member states of the European Union, to become more restrictive, and so I see that it is

<sup>2</sup> Seventy-third Session, 60th and 61st Meetings, GA/12113, 19 December 2018.

<sup>3</sup> For a clarification on the meaning of the terminology used in these volumes, see glossary here: <http://www.sogica.org/en/the-project/glossary/>

<sup>4</sup> We use the term ‘minorities’ for ease of communication, but are conscious that such groups are in reality ‘minoritised’, in the sense that they are constituted by active processes of ‘othering’ that designate certain attributes of groups in particular contexts as being in a ‘minority’ (Gunaratnam 2003, p. 17).

harder for asylum seekers to get asylum granted in the end, that it is harder to make their case, and in some member states so hard as if they want to get juridical support, consultancy from NGOs for example, they are restricted to access and so on and so on.

In these volumes we explore the legal and social experiences of those people who flee persecution in their home countries and somehow manage to travel to Europe, where they eventually present asylum claims relating to their SOGI. These claims are commonly perceived by judges, practitioners and academics alike as being particularly problematic. This is due to a mixture of factors, including the increasing number and awareness of such claims, the perceived unfairness in the adjudication of these claims, and the heavily politicised decision-making environment, with some evidence pointing to a disproportionately high rate of refusals on these grounds (UKLGIG 2010). These claims also raise particular issues in relation to different aspects of asylum adjudication, especially the intense social prejudice against these claimants in their country of origin, the role of legislation – namely criminalisation – in the country of origin in endorsing that prejudice, the assessment of credibility, the lack of possibility of internal relocation, and the role of private actors in persecution. Finally, these claimants face particular psycho-social challenges in terms of personal identity and community integration in the host state (Jansen and Spijkerboer 2011; UKLGIG 2010, 2013).<sup>5</sup> SOGI asylum claims are thus of a striking complexity and significance for the purposes of assessing the efficiency and fairness of an asylum adjudication system (Saiz 2004; Tunstall 2006). Importantly, SOGI claimants experience much suffering, as our participants have told us. Ali (UK), for example, asked himself ‘why am I humiliating myself, why am I doing this to myself’, and Lutfor (UK) told us that ‘when I was in the asylum system, I felt it was like I came from another hell to this hell’.

These volumes deliver a much needed European comparative study of SOGI-based asylum claims, thereby contributing to improvements in the standards of law, decision and policy-making. So far, comparative works have for the most part concentrated on discrete matters in two or three countries, or attempted to compare a larger number of countries but being unable to offer a theoretically and empirically-informed in-depth treatment of the subject-matter. We combine the best of both approaches, by drawing from insights from a range of countries, as well as offering a theoretically and empirically-informed in-depth analysis of the subject-matter in a selection of key countries in this field. Such comparative approach addresses the urgent need to tackle the lack of reliable data that is currently perpetuating misunderstandings about the plight of SOGI asylum claimants and, in turn, perpetuating discriminatory and exclusionary treatment. Simultaneously, we aim to test whether

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<sup>5</sup>We will use the term (social or community) ‘integration’ throughout these volumes for ease of communication, while acknowledging that it is a problematic notion, critiqued by scholars from various angles (Ager and Strang 2008; Castles et al. 2001). As this is not a central notion to our analysis, we will not expand on our use of it or the relevant critique. For our purposes, we will use this term loosely, as encompassing a range of aspects of the lives of asylum claimants and refugees (such as education, health and employment), without suggesting any degree of assimilation or loss of cultural identity.

the racialised, gendered, classist, heteronormative and homonormative legal and social experiences that SOGI asylum claimants undergo in other jurisdictions also take place in Europe (Aberman 2014; see, on intersectionality, Chap. 3). In doing so, we hope to re-politicise, de-criminalise and re-historicise the actions of SOGI asylum claimants escaping persecution and seeking international protection (Judge 2010; Chaps. 5 and 7).

Nobody knows exactly how many SOGI claimants there are in Europe, as asylum statistics generally only refer to the overall number of claims/decisions, nationality of asylum claimants, and outcome of procedures (including type of status granted). To our knowledge, only Belgium and Norway (which are not amongst the most statistically significant EU asylum host countries: EUROSTAT 2019) collect statistics regarding the claimants' SOGI (European Migration Network 2016), and the UK has – and only since 2017 – released experimental statistics regarding asylum claims on the basis of sexual orientation (Home Office 2017, 2018a, 2019). The very limited (and often poor) collection of this data (ICIBI 2014, p. 42 ff), despite decades of advocacy, can be seen as strategic – and even a tool of control by public authorities – to limit the strength of advocacy efforts on behalf of these claimants and force advocates into the realm of speculation (Kadir, NGO worker, Germany). Although it is recognised that statistics should be as thorough as possible, there are practical issues and deficiencies that prevent statistical high standards across the EU, and, as a European Commission staff member has told us, including information regarding claimants' SOGI is also problematic owing to the sensitive nature of this data. The judiciary also seems to oppose collection of this data: Harry, a UK senior judge, suggested to us that 'it would be too controversial, wouldn't it, really?', and Adrian, another UK judge, also stated that 'we don't keep statistics of that sort, obviously, it would be quite wrong to do so'. Similarly, according to the German government, it is the claimant's decision to inform government institutions about their SOGI. This cannot be asked routinely, as SOGI can be of relevance during the asylum process but may not be. In contrast to the UK, the German government argues that the right to freedom of choice with regard to the use of personal information needs to be respected, and 'the offensive interrogation and storage of intimate and highly personal information on sexual identity or other vulnerabilities' would interfere with this right (BMI 2019, p. 5).

In the absence of reliable figures, in 2011 (pre-'refugee crisis'), Jansen and Spijkerboer have roughly estimated an annual overall number of 10,000 LGBTI (lesbian, gay, bisexual, trans and intersex) asylum claimants in the EU (Jansen and Spijkerboer 2011, pp. 15–16),<sup>6</sup> and according to the German LGBTIQ+ (lesbian, gay, bisexual, trans, intersex, queer and others) rights organisation Schwulenberatung, there are an estimated 3500 SOGI asylum claimants in Berlin alone (Thomson Reuters Foundation 2016). Nonetheless, no statistical correlations between countries, claimants' SOGI, claim basis, and outcomes of the claims can be established

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<sup>6</sup>This figure thus relates to the identity of the asylum claimant, as opposed to the grounds for the asylum claim, even if in practice there may be no substantial difference in the estimate achieved.

at present. Within this grouping of claims, it appears that the number of female claims is smaller than those of male claims, possibly owing to the lower number of female claims in general (due to limited financial resources and independence enabling women to escape persecution), less social visibility of lesbians in many countries compared to gay men, and less severe legal punishments (although only on the statute books and not in reality) for lesbian same-sex conduct (Dawson and Gerber 2017, pp. 305 and 318; Neilson 2005, p. 419; Ramón Mendos 2019; Terry, member of the European Parliament).<sup>7</sup> The numbers of trans, bisexual and intersex claims is perceptibly smaller still, but again unquantifiable.

We set out to include in our research both SOGI asylum *claimants*, on the one hand, and SOGI-based asylum *claims*, on the other, as overlapping but conceptually different categories. SOGI asylum claimants may lodge asylum claims on non-SOGI-related grounds, either feeling reluctant to ‘out’ themselves during the asylum procedure and fearing that friends and family will find out about their SOGI (Held et al. 2018; Kalkmann 2010); because another ground is more relevant to their experience of persecution (for example, political or religious persecution); or because they may not know that claiming asylum on grounds of SOGI is a possibility (Chap. 5). Moreover, SOGI-based asylum claims may be lodged by heterosexual and cis-gender individuals, for example, when a certain minority sexual orientation is merely imputed to the claimant by the persecutors. Yet, the focus of this work is more squarely on SOGI as grounds for an international protection claim, as in our fieldwork we only met SOGI asylum claimants who were primarily claiming on the basis of SOGI.

We endeavour to place the experiences of individuals claiming asylum at the centre of this work. We do so by combining a comparative study (Germany, Italy, and the UK), an interdisciplinary approach (socio-legal), and an empirical methodology (semi-structured interviews, focus groups, judicial observations and a survey). Our analysis is grounded in human rights, feminist, intersectional and queer theoretical and analytical frameworks. This combined empirical and theoretical treatment secures new insights, laying the ground for policy-relevant recommendations of benefit to the academic community and asylum practitioner community alike. We begin by contextualising our subject matter in the international and European legal and policy frameworks.

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<sup>7</sup>In the UK, for example, in 2016, of 30,747 asylum applicants, 23,066 were men (Home Office 2018b).

## 1.2 The International and European Legal, Policy and Social Context

The 1951 Convention Relating to the Status of Refugees (Refugee Convention),<sup>8</sup> along with the 1967 Protocol Relating to the Status of Refugees,<sup>9</sup> were developed in the aftermath of World War 2 and built on the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War,<sup>10</sup> to regulate the movements of refugees across Europe and beyond (Rabben 2016). Article 1(A)(2) of the Convention defines refugees as someone who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of [their] nationality and is unable or, owing to such fear, is unwilling to avail [themselves] of the protection of that country; or who, not having a nationality and being outside the country of [their] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Although simply a part of a much more complex system of assistance to displaced persons and regulation of refugee movements (Ferreira et al. 2020), this definition and, more generally, these UN instruments stand as the cornerstone of this system. Complementing this system, each domestic jurisdiction has introduced constitutional norms and/or ordinary statutes that enshrine the right to international protection.

Later in time, the EU also developed its own system of norms and policies applicable to people seeking asylum: the work-in-progress Common European Asylum System (CEAS).<sup>11</sup> CEAS is a system designed to set minimum standards across the EU member states with regard to different aspects of asylum, especially the standards for the reception of claimants for international protection, the qualification of third-country nationals or stateless persons as beneficiaries of international protection, and the procedures for granting and withdrawing international protection (Gorlick 2003; Noll 2000). CEAS aims to fulfil two main aims: to be fair and to be effective (Ippolito and Velluti 2011). Yet, the success of the CEAS has been undermined by a lack of harmonisation and consistency in standards across EU member states, which has remained the case even after the introduction of the recast EU Directives 2011/95/EU on qualification for international protection (Qualification

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<sup>8</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>9</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

<sup>10</sup> Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War.

<sup>11</sup> For further discussion on some specific rules in this system, see Chaps. 4, 6 and 7.

Directive),<sup>12</sup> 2013/32/EU on asylum procedures (Procedures Directive),<sup>13</sup> and 2013/33/EU on reception conditions (Reception Directive) (De Baere 2013; Velluti 2014).<sup>14</sup> Furthermore, the EU has become an anxious and eager player in this field, especially in light of the increased number of people claiming asylum in Europe in 2014–2017, a number that has gone down to 634,700 applications in the EU, Norway and Switzerland in 2018, an approximate 10% decrease compared to 2017 (EASO 2019). The starkly different number of claimants received by each EU member state and the considerable variation of refugee recognition rates across the EU remain two of the major challenges to the CEAS, awaiting a political solution that struggles to materialise in the current politically-charged migration and refugee debates in Europe.

Within an increasingly complex and politicised asylum policy context, domestic jurisdictions started granting international protection – including refugee status – to SOGI asylum claimants in the early 1980s, under the ‘particular social group’ (PSG) ground, with the Netherlands leading on this development in 1981.<sup>15</sup> This development gradually, but very slowly took place across other jurisdictions in Europe and around the world,<sup>16</sup> as a combined reaction to socio-cultural factors (growing movements across Western countries on ‘gay’ rights and the fight against AIDS), institutional and personnel changes in the asylum system, the gradual tendency to build on incremental progress in asylum authorities’ procedures and policies, theoretical breakthroughs (including pioneering feminist and queer theories), international and supranational legal and policy advancements (particularly at EU

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<sup>12</sup>Directive 2011/95/EU of the European Parliament and of the Council of 13 December, 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, p. 9–26, which replaced Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004, p. 12–23.

<sup>13</sup>Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60–95, which replaced Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13.12.2005, p. 13–34.

<sup>14</sup>Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, p. 96–116, which replaced Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31, 6.2.2003, p. 18–25.

<sup>15</sup>Judgment of 13 August 1981, Afelding Rechtspraak (Judicial Commission of the Council of State) no. A-2, 1113 Rechtspraak Vluchtelingenrecht no. 51981.

<sup>16</sup>In the USA, decision of the Board of Immigration Appeals (BIA), *Matter of Acosta*, A-24159781, 1 March 1985; in Germany, judgment of the Federal Administrative Court, BVerwG 9 C 278.86, 15 March 1988, 79 BVerwGE 143; in Canada, judgment of the Supreme Court, *Canada (Attorney General) v. Ward*, n. 21,937, 30 June 1993 (4DLR 103; 1993 2 RCS 689). The German judgment did not refer to PSG but political persecution. See, also, Millbank 2009b, p. 13.



level), and the growing recognition of SOGI as the basis for rights claims (Ferreira 2015; Hamila 2019, pp. 160–161; Kobelinsky 2015; Various 2017). This, however, has been a contentious and arduous trajectory, reflecting tensions between an increasingly progressive LGBTIQ+ equality agenda, on the one hand, and a strategy aimed to prevent the arrival of migrants to Europe (including people in need of international protection), an ever more hostile environment for all migrants, and a large degree of deference by international bodies to member states regarding migration and asylum matters, on the other hand (Danisi 2018; Dembour 2015; Ferreira 2021). This siloed approach to the LGBTIQ+ equality agenda, on the one hand, and migration and asylum, on the other, is a common feature of current debates, reflected in institutional reports and policy papers (for example, FRA 2019).

Against this background, international bodies have increasingly dotted their recommendations and reports with positive references to SOGI asylum claimants, with the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (Victor Madrigal-Borloz), in particular, highlighting the ‘unique vulnerability and specific needs of lesbian, gay, bisexual, trans, intersex and gender diverse (LGBTI) asylum-seekers and refugees’ (OHCHR 2019). Nonetheless, the protection of SOGI asylum claimants has failed to attract sufficient support from UN quasi-judicial bodies. In 2003, for example, the UN Committee Against Torture addressed the *K.S.Y.* case,<sup>17</sup> involving a gay Iranian man who sought asylum in the Netherlands and saw his claim denied. He then filed a complaint before the Committee Against Torture, on the grounds that his deportation to Iran would violate Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (on prohibition of return in case of danger of subjection to torture, also known as the principle of non-refoulement). *K.S.Y.* reported having been tortured and sentenced to death in Iran due to his homosexuality. Both the torture suffered and post-traumatic stress disorder (PTSD) were confirmed by medical reports. In a surprisingly short and superficial consideration of the complaint’s merits, the Committee subscribed to the Dutch authorities’ arguments: there was no active policy of prosecution of homosexuals in Iran, and the claimant’s account lacked credibility. More recently, the UN Human Rights Committee dealt with the *M.Z.B.M v. Denmark* case,<sup>18</sup> relating to a transgender Malaysian woman who claimed that her deportation from Denmark would violate her rights under Article 7 of the International Covenant on Civil and Political Rights (ICCPR) (on prohibition of inhuman and degrading treatment), in conjunction with Articles 17(1) (on privacy and family life), 18(1) (on freedom of thought, conscience and religion) and 26 (on non-discrimination). Although admitting the claim regarding gender identity, the Committee accepted the domestic authorities’ assessment of lack of credibility and found there would be no violation of ICCPR rights upon her removal to Malaysia.

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<sup>17</sup>UN Committee Against Torture in *K. S. Y. v. The Netherlands*, Communication No. 190/2001, 15 May 2003, CAT/C/30/D/190/2001.

<sup>18</sup>*M.Z.B.M v. Denmark* (Communication no. 2593/2015), 119th Session (6 March 2017–29 March 2017).

Despite this somewhat bleak picture at UN level, the UN High Commissioner for Refugees (UNHCR) has been proactive in protecting the rights of SOGI asylum claimants and refugees for more than a decade. While it had already expressed an interest in SOGI-related persecution in the late 1990s (Bissland and Lawand 1997), it was in 2008 that the UNHCR issued a ‘Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’ (UNHCR 2008), subsequently replaced by the 2012 SOGI Guidelines (UNHCR 2012). Building on the UNHCR 2002 ‘Guidelines on International Protection No. 1: Gender-Related Persecution’ (UNHCR 2002), the SOGI Guidelines offer valuable assistance to decision-makers and support organisations in the field, encouraging them to become more sensitised to the needs and specificities of SOGI asylum claims. Although by 2008 many countries across the world already granted refugee status to SOGI asylum claimants within the scope of membership of a PSG ground (Chap. 7), the UNHCR Guidance gave these claims a new and welcome prominence, raising hopes of greater fairness and appropriateness in the adjudication of these claims. Subsequent work – including staff operational guidance, risk identification tools, and resettlement assessment tools – has reinforced the UNHCR’s commitment to improving the conditions of SOGI asylum claimants (Türk 2013; UNHCR 2015).

While the UNHCR’s efforts in this field are commendable, there are still strong signs that the SOGI dimensions of asylum claims are treated in a particularly insensitive way in many countries, often inappropriately at legal, cultural and social levels. This has been explored by some scholarship and other literature over the years and has focused, for example, on asylum claimants’ proof of belonging to a PSG, their identity, past and future risk of persecution, and credibility (Balboni 2012; Dustin 2018; Güler et al. 2019; ICIBI 2014; Jansen 2019; Jansen and Spijkerboer 2011; Millbank 2009a, b). Evidence of stereotyped adjudication processes presents a challenge to the claimed impartiality and objectivity of the legal system. Our survey with people who work with or support SOGI claimants confirmed that there are still significant problems in the asylum legal process, namely in relation to credibility assessment (81%), stereotyping (60%), Country of Origin Information (COI) (48%), ‘discretion’ reasoning (40%), the claimants’ unawareness that SOGI can be the basis for claiming asylum (39%), and the ‘internal relocation alternative’ argument (34%). The jurisprudence at European level – both from the Court of Justice of the EU (CJEU) and European Court of Human Rights (ECtHR) – has either not addressed these issues appropriately, or only addressed them in a partially satisfactory way (Ferreira 2018, 2021).

The reported unfairness of the legal system is compounded by these asylum claimants being ‘doubly’ isolated, that is, not only as asylum claimants, but also as members of SOGI minorities. Often they cannot rely for support on their families or expatriate communities of other individuals who share their ethnicity and/or nationality to live freely and safely (Çalik and Hayriye 2016). Furthermore, SOGI claimants are frequently affected by serious psychological trauma and mental health conditions – including recurrent depression, dissociative disorders, panic disorder, generalised anxiety disorder, social anxiety, traumatic brain injury, substance abuse and PTSD – on account of the persecution they suffered in their home countries and

their journeys to host countries (Hopkinson et al. 2017; Kahn et al. 2017; Shidlo and Ahola 2013). Yet, the asylum adjudication process often makes unreasonable expectations of asylum claimants; expectations that they will feel able to be entirely open, and give full, consistent and lucid accounts of their SOGI and experiences of persecution.

SOGI claimants' experiences are also highly variable amongst themselves. While considering SOGI claimants' experiences collectively may have value for the purposes of activism and service provision (for example, when advocating for targeted accommodation or community groups), it is important to disaggregate the identities of SOGI claimants in many contexts in order to offer more adequate and tailored services (Chap. 11). This can be clearly seen, for example, in relation to individuals claiming asylum on grounds of their gender identity – or who may present their claims on other grounds but identify as trans. There are reports of inadequate staff training, erroneous recording of these claims as pertaining to sexual orientation, and inappropriate assessments of lack of credibility (TGEU 2016, p. 6). In terms of social integration, trans asylum claimants face difficulties in finding specific social support and community groups, which leads to particular forms of isolation (TGEU 2016, p. 7). Many further issues may go unreported, leaving us with only a partial picture of these individuals' experiences.

Despite substantial scholarly and activist efforts in some countries to address the SOGI dimensions of asylum matters, NGOs' efforts and scholarly criticism concerning SOGI claims are still scarce in many European jurisdictions. This prevents the improvement of procedural and substantive decision-making and social integration in cases involving SOGI asylum claims. There is still need for a more comprehensive, theoretically and empirically-grounded analysis of the legal and social experiences of SOGI asylum claimants across several European jurisdictions. This is what these volumes aim to do.

### 1.3 Framing Our Research

Although there are instances of SOGI asylum claimants being resettled to European countries (Taylor 2019), their limited number and the nature of our fieldwork have led us to focus almost exclusively on claimants who undergo the refugee status determination (RSD) process in European countries. In other words, our analysis is limited to instances of territorial asylum, where claimants have reached the territory of the country where international protection is sought, as opposed to other forms of asylum such as diplomatic asylum. Our analysis is also limited to the individual assessment of international protection needs, rather than group assessment, as may happen in relation to group arrivals or groups of claimants from certain countries of origin (for example, Syria).

Focus will remain on developments that have taken place since the creation of the EU CEAS, in other words, post-1999 (Ferreira 2018), which has framed most key features of the asylum systems in EU countries. We focus mostly on the

SOGI-specific dimensions of the asylum experiences of SOGI claimants, and how these intersect with other dimensions (such as ‘race’, class, religion, etc.), rather than analysing their entire experiences.

Three levels of analysis are employed throughout these volumes: i) macro-level, through the examination of the incorporation by current legal frameworks of the emergent SOGI dimensions of human rights, the different scopes and approaches of asylum policies in European countries with regard to SOGI, and the fairness of the asylum adjudication process in SOGI-related claims; ii) meso-level, through the examination of the way in which the asylum adjudication system interrelates with these claimants’ self-perceptions and integration both in the host communities and in the established diaspora of fellow nationals; iii) micro-level, through the examination of how, in the course of the asylum adjudication process and beyond, asylum claimants’ identities evolve and adapt.

These volumes rely on a combined comparative, socio-legal and empirical methodology, as further explored in Chap. 2. As case studies for our comparative approach, we have adopted Germany, Italy and the UK. The rationale behind this choice is explained in Chap. 2. While acknowledging a range of other interests and perspectives (including states’ sovereignty over borders, security and societal fears), we unapologetically adopt a normative approach that draws above all from the theoretical and analytical underpinnings expounded in Chap. 3, thus favouring human rights, feminist, queer and intersectional perspectives.

Terminology in the field of asylum/refugee policy and gender/sexuality has become a veritable minefield, both in academia and activism. This makes it important to dedicate space to explaining our terminological choices and offer some caveats before proceeding. While writing these volumes, the first choice before us was to decide how to refer to asylum and refugee matters. The term ‘asylum seeker’ has become negatively loaded in political and public debates and is rightly seen as dehumanising by many people, so there have been calls to replace it with ‘people seeking asylum’ (African Rainbow Family 2017). Endorsing this position, we thus either refer to people seeking asylum or asylum claimants throughout these volumes. We also explicitly refute the expression ‘failed asylum seeker’, because:

[t]he use of the term “failed” evokes fault of the individual that he or she has not succeeded in obtaining international protection just as students who fail their exams did not study sufficiently or were inadequate. The individual is responsible for his or her fate, the authorities warned him or her of the risk of a poor application but he or she persisted in pursuing, inadequately, the claim. (Guild 2012, p. 20)

We favour instead the expression ‘unsuccessful claim’ or ‘rejected claim’, thus putting the emphasis on the lack of success of the claim, not the person. More generally, we will refer to ‘refugees’ in a non-technical way, thus including all beneficiaries of international protection, unless we specify the legal status granted.

Other fundamental terminological choices refer to whether to adopt characteristics (sexual orientation, gender identity, etc.) or identities (gay, lesbian, trans, etc.) as the key focus of our analysis (to use the common, if potentially reductive choice of terminologies available in this field of research). As one can deduce from this

introduction, we have opted for the former. We chose a characteristic, as opposed to an identity-focused analysis, because a focus on certain identities and the use of terms such as ‘LGBT’ creates a greater risk of replicating Westernised concepts of personhood for individuals claiming asylum (something further explored throughout these volumes). Focusing on certain characteristics and using terms such as ‘SOGI’ reflects, or aims to consolidate, a more universal and cross-cultural basis for discussion, more sensitive to an intersectional approach to SOGI asylum (Dayle et al. 2010; Dustin and Ferreira 2017). As one of our participants said, ‘I chose to say that I am gay, it’s easy to understand and accept here [Europe]. Even if I keep thinking that being LGBTQ as definition is reductive’ (C61, Italy). Moreover, as we explore further in Chap. 3, while:

queers may reject the [LGBT+] acronym altogether, often because of its identitarian, culturally specific, or geo-politically loaded reference points (...) SOGI is used by the UN and is often used outside the West because of its capacity to be distant from the Western cultural and identitarian forms usually associated with the categories in the LGBT+ acronym. (Langlois 2018, p. 155)

Where appropriate to refer to an identity-based acronym, we have either opted for the acronym used by the author being discussed, or for LGBTIQ+, conscious of the scope to expand this acronym with a practically infinite number of other specific identities (for example, asexual, pansexual, unsure, polyamorous, etc.). While conscious that the UN opts for the acronym LGBTI (United Nations Human Rights Office 2019), we have found it important to add Q for queer, as ‘identity categories are burdened by legacies that must be interrogated, do not map neatly across time and space, and become transformed through circulation within specific, unequally situated local, regional, national and transnational circuits’ (Luibhéid 2008, p. 170).

Four further clarifications are relevant in this context. First, sexual orientation and gender identity constitute separate characteristics, but persecution related to these two notions raises common issues in terms of individuals’ non-compliance with held social and cultural conceptions of gender roles (Kendall 2003; Miller 2000; Stichelbaut 2009, p. 70; UNHCR 2002). In essence, both sexual orientation and gender identity asylum claims are a consequence of ‘failing to conform to gender-prescribed social norms and mores or for claiming their rights’ (CEDAW 2014, par. 15). So, both these characteristics need to be considered if we are to tackle the insufficiencies of the asylum system, even if recognising along the way their autonomy, hence predominantly adopting the acronym SOGI throughout these volumes. Further characteristics such as sexual characteristics (or intersex variations) and gender expression, while distinct from SOGI, are also deeply connected to oppression on account of gender roles and are thus relevant to our subject-matter. This would have made the acronym SOGIESC (sexual orientation, gender identity and expression, and sexual characteristics) appropriate as well. While not adopting SOGIESC as our core acronym, we consider sexual characteristics and gender expression where relevant. However, we remain focused on SOGI, as that is where our empirical data has, for the most part, led us.

Second, where it is more appropriate to refer to certain SOGI-related identities in the light of the issues or data in question, we favour, wherever possible and known, the identities ascribed by those concerned to themselves. When not specified by the individuals in question, we have avoided ascribing an identity. And when wishing to refer to non-heterosexual and non-cisgender people generally, we also use the terms ‘sexual minorities’ and ‘gender minorities’.

Third, ‘sexual identity’ is a term that is sometimes used to encompass a range of SOGI-related characteristics, and employed to replace ‘SOGI’ or ‘SOGIESC’. As ‘sexual identity’ is not yet a term that is widely used and acknowledged, or consensually understood, we have opted not to use this term as our main terminology, despite its potential and merits, unless when referring to other sources that use that expression. Similarly, we do not use the words ‘homosexual’ and ‘homosexuality’, owing to their negative connotations, being increasingly disfavoured and replaced with the words ‘gay’ and ‘lesbian’ in English-speaking contexts. Yet, they are still frequently used in judicial decisions, policy documents and in other languages, and so we use the terms in the context of such sources without endorsing them.

Finally, we acknowledge that not everyone we wish to refer to, in the context of our fieldwork and beyond, may identify as a member of a ‘sexual minority’ or a ‘gender minority’, or see the matters discussed as a matter of ‘sexual orientation’ or ‘gender identity’. We try to respect our participants’ preferences as far as possible, while retaining the consistency needed for the purposes of these volumes.

## 1.4 The Structure of These Volumes

These volumes are constituted by 11 chapters, with Vol. 1 gathering Chaps. 1–6 and Vol. 2 gathering Chaps. 7–11. Chapters are divided into three Parts, with Part I in Vol. 1, Part II straddling the two volumes, and Part III in Vol. 2. Part I is aimed at contextualising our research on SOGI asylum and is constituted by four chapters. Following this introductory chapter, Chap. 2 offers an overview of the methodology used in the research underlying these volumes, including a discussion of the range of empirical methods employed. The chapter will also explore insights gained through our research in relation to conducting empirical research with refugees. Chapter 3 sets out the theoretical underpinnings of our research, derived from human rights, feminist theory, queer studies and intersectionality. This chapter identifies and explores a number of debates within these three vast and diverse bodies of literature, debates chosen for the novel contribution they can make to our understanding of SOGI asylum. After a critical analysis of these contributions, we use them to identify key underpinning principles or themes that will guide and inform the subsequent data analysis in the chapters that follow to provide a coherence to our approach, while avoiding a restrictive or orthodox approach to SOGI asylum. Chapter 4 concludes Part I by exploring the legal and policy framework that applies to SOGI asylum in the case study jurisdictions, including an exploration of key actors and instruments, the degree of domestic asylum systems’ compliance with



supranational and international obligations, specific SOGI asylum policy and guidance, and the range of outcomes an asylum claimant may expect, amongst other issues.

Part II offers an analysis of the legal and social experiences of SOGI asylum claimants and refugees across the three case study jurisdictions and further across Europe. Chapter 5 considers the lives of individuals before fleeing persecution, the journey and arrival in Europe, including a range of social and legal aspects. These include the availability in the three countries under comparison of information on SOGI asylum upon arrival, as well as what assessment is carried out, especially in relation to SOGI claimants' initial accommodation. Chapter 6 – the last one in Vol. 1 – proceeds to exploring SOGI asylum in the context of decision-making procedures, including: the interview setting; the training and conduct of caseworkers, judges, interpreters and other people working with SOGI claimants; how COI is produced and used in relation to SOGI asylum claimants; the impact of individuals' personal background and prejudices; and access to and quality of legal representation at initial decision-making stage and appeal stage.

Volume 2 starts with Chap. 7, which considers how the substance of SOGI asylum claims is dealt with. In particular, its analysis focuses on how decision-makers assess whether a SOGI asylum claimant is a member of a PSG (including whether the claimant's SOGI self-identification is influential), how the notion of 'persecution' is assessed (including the role of criminalisation of same-sex acts in the claim assessment), and to what extent the notion of 'internal relocation' is a relevant consideration. This chapter will also explore the evidentiary standards and how they are applied to SOGI claimants, exploring how decision-makers assess the 'credibility' of SOGI asylum claimants and whether a 'culture of disbelief' still persists amongst asylum authorities.

Chapter 8 shifts the focus to the lived experiences of SOGI asylum claimants in relation to housing and accommodation. This includes an analysis of SOGI asylum claimants' perceptions of reception and accommodation centres, experiences of detention, longer-term accommodation, homelessness and destitution, and post-refugee status housing arrangements. To conclude Part II, Chap. 9 focuses on a range of other aspects in the lives of SOGI asylum claimants and refugees that have a significant impact on their feelings, well-being and quality of life, but are often inappropriately regulated, namely access to healthcare services, the labour market and educational provision. The chapter explores access to mental health services, experiences of torture and sexual violence, the impact of being denied the right to work, experiences of volunteering, and issues related to language tuition and access to higher education, as well as emotional health more generally.

Part III presents our vision for a better future for SOGI asylum in Europe, one where all actors place greater trust in the asylum system and are confident of its fairness, as defined by the analysis carried out in these volumes. Chapter 10 brings together experiences of harassment, isolation and oppression that participants shared with us. The analysis revolves around four key themes – identities, discrimination, space and agency – all of which affect both the legal and social experiences of SOGI claimants. Finally, Chap. 11 offers a range of policy recommendations

addressed to decision-makers, policy-makers, NGOs and service providers, for improving the socio-legal framework that applies to SOGI asylum. These focus mainly on domestic level contexts, but also refer to the European level to offer a more encompassing analysis. This chapter also functions as the conclusion to these volumes, and offers some final observations on the theme of SOGI asylum in Europe.

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# Chapter 2

## Researching SOGI Asylum



*I wish you all the best with this study, really. I'm so happy to do this interview with you.*

*(Fares, focus group no. 6, Lower Saxony, Germany)*

*It was a cathartic experience for participants.*

*(Giulio, referring to focus groups no. 1 and 2, northern Italy)*

*I want to live a free life, and encourage others that they shouldn't give up.*

*(Tiffany, focus group no. 2, Glasgow, UK)*

### 2.1 Introduction

The SOGICA project ran from September 2016 until August 2020.<sup>1</sup> In these four years, the project consisted of different phases: (1) delineating the project's methodology and theoretical and analytical frameworks, in particular how human rights, feminist and queer studies and the concept of intersectionality can be used as particular lenses for the analysis of SOGI asylum claims; (2) preparing and conducting fieldwork in Germany, Italy, the UK and at EU and Council of Europe levels; (3) analysing the data, writing up the results and producing detailed policy recommendations.

As explained in Chap. 1, we adopted an interdisciplinary, comparative and intersectional approach to explore the social and legal experiences of SOGI claimants.

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<sup>1</sup>Asylum law and policies are constantly changing and in all three countries changes (and reforms) were implemented during the 4 years of our project. Important to note, therefore, are the timeframes when we conducted our interviews. In Germany, interviews and focus groups were conducted between 2 November 2017 and 16 October 2018; in Italy between 22 September 2017 and 4 January 2019, in the UK between 6 November 2017 and 26 October 2019, and at EU and CoE levels between 9 March 2018 and 5 July 2018.

The interdisciplinary approach encapsulates legal and sociological theoretical and analytical frameworks and methods and therefore contributes to the developing field of refugee studies that take a socio-legal approach (Anderson et al. 2014; Güler et al. 2019; Khan 2016; Lukac and Eriksson 2017; Venturi 2017). As McConville and Chui (2007, p. 5) explain: ‘The non-doctrinal approaches represent a new approach of studying law in the broader social and political context with the use of a range of other methods taken from disciplines in the social sciences and humanities’. Employing a wide range of quantitative and qualitative methods,<sup>2</sup> socio-legal approaches look at the social factors involved and the social impact of law and practice (McConville and Chui 2007, p. 20). In the context of these volumes, these approaches are especially useful for exploring the relationship between sexuality, gender (identity) and the law, and their intersections with other social relations of power. As McConville and Chui (2007, p. 22) argue, ‘the law cannot be objectively isolated’. For analysing the complexities of the social as well as the legal experiences of SOGI claimants, doctrinal positivistic approaches focusing on case law would not have been sufficient.

In order to address the issue of disparate (and occasionally low) standards across the EU’s and CoE’s member states in asylum legal adjudication, a comparative approach is necessary (El-Enany 2008; Ferreira and Kostakopoulou 2016; FRA 2010a, b; Lomba 2004; Whittaker 2006). As we will explore further in Chap. 4, disparities still exist, even if they have to some extent been addressed by the establishment of the EU CEAS. By focusing on Germany, Italy and the UK, we aim to explore better and worse practices, as well as some distinctive trends that may guide asylum decision and policy-making.

The selection of the three countries was done on the basis of three factors:

- Volume of asylum claims – these countries are among the top six EU host countries in terms of numbers of applications (EUROSTAT 2019).
- Different adjudication procedures. While Germany adopts an inquisitorial system (where the decision-maker should take the lead in gathering evidence), and the UK adopts an adversarial system (where the evidence gathering burden is theoretically shared between decision-maker and asylum claimant, but in practice most of the burden lies on the claimant), Italy adopts a mixed system. The inquisitorial or adversarial character of the asylum adjudication system has been identified as a crucial feature that may have a bearing on the outcome of asylum claims (Committee on Migration, Refugees and Population 2009; Independent Asylum Commission 2008; Künnecke 2007; Sonnino and Denozza 2005; UNHCR 2005).
- Socio-cultural-legal context, particularly in relation to SOGI. There still exist significant differences in relation to social perceptions of sexual behaviour and gender roles across Europe as well as in protection provided by law (Gerhards

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<sup>2</sup>A common definition of quantitative/qualitative method is, as McConville and Chui (2007, p. 48) describe: ‘Quantitative research deals with numbers, statistics of hard data whereas qualitative data are mostly in the form of words.’

2005; Giordano 2001; Philips 2001; Waaldijk 2006). By comparing three countries that reflect different approaches to sexuality and gender identity, we were able to explore the influence of these differences on asylum adjudication.

While intersectionality is key as a theoretical concept underpinning this research (Chap. 3), it also guides our methodology. By applying intersectionality as methodology, we follow Matsuda's approach in that we 'ask the other question' (Matsuda 1991). Using an intersectional approach was vital for exploring the socio-legal experiences of SOGI claimants and guided how we developed the different methods we used for the data collection across the three case study countries and at EU and CoE levels.

## 2.2 Methods

In order to achieve an analysis that offers both breadth and in-depth understanding, we used a mixed-methods approach (Blanck 1993; Epstein and King 2002; Travers 1999; Travers and Manzo 1997). Data was collected using the following methods:<sup>3</sup>

- 143 interviews with SOGI asylum claimants and refugees, NGOs, policy-makers, decision-makers, members of the judiciary, legal representatives, and other professionals;
- 16 focus groups with SOGI asylum claimants and refugees;
- 24 non-participant contextual observations of court hearings;
- Two online surveys for SOGI asylum claimants and refugees and professionals working with SOGI asylum claimants and refugees;
- Documentary analysis of international, European and domestic case law, policy documents, NGO reports, case files, etc.;
- Freedom of Information (FOI) requests.

All of the above covered Germany, Italy and the UK, as well as the EU and CoE. A range of qualitative research methods were used (Bertaux 1981; Morgan 1998; Seal 2004; Seale et al. 2004). While the online surveys produced some numerical data, qualitative interviews and focus groups offered more in-depth accounts of the legal treatment of the participants' claims and the impact on their social experience and well-being. Our ontological and epistemological standpoint is that asylum claimants and refugees are experts on the refugee experience. Hearing their knowledge and experience is essential to gain unique insights into those experiences and to verify whether international, European and domestic legal frameworks in place address appropriately their claims (Hynes 2003, p. 13). In total, 157 asylum claimants and refugees participated in the semi-structured interviews and focus groups (64 in semi-structured interviews and 93 in focus groups).

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<sup>3</sup>All fieldwork materials are available on the SOGICA website: [www.sogica.org/en/fieldwork/](http://www.sogica.org/en/fieldwork/).



As we aimed to include a range of perspectives in our project, when recruiting participants, we looked for a diverse sample in terms of sexual orientation, sex, gender identity, country of origin and other factors such as ethnicity, religion, age and social class. We also tried to reach participants in different regions and nations (with regard to the UK) within our three countries, recognising the importance of place in terms of both where participants came from and where they settled or resided in the host country. To make our research as accessible as possible, we provided translations of the project flyer, information sheets and consent forms not only in German and Italian, but also in Arabic, Farsi, French, Turkish and Urdu.<sup>4</sup> Many of the asylum claimant and refugee participants were found through contacts with local, national and international NGOs offering support to asylum claimants, legal practitioners, or through contacts with other claimants. A European-wide network of SOGICA Project Friends that we had launched at the beginning of our research and that consisted of people with experience and expertise on SOGI asylum issues, supported us in recruiting participants for our research by cascading information to their contacts and networks.

In order to be able to base findings on a heterogeneous sample, it was important not to rely solely on gatekeepers,<sup>5</sup> but use other recruitment strategies. Gatekeepers often fear that their clients are ‘too vulnerable’ and traumatised to participate in research projects and, as we have also experienced, may, with the best of intentions, close the door to researchers. In addition, NGOs might only refer participants who they see as the ‘ideal’ sample (for example, for the reputation of the organisation; Hynes 2003, p. 14).<sup>6</sup> In light of these factors, to recruit participants, we used a wide range of means such as publishing the call for participants in newsletters, mailing lists, relevant publications, and on social media – our own and those of other individuals and organisations. We also distributed flyers about the research through NGOs, community groups and LGBTIQ+ cafés and bars (although this was the least successful method). Many of the participants were found through snowballing (that is, a participant suggested another participant) and direct contacts.

We are aware that, even though we adopted different recruitment strategies, we may have not reached the most isolated SOGI claimants, for instance LGBTIQ+ people who are dispersed to remote areas where they have no possibility at all to access support groups, or who have to live in concealment because of their living arrangements (living with their family, for instance).

We also noticed some differences with regard to recruiting participants in the three countries due to different structures and political and policy cultures. For instance, in contrast to the UK, where support groups for SOGI claimants have existed for at least a decade, in Italy and Germany the existence of these groups has

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<sup>4</sup><http://www.sogica.org/en/fieldwork/>.

<sup>5</sup>In this context, individuals usually working in NGOs or law firms, acting as intermediaries between researchers and potential research participants.

<sup>6</sup>When gatekeepers are involved, it is important to make sure that potential research participants understand that the service provision they receive from that organisation is not affected by their decision to participate in the research or not (Clark-Kazak 2017, p. 12).



been a fairly recent phenomenon. In Germany and Italy, most of the support organisations and groups that now exist were set up in or since 2015. Because of the more established nature of organisations in the UK, there has also been more (positive) media interest in SOGI claims and there is also a policy culture and established principles of consultation and transparency between policy-makers and ‘stakeholders’ – at least on paper. And while decision-makers in Germany and the UK were recruited through official means (judicial authorities, government departmental channels, etc.), in Italy this was to a large extent only possible through personal contacts. In general, our participants were self-selecting. Consequently, it is likely that the lawyers and decision-makers (but also NGO and other professionals) we interviewed, and on whose accounts we draw in Chaps. 4, 5, 6, 7, 8, 9 and 10, are committed to addressing failings in the SOGI asylum system, perhaps to a greater degree than a random sample of stakeholders would be.

Furthermore, there were some striking differences in the demographics of the SOGI claimants who participated in individual interviews and focus groups, especially with regard to their country of origin. Many of the Italian participants came from French-speaking countries and all of them came from Africa; in Germany, participants came from Africa, the Middle East, Asia, Eastern Europe and the Caribbean; and in the UK, participants came from Africa, Asia, the Middle East, the Caribbean and Central America. In addition, in Italy it was more difficult to find lesbian participants and cases based on gender identity. This may be also due to the different paths of arrival followed by many transgender people (for example, people from South America who have been living in Italy for many years) (Chap. 5). The different arrival paths might also be the reason why participants in Italy were younger (in the UK, for instance, more people claim ‘sur place’<sup>7</sup>).

It needs to be said that not all of the different identifiers included in LGBTIQ+ are represented in our study. Our sample does not include any intersex claimant and only three claimants who identified as bisexual. Therefore, it needs to be kept in mind that ‘questions of access and recruitment can be central to understanding the “outcomes” of the research’ (Rapley 2007, p. 17). Nevertheless, as the demographics of our asylum claimant and refugee participants summarised in Tables 2 and 3 below demonstrate, we managed to recruit a diverse sample for our research. In Germany and the UK, we were able to recruit almost equal numbers of women and men for individual interviews and more women for the focus groups. Some other differences between the participants of the three countries emerged: the educational level of individual interview participants in Germany was higher than in Italy and the UK (which also seemed the case for focus group participants, but data is missing here; see table below). Also to note is that in the UK a wider range of legal avenues are available to claimants (Chap. 4), with some of our participants waiting for the outcome of a judicial review or fresh claim. Not reflected in the tables below is the

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<sup>7</sup>A sur place refugee is ‘a person granted refugee status based on international protection needs which arose sur place, that is, on account of events which took place after they left their country of origin’ ([https://ec.europa.eu/home-affairs/what-we-do/networks/european\\_migration\\_network/glossary\\_search/refugee-sur-place\\_en](https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/refugee-sur-place_en)).

claimants' family status and number of children, as we did not collect information from all the participants about that matter. From the information we have, the majority of participants were single and in each country five of the individual interview participants had children (in Germany about 40% of the focus group participants had children).

All of the interview and focus group audio files were transcribed, mainly by professional transcribers who had signed our confidentiality agreement, although a small number were transcribed by members of the project team. We then uploaded the transcripts, as well as the court hearing observation notes, onto the software programme NVivo. This data analysis software is mainly used for qualitative data analysis and allows for comparative analysis. We coded the interview, focus group and observation files according to a coding framework that we developed after a coding pilot exercise involving a small number of interviews. The software then enabled us to pull out the relevant codes (or nodes, as termed in NVivo) for the analysis and writing up of our results.

In the following, we explain the different methods used.

### ***2.2.1 Semi-structured Interviews***

Most of the 143 semi-structured interviews carried out were one-to-one interviews, but 12 interviews were held with two people: either couples, friends or professional colleagues.<sup>8</sup> We conducted interviews in a wide range of locations in Germany, Italy, the UK and Brussels to gain understanding of regional and national differences.<sup>9</sup> The overall number of participants interviewed in each category of participants is summarised in Table 1:

These in-depth interviews were semi-structured, that is, we followed an interview guide but remained flexible in terms of the wording and the order of the questions, and left space for discussion of matters not raised by our questions. The purpose of the guide was to provide direction, ensuring that the interviews focused on the crucial topics we aimed to explore. In contrast to structured interviews, which consist mainly of closed-ended questions, semi-structured interviews allow the interviewer to find out about feelings and perceptions of participants that do not fit into pre-chosen options. Furthermore, too much standardisation can inhibit building

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<sup>8</sup>In Italy, 42 interviews were conducted, three of which were with two interviewees; in the UK 52 interviews were conducted, five of which were with two interviewees; in Germany 41 interviews were conducted, four of which were with two interviewees; at the European level eight individual interviews were conducted.

<sup>9</sup>In Italy, interviews were conducted in 13 locations (across ten regions); in Germany, interviews also took place in 13 different locations (across eight federal states: Hesse, Lower Saxony, Saxony, Berlin, North Rhine-Westphalia, Rhineland-Palatinate, Saarland and Bavaria); in the UK, interviews were conducted in ten different cities, one of which was in Scotland, one in Northern Ireland (by telephone), and all the others in England.

**Table 1** Number of participants

Participants	UK	Germany	Italy	European level
Asylum claimants and refugees	25	21 (3 of which also worked in NGOs)	18 (2 of which also worked in NGOs)	–
NGOs	16	14	11	2
Lawyers	6	5	6	-
Decision-makers	8	2	7	-
Policy-makers	1	1	–	3
Other professionals	1	2	3	3
<b>Total</b>	<b>57</b>	<b>45</b>	<b>45</b>	<b>8</b>

Many thanks to our placement student Alba Trabant (University of Sussex/Freie Universität Berlin), who assisted us in creating the first draft of the tables used in this chapter

**Table 2** Demographics of interview participants – asylum claimants and refugees

	Germany (21)	Italy (18)	UK (25)
Sex	10 female	3 female	13 female
	11 male	15 male	10 male 2 identify as neither
Gender Identity	7 women	2 women	12 women
	9 men	15 men	9 men
	1 woman (trans)	1 trans (FtM)	1 transwoman
	1 man (trans)		1 transman
	1 female born identified as male		2 not answered
	1 trans ('female inside, male outside')		
1 S/he ('gender not important to me')			
Sexual Orientation	9 lesbian	2 lesbian	9 lesbian
	8 gay	14 gay	8 gay
	1 hetero	1 heteroromantic asexual	2 heterosexual
	3 queer	1 not sure	1 bisexual 1 pansexual 1 transsexual 3 not answered
Age range	24–48	17–36	24–47
Asylum status	1 Dublin case (church asylum)	3 no decision yet	4 no first decision yet
	8 refused and in the appeal process	7 refused and in the appeal process	2 waiting for decision on fresh claim

(continued)

**Table 2** (continued)

	Germany (21)	Italy (18)	UK (25)
	12 international protection granted	6 international protection granted	3 refused and in appeal process
		2 not answered	3 refused and in the process of submitting fresh claim
			1 judicial review pending
			5 international protection granted
			7 not answered
Country of Origin	1 Egypt	3 Cameroon	2 Bangladesh
	2 Iran	3 Gambia	1 Benin
	2 Jamaica	2 Ivory Coast	3 Cameroon
	2 Lebanon	1 Libya	2 Egypt
	2 Morocco	1 Mali	1 Guatemala
	1 Nigeria	7 Nigeria	2 Kenya
	1 Oman	1 Senegal	1 Kyrgyzstan
	2 Russia		1 Libya
	2 Syria		2 Malawi
	1 Tanzania		1 Malaysia
	1 Turkmenistan		1 Nigeria
	4 Uganda		2 Pakistan
			1 South Africa
			1 Tanzania
2 Trinidad			
1 Uganda			
		1 Zimbabwe	
Educational background	8 secondary school education	2 primary school education	1 primary school education
	11 further and higher education	5 secondary school education	8 secondary school education
	2 not answered	6 further and higher education	8 further and higher education
		5 not answered	8 not answered
Religion	3 Atheist	1 Atheist	1 Agnostic
	6 Christian	6 Christian	8 Christian
	1 Humanist	5 Muslim	1 Muslim
	1 Jewish	6 not answered	6 religious, but not specified
	2 Muslim		4 no religion
	1 Orthodox (not specified)		5 not answered
	3 no religion		
4 not answered			

The descriptions and terms used in this table are largely those that were chosen by the participants, which is why there are a variety of identifiers in this table, especially with regard to gender identity and sexual orientation

**Table 3** Demographics of focus groups participants

	Germany	Italy	UK
Number of focus groups	6	5	5
Participants	35	32	26
Sex	23 female 12 male	2 female 30 male	17 female 9 male
Gender Identity	22 women 11 men 1 trans woman 1 gender fluid	2 women 30 men	17 women 9 men
Sexual Orientation	21 lesbian 11 gay 2 bisexual 1 not answered	2 lesbian 21 gay 2 bisexual 7 not answered	15 lesbian 4 gay 7 not answered
Age range	21–48	17–39	23–57
Asylum status	3 waiting for decision 20 refused and in the appeal process 2 international protection granted 10 not answered	4 waiting for decision 4 refused 9 in appeal process 6 international protection granted 9 not answered	20 pending decision or waiting for appeal 2 refused 4 refugee status
Country of Origin	2 Iraq 4 Jamaica 1 Morocco 5 Nigeria 1 Syria 21 Uganda 1 not answered	6 Cameroon 3 Gambia 3 Ghana 1 Guinea Conakry 2 Ivory Coast 16 Nigeria 1 Togo	1 Bangladesh 1 Cameroon 1 Iraq 1 Jamaica 1 Kenya 2 Malawi 1 Namibia 1 Nigeria 3 Pakistan 1 Tanzania 2 Uganda 1 Zimbabwe 10 not answered
Educational background	2 no school 1 primary school education 12 secondary school education 14 further and higher education 6 not answered	1 no school 3 primary school education 4 secondary school education 6 further and higher education 18 not answered	1 secondary school education 3 further and higher education 22 not answered

(continued)

**Table 3** (continued)

	Germany	Italy	UK
Religion	1 Atheist	12 Christian	2 Christian
	27 Christian	5 Muslim	3 religious but not specified 1 no religion
	6 Muslim	1 no religion	20 not answered
	1 religious but not specified	14 not answered	

trust and rapport (Burns 1994, p. 278). Semi-structured interviews focus on the participant’s perspective rather than the researcher’s and allow participants to use their own language to describe their experiences and social reality.

These are some of the advantages to a semi-structured and more flexible interviewing approach. However, a corollary is that coding becomes more difficult and the interview data is less comparable than it would be with structured interviews (Burns 1994, pp. 278–279). Entirely open-ended interviews, on the other hand, would have been too loosely structured for our purposes (Burns 1994, pp. 279–280). We followed some of Burns’ advice for questioning techniques, for instance, in reflecting back to the participants what they had said, and in using descriptive questions (for example, describing people and events) and probing questions such as ‘Can you tell me more?’ We started interviews in a friendly and supportive way, allowing participants to be in control of the flow of the information (Burns 1994, p. 281). It was important to follow what our participants said, rather than impose a predetermined agenda in order to get sufficient detail and depth of data (Rapley 2007, p. 18).

Our approach recognises the interactive nature of data collection, and rests on the assumption that an interview is always a joint production of accounts (Rapley 2007). We followed the approach Rapley (2007, p. 26, original emphasis) calls “‘engaged, active or collaborative’ interviewing”. It was vital to us to respect participants’ privacy by not asking overly personal questions. Furthermore, being honest and encouraging dialogue about what our study could achieve and what the limitations were, were essential, in our view, to building a trusting relationship (Krause 2017). We engaged with our participants’ discourse by also bringing in our own perspectives (we thus question the ‘neutrality’ of the researcher – see more on our positionality in Sect. 2.3).

As Krause (2017) suggests, especially when conducting research with refugees who have experienced human rights violations, it is vital to enable participants to speak about the issues that are important to them. Krause thus argues that ‘[c]rucially, when participants can speak out about issues that are relevant for them, they are not treated as “data sources” but as persons’ (Krause 2017, p. 20). This issue is also important from an intersectional perspective. For this reason, even though our research focused on sexuality, gender identity and ‘refugeeness’, we also asked participants questions addressing other identifiers such as ‘race’ and religion. We ‘tested’ the interview guides with several pilot interviews, asking the participants how they felt about particular questions (Burns 1994, p. 281), and amended the guide according to the feedback that we received.

SOGI asylum claimants and refugees were asked open questions about their social and legal experiences with regard to their asylum claims. In order to minimise the levels of stress, we tried to keep the interview length to an hour. We made participants aware that they could stop the interview at any time or choose not to answer particular questions. The semi-structured interviews with policy-makers, decision-makers, members of the judiciary, lawyers and NGO workers explored these actors' positive and negative practical experiences with SOGI asylum claims. As Chaps. 4, 5, 6, 7, 8, 9 and 10 will demonstrate, these interviews provided in-depth data. Most participants gave permission for their interviews to be audio recorded and transcribed. In a few cases where participants did not give permission, notes were taken. The interviews (and the focus groups) were conducted in semi-public places (for example, spaces in universities or quiet cafés) or in places familiar to the participant (local LGBTIQ+, refugee and migrant organisation venues or the offices of law firms).

### ***2.2.2 Focus Groups***

We conducted 16 focus groups with 93 SOGI asylum claimants and refugees in Germany (six focus groups), Italy (five focus groups) and the UK (five focus groups). Focus groups offer an opportunity for sharing and comparing views in a way that individual interviews do not. Questions in the focus groups concentrated on opinions about the asylum process for SOGI claimants, life in the respective countries and support services available.

In Germany five focus groups were held in English and one in German; in the UK, all five focus groups were conducted in English; in Italy three were conducted in English, one in French and one in a mixture of English and French. In our pilot focus groups we found that smaller groups worked better and were more interactive. Matters of sensitivity and confidentiality are also more manageable in a small group. Consequently, we decided to keep the groups fairly small (each focus group had six participants on average). Most focus groups were recruited through NGOs, thus participants often knew each other. This had the advantage of participants feeling more relaxed with each other; a disadvantage, however, was that they may not have articulated specific points which they assumed everybody already knew, and conversely, differences in opinion may not have been expressed for fear of alienating peers (Macnaghten and Myers 2007, 70).

In line with ethical standards – guided by the University of Sussex, academic and professional bodies and also our own principles – we tried to make our information sheets and consent forms as detailed as possible (Sect. 2.3). Nonetheless, this meant that going through these documents with a group of participants and making sure that every participant understood what participation involved, was challenging. Some participants found the information sheet and the consent form too bureaucratic, and some participants were illiterate or nearly illiterate, so we allowed time to explain everything carefully and in detail. All participants signed the consent

form, but we also made sure that we received consent verbally. In a few focus groups (in Italy) assistants helped with translation, filling out forms and taking notes. We moderated the focus groups and endeavoured to encourage all participants to speak using appropriate strategies. For example, where one participant tended to dominate the conversation, the interviewer would look away from that person and turn their body towards somebody who had contributed less (Macnaghten and Myers 2007). Sometimes participants asked us to use simpler and more basic language, and we also discovered that descriptors such as ‘men loving other men’ and ‘women loving other women’ were sometimes preferable to ‘being gay or lesbian’, as some participants did not identify that way (even if in relation to demographic questions, participants mostly adapted to those categories). In the pilot carried out in Italy, we also discovered that the original opening question we had set seemed to require a ‘capacity of abstraction’ that made some people uncomfortable from the outset.<sup>10</sup> Therefore, we changed it to a question asking more specifically about the arrival in the host country.<sup>11</sup>

We had some ethical concerns about conducting focus groups with asylum claimants and refugees (Sect. 2.3), based on the potential re-traumatisation participants might experience when listening to other participants’ stories. Yet, according to the feedback we received from participants, these focus group discussions were largely positive experiences. The focus groups offered participants a way to reflect on particular issues within a group setting, sometimes for the first time, and to become aware that other people faced similar issues. Often there were passionate discussions in the groups, especially when participants discussed the decision-making process and how to prove their sexual orientation.

### 2.2.3 *Observations in Courts*

We conducted 24 non-participant contextual observations of court hearings of asylum appeals in Germany (ten), Italy (three) and the UK (11) between February 2018 and April 2019.<sup>12</sup> Using a guide, these observations focused on how the different actors involved dealt with asylum claimants’ SOGI and related aspects of their claims.<sup>13</sup> As Burns (1994, p. 265) points out, ‘the functional distinction between participant and non-participant observation is ambiguous as it is impossible to avoid

<sup>10</sup> ‘With regard to your sexual orientation or gender identity, what would you say, how is life in the UK/Italy/Germany different to life in your country of origin?’

<sup>11</sup> ‘Would you like to tell me something about your arrival in this country?’

<sup>12</sup> The 11 court hearings in the UK were conducted between February and November 2018 in the First Tier Tribunal and Upper Tribunal. The ten court hearings in Germany were conducted in administrative courts between March 2018 and April 2019. In Italy, we tried to gain access to 10 court hearings between March 2018 and February 2019, and only effectively observed three out of these.

<sup>13</sup> <http://www.sogica.org/wp-content/uploads/2019/12/Court-Observation-guide-.pdf>.



interactions in social situations. The aim of non-participant observation is to observe unobtrusively by minimising interactions with participants. The hearings we observed in Germany and the UK were open to the public and no authorisation was required, however, we needed assistance from lawyers and NGO workers/volunteers to identify forthcoming SOGI asylum appeals, as the detail and nature of appeals is not published. In Italy, we could only observe two tribunal hearings directly, and one indirectly via an interpreter and a lawyer, whom we interviewed when the hearing ended. Hearings are not public and in seven cases the relevant judges did not authorise the attendance of third parties. In these cases, we were denied access despite the claimants' consent and sometimes despite our presence at the venue of the hearing.

While we tried to observe unobtrusively, to respect and avoid distracting the claimants, at times we made our presence as researchers known to the judges. In all three countries, lawyers and NGO workers fed back to us that they thought our presence made a difference as to how the hearings were conducted and their outcome.<sup>14</sup> When we refer to the court hearings we observed, we specify the court, the broad geographical location and the year the hearing took place, but omit further details to protect the anonymity of the claimants.

### **2.2.4 Online Surveys**

Between August 2018 and March 2019, SOGI asylum claimants and refugees in Europe, and those supporting them, were invited to complete an online questionnaire about their experiences with SOGI asylum procedures and wider social experiences. Although these volumes focus on a comparison between the three country case studies – Germany, Italy and UK – the online survey included participants from across Europe, contributing to a broader understanding of the situation of SOGI claimants in Europe. There were two separate surveys: one for claimants and one for people who work with or support them.<sup>15</sup> These surveys had the following aims: to provide some quantitative data and further qualitative material across Europe to complement the detailed fieldwork described above and inform the project's policy recommendations; to provide complete anonymity to people who did not feel comfortable participating in interviews or focus groups, but wanted the chance to have their voices included in the research; to broaden the opportunities for contributing to the research to the many individuals who expressed an interest in the project and

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<sup>14</sup>For example, in Germany, out of the ten appeal hearings we observed, four were rejected, five accepted and one received subsidiary protection (instead of refugee status). In the UK, out of the 11 appeal hearings observed, seven of the appeals have been accepted, two were refused, and two were still pending. From the 10 court appeals in Italy that we tried to access between March 2018 and February 2019, three were granted refugee status, two were granted humanitarian protection and five were still pending at the time of writing.

<sup>15</sup>The surveys can be found on our website <http://www.sogica.org/en/fieldwork/>.

could not be accommodated throughout the fieldwork, both in the case study countries and in other countries.

We developed the questionnaires according to what is described in the literature as ‘model questionnaire’ (Burns 1994, p. 349), including an introduction, body of survey and demographic questions. The (numbered) questions were grouped into logical sections with a smooth transition between them, and some ‘lighter’ questions at the end (Burns 1994, pp. 349–358). Most of these questions were ‘closed questions’, in other words, participants were able to choose from a range of options, but with the option to provide additional responses in free text form. Some questions had a sliding scale from one to ten (for instance, ‘how easy/difficult is it...’). The surveys were made available in different languages<sup>16</sup>, and participants were offered a document with a range of answers to potential queries they could have on the surveys.<sup>17</sup>

Information about our research and links to the online survey was distributed through our website, social media, SOGICA’s quarterly newsletters, Project Friends, LGBTIQ+ and refugee mailing lists, and our professional networks. In total, 157 supporters and 82 claimants filled in the online surveys, but not everyone answered all the questions. As the survey was based on a non-representative sample and received a relatively low response rate, we treat the quantitative aspects of the data with care in the subsequent chapters. We use the European-wide quantitative data to provide some background to particular issues, while we use the surveys’ qualitative data to complement our fieldwork in Germany, Italy and the UK. A full analysis of the results of the survey can be found elsewhere.<sup>18</sup> Here, we provide a summary of the demographics of survey respondents.

Perhaps unsurprisingly, the majority of the 82 SOGI claimants who answered the survey were claiming asylum in the three SOGICA case countries, as it was here where we had the most contacts (Fig. 1). It is likely that some of the SOGICA claimants we interviewed also participated in the survey. However, we also reached respondents in many other European countries. Seventeen percent of the respondents were claiming asylum in Austria, Belgium, Denmark, Greece, Hungary, Ireland, Portugal, Spain, Sweden, Switzerland and the Netherlands. Unfortunately, we do not know where 29% of the respondents claimed asylum, as these respondents did not disclose that information.

In terms of countries of origin, the survey reached a sample slightly different from our interview and focus group participants (Tables 2 and 3). As in our qualitative research sample, a high percentage of survey respondents were from Uganda (16%), Nigeria (7%) and Jamaica (4%), however our survey reached more SOGI claimants from Syria (9%). Twenty-eight percent of survey respondents came from other countries, including some that were not represented in our other methods’

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<sup>16</sup>[http://www.sogica.org/wp-content/uploads/2019/12/Qualtrics-survey\\_information.pdf](http://www.sogica.org/wp-content/uploads/2019/12/Qualtrics-survey_information.pdf).

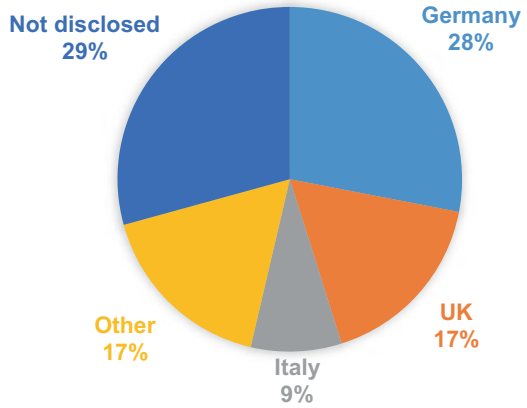
<sup>17</sup>The survey for claimants was available in Arabic, German, English, Italian, French, Spanish and the survey for supporters was available in English, German, Italian and Spanish. Translation was offered through Google Translate (owing to limited resources).

<sup>18</sup><http://www.sogica.org/en/publications/>.

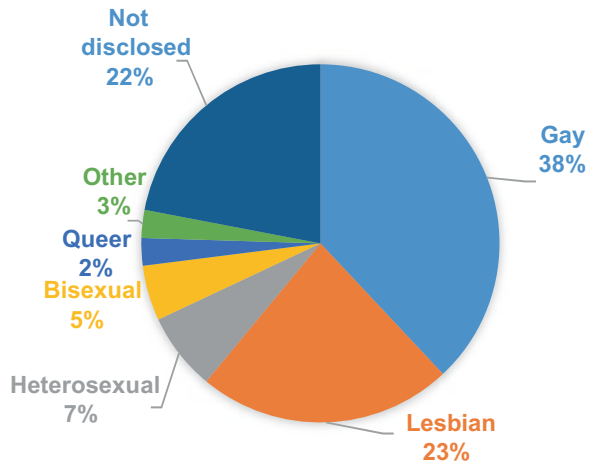
sample, such as Algeria, Armenia, El Salvador, North Macedonia, Sierra Leone and Turkey.<sup>19</sup>

Regarding gender, gender identity and sexual orientation, the survey respondents' self-identification was fairly similar to our interviewees' and group participants' self-identification: 34% described their gender or gender identity as male, 23% as female, 7% as trans, 5% as queer, and 1% as 'other' (for sexuality, see Fig. 2).<sup>20</sup>

**Fig. 1** In what country are you claiming asylum?



**Fig. 2** How would you describe your sexuality?



<sup>19</sup>The other countries of origin were Bangladesh, Cameroon, Egypt, Iran, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Russia, South Africa and Zimbabwe. Thirty-six per cent of respondents did not disclose from which country they were from.

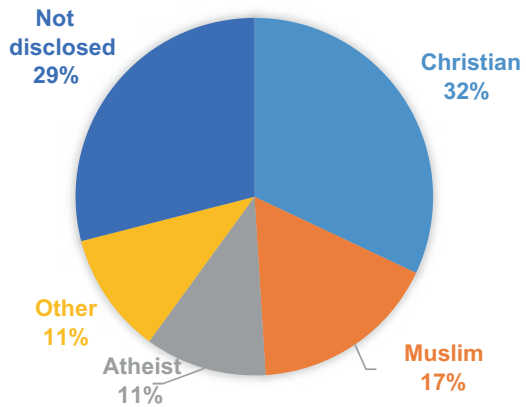
<sup>20</sup>Thirty per cent of respondents preferred not to disclose their gender or gender identity, or did not answer this question.

In terms of religious identity, age and educational background, the survey respondents' demographics matched those of our interviewees (Tables 2 and 3). The majority were Christian (Fig. 3), between 25 and 34 years old (45%, Fig. 4), and their highest level of education completed was further or higher education (38%, Fig. 5).

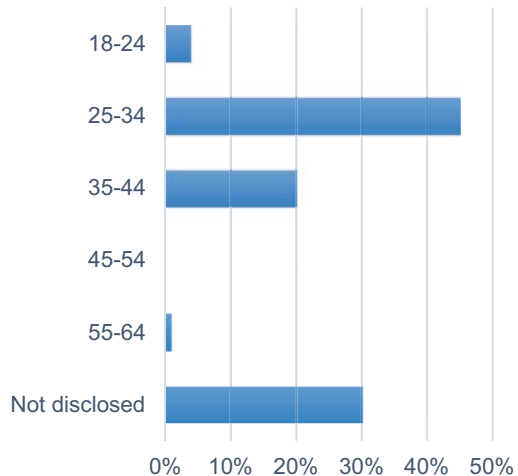
From the 157 people who answered the 'survey for people who work with or support LGBTIQ+ people claiming asylum', the majority (41%) were working or volunteering with an LGBTIQ+ organisation or with an organisation providing legal advice and/or representation (19%) (Fig. 6).

Also here, perhaps unsurprisingly, the majority of respondents were working in the UK (39%), Italy (17%), and Germany (9%), and it is likely that some of our interviewees participated in the survey. Other countries where respondents were working (34%) were Austria, Belgium, Cyprus, Denmark, France, Greece, Ireland, Malta, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland, and the Netherlands.

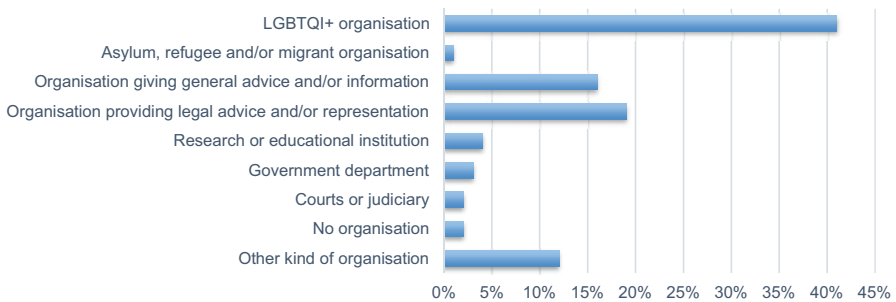
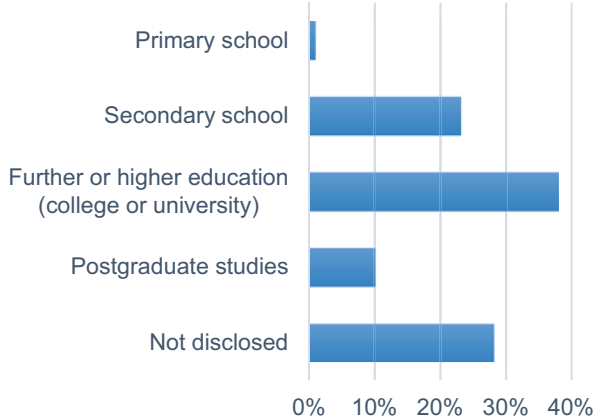
**Fig. 3** How would you describe your religious or non-religious identity?



**Fig. 4** How old are you?



**Fig. 5** What is the highest level of education that you have completed?



**Fig. 6** What kind of organisation do you work or volunteer with?

The data of the surveys, which were created using Qualtrics Survey Software, was analysed using the statistical software package SPSS. However, we did not carry out any bivariate and multivariate analysis or statistical tests to measure the correlation between variables (McConville and Chui 2007, p. 62). For our purposes, univariate analysis (looking at only one variable at a time) was sufficient. When we refer to survey respondents in this publication, we use codes: C corresponding to claimants and S to supporters.

### 2.2.5 Documentary Analysis

During the course of our research, we analysed a variety of documents: international treaties and international courts' and committees' decisions, European and domestic legislation, case law, policy documents, NGO reports, case files, etc. These documents were available through publicly accessible sources (for example, Refworld) and provided by the research participants. This material was used to

support the analysis of the fieldwork primary data in the chapters that follow. We also produced four case law tables for European, German, Italian and UK case law, which contributed to our analysis.<sup>21</sup>

### 2.2.6 *Freedom of Information Requests*

In order to gain more official information about SOGI asylum statistics, training offered to interviewers and decision-makers, etc., we submitted freedom of information (FOI) requests to the relevant authorities in Germany, Italy and the UK.<sup>22</sup> Freedom of information laws are the means by which members of the public or NGOs are entitled to ask for and receive information held by national governments. Legislation varies from one European country to another.<sup>23</sup>

FOI is ‘a relatively new research innovation in academia’ (Walby and Luscombe 2018, p. 10). In recent years, it has been recognised that FOI ‘is a powerful tool available to researchers’ (Savage and Hyde 2014, p. 315), with more and more researchers using it (Walby and Luscombe 2018, p. 2), although, as some authors argue, researchers are still not making sufficient use of it (Bunt 2018; Savage and Hyde 2014; Turnbull 2015; Walby and Luscombe 2017).

FOI requests can be seen as ‘an innovative research technique for qualitative researchers’ (Turnbull 2015), and are especially useful when combined with other methods (Savage and Hyde 2014), but like all methods of data collection, they have advantages and disadvantages. The main advantage of FOI requests is that ‘[b]y providing a way to access information produced and/or assembled by public authorities, freedom of information requests allow data to be accessed that otherwise could not be, at least without lengthy negotiations with public authorities’ (Savage and Hyde 2014, p. 308). FOI allow researchers to gain access to information and documents that are not publicly available, especially valuable in situations where it is difficult to gain access to gatekeepers, as was the case in Germany where we could not gain access to BAMF staff.

However, there are also disadvantages, as we discovered. Making FOI requests can be time-consuming when public authorities do not provide the information

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<sup>21</sup><http://www.sogica.org/en/case-studies/>.

<sup>22</sup><http://www.sogica.org/en/fieldwork/>.

<sup>23</sup>In Germany, there is the Federal Act Governing Access to Information held by the Federal Government (Freedom of Information Act) of 5 September 2005 (Federal Law Gazette [BGBl.] Part I, p. 2722), last amended by Article 2 (6) of the Act of 7 August 2013 (Federal Law Gazette I, p. 3154) ([http://www.gesetze-im-internet.de/englisch\\_ifg/index.html](http://www.gesetze-im-internet.de/englisch_ifg/index.html)). In Italy, the right of access to administrative documents was reaffirmed and further expanded by the legislative decree 25 May 2016, no. 97 (<https://www.gazzettaufficiale.it/eli/id/2016/06/08/16G00108/sg>), but the implementation of these new provisions is still problematic. In the UK, the Freedom of Information Act 2000 provides public access to information held by public authorities in England, Wales and Northern Ireland, and in Scotland for UK-wide public bodies (<https://www.legislation.gov.uk/ukpga/2000/36/contents>).

needed and the researcher is ‘fishing around for information’ (Turnbull 2015). The path that researchers need to take to gain the required information is unpredictable and dependent on the person who coordinates the request (Walby and Luscombe 2018, p. 10).

Our FOI requests were drafted in consultation with relevant stakeholders (in Germany, the LSVD; in Italy the UNHCR Italy; in the UK, the UKLGIG and Asylum Research Consultancy). We had different experiences with how public authorities responded to our FOI requests and, more generally, our research.

In Germany, we tried several times to gain access to interviewers and decision-makers, but the BAMF rejected our request on each occasion.<sup>24</sup> In order to gain the information we needed, we prepared comprehensive FOI requests containing 30 questions. As these questions were addressed to different public authorities, we liaised with the party ‘Die Linke’, who submitted these questions as a parliamentary request (‘Kleine Anfrage’). The government responded to the request within 4 weeks.<sup>25</sup> Nonetheless, the government’s response was not comprehensive and some of the information requested could not be provided due to the country’s federal structure. For instance, in its response, the government stated that individual federal states are responsible for reception and that the government did not have information about how federal states respond to vulnerabilities. The government also stated that they did not have information about specific accommodation for SOGI claimants, or what happens if claimants ask to be moved from their accommodation centre. Furthermore, no statistical information about SOGI claims exists (Chap. 4).

In Italy, the process of gaining access to information was more difficult. In February 2019, the FOI request was sent to the National Commission for the Right of Asylum (‘Commissione Nazionale Asilo’) and the Minister of Internal Affairs (Department for civil liberties and immigrants). We received no confirmation that they had received the FOI request and they did not respond to the request, nor to reminders sent in May 2019. In fact, all the participants in our fieldwork in Italy, including decision-makers, were found through personal contacts after attempts to make contact at an institutional level failed. It is rare for Italian public administrative bodies to respond to such information requests from citizens, although they are formally obliged to do so ‘in a reasonable time’. We then sent a complaint to an opposition party’s member of Parliament, including a request to submit, through him, a parliamentary question (‘interrogazione parlamentare’). However, we did not receive a reply. As context, the political climate in Italy throughout 2017 and 2018 became tense, which our analysis of the asylum reforms highlights (Chap. 6).

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<sup>24</sup> Between November 2017 and November 2018, we contacted BAMF staff on more than five occasions and by email, telephone and post. These communications were made to: a special officer for SOGI claims; the BAMF press office; BAMF arrival centres; and branch offices. Where we received a reply to our request, it was that participation in our study was not possible ‘for reasons of capacity’.

<sup>25</sup> ‘Kleine Anfrage der Abgeordneten Ulla Jelpke u.a. und der Fraktion DIE LINKE. Situation von LSBTI-Geflüchteten’, BT-Drucksache 19/1030, 04.06.2019 (questions were sent by SOGICA to Die Linke on 10 April 2019 and sent by them to the parliament on 8 May 2019).

In the UK, the process was also far from quick or transparent. Three FOI requests were submitted in January 2019: one to the Ministry of Justice and two to the Home Office.<sup>26</sup> The FOI request to the Ministry of Justice as well as the one to the Home Office regarding detention were answered but elicited no new information, largely on the basis that neither department held the information we were requesting. With regard to the third FOI request, which was the most detailed, covering decision-making, we only received a full answer to our request in June 2019 (FOI reference 52467), thus much later than the specified 20 working days, despite further emails and complaints on our part to both the Information Commissioner’s Office and to the Home Office.<sup>27</sup> Nonetheless, much of the information provided was either not relevant or did not directly answer the questions posed in our FOI request. In addition, the Home Office stated that it was withholding information regarding the decision-making process on ‘public interest’ grounds:

Regarding your request for information and the questions used to identify the basis for an asylum claim, we do hold the information, but have decided to exempt this information under section 31 of the FOIA 2000. Section 31(1)(e) allows us to exempt information if its disclosure would or would be likely to prejudice Law Enforcement – the operation of immigration controls. This exemption requires us to consider whether, in every respect the public interest in maintaining the exemption stated above, outweighs the public interest in disclosing the information. Arguments for and against disclosure in terms of the public interest are set out in the attached Annex 1. (p. 3)

In short, the way the FOI requests in Italy and the UK were handled raises important concerns regarding democratic accountability of officials and transparency in public policy, not only in relation to the substance of the responses we received, but also in terms of procedural failures that make freedom of information a right that in some cases exists only on paper.

### 2.3 Ethical Implications: Doing Research with SOGI Refugees

It might be said that fulfilling ethical standards is important for any project. However, due to the particular situation in which SOGI asylum claimants find themselves, considering ethical implications when conducting research with this group of participants was particularly important (Held 2019). Before we started the research,

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<sup>26</sup>The FOI request to the Ministry of Justice as well as the request to the Home Office regarding decision-making were submitted directly by SOGICA. The other request to the HO regarding LGBTIQ+ detainees and their treatment in immigration detention centres was submitted by the Asylum Research Centre on behalf of us.

<sup>27</sup>It also appears to be Home Office practice to send emails and letters as PDF attachments in the name of non-existent employees: when we telephoned the Home Office switchboard in June 2019 and asked to speak to any one of the three individuals that were signatories in the correspondence, we were told that no-one with those names worked in the team in question.



several ethical issues were identified and ethical approval from the University of Sussex' Ethics Committee obtained.<sup>28</sup>

The interviews and focus groups with asylum claimants and refugees invariably involved individuals who had gone through difficult life experiences. Depression, PTSD and anxiety are common in the refugee population (Chap. 9). Therefore, the retelling of traumatic events can have a considerable impact on research participants' mental health. If their SOGI was the basis for the harm inflicted on them, then talking about these aspects of themselves, and their experiences in this regard, may be re-traumatising. Yet, as Stevenson and Willott (2006) point out, we may not always have the right understanding of what topics will be sensitive for a participant.<sup>29</sup> There may be other intersecting aspects of SOGI claimants' identities that are more difficult to talk about and foresee. Furthermore, policy-makers, members of the judiciary, legal representatives, and NGO workers interviewed delved into intimate aspects of the lives and experiences of SOGI claimants, which also risked causing them some distress and anxiety about their and their clients' confidentiality.

It was important to us not to cause psychological harm by asking questions in an insensitive way or probing too much about experiences that might have caused distress to the participant (Krause 2017). We tried to minimise risks to asylum claimant and refugee participants by offering to refer them to agencies and services (where available) capable of dealing professionally and in a supportive way with any mental or physical health issues. We also provided a list of support services available in the relevant countries.<sup>30</sup> Nonetheless, we were also aware that listening to participants' potential disclosures of (sexual) violence and trauma might be distressing for us and impact on our well-being (Krause 2017, p. 4). Therefore, before going into the field, we received training on 'vicarious trauma' from Freedom from Torture, to learn about the signs of vicarious trauma and how to practice self-care in the course of our fieldwork.

We obtained informed consent from all research participants, who were given comprehensive information about the project. This consisted of a clear and honest discussion with the researchers, alongside an information pack (in their preferred language where possible), which explained the project aims, purpose of the data collection, methods, data storage, information on how to withdraw consent and contact information for further enquiries.<sup>31</sup> This information allowed individuals to consciously decide whether they felt emotionally and mentally prepared to share and discuss their experiences. Participants were given time to reflect and ask questions on the information given. Consent forms included questions about consent to audio-record interviews, with information on how all data would be anonymised for

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<sup>28</sup> Certificate of approval for Ethical Review ER/NH285/1.

<sup>29</sup> For instance, researchers need to be careful not to bring up potential guilt for having left family members behind by probing about family members/partners (Hynes 2003, p. 14).

<sup>30</sup> <http://www.sogica.org/wp-content/uploads/2019/12/Organisations-to-signpost-to.pdf>.

<sup>31</sup> <http://www.sogica.org/wp-content/uploads/2019/12/Information-sheet.pdf>.

publication.<sup>32</sup> With regard to the self-completed surveys, submitting a response to the survey implied consent (this was stated on the information sheet preceding the survey).<sup>33</sup> Participants were given the opportunity to withdraw consent, and request the destruction of any data relating to them, at any time up to the publication of an outcome, without giving any reason, and without repercussion or penalty for the participant. This was explained clearly by both the researcher and on the information sheet provided to each participant.

Many of our participants would typically be seen as ‘vulnerable’. Yet, the issue of ‘vulnerability’ is complex (Krause 2017). As further discussed in Chap. 4, asylum claimants and refugees might in some circumstances be officially defined as ‘vulnerable’, – for example ‘transsexual and intersex people’ for the purposes of immigration detention in the UK (Home Office 2018), and they might also in some sense be ‘vulnerable’ because they are more likely to be exposed to human rights violations (Chap. 3). Nonetheless, not all asylum claimants and refugees are vulnerable or would like to be identified as such in the everyday sense of the word, which can have infantilising connotations; most individuals seeking protection have needed to be immensely strong and resourceful, and might not consider themselves vulnerable (Stevenson and Willott 2006). In fact, we might think of asylum systems as not addressing pre-existing vulnerabilities but actually imposing vulnerability. In addition, vulnerability has also been described as a term that is ‘overused’ (James 2020, p. 33). Taking intersectionality seriously means that when assessing vulnerability, we ‘need to consider both the individual circumstances of each research participant, rather than see them as a homogenous group’ (Stevenson and Willott 2006, p. 383). By focusing on hardship and using victimising notions, people seeking asylum are often portrayed as having similar experiences including the shared experience of vulnerability (Krause 2017), but they may find this label patronising. Instead of homogenising SOGI claimants as a ‘vulnerable group’, the intersecting characteristics of each person need to be taken into account when assessing individual vulnerability. It is also important to highlight asylum claimants’ and refugees’ agency. For instance, many are themselves involved in establishing networks, support groups, and other forms of refugee activism (Bhimji 2016). In this respect, while it might be crucial to anonymise data to avoid risks, it is also important to grant participants the autonomy to decide for themselves whether they want their accounts to be anonymised or not (Clark-Kazak 2017; Krause 2017). In our research, about a quarter of the SOGI claimants and refugee participants chose to be named, while the other three-quarters chose to be anonymised (some provided a pseudonym, for others we chose one), or did not mind either way. To be consistent, we refer to all participants only by first name, including professionals. Occasionally, when we refer to very sensitive matters, we use neither a real name nor a pseudonym.

It has been highlighted that the uniqueness of the refugee experience brings high levels of distrust with it – because of mistreatment in countries of origin, but also

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<sup>32</sup>[http://www.sogica.org/wp-content/uploads/2019/12/Consent-form\\_individual-interview.pdf](http://www.sogica.org/wp-content/uploads/2019/12/Consent-form_individual-interview.pdf).

<sup>33</sup>[http://www.sogica.org/wp-content/uploads/2019/12/Qualtrics-survey\\_information.pdf](http://www.sogica.org/wp-content/uploads/2019/12/Qualtrics-survey_information.pdf).

mistreatment during the asylum process (Hynes 2003, p. 13). SOGI claimants in particular might have had experiences of not being able to trust people and ‘be out’ with regard to their SOGI. In the host country they might have had negative experiences with government officials, housing and other social service providers, and the discrimination they experience adds to their levels of mistrust. This will be compounded by the power differentials between researchers and researched and the fact that researchers often treat research participants solely as ‘data source’ and not as active subjects with rights, dignity and agency (Krause 2017).<sup>34</sup> The asylum system disempowers SOGI claimants, and often they have internalised disempowering messages. Traditional approaches to research can make asylum claimants and refugees feel exploited (Cochrane 2015).

The three researchers who conducted interviews with SOGI claimants are all cis-gendered (one male, two female) – one gay, one lesbian and one heterosexual – and White academics with considerable social, economic and cultural capital. Consequently, power inequalities between us and our participants were likely to exist on grounds of ‘refugeeness’, gender, ‘race’, socio-economic status and political rights. For instance, one of the participants in a focus group in Italy complained about the fact that we were White researchers, stating that ‘we cannot understand’ in full depth their stories and feelings, and that researchers are not necessarily aware of the pain they go through (focus group no. 1, northern Italy). In the interactive process of data collection, power differentials (real or assumed) need to be addressed, while acknowledging that power is relative and exists in all relationships, in other words, it can shift and change. It was thus important to not only consider the intersecting identities of participants, but also those of the researchers. Our gender, sexuality, ‘race’ and nationality will necessarily have had an impact on how open participants felt to talk about their experiences. For instance, one NGO volunteer we interviewed (Thomas, Germany) felt that LGBTIQ+ asylum claimants and refugees might not tell him about their experiences with discrimination ‘out of politeness and hospitality’.

While we were aware that power differentials could not be eliminated, we aimed to conduct research that brought reciprocal benefits, and established ‘ethical relationships between researchers and participants that are responsive to the needs, concerns and values of participants’ (Mackenzie et al. 2007, p. 307). Our aim was to do research *with* refugees instead of *for* or *on* refugees (Hynes 2003, p. 14) and to work collaboratively as much as possible. Even in so doing, however, power imbalances were unavoidable: three years into the research and having developed ongoing relationships with a number of our participants, we sometimes found ourselves in situations where journalists or event organisers contacted us asking if we knew of any

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<sup>34</sup>For instance, during the 7-year involvement of one of us with the Lesbian Immigration Support Group in the UK, it often happened that after access to participants had been gained, trust won, and women been interviewed, researchers failed to follow up or contact the group again. Such conduct contributes to SOGI claimants’ frustration and mistrust of researchers, but it also denies claimants the opportunity to use any research findings for their own causes (Krause 2017; Mackenzie et al. 2007).

individuals claiming asylum on SOGI grounds who might wish to speak at a conference or appear in a programme. We had to decide which of our many participants to contact about such opportunities, which might not only be enjoyable experiences for the individual in question, but also constitute ‘evidence’ to include in an appeal bundle. While we always stressed the advantages and disadvantages of such public engagement opportunities to individuals, the underlying power differential remained in place.

In order to achieve our collaborative objectives so far as possible, we established an Advisory Board consisting of five members with expertise in socio-legal research and SOGI asylum claims, including two beneficiaries of international protection, who oversaw the methodological and ethical soundness of the research, as well as offered advice on any aspect of the activities carried out to achieve our aims and objectives. In the spirit of knowledge exchange, we were keen to collaborate with research participants and stakeholders throughout the project, and tried to make this a genuinely two-way process so that we could also give something in return. All researchers were engaged with local NGOs and gave presentations and workshops for LGBTIQ+, refugee and migrant organisations and offered various forms of support to individual and NGO participants, in light of occasional requests. We provided letters for participants confirming that they had participated in our study, which they could use as part of their claims and appeals. We kept in contact with many participants throughout the project and offered emotional and practical support. We invited participants to attend and speak at conferences and events we organised, and connected them with other people and groups, which often helped in breaking down isolation. We sent out a regular newsletter to participants (and increasingly to other people who subscribed to it – a total of more than 1,200 individuals by January 2020) to provide updates on the project.<sup>35</sup> We also created a database of resources for use by SOGI claimants, practitioners and researchers alike.<sup>36</sup>

While there is a risk that interviews can re-traumatise participants, the potential therapeutic effect of telling their story in a safe environment has also been pointed out (Harrell-Bond and Voutira 2007). In particular, the focus groups, which provided a space for open discussions, seemed to have had cathartic effects on participants (Giulio, referring to focus groups no. 1 and 2, northern Italy). As Rosette, who for the first time visited LeTRa when we had the focus group (no. 3, Bavaria, Germany), described her feelings: ‘Yeah. I can talk and express myself, and at least listen to people, how other people really feel’. Inspired by the same focus group, Ayeta said ‘I feel that we should be always... we have to select some few days that we can be together and talk about issues and everybody’s issues’. People were excited about and committed to participating in the study. As Kennedy (Italy) explained: ‘and that is the reason why I am so happy, you know, in doing these

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<sup>35</sup><http://www.sogica.org/en/the-project/activities-plan/>.

<sup>36</sup><http://www.sogica.org/en/sogica-database/>.

interviews, for us to pass a message across to the governments, not just Nigeria, to Africa, governments, to Africa leaders’.

We tried to avoid raising any expectations on the part of participants that participating in this research would enhance outstanding asylum applications, but very often participants were keen to take part in order to make their voices heard, and above all to help improve the lives and experiences of SOGI refugees in the future (see also Venturi 2017). For instance, Winifred, who participated in focus group no. 4 in Bavaria, Germany, and who is a researcher herself, said:

We really appreciate taking part in this interview. We really appreciate it. It is a very big opportunity, even though we don’t know what will come out. Or we know it will help us in the future, but we really appreciate it. Maybe by then, those people who will be in our shoes now, they will have a better future, they will be given different opportunities. So we really appreciate being part of this interview.

In the following chapters, we hope we succeed in making the voices of our participants heard.

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# Chapter 3

## A Theoretical Framework: A Human Rights Reading of SOGI Asylum Based on Feminist and Queer Studies



*With my gender... it's like... why don't they stop, I don't think it's important to ask. What I'll be, I'll be. It's important I'm queer and I'm here.*

(Prince Emrah, Germany)

*The notion of vulnerability does not reflect the whole life experience of an individual (...) so talking about specific needs may also help to expand the range of beneficiaries.*

(Cristina, UNHCR Italy)

*... men, they have got all the say on women, on how we, we grow up. It makes me like very, very angry and like, why?*

(Meggs, UK)

### 3.1 Introduction

Since SOGI considerations have started to inform the interpretation and the implementation of the Refugee Convention (Chap. 1), a broad range of scholars from different disciplines have explored how questions of sexual orientation and gender identity can be effectively addressed within international, supranational and domestic asylum systems. The debate around aspects of RSD and beyond generated by this theoretical exchange within the same discipline and between different research areas has contributed to the (ongoing) normative movement towards a more inclusive Refugee Convention framework. In an attempt to nurture this continuous debate, we outline the theoretical and analytical frameworks that shape the subsequent analysis. We take advantage of the authors' diverse experience in different academic fields to apply an interdisciplinary approach, addressing our subject from various perspectives. We start from the recognition that a detailed understanding and application of the Refugee Convention is vital as the floor for addressing SOGI asylum claims, but not in itself sufficient to ensure that these are fairly treated. Section 3.2 therefore looks to human rights to show how interweaving human rights frameworks with refugee law heightens understanding in this field of



asylum. To this end, the main body of this chapter develops an approach that addresses the failings from the perspective of international human rights law (IHRL), both alone and in interaction with international refugee law (IRL). However, we then argue that, without explicitly recognising the gendered and sexualised nature of SOGI asylum, IHRL is only part of the solution. In Sects. 3.3 and 3.4 below, we claim that feminist and queer theories, and particular threads of debate within these broad disciplines, can help to understand the experiences of SOGI minorities fleeing persecution and, importantly, to explain why, despite improvements to the law and guidance that recognise the right to protection on this basis, there has been insufficient progress on the ground. In this way, combining a human rights-based approach that is largely legal with political and sociological contributions from feminism and queer theories facilitates a more holistic analysis.

### 3.2 A Human Rights Approach to SOGI Asylum: What Role for Rights?

The theoretical debate over the application of the Refugee Convention through a ‘human rights paradigm’ is not new (Anker 2002; Cantor 2016; Storey 2015). Yet, what this ‘paradigm’ means for SOGI asylum claims, and how to interpret the concepts at play within this context, remains largely unexplored. In her seminal study of the role of human rights in sexual orientation asylum claims, Jenni Millbank showed that ‘the lack of a human rights framework, in general, combined with an underdeveloped analysis of sexual orientation as a human rights issue’ can lead to ‘extremely regressive refugee determinations’ (Millbank 2004, p. 194). She demonstrates how different framings of SOGI minorities as human rights holders potentially restrict or expand protection under the Refugee Convention. She also makes it clear that the lack of a human rights framework in the field of asylum cannot simply be addressed by referring to international human rights standards, that is, those emerging from the international human rights treaties binding upon the European countries explored in our study. These include, at minimum, the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (CFR), which also binds the European Union.<sup>1</sup>

Millbank’s work does not provide a fully expounded theoretical model for the basis of a human rights ‘paradigm’ for SOGI asylum.<sup>2</sup> Nevertheless, her contribution provides a good starting point for the aim of this section: to construct

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<sup>1</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950; European Union: Council of the European Union, *Charter of Fundamental Rights of the European Union (2007/C 303/01)*, 14 December 2007, C 303/1.

<sup>2</sup> Although she only addressed sexual orientation asylum claims, her findings apply equally to gender identity, as the denial of human rights enjoyment is common to all members of SOGI minorities (Muntarbhorn 2017; Ramón Mendos 2019).

a human rights approach to SOGI asylum. To this end, and applying a multi-layered approach following Millbank, we focus on three interrelated aspects of the potential role played by human rights: a) the status of SOGI *within* human rights law; b) the general relation *between* human rights and refugee law when SOGI is in play; and c) the possibility of reading human rights law *in parallel* with the international refugee system based on the Refugee Convention to protect SOGI within and beyond asylum.

The reason for such a threefold investigation lies in the very foundations of the idea of human rights, based on ‘the recognition of the inherent dignity and equal and inalienable rights of all members of the human family’.<sup>3</sup> Yet, as Paul Johnson, Martha Nussbaum and Robert Wintemute demonstrate (Johnson 2013a; Nussbaum 2010; Wintemute 1996), when SOGI minorities are the subject, inherent dignity is not always a guarantor of equal rights. ‘Inclusiveness’ remains the ideal culmination of an evolutionary process for IHRL, rather than a category of interpretation when these minorities claim ‘to have rights’. Using the lens of Arendt’s work, SOGI minorities should be protected as members of their countries’ ‘political communities’. Instead, along with stateless and refugee people<sup>4</sup> – that is, political communities’ outsiders – SOGI minorities may find themselves recognised as humans but ‘with no effective citizenship and no place in the world’ (Arendt 1973, p. 296). As a result, people who are both members of SOGI minorities and asylum claimants may face extreme difficulties in accessing international legal protection.

It is true that, for some critics, ‘the idea of human rights as a project (...) is already affected by – and overtly and covertly implicated in – structures of power, laying bare the fallacy of human rights as linked to an external, optimistic pursuit of freedom’ (Kapur 2018, p. 2). Equally, human rights advocacy has not always led to the transformation of power relations or to meaningful freedoms for people in need of international protection (Bhabha 2002). Yet, inspired by Arendt’s assertion of the primordial ‘right to have rights’ (Arendt 1973) and while avoiding defining freedom for SOGI claimants as simply ‘an accumulation of rights’ (Kapur 2018, p. 6), we intend to reconsider IHRL in light of its underlying inclusionary rationale in the asylum context. In fact, while IRL is driven by an exclusionary rationale, leading to a kind of ‘in or out’ process depending upon whether the specific conditions required by the ‘refugee’ definition are met, IHRL remains the more inclusive international legal regime. Yet, simply framing IRL as a ‘surrogate human rights protection system’ (Cantor 2016, p. 357) does not provide any solid ground for our approach. Instead, by recognising that these two international systems are interrelated while remaining distinct (Chetail 2014, p. 24), we need to reframe how human rights should be embedded in IRL to effectively address the challenges that SOGI claimants experience in practice, thus showing how the intersection between these legal fields is potentially beneficial.

<sup>3</sup>UN General Assembly, *Universal Declaration of Human Rights*, Resolution 217(III), 10 December 1948.

<sup>4</sup>As Mann explained, the categories of refugee and stateless people ‘were interchangeable for Arendt, but came to be understood as distinct’ (Mann 2017, p. 9).

To this end, this section elaborates a human rights approach to SOGI asylum by exploring three claims, which ultimately relate to the enjoyment of rights regardless of one's citizenship or of state's consent. First, human rights are essential to qualify SOGI as core aspects of identity and to verify how these should be protected as such (Sect. 3.2.1). Second, human rights in light of SOGI provide a tool for interpreting the Refugee Convention, thus questioning the interaction to date between IHRL and IRL (Sect. 3.2.2). Third, besides helping us elaborate procedural guarantees for people in need of international protection, a human rights approach to SOGI asylum also contributes to substantial developments in terms of autonomous means of protection when refugee law does not offer any or sufficient guarantees to people fleeing homophobia and transphobia (Sect. 3.2.3).

### ***3.2.1 Human Rights and SOGI: Reconsidering Personhood Through a SOGI and Anti-stereotyping Lens***

In attempting to (re)affirm the recognition of the inherent dignity of every person, IHRL has provided a fertile environment for setting the conditions to, at a minimum, promote individual autonomy and self-determination.<sup>5</sup> In this context, SOGI are increasingly framed as categories subject to international law protection for the fundamental role they play in defining and expressing personhood<sup>6</sup> (or 'humanity', as Muntarhorn states it: 2017, p. 2). Despite not being expressly included in universal and regional core human rights treaties prior to their partial inclusion in the CFR, the recognition that human rights violations could be motivated by individuals' or groups' SOGI has led to a twofold process.

On the one hand, within international and regional human rights systems, there has been a movement towards a gradual 'definition' of SOGI as universal concepts, as opposed to 'invented' Western categories (Chase 2016, p. 704; Lee 2016). Similarly to the development of the notion of refugee within IRL as apparent in the Refugee Convention (Hathaway 1991, p. 136), this process has identified generalised categories of protection rather than naming marginalised groups in need of protection. That is why, in IHRL, sexual orientation has increasingly been addressed as an 'inherent'<sup>7</sup> and 'most intimate',<sup>8</sup> aspect of human personality, as a basis on

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<sup>5</sup> Given the purpose of these volumes, the doctrinal foundations of human rights cannot be explored. It is, nonetheless, evident that we conceive human rights as 'given', rather than 'agreed upon' (Dembour 2010).

<sup>6</sup> This term is used here in order to stress the complexity of identities of people in need of international protection, including SOGI claimants, which requires a more complex analysis of individual situations than a focus on a particular aspect of one's identity for asylum purposes (Firth and Mauthe 2013).

<sup>7</sup> Inter-American Court of Human Rights, *Identidad de Género, e Igualdad y No Discriminación a Parejas del Mismo Sexo*, Opinión Consultiva OC-24/17, 24 November 2017, para. 40.

<sup>8</sup> ECtHR, *Dudgeon v. United Kingdom*, Application no. 7525/76, 22 October 1981, para. 52.

which marginalised people are entitled to ask for and obtain protection.<sup>9</sup> That is also why, in supporting what may be a human rights reading of refugee law in the search for a PSG, the CJEU found that ‘a common ground’ exists in that ‘a person’s sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it’.<sup>10</sup> The same is true of gender identity, considering that the freedom to name one’s gender identity has been framed in the human rights context as ‘one of the most basic essentials of self-determination’.<sup>11</sup>

This evolution in understanding has not escaped criticism. For instance, Gross affirmed that ‘in societies where men have sex with men regardless of any specific sexual identity, defining people as having a sexual orientation that is integral to their humanity constitutes an exportation of the “Western” model of sexual orientation identity and its categorisation of this orientation as a distinct and autonomous feature of the self’ (Gross 2013, p. 127; Sect. 3.4). Yet, for our purposes, human rights have created the necessary framework for self-identification, in the sense that SOGI should be protected as such when people choose to refer to these traits in order to express or determine their personhood. In fact, SOGI may correspond to a variety of human rights and freedoms with concrete consequences – as will emerge below – in terms of determination of refugee status.<sup>12</sup> As such, adopting a human rights approach in relation to SOGI asylum supports the protection of the infinite range of ways in which these core characteristics find expression.

In this respect, it is worth noting that common concepts in IRL have already been reconsidered to take into account such developments in IHRL. For instance, the concept of ‘exogenous’ harm has been questioned for advancing the idea of ‘endogenous’ harm (Hathaway and Pobjoy 2012), which better expresses SOGI minorities’ well-founded fear of persecution. Equally, this understanding of SOGI as the most intimate characteristics of personhood rules out the infamous behaviour/identity dichotomy explored by scholars in the field of asylum (Wessels 2016). As a consequence, our analysis considers any position by countries of origin or host countries supporting a denial or a restriction of an individual’s SOGI through human rights violations to be unlawful and intolerable.

On the other hand, a more refined – although not always consistent – clarification of states’ obligations under IHRL has materialised in order to protect individuals whose SOGI is at odds with societal norms (Muntarborn 2017, p. 2). While it is

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<sup>9</sup>The same is true at domestic level. For instance, in one of the leading cases of SOGI asylum in the UK, sexual identity was accepted as being ‘a fundamental characteristic and an integral part of human freedom’: *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, para. 33.

<sup>10</sup>Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*, 7 November 2013, ECLI:EU:C:2013:720, para. 70.

<sup>11</sup>ECtHR, *Van Kuck v. Germany*, Application no. 35968/97, 12 June 2003, para. 73.

<sup>12</sup>By embracing such an approach, we are not suggesting any normative content for SOGI. Instead, to avoid imposing particular notions on SOGI minorities, these human rights principles will be read through queer and feminist lenses (Sects. 3.3 and 3.4) to assess how fair European asylum systems are towards SOGI claimants.

true that, in relation to human rights treaties, ‘States gave their consent to a notion of human rights that had certain types of violations in mind, and not others that did not exist at the time’,<sup>13</sup> this evolutionary trend does not depend on states’ consent but on the ability to read human rights in light of their potential ultimate scope. In other words, human rights bodies have increasingly called upon states to apply the principle of equality and non-discrimination, enshrined in all universal and regional human rights treaties, to more and more freedoms and rights as meaningful expressions of people’s dignity, and so one’s SOGI. Here, two interrelated consequences are fundamental for SOGI minorities.

First, by bringing to the fore the distinction between negative and positive obligations as two sides of the same coin, the protection of SOGI minorities is now recognised as requiring a proactive role from national authorities, one that addresses the social marginalisation deriving from past discrimination. In light of the complexity of SOGI, this proactive role entails a strong anti-stereotyping approach. By exploring developments aimed at eradicating structural disadvantage and discrimination against certain groups, such as women and ethnic minorities,<sup>14</sup> Eva Brems and Alexandra Timmer advocate a ‘legal methodology’ consisting of ‘naming’ and ‘contesting’ widely accepted beliefs that impair the recognition of the equal dignity and personal autonomy of all individuals (Brems and Timmer 2016; Timmer 2011, 2015). When applied to SOGI minorities, an anti-stereotyping approach translates into contesting ‘ready-made opinions’ and ‘preconceived ideas that lead to bias’ (Timmer 2011, p. 713) and perpetuate discrimination. Such an approach has, for example, allowed the UN Human Rights Council (HRC), the ECtHR and the CJEU to eradicate ‘traditional’ ideas about the ability of members of SOGI minorities to establish a family life worthy of protection, thus ensuring in some circumstances the same treatment already provided to members of the heterosexual majority.<sup>15</sup> Considering that stereotypes tie SOGI minorities to a particular identity by placing ‘a certain mould on individuals, independent of what they are capable of, experience or desire’ (Timmer 2011: 715), this anti-stereotyping ‘legal methodology’ is instrumental in the asylum context. It supports the need to fight against the structural disadvantages from which SOGI claimants suffer by avoiding a default judgment of the individual on account of assumed group characteristics. It requires us, as will be particularly apparent in Chaps. 6 and 7, to name and contest mechanisms connected to asylum adjudicators’ mental processes by which, for example, SOGI are consciously or unconsciously defined in terms of societal roles, of ‘openness’ or appearance/expression in Western terms (Millbank 2009; Spijkerboer 2013, 2018).

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<sup>13</sup>Inter-American Court of Human Rights, *Atala Riffo and Others v. Chile*, 24 February 2012, para. 74.

<sup>14</sup>In relation to gender, Holtmaat states: ‘Stereotypes tend to fixate gender identities and gender roles and make them appear as real, universal, eternal, natural, essential and/or unchangeable. (...) stereotypes often serve to maintain existing power relationships; they are control mechanisms’ (Holtmaat and Naber 2011, p. 57).

<sup>15</sup>For instance, ECtHR, *Schalk and Kopf v. Austria*, Application no. 30141/04, 24 June 2010, para. 99.

It also requires that we question asylum systems as heteronormatively framed, thus giving rise to a process of ‘contestation’ of the assumed heterosexual nature of claimants’ personhood in every phase of asylum.<sup>16</sup>

Second, the range of SOGI-related scenarios identified as human rights violations is growing. What were previously accepted as ‘permissible’ treatments or attitudes towards SOGI minorities are increasingly recognised as breaching IHRL. While these developments are often framed simply in terms of prohibited discrimination, there are more progressive readings of IHRL, with positive implications for SOGI asylum, though still unrealised in some cases. Two examples illustrate this point. On a positive note, the Inter-American Court of Human Rights has asserted that ‘the discrimination suffered by [SOGI minorities] is also highly harmful of [their] right to physical integrity’.<sup>17</sup> This is because the process of SOGI self-perception often occurs in a hostile environment, where prejudices are widespread within the family itself. In terms of improved readings of the notion of persecution and of agents of persecution, as well as recognition of lack of protection by the state and/or family, this development is valuable for SOGI claimants. Less positively, the prohibition or the lack of legal recognition of same-sex relationships (in the form of marriage or civil partnerships) irrespective of SOGI is still not seen as a human rights violation under IHRL. Although some fear that this would lead to human rights being used as a vehicle for reinforcing ‘homonormativity in the form of marriage of same-sex couples at the expense of giving equal value to diverse forms of living’ (Gross 2013, pp. 123–124), this development would enhance the scope and extent of asylum protection in SOGI claims via the notion of persecution.

This evolution has a significant impact on IRL. It is worth noting that, although the general prohibition on discrimination is enshrined in the Refugee Convention (Article 3), the meaning of discrimination in IRL remains distinct, that is, more restrictive, if compared to the interpretation of this concept in IHRL (Dowd 2011, p. 28). As a result, when evaluating asylum claims, decision-makers may find it hard to consider the impact of discrimination on the individual’s ability to live a dignified life, including family life, to the same extent that they would in a human rights claim. This has led, in practice, to an arbitrary selection of which human rights count as relevant to asylum claims, something we question throughout our study. For this reason, in light of the fact that IHRL demands protection of SOGI, a reconsideration of the role of IHRL as an interpretative tool of IRL is needed to frame the appropriate human rights approach for SOGI asylum.

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<sup>16</sup> See how this approach was successfully applied by the ECtHR in relation to gender stereotyping, for instance, in *Carvalho Pinto De Sousa Morais v. Portugal*, Application no. 17484/15, 25 July 2017, paras. 52–55.

<sup>17</sup> Inter-American Court of Human Rights, *Identidad de Género, e Igualdad y No Discriminación a Parejas del Mismo Sexo*, Opinión Consultiva OC-24/17, 24 November 2017, para. 48.



### 3.2.2 *Human Rights and the Refugee Convention: Establishing the Right Relationship*

Like IHRL, refugee law developed at a time when SOGI minorities were barely recognised on the international rights agenda. There is no evidence suggesting such issues were discussed during the preparatory work of the Refugee Convention (UNHCR 1990, p. 36), a deplorable omission given the targeting of SOGI minorities in the violence that led to the Refugee Convention (McAdam 2014; Plant 1987). Yet, despite the differences in aims and scope of application, IHRL and IRL interact and, sometimes, converge when SOGI asylum is considered (Houle and Allister 2017).<sup>18</sup> When the content of these international law areas coincides, this interaction has the potential to create a more inclusive international refugee system. In principle, this may happen where the prohibition on discrimination and the principle of non-refoulement are concerned, as both rights are enshrined in the Refugee Convention as well as in IHRL. That is why both scholars and the UNHCR have stressed that the Refugee Convention should be read through the prism of human rights (Foster and Hathaway 2014; Hathaway 1991; UNHCR 2002, paras 5, 9, 2011, pp. 1, 8, 14, 16, 36, 81, 2012, paras 5–7). Beyond this, it remains unclear precisely how human rights should inform IRL. A human rights approach to SOGI asylum needs to define the extent of this interaction in light of the implications for SOGI protection.

From a general point of view, this interaction should not come as a surprise if we consider the general rules on interpretation of international law as codified in the 1969 Vienna Convention on the Law of the Treaties (VCLT). According to Article 31 of this Convention, ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ (para. 1), and ‘there shall be taken into account, together with the context (...) any relevant rules of international law applicable in the relations between the parties’ (para. 3, c). This means that, while human rights cannot be the only element used to interpret the Refugee Convention, IHRL occupies a primary position among these other international rules when this Convention has to be interpreted and applied.<sup>19</sup> In line with the previous sub-section, we may argue that, in order to respect these rules on interpretation, the Refugee Convention should be read through the ordinary meaning that its terms – for example, discrimination, persecution, well-founded fear – have acquired in today’s society and, where SOGI asylum is concerned, taking into account SOGI-specific features. Equally, these rules of interpretation require an interaction between IRL and IHRL that is based on an understanding of human rights that looks at the reasons why international

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<sup>18</sup>For example, in relation to the Canadian experience. Interestingly, if we consider Millbank’s comparative study involving UK, Australia and Canada, only the Canadian refugee system allowed such a convergence, because it was ultimately based on a non-discriminatory understanding of sexual orientation as a human rights issue (Millbank 2005).

<sup>19</sup>See also para. 1 of the Preamble and Article 3 of the Refugee Convention.

protection is due to SOGI minorities under international law. In other words, only when this interpretation is grounded in the idea of human rights in light of the ideal category of ‘inclusiveness’ and through an anti-stereotyping approach, can the continuing marginalisation and inequality affecting SOGI minorities be avoided in the refugee context. While our human rights approach for SOGI asylum embraces this model of interaction for the application of IRL, and consequently of European asylum law, the appropriateness of other ‘models’ already advanced or in use to this day requires further consideration. These come into play, first, from a general point of view and, second, from a more specific SOGI perspective.

Having regard to the general relation between IHRL and IRL, the model of refugee law as surrogate human rights protection based on early Hathaway’s writings (Hathaway 1991) deserves attention. Whether or not it has been extensively embraced in theory and in practice (Cantor 2016, p. 378 ff), his model has supported a ‘normative reading’ of the Refugee Convention by using human rights to provide objective standards on the basis of which asylum adjudicators can read notions that the authors of that Convention intentionally left open. In so doing, it stresses the failure of the state in the claimant’s country of origin to respect basic international duties in human rights terms, thus favouring the identification of a selection of rights that, when denied or restricted in the country of origin, may trigger the surrogate protection of IRL (Hathaway 1991, pp. 108–112). Nonetheless, this reasoning has more to do with the scope of application of IHRL and states’ obligation to avoid human rights violations abroad, than it has to do with the primary aim of the Refugee Convention (Goodwin-Gill and McAdam 2007). An immediate consequence is indeed a conflation of the individual well-founded fear of persecution with the lack of protection due to that failure – a conflation of two separate concepts of the Convention’s definition of refugee. Applying Hathaway’s approach, based in practice on a selection of rights rather than looking at human rights as a whole, interpreters of the Refugee Convention act in conflict with the very foundation of human rights as an indivisible catalogue, as well as in an arbitrary way limiting the object of IHRL’s protection.

When applied more specifically to SOGI, the inconsistencies in this approach are evident. By focusing on the failure of the country of origin to provide protection,<sup>20</sup> asylum adjudicators concentrate on the lack of guarantees for the enjoyment of non-derogable rights. In doing so, however, they disregard the effect of violating the full, interdependent, range of human rights in generating a well-founded fear of persecution in people who identify as belonging to SOGI minorities. Moreover, in practice, this model reinforces some negative trends in the protection of SOGI under IHRL, which connect these core characteristics to only certain human rights and, stereotypically, to certain aspects of life (Johnson 2013a; McGoldrick 2016). In the SOGI

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<sup>20</sup>According to Spijkerboer, SOGI claimants have exploited this model by overstating specific human rights violations and, in turn, reinforcing the European/non-European dichotomy regarding States’ friendliness towards SOGI minorities. However, whether this collateral consequence really takes place remains to be shown, also on the basis of our fieldwork, as analysed in subsequent chapters (Spijkerboer 2018, p. 22).



asylum context, a good example can be taken from the case law of the CJEU. When it was called upon to read EU asylum law in light of the wide EU's human rights framework in a ruling related to claims based on sexual orientation, the CJEU referred directly to the right to respect for private life as 'naturally' connected to sexual orientation, something that is incompatible with the indivisibility of human rights.<sup>21</sup>

Considering the specific features of SOGI in the context of asylum, the UNHCR's interpretative activity also needs to be reconsidered. While the UNHCR has supported a human rights reading of the Refugee Convention since the first publication of its 'Handbook on Procedures and Criteria for Determining Refugee Status', a coherent explanation of how IHRL and IRL interact has not been developed (also Cantor 2016, pp. 352–353). This is evident when SOGI claims are involved, as the UNHCR 2012 SOGI Guidelines show (UNHCR 2012). By referring to the Universal Declaration of Human Rights as the cornerstone of IHRL, the Guidelines state that 'all people, *including* LGBTI individuals, are entitled to enjoy the protection provided for by international human rights law on the basis of equality and non-discrimination' (UNHCR 2012, para. 5, our emphasis). While they stress that 'respect for fundamental rights as well as the principle of non-discrimination are core aspects of the 1951 Convention', setting the ground for an interaction in line with Article 31 VCLT, the Guidelines then limit their potential scope in at least two ways. First, they refer only to the refugee definition as one that needs to be interpreted through a human rights lens; however, such an interpretative interaction should inform the application of the entire Refugee Convention (see Articles 2–34), even if IHRL may provide independent, and broader, protection beyond the refugee definition, as we discuss below. Second, the Guidelines explicitly refer to the 2007 'Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity' as a privileged instrument for identifying the human rights protection framework applicable in the context of SOGI (UNHCR 2012, para. 7).<sup>22</sup> Yet, despite their positive impact on the evolution of IHRL and their diffusion within universal human rights bodies (Thoreson 2009), these Principles only reflect 'well-established' principles of IHRL (UNHCR 2012, para. 7). Given that the aim of the Principles is to ensure universal visibility to 'already binding' SOGI-related human rights obligations, they do not go as far as they should in defining how IHRL should be read on the basis of the overarching principles of equality and non-discrimination.<sup>23</sup> As a result, one cannot exclude the possibility that the UNHCR SOGI Guidelines may generate ambiguous interpretations of the Refugee Convention if applied without a sufficiently encompassing understanding of IHRL and SOGI.

<sup>21</sup> Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*, 7 November 2013, ECLI:EU:C:2013:720.

<sup>22</sup> See the update version of these Principles: Various 2017.

<sup>23</sup> Interestingly, Gross (2013, pp. 126–128) also criticises these Principles for their definitions of SOGI, for example, '[s]exual orientation defined as such is a feature of modern "Western" societies but not necessarily a feature of all humanity'.

In order to avoid such pitfalls, we suggest a more principled approach to the interaction between IHRL and IRL as a part of a human rights approach to SOGI asylum. Following the legal and theoretical developments explored above (Sect. 3.2.1), a framework for interpreting the Refugee Convention through a human rights lens should be based on two essential features: (1) the principle of equality and non-discrimination, as the major point of intersection between IRL and IHRL, including in terms of positive obligations and an anti-stereotyping approach; and (2) recognition of SOGI as core aspects of individual personhood needing protection. This approach would enable an evaluation of the impact of denying or restricting human rights in terms of an individual's SOGI and their ability to express their personhood. By 'measuring' how serious a human rights violation is for particular individuals, the approach suggested here would also question and avoid rigid categorisations of rights when defining a refugee under the Refugee Convention. Equally, while having regard to the VCLT, this approach eliminates the likelihood of a selective or limited application of IHRL that results in the continuation of 'permissible persecution' of SOGI minorities through refugee law (Johnson 2007, p. 99). In addition, a positive collateral effect of this approach would be to finally clarify what protection is really achievable through IRL when interpreted in the light of IHRL and what autonomous role IHRL can additionally play, owing to the impossibility of stretching the interpretation of IRL in a way that goes well beyond its ordinary meaning. Considering the range of experiences faced by SOGI claimants before, during and after the asylum process, IHRL may further complement the Refugee Convention, both procedurally and substantively, as we will now discuss.

### ***3.2.3 Human Rights as an Independent Basis for Protection in SOGI Asylum: From Procedural Guarantees to Substantive Fairness***

As Bhabha states, people in need of international protection appear to be 'a temporary and increasingly disenfranchised category of non-citizens' who need to wait until their status is settled to enjoy the prospect of long-term safety and, at least to a certain extent, non-discriminatory treatment (Bhabha 2002, p. 115). Although the Refugee Convention (Articles 3-34) provides a framework of guarantees that binds state parties, these are not based on the requirement that refugees should be treated equally to citizens in the host states, nor are they framed in terms of human rights (Cantor 2016; Chetail 2014). As scholars in this field have explored, the process faced by asylum claimants underlines, in particular, two different situations where IHRL provides an independent basis for protection: the evaluation of the asylum request and the life in the host countries during and after the asylum process. In contrast to the period of departure and travel towards a 'safe haven', where the question of jurisdiction under relevant human rights treaties is also still debatable in terms of obligations to issue humanitarian visas (Danisi 2019; Moreno-Lax 2018;

Chaps. 4 and 5), human rights obligations certainly apply when people in need of international protection submit an asylum request. It is at this precise moment that the risk of an ‘intersection of borders of inequality’ (Peroni 2018) emerges strongly for SOGI claimants, but also when human rights may concretely shape a fair system for the evaluation of their applications, their reception and integration (Chaps. 6, 7, 8 and 9).

While IHRL does not encompass a right to receive asylum, universal and regional human rights bodies have defined the conditions for facilitating the right to claim asylum, thus sowing the seeds for defining the concept of fairness in the asylum context. First, in light of the principle of non-refoulement, reaffirmed in the European context by Article 19 CFR as the corner stone of the protection to be granted to everyone, a thorough individual evaluation of each asylum request is due. Even when a third country qualifies as ‘safe’ (Chap. 6), for example as a consequence of international agreements for facilitating readmission or transferal, the evolution of IHRL binds national authorities to verify whether or not, for personal circumstances or characteristics or for lack of procedural guarantees in the country of destination, a person risks being exposed to torture or inhuman or degrading treatment.<sup>24</sup> The fairness of any asylum system thus depends on the national authority’s ability to take into account the specific situation of people claiming asylum, through the lenses proposed in this chapter, in order to promote a dignified treatment.<sup>25</sup> This principle applies well beyond non-refoulement, spreading its potential effect to the entire human rights catalogue when applied to the situation of people in need of international protection. To use the words of the ECtHR, the ultimate aim is always ‘to avoid situations which may reproduce the plight that forced these persons to flee in the first place’.<sup>26</sup>

When these general guarantees, aiming – at a minimum – to ensure individual assessment and effective access to an asylum procedure, are applied to people requesting asylum on SOGI grounds, they result in an individualised procedure that, among other things, considers the specific needs of the claimant and avoids stereotyping. This individualised approach is evident in the context of reception at European and universal level,<sup>27</sup> as a result of the interpretation of the right to liberty and security in light of the need of people belonging to SOGI minorities to avoid being placed with people having the same socio-cultural and/or religious background of their persecutors. An anti-stereotyping approach has, in turn, found application in the assessment of asylum requests. Here, a fair approach precludes

<sup>24</sup>The case law of the ECtHR is a remarkable example of this trend: among others, ECtHR, *M.A. and Others v. Lithuania*, Application no. 59793/17, 11 December 2018.

<sup>25</sup>For a seminal case in the European context, see ECtHR, Grand Chamber, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011.

<sup>26</sup>ECtHR, *O.M. v. Hungary*, Application no. 9912/15, 5 July 2016, para. 53.

<sup>27</sup>At European level, ECtHR, *O.M. v. Hungary*, Application no. 9912/15, 5 July 2016, para. 53. At universal level, see the UN Working Group on Arbitrary Detention 2018, where SOGI migrants have been identified within the group of ‘vulnerable people and/or at risk’, whose detention ‘must not take place’. See also Various 2017, Principle 23, E.

questioning that is detrimental to the dignity of SOGI claimants or that relies exclusively on stereotypical ideas of sexual minorities.<sup>28</sup>

This human rights approach to SOGI asylum includes some of the benchmarks against which we will assess the fairness of European asylum systems. In an attempt to deliver a fair system, national authorities often identify particular people, such as women claimants, as ‘vulnerable’ or members of ‘vulnerable’ groups. Scholars such as Martha Fineman, and Timmer and Lourdes Peroni (Fineman 2008; Peroni and Timmer 2013) have emphasised the negative consequences of such identification, including the stigmatisation of some individuals and groups in a way that risks perpetuating stereotypes. Yet, from a purely legal perspective, ‘vulnerability’ seems to underline, as a matter of principle, a higher risk of being exposed to human rights violations. This risk may be due to personal characteristics, the claimant’s history of past discrimination, or measures adopted by transit or host countries against migrants, including people claiming asylum. In this way, in the asylum context, the attribution of vulnerability may simply increase visibility of the need for support for specific claimants and, without creating new human rights obligations, may focus attention on the human rights positive duties of national authorities (Ippolito 2018). For example, in some cases, the qualification as ‘vulnerable’ could result in lowering the threshold for finding degrading or discriminatory treatment for the purpose of recognising refugee status (Brandl and Czech 2015). Overall, however, when vulnerability emerges as a group-centred concept, it seems in tension with an approach such as ours that resists stereotypes and highlights intersectionality (also Chap. 2). As such, ‘compounded vulnerability’ (Timmer 2013) seems to be the only definition that should be applied to SOGI claimants as a group. Following Timmer’s approach, ‘compounded vulnerability’ can be defined as the higher risk SOGI claimants run of being exposed to human rights violations owing to the intersection of multiple ‘endogenous’ traits defining their individual personhood (like SOGI, gender, disability, refugeness, etc.) with ‘exogenous’ contexts (like reception conditions or asylum interview). In fact, while rejecting an application of vulnerability as an exclusionary tool,<sup>29</sup> we can accept a strategic use of vulnerability as framed here to underline a temporary condition of human rights deprivation to be specifically addressed through structural and individual solutions required from states.

The same applies in the context of integration. While the Refugee Convention does not include SOGI in its non-discrimination provisions, a human rights approach requires that these claimants be able to enjoy the full catalogue of human rights and freedoms, that is, at least the rights and freedoms that emerge from international human rights treaties binding host states, irrespective of their SOGI, asylum background and/or their status as non-citizens. Equal access to employment, healthcare or education, to name a few examples (Chap. 9), will not address all claimants’

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<sup>28</sup> See CJEU, Joined Cases C-148/13 to C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, 2 December 2014, ECLI:EU:C:2014:2406.

<sup>29</sup> See the exclusionary effect of the ‘vulnerability’ label in ECtHR, Grand Chamber, *Ilias and Ahmed v. Hungary*, Application no. 47287/15, 21 November 2019.

needs and rights (ORAM 2010, pp. 27–35). Under IHRL, states are also required to enable SOGI minorities to express their SOGI in every dimension of life, including family relationships.<sup>30</sup> They must also identify and address the intersection of different grounds of discrimination when these emerge as an obstacle to integration (Muntarhorn 2017, p. 12), in line with the intersectional lenses proposed in the next Section. Nonetheless, the current protection of SOGI minorities in some host countries fails to respect all rights that SOGI minorities should enjoy. This hampers the necessary improvements needed for a truly fair SOGI asylum. For instance, it would be difficult to justify a finding of persecution for denial of recognition of same-sex unions in claimants' countries of origin while in many European states such unions are still not legally recognised.

The prevailing standards in human rights protection of SOGI minorities in some European states may also prevent the use of alternatives to asylum to protect people who are forced to flee their countries on SOGI grounds. Here, human rights may provide the autonomous framework for looking beyond asylum to offer protection. For example, a human rights-based approach may require states to ensure the right to family reunification irrespective of SOGI, to issue humanitarian visas, or to promote the rights of SOGI minorities in international relations with countries of origin of SOGI refugees.<sup>31</sup>

In sum, in the first part of this chapter, we have laid out a human rights approach to SOGI asylum demonstrating what a genuine interaction between IRL and IHRL entails, as the basis for identifying individualised procedures and solutions for people in need of international protection in general and SOGI claimants in particular. However, we posit that addressing SOGI asylum only through this human rights approach cannot create the necessary improvements both within and outside asylum procedures without an understanding of the larger context within which these claims exist. That is why, to understand the socio-legal experiences of SOGI asylum claimants we need to complement the above analysis with some brief inroads into feminism and queer theories.

### 3.3 A Feminist Approach to SOGI Asylum

In this section we ask what feminist analysis brings to an understanding of SOGI asylum. We start by explaining why it is useful to look to feminism when seeking to understand and improve the experiences of SOGI minorities claiming asylum in Europe. While our two other underpinning bodies of literature – human rights

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<sup>30</sup>For example, ECtHR, *Oliari and Others v. Italy*, Applications nos. 18,766/11 and 36,030/11, 21 July 2015.

<sup>31</sup>The latter can also be meant as an obligation to not cooperate with these countries if the economic or other kinds of cooperation contribute, even indirectly, to human rights abuses against SOGI minorities. See International Law Commission (2001), especially Article 16 if the conditions included therein are satisfied.

scholarship and queer theories – have an obvious link to research addressing SOGI asylum as a European human rights challenge, the connection to feminism may be less obvious. Our reasoning is that it is impossible to fully understand any global forms of injustice and abuse, including the injustice and abuse that drives some people to claim asylum, without feminism; that feminism is an essential tool of analysis for any project with a social justice goal, not only in its underpinning aims, but also in the debates that it has generated. Furthermore, there are fundamental intersections between gender and SOGI persecution, and the way that IRL and domestic policy addresses both that make feminism of particular relevance here, as we show below.

Feminism is not, of course, a unified theory (nor is queer theory or human rights scholarship) and there are many different ‘feminisms’. It is conceptualised here (rather than defined) in its very broadest sense as a body of scholarship and activism that recognises gender and/or sex as a critical factor in explaining and combatting societal and global inequality, that is, a social force for change embracing theory and activism. This encompasses activities from lobbying the UN to empower women through the Millennium Development Goals, to seeking to increase the proportion of women on company boards in the UK, to demonstrating for women’s right to enter temples in India. Furthermore, there are many scholars and activists who come within this understanding of feminism but who would reject that label because of its association with Western/White women’s scholarship, in favour of another term. Most obviously, Alice Walker coined the term ‘Womanist’ for ‘A black feminist or feminist of color’ (Walker 2004, p. xi).

Our starting point is the recognition that women and SOGI minorities experience high levels of discrimination and abuse around the world on the basis of their SOGI, and that these experiences sometimes force them to flee their homes and countries of origin. We illustrate this with a quote from Lord Hope taken from a landmark case for women claiming asylum in the UK, because it highlights what is distinctive about women’s persecution: ‘The reason why the appellants fear persecution is not just because they are women. It is because they are women in a society which discriminates against women’.<sup>32</sup> Lord Hope’s words could equally be rewritten as: ‘The reason why the appellants fear persecution is not just because they are LGBTIQ+. It is because they are LGBTIQ+ people in a society which discriminates against LGBTIQ+ people’.

This goes to the heart of what is distinctive about gender and SOGI persecution. The archetypal refugee is an *individual* fleeing a time-specific and space-bound form of political persecution – defectors from North Korea or perceived collaborators in Iraq, to give two examples (Home Office 2016, 2019). The oppression and marginalisation of women, in contrast, has been shown through feminism to be a

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<sup>32</sup>Lord Hope, *Islam v. Secretary of State for the Home Department and R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah*, UK House of Lords, [1999] 2 WLR 1015, p. 22. There are a number of analogies made with sexual orientation in the ruling, and Lord Millett explicitly states (para. 20): ‘Thus I would accept that homosexuals form a distinct social group.’



phenomenon that is as diverse as it is universal (as queer theories have shown in relation to SOGI minorities). As Verdirame points out, '[t]he recognition of a political dissident as a refugee may expose the wrongdoing of a government, but the grant of refugee status to women fleeing gender-based persecution or gay men escaping homophobia will often also expose the wrongdoing of a society' (Verdirame 2012, pp. 559–560). The abuse of women and SOGI minorities is generally ongoing, systematic and is a phenomenon of both 'refugee-producing' and 'refugee-receiving' countries.<sup>33</sup>

Despite this seeming incongruence between gender and SOGI-based persecution, on the one hand, and the premise of refugee law, on the other, 'refugee-receiving countries' have, since the late twentieth century, come to recognise gender and SOGI-based asylum claims, generally by using the category of PSG in this context. In the UK, the 1999 case of *Shah and Islam*, from which Lord Hope's words are taken, was the catalyst for this. Yet, this deployment also causes problems in classification: if one adopts a universalising theory of women's oppression, as some Western second wave feminism may be viewed as doing (such as de Beauvoir 1997; Daly 1979; Millett 1977),<sup>34</sup> then any woman who is outside the country of her nationality should be able to claim asylum but no state would be positioned to provide it because of the global nature of women's persecution. Of course, this is not the case for many reasons relating to IRL and its domestic application, but this oversimplification highlights the potential difficulty faced by advocates for women and SOGI minorities claiming asylum, and which we explore further in the debates we highlight below. Several complex facts need to be reconciled here: (a) women and SOGI minorities are indeed in need of refuge because of their experiences as women and SOGI minorities; (b) those experiences are not universal but, on the contrary, highly diverse to the extent that the very categories of women and SOGI minorities (and its many variations) are increasingly contested, raising the question of what, if anything, is the shared basis for being defined and self-defining as a woman or member of a SOGI minority; (c) broadly speaking, feminist and queer activists, lawyers and scholars share a commitment to using refugee law to protect women and SOGI minorities from persecution; (d) the most expedient way to promote the interests of women and SOGI asylum claimants within the flawed but existing paradigm of 'refugee-producing' and 'refugee-receiving' countries may be to depict the former as misogynistic, homophobic and transphobic regimes and the latter as havens characterised by freedom and democracy.

In the confines of a few pages, what is the best way to 'use' feminism, given its breadth, to address these difficulties? There are some obvious points of entry when

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<sup>33</sup> See, for example, ONS figures for domestic abuse in England and Wales 2018. <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2018#prevalence-of-domestic-abuse>

<sup>34</sup> Recognising the problematic universalising elements to these works should not detract from recognition that all of these writers made significant contributions to second wave feminism and establishing gender as the critical site of activism, theory and debate that it now is globally.

approaching SOGI asylum from a feminist perspective. One would be to take a practitioner-based, bottom-up approach building on the similarities in concrete terms between claims based on gender and SOGI persecution: the fact that persecution is often carried out by private actors, that evidence is therefore more difficult to secure, that shame and stigma may contribute to claimants' experiences, and that sexual violence is often a cause of flight. Alternatively, one could take a top-down approach, starting with the abstract concept of a refugee in international law and then considering how that maps onto the experiences of women and SOGI minorities (recognising that many women also identify as members of a SOGI minority). Taking either of these starting points, one could look to a wealth of gender-focused writing on asylum that challenges the core paradigm of the Refugee Convention and its failure to meet the needs of women. Feminist refugee scholars have shown, first, how IRL was created to address the persecution of the male, individual, human rights-bearing subject and, second, how women have been shoe-horned into the PSG category to address this (Crawley 2001; Firth and Mauthe 2013; Greatbatch 1989; Kneebone 2005; Macklin 1995; Oxford 2005).<sup>35</sup> Much of this theory would apply to SOGI asylum and shed light on why SOGI claims often fail, and various writers have addressed women's and SOGI asylum together (Lewis 2014; Neilson 2005).

We feel that either of those approaches, while of interest, would provide little more than a literature review. Instead, in this section we take a different approach, one we feel is more original and therefore more productive: we look beyond the refugee literature to specific debates within feminism as a broader body of scholarship. These debates – dating back half a century – analyse gender inequality through the lenses of culture, identity and difference in a way that sheds new light on SOGI-based asylum claims.

### 3.3.1 *Feminism and Multiculturalism*

Our starting point is a debate that speaks directly to the question above concerning how, within the prevalent paradigm of 'refugee-producing' and 'refugee-receiving' countries, it is possible to promote the interests of women and SOGI asylum claimants without affirming cultural binaries of oppressive and saviour states. In 1999, there was an academic and public discussion about whether Western democratic states are more advanced than non-Western regimes in terms of women's rights, sparked by the question posed by Susan Moller Okin: 'Is multiculturalism bad for women?' in her publication under that name. She went on to ask: 'What should be done when the claims of minority cultures or religions clash with the norm of

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<sup>35</sup>For more discussion of PSG in application to SOGI claims see Dustin and Held (2018) and Chap. 7.



gender equality that is at least formally endorsed by liberal states (however much they continue to violate it in their practices)?' (Okin 1999).

While Okin recognised that all societies are characterised by gender inequality, she believed that Western democracies have moved further away from their patriarchal pasts than other types of society. She asked: '[w]hen a woman from a more patriarchal culture comes to the United States (or some other Western, basically liberal, state), why should she be less protected from male violence than other women are?' (Okin 1999, p. 20). Okin was not writing about asylum. However, this is an argument that is often used by advocates and activists for refugee women and SOGI minorities: for example, women in the UK are protected from Female Genital Mutilation (FGM); we should extend that protection to women from other countries (Singer 2012). Women from countries that either allow FGM or fail to protect women from FGM, and who are able to escape, should be entitled to claim asylum and the mechanism for doing so is generally their membership of a PSG. Similar arguments are made in relation to SOGI: '[the gay man's] country of nationality is therefore not affording him the necessary level of protection. So the receiving country should'.<sup>36</sup>

Applying Okin's reasoning to the field of asylum, we find what is in fact the present reality: here, the world is divided into 'refugee-producing countries' (countries where women are oppressed through 'practices' such as FGM) and 'refugee-receiving countries' (countries where women are liberated and that liberation is expressed in ways that may include genitoplasty among other forms of cosmetic surgery, but which are not oppressive because they are perceived as being freely chosen). One could argue that Okin both explains and solves the problem of gender equality: the values and gender equality standards of Western societies are more progressive than those in other parts of the world; they simply need to be applied systematically and universally. If this is true in the context of gender-based asylum claims, it is equally true for SOGI minorities seeking protection. The problem is not one of analysis or understanding, but simply of application.

We reject this position and do so by approaching it through a number of other feminist-based analyses deriving from intersectionality, Black and post-colonial perspectives and interrogations of 'cultural identities'. Most of the writers cited are not responding to Okin directly, but their work undermines her arguments from various perspectives in ways that are useful to understanding SOGI-based asylum.

### 3.3.2 *Intersectional Feminist Writing*

The binary categories that Okin's work depends upon are disrupted when we introduce the notion of intersectionality. Intersectionality is generally attributed to USA legal scholar and civil rights activist Kimberlé Crenshaw, who is credited with

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<sup>36</sup> *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, 7 July 2010, para. 65.

coining the term, but the concept dates back to at least the late 1970s with the work of the Combahee River Collective:

The most general statement of our politics at the present time would be that we are actively committed to struggling against racial, sexual, heterosexual, and class oppression and see as our particular task the development of integrated analysis and practice based upon the fact that the major systems of oppression are interlocking (Combahee River Collective 1977, p. 13).

A decade later, Crenshaw developed intersectionality as an anti-discrimination tool to explain and combat Black women's experiences of inequality by showing that these experiences are not only distinct from White women's and Black men's, but also cannot be explained by simply adding recognition of racism to recognition of gender oppression (Brah and Phoenix 2004; Crenshaw 1991; Hill Collins and Bilge 2016; Phoenix and Pattynama 2006). As she argued: 'Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated' (Crenshaw 1989, p. 140).

Intersectionality has subsequently developed into a large body of scholarship, including work that critiques the value of the concept itself (Anthias 2013; Firth and Mauthe 2013; Grabham et al. 2008; Nash 2008). It has an obvious application to the issues discussed here. Davis, for example, argues that applying an understanding of intersectionality will lead to legal redress for human rights abuses that is better able to address the realities of women's experiences, with application to asylum and furthermore to SOGI asylum (Davis 2015). However, two things are striking in considering it as an explanatory tool when approaching asylum from the perspective of gender and SOGI. Firstly, the ubiquity of the concept of intersectionality in academia but also beyond: bodies such as CEDAW, for example, routinely reference it in statements such as 'discrimination against women based on sex and/or gender is often inextricably linked with and compounded by other factors that affect women, such as "race", ethnicity, religion or belief, health, age, class, caste, being lesbian, bisexual or transgender and other status' (CEDAW 2014, para. 6). In some ways, intersectionality has become a victim of its own success, a value that is universally espoused, mainstreamed to the point of being taken for granted, and assumed to be now fully entrenched beyond feminist discourse.<sup>37</sup> Secondly, at the same time and paradoxically, it is startling to see how little impact it has as an applied concept in law or policy – certainly in relation to asylum where, as we will see in subsequent chapters, decision-makers appear unable to recognise that lesbian women claiming asylum have been persecuted on the basis of both their gender and their sexuality.

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<sup>37</sup> Both the Inter-American Court of Human Rights and the UN independent expert on SOGI have stressed the need for an intersectional approach with such other grounds to capture the harmful effect of discriminatory treatment on individuals in question. So, sex, ethnic origin, age, religion, socio-economic factors including poverty, and/or armed conflicts may exacerbate discrimination on SOGI grounds: Inter-American Court of Human Rights, *Identidad de Género, e Igualdad y No Discriminación a Parejas del Mismo Sexo*, Opinión Consultiva OC-24/17, 24 November 2017, para. 48; Muntarhorn 2017, p. 5.

And we see the failure to apply any grasp of intersectionality at even a basic level in the assumptions about religious, age and class-based identity that are prevalent in asylum decision-making.

Moreover, this plays out beyond the legal asylum machinery in terms of the support structures available to people seeking asylum, who often end up choosing between LGBTIQ+ or migrant support groups rather than groups that can address the totality of their experiences. Intersectional analyses can be of tangible value here in undermining such tunnel-vision thinking. Patricia Hill Collins, for example, points to the way a 'queer of colour critique' uses intersectionality to both draw from and critique 'critical race theory', feminism and queer theories. This can highlight gaps in political agendas: an LGBTIQ+ focus on workplace and marriage equality does not address the high rates of violence and murder experienced by Black trans people (Hill Collins 2019, pp. 106–107). In the next section, we look to queer intersectionality theories to support our analysis.

An intersectional approach is critical to our analysis, yet it has drawbacks. It can be used on multiple levels, simplistically, or with different meanings (Phoenix and Pattynama 2006). Moreover, following Floya Anthias (2013), we argue that its deconstructionist project may have limitations when applied to law and policy. The risk is that intersectionality alone may simply create and affirm a larger number of categories than previously without enhancing understanding or the means to address inequality. Additionally, it may entrench an identity-based approach at the expense of socio-economic analysis. None of these flaws are inherent in the discourse and many scholars have developed intersectionality-based approaches to improve it, which is why we defend intersectionality as a key notion to inform our analysis in subsequent chapters. We are also guided by Hill Collins in recognising intersectionality as 'a metaphor of social transformation (...) It arrived in the midst of ongoing struggles to resist social inequalities brought about by racism, sexism, colonialism, capitalism, and similar systems of power' (Hill Collins 2019, p. 27). In this way, as much as a theory, it is a problem-solving tool that can support scholars bridging the gap between theory and practice in the area of refugee studies in a holistic way that few other theoretical approaches are able to do. Moreover, it complements the Black and post-colonial scholarship considered in the next section.

### 3.3.3 *Anti-essentialism*

Critiques of 'Is multiculturalism bad for women?' build on and foreshadow a large body of writing by feminists and those who would reject the label but who share a common recognition that feminism, as it developed through its first and second waves in the West, had little to say to or to offer Black or minoritised women, partly because of a tendency to homogenise and extrapolate the experiences of all women based on those of White women and partly because of its failure to acknowledge historical contexts, specifically histories of colonialism, racism and slavery. This

has implications for those writing and active in the field of asylum, which we go on to explore, considering some of the gender-focused, Black and post-colonial scholarship that challenges essentialist notions of culture and identity and effectively complements intersectionality.

Discourses that contrast a free Western and westernised female subject with a subjugated Other – frequently embodied in the form of the veiled Muslim woman – have been interrogated over several decades, although often not with a focus on refugee law. Writing in the 1980s, Chandra Talpade Mohanty contrasted the ‘truncated’ life the average ‘Third World’ woman is assumed to lead with the ‘(implicit) self-representation of Western women as educated, as modern, as having control over their own bodies and sexualities, and the freedom to make their own decisions’ (Mohanty 1988, p. 337). And in 1991, Isabelle R Gunning used the term ‘arrogant perception’ for Western descriptions of other ‘cultural practices’ such as FGM, suggesting that Western feminists’ ‘articulations of concern over the contemporary practice of genital surgery in third world nations are often perceived as only thinly disguised expressions of racial and cultural superiority and imperialism’ (Gunning 1991, p. 212). From post-colonialism and subaltern studies, and in an earlier women-focused articulation of the homonationalism discussed in Sect. 3.4, Gayatri Chakravorty Spivak demonstrates how ‘the protection of women (today the “third-world woman”) becomes a signifier for the establishment of a *good* society’ (Spivak 1988, p. 94). Her most famous quote could be rewritten to describe European asylum as ‘[straight] White men [and White women] are saving brown women [and queer people] from brown men’ (Spivak 1988, p. 92).

Writers who approach gender through an analysis of culture challenge the portrayal of women as victims of their cultures and of cultures as unchanging monoliths. As Avtar Brah points out, we should conceive cultures ‘less in terms of reified artefacts and rather more as processes’ (Brah 1991, p. 174). Uma Narayan has highlighted how early feminist condemnations of Sati as an Indian practice reinforced portrayals of unchanging non-Western cultures, in which ‘Indian women seem to go up in flames – on the funeral pyres of their husbands and in the “kitchen accidents” that are the characteristic mode of dowry-murder – without historical pause’ (Narayan 1997, p. 48). Narayan draws attention to the way colonial condemnation of Sati was politically motivated:

Thus liberty and equality could be represented as paradigmatic “Western values,” hallmarks of its civilizational superiority, at the very moment when Western nations were engaged in slavery, colonization, expropriation, and the denial of liberty and equality not only to the colonized but to large segments of Western subjects, including women (Narayan 2000, pp. 83–84).

She calls for a commitment to ‘antiessentialism’ both in relation to women and culture, resisting the reification of cultures that prevails (Narayan 2000, p. 98). In the current context and a climate of terrorism and Islamophobia, the archetypal Other has become further entrenched as the veiled Muslim woman – as has been widely recognised and written about by feminists and women writers (Abu-lughod 2015; Farris 2017). The challenge to essentialist thinking is particularly relevant to

research with LGBTIQ+ refugees subject to compartmentalisation based on narrow understandings of the experiences of just a few individuals.

Move to the context of refugee law and this illustrates a problem that Audrey Macklin starts to identify when she points out:

If the United States, or Canada, or Australia are refugee-acceptors, it follows that whatever they do cannot constitute persecution, because that would make them potential refugee-producers (...) The practical consequence of this effacement will be that gender persecution will be most visible and identifiable as such when it is committed by a cultural Other. So the commonality of gender oppression and homophobia is disguised by attributing abuse to culture (Macklin 1995, p. 271).

Or, as Razack points out:

racial and cultural othering, as an important part of how [a woman's asylum] claim is presented, arise initially from the need for a refugee claimant to establish that she has a well-founded fear of persecution from which her own state will not or cannot protect her. The simplest and most effective means of doing so is to activate in the panel members an old imperial formula of the barbaric and chaotic Third World and by implication, a more civilized First World (Razack 1995, p. 69).

This analysis is highly relevant to a research project with policy-related as well as scholarly ambitions. The most promising way of supporting women's asylum claims in the courts is usually to argue that the claimant is fleeing from an oppressively patriarchal regime to seek refuge in the liberal West, reinforcing a simplified 'us' and 'them' concept of culture in which the individual woman can appear to be a pathetic victim. This is illustrated well in relation to FGM. In 2006, in the UK, the House of Lords granted asylum to a woman from Sierra Leone fleeing FGM stating that: 'Even the lower classes of Sierra Leonean society regard uninitiated [non-FGM] indigenous women as an abomination fit only for the worst sort of sexual exploitation'.<sup>38</sup> The implication is that, in contrast to rational Western individuals, Sierra Leoneans are bound to act in certain ways by their culture. In this example, the interests of the claimant are best served by reinforcing stereotypes of backward cultures. It would be difficult for an advocate to bring in the kind of contextual factors that would lead to a less simplistic portrayal of cultures and, at the same time, pursue the best interests of the client in these cases.

Leti Volpp shows how narratives such as this have been developed and deployed in the name of women's protection: 'colonialist and imperialist discourse which opposes tradition (East) and modernity (West), and which associates East with ancient ritual, despotism, and barbarity, and West with progress, democracy and enlightenment' (Volpp 1996, pp. 1588–1589). Sexual and gender violence is only 'cultural' when it happens in a non-Western country or within a minority community in the West. Feminist theory has interrogated cultural relativism and the use of a cultural defence in courts to defend men who abuse women (Coleman 1998; Nussbaum 2000, pp. 48–50; Phillips 2003; Volpp 1996). Yet, here we have a

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<sup>38</sup> *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant) Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)* [2006] UKHL 46, para. 7.

situation where cultural stereotypes can work to the advantage of groups of individuals seeking protection in the face of a hostile immigration climate and in need of all the strategies and tools that are available.

This presents a problem for advocates and legal representatives in such cases: they can 'buy into' cultural stereotypes when these seem likely to work to their client's advantage in leading to a grant of international protection, or they can reject such strategies as reinforcing gendered cultural stereotypes and risk acting against their client's immediate interests. The dilemma has been articulated by Volpp, writing about the use of cultural defences in criminal cases in North America:

The first issue we face is the strong tension between helping an individual person and the broader effects of employing stereotypes. (...) What do we do then if we want to help an individual woman? Do we want to say that her horrific barbaric culture that condones these practices from which she has absolutely no escape, led to these bad acts or led to her being trapped, or led to her not fleeing? Are we using racism to get rid of sexism? Is there a way in which we are relying on certain kinds of problematic descriptions that buy into already existing preconceptions about our communities to help individual women? We know there are broader stereotypes out there and that is why we think they work and that is why we might use them. We need to consider these implications (Volpp 2002, p. 4).

Volpp is concerned by the strategy of deploying cultural stereotypes to help individual women. Nonetheless, for the refugee paradigm to function effectively for women, the USA (or UK, Germany or Italy) has to be presumed to be a site of liberation. Women's claims will be best served by depicting them as victims not only of abuse that is equivalent to persecution, but also abuse that is different to the regular day-to-day violence against women that occurs in Western 'refugee-receiving countries'. This argument is equally applicable to SOGI asylum: in the case of a lesbian woman from an African country, particularly a country where same-sex relations are illegal but the law is not enforced, it would be a reckless or overly confident advocate who did not deploy the ideal narrative of an individual who comes to realise how different she is to her fellow intolerant homophobic citizens and embraces European values and freedoms as an alternative. In seeking to undermine cultural stereotypes without damaging the asylum claims of women and sexual and gender minorities, feminist scholarship on agency and choice is a useful resource and is the subject of the next section.

### **3.3.4 *Recognising Agency***

We have argued that, while intersectionality will be critical to understanding the experiences that are the focus of this work, it needs to be accompanied by an analysis that interrogates prevalent understandings of culture and cultural identity. What these discourses share is a recognition of context and agency. They illustrate how successfully patriarchal, capitalist and neo-liberal forces have diverted attention from the gender and 'race' oppression and exploitation of the West by focusing on the extreme abuses of women at the hands of non-Western state and non-state actors,



at the expense of a focus on their own misdeeds. The writers we discussed disrupt the simple story of illiberal regimes perpetuating illiberal practices against SOGI minorities. They also draw attention to the way that gender and cultural or ethnic affiliations come together to deny agency to women and a range of minorities – a phenomenon that is nowhere truer than in the field of asylum, where we are presented with the ‘vulnerable’ (or thus rendered) displaced woman seeking Western protection (ICIBI 2018, p. 40). The danger is in the attribution of a cultural group identity to the ‘other’. What is lost is the agency of both victim and perpetrators of ‘cultural practices’ and that has implications on various levels for asylum, as we discuss in subsequent chapters.

Elsewhere, feminism has both prioritised and problematised choice. Marilyn Friedman develops the concept of autonomy in connection with a specific definition of identity based on the perspectives, values, wants and commitments that matter to her. To live autonomously is to live in accordance with those priorities. However, Friedman draws attention to the constraints within which agency is exercised in a way that is particularly relevant to SOGI claimants, arguing that even lives of suffering can afford opportunities to exercise agency: ‘A valiant, noble, inspiring sort of autonomy emerges when someone stubbornly preserves or pursues what she deeply cares about during a time of suffering or tragedy and against hostile opposition’ (Friedman 2003, p. 26). We can apply this conceptualisation of autonomy to understand the decisions made by, for example, a lesbian woman who is unable to live openly in her home country and ‘chooses’ to leave to seek asylum in Europe, even though this means separation from her children. Martha Nussbaum, writing to address the ‘unequal human capabilities of women’, attributes it to the failure to see women as ‘ends’ in themselves (Nussbaum 2000, pp. 1–2) and develops a political approach to gender justice based on ‘capabilities’ – ‘what people are actually able to do and to be’ – while also questioning the conditions in which choices are made. Finally, feminism has been instrumental in challenging definitions of Western subjects as individuals, making life choices in contrast with non-Western subjects lacking in agency (Madhok et al. 2013). This is particularly valuable in considering how to extend asylum protection to groups including women and SOGI minorities without framing them as eternal victims (Henry 2013).

In this section, using Okin’s work as a launch pad, we have identified discourses that explicitly or implicitly critique her analysis in ways that are helpful to an understanding of SOGI asylum. These volumes are not only an academic contribution, but also seek to make recommendations for improving asylum for SOGI minorities in Europe. That leads us to ask how the intellectual and practical work of exposing neo-colonial discourses can coexist with the ongoing imperative of protecting women and SOGI minorities from abuse. One could argue that deploying cultural stereotypes is a necessary evil in the case of asylum claims by women and SOGI minorities. However this argument is flawed, not only because of the wider damage of what Narayan has called ‘the package picture of cultures’, but also in individual asylum cases (Narayan 2000). First, not everyone who is fleeing sexual or gender-based violence is able to conform to cultural stereotypes. Second, if successful asylum claims for women and SOGI minorities rely on extreme contrasts between

conditions for these groups in the host country and the country of origin, then people seeking asylum and those who support them will have an interest in seeing ‘refugee-producing countries’ maintain the harshest, most misogynistic, most homophobic and most transphobic laws and regimes. Third, the intersection of a gender and group-based identity to deny agency perpetuates the binaries of a Western individual subject with agency and a non-Western ‘other’ without agency.

In terms of solutions, feminist approaches to dismantling homogenising portrayals of the cultural woman ‘other’ often rely on enhanced voice and agency for women from different cultures, as have campaigners in relation to SOGI minorities. We discuss feminist writers’ analysis of choice and agency above. However, in the area of asylum law these strategies are probably the hardest to apply, because they come into conflict with the fixed categories of victim and saviour, generally relied upon by decision-makers, even if only implicitly. One of the challenges we face here is to make recommendations for improving asylum processes for SOGI claimants that do not rely on deploying a ‘package picture of cultures’ that persecute their SOGI minorities. While this debate neither solves gender inequality nor provides a solution to SOGI asylum, it does identify themes to shape what follows: essentialism, difference, culture, agency.

### 3.4 Queer Theoretical Approaches to SOGI Asylum

Moving to our third body of work, queer theoretical approaches have an obvious bearing on the subject of SOGI asylum. Sexual orientation and gender identity are two categories that are often either problematically conflated or treated as separate entities of identification and experience. As we show in this section, a queer theoretical approach can help us to understand how sex, gender, and sexuality are intrinsically linked. As we will demonstrate, the light that queer theories shed on these categories, as well as their theoretical framing of ‘identity’, can help understand the legal and social experiences of SOGI claimants. In addition, these approaches can be productively used to pursue (fairer) decision-making. The intersections of sexuality with ‘race’, gender and class alone do not fully explain the particular experiences of these SOGI minorities who lack protection, go through the asylum process – where they have to prove their SOGI – and are seen and perceived by other people as ‘asylum seekers’ (and the particular connotations and stereotypes that come with it). Therefore, in order to acknowledge the particular experiences of SOGI claimants, intersectional queer approaches need to include ‘refugeeness’ as a category in their analyses. As we argue, not only does ‘refugeeness’ need to be added to intersectional analysis, but also ‘space’, as space shapes these intersectional experiences in particular ways and is co-constitutive of sexuality (and other categories). Our analysis in the subsequent chapters will be led by these theoretical approaches, and in turn will add new understandings to queer theories in general, and queer geographies in particular.



Queer theories emerged as a body of literature in diverse fields of studies in the early 1990s (feminist theories and lesbian and gay studies have been crucial in this development) and has since then been influential in many different academic disciplines and areas of research. Here, we do not aim to give a comprehensive overview of published work in the field of queer theories; instead, we will focus on those approaches that we consider most helpful and relevant for our analysis, and in particular for understanding the legal and social experiences of SOGI claimants.

We begin with a short overview of queer theories' main ideas with regard to the relationship between sex, gender, and sexuality and the conceptualisation of identity. We then look at queer theoretical approaches that bring in intersectional thinking – building on the intersectional feminist writing discussed above (Sect. 3.3.2). Here, we will argue that queer studies not only need to be intersectional, but also need to include the experience of being a queer asylum claimant in their analysis and production of theoretical and analytical frameworks. The same counts for the field of 'queer geography', which offers useful approaches for analysing the social experiences of queer refugees, which we discuss in Sect. 3.4.3. This field explores 'the ways in which space is sexed and sex is spaced, or in other words, the ways in which the spatial and the sexual constitute each other' (Taylor 1997, p. 3). While work published in this area will be useful for our analysis, with our particular focus on how queer refugees experience certain spaces and how their identities are shaped by these spaces, our research adds a new understanding to this field. We show that the relationship between queer refugee identities and spaces are shaped by 'refugeeness'. We argue that both 'space' and 'refugeeness' are categories that need to be included in intersectional analyses. Finally, we summarise how these understandings of sex, gender, sexuality, identity, intersectionality and space may be used for decision-making processes and social policies.

### ***3.4.1 Queer Theoretical Understanding of Sex, Gender, Sexuality and Identity***

Since the 1990s, queer theorists have offered new ways of thinking the relationship between sex, gender, and sexuality. These poststructuralist theorists consider these categories and the relationship between them not as natural or biologically determined, but as socially, legally and historically produced. Queer theorists conceptualise sexuality as the product of social processes, as regulated and produced, and as constantly changing (see, for instance, Butler 1990; Sedgwick 2008; Warner 1993). Furthermore, they define sexuality as institutionalised in the ways in which 'in the everyday political terrain, contests over sexuality and its regulation are generally linked to views of social institutions and norms of the most basic sort' (Warner 1993, p. xiii). As Chaps. 4 onwards suggest, the institutionalisation of sexuality is also seen in the asylum process.

By drawing on the ground-breaking work of Michel Foucault, especially his first volume of the *History of Sexuality* (1990), queer theorists challenge the idea of thinking of sexuality in terms of fixed identities. As Foucault showed, this Western understanding of fixed sexual identities has its roots in the late nineteenth century, when psychiatric, legal, moral, religious and medical discourses emerged that categorised people into different sexual human beings and produced sexual subjects:

The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology. Nothing that went into his total composition was unaffected by his sexuality (Foucault 1990, p. 43).

During that time, ‘the homosexual’ came into being as a distinct ‘species’, one that is deviant and ‘abnormal’. Whereas prior to that time the main concern was about sexual practices (such as sodomy), in the late nineteenth century a distinct sexual identity (‘the homosexual’) was created. Consequently, as Foucault’s work demonstrates, Western understandings of sexuality are based on the concept of identity. This distinction between practice or behaviour and identity is one that has a particular significance in relation to SOGI asylum as highlighted throughout this work, and in particular in Chap. 10.

Queer theorists draw on Foucault, but take his ideas further by demonstrating that the fixedness of sexual identities is based on polarisations including hetero/homo, male/female and masculine/feminine. They challenge the idea that these categories are based on fixed binaries and are ‘naturally’ linked (Butler 1990; Jagose 1996; Sedgwick 2008; Warner 1993). Queer theorists destabilise these binaries by decoupling sex, gender and sexual desire, and by conceptualising gender and sexuality as a constant work-in-progress (Warner 1993, p. xiii).

In her book *Gender Trouble* (1990), the most prominent queer theorist, Judith Butler, explains the relationship between sex, gender and sexuality as follows: ‘The heterosexualisation of desire requires and institutes the production of discrete and asymmetrical oppositions between “feminine” and “masculine,” where these are understood as expressive attributes of “male” and “female”’ (Butler 1990, p. 23). The ‘natural order’ of heterosexuality is maintained through a fixed binary system of sex and gender, and this binarism is necessary for compulsory heterosexuality. In other words, we have an underlying assumption that someone is born as either male or female, then presents themselves through either a masculine or feminine gender, and is attracted to the opposite sex. Butler argues that there is a link between gender and (hetero)sexuality in the ways in which ‘under conditions of normative heterosexuality, policing gender is sometimes used as a way of securing heterosexuality’ (Butler 1999, p. xii). But what we take as the internal essence of gender is manufactured through repetitive gendered stylisation of the body. In that sense, gender is performative; it is not a noun but a verb. There is no pre-existing gender. Gender is performatively produced through the repetitive, compulsory citation of gendered norms: ‘There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very “expressions” that are said to be its results’ (Butler 1999, p. 33). The ways in which gender is policed and enforced affects

everyone, ‘but has particularly dangerous outcomes for trans people’ (Spade 2015, p. 9). This becomes most obvious when looking at the murder rates of trans people worldwide but is also evident in everyday experiences of non-binary and trans people in a binary gendered world, such as when using a public bathroom, for instance, when verbal and physical harassment is often experienced (Spade 2015).

These theoretical ideas are useful for the analysis of the legal and social experience of SOGI claimants in several ways. First, it needs to be recognised that Western concepts and labels may not capture the ways in which SOGI claimants understand and express their sexual orientation and gender identity (Lee and Brotman 2011). As Calogero Giametta (2014, p. 587) points out, Western understandings of sexuality are often problematic for asylum claimants, who ‘negotiate their sexual and gender identities across cultural constructions of gender liminality and sexual identity that do not match the repertoires of Western LGBTI identifications and lifestyles’. Sexuality is often lived in much more fluid ways, without the need to conform to fixed identity labels as it is common in Western societies (see, for instance, Wekker’s 2006, fascinating study of a women’s community in Surinam). This can be problematic, if decision-makers make decisions on SOGI claims through the lens of Western conceptualisations of gender and sexuality. Furthermore, queer theorists show that sexual identity is fluid and subject to change during the course of a lifetime (Jagose 1996; Seidman 1993), which may be helpful to asylum decision-making, by challenging the simplistic categorising imperative that characterises asylum procedures as the basis for determining whether an individual should be granted protection or not.

Second, the Western model of sexuality takes gay identity and homosexual conduct as interchangeable and ‘presumes clarity of boundaries between heterosexual and homosexual identity and requires public expression of private and sexual behaviour’ (Morgan 2006, pp. 151–152). This can lead to the conflation of sexual conduct and sexual identity in decision-making, and a failure to recognise the complexities of sexual identity (O’Leary 2008). SOGI claimants may then be expected to be ‘out and proud’ and conform to Western stereotypes of what it means to be LGBTIQ+ (for example, visiting gay bars, participating in lesbian and gay groups and Gay Prides, etc.) (Bennett and Thomas 2013; Morgan 2006). These expectations of conformity to Western notions of homosexual behaviour make it more difficult for SOGI asylum claimants to ‘demonstrate’ and ‘prove’ their SOGI.

Third, persecution on grounds of sexuality is often linked to how gender is performed, demonstrating the links between gender and sexuality that Butler has so powerfully demonstrated (see above). As Nora Markard argues:

Gender doesn’t simply differentiate between “men” and “women”, to the exclusion of inter\* bodies and certain trans\* and inter\* identities. It is also fundamentally heteronormative, predetermining the acceptable sexual preference and the specific way in which to “do gender”. (...) An intersectional approach can make these dimensions visible in a more differentiated manner (Markard 2016, p. 56).

Understanding the co-constitution of gender and sexuality can improve decision-making, especially in terms of how persecution is assessed, but there are also intersections with other categories that need to be taken into account.

### 3.4.2 *Intersectional Queer Approaches*

Focusing on gender and sexuality as the main categories of analysis, the early queer theoretical approaches were criticised for the lack of discussion of intersections with other categories. While above we discussed intersectionality as it developed in relation to feminism and ‘race’, there is now an extensive body of work that brings in an intersectional approach to queer theories (see, for instance, Taylor et al. 2010), and looks specifically at the intersections of sexuality with socio-economic class (McDermott 2010; Penney 2015; Taylor 2007), disability (Inckle 2010), ‘race’ (Kuntsman and Miyake 2008; Mercer and Julien 1988; Somerville 2000; Stoler 1995) and religion (Bakshi et al. 2016; Giametta 2014; Puar 2007). There has also been work specifically on bisexuality, long under-represented, invisible and marginalised in sexualities and queer scholarship (Klesse 2018; Monro et al. 2017). As Surya Monro, Sally Hines and Antony Osborne (2017, p. 671) argue, especially ‘the peak years of queer theory – the mid to late 1990s – was a period in which scholars were particularly silent about bisexuality’. This is surprising, as the category of bisexuality ‘raises important critical questions about the intersections of sexuality and gender, and the epistemologies of these categories’ (Monro et al. 2017, p. 675). These questions help us understand the assessment of bisexual people’s asylum claims in subsequent chapters, and also why bisexual asylum claimants are rendered invisible by the asylum system.

There has also been an increasing interest in the relationship between sexuality and ‘race’, or the ‘raciality’ of queerness. As Adi Kuntsman and Esperanza Miyake (2008, p. 5) argue:

We believe that “raciality” and “queerness” should always be interrogated together as queerness/raciality in order to hear the invisible, to see the inaudible. How and/or what are the ways in which “raciality” becomes silent and/or silenced within the queer discourse and practice? What do these silences do and how can they be conceptualised?

Black and Asian queer theorists have challenged the White male and Western focus of queer theories (see, for instance, Eng et al. 2005; Ferguson 2004; Gopinath 2005; Johnson and Henderson 2005). Some scholars have extended Foucault’s analysis and shown that the formation of sexual subjects cannot be separated from the formation of racial subjects, that racism and ideologies of sexual morality actually work together (Mercer and Julien 1988; Somerville 2000; Stoler 1995). In this context, Kobena Mercer and Isaac Julien argue that ‘the prevailing Western concept of sexuality... *already contains racism*. Historically the European construction of

sexuality coincides with the epoch of imperialism and the two inter-connect' (Mercer and Julien 1988, p. 106, original emphasis).

Others have explored the relationship between normative constructions of gender, sexuality and 'race' in the context of nations and borders, or *queer diasporas* (Gopinath 2005; Manalansan 2006). These scholars also encourage us to think about sexual identities from a postcolonial perspective (Manalansan 2006; Badruddoja Rahman 2006) and decolonise queer studies by bringing in transnational perspectives on the studies of sexuality, to show how sexuality, 'race', gender and religion intersect transnationally (Bakshi et al. 2016).

To adopt a transnational perspective when looking at these intersections is particularly important when considering how 'homonationalist' discourses shape the asylum process and the legal and social experiences of queer refugees. In *Terrorist Assemblages*, Jasbir Puar develops the conceptual frame of 'homonationalism' for understanding the complexities of 'how "acceptance" and "tolerance" for gay and lesbian subjects have become a barometer by which the right to and capacity for national sovereignty is evaluated' (Puar 2013, p. 33). Puar is critical of the narrative of progression of LGBTIQ+ rights, which includes some individuals while excluding others. As she argues, these rights are used to reinforce boundaries between a 'civilised' and 'uncivilised world', with religious values in particular constructed as 'backward'. In this way, LGBTIQ+ human rights discourses play a critical role in defining a racialised Other whose lack of progress is proved by their rejection of sexual and gay equality.

Puar argues that, in our times, 'an exceptional form of national heteronormativity is now joined by an exceptional form of national homonormativity'<sup>39</sup> (Puar 2007, p. 2), and some homosexual bodies are now 'worthy of protection by nation states' (Puar 2013, p. 337). Homonationalist discourses produce the idea of Western nations as 'LGBTIQ+ tolerant' in contrast to non-Western 'LGBTIQ+ intolerant' nations. This discourse is shaped by neoliberal capitalist structures, for instance, the tourist industry that defines gay-friendly and not-gay-friendly destinations, and recognition by the economic market of the consumer-value of SOGI minorities and the 'pink pound'. As Puar points out, these definitions are coupled with religion, in that Muslim-majority states are perceived as being particularly intolerant of SOGI minorities. The consequence of this is that the 'liberal' Western gay subject is defined in contrast with the 'oppressed' and/or homophobic non-Western subject (Hubbard and Wilkinson 2015, p. 605). The intersections of sexuality, 'race' and religion become visible here in the ways in which 'Muslim' and 'gay' are seen as incompatible identities, and the conflation of 'race' and religion leads to a discourse

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<sup>39</sup>Heteronormativity is a concept coined by Michael Warner (1991) and describes the ways in which heterosexuality functions as the 'norm', as a given, the 'default'. The concept is gendered and based on (fixed) gender roles/expectations. Homonormativity is a concept coined by Lisa Duggan and describes 'a politics that does not contest dominant heteronormative assumptions and institutions — such as marriage, and its call for monogamy and reproduction — but upholds and sustains them while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption' (Duggan 2002, p. 179).

that constructs Islam as a homophobic religion (Haritaworn et al. 2008; Puar 2007), failing to recognise the voices within often small and under-resourced organisations around the world interpreting faith in LGBTIQ+ friendly ways.<sup>40</sup> In that respect, an apparent intolerance towards SOGI minorities is often used as justification for Islamophobia (Hubbard and Wilkinson 2015).

As we will dissect further in later chapters, these discourses have an effect on the asylum process that SOGI claimants go through, as well as on their lived experiences. With regard to the asylum process, the perceived incompatibility between 'Muslim' and 'gay' affiliations makes it particularly difficult for LGBTIQ+ Muslim individuals to secure international protection due to the expectation that they either reject their religion to be truly LGBTIQ+ or refrain from being LGBTIQ+ to be truly religious. As Giametta's (2014) research shows, being openly religious can undermine someone's asylum claim. Decision-makers often perceive religion, non-Western religions in particular, as patriarchal and homophobic, and religious believers are therefore viewed as backward, irrational and bound by tradition. Asylum claimants are expected to embrace progress and separate themselves from the 'backward non-West'. Claimants, as well as lawyers and supporters, might co-create these homonationalist discourses by presenting a narrative of 'suffering' in the 'backward' homophobic country of origin.

In terms of social experiences, these volumes look at how gender, sexuality, 'race' and religion intersect, including the ways in which SOGI claimants experience sexism, transphobia, homophobia, racism and Islamophobia. The intersectional queer approaches that we have outlined here are useful, not only for understanding the relationship between sex, gender and sexuality, but also how other categories intersect with them, or are co-constitutive of them. Yet, what is missing in intersectional approaches is the particular experience of being a 'refugee', an experience which may include but is not fully covered by an analysis of 'race' or nationality. As our analysis demonstrates, the experiences of SOGI refugees are shaped by the many different identities and identifiers that they choose or which are imposed on them, as is true for any individual, but also by their unique experiences within the asylum process. In the next section, we argue that it is also important to bring in the notion of 'space' when looking at the intersectional experiences of SOGI refugees.

### 3.4.3 *Queer Geographies*

The relationship between sexuality and space in the lives of queer refugees is particularly interesting. To analyse the social experiences of queer refugees, we draw on concepts and theories developed in the field of 'queer geographies'. As Kath Browne, Jason Lim and Gavin Brown (Browne et al. 2009, p. 4) argue:

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<sup>40</sup> Such as Imaan in the UK or Al-Fitrah Foundation in South Africa.

Sexuality – its regulation, norms, institutions, pleasures and desires – cannot be understood without understanding the spaces through which it is constituted, practiced and lived. Sexuality manifests itself through relations that are specific to particular spaces and through the space-specific practices by which these relations become enacted.

Queer refugees have to leave what is often the only location they have known, their country of origin, because of their sexuality and, when arriving in the host country, asylum spaces, such as refugee camps or dispersal accommodation, again shape the ways in which they can experience and live out their sexuality. The implications of this are further explored in Chaps. 5, 8 and 10.

Studies in the field of sexual geographies have proliferated since the mid-1990s, demonstrating the relationship between sexuality and space; how spaces are sexually structured and how space is constitutive in shaping sexuality (see, for instance, Bell and Valentine 1995; Browne et al. 2009; Doan 2015; Hubbard 2012; Johnston and Longhurst 2009). They have demonstrated the ways in which sexuality is made in mundane interactions in certain places and how those interactions sexualise space. In particular, they have shown how everyday spaces (such as the street, the home, the workplace) are constituted as heterosexual through repetitive heterosexual performances (Bell and Valentine 1995; Johnston and Valentine 1995; Valentine 1993, 1996). This literature is helpful for analysing the experiences of SOGI refugees, and how they experience everyday spaces as sexualised such as the heterosexualisation of accommodation centres.

Since the early 2000s, these studies have also increasingly looked at processes of inclusion and exclusion in LGBTIQ+ spaces, especially ‘gay villages’ all over the world, particularly in the UK, North America, Australia, Singapore and South Africa (see, for instance, Andersson 2015; Binnie and Skeggs 2004; Caluya 2008; Han 2015; Held 2017; Nero 2005; Tan 2015; Tucker 2009; Visser 2003, 2013). In this literature, sexual geographers have shown that, within these spaces, exclusions are produced on grounds of identifiers other than sexuality. In this respect, it has been argued that particular lesbian and gay identities are constructed in LGBTIQ+ spaces that exclude differences on grounds of class (Rooke 2007; Taylor 2007), ‘race’, (dis)ability, sexual desires, and gender (appearance) (Casey 2004; Skeggs 1999), and produce normativities and a certain form of homonormativity (Bell and Binnie 2004; Brown 2014). These studies have also revealed that ‘gay villages’ focus on an able-bodied, White, middle-class, young clientele and are male dominated.

While there have been interesting studies conducted on the racialisation of LGBTIQ+ spaces in Australia (Caluya 2008), the USA (Andersson 2015; Han 2015; Nero 2005), South Africa (Livermon 2014; Tucker 2009; Visser 2003, 2013) and the UK (Bassi 2006; Held 2017; Kawale 2003, 2004), none of these studies have explicitly taken the experiences of SOGI refugees in these spaces into account. These studies are revealing, however, in the ways in which they demonstrate exclusionary and discriminatory practices based on ‘race’ (for example, clubs’ door policies), and how sexual desires are shaped by ‘race’ through fetishisations, exoticisations, or dislike.



Queer geographies have not only shown how the spaces we inhabit are made through our repetitive actions, but also how these spaces shape us; the way that we do what we are supposed to do, what is perceived to be common sense, in any given place. Space is not simply an empty entity or container that can be filled with things or people. It is not dead and fixed, but alive, active, fluid and always under construction. Space is active and always 'in process' (Crang and Thrift 2000, p. 3). Building on this understanding informs our recognition of how queer refugee subjectivities are shaped by space, especially asylum spaces such as refugee accommodation centres (Chap. 8).

Asylum spaces are shaped by 'refugeeness' and shape 'refugeeness', in particular through the ways in which people feel 'out of place', or as 'space invaders' (Puwar 2004). As Nirmal Puwar (2004, p. 8) describes the relationship between bodies and space:

Some bodies are deemed as having the right to belong, while others are marked out as trespassers, who are, in accordance with how both spaces and bodies are imagined (politically, historically and conceptually), circumscribed as being "out of place". Not being the somatic norm, they are space invaders.

As it will become clear in our analysis, certain spaces are marked as 'refugee spaces', whereas others are marked as 'LGBTIQ+ spaces', often leaving SOGI refugees feeling out of place in most spaces.

In sum, Queer theoretical approaches provide a frame of analysis for understanding, on one hand, how the concepts of gender and sexuality are utilised in decision-making processes and, on the other, how they shape the experiences of SOGI refugees and people seeking asylum and their sense of themselves. Bringing in an intersectional approach to queer theories is important, as it gives us a tool to analyse how gender and sexuality are co-constituted by other social categories such as 'race', class and religion. Taking intersectional approaches seriously means to 'ask the other question' (Matsuda 1991); for instance, in accounts on sexuality, we need to ask 'where is gender here?', in accounts on gender we need to ask 'where is "race" here?', and so forth. This is vital for exploring the socio-legal experiences of SOGI claimants. We suggest that intersectional queer theories can be productively used in SOGI asylum cases to analyse whether there is a Western bias in decision-making and how credibility assessments might draw on racialised sexual stereotypes. Our study looks at how asylum law and policies play a role in producing these categories, but also how they might be shaped and reconstructed by SOGI claimants themselves (Berger 2009). Importantly, we argue that in order to acknowledge the particular experiences of SOGI claimants, queer intersectional approaches need to include 'refugeeness' as a category in their analyses. Finally, from queer geographies we take the interrogation of space and the way that space shapes these intersecting experiences in particular ways and is co-constitutive of sexuality (and other categories).



### 3.5 Concluding Remarks

Various themes have emerged in this chapter, including dignity, essentialism, cultural differences, space, agency, equality, and above all identity or personhood – the concept underpinning all asylum claims in relation to credibility and the question: Are you *really* gay (or lesbian, bisexual, transgender)? Identification of these themes helps us to understand that, while SOGI asylum claimants have much in common and are often homogenised as a group, they have individual, distinct experiences and perspectives that cannot be overlooked. So, while necessarily identifying commonalities in our work based on the shared characteristics that people possess, and which are the focus for the protection they claim as well as the discrimination they undergo, we return to identity and identities throughout these volumes as a way of humanising the ‘queer refugee’.

To conclude, the theoretical mix of human rights, feminism and queer theories constitutes the lens through which we will analyse our fieldwork and the parameters against which we will assess the asylum systems under comparison, including the following specific insights:

- Human rights are critical in facilitating an interpretation of the Refugee Convention that is grounded in the idea of human rights in light of the ideal category of ‘inclusiveness’ and through an anti-stereotyping approach, which requires individualised assessment and solutions to avoid the continuing marginalisation and inequality affecting SOGI minorities in the refugee context.
- From feminism, we take a recognition of ‘culture’ as a problematic term in its current usage. We critique essentialist frameworks that fail to recognise the different facets of asylum claimants’ identities and we also interrogate agency, the individual agency and potential for agency, of all ‘actors’ in the SOGI asylum field.
- Queer theories inform our understanding of the fluidity of sexuality and gender (and by implication, of other identities such as ‘refugee’), and from queer geography we take our questioning of location and space in its broadest sense as critical to LGBTIQ+ asylum experiences, ensuring asylum systems recognise the fluidity of sexuality and gender, and are mindful of how refugeeness affects people’s legal and social experiences.

As a necessary caveat, we recognise that it would be naïve to argue that blending aspects of human rights, feminism and queer theories can fully explain and address the injustices of SOGI asylum in Europe. Indeed, it might be argued that it takes us down a narrow neoliberal path that ‘solves’ SOGI asylum only for those willing and able to transform themselves to fit the Western individual consumer-citizen model, or its LGBTIQ+ alter ego. Writers such as Kapur and Otto (Kapur 2018; Otto 2017) address whether feminist and queer politics benefit from deploying human rights or rather lose their radical, questioning and liberatory edge. Put simply, does extending human rights to women and gay people merely extend patriarchal and

heteronormative entitlements and values to some Others – putting women in the boardroom, letting lesbians marry, granting asylum to the right kind of ‘gay’ – while leaving racism, misogyny, heteronormativity and neoliberalism fundamentally intact? Our answer is both theoretical and practical: a single-lens approach to the ‘problem’ of SOGI asylum leaves many questions unanswered and, more importantly, is not able to address the injustices in current European approaches to SOGI claims. Our argument is that, without dismantling existing asylum frameworks, there are incremental improvements to be made for SOGI minorities by looking to a wider range of knowledge sources, of which human rights, feminism and queer theories appear to us as the most helpful.

We will return to these critical parameters and lenses throughout these volumes and in particular in Chaps. 10 and 11, where we consider how they help (theoretically) to improve our understanding of the European SOGI asylum panorama and (practically) to inform our recommendations.

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**Part II**  
**The Legal and Social Experiences of SOGI**  
**Asylum Claimants and Refugees**

# 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,<sup>1</sup> the UK has remained only bound by the 2003 Reception Directive, 2004 Qualification Directive and 2005 Procedures Directive.<sup>2</sup> 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

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

<sup>2</sup>Council 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).<sup>3</sup> 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,<sup>4</sup> 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

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<sup>3</sup> 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).

<sup>4</sup> 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 UKLIG 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,<sup>5</sup> 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;

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<sup>5</sup> <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,<sup>6</sup> 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,<sup>7</sup> but introduced same-sex marriage and adoption rights in 2017.<sup>8</sup> Despite still lagging behind most other Western European countries, Italy eventually also adopted an act on same-sex civil unions in 2016.<sup>9</sup> 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.<sup>10</sup>

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.

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<sup>6</sup> Council 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.

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

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

<sup>9</sup> Law no. 76, 20 May 2016.

<sup>10</sup> See, 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,<sup>11</sup> and could remain married when choosing to undergo sex reassignment surgery.<sup>12</sup> Germany again stands somewhere in the middle, with the rights of people undergoing sex reassignment being regulated since 1980,<sup>13</sup> 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.<sup>14</sup>

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,<sup>15</sup> 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,<sup>16</sup> 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

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<sup>11</sup> See, among others, Tribunal of Rovereto, judgment no. 194, 3 May 2013.

<sup>12</sup> Constitutional Court, judgment no. 170, 11 June 2014.

<sup>13</sup> 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.

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

<sup>15</sup> 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.

<sup>16</sup> 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).<sup>17</sup> 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

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<sup>17</sup>An English version of the Asylum Act is available online: [https://www.gesetze-im-internet.de/englisch\\_asylvfg/index.html](https://www.gesetze-im-internet.de/englisch_asylvfg/index.html).

that asylum can be granted directly on the basis of this constitutional norm,<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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

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

<sup>19</sup>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).

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

<sup>21</sup><http://www.bamf.de>.

<sup>22</sup>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/dipartimento/dipartimento-liberta-civili-e-immigrazione/commissione-nazionale-diritto-asilo](http://www.interno.gov.it/it/ministero/dipartimento/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.<sup>23</sup> 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

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<sup>23</sup>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 69<sup>th</sup> 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.<sup>24</sup>

#### 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,<sup>25</sup> 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’, ‘incurable’ 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

<sup>24</sup> 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/>.

<sup>25</sup> 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.<sup>26</sup>

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).<sup>27</sup>

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.<sup>28</sup> 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,<sup>29</sup> with the same approach subsequently being applied to SOGI asylum claims.<sup>30</sup>

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,

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<sup>26</sup> 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).

<sup>27</sup> 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/>.

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

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

<sup>30</sup> 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).<sup>31</sup> 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.<sup>32</sup>

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

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<sup>31</sup> 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).

<sup>32</sup> 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.<sup>33</sup> 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-

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<sup>33</sup><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.<sup>34</sup>

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

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<sup>34</sup>This 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.<sup>35</sup> Yet, this seems to happen rarely: none of the SOGI

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<sup>35</sup>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.<sup>36</sup> 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.<sup>37</sup> 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

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

<sup>37</sup>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’,<sup>38</sup> 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).<sup>39</sup> 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

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<sup>38</sup>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).

<sup>39</sup>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.<sup>40</sup>

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

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<sup>40</sup>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.<sup>41</sup> 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,<sup>42</sup> ‘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.<sup>43</sup> 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 benefiting 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

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

<sup>42</sup> 5 August 2016, Federal Law Gazette I, no. 39, p. 1939.

<sup>43</sup> 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.<sup>44</sup> 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

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<sup>44</sup>With 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’.<sup>45</sup> ‘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.<sup>46</sup> 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

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<sup>45</sup> 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).

<sup>46</sup> 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.<sup>47</sup> 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.

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<sup>47</sup>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).<sup>48</sup> 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:

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<sup>48</sup>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.<sup>49</sup> 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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<sup>49</sup> [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/](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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# Chapter 5

## Life in the Countries of Origin, Departure and Travel Towards Europe



*I was living but not really living, I had no taste of anything. I had no life.*

(Sandra, Germany)

*We should help these people to create a vocabulary, their vocabulary. They have never narrated themselves.*

(Valentina, social worker, Italy)

*When I was in my own country, I don't know about asylum but the intention is to be free, to be safe.*

(Ophelie, focus group no. 2, Glasgow, UK)

### 5.1 Introduction

According to the United Nations (UN), at least 258 million people are moving across countries around the globe, consciously or unconsciously, in search of a safe and dignified life (IOM 2019; UN 2017). The international attempt to regulate these movements through the so-called Compacts seems unlikely to provide effective solutions.<sup>1</sup> Often criticised as being non-binding instruments but with great potential in shaping states' future behaviour (Türk 2018), the Compacts are not explicit in including SOGI minorities in the measures to be adopted through international cooperation for improving the management of migration and refugee flows, while respecting their human rights. It is noticeable that objective no. 7 ('Address and reduce vulnerabilities in migration') of the Global Compact related to migration refers to 'victims of violence, including sexual and gender-based violence (...) [and] persons who are discriminated against on any basis' as examples of

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<sup>1</sup> UN General Assembly, *Global Compact for Safe Orderly and Regular Migration*, adopted at the seventy-third session, 19 December 2018; *Global Compact on Refugees*, adopted at the seventy-third session, 17 December 2018, A/RES/73/151. The Compacts follow the adoption of the *New York Declaration for Refugees and Migrants*, adopted at the seventy-first session, 19 September 2016, A/RES/71/1.

vulnerable groups and, more generally, advances the development of gender-responsive migration policies (Atak et al. 2018). Equally, the Global Compact on Refugees pays attention in all fields to ‘sexual and gender-based violence’, while calling upon states to strengthen international efforts to prevent and combat it (paras. 5, 13, 51, 57, 59, 72 and 75). Yet, although this wording may be inclusive of SOGI, the Compacts avoided any specific reference or commitment in relation either to migrants who identify themselves as LGBTIQ+ or to SOGI claimants, perhaps owing to the need for the widest possible consensus among UN member states to secure the Compacts’ adoption. This represents a missed opportunity to raise awareness of SOGI asylum claimants’ needs at the universal level and speed up multilateral solutions to the movements across countries of people fleeing homophobia and transphobia.

Yet, as Victor Madrigal-Borloz stated, for many SOGI claimants ‘the trauma and persecution start well before their actual flight to safety’, while ‘the journey to safety can prove particularly treacherous [because these claimants] continue to face prejudice and violence in countries of transit and host countries’ (UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity 2019). Therefore, he called upon states to grant ‘safe settings’ well before the asylum process starts in the receiving country, in order to cover also their often long-term travels and stays in transit countries. This opinion is also shared by some European policy-makers. As Terry, a member of the European Parliament, explained:

Very often we start looking at a process of fleeing when the person arrives in the European Union but, actually (...) there is a long process before that. And the question would be, how can we actually make sure that people get legal entry ways that don’t include (...) being on the road for weeks or even months in very vulnerable situations?

Significantly, SOGI claimants also perceive us to be experiencing a particular historical moment. According to Diana (Germany), ‘the refugee concept has changed a bit from seven years ago (...) we did not have a refugee crisis like now’.

For these reasons, this chapter aims to analyse the complex situation faced by SOGI claimants before they leave their countries of origin, during their travel to, and arrival in Europe. Considering the paucity of studies in this specific area of SOGI asylum (Danisi 2018; Piwowarczyk et al. 2017; Winton 2019), and the fact that these are often country specific (Munir 2019; Odlum 2019) rather than addressing the multinational journeys that occur, this chapter also explores the implications of these journeys for SOGI claimants’ experiences with the asylum process. As Chiara, a psychotherapist who works with migrants arriving in Italy through the Mediterranean Sea, explained, the experiences of SOGI asylum claimants are complex, and besides the abuses suffered in their home countries, their travels are also ‘a synonym of violence and ill-treatment’. The reception systems in Europe, which should provide appropriate support at arrival, are instead the cause of additional trauma.

As context for understanding SOGI claimants' subsequent experiences in Germany, Italy and UK, this chapter first looks at their lives in their countries of origin, including their social experiences and family relations, and, through these lenses, at the treatment reserved to SOGI minorities in those countries (Sect. 5.2). Recognition of the importance of these aspects of life in countries of origin may facilitate subsequent analysis of how SOGI asylum claims are assessed and whether or not claimants' personhood is respected by European decision-makers (Chap. 7). Second, by questioning the lack of alternatives to asylum, including the possibility of obtaining humanitarian visas under IRL and IHRL, this chapter considers whether SOGI claimants are aware of the possibility of claiming international protection in Europe on the basis of their fear of persecution on SOGI grounds and whether their travel routes are consciously chosen. The travel experience is also investigated, in an attempt to analyse whether and how it influences the subsequent asylum application and wellbeing in host countries. Third, by exploring the procedures upon arrival in Europe, this chapter verifies whether or not host countries provide the 'safe settings' advocated by the UN SOGI Independent Expert (Sect. 5.3). These settings include, at the very least, the existence of effective means for informing claimants about the possibility of seeking asylum on SOGI grounds, as well as an assessment of the protection needs of each individual (Sect. 5.4). Some provisional concluding remarks are provided in Sect. 5.5.

## 5.2 Life in the Countries of Origin

While often disregarded in SOGI asylum analyses, understanding the life experiences of people claiming asylum on SOGI grounds *beyond* persecution is essential to the intersectional and integrated approach advanced in our theoretical and analytical frameworks (Chap. 3). Focussing attention only on episode(s) potentially amounting to persecution risks ignoring not only fundamental aspects of claimants' personhood but, also, relevant data that may contribute to shaping fair asylum decision-making.

For this reason, we investigate: how SOGI claimants saw their lives before being forced to flee; what their social experiences were, including activism for SOGI equality; and what their perception was of how SOGI minorities are treated in their countries of origin. While a number of NGOs and international organisations have reported on the legal treatment of SOGI minorities (Ramón Mendos 2019), the insights of our participants on the social environment that determines the life experiences of SOGI claimants shed light on a largely unexplored area. Here, we offer, through SOGI claimants' lenses, an analysis of these pre-departure experiences.

### 5.2.1 ‘Ordinary’ Lives

It is often assumed that SOGI claimants left a life of absolute misery for a life of absolute freedom. Yet, such an assumption reflects an over-simplistic paradigm of persecutory and protective countries. In fact, experiences are far more nuanced.

One of the recurrent feelings shared by people claiming asylum on SOGI grounds appears to be the sense of frustration at having been forced to leave their ‘ordinary lives’, including everything they had built up over the course of their lifetime. This includes family, social and love relationships, as well as employment, all aspects of one’s private and public life protected by IHRL (for example, Article 17 ICCPR or Article 8 ECHR). As a result, against all sort of related stereotypes still popular among decision-makers (Chaps. 6 and 7), SOGI claimants do not always show a total rejection of their countries of origin (Giametta 2016, p. 68). At the same time, feelings of disempowerment may shape their individual experiences after arriving in Europe, as we will see across these volumes.

The case of Alphaeus (Germany) is illustrative: ‘I was an engineer before in my country. I had my own company, a construction company. And unfortunately that all ended like that’. A similar experience was shared by Sandra (Germany):

In my country I worked, before everything went bad, I worked, so I had my own place, my own space. Yes, I understand people flee for different reasons. Some lose their parents, some lose their families but, at the end of the day, you lose something. I had all this (...) I had plans for my life, I had goals to achieve, and things were really going the way that I had planned. And I was there and seeing my friends, being happy (...) in my country we buy land, pieces of land and build houses. [Now] I’m like... I felt like a failure.

Kamel (Italy) shared similar feelings: ‘I left a family, my job, my house, my friends, my lover... I left many things. I left a country’. Equally, Kennedy (Italy) stressed: ‘If they can amend the laws tomorrow, I will be among the first person to... voluntarily to go, because before I left, I was still having a life’. As Ibrahim (Germany) reiterated: ‘Despite the stress, I did have a structure and community and I didn’t want to leave all of this behind’. Alphaeus concluded: ‘If I’m told Uganda is better [in terms of LGBTIQ+ rights], I go back to my country because I had a life’.

This sense of loss and disempowerment, which has clear consequences also for integration in the host country (Chaps. 8 and 9), is expressed well by Marhoon:

I’ve worked in Oman for ten years, so that the retirement money that I’ve paid from my own money has been lost. Ten years! I will not have it here in Germany. (...) Are they going to employ someone who’s 24 or someone who’s like me [much older]? Will I have a senior position like I used to have in Oman? (...) I have all these questions and all this confusion.

The only solution remains the one indicated by Milad (Germany): ‘I had to start from scratch. Building zero. It was really difficult’.

These accounts of positive experiences, relationships and achievements in claimants’ lives in their countries of origin need to be balanced by experiences of discrimination, abuse and forced concealment of their SOGI. In this respect, Ibrahim (Germany) remembered:

I stayed in a Lebanon jail for five years. (...) My family had an idea – if we put him in jail away, jail makes boys into men and people will forget his issues, that he is a sissy boy (...). And they made for me a case of drugs, just to put me away.

Bella (Italy) also evoked how her life changed when some people found her with another woman:

They started blackmailing me to bring money (...) so that they will not take you to the police. (...) Before escaping, I was paying but I could not [do it anymore] because I was the one taking care of my child.

Similarly, Lutfor (UK) explained:

I tried my best, to stay in Bangladesh. (...) It is your country, you can speak to them and (...) I had a very good result [in] school, college so, if I could hide my sexuality, if I didn't come out, I could go [to a] top level job, government job. I had to give up.

In these environments, the ability to express one's personhood is seriously restricted. In this respect, Marhoon (Germany) explained his experience as an exception:

I was very comfortable with my sexuality since I was 19, so even on dating apps I would use my face, which was very rare in Oman. Most people don't use... I didn't lead a double life, I didn't have a wife or kids. Most guys did in Oman.

Equally, according to Milad (Germany):

We met in some secret places that we only know each other. We also had the apps (...). But was not public. Was always private. (...) with friends drinking tea, drinking coffee, talk, go for a walk (...) to the cinema. [But] I was always careful.

Kennedy (Italy) recalled how having a relationship is nevertheless possible in these difficult circumstances:

We fell in love, year 2008. So we were together, although it was secret, strictly secret, nobody knows about our relationship. But the reason why we have the greatest opportunity [is] that I have my own house, so he normally comes, he comes, he sleeps any time he likes.

Yet, an ambivalence between a desire for the lost country and the realisation of things SOGI claimants can enjoy in Europe also emerges powerfully, especially when religion plays a key role in shaping oppressive social environments. As the experience of Meggs (UK) shows:

Zimbabwe is a very Christian country, so homosexuality is just a sin. (...) you grew up knowing that (...) you are not supposed to do it and you are still trying to find yourself (...) and say "this is who I am". (...) Regardless of the economy and everything (...) sometimes I wish I was home. I love, I love Zimbabwe (...) I am only seeing it now that it was really bad. But, I just grew up knowing that if I have got tea morning, if I have lunch and I have dinner in the evening, that is all, so to me that is how it used to work and it never used to bother me.

This does not mean that SOGI claimants are always able to exercise greater freedom after they arrive in Europe. As Fares explained in relation to his fellow nationals:

I don't have a lot of friends from Syria here in Germany. Not all the Syrian gays came out and say that we are gays, they're still in the closet. Here in Germany, there are a lot of

people from Syria, so we cannot come out directly. [But] You should be proud of yourself, because every time when I was in the closet, I was thinking “oh my God, I’m ashamed, I’m something bad”, [and] I prayed to God to change my life, or to be straight.

People who were involved in activism before fleeing their country experienced additional difficulties. In fact, despite the restrictions they faced in their countries of origin, many people fleeing homophobia and transphobia described their activism in Nigeria, Malaysia, Oman, Egypt and Zimbabwe, to give a few examples. Interestingly, the term ‘activism’ acquires a broad meaning in similar contexts, because it is not restricted to the political dimension.

For Marhoon (Germany), activism meant ‘gather[ing] people in private spaces (...) because [Oman is] a segregated society (...) and [I] like[d] to build a community’. Most of the time, the willingness to campaign for certain social issues was hampered by the fear of making one’s SOGI public. In fact, Kennedy (Italy) reported:

We [were] thinking what could we do to stop the massive killing (...) of the homosexual people in Nigeria? [We wanted] to sensitise the people (...) we came out not to say “we are gay”, but we [came] out, you know, to tell the public that they should stop killing.

Besides the fact that open activism in relation to LGBTIQ+ issues was rare, attempts to register or formally establish associations often failed. Amber (UK), fleeing Malaysia, said:

We can’t explicitly say we are campaigning for LGBT rights, otherwise we will get into trouble. [We tried] to register our organisation with the Home Ministry (...) but we were never granted status, even after appealing. So our resources are limited with no funding.

As Ximena (UK) also confirmed, the price to pay for carrying out such activities extends from threats to one’s safety to the need to flee the country.

This kind of involvement with SOGI activism may have a positive impact on asylum decision-making. As Louis, a volunteer from Rainbow Refugees Frankfurt in Germany, suggests, experiences of activism in the country of origin may speed up the evaluation process, while in their absence ‘it takes much longer’. Moreover, according to Roberto, a decision-maker in Italy, activism in fields other than LGBTIQ+ campaigns may also be relevant for granting refugee status on SOGI grounds if the activities attract ‘a certain visibility’. This is also relevant for countries where no laws criminalising same-sex acts are in force, such as Eastern European countries, where ‘social’ persecution may, nevertheless, be prevalent, as well as for the use of other grounds beyond PSG during the evaluation of the asylum request. While we will return to this matter in Chap. 7, data related to the treatment of SOGI minorities in countries of origin are particularly rich and deserve specific investigation.

### 5.2.2 *Treatment of SOGI Minorities in Countries of Origin*

To this day, approximately 75 countries still have in force legislation criminalising non-heterosexual and non-cisgender identities and/or behaviours (Ramón Mendos 2019). This information alone, however, does not reflect what living in one of these countries means to SOGI claimants. The effect of such a legislation on claimants' lives may vary to a significant extent. To use the words of Ibrahim (Germany), fleeing Lebanon:

I have my scars, I have hospital reports, I have everything with me, that I faced violence, discrimination and so on. But not all LGBT people face violence. Maybe, people just flee because they want to live a decent life, they want to live life with love, to love what they want, to live their true identity.

With this in mind, the perspectives on the social environment in their countries of origin that SOGI claimants shared were enlightening. To illustrate the range of treatment suffered by SOGI minorities worldwide, an analysis per country of origin, which is connected by claimants' experiences, is appropriate at this point.

Starting with participants from Africa, Rosette (Germany), fleeing Uganda, explained how pervasive homophobia is across different life spheres in her country of origin:

We were disqualified from that school [after I was found being intimate with another girl] and then my parents were really mad about me and (...) I was transferred to my uncle's place. (...) My mother said that she doesn't want to know what I am, who I am, whatever. She didn't even take time for me to explain how I feel. (...) But when the [uncle's] wife also realised why I was disqualified from school, then he [the uncle] also turned blue, he really did not want me to associate with (...) their kids. (...) One day my mother came and said "now we have to go back to town". I was happy [but] what I didn't know was that she was going to force me to marry. (...) I was so frustrated, very frustrated, and I felt like dying but I could not kill myself. (...) All that time I stayed together with that man, it was as if he was raping me. I was married for 18 years. (...) In Uganda you can't survive. (...) They will say no, how? Why? You have a demon, they believe that if they put a sword on you and cut, bleeding you, that the demon is getting out, that's what they believe.

Alphaeus (Germany), also fleeing Uganda, confirmed this by stating that '[t]he time I left, it was a terrible time where many gay people were castrated, many gay people were being beaten badly'. William (Germany) had a similar view:

Uganda is a country where the police and the government and the law are so strict and they cannot allow it. Then you talk about the people and their culture. [They] cannot allow that to happen. Never. Never! You cannot even talk about it.

According to Aisha (Germany), in Uganda:

We are not taken as people who understand. Many people, they think we are mad, we are crazy (...) when they found out that I'm that, they take you like you are not a human being, you are not supposed to be with them together. They take you like they have to stone you to death.



Referring to Nigeria, Nelo (Italy) stated: ‘They look [at you] like an animal, so they describe this thing [like] you are an abomination to the land’. Patti (UK), fleeing the same country, stressed:

When you talk about it, some of the family, they kill the person because they think that that is a shame to the family, if other people got to know about it. Or, one demon has possessed this family, or they are a cursed family (...) and no one will want to associate with the person. Even me, as a hair stylist, and I am going to let people know about it, some of them won’t want me to touch their hair. They think “oh, she is possessed”. (...) So, I don’t know when that is going to come off from Black people’s head, it is like, no go area.

Silver (Italy), who explicitly refused to hide in Nigeria (‘I can’t say I’m not gay. I was born this way’), recalled that a friend suggested to him ‘If they see you, they understand that you are gay, so stay at home. (...) You can’t live in Abuja, because if they find who you are, you will be dead’.

Similar perceptions of the Nigerian social and cultural environment were shared by Tina (Germany), Kennedy (Italy) and Bella (Italy), among others. As Kennedy put it, ‘[if] you are gay or homosexual, lesbian, you are enemy to the state, and to the members of your family, to the members of the society’. Bella further explained:

Even if I am not a lesbian (...) they will say “no, she is a lesbian, you see her (...) she is following girls”. (...) Without seeing you as a lesbian, without maybe catching you doing it (...) everybody will hate you. Everybody will discriminate you, you know, look as if you are alone.

This degree of rejection may reach the level described by Momo (Italy), fleeing Senegal:

When they knew that I’m not a simple man, that I’m gay, no one wanted to see me again (...). Mums love their children. When children are gay, many mums try to protect them, but many others don’t. Some mums may even kill you in your room when they discover that you are gay.

Diarra (Italy), an asylum claimant from Mali, explained that, in his country, even for his mother life could become unbearable if people found out about his sexual orientation:

When they know that you are gay, they beat you with a cane to death. People say that our country is a Muslim country and homosexuals do not exist. They do not want [to] even hear that word. (...) Change these people’s mind, it is not easy.

Siri (Italy), from the Ivory Coast, explained in turn that in his country:

If people get to know that you are gay, you can be killed, because you can be stoned by some or be beaten with sticks by others, you’ll be struck, they will beat you up, while other[s] will film you for uploading your picture onto social networks, your face on social media.

Dev and Fred (Italy), who fled Cameroon, also referred to ‘popular justice’: ‘Homosexuality (...) is punished with a one year prison sentence by Cameroonian law and, above all, even with a condemnation to death by popular justice’. As Irma, who arrived in Germany from Cameroon, further explained:

Where I come from, they are looking at it, taboo. That you break the culture, you have given a shame to your whole family. (...) They will call the chiefs (...) of the village, they will follow protocol, kill you or send you to prison. Before then they can even isolate you from the village.

Alain A. (Italy), also fleeing Cameroon, stressed that homophobia is a cultural problem:

These people are treated like animals, they are treated like they are not human beings. (...) And you are an outcast in the society because first you lose your family, then you lose all the friends you have, and then everywhere you go in the society you are being haunted by the people because of your sexual orientation. So, at times so many people don't even get the chance to experience their life or to try to, like, discover who they really are because of the society. So, being homosexual or having sexual orientation problem in Africa in general, and again my country, is very, very, very, very horrible. (...) And if somebody kills you because you are homosexual, the person is not penalised. (...) It is not about the government accepting, it is about the population. The government can say "yes, we support same-sex marriage", but you will still face torment and the people don't want, the problem is the people, cultural, Africa is like so hooked up to culture and religion.

Finally, according to Martin (UK), the Cameroonian police takes a particular and negative approach towards SOGI minorities:

They look at it like it is abnormal, it is a witchcraft, you are just like practising something, you know what I mean, you are in a cult which you do that to kill other people, so they look at you like a threat for them. (...) You might be rescued by the police. But they will take you to prison, and you have no right to a lawyer to talk to, you have no right to people to talk to, and the police themselves they are part of the population. They have the same feeling, they have the same belief, the people who are supposed to protect you, they will be the one basically hitting you, oh my God, I don't want to talk about it, hopefully you don't get raped there.

In contrast, Amadin (UK) reported some differences between the behaviours of the authorities and the population in Benin:

The law punishes when you act. (...) As you are gay or lesbian, they don't bother who you are. (...) So, in Benin the problem is the community. (...) If, like, two men kiss in the street, the community can get beating (...). And some time when they call the police to say the police must come, the police say they cannot waste their time to come. But sometime they can come and they come to lock you.

Experiences in Malawi have similarities with those in the countries already mentioned. Stephina (UK) described the situation in her country of origin stressing that the information available in the UK about Malawi does not correspond to social reality:

In my country, they said, people are no longer put into prison and nobody is taken into custody. [But] my worry is if the community decides so (...) the government is not going to come to my rescue. (...) Recently there were so many reports of people being killed, like, there were videos everywhere of people being stoned by communities, because they are suspected that they are blood suckers. (...) Even the president says we are like dogs that eat our own vomit. So, the law would say one thing, but the reality is another.

Buba (Italy), from the Gambia, confirmed that, despite public announcements, nothing had changed in practice with the new President coming into post. Diamond

(UK) also referred to Tanzania as a society that is particularly homophobic and homophobia remains unpunished:

It is very illegal. (...) They will just start beating you. They might even kill you. And they don't have anything for them to... go and complain or nothing. Because if you go and complain to police, they will torture you. (...) Even the family, family, people, anybody, nobody will give you support. (...) Because government itself, the president at the moment, he said that gay are like a cow, he has already mentioned us in the category of animals.

As Sandra (Germany), also fleeing Tanzania, confirmed:

They will just start chasing you with stones and calling you a thief or someone will just say "a thief!", then everyone comes chasing you, they beat you, then they take tyres, put them around you, put some petrol over them and then light you openly on the street.

Similar patterns of social intolerance towards SOGI minorities were expressed in relation to Zimbabwe: '[t]hey are a strict Christian country, they don't accept that. And it is not only the government, it is the community' (Meggs, UK).

Pointing out the impact of well-reported homophobic events involving SOGI minorities, Ibrahim A. (UK) from Egypt explained that the absence of a law criminalising homosexuality does not ensure better treatment for SOGI minorities in Egypt:

There is a continuous LGBT crackdown from the government since 2013, after the military coup. (...) There is no law that criminalises homosexuality but... we have the combatting prostituting and debauchery law, so the government applies the article of this law on homosexuals.

Moreover, new technologies are actively used to identify members of SOGI minorities:

The internet revolution and the online platforms [were] somehow a way for LGBT community to communicate with each other. And it also start[ed] a new age of... criminalisation for LGBT. Because even the government was using the same platform to start to entrap gays and transgenders and take their activity online as an evidence even for their sexual orientation (Ibrahim A., UK).

Selim (UK) further explained this trend in Egypt (as well as in Dubai, where he lived for a few years):

I have seen a lot of my friends getting killed and that is on daily basis (...). People disappear. (...) And, I don't even know how many times we used to switch off our phones right after, you know, someone has disappeared, one of the group disappears and that for us means is arrested, they are going to go through his phone and they are going to try and find us as well. So we just switch our phones off, we disappear for months. (...) Grindr on his phone, he is chatting to this guy for a while now and then finally they decided to go and meet, he goes to meet him and it was just the police.

Finally, Shany (Germany) stressed the total denial of their existence experienced by SOGI minorities in Morocco:

The idea is lesbian or gay, it is a taboo (...) you go to the jail. (...) It's a big crime, it's a scandal. (...) You give no respect to the society because there is no lesbians and gays, they don't know this word. It's forbidden, it's not in the society.

Moving toward the Middle East, accounts of violence and abuses, including by family, were also given about Iraq and Syria. Fares (Germany) remembered that, in Iraq, one of his friends was beaten very badly by his parents when they found out about his sexual orientation and they stopped feeding him, as they considered his sexuality to be a shame for the family. Fares also emphasised the role played by religion in determining SOGI minorities' lives in Syria:

In Syria, in the school we study the Koran. We should study that. They start to put in our mind LGBT or gays, LGBT community are something bad, they will go to hell and these things. And you shouldn't do that, and do this. (...) I thought that I'm totally alone in this world.

Diana (Germany), instead, pointed out the 'multifaceted' approach in Iran towards SOGI minorities:

If someone is obviously gay or lesbian or something like that, it can turn into jail and then kill – so not be alive anymore. But that's also different levels. (...) And of course that's from the person who is [sexually] passive, that's killing. When [penetrative] active person is different. (...) Only transsexuality is acceptable – that is legal. (...) Many gay and lesbian people as trans also do these operations. Because they think if they change the sex, that would be better to live in Iran. (...) That is only legal. Socially, of course, that's taboo.

SOGI claimants from other regions, like Eastern Europe, Asia and the Caribbean, shared analogous difficulties and ill-treatment, whether or not criminalising laws are still in force in their country of origin. A few examples are illustrative. Referring to Russia, which is a member of the Council of Europe and ratified the ECHR, Veronica (Germany) explained: 'Other people are allowed to behave aggressively and say and beat, bad words, so openly, because they see what comes from the state. (...) That's hard to really live openly in Russia. And for men, I mean, worse'. Similarly, Prince Emrah (Germany) explained in relation to Turkmenistan:

If I go to Turkmenistan, they will take me to jail again. (...) You cannot be openly manly, you cannot be openly feminine. You cannot go to the clubs as gay. When they see you, they catch you (...) they give you four years, five years to sit in the jail.

The persistence of 'cultural' beliefs about SOGI minorities was stressed by Sadia (UK) with reference to Malaysia: 'My uncle think it was the devil coming inside my body'. Such accounts confirm the strong influence that religion plays in that country in this respect. In fact:

[They] do have laws that specifically legislate to curb LGBT people and its "lifestyle", especially Sharia law, because Malaysian society is predominantly Muslim and Malaysia made Islam as the official religion in its constitution. (...) Especially if you are trans, there is a specific Sharia law against cross-dressing in every 13 states, basically saying if you are caught dressing up as the opposite sex and doing immoral acts (loose term for prostitution), you can be prosecuted. And in three states it just simply stated that you can be prosecuted if you step out of the house while presenting as the opposite sex or crossdressing. And for gays or lesbians, who might be presenting too femme or butch respectively, they could be approached by self-righteous "religious police" offering unsolicited advice to return to the right path (Amber, UK).

Jamaica is another case in point. Angel (Germany) explained that:

The church uses the buggery law against every member of the LGBT community. (...) It's embedded in your mind from when you're a child that lesbians must die, gay men must die. And they don't say lesbians, they say "sodomite". They don't say gay men, they say "batty man". (...) I've had partners that I've had to tell people that she's my cousin. (...) You can't be a transgender in Jamaica, because a man can't put on a woman's clothes (...) you will die by the time you step through your door. Your neighbour will kill you. (...) When straight heterosexual people kill them, and no police is investigating, and on top of that the parents are not going to claim the body and bury it.

As Trudy Ann (Germany), also from Jamaica, summarised: 'As a man you can never be girly, you have to tug that out because you would be like dead meat'.

The pervasive legal and social homophobia and transphobia evident in these claimants' experiences throws doubt on the possibility of improving SOGI minorities' enjoyment of human rights through law alone, including by undertaking international commitments. A more encompassing cultural and social 'revolution' seems necessary. South African experience confirms this difficulty (Cammaing 2018, 2019). As Junio (UK) explained:

There are different ways that they are treated. Firstly, they are met with the stigma of the community, even though there is a constitution that supports LGBT people. (...) LGBT people in South Africa have a difficulty to express themselves (...) they can't because of the community and the traditional leaders. (...) Then there is corrective rape that unleashes from the community to LGBT people and access to healthcare is very limited, jobs as well. (...) The police is not really doing much. (...) So, most cases go unreported for the sake of that fear.

The overall implications of past abuses and discrimination on the 'new' life in Europe are evident in a Syrian claimant's words:

[I]t was hard [to get used to life in Germany]. Because I saw the culture, it was a shock for me because in Syria we can't do anything, we cannot do anything to hang out, to kiss a guy or to hold his hand on the street. (...) Because if you do that you will go to the jail or the community will judge you. It's going to be really horrible (Fares, Germany).

Indeed, the habit of living one's SOGI in the 'closet' to avoid persecution makes living in a more open environment difficult at first. In sum, for many SOGI minorities, it was the social and cultural environment of their countries of origin, as much as the law, that made life intolerable. As Just Me (focus group no. 3, northern Italy) expressed very clearly, '[s]ome people live with that fear every day in Africa, day to day. It is always their secret, always afraid for people not to know about your sexual identity'. When the need to flee becomes overwhelming, new challenges lie ahead, as the next section explores.

### 5.3 'It Suddenly Happened'

The previous section has shown why, while some aspects of people's lives may be relatively satisfactory, the constant presence of homophobia and transphobia forces individuals to leave their country of origin. Yet, the decision to leave is rarely

followed by an easy process of departure and travel towards a 'safe haven'. The main obstacle is the general lack of legal channels for escape, including to European countries, which forces claimants to find alternative solutions rather than use direct, safe and legally recognised pathways. As anticipated in Chap. 4, even legal channels such as family reunification are often not an option for SOGI claimants (Del Guercio 2018) owing to a still widespread heteronormative reading of the notion of family, which contrasts with our theoretical framework (Chap. 3).

The current extent of territorial and extraterritorial control of state borders, particularly those of the EU, means that it is increasingly difficult to reach a safer country in order to lodge an asylum application. This is not a new phenomenon, as historical analyses have confirmed (Scott FitzGerald 2019), in light of states' 'undeniable sovereign right to control aliens' entry into and residence in their territory'.<sup>2</sup> By applying an 'embodied border paradigm' in relation to EU migration and asylum law, Violeta Moreno-Lax demonstrates how external borders, set up at the European level inside and beyond the EU to exercise this sovereign right, now constrain all migrants (Moreno-Lax 2018). People seeking asylum, including SOGI minorities, are prevented from reaching Europe through the deployment of a variety of legal and institutional mechanisms and enforcement controls, not only at European borders but also in transit countries. In sum, these macro-level factors may suggest that European countries are primarily implementing their Refugee Convention-related obligations by pursuing their own internal interests, thus stretching the exclusionary rationale embodied in that Convention (Chap. 3) rather than adopting a human rights-based approach.

The international legal framework leaves states with significant room for discretion in this field. Doubts have been raised about whether IHRL includes an obligation to issue humanitarian visas, thus granting people who are in need of international protection a 'safe passage' to destination countries, even before the formal submission of an asylum application (Danisi 2019). Despite the fact that every individual, regardless of nationality, is entitled to enjoy certain human rights and freedoms, human rights treaties apply only 'within the jurisdiction' of contracting states. Unless the notion of 'jurisdiction' is framed along the lines of more progressive models based, for instance, on the impact of decisions refusing 'safe passage' in order to claim asylum,<sup>3</sup> human rights play a limited role, mainly through the principle of non-refoulement or procedural obligations once the asylum application is already submitted at the borders of the destination country or within its territory.<sup>4</sup> An obligation to issue humanitarian visas cannot be established under EU law either, as the CJEU found in *X and X*.<sup>5</sup>

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<sup>2</sup>Taking into account the ECHR, for instance *Saadi v. UK*, Application no. 13229/03, Grand Chamber, 29 January 2008, para. 63.

<sup>3</sup>HRC, General Comment no. 36, 2018, paras. 5–7. For an analysis of this model, see Danisi (2019).

<sup>4</sup>For example, when a European country has control over a claimant's life, such as on high seas: *Hirsi and Others v. Italy*, Application no. 27765/09, 23 February 2012.

<sup>5</sup>Case C-638/16 PPU, *X and X*, 7 March 2017, ECLI:EU:C:2017:173, para. 51.

For people fleeing homophobia and transphobia, as for many others, such an obligation to issue humanitarian visas would help avoid the additional layers of violence and abuse that this section, through the personal accounts of SOGI claimants, explores. It should be noted, however, that it may be easier to cross European borders when exceptional situations arise, putting specific groups in a position of relative advantage for reasons unrelated to SOGI but that, nonetheless, may have a positive effect on people belonging to SOGI minorities. This was the case of Ibrahim (Germany): whereas humanitarian visas were issued for some people following the war in Syria, Ibrahim was not Syrian and was denied a visa in European embassies in Lebanon. Nonetheless, Ibrahim took the opportunity to escape homophobia and travelled to Germany via Turkey, Greece and Macedonia:

Since I was 17, 18, I always had the dream to live in Europe, because I saw this parade on YouTube. (...) But I never believed that I would be here one day, until that day of what happened. In Syria, the war, the borders [were] opened. [H]ow should I come? I won't have a visa, I won't be able to come here. So, I guess sometimes war was positive for some people.

The same phenomenon occurred in Italy, where Anna, an LGBTIQ+ group volunteer, told us about the case of a bi-national couple where the Syrian partner in the relationship did not need to apply for asylum on SOGI grounds, as he had obtained international protection owing to war-related events in his country of origin. Similarly, the UK's Syrian Vulnerable Persons Resettlement Scheme (Chap. 4) takes people identified as vulnerable by the UNHCR, which may include individuals at risk owing to their SOGI.

Other useful mechanisms for protection are humanitarian corridors, which may have a general scope, as reported in Italy (for instance, Valentina, social worker) or may consist of more limited initiatives devised for SOGI claimants with NGOs support (Angel, Germany). These scenarios, however, constitute exceptions to the experiences of most SOGI claimants, especially if compared to other national experiences like Canada's dedicated resettlement programme (House of Commons Canada 2017). In the following sub-sections, we explore the experiences of forced departures and travel, including the treatment suffered in transit countries.

### ***5.3.1 Forced Departures***

Our data show that, most of the time, neither the decision to flee a country nor the final destination are planned by SOGI claimants. More often than not, these follow unforeseen events. As Shany (Germany) put it, after a family member discovered her sexual orientation, '[a]ll my life I was working, I didn't have any, any kind of any problem... [Other people] plan their coming (...) all their lives. This is the difference between me and them (...): I didn't plan it'. Not surprisingly, she continued as follows: 'it was something like, "I have to do it, I have no way"'. (...) The life in my place [was] not possible anymore'. Equally, Selim (UK) explained:



[Asylum] is a term that never crossed my mind before. Like it was nothing, it was never planned. I had a good life, I had a good career. Lots of people wanted to be in my position, but I was always unsafe because (...) you wake up every morning in the Middle East and you draw this line on your face that you are straight, but you are not.

A similar experience was shared by Diana (Germany): '[T]he goal was simply to leave Iraq. So that was not a decision where or where to go'. The most common experience is expressed well by Jayne (UK): 'It wasn't anything to do with choices at that point, I was kind of desperate'.

Nonetheless, our data include some SOGI claimants in all countries under comparison who had planned their destination and journey. For instance, Janelle said: 'I chose to come to the UK. I did my research in terms of gender identity, the laws of the country, and it was my place of choice'. The same experience was shared by Tiffany (focus group no. 2, Glasgow) who explained: 'I escape[d] from home, to go to UK because I know in UK... people with sexuality to live freely and openly'. Still, as Kamel explained, decisions may not be entirely freely made: 'Italy was not my choice, not at all. I have gathered information on all countries of the world in relation to my situation, but the only place I found doable was Italy'. Even when planned, there is no guarantee that the chosen destination will be reached. For instance, Alphaeus explained: 'When I reached [Germany] I struggled still, because I wanted to proceed my journey, to continue to go to Finland. (...) But the police told me "you're not going anywhere"'. In turn, Sadia remembered: 'No, I [didn't] have any idea about UK, but my sister just [told] the agency [to] give [me] any place for just a safe place'. What she meant by 'the agency' was not, however, clarified.

These accounts lead us to what some participants referred to as the common story of many claimants claiming asylum on grounds of sexual orientation (for instance, Diego and Riccardo, LGBTIQ+ group volunteers, Italy). As reported, such recurring scenarios generally involve two people, the claimant and their partner, who are found in intimate or sexual circumstances in someone's home (or less commonly, at school or at work). What follows may be expressed in the words of William (Germany): 'I was naked and my partner was also naked. (...) They forcefully entered. (...) They started beating me, shouting "you are promoting homosexuality in our village". (...) They dragged me outside [and continued] beating [me]'. Often, what happened to the partner is unknown and, even where the police intervenes, such accounts commonly include arbitrary mistreatment, interrogation to identify other LGBTIQ+ people, eventual release from imprisonment (sometimes after the payment of bribes), and an immediate attempt to escape the country, which, by that time, seems the only possible solution. As always William explained: 'I could not go back to the village because I was now a vagabond, I was now an outcast'.

In these particular circumstances, the option of resorting to humanitarian visas, even if available, was deemed problematic by some participants. Fred (Italy) explained: '[For visas] you need to wait and wait. But when a person experiences a problem like the one we [SOGI minorities] have and apply for a visa, when will it be provided?' The same difficulty is expressed by Fido (focus group no. 4, northern Italy):

You know why people will not ask [a visa] from Nigeria, and come to Europe through flights or whatever (...)? Because when you are living your life, you don't have any problem, you would not think of going to Europe. (...) [T]he problem occurs immediately, no one out there would think "let me go to airport and go and prepare my visa and take flight", it is not possible when they are looking for you. The next opportunity is your road.

Our data also demonstrate the persistent and ongoing nature of persecution experiences in countries of origin before the final decision to flee. To use the words of Halim (Germany):

I had certain incidents and threats from the government (...). I used to dismiss those fears and threats for a long time. However, by the end of 2014, I felt I [was] no longer safe in Egypt, [because it became] increasingly dangerous, friends of mine [were] arrested.

In other cases, relatives and friends play a key role. Sandra (Germany) explained that:

I didn't know that I would be a refugee, but a friend of mine who is in France (...) he knew my problems, and he told me to leave the country (...) I had to quit my job, I had to quit everything and just not exist. (...) If it wasn't for him giving me a way out (...) I don't know, maybe I would still be living inside [my country].

When escaping persecution, protection is often sought and, sometimes, temporarily obtained through personal contacts or socio-economic connections in the country of origin, thus avoiding forced and immediate departure. A first example of this is provided by Sandra (Germany):

I had to move [to the house of my best friend's sister] because I knew that nobody would ever suspect me being there. She took me in because she lived maybe 15 years in the states. (...) She's a lot open minded, so for her it was ok, and that's where I stayed all this time.

A second experience was shared by Marhoon (Germany), who came from a privileged and well connected family in his country of origin:

When people see it [my name], immediately they change their attitude towards me. I'm respected automatically just because of my family name and title. I was caught once with a guy in a car kissing, having sex, not only kissing (...) by the police. I thought ok, I'm done, my family will disown me. (...) Then, once they saw my ID card, they said "ok, go home".

While these experiences are unusual, such 'private' and limited protection is immaterial for claiming and being granted international protection. In fact, the availability of a private, relatively safe environment, is no surrogate for state protection and does not reduce SOGI claimants' fear of persecution. In this respect, Sandra (Germany) herself pointed out that '[y]ou just wake up with a cancer. You don't plan to have it. So it's either you die or you survive from it'.

These experiences of forced departure are aggravated by the need to undertake dangerous routes, often with the involvement of smugglers and harsh treatment in transit countries – harsh treatment both for their 'refugeness' *and* as members of a SOGI minority, as our intersectional approach suggests (Chap. 3).

### 5.3.2 *Journey Experiences*

Travel experiences were described as extremely traumatic by professionals working directly with arrivals in Europe, in line with 'desperate journeys' of migrants already documented at Europe's borders (UNHCR 2019). For example, Susanna, a social worker in Italy, explained:

We are talking about extremely vulnerable people, not only because they are claiming asylum on sexual orientation grounds, but also because they have gone through such a tough journey that they arrive here with an intermingling of psychological issues, including sometimes a certain amount of apathy, as well as restraint in showing their inner feelings.

According to Susanna, these psychological problems may also be related to sexual abuse suffered in transit countries that, in turn, may cause diseases or infections: 'Belonging to sexual minorities is an additional factor that generates a higher level of vulnerability. (...) These claimants appear to be more subject to sexual exploitation (...) especially those who are not able to hide their sexual orientation'. She provided the example of two men who, after arriving in Libya, were sold and raped before attempting to cross the Mediterranean Sea. As a consequence of sexual exploitation, the sole survivor who eventually arrived in Italy discovered that he was infected with HIV in Libya.

While only a few people felt sufficiently comfortable or secure to talk openly about their journey to Europe, and we avoided pushing them to do so because of the risk of re-traumatisation (Chap. 2), our data show that travel experiences varied according to the destination country. Lacking space to recount in full these experiences, we note that whereas the journeys of those arriving in Germany and Italy often involved smugglers, a significant number of journeys to the UK seemed connected to trafficking. For instance, Daphne (UK) said:

I was brought here by somebody called (...) and he promised me to find me a job here. But, when we reach here (...), the job he offered me was prostitution. That is why I ran away from him and (...) I went to claim asylum.

Experiences of direct flights were reported most often by participants in the UK, and were rare for our participants in Italy. Sometimes, those were the result of a 'fortunate' chain of events. For instance, Halim (Germany) remembered:

I didn't want to really leave but because of the threats I felt I had to, and around that time I got invited to a conference in Berlin and that was my visa out of Egypt and into Europe. (...) Somehow, it ended up being Berlin without me really planning to be in Berlin.

In her turn, Shany arrived in Germany because her job involved travel in Europe, while Mary and Zaro used their sporting achievements to secure invitation letters and apply for short-term visas to the UK. Others, like Veronica and Julia (Germany), fleeing Russia, used tourist visas, and yet others, like Fares (Germany), fleeing Syria, resorted to a student visa. In short, due to the lack of any systematic means of safe passage to Europe, SOGI claimants who flee are forced to use a range of ways to reach Europe and, only on arrival, submit applications for international protection.

SOGI claimants in Germany and Italy had generally taken different routes, in line with more general migratory flows.<sup>6</sup> In both cases, however, they were exposed en route, along with other people in need of international protection, to experiences of violence, extortion and abuse, as well as additional isolation. As Prince Emrah (Germany) recalled, '[t]alking is so difficult, not sleeping, not eating anything, sleeping with I don't know how many people, not counting. And I'm alone from Turkmenistan to Turkey. (...) I [could not] tell my feelings'.

Most of our asylum claimant participants in Germany followed the Balkan route, entering Europe by land via Eastern European countries. The length of some journeys was notable. While Tina took seven months to arrive to Germany via Greece, Bebars recalled his four-week travel from Syria to Germany: he went from Syria to Lebanon, Turkey, Greece, then he crossed Macedonia and Austria by train, bus, and on foot before he arrived in Germany. Sometimes the journey took even longer, as for those SOGI claimants fleeing sub-Saharan countries. For instance, a claimant who travelled to Germany from Uganda via Turkey, explained in detail:

The best way was to go to Kakuma Camp (...) to seek for asylum in Kenya. (...) It's where I met fellow Ugandans who are also LGBT people. Some had been there for one week and they told me life was hard there, the camp was full. (...) I had to fly out of Kenya. I went to Turkey (...) I stayed on the streets for almost one week and a half. (...) Life was really hard. (...) There was a gay man that I came to know. He took me to his place. (...) He gave me another choice of life. [But] he started treating me badly, really, really badly. He could sometimes even send some guys to force me to have sex with them, (...) they raped me, forced me to have it. [After meeting two Syrian guys] we collected some small money. (...) So I ended up with these guys on the journey, on the same journey, on a small boat from Turkey to Greece, to a certain island in Greece. When we entered Greece (...) they welcomed us, they took some small care of us (...) we were given some bad food. (...) After we were released and we (...) proceeded to Macedonia, from Macedonia we just passed through, we entered Serbia. (...) We entered Hungary. (...) They detained me in Hungary, [but] they released us, they drove us to the next border. (...) When we reached Vienna, at the Bahnhof [train station] there were so many people and we heard that the German borders are closed. (...) Then after some time they boarded us in (...) a train. And they brought us to Germany.

William (Germany) confirmed that the journey appears to be a chain of causal events, where forced labour and sexual exploitation is often the price for a passage to Europe:

I stayed with this man in this house surviving on the mercy of these people. (...) We went to a place called Izmir. (...) It's like, this was the place where people used to cross. (...) One day, we were crossing, we fell into the water and were rescued by the Turkish police, and they imprisoned us (...) they gave us some white papers, return. These papers were allowing us now to move. (...) When we crossed, we came to Greece. (...) It was a very big reception camp. (...) They took us to Athens. Now in Athens we slept on the street for two days in the city. Then we managed to board trains, which trains took us through Macedonia, they took us again to Serbia. In Serbia, we stayed there for two days again sleeping on the streets. Then (...) I reached Hungary. (...) I was not looking for good things to be in a good

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<sup>6</sup> See Frontex: <https://frontex.europa.eu/along-eu-borders/migratory-map/>

life, but I was looking for a place where my life could be safe. And I said, since I'm here I'm going to stay here. Let me make this my home.

Yet, the discriminatory treatment suffered in Hungary motivated him to move to Germany.

In the hope of avoiding such violent and traumatic experiences, some SOGI claimants feel forced to resort to fake visas. As Diana (Germany) explained:

I've heard a lot of disadvantages, that's a very difficult and dangerous way. That's why I said, okay, so I tried to find a direct route and I just want to go straight from Iran to that safe country. And that was – it costs more, but I found someone, there's just you pay and give you a fake visa. (...) I wanted to leave Iran because I could not live with the situation anymore. (...) My mother did not know that I go to Germany to claim asylum. She thought I have a tourist visa. I did not tell my family what would happen.

Most SOGI claimants interviewed in Italy, as nationals of sub-Saharan countries, arrived instead through the Mediterranean by sea. Ken explained his travel as follows: 'From Nigeria to Niger, from Niger to Algeria, from Algeria to Libya, then I got stopped in Libya for some time. Then from Libya to Italy [by boat]'. Dev and Fred, fleeing Cameroon, passed through Algeria, where they worked for five months, before reaching Libya. Mamaka had an even longer journey:

I am from the Gambia. (...) When I have the problem in my country I moved to Senegal because it was the neigbhoubrest country (...) I was there for a year but it could not be ok with me. So (...) I came to Mali. So it is from Mali I had the information that there is a road going to Italy (...) from Mali to a placed called Niamey [in Niger] (...). Then from Niamey to Agadez [in Niger], from Agadez to Sabha [in Libya] (...) I was almost two to three weeks, almost a month in Libya before I took the boat to Italy.

Similar journeys were described by other participants, including Buba, Bella, Diarra, Franco, Siri and Moses. As Moses recalled, '[m]y intention (...) was to just leave my country and go to a place where I could probably be safe from the horrors of my country'. Instead, he ended up spending eight months in Libya before being able to cross the sea.

During this kind of journey, episodes of violence, detention and extortion were frequently reported. According to Gbona (Italy), who reached Libya from Mali through the desert, 'along the way, there were some Arabs, they are in the desert. They went around, around and then stopped us, forced [us] to get off the car, and start beating... yes, beating'. As Nelo (Italy) also explained:

Basically, I was just only run saving my life first, and when I got to Niger, to Libya, they were very angry because the money I was supposed to pay, I didn't pay... they have to keep me in different parts, called prison, they call it... kidnapping. (...) They will (...) beat you and tell you to call your people at home to send the money.

The lack of support from contacts in their country may lead to extended deprivation of one's liberty. So Odosa summarised his travel experience as follows: 'Oh, the travel. It is not good. (...) I spent close to six months (...) because of the delay and the kidnapping, the "trankey" [forced labour camp] in Libya. (...) From Nigeria to Italy, take like one month and some weeks, but because of the kind of problem I face along the road, that is why I use close to six months'.

Nice Guy (focus group no. 1, northern Italy) remembered the attempt to cross the sea as an experience of complete uncertainty: ‘All I knew was that, OK, the boat is going to take me to Europe, I don’t even know if it’s Italy, France, Germany... No way, I don’t know. In fact, it’s just like being re-born, you know nothing’. For this final part of the trip, other SOGI claimants, like Nelo, Gbona and Moses, expressed mixed feelings following incidents on the high sea and subsequent rescues by NGOs (‘the Swedish’, ‘the Norwegian’ or ‘the Dutch’) or Italian coastguard vessels. For Gbona, ‘Italy saved my life (...) we were on danger on the high sea with water rising and [the boat] going down’, whereas for Moses:

Seeing the sea alone is like death already, because (...) if anything should happen, there is no safety guarantee and so (...) I felt that, at least (...) I am going to be alive (...) when the rescue came. So I arrived in Italy [and said] “thank God, I still have a future ahead”. (...) For a moment I was happy.

Nelo (Italy) explained that he discourages other people from coming to Europe to avoid such fear: ‘The most scary part of it is when you’re on top of the blue sea. (...) So that’s what I’m always advising every day, “look, don’t think of coming to Europe by land [and by sea], it’s not good, it’s dangerous”’. Nelo felt lucky to have arrived in Europe, but also said that ‘due to the fact that I just came in, my head is still a mess’. This ‘mess’ can be insurmountable for people, such as Alain A., who lost their partners in the high sea after the sinking of the dinghy used to cross the Mediterranean Sea. The short and long-term consequences of these traumatic experiences in terms of health appear self-evident (Chap. 9; Alessi et al. 2018).

From the above, it seems that belonging to a SOGI minority shaped our participants’ journeys differently. On the one hand, it may influence the entire journey plan. For instance, Mary and Zaro (UK) explained that, in order to avoid raising suspicions, they travelled individually: ‘First she... she went to Dubai, then I came, after three or four days I came, after her. Because we could not travel together’. On the other hand, SOGI aspects appear immaterial for some claimants, who see mere survival as their only need. According to Kennedy (Italy), who reached Libya from Nigeria, people simply hide their SOGI during the journey:

I stayed in Libya four months. (...) What you are just thinking at that particular moment is let me get to (...) a place to just rest my head. (...) The second thing is (...) food. When you eat, you begin to think security. When you get security, then your mind calms down [and] you express (...) feelings, you know, with person that you love.

Similarly, Alain A. (Italy) pointed out:

It is a very dangerous journey. For everyone, not only for LGBT, and it is not a journey where you get to know who is gay and who is not gay. Because it is just a journey, so we don’t stay like to exhibit our characters, or our what we are. So, [in] my journey I didn’t face a problem as an LGBT because I didn’t identify myself as a LGBT.

For Ken (Italy), the reason to avoid mention of his SOGI was simply to avoid additional abuse: ‘You don’t talk about it, it is hell. No’. Yet, the negative effects of such repression and fear on the submission of the asylum claim at arrival are noticeable, as the next section will discuss.

Finally, it is worth noting that a significant exception to these general trends seems to relate to those transgender claimants who were mostly nationals of South American countries and claimed asylum after several years in Italy. As Valentina, a social worker in Italy, explained: 'They have no other way to be granted a permit to stay in Italy. (...) Many sex workers from South America would not claim asylum but would like to work in Italy, as it happens in other European countries'. Valentina also reported that, where other transgender claimants from the same countries have travelled to Italy through Eastern European countries after flying to Russia, border authorities often signpost people to NGOs, more as a result of practice than clear guidance but with positive implications in terms of addressing their reception needs. In her view, this is related to the 'visibility' of trans claimants, which distinguishes them from other SOGI minorities.

From the above analysis, one of the most difficult aspects of such journeys is certainly the treatment suffered in transit countries. This has an additional impact on the well-being and social experiences at and post-arrival of SOGI claimants. The countries of transit for claimants headed to Europe are often Turkey and Libya, which are also the primary recipients of the EU and its member states' assistance to neighbouring countries in the area of migration irrespective of their human rights record (Human Rights Watch 2019; United Nations Support Mission in Libya-Office of the High Commissioner for Human Rights 2018). In this respect, it is appropriate to explore, albeit briefly, how SOGI claimants experience and perceive these countries. Most importantly, the intersection of a variety of personal characteristics – being migrant and member of a SOGI minority – appears to render SOGI claimants more exposed to abuse in these transit countries than other migrants and refugees. This risk increases exponentially when they cannot leave these countries, or are even sent back to their countries of origin, especially as a consequence of EU-led externalisation migration policies (Liguori 2018).

Starting with Turkey, the prevalence of homophobia and transphobia that has been denounced at international level (Ramón Mendos 2019), combined with high levels of racism (UNHCR 2011), were confirmed by our participants. For instance, William (Germany), who arrived to Turkey from Uganda, explained:

When I told [a Turkish man] that I'm gay he told me "that cannot happen. In Turkey I cannot even take you to the authorities because they cannot accept you". The next day he transferred me to another house. (...) He moved me out of his family, because he had two kids and a wife. (...) I stayed in fear, crying day and night, fearing the police because they could arrest me any time. (...) I could not work because I used to fear going to the streets. The Turkish people are not easy people. They are racists, they segregate Blacks, you're a Black man.

As for Libya, arbitrary detention is the rule for all people trying to migrate across the Mediterranean to reach Europe (MSF 2019; United Nations Support Mission in Libya-Office of the High Commissioner for Human Rights 2018). SOGI claimants communicated a striking level of fear at the prospect of being forced to stay in Libya. Despite the severity of the legal and social environment of his country of origin, Nelo (Italy) told us that: 'It's even better that you are recognised as a gay in



Nigeria than to be recognised as a gay in Libya, in Arab country'. In his view, violence in Libya reaches unimaginable levels.

In an attempt to explain the negative implications of such journeys and treatment in transit countries, Just Me (focus group no. 3, northern Italy) pointed out: 'Many people that died in my presence (...) even in Libya (...) they kill somebody from my back. (...) You see people die after passing through all this, you come here, Commission give[s] you negative. (...) If you are not strong, you will go mad'. Yet, these traumatic stories and consequences in terms of depression and anxiety are rarely considered and addressed at and after arrival in host countries (Piwowarczyk et al. 2017).

As we will explore especially in Chap. 7, the circumstances of the departure, aspects of the journey and the treatment in transit countries may however be, among others, at the centre of the credibility assessment at administrative or judicial level. For instance, during a hearing, an Italian judge focused a significant part of the questioning on the separation of the claimant from his partner in Libya and on the attempts made, at arrival and in Libya, to obtain any information about his partner's disappearance (Tribunal observation, northern Italy 2018). The claimant argued that, at arrival, he was too traumatised to seek information about his partner's fate from Italian authorities or from his smugglers. Any empathy, which common sense should require, aside from any theoretical approach or SOGI guidelines (Chaps. 3 and 4), was replaced by an evident 'disbelief'. Similar episodes show that decision-makers are not always aware of, or consciously ignore, the general condition of SOGI claimants on arrival in Europe and the reasons why they may not be able to express their SOGI immediately. The next section therefore aims to explore this particular aspect.

## 5.4 The Arrival in Europe

A complex mixture of feelings was shared by participants in relation to their arrival in Europe. Several asylum claimant participants described feelings of safety. This was true of Susan (focus group no. 3, Bavaria, Germany), who told us '[w]hen I came to Germany, I felt safe', as well as Silver (Italy), who said: 'When I arrived in Italy (...) I was very happy [and] I said "Why no one is looking at me? Why do not they beat me?"' Others remembered, instead, feeling fear and anxiety about the risk of being returned. As Miria (focus group no. 3, London, UK) explained: 'If it is going back to Uganda (...) I said I really tried to kill myself, I said, already in Uganda I was dead. Kill me here rather than spoiling your ticket'.

Related to their stressful experiences before and upon arrival, some SOGI claimants told stories of alcoholism and drug abuse. As Shany said: 'Mostly I wake up at six in the evening, but I was using a lot of marijuana, a lot of alcohol. (...) I [didn't] want to think nothing. (...) I [didn't] want to wake up because I just, like, think somebody in the door going to kill me. I was a paranoid'.

Above all, a feeling of bewilderment emerged. As Nelo (Italy) explained: ‘We don’t know many things about asylum or whatever. I’ve been to Niger, I’ve been to Libya, I never had to go to the courts, go to Commission, go to anything in order to stay’. This feeling may have been exacerbated in cases of collective arrivals. As Vincenzo, an LGBTIQ+ group volunteer in Italy, pointed out: ‘At arrival the security approach is undeniable nowadays. (...) People probably get the perception of being only numbers and are put under control’. In such situations, the SOGI dimension does not receive the attention and care it warrants.

In the particular context of arrival, participants consistently raised at least three issues to assess how fair an asylum system is for SOGI minorities: (1) whether, and what, information is provided on SOGI asylum at the moment of first contact with national authorities; (2) the guarantee of individual assessments; and (3) whether the initial reception (or detention) takes SOGI into account. Before delving into these aspects, a brief clarification is needed. First, our survey confirmed that arrival is a key moment for SOGI claimants themselves, as 63% of respondents claimed international protection immediately after they reached their host country. Second, the conditions of arrival clearly vary between Germany, Italy and UK. As discussed in Chap. 4, the reason for this lies not only in the lack of harmonisation between EU countries in this specific area,<sup>7</sup> but also in geo-political factors that explain the different travel experiences of SOGI claimants arriving in these three countries (IOM 2019).

Regarding the general initial procedure, in Germany asylum applications can only be registered at the BAMF, but an asylum claimant can also report to a federal or local police, or at reception facilities (ECRE, AIDA & Asyl und Migration 2019, p. 18). While this reporting should happen ‘immediately’, there is no time limit for lodging an application. The situation of SOGI claimants interviewed in Germany confirmed that the bulk of applications were registered at the BAMF, after having been sorted and processed at the border.

Italy, in turn, has faced a high number of arrivals in recent years. As a result, most people claiming asylum, including SOGI claimants, followed a similar path for the submission and subsequent evaluation of their asylum request. On arrival at the border, by land or by sea, Italian authorities take charge and, afterwards, claimants’ asylum requests are registered at the police local headquarters (‘Questura’). As Jonathan, an LGBTIQ+ group volunteer, explained, SOGI claimants who are already in Italy or enter the country in a different way have less chance of being taken in charge by the authorities. It may therefore be more difficult for these claimants to receive initial support, at least in terms of accommodation.

The UK, in contrast, has not faced similar high numbers of arrivals. Excluding specific programmes such as the Syrian Vulnerable Persons Resettlement Scheme, asylum applications should be made on arrival or ‘at the earliest possible opportunity’ (UKVI 2016, p. 4). This means that if claimants do not apply on arrival or at the border, as was the case for some of our participants, they submit their

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<sup>7</sup>In contrast to other aspects of the asylum process, as the CEAS shows (Chaps. 4, 6, 7 and 8).

application to offices ‘in country’, the most well-known being Lunar House in Croydon, South London. Once the application is submitted, a meeting with an immigration officer (known as a ‘screening interview’) takes place, followed by an asylum interview with a caseworker some time later (usually a few weeks, but sometimes months).

Taken this broad context into account, the situation that each SOGI claimant needs to face initially, including the nature of their first contact with authorities, varies in light of individual circumstances and according to the receiving country in question. Yet, from our data, some general trends emerge.

### *5.4.1 Information on SOGI Asylum*

The importance of having knowledge on SOGI asylum to enable informed decisions is widely recognised. For instance, according to Jean, a member of the European Parliament, the access to ‘quality information’, which needs to be provided ‘in a format they can understand’, is essential in improving the system for (all) claimants. As Ibrahim (Germany) explained: ‘I got informed a bit about asylum and I felt it more reasonable to stay and not be living in fear’.

Some SOGI claimants we met knew at the time of their arrival in Europe that they could make an application for protection on SOGI grounds. Such information is often shared through SOGI claimants and refugees already in Europe. For instance, Momo (Italy) explained that one of his friends in France instructed him: ‘He explained me everything. You need to do this, follow this procedure, until you get international protection. In Africa you do not have such a thing [being protected on SOGI grounds]’. According to Jonathan, an LGBTIQ+ group volunteer in Italy, and Livio, a lawyer in Italy, the increasing exchange of information on SOGI asylum between potential claimants who are still in their countries of origin, asylum claimants (including SOGI), NGOs and other personal contacts in Europe, means there is a greater awareness of relevant procedures, which may on occasion also improve decision-making. A good example of this was provided by Kamel, who was granted refugee status in Italy after having prepared all the necessary material to support his claim before fleeing Libya. For these claimants, it may have been easier to tell their story at arrival. Wole (focus group no. 2, Glasgow, UK) explained: ‘When I was back at home, I did a research and I found out that you can claim in the UK, so when I came in the UK, at the airport, I claimed directly for asylum protection’. Michael (UK) also recalled:

When I came to... airport Heathrow, I ask officer (...) please can you help me with protection. And they asked me a lot of questions about why you ask about protection, why we should help you with asylum, and I answer them everything.

However, this openness does not necessarily secure advantages in relation to individual assessments and reception conditions. To use Michael’s experience as an example once again: ‘After that I had been in airport I didn’t know anyone in Great

Britain (laughs) I didn't have any colleagues here, I didn't have any friends here'. He was eventually helped by an NGO.

Yet, most of our claimant participants identified the lack of information on SOGI asylum at arrival as one of the most problematic aspects of the system across Europe. According to our survey, 31% of respondents did not know they could claim asylum on SOGI grounds when they arrived. This lack of information not only prevents them requesting asylum on SOGI grounds as soon as possible, it also denies them reassurance that they are now safe if the reason for having fled their country is connected with their SOGI. As Ibrahim (Germany) confirmed, many SOGI refugees 'didn't know from the beginning that they can apply for asylum based on their sexual orientation'. This failure of communication may be expected given that the relevant legislation in Germany, Italy and the UK does not include a general duty to provide specific information on SOGI asylum at arrival, nor do relevant EU directives address this point. Yet, there is a general duty to inform claimants about the asylum procedure (for instance, Recitals 22 and 25 and Article 12 of the Procedures Directive), and its importance has been stressed also by the ECtHR in its jurisprudence.<sup>8</sup> In some cases, specific information is provided thanks to the involvement of NGOs. For example, in the UK, in 2014, the Scottish Refugee Council (with other agencies) published an information leaflet for SOGI asylum claimants arriving in the UK in 12 community languages (Scottish Refugee Council 2014). However, this example of good practice has not been taken forward elsewhere. The 2019 reform in Germany (Chap. 4), which restricts the role of NGO counselling as it happens already in AnKER Centres (ECRE, AIDA 2019, pp. 10–11), may therefore have a particularly negative impact on the right to receive adequate information on SOGI asylum.

More generally, according to Helena, an EASO officer, even when SOGI information is provided, there is lack of uniformity across Europe. Therefore, it is not surprising that a significant number of our participants were unaware of what 'asylum' is and what procedures apply, in general, and that SOGI asylum is possible. Shany (Germany) explained:

Even the word asylum, I couldn't even find it in my mind in that time because I was like, you know, you using, this is like a big, big moment which like your brain is completely, it's not working, it's like plastic.

According to Gbona (Italy), at arrival, no one asked the reason why he fled his country of origin but only for basic personal details. Siri (Italy) became aware at arrival that he could apply for asylum in order not to be immediately returned to his country of origin, but no information on SOGI was provided to him. Giovanna, a lawyer who was involved as a volunteer in a few disembarkation operations, confirmed the way post-arrival situations are managed in Italy:

Actually, after the disembarkation, only a few general pieces of information are requested, such as age or health records. Then, they are sorted into groups and asked whether they want to apply for asylum. If they don't, a return order is issued. There is no room for

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<sup>8</sup> *M.A. and Others v. Lithuania*, Application no. 59793/17, 12 December 2018.

personal stories and, in that very particular moment, people just arrived have often no idea about refugee status, subsidiarity or humanitarian protection.

Participants in other countries, like the UK, shared similar experiences. Meggs, for example, explained:

I didn't know it was called asylum, no, I didn't know. I just, when I got here I thought, since I am here, that is it, I will just have to find a place to live legally, and start my life all over again (...). That is what I thought, I didn't know there was this process, and how long it is, and how painful it is, I wasn't ready and prepared for that.

Success (Germany), in turn, explained: 'I was not bold enough to say that. Yeah. I was not bold enough, because I thought it was like Nigeria'. This fear may increase when different personal and cultural factors intersect, as our theoretical approach suggests (Chap. 3). For instance, in terms of relationship with fellow nationals, Lutfor (UK) recalled:

No, I didn't hear anything about [being able to claim] the asylum and, being honest, when I was living with other guys [from Pakistan and India], I think they have no idea what is asylum (...) I didn't work, so I was living with them, I cooked for them, I ironed their clothes, cleaned the house (...) I was really scared to go out.

The difficulties faced by SOGI claimants are often aggravated by other elements. First, translation issues are a case in point. As Sadia (UK) stated:

But that time also I am not doing any claim because I, I have a problem, language problem. I am not educated, so I have a problem. So I didn't understand, I didn't understand, I am just going there and sitting, I don't understand anything.

Second, other than facing unknown bureaucratic challenges, feelings of distress may hamper the identification of SOGI as a reason for claiming asylum. For instance, Miria (UK) explained:

I had some problems. (...) Yes, I am a lesbian, but for that time I had no idea of that. And, you know, when you have a problem, you can't think about that thing at the same time, because I was struggling a lot. Yes, and my life was in danger, so when I came here I had to think about my life. Yes, I didn't think about of being a lesbian, I had to put that aside, because at that time that was not the issue. But, I was struggling.

The situation is even more complex when SOGI claimants are not identified by public authorities as soon as they arrive. For those who enter Europe in a group or are exploited after arrival obtaining accurate information about SOGI asylum can be particularly difficult. This trend is especially noticeable in the UK. Irma stated:

No, I never knew that [SOGI asylum], I never knew that. Because, I mean, I never had the opportunity to talk to people. Where who brought me into the country, I was under like security, the woman was all the time, she was saying "I will report you back, I will send you back." (...) If I knew like that [SOGI asylum], I would have come out straight away with my sexuality.

Jayne, also an asylum claimant in the UK, explained:

I had to stay with people I met from church, and surprisingly throughout the years no one said anything to me about asylum. Maybe those people were taking advantage to have me in the house, maybe babysitting, just so that I have somewhere to live.

A potential consequence of the lack of adequate information on SOGI asylum is the submission of a claim on grounds not related to SOGI (Chap. 7), but often connected to a particular situation of widespread violence in their country of origin. For instance, Fares (Germany), like other SOGI claimants, applied first on the basis of religious and political persecution due to the existence of political or religious conflicts. Likewise, Kennedy (Italy), fleeing Nigeria, explained:

I did not see reason to tell them that it's [because I'm] gay, because I don't want any problem again to reoccur, whereby I will be running from Italy again to another place. So that is the reason why I told them, yes, it's Boko Haram.

Damiano, a lawyer in Italy, and Valentina, a social worker in Italy, highlighted a particular concern for SOGI claimants: the combination of the lack of information about SOGI asylum, the lack of knowledge about the treatment of SOGI minorities in the host country, internalised homophobia and/or the proximity of fellow nationals may nudge some SOGI claimants to rely on more familiar narratives of persecution as the basis of their claim. This makes it more important that authorities are sensitive to what may be the real reasons for claiming asylum in the initial screening, as well as during the main interview (Chaps. 6 and 7).

Titti, a decision-maker in Italy, also stressed this point:

Let me give you an example. A claimant could say "I left my country because I was in conflict with my father" and, then, incidentally says that he left his [same-sex] "partner" in his country (...) This is a SOGI claim but he does not know that. (...) Probably, he does not have the tools to understand that the conflict with his father is based on his sexual orientation and that this is something wrong.

Without official information about SOGI asylum at the point of arrival, claimants had to rely on their own research or word-of-mouth information from other claimants. Alain A. (Italy) explained:

When I came to Italy, first of all I had so much fear in me, like the fear I brought from my country was still in me. Yes, I knew like Italy protected gay people or the homosexual, but I didn't know, like, where to deal with my problem, with who to speak to. So, I was so afraid and I went to the internet (...) to do research on gay associations.

For some SOGI claimants, however, having the relevant information did not guarantee a smooth process. For instance, Nelo (Italy) was still traumatised by his past experiences when he found out about the possibility of claiming asylum on SOGI grounds. He found it difficult to trust anyone: 'And when they said, I actually have to think of it, like trying to understand if this is just a trick'.

For other claimants, instead, discovering that SOGI minorities enjoy higher levels of social and legal protection in European countries, at least to a certain degree and on paper, was a source of relief and empowerment. As Miria (UK) pointed out:

When I saw people on the train free, for the first time to get that confidence, to know that lesbians are free here. (...) So, when I saw that I say what... oh this means LGBT here are free. Then my mind opened up, I started to know and I started to feel, what I am, to feel in my mind, I started to feel, feeling free.

In this respect, refugee community organisations and support groups, which are often the first and trusted point of contact for newly arrived asylum claimants, play a positive role, although their support can be limited in this initial phase for reasons such as lack of resources or trained staff (Chap. 6). For example, Diarra (Italy) recalled that he was not aware of the possibility of requesting asylum on SOGI grounds but, thanks to an information session on SOGI rights organised by a support group in his reception centre, he learned how SOGI minorities are treated in Italy. As he put it: ‘Today I can say that I’m gay. After that meeting, I went to talk to the reception centre’s staff’. This feeling of empowerment was also experienced by those claimants who were already aware that they could submit an asylum request on SOGI grounds and needed a safe environment to be able to gradually open up about themselves. As Ophelie (focus group no. 2, Glasgow, UK) confirmed:

I did a research back home in Namibia so (...) I knew that you can claim asylum in Scotland. (...) The airport (...) was hectic, they didn’t want to let us in and we (...) told them that “no, we can’t go back because of my sexuality, I came with my partner”. (...) [Scotland] is not an environment that we were used to, so we didn’t, we were not open to show out our sexuality, because we were afraid of the same judgement we had home. (...) We had to hide (...) just stay indoors [and] not going out, until we met the LGBT Unity group. (...) It was fine, we were welcomed nicely.

To summarise, the lack of information on SOGI asylum and treatment of SOGI minorities before and at arrival may play a significant role in the submission of a claim in terms of content, timing and evidence. Surprisingly, as we will explore in Chap. 7, the lack of awareness of SOGI asylum is not duly considered by decision-makers, who sometimes also use it to cast doubt on SOGI claimants’ credibility. The fallaciousness of such an approach was strongly criticised by Emily, a decision-maker in the UK:

[Most people know they can claim on that basis] more now than before. We’re seeing a lot more LGBT cases than ever before. [Decision-makers may ask] “if you’ve been here for 15 years, why have you never claimed asylum?” (...) I don’t think I knew before this job that that is actually a specific reason for claiming asylum in this country, I’ve lived here for 28 years and I didn’t know that!

As Giulia, an LGBTIQ+ group volunteer in Italy, stated: ‘SOGI is not considered until there is a need to express it’. This need may arise during the initial individual assessment.

### 5.4.2 *Initial Screenings*

When a claimant receives appropriate information, the initial screening is more likely to run smoothly. For instance, Siri (Italy) remembered that, after he had disembarked, he was told simply that everyone in Italy is free to say whatever they want, as long as they are not breaking the law. As he explained: ‘I was not told that I could be homosexual here. [But] when I was sent to Questura [police local headquarters] after 15 days and I was asked the reasons why I fled my country, I did not



hesitate'. When this sort of reassurance about speaking openly is not provided to claimants, it is more difficult for SOGI claimants to share their real stories at the first screening interview. The same is true when a strong securitisation approach is adopted at arrival, echoing the security paradigm that has characterised EU policies since Amsterdam (Kostakopoulou 2000). For instance, Mamaka (Italy) remembered that she was only fingerprinted, while no immediate access to an immigration office was granted. Again in Italy, another participant recalled that, despite her willing to share her story, only examinations of a medical nature were carried out at arrival:

I told them that I was being raped and all, so they took me to one place, they snapped my picture and they took me to the hospital, check if I am pregnant, they found out that I was pregnant. (...) They put us on one big bus, so we spent almost a full day on the road. (...) The next day (...) they took me to Questura.

Although the duty of individual and objective assessment of all international protection claims is well established in ECHR<sup>9</sup> and EU law (EASO 2018), there were no accounts of any SOGI-friendly individual assessment at national level during the screening interview stage. The different logistics in each country also need to be considered. Whereas in all three countries under investigation the initial screening is carried out by national officers, in Germany and Italy it may take place in arrival/reception centres. No clear or direct questions on SOGI are asked at this stage, unless claimants self-identify as LGBTIQ+, as confirmed by our data. Taking the example of Italy, when a request is submitted to the police local headquarters ('Questura'), only general information is required: personal details, the presence of any family members in Europe, educational and family background, and travel details. While the form used for screening – the so-called 'C3' – expressly asks about the reasons for applying for international protection, these reasons are often not specified at this stage (Chap. 6).

The difficulty in talking about individual personal experiences in terms of SOGI was confirmed by other participants. For example, SOGI was not mentioned during these initial stages in the cases of Pato and Frank (focus group no. 3, northern Italy), Osa and Chima (focus group no. 4, northern Italy) or Bakary (focus group no. 2, northern Italy), who were hosted in temporary camps in southern Italy for a few days. However, it should be noted that for some people this was not an issue, because not addressing SOGI as soon as possible may be more consistent with a sensitive cultural-based approach. According to Jonathan, an LGBTIQ+ group volunteer:

We have a very Western approach to this aspect (...). Many people can be MSM [men who have sex with men] or have adopted a similar behaviour (...) and, if you are asked "are you gay?", they might not answer "yes". I think it's a positive thing that it's not specified at this stage.

Whether or not such an approach should be followed as a rule is doubtful, individualised solutions being more appropriate to balance all general and personal factors at play. The perception of this initial stage of the asylum procedure shared by

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<sup>9</sup>For example, *Sharifi and Others v. Italy and Greece*, Application no. 16643/09, 21 October 2014.

Nice Guy (focus group no. 1, northern Italy), who was asked to explain the reasons why he fled Nigeria after the arrival in a reception centre, offers a good overview:

We come here the first time, as asylum seekers, we know nothing about the Italian system or anything. Then, like just I think within a week they gave us piece of paper to fill with our data and everything about our stories. A lot of us do not even know what we are writing. Some are still sick, very, very sick, they have other people write it for them. Some have other people advise them, ah don't write this, write this, and it is not right. They make blunders, big mistake. (...) Then they submit it, without nobody educating them about the concept of the form they are filling. (...) You cannot even get a copy of that form – you have just few days to submit it, and that's this. (...) They photostated [photocopied] the form (...) “go and write your story, go and write” (...) What can you write? (...) Then later, you start judging the same person by what the person wrote when his or her head was not in a stable state. It's not good. They should encourage them and inform them the minute they get here. Give them time to understand. Let them ask questions also.

This personal analysis of the shortcomings of this initial stage is enlightening. In addition to the lack of appropriate information on asylum (in general and specifically in relation to SOGI) and the delicate mental and physical condition of claimants, the importance of a number of other factors emerges strongly: the lack of support; the short time period between arrival and first screening; the level of education of claimants; the influence of other people claiming asylum on the grounds for persecution that are put forward; and the risk of authorities using the initial screening as the basis for denying international protection.

The lack of support received on arrival was indeed stressed by participants in all countries. Starting with Germany, Trudy Ann remembered when she arrived in Frankfurt with her girlfriend and they said at the airport that they were a same-sex couple:

When we just arrived off the plane and go to the immigration part, we told the lady that we wanted to seek asylum. She was shocked at first (...) like she never know what we were speaking about. So I had to repeat it back three times.

The support in arrival or reception centres may also be problematic when SOGI is not taken into account. For instance, Jacqueline (Germany) explained: ‘Generally in the camps they don't ask about your sexual preference or the reason why you came. That is saved for the big day [main interview]’. This lack of SOGI support played a bigger role in Italy where SOGI claimants' accounts are collected in reception centres, shortly after arrival. Silvana, a judge, and Valentina, a social worker, stressed that the staff of these centres are not adequately trained to explain to claimants that they can request asylum on SOGI grounds, or to identify such claims when individual stories are recorded (Chap. 6). Nelo, who shared his story only three months after arrival, pointed out that when he met trained and experienced staff in SOGI claims, it was not necessary for him to open up directly to be understood. As he told us:

When they collected my story for the first time, I gave them part of it (...) when I was in the hotel [reception centre], I asked them not to go to Nigerians. (...) Specific[ally], I said, I don't want to go to Nigerians.

Because the staff at this point identified a potential SOGI claim on the basis of Nelo's plea, he eventually opened up about his reasons for fleeing Nigeria. Unfortunately, as we will explore in Chap. 6, staff in accommodation centres who are called upon to support asylum claimants in their claims procedure more often than not lack this ability to identify not-declared claims, being unprepared to deal with SOGI claims and, more generally, with people survivors of sexual and gender-based violence (UNHCR 2012b).

The level of education and how articulate claimants are, as well as the presence of other people from the same community, were also raised as important factors, which relevant authorities more often than not overlooked. As Ibrahim (Germany) put it: 'I am able, like I have a power of discussion and I have a power of communication with people. I can speak, or I know what I speak. But some other people don't know what to say'. When this 'power' is absent, other asylum claimants may play a significant part in SOGI claimants' narratives: Bakary (focus group no. 2, northern Italy) provided an example: 'When I arrived, I was given two papers. One for my personal details and the other for describing my personal history. (...) I asked a guy from Ghana how I should fill it'. In turn, Abdoul (focus group no. 2, northern Italy) found it difficult to give his account in the presence of other claimants with a similar cultural background:

When we arrived (...) after three or four days, I was given a few forms for describing my story. (...) Frankly (...) there was a big community of people from the Ivory Coast. (...) When they know that you are gay... no, I couldn't.

In this initial phase, there were few mechanisms signposting SOGI claimants to relevant NGOs or support groups, or addressing the specific needs of transgender claimants. Whereas a few of our participants referred to the fact that some reception centre staff suggested SOGI claimants contact support groups, only Valentina, a social worker in Italy, pointed out that national authorities at the north-eastern border of Italy seem to routinely signal the arrival of transgender people to NGOs and specialised support groups. The potential empowerment of SOGI claimants through contacts with LGBTIQ+ actors is therefore far from being facilitated in all countries under comparison.

The lack of specific solutions and support for trans claimants, including in terms of health (Chap. 9), is combined with bad practices at the initial screening. As Kamel (Italy) recalled:

I was asked if I was a boy or a girl. My documents, including my passport, signal that I am a woman, but I show myself as a man. I answered "I am trans", but [the officer] did not know what that means. (...) It was very bad. (...) I submitted my request, I was given a form (...) and then stop. I went out and I spent my days in the streets, without a doctor, hormones, nothing.

What is more, apart from a few exceptions, the initial screening appears to play no role in identifying appropriate accommodation in any country studied. There is no consideration of the need to provide queer spaces, where SOGI claimants can be free from repetitive heterosexual performances (Chap. 3). The suggestion given to Julian (focus group no. 5, Bavaria, Germany) by an officer is illustrative of the

obligation imposed on asylum claimants to cope with non-queer spaces by erasing their SOGI:

The first office I went to was the Bundesamt [federal office] in Bielefeld, that's where my asylum process started from. (...) And the first person who interviewed me, when (...) I explained to her the reason I don't want to go back home is because I'm a lesbian and I'm having so many issues at home. She did the paperwork for me to be transferred to Munich and she told me not to say it to anybody in those camps. Meaning, she was aware more than me that it could also be dangerous for me.

In light of this omission, we now consider how SOGI claimants are initially hosted in the countries under investigation.

### ***5.4.3 Initial Reception and Detention***

The EU Reception Directive omits any reference to SOGI (Ferreira 2018). Therefore, as further explored in Chap. 8, it is not surprising that no country involved in this research has any specific policy in place for the initial reception of those who identify as SOGI claimants. This lack of specific regulations or provision gives rise to a range of experiences that, more often than not, leave SOGI asylum claimants in 'vulnerable' situations at arrival. In light of the wide use of detention measures in the UK in comparison to Germany (at least until the 2019 reform, Chap. 4) and Italy, this lack of specificity does not relate only to reception centres but applies also to detention structures. While in Germany a threefold system of reception is in place (Chap. 8), Italy has shaped its system on the basis of an emergency rationale owing to collective migration flows and, more recently, to far-right political policies (ECRE, AIDA & ASGI 2019).

This state of affairs was confirmed by our participants. In most cases, SOGI played no role in the allocation of accommodation or reception conditions. For instance, Jacqueline (Germany), stressed that initial accommodation was chosen on the basis of her country of origin:

They had something like a temporary camp, so I stayed there like, almost a week. And then we went to the police, they took... that's when they asked our names and then they took the fingerprints, and that's where they were selecting where you're supposed to go depending on your country. Like, where you're coming from. So, I was given a ticket to come to Munich with all the directions. That's how I ended up here. (...) They don't ask why you came or anything, it's about placing you somewhere and then other things will follow.

This signals a wider trend in Germany, which is based on a distribution system called 'EASY' (Chap. 8), given that Amis (focus group no. 2, Bavaria) also stated that most claimants from Uganda are transferred to Munich. The risk of placing claimants in the same persecutory environment from which they have fled is therefore very high. A less organised approach is identifiable in Italy, as Moses pointed out:

Moses: Initially, when we came it was a general camp. A big camp where there were up to like from 100, 150, a very big camp.

Interviewer: And did the authorities ask you “do you want to stay with people from your country or do you want to stay with other people”?

Moses: No, it was just normal distribution.

Yet, this ‘normal distribution’ – no matter on which basis it is carried out – does not reflect SOGI claimants’ needs. In fact, by totally denying queer spaces, for SOGI claimants this initial accommodation was far from ideal. According to William (focus group no. 2, Bavaria, Germany): ‘I was living with people that are not of my character, and anything maybe could happen to me. And I had stress, because of it not being open and always being in bed in that camp’. Equally, Jolly (focus group. no. 3, Bavaria, Germany) stressed:

I felt some difficulties in me. As in, how to identify myself. Why? First of all I looked around, there were not only the White people around. My fellow Blacks were also there. So, I didn’t know their background or where they came from, and I had a fear that maybe some of them came from my country, whereby they know maybe me. (...) So, that was really a very big fear in me and it really made me not open up as fast as possible. Until when I went for the interview.

These fears connected to entirely heteronormative spaces have to be added to the precarious conditions of these initial reception centres. As Sandra (Germany) pointed out:

Then I got the shock of my life because that was a very huge place, where I was taken to. It was a big hall and there’s were all kinds of people, all ages and all sexes. Kids, old, young, female, male, like, we’re all there.

To make matters worse, what is intended as initial or provisional accommodation may end up as a long-term solution, coupled with restrictions on individual freedom of movement, something that, for instance, the 2019 reform in Germany further promoted by extending the length of stay in initial reception centres (Chap. 8). Ibrahim (Germany) explained:

There was a lot of isolation in the beginning. Part of it is about moving to another place where I didn’t know people and I had to start from the beginning. Part of it is frustration... the first three months, for example, I’m not allowed to leave Berlin. That was a rule, and it sounded very strange for me. It just sounded very absurd and medieval.

Although the limited contacts established in these initial camps may help in finding out about LGBTIQ+ associations and support groups (for instance, Bella, Italy), a feeling of isolation often prevailed. According to Sandra (Germany):

We were just coexisting, nobody speaks to anyone, nobody tells anyone why they are fleeing, you just try to exist. (...) I felt empty, defeated, lost, tired, very, very tired. I lost all the motivation and all the thinkings that I had about life and what I wanted to achieve and everything. I was pretty much not thinking, my mind was just blank. I’m just sleeping and waking up not thinking about anything.

Edoardo (focus group no. 3, northern Italy) also recalled:

I am a little boy and to the place they took me to in the camp was bush, and... meeting new people and I don't know. I don't know how they behave, I don't know how they talk, I was like, early morning someone would come to, "come, you don't talk, you don't eat, you don't do this", I was like, many times because what I saw in the sea was in my head, I don't know how to talk it, because it is like my spirits have left, I am trying to recover myself. Like one month, so I was in the room all alone.

This feeling of isolation was aggravated by the often inadequate management of these centres, as we explore in greater detail in Chap. 8. Just Me (focus group no. 3, northern Italy) worried about this:

I was afraid. I was solely scared because I was like in a strange place. Nobody, no family, I never knew anybody. I was just all alone. I was transferred from Messina to Settimo Torinese after about two weeks, I was taken to Saluggia, so the condition in the camp was so grim, so horrible. They don't really care about us, anyway. (...) Due to my experience in the sea and the road to Libya, I was in kind of depression. So, the camp nurse take me to a psychiatric to have a look at me and see if they could help about my situation.

In turn, Halim (Germany) explained:

It was very hard for me to...I mean, in the beginning, arriving there, I didn't really know if I felt safe to disclose that I'm gay to people even who were there. Because there was no introduction, guidance, orientation or... it was just, you discover things yourself. And I had a flatmate and basically I didn't want to tell anybody, even the workers, because if it comes out I might be at risk, and I don't want people to be talking about me, people might harass me or whatever. (...) And then I had the problems inside also, not feeling safe, also tired and not having my own private space. That was the biggest problem.

A range of experiences were shared in the UK. As many of our UK claimant participants arrived through a variety of channels, often with the help of third parties, and did not immediately claim asylum, their initial reception often had a private dimension. In these cases, a set of different actors came into play. For instance, Luc explained that:

I start[ed] living with the man (...) with hope that he will help me, but I [didn't] know anything about asylum and they told me I should not tell anyone about my life. (...) One day when I know he is not around, I went to the one church in London. (...) I was living in that church (...) so I started working [there].

The religious nature of this support, however, inhibited him from being himself: 'Since then, I [didn't] want to tell anyone about who I am'. However, without such support, individuals may be left entirely alone. As Mary and Zaro said: 'We were homeless, we did not know if you come to airport you can call to the police (...) we are not that quick'.

While detention did not emerge as an issue in Germany or Italy, it was of great concern in the UK, where calls to address the needs of sexual minorities in detention have remained mostly unaddressed (Chaps. 4 and 8). What is more, when deciding to detain SOGI claimants, asylum authorities do not place enough weight on previous long stays and the degree of social integration those claimants may already have achieved. For instance, SGW (focus group no. 4, London), an asylum claimant who arrived in the UK as a student, explained:

After spending (...) six years out [in terms of sexuality] (...) I decided I didn't want to go back to Jamaica because I had adapted so much to the (...) culture (...). I told the Home Office (...) I went down to Croydon, in person, to (...) state my situation, and then I was detained in Yarlswood for about six weeks. (...) It was a miracle that through Asylum Aid (...) I was able to get temporary release.

Lutfor (UK) elucidated:

When I was in relationship, my boyfriend told me (...) that you can claim asylum based on your sexuality. (...) I didn't do any research or anything on any lawyer, I went, I make appointment to the Home Office, and I called them and I went for interview and they put me in detention for 22 days and I got a lawyer from legal aid, and interviewed and so that time I realised I should prepare for my case. I mean, I had the confidence that I am gay, I know this, so it would be easy to prove this. But I didn't know the system was too horrible.

Given the likelihood that SOGI minorities in detention may not feel able to disclose their SOGI as the basis for their asylum claim, it is particularly likely that their claims will also be jeopardised by relying on hearsay from other detainees, misinformation from detention centre staff with no training in RSD matters, and a lack of access to external sources of advice and information (as described in Chap. 4).

A final specific concern relates to people claiming asylum on gender identity grounds, where the lack of initial appropriate accommodation may be a serious obstacle to providing adequate support. Valentina, a social worker in Italy, recalled the case of a transgender claimant fleeing Cuba who arrived at the north-eastern Italian border: 'In that territory, all reception centres are reserved to men. They found for her an apartment managed by the Italian Red Cross. But it was absolutely personalised. There is no system in place, no reception protocols in this case'. Another transgender claimant, also remembered by Valentina, was less lucky on arrival in Tuscany, after having transited through Hungary and Austria: she was abandoned by the authorities, who failed to offer her any accommodation at all. The personal experience of Kamel, a transgender person claiming asylum in Italy, confirms the inadequacy of provision:

They told me that it was difficult, they did not know where to put me, if in a male or female reception centre, because I've not undergone the operation yet. We went to Caritas, in many churches, but no one hosted me (...) until an association called me and said that a family could host me. (...) Now they are my family (...) I stayed at their place during the first two weeks.

The above experiences make it clear that domestic authorities still fall short in meeting the duty to consider the individual's condition in order to identify the most appropriate reception solution on arrival, as required by ECtHR jurisprudence.<sup>10</sup> Action, including specific amendments to the Reception Directive currently in force, seems more urgent than ever.

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<sup>10</sup> *O.M. v. Hungary*, Application no. 9912/15, 5 July 2016, para. 53.



## 5.5 Concluding Remarks

This chapter has shown that the difficulties experienced by SOGI claimants start well before the evaluation of their asylum request, and have clear implications for the submission of an asylum application on SOGI grounds. Considering the limited literature dealing with these aspects, this analysis brought new insights and depth to our current understanding of SOGI claimants' legal and social experiences in their countries of origin, during their journeys, and at their arrival.

In many cases, the need to escape persecution forces SOGI claimants to leave their countries of origin and travel taking unknown routes, often at very short or no notice. This experience is often accompanied by the fear that one can never go back. Within a very short period of time, the new "unknown" takes the place of an entire life and all that one has experienced matters only insofar as it supports or undermines the claim. Yet, while persecution is an essential reason for flight, it is still only a fragment of a larger, fuller more complex life made up of many experiences. Persecution does not define the individual, although the assumption that it does is prevalent and unspoken during the assessment of the claim, as the subsequent chapters will show.

This is also why Marhoon, who submitted a *sur place* claim (Battjes 2013; UNHCR, 2012a, para. 57), said: 'I [was] very afraid of applying for asylum because (...) I'd seen a lot of terrible pictures and heard news about refugee camps and what's going on there'. He therefore tried other options, including scholarship applications, before reluctantly taking the asylum pathway. Making a related point, Anna, an LGBTIQ+ group volunteer in Italy, recalled the case of a bi-national couple where the Russian national did not want to apply for asylum because he knew that, if refugee status was granted, he would not be able to go back to his country and see his family again. As a consequence, he preferred to try other strategies to secure protection, such as entering into a civil union with a Syrian refugee in Italy. Fear of loss may therefore prevail over international protection needs.

Within European asylum systems as currently conceived, claimants' experiences are homogenised and individual needs and fears are not taken into account. The lack of alternatives to asylum is itself a major problem needing further investigation. As pointed out by Diego and Riccardo, LGBTIQ+ group volunteers in Italy:

Why is it not possible to create humanitarian corridors? Why should they be forced to arrive in Italy to claim asylum? [We] have just received an e-mail from (...) a Sierra Leone's national, "how could I claim asylum in Italy?" (...) In this case, we can do almost nothing.

In this respect, the SOGI dimension of human corridors and the UNHCR's role in supporting these initiatives, as reported by Cristina (UNHCR officer, Italy), should be strengthened, and the possibility of issuing humanitarian visas considered. While a motion in this respect was adopted by the European Parliament, asking the Commission to prepare a draft for an EU regulation on humanitarian visas, thus bringing this matter under EU law with the consequent application of the EU

Charter of Fundamental Rights,<sup>11</sup> developments remain dependent on the political agenda of EU's member states too often based on their border control interests (Balboni and Danisi 2019).

Overall, the detrimental effects of their journeys on SOGI claimants are striking. As Just Me (focus group no. 3, northern Italy) stated:

If I have the freedom in my country, I don't think I will risk all the odd[s] to pass through the desert, to the sea, to Italy. So even to the European country that I can't speak their language. It is very difficult for me. Where I have nobody, it is like, if the life in my country was not so difficult about homosexual, I don't have to, I can't even imagine to take such risk.

Sometimes, such risk is undertaken for meeting basic survival needs, while totally ignoring the socio-cultural conditions of the chosen destination country. Nelo's experience (Italy) is a case in point:

I feel lucky, very, very lucky because... I spent three days or four days in the desert. (...) Some of them died in the process. (...) When you are fighting with the Arabs (...) they see you like, like an animal. (...) I heard a lot of stories that in Libya there's a lot of opportunity to work. (...) The plan was not to come to Europe.

The difficulties we have discussed above relating to submission of SOGI claims at arrival, often owing to the lack of appropriate information and inadequate initial screening, were highlighted as a key concern. As Giovanna, a lawyer in Italy put it:

The low percentage of SOGI claims and the fact that SOGI claimants are reluctant to manifest their personality, as well as the fact that they travelled to reach Europe, are all elements which should be clear enough to understand that, before submitting an asylum request, SOGI claimants really struggle with themselves.

The lack of a 'common language' preventing SOGI claimants from submitting their claims as soon as possible was expertly summarised by Valentina, a social worker in Italy:

We should help these people to create a vocabulary, their vocabulary. They have never told themselves to anyone. I can see a comparison with the Italian trans community, with the European trans community and the north America's trans community, where no words existed to narrate oneself.

The 'trans' dimension, which still remains largely unexplored, thus brings specific difficulties, compounded by the absence of appropriate initial accommodation.

More generally, the current initial reception solutions are inadequate to address SOGI claimants' needs. As they stand now, initial reception centres often contribute to aggravating individual fears on arrival, hampering the likelihood that a full and frank claim for asylum will be made at the earliest possible opportunity. One solution may be to classify SOGI claimants as 'vulnerable', as Gisela, a lawyer in Germany, and several other participants suggested:

[if] people [are] classified as a vulnerable group from the beginning, then they could be offered the corresponding information. Then maybe they would know before the interview

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<sup>11</sup> European Parliament, Humanitarian Visas, 12 December 2018, 2018/2271(INL).

that they do not have to be afraid, that it is not punishable in Germany, that the interpreters actually should not talk about it.

Whether or not this classification would improve the life experience of SOGI claimants at arrival, as explored in Chaps. 3 and 4, is still debatable. It is instead certain that different factors influence their experience, thus confirming the need to elaborate specific solutions for SOGI asylum, both before and upon arrival, based on an intersectional and queer human rights approach (Chap. 11). The urgency of addressing SOGI-specific needs is indeed apparent also in the context of the procedures in place for the evaluation of SOGI asylum applications, which we explore in the next chapter.

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# Chapter 6

## The Decision-Making Procedure



*I am still waiting. And it's too much and it's too stressful for me. (...) They keep me as if we're in prison. I don't know what is going on.*

(Mayi, focus group no. 4, Bavaria, Germany)

*You cannot just sit in front of me and ask me question, and expect to know me (...) I might not trust you to tell you the truth.*

(Nice Guy, focus group no. 1, northern Italy)

*They are torturing us. Really torturing.*

(Mary and Zaro, UK)

### 6.1 Introduction

Whereas in Chap. 5 we analysed pre-departure, journey and arrival experiences of SOGI claimants, we now turn our attention to the decision-making procedure. Whether they apply for asylum on arrival or later on, the initial screening is usually followed by a substantive interview. This is the essential moment when SOGI claimants have the opportunity to present their case. If the application is then refused, a judicial process is normally activated to appeal against the initial negative decision.

This chapter aims to analyse the most problematic aspects of these asylum procedures, as they emerged in our research as well as in the relatively limited available literature, and their impact on SOGI claims. These aspects include: the interview setting; the training and conduct of caseworkers, judges and other people working in this field, including interpreters; access to legal aid at all decision-making stages, including the appeal; and the quality of legal representation. The preparation of the asylum claim and – where applicable – of the appeal are also explored. In relation to all these aspects, the potential influence of bias of all actors involved in the asylum procedures is considered in detail.

This attempt to explore procedural issues, while leaving the substantial analysis of decisions on SOGI claims to the next chapter, takes into account the efforts already made at domestic level to integrate IRL and IHRL for setting up a fair asylum system and the positive influence of the EU's asylum framework, which takes the Refugee Convention as the cornerstone of its Procedures Directive (Chap. 4; ILGA 2014). In this respect, the UK is the only country under comparison that has made a clear commitment to 'continue (...) 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 2018, p. 17). However, this commitment is absent in the Government's Progress Report published a year after it was made (Government Equalities Office 2019).

As a preliminary background for this analysis, we briefly outline the procedural aspects of the general asylum framework in force in each country analysed here. In Germany, the asylum decision-making procedure may be easily summarised through the following chart (Fig. 7):

As pointed out in Chap. 4, the administration of asylum is not homogeneous across Germany owing to its federal structure. The body responsible for the implementation of asylum procedures and refugee protection is the BAMF. As seen in Chap. 5, on arrival at Germany's borders, people claiming asylum are distributed throughout the federal states with no consideration of SOGI or other grounds for persecution. Despite often being 'severely exhausted [and] traumatised' (Noah, NGO social worker), asylum claimants are suddenly immersed in an unfamiliar process, that may last for many months, or even years, from their first interview through to – in the case of a refusal and appeal – their hearing before a judge. In practice, there is no time limit for the BAMF reaching a decision on asylum applications, although within 6 months of a claim being lodged it needs to state when the decision is likely to be taken (ECRE, AIDA & Asyl und Migration 2019, p. 24). However, under paragraph 75 of the Code of Administrative Court Procedure,<sup>1</sup> if the BAMF does not produce a decision within 3 months of receiving an asylum claim, claimants can make a claim against the authorities' failure to act.<sup>2</sup> In 2018, the average claim took approximately 8 months to process,<sup>3</sup> and this became almost 17 months for a final decision to be reached in cases where there was an appeal (ECRE, AIDA & Asyl und Migration 2019, pp. 20–21). The need to speed up the assessment of asylum claims is at the heart of the reform that, in 2017, introduced the so-called AnKER centres – a network of centres that gather all asylum-related stages within them (BAMF 2019). While in these centres applications may be

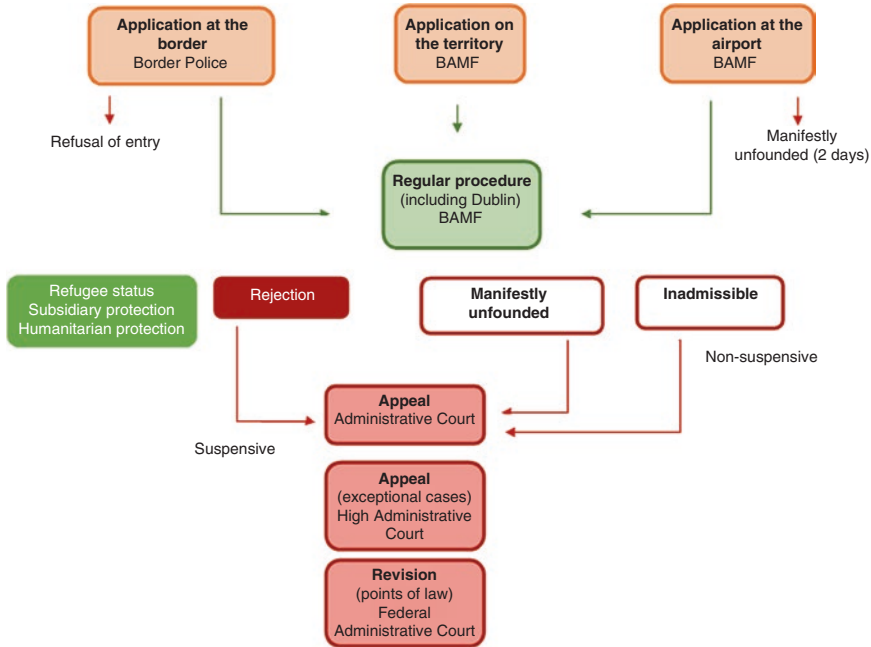
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<sup>1</sup>Verwaltungsgerichtsordnung (VwGO).

<sup>2</sup>'Untätigkeitsklage'. This was confirmed by the Federal Administrative Court (BVerwG), 1 C 18.17, judgment of 11 July 2018.

<sup>3</sup>However, the length of the procedure varies according to country of origin. Data from the BAMF from the third quarter of 2018 shows that claimants from Syria (5 months), Iraq (6.1 months) and Iran (6.8 months) were under the 8 months threshold on average, while claims from Pakistan (11.7 months), Afghanistan (11.3 months) and Russia (13.5 months) took much longer (ECRE, AIDA & Asyl und Migration 2019, p. 21).





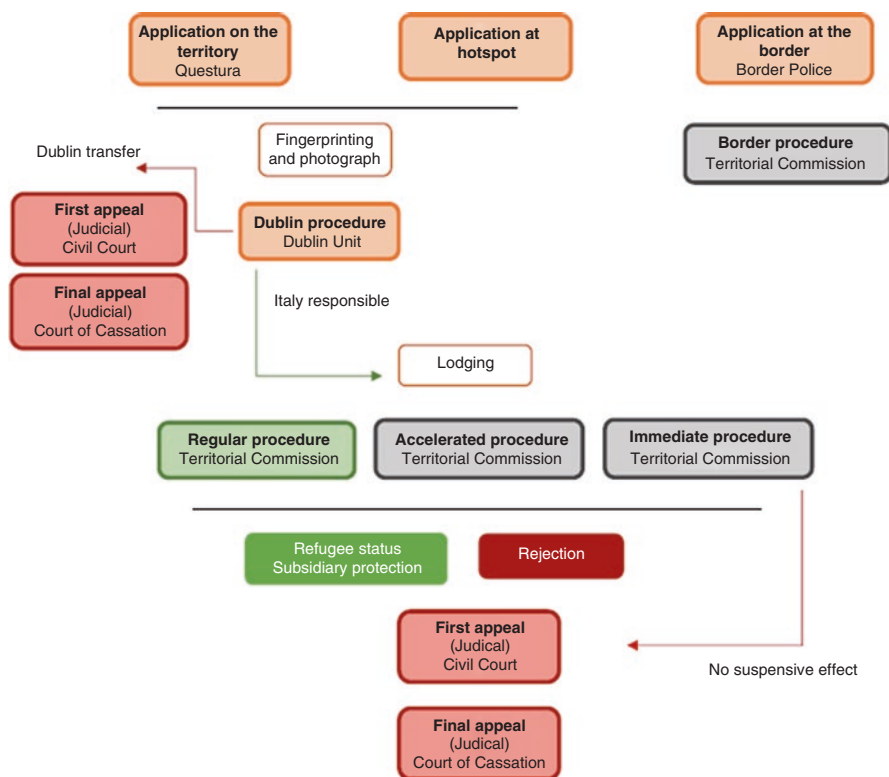
**Fig. 7** Asylum decision-making procedure in Germany. (Source: ECRE, AIDA & Asyl und Migration 2019, p. 13)

decided within a few days (Chaps. 4 and 8), this system has a particularly negative impact on the fairness and the quality of the asylum procedure in relation to all aspects explored in this chapter (ECRE, AIDA 2019).

In Italy, the procedure starts when the asylum application is registered at the police local headquarters ('Questura') using the 'C3' form (Chap. 5). As Roberto and Titti, decision-makers, emphasised, the way in which this form is completed may heavily influence the procedural arrangements adopted to assess a SOGI claim. Owing perhaps to the lack of a common language between those who fill the form (the Questura's officers) and SOGI claimants, only relatively 'visible' causes of 'vulnerability' tend to be reported at this stage, such as pregnancy or underage status, but not SOGI. The submission of the C3 form is followed by an interview with the territorial commission after an indeterminate number of months, depending on the general flow of arrivals and number of pending applications to be processed. In recent years, territorial commissions have been under great pressure, to the point of being expected to carry out 12–15 main interviews each day (Filippo, senior judge). Although this means that each individual member of a territorial commission listens to four-five claimants in 1 day (Titti, decision-maker), raising doubts about the commission's ability to fully engage with claimants' testimonies, a claimant may still wait for more than a year before being interviewed. In the case of a refusal at this administrative stage, the right to appeal exists for all claimants, despite the fact that this right has been seriously undermined by the 2017 and 2018 reforms of the

asylum legislation (Chap. 4 and Sect. 4.4, below; Palermo 2018). In order to speed up the assessment of asylum claims, these reforms introduced new procedures, including the concept of ‘safe country of origin’ and a new border procedure,<sup>4</sup> which provides for a nine-day examination of applications submitted at designated border areas or transit zones, or made by people coming from a ‘safe country of origin’. A good summary of the different procedures in place after these legislative amendments is provided by the following chart (Fig. 8):

Finally, in the UK, applications are processed through a number of routes. These include the regular route, in which claimants are dispersed across the country pending a decision by a regional office or the Home Office, and other specific procedures, such as in the case of people arriving from ‘safe countries’ or whose applications are clearly unfounded and for which there is no in-country appeal (so-called ‘accelerated procedures’; ECRE, AIDA & Refugee Council 2019). Perhaps



**Fig. 8** Asylum decision-making procedure in Italy. (Source: ECRE, AIDA & ASGI 2019, p. 17)

<sup>4</sup>Article 28-bis (1-ter) of the Procedure Decree, inserted by Decree Law no. 113/2018 (converted into Law no. 132/2018).

to an even larger extent than in Germany and Italy, the time taken to process an asylum application varies greatly, although all asylum cases ‘have a deadline of 182 days between the moment that someone claims asylum until the moment they should receive a decision’ (Qasim, decision-maker).<sup>5</sup> Similarly, when the initial decision by the Home Office is a refusal, most claimants can appeal to the First Tier Tribunal. A judicial review – but only of the process, not the substance of the case – is sometimes a final resort before a case becomes Appeal Rights Exhausted (ARE). At this point a claimant may be able to submit a fresh claim if the Home Office accepts the existence of new evidence. This might apply in SOGI cases where, for example, a country of origin introduces new legislation criminalising homosexuality, as happened in Nigeria in 2014.<sup>6</sup> Again, a good summary of the asylum procedures in the UK is provided by ECRE (Fig. 9):

In all these countries, as well as across Europe, time and waiting are key issues for SOGI claimants. To give an example from our survey, 51% of respondents who lodged an appeal against a negative decision reported that they had waited more than 6 months for their hearing. As Joachim, an NGO worker in Germany, put it, timing ‘is very much a double-edged sword for LGBTI people’. While quicker procedures may have positive effects in terms of the well-being and mental health of SOGI claimants, a short process does not always correspond to a fair process in SOGI cases, considering the time needed to adequately prepare for the asylum interview (Sect. 6.2.1). Nevertheless, as Thomas, an NGO volunteer in Germany, explained in relation to the first period of the NGO’s activity between 2015 and 2016:

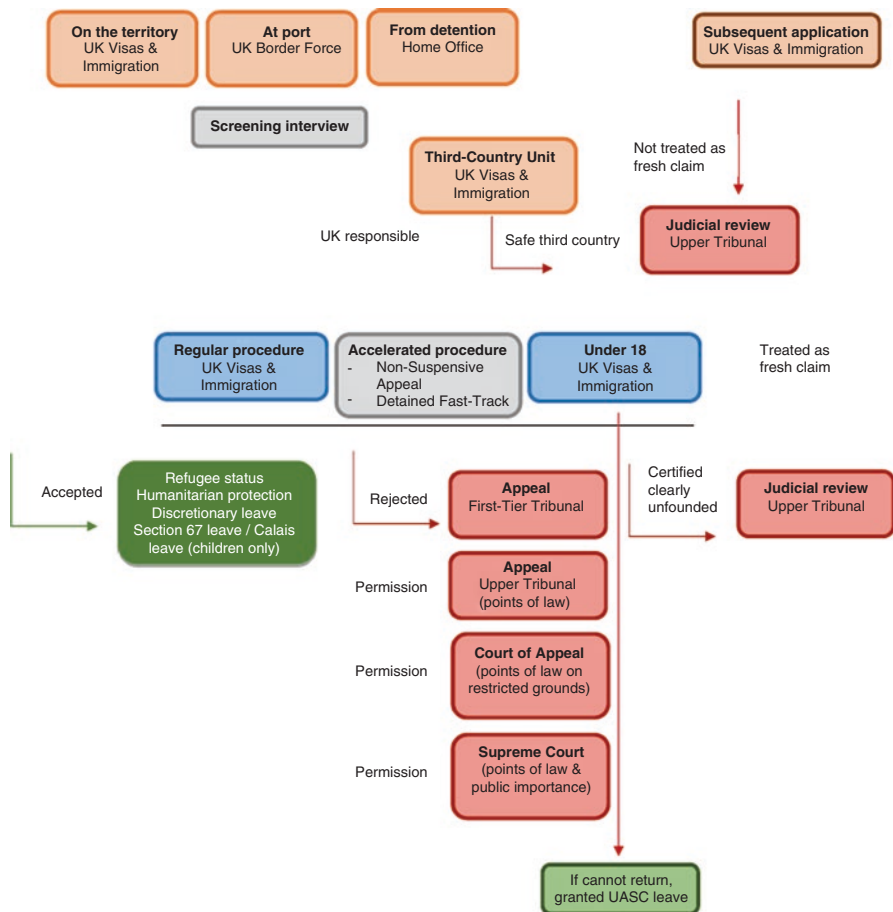
Waiting times were so insanely long between the first interview and the second. During this period, the refugees were doomed to inaction. And that is of course a real psychological problem. We have partly tried with work permits, but it was difficult.

For some SOGI claimants, the wait for a decision can feel unbearable. For example, Halim felt lucky to have been granted refugee status in Germany within less than a year. Nevertheless, he also felt that the whole period was ‘like a very long time (...) a waste of time and energy. (...) I lived that year with a feeling of uncertainty, not knowing what to expect, what’s going to happen next’. Susanna, a social worker in Italy, also reported the pain of a claimant who, after another postponement of a hearing, simply stated: ‘I cannot wait anymore, I do not know anymore what I shall do with my life’. The wait was particularly traumatic for those separated from their children and who needed a grant of asylum before their children reached adulthood in order to bring them to Europe through family reunification (Stephina, UK). Yet, for people like Bella, claiming asylum in Italy, 10 months waiting were tolerable because her accommodation centre had arranged training activities for all residents and she was able to learn Italian.

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<sup>5</sup> However, in May 2019, the Guardian reported that the government had abandoned its six-month target (<https://www.theguardian.com/uk-news/2019/may/07/home-office-abandons-six-month-target-for-asylum-claim-decisions>)

<sup>6</sup> The Same-Sex Marriage Prohibition Act was passed into law by the Nigerian president in January 2014.



**Fig. 9** Asylum decision-making procedure in the UK. (Source: ECRE, AIDA & Refugee Council 2019, p. 13)

As many of our participants pointed out, SOGI claimants may need time to come out and reveal the real reasons for requesting asylum in Europe. For instance, Bakary (focus group no. 2, northern Italy) was asked to complete the C3 form only 4 days after arrival, when he was not ready to discuss the real reasons for having escaped his country of origin. Moreover, as Thomas (NGO volunteer, Germany) pointed out, shorter assessment periods may prevent a comprehensive preparation of the claimant ‘to just have a fair chance in the process’. In this respect, it is noticeable that the expected CEAS reform at EU level will not bring benefits for asylum claimants. In fact, as Jules, staff member at ILGA-Europe, highlighted, ‘the reform is now focused on accelerating procedures and making it quicker (...). But, in the cases of (...) LGBTI asylum seekers, this becomes extremely problematic

especially considering that (...) a vast majority of asylum seekers who arrive are traumatised in some form or another’.

With this background and difficulties in mind, this chapter is structured as follows. Section 6.2 investigates how SOGI claimants are prepared for the main administrative interview and for judicial hearings, including access to legal aid. The quality of legal aid provision during this preparatory phase is also considered. Section 6.3 examines the procedures around the main interview, paying attention to the individual experiences of SOGI claimants, while attempting to identify any specific procedural arrangements that are in place to assess SOGI applications in these countries. Other than the interview setting and the conduct of the interview, this section also explores the selection and training of administrative decision-makers and, where possible, the existence and influence of any bias on their part. The same aspects are analysed in Sect. 6.4 in relation to the judicial adjudication of SOGI claims. Section 6.5 investigates the collection and use of Country of Origin Information (COI) in light of its fundamental role in the assessment of SOGI claims. Section 6.6 examines interpretation issues, transversal to both the administrative and judicial procedures. Finally, Sect. 6.7 explores other procedures in place in the countries under comparison, namely accelerated procedures and Dublin transfers, in light of their particular impact on SOGI claims. While all sections highlight elements that may shape a fair asylum procedure for SOGI claimants, the chapter ends with some final remarks that take into account participants’ calls for an overall improvement of the procedural aspects in SOGI asylum.

## 6.2 The Preparation of Asylum Claims and Legal Aid

The preparation of SOGI claimants for the main interview and judicial hearing(s) was widely identified by our participants as a key aspect of a fair asylum procedure. According to Roberto, a decision-maker in Italy, whether SOGI claimants are briefed in reception centres about what an interview entails, and have discussed their stories with staff and written them down, can be the most influential factor in ensuring a positive RSD experience and outcome. In turn, Qasim, a decision-maker in the UK, explained that when claimants arrive ‘with lots of information, really professionally sort of organised information, their interviews [are] really, really easy as well and straightforward’. Yet, this kind of preparation is not standard practice for SOGI claimants, especially those who, for various reasons, are not accommodated by the state during the application or, even if the state takes charge of them, are held in reception centres that do not offer the necessary social or legal services.

### 6.2.1 *The Preparation for the Main Interview and Judicial Hearing(s)*

Despite the evident role it can play in a successful claim, preparation can be an issue in all countries under investigation. In Germany, while in some areas NGOs and support groups provide advice to SOGI claimants assessed through the regular procedure, their support is increasingly hampered by the creation of the AnKER centres (mainly in Bavaria). Claimants who are hosted in these centres receive all information on the asylum process by the BAMF. Independent advice is rarely available, not least because of the short time between arrival at the centre and the main interview. As our participants confirmed, the gathering of evidence is severely jeopardised by this system (Nina, legal advisor; Frank S., legal advisor). In such circumstances, claimants are often still in ‘flight mode’, unable to relax, concentrate or present their claim to the best of their ability, while no connections to local LGBTIQ+ community for advice and evidence can be established. Following the adoption of the 2019 reform (Chap. 4), no improvements are expected as this approach seems to apply more generally. In fact, the law now requires that the Federal Office provide voluntary and independent legal advice on the asylum procedure through group and individual counselling sessions, with the potential involvement of welfare organisations. This move has been already criticised, as it risks undermining the role of NGO counselling, which, if adequately provided, is often an essential part of a fair and efficient asylum procedure (ECRE, AIDA 2019).

In Italy, at least in principle, a combination of services in accommodation centres, which are publicly funded but provided by private entities, along with support by associations and LGBTIQ+ groups, is available to prepare SOGI claimants for their interview(s) and hearing(s). If we look at the situation on the ground, however, most participants, with few exceptions, reported that the quality of services provided in accommodation centres was unsatisfactory for different reasons. Some participants did have a positive experience, such as Alain A., who remembered ‘I had a meeting with my legal operator [advisor], we did the story, she wrote everything in Italian, we tried to read [the story]’. Yet, many other participants complained about the lack of an adequate number of legal advisors in these centres, or the inexperience of the staff running these centres in dealing with SOGI claims. According to Susanna, a social worker:

The management of reception centres was also given to private individuals or companies that were not previously involved in community work (...) and they want to make profit. So, they save money by not providing a psychologist, a cultural mediator [mediatore culturale], a lawyer [in] many facilities that are totally isolated from society.

Diego and Riccardo, LGBTIQ+ group volunteers, reported that the accommodation centres are often packed and in-house legal advisors, even if very competent, are not able to provide appropriate support to all claimants. As one of the participants in focus group no. 4 in northern Italy, Bubacan, explained: ‘the [reception] centre’s lawyer cannot but work superficially, cannot pay regular and specific attention to everyone, owing to the amount of people under their mandate’. Many SOGI

claimants did not meet an advisor at all. In this respect, Cedric (focus group no. 5, southern Italy) remembered that ‘they [the managers of the reception centre] can tell you that lawyers are available but you never see them’, whereas Fred (focus group no. 5, southern Italy) simply affirmed ‘[m]y camp did not even have a lawyer to tell my story’. This is also why associations and support groups in Italy play a central role at this stage. It is no coincidence that the number of SOGI asylum support groups has rapidly increased between 2016 and 2019 (Il Grande Colibri 2019). Thus, Antonella, who leads a support group that offers psychological support, legal advice and cultural mediation, recalled that some claimants expressly asked her to carry out simulations of the main interview, in order to test answers to the most recurrent questions. This is also why a significant part of her support aims to train claimants to understand ‘decision-makers’ own mental schemes’ (Antonella, LGBTIQ+ group volunteer). As an example, she explained that a lot of effort is placed on remembering dates and places and on reporting all facts without contradictions and through a ‘European lens’. This voluntary support is even more fundamental when SOGI claimants are not hosted in reception centres. As Jonathan, an LGBTIQ+ group volunteer, pointed out, in these situations associations support SOGI claimants during the entire procedure, from the submission of the application and the request of a permit to stay, to the preparation of the narrative to be articulated during the interview and the collection of evidence.

Equally, in the UK, voluntary and non-governmental organisations (NGOs) play a fundamental role. Many individuals seek information, advice and support from voluntary organisations, ranging from larger or national ones, such as Refugee Action, to local ones supporting particular refugee communities or working in particular areas, such as the Somali Women’s Support Group or Southwark Refugee Communities Forum. SOGI organisations also play an important role and, again, these range from national – for instance, Stonewall, UKLGIG and Stonewall Cymru – to local and grassroots organisations like Brighton & Hove LGBT Switchboard and the Lesbian Immigration Support Group in Manchester. These have been complemented by a number of asylum support groups set up by SOGI claimants, such as African Rainbow Family in Manchester, Out and Proud in London, the LASS group in Sheffield or Reach Out in Leeds (as reported by Janelle). Research dating as far back as 2009 pointed out that SOGI claimants rely mostly upon personal relationships or social networks in the absence of more traditional support from family and ethnic networks (Bell and Hansen 2009, p. 43), therefore it is unsurprising that, for many participants, these organisations and support groups provide more than procedural and legal advice.

The complexity of this preparatory work across all countries under comparison, extending well beyond simply giving information about the asylum process, was well expressed by Noah (NGO social worker, Germany). After reporting that a significant number of people arrive totally unprepared at the main interview, he highlighted the need to establish a relationship of trust as a precondition for a successful preparation:



I have to take away the fear from the people, reduce the boundaries of shame, establish a bond of trust that enables them to express themselves on things that may have traumatised them in their lives, which still move them today.

Nonetheless, much of the time this dedication is absent in the asylum system. As Bakary (focus group no. 2, northern Italy) recalled:

When I arrived, my friend helped me to write down my story in order to fill the C3 form, he told me how to proceed. (...) it's the cooperative [reception centre] that should (...) support you in improving the narrative of your personal account, because we come, we arrive here, after facing several difficulties; it is clear that you are not able to express yourself, the cooperative must look for someone who can help improving how to present your story (...) rather than simply submitting your story as you can write.

In the face of this lack of support in preparing claimants for the interview, individuals are likely to look to other claimants for advice as the only available option. However, being advised by other claimants may backfire in being perceived negatively by decision-makers. As Halim, claiming asylum in Germany, where he works for an NGO, pointed out:

[T]he interviewer (...) asked him [Halim's client] who gave advice about asylum and he mentioned that he got counselling from people including myself about how the process goes. I think people have the right to get counselling and the information about the asylum process. Then he considered this a manipulation of asylum, "Asylbetrug" he said, and it was rejected.

In some circumstances, the lack of support services and failure to provide accurate information about asylum procedures may result in some claimants feeling insecure to the point of fabricating or embellishing elements of their narrative. The peculiar submission of Abdoul's (focus group no. 2, northern Italy) claim is illustrative. As he put it:

a person told me to use a story of gays. Ah! Since I was ashamed to declare who I really was, he did not know [that I was actually gay]. Hence, I was obliged to write down that story (...) without being forced to disclose my real identity.

In light of the central role they play in all three countries for the preparation of SOGI claimants, NGOs and support groups are often, at least indirectly and informally, involved in the decision-making process in a number of ways.

A primary way is certainly the provision of supportive statements. While the value attributed by decision-makers to evidence provided by third parties is examined in Chap. 7, it is nonetheless important to highlight here how participants justified this proactive intervention of associations and support groups during the preparation of administrative interviews and judicial hearings. Diego and Riccardo, LGBTIQ+ group volunteers in Italy, explained that their involvement in the asylum procedure became necessary due to the assumption that claimants needed to prove their SOGI. In this respect, their project – called 'Immigrazioni e Omosexualità' (IO – Immigration and Homosexuality) – made a clear choice: alongside providing a safe space where claimants could learn Italian and gain self-confidence before sharing their stories, IO supports them by issuing a statement on their involvement in the project's activities. As Diego emphasised, decision-makers will never find in

these statements ‘what [claimants] like [in terms of partners], [but] these simply describe the life of a person’, in light of the experiences which claimants shared with the project’s volunteers. Significantly, according to Diego, once these statements are produced, decision-makers’ questioning during the asylum interview is often more pertinent and less intrusive of claimants’ privacy. Other support groups adopt a different approach. For example, Zouhair, claiming asylum in Germany and who now works for an NGO, affirmed that his group usually sends letters where it is written that ‘he or she... is gay or lesbian’.

Another fundamental aspect of the role of support groups was shared by Valentina, a social worker in a trans association in Italy. Besides discussing the testimony with a claimant before the main interview, her association – MIT – collects information on the socio-cultural environment of the relevant country of origin, as well as on the rights granted to transgender people in Italy. This information is then made available to the decision-makers. Perfectly in line with a human rights approach to asylum (Chap. 3), she stressed that decision-makers may ignore these rights, for example, the law allowing gender reassignment, but should be aware of the availability of appropriate health services and legal guarantees in force in Italy to adopt informed decisions. Considering that all asylum applications followed by MIT, including the case of a claimant from Nigeria who recently started the male-to-female (MtF) transition process in Italy, have been successful, this approach certainly helps to fill the existing gap in the training of decision-makers on SOGI-related rights (Sect. 6.2.3).

The lack of training, coupled with the (still) widespread stereotypes of SOGI minorities in the decision-making process (Sect. 7.5 of Chap. 7), may prompt other associations involved in the preparation of SOGI claimants to encourage claimants to ‘fit’ specific categories in order to maximise their chances of receiving a positive decision. Jonathan, an LGBTIQ+ group volunteer in Italy, provided a powerful example connected to the ‘invisibility’ of bisexuality in asylum decisions (Rehaag 2009): ‘More than once I suggested to avoid bisexuality and to say they’re gay’. Although conforming to certain Western-informed categories may indeed increase the chances of a successful application, it also undermines the agency of SOGI claimants. Despite the good intentions behind this type of instructions, claimants may disapprove of such strategies. William, who claimed asylum in Germany, reacted to a suggestion aimed at boosting his gay appearance for the interview as follows: ‘you cannot make someone who has been one year in Germany like someone who has grown [up] seeing gay, or someone who has grown [up] with gays in a gay lifestyle. You cannot change in one year, no no no no’. In so doing, NGOs and support groups risk reproducing decision-makers’ disputable stereotypical assumptions on SOGI minorities (McGuirk 2018), rather than trying to eradicate them.

During this preparatory period, members of support groups, as well as reception centre staff if they are appropriately trained, may shape the procedural aspects of SOGI claims’ assessment. This outcome can be achieved indirectly, by providing information to SOGI claimants about their rights, but also directly, by communicating with relevant decision-makers in order to request SOGI-friendly arrangements. Giulia, an LGBTIQ+ group volunteer in Italy, explained that she would inform

claimants that they are entitled by law to change interpreters if they perceive biased or stereotyping behaviour, and that they should sign the record of the interview only after having had it carefully translated. Nonetheless, as she explained and other participants confirmed, many claimants get in touch with support groups only after a first refusal by the administrative bodies, once these basic rights have already been ignored. Moreover, in focus group no. 5 in southern Italy, it emerged that even those who are aware of these rights may not 'dare' to invoke them owing to the power imbalance in the interview setting. In Cedric's own terms, 'I considered that, maybe, if I contested, I could be seen as a rebel, thus I agreed with everything they did'. In contrast, Dev recalled: 'We redid my transcript, she [the interviewer] said to be in a rush but I said "no, we are going to spend all the time required to redo it" and so we did'. That is why, Alain A., a refugee in Italy, stressed the importance of also being 'psychologically prepared' to face, among other things, the presence of an interpreter with a similar cultural background (Sect. 6.6).

In order to address some of these issues, Zouhair explained that, before the interview takes place, his group informs relevant asylum authorities in Germany about the need to secure a 'sensitive interpreter'. The same approach is adopted in some areas of Italy, where staff in reception centres and support groups developed the habit of informally giving the territorial commissions advance warning of the upcoming interview of a person claiming asylum on SOGI grounds (Chiara, NGO worker; Cristina, UNHCR officer). In some circumstances, this preliminary communication is also necessary to speed up the process. As Diego (LGBTIQ+ group volunteer) explained, a request to bring forward the interview date was submitted to the relevant territorial commission on behalf of a lesbian claimant from Cameroon who, due to her appearance, was continuously discriminated against by other female guests in their accommodation centre. Bringing forward the interview was an effective way to limit the time she spent in that reception centre before a final decision on her application was taken.

Finally, despite preparatory efforts, some volunteers or staff of reception centres reported the importance of accompanying SOGI claimants on the day of their interview to support them psychologically. Yet, this is not always permitted except in exceptional individual circumstances (for instance, when the claimant is an unaccompanied child, their guardian may assist). Mara, a lawyer in Italy, explained that, owing to the particular situation of 'vulnerability' of a gay claimant from Pakistan, she asked and obtained authorisation for a member of the support group to attend his main interview before the territorial commission. Considering the power dynamics during the interview process, this simple but fundamental entitlement emerged as one of the possible recommendations for rendering the asylum system for SOGI claimants fairer (for instance, Thomas, NGO volunteer, Germany; Daniele, decision-maker, Italy; Giuseppe, lawyer, Italy). The empowering effect of such a measure is already visible at the appeal stage, where volunteers and support groups assist SOGI claimants on the day of tribunal hearings (for instance, Court observation, Hesse, 2018; Tribunal observation, northern Italy, 2018).

According to Damiano, a lawyer in Italy, the impact of all this 'laborious' voluntary work is shown by the high percentage of recognition of SOGI claims at

administrative level during recent years. Based on the experiences of SOGI claimants, it is clear that NGOs and support groups also play a significant role in the preparation of judicial hearings, especially in relation to those who have their first contact with LGBTIQ+ associations only after the administrative refusal of their asylum application (for instance, Odosa, Italy). According to Antonella, an LGBTIQ+ support group volunteer in Italy, when SOGI claimants get in contact with associations only after filing a judicial appeal, their preparatory work consists of understanding the reasons for the refusal and drafting appropriate answers to the most problematic points. Equally, Noah, NGO social worker (Germany), explained that, during the 6–12 months before the hearing:

[They] collect (...) write down, capture in detail (...) which things were asked in the interview, which were not. (...) That means [that] you have a lot of preparation, [especially because] it depends more on the credibility. People who have fled or migrated here do not have the evidence, unless they have physical scars and a credible narration.

In the UK, the support at this stage seems to be more encompassing. Organisations such as Asylum Aid, Refugee Action and the Refugee Council provide a range of resources to help individuals navigate the asylum system (Asylum Aid 2018). In this context, Denise and Umar, legal advisors, explained that, besides providing letters of support, their preparatory work is focused on the need to demonstrate that SOGI claimants have a general support network, attend meetings and take part in demonstrations in the UK, such as Pride. This also includes the identification of appropriate witnesses, although in their view some judges look at witnesses positively, while others do not: ‘we know with a couple of judges that [a witness] has had an effect’ (Denise and Umar, legal advisors). The preparatory work also aims to address issues that, without the adoption of an intersectional approach (Chap. 3), may not seem reconcilable in terms of the relationship between religion and sexual orientation. As Debbie, an NGO worker, explained ‘we try now to help people to verbalise, to give people sort of arguments to verbalise why it can be reconciled. But it did seem to be something that was used [by Home Office interviewers] to just... to shake them [claimants] up’. However, for a range of reasons, this initial preparation of the case is not always carried out as it should. For example, Irma, who claimed asylum in the UK, experienced a number of problems at all stages of her application and the appeal process: some of her paperwork went missing, her solicitor went on holiday immediately before the hearing date, and an expert report was submitted late. Irma also reported that on the day of the hearing the barrister found the material prepared by an NGO ‘no[t] good’. As she recalled, she was ‘really angry with them’, taking into account that her case was a ‘good one’ and should not have been rejected again.

Irrespective of the preparatory activities of NGOs and support groups, it seems that during the appeal procedure claimants become more confident. As Giovanna, a lawyer in Italy, put it, during the appeal ‘claimants tend to have a chance to talk, to explain their stories after having had the time to elaborate them [and] to become familiar with the [surrounding] society’. In fact, SOGI claims fail at first because people are still often in hiding and/or do not have evidence. By the time they get to the appeal, they may be more confident and provided with better evidence.

Consequently, preparation at this stage is often accompanied by a greater willingness and ability on the part of SOGI claimants to fight for their rights. Perhaps it is also this increased awareness that explains why relationships with lawyers, who sometimes tend to make decisions about aspects of the claim without consulting their clients (pointed out, among others, by Susanna, social worker, Italy), may be particularly problematic during the appeal, as the next section explores.

### ***6.2.2 Access to, and Quality of, Legal Representation***

Our fieldwork confirmed that asylum claimants experience serious difficulties in accessing legal representation across Europe. Only 54% of claimants responding to our survey had a legal advisor or representation during the asylum procedure. This data is consistent with the different provisions and practices that emerged in our three country case studies.

In Germany no legal aid is available for initial claims, only for the appeal stage. According to Evelyne and Anne, lawyers in Germany, legal advice is nonetheless provided by advice centres, volunteers and non-governmental institutions like Caritas. As Ibrahim, a claimant now working for an NGO, confirmed, in some federal states the financial support for legal advisors has been reduced, leading them to work fewer hours than in the past. This general framework causes financial hardship to claimants, who cannot consequently ensure access to adequate representation in the early stages of their asylum claim.

By contrast, in Italy, while as a general rule legal aid is not granted during the administrative procedure, asylum claimants who are hosted in accommodation centres are entitled to receive legal assistance from the staff. However, often these staff do not have any legal training and, according to some claimants, the limited legal assistance provided in these centres is sometimes offered against payment. Bakary (focus group no. 2, northern Italy), for instance, told us that ‘yes, you need to pay 150 Euros, so every month when they give you the pocket money, you give back 15 Euros’. In contrast, during the appeal stage, all claimants with insufficient financial resources may apply for, and usually receive, state legal support (so-called ‘*gratuito patrocinio*’).

Free legal assistance is available in the UK to people claiming asylum who cannot meet the costs of representation. Yet, in practice, access to good legal advice is difficult for many of them. Problems arise because of the low level of funding available to solicitors working under a legal aid contract and because there are not enough high quality solicitors with legal aid contracts to meet demand. It seems that few claimants receive legal advice prior to their screening interview.<sup>7</sup> Since 2014,

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<sup>7</sup>Legal aid expenditure was significantly reduced through the 2012 Legal Aid, Sentencing and Punishment of Offenders Act (LASPO). The loss of this funding ‘threatens the existence of legal firms who represent asylum seekers, and the loss of representation to those in desperate need’

the Home Office has funded Migrant Help to provide asylum support, but this no longer includes advocacy either in relation to decision-making or appeal stages (ECRE & Refugee Council 2016, p. 54).

Irrespective of access to legal aid, a general problem arises from the fact that asylum systems do not always allow lawyers to be present during the main interview (also called administrative or substantive interview in some countries), unless authorised on a case-by-case basis, as was reported in Italy. Lawyers are instead entitled to attend the substantive interview in Germany and the UK, where such attendance is however not usually covered by legal aid, thus in practice lawyers only tend to attend if privately funded. Even when they do attend, the lawyer's role in the interview may be limited. Yet, as Giuseppe, a lawyer in Italy, explained, the best thing for all asylum claimants would be to have the lawyer with them during their main interview. In fact, lawyers are in the best position to intervene when answers are reported or transcribed inaccurately, strengthen claimants' confidence, and even stop the interviewer in case of inappropriate questions (something reiterated by Damiano, lawyer, Italy; Diana, Germany; Thomas, NGO volunteer, Germany; and Sofia and Emma, NGO workers, Germany). The case of Alphaeus, who claimed asylum in Germany, is illustrative:

In my big interview [I was] mentioning the date of when my mum died. The interviewer (...) instead of 1996, he wrote 2006. (...) I just thank God that my lawyer was there. (...) He told them "No, this is not real. See what you've done here". So he managed to correct them.

The positive effect of having legal assistance is even more evident when we look at the active role played by certain lawyers at judicial hearings. For instance, during a tribunal observation in northern Italy in 2018, the lawyer intervened to challenge those questions that were perceived (also by the claimant) as irrelevant in the context of his overall story, while trying to direct the judge's attention towards his LGBTIQ+ activism. The need for a change was therefore widely shared in this matter. Consequently, Allan, a lawyer in the UK, affirmed in light of his multi-year experience that 'having good legal representation from the outset does make a huge difference (...) no question'.

It should also be recognised that, in addition to the appeal, sometimes lawyers' support is essential in other areas of SOGI asylum, like accommodation. For example, only the intervention of a lawyer allowed Ken, who claimed asylum in Italy, to move out of the reception centre where he was continuously discriminated against by other asylum claimants (Chap. 8). In the UK, the Asylum Support Appeals Project fulfils this role, by helping people claiming asylum to obtain housing and welfare support, including by providing free representation at the First Tier Tribunal.<sup>8</sup>

Overall, this shortage of free legal provision is unsurprising given that, under EU law, the obligation to grant legal aid relates only to the appeal stage (Article 20 of

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(Asylum Aid 2013). Two of the main not-for-profit advice organisations – Refugee and Migrant Justice and the Immigration Advisory Service – closed in 2010 and 2011.

<sup>8</sup><http://www.asaproject.org/about/representation>



the Procedures Directive). Yet, even when legal aid is available and legal representation granted, our data shows that, despite some important exceptions consisting of highly qualified lawyers and legal advisors, the quality of representation does not always reach adequate standards across the three countries under comparison.

First, besides a lack of contact between lawyers and claimants in preparation of the initial claim, there is a clear problem in relation to the preparation of the appeal hearing. Very limited contact between claimants and lawyers was reported before the hearings. Betty (focus group no. 3, Bavaria, Germany), for example, told us that ‘it is one year and one month, but I’ve never got anything like a paper from my lawyer’. In other cases, claimants were neglected, as, for instance, Zaro (UK): ‘weekly we try to call [the solicitor], trying to meet with her, she ignoring us’. During a tribunal observation in northern Italy in 2018, the lawyer asked the SOGICA researcher to contact the claimant, because the lawyer had never called them before, all contacts having previously been managed by the reception centre’s staff. A similar disinterest emerged during other judicial hearings we observed (for instance, Court observation, Hesse, Germany, 2018), including the failure to ensure preliminary contact with tribunals as requested by claimants themselves (for instance, Court observation, Hesse, Germany, 2018, when the lawyer did not ask for a joint hearing of a couple, despite her clients’ express request). Other observations also showed a lack of preparation by lawyers and, often, a total reliance on support groups’ preparation of the claim (for instance, Court observation, Hesse, Germany, 2018; Tribunal observation, northern Italy, 2018).

Where, instead, there is good engagement between claimants and their lawyers, a process of empowerment may take place. For instance, Buba, an unaccompanied child in Italy, recalled that he only obtained free legal assistance after the refusal of his asylum application by the administrative body, which did not determine that he was underage until a volunteer discovered it. Together with his legal representative, Buba analysed the negative decision and collected appropriate evidence, including medical reports and pictures of his scars, and was eventually able to cogently present his claim before the judge. In fact, as Sean, a lawyer in the UK, pointed out, for legal representation to be of good quality it is essential to spend a considerable amount of time together with the claimant:

[For] LGBT cases (...) it might take you five hours just to build the relationship with the client. Ten hours after that to take a detailed statement, four hours after that to go through the statement and look at difficulties and contradictions and gaps, and to bring some experience to that (...) You can’t ask [some kind of] question[s] on hour one or even on day six, but weeks later (...). So it is about exploring and spending the time that you need to get as much as you think you need.

Nazarena, a lawyer in Italy, also confirmed that, by following this approach, SOGI claimants may articulate experiences that they were not able to share before, including the real reason for fleeing their country of origin when not disclosed any earlier. Sean asserted as well that to ‘strike a relationship’ one needs to also be gender-aware, something that tallies with our intersectional and feminist approach



(Chap. 3). That is why Sean always asks female clients whether they are comfortable with talking to a man, giving them the option of having a female advisor instead.

Nonetheless, it is true that, in some cases, despite the willingness and the availability of lawyers, SOGI claimants find it difficult to ‘open up’. In this respect, the cooperation with NGOs or staff in reception centres remains fundamental. The case of a lesbian claimant retold by Celeste, a social worker in Italy, is illustrative. The claimant was convinced that she had to talk only about the sexual aspects of her relationships in line with her understanding of being lesbian: ‘She always referred to herself by using the expression “I do lesbian”, not “I am” lesbian’. Despite the availability and the efforts of the lawyer, only the intervention of Celeste changed the situation. So, during a long talk between them before the hearing, Celeste explained again why the claimant’s initial claim was refused and what questions were to be expected by the judge. It was only thanks to the clarifications provided about the meaning of ‘being in a relationship’ that the claimant was eventually able to argue effectively before the judge. In other words, a cultural mediation process was necessary to build a case that would otherwise have been unsuccessful. Yet, it is noticeable that this approach may nonetheless reinforce the recognition of refugee status largely on a Western identity basis, as further explored in Chap. 7, in contrast with the queer perspective we advocate (Chap. 3).

Second, the lack of effective communication between legal representatives and claimants was a widespread point of concern. For example, Stephina, a claimant in the UK, told us that when she went to court for her hearing, she could not speak: ‘I didn’t, I wasn’t given a chance to speak and explain some things for myself (...) I followed what my lawyer said... “you say this, you don’t say that”, so I went with the mentality of “yes sir”, he said this and he said not this’. Maria (focus group no. 5, Nottingham, UK) was asked by her lawyer not to mention sexuality as the real ground for requesting asylum, despite the negative implications she feared for the assessment of her claim. Something worse happened to a claimant in the UK, who was involved in focus group no. 3 in London, who discovered after a period of 2 years that her fresh claim, which was supposed to have been submitted, had never been filed: ‘Over two years I have been in lie (...). When we phoned him, I went to his office, he said “oh, I don’t think I believe you, you were a lesbian”’. For people who have used their own initiative to bring about changes in their lives, the requirement to hand over control to advocates can be difficult. In this respect, Meggs (UK) pointed out: ‘Maybe it is one of the mistakes that I did, I didn’t kind of do my own research and find out what is really needed, what are they going to ask or what kind of evidence they really required’. In some cases, however, what might be perceived as a lack of energy in pursuing a claim may be motivated by other legitimate reasons. In this respect, the experience of Deirdre, a lawyer in the UK, is enlightening:

Sometimes I would say to a client, “I am not necessarily sure you are ready for this interview and this interview is the most important thing. I think you should go to your GP, I think you should get referred to mental health services, I think we should say to the Home Office, you need a bit more time”.

Third, the substantial amount of money that good legal representation costs, mainly in Germany and the UK, is problematic, especially in light of the lack of work opportunities for asylum claimants (Chap. 9). Fees may even be charged for initial consultations (Marlen, legal advisor, Germany), although some lawyers stressed that charging for initial advice can help claimants save ‘a lot of money in the long run by being properly advised on the merits’, rather than being more concerned ‘by the offer of “free” consultations where applicants are then advised to go ahead with expensive poor claims’ (Barry, lawyer). Some participants also believed they needed to pay a private lawyer to improve their chances of securing international protection during the administrative process. For instance, Diana (Germany) had paid 700 Euros for a lawyer in the belief that ‘it would be easier if you have someone like that (...). That was not a social lawyer or refugee advocate’. For some claimants, a private lawyer remained essential even when reception facilities offered legal support. According to Nice Guy (focus group no. 1, northern Italy):

There’s a difference (...). If you are using a camp lawyer, it’s free. If you are using your personal lawyer, you have to pay (...) by yourself. But most of the time, the personal lawyer works better than the camp’s lawyer.

This perception puts many SOGI claimants under serious financial pressure. In Germany, a questionable system is in place: claimants can apply for legal aid to pay for a lawyer, but legal aid is granted by the same judge who has to decide on the appeal itself, depending on how that judge rates the chances of success of the appeal (ECRE, AIDA & Asyl und Migration 2019, p. 29). Not surprisingly, Barbara, a lawyer, affirmed: ‘There was a time, I used to feel that legal aid, if I get that, I’ve already won’. Far from being compliant with the right to access to a fair asylum procedure (for example, Article 13 ECHR), Thomas, an NGO volunteer, explained that, in practice, claimants need to pre-finance their legal representatives and are only reimbursed in case of success. As further confirmed by Halim, who claimed asylum and worked for an NGO in Germany, the money to anticipate the payment of legal support must come from claimants’ monthly welfare income, which is intended to cover basic expenses, including food. This disproportional burden is clear in Tina’s account: ‘Every month I give 50 Euros from the money government pays me. They pay me 100 Euros every month’. The involvement of LGBTIQ+ support groups sometimes addresses this problem by co-financing initial fees (Sofia and Emma, NGO workers, mentioned the Rainbow Foundation in this respect), which may amount to up to 500 Euros (Noah, NGO social worker).

In Italy, where almost all participants had obtained legal aid to cover their representation by a lawyer, cases of misconduct emerged. Although they had already been paid by the state, we were told of some lawyers asking for additional money, which claimants are unlikely to have. Disturbingly, despite these fees, which may amount to 600 Euros for a first appointment according to Jonathan, an LGBTIQ+

group volunteer, most lawyers do not have specific competences in SOGI claims, as reported to us by Cristina (UNHCR officer), among others. The case of Franco, who was in touch with a lawyer for 2 years and was never clearly told why his application was rejected, is illustrative:

I don't know the woman [lawyer]. Someone pushed me. I said no, I don't have choice, before I lose they said 30 days [to appeal]. I pay a lot. She said 550 euro. (...) Yes, I make "campagna" [working in farms]. She never tell me to go to court. (...) She always tell me "Non preoccupare" [do not worry], "Io devo parlare con il giudice" [I have to talk with the judge]. [On the day of the hearing] The police [stopped me], but lawyer don't want to come down (...). After that (...) negative [RSD outcome]. (...) She asked for the rest of the money. I said "no".

The cost of legal advice and representation was also a concern in the UK. Retaining a good private lawyer was expensive, especially when SOGI claimants were not supported by specific entities – for instance, Ibrahim A. was supported by Amnesty International and by Freedom House, through a programme called Dignity for All. As Ali explained: 'even after I got the refugee status I kept paying her by month, [but] it was worth it at the end because she did a hard job (...). I think at some stage we were meeting every week'. For Amber, who was pushed to choose a specific firm for its expertise with Malaysian claimants, legal fees amounted to GBP 3,000. They could not afford to pay the entire amount, until that firm decided to take their case *pro bono*. The preparation of their appeal was indeed meticulous:

I had to come to the office about once a month or every two weeks or so to sit down and talk to my lawyer about my background. After we're done with the statement, I focused on documenting all the articles and pictures of what was asked by my lawyer after the statement completion as supplementary evidence. (...) It was very detailed and long, and it took me months to complete.

In comparison to others participants, Amber's and Ali's experiences of legal representation are, however, uncommon. According to Wendy and Justina, NGO workers in the UK, many solicitors are not prepared in this area and provide poor advice for high fees. In this respect, Seth, another NGO worker in the UK, summarised what happens to most claimants: 'Quite often, they have spent all their money on a claim that is going to go nowhere, and then when they do finally get the right advice, they have got no money left'. Overall, the experience in the UK seems to suggest that the quality of representation is not determined by whether the client is legally aided or paying privately. As Barry, a lawyer, put it: 'Some legal aid lawyers provide excellent advice, some provide poor representation. It is the same for those who are paid privately'. The consequences of this state-of-affairs are well described by Jayne, who was not lucky enough to meet an experienced lawyer:

I remember first thing when I walked into the interview room, I was asked if I had brought a witness statement, and I was like "what is that?" (laughs). I had no clue. (...) The solicitor (...) just helped me to give me the numbers to call the Home Office and then he just left. [I] wanted just to have an idea of what I should expect, just to prepare myself psychologically, but... he just said "oh, they will just interview you, about your life generally".

From the perspective of those working on legal aid contracts, it is noticeable that funding is increasingly inadequate as a result of successive cuts to legal aid that have indirectly affected asylum work. As Sean, a lawyer, told us:

We set up [the law firm] in 2003, predominantly doing legal aid work. Then when the cuts came in, we had to take on private work, to support ourselves and also the legal aid rates were cut... So, in reality, doing legal aid work is not really viable financially.

Financial issues may also prevent the collection of appropriate evidence on claimants' countries of origin. As Sean also explained:

If you apply to the Legal Aid Agency, say, for GBP1,100 to buy an expert report on the... treatment of LGBT victims of hate crime in [the] Gambia over the last 12 months, the Legal Aid Agency will say "No", because we don't even know that it is an issue in your case yet. (...) So, it is very difficult to get funding for specific expert evidence in advance. (...) A lot of the country-based reporting that we do get evidence of is after the refusal, because the Legal Aid Agency will fund it.

A similar situation applies to psychiatric and medical reports providing evidence of torture, as Deirdre, a lawyer, explained:

So the way that legal aid works is that until something is in dispute, you can't put forward expert evidence. So I couldn't get an expert psychiatric report on a client until after the Home Office decision letter, because the legal aid agency would say to me "but you don't know that the Home Office don't believe her".

All the above contributes to the likelihood that claimants in the UK will be refused at the initial decision-making phase on evidentiary grounds but may then be successful on appeal when they have been able to commission corroborating reports. Strikingly, some decision-makers are not aware of these dynamics. For instance, Adrian, a judge in the UK, told us that 'I am a strong believer in legal aid... I haven't noticed a falloff in quality as a result [of cuts to legal aid] by and large'.

Fourth, nationality can be relevant to the selection or provision of solicitors. When the lawyers available are from the same ethnic or religious community, there may be negative implications for claimants who are not (yet) open about their SOGI. As previous research has reported, sometimes lawyers are 'arranged through members of the applicant's extended family, so gay applicants that are supported by their community are unlikely to be able to come out to their lawyer' (Miles 2010, p. 30). This general difficulty was confirmed, among others, by Ashley, a psychotherapist in the UK:

After their initial experiences, maybe at the Home Office interview (...) of interpreters (...), their fears about information getting back to people in their community or back home [prevent] at their initial meetings with their lawyers [the] disclosure around sexuality. [Therefore] that part of the story is delayed and not in their initial claims and that adds to the issue of credibility.

From the discussion above, overall access by SOGI claimants to legal representation of high quality seems therefore difficult across Germany, Italy and the UK, especially when legal aid is not effectively granted to cover the time needed to prepare such complex cases. When high quality representation is accessible instead, even good lawyers may find it difficult to rectify initial wrong advice at a later stage

of the procedure. Bearing in mind this general state of affairs, a wide range of unethical conduct and working methods were described by our participants. Giulia, an LGBTIQ+ volunteer in Italy, shared the case of a lawyer who forgot to submit the appeal on time with very negative consequences for the claimant, who had to leave the accommodation centre and, only after a while, was able to start a fresh claim. The case of Amadin, who claimed asylum in the UK, is even more concerning:

So my lawyer make a mistake (...) because there is a confusion between Benin City who is a city in Nigeria and the Benin country. (...) The lawyer got some evidence online, where he put, I don't know what he put because he no tell me what he was putting, so I did not know what he knew. (...) So my lawyer was not ready to defend the country issue. (...) So now, the lawyer dropped me and I get a new lawyer now, who are preparing the case and they are doing a country report.

In other cases, lawyers failed to inform claimants about the day of the hearing (as reported by Juliet, Germany) or did not follow up the claim, despite having been already paid by a support group (Louis, NGO volunteer, Germany). Giulio, an LGBTIQ+ group volunteer in Italy, gave us another worrying example of the poor quality of some legal representation:

[Asylum appeals] are considered easy ones (...) they just copy and paste, submit the same documents. [In SOGI claims] they find also difficult to understand the difference between being persecuted for being gay or for being perceived as gay... (...) So, in the appeal form, they simply write "gay claimant" although he might not be gay (...). The judge will then see a contradiction with negative consequences for the claimant.

Lawyers themselves are critical of their colleagues' work. According to Mara, a lawyer in Italy, lawyers who submit an LGBTIQ+ association membership card as part of their documentation to the judge damage the claimant's case because they are indirectly suggesting that homosexuality needs to be proved (Chap. 7). Similarly questionable advice was reported in the UK. Sean, a lawyer, recalled the case of a lesbian claimant:

The number of errors that she suffered at the hands of her previous solicitors were significant such as: not being advised why witnesses might be necessary at a hearing; not having the witness statements prepared for her witnesses in advance of the hearing; getting to court and then her star witness can't make it, and the advisor from the same [law firm] says "we don't want an adjournment, we are just going to press on". Wow – that is basic, basic stuff! And now she finds herself a year, six months on, living off nothing, separated from her son, and her story is compelling.

The worst experiences were perhaps those where claimants were unable to find a lawyer to represent them and invest time in their case (Joyce, focus group no. 5, Nottingham, UK, among others). As Leon, LGBTIQ+ community project staff member in Germany, told us, '[w]e have many cases where several of the lawyers (...) tell us that, from their point of view, this is hopeless'. As Meggs (UK) put it:

I was told we are supposed to appeal again that [but] he said, "oh no, we don't have a case. (...) Just go and find new evidence, if you find it, come back to me", and I didn't know what new evidence would that be. Don't know what is fresh claim or what I have to look for, yes. So if we didn't have like the kind of organisation First Wednesday, Lesbian Immigration

Support Group, where you meet and they tell you like this is how it is done, I wouldn't even know until today. Because I didn't know what I was looking for.

In these cases, the claimant's only option was to lodge an appeal without legal representation to the best standard possible for a non-legal professional. Irma (UK) represented herself and became homeless after seeing her appeal rejected. The case of Daphne (UK) is also illustrative. When her solicitor abandoned her before the hearing, she led her own appeal. After explaining what had happened to the judge, he adjourned her case for 2 weeks, however she was still unable to find a legal representative, so her appeal was refused. Incredibly, when she finally found a solicitor to take her case to judicial review, she was eventually given refugee status after a total of three refusals and more than 6 years in the asylum system.

Denise and Umar, legal advisors in the UK, explained one reason why law firms are reluctant to take cases based on sexual orientation-related persecution, particularly fresh claims:

If [a sexuality case] has been refused, then it really needs some real... detailed and really kind of concentrated work in order to try and make it a success. (...) If you are in a private practice and (...) you are looking at your profit, then some of these cases are not the kind of cases that you would want to take on because they require a lot of work that you are not necessarily going to be paid for by through legal aid.

According to Sean, a lawyer in the UK as well, it is not only about profit:

Those fresh claim cases add a layer of complexity and difficulty to an original asylum claim. Because if you have got a new client who hasn't claimed asylum yet, you can sit down and say "Right, this is the process, this is what is going to happen. Let's take your story". (...) With a fresh claim you have got to do all of that, you have got to identify what went wrong in a previous claim, turn that around, explain this is the actual story and the corroborating evidence, and why it wasn't done before or what was missed and that there might have been delay for personal reasons, reluctance to talk about things. It may be a solicitor's incompetence, [or] they haven't done it because they feel restrained by the fixed fee (...). And then you put it altogether and you present the fresh claim in person but in Liverpool.

Negative attitudes also emerged during hearing observations in tribunals. For example, during a tribunal observation in northern Italy in 2018, we observed the completely passive behaviour of a substitute lawyer before the judge, and failure to intervene on the claimant's behalf. The situation appears even more problematic if coupled with the influence of strong bias against SOGI claims. As one of the lawyers contacted for carrying out that observation expressly affirmed, 'SOGI claimants always tell the same stories', thus assuming that – at least as a starting point – all his clients lie to obtain international protection.

The difference between legal representation of good or poor quality is captured in the account given by Jayne (UK):

I have never been to court, I don't know what to expect, what do they expect me to do, what shall I bring with me. Just general information. So, I remember all [the solicitor] said was just prove you are a lesbian. (...) the day before my hearing I went to the office tearful to the receptionist to say, I have court tomorrow (...) and I don't know what to do. (...) One of the solicitors came and said "oh, you shouldn't worry, your solicitor will be at the court

tomorrow". I went home, the following day I went to court (...) one lady came and said (...) "I am going to represent you" (...) She doesn't know anything about my case, there are some things that I requested that they don't get like discussed, in front of people, and... boom [they were discussed publicly], because she didn't know anything. (...) At some point the judge asked her a question and she said, "I am sorry but I have only been given the file this morning, so I really haven't had time to go through this file." (...) Now I started the journey of a fresh claim. And it was a totally different experience altogether, because I could sit two or three hours with [the lawyer] asking me personal... questions, getting deep into my case, asking me about my relationships, I didn't know all that would be relevant to my case.

Perhaps not surprisingly, decision-makers are conscious of the differences in the quality of legal representation. Harry, a senior judge in the UK, told us that while some lawyers do their job very well, at 'the other end of the spectrum are unscrupulous people who prey upon the most vulnerable in our society, take their money and do a dreadful job for them'. Equally, according to Silvana, a judge in Italy, SOGI claimants too often lack adequate legal representation, which is clearly reflected not only in the lack of contact with their clients, but also by their usual 'copied and pasted' appeals. Training and preparation of lawyers, as well as of any other staff working with SOGI claimants, thus remains a highly problematic aspect which needs specific investigation.

### **6.2.3 *Training of Volunteers, Lawyers and Staff Working with SOGI Claimants***

Concerns about the lack of training of SOGI asylum of volunteers, lawyers and staff working in the field were widely reported, particularly in Germany and Italy (Helena, EASO staff member; Angel, Germany; Kadir, NGO worker, Germany; Emilia, judge, Germany; Nazarena and Giuseppe, lawyers, Italy). The rules currently in force, including at EU level, do not establish any obligation to train staff working with SOGI claimants on the specificities of these claims. The same is true for lawyers, whose basic legal training does not cover SOGI claims specifically, and for volunteers, who often are not trained at all. Only a few of our participants received training on SOGI asylum (for instance, Knud, NGO worker, Germany; Juliane, public official, Germany). Even when training on asylum is offered, for instance concerning the CEAS, this does not cover the grounds considered here.

From a positive perspective, various kinds of SOGI asylum training are provided by support groups across the three countries under comparison, sometimes in cooperation with local/national/European/international institutions, for anyone who is willing to be involved on a voluntary basis. For example, Giulia, an LGBTIQ+ group volunteer in Italy, recalled a training course organised in 2017 by local associations in central Italy, in cooperation with the UNHCR, as a fundamental moment in her involvement with SOGI claimants. On that occasion, she learned it was possible to alert territorial commissions in advance of the interview date to ensure



SOGI-friendly procedural arrangements on the day (Sect. 6.3). Still in Italy, before launching their new support groups, some leaders organised training courses on the basics of SOGI asylum by inviting experts in the field or attending training with ‘experts’ (for instance, Anna and Vincenzo, LGBTIQ+ group volunteers; La Migration 2018). As Vincenzo put it: ‘I needed to be trained to avoid damaging or not supporting entirely people who arrive with problems that I was unable to understand’. Perhaps even more interesting, owing to the lack of training available to staff working in reception centres, a few support groups took the initiative of offering training to local reception centres, not only on SOGI asylum but also on SOGI equality – an offer that some centres accepted (for instance, Giulia, LGBTIQ+ group volunteer). Yet, as Vincenzo (LGBTIQ+ group volunteer) pointed out, most staff working with SOGI claimants are not ‘craving for training, but need mechanical tools to make their work easier’. Consequently, in his view, only those people who already have an interest in this topic choose to be involved in voluntary training courses; thus the challenge is engaging the remaining staff working with SOGI claimants but without an interest in improving their knowledge and expertise in this field.

In the Italian asylum system, we also heard of the specific problem of accommodation centre staff not possessing a legal education or previous experience with refugees or migrants (for instance, Vincenzo, LGBTIQ+ group volunteer). This hampered their ability to elicit claimants’ stories in an appropriate way, with negative consequences for the asylum procedure, especially in terms of subsequent assessment of credibility (Chap. 7). The different degrees of SOGI asylum expertise of staff may be attributed to the particular individual or entity managing a given accommodation facility. Many participants shared the view that, as such facilities are run by private companies, their managers did not find it profitable or, more simply, were not aware of the need to train their staff in general and, more specifically, on SOGI asylum (Nazarena, lawyer; Roberto, decision-maker; Silvana, judge; Susanna, social worker). For these participants, finding competent staff in reception facilities was indeed a kind of lottery. Positive experiences were nonetheless found among this specific group of professionals. For example, Nazarena, a lawyer, explained that the staff with whom she cooperated at accommodation centres had begun to compile information about claimants’ countries of origin in order to better understand their experiences.

Lack of training facilitates the prevalence of practices based on bias, prejudices and stereotypes. For instance, the lack of basic understanding of transgender issues was at the core of experiences of discrimination against transgender claimants. Kamel, who submitted an asylum request in Italy by using identity documents where his sex at birth was signalled, reported the ignorance of the staff met at the police headquarters: ‘I said “I’m trans” and she did not know what trans means [while] keep saying “are you a man or a woman?”’. He felt very hurt. More strikingly, as Kamel also explained, this same problematic attitude towards transgender claimants was observed in relation to staff who already dealt with gay claimants. Another relevant case was mentioned by Giulia, an LGBTIQ+ volunteer in Italy. Despite the obligation to respect the right to privacy of claimants, a reception centre

staff member had shared details about a gay claimant with other users of the centre, and as a result he experienced discrimination. As confirmed by Cristina (UNHCR officer, Italy), this was not an isolated episode. Lawyers also fall prey to bias and prejudice, leading some to treat SOGI claimants arriving from particular countries with suspicion (for instance, Tribunal observation, northern Italy, 2018).

For these and other reasons, while pointing out a general need for both basic (on asylum) and specialised (on SOGI issues) training of all categories working with SOGI claimants, our participants also drew our attention to particular areas of need. For instance, Cristina (UNHCR officer, Italy) emphasised the importance of multi-disciplinary training also covering basic concepts, such as SOGI and equality, in order to promote and consolidate an anti-stereotyping approach within the asylum system, consistent with our theoretical underpinnings (Chap. 3). This view was shared by Louis (NGO volunteer, Germany), who pointed out the need to sensitise people working with asylum claimants in a way that can help them understand claimants fleeing homophobia or transphobia *without* forcing them to come out. According to Nazarena (lawyer, Italy), training should include background information on COI (Sect. 6.5) and on claimants' cultural background, not simply on legal matters. Finally, Evelyne and Anne (lawyers, Germany) pointed out the need to involve claimants in training all people working with SOGI, as well as therapists or psychologists to support these people in how to manage the emotional consequences of their job. In this respect, it is noteworthy that positive experiences on training carried out at EU level included topics like how to create a safe space and how to help SOGI claimants to be open about their stories. Of course, while being relevant for all those considered in this section – volunteers, lawyers and staff – these general recommendations need to be tailored, taking into account the specific role played by these actors in the SOGI asylum procedure (Chap. 11).

In brief, while we heard of the provision of one-off training, we found little evidence in the three countries under examination of mandatory, systematic and continual SOGI-specific training for those working with SOGI claimants, except where volunteers, lawyers and staff autonomously choose to attend available training on SOGI asylum. Some participants also expressed doubts on the real effect generated by widespread specific training, other than producing greater awareness on SOGI asylum. In fact, the working conditions in the asylum sector remain 'hard' in the context of large migration flows and involve actors that may not support SOGI equality. In relation to the latter aspect, Celeste (social worker, Italy) told us of a lesbian claimant who was accommodated in a facility run by the Catholic Church. Irrespective of the background training of the staff, she decided to avoid any reference to her grounds of persecution for 'safety' reasons.

Beside this, even for the most sensitive and experienced SOGI asylum advisors and representatives, the impact of work of this nature can have an effect on the individual that in turn affects their ability to do their job. For example, Deirdre, a lawyer in the UK, explained that:

[T]hat's the risk that you become so exposed to it (...) that you do to protect yourself and how you are feeling, you almost try and close the door and it is just words (...). And we

have to be so careful of our staff with that, because as soon as that starts to happen, quality just goes.

As Helena (EASO staff member) explained, almost everyone who has been in the asylum system for more than 2 years has had vicarious trauma or a ‘burn out’, so the easiest response is to stop believing in claimants’ stories. Yet, apart from some institutions’ measures mitigating against the risk of burn-out of their staff (for instance, the psychological support offered by the UNHCR, as reported by Cristina, UNHCR officer, Italy), there is no obligation whatsoever in the legislation of the three countries under comparison, nor under EU law, to provide appropriate support or risk-management measures. Similar concerns emerged in relation to decision-makers involved in the main asylum interview, to which we now turn.

### **6.3 The Main Interview: Actors and Procedures in SOGI Asylum**

The key moment for all asylum claimants is indubitably their main interview. As Evelyne and Anne, lawyers in Germany, pointed out:

[we] often have clients from all sorts of countries saying, “Yes, I was in the hearing with the judge”. Those are not judges. But they have the feeling that this is an incredibly important person. (...) They have a huge respect. They do not sleep for days before this interview (...) they have dark circles under their eyes because they did not sleep all night. Eat nothing, drink nothing (...). And [often] there is no one who somehow creates a pleasant atmosphere.

In spite of the differences between Germany, Italy and the UK, a common pattern emerges. Asylum systems should provide an environment in which claimants feel comfortable about self-identifying as members of a SOGI minority and revealing the real grounds for their asylum request, in line with the UNHCR SOGI Guidelines. Instead, no asylum system under investigation here has in place formal procedures addressing the specific needs of SOGI claimants at the main interview. Even the simplest possible measure, consisting of a formal preliminary communication mechanism to inform the relevant administrative body that an interview with a SOGI claimant will take place in order to identify the most appropriate interviewer/decision-maker (as pointed out, for instance, by Cristina, UNHCR officer, Italy), is absent in all countries.

In addition to the lack of specific measures, the entire interview process seems designed to unveil false claims. As Sean (lawyer, UK) put it, often the starting point is “[y]ou are a liar, convince me otherwise” (...) rather than having an open mind, asking, “tell me your story, let me understand it, and let’s explore it”. Moreover, as David (official, UK) confirmed, SOGI claimants are not always recognised as complex cases: ‘I think there are seven types which are automatically perceived to be complex, pregnant women being one, for example. I don’t think LGBT is one’. That is why this section places particular attention on the actors involved in the interview process. After analysing the interview setting and the – general or

informal – procedures in place for reaching a decision on asylum applications, we move on to the selection and the training of interviewers and decision-makers, how these actors carry out an interview with a SOGI claimant and, finally, the influence – if any – of bias during the interview, in light of the experiences of our participants.

### 6.3.1 *The Interview Setting*

As anticipated in Chaps. 1 and 4, despite some similarities, each country under investigation has shaped its asylum system differently, especially at administrative level. Here we aim to identify any specific, even informal, procedural arrangements in place for managing these particular claims.

In Germany, the BAMF is responsible for the asylum interview (‘Anhoerung’), which in most cases is carried out by a single officer. When there is an indication that the claimant belongs to a ‘vulnerable’ group, a specialised decision-maker may be called to process the claim. In line with Article 12 of the Procedures Directive (Chap. 4), vulnerable groups include unaccompanied children, victims of torture, traumatised asylum claimants and victims of gender-specific persecution, which may also cover SOGI claimants on a case-by-case basis.<sup>9</sup> The involvement of a specialised officer (‘Sonderbeauftragter’) can be also requested before the interview. Some criticism has emerged in relation to the effective availability of these officials in every BAMF office, as well as the quality of interviews (ECRE, AIDA & Asyl und Migration 2018, p. 45). Moreover, according to a local survey involving several NGOs in North Rhine-Westphalia (Held et al. 2018), most SOGI claimants are not aware that they can ask for a specialised officer and, when requested, their involvement was not always guaranteed.

Our participants in Germany shared contrasting views on this subject. Although the existence of specialised officers was widely reported, some doubts were expressed in relation to their number (for instance, Evelyne and Anne, lawyers; Noah, NGO social worker), availability across Germany (for instance, Frank S., legal advisor) and the regularity of their involvement in processing SOGI claims (among others, Marlen, legal advisor). Where and when this procedural arrangement is adopted, it seems to be based on informal grounds. In this respect, Sabrina, an NGO worker, explained that, during a meeting with BAMF, ‘it was virtually decided that we could inform the BAMF if we knew of any such case, and then a specialised officer would be appointed for the interview, or at least included in the decision-making process’. Sandra, who claimed asylum in Germany, confirmed that her lawyer requested a specialised officer and one was appointed. The officer was a man, and, in line with EU law norms on this matter (Article 15(3)(b) of the

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<sup>9</sup>Statistics in this respect, however, are not available: see responses 8, 11 and 12 in the answer to the FOI request submitted in Germany (BMI 2019).

Procedures Directive), Sandra was given the possibility to choose the gender of her interviewer. To this, she answered:

If it's gay or lesbian, I feel like I'm home. Someone I can be open about anything, because he or she would understand. So, for me, if it's a man or a woman... as long as he's from my group.

In her view, sexual orientation played a more important role than gender in terms of the choice of the interviewer, which highlights the importance of the intersectional approach to our analysis adopted in Chap. 3. For other participants, or in specific contexts in Germany, this choice still remained problematic. A striking example was provided by Tina. She was not aware of this possibility and, despite being interviewed four times, only the last interview was carried out by a woman and then she finally felt 'free' to talk. Equally, Mayi (focus group no. 4, Bavaria), who was interviewed by a male officer, explained:

I did not give them everything. Because myself, I was feeling ashamed. Maybe I thought they would judge me (...). I didn't have a choice. And when you are talking to them, the way they look at you, it's like "what are you talking?" Really, you feel fear.

In turn, Shany recalled that, being in detention at the time of the interview, she had 'no choice' and experienced a particularly distressing situation:

I'm sitting and then I need to say my story in Moroccan [Arab] and they are two men [the interviewer and the interpreter], I mean, like not women, I mean, how can you bring men? It was like horrible. (...) It's just like you can't, because there is two men and I got small, my confidence is low, it's going down. (...) I see father, I see jail, I see knives, I see that I'm there, I see everything then (...) I would never do it if I have this kind of interview (...). I would stay in the desert, maybe living alone with animals. (...) I never have any conversation with Moroccan men.

A distinct situation is in place in Italy, where the UNHCR is directly involved in the administrative decision-making process, as discussed in Chap. 4. The presence of the UNHCR staff in the territorial commissions brings the attention of these bodies to the specific needs of SOGI claimants. An informal procedural arrangement was consistently reported across Italy. When the presence of a SOGI claimant is known via the C3 form, there is a high chance that the interview will be carried out by the UNHCR representative or otherwise by another territorial commission member specialised in SOGI issues (among others, Giuseppe, lawyer; Maria Grazia and Roberto, decision-makers; Celeste, social worker). The same arrangement takes place if a SOGI case is communicated in advance, mainly by the accommodation centre's staff, NGOs or support groups, or when SOGI is visible (for instance, when transgender claimants are already transitioning, as reported by Valentina, social worker). When the SOGI nature of the case is not known or communicated in advance, the interviewer may decide to stop and postpone the interview to ensure that the most competent member of the territorial commission is involved. As Daniele (decision-maker) pointed out, this system clearly favours SOGI claimants who are already open about their story or are sufficiently prepared for the interview. A similar informal arrangement is also used for other specific categories identified as 'vulnerable', like victims of trafficking. The ongoing discussion about the

replacement of the UNHCR representatives with human rights experts may not, therefore, lead to an improvement of the overall process insofar as SOGI asylum is concerned (Roberto, decision-maker), unless the new professionals are required to have an equal level of expertise and are employed with the same UNHCR mandate, which is clearly based on a human rights reading of the Refugee Convention, in line with our theoretical underpinnings (Chap. 3). Finally, our participants confirmed that a general measure adopted in the daily activities of territorial commissions for all claimants, as required by law, irrespective of their persecution grounds, is to ensure that participants are offered interviewers of the same gender (for instance, Daniele, decision-maker). Yet, this is not always possible, especially when the commission member most competent on SOGI asylum is not of the same gender of the participant. Moses, claiming asylum in Italy, explained that he was not comfortable at all with ‘a woman asking such questions... it wasn’t really easy for me’. Considering that he waited 10 months for the interview, however, he decided not to risk further delays by asking for a male interviewer.

Moving to the UK, no separate process for SOGI claims is in place, but the activity of the Home Office is informed by specific SOGI guidance, namely the 2011 guidance on gender identity and the 2016 guidance on sexual orientation (Chap. 4). Both documents show a high degree of sensitivity to the particular issues likely to affect SOGI claimants. For instance, claimants should be ‘given respect and referred to by their chosen name and gender identity’ (Home Office 2011, p. 12). The 2016 sexual orientation guidance emphasises, in turn, that caseworkers should avoid stereotyping such as requiring familiarity with the ‘gay scene’ and should allow the claimant to provide a narrative without expecting ‘milestones such as first romantic encounters’ (Home Office 2016, p. 27). Equally, they should recognise that claimants may find it difficult to talk about their sexual orientation (Home Office 2016, p. 13). In our fieldwork specific contrasting views emerged in relation to how the processing of SOGI claims is supervised. Olivia (government official) explained that in Scotland and Northern Ireland all SOGI claims are subject to the Second Pair of Eyes procedure, consisting mainly of an evaluation of the quality of the decision-making process by a more senior colleague. As Olivia pointed out, according to available records, final decisions did not change most of the time, ‘but it may well be that that [more senior colleague] goes back to the decision-maker to say, “here is another aspect that you have not actually considered”’. While the value of this procedure is apparent for SOGI claims, it does not seem to be mandatory across the UK (David, official). As for the right to choose the gender of the interviewer, it is granted so far as Home Office’s resources allow it. For instance, when Amber was asked during the screening interview if they had any preference in this respect, they were told that the Home Office would try to accommodate the request ‘depending on available staff’. Finally, it is worth noting that, once an interview is scheduled, claimants are not always given appropriate resources to reach the venue. The case of Selim is striking. After waiting for 7 months, he could not afford the price of the train ticket. To avoid seeing the interview postponed for months or years, he sold his engagement ring.



An important question to consider in all countries under comparison is whether the interview is carried out by the same person who eventually takes a final decision on the case. In Germany, cases are often decided by designated decision-makers rather than the person who interviews the claimant (Gisela, lawyer), even when a specialised officer is involved. In Italy, instead, given the particular composition of territorial commissions, the interviewer corresponds, at least informally, to the officer deciding on the case. In fact, whereas the law establishes that, within territorial commissions, decisions are taken collectively, in practice it is the officer who individually interviews a claimant who, afterwards, reports directly to the entire commission and drafts a decision to be jointly discussed. As Titti, a decision-maker, explained, after interviewing a claimant, she usually drafts a decision consisting of three main parts: applicable law, facts of the case and credibility of the claimant. When the entire commission reunites after each member's interviews, reasons for the drafted decision are explained in order to reach a unanimous decision. During this discussion, it may happen that, when a SOGI case is reported, the most competent member of the commission in this area asks for a second interview to be scheduled with the claimant *if* it is perceived that the interview was not carried out appropriately (for instance, Maria Grazia, decision-maker; Cristina, UNHCR officer). Equally, a second interview may be scheduled when, from the account of the interviewer, doubts arise about the existence of a potential non-declared SOGI claim or when the interviewer is not able to report accurately the case while proposing a rejection (for instance, Daniele, decision-maker). In all other circumstances, if a consensus is reached, the drafted decision is adopted by the territorial commission. In very exceptional situations, where the members of the commission do not agree, it is possible to issue a dissenting separate opinion. According to some participants, the collective approach to decision-making is not only an essential guarantee of a fair decision-making process for SOGI claimants, but also stimulates all members to operate appropriately to avoid seeing the decisions they draft refused (Roberto, decision-maker). Finally, in the UK, most cases are decided by an officer who is different from the interviewer (Olivia, government official). Alternative experimental models have been tested, such as the pilot scheme called the Early Legal Advice Project, in which individual case owners were more likely to cover all aspects of a case. Yet, these experimental models were not adopted permanently, for reasons such as cost and the longer time that decisions took to be made (Home Office 2013).

On the need to have – or not – a single caseworker for the entire administrative procedure in order to improve the fairness of the SOGI asylum system, some contrasting views were held by our participants. According to Roberto (decision-maker, Italy), there are no advantages at all to having a single caseworker. As he explained, every system should be based on collective decision bodies or on discussions between peers before reaching a final decision or, at least, on referrals to senior caseworkers. In fact, there is a widespread belief that involving different caseworkers contributes to the objectivity of decisions (for instance, Evelyne and Anne, lawyers, Germany). Yet, for some participants, a collective decision-making system is problematic. According to David (official, UK), the involvement of different



caseworkers leads to a decision process that appears as a ‘transaction [in which] the [final] caseworker is reviewing the material (...) and saying “does this [claimant] meet [certain] tests”’. In turn, for Daniele, decision-maker in Italy, when the interviewer is not the decision-maker, the latter can never properly evaluate the claimant’s credibility. In his view, the decision-maker needs to focus also on elements like demeanour or non-verbal communication, which are essential factors in complex applications, such as those based on SOGI grounds. In any case, as Daniele further pointed out, in this area the fairness of the evaluation process always depends on the ability of the single caseworker to avoid being influenced by bias, prejudices and stereotypes, that is, an approach based on some of our theoretical underpinning (Chap. 3). That is why their selection and training, to which we now turn our attention, remain fundamental.

### ***6.3.2 The Selection and the Training of Caseworkers***

In light of the differences that have emerged so far in our analysis, it is not surprising that each country under investigation has its own rules and practices on the selection and training of interviewers and decision-makers.

Starting with Germany, there is no indication that the BAMF, when hiring its officers, requires that they undergo a particular training covering SOGI asylum or possess particular high level qualifications. Data shows that most caseworkers did not complete any or the full training programme, ‘with new staff members only being trained in “crash courses” and getting basic training only after they have started their job’ (ECRE, AIDA & Asyl und Migration 2019, p. 20). Having regard to the caseworkers who process SOGI claims, the so-called ‘special officers’, the German government explained that BAMF officers should complete specific training on ‘vulnerable’ groups, which also contains modules on gender, gender identity and sexual orientation, and receive appropriate references to documents and publications such as those issued by the EASO (BMI 2019, pp. 2–3, 18). Yet, most of our participants claiming asylum in Germany were not heard by special officers, being interviewed by officers who had therefore not received specific training. From their perception, the training of the BAMF officers in SOGI asylum is indeed very poor. An example of this was provided by Ibrahim, who still remembered that:

When I first applied (...) she asked me “why are you here? Why are you applying for asylum?” In English. I said “because of my sexual orientation”. She said to me “what?”. I had to let her see a picture of two gay men kissing so she understood.

Although signs of improvement had been noticed (Knud, NGO worker), the pressure caused by a high number of asylum applications in 2015 and 2016 was reported as one of the main reasons for shorter intensive training programmes for newly-arrived caseworkers (for instance, Elias, lawyer). Serious consequences from the lack of specific training have followed. Speaking about one of his clients who was hiding his sexual orientation from his family, Frank S. (legal advisor) recalled

that when the claimant's mother arrived in Germany a few months later and was interviewed in the context of her asylum application, the interviewer revealed to her the son's sexual orientation, thus violating the son's right to privacy. Specific concerns were also reported in relation to the correct use of information about claimants' countries of origin (Sect. 6.5). In this respect, Noah (NGO social worker) noticed that most decisions related to Jamaica are copied and pasted: 'Besides the individual rejection reasons, which are derived from the interview, [BAMF decision-makers state that] "in Jamaica, the situation is not as bad as shown, because (...) the Ministry of Justice set up a programme that should sensitise the local police [and] protect them"'. This mechanistic use of COI reflects poorly on the training of the decision-makers.

In Italy, the particular composition of the territorial commissions shapes both the selection mechanism and the training available to each member. Following the 2017 reform (Chap. 4), if we exclude officers serving as presidents and the UNHCR representatives, whose selection and training follow different paths, 250 new officers were selected through a national public competition in 2018. The evaluation was mainly based on legal knowledge of the asylum legal system, thus excluding people with other university studies (Vincenzo, LGBTIQ+ group volunteer). In the context of the training programme organised by the National Commission of Asylum in cooperation with the UNHCR, successful candidates specifically addressed SOGI asylum through a format consisting of general information and case-study analyses with the involvement of SOGI experts. As Cristina (UNHCR officer) explained, a transgender activist was invited as well, not only for the information they could offer, but also to address, directly and indirectly, potential stereotypes and prejudices in newly-appointed officers. This initial training has been followed by periodic refresher trainings. This development was seen as positive by our participants, because it came after a period where the high number of applications, and the consequent setting up of new territorial commissions on an emergency basis, hampered the implementation of specific training on SOGI asylum. In fact, one of the decision-makers who was employed in that precise period explained that, in light of her legal background and her activism on SOGI equality, she was appointed by the local municipality but, except for a few days of individual coaching by the UNHCR representative in her Commission, she had received no comprehensive training before starting her new role. As she summarised, 'I really felt like I was thrown into the deep end' (Maria Grazia, decision-maker).

At least in principle, the employment and the coordinated and intensive training of the new caseworkers in Italy may improve the poor level of preparation of decision-makers reported by some participants (among others, Anna and Giulio, LGBTIQ+ group volunteers). The involvement of professional staff with an expertise in asylum would potentially lead to fairer evaluations and better-motivated outcomes (Silvana and Maurizio, judges). These opinions were also based on the premise 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 being influenced by bias and prejudices (for instance, Maria Grazia, decision-maker). A number of examples connected with the

former composition of territorial commissions were attributed to the lack of, or poor, training. For instance, Mara (lawyer) recalled that the decisions of some territorial commissions show a clear lack of knowledge about the situation of SOGI people in their countries, leading to the use of ‘copied and pasted’ information on the claimant’s country of origin, without paying attention to the specific region and situation at stake, thus similar to Germany. It is worth noting however that, due to the role internationally fulfilled by the UNHCR, even when specific training is not available, the UNHCR representatives within most territorial commissions provide a sort of ongoing training to all other members and staff. In fact, in case of doubts on how a case should be managed or which form of protection should be granted, the UNHCR representatives are regularly consulted (Titti, decision-maker). For this reason, their own training becomes fundamental. As several participants explained, the UNHCR representatives are continuously trained on different aspects of the asylum process, including SOGI asylum. Moreover, thanks to their periodic rotation across different territorial commissions, the risk of burn-out is also somewhat reduced.

In the UK, repeated calls for better training on SOGI claims for Home Office decision-makers led to some improvements (Gray and McDowall 2013, p. 23). Thanks to its activities, the UKLGIG ‘had extensive input into compulsory training for all UKBA decision-makers and into an Asylum Policy Instruction on sexual identity asylum claims’ (House of Commons Home Affairs Committee 2013, pp. 86–87). Despite this, in 2016 it transpired that university education did not seem to be a requirement for being selected as a caseworker, it being only incidental that most caseworkers have university degrees (Khan 2016, pp. 277–282). In the same year, a parliamentary report recommended that the Home Office improve staff training and potentially appoint specialised caseworkers in SOGI cases (APPG on Global LGBT Rights 2016, p. 6). While the reduction in the seniority and expertise required of asylum decision-makers as a cost-saving measure contrasts with Home Office reassurances about the delivery of appropriate training on SOGI asylum (Home Office Minister 2018), our participants shed light on the kind of programmes in place to train interviewers and decision-makers. According to Olivia (government official), a foundation training programme is given over a period of 5 weeks. While the first 3 weeks are dedicated to decision-making, the principles of the Refugee Convention and immigration rules, the subsequent 2 weeks cover specific types of asylum applications, including those based on SOGI grounds. Qasim, a decision-maker who was trained in 2017, confirmed this in detail:

We looked at some of the feedback that previous LGBT applicants have given regarding their experience of the asylum process, including their criticisms of the Home Office. We then had further group discussions around what an LGBT asylum applicant would find difficult in an interview environment, why an LGBT person may not want to disclose their sexuality, and how we as interviewers can help applicants to explain any shame or stigma they may have felt as a result of their sexuality. We also looked at the difference between someone’s identity as a gay person and their conduct, why someone might be at risk as a result of either of these factors and the reasons why someone who is gay might not want to get involved in a gay relationship. We also explored how we would conduct an LGBT interview (...) and we completed case studies to prepare us for dealing with LGBT applicants.

We also of course looked at what factors we would need to consider in order to decide whether an LGBT person should be granted asylum in the UK. This includes looking at the degree of risk for LGBT people in their country and whether internal relocation within their own country or sufficiency of protection is available.

This foundation programme is followed by periodic refresher training, but enrolment is voluntary. A sort of mentorship scheme, consisting of an experienced officer following the newly arrived caseworker for a certain period, is also organised. As Emily (decision-maker) explained, ‘at the beginning you get every decision checked by a technical expert, until you’re ready to be signed off’. Overall, by taking the training and this mentorship into account, as Olivia (government official) pointed out, ‘it probably takes about six months for a decision-maker to become (...) more competent, confident’. Although this training appears satisfactory, as David (official) reported, caseworkers who are relatively new do not always ‘feel that their training was adequate’ and lack adequate mentoring. The consequences for him are evident:

If you have got volumes of demand coming in, time limits on decisions, lots of very new people with little experience and the people who have been bumped up to be their immediate managers, you know, are equally not especially experienced, (...) you are giving people a challenge which they can’t meet.

As a result, David favoured a focus on ‘quality assurance’ and more effective mentoring of more junior caseworkers.

In light of data collected across the three countries here analysed, a few more aspects concerning the selection and training of decision-makers should be highlighted. First, while suggested by some claimants (for instance, Ibrahim A., UK; SGW, focus group no. 4, London, UK), the specific recruitment of people belonging to SOGI minorities as caseworkers in SOGI cases was deemed unfeasible by other participants, partly because of employees’ right not to reveal their SOGI (in contrast to perceptions of the rights of the claimants whose claims they assess). In fact, Olivia (government official, UK) argued that ‘my team is a diverse team, and they do their job regardless of who they are speaking to’. Second, it was widely stressed that, once decision-makers are appointed, they should be able to rely on adequate support and periodic breaks to reduce the risk of burn-out. For example, Roberto (decision-maker, Italy) told us that ‘I cannot imagine someone who interviews claimants for 40 years (...) you certainly die before’. Third, as for the kind of training organised for new caseworkers, participants highlighted the need for knowledge and tools that go beyond legal notions, and which considered the concrete experiences of SOGI people (among others, Chiara, NGO worker, Italy). As Maria Grazia (decision-maker, Italy) pointed out, many decision-makers still do not have direct experience of SOGI minorities and should be taught about the meaning of SOGI to break down the ‘stereotyped, generical, unreal idea’ they may have. In order to be effective, such training should directly involve SOGI refugees. Fourth, the importance of training was often related to the development of caseworkers’ ability to recognise SOGI claims even when they are not raised by the claimants. This seems to be the real challenge, but which may help to effectively implement an approach

compatible with our theoretical underpinning (Chap. 3). The example reported by Titti (decision-maker, Italy) is illustrative:

Once, I was interviewing a male claimant who was talking about many different things and at some point, despite the presence of the interpreter, I noticed that he mentioned a male partner, not a female one, but he promptly corrected himself. The interview went on for a while and he never mentioned his partner again. I didn't treat this episode as a slip, but as a sign that he was ashamed to talk about certain life experiences. (...) After the end of the interview, I contacted the accommodation centre to ask if they had checked or prepared the claimant somehow. [They did not] In that moment, all [his fear of persecution] was clear to me. (...) It was unnecessary to ask "Are you homosexual?"

All these dynamics require a multi-dimensional and multi-disciplinary training, which in turn can ensure an effective and fair interview.

### 6.3.3 *The Conduct of Interviews*

Other than the relevant provisions of the Procedures Directive (2005 original version for the UK and 2013 recast version for Germany and Italy, Chap. 4) and the jurisprudence of the CJEU, there are no common standards between the three countries explored here for the conduct of an interview with a SOGI claimant. Bearing in mind that the Refugee Convention leaves this matter to the discretion of contracting states, the general standards recommended by the UNHCR SOGI Guidelines have not provided enough common ground for harmonisation of interview procedures. Crucially, according to our data, differences exist even within each country. A variety of aspects need to be analysed.

To start with Germany, no list of specific questions is provided to interviewers, with all questioning individually tailored (BMI 2019, pp. 13, 16). SOGI claimants shared a general feeling of disempowerment in this stage of the procedure. One example was provided by Alphaeus, who was informed of his second interview only the day before it was scheduled:

[The BAMF stated] "Before we ask you further questions you have to sign this document". I was like "what is the document all about?" They told me "this document, it's about asking permission from your embassy, from the Ugandan Embassy, to give us authority to take you back to your country. (...) If you don't sign it, we don't proceed. (...) Failure to do so, that means you're not co-operating." (...) I had no option other than to sign.

According to Evelyne and Anne (lawyers), sometimes the interviewer's cultural and social background hampers SOGI claimants from opening up. Recounting the case of a gay claimant coming from an Islamic culture, who was severely traumatised by his life in a small village, they explained how a cultural awareness and sensitivity could diminish this risk:

He saw the worst things. And there was the interviewer with a headscarf. Not the interpreter, but the interviewer was wearing a headscarf. And he (...) was practically unable to speak. (...) That's such a sensitive area. (...) [Then the interviewer should ask]: "Is it alright

for you? Have you experienced things that you do not want to tell me now because of my religious attitude? That's no problem, we can swap the interviewer".

As for the length of interviews, they range from a few hours (for instance, Trudy Ann was interviewed for 'only' 3 h) to almost a day (for example, Alphaeus was interviewed for 9 h). Evelyne and Anne also gave the case of a claimant who had been repeatedly raped over the years and was interviewed for more than 9 h with no break, ignoring the risk of re-traumatisation (UNHCR 2012b).

The wish to create a safe environment for SOGI claimants sporadically emerged in our fieldwork in Germany. For instance, Sandy (focus group no. 1, Hesse) reported that the interviewer approached her at the end to say 'Miss X, you don't have to worry no more, you're safe'. By contrast, in other cases, no efforts were made. Veronica waited with her partner and her two children for 5 h for the interview to take place:

And it's already five-thirty in the evening. (...) Of course, they [children] are all a bit nervous because five hours and no food and decision-maker (...) did not ask me so much. (...) I also felt that she is not so open to conversation. (...) It is already almost night, eight o'clock in winter [when the interview finished], totally dark. We have nothing to eat, we should go to the train station and we do not even know where to go, which direction, it is raining.

Diana reported that the lack of support after the screening interview made it impossible for her to open up again:

At that time, I told them I'm a lesbian, like that. (...) So me, I was waiting to hear from them, that (...) maybe they could give me organisations that, maybe you can go to these people, they can take care of you (...). But they didn't tell me anything, so when I went back, I started growing fear in me, not to come out, to talk. (...) So when I was called to the second interview, so I said "maybe if I talk it again, no-one can help me, so it is maybe better for me to keep quiet, not to tell them". (...) I didn't open up. (...) No-one is there to help you.

Cases of multiple interviews were also reported (for example, Tina was interviewed four times before a final decision was reached), in spite of the acknowledged risk of re-traumatisation (Alessi et al. 2016, 2018; Bögner et al. 2007). We were also told of the (unusual) involvement of claimants' children during interviews (Harriet, focus group no. 2, Bavaria), potentially violating claimants' and their children's right to privacy. Finally, interviewees' right to read and sign the minutes of the interview was sometimes rendered meaningless because of language issues, as highlighted by one of our participants: 'even if you could read German, you will not be able to understand what you read. And it doesn't make any sense' (Emroy, focus group no. 1, Hesse). For these reasons, the previously mentioned option of being accompanied, by support group volunteers and/or to be assisted by a lawyer during the main interview is particularly important for these participants (Sect. 6.2).

In Italy, the presence of the UNHCR representatives may be the basis for a more sensitive approach towards SOGI claimants, beyond the already mentioned frequent allocation of these claims to the most competent member of territorial commissions. First, there is no indication that the interview is carried out on the basis of a

pre-established list of questions, commissions generally preferring an open approach based on the specific circumstances of the case. As Titti (decision-maker) confirmed, questioning cannot but be case-specific. Second, particular attention is given to creating a supportive environment. While Cristina (UNHCR officer) explained that ‘sometimes there is no need to ask many questions’, Titti also shared with us the general approach she adopts during interviews:

At the very beginning, I introduce myself as a member of the UNHCR in order to make it clear that I do not have any prejudices based on gender, culture or religion. I show them pictures about the UNHCR (...). At that point, I can see that the claimant is more confident (...). I also ask if it is ok that I’m a woman and specify that they can choose [another interviewer] with no consequences for the final decision (...) I also ask them if they have questions for me, as I have for them [and] some claimants asked me questions to know who they were talking to. (...) I think all this is very important (...) in order to establish trust.

In turn, Maria Grazia (decision-maker) recalled that she usually started interviews by trying to provide as many guarantees as possible in relation to the claimant’s privacy and the confidential nature of the interview. Once she also revealed her own (non-heterosexual) sexual orientation when she noticed that a gay claimant was embarrassed and afraid to speak about themselves. Although she expressed doubts about the appropriateness of such an initiative, that claimant eventually opened up. The value of this kind of attention to detail was confirmed by some claimants. For example, Dev explained that:

When he heard that I was a bit depressed, he asked me if I were ready, and that I needed to be reassured before starting [the interview]. He offered me a glass of water. (...) After the interview ended he asked me if I really felt well, and added that, if it were just for him (...), he would have granted me international protection.

Third, a certain awareness of the existence of cultural differences emerged. According to Titti (decision-maker), when people coming from some specific countries are interviewed, she does not even use the word ‘gay’ because ‘it is equal to mention “the devil”’. Similarly, due to the cultural background of certain male claimants, she knows they may not feel able to look her in the eyes as that may be perceived as a form of disrespect, and not ‘a sign of a bogus SOGI claim’. Crucially, thanks to the collective discussion between all members of the territorial commissions before adopting a final decision (Sect. 6.3.1), these cultural aspects are often cross-checked by the most competent caseworker in SOGI claims (confirmed by Roberto, decision-maker, among others). Finally, as for the length of the interview, there were a variety of experiences. Very short interviews were reported (Wilson, focus group no. 3, northern Italy, was interviewed for only 1 h, and Gbona, for one hour and a half), alongside questionings lasting many hours (for instance, Dev was questioned for 6 h). Perhaps coincidentally, the longest and most detailed interviews saw the involvement of the most competent member of the commission in SOGI cases. Significantly, due to the complexity and the length of these interviews, Roberto (decision-maker) explained that, if he has advance notice, he prefers to start his working day with a SOGI claimant or to postpone these interviews when there is not enough time to carry them out properly.



Despite attempts to create a friendly environment for SOGI claims, some criticisms remain in Italy. As Giovanna (lawyer) confirmed, asylum claimants, including those fleeing homophobia and transphobia, face a sort of inquisitorial approach. In the legitimate attempt to investigate the position of the claimant, by asking for instance locations and dates, interviewers are sometimes eager to identify inconsistencies. The feeling of being under investigation was widely shared. For instance, Edoardo (focus group no. 3, northern Italy) noticed that ‘when I was telling her, she was like going to the Google to confirm so many dates (...) trying to get if this is true’. Other claimants stressed the irrelevant nature of some questions asked (Nice Guy, focus group no. 1, northern Italy) or the lack of mutual understanding, sometimes based on the differences in interviewer-claimant social and educational backgrounds (Chap. 7). Odoosa, for example, could not work out what information the interviewer wanted from him, after he reported that he was caught by the police ‘for being gay’, thus forced to run away. His feeling of distress, mixed with incomprehension, was evident: ‘I don’t know, I don’t, he [the interviewer] might have explained his self but because of things that was in my head, I can’t just remember everything’. Equally, Nazarena (lawyer) reported that questions are too often aimed at ascertaining credibility and are not pertinent or related to the available COI. It is no coincidence that, in her view, many negative decisions are justified by saying that the claimant gave a ‘generic and contradictory account’, without explaining why that particular account is not consistent with available COI, as research has also shown (Busetto et al. 2017). For Giulio (LGBTIQ+ group volunteer), one problem is that territorial commissions rarely stop and postpone the interview in case of doubts, instead preferring to reject the claim.

Finally, although claimants have the opportunity to revise the minutes at the end of the interview, too often claimants simply feel obliged to sign, irrespective of their accuracy (Giovanna, lawyer). In fact, Water (focus group no. 4, northern Italy) alleged that the minutes were not read point-by-point, but only summarised.

It should be noted that most of these good practices and criticisms reflect local experiences and, consequently, the activity of specific territorial commissions. Yet, macro-level factors may hamper the general implementation of the positive procedural arrangements already in place. First, the necessity to assess a high number of asylum claims every day may lead to the lower quality of the process. As Titti (decision-maker) reckoned, with this imposed rhythm, ‘how could you summarise the life of a person in half an hour?’ Second, the 2017 reform introduced the obligation to video-record the interview so that it can subsequently be used for the appeal process, if necessary. Some of our participants expressed a positive opinion about this development, not least because it may avoid the risk of re-traumatisation (Silvana, judge). Instead, for other participants, this new procedure risks having a specifically negative impact for SOGI claimants and their willingness to open up on camera for reasons that include concerns about confidentiality of the recording within the asylum system (for instance, Mara, lawyer).

Moving on to the UK, past research has showed that interviewers often apply the inquisitorial approach of a criminal court when carrying out asylum interviews (Cohen 2002; Gill and Good 2019). Earlier research has also indicated a tendency

on the part of caseworkers to refuse SOGI claims in the belief that any erroneous decisions will be corrected at appeal stage by tribunal judges (Miles 2010, p. 22). Yet worryingly, at the same time, a ‘deference of appellate courts to first decision and fact-finding’ has also been identified (Millbank 2009, p. 33). Consequently, whereas civil servants rely on the judiciary to be the ultimate arbiter, the judiciary in turn relies on civil servants to have made a sound initial decision.

In relation to this initial interview process, contrasting views emerged in our fieldwork. Starting with the existence or not of a friendly environment during the interview, Amber remembered that:

[The interviewer] came herself to get us (...) from the waiting area, she called me by my name properly and asked if it was the right way [to pronounce it] and I assured her that she is correct, and we walked to the interview room together. [She] was very friendly, welcoming and cheerful, and that made the whole interview process easier.

Even more importantly, Amber being a transgender claimant, the interviewer always referred to her as a female: ‘She didn’t make any errors because it just flow naturally and she just, labelled, put my gender as female, instead of asking what is your gender, so she knows already’. In turn, Janelle explained: ‘The person who interviewed me was very nice. So I felt very calm, because I was very frightened, I was shaking, and she said she will try to make it as comfortable as possible, which she did’. By contrast, Selim’s experience was less positive:

She didn’t look at me the whole time, she was just taking [notes], writing down what I was saying and she asked me to slow down, you know, when you are telling a story, you get excited and you know, and then she was like “no, slow down because I need to write it down”. And then you break down the story and then you lose the point and you are, like, what was I saying, it was just a mess.

The perspective of an interviewer is particularly valuable in this context. Emily, a decision-maker who told us she found SOGI claims ‘harder’ to handle, also said:

I get the file and go through it. (...) Everyone’s preparation is slightly different but generally you need to be sure that you’ve... every aspect of their claim, so that you can make a good decision at the end. (...) Every case is different. You have to make it personal, as personal as you can with them because they’re talking to a stranger about quite private parts of their life... and also they’re probably sitting there thinking this is the person making a decision on my life, I can’t really inform how they’re feeling (...). If you get someone who’s giving one-word answers, it’s very hard to try and decide on that basis, so you’re just trying to get people to talk, really. It’s quite difficult. (...) You’re asking people to relate very difficult periods of their life (...) They’re coming from countries where they don’t talk about it... so it’s very difficult to try to navigate.

In light of this challenge, Emily usually adopts an open approach:

I say “I’m happy to listen, if there’s anything you want to tell me, that’s fine”, I prefer people to just, free recourse of memory and then if they stop or if they’re struggling I say “is it just easier if I ask a direct question” and most of the time they say “yes, please”, and then I say specifically “I’m not looking for details of what they’ve done to you specifically”, you try and guide them, you say “I’m going to ask who they are, what they’re like, the location, days, things like that”, and then they usually calm down a bit.

Yet, other experiences show that direct questions on specific aspects of claimants' lives, including in relation to religion, first sexual experiences or the involvement in the gay scene in the UK, are usually asked (Chap. 7). As Ibrahim A. explained, 'she [the interviewer] wasn't rude. (...) She didn't like humiliate me with any word or anything, but she provoked me (...). She kept asking me about very detailed information which I don't have'. Whereas for claimants these questions appear irrelevant or even offensive, Olivia (government official) defended such an approach at least indirectly:

If you were living in a country where it is illegal, you would expect somebody to be able to say how they felt about it [SOGI]. (...) And then maybe their first encounter, how did it happen, how did you tell your parents, people find out, were you scared, you know, it is illegal there, how did you go about it, things like that. But, you know, nothing sexual. (...) If somebody just says, "oh, yes, I was about 15, and yes I felt fine about it", you would expect more detail. Like, I say to some people "do you remember your first kiss?" (...) they are going to remember details about it.

This problematic expectation may be greater in certain cases. Although it echoes an intersectional approach (Chap. 3), Emily (decision-maker) explained that there are

lots of variations in how people express their sexuality (...) so you have to take... the individual circumstance of the claimant into account. You know, their education background, their history, the country, the sort of the society that they grew up in. I mean, if for example you get someone from like a really middle-class background in Pakistan, then you would expect them to be able to talk a bit more freely about how they were living, because amongst middle class families in Pakistan it is a little bit more accepting.

This approach is sometimes coupled with other general disputable attitudes, when SOGI claimants in the UK are not offered a 'safe' environment. As Edith explained:

The Home Office where you go to sign [in], it is not a very homely place, you just feel like it is stressing, the whole situation is stressing, so sometimes I even get sick when I am going there. So... they did an interview, but I said I can't finish the interview because already I was sick [and] he wants for me to sign, I said I can't sign it. (...) And they didn't even offer me even a glass of water or anything.

Finally, in relation to the length of interviews, it is variable as observed in Germany and Italy, but so is the number of interviews carried out per day/week. Emily (decision-maker) reported the existence of a guideline suggesting a time of '2.5 to 3 hours', which allows decision-makers to interview at least six people a week. Yet, as she pointed out, while trying to respect these indications, she does not 'know how you're supposed to assess someone in 2 h. Everyone's different, so you have to try to do your best to get as much information [as you can]'

In short, with a few exceptions mainly connected to the Italian (formal and informal) procedural practices, none of the systems under investigation may be described, at least in relation to the interview process, as entirely SOGI claimant-friendly. In particular, the risk of re-traumatisation is rarely considered, while an environment that is conducive to self-identification is absent. As Mariya, an NGO worker in Germany, pointed out, the 'interview-hearing situation [is] simply an imposition

(...) and a totally exhausting and re-traumatising situation for people who like to leave their story behind them, to experience (...) a new non-discriminatory life'. It is no surprise that, according to her experience as well as our data, claimants often perceive the interview as 'a humiliation', with negative implications also for their self-confidence, well-being and integration. Winifred (focus group no. 3, Bavaria, Germany) affirmed that she has 'never felt safe' during the asylum process. Sandra, also claiming asylum in Germany, chose 'to forget, just to make [herself] feel better'. Rather than being an occasion for claimants to share the reasons why they believe that they risk persecution if returned to their countries of origin, interviews often focus largely on ascertaining claimants' SOGI.

What is more, these dynamics may be further aggravated by the vivid influence of bias and prejudices of caseworkers in carrying out their responsibilities (Chap. 7, especially in relation to how these intertwine with stereotypes in SOGI claims). In all the countries under comparison, our data has pointed to the significant influence of bias in the way interviewers and decision-makers conduct interviews, probably owing to the unconfirmed assumptions on the 'abuse' of the asylum system (McFadyen 2016; Veglio 2017). In particular, the belief that many SOGI claims are fabricated is still strong, thus influencing the line of questioning (Rousseau and Foxen 2006). An example in this respect relates to the intervention of the Home Office's presenting officer during a hearing (Upper Tier Tribunal observation, London, 2018): 'Isn't it correct that your claim for asylum came at a moment when you had exhausted all other possibilities of getting leave to remain in the UK?'. In the same case, the Home Office complained that the claimant was not active in the 'LGBT community'. While this bias ostensibly derives from the inquisitorial approach emerged above, for some participants, its roots lie in the increased number of SOGI claims. For instance, Celeste, a social worker in Italy, explained that, in the past few years, SOGI claims were considered extremely vulnerable cases with few doubts about their authenticity but, more recently, territorial commissions are increasingly cautious to avoid granting refugee status to 'bogus claimants'. This approach is particularly evident in the UK. According to Sean, a lawyer:

Our collective understanding and feeling is that the Home Office is a beast, it is a terrible, terrible beast and they will do everything they can to refuse cases, even the strongest cases where we will say to a client "we will win this", and the Home Office refuse and you appeal and then you win.

For Joseph, an NGO volunteer in the UK, this attitude is the result of the previous Home Secretary Theresa May's policy aimed to 'create a hostile culture [that] when it comes to LGBT stuff it just becomes homophobic'. In this kind of situation, according to Siri, who claimed asylum in Italy, there is no room for taking into account the particular feelings experienced by many SOGI claimants during the interview:

At first you feel a pressure deep inside. (...) You have a hard time expressing yourself, sometimes there are words that you would like to let out [but] – because of that pressure – you simply can't let out. Maybe also other people shake when they are speaking in front of the commission, and those who are listening have the feeling that you may not be telling the truth.

As explored elsewhere in relation to asylum claims submitted by women on the basis of sexual violence (Baillot et al. 2012, p. 19), one reason for this attitude is that caseworkers may be vulnerable to ‘case hardening’. Consequently, the intersection between a hostile climate and the pressure to deliver more with less resources may make it harder for interviewers and decision-makers to connect emotionally with asylum claimants, including those with SOGI claims, thus preventing them from carrying out an individual assessment as required by our theoretical underpinnings (Chap. 3).

Other specific kinds of bias towards SOGI claimants also emerged. These include at least two different, but interconnected, beliefs in terms of ‘similar’ stories (Chap. 7) and of ‘countries of origin’. First, a bias seems to exist in relation to claimants who arrive from a particular country. In Germany, Barbara (lawyer) mentioned Cameroon or Pakistan in this respect, while Julian suggested that this bias may also be frequent in relation to Uganda: ‘My interviewer was really biased. I entered and he said “oh, you’re from Uganda, I guess you’re now going to tell me that lesbian story”. Before I could even start’. For many participants in Italy, SOGI claimants from Nigeria and the Gambia are usually viewed with greater suspicion (Giulia, Diego, Riccardo and Giulio, LGBTIQ+ group volunteers; Chiara, NGO worker; Celeste, social worker; Damiano, lawyer). Roberto (decision-maker), for example, did not hide the fact that, when a Nigerian male claimant alleges persecution on grounds of his sexual orientation, he needs to ask more questions ‘because many SOGI claims are fake’. As he said:

Since I’m here, I have only heard a Turkish national claiming asylum for being transgender (...) a Somali national for being homosexual, no one from Eritrea. It’s clear that the great weight of some nationalities [in SOGI asylum] makes you be more doubtful.

Following the same problematic line of reasoning, Daniele (decision-maker) added that it is ‘informally known’ that, for people coming from specific countries, it is particularly difficult to expose themselves as belonging to or being associated with SOGI minorities. In his view, this is the case for claimants coming from Mali, who may perceive this kind of request as a shame, but not for Nigerian nationals, who appear to submit such a claim ‘more easily’. According to Nazarena (lawyer), this attitude does not have negative implications only for the number of refusals, but also for the rate of recognition of refugee status in opposition to other forms of international protection (equally, Mara, lawyer; Maria Grazia, decision-maker). People from some countries appear to deserve refugee status more than claimants from other countries, irrespective of a thorough and individual analysis of the risk of persecution and the relevant COI (Sect. 6.5).

While preconceptions based on nationality or ethnicity are apparent, a lack of knowledge of SOGI, in general and SOGI from different cultural perspectives, has an equal negative influence in the conduct of interviews. Kennedy, who claimed asylum in Italy, pointed out that the interviewer ‘did not even know anything about LGBT’, while Damiano (lawyer, Italy) shared his impression that many caseworkers are ignorant of the number of LGBTIQ+ people there are in society. He remembered the case of a member of a territorial commission who believed that SOGI

claims were ‘too many’ because they hear an average of five SOGI claimants per week, out of a total of 60 claimants. For Anna, an LGBTIQ+ group volunteer in Italy, the interviewers’ ‘lack of belonging’ to a minority group themselves may prevent them developing ‘empathy’ with SOGI claimants. A good example in this respect was provided by Julian, who claimed asylum in Germany:

He said “what makes you think Bayern [Bavaria] or Munich is interested in lesbians?” (...) “What makes you think you will even be safe here?” (...) Now, imagine you’re really stressed. Someone is already biased, you are feeling it and you have to go ahead and tell your story. You’re already frustrated.

The situation with transgender claimants is often more problematic. The NGO Transgender Europe (TGEU) has reported that trans asylum claims are often mistakenly treated as sexual orientation-based claims because of lack of knowledge on the part of the interviewer (TGEU 2016, p. 6) or incredulity if the claimant has not had hormonal treatment or surgery, with clear implications for the outcome of the interview. In this respect, Prince Emrah’s interview in Germany is illustrative, not least in terms of the distress caused to asylum claimants by the lack of a queer approach:

They asked me about my gender so much. They said to me, “do you want to change from your body? What do you want to change? Or do you want to cut? Do you want to, I don’t know, operations? In the future what will you do here?” With my gender...it’s like...why don’t they stop, I don’t think it’s important to ask. What I’ll be, I’ll be. It’s important I’m queer and I’m here. So I will, I will not cut, I will put my boobs, or not, it should not interest them. It’s my own life.

For the sake of completeness, it is worth noting that particular forms of bias have also emerged amongst other participants (Sect. 6.2) as well as asylum claimants themselves, thus leading to complaints about some procedural aspects of the interview. This is especially the case regarding the relationship between SOGI and religion, in cases where the interviewer has an obvious religious background. The case of Selim (UK) is illustrative of this:

I still remember my feeling in the interview, my interviewer is a covered woman, so she is Muslim, she is covered, and the questions the interviewer asked are very personal, and please don’t take it as an offence, one of the questions like what did you used to do when you get aroused or you get, how can I say like she is asking me if I used to masturbate how can I tell a covered woman that I masturbate. It was just, it felt uncomfortable (...). But then the question is (...) how far does she know about the gay culture.

In short, despite the improvements noticed in terms of training and, sometimes, of procedures, patterns of bias still permeate the asylum system of Germany, Italy and UK in different ways. Those caseworkers who were aware of their impact on the interview process and the decision, also recognised the difficulty in remaining totally uninfluenced by ‘external factors’ (for instance, Daniele, decision-maker, Italy; Vincenzo, LGBTIQ+ group volunteer, Italy; Bilal, presenting officer, UK). As Deirdre, UK, told her client in trying to explain the lottery effect prevalent in the asylum system: ‘Sometimes you will be lucky (...) and get somebody who is just nice at the Home Office’. We explore this lottery effect in terms of the assessment

of SOGI claims in Chap. 7, while in the next section we investigate the appeal process for those who are not so ‘lucky’ and whose applications are rejected.

## 6.4 The Judicial Procedure

In all the countries we consider, asylum claimants may appeal against a rejection of their claim in accordance with international, European and domestic guarantees. In particular, it is worth remembering that the ECHR protects the right to an effective remedy (Article 13), which, when applied to asylum claimants, is often read in combination with the right to life (Article 2) and the prohibition of torture and degrading or inhuman treatment (Article 3). Contracting states, like Germany, Italy and the UK, thus need to ensure that all claimants have, at least, access to an independent authority that can review the risk of being returned to a country where they might be exposed to the risk of death or torture, degrading or inhuman treatment. In turn, if we look specifically at the Procedures Directive, member states ‘shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law’ (Article 46(3)), at least in appeal procedures before a court or tribunal of first instance. The importance of effective access to an appeal procedure is evident in light of some trends on the significant number of positive decisions against administrative refusals. For instance, according to Sabrina, an NGO worker in Germany: ‘You can see that in the judgments, which are loads in the administrative court, and where a large number of, I believe, 30% are then granted a positive decision’. This high success rate in appeals suggests that decision-making standards at the BAMF are poor and that the BAMF generally decides too many claims negatively (NDR 2019). Similarly, in the UK the fact that over two thirds of refusals are over-turned on appeal (ECRE, AIDA & Refugee Council 2019, p. 10) chimes with concerns from NGOs ‘about an apparent over-reliance by the Home Office on asylum appeals to correct straightforward failures by caseworkers’ (Freedom from Torture 2016, p. 49). Yet, this right is ensured and enjoyed in different ways in Germany, Italy and UK, some of which may have a particular impact on SOGI claimants, as we explore in the following sub-sections.

### 6.4.1 The Appeal Setting

Starting with Germany, when an asylum request is rejected, a claimant can appeal against that decision before the relevant administrative court among the 51 administrative courts (‘Verwaltungsgerichte’) that deal with asylum matters. These appeals usually have suspensive effect, unless they are rejected as ‘manifestly unfounded’ or ‘inadmissible’ (on Dublin cases, Sect. 6.7). If the administrative court also rejects the claim, further appeals are possible but, in practice, only in exceptional circumstances (Evelyne and Anne, lawyers; ECRE, AIDA & Asyl und Migration 2018,



p. 16). In fact, it seems that a second instance appeal is only allowed in case of procedural errors or ‘fundamental questions’ raised by the appeal rejection. According to Emma, NGO worker, and confirmed by Oscar, a judge, since most cases are rejected on credibility grounds, it is hard to argue for the necessity of a second instance examination. If the appeal before the administrative court is successful, the judge also decides on the kind of international protection to be granted (Chap. 4). Other than the length of the appeal procedure, which takes more than a year in some cases (for instance, Veronica and Julia), the essential obstacle to appeal is the short deadline for submitting the application before the administrative court. Indeed, if viewed in the broader context of asylum claimants’ conditions and bureaucratic delays, a deadline of 2 weeks is generally difficult to meet. For example, Ayeta (focus group no. 4, Bavaria) received her rejection letter when the 2 weeks were already over: ‘So I had to go to the Caritas where I stayed and they had to get me a lawyer, so the lawyer wrote to the Bundesamt [federal office]. There, they accepted the late appeal’. Noah (NGO social worker) explained that many claimants cannot read properly in German or experience feelings of shame, which may mean they are less likely to take action within the given time limits. Moreover, while it seems that BAMF notifies decisions through post without using recorded delivery, thus generating confusion in relation to the date of notification, in collective reception centres it is not unusual for letters to be lost or held up (ECRE, AIDA 2019, p. 9). In cases of unfounded or inadmissible claims, the deadline is even shorter, which amplifies these problems. As Kadir, an NGO worker, pointed out, in this process the psychological implications are often neglected: ‘It’s a week and you have to react. And first of all handle the shock that you have been rejected and then react quickly, find a lawyer and file an appeal’.

In terms of internal organisation, it is worth noting that some administrative judges in Germany consistently deal with cases relating to the same country of origin (for instance, Evelyne and Anne, lawyers; Court observations, Hesse, 2018). By encouraging expertise, this system has a great advantage according to Noah (NGO social worker): ‘You can figure out with time what arguments you can get through in court or what boxes you need to tick, what do they ask, what do they want’. Yet, being overexposed to SOGI claims coming from the same country may lead to ‘case hardening’, that is, as already explored above, a general unwillingness to believe claimants when stories have a range of similar elements or entail high degrees of violence and distress (Baillot et al. 2013). Moreover, this procedural arrangement does not seem to produce any degree of consistency across Germany. As Oscar, a judge, affirmed, ‘we may have judgments from different administrative courts on a nearly identical situation with different results. But it is quite normal in asylum’.

While in Italy an appeal against a refusal of an asylum request is allowed within 30 days of the notification of the negative decision, the 2017 reform radically changed the applicable judicial procedures. The elimination of the second instance appeal on merits effectively means that asylum claimants can only submit an appeal against judicial first-instance negative decisions to the Supreme Court, which carries out an evaluation of procedural legitimacy, but not on the substance of the claim. This aspect of the reform was widely criticised (De Santis 2018) and worried

a number of our participants, because it may be unconstitutional. In fact, although the Italian Constitution does not impose a two-instance process to have an appeal examined on the merits, this reform is clearly discriminatory in comparison to other judicial processes, which are all based on the possibility of a two-instance appeal plus a legitimacy review by the Supreme Court. Consequently, as our participants also pointed out (for instance, Nazarena, lawyer), people claiming asylum are treated differently to other parties in court cases, in potential violation of Article 3 of the Italian Constitution. Some judges, however, defend this aspect of the reform by arguing that the more appeals are granted and the claimant tells their story, the greater the risk that the claimant's testimony will contain inconsistencies (Silvana).

In parallel, the 2017 reform introduced two additional novelties. From an institutional point of view, it set up specific sections in the main tribunals to cover only matters of asylum and migration. Although in practice a single judge follows the entire appeal procedure within these specialised sections, all asylum decisions are adopted collectively by three judges, in contrast to the previous system with only one judge deciding on each case. From a procedural perspective, there is the concrete danger that claimants are no longer heard live by the first instance judge, because the same 2017 reform introduced the mandatory recording of the main administrative interview. This recording should be used subsequently by the first instance judges to decide on the appeal. This aspect of the reform was criticised both as a violation of the fundamental right to defence and the right to asylum (Nazarena, lawyer), as well as removing the scope for judges' empathy for, and understanding of, SOGI claimants (Vincenzo, an LGBTIQ+ group volunteer; Palermo 2018). Moreover, as Damiano explained, this procedure is an evident additional obstacle to a safe environment:

Besides someone [the interviewer] they never met before, they see a camera, a tape recorder, and are told "This recording will be seen by the judge, by the lawyers" (...) They will be afraid that someone will see this video-recording.

In addition, there is no certainty that judges will watch the video-recording of the interview, especially in light of the limited amount of time available (for instance, Nazarena, lawyer). Some Italian courts resisted this reform and have continued offering a hearing to claimants, whether or not the video-recording of administrative interviews was available (for example, Filippo, senior judge). According to Silvana, a judge, for those claims where credibility is an issue, such as SOGI ones, hearings with claimants may be nonetheless necessary in order to allow judges to form an opinion on whether or not the claimant is credible. Yet, Silvana also explained that, in line with the jurisprudence of the CJEU, there is no need to hear the claimant, including in SOGI cases, if judges have all the necessary evidence to hand, such as a detailed transcript of an interview carried out well by the territorial commission. This judicial discretion to hold a hearing or not introduces an element of 'lottery' in the appeal system (Cristina, UNHCR officer), especially when claimants were not adequately interviewed in relation to SOGI elements or were not able to reveal the real reason for fearing persecution (Livio, lawyer). As Filippo, a senior judge, affirmed: 'Sometimes holding a new hearing is not necessarily a guarantee of

recognition of international protection or of a better understanding of the story. Yet, it is certainly a clear assumption of responsibility [by the judge]. In any case, as Silvana effectively summarised, even with the new system, the competence of the judge in asylum matters is always the key to a fair appeal procedure. Due to the 2017 reform, the new specialised and collective decision-making mechanism may foster this expertise.

Finally, as anticipated in Sect. 6.1, the UK system allows an appeal against negative decisions to the First Tier Tribunal but there are restrictions on further appeal stages. Claimants whose case becomes ARE may be able to submit a fresh claim but, given the elements that emerged above, our participants are cautious about the real prospects of success in such cases. According to Sean, a lawyer, the way ‘fresh claims’ are usually treated is clearly intended ‘to stop people having a further appeal’, as both the Home Office and judges rarely agree that a claimant has a fresh claim. The long time that the appeal process takes was widely criticised by our participants (for instance, Ernest, judge), with the entire asylum procedure in the cases of Daphne and Junio taking, respectively, more than six and eight years. An important factor characterising the UK appeal system is the presence of the Home Office Presenting Officer or legal representative at most appeal hearings, which often contributes to the hostile atmosphere encountered in UK hearings (Braganza 2019). As a participant in our surveys pointed out:

The UK Home Office representatives are often hostile, implicitly or explicitly homophobic, and aggressive. Even if sexuality has been accepted prior to appeal, there can be questioning about credibility, about relationships, etc. For example last week I was at an appeal where (...) the [Home Office presenting officer] also repeatedly told the appellant to “speak up” and “stop mumbling”. The appellant was a 21 year old lesbian (for whom English was not first language) who had escaped forced marriage (imposed to try and “cure” her of being a lesbian) and sexual violence (S110, NGO volunteer, UK).

The awareness of some UK judges of the need to create a ‘safe environment’ at the appeal stage is valuable in this context. Adrian, a judge, clearly supported the need ‘to create an atmosphere where [SOGI claimants] will feel able to talk about it and in some cases that may mean that we will ask for a closed court and so forth’. Reassuringly, the reason given for this was not SOGI prejudice but claimants’ needs. As Adrian further explained:

There should not normally be closed courts because being gay is not anything to be ashamed of in any way but some people feel incredibly sensitive and... also if they are not used to the British system they may feel less confidence in how things work, so judges have to be quite sort of open and creative in these sorts of cases.

With this overview in mind, we now look at how members of the judiciary are prepared for deciding asylum cases. With the exception of the UK, judges are not specifically selected for asylum or immigration purposes. In Germany and in Italy they simply follow the ordinary selection process for joining the judiciary, while in the UK they are appointed through the Judicial Appointments Commission and must meet the statutory qualification necessary for sitting in the Immigration and

Asylum Chambers. One important question thus arises: are there any specific procedural arrangements or training for judges deciding on SOGI cases?

In Germany, there is no evidence of specific procedures for selection or training of judges dealing with SOGI claims, as asylum is only one of the areas under judges' mandates. This was confirmed by a judge, Emilia, who explained that the judicial body tasked with the training of judges offers educational sessions on a variety of subjects, but no training on SOGI asylum had been organised until then. Enrolment on training courses is, in any case, voluntary. The lack of specific training was commented on by lawyers (for instance, Elias and Barbara), but judges themselves may not see the need for training. Oscar, a judge, stated: 'The interest in the judiciary would be rather low. After all, there are very few homosexuals who make asylum applications'. Besides such a biased assumption, this appears more worrying when we consider that university law studies generally do not cover immigration and asylum as a compulsory subject.

In Italy, by creating specialised asylum sections in some tribunals, the 2017 reform aimed to ensure that judges who join these units have specific competences in migration and asylum, as well as in foreign languages to communicate with asylum claimants in case of hearings. Yet, many participants asserted that, in practice, there are no guarantees that only experienced and trained judges will be selected (for instance, Mara and Nazarena, lawyers), especially when there are no judges interested in this field of law. In fact, Filippo, a senior judge, reported that in his tribunal it was impossible to find a sufficient number of judges to set up the new specialised section. Consequently, as Filippo explained, the youngest judges were appointed simply by virtue of 'their knowledge of foreign languages'. In other tribunals, judges working on family issues are usually called on to cover asylum and migration issues as well (for instance, Silvana and Maurizio, judges). In relation to both newly appointed judges and judges working on family issues, there is no evidence of any intensive training on asylum, including SOGI asylum. Yet, at a more general level, it seems that in recent years specific training on different aspects of asylum, including SOGI claims, has been organised by the national judicial training body in cooperation with the UNHCR (Silvana, judge). However, judges enrolled on it on a voluntary basis, so there is no guarantee that all judges working with SOGI claimants will have attended this training. Perhaps surprisingly, if compared with the German case, specific training is felt as a priority by some judges, like Filippo (senior judge), who see their role as 'not appropriate to deal with such a complex area', one that in his view requires other, non-legal, expertise to deal with claimants' suffering and trauma.

While there is general selection for judges who work with asylum claimants in place in the UK, there is no specific selection for dealing with SOGI claimants. The Tribunals Committee, which is the body with overall responsibility for the training of tribunal judges, may organise specific training sessions in cooperation with relevant NGOs. For example, participants mentioned asylum training with EASO (Alex, judge) and a one day-training session on SOGI issues, including asylum, with Stonewall (Ernest, judge). Adrian, a judge, reported that cycles of one-day training are organised on different subjects and are compulsory for all judges,

including a training on transgender issues held in 2017, whereas others are attended on a voluntary basis. Yet, according to other participants (for instance, Bilal, presenting officer; Allan, lawyer), judges do not appear adequately trained in SOGI asylum, nor in SOGI issues more generally. This was confirmed by the fact that some of them ignore the existence of rules in the Equal Treatment Bench Book or the Home Office's SOGI guidance. Some examples of the impact of the lack of comprehensive training of judges on the judicial decisions reached in SOGI cases, mixed with personal bias and prejudices, will be explored in Chap. 7. That impact is also evident in the way hearings are conducted.

### ***6.4.2 The Conduct of Hearings and the Adoption of Decisions***

Looking now at the ways in which hearings of SOGI claimants are carried out as well as the decision-making process in tribunals, our data provides a mixed picture with negative experiences coupled with positive attitudes that are more in line with a human rights reading of the Refugee Convention. Owing to the different characteristics of each judicial system in question, a country-by-country investigation is particularly appropriate here.

To begin with Germany, our data shows the existence of encouraging decision-making processes along problematic lines of questioning. Examples of promising approaches include the attitude adopted by a judge during a hearing (Court observation, North Rhine-Westphalia, 2019), where she carefully introduced herself and explained the entire procedure and its consequences to the claimant. As Noah (NGO social worker) explained, when a case is well prepared, 'these are the moments of joy, that the judge opens the file, checks the personal data, closes the file, says: "That's clear" and he grants it. Then (...) no further check is made'. More importantly, both judges interviewed in Germany (Oscar and Emilia) adopt an approach that seems, in principle, to conform to the notion of refugee enshrined in the Refugee Convention. According to Oscar, 'two things always run in parallel', namely the research and the evaluation of relevant COI (Sect. 6.5) and the examination of the specific circumstances of the claimant. These are investigated by reading the transcript of the interview(s) prepared by the BAMF, which also serves as a basis for the choice of questions to be asked during the hearing. As Oscar pointed out, these questions aim to ascertain the credibility of the claimant or aspects that were not clarified at the BAMF interview. These include basic information, such as the reasons for fleeing one's country and the individual process leading to the decision to escape. Oscar emphasised that, although administrative decisions are often based on the lack of credibility, they do not provide appropriate evidence that all efforts were made to clarify the claimant's account, which is 'bad work from the Federal Office'. This might also be why, during most hearings observed in Germany, claimants were asked several questions to clarify apparent inconsistencies in the decision taken by the BAMF. Sometimes questions did not appear focused on claimants' SOGI, but were mostly aimed at checking the plausibility of the story (for instance, Court

observation, Hesse, 2018). Other times, questions moved on to relationships, first sexual encounters, visits to gay bars, as well as intimate aspects, in the attempt to assess the credibility of claimants' testimonies (for instance, Court observation, Hesse, 2018). Therefore, overall judges do not seem to favour an open narrative (with some exceptions, for instance, Court observation, Hesse, 2018), even though this approach is more consistent with a SOGI-friendly asylum system (UNHCR 2012a, para. 60). Yet, significantly, by confirming the reliance on the individual circumstances of the claimant, another judge – Emilia – emphasised the role of COI. In this respect, she investigates whether or not in the claimant's country of origin 'possible and reasonable' forms of protection exist, or whether the required level of persecution – curiously identified as a 'gradual concept' (not an isolated understanding however, see Danisi 2019) – is reached, taking into account the personal circumstances of the claimant. From a negative perspective, some disrespectful attitudes to claimants were witnessed. For instance, in a Court observation in Hesse, in 2018, the judge failed to address the claimant directly and only addressed the lawyer and the interpreter (also Court observation, Hesse, 2019). Moreover, when additional evidence was produced at the appeal stage, the new material was analysed with suspicion. This was the case in another hearing (Court observation, Hesse, 2018), where the judge scrutinised a letter provided by a support group and asked detailed questions in a way that seemed to question the letter's authenticity. Finally, it is noticeable that, although the BAMF is expected to attend hearings, it is rarely present (except for one Court observation – Hesse, 2019 – out of ten observations carried out in Germany), while on some occasions there were no witnesses heard (for instance, another Court observation, Hesse, 2019). The duration of hearings appears overall very variable.

Experiences in Italy were also mixed. Here, judges are under considerable pressure to decide on a substantial number of appeals against territorial commissions' refusals in a (much criticised) new time frame of 4 months (Various 2018). During observations carried out in tribunals in 2018, it was noticed that several hearings a day were usually scheduled with the same judge, one every 15 or 30 min. In this respect, Maurizio, a judge in one of the newly-established specialised sections on immigration and asylum, referred to an average of 60 new appeals every week and an average of 20 or 25 cases decided each week. No specific procedural arrangements emerged for SOGI claimants, and in general the approach adopted in these appeals depends on the individual judge appointed. According to Filippo, a senior judge, his usual approach with asylum claimants is to start by attempting to reassure them and to make sure that they understand that it is essential 'to be precise and say the truth'. Then, claimants are asked if they confirm the account shared at the main interview or whether they want to clarify or specify some points. As Filippo explained, he tends to let the claimant talk, rather than ask direct questions about partners or feelings during relationships. It happened that, in some cases, claimants directly signalled problems with interpretation or the transcript of the main interview, thus clarifying inconsistencies emphasised by the administrative body. In other experiences, less open lines of questioning emerged. For instance, Maurizio (judge) told us that he usually asks questions to verify unclear or doubtful aspects of



the main interview, often with the aim of assessing the credibility of the claimant. As he explained, in this process there is room to provide new evidence and, as has happened on occasion, a claimant may put forward SOGI grounds for persecution for the first time at this stage.

It is worth noting that, in Italy, the judge in charge of an asylum appeal may delegate the conduct of the hearing to an honorary judge ('*giudici onorari*', GOT), who then provides a transcript that the judge in charge of the case uses to discuss the final decision, sitting in a composition of three judges. The choice as to whether to delegate the hearing is based on a number of factors. Our participants mentioned that, given the high number of appeals, this choice is sometimes inevitable. In some tribunals, instead, this is a matter of practice, irrespective of the kind of claim at stake. Yet, as Maurizio explained, in light of credibility issues, he tries to hear SOGI claimants himself as much as possible. In fact, as he put it, 'the perceptions gained during the hearing are invaluable and cannot be transcribed'. Importantly this support staff may not have received appropriate training. In this respect, Filippo (senior judge) mentioned that some training is provided to GOT by simply having them assist a number of hearings of asylum claimants by a judge.

Disparities between hearings held by support staff and judges were evident at our observations in tribunals in Italy. Two hearings, observed in the same tribunal in northern Italy in 2018, are illustrative in this respect. A first hearing, which was indirectly observed thanks to the support of the interpreter (Chap. 2), was held in a private room with the sole presence of the (male) claimant, the interpreter, the lawyer and the (female) GOT. Worryingly, in terms of the rigour and therefore the fairness of proceedings, it lasted less than 15 min. The GOT mainly asked the (non-professional) interpreter to swear and, in a perfunctory manner, as to whether the SOGI claimant wished only to confirm the declarations made at the main interview or wished to add something about his fear of persecution. No evidence was requested, except for a single question on the claimant's integration in Italy. A second hearing with a (female) GOT, which was directly observed by us in a private room with the presence of the (male) claimant, the (non-professional) interpreter and the lawyer, showed a slightly more positive, though still problematic, approach. With no introductions of any kind, the GOT asked questions on specific circumstances reported by the claimant at the main interview. These questions were related to the family's lack of acceptance of his homosexuality, the claimant's relationship with a partner in his country of origin (including dates), the circumstances of his escape from Nigeria, the separation from the partner after the journey by boat in the Mediterranean, and the level of integration in Italy, which was deemed 'essential' for a positive outcome of the case. Some of these questions were irrelevant to an assessment of the fear of persecution, being based on minor aspects of the travel towards Italy, or inappropriate from a SOGI perspective. For example, by relying on a stereotyped notion of SOGI identity in contrast to a more nuanced analysis (Chap. 3), the claimant was asked 'are you truly homosexual?' and whether or not he had had any homosexual 'affective' relationships after his arrival in Italy. An equally problematic approach was discernable in relation to evidence (Chap. 7). In particular, the GOT in this hearing wished to be reassured that the support group that wrote



a declaration for him was one dedicated to supporting mostly, if not only, SOGI claimants. Allowing the intervention of one of the group's representatives, she asked how they can 'certify' that only 'gay claimants' are supported. The influence of bias in the GOT's questioning here is evident.

A more sensitive approach was perceived in a third hearing, observed in a different tribunal in northern Italy in 2018, where the (male) claimant was not heard by a single judge but by a panel composed of three immigration and asylum judges (two women and one man). Importantly, no sexual-related questions were asked in this hearing. After starting the hearing by verifying that the claimant did not need clarification on any points, the judges asked for further information relating to aspects of the claimant's personal circumstances (as reported at the main interview) that appeared contradictory. Overall, the hearing appeared to focus on identifying minor inconsistencies in the claimant's story, rather than establishing the credibility of the claimant. Examples of questions included 'How could you forget to leave the door open while spending time with your partner?' or 'In what moment of the day your neighbours discovered you?', both aimed at finding reasons for inconsistencies emphasised by the administrative body. At the end, the transcript of the hearing was read point by point aloud by one of the judge and, although it was checked in Italian, some errors were corrected.<sup>10</sup>

Following the Italian 2017 reform, once judges have all the necessary material at their disposal and, if deemed necessary, the hearing has taken place, a decision is made. Analysis of the available case law (Danisi 2020) and participants' views indicate that too often judicial decisions are formulaic, in particular, COI is 'copied and pasted' from one decision to the next. According to Filippo (senior judge), the new collective decision-making procedure is to be welcomed in this respect. Judges are required to report every case to their colleagues for a joint discussion with references to case law and relevant COI. As a result, the overall quality of decisions improves and the influence of individual bias is better controlled, as we saw above in relation to administrative caseworkers, leading to a fairer Italian judicial asylum system also for SOGI cases.

Data on the UK is also rich. No specific procedures are in place for SOGI claimants making an appeal in the UK. While our approach would suggest the adoption of specific individualised measures (Chap. 3), according to Harry (senior judge), such arrangements would be unnecessary because 'LGBT isn't thought of as anything unusual or special really'. On judges' approach to SOGI asylum cases, some of our participants gave positive accounts. According to Bilal (presenting officer), almost all judges now introduce themselves and explain carefully every aspect of the appeal, while trying to reassure claimants throughout the hearing. In this respect, the case of Irma is illustrative. At her hearing, she did not have a lawyer and the questioning by the Home Office representative upset her to the point of crying.

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<sup>10</sup> It is only fair to point out that, according to lawyers who had been involved in other hearings with the same judges, this kind of long and detailed hearing is uncommon. The presence of a SOGICA researcher, duly authorised, might have influenced the conduct of the hearing and the subsequent positive outcome, as the claimant's lawyer argued.

Showing a sensitive approach, the judge told her ‘I will be your barrister and your solicitor because, why, you don’t have a solicitor to help you... and I will’. In turn, Lutfur, who faced hard questioning from the Home Office representative and expressed fear, explained that the judge reassured him by reprimanding the presenting officer for their inappropriate manner. Less positive experiences were shared by other participants, including Gary and Debbie (NGO workers), who found that the appeal system is not ‘genuinely impartial’. Christina, for instance, explained that they never had the opportunity to talk during the hearing, even to correct errors made by the judge about her story. Judges also seem to have limited time to prepare before the hearing, owing to the lack of cooperation with the Home Office. In this respect, as Harry (senior judge) confirmed, judges usually receive the claimant’s bundle only the day before the hearing.<sup>11</sup>

It can be very frustrating... (...) And it is disgraceful, it shouldn’t happen, they have got loads of time and some people just fail to do so. Fail to file and serve their documents. (...) But the barrister wants the case to go ahead anyway... and of course you know if you have, if you have dealt with one Cameroonian asylum which is based on LGBT, you know what the issues are anyway, so it is hardly likely that anything startlingly new is going to come out of the documentation. Because they normally just turn on credibility.

Overall, as Ernest (judge) said: ‘I’m personally quite unhappy about how inconsistent the judiciary is’. This inconsistency in the decision-making process is likely to lead to inconsistent outcomes, as Chap. 7 will explore in detail.

Inconsistencies and unfair treatment may also be attributable to the Home Office representative at the hearings. It is worth noting that in 2019, the ICIBI launched an inquiry and call for evidence addressing ‘what is working well and what is working not so well’ in the work of Home office presenting officers (ICIBI 2019). It is true that, sometimes, the Home Office is unrepresented (for instance, Tribunal observation, Manchester, 2018) or unprepared (for example, Tribunal observation, London, 2018, where the Home Office presenting officer asked the judge for time to read the relevant papers). And this is generally due to capacity and resourcing issues. Yet, when the Home Office presenting officer or barrister is present, their manner towards the claimant could often be described as sceptical or incredulous, unsurprising given the inquisitorial nature of the judicial system, as emerged during the hearings observed in 2018. Judges and Home Office presenting officers recurrently question the nature of support organisations, aiming to verify whether they ‘accept’ only LGBTIQ+ people and ‘certify’ asylum claimants’ SOGI (for instance, Upper Tier Tribunal observation, London, 2018; Tribunal observation, Manchester, 2018). What is striking in all these direct experiences is that, in most cases, the judge did not intervene to prevent inappropriate questions to the claimants. Indeed, on

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<sup>11</sup> According to Bilal, a presenting officer, ‘the appellant’s bundle (...) have a huge amount of background material, that is called the objectable background evidence and then the main bulk of it should be the subjective material. That will have the appellant’s witness statement (...) and any evidence that they have managed to get hold of... either about their claim or about matters contiguous to that perhaps, mental health issues or health issues or anything like that. So they differ in quality and quantity, but that is the usual structure’.

occasion, judges gave the impression of taking the Home Office's side. For instance, in a First Tier Tribunal observation in London (2018), the judge requested clarifications on the streets where gay clubs were located, and asked what was the difference between 'gay venue and gay bar'. In this kind of dialogue, the imbalances of power felt by claimants become evident. For example, during that same observation, when one of the witnesses mentioned that they had met the claimant to look for a Christmas tree, the judge asked 'I just have one question out of straightforward interest, from your statement, what is camp about Christmas?' The sense of relief when the Home Office does not adopt this kind of approach was well expressed by Janelle:

After court I felt a relief. I was just actually happy I don't have to say anything, because I was worried on my way to [tribunal location], my belly was hurting. (...) I am like "oh my God, they are probably going to ask me a lot of questions", I was preparing myself mentally, physically to answer questions, and when I got there and I spoke to the barrister, the barrister says Home Office has nothing to ask you. I took a deep breath and I said, "Amen".

Coming to the adoption of decisions in the UK, the approach of a judge, Adrian, is instructive. To decide on an appeal, he explained that he first looks at the declarations of the claimant at the main interview, taking into account the quality of the interview. Then, he examines witnesses' statements and verifies inconsistencies and the plausibility of the claimant's story. He also looks at the claimant's social life and what 'benefit from living in a free society' they have had. As he explained, a balanced approach is required. For instance, 'in South Asian community, probably more Bangladesh perhaps than India... there is social disapproval, so there may only be a relatively small group of people who they can socialise with. I mean, you just have to be aware of things like that'. Although in apparent tension with the cultural anti-essentialist approach we adopt in our analysis (Chap. 3), Adrian's statements reflect an effort to embed his decision-making practices in a degree of cultural awareness. Adrian said he would not give weight to evidence such as participating in gay Pride events or submitting explicit videos: 'if you were making that kind of material in a country where you could face the death penalty (...) it is completely insane'. Furthermore, he pointed out that 'no one has any ability to know a person's sexual orientation, the only relevance in our field is if that is the claimed cause of persecution'. However, despite the generally recognised reliance on objective evidence, other factors may influence some judges. For instance, although a claimant had permission to appeal, the judge in question affirmed that, irrespective of the number of witnesses and the evidence provided, he could not ignore the fact that two judges had previously found the claimant not credible (Tribunal observation, Manchester, 2018). The overall fairness of the process is therefore seriously undermined.

Before moving on to other procedural aspects, a final point should be stressed. Like caseworkers, judges bring their own attitudes, experiences and values to bear in decision-making. Previous research has found that, in light of their very limited or absent training on asylum SOGI issues, bias and prejudices may have a stronger influence on the judiciary than at administrative level (Jansen 2014, p. 45). As Chap. 7 will further explore, too often disbelief is the starting point in asylum claims and

this is reflected in the way hearings of SOGI claimants are carried out (Nana, focus group no. 3, Bavaria, Germany; Evelyne and Anne, lawyers, Germany; Thomas, NGO volunteer, Germany). For example, during a Court observation (Hesse, 2018) which involved a claimant applying for protection for the second time, the judge made it clear that he did not believe him and potentially intimidated the witness by telling him that he could receive a 12-month prison sentence if false information were provided. The existence of this kind of biased preconception is confirmed by the words of Oscar, a judge in Germany: ‘And the more you have listened to asylum seekers from a country, the sooner you will notice whether this really happens [claimants using fake stories] or if that is more likely. These are stories that are passed on from asylum seeker to asylum seeker and which they always try to use here [in court] So, typical stories’. Similar examples were also found in Italy (Maurizio, judge) and in the UK, where Bilal (Home Office presenting officer) said: sometimes ‘evidence doesn’t seem to persuade some judges at all’. Such bias in hearings may have racist undertones. In this respect, Joseph, an NGO volunteer in the UK, noticed that: ‘if you take lots of witnesses to court, if they are White and middle-class, they are believed.’ He described a case in January 2019 where a Pakistani couple gave evidence to support two Pakistani claimants: ‘The judge said they weren’t worth much [as witnesses]’.

Bias on the part of asylum judges may lead to insensitive and unfair reactions. For example, Filippo, a senior judge in Italy, made it clear that some colleagues are not willing to hear asylum claimants because they sell each other ‘absurd stories’, especially when they arrive from particular countries, like Nigeria. Another example is that of a judge responding to a claimant facing trauma generated by his journey to Europe (Chap. 5):

My client (...) said, “There was water everywhere”. And then the judge said: “Yes, I’m sure you were on the sea”. And he said: “Yes, in the boat the water came in”. And then it went on, [saying] that he sleeps badly because of that and always dreams and his friend or brother, I do not know, has died. And then the judge says: “Yes, I sleep badly too” (Evelyne and Anne, lawyers, Germany).

SOGI-specific bias has also emerged. This tends to be connected with the lack of knowledge of SOGI experiences and concepts, something that is illustrated by cases where the judge does not understand the concept of bisexuality (Elias, lawyer, Germany) or the difference between sexual orientation and gender identity, for example, by asking a claimant ‘Are you gay or a trans woman now? What is it now? You have to commit yourself!’ (Noah, NGO social worker, Germany). During one hearing in Germany (Court observation, Hesse, 2018), a judge stated openly: ‘this story is so deceitful, it’s unbelievable! [The claimant] has five children and tells me that he is gay all the way! That is unbelievable!’ Claimants’ desires and interests are totally neglected or misunderstood in such cases. In fact, as Emroy (focus group no. 1, Hesse, Germany) said, ‘my son is because I want a child, and which gay person or which human doesn’t want a child?’

Insensitivity in hearings sometimes becomes open homophobia or transphobia. During the hearing in Italy of a lesbian claimant from Nigeria, Mara (lawyer) was

explaining to a senior judge that the claimant had been discovered with her girlfriend and seriously beaten. Mara made it clear that the claimant was traumatised and had been through a difficult recovery and an equally difficult pathway to self-acceptance. At that point, the judge intervened saying ‘well, that’s not really a trauma...’ and pointed out that she (the judge) would have reacted in the same way as the alleged persecutor of the claimant if she had found her young daughter in bed with a girlfriend. While this example confirms the still widespread lack of empathy amongst decision-makers, the sexuality or gender identity of the judge is no guarantee of an impartial hearing. According to Allan (lawyer, UK), gay judges ‘are very much imposing their own gaydar or lesbian-dar or whatever you call it-dar on somebody. They are sitting there and they might be gay or lesbian themselves, but they are very much judging the person’.

In sum, subjective factors may still influence decision-makers, both at administrative and judicial level, thus shaping the way interviews and hearings are carried out. For this reason, the availability and the correct use of objective information on countries of origin becomes even more essential in SOGI claims. In the next section, we thus turn our analysis to COI.

## 6.5 Country of Origin Information

As many of our participants emphasised, COI is an essential element for the evaluation of every asylum application, irrespective of the grounds of persecution. According to the definition of a refugee, individuals who fear persecution need to demonstrate that the protection available if returned to their country of origin, if any, is insufficient. Therefore, other than assessing the individual circumstances of a claimant (Chap. 7), decision-makers need to verify whether those circumstances are consistent with the information available on the country of origin in question. Inevitably, the sources and the quality of this information become crucial to the grant or refusal of refugee status or any other form of international protection. In this respect, SOGI claims pose particular challenges to decision-makers, primarily because most COI sources do not have specific information on the treatment of SOGI minorities (Jong 2008) or, if they do, relevant data ‘privileges certain voices over others’ (McDonald-Norman 2017). In other words, against the principles underlying our theoretical approach to SOGI asylum (Chap. 3), the risk of homogenisation of SOGI minorities is very high. Indeed, no obligation to collect SOGI-specific COI exists at EU or national level, although the increasing role of EASO in the collection of information on refugees’ countries of origin has progressively led to the gathering of evidence on SOGI minorities in a more consistent way (EASO 2015). Yet, as Helena (EASO staff member) confirmed, this material has not reached a satisfactory level of detail and completeness. It is therefore no surprise that significant disparities emerge not only between the countries under investigation, but also within each country, considering the lack of guidance for, or the inconsistent material available to, decision-makers. In this area the UK appears to play a significant

role with the potential to influence decision-makers in Germany and Italy, as well as in other European countries.

In Germany, the BAMF includes specific departments working on COI and producing background papers, sometimes for internal use only, and has set up a specific database to support decision-makers' assessments.<sup>12</sup> This database, however, does not hold extensive information on SOGI. Moreover, when publicly available, relevant sections often focus on sexual orientation issues, in this way marginalising transgender minorities (Huebner 2016, p. 247). Although, during the appeal, courts may request specialist reports from experts, there is no guarantee that SOGI-specific reports are commissioned. Given that relevant material in foreign languages is not generally consulted (Kalkmann 2010) and Google is used to find the 'best article' that confirms the decision-maker's view on a specific case (Gartner 2015, p. 14), there are also serious doubts about the fairness of the assessment of SOGI claims in Germany. Yet, according to the response provided by the German government to a parliamentary request, a less instrumental and more objective use of COI is emerging as decision-makers are said to draw on reports by the BAMF, the EASO, the UNHCR and, more generally, the UN, as well as on cases decided by administrative courts (BMI 2019, p. 14). This broad and contrasting picture on COI was confirmed by our participants. While Evelyne and Anne (lawyers) defined the BAMF's reports as accurate but 'cautious', Elias (lawyer) and Thomas (NGO volunteer) emphasised that their confidential nature prevents open consultation. In light of these pitfalls, it is promising that judges, like Oscar, usually consult a variety of sources on the relevant country of origin, other than BAMF's relevant reports, for reaching an informed decision:

I inform myself about the respective country (...) in a very detailed way and the more detailed the better. That means that I also watch a lot on the Internet and I also read many reports, newspaper articles, the Foreign Office, Amnesty International (...) they write country information and individual information. (...) Most of the time, the truth is, I estimate a lot, so somewhere in the middle. Amnesty always writes "all very bad", Foreign Ministry writes "everything is fine". And probably it will then hit somewhere in the middle.

As Oscar also pointed out, finding information on some countries may require greater research, as is the case with Jamaica, the country of origin of only a small number of asylum claimants in Germany. Gisela (lawyer) confirmed this disparity of information with the example of Uganda, for which information is usually available, in contrast to Somalia, for which there is little accessible material. While she relies on the UK Home Office's COI for her clients' appeals, which is deemed 'much more accurate and up to date' than the BAMF's reports, in her experience, many decision-makers usually only use sources available in German.

As anticipated, a further problem is that decision-makers in Germany often read COI in a way that supports their own position in an inappropriate way. Kadir (NGO worker) provided two different, but equally illustrative, examples in this respect. In one case, a worrying parallel between members of a sexual minority and murderers

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<sup>12</sup><https://milo.bamf.de>



was made. So, in light of the difference between rural and metropolitan areas in Pakistan, a gay claimant from that country was told ‘you could have fled to Karachi. Karachi has about 20 million inhabitants, even murderers can hide there’. In another case, following the rejection of his asylum request, a claimant was given a country report on the economic development of his country and the increasing availability of employment options, although he had not applied to stay in Germany on economic grounds but because of SOGI persecution.

The situation in Italy is similar. The Italian asylum system does not have a department that gathers evidence on countries of origin, if we exclude the unsuccessful attempts of the National Commission of Asylum to draft national COI (among others, Roberto, decision-maker). It is thus no surprise, in line with past research (Busetto et al. 2017), that most participants stressed a lack of detailed information on the treatment of SOGI minorities in their countries of origin (for instance, Maria Grazia, decision-maker). Consequently, the use of a variety of sources was reported, suggesting that, apart from perhaps the UNHCR representatives, decision-makers had their own approaches to finding and consulting relevant COI. For instance, Roberto (decision-maker) usually looks for information using Refworld and Google. Daniele (decision-maker) consults EASO material, NGO reports, and the jurisprudence of the ECtHR and CJEU. In Daniele’s experience, if no information is available, the decision may be suspended for the time needed to collect appropriate material. In his view, in light of the expected reform of the CEAS (Ferreira 2018; ILGA Europe 2016), EASO reports will probably become the primary source of COI in Italy in due course. In addition, Titti (decision-maker) referred to the UK Home Office’s COI, as well as non-institutional online databases such as Asilo in Europa and Melting Pot Europa. She also emphasised the importance of consulting media from the claimants’ countries of origin, because these may provide an understanding of the social environment and the discrimination prevailing in their communities. Here Titti gave the example of Ukraine, where the President often states that SOGI minorities are protected by law and a Pride march had been organised but where negative attitudes towards SOGI minorities remain prevalent. By consulting a survey carried out in Ukraine, Titti established that more than 50% of Ukrainian citizens (still) believe that homosexuality is ‘an incurable disease’, thus raising doubts about the existence of a ‘safe’ social environment for SOGI minorities. As for the COI used specifically by judges, the collection of case law on asylum applications from specific countries carried out at national level by the self-governing judicial body (‘Consiglio della Magistratura’) was widely reported (Titti, decision-maker; Maurizio, judge). According to Nazarena (lawyer), while only some judges use diverse COI sources similarly to administrative decision-makers, most of the time in both administrative and judicial decisions, as well as in appeals prepared by lawyers, COI sources are not specified. When they are specified, sources are inappropriate (for instance, travel guides like ‘Viaggiare sicuri’) or insufficiently specific (for example, Amnesty International).

If we look at the responses provided by judges in Italy, approaches to COI depend on individual background and training. Silvana referred to Refworld and COI-net as main sources, arguing that EASO material is often too broadly framed to provide



SOGI-related information. Filippo mentioned an online migration network of lawyers, academics, judges and public administration officers providing, among other material, information on countries of origin called ‘Malta’. Filippo also mentioned travel guides, but emphasising that ‘working with COI can be an endless job, [because] one can never be sure about their trustworthiness’. He observed that some judges in Italy tend to repeat information on countries of origin that had already been used by other colleagues in earlier decisions. Consequently, as other participants confirmed (Giovanna and Mara, lawyers), COI mentioned in much case law is out of date. It is no coincidence that, in 2019, the Italian Supreme Court found that judges should avoid ‘generic’ and ‘stereotyped’ references to the claimants’ country of origin, and should identify specific and up-to-date COI for each case.<sup>13</sup> This obligation derives from the general ‘duty-power of cooperation’ of judges (Flamini 2018), which the Supreme Court has repeatedly emphasised in its case law (Chap. 7). As Filippo stressed, echoing Nazarena (lawyer), the problem is that very often territorial commissions are not clear about what COI is used to deny an asylum request. In Filippo’s view, this lack of information does not reflect inexperience or incompetence but might simply be a consequence of the ‘hellish rhythms’ imposed on the commission. For all these reasons, COI provided by lawyers or support groups is particularly welcomed by members of the commissions and judges because it facilitates their work (Sect. 6.2). For example, in the case of a transgender claimant from Cuba, Valentina (social worker) provided original material collected by local contacts in that country that showed abuses by the police against SOGI minorities, despite the absence of any discriminatory legislation. In this light, it was suggested that one way to greatly enhance the quality of COI in use would be to fund social and ethnographic research in claimants’ home countries, thus shedding light on social perceptions of these minorities (Vincenzo, LGBTIQ+ group volunteer).

Compared with Germany and Italy, at first sight the UK asylum system appears very advanced in relation to COI and SOGI. There is a growing number of SOGI-specific Country Policy Information Notes (CPIN) that, being publicly available, are also in use in other European countries, as discussed above.<sup>14</sup> In the past, there have been concerns regarding the regularity with which this material is updated (UKLGIG 2013, p. 31). At the same time, some Country Information and Guidances have been found to be problematic. An example is the guidance on Jamaica, which was for a long period on the list of ‘safe countries’ (Sect. 6.7).<sup>15</sup> The guidance clearly mentions that, according to the Jamaican Offences Against the Person Act of 1864, ‘[w]hosoever shall be convicted of the abominable crime of buggery [anal intercourse] committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years’ (Home

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<sup>13</sup> Supreme Court, decision no. 11312, 26 April 2019, pp. 3–4.

<sup>14</sup> Publicly available at <https://www.gov.uk/government/collections/country-policy-and-information-notes>

<sup>15</sup> Although the Supreme Court found that it could not be considered ‘safe’ already in 2013: *R (on the application of Brown) Jamaica* [2015] UKSC.

Office 2017, p. 10). Equally, the guidance recognises that lesbians risk violence ‘up to and including “corrective” rape and murder’ with insufficient state protection. Yet, the same guidance also quotes a Tribunal ruling saying that:

Not all lesbians are at risk. Those who are naturally discreet, have children and/or are willing to present a heterosexual narrative for family or societal reasons may live as discreet lesbians without persecutory risk, provided that they are not doing so out of fear.<sup>16</sup>

The obvious question is whether anyone at risk of corrective rape or murder would *not* hide their sexuality through fear of persecution (Weßels 2012, p. 821). These logical inconsistencies, however, are far from being duly considered. In fact, ‘discretion reasoning’ according to the *HJ (Iran)* ruling is generally emphasised in all the CPIN and Home Office guidance also identifies countries where relocation is an option for SOGI minorities (UKLGIG 2013, p. 22). The guidance on Iran is a case in point. Despite the severity of punishments in case of same-sex sexual relations, the Home Office guidance on Iran excludes internal relocation to escape persecution but, simultaneously, also says that ‘some evidence suggests that homosexual and bisexual persons who do not openly reveal their sexual orientation and keep a low profile are able to move freely within society’ (Home Office 2019b, p. 9).

For reasons connected to ‘discretion’, relevant guidance often recognises criminalisation and discrimination but not to the level of persecution. For example, although the Home Office guidance on Bangladesh includes serious concerns about human rights and violence against SOGI minorities, it then distinguishes between different groups to identify persecution (Home Office 2020, p. 11). On the one hand, the Home Office’s guidance states that ‘an LGBTI person who is open’ may be at risk of persecution. On the other hand, it requires that where a person does not openly express their SOGI, ‘consideration must be given to the reasons why they do not’ and, consequently, shall bear the burden of demonstrating that they would be at real risk of persecution on return (Chap. 7). What is more, past research emphasised that these country guidance documents do not always include information on specific groups within SOGI minorities (ICIBI 2014, p. 31), for instance in relation to transgender or lesbian people, leading to the risk of the absence of evidence being interpreted as absence of persecution (Bach 2013). In this respect, however, it is worth noting that the last available guidance tends to avoid homogenisation of SOGI minorities and provides specific details on particular groups in countries of origin (Home Office 2020, para. 7). Moreover, both the Home Office’s 2016 Sexual Orientation guidance and the 2011 Gender Identity guidance point out that there may be a lack of country of origin supporting evidence, with the Gender Identity guidance stating that ‘absence of specific legislation on transgender men and women in particular may be an extension of their general marginalisation’ (Home Office 2011, p. 15).

Based on our data, these CPIN and guidance documents are widely used in UK decision-making (for instance, in four different judicial hearings that we observed – Tribunal observations, London 2018; First Tier Tribunal observation, Birmingham,

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<sup>16</sup> *SW (lesbians – HJ and HT applied) Jamaica CG* [2011] UKUT 251 (IAC).

2018 – related to Kenya, Albania and Malawi). Our data also shows the existence of some gaps and mixed views on the real value of these CPIN and guidance documents. According to one decision-maker, consulting Home Office material in advance of an interview is fundamental to identify appropriate questions for the claimant (Emily, decision-maker). For instance, when the relevant guidance suggests that SOGI claimants cannot relocate to other parts of their countries of origin, in her view there is no need to further investigate that option. More generally, the availability of up-to-date COI usually depends on the specific country under examination. In fact, as Emily explained, COI on countries from which SOGI claimants commonly arrive may contain detailed information on the treatment of SOGI minorities, while there might be a lack of SOGI-related information in relation to less common countries of origin. In these cases, reports by the US government may be consulted, although Emily explained that these are often too general and ‘basic’. Worryingly, another decision-maker explained that, when information is lacking, his research includes academic sources as well as news about ‘Pride events’ or the existence and activities of ‘any LGBT societies’ in the claimant’s country of origin (Qasim, decision-maker). COI was equally challenging for judges. For instance, Amadin, who claimed asylum in the UK from Benin, explained that the judge in his case had confessed to being ‘confused’ by the contradictory evidence she had found by searching online for information about gay acceptability in Benin. Amadin’s case was also set back by his lawyer’s confusion of information about Benin (Amadin’s country of origin) with information relating to Benin City (a city in Nigeria) (Sect. 6.2). During the appeal stage, lawyers may contribute to filling evidentiary gaps, given that – in contrast to Italy for example – in the UK the judge does not play an active role in gathering information and relies primarily on lawyers’ ‘bundles’. For instance, during a judicial hearing observed in 2018, the lawyer provided evidence on the treatment of gay men in Tanzania from NGO sources, such as Human Rights Watch and the Human Dignity Trust. In other cases, even the use of tourist guides by the Home Office’s presenting officer was reported (Allan, lawyer). Finally, regarding the updating of available COI, concerns were expressed as to the capacity of the Home Office to ensure that this is done consistently:

I find it quite difficult to get my head around how it is that, a team of 14 or 15 is responsible for producing all of this material which is essentially life changing material for thousands of people (...). You need to get really good up-to-date stuff, but if you have got an expert, and we try to find the people who are most expert to inform the reviews, you need to listen to them and there is a risk that if the expert is saying something that the Home Office doesn’t like the sound of, they are not necessarily going to be quite so receptive (David, official).

In addition, material that is not available in English is not necessarily taken into account, thus limiting the sources of information and adding further concerns about the value of the COI used (David, official). That is perhaps why, although Emily and Qasim (decision-makers) stated that they usually consider the information provided in such guidance, their assessment is always based on the individual circumstances of SOGI claimants. As Qasim (decision-maker) put it:

Someone from (...) say... Jamaica, is not going to be able to display all of the thoughts and processes and emotions that the guidance tells us they should be doing. Again it depends on the kind of society they grew up in... it depends on, yes, their own experiences in their childhood... you have just got to look at the individual aspects of the case on a case-by-case basis and judge according to that.

According to the Refugee Convention and UNHCR guidelines, a case-by-case analysis is indeed the method that should always be adopted, irrespective of more or less detailed COI. Consequently, criticising the general UK approach in this field, Roberto, a decision-maker in Italy, pointed out that ‘the main problem with COI is that too often information on a country is used to support a specific position, not as a helpful tool for reflecting on a case’. In fact, as Chap. 7 will investigate, once a claimant is deemed credible, there is the risk that COI is used to deny the fear of persecution on the basis of ‘objective’ evidence in an exercise of detachment from ‘personal’ circumstances. It is perhaps no surprise that, according to Nath, a lawyer in the UK, ‘where there is a little information, [decision-makers] tend to give the benefit of the doubt (...) so paradoxically sometimes you are quite happy when there is no guidance’. Conversely, when ‘objective’ evidence related to the country of origin is available, this evidence may be given more weight than evidence submitted by claimants. For instance, in a case involving a Nigerian claimant, the Tribunal of Bari (Italy) reversed the territorial commission’s decision in the belief that the lack of proof should have been afforded less weight than the objective situation of discrimination faced by sexual minorities in that country.<sup>17</sup>

In sum, while COI is undoubtedly important, its gathering, production and use raise doubts across all countries under investigation, particularly when the individual circumstances of a SOGI claimant are outweighed by general, but not necessarily relevant, information about the country of origin in question. Our survey confirms this conclusion, by signalling an even more worrying trend. For 50% of respondents who work with or support LGBTIQ+ people claiming asylum, COI is the second main problem at the appeal stage in SOGI claims – second only to credibility (75%). Similar concerns emerged in relation to interpretation, to which we now turn our attention.

## 6.6 Interpretation

An important component of a fair asylum system is access to an interpreter for all claimants to ensure that they can both understand the proceedings and be understood. This guarantee is protected and further specified at European level. Whereas the ECtHR has emphasised in its jurisprudence ‘the importance of interpretation in order to ensure access to the asylum procedure’,<sup>18</sup> the Procedures Directive provides

<sup>17</sup>Tribunal of Bari, decision of 23 September 2014.

<sup>18</sup>For instance, ECtHR, *M.A. and Others v. Lithuania*, Application no. 59793/17, 11 December 2018, para. 108 ff.

for specific obligations on member states in this respect. According to Article 12(1) (b), claimants ‘shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary’, to be paid for by public funds. Equally, according to Article 15, member states shall select an interpreter for the interview who can ensure appropriate communication in the language preferred by the claimant and, wherever possible, of the same sex, if the claimant requests it.

Yet, when we look at our data, the failure to implement these guarantees across Europe was evident. According to our survey, only 43% of those respondents who had an interpreter for their interviews or court hearings (73% of the total) declared being happy with the interpreting service. The situation is not any more positive in our country case studies, both from a general asylum perspective and a more specific SOGI dimension. While Germany and Italy appeared less compliant than the UK in this area, probably for linguistic reasons, two distinctive features emerged. On the one hand, where possible, claimants preferred to avoid interpreters to enable more direct communication (for instance, Diarra, Italy; Harriet, focus group no. 2, Bavaria, Germany). As Tina, who claimed asylum in Germany, explained:

You can't translate something you really would like to express... the way you feel, it can't be translated. That's what I felt, like I wish I could... I know the language to express deeply how really I... that I really have here [within myself]. But I have not got that chance.

The inability to talk directly to the interviewer or the judge, also given the fact that judicial proceedings are carried out in German or in Italian, appeared to create feelings of disempowerment in SOGI claimants, which were sometimes aggravated by interpreters' attitudes. Owing to power differentials within the system, often coupled with time constraints, many claimants explained that they did not ‘dare’ asking to change interpreters, despite this being a legal entitlement (for instance, Odoza, Siri, Mamaka, Franco, all claiming asylum in Italy). On the other hand, a low level of linguistic competence by national authorities working with asylum claimants was reported (for instance, Gisela, lawyer, Germany), which clearly hampers direct conversations. These linguistic barriers, coupled with the use of a third language, such as English, which is then translated by interpreters into the claimants' native language, risk seriously undermining effective communication (Giuseppe, lawyer, Italy).

Rigorous selection and training of interpreters is an essential component of a fair asylum system. In Germany, although the presence of a ‘language mediator’ (‘Sprachmittler\*innen’) is provided for by law, for BAMF interviews freelance interpreters are usually employed but no specific professional qualifications or state examinations are required (ECRE, AIDA & Asyl und Migration 2019, p. 25). Nonetheless, as the 2019 ECRE/AIDA report states, in recent years the BAMF announced new measures to improve the quality of interpretation services. In particular, language mediators are now obliged to acquire, at least, a C1 certificate in German and to complete an online training programme. This training includes general themes relating to the asylum process and the treatment of claimants with symptoms of trauma, in order to develop psycho-social competences and to acquire knowledge of professional ethics (BMI 2019, p. 14). In addition to a formal

complaint system, the BAMF also introduced a ‘code of conduct’ containing a number of principles, such as integrity, professional and financial independence and neutrality, to which language mediators should commit.<sup>19</sup> These improvements seem much needed in light of our participants’ strong concerns about the qualifications of interpreters used by the BAMF. According to Barbara, Evelyne and Anne, all lawyers, many people are not qualified as interpreters but are simply ‘language mediators’, and so more likely to accept lower fees than trained professionals. Other claimants reported the lack of interpreters/language mediators for some languages. Sylvia told us that, although she asked to be interviewed in Luganda, no Lugandan interpreter was provided for her. She was asked to use English during the interview. As she put it, ‘I felt like I had no choice, but forced myself to express my story in English. But I don’t think I even said the right things I had to say. That was not fair’. This corresponds to experiences in some of the hearings observed during our fieldwork, where the quality of English interpretation was poor (Court observation, Hesse, 2018), including the use of offensive terms to identify SOGI minorities (Court observation, Hesse, 2019). Judges were only rarely proactive in ensuring that claimants understood every question before recording their answers (for instance, another Court observation, Hesse, 2019). In this context, not surprisingly, no SOGI-specific training for interpreters was reported (for instance, Kadir, NGO worker).

In Italy, the selection of interpreters varies for different stages of the asylum procedure. According to our data, a combination of formal procedures and informal practices are in place. At the administrative interview, interpreters are provided by territorial commissions through private companies. During the appeal, instead, claimants often need to find an interpreter in case a hearing is scheduled. Sometimes reception centres and support groups help asylum claimants in this respect, while on other occasions claimants rely on personal contacts or pay a professional. Although public funds are theoretically available to cover these expenses, bureaucratic delays may prevent their use in practice (for instance, Giuseppe, lawyer). In addition to general concerns over the lack of interpreters from specific countries or with knowledge of specific dialects (Nazarena, lawyer; Daniele, decision-maker), this twofold ‘selection’ process generates concerns. While some SOGI claimants welcomed the possibility to choose their own interpreter for the tribunal as it meant they could appoint someone they trusted and avoid using people from their communities serving as interpreters (for instance, Nicola and Giulio, LGBTIQ+ group volunteers), this mechanism may undermine the quality of interpretation. Much of the time interpretation is indeed provided on a voluntary basis by Italian contacts. However, when no one is available, claimants have to rely nonetheless on people from their same community, even if with no qualifications at all. According to Filippo (senior judge), this practice violates the most basic principles of justice: ‘neutrality, impartiality and independence’. Moreover, an interpreter chosen by the claimant may be perceived as less neutral and trustworthy by judges, as we saw in a Tribunal

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<sup>19</sup>Following the introduction of these measures, more than 2100 interpreters were declared unfit for further employment by the BAMF, most of them apparently due to insufficient language skills (ECRE, AIDA & Asyl und Migration 2019, p. 25).



observation in northern Italy in 2018. At the same time, when appointing the interpreter is left to reception centres, there is no guarantee that SOGI dimensions are considered (Silvana, judge). In fact, this consideration depends on the professionalism of the specific centre in question (Sect. 8.2 and Chap. 8).

In relation to the administrative interview, the provision of an interpreter by the state is positively evaluated given most claimants' lack of resources. However, since there are no provisions for verifying interpreters' qualifications or experience, professional and ethical standards cannot be guaranteed (Livio, lawyer). As a remedy, Roberto (decision-maker) explained that informal procedural arrangements are sometimes adopted in territorial commissions. For example, when he knows in advance that an interview with a SOGI claimant is scheduled, he submits very specific requirements in order to have the most qualified interpreter among those usually employed, namely the one 'with the right attitude' towards these claims. Yet, these informal procedural arrangements are left to the initiative and discretion of caseworkers, which in turn depends on their training on, and understanding of, SOGI asylum. After the interview, interviewers may report inaccurate or inappropriate interpretation services to the president of the territorial commission, to prevent the interpreter in question being employed again (for instance, Maria Grazia, decision-maker). In relation to the selection process, participants commented on the increasing employment of former asylum claimants as interpreters. On a positive note, as Roberto (decision-maker) explained, their employment may be a useful way to remedy the imbalance of power experienced by many asylum claimants. It is nonetheless true that the risk of re-traumatisation (Titti, decision-maker) as well as lack of legal, psychological and social competences (Vincenzo, LGBTIQ+ group volunteer) can be high. Despite any inadequacies, in Roberto's view some SOGI claimants trust the interpreter 'no matter what', just 'because they do not trust the interviewer'. As he put it, unless evident signs of homophobia or transphobia emerge, 'the interpreter is always a person of the community, someone who speaks their language, while the interviewer is always a White person who is examining them'. The experience of Mamaka, who claimed asylum in Italy, is noteworthy in this respect:

I was not thinking that I would meet someone who speaks my language (...) I was expecting to speak English. So when I met him (...) he also gives me the courage. We will understand each other because he also went to my country.

Overall, this data shows that, in both Germany and Italy, basic standards are not consistently met. For instance, although asylum claimants are entitled to ask for an interpreter of a specific sex, we heard from participants that these requests are not always properly addressed (for instance, Maurizio, judge, Italy; Evelyne and Anne, lawyers, Germany). Often claimants themselves are not in a position to postpone their interviews to wait for an appropriate interpreter to become available (for instance, Ibrahim, Germany). The case of Trudy Ann, who claimed asylum in Germany, is illustrative. No one asked if she preferred a female interpreter/language mediator before the interview and no female was available that day. As she explained, 'with the interpreter I never feel really comfortable because he's a man, so I can't



really express myself in the way I want to express myself'. Yet, Water (focus group no. 4, northern Italy) asked for and obtained a male interpreter, explaining that he did not feel confident speaking with a woman. Despite the above-mentioned CEAS obligation, it is therefore evident that no automatic mechanisms are in place to ensure an interpreter of the same sex of the claimant. This right is only granted where interpreters of both sexes are available to interpret in a particular language (Titti and Daniele, decision-makers, Italy).

In Germany and Italy, concerns were also reported in relation to the quality of interpretation from both a general and a specific SOGI point of view. In Germany, among many cases of interviews that had been poorly interpreted (including by William and by Nina, a legal advisor), Angel described how the interpreter himself stopped the interview because he did not feel able to translate adequately: 'He said he hasn't spoken English in a couple of years, so he understands English but not as much. So he said he didn't think it was fair to me, for him to continue the interview'. Always in Germany, we also heard of interpreters behaving in an unprofessional manner, asking questions in the place of the interviewer (Amis, focus group no. 2, Bavaria). As previous research has pointed out, interpretation can be a difficult task when terms used are intimate, colloquial or relate to a subcultural scene, which the interpreter feels embarrassed or ashamed to use (Hübner 2016, p. 250). Lack of understanding and erroneous translation of SOGI terms were also reported (for instance, Frank S., legal advisor; Halim). Marhoon remembered that his interpreter was not aware of the word 'gay', so the interview was postponed:

When I told this woman that I'm gay in English, she didn't understand. And when I used the Arabic term for homosexuality in Arabic which is "mithli", she didn't understand. (...) I have to wait for another 3–4 weeks. But I'm glad I did it, because if I had carried on with that, they might have misunderstood my whole story.

Diana mentioned that, during the interview, the interpreter 'did not want to understand what is called the transition of man to woman, woman to man. And that is totally like a violence for a refugee, if that happens'. Finally, Trudy Ann recalled:

I said to him "she's a butch", he said "I don't know what a butch is" [and] when I told him that I would take pills to kill myself (...) because of my lifestyle. He did not interpret that part.

Similarly, in Italy, decision-makers reported on the difficulty of working with non-professional interpreters who frustrated their efforts to ask questions in a sensitive way, with some interpreters going so far as to answer questions themselves or summarise complex answers by the claimant in just a few words (Daniele and Maria Grazia, decision-makers). One decision-maker offered an enlightening example in this respect: some interpreters may translate a claimant's statement 'I have had sex with men' with 'I'm gay' (Titti, decision-maker), with potentially negative implications in terms of credibility (Chap. 7). Giulio (LGBTIQ+ group volunteer) referred to interpreters who had no understanding of bisexuality or transsexuality. The situation may be worse in tribunals, especially when voluntary interpreters are brought along by claimants (for instance, Silvana, judge). Where they were not professionals in the field, basic mistakes would often be made. For example, during a Tribunal

observation in northern Italy in 2018, a friend of the claimant who was serving as an interpreter did not translate parts of his personal account and, when she did, the meaning had been changed (for instance, ‘friend’ in English was translated with the Italian word for ‘partner’). In this situation, it was only the readiness and ability of one of the panel of three judges to detect linguistic discrepancies and to ask further specific questions to clarify the claimant’s story that prevented this mistake damaging the claimant’s credibility.

Other concerns in both Germany and Italy were reported in relation to the background of the interpreters and the problematic relationship with SOGI claimants. Ibrahim (Germany), as several others, shared the fear that when interpreters have the same socio-cultural background of the persecutors of a SOGI claimant, they may replicate homophobic or transphobic attitudes. In Germany, Joachim (NGO worker) recalled the use of offensive terminology, ‘either out of own prejudice or out of ignorance’, while Knud (NGO worker) reported the case of an interpreter in court who ‘as soon as he heard what it was about, had no more interest’. More worryingly, the BAMF legitimises this kind of approach by not adopting adequate countermeasures in such cases (Knud, NGO worker). In Italy, Giulio (LGBTIQ+ group volunteer) explained that, in some cases, during the preparatory meeting before the interview or the hearing, interpreters refused to fulfil their role because ‘they do not talk about homosexuality, or use this word’. Giovanna (lawyer), confirmed this by telling us about a former claimant who now serves as an interpreter: although he ‘does not even want to hear about SOGI claimants’, he had worked on several SOGI claims. It is therefore promising that, when such attitudes emerged during an interview, most decision-makers would suspend the interview (Jonathan, LGBTIQ+ group volunteer).

Finally, in some circumstances, an interpreter having the same background as a SOGI claimant was identified as an obstacle to the claimant being open about their real fear of persecution (for instance, Ibrahim, Shany, Prince Emrah, all claimants in Germany). Fares (Germany) expressed this feeling in the following terms:

I was thinking to come out and say that I’m gay. I was like, for one week, I was thinking, should I say something? I want to say something, I want to be myself, but at the same time no. Psychologically I was really ready to say that, but when I saw this translator, every door was blocked, I cannot say anything anymore.

Despite the criticism this may raise from a theoretical perspective (Puar 2007, 2013), our data suggests that such experiences were more common when interpreters showed a religious background. For example, Gisela (lawyer) reported the case of a young claimant from Iraq, who, in Germany, was given an interpreter wearing a headscarf: ‘that looked so strictly Islamic (...) he simply did not dare to say [his SOGI]’. Similar cases were reported in Italy. Valentina (social worker, Italy) recalled the experience of a Russian gay claimant with an orthodox interpreter from Ukraine, who could barely translate apparently because she was too embarrassed by the SOGI nature of the claim. Sometimes, being aware of their rights, claimants felt able to overcome such situations. As Moses (Italy) summarised: ‘For the fact that I was here, I knew I was safe, that he [interpreter] couldn’t really do anything’. Other

positive experiences were reported, for instance, by Mamaka (Italy), who recalled that her interpreter was male with a similar socio-cultural background and, after the end of the interview, approached her to say: 'I am very sorry about what happened, what makes you to leave your country'. In turn, Cristina (UNHCR officer) remembered an interpreter from Iran who, despite admittedly struggling to accept same-sex relationships, tried to increase his understanding of SOGI matters by connecting with people belonging to SOGI minorities.

Similar problems concerning interpretation also emerged in others settings, including arrival and reception centres. On a general negative note, Livio (lawyer, Italy) recalled the case of a cultural mediator who was tasked with collating asylum requests in an arrival centre in Italy, and who suggested to newly arrived migrants that they claim asylum based on a fabricated story. One claimant was only able to correct his false account and avoid the likelihood of being identified as 'not credible' after meeting with a lawyer before his main interview. On a more positive note, in Italy, Chiara (NGO worker) and Celeste (social worker) explained that they specifically identify the most appropriate interpreter for SOGI claims by choosing, among those available, the interpreter closes to the claimant in terms of ethnic background, as long as they have not adopted discriminatory attitudes in the past. An interpreter who was called on to translate in therapy sessions with a lesbian claimant, but displayed a homophobic attitude, was promptly removed from that position. A similarly positive approach to the selection of interpreters was also reported by some lawyers (for instance, Damiano).

Apart from some negative experiences reported by claimants (Sadia, Mary and Zaro, all claiming asylum in the UK), there were more accounts of satisfaction with interpretation services in the UK. As Olivia (government official) explained, the Home Office has a database of interpreters who are checked before being employed and whose proficiency is constantly monitored. If any issues arise, the matter is reported to the Home Office's interpreters unit. Similar checks to ensure that a person meets the required standards are carried out in relation to external interpreters as well, needed for less common languages. A code of conduct is available for interpreters, but it seems that asylum claimants are often unaware of it and of what to expect from interpreters (ECRE, AIDA & Refugee Council 2019, p. 22). Asylum claimants are usually asked at the screening interview whether they wish to be interpreted by a man or a woman, but some concerns have been raised in this respect in light of the low number of such requests (ICIBI 2017). One senior judge, Harry, described interpreters used in tribunals as adequate for their role, while another judge made it clear that if an interpreter shows embarrassment or disapproval, the hearing is usually suspended (Adrian). As many claimants in the UK are able to communicate in English, Nath (lawyer) explained:

Even if it is not great, I encourage them to go without an interpreter. (...) Also because it is very much about your feelings and emotions and so on, it will necessarily get distorted in one way or another, when it gets interpreted it is not, it is just not going to be the same... there is a lot of body language.

Yet, while recognising that some claimants are comfortable talking with interpreters of their own country of origin, Nath suggested that, in relation to interpretation as well as other aspects of the claim, preparation always remains the key factor:

I spend so much time with my clients before getting to the interview, that I am, I have got quite a good feeling of whether or not they can do it without an interpreter... and obviously if they can't, then you just go with one.

Even where preparation and high quality interpretation services are provided, asylum claimants, including SOGI ones, risk being deprived of their rights when their requests are assessed through special procedures, to which we now turn.

## 6.7 Other Procedures

Before concluding, we consider some special asylum procedures that may apply to SOGI claimants in particular contexts. These include, amongst others, accelerated procedures, which often involve asylum requests from nationals of countries identified as 'safe', and Dublin transfers, which are based on the implementation of the Dublin Regulation (III) as a key instrument of the CEAS framework currently into force (Chap. 4). Albeit briefly, it is necessary to assess whether or not these procedures are appropriate for SOGI claimants given their specific needs.

As for accelerated procedures, their negative effects are primarily connected to the obstacles they pose to the identification of SOGI claimants' specific needs. For example, in Germany, if specific conditions are met, claimants may be assessed by special officers within a few days (ECRE, AIDA & Asyl und Migration 2019, p. 50), especially in the context of the new 'AnKER centres'. Given the speed of these assessments, claimants may not be in contact with social services, which are usually called upon to identify vulnerabilities and reception needs, or with NGOs to be supported or prepared before the interview. Considering the importance of preparation as well as the time often needed by SOGI claimants to reveal their real grounds of persecution, many participants in Germany expressed serious concerns about the effects of this new system on SOGI claimants (Nina, legal advisor; Frank S., legal advisor; Mariya, NGO worker; Sofia and Emma, NGO workers). While Halim, claiming asylum in Germany, where he works for an NGO, provided examples of the inconsistencies between decisions adopted through accelerated procedures, by referring to different results in two very similar cases of gay activists from Egypt, Thomas (NGO volunteer) emphasised their social cost. As he put it, '[t]hat's the next level of exclusion'.

The general inequity of accelerated procedures was confirmed in the UK in relation to the so-called Detained Fast Track ('DFT') when it was suspended in 2015, precisely because the England and Wales Court of Appeal found it to be

‘structurally unfair’.<sup>20</sup> On the same basis, despite the attempts of the government to draw up a new Fast Track system for ‘detained foreign criminals and failed asylum seekers’ (UK Ministry of Justice 2017), the High Court ruled out any revival of the DFT in 2019.<sup>21</sup> Also in 2019, there was confirmation of the inappropriateness of these procedures for SOGI claimants when the case of a woman who applied for asylum on sexual orientation grounds while she was in detention was heard by the England and Wales High Court (Administrative Court).<sup>22</sup> As a result of the rejection of her asylum request through DFT and, in appeal, by the First-Tier Tribunal, the claimant had been returned to Uganda. After 6 years, the High Court held that the woman must be brought back to the UK to have her asylum claim fairly heard. It recognised that she required a longer timeframe to obtain relevant evidence. More broadly, as Amanda (NGO worker, Brussels) emphasised, it is not only a matter of proof but also of the environment generated by these procedures, which inhibits self-identification in SOGI claimants.

Accelerated procedures usually apply to claimants coming from so-called ‘safe countries’, whose claims have a reduced likelihood of being accepted (Joachim, NGO worker, Germany; Thomas, NGO volunteer, Germany; Gisela, lawyer, Germany). Whereas the concept of ‘safe country of origin’ is problematic overall (Costello 2016), when examined from a SOGI perspective, it is even more troubling when countries classified as ‘safe’ criminalise same-sex acts. For instance, participants in Germany pointed to the example of Senegal, among others, which criminalises same-sex acts and yet is treated as a ‘safe country of origin’. This effectively places an extra evidentiary burden on SOGI claimants coming from those countries, who are expected to challenge the assumption that their countries of origin are safe. Considering that the timeframe to appeal in these cases is generally shorter than in ordinary procedures (Frank S., legal advisor), additional barriers to a fair procedure are clearly in place for SOGI asylum claimants coming from those countries.

The situation in the UK is somewhat different. Section 94(4) of the Nationality, Immigration and Asylum Act 2002, contains a list of designated states. A state is included on the list (that is, it is ‘designated’) if the UK government believes that ‘there is in general in that state or part of it no serious risk of persecution of persons entitled to reside in that state or part of it’ (Home Office 2019a, p. 7). Claims from

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<sup>20</sup> ‘[T]he time limits are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases (...) The system is therefore structurally unfair and unjust’: *The Lord Chancellor (appellant) v Detention Action (respondent) and the Secretary of State for the Home Department (interested party)* [2015] ECWA Civ 840, 45.

<sup>21</sup> Consultation on Tribunal Procedure (First-Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and Tribunal Procedure (Upper Tribunal) Rules 2008 in relation to detained appellants, Tribunal Procedure Committee, 12 June 2019, available at <https://www.gov.uk/government/consultations/consultation-on-tribunal-procedure-first-tier-tribunal-immigration-and-asylum-chamber-rules-2014-and-tribunal-procedure-upper-tribunal-rules-2008>

<sup>22</sup> *PN v Secretary of State for the Home Department* [2019] EWHC 1616 (Admin). The consequences of her removal, once arrived in Uganda, were reported by Bulman (2019).

individuals from these states will be designated ‘clearly unfounded’ – meaning there is no right of appeal from within the UK – unless the caseworker finds reasons to designate the application otherwise (ECRE, AIDA & Refugee Council 2019, p. 54). Countries like India or South Africa, where ‘corrective rapes’ affecting lesbian women are still reported, are included in this list (Strudwick 2014). Significantly, as far as SOGI claimants are concerned, in 2013 the Parliamentary Home Affairs Committee raised concerns about the impact of the credibility assessment for LGBTI claimants from countries designated as safe (House of Commons Home Affairs Committee 2013). The government responded: ‘we agree. With specific reference to LGBTI related claims, there are further instructions relating to claims from some of the States designated under section 94(4) of the Nationality Immigration and Asylum Act 2002. Where there is strong objective evidence that members of the LGBTI community would be at risk of persecution in these countries, a grant of asylum would be appropriate’ (UK Government 2013, p. 13). Also in 2013, the Court of Appeal in England and Wales found the designation of Jamaica as a ‘safe country’ unlawful because of the violence experienced by SOGI minorities and the lack of state protection against it in that country.<sup>23</sup> Therefore, as Olivia (government official) confirmed, even when the safe country concept applies, every claim needs to be evaluated on a case-by-case basis: ‘we have a SPoE [Second Pair of Eyes] process for NSA [Non-Suspensive Appeals] or safe countries...’<sup>24</sup> That is probably why our research found that, in practice, the application of the ‘safe country’ concept and a list of ‘designated’ states is not currently a determining factor in SOGI asylum claims in the UK. Indeed, only an individual examination would be in line with the ECHR and EU law (Article 36 of the Procedures Directive).

Considering these pitfalls and the need to review the specific circumstances of each claimant, it is regrettable that the reform adopted in Italy in 2018 introduced, for the very first time in the Italian legal order, a list of safe countries allowing accelerated procedures, including at the border.<sup>25</sup> As a result, in October 2019, a first list of 13 ‘safe countries of origin’ was drafted and includes Algeria, Morocco, Tunisia, Ghana and Senegal, countries with poor human rights records insofar as SOGI minorities are concerned (Ramón Mendos 2019). Considering that territorial commissions need to decide on these applications within 5 days as a rule, the quality of examination of claims relating to countries designated as ‘safe’ will in all likelihood decrease and there will be a heavier burden of proof for the claimant (Chap. 7).

If accelerated procedures and the ‘safe country’ concept are inherently unfair for SOGI claimants, there are also strong concerns about the application of the Dublin Regulation to these claimants. This is confirmed by our survey, given that (at least) 17% of respondents were transferred between EU member states under this Regulation. The Dublin Regulation establishes the criteria and mechanisms for

<sup>23</sup> *R (JB (Jamaica) v SSHD* [2013] EWCA Civ 666.

<sup>24</sup> ‘A certification decision must be authorised by an accredited caseworker. This is referred to as a second pair of eyes (SPoE)’ (Home Office 2019a, p. 22).

<sup>25</sup> See Decree Law no. 113/2018 (converted into Law no. 132, 1 December 2018), so-called ‘Decreto Salvini’.



determining the EU member state responsible for examining an application for international protection lodged in one of the EU member states. Similarly to other claimants, when SOGI minorities request asylum in an EU country, it may happen that, following the rules of the Dublin Regulation, another member state is instead responsible for the evaluation of their claim. For example, in light of the importance attributed to family reunification in the Regulation, irrespective of the country where these requests are submitted, SOGI claims may potentially be examined by the member state where the claimant's family members have been already granted or have applied for international protection. Nonetheless, considering the likely heteronormative reading of the notion of family when the Dublin Regulation is applied to SOGI claimants, doubts have been raised about the fair application of this element of the Dublin Regulation from a SOGI perspective (Del Guercio 2018). Consequently, when a SOGI claim is submitted, there is a higher risk that, according to the Dublin Regulation, the first member state of access to Europe will be the country responsible for evaluating the claim (Danisi 2018).

It is not surprising, therefore, that during our fieldwork concerns were expressed in particular in relation to the transfer of SOGI claimants to Italy, Greece or Eastern EU member states, these countries often being the first member states through which claimants enter the EU (for instance, Evelyne and Anne, lawyers, Germany; Knud, NGO worker, Germany; Chiara, NGO worker, Italy). The problem here is not (only) whether the country identified as responsible for evaluating a SOGI asylum claim protects or not SOGI minorities, considering that all EU member states should – at least as a matter of law – offer a minimum level of protection to these minorities. The primary issue in SOGI claims is rather whether or not the designated country makes a fair evaluation of the asylum request and has in place adequate services, including accommodation, to address SOGI specific needs (Oscar, judge, Germany). Barbara (lawyer, Germany) expressed concerns about the alarming level of homophobia in countries like Hungary, raising doubts about the fairness of Dublin transfers of SOGI claimants to that country. Moreover, as Sabrina (NGO worker, Germany) pointed out, many claimants are so traumatised that a transfer can have a serious impact on their mental health (Chap. 9). In this situation, as she further explained, only the use of 'psychiatric statements' prevented Dublin transfers to Italy or Hungary from taking place.

It is nonetheless particularly difficult to appeal against such transfers. An example of this is the case of a male gay claimant whose hearing was observed in Hesse, Germany, in 2018. He had applied for asylum in Greece, where he experienced violence – including rape – before and after obtaining refugee status. He had not received any support from the Greek authorities. On the basis that Greece is a 'safe country' for asylum claimants, including SOGI, the judge did not ask the claimant any questions, not even related to the SOGI nature of his claim, and stated: 'I assume that this [abuse] does not happen everywhere in Greece. Greece is a member of the European Union and I assume that there is protection available'. The appeal was rejected, although the claimant was able to remain in Germany on separate grounds. In other cases, despite mental health concerns, Dublin transfers have been allowed. For example, Chiara (NGO worker) and Susanna (social worker), both in Italy,



reported the transfer from Austria to Italy of a gay claimant from Morocco who had made several suicides attempts. On his arrival in Austria across the Italian border, he had found a SOGI asylum association, dedicated accommodation and mental health support. Despite his specific circumstances, the Austrian authorities decided that Italy was the EU member state responsible for evaluating his asylum request. With no specific and individual guarantees or assurances from the Italian authorities, he was sent to Venice and, from there, to Sicily. Thanks to the efforts of the Austrian SOGI asylum association, the claimant was referred to a support group in Italy, which then followed his asylum procedure while making sure his health issues were properly addressed. Yet, as Chiara pointed out: ‘he is very traumatised, especially because he lives in a reception centre [for male claimants], where he constantly fears abuses by other guests (...) also due to the violence he already suffered in Lybia, where he was raped’. Franco (Italy) was another claimant sent back to Italy twice from Austria. As he explained, the reception conditions in Austria were very poor: ‘they treat us as a prisoner, but they don’t beat’. Remarkably, neither authority took his grounds for persecution into account when they considered his case under the Dublin Regulation.

Our participants also reported a lack of sensitive Dublin transfers, especially in relation to SOGI claimants sent back to Italy. For instance, Kamel (Italy) recalled a gay claimant from Germany who was transferred by flight to Rome with a voucher for one meal and without contacts of any kind. The claimant only avoided becoming homeless thanks to local associations in Rome, which found him temporary accommodation. In turn, Valentina (social worker, Italy) recounted the cases of several transgender claimants who, after obtaining visas to remain in Italy, tried to travel to the Netherlands to claim asylum there because of the availability of good quality trans-dedicated social services in that country. Yet, apart from a specific few whose medical issues presented obstacles to their transfer, they were all returned to Italy under the Dublin Regulation (Article 12). Only the intervention of an association defending transgender people’s rights ensured that the Italian authorities and reception centres where they were eventually hosted addressed their specific needs, at least in part. In one case, Valentina reported that, owing to the violence they had already experienced in a reception centre in Italy, the transfer of a transgender claimant from the Netherlands was halted. A final concern is that, when claimants who belong to couples have to be transferred under the Dublin Regulation because they may not be legally recognised as partners, they risk being separated and sent to different countries if they entered the EU via two different member states. Gisela (lawyer, Germany) explained that, in at least one case, German authorities eventually decided to keep two claimants together after positively evaluating the ‘informal’ evidence of their relationship (mainly pictures taken in their home country).

Perhaps not surprisingly in light of the patterns of arrivals in the UK explored in Chap. 5, Dublin transfers do not seem to be a particular issue there as far as SOGI claimants are concerned. Only Denise and Umar (legal advisors) reported the case of a gay couple from Syria who risked being sent back to Croatia, as their first country of entrance into the EU. In their view, one of the reasons for the limited relevance of Dublin transfers in the UK may be that many SOGI claimants submit *sur place*

applications in the UK, meaning that no other EU member state had previously been identified as responsible for their asylum applications. Indeed, as Oliver, an NGO worker, put it, ‘Dublin is very, very rare’.

Overall, these experiences should prompt EU member states to invoke more often the ‘sovereignty clause’, and claim jurisdiction of a claim where there is a risk of exposing SOGI claimants to degrading treatment, at least in terms of lack of appropriate services in the country of destination. This would be in line with the case law of the CJEU<sup>26</sup> and the ECtHR.<sup>27</sup> The much awaited reform of the Dublin Regulation needs to review the current criteria by avoiding a heteronormative perspective, while addressing the specific needs of asylum claimants, including SOGI claimants, and ending the practice of inhumane transfers of people between EU countries.

## 6.8 Concluding Remarks

This chapter has examined procedural aspects of SOGI asylum as applied in Germany, Italy and the UK, having regard to the Refugee Convention and the European asylum and human rights frameworks. It has also examined the role played by different actors in applying or setting up informal procedural arrangements, aimed at improving the fair assessment of SOGI claims, while addressing people’s specific needs. Our empirical data confirmed the perception of these claims as particularly complex ones and findings on aspects already explored in past research (Buscher 2011; Jansen and Spijkerboer 2011). Overall, by comparing these countries’ practices, our analysis has demonstrated that procedures play a fundamental role for better decision-making but, as currently regulated at EU and domestic level, they still fail to fully comply with the UNHCR guidance (UNHCR 2012a).

Some of the problematic areas that emerged across all countries under investigation include: a lack of specific procedures, the long duration of the process, imbalances of power, the impact of bias, a lack of cultural awareness, and poor quality services, especially in terms of legal advice and interpretation. Training is needed to address gaps in knowledge and understanding of SOGI as concepts and as life experiences, although it cannot be the only answer to all these shortcomings in domestic asylum systems (LaViolette 2013). In addition, we found a generally low standard of COI in Germany and Italy, but better provision and practice in COI in the UK. However, commenting on this UK practice, Roberto (decision-maker, Italy) emphasised the risk that COI is used to turn individual assessment into an ‘automatic box-ticking exercise’, thus providing clear solutions (‘modelli matematici’) to life changing decisions. Overall, many doubts were raised about whether

<sup>26</sup>Joined cases C-411-10 and C-493-10, *N.S. v United Kingdom and M.E. v Ireland*, 21 December 2011, para. 94 ff, ECLI:EU:C:2011:865.

<sup>27</sup>For instance, *Tarakhel v. Switzerland*, Application no. 29217/12, Grand Chamber, 4 November 2014, para. 109.

European asylum authorities are correctly implementing the Refugee Convention, read in line with the UNHCR SOGI Guidelines and in light of our theoretical and analytical frameworks (Chap. 3), when SOGI claimants are involved. We also came across some positive practices, especially in Italy, for instance in terms of the designation of the interviewer in SOGI claims and of administrative and judicial collective decision-making in many asylum claims. Yet, these were not common to all countries analysed, nor were they applied consistently within each country.

Factors such as Brexit, the rise of anti-immigration political parties, the media portrayal of immigration flows, and the lack of investment and resources, cast doubts on the likelihood of positive developments in this area, despite the range of actions that might easily be taken (Chap. 11). Moreover, the future reform of the CEAS, which might lead to improvements to many of the procedures analysed above (at least in Germany and Italy) if these are implemented in a human rights compliant manner (Chap. 3; Ferreira 2018; Velluti 2014), is today uncertain. Despite these macro-level changes and the persistent impact of biased attitudes, on the ground some decision-makers are clearly worried by the role to which they have been assigned. As Filippo, a senior judge in Italy, explained: ‘it’s [asylum] a situation of extreme difficulty. I feel a profound discomfort (...) for this task [and] I wonder if the judiciary is the authority best placed to deal with it’.

In turn, SOGI claimants do not feel their suffering is properly addressed by the existing systems. As Nice Guy (focus group no. 1, northern Italy), put it:

People come here, they keep preparing for Commission, Commission, Commission, many of them, a week to the Commission, they have sleepless nights, they are so scared. They get there and... the Commission is not friendly, that is just issue, it is not friendly. They just put you in front of somebody as if you are doing a job interview and start bombarding you with questions.

Their frustrations sometimes lead them to blame themselves for ‘being’ what they are. As Lutfur, who claimed asylum in the UK, explained:

Do you know how hurtful I was, how ashamed I was, of me how much I have to struggle, how much feel guilty about myself, then slowly, slowly I accept myself but it is still every time I have sex, I feel guilty. (...) I don’t hurt anyone, [but] sometimes I blame the system, sometimes I blame myself.

Whether or not these life experiences are duly considered in the assessment of their claims in Germany, Italy and UK will be addressed in the next chapter.

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# Chapter 7

## The Asylum Claim Determination



*... they didn't believe me. I don't know why. What can I do? Get a man and... make sex close to them?*

(Mahmoud, Germany)

*... if we start thinking about these improvements [to the system], then we lose sight of the viability of the system as a whole, which is required to examine a number of cases a day, otherwise the first reception system becomes unsustainable.*

(Daniele, decision-maker, Italy)

*... each judge decides depending on how he wake[s] up from his bed. In short it's a lottery. It also depends on where your claim is heard.*

(C15, UK)

### 7.1 Introduction

Public international law and, more specifically, international human rights law protect the right to access an asylum determination procedure and the principle of non-refoulement, as established in Chap. 3. Some would argue that asylum should not be seen by states as their own prerogative, but rather as a fundamental human right (Díaz Lafuente, 2014, pp. 206–207). How the right to access an asylum determination procedure and the principle of non-refoulement are implemented varies from country to country, including within the EU, as discussed in Chap. 4. Chapter 6 dissected the different procedures adopted to adjudicate SOGI claims of international protection in Germany, Italy and the UK. In this chapter, we focus on the decision itself by analysing the Refugee Status Determination (RSD) process in the three countries studied. In the process, we highlight similarities and differences, merits and shortcomings, and often inconsistencies with supranational and international standards.

Despite the growing body of literature on SOGI asylum adjudication,<sup>1</sup> some areas remain under-explored and require further analysis, as we begin to do here. We start by discussing the Refugee Convention grounds used in SOGI asylum claims (Sect. 7.2.1) and the prevalent application of the notion of ‘Particular Social Group’ (PSG) to SOGI claims (Sect. 7.2.2). In this section, we discuss the often ignored option of SOGI minorities using Refugee Convention grounds other than PSG and highlight the difficulties that some SOGI claimants have in ‘fitting’ into a PSG. We then explore how the notion of ‘persecution’ is interpreted in SOGI claims (Sect. 7.3), in particular how adjudicators deal with the criminalisation of same-sex conduct (Sect. 7.3.1) and make use of legal tools such as the ‘discretion argument’ (Sect. 7.3.2) and the ‘internal relocation alternative’ (Sect. 7.3.3). Section 7.3 thus presents a much-needed exploration of the inconsistent ways in which the criminalisation of same-sex acts and internal relocation alternative are used in SOGI asylum adjudication, highlighting that the ‘discretion argument’ is still very much alive, despite conventional wisdom on this matter telling us otherwise.

Next we analyse the standard and burden of proof adopted in SOGI asylum claims (Sect. 7.4.1) and the types of evidence required and accepted (Sect. 7.4.2). Here we conclude not only that the standard of proof often applied to SOGI claims is in violation of the principle of the benefit of the doubt, but also that the way the burden of proof is applied is in violation of UNHCR guidance. This is followed by an analysis of how credibility is assessed in the context of SOGI asylum claims (Sect. 7.5), where we identify the persistence of a culture of disbelief in SOGI asylum systems. We find significant scope to improve the way SOGI claimants’ credibility is assessed. The characteristics of possible and usual outcomes of the RSD process in relation to SOGI claims are then considered (Sect. 7.6), focusing on the need for an intersectional approach to ensure appropriate decision-making. A summary assessment of the substantive adjudication of SOGI asylum claims is offered at the end (Sect. 7.7), and we link our discussion to broader debates about epistemic justice in the asylum system. In this chapter, we show that many serious problems still affect SOGI asylum adjudication in Europe, often because decision-making fails to apply the theoretical and analytical frameworks adopted in these volumes.

## 7.2 Using the Grounds for the Recognition of Refugee Status

The international refugee regime, including the Refugee Convention, was a response to the persecution of members of religious/ethnic minorities by fascist regimes in mid-twentieth century Europe (Juss, 2018). As Oscar, a judge in Germany, pointed

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<sup>1</sup>This body of literature has become so rich, that it is impossible to offer an overview of it or do it justice in this chapter. The extent and variety of this literature is patent from the 1000+ items collected in the SOGI asylum database available in <http://www.sogica.org/en/sogica-database/>. In this chapter, we will make reference to only a short selection of that literature.

out, the archetypal refugee is a member of the Jewish population in Nazi Germany, which narrows down the mind-set of decision-makers until today:

our asylum law has always almost... it brings out the image of the Jews who have tried to reach Switzerland during the Nazi regime – that’s always for me the absolutely, the classic asylum seeker: persecuted because of their “race” and they knock on Switzerland[’s doors] and say: “We want to have asylum here”.

SOGI minorities were thus not explicitly considered during the preparation of the Refugee Convention, despite the persecution of gay and lesbian people in Nazi Germany (Grau & Shoppmann, 2013), and it took several decades to introduce and establish the idea that they could also secure protection using the Refugee Convention, namely by using the PSG ground (Chap. 1). Here we consider the range of Convention grounds available and what use SOGI claimants make of them.

### 7.2.1 *Choosing from the Five Refugee Convention Grounds*

The Refugee Convention makes express reference to five grounds on the basis of which the ‘well-founded fear of persecution’ can be invoked: ‘race’, religion, nationality, membership of a PSG and political opinion. Although there are still some – very rare – instances of decision-makers finding it difficult to connect SOGI to one of the Refugee Convention grounds,<sup>2</sup> it is now legal dogma that SOGI minorities fall within a PSG. Indeed, although SOGI claimants can potentially make an asylum claim on the basis of any of these grounds, it is the case that claims are almost invariably based on the PSG ground. Other reasons for persecution are mostly absent in this field, despite their potential applicability (Balboni, 2012, Chap. II; Braimah 2015b). As Cristina, a UNHCR officer, said:

Very often there is a tendency to take for granted that SOGISC [sexual orientation, gender identity and sexual characteristics] cases fall within the particular social group, while often an evaluation of political reasons or religious reasons is not made, based on the context, so I would say that there is an insufficiently deep analytical-juridical elaboration.

Our fieldwork has confirmed the historic and current prevalence of the use of the PSG ground in SOGI asylum claims in the countries under comparison, even if we have come across a few exceptions to this rule.

One such case, referred to us by Emilia, a judge in Germany, was that of an LGBTIQ+ and Kurdish activist, who was thus potentially persecuted on grounds of membership of a PSG but also political opinion. Still in Germany, Marlen, a legal advisor, told us of an asylum claim on grounds of religion, lodged by a trans claimant who did not mention gender identity at the first claim stage but introduced that element at the appeal stage. Mariya, an NGO worker in Germany, also spoke about

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<sup>2</sup>Tribunal of Palermo, decision of 31 May 2017, where the judge affirmed that the applicant – a gay man from Nigeria – could not fear persecution in relation to one of the five grounds of the Refugee Convention.

a SOGI claimant who had an ethnic minority background in the country of origin, thus exposing him to further persecution on this basis. Although the asylum claim was based on both PSG membership and ‘race’, the asylum authorities failed to grasp the way in which the intersection of these two grounds contributed to a stronger risk of persecution, and denied international protection. Diana spoke of her participation in theatre plays, involvement with LGBTIQ+ groups and publications in Iran, which attracted the attention of the police. This combination of activities offered her the potential to claim international protection both on grounds of membership of a PSG and political opinion. Similarly, Marhoon and Halim described their activities as LGBTIQ+ activists and human rights defenders (in the case of Marhoon, also linked to his atheist belief), and Mahmoud mentioned his political activities to BAMF, but all these three claims were eventually adjudicated exclusively on the basis of SOGI.

In Italy, we also found cases involving Refugee Convention grounds beyond PSG. One case involving a Nigerian claimant, reported to us by Valentina, a social worker, combined both sexual orientation (bisexuality) and gender identity (male-to-female), thus remaining within the PSG ground of the Refugee Convention but adding another layer of complexity to the claim. A more obvious – and successful – case of multiple grounds was described to us by Kamel, whose asylum claim was based on gender identity (PSG), activity as journalist, activist and volunteer as anaesthetist in areas of military conflict (political opinion), and atheist belief (religion). Another case, referred to us by Celeste, a social worker, was that of a claimant who was persecuted on the basis of forced marriage, SOGI and religion, thus potentially making use of two grounds of the Refugee Convention. This claim was, however, received with suspicion by the authorities, something which we will return to below (Sect. 7.5).

In the UK, as well, there were isolated instances of asylum claims combining different Refugee Convention grounds, such as the case of Miria (combining political activity and sexual orientation), Ibrahim A. (combining his sexual orientation and LGBTIQ+ activism), Ximena (combining human rights activism and gender identity), as well as Amber (combining SOGI identity, political activity and – perceived – religious identity):

Being in a “particular social group” [LGBT], I was also involved in some political activism in Malaysia. I was one of the early members of an NGO called Pelangi. Pelangi means rainbow in English, and we are an organisation campaigning for equality and human rights. (...) we did organise events for the community, but specifically in June where we hosted a Pelangi day event consisted of a panel discussion, an iftar meal inspired by “The Big Gay Iftar” initiative by current Mayor of London, and a film screening. Little did we know, the event went viral and reached the public eye, and they deemed it as disrespectful especially towards the “Big Gay Iftar” slot, as the public is too sensitive about associating the word gay with iftar to even going as far as saying we were deliberately disrespecting the holy month of Ramadan. So, things got heated pretty quickly and many of us in Pelangi were feeling unsafe, and some of us left the group for their own safety.

Even when another Refugee Convention ground seemed more relevant than PSG, that was often sidelined:

my claim was based on my LGBT activism and on my sexual orientation, but basically they [Home Office]... she [caseworker] only focused, she asked me of course about my LGBT activism, but she only focused on my sexual orientation. (...) Not at all [interested in my political activism]. (...) What is worrying me more is my activism and the work I do. (...) Like she had it on paper and she felt like she had to mention it because I wrote it, but she didn't focus on it. Like for me the interview was mostly focused on my sexual orientation and the idea that I will not feel free to practice it if I went back to Egypt, yes (Ibrahim A.).

Such exclusive focus on the claimants' SOGI at the expense of other aspects of their lives and grounds to claim international protection reduces SOGI claimants to uni-dimensional beings who are exclusively characterised by their SOGI, but not by their political activism, religious beliefs, ethnicity, etc. Furthermore, although some decision-makers told us they fully considered all grounds for international protection available within each single claim (Maurizio, judge, Italy), with the exception of Kamel's case, decision-makers in all the cases mentioned above tended to focus on one ground and make a decision in relation to that ground, rather than considering the overall risk of persecution based on the cumulative and intersecting effect of the grounds in question. The failure to adopt an intersectional approach (Chap. 3) leads to a partial portrayal of claimants' persecutory experiences. In particular, it erases the political nature of many SOGI minorities' claims and their activism (Chap. 5).

PSG thus remains the main asylum ground for members of SOGI minorities. How to conceptualise one's membership of a PSG in terms of one's SOGI is always problematic, as we will now discuss.

### 7.2.2 SOGI and 'Particular Social Group'

The notion of PSG is not defined in the Refugee Convention, and it has thus been object of extensive case law and literature in different jurisdictions (Arnold, 2012; Berg & Millbank, 2013; Braimah 2015a, b; Millbank, 2009b; UNHCR, 2002a, b). In the EU context, the key source in this regard is Article 10(1)(d) of the Qualification Directive:

a group shall be considered to form a particular social group where *in particular*:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, *and*
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society (our emphasis).

While SOGI are now recognised as characteristics that may lead to a finding of membership of a PSG, as we have explored elsewhere, the way these criteria have been interpreted by the CJEU is contentious (Ferreira, 2018, p. 30). The relevant criteria include two tests: the 'fundamental characteristic test' and the 'social recognition test'. UNHCR Guidelines recommend an alternative application of these tests, so it should be enough to satisfy one of them (UNHCR, 2002a, b, para. 2), but

the CJEU, in *X, Y and Z*,<sup>3</sup> opted for a cumulative application, thus requiring that both tests be satisfied for an individual to be recognised as a member of a PSG. This reading of the norm is based on the use of the word ‘and’ between the tests, ignoring that the tests are introduced with the words ‘in particular’, implying that other defining characteristics of a PSG may exist and these criteria should not be applied in a restrictive way. Furthermore, the tangible impact for individual claimants of a cumulative two-limb test is that:

some refugee-status decision-makers have found that, while certain applicants’ claims satisfied the protected characteristics limb, they did not meet the social perception limb, either because the group of LGBTI persons are not visible within a given society or because the individuals themselves are not “out” enough to be perceived as part of that group by society (ICJ 2016, p. 201; references omitted).

In *X, Y and Z*, the CJEU more positively asserted that the existence of criminal laws targeting SOGI minorities supports the finding that those persons form or belong to a PSG. Against this background, we now look into how the three countries under comparison generally apply the notion of PSG to SOGI asylum claims.

In Germany, the 1988 seminal decision of the Federal Administrative Court applying the notion of ‘political persecution’ to SOGI asylum (Chap. 4) led to a long line of questionable decisions, effectively leaving some SOGI claimants without international protection.<sup>4</sup> For instance, in 1998 the Administrative Court of Regensburg referred to a medical report arguing that the claimant’s sexuality was not ‘compulsive’ and ‘abnormal’, and that therefore he could fulfil his sexual urges by masturbating.<sup>5</sup> More positively, there have also been cases where asylum has been granted to SOGI claimants from countries where Sharia law applies and punishes same-sex sexual conduct, as persecution could be feared because of ‘otherness’, thus falling within the scope of protection of the right to political asylum and human dignity under the German Basic Law.<sup>6</sup> The more restrictive line of case law of the Federal Administrative Court and the administrative courts became outdated when persecution on grounds of sexual orientation came to be recognised under the PSG ground, following the definition of PSG according to the Qualification Directive (§3(1) of the Asylum Act). It now does not (or, at least, should not) matter whether the sexual orientation of the claimant is so ‘inescapable’ as to preclude abstinence from same-sex sexual activity.<sup>7</sup>

When establishing membership of a PSG, the BAMF and courts in Germany have followed the cumulative approach argued for by the CJEU (BAMF, 2017, p. 282). This means that individuals need to demonstrate *both* that they share an innate or fundamental characteristic or common background, *and* also that they are

<sup>3</sup>Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*, 7 November 2013, ECLI:EU:C:2013:720.

<sup>4</sup>BVerwGE, 15 March 1988, C 278.86.

<sup>5</sup>4 August 1998, RN 11 K 97.31221, cited in Markard & Adamietz (2011, p. 296).

<sup>6</sup>Administrative Court of Gießen, 26 August 1999, 10 E 30832/98.

<sup>7</sup>See, for instance, Administrative Court of Frankfurt/Oder, 19 November 2015, 4 K 1099/12.A.



perceived as having a distinct identity. In internal instructions, the BAMF clarifies that at least one common group-identifying characteristic has to be identified: a shared innate characteristic, a common immutable background, or common characteristics or beliefs that are so important to the identity or conscience of the person concerned that renunciation would be unreasonable (so-called ‘indispensable features’). The BAMF lists sexual orientation amongst the latter characteristics (BAMF, 2017), and, according to some of our participants, ascertaining membership of a PSG remains a key (if not *the* key) element in SOGI asylum claims in Germany (for instance, Elias, lawyer).

In order to demonstrate membership of a PSG, claimants have often needed to present a fixed and linear narrative of gay identity, according to a Western epistemic framework. In tension with the queer theoretical framework adopted in Chap. 3, decisions are often based on an understanding of sexual orientation as definitively fixed at a particular age in an individual’s life;<sup>8</sup> we instead adopt the understanding that sexual orientation and gender identity are fluid, rather than static or siloed, categories. For example, participants in Germany pointed out that if claimants report having become conscious of their non-heterosexuality only when they reached their twenties, they would be unlikely to meet the PSG criteria because their sexuality would not be found to be ‘irreversible and inescapable’ (Sofia and Emma, NGO workers), in terminology reminiscent of the 1988 decision discussed above that should no longer be valid.

Furthermore, and in parallel with BAMF’s culture of disbelief (Sect. 7.5), we observed a trend to deny PSG membership because of elements relating to social visibility, rather than the claimant’s characteristics. For example, in letters of refusal to some of our participants, the BAMF stated that it ‘is doubtful whether the social group of LGBT members for the country of origin Russian Federation can be distinguished with sufficient certainty even through the local prohibitions and/or through the nationwide propaganda ban on non-traditional sexual relations’ (decisions regarding Veronica and Julia). This is inconsistent with UNHCR standards (UNHCR, 2012, para. 48) and contradicts the CJEU assertion that the existence of legislation targeting SOGI minorities supports the finding that those persons form or belong to a PSG.

Similarly, in the UK, a cumulative approach to the PSG tests is followed. Before 1999, SOGI claimants had difficulty meeting the criteria for refugee status following a High Court ruling stating that they did not constitute a PSG because their only common characteristic of sexual orientation was normally concealed.<sup>9</sup> SOGI claimants are now generally recognised as members of a PSG as a result of the House of Lords judgment in the case of *Shah and Islam*, where it was found that women in

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<sup>8</sup>Administrative Court of Ansbach, 21 August 2008, AN 18 K 08.30201; Administrative Court of Trier, 17 January 2013, 2 K 730/12.

<sup>9</sup>*R v SSHD ex parte Binbasi* [1989] Imm AR 595 (QBD).

Pakistan constituted a PSG.<sup>10</sup> The same approach was applied to SOGI,<sup>11</sup> which falls in line with the EU Qualification Directive. Having to satisfy both the ‘fundamental characteristic’ and the ‘social visibility’ tests has led a practitioner to encourage clients presenting to a judge ‘to bring friends from the gay community and referred to it as a “pink parade”’ (Arnold 2012, p. 106).

In contrast, in Italy, decision-makers adopt an alternative approach to the ‘fundamental characteristic’ and the ‘social visibility’ tests, thus adhering to the UNHCR guidelines.<sup>12</sup> Consequently, for the recognition of a PSG in the Italian system, it is sufficient that its members share a common characteristic fundamental to their personality (such as sexual orientation or gender identity) *or* that they are perceived as such by the rest of society in the country of origin. In other words, when implementing the EU Qualification Directive, Italy decided that these two requirements did not need to be satisfied at the same time to identify a PSG. SOGI are expressly recognised as personal characteristics relevant to the determination of a PSG in light of the specific situation of some countries of origin. Once a claimant’s SOGI is found to be credible (Sect. 7.5), establishing PSG membership is generally unproblematic, although the reasoning adopted for the finding is not always specified. Our participants rarely raised this matter, and PSG seems to be more often than not a ‘given’, with the RSD process tending to focus on the risk of persecution (Sect. 7.3) and credibility assessment (Sect. 7.5). This approach is also followed by territorial commissions (Celeste, social worker) and lower courts when SOGI claimants appeal against negative decisions by territorial commissions. For example, the Court of Appeal of Trieste, in a case involving a gay claimant from the Gambia, decided that it was irrelevant to ascertain whether the claimant was effectively gay or not, as what mattered was how he was perceived by Gambian society and the consequences of that perception.<sup>13</sup>

Across all three countries under comparison, bisexual claimants may find themselves entangled in inadequate understandings of sexual orientation, which have an impact on establishing PSG membership. This may be due to an inherent tension between, on the one hand, refugee law and related decision-making, which is about establishing facts and definitive accounts, and, on the other hand, sexual orientation, which is fluid both over time and at any one moment (Chap. 3). The reference to an ‘innate characteristic’ in the PSG definition in the Qualification Directive is likely to prove particularly problematic for bisexual claimants if it is prioritised over the other elements in that sentence, in particular, ‘a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it’. It seems to be often assumed (even if implicitly) that bisexual claimants can choose between heterosexuality and homosexuality. Bisexuality and fluid forms of

<sup>10</sup> *Shah and Islam v Secretary of State for the Home Department*, House of Lords, 2 A.C. 629, 1999.

<sup>11</sup> See The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, 6(e), and UKVI, 2011, p. 11.

<sup>12</sup> Article 8 of the Legislative decree no. 251, 19 November 2007.

<sup>13</sup> Judgment no. 541, 25 July 2019.

sexuality are thus devalued and unrecognised, leading to credibility assessments based on collective heteronormative knowledge and essentialising non-heteronormative ways of life (Sect. 7.5; Hübner, 2016).

Participants in Germany told us that the BAMF tends to be dismissive of bisexual claimants, because they are perceived as needing to ‘make up their minds’ and able simply to ‘opt for being heterosexual’ (Gisela, lawyer). We were also told that it is ‘harder to work’ with claimants with less ‘clear’ and ‘classic’ sexual identities, such as claimants who have had opposite-sex relationships in the past and have children (Nina, legal advisor; Sofia and Emma, NGO workers). Court decisions may subsume bisexuality within homosexuality, or fail to recognise bisexuality where it is the most appropriate identifier,<sup>14</sup> thereby contributing to the invisibility and erasure of individuals claiming on this basis (Klesse, 2018; Monro et al., 2017). Ignoring queer theoretical approaches, decision-makers leave bisexual claimants out of the scope of protection of a PSG, as in a decision by the Administrative Court of Saarland, where the judge argued:

Due to his predisposition, the claimant would be in a position to have a relationship with a woman in Algeria and to live out his sexuality. This assumption is supported by the fact that the claimant has already become the father of a child in Germany. In that respect, the present case differs from the cases decided by the CJEU, which dealt with the homosexual orientation of those affected. However, in case of homosexuality, the person would be, unlike the claimant in the present case, forced to completely deny their sexual orientation or to live in secret in order to escape the danger of punishment in Algeria.<sup>15</sup>

Even though the claimant had been in a two-year relationship with a man at the time this decision was made, the Court decided that the claimant could relocate within Algeria and carry on meeting men ‘discreetly’ (Sect. 7.3.2).

In Italy, bisexual claims are also problematic, indicated by the absence of such claims in our fieldwork, in other scholarship and in NGO materials. This also emerges from the fact that claimants are sometimes encouraged by legal advisors and support groups to adopt homo-narratives to be more convincing (Chap. 6, Sect. 6.2). Bisexual claimants may also face obstacles to recognition in the UK, where the leading judge in *HJ (Iran)* said that the PSG was ‘defined by the immutable characteristic of its members’ sexual orientation or sexuality’ (para. 11). There is a perception that bisexual claimants are at a disadvantage:

say, if the Home Office accepts someone is bisexual and if LGBT rights could be non-existent in their country, but the Home Office can always argue, and usually do that, “well, they can still have relationships, you know, they can still function in that society with sort of opposite sex partner (Amelia, NGO worker).

Similar considerations affect trans claimants, if to a lesser or different extent. The fluidity of gender identity has been explored in the context of asylum, where it has been shown that transgender people claiming asylum are not only reabsorbed

<sup>14</sup>Administrative Court of Ansbach, 21 August 2008, AN 18 K 08.30201.

<sup>15</sup>Administrative Court of Saarland, 18 February 2015, 5 K 534/13, pp. 11–12. See Dustin & Held (2018) for further discussion of this case.

within the gender binary system (Vogler, 2019), but may also present or be accepted as claiming on the basis of sexual orientation rather than gender identity, serving to disguise the level and nature of transgender persecution (Berg & Millbank, 2013, p. 140). This reflects a lack of understanding of the difference between sexual orientation and gender identity, and harms the chances of success of subsequent trans claims. In Germany, gender fluid claimants are seen as an ‘implosion’ and ‘challenge’ for decision-makers who wonder what is the PSG in question (Nina, legal advisor). We were also told that a trans claimant may define herself as ‘gay’ because she is familiar with the word ‘gay’, while at the same time she identifies as a woman who feels attracted to men, and is thus a ‘trans woman’ according to Western LGBTIQ+ terminology (Noah, NGO social worker). Decision-makers need to be receptive to variations in the use of such ‘labels’ and not impose a simplistic application of templates (Kadir, NGO worker). Similarly, in Italy, we were told that trans claims can constitute a challenge for decision-makers:

In some countries, people do not call themselves trans, and in that case you cannot force a person to fall into a category that we ourselves have created, we have given to ourselves, which can be good for me, can be good for you, can be good for an Italian or American transgender person, but it may not be good for a trans person whom we perceive as trans, whom we identify as a trans from an African country or a Middle Eastern country (Cristina, UNHCR officer).

Fitting trans claims into a particular PSG is thus likely to require ‘cultural translation’ skills that many decision-makers lack. This is also true in the UK, where the limited information available about trans asylum claims is a challenge to decision-makers and activists alike – a challenge compounded by the absolute lack of information about intersex claims or the experiences of people claiming asylum with intersex variations (APPG on Global LGBT Rights, 2016, p. 13). To a lesser extent, trans claimants have also been underrepresented in the literature historically. An international study of transgender people’s asylum claims between 1994 and 2011 found only three trans asylum decisions in the UK (Berg & Millbank, 2013). Acceptance of gender identity claims has been even slower than acceptance of claims based on sexual orientation – not helped by the UK’s failure to opt into the recast Qualification Directive, which explicitly covers transgender people (Arnold, 2012, pp. 106 and 118). Gender identity issues are often omitted in research and reports on sexual minority asylum claims – the Vine Report did not cover gender identity cases (ICIBI, 2014) – or appear as an afterthought. At one time, UKLGIG stated that they received few requests for support from transgender claimants and thought claimants were often unaware that gender identity can be the basis of an asylum claim (UKLGIG, 2013, p. 7).

Significant issues thus remain for all SOGI claimants in relation to determining membership of a PSG. In line with our theoretical and analytical underpinnings (Chap. 3), decision-makers need to be more flexible in relation to SOGI identity variations (Hinger, 2010, p. 402) and aware of different cultural perceptions of certain SOGI identities that may be less familiar in the Western context, but more relevant in the case in question, such as ‘men who have sex with men’ (Sridharan, 2008). Only like this these identities can be tools for liberation, rather than

oppression. As we heard from one of our participants, there may even be a dynamic process of self-identification throughout the asylum claim process – for example, a transition from identifying as a gay man to identifying as a trans woman – and this needs to be accommodated by decision-makers (Louis, NGO volunteer, Germany). The same claimant may present and be perceived in different ways at different times and in different contexts: one claimant who described herself as a lesbian on arrival and would have been persecuted as such in her country of origin, identified as a trans man at the time of his (successful) appeal hearing (Upper Tier Tribunal observation, London, 2018). These variations in SOGI self-identification and the different meanings accorded to the various letters in the ‘LGBTIQ+’ acronym in different contexts and times require far greater awareness of the fluidity of SOGI self-identification on the part of everyone involved in the asylum system (Noah, NGO social worker), something that can be improved through greater investment in training (Chap. 11).

For these reasons, there have been calls to move away from what some have described as a ‘fixation’ on whether claimants are ‘truly’ LGBTIQ+ (Jules, staff member at ILGA-Europe). Accordingly, the Italian Supreme Court has affirmed that the judge is not called to ascertain if claimants are ‘truly’ LGBTIQ+, but only if they may be persecuted on that ground.<sup>16</sup> This has also been highlighted by the CJEU in the *F* case.<sup>17</sup> The need to focus on the basis of persecution rather than on the individual’s ‘true’ identity is obvious in relation to an ‘imputed’ SOGI, and there needs to be greater recognition in other SOGI cases that what is important is not ascertaining the claimant’s identity but assessing the harm that they may suffer (Chiara, NGO worker, Italy; Silvana, judge, Italy). As also suggested by scholars (Dustin 2018), this would shift the focus from the PSG to the notion of persecution, to which we now turn.

### 7.3 Reaching the Persecution Threshold

Besides establishing membership of a PSG, asylum adjudicators also need to determine that there is a ‘well-founded fear of persecution’. According to Article 9(1) of the Qualification Directive, for an act to constitute persecution, it needs to:

- (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
- (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

<sup>16</sup>Supreme Court, decisions no. 2875, 6 February 2018 and no. 267, 9 January 2020.

<sup>17</sup>Case C-473/16, *F. v Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, ECLI:EU:C:2018:36, paras. 31–32.

This definition still leaves much leeway to each country to determine who falls within their remit of protection.<sup>18</sup> Determining a ‘well-founded fear of persecution’ remains a considerable challenge in SOGI claims in some asylum systems, for example, in Germany (Gisela, lawyer).

In relation to SOGI claims, decision-makers tend to consider as relevant human rights violations such as physical or psychological violence, legal and administrative measures that are discriminatory in themselves or are applied in a discriminatory manner, and discriminatory criminal sanctions. We would however argue, in line with the framework expanded in Chap. 3, that every human rights violation can potentially lead to a well-founded fear of persecution if it leads to restricting or denying one’s SOGI, especially considering that this fear is strictly individual and any person can experience it differently. The assessment of whether there is a ‘severe violation of basic human rights’ in the claimant’s country of origin or not, is an exercise carried out with little degree of consistency across countries or even within the same country. On the contrary, it remains a subjective exercise, highly dependent on each decision-maker. In Italy, for example, there may be no consideration of specific human rights violations suffered in the country of origin. It is more important that the claimant is able to offer a coherent account of their experience (Sect. 7.5), combined with evidence that, at a general level, SOGI minorities’ human rights are breached in the country of origin. This goes beyond the issue of whether or not there are laws criminalising same-sex acts (Sect. 7.3.1). For instance, the Tribunal of Milan has considered the social attitudes in the Ivory Coast against SOGI minorities to be sufficient for granting refugee status to a male claimant, despite the absence of criminalising legislation.<sup>19</sup> In contrast, in the UK, sometimes not even the criminalisation of same-sex conduct, police violence and social stigma is enough:

Say someone is from Bangladesh [where same-sex acts are punished criminally] and a series of reports say police mistreated this person, a Pride march is broken up, then you’ve still got to pull that together. Just because someone’s been beaten up, does that mean everyone will be? (Ernest, judge, UK).

As for what constitutes an ‘accumulation of various measures’ that may give rise to persecution, although there is no international consensus, it is clear one needs to take a holistic – and intersectional, we argue – approach to claimants’ experiences:

But I think that also when you are not in this kind of situation [risking death penalty], there can be multiple discriminations that come together, because of your sexual orientation, gender identity, but also because of other aspects that actually force you to leave the country and then look for asylum somewhere else. So I think it is very important to have this more holistic image in order to take a decision in the end (Terry, member of the European Parliament).

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<sup>18</sup>For some guidance from the CJEU, see, for example, Joined Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*, 5 September 2012, ECLI:EU:C:2012:518.

<sup>19</sup>Tribunal of Milan, decision of 18 October 2017.

We can again use an Italian example, this time involving the case of a gay man from Benin. While the territorial commission denied refugee status because it found there was no risk of persecution, the Tribunal of Trieste stated that the intimidations, the loss of job, and the violence suffered by the claimant after his sexual orientation became publicly known did amount to persecution.<sup>20</sup> On other occasions, territorial commissions themselves deemed that the existence of a homophobic environment preventing a gay man from living openly his sexual orientation was sufficient to ascertain persecution.<sup>21</sup> This was also affirmed in relation to claimants from Russia, especially after the adoption of the law against ‘homosexual propaganda’.<sup>22</sup> In Germany, however, in the case of a lesbian woman from Russia,<sup>23</sup> the Administrative Court of Potsdam decided that even though discrimination against SOGI minorities existed, there was no persecution of homosexuals across the country that would allow the finding that there is a ‘considerable likelihood’ of persecution of the claimant. Furthermore, the discrimination experienced by SOGI minorities in the host country – in this case the UK – may be used to argue that not every experience of discrimination can be the basis of international protection:

persecution is an extreme situation. And, frankly, people are not entitled to refugee protection unless discrimination has reached that very high threshold. And, that is where, I am afraid, people have to live with discrimination. I mean, there will be parts of the United Kingdom where gay and lesbian people will suffer discrimination... (Adrian, judge).

What often also transpires in SOGI asylum decisions is the idea that SOGI claimants should be content with a smaller scope of rights and freedom than European citizens (Allan, lawyer, UK). As Butler (2004) highlights, such views on queer lives make them less liveable, if liveable at all. Even when there is legislation protecting some SOGI minorities, such as Pakistani legislation protecting the gender identity of hijras, there may be discrimination and lack of protection by public authorities (Louis, NGO volunteer, Germany), so the existence of formal statutory protection should not be interpreted as precluding persecution (UNHCR 2012, para. 37). This affects European countries themselves, with legal protection of SOGI minorities still not fully reflected in social practices and individuals still needing to escape persecution (Titti, decision-maker, Italy).

In the UK in particular, decision-makers often placed considerable importance on the degree of visibility of claimants in the host country as the basis for determining whether or not it would be safe for them to return to their home countries, sometimes using the claimant’s lack of a ‘public profile’ to deny the risk of persecution upon return (Zena, First Tier Tribunal Appeal, London, 2018, decision paper, para. 47c). At the same time, commentators have been critical of UK Home Office decision-makers’ depictions of SOGI asylum as a claim for clubbers’ rights by

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<sup>20</sup>Tribunal of Trieste, judgment of 8 August 2009.

<sup>21</sup> See, for example, the case of a gay man from Albania, reported by the Consiglio Italiano per i Rifugiati (2007).

<sup>22</sup>Tribunal of Salerno, decision of 18 April 2017.

<sup>23</sup>6 K 435/13.A, 27 February 2014.



people from countries without a ‘gay scene’, rather than flight from imprisonment and violence, pointing out that this discriminates against anyone who does not fit such stereotypes (Juss 2015; Millbank 2009b, p. 19). Our fieldwork confirmed that these issues persist and we will return to this in the context of our discussion on credibility (Sect. 7.5).

It is also worrying that some decision-makers seem to require persecution to have already occurred in the country of origin, rather than focussing on the future risk of persecution. This was reported by several participants in Germany (Thomas, NGO volunteer; BAMF decision appealed in Court observations, Hesse, 2018, 2019; decision regarding participant DE34 in Held et al. 2018). The lack of past persecution, even in the case of countries with well-documented widespread homophobia like Guyana, is seen to count against claimants (Leon, NGO worker, Germany). Claimants understandably react strongly to such expectation:

I haven’t faced any violence or attack. Do I have to go back to Iraq and be beaten or killed to prove that I am in danger in my country? Would you be convinced if I was attacked in Iraq? (Court observation, Hesse, 2019).

What matters from a legal perspective is the risk of persecution upon return (UNHCR 2016, paras 24–25 and 89–92), irrespective of whether persecutory acts have already been carried out or not. Decision-makers should, therefore, always make a forward-looking assessment.

Past debates about the relevance of private actors to establishing a risk of persecution in asylum claims have been largely superseded, with asylum adjudicators in the EU now being in agreement that it is possible to grant international protection when the agents of persecution are not national authorities but private agents, under Article 6 of the Qualification Directive. What is relevant is whether the country of origin’s authorities are able or not to protect an asylum claimant from private acts of persecution on one of the grounds provided by the Refugee Convention. For example, in Italy, in the case of a gay man from Ecuador who suffered violence inflicted by family members, the Court decided that ‘the general situation of impunity’ made the protection by Ecuadorian authorities illusory, thus warranting granting refugee status.<sup>24</sup> SOGI asylum claimants benefit from this understanding, as many of our participants suffered persecution at the hands of parents and carers (Ibrahim, Germany; William, Germany; Momo, Italy; Buba, Italy), partners (Rosette, Germany), cousins (Shany, Germany), extended families (Alain A., Italy), radical religious groups (Ibrahim, Germany), criminals and other members of the community (Ximena, UK), public mobs (Alphaeus, Germany) and, more generally, members of the public (Siri, Italy), as also explored in Chap. 5. Nonetheless, some of our participants were convinced that decision-makers were much less likely to grant protection when persecution was carried out by private actors, such as family members, which betrayed a troubling misunderstanding of the legal framework and the

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<sup>24</sup>Giudice di pace di Genova, decision of 10 June 2010. See, also, Tribunal of Rome, decision no. 4675, 5 May 2010, in relation to a Palestinian man; and Court of Appeal of Bari, judgment no. 299, 5 March 2013.

social mechanisms of oppression in some countries of origin (Thomas, NGO volunteer, Germany).

While the role of private actors is reasonably clear, there is little consensus across, or even within, the countries studied as to what matters when assessing the ‘risk of persecution’. Here, three themes emerged in our fieldwork, to which we now turn: the importance of criminalisation of same-sex acts (Sect. 7.3.1), the ‘discretion argument’ (Sect. 7.3.2), and the ‘internal relocation alternative’ (Sect. 7.3.3).

### 7.3.1 *The Criminalisation of Same-Sex Acts*

The CJEU used its judgment in *X, Y and Z* to assert that the criminalisation of same-sex acts does not in itself constitute an act of persecution. Although this decision was considered balanced and flexible enough by some of our participants (Helena, EASO staff member), it runs against UNHCR guidance stating that criminalisation should generally be sufficient to claim persecution (UNHCR 2012, para. 26 ff). The CJEU decision also ignores scholarly recommendations (Jansen and Spijkerboer 2011), and fails to place these criminal law norms within their broader societal context of discrimination and intolerance (ICJ 2014; Markard 2013). Furthermore, it ignores the realities of countries such as the Ivory Coast, where despite the lack of actual prosecutions, the legislation is used to facilitate blackmail, discrimination and harassment, including on the part of the police (Gisela, lawyer, Germany; Damiano, lawyer, Italy). Therefore, even if the criminalisation of same-sex acts is not considered persecutory in itself, we should give greater recognition to the import that it has in the asylum context:

But the very fact that the law exists, and there is no willingness to remove it from the books... I think is a bit of a red flag. And also the very fact that they exist means that it is open to abuse. That means from today to tomorrow you can have immense problems (Jules, staff member at ILGA-Europe).

Germany, Italy and the UK have followed separate paths in this regard. In the German context, initial case law of the Federal Administrative Court focused on whether legislation criminalising same-sex acts could be justified on grounds of maintaining ‘public morality’.<sup>25</sup> For instance, as recently as 2006, an administrative court argued that ‘Islamic cultures’ may restrict same-sex acts because of the country’s prevailing morality without this constituting political persecution.<sup>26</sup> More recent case law abstains from this type of argument. BAMF instructions clarify that, in relation to the assessment of fear of SOGI-related persecution, ‘[a]n imminent persecution is always to be assumed if the applicant makes it credible to be threatened by a relevant imprisonment existing in the country of origin and if this is

<sup>25</sup> BVerwGE, 15 March 1988, C 278.86.

<sup>26</sup> Administrative Court of Düsseldorf, 14 September 2006, 11 K 81/06, cited in Hempel (2014, p. 51).

actually imposed there' (BAMF 2017, p. 289). Enforcement of criminalisation is thus taken seriously at a policy level, but the existence of 'anti-homosexuality laws' is not sufficient to prove a risk of persecution.

Refusals are often based on the reasoning that existing laws are not used, or that there is no evidence that these laws are used, or that they are used but without harsh sanctions (Barbara, lawyer; Kadir, NGO worker; Marlen, legal advisor). There seems to be an increasing number of refusals based on the idea that such cases lack 'asylum relevance'. While courts have focused more on the 'discretion argument' in the past (Sect. 7.3.2), in recent years they have more often argued that the threshold for 'asylum relevance' has not been met. For instance, in a decision by the Administrative Court of Frankfurt am Main,<sup>27</sup> the appeal of a bisexual man from Ghana was dismissed with the argument that, although there were homophobic tendencies in the Ghanaian society, criminal prosecution did not take place in practice and only certain homosexual practices were prosecuted, not a 'homosexual disposition' in itself. Similarly, the case of a gay man from Kenya was dismissed by the Administrative Court of Potsdam,<sup>28</sup> with the argument that although the Kenyan Criminal Code provides for up to fourteen years' imprisonment for homosexual acts, there is no evidence that these penalties are, in fact, imposed and executed. Other court cases, involving a gay man from Albania and a bisexual woman from Morocco,<sup>29</sup> offer further examples of asylum rejections on grounds of lack of 'asylum relevance', despite the existence of criminal laws against SOGI minorities in the countries of origin.

Our fieldwork also provided examples of this practice. In the BAMF refusal letter shared by one of our participants, it was argued that the 'applicant's submission of facts does not show any refugee-relevant persecution. The Federal Office has no information that homosexuality in Lebanon leads to persecution. State prosecution of homosexuals can be ruled out' (decision regarding Ibrahim). Other participants affected by this approach are lesbian women from Jamaica, who, not being explicitly targeted by Jamaican 'buggery laws', are not seen as being at risk of persecution in Jamaica, despite being victims of discrimination and hate crime as are other SOGI minorities (Angel).

There are also glaring inconsistencies in decision-making with regard to 'asylum relevance' according to country of origin. In Germany, this appeared to particularly affect claimants from Uganda and Jamaica, where courts come to different conclusions with regard to how safe these countries are for SOGI minorities. For instance, a decision by the Administrative Court of Munich on the case of a lesbian woman from Uganda dismissed the appeal, arguing that even after tightened penalties came into force in 2014, there were no convictions for homosexual charges in Uganda and government agencies did not tolerate attacks by non-state actors against

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<sup>27</sup> 1 L 3416/13. F. A, 26 September 2013.

<sup>28</sup> 6 K 3802 / 13.A, 13 May 2014.

<sup>29</sup> Respectively, Administrative Court of Aachen, 16 October 2014, 1 K 1201/14.A, and Administrative Court of Cottbus, 7 November 2017, 5 K 1230/17.

homosexuals.<sup>30</sup> In the same year, however, the Administrative Court of Frankfurt am Main decided on the case of a lesbian woman from Uganda, determining that homosexuality is criminalised with up to 14 years imprisonment, homosexuals are indeed being persecuted and they do not receive state protection against attacks by private persons because of their sexuality.<sup>31</sup>

Inconsistencies between courts go so far as some courts considering the mere criminalisation of same-sex conduct as ‘potential persecution’ and granting refugee status in such cases provided credibility is established (Marlen, legal advisor). Some appeal judges are also more sophisticated in their analysis and understand the reasons behind a possible lack of prosecutions in countries where same-sex acts are criminalised:

the fact that Pakistan is rarely acquainted with criminal cases and homosexual convictions for consensual sexual intercourse is, in essence, due to the fact that homosexuals in Pakistan hide their sexual orientation due to legal requirements and widespread reservations among the population, and, for example, lead double lives in a forced marriage. Homosexuality is tolerated in Pakistan for as long as sexual orientation remains secret or invisible (Court observation, Hesse, 2018).

Similarly, in the UK, criminalisation of same-sex acts in itself is not sufficient to find there is a risk of persecution, if the law is not enforced. This was confirmed as long ago as 2003.<sup>32</sup> This is reflected in Home Office guidance, for example, the 2017 Country Policy and Information Note on Kenya, which states: ‘Sources suggest that the law on “unnatural offences” is rarely applied and there have only been two recent reported cases of its use, one of which was dismissed and the other still ongoing at the time of publication’ (Home Office 2017, para. 2.3.5). This policy is also evident in the case law. For example, in a case regarding Sri Lanka, the Court found that ‘the treatment of gay men in Sri Lanka does not reach the standard of persecution or serious harm’, despite the criminalisation of same-sex acts.<sup>33</sup> In such cases, the claim is often refused on the grounds that the individual could safely relocate to a different part of the country of origin (Sect. 7.3.3).

As argued by UK lawyers, not accepting criminalisation of same-sex acts as persecution in itself fails to recognise that ‘persecution does not begin and end with prosecutions’ and that criminalisation of homosexuality, even without enforcement, is likely to be accompanied by a climate of homophobia and impunity for attacks on SOGI minorities (Briddock 2016, p. 147). For example, the articles in the Sri Lankan Penal Code relating to ‘unnatural offences’ and ‘gross indecency’ are unenforced, yet SOGI minorities are the target of extortion and violence, would not be able to rely on police protection, and ‘one-third of the LBT interviewees [in an IGLHRC study] reported that they attempted suicide’ (IGLHRC 2014, p. 32). The

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<sup>30</sup> M 25 K 13.31348, 19 November 2014.

<sup>31</sup> 8 K 4089 / 14.F, 10 December 2014. See, also, Administrative Court of Regensburg, RN 1 K 17.32818, 4 September 2017.

<sup>32</sup> *Queen on the application of Dawkins v IAT* [2003] EWHC373 Admin, para. 49.

<sup>33</sup> *Sri Lanka CG* [2015] UKUT 00073 (IAC).

requirement for homophobic and transphobic law to not only exist but also be enforced effectively creates an unjustifiable two-tier system in relation to SOGI claimants, distinguishing those from countries where the law is enforced (for example, Pakistan and Cameroon) from those who come from countries where the law is not always or clearly enforced (for example, Sri Lanka and Kenya). Such distinctions have also been challenged by lawyers in court, with claimants pointing out that it may be true that criminalisation in itself does not establish fear of persecution, but that it *goes* to establishing fear of persecution (Upper Tier Tribunal observation, London, 2018).

The Italian asylum system stands as an exception amongst the three countries under comparison and most others across Europe, as it considers criminalisation of same-sex acts persecution in itself. In 2007, the Supreme Court ruled that the criminalisation of same-sex acts did not amount to persecution, as such acts were an (avoidable) expression of homosexuality, so such criminal law rules did not target an identity as such.<sup>34</sup> Yet, following criticism by scholars (Gasparini et al. 2011; Winkler 2011) and resistance in the lower courts,<sup>35</sup> in 2012 the Supreme Court affirmed that the simple circumstance of maintaining criminal sanctions of this kind hampers the individual ‘fundamental right to live freely their sexual and emotional life’.<sup>36</sup> This makes it unnecessary to verify whether these sanctions are applied or not. It is recognised that such criminal norms constitute a serious interference with one’s private life, and therefore place people in ‘an objective situation of persecution’. This decision has been followed by Italian judicial and administrative decision-makers ever since, thus making Italy stand out in the field of SOGI asylum. Italian decision-makers, therefore, generally see criminalisation of same-sex acts as ‘obvious indication’ of persecution (Maurizio, judge). One decision-maker described this approach as follows:

This is based on information on the countries of origin and, when the information on the countries of origin says that in that country the legislation is of a certain type, or public opinion is oriented towards a certain direction, protection is granted automatically (Daniele, decision-maker).

Decisions on SOGI claims in Italy also tend to grant international protection to claimants coming from countries where there may not be criminalisation of same-sex acts but there is social oppression against SOGI minorities, such as Russia (Cristina, UNHCR officer; Livio, lawyer).

We now consider the concept of ‘discretion’ where, as with criminalisation, there is little consistency in the countries under comparison.

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<sup>34</sup> Supreme Court, judgment no. 16417, 25 July 2007, confirmed by the same Court in judgments no. 2907, 23 November 2007, and no. 41368, 14 October 2009.

<sup>35</sup> For example, Tribunal of Turin, decision no. 426, 5 November 2010, reported in *Diritto, Immigrazione, Cittadinanza*, 2011, p. 141.

<sup>36</sup> Supreme Court, decision no. 15981, 20 September 2012, reiterated subsequently, for example, in Supreme Court, decision no. 267, 9 January 2020.

### 7.3.2 *The ‘Discretion Argument’*

The so-called ‘discretion argument’ or ‘discretion requirement’ – the idea that a SOGI claimant may be sent back to the country of origin and be ‘discreet’ about or ‘conceal’ their SOGI to avoid persecution (Dustin 2018) – has been central to the history of SOGI asylum in several countries. Although the concept was rejected by the CJEU’s decision in *X, Y and Z* and has been slowly set aside across Europe and beyond (Dustin and Ferreira 2017), more subtle forms of this ‘discretion argument’ (or, more accurately, concealment) persist and are not necessarily held to be incompatible with the CJEU’s ruling (ECRE 2017).

In the UK context, findings of credible risk of persecution have for long been tainted by this argument. In the period between 1999 and 2010, having been recognised as members of a PSG, SOGI asylum claimants were likely to be refused not only on grounds of credibility, but also (or in the first instance) because they could return to their country of origin and live ‘discreetly’. This was known as the ‘reasonably tolerable’ requirement, according to which the question to be asked was whether the individual ‘had adapted and would again adapt his behaviour so as to avoid persecution in circumstances wherein it amounted to his preferred way of dealing with the problem and a way which was reasonably tolerable to him’.<sup>37</sup> This thinking led to absurdities such as the 2005 case of an Algerian man, where the Secretary of State argued that ‘because in Algeria there are no gay rights, there are no opportunities for displaying homosexuality with those who are of a similar mind, and it will be impossible for him not to be discreet’.<sup>38</sup> Painfully circular thinking such as this was also found acceptable amongst UK judiciary:

It is the respondent’s [Home Office] position that self-restraint due to fear will be persecution only if it is such that a homosexual person cannot reasonably be expected to tolerate such self-restraint. Where a person does in fact live discreetly to avoid coming to the attention of the authorities he is reasonably tolerating the position.<sup>39</sup>

In 2010, a pivotal moment took place: a Supreme Court ruling rejected the ‘reasonable tolerable’ thinking and blatant forms of the ‘discretion requirement’ were held unlawful.<sup>40</sup> In the case of *HJ (Iran)*, sexual identity was accepted as being ‘a fundamental characteristic and an integral part of human freedom’, and for the first time it was recognised that ‘to require an applicant to engage in self-denial was to require him to live in a state of self-induced oppression’.<sup>41</sup> The Court, however, also found that if claimants ‘chose’ to conceal their sexuality for other reasons (social mores, etc.), they would not be eligible for asylum. Discretion thinking was thus

<sup>37</sup> *J v Secretary of State for the Home Department* [2006] EWCA Civ 1238; para. 13.

<sup>38</sup> *B v. Secretary of State for the Home Department* [2007] EWHC 2528, para. 20 (the case was remitted for redetermination).

<sup>39</sup> *HJ v. Secretary of State for the Home Department* [2008] UKAIT 00044, para. 10.

<sup>40</sup> *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31.

<sup>41</sup> *Ibid.*, paras. 32 and 33.

reformulated in a new, cumbersome test.<sup>42</sup> This tortuous test has been widely criticised as unreasonable, discriminatory and unworkable by both scholars and the UK Equality and Human Rights Commission, and runs against UNHCR guidance (Dustin 2018; Held 2016; Khan 2016, p. 133; UNHCR 2002a, b, p. 32).<sup>43</sup> As the Equality and Human Rights Commission, intervening in the case, pointed out:

Such cases [where someone can safely be returned to live “discreetly”] will be extremely rarely (if ever) encountered in the asylum system since where a claim is made on grounds of sexual orientation that will in itself require a person to “out” him or herself, at least to a limited extent and in any event a person who voluntarily wants to conceal their same-sex sexual orientation in circumstances where there was no real likelihood of it being otherwise exposed is self-evidently unlikely to claim asylum on grounds of sexual orientation.<sup>44</sup>

In asking decision-makers to assess the reason why an individual would behave ‘discreetly’, the test creates an additional hurdle for sexual orientation asylum claimants and discriminates against them relative to other people claiming asylum, none of whom are required to provide a motive for the behaviour that results in persecution (Khan 2016, p. 133). Nonetheless, such ‘discretion reasoning’ has been replicated in most Home Office country guidance (Chap. 6, Sect. 6.5) and enshrined in the Asylum Policy Instruction on ‘Sexual orientation in asylum claims’ updated in 2016 (Home Office 2010, 2016).

Several UK lawyers and advocates remained convinced that *HJ (Iran)* needed to be challenged, on the basis that it has been misinterpreted, applied too broadly (UKLGIG 2018), and had been intended to be used only in exceptional circumstances (Allan, lawyer). Indeed, as explored in Chap. 5, SOGI claimants often escape their home countries after having gone to great lengths to hide their sexuality but having been unsuccessful in those efforts, thus rendering ‘discretion’ a mostly theoretical debate. As Beth, a lawyer, summarises:

*HJ* urgently needs to be revisited... if a person is LGBT in a country which persecutes those who are, then there should be no further need to explore the way in which that person would live or express themselves. There are so many fundamental flaws in the approach inquiring into how the individual will live not least that we as humans are constantly changing in our nature and behaviour. (...) the person may come to others’ attention for a whole host of other reasons, even if living discreetly and privately. There is also an inherent unfairness in denying an individual protection on the basis they live privately. (...) This effectively creates a qualified protection – depending on how you live, protection is conditional – that fundamentally undermines the purpose of the Convention.

A setback for those arguing against any use of the concept of ‘discretion’ was the disappointing Court of Appeal in England and Wales judgment in *LC (Albania)*,<sup>45</sup> where the claimant argued that, to be consistent with EU law, only the first two

<sup>42</sup>Ibid, para. 82. See, also, Wessels (2012).

<sup>43</sup>*HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, para. 60, 37.

<sup>44</sup>Ibid, para. 37 and 60.

<sup>45</sup>*LC (Albania) v The Secretary of State for the Home Department & Anor* [2017] EWCA Civ 351; [2017] WLR(D) 318.



questions from the 2010 test should apply: ‘1) Is the applicant gay or likely to be perceived as gay’, and ‘2) If so, are openly gay individuals persecuted in the individual’s country of origin?’ This was rejected and Justice Hinkinbottom stated that the legal analysis in the 2010 case was fully in line with EU law, and that the Supreme Court distinction between concealment for fear of persecution and concealment for other reasons is ‘principled and clearly right’. The judge emphasised the clear distinction between concealment ‘in response to social pressures or for cultural or religious reasons of his own choosing’, stating that the distinction must be right because such social pressures exist everywhere, including the UK. The implication was that it is important to clearly distinguish persecution in ‘refugee-producing countries’ from discrimination in ‘refugee-receiving countries’, such as the UK.

It is also widely believed that, in an attempt to continue curbing recognition of SOGI claims, UK asylum adjudicators have simply shifted their focus from ‘discretion’ or internal relocation to credibility, tending to deny claimants’ SOGI self-identification (Ashley, psychotherapist; Amelia, NGO worker; Joseph, NGO volunteer). Indeed, the risk is that the post-2010 version of ‘discretion reasoning’ translates into a preoccupation on the part of caseworkers with how open individuals are about their sexuality and whether they are ‘out’:

The judges seem to be clear that there is a distinction between has somebody been living openly here, if they have been living openly here, then that is their life now and they could not go back and live the life that they have as an open, out, particularly when someone is a couple, person. So if somebody can show that they have been out, they have been part of the LGBT community going to Prides or they have a partner or their friends know, then often that carries a lot of weight in terms of the judge saying, “well you couldn’t go back, you shouldn’t be expected to have to go back into secrecy” (Debbie, NGO volunteer).

Our participants had experienced that first hand:

they also want to know, if you are granted refugee status in the UK, that you are going to be an out gay man, you are not going to go back in the closet. So you need to provide them with, let’s say, pictures and stuff that you have been out in London since you came. Which also doesn’t make sense, because if you are not working and you don’t have a place to sleep, the last thing you are going to think about is going out clubbing. And that was also something I found really strange (Selim).

Individuals who are not ‘out’ in the UK, perhaps because they want to retain the support of members of the diaspora community, may be refused on the basis that they are ‘discreet’ in the UK and would therefore be ‘discreet’ if returned to their country of origin (Khan 2016, p. 134). This is in clear tension with the human rights, feminist and queer theoretical and analytical underpinnings adopted in our analysis, to the extent that this scrutiny of how ‘open’ a claimant is about their sexuality relies on stereotyped, oppressive and culturally biased visions of how a ‘genuine’ member of a SOGI minority should act when living in the West.

During our fieldwork, we encountered evidence of the Home Office using the ‘discretion requirement’, stating, for example, that ‘one can be anonymous in Nairobi’ (Upper Tier Tribunal observation, London, 2018). Even claimants who are clearly ‘out’ have been expected by some judges to change their conduct and behave

more ‘discreetly’, so that they can safely be deported, for example, by suggesting that it would be possible for a lesbian claimant to act in a ‘less mannish’ way (quote from First Tier tribunal decision, London 2018; this was part of the basis for the decision being overturned on appeal to the Upper Tier Tribunal, observation, London 2018). Indeed, a number of the judicial observations we carried out in the UK were dominated by discussions about whether or not the claimant would live ‘discreetly’ upon return and, if so, for what reason. A variation on ‘discretion reasoning’ is also reflected in the way decision-makers sometimes question the risks claimants have taken in their countries of origin before fleeing (Nath, lawyer). Perniciously, claimants are thrown into ‘no-win’ situations: ‘Then there is a whole catch 22 of, if they are saying you should have been “discreet”, but if you had been, then you could carry on being so you could go back and carry on being [“discreet”]’ (Nath, lawyer). Decisions – including at a judicial level – even go beyond the test set out in *HJ (Iran)* and blatantly return to full-blown ‘discretion reasoning’: ‘Yes, they are saying “oh, no, you could live a secret life, you could suppress who you are, and go back to living how you were before”’ (Christina). Lesbian and bisexual claimants seem to be particularly affected by ‘discretion reasoning’ under *HJ (Iran)*: ‘Lesbians and bisexual women are more likely to be told that they will be “discreet” for reasons supposedly not related to a [form] of persecution, such as a desire for family approval’ (S4, lawyer). Jules, staff member at ILGA-Europe, shared this concern:

if you have a person who identifies as bisexual, then you will have responses along the lines of “oh well, but if you like both the opposite sex and the same sex, you can go back home and just be with someone of the opposite sex, that simple.”

To worsen this state-of-affairs, it has become apparent that this UK judgment has influenced other European decision-makers, both at domestic and international level (Amanda, NGO worker, Brussels; ECRE 2017). This seems to be the case, for example, in the Netherlands (Jansen 2019, p. 151) and with the European Court of Human Rights, as in *M.E. v Sweden*.<sup>46</sup> This may be interpreted as the decision in *HJ (Iran)* having a negative influence across Europe, and emboldening decision-makers in their desire to retain at least some forms of the ‘discretion requirement’.

That might well be the case in Germany. Even before the judgment in *HJ (Iran)*, German decision-makers made use of the ‘discretion requirement’. For instance, the Administrative Court of Düsseldorf, in a case relating to a gay man from Morocco, dismissed the appeal and suggested that ‘discretion’, combined with relocation, would protect the claimant from persecution.<sup>47</sup> The Administrative Court of Trier also dismissed the claim of a gay man from Algeria, arguing that the criminalisation of homosexual acts in Algeria was not the basis for refugee protection, because it was not about ‘predisposition’, but about certain sexual practices being punishable if they became public.<sup>48</sup> The Court argued that it was reasonable to expect the

<sup>46</sup> *M.E. v Sweden*, Application no. 71398/12, 8 April 2015, in particular para. 36.

<sup>47</sup> 11 K 6778/09, 14 January 2010.

<sup>48</sup> 1 L 928/10.TR, 9 September 2010.

claimant to be ‘discreet’ about his ‘disposition’ in a large city in Algeria.<sup>49</sup> Although there has been some judicial dissidence, with several courts disagreeing with ‘discretion reasoning’ and arguing that it is unacceptable to ask a claimant to keep their sexuality secret,<sup>50</sup> that has not been the approach taken by the majority.

In 2010 the government formulated the ‘discretion requirement’ more carefully, arguing that the decision depends on the claimants’ expected future behaviour, but not on the reasonableness of alternative behaviour (Hempel 2014, pp. 56–75). Following higher courts’ case law, and perhaps feeling supported by the judgment in *HJ (Iran)*, the BAMF laid out that the decision on the potential risk of persecution of sexual minorities depended on the individual’s ‘sexual disposition’, in other words, whether this ‘disposition’ was so strong that it would be likely that the authorities would find out about such a ‘disposition’. The cornerstone element here was thus the prognosis of future conduct. If the claimant had already suffered persecution, constitutional asylum or refugee status should be granted; if the claimant had not yet been persecuted, the decision on whether to grant them refugee status should depend on what sexual behaviour was to be expected from them if returned (Kalkmann 2010, p. 7). In December 2012, in anticipation of the CJEU judgment in *X, Y and Z*, the BAMF finally confirmed that it had changed its decision-making and had abolished ‘discretion reasoning’ (BAMF 2012; Hempel 2014, pp. 56–75).

Nonetheless, in 2017, the BAMF again recognised that although SOGI claimants cannot be expected to avoid risky behaviour in order to evade persecution, if a claimant would be likely to choose to live their sexuality ‘discreetly’ on a voluntary basis, then ‘it can be assumed that he or she will accept this lifestyle for themselves. Under these conditions, refugee protection can exceptionally not be established’ (BAMF 2017, p. 292). The BAMF instructions also clarify that if claimants voluntarily and without impairment to their personal identity lead a life that makes it unlikely that their SOGI would become publicly known, even after their return, then a decision that the persecution threshold has not been met is reasonable. Appeal judges also ask questions about whether the claimant is visibly ‘out’ in Germany as the indicator of whether they would behave in the same way in their country of origin and could therefore safely be returned (Court observation, Hesse, 2018, 2019). All this is akin to ‘discretion reasoning’, in the same vein as *HJ (Iran)*.

Our participants confirmed that they still see ‘discretion reasoning’ in asylum decisions (Barbara, lawyer, Germany; Marlen, legal advisor, Germany; Sofia and Emma, NGO workers), which was also confirmed by claimants themselves

<sup>49</sup>Other examples can be found in Administrative Court of Düsseldorf, 11 K 6778/09, 14 January 2010; Administrative Court of Düsseldorf, 11 K 1003/09.A, 27 August 2009; Administrative Court of Düsseldorf, 5 K 1875/08.A, 11 March 2009; Administrative Court of Regensburg, RN 8 K 08.30020, 15 September 2008; Administrative Court of Düsseldorf, 11 K 2432/07.A, 21 February 2008; Administrative Court of Bremen, 7 K 632/05.A, 28 April 2006; and Administrative Court of Aachen, 5 K 2455/05.A, 26 February 2007.

<sup>50</sup>See, for instance, Administrative Court of Frankfurt/Oder, 4 K 772/10.A, 11 November 2010; Administrative Court of Chemnitz, A 2 K 304/06, 11 July 2008; Administrative Court of Neustadt/Weinstraße, 3 K 753/07.NW, 8 September 2008; Administrative Court of Munich, M 21 K 04.51404, 30 January 2007.

(Zouhair). This is seen as sending claimants ‘back to the closet’: ‘In practical terms it means “The claimant has not lived openly as gay, so there is nothing against him continuing to live like that”’ (Thomas, NGO volunteer). This is clearly used in BAMF decisions, particularly affecting claimants who had not ‘come out’ in their home countries (decision regarding participant DE34 in Held et al. 2018) and who were also not ‘out’ in Germany or did not have an active sexual life. Yet research shows that, for SOGI claimants, ‘coming out’ processes in host countries may take many years (Shidlo and Ahola 2013, pp. 9–10). As one of our participants pointed out, this is both a reductive and racist treatment of SOGI claimants:

And there is still a bit the expectation of “discretion”, so if it was like that until the 20th, 25th year of age, then it has to go on. That’s an argument that is in several letters of refusal [of asylum]: “If the person somehow managed to carry on with their lives like that, then it is not so difficult.” (...) Be quiet and it will be fine. This suggests that homosexuality implies something you just do not have to live with, in the worst case scenario, or it is enough to live it out in silence. That means that [SOGI claimants] will not have the same claim to human dignity and human rights and freedom that you have in Germany, and if you question that, if you are shocked by it, then you do not have [those rights]. That’s a very racist outlook, because then if you’re Arab, Persian, Afghan or whatever, or Colombian, then you cannot have the same claim [to those rights] (Kadir, NGO worker).

In Italy, in contrast, there is no evidence of ‘discretion reasoning’ being used in SOGI asylum adjudication. Italian decision-makers do not attach any importance to the question (Roberto, decision-maker; Daniele, decision-maker; Cristina, UNHCR officer). According to all available data, including the extensive body of case law on SOGI asylum, no SOGI asylum claims in Italy have been refused on the grounds of ‘discretion’. This might be an indirect consequence of the stronger influence of the UNHCR in asylum adjudication in Italy, along with extensive use of the UNHCR 2012 SOGI guidelines (UNHCR 2012; Chaps. 4 and 6) and a human rights approach to asylum (Chap. 3).

Indeed, all forms of ‘discretion reasoning’ are rejected by the UNHCR in its SOGI guidelines:

The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences. It is important to note that even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetime. The risk of discovery may also not necessarily be confined to their own conduct. There is almost always the possibility of discovery against the person’s will, for example, by accident, rumours or growing suspicion (UNHCR 2012, para. 32).

We are far from seeing this guidance observed by asylum authorities across Europe. In fact, ‘discretion reasoning’ affects not only sexual orientation, but also gender identity-based asylum claims:

we have heard of cases where trans people who are physically “passing” are told “well, you can go back now because you pass and so even if it is not safe for trans people, you don’t look like a trans person, and so you can go back.” (...) these issues disregard the fact that, ok, maybe you are passing, but that still exposes you to a higher number of risks, you could be blackmailed, you could be exposed, what is considered safe for LGBTI people is not always really safe (Jules, staff member at ILGA-Europe).

Inappropriate consideration of the ‘internal relocation alternative’ makes the overall picture worse.

### 7.3.3 *The ‘Internal Relocation Alternative’*

The ‘internal relocation alternative’ refers to the possibility of asylum claimants being returned to their country of origin and moving to a different part of it where they may be able to avoid the risk of persecution. This is allowed under Article 8 of the Qualification Directive, and generally included in domestic legislation. Nonetheless, it is generally not recommended by the UNHCR in SOGI cases (UNHCR 2012, para. 51 ff). This guidance, as we will see, is largely disregarded, and once again, the differences across the asylum systems in the countries under comparison are striking.

German asylum instructions refer to ‘internal relocation’ of SOGI claimants in the context of claimants who have not suffered persecution previously, and establish that it is only reasonable to expect these claimants to relocate if, should their sexual orientation or gender identity be discovered, they would not need to relocate again (BAMF 2017, sec. 7.5.1). Nonetheless, when information on persecution is lacking, there is an assumption of a certain tolerance towards SOGI minorities in certain parts of the country of origin, and that internal relocation is therefore possible (Thomas, NGO volunteer; Sofia and Emma, NGO workers; Barbara, lawyer; decision regarding participant DE34 in Held et al. 2018). Yet, even if a country is large and still retains some degree of rule of law, internal relocation may not be an option. Russia is a good illustration of this:

We lived in the city, in St Petersburg, it does not work, there are problems, then we move to a village, try to live there, and many times we try to move, yes, and again same problems, and lawyer says “the reason for judge can maybe also be that Russia is a huge country and it is possible to find a safe place, somewhere, maybe in the woods” (laughs), I do not know (Veronica).

Decision-makers, however, still proceed on the basis that internal relocation is viable in Russia (decisions regarding participants D16 and D33 in Held et al. 2018), where anti-gay propaganda laws have promoted a highly homophobic environment across the country (Ramón Mendos 2019). Smaller countries may also be mistakenly believed to be safe in some parts:

In the decision they say I should move to northern Jamaica. Now, if you go on Google, northern Jamaica is the murder capital of Jamaica. Most murders per year, for straight people. So how would it be for a gay person, a lesbian person? If straight people aren’t safe there, how am I gonna be safe there? (Angel).

Besides Jamaica and Russia, we saw internal relocation used by German decision-makers in relation to countries including Turkey, Pakistan and Uganda, with insufficient consideration of the social, economic, cultural, linguistic and personal reasons that may preclude internal relocation from being a realistic solution (Louis,

NGO volunteer; Elias, lawyer; Barbara, lawyer; Oscar, judge; focus group no. 1, Hesse; focus group no. 2, Bavaria). Internal relocation has thus become known as the latest ‘trick’ to deny international protection (Gisela, lawyer).

Participants also pointed out that there is an inconsistent overlap between the areas judged to be safe for internal relocation for asylum claimants, and the areas that countries’ own nationals are advised *not* to visit by their own governments, for example, in Jamaica (focus group no. 1, Hesse).

The lack of consistency between different courts in this respect is noticeable (Oscar, judge). For example, in the case of a gay man from Jamaica, the Administrative Court of Giessen decided that although there was no risk of state persecution, there was a risk of persecution by private actors and therefore there was no internal relocation alternative to tourist areas in the north of the country, as the BAMF had argued.<sup>51</sup> Nonetheless, in the same year, the Administrative Court of Kassel suggested that another gay claimant could internally relocate (to tourist areas in the north) to avoid persecution.<sup>52</sup>

As in Germany, in the UK, internal relocation is a common ground for refusing SOGI claims,<sup>53</sup> often in connection with the idea that claimants would choose to live ‘discreetly’. Home Office guidance identifies countries where relocation is an option for SOGI minorities (Home Office 2016, p. 36). Albania, for example, is on the ‘safe countries’ list (Chap. 6, Sect. 6.7) and Home Office guidance states that ‘[w]here a person has a well-founded fear of persecution from a non-state actor – including ‘rogue’ state agents – internal relocation is likely to be an option to escape such risk’, also referring to the existence of human rights group that ‘operate without government restriction’ and active ‘LGBTI specific NGOs’ (Home Office 2019). Yet, as the International Commission of Jurists points out, ‘[t]his approach is legally unsustainable. The responsibility to provide effective protection and ensure access to rights without discrimination rests on the relevant State and not on NGOs or *ad hoc* group of individuals who may themselves be under threat’ (ICJ 2016, pp. 245–246).

Our participants also experienced or had been told of claimants being denied international protection on grounds of – according to decision-makers – being able to relocate internally within their country of origin, such as Cameroon and Zimbabwe (Irma; Sean, lawyer). On a more positive note, and indicating some recognition of the intersections of gender and sexuality (Chap. 3), the Home Office guidance acknowledges that relocation is also likely to be more difficult for lesbians and women in general (Home Office 2016, p. 36).

Once again Italian asylum adjudicators stand out among European states in not considering internal relocation as an alternative form of protection in the country of

<sup>51</sup> 2 K 4928 17.GI.A, 2 March 2018. Similarly, Court observation, Hesse, 2019.

<sup>52</sup> 1 K 6981/17.KS.A, 6 June 2018.

<sup>53</sup> See, for example, *The Secretary of State for the Home Department and SMR* [2018] UKAITUR PA059122017; *BF (Tirana – gay men) Albania* [2019] UKUT 0093 (IAC).

origin as the basis for denying recognition of refugee status.<sup>54</sup> This is the direct result of the Italian legislature's earlier choice not to transpose Article 8 of the Qualification Directive. Consequently, Italian authorities have not denied international protection on the basis that in some parts of the country of origin, such as larger cities, SOGI asylum claimants may live safely (Titti, decision-maker).

Although the 2018 reform introduced the potential for using internal relocation as an alternative to protection in Italy,<sup>55</sup> there are as yet no public records of this happening, including in SOGI cases. However, even before this reform, some decision-makers were considering the existence of supposedly safer areas in the country of origin as a relevant factor for the purposes of deciding what kind of protection to grant – refugee status, subsidiary protection or humanitarian protection (Maurizio, judge) – a legally dubious approach made worse by the low quality of COI (Chap. 6, Sect. 6.5).

Differences between the countries under comparison are again patent, highlighting the scope for variation despite EU harmonisation efforts. This is also evident in relation to evidentiary matters.

## 7.4 Proving Claims Based on SOGI

Both membership of a PSG and well-founded fear of persecution need to be considered as 'proven' by asylum decision-makers. 'To what extent' (Sect. 7.4.1), 'by whom' (Sect. 7.4.1) and 'through what means' (Sect. 7.4.2) are key questions here. Adjudicators also need to be convinced of the overall 'credibility' of the claim (Sect. 7.5). Although these questions are connected, in this section we separate them for analytical reasons and explore them in the context of SOGI asylum.

### 7.4.1 *Standard and Burden of Proof*

The first question we consider is 'to what extent' SOGI asylum claims need to be proven. In other words: What is the standard of proof? The UNHCR offers some guidance in this respect, stating, in relation to persecution, that:

In general, the applicant's fear should be considered well-founded if he can establish, to reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there (UNHCR 2011, para. 42).

<sup>54</sup>Supreme Court, decision no. 2294, 16 February 2012 (in relation to an asylum claim based on religious belief) and judgment no. 15781, 10 July 2014.

<sup>55</sup>Article 32(1)(b-ter) of the Procedure Decree, inserted by Decree Law no. 113/2018 (converted into Law no. 132, 1 December 2018), so-called 'Decreto Salvini'.



The standard of proof is therefore ‘reasonable degree’, also applied in the European context (EASO 2018). This is acknowledged in all three countries under comparison. In Italy, for example, we were told that the ‘UNHCR manual [Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status] speaks of a reasonable level of probability, even just a 5% chance of a person being killed [means that they] must be protected’ (Roberto, decision-maker). In the UK, there is also – theoretically – a low standard of proof for SOGI asylum claims, as for other asylum claimants:

The level of proof needed to establish the material facts is a relatively low one – a reasonable degree of likelihood – and must be borne in mind throughout the process. It is low because of what is potentially at stake – the individual’s life or liberty – and because asylum seekers are unlikely to be able to compile and carry dossiers of evidence out of the country of persecution. “Reasonable degree of likelihood” is a long way below the criminal standard of “beyond reasonable doubt”, and it is less than the civil standard of “the balance of probabilities” (i.e. “more likely than not”). Other terms may be used: “a reasonable likelihood” or, “a real possibility”, or “real risk”; they all mean the same (Home Office 2015, p. 11).

In practice, decision-makers often apply a higher standard of proof, whether consciously or unconsciously:

All those things combined mean that the Home Office and judges are forgetting the reasonable likelihood. Everything has to be proven to the Nth degree. It is not just a question of considering things. There are lots of plausibility issues. “This wouldn’t have happened and you wouldn’t have done this.” The law on asylum more generally is pretty clear that you shouldn’t really be using plausibility from your own perspective, whoever the decision-maker is. Just because something might seem implausible to you or I doesn’t mean it didn’t happen. I think SOGI claims are not unique with that, but they are more susceptible to that (Allan, lawyer, UK).

Even Home Office presenting officers recognise this issue: ‘Judges often use – I don’t know if this is because they are on autopilot – they refer to balance of probabilities, when obviously they mean low risk’ (Bilal).

We also found an acute neglect of the principle of the benefit of the doubt, a central tenet of IRL. On this principle, the UNHCR Handbook states that:

203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. (...) it is hardly possible for a refugee to “prove” every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt (UNHCR 2011).

Instead of systematically applying the principle of the benefit of the doubt, decision-makers seem to be vulnerable to ‘case-hardening’ and vicarious trauma, a concern identified in relation to SOGI claims (Gray and McDowall 2013, p. 25), and also to women claiming asylum on the basis of sexual violence (Baillot et al. 2012). The intersection of a number of factors may contribute to this, including: a culture of disbelief (Sect. 7.5); a ‘hostile climate’ to all migrants (Chap. 4); the pressure that all public bodies are under to deliver more with less resources; and the self-protection and defensive coping mechanisms that caseworkers and judges develop to enable

them to do their work. All these factors may make it harder, on an individual level, for decision-makers to connect with claimants emotionally and really *hear* their accounts of persecution on a daily basis.

Although some decision-makers made an explicit reference to the principle of the benefit of the doubt (Titti, decision-maker, Italy), at lower levels of the decision-making process we found that this principle is often disregarded, confirming a historical trend (Millbank 2009b, p. 6). As we explore in detail in Sect. 7.5, caseworkers are too often still applying the inquisitorial approach of a criminal court, where truthfulness is equated with consistency in the detail of the defendant's narrative. In asylum claims, decision-makers tend to ignore factors such as the effect that trauma and the passage of time can have on memory of painful events (Cohen 2002; Herlihy and Turner 2007, 2009; Millbank 2009b, p. 12; Shidlo and Ahola 2013). In addition, cultural differences may make it harder to provide the details required for a coherent account according to European standards, such as dates of birthdays, anniversaries and first meetings, details which may have less significance from one country and culture to another.

Yet, at the level of policy, the principle of giving claimants the benefit of the doubt was defended:

I think we should [use more the principle of the benefit of the doubt] (...) unless you have got very, very strong sort of evidence in terms of numbers or whatever that says to you "look, this is, this is something which now is being used as sort of, I don't know, evidence of abuse [of the system]" (...) if somebody has actually been willing to leave their country of origin, particularly if they have, they are somebody who has actually made one of the long and more tortuous journeys and has been willing to put themselves through that (...) there is no really strong reason to disbelieve it, you know, you are not being told something which just seems so incredible, or which doesn't add up (...) then I think that that balance of credibility side of it should be coming in (Jean, member of the European Parliament).

Some decision-makers also endorsed a more systematic use of the principle of the benefit of the doubt:

when the claimant's personal story is considered coherent, plausible and sufficiently detailed with reference to what he declares about his [sexual] orientation and also about the country from which he came, then normally credibility is accepted and if there is a doubt, the benefit of the doubt is conceded. So, let's say, in doubt or in difficulty of establishing credibility, there is a tendency to favour the claimant. (...) protection must be recognised, even with the risk of making mistakes, granting the benefit of the doubt (Daniele, decision-maker, Italy).

The benefit of the doubt principle should be applied where there are minor 'inconsistencies' in claimants' testimonies (Silvana, judge, Italy), when assessing whether the required standard of proof has been reached. The claimant's testimony should be accepted as the 'default truth' – or believed in principle – unless there is evidence to the contrary.

A second question one needs to address in relation to 'proving' SOGI asylum claims is who should provide proof; in other words, who has the burden of producing the evidence needed to make the claimant's case. In this regard, the UNHCR Guidelines establish that:

while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application (UNHCR 2011, para. 196).

However, because of the tendency on the part of some decision-makers to view SOGI claims with suspicion, they may (wrongly) transfer the full burden of proof to the claimant (Helena, EASO staff member).

In Germany, asylum claimants have a legal duty to cooperate in the asylum procedure. This includes giving a ‘coherent’ and ‘complete’ account of the ‘events falling into his own sphere, in particular his personal experiences’.<sup>56</sup> Similarly, in the UK, it is the duty of the claimant to submit all material factors and the account should be ‘internally consistent and coherent’ (Home Office 2015). Italian asylum authorities, however, adopt a more balanced approach, with the Supreme Court recognising that the burden of proof must be shared between the claimant and relevant authorities.<sup>57</sup> Decision-makers are, therefore, called upon to collect all relevant proof aimed to ascertain claimants’ testimonies (including their SOGI) and to verify the legislation on SOGI minorities in force in their home countries.<sup>58</sup> As affirmed by the Supreme Court, judges may not dismiss an asylum request solely for reasons of credibility, particularly so where decision-makers did not share the burden of proof with the claimant and play an active role in acquiring the necessary information to confirm the account of the claimant.<sup>59</sup> This does not mean that decision-makers need to support claimants’ efforts to prove their SOGI. The Supreme Court stated in a subsequent case that the judge should collaborate in collecting information when the situation of SOGI minorities in the country of origin is not fully clear, but that the judge cannot be asked to take a proactive role in verifying the claimant’s SOGI (where verification is seen to be required).<sup>60</sup> This approach should result in better treatment for SOGI claimants in Italy than in the other countries under comparison, but decision-makers have been critical of actual practice in Italy:

there is a reversal of the burden of proof... as if we started from the assumption that it [the testimony] is not true, of no credibility and we ask the asylum claimant to prove their homosexuality. The approach is then permeated, in my opinion, by a fairly veiled homophobic attitude (Maria Grazia, decision-maker).

However, there have been suggestions for using the reversal of the burden of proof in asylum law in a more benign way, as is the case in discrimination law (Network of Legal Experts in the Non-Discrimination Field 2015). One of our participants argued that we should reverse the burden of proof and demonstrating lack of credibility should be the responsibility of the authorities (Philippe, European

<sup>56</sup> Federal Administrative Court, 26 October 1989, 9 B 405.89.

<sup>57</sup> Supreme Court, judgment no. 27310, 17 November 2008; decision no. 9946, 19 April 2017; decision no. 267, 9 January 2020.

<sup>58</sup> See, for example, Tribunal of Venice, decision of 24 February.

<sup>59</sup> Supreme Court, decision no. 26921, 28 September 2017.

<sup>60</sup> Supreme Court, decision no. 10549, 12 January 2018.

Commission staff member). This would be a bold, but certainly interesting avenue of reform, which might re-balance the power dynamics in the asylum process.

### 7.4.2 *Types of Evidence*

Having established what standard of proof and burden of proof are in question in relation to SOGI asylum claims, we need to now consider what types of evidence can be used in this context. As the individual's SOGI is central to these asylum claims, it is to be expected that evidence regarding that aspect of the claim is a crucial part of the process. How one proves one's SOGI has been a conundrum ever since international protection regimes started to recognise SOGI minorities, one that may never be satisfactorily resolved. Allan described how, in SOGI claims, 'proof' is not always available. If people are marginalised, if they are not sociable, then '[t]hey don't really have any evidence to show that they are LGBT. I think SOGI claims are more likely to suffer from that problem than other claims' (Allan, lawyer, UK).

Let us start by considering what role SOGI self-identification plays in this process. In light of the diversity across asylum claimants in terms of cultural background, national origin, ethnic group, SOGI, etc., it would arguably be more sensible and compatible with the theoretical and analytical frameworks delineated in Chap. 3 to rely, as default, on claimants' SOGI self-identification:

in the asylum procedure, I believe, people look for templates, to create these templates and then recognise [international protection]. (...) we somehow have people not only from the countries well known through the media, but people also come from Benin and Nicaragua, from Russia, from Georgia. And if I know that cultural expressions can be so different, even identities can be so different, then I do not try to grant [international protection] to people on the basis of a few templates, but simply according to how they describe and place themselves (Mariya, NGO worker, Germany).

Some of our participants also argued for self-identification to work as the 'principle' on the basis that no-one's 'gaydar' is infallible (Frank S., legal advisor, Germany). A German judge put this idea across in quite simple, but cogent terms:

I cannot tell [if someone is really gay or lesbian]. If they tell me that, then that's it. What, how should I ask now? You cannot query love! Yes! [laughs] That's it. If someone asks me whether I love my wife, I'd say "Yes." Whether that's true, no one knows exactly (Oscar, judge).

Yet, relying on self-identification was not seen as sufficient by all our participants:

it presumes that the environment would be conducive to someone who would feel comfortable in self-identifying potentially. I guess by self-identifying it means proactively giving the information. (...) I think that would be welcome in the case where the person was totally cognisant of his or her sexual orientation and they felt no external pressure in which to divulge this information to an unknown person. (...) I just think that there is a stage beforehand in which the environment has to be... the individual has to be totally in the know about

their rights and about... which then also relies on the legal assistance, and legal information (...) I think self-identification works if the conditions are right, but [not] for people who might, may be extraordinarily hesitant to provide the information willingly (Amanda, NGO worker, Brussels).

A more balanced approach, some participants argued, is required:

I know there are schools of thought that say it [credibility assessment] should rely purely on self-identification, and that if a person says I am... gay, I am lesbian, I am trans, that it should be accepted as such. I can absolutely see the logic and the reasonings behind that, but I can also see where the opposition would come, in that this becomes open to abuse, because if people start saying that people are coming from a certain country, who identify themselves as being LGBTI, automatically get asylum, you open up essentially the door to anyone being able to claim this. And in the long run then that becomes harmful for people who genuinely need support, because you will at some point get backlash and you will at some point essentially create mistrust that basically anyone coming and claiming "this [claimant] is not telling the truth and is just an opportunist" (Jules, staff member at ILGA-Europe).

Whether or not self-identification should be the default starting point for SOGI asylum claims, in reality this is clearly not the approach generally adopted by asylum authorities. While it is recognised that self-perception and self-identification should be at the centre of analysis (Helena, EASO staff member), officials also argue that there has to be some kind of independent standard of proof, requiring additional questions; it is not enough for a claimant to say that they are gay and from a country where there is criminalisation of same-sex acts (Philippe, European Commission staff member).

In Germany, when decision-makers assess the overall credibility of a claim (Sect. 7.5), they also consider claimants' self-identification but have, in the past, also scrutinised the claimant on whether their sexuality is 'reversible', as in this case decided by the Administrative Court of Trier: 'In the present case, on the basis of the impression made at the hearing, the Chamber of Appeal came to the conclusion that the applicant's submission that he had been irreversibly homosexual since puberty was credible'.<sup>61</sup> In Italy, self-identification plays some role in the decision-making but, as already explored, decision-makers are called upon to play an active role in obtaining the necessary information to confirm the claimant's account.<sup>62</sup> Finally, in the UK, caseworkers and interviewers are instructed to ensure they establish all material facts and the interview should sensitively explore the claimant's self-identified SOGI (Home Office 2016, p. 26). The Gender Identity guidance also states that self-identification should be the starting point in the process, and that individuals may not have felt able to disclose their gender identity at the screening interview (Home Office 2011). SOGI self-identification remains, however, subject to scrutiny

<sup>61</sup> Administrative Court of Trier, 17 January 2013, 2 K 730/12.TR, p. 11.

<sup>62</sup> Supreme Court, decision no. 9946, 19 April 2017.

in all three countries under comparison, and self-identification is only the ‘starting point’, as defended by the CJEU in *A, B and C*.<sup>63</sup>

Consequently, asylum authorities generally expect evidence to substantiate not only the claimed SOGI, but also other aspects of the claim. The nature of the evidence submitted by SOGI asylum claimants has been much debated. The CJEU took the opportunity to introduce some clarity by precluding evidence that would undermine the dignity and privacy of asylum claimants (Ferreira and Venturi 2017, 2018). These include sexualised evidence or stereotyped assessments (including medical tests such as phallometric testing and explanation of sexual practices),<sup>64</sup> as well as projective personality tests.<sup>65</sup> However, the Court has not provided positive authoritative guidance on what types of evidence *are* appropriate, and accordingly, there is considerable variation between each country in this respect.

Detailed oral submissions provided by SOGI claimants in their substantive asylum interview remain the main form of evidence used as the basis of decision-making in Germany, Italy and the UK. In Germany, advisors generally warn against personal written statements, to avoid the risk that the BAMF find the claimant’s story has been carefully fabricated ahead of the interview (Marlen, legal advisor). In Italy, the focus is generally placed on the coherence and the consistency of the personal story as reported by claimants. Detailed testimonies are also the standard expectation in the UK:

They are asked things like “how did you first know that you were gay?”... and they are expected to give a detailed explanation of what their feelings were, at that time. So you can imagine somebody that is suddenly thrown into an interview, with a language barrier, with trauma, mental health problems, not knowing whether this person is going to be sympathetic and they may not be sympathetic. So there is all these barriers that make it difficult for them to say as much as they need to say, because they are expected to give a lot of detail (Debbie, NGO volunteer).

if they’ve given you more than a few lines, OK, “can you tell me more about that?” and probe to try to get as much detail out of them as possible (...). At the end of the day, if they can provide you with that detail, you can’t say them having or not having a relationship is against them, you wouldn’t, it’s not a tick box (Emily, decision-maker).

Many SOGI claimants strongly resented the need to provide detailed testimonies on intimate matters as evidence of their SOGI, pointing out the discriminatory nature of this expectation: ‘if I was straight I wouldn’t answer this question because it is feelings, it is deep down how you felt, your emotions (...) I don’t think a straight person would actually answer those questions’ (Ali, UK).

Other written evidence, such as relevant certificates and documents in possession of the claimant, should also be submitted. This is the case in Germany (Nina, legal

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<sup>63</sup>Joined Cases C-148/13 to C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, 2 December 2014, ECLI:EU:C:2014:2406.

<sup>64</sup>Ibid.

<sup>65</sup>Case C-473/16, *F. v Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, ECLI:EU:C:2018:36.

advisor), but some claimants felt that the BAMF had unreasonable expectations in relation to evidence of persecution and discrimination in the country of origin:

[One suffers attacks] And you ask me for that evidence here? Really? It is not fair. There is no way somebody could get such evidence. No way. So it is one thing I would emphasise, BAMF should look at that the evidence that it asks for people, normally it is hard to get. Or people were not in the position of getting it. You are running for your life, you're in big trauma, you're in fear and now you're taking selfie or you're recording voices? (Alphaeus).

In Italy, claimants are also expected to bring before the territorial commissions all the information and documentation at their disposal to support their claims, even if this is not an essential requirement for the recognition of refugee status. In the UK, it was found that there was an unreasonable expectation to produce documents from the country of origin. Lubwa, for example, told us: 'So if they expect me to produce documents from back home, it is like they literally don't want me to go ahead with interview anyway' (focus group no. 1, Manchester). Milton also felt strongly about this matter:

If someone claim[s] asylum, coming from Africa, or any part of the world, why did you expect such person to bring evidence? What kind of evidence am I going to bring when I am in danger? I remember the day I was coming, there is blood, I can show you my leg, blood here. So I cannot get evidence, which evidence they want me to bring, where I am in critical condition? (focus group no. 2, Glasgow).

This issue may be compounded by the costs of translation (Chap. 6, Sect. 6.6), with one participant explaining he did not submit emails in Arabic as evidence 'because we needed to pay for translation and they [legal representatives] couldn't afford it' (Selim).

The testimony of supporting witnesses is accepted in all countries under comparison, and partners can also be interviewed as witnesses. Nonetheless, decision-makers' attitude to supporting witnesses can be ambivalent. As Umar (legal advisor, UK) explained, judges will view the failure to call witnesses in a negative light, yet 'the point about that is that you call the witnesses, and the judges ignore the witnesses, because there is no direct evidence of the person being gay because of what the witnesses have said'.

Moreover, the expectations relating to some witnesses, particularly children, can be inappropriate to the point of inhumanity:

I didn't even make an effort to bring my son to court, because I didn't know that him coming or not would have an impact on my case. So, in my refusal they said "oh, you didn't bring your son to court because you didn't want him to be questioned". I didn't know. I didn't know that if I come with my son to court, I personally as a parent, I was just protecting my son because I was thinking it is a sexuality case, I don't want this kind of things to be discussed in front of my teenage son. I didn't want, like, because I have a teenage son who I conceived through rape, I didn't want such kind of things to be discussed in front of people because how that will affect my son, knowing that people just know that kind of information about him. Kind of protecting him in a way (Jayne, UK).

In line with our analysis in Chap. 6 (Sect. 7.2), evidence related to NGOs also plays an important role in SOGI asylum claims, but the probative value of NGO statements may be challenged. Participants in Germany, for example, reported that



NGOs' supporting statements are generally disregarded, as they are seen as 'partisan'; this was judged as 'absurd' and just like ignoring 'medical evidence', especially in light of the dramatic consequences that asylum decisions possess (Sofia, NGO worker). Some NGOs are also conscious that supporting statements may be used against claimants, where they contain contradictions or information that decision-makers can use against claimants (Thomas, NGO volunteer). There is a concern that the more such statements are provided, the less probative value they are accorded (Sofia and Emma, NGO workers; Court observation, Hesse 2018). Decision-makers may also express scepticism about NGO supporting statements because they do not prove anything in relation to country of origin conditions (Oscar, judge).

In Italy, NGO supporting evidence has most often consisted of confirmation of claimants' membership of LGBTIQ+ associations. Such membership has played an overly prominent role in the recognition of refugee status or some form of international protection, sometimes practically ensuring credibility (Antonella, LGBTIQ+ group volunteer; Titti, decision-maker; Celeste, social worker; Tribunal observation, northern Italy, 2018). For example, in one case involving a gay man from Nigeria, membership of a local gay association was deemed essential to confirm his sexual orientation.<sup>66</sup> The need for such 'associative evidence' is such that some associations have been approached by claimants who have been told by judges that they needed to obtain evidence of involvement with LGBTIQ+ associations, regardless of the claimant's individual interests, past experience or desire to be socially or politically active in this way (Nicola and Giulio, LGBTIQ+ group volunteers). Such practices are in obvious tension with the queer theoretical approach we advocate, as they contribute to prescriptive forms of identity and 'performance', effectively limiting claimants' freedom to express their SOGI as they wish. Some decision-makers are thus critical of the simplistic way in which some territorial commissions treat evidentiary requirements, such as membership cards:

you do not need to reach a full certainty of the claimant's sexual orientation. I don't have a gaydar to help me tell you exactly from the statements or from the demeanour [whether the claimant is LGBTIQ+]... there is no decisive proof. This is a very current debate in the Italian [territorial] commissions: "You don't have an Arcigay [national LGBTIQ+] card", "You don't have relationships here", "You don't attend groups" or the other way around... Not in this commission, but in many commissions, for sure (Roberto, decision-maker).

We use – *in addition* – the fact that in Italy [claimants] attend associations for the protection of gay rights, which is not at all essential, it is not a necessary element. However, the same [UNHCR] guidelines say that this is an element to evaluate, the fact that he [the claimant] consciously chose to attend an association. So, the gay association membership card is irrelevant, but it can be significant that the head of the [gay] centre *voluntarily* produces a statement, makes a statement to us saying that for a year, for six months, he [claimant] attended [the gay centre] (Silvana, judge).

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<sup>66</sup>Tribunal of Naples, decision 25 October 2013.

We found some NGOs only offered membership cards to claimants who were clearly involved in the activities of the organisation in question (Maria Grazia, decision-maker). Nevertheless, membership cards should not be seen as indispensable evidence in SOGI claims. As Giulia (LGBTIQ+ group volunteer) pointed out, ‘one is not any less gay’ for not frequenting an LGBTIQ+ organisation. We heard evidence that practice in this respect is changing:

in relation to the membership cards, for example, they [decision-makers] have come to understand that whoever has the card, that only means that a person espouses the ideals of an associative project and not that he is a gay, lesbian, bisexual or trans person. But it took [them] some time to understand this, and this led to something. It led to that reductionism, that analogy “possession of card = possession of identity” among decision-makers (Vincenzo, LGBTIQ+ group volunteer).

In place of simply establishing membership, more elaborate statements from associations, produced on the basis of several meetings with claimants where their testimonies are explored, are now routinely submitted to territorial commissions and courts (Tribunal observation, northern Italy, 2018).<sup>67</sup> Such lengthier declarations are deemed increasingly important and, when no other evidence is submitted, even crucial (Daniele, decision-maker). Some decision-makers, however, remain sceptical of the probative value of any declaration from such associations:

I value them as a statement from an employer... who can give me some sort of reference. Indeed, I would rate it in slightly lower terms. These [declarations] are indications, but they cannot establish an assessment of the reliability of the homosexual orientation (Maurizio, judge).

In the UK, NGO supporting statements are also often submitted by claimants, but may be dismissed by the Home Office, on the basis that it would be easy to ‘fake’ one’s sexuality for the purposes of obtaining such a statement (Upper Tier Tribunal observation, London, 2018). Judges may also find NGO testimonials unconvincing, confirmed by both our participants and our past research (Held 2017):

I wrote a letter and I said that I had seen them together and that they treated each other with affection, fondness and kindness, like lots of couples that I know. That is the wording I chose to use and that is because I didn’t want to be too explicit, didn’t want to talk too intimately about them. In the refusal even the judge said that my, the letter that I wrote could have been interpreted as just non-romantic friends. So it wasn’t explicit enough, essentially (Chloe, NGO worker).

Evidence of a (physical or mental) medical nature may also be submitted; however, the weight given to such reports, especially when diagnosing PTSD (Chap. 9), has been a matter of debate (AIDA 2017, p. 46). In Germany, reports by psychotherapists or psychologists to assess the claimant’s sexual orientation can positively contribute to the case where credibility is questioned (Zouhair; focus group no. 6, Lower Saxony, Germany). Yet, according to one participant, their probative value has diminished over time (Sabrina, NGO worker), and they can also be problematic

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<sup>67</sup> See, also, Tribunal of Milan, decision of 18 October 2017; Tribunal of Venice, decision of 14 June 2016; La Migration (2018).

if they are used to confirm an ‘irreversible homosexual disposition’, especially after the CJEU’s decision in the *F* case.<sup>68</sup>

In Italy, territorial commissions operate on the basis of generally not requesting evidence of a medical or psychiatric nature (Daniele, decision-maker). It is, however, possible to request medical exams with the consent of the claimant where it is necessary to prove the persecution previously suffered. Claimants are also free to submit psycho-social reports, often produced by professionals at reception centres, which may discuss: the process of ‘coming out’ for the claimant; trauma associated with their life in the country of origin, departure and journey to Europe; SOGI and related therapeutic issues; and ‘vulnerabilities’ and needs. These reports are particularly useful to pre-empt possible negative assessments of credibility when claimants have not offered clear, thorough or consistent testimonies (Titti, decision-maker; Chiara, NGO worker). However, it is important to avoid any inconsistency between the content of such reports and what the claimant says during the asylum interview (Giuseppe, lawyer; Mara, lawyer).<sup>69</sup>

In the UK, it is acknowledged that medical reports can help decision-makers, especially at appeal level, understand better elements of testimonies and demeanour that are related to PTSD or other past traumatic or violent experiences, rather than indicating lack of credibility (Ashley, psychotherapist). Yet, there are concerns that the authority of such medical reports and their authors is not sufficiently recognised by authorities (Freedom from Torture 2016).

We were told that evidence of a sexual nature (such as video recordings and pictures of sexual intercourse) was no longer submitted or expected in any of our case study countries, rightly recognising SOGI claimants’ rights to dignity and privacy. Yet, while all asylum authorities may now be formally compliant with European law and guidance here, many participants reported inappropriate questioning about claimants’ sexual lives. In Germany, although detailed questions about sexual practices are inadmissible (BAMF 2017), questions asked in the interview have included: ‘When did you start having sex? Why did you prefer to have a man, instead of-? How many people have you slept with?’ (Alphaeus), ‘Are you top or bottom? What apps do you use to meet men?’ (Marlen, legal advisor), ‘How did you feel when you made first time sex with him?’ (Prince Emrah); ‘Have you ever had sex with a man? How do you feel when you’re having sex with a man?’ (Jolly, focus group no. 3, Bavaria); ‘How lesbian sex looks like in practice’ (Sofia and Emma, NGO workers); what claimants ‘do with their partners’, why they ‘kissed in a car’ (Halim), and details about a rape experience (Diana). One participant even asserted that ‘[s]ome people do [submit naked pictures to BAMF]. I’ve had people that have given them when they are having sex. Pictures. Nude pictures. And they have negatives [decisions]. Someone said that “he is not [gay]”’ (Alphaeus). These reports from Germany were confirmed by our survey (C36). Similar questions were asked at

<sup>68</sup>Case C-473/16, *F. v Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, ECLI:EU:C:2018:36.

<sup>69</sup>See, also, Tribunal of Florence, decision of 15 November 2018.

appeal level (Court observation, Hesse, 2019), even in cases where judges are empathic and supportive (Court observations, Hesse, 2018, 2019). Such lines of questioning are not only a violation of claimants' fundamental rights (Chap. 3) and illegal in the light of the CJEU's jurisprudence, they are also traumatising:

So I was so annoyed that I even asked the lady [interviewer], I was like, "will it be okay if I asked you if you have ever slept with a man?" I know it was so negative that it maybe could have contributed to maybe 70% of my negative that I received. Because some of the questions were so annoying. (...) And I'm still traumatised. I'm still thinking of how I am supposed to align myself. I mean, yes, I will be open, I will tell you everything, but when you tell me "there are certain questions we do not ask you on your interview about [your] life", remember I lost my partner. And some of my friends are still on the run (Amis, focus group no. 2, Bavaria, Germany).

Trans claimants in Germany also reported feeling particularly disturbed by very intimate questions about the degree of gender-affirming interventions they had undergone (Bebars; Diana).

Similarly, in Italy, we heard reports of questions of a sexual nature, such as 'how was your first [same-sex sexual] experience?' (Silver, Italy), and a judge asking a claimant 'were you bottom or top?', after the claimant described a sexual encounter (Nazarena, lawyer). Giuseppe, a lawyer, also reported that:

More than anything else, there is this insistence on purely personal aspects of one's sexual life, obviously they do not ask what you do in terms of sexual practices, but they are rather insistent on questions about what you did, where you were, how many boyfriends you had, how many boyfriends you have had sex with, have you had sexual intercourse for money, has it ever happened to you, that is, rather invasive questions.

For the most part, however, decision-makers seem to have abandoned questions of a sexual nature: 'Here is a question *not* to ask: "tell me about your first sexual relationship"; "It happened when I was twenty years old"; "So what happened exactly?"' (Titti, decision-maker). More generally:

expecting that these people, in face of a stranger, who is sometimes even a female stranger – which, in my opinion, for a migrant who comes from Africa can constitute a further issue – can, in a free and uninhibited way, tell us about their sexual adventures, frankly, it seems quite ridiculous to me (Filippo, senior judge).

Italian decision-makers now focus more on questions related to the 'discovery' of one's sexual orientation. The questions that recurred were related to when the claimant found out they were gay and how that made them feel. Some decision-makers have highlighted the need to understand the cultural differences that affect sexual experiences and identities:

I have met homosexual people who come from Pakistan, who live homosexuality in a very different way from how they live in the West. I don't know if they call themselves homosexuals... they spoke of having had a homosexual experience and, because of that homosexual experience, having experienced social condemnation, a form of persecution... very different from how homosexuality would be lived by a person from Western countries. And so it is also different in Africa (Maria Grazia, decision-maker).

Social workers also confirmed this, underlining the culturally biased nature of some questions:

They were very Western questions (...) I remember a girl from Cameroon who was asked: “What does it mean for a young Cameroonian woman to be homosexual?” It is not an easy question. It is a very complex question, which presupposes that a person is self-aware, has accepted [their sexuality], and is not traumatised and has the logical ability to formulate a thought and say what “for me” is to be as they are (Celeste, social worker).

In the UK, evidence of sexual nature has had a particularly turbulent history. In 2013, there were reports of gay asylum claimants filming themselves having sex to prove their claim (Elgot 2013; Hall 2013). The same year, UKLGIG found that despite improvements since 2010, Home Office caseworkers were continuing to ask inappropriate questions about sexual activities (UKLGIG 2013). Highly inappropriate questions being asked in some asylum interviews were also highlighted in the media, including ‘When x was penetrating you did you have an erection?’ and ‘What is it about the way men walk that turns you on?’ (Taylor and Townsend 2014). In response to all these problematic practices, the government commissioned an independent report by the Chief Inspector of Borders and Immigration on the handling of claims based on sexual orientation (but not gender identity) (ICIBI 2014). The Vine report found that more than 10% of the questions asked in SOGI claims were ‘unsatisfactory’, such as ‘[w]hat sexual activities did you do with your girlfriends?’ (ICIBI 2014, p. 24) A leading barrister in this field has also cited a case from the same year in which a Court of Appeal judge indicated that he would view a DVD with evidence of sexual behaviour (Yeo 2016). The Vine report recommendations included improved training to avoid stereotyping in interview questions, ensuring that caseworkers do not ask sexually explicit questions and equipping them to cope with sexually explicit responses. The government accepted all of the recommendations. In line with the CJEU judgment in *X, Y and Z*, sexually explicit questioning is now explicitly forbidden in Home Office guidance, which goes so far as to provide a script for caseworkers in situations where they are presented with sexually explicit material, a script beginning ‘Stop please. I am not going to ask you any detailed questions about sex’ (Home Office 2016, p. 29). This has been confirmed to us by a decision-maker:

a lot of people want to tell you, I think they feel, they want you to know, sexually explicit details, and you have to say straight away “that’s not an aspect you need to tell me about, that’s not something I’m going to consider” (Emily, decision-maker).

Yet, like in Germany or Italy, there is no independent complaint office that SOGI claimants can approach if interviewers ask personal, intrusive questions. Furthermore, Beth, a lawyer has highlighted that:

POs [Home Office Presenting Officers in appeal hearings] are still asking intimate, unnecessary questions which do not respect our clients’ dignity and do not further the issues, there also is still a real emphasis on actual sexual experiences, which is contrary to the guidance – sometimes the questioning almost appears gratuitous or prying, which is unwarranted and a misapplication of the law.

Another demeaning and humiliating form of evidence we heard was expected, while not routinely required, was for claimants to display scars. In Germany, showing scars during the interview with the BAMF is unexceptional according to one participant (Trudy Ann), violating the claimant's right to privacy and human dignity, and potentially causing re-traumatisation. Ibrahim told us of an instance of this practice:

The other question which he [interviewer] did – and he is not allowed to do it, because I gave him pictures of my scars, pictures from my surgery and everything – he told me “is this your scar?” I told him “yes, this is my scar”. He told me “let me see it”. And this is not his right, but at some point, to be honest... I knew this was not his right, but I did not realise it, because you are in a moment to prove your right to stay. So you will feel weak, to be honest. You feel weak, you do what they want you to do, just to prove that you have to stay here. So I had to take off my trousers and let him see my scar.

In Italy, too, we were told of instances where territorial commissions asked claimants to undress to show their scars: ‘I have some scar on my back owing to my story, I was asked to undress to see; I undressed, they looked, they really confirmed’ (Fred). This has rightly been criticised by a judge that we interviewed:

The judge, in my view, should not even look at the scars, because that is an act against [the claimant's] human dignity. They [claimants] often want to show you their scars, but this is certainly an invasive thing that is absolutely not necessary (Silvana, judge).

More generally, claimants are routinely asked about past and current relationships, as well as questions of a ‘romantic’ or ‘sentimental’ nature, implying an expectation that claimants should be sexually active and in (or seeking to be in) an intimate relationship. This was the case across all our case study countries (Kadir, NGO worker, Germany; Leon, NGO worker, Germany; Nicola and Giulio, LGBTIQ+ group volunteers, Italy; Jayne, focus group no. 4, London, UK). In Italy, for example, Susanna, a social worker, told us of a claimant who was quickly granted international protection despite having children in his country of origin (which could have been seen to damage his credibility), mainly on account of evidence he gave of Facebook conversations and relationships with several men during the three-month period he had been in Italy. In situations where this kind of evidence is not available, territorial commissions explore other aspects of claimants’ narratives:

In fact, very recently, I’m noticing that they [territorial commissions] are asking different types of questions. No longer connected to “coming-out”, of which they [some claimants] have no awareness, but linked to the way they were discovered when they were with one person rather than another, [the commissions being] aware of the zero level of schooling and lack of awareness, of the young age that makes it impossible for one to tell of a conscious experience (Silvana, judge).

This is more in line with the CJEU decision in *F*,<sup>70</sup> which emphasised the assessment of risk of persecution on account of one’s – real or perceived – SOGI rather

<sup>70</sup>Case C-473/16, *F. v Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, ECLI:EU:C:2018:36. For a comment, see Ferreira & Venturi (2018).

than ascertaining one's actual SOGI. In the UK, asylum authorities also expect evidence of relationships, which may then be disregarded:

I put in pictures, they wanted, when I went for the interview they said they wanted pictures of me and my ex-girlfriend and I presented, they didn't want in their words anything explicit. So I took some holiday pictures and put it in there, and the judge said, they are just two women on a beach (Jayne, focus group no. 4, London).

Evidence may also include indications of the claimants' willingness to integrate, any signs of successful integration, and overall 'good character'. This is more clearly the case in Germany (Noah, NGO social worker) and in Italy, where the degree of integration in society is increasingly a factor mentioned in NGO supporting statements (Anna, LGBTIQ+ group volunteer), as it may contribute to a positive decision (Tribunal observation, northern Italy, 2018).

Decision-makers also rely on evidence from the internet, but this may not be appropriate or sensitive to different contexts. In Germany, for example, we were told that Google Maps may be relied on as a source, although the data is not always up-to-date or may include changes that occurred some years after the claimant left their country of origin (Alphaeus). In Italy, participants told us of commissions' often unrealistic expectation that relevant events will be reported by news agencies and on the internet. However, in any country (of origin or reception) there will be many incidents of violence or abuse that are not reported, especially when they take place in remote areas or areas controlled by non-governmental forces, where there is no internet connection, or where information is not made available on the internet for fear of persecution (Kennedy). Giulia, an LGBTIQ+ group volunteer, also shared with us what she had heard at an appeal hearing in this respect:

The judge said, ah, that the guy, that it was not possible for him to have set up this LGBT anti-discrimination group because there was virtually no online record, because there is no evidence, and actually [claimant] said, "but how can I put that stuff online, if they arrested me is because I distributed flyers".

While asylum authorities expect to be given extensive evidence, they often dismiss it when they have it. For example, in Germany, SOGI claimants are asked about their involvement with LGBTIQ+ groups, but when pictures and videos of participation in Pride parades are submitted, they are often dismissed, for example, on the grounds that 'anyone can go to the Pride parade', ignoring the courage and risk involved in 'outing' oneself in this way (Gisela, lawyer; Elias, lawyer; decision regarding participant D33 in Held et al. 2018). The UK Home Office also adopts a selective approach to the way it considers evidence. For example, in the case of Lutfor, although both his statement and the report produced by the Helen Bamber Foundation stated that his father gave him money and told him to leave the country and not come back, the Home Office said: 'It is also noted that your father, brother and 4 sisters remain in Bangladesh, and there is no reason to suggest that they would not adequately support and assist you on return'. Joseph, an NGO volunteer, confirmed this selective approach to evidence by pointing out that:



often I notice with the Liverpool office, that letters from partners are ignored in the decision when it comes back. “We received this, this, this, this and this”, and then no comment is made on the supportive bits and that is very common.

There is, therefore, much scope for improvement in relation to the types of evidence required, accepted and used by asylum authorities in all three countries under comparison. This has important implications for the outcome of the asylum adjudication process in contributing to the assessment of the credibility of the claim.

## 7.5 The Assessment of Credibility

Credibility assessment remains the single most contentious and problematic issue in the field of SOGI asylum. Despite endless debates, recommendations and reforms, consensual and good quality practices seem to be difficult to achieve (Gyulai et al. 2013; UNHCR 2013). According to UNHCR Guidance, ‘[c]redibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed’ (UNHCR 1998, para. 11). This includes internal credibility (consistency within the testimony) and external credibility (consistency between the testimony and publicly known information). The UNHCR adds that ‘credibility should be assessed through individualized and sensitive questioning, using both open-ended and specific questions that are crafted in a non-judgemental manner’ (UNHCR 2012, p. 62 ff).

This still leaves much leeway to domestic authorities as to how to use all the evidence collected to reach a decision on the credibility of SOGI claims, and decision-makers themselves are acutely aware of the risk of getting it wrong, both by refusing to grant international protection to someone who was entitled to it or by granting it to someone who was not entitled (Emilia, judge, Germany). The lack of resources prompts decision-makers to ignore the requirement for individualised credibility assessment and resort to ‘staple’ decisions:

there are three, four page forms, they are all copy-and-paste. That means that besides the individual rejection reasons, which are derived from the interview, one also finds copy-and-paste reasons. (...) Copy-and-paste answers that completely bypass the reality of life (Noah, NGO social worker, Germany).

Credibility is the basis of all asylum applications, but particularly difficult to ascertain in SOGI and gender-based claims, where persecution is likely to be undocumented, take place in private and often at the hands of family and other non-state actors. It is also worth pointing out that credibility is sometimes used to refer to the claim, and other times to refer to the claimant, even within the same document (UNHCR 2011). A legitimate claim is a credible claim, and a credible claimant is perceived to be a truthful claimant (Khan 2016, p. 217), but this imposes unrealistic expectations on claimants who will almost inevitably have had to use deceit of some kind to reach European soil. SOGI minorities will, by definition, have had to live

covertly to some extent in their country of origin and have generally endured such traumatic experiences that they are unable to present their case to the standard required (Chap. 5).

Experiences may vary for different SOGI minority claimants. We were told that authorities:

tend to find it easier with trans people, particularly trans people who are in some stage of medical transition, because there is a visible presentation... when it comes to sexual orientation that is extremely difficult (...) there is not necessarily any visual cue about the person's sexual orientation unless you start to rely on stereotypes. And stereotypes can never be consistent and that's where I think the bigger issue is at the moment (Jules, staff member at ILGA-Europe).

This was confirmed by our participants in different countries. In the UK, Allan, a lawyer, told us that 'generally with trans people there will be some sort of transition which will be visible so it's less likely that the decision-maker will disbelieve them on that'. Similarly, in Italy:

for trans asylum seekers or in any case on the basis of gender identity, it is simpler than working with people who instead made the request on grounds of sexual orientation. Because, paradoxically, the medicalisation and the pathologisation of trans bodies allows us to demonstrate that we are indeed trans, with a lot of medical and psychological certificates, so when we reach the Commission, the road is open. In reality, paradoxically, trans people find no difficulty when applying for asylum. Instead, homosexual people have the difficulty that there is no scientific method to prove whether a person is homosexual or not. We must trust the story that a person presents (Valentina, social worker, Italy).

Trans claimants also acknowledge this trend:

Fortunately, when I went to the [territorial] commission, I already had a beard, I had already started hormonal therapy a year and a half before... and how I dress, how I speak, so there is no doubt of what I said in that respect (Kamel, Italy).

Both SO and GI asylum claims, however, are subject to an assessment of credibility in all three countries under comparison, as even trans claimants only have an 'advantage' '[u]ntil a point that you are passing which, in which case it can become... something [of] a point against you' (Jules, staff member at ILGA-Europe; Sect. 7.3.2).

All three countries under comparison offer decision-makers some sort of guidance as to how to assess a claimant's credibility. In Germany, although such guidance is not publicly available, it is clear from BAMF decisions what decision-makers expect in order to consider a testimony credible: testimonies should be coherent, specific, detailed and vivid, ideally peppered with 'unnecessary, unusual and original details, which are usually hard to make up' (Decisions on case of participants DE17 and DE40 in Held 2018). Claimants' credibility is often challenged because of implausibility, inconsistency or lack of detail (BAMF decision appealed in Court observation, Hesse, 2018; Hübner 2016; Kalkmann 2010). Indeed, several of our participants in Germany saw their asylum claims refused on grounds of lack of credibility (for instance, William, Tina, Zouhair, Winifred, Veronica and Julia). The BAMF appears unable to deal with the complexity and variety of people's lives:

through the glasses of BAMF, just how drastic the narrative is, so... because not too many things must have happened... There is a woman who has, or there are now several women, but the most blatant case, one who has experienced forced prostitution in China, so from Uganda to China, then she had different [experiences], then fled to other African countries, where she was raped, and then [fled] again to Germany, where she has been almost forcibly prostituted. And... she is also lesbian, and with her partner, so to speak, and different things... escaped, and so, for the Federal Office, this is so blatant that it cannot be credible, such things. That's just too much, but it should not be too little either, so really you have to stop [at the point where] you really lose your partner, or you yourself almost got killed (Sofia and Emma, NGO workers).

Besides being expected to reach a 'perfect' degree of 'dramatic narrative' (something which may vary from decision-maker to decision-maker), the level of detail and consistency required of claimants is often also unreasonable in light of their personal circumstances: 'I can explain the suffering I went through because it happened to me. But it's the exact... these small, small things. (...) Sometimes you lose the dates. (...) Because of stress' (William).

In Italy, it has fallen to the high courts to offer some guidance. In a case related to a gay man from Nigeria, the Supreme Court established that the evaluation of an asylum request should be based on clear steps and objective criteria statutorily established. The evaluation should be made in light of the individual situation of claimants, including their social class, life experiences, sex, age, and the social context of their home country.<sup>71</sup> This should correspond with an intersectional approach to decision-making (Chap. 3), but whether it does is another matter. The Court also stated that contradictions related to secondary aspects of the claimant's account should not be given weight if the main event on which the claim is based is deemed credible. This should help to eliminate stereotyping and culturally-specific expectations from the Italian asylum system, but in practice that has not always happened. In relation to the notion of time, for example, commissions may have expectations based on Western conceptions that are damaging to claimants:

It is very important for an Italian, "what did you do on the fifteenth of January this year?", "What happened to you on the sixteen of January last year?" That, for an African man, is unthinkable to be able to understand, to have the same time line as a European. For them, time does not exist as we understand it. I often noticed that with the men [claimants], I give them an appointment at four, of course, for him, at four it means that day, it does not mean at four o'clock that day. So it is very complicated, it is very difficult to succeed, in the Commission, to be linear as they wish (Valentina, social worker).

Elsewhere in this section we see how Western stereotypes affect SOGI claims in other ways (Sect. 7.5.1).

In the UK too, the existence of good guidance does not necessarily lead to high-quality credibility assessment. Both the 2016 Sexual Orientation guidance (Home Office 2016) and the 2011 Gender Identity guidance (Home Office 2011) emphasise many of the issues that campaigners and advocates have raised, including in relation to credibility assessment. For example, they stress that the claimant's credibility is

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<sup>71</sup> Supreme Court, decision no. 26969, 24 October 2018; Article 3(5) of the Legislative decree no. 251/2007.

not necessarily undermined by having had opposite-sex relationships or children. The Gender Identity guidance points out that where there is intolerance of non-conformity in gender behaviour, there is also likely to be intolerance of trans people (Home Office 2011, p. 15). However, these guidance instruments are not adequately applied. Credibility assessment in the UK has been found to be ‘particularly poor’ in relation to SOGI claimants (House of Commons Home Affairs Committee 2013, p. 27). Although after 2010 there seemed to be better protection for individuals fleeing persecution on the basis of their SOGI owing to the limitations imposed on the ‘discretion requirement’ (Sect. 7.3.2), in practice, claimants found credibility had become the new obstacle to recognition of their claims. 2010 has thus come to be seen as the year when the message to SOGI asylum claimants changed from ‘be discreet about your sexual orientation’ to ‘prove that you are gay’, similar to experience in Australian SOGI asylum law (Millbank 2009a). This has shifted the assessment of credibility towards elements related to membership of a PSG, rather than persecution. The Vine report found an almost complete correlation between whether a claimant was accepted as LGB and whether they were granted international protection (ICIBI 2014, p. 34). Time and again refusal letters and subsequent rejections at appeal are based on decision-makers not believing claimants’ SOGI. Current practices also seem to reflect a medical and pathological notion of non-heterosexuality:

The Home Office approach seeks answers, rather than understanding. An interrogative approach that addresses the curiosity of the questioner is framed from their perspective (and consequently, their assumptions and prejudices). By seeking factual verification, this empirical approach, in my experience, is founded on a perception of homosexuality that is deeply rooted in a medical model, and seeks evidence of it as a pathology (Fletcher 2017, p. 230).

The existence of administrative or judicial guidance is thus not a guarantee that credibility assessment is carried out to an appropriately high standard. This can be seen in the persistent use of stereotypes regarding what it means to be a member of a SOGI minority (Sect. 7.5.1), expectations about how a member of a SOGI minority should express and experience their SOGI publicly (Sect. 7.5.2), and the way that asylum authorities often deny claimants the right to provide clarification of their narrative, thus promoting a culture of disbelief (Sect. 7.5.3).

### 7.5.1 *Stereotyping ‘Gayness’*

Individual prejudices and Eurocentric understandings of SOGI still plague asylum adjudication systems, polluting credibility assessments, as confirmed by Helena (EASO staff member) as well as Jules (staff member at ILGA-Europe): ‘when it comes to sexual orientation, I think there is still an expectation of performance. Of performing certain stereotypes’. The use of inappropriate, culturally-biased and even offensive stereotypes in RSD has been extensively documented. As most decision-makers have a Western, heteronormative outlook on the world, claimants

need to comply with certain norms in order to be perceived as credible (Gartner 2016). These stereotypes and norms include expectations of a ‘coming out’ narrative, identification with the opposite/another gender, involvement with LGBTIQ+ activism, attendance at LGBTIQ+ social and nightlife spaces, familiarity with LGBTIQ+ culture, being sexually active according to the self-identified SOGI, and not ever having had heterosexual partners or children (Bennett and Thomas 2013; Fernandez 2017, p. 202). Failure to meet all or most of these stereotypes may be punished with failure to recognise PSG membership or, more generally, denial of credibility. Conversely, meeting all these stereotypes too neatly may be seen as a sign of fabrication or dramatisation, which may also mean the claimant is found not credible (Batchelor 2018). For the claimant, it can feel like a no-win situation.

Our fieldwork confirmed that many of these stereotypes are still pervasive, as well as unearthing other stereotypes that affect credibility assessment. Across all our country case studies, decision-makers’ personal attitudes and prejudices impact on findings of credibility (Court observations, Hesse, Germany, 2019; Nicola and Giulio, LGBTIQ+ group volunteers, Italy; Valentina, social worker, Italy; Gary and Debbie, NGO workers, UK; Oliver, NGO worker, UK). Our participants also spoke about decision-makers having various degrees of sympathy towards claimants and the impact that this has on credibility assessment (Emilia, judge, Germany). Our findings relating to the use of stereotypes by decision-makers correspond to those of a survey conducted in North Rhine-Westphalia, Germany: 22.5% of the 40 respondents who had claimed asylum on SOGI grounds met stereotypes in their interviews (Held et al. 2018).

We heard that many decision-makers are influenced by their first ‘visual impression’ of the claimants and their stereotypes of what an LGBTIQ+ person looks like (Frank S., legal advisor, Germany; Noah, NGO social worker, Germany; Louis, NGO volunteer, Germany). Clothes and demeanour play a critical role here, with decision-makers sometimes being more inclined to believe ‘camp’ male claimants and ‘butch’ female claimants (Thomas, NGO volunteer, Germany; Kadir, NGO worker, Germany; Sabrina, NGO worker, Germany; focus group no. 6, Lower Saxony, Germany; Gary and Debbie, NGO volunteers, UK; Oliver, NGO worker, UK). One participant reported being told by the interviewer that ‘[y]ou don’t look so gay’. He was aware that members of an LGBTIQ+ group which he frequented had a 100% success rate where claimants attended the interview wearing make-up and female clothes; conversely, gay claimants with a ‘mannish’ appearance were less likely to obtain a positive decision (Zouhair, Germany). Fares (Germany) also expressed his worries about decision-makers’ stereotypes:

My best friend, he’s totally gay, but at the same time his situation is really hard. He came from Iraq, and they didn’t accept that he’s gay. They told him “no, you are not”. Just, he don’t look like a gay. Should he wear make-up or something like that? This is the problem here. They didn’t believe that he’s gay, because he went like this, like me now. He doesn’t have any make-up, just go there.

In the UK, we found that some decisions analyse at length the claimants’ build, haircut, use of make-up and overall (more masculine or feminine) manner (Zena,

First Tier Tribunal Appeal, London, 2018, decision paper). Such stereotypes can also be found in the judiciary:

since then [2016] I think the bog-standard stereotypes have come back. That is more at a judicial level rather than at Home Office level. The Home Office level are a bit better at not saying the bog-standard stereotypes. I recently saw an appeal where a judge said that the client staying in contact with their children was not the actions of a genuine lesbian. They are coming back quite often in judicial (Allan, lawyer).

Such reliance on stereotypes when considering claimants' demeanour struck our participants as unfair:

I would not consider your physical appearance and then evaluate it: "Hm, but you are not heterosexual enough. But you could let the hair grow longer and so on. And you don't have enough make-up and you can wear more earrings and skirts, please." I would never do this, so why is the opposite allowed, and say whether someone is LGBT enough or not on the basis of their physical appearance? (Kadir, NGO worker, Germany).

The intersections between sex, gender, sexuality, cultural and ethnic background possess a significant influence in this context, which is often overlooked by decision-makers despite its importance from the perspective of our feminist and queer theoretical underpinnings (Chap. 3). Lesbian claimants may struggle to convince decision-makers, as many of the most concrete SOGI stereotypes relate to gay men, while 'lesbian sexuality is either invisible or it is treated in a manner verging on the pornographic' (Lewis 2014, p. 966). An example of this was shared with us by Sean, a lawyer in the UK:

she [claimant] was found lacking in credibility, that [according to Home Office] "she is not a lesbian and the information you provided doesn't change our mind". And we say "well, that is ridiculous, because you have got 11 witnesses who believe that she is gay, three ex-partners who know that she is gay, and all attesting to their relationships with her".

Female SOGI claimants also seem to be affected by particularly ludicrous stereotypes and crude lines of questioning:

In court, Home Office representatives occasionally suggest that gay women cannot really have sex. They suggest or imply that female partners cannot discern each other's sexual orientation and therefore cannot give reliable evidence (S4, lawyer, UK).

Trans participants are also defined by stereotypes, with Diana (Germany) told by the interviewer: 'you don't look like a trans'. Witnesses are also expected to conform to stereotypes, with judges often expecting 'typical' LGBTIQ+ people to appear in support of claimants (Bilal, presenting officer, UK).

Unfortunately, but unsurprisingly, as SOGI claimants become aware of the power of SOGI stereotypes, they may find it expedient to adapt their behaviour to conform to those stereotypes when attending interviews and hearings, for example, wearing rainbow flag motifs when otherwise they would not do so (Tribunal observation, northern Italy, 2018; Selim, UK; Joseph, NGO volunteer, UK). In this way, SOGI asylum systems foster 'homo-cultural essentialist paradigms' (Hinger 2010, p. 389). This leads to situations such as the one described by Allan, a lawyer in the UK:

My client, I wouldn't describe him as stereotypically gay, but he had a busload of friends who all were. It was high camp at the back of court and it was all very hilarious. He had, I think, four people give evidence that he had had sex with. I'm like, what is the point in doing this case? It is completely ridiculous.

Yet, not all claimants are able, even if they wish, to conform to decision-makers' stereotypes:

Recently I have come across many cases of LGBT+ people seeking asylum had been dispersed to areas which are not diverse and there is no LGBT+ community and that has had an enormous impact on their me[n]tal health and in proving their case and Home office want to know if they had been to any LGBT+ bars or clubs since coming to UK (S145, community development worker, UK).

Stereotypes also relate to the frequent assumption by decision-makers that religious beliefs are incompatible with belonging to a SOGI minority. In Germany, for example, we observed this dialogue in an appeal hearing:

Judge: How can you be religious and gay at the same time?

Claimant: My religion was given at birth, I grew up with it. I decided to convert later. But now I don't mix my sexuality and religion together. I don't think of sex with men when I am praying to God. And I don't think of God when I am having sex with men.

Judge: So you believe in God when you are not having sex and when you have sex with men, suddenly God doesn't exist anymore. Is that what you are telling me? (judge laughs) (Court observation, Hesse, 2019).

In Italy, there were similar accounts. Antonella, LGBTIQ+ group volunteer, stated that:

A question that the Commission may ask: "but how can you, as a believer, still manage to be homosexual even if you are a believer, a Muslim" and ... those are questions that are, I consider them a bit idiotic because you cannot ask someone why they are homosexual. You just are, full stop.

Giulia, an LGBTIQ+ group volunteer, also offered an example of such stereotypes:

But then he [claimant] came here [to Italy] and the first ones who spoke to him in English, who were able to communicate with him, were these Jehovah Witnesses. He goes there, spends some time with someone, has some company, has a network of contacts, that is, this somehow helps him, but he does not realise what Jehovah Witnesses say about the LGBT population, what the Witnesses' ideas are. (...) Yet, for the judge it was a cause of inconsistency [but for] the claimant this did not even go through his mind. He likes to be there [with Jehovah Witnesses], they do the meetings, and he likes to come to meetings with us because he's gay.

This problem is particularly evident in the UK. Home Office questions often require Muslim and Christian SOGI claimants to explain an assumed tension between their religious and SOGI identities (UKLGIG 2013, p. 15, 2018), assuming both that certain world religions have a single position on these issues and also that individual believers are able to reconcile different aspects of their identity in a tidy package:



Given your awareness of the treatment that lesbians receive in Pakistan, along with the fact that your own religion condemns same sex relationships, it is inconsistent to suggest that you would have felt “blessed” and thanked God when you discovered you were a lesbian (Mary, Home Office decision, 2016).

Another example can be found in a Home Office refusal letter dated July 2018: ‘Given that you are a practicing Christian, your failure to raise any potential conflicts in relation to your behavior and faith raises doubts concerning your credibility’. NGOs have also confirmed this approach by the Home Office:

he [claimant] was really shocked when they confronted him about how can you be gay and Christian. He was, he said “I was completely upset and thrown by that question”, because he had always been a Christian and he has always been gay and so for him it’s simply how it is, the fact that it is difficult to reconcile with what people tell you, is just, it is just the way it is (Debbie, NGO volunteer).

Legal representatives are understandably concerned: ‘Then there are other stereotypes about religion. That is really starting to grow. “This is not compatible with your religion.” Even asking the question, “How is this compatible with your religion?” and then not accepting what the person says’ (Allan, lawyer). Failure to offer an explanation that satisfies decision-makers may further undermine credibility. This approach by the Home Office is in clear tension with the anti-cultural essentialist and anti-homonationalist approach we adopt in our analysis (Chap. 3), to the extent that it reflects a reductive and stereotypical understanding of the relationship between culture, religion, ethnicity and sexuality, and presumes the decision-makers’ own culture deals with such matters more convincingly. Decision-makers also display stereotypes and Western or Eurocentric values in their expectations that claimants be ‘out’ about their SOGI.

### 7.5.2 *Be ‘Out and Proud’ – The Western Way*

Across all countries under comparison, we encountered an expectation on the part of decision-makers that claimants be ‘out and proud’ in ways conforming to Western cultural perceptions. This expectation relates both to how claimants live their daily and personal lives and to whether they take part in community initiatives and events.

For example, having a same-sex partner was invariably beneficial for credibility assessment purposes, even if this was simply a sexual partner willing to confirm the claimant’s alleged sexual orientation.<sup>72</sup> This expectation was most evident in the UK:

[I feel] Very scared because I don’t know how to prove my sexuality. They said they don’t believe me because I’m not in a relationship now and have no proof that I have been in a same sex relationship in my home country (C54).

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<sup>72</sup>In Italy, for example, this was reported by Giulia, an LGBTIQ+ group volunteer, and can also be seen in case law: Tribunal of Trieste, decision of 8 August 2009 (the witness was the claimant’s partner).

UK decision-makers often had precise expectations of what such relationships should be like, which they often expressed insensitively. Relationships were expected to be based on trust and full disclosure of past experiences:

It is not conceivable that the allegation of the rape and the account of her [claimant's] experiences in Malawi would not be shared with an intimate partner and I draw the conclusion that it was not referred to because the appellant and [her ex-partner] were not in an intimate relationship at all (Jayne, First Tier Tribunal decision, Birmingham, 2017).

Relationships were expected to last for a minimum amount of time:

People may rely on partnerships in the UK to attest to their sexuality and there are heteronormative expectations on what those partnerships should look like, therefore a person with a number of short relationships may not have someone willing to provide a witness statement because they are no longer together. There are heteronormative expectations regarding the length and longevity of relationships (S147, barrister).

Partners should share a strong emotional connection as well as a physical attraction:

Aside from stating that [X] had a nice body and smile and was beautiful and handsome (...), you do not describe any emotions around your relationship with him. Given that you had been together for ten years prior to him passing away in a car crash (AIR Q107), it is considered that some description of your emotional connection to him would be reasonable to expect, however you purely describe your relationship as only being sexual (Vincent, Home Office decision).

Partners should be able to remember what decision-makers viewed as critical dates in a relationship:

When asked why she was unable to remember the date, she stated that neither she nor [X] remembered this and did not pay any attention to it. I do not find it credible that the Appellant... would not be able to recall basic details about when in 2013 they met and how and when in 2014 their relationship developed into more than friendship (Mary and Zaro, appeal decision, 2016).

Legal representatives confirmed – and were critical of – such expectations:

[Another problem] It's conflating sexuality with sex. It is saying, "You are not sexually active, therefore you are not gay." They [decision-makers] don't literally say those words, but if you go to court and you haven't got a partner, you have never had a partner, it is so much harder for them to accept your sexuality. It is, "You don't have a boyfriend now" or "You don't have a girlfriend now". Yes, but so what? That doesn't make you not gay or lesbian (Allan, lawyer, UK).

Even claimants who had endured traumatising experiences, such as slavery and trafficking, were expected to be in relationships (Zena, First Tier Tribunal appeal, London, UK, 2018). This fails to recognise how difficult it is to establish and maintain any such connections while going through the stressful and often lengthy process of claiming asylum:

when I started asylum [in] 2015, I was in a relationship, but the process got me into so much depression, it affected [me], I lost the relationship. I just made my mind since then that I don't think I am in a right state of mind with this process to be in love with anyone, I don't

think I can be able to, if I can't put up with myself, I don't think I would be able to look after somebody's emotions (Jayne, focus group no. 4, London, UK).

The expectation to have a partner is understandably perceived as unfair by claimants: 'Because it is normal for someone who is not seeking asylum to be single, but it is not normal for an LGBT asylum seeker to be single, you understand?' (Jayne, UK). Supporters see this expectation as a source of increased risk for claimants: 'the systems are institutionally bias on many levels anyway – there is much unconscious bias. People are expected to provide evidence which pressures them into unsafe relationships or situations...' (S57, NGO volunteer, UK). It is also an unacceptable interference with claimants' personal choices of when and how to develop romantic relationships (Harriet, focus group no. 2, Bavaria, Germany; Alphaeus, focus group no. 3, Bavaria, Germany). The expectation of a 'romantic' or 'emotional' narrative can also be inappropriate because it may be absent from some claimants' accounts (Roberto, decision-maker, Italy). For example, a judge in Italy told us that:

now they arrive very young – like 18 year olds – who are not homosexual at all, but were forced into prostitution and, therefore, were perceived as homosexuals by the state authorities, but who have zero awareness of their sexuality. They conceive it purely as a physical action, so they cannot express anything related to their awareness and this is often seen as a factor of non-likelihood and non-credibility. This is therefore a huge problem, of course (Silvana).

As the accounts above show, credibility assessment in Germany, Italy and the UK eventually lead to some kind of exploration of the claimants' sexual consciousness and experiences: 'that initial bit of the interview where you are talking about their realisation of their sexuality... that is the key core' (Qasim, decision-maker, UK). There is a lack of awareness that claimants' lives – like those of everyone else – are multi-dimensional and cannot be reduced to their SOGI and related experiences (Chap. 3).

In Italy, this exploration often concentrates on the claimant's journey of sexual self-realisation and the expectation that this would be 'extremely troubling' to them (Titti, decision-maker) or, at the very least, that there be a clear journey of (non-heterosexual) sexual awakening (Vincenzo, LGBTIQ+ group volunteer). To find claimants credible, asylum adjudicators seem to expect them to somehow prove the emotions and suffering they endured during this self-realisation process, by providing very specific and typically Western answers, something that happens to some extent across all asylum claims (Woolley 2017). If claimants are not able to express such feelings or suffering using notions familiar in a European context, their applications risk being rejected:

they [interviewers] said in my face, they did not feel the emotion, how sad I was. I asked myself: why do they want me to be sad? If I'm already free, why should I be sad? Why do I still have to show sadness? (...) in the Italian conception, they need, perhaps, to see the tears flow, but we are not always like that. They [decision-makers] must understand that everyone is different. There are people who will cry, there are people who will not cry. Each one is different (Cedric, focus group no. 5, southern Italy).

In contrast to some territorial commissions, Italian judges have afforded significant importance to claimants' psychological difficulties in reporting their personal story.<sup>73</sup> Lawyers have also showed awareness of how inappropriate such expectations of emotional display are:

they [territorial commissions] expect a strong emotional participation, but in reality one needs to understand that a person [claimant] is speaking with some embarrassment and therefore the emotions can be externalised or not externalised, there is embarrassment, for them it is objectively very difficult to understand those that can be the real criteria (Damiano).

Some decision-makers are conscious of this issue as well, such as Maria Grazia:

I [very often] ask [to sexual orientation claimants] "what did you feel when you kissed a man for the first time?" I mean, I try to refer to my experience, but I realise that it is *my* experience, that of a Western woman.

To avoid Western conceptions of sexuality and emotion dominating credibility assessment, appeal judges have found it credible that claimants would place more emphasis on the physical aspects of their sexuality than the emotional one, overturning decisions by territorial commissions denying international protection owing to lack of credibility.<sup>74</sup>

In the UK, as past research has identified (UKLIGIG 2018, pp. 23–26), decision-makers expect the 'journey of sexual awakening' to be verbalised by claimants in emotional terms:

I think the majority of LGBT applicants I felt to be, I have recommended to be a refusal because... they are not able to describe any kind of... emotional internal detail about how they came to realise that they were gay, how that has in fact impacted their life, it is, they... I tell them at the start of the interview that I don't want any kind of explicit detail, and some people tend to focus on just the sort of physical aspects on the claim. Which is a big "no, no" for us and we don't, that is not the kind of information that we are looking for. (Qasim, decision-maker).

If they want to convince officials, claimants are expected to put their emotions on full display: 'What struck me was that her account lacked any kind of emotional depth or detail of her journey towards her sexuality in a place where such relationships are criminalised and taboo' (Jayne, First Tier Tribunal decision, Birmingham, 2017). The requirement to present an 'emotional journey' is particularly unrealistic and inappropriate for claimants who may be suffering from PTSD, who experience numbing, and who wish to avoid thinking about traumatic past events in their life (Shidlo and Ahola 2013, p. 9). One survey respondent reported that this seems to 'trip up' men in particular: 'I see a number of refusals of men on the basis that they have not articulated their feelings with clarity' (S147, barrister). An example of this can be seen in the UK Home Office decision in Vincent's case:

You state that you first began to realise your sexuality as you would have sex with your neighbour at the age of eight (AIR Q71). It is considered that your account of this claimed

<sup>73</sup> See, for example, Tribunal of Bologna, decision of 4 November 2013.

<sup>74</sup> Appeal Tribunal of Brescia, judgment no. 1350, 18 July 2019.

experience is particularly vague, unclear and fails to actually substantiate an apparent self-realisation of your claimed sexuality based on an otherwise socially unacceptable situation with your neighbour. Therefore, concerns are raised as to this account of your realisation, due to the incoherence within it.

It is not clear why the claimant's testimony in this regard is seen as 'vague' and 'unclear'. What details was the interviewer expecting? Why did the interviewer not ask for them or seek clarification at the time? Was it deemed incoherent simply because the same standards of social acceptability are expected of everyone, regardless of culture, nationality, class and a range of other factors? Vincent's Home Office decision goes on to state:

Aside from feeling afraid and fearful of others harming you, you make no mention of your emotions of being gay in a homophobic society. It is considered that you would have some trouble coming to terms with your sexuality given the environment you were brought up in (AIR Q76) however you make no mention of this and simply state that you felt thrilled.

It is unclear how many more adjectives the decision-maker expected from Vincent describing his feelings, or what sophisticated emotional narrative would have satisfied them.

There are records of claimants having been expected to define themselves using terms familiar to the decision-maker rather than ones that are familiar and meaningful to the claimant: one claimant was reportedly disbelieved for saying the 'T' in 'LGBT' stands for 'Trans' and not 'Transgender' (Beresford 2016). 'LGBT' itself may be an unfamiliar acronym for some SOGI claimants: 'for all different social and cultural reasons, LGBT is not a commonly used term to refer to sexual identities of persons within these categories in Afghanistan' (ICIBI 2016, p. 23). Expecting SOGI self-awareness according to Western standards and terminology is unreasonable, as one survey respondent pointed out:

Applicants are also expected to have reflected on their experiences and have a degree of insight that is unrealistic where they have never had access to any kind of support and where the only message they have received about LGBTQI+ in their country of origin is that it is wrong (S4, lawyer, UK).

It is also striking that when claimants narrate their sexual experiences, transgressing social norms and engaging in risky behaviours often damages their credibility (UKLGIG 2018, p. 32): 'It is considered questionable that such overt and direct sexual behaviours were instigated in such a setting, given that being gay in Malawi is illegal and the punishment could be imprisonment' (Vincent, Home Office decision).

Decision-makers in all our country case studies also based their credibility assessment to a significant extent on whether claimants were 'out and proud' in the community or not. Claimants were frequently asked about their experiences of frequenting LGBTIQ+ venues, membership of LGBTIQ+ associations, and attending LGBTIQ+ events such as Pride. This was the case in Germany (Shany; Barbara, lawyer; Gisela, lawyer; Nina, legal advisor; Thomas, NGO volunteer; Court observation, Hesse, 2019; William, focus group no. 2, Bavaria), Italy (Giulia, LGBTIQ+ group volunteer) and the UK (Allan, lawyer). Where claimants did not have much

evidence in terms of being publicly ‘out’ and involved with the LGBTIQ+ community, they risked receiving a negative decision. Accordingly, activist claimants with evidence of their involvement with protests and parades were more ‘believable’ than those claimants who had lived their SOGI ‘undercover’ in their countries of origin (Barbara, lawyer, Germany).

Yet, being involved with the LGBTIQ+ community should not be an expectation, in light of the lack of involvement of many ‘native’ LGBTIQ+ people with those structures and groups (Sofia and Emma, NGO workers, Germany). This expectation places undue pressure on claimants to reveal their SOGI in public contexts, running the risk of exposure were they to return to their country of origin. Finally, such public engagement may be difficult or impossible for some claimants, depending on their economic resources, health condition, experiences of discrimination and reception conditions (Chap. 8 and 9; Evelyne and Anne, lawyers, Germany; Jordan and Morrissey 2013, p. 14).

The impact of this sort of expectation on credibility assessment is of great concern to legal representatives:

there is often a real “stereotypical” and wrong focus on whether the individual goes to gay clubs or particular bars or reads particular publications or is part of particular social media groups. This is treated as determinative of the individual living openly and so being at risk – which is a very narrow and restrictive approach as to how a LGBT person lives or should be required to live, and also imposes an artificial and potentially prejudiced and discriminatory expectation and projection. It is as though “one size fits all” and if you do not behave in a certain way then you should not be afforded the protection of the Geneva Convention, which cannot be right (Beth, lawyer, UK).

If claimants were given the opportunity to fully express themselves, clarify any inconsistencies in their account, and listened to with an open mind, then some of the problems highlighted above might well be resolved. However, it is clear that asylum authorities do not always give claimants the time and space they need, instead, using any inconsistencies to cast doubt on claimants’ credibility, reflecting and reinforcing a ‘culture of disbelief’.

### ***7.5.3 A Persisting Culture of Disbelief***

There was a clear perception amongst our participants that decision-makers use inconsistencies and contradictions to deny international protection, rather than seeking clarification from claimants through further and more sensitive questioning. In Germany, we heard that small misunderstandings are used to undermine claimants’ credibility, for example, asking claimants about their participation in ‘CSD’ (Christopher Street Day), which is how Pride parades are known in Germany but which is an acronym that is likely to be unfamiliar to claimants, who then answer that they have not participated in such events, even when they have (Frank S., legal advisor; Nina, legal advisor). In Italy, one of our participants – Odosa – told us his asylum claim had been denied simply on account of a perceived inconsistency in his

testimony (regarding how his hand had been hurt), without the interviewer taking the time to seek clarification. Other participants had similar experiences (Buba). Similarly, in the UK, both at administrative (UKLGIG 2018, p. 18) and appeal level, minor discrepancies and the failure to recall certain details or people are portrayed by the Home Office as evidence that SOGI claims are fabricated (Upper Tier Tribunal observation, London, 2018).

Yet, some decision-makers are conscious of their obligation to ask for clarification and further detail, (Oscar, judge, Germany), and some are also conscious that small inconsistencies may in fact demonstrate that events have been experienced, not simply memorised (Court observation, Hesse, Germany, 2018). Some also recognise that minor inconsistencies do not undermine a claimant's credibility where they do not relate to material points in the asylum claim (Court observation, North Rhine-Westphalia, Germany, 2019). Importantly, there is some awareness that claimants should have the opportunity to comment on elements of the testimony that the interviewer may find non-credible. In Italy, for example, Daniele, a decision-maker, told us that:

if I have a claimant who gives me elements that from my point of view, to ascertain sexual orientation, are implausible, I don't keep them for myself. I tell him: "Look, you are telling me that you have a homosexual orientation that you have become aware of in this way, but I must point out to you that this statement of yours is very difficult to believe on the basis of how one can generally think that a sexual orientation is matured". (...) This is always done, because we know that the interview must have a cooperative character. (...) [but] Basically not everyone [amongst the commission's members] does that (laughs). I mean, if some non-plausible elements are offered, it is not the case that this non-plausibility assessment is generally shared with the claimant, but in my opinion it should be done in this way and I generally do so, ok?

In the UK, as well, Emily, another decision-maker, said that '[i]t's quite good to be able to put that [inconsistencies] to them [claimants] at the time, so that they can [clarify them], there might be a reasonable explanation, so it's good to be able to put that to them' (Emily, decision-maker). However, this awareness by some decision-makers of the need to offer claimants the opportunity to clarify any apparent contradiction or inconsistency was not evident in most interviews and appeal hearings.

Overall, we have found that there is a persistent culture of disbelief affecting all aspects of SOGI claims, resulting in negative credibility assessments for many of our participants. In Germany, for example, the BAMF sometimes doubts the claimant's ethnic origin or nationality without good cause (Ham). We also heard about the BAMF disbelieving that a claimant's landlady had an extra key of the apartment and was thus able to enter the apartment and find the claimant having sexual intercourse with a same-sex partner (decision regarding participant DE16 in Held 2018). Similarly, the BAMF was unable to believe that a claimant distributed flyers regarding SOGI matters despite the danger that entailed (Veronica and Julia). This culture of disbelief permeates German asylum adjudicators' assessment of credibility, all the way up to appeal courts:

We have an advantage over the Federal Office: we already have a narrative, namely the narrative of the Federal Office, which has been produced relatively short after arrival [of the



claimant]. And the probability that this [narrative] is true, of course, is greater, and it is not uncommon for maybe one [claimant] or other to come up with something during their time here in Germany to increase their chances. One may hear: “Oh, here, I have been recognised with this and that story. Then try it”. So, the falsest thing you can do. Then you do not believe anything anymore, but that’s the right thing to do (Oscar, judge, Germany).

In Italy too, some of our participants have suggested that a culture of disbelief affects the asylum system (focus group no. 4, northern Italy; focus group no. 5, southern Italy), although seemingly to a lesser extent than in other countries. This may increase following the 2018 reform. On many occasions, judges have reversed negative decisions by territorial commissions where claimants have, according to judges, provided a coherent account that was factually in line with the information collected by the tribunal about claimants’ countries of origin.<sup>75</sup> However, in light of the limited scope for appeals in the reformed Italian asylum system (Chaps. 4 and 6), SOGI claimants will inevitably suffer without the opportunity to establish their credibility in person before a judge (Palermo 2018). The non-verbal aspects of interviews are often lost in audio and video recordings, detracting from the authenticity of the account and negatively affecting the credibility assessment (Puumala and Ylikomi 2017).

In the UK, too, it is clear that a ‘culture of disbelief’ still harms SOGI claimants, as pointed out by several NGO participants:

And what they [Home Office] tend to do is start off with a great deal of scepticism, and refuse on the basis that the person hasn’t provided information or details even when they don’t ask for the details (...) The general things [to refuse a claim] would be the same, “we don’t believe you because...”, well the thing is because of anything. (...) they pick on very small parts of the interview, ignore the rest of the interview, they pick on one or two lines, or the standard one (...) is “too vague” and “too inconsistent”, without defining what the vagueness or the inconsistency was (Denise and Umar, legal advisors).

Chloe, an NGO worker, also said: ‘I have never worked with a gay asylum seeker who has been granted it [asylum] and had their sexuality not been disputed by the Home Office’. Yet another NGO participant believed that a ‘fundamental problem is that the asylum seeker is routinely treated as a liar (...) [and there are] lengthy interviews which seem intended to catch them out’ (S130, NGO volunteer). Asylum claimants made the same assessment:

They believed one thing, that I am from Bangladesh, I came here in 2009, because I came in legally with passport. Apart from this, they said I am pretending to be gay, the social media, this chatting I am doing, the copy they had, “it doesn’t make any proof that he is gay, anybody can do this”. Then Helen Bamber [Foundation] report[ed] the scars I had when I was in Bangladesh, [but Home Office argued that] it could [be] from a crime, maybe he did had fight with someone, this kind of, the beating is not about, could be sexuality. And, I

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<sup>75</sup> See, for example, Tribunal of Bari, decision of 4 December 2014; Tribunal of Genoa, decision of 16 September 2016; Tribunal of Venice, decision of 25 May 2018. See, also, Tribunal of Genoa, decision of 13 May 2016, where the judge placed fundamental importance on the ‘quality’ of the information provided by the claimant when considering the difficulties experienced in reporting a traumatic personal account.

mean, they tried to make everything that I am lying. And, it really drove me, pushed me to the edge. That I almost lost hope (Lutfor).

The interview started from 11 until 6.30 in the evening. (...) Then, when the decision came, they didn't believe anything. None of the things that I said they believed. Not even one. I don't know how many questions I had, I think I had 300 and something questions, none of them [were believed], they just believed that I am from Zimbabwe. The rest, nothing (Meggs, focus group no. 1, Manchester).

Bisexual people claiming asylum are particularly likely to be disbelieved:

Bisexuals, forget it. It is so difficult for a bisexual to prove they are bisexual. I think that is the hardest category. It is not just about proving it. Say it is a bisexual male and they have had a relationship with a woman, it will be, "You are not bisexual because you had a relationship with a woman." I think that is the definition of bisexual! There is a real culture of disbelief with bisexuals generally, which manifests itself in the system (Allan, lawyer).

A case in point is that of Orashia Edwards, a bisexual Jamaican man, who spent three and a half years battling attempts of the Home Office to deport him to Jamaica and was detained a number of times, after authorities claimed he was heterosexual and had just been 'experimenting' with men (Duffy 2018). Another claimant was told by the Home Office barrister: 'You can't be a heterosexual 1 day and a lesbian the next day. Just as you can't change your race' (Dugan 2015). As a leading barrister in SOGI appeals stated: 'The Home Office has just about understood there's such a thing as a gay identity, but just doesn't understand there's a bisexual identity' (Allan Briddock, quoted in Morgan 2018). To avoid scepticism on the part of decision-makers, it is not surprising that some bisexual individuals misrepresent themselves as gay or lesbian (Khan 2016, p. 172).

The Home Office sometimes depicts claimants as plotting their asylum claim strategy years ahead of time, in a way that appears far-fetched under any circumstance: Diamond saw his asylum claim refused by the Home Office, which discredited his claim to be HIV positive as a ploy to claim asylum on sexual orientation grounds at a later date.

At the end of the day, some are left feeling at an impasse:

it is very much down to "damned if you do, damned if you don't". "Why didn't you have a girlfriend, why did you, how could you now have a girlfriend when it is so dangerous" (...) which then damages the credibility of the whole of the case (Amelia, NGO worker).

The problems with credibility assessment in SOGI claims are pervasive across all countries under comparison. This is also the conclusion reached by European-level NGO workers and policy-makers. The anger and frustration of not being believed, especially in relation to an aspect of someone's identity that is likely to be so important to SOGI claimants, is enormous:

No [they didn't believe me], then how can I? Should I go and put my ass, they fuck my ass to prove that I am gay? That's the question they said, "No, you have to prove us that you are gay". Can I get my boyfriend and go and have sex in front of the court for them to know that I am gay? If they want that, then I will do it (Amis, focus group no. 2, Bavaria, Germany).

you're asking me deep, deep question, which you expect me to answer. And you are asking me irrelevant dates. I told you I'm running from my country, and you're asking me dates. So you expect me running, I'm sick on the way, I spent, in fact I witness here, you are expecting me to answer the questions I ought to forget. And then you determine which that if I'm right or I'm qualified to get your visa or not, your documents, that is bullshit, it's wrong. Forgive me for using that word, it's very, very wrong, it's not good. You cannot assess a man or a woman just by looking at the person and asking the person a question based on a piece of paper (Nice Guy, focus group no. 1, northern Italy).

Expectations regarding the narrative required from SOGI claimants thus need to change: bearing in mind how differently SOGI is legally regulated and socially experienced throughout the world, European decision-makers need to stop neglecting the specificities of countries of origin, go beyond a Euro-centric lens of what 'homosexuality' means and be open to different narratives. As Dina Nayeri (2019, p. 233) puts it, at the end of the day:

[e]very true story has strangeness, things that can only happen to *those* people at that time – the unbiased listen for it, trying to imagine an unknown world. But the biased look only for *familiar* oddities, the ones that match and validate their own story.

Nor should one overlook the discriminatory and often demeaning nature of this intensive probing of individuals' SOGI, a probing that is unimaginable in relation to heterosexual and cis-gendered asylum claimants, and which would be seen as highly offensive and inappropriate outside the asylum context:

I do not go to a judge and say, "Well, I do not think you're heterosexual. Prove it to me!". "Yes, I have two children and built a house and have a German shepherd dog." "Oh, well, that's not the standard now." "What do you expect, then?" It could be like that (Noah, NGO social worker, Germany).

Until a social and cultural revolution of sorts takes place in asylum adjudicators' minds, it will very often be the case that:

[t]he law may have adapted, but the nuances of coming out haven't sunk in for the individual asylum officers. Until they do, you can't be a quiet, bookish lesbian. Forget about being questioning, bi, celibate, heartbroken and not in the mood for new love, culturally beaten down or too afraid to act. Every gay person has to be a flamboyant scene-kid, out at clubs and fashion shows and on Grindr texting strangers at a nightclub (Nayeri 2019, p. 252).

The lack of belief in stories that do not fit asylum adjudicators' conceptions of what an LGBTIQ+ person is, reflects the homonormativity that permeates the European legal and political institutions, in general, and asylum systems in particular (Duggan 2002). In the process, we inflict violence on SOGI asylum claimants, and the principle of the benefit of the doubt and the fairness of the European asylum system are shredded to pieces.

## 7.6 Outcomes of the RSD Process and What Lays beyond SOGI – Through an Intersectional Lens

In light of the experiences of claimants described in Chap. 5 and the analysis above, refugee status or, at least, some form of international protection would seem the only legally appropriate and humane decision in many SOGI asylum applications. Yet, SOGI claimants receive international protection in a relatively small number of cases and, even then, are often not given full refugee status, depriving them of the degree of permanency needed to move on with their lives. According to our survey with SOGI claimants, claimants see their claims rejected because the decision-maker does not believe they were persecuted or at risk of persecution in their country of origin (40%), the decision-maker does not believe in the claimants' stated SOGI (32%), there is allegedly an 'internal relocation alternative' (14%) and claimants can return and be safe by living 'discreetly' (9%).

In Germany, refugee status is often granted to SOGI claimants when claims are found to be credible. Yet, there are cases, such as Ibrahim's, where although the claimant presents a credible claim, the authorities only grant subsidiary protection. Moreover, in the case of Syrian claimants, authorities generally only grant subsidiary protection if they only claim to be escaping conflict (ECRE, AIDA & Asyl und Migration 2019, p. 65). Syrian nationals who are members of SOGI minorities may not mention their SOGI during the asylum process to secure the speedy recognition of some form of international protection and avoid disclosing their SOGI, as in the case of Fares. That has as a consequence only being granted subsidiary protection instead of refugee status, despite the SOGI of those claimants putting them at risk of individual persecution.

In Italy, as well, some judicial decision-makers tend to either confirm administrative decisions denying SOGI claimants asylum,<sup>76</sup> or grant a lesser form of international protection than refugee status, such as subsidiary protection or humanitarian protection.<sup>77</sup> This has led one decision-maker to talk of some members of territorial commissions seeing international protection as a sort of 'reward', which should be given only rarely, resulting in more decisions of humanitarian protection than subsidiary protection or refugee status (Maria Grazia, decision-maker). A lawyer also explained that decision-makers sometimes see humanitarian protection as a compromise in cases of doubt about the claimant's credibility (Mara). This trend seems to depend both on the (disputable) understanding of the different forms of international protection (for example, from assertions we heard from a participant judge), but also on the human right at stake. In the case of a Ukrainian citizen who could not enjoy family life with her partner because of social attitudes, the Tribunal of Brescia only granted her humanitarian protection. The reason was based on the fact that the

<sup>76</sup>Tribunal of Ancona, decisions of 26 September 2018, 3 October 2018, 24 October 2018, 21 November 2018, 28 November 2018, 19 December 2018 and 30 January 2019 (unpublished).

<sup>77</sup>Tribunal of Ancona, decisions of 17 October 2018, 24 October 2018, 28 November 2018, and 19 December 2018 (unpublished).

claimant was deprived of the enjoyment of the right to respect for family life, which is not a non-derogable right for the purpose of granting refugee status, and the right to family life could be secured through the issuance of a humanitarian permit.<sup>78</sup> When it comes to gender identity, although international protection is generally granted, the recognition of refugee status can also constitute a challenge. For example, in a 2011 case related to gender identity, the claimant was granted humanitarian protection, although a careful reading of the case could have led to the recognition of the status of refugee.<sup>79</sup>

In the UK, the number of refused SOGI asylum claims is also high and there are regularly internet and social media campaigns – some of which appear to be successful – to prevent deportation of SOGI asylum claimants on charter flights, such as Jimmy Kyesswa, whose deportation to Uganda was postponed in December 2016 following an online petition (Butterworth 2016). It has been suggested that gender identity applications tend to be more successful than sexual orientation applications (Berg and Millbank 2013). This likely higher acceptance rate is attributed to the fact that ‘trans applicants were accepted as credible when their bodies conformed to a visual typology *and* their narratives to accepted western tropes of gender dysphoria’ – that is to say, when decision-makers could identify the classic transsexual ‘wrong body’ narrative (Berg and Millbank 2013, pp. 128–129).

The intersectional and feminist approaches informing our analysis make it clear, however, that decisions on SOGI claims are about much more than the claimants’ SOGI. Our survey with people who work with or support SOGI claimants confirmed that, besides their SOGI, SOGI claimants’ country of origin (62%), cultural background (53%), demeanour (clothes and mannerisms) (49%), educational background (46%), religion (45%), and gender (44%) are key factors in decision-making. These, along other factors such as socio-economic status, age and disability, are overlooked or subsumed by a focus on SOGI. Many decisions refusing international protection to SOGI claimants reflect a poor understanding of the intersectional nature of the harm suffered and feared by these claimants. This problem can be seen, for instance, in the failure to recognise how sexual orientation and gender come together for women claiming international protection. In the UK, for example, in the case of a 19-year-old Belarusian lesbian woman, gang raped along with her girlfriend, the Tribunal judge in the case said that ‘[t]he appellant appears to have been targeted only because of her sex and vulnerability rather than her sexuality’ (reported in UKLGIG 2013, p. 26). Gender also affects the kinds of harm experienced, with research suggesting that lesbian and bisexual female asylum claimants experience the most severe psychological harm and UK Home Office guidance not adequately recognising that (Khan 2016, p. 127). Several women claimants we interviewed in the UK had experienced gender-based violence, such as rape and

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<sup>78</sup>Tribunal of Brescia, decision of 29 May 2018 (unpublished), discussed by Danisi (2019, p. 372) in the context of the relationship between IRL and IHRL (Chap. 3).

<sup>79</sup>Tribunal of Rome, decision of 18 November 2011.

forced marriage, and it was not clear that these intersections were adequately recognised by decision-makers. In the German context, as well, we were told that:

she [lesbian claimant] has to be outed first as a woman, to understand her rights as a woman, to be first [able] to speak about her sexuality. (...) They have these issues of not being taken seriously, or the fear of speaking about their sexuality (Ibrahim).

Socio-economic status is another significant factor that SOGI asylum adjudication needs to consider, particularly in the way harm is risked and one's SOGI identity is experienced:

[In Pakistan] Some people say that they have relatives in the police and politics and the government and they are particularly worried because not only will they be known by everybody, but their family has got this extra kind of concern about honour and one person said to me "my parents wouldn't have any fear about killing somebody, getting rid of somebody and no one would know, because of their status" (Debbie, NGO volunteer, UK).

Socio-economic status is often intertwined with one's educational level:

Class and cultural and educational background all affect how able an applicant is to provide the kind of self-reflective narrative the Home Office is looking for. They also play a part in stereotypes. People from more conservative nations and ethnicities appear to face more scepticism from the authorities, and people from poorer nations and ethnicities are more likely to be labelled "economic migrants" (S4, lawyer, UK).

Some decision-makers willingly recognise that claimants' educational background has an impact on the quality and cogency of their testimony – for example, in relation to claimants' ability to speak about their journey of sexual awakening – thus influencing their credibility:

the tools, the culture, the capacity, even the school background is fundamental [to be able to establish one's credibility]. A person who has never studied, who has always been a shepherd since he was ten, will have difficulty talking about himself because he has never done it before (Titti, decision-maker, Italy).

This consciousness, however, seems to be insufficiently reflected across all SOGI asylum decisions. That is also clear at appeal level, with 'middle class', articulate claimants being able to present their cases much more cogently and confidently than claimants from more disadvantaged socio-economic backgrounds with lower literacy (Court observation, North Rhine-Westphalia, 2019; Court observation, Hesse, 2019). Elias, a lawyer in Germany, also asserted that 'we often deal with people who have little education. That means they do not know how to spontaneously respond to criticism'. One judge in the UK also suggested that appeals may be more successful when claimants have a better educational background:

I think in general, the sort of people we would tend to have... before us will by and large have some level of education and sophistication and so normally will perhaps with a little bit of help... be able to open up and just explain what it is (Adrian, judge, UK).

Less cognitively able gay men may find it more difficult to articulate their case in terms that resonate with European decision-makers than other SOGI claimants. An example of this is a gay claimant in the UK who was denied asylum because the

Home Office did not believe that someone with learning difficulties could be gay, finding that ‘you have failed to show that you are a homosexual man’ (Strudwick 2018).

Educational achievement is often intertwined with social class, religious, national and cultural backgrounds in inextricable ways, as legal representatives are aware:

You cannot clarify being LGBTI as a ground for persecution without mentioning racism and class issues. Yes? So, if a gay man, White, academic, comes and could talk concretely about what happened to him, then he gets a handshake after that and two days later he has his positive decision. If a Cameroonian who has been to school for four years comes from somewhere, you do not believe him. Since he cannot talk about it at all, because he cannot express it at all. He has experienced an environment that is (...) he has a very different kind of repression, that is, a very different inner [life] and outer community. No one is able to understand that. He talks in a quite different manner. And he does not even know how to say “how I realised that”, yes? (Barbara, lawyer, Germany).

If one has done nothing but two years of Koranic school in a poor country, he only answers the questions that are asked and says things that seem miserable... This is, however, something that I have noticed over the years: wealth and oral ability count for a lot, those who are able to speak and those who are not (Livio, lawyer, Italy).

Educational attainment is also, however, sometimes used perniciously to undermine credibility:

all they could say to me was “well, you seem like an educated person”, but what does my education have to do with knowing legal things? I have never been in a situation where I needed a lawyer even back home, so all of this is new, I am sure even somebody who had a PhD in that situation, you can’t think straight, you are confused, you don’t even know what is going to happen to you (Stephina, UK).

Similarly, educational attainment can be used to deny risk of persecution: ‘And after he [interviewer] told me “you seem educated. An educated woman in Africa can survive anywhere”’ (Julian, focus group no. 5, Bavaria, Germany).

Strong individual and community religious beliefs also often play a role in the nature and virulence of persecution and lack of protection by public authorities, in particular if the claimant’s family holds a position of responsibility in the religious community (Siri, Italy). More generally, socio-economic factors such as education, class and caste may intersect with religion and SOGI to render places more or less safe. Religion and ethnicity also intersect with gender, relevant to understanding why some women of a certain religion may find it difficult to talk about their SOGI if the interpreter or legal representative is also of the same religion (Jivraj et al. 2003, para. 8.8; Chap. 6).

Although generally neglected, age may also play a role in SOGI claims, with older claimants potentially being more experienced and self-confident in their dealings with asylum adjudicators, or being more resilient and resourceful during the asylum process. Thomas, an NGO volunteer in Germany, told us, for example, of a 20-year old claimant who felt intimidated and was ‘systematically challenged’ during an appeal hearing that lasted for three and a half hours, to the point of speaking lower and lower and having to be told to speak louder during the cross-examination. Conversely, older age may also decrease a claimant’s credibility, with a survey respondent stating that the ‘Home Office [is] less likely to believe someone is gay if



older for some reason’ (S155, solicitor, UK). This was confirmed by another participant, who stated:

when I was in court, I was about 35 thereabout or so, “oh, you can go back to Jamaica because you are getting old now, you are up in age, and you are single, so you won’t need a partner” (SGW, focus group no. 4, London, UK).

‘Older’ claimants – especially women – are thus expected to return to their home countries and live alone because no-one will question their lack of children (as they could have grown up) or a partner (as the claimant could be widowed or separated). Youth may also benefit claimants in other ways, albeit by relying on equally inappropriate stereotypes. For example, in a case involving a Nigerian gay claimant in Italy, the territorial commission made a negative assessment of credibility on the basis that the claimant, amongst other things, had offered a ‘generic’ testimony and focused on the physical aspects of his relationships. The judicial instance of appeal rejected the commission’s stereotypical assumption that relationships are about emotional engagement. Instead, the Tribunal used the stereotype that younger people are ‘understandably’ more focused on sex than emotions, as if young people value sexual activities more than older people.<sup>80</sup>

Yet another often neglected factor in this field is disability. A claimant’s disability may be misunderstood to the point of hurting their credibility and, consequently, the RSD process outcome:

They think that we people who are moving with crutches, who are disabled, we cannot move. They do not understand how I came to Europe from Africa, they think that we disabled people do not move, but there are people who have empathy and who help. (...) I can move, and somebody helped me to get my ticket to get here, I did not come by foot (Betty, Germany).

An understanding of the diversity *within* SOGI claims, but also of the intersectional nature of identity, is critical to the development of an asylum system that is responsive to claimants’ experiences, rather than one that imposes a single model of SOGI identity based on Western stereotypes. Gender differences must be recognised to understand the different experiences of male-to-female and female-to-male transgender claimants, and a variety of religious, ethnic, social, educational and cultural differences need to become ingrained in the minds of asylum adjudicators if we are to move towards a more socio-culturally sensitive, appropriate and fair system.

## 7.7 Concluding Remarks: Assessing the Assessor

Much has been written about SOGI asylum legal adjudication. Yet, some crucial issues have been the object of only limited research or, despite having been discussed widely, remain under-theorised or inadequately explored. In this chapter, we

<sup>80</sup>Appeal Tribunal of Brescia, judgment no. 1350, 18 July 2019.

have scrutinised matters relating to: the failure to consider Refugee Convention grounds other than PSG for SOGI minorities, despite the difficulty some SOGI claimants face in ‘fitting’ into a PSG; inconsistencies in the consideration of criminalisation of same-sex acts and the internal relocation alternative; the persistence of the ‘discretion argument’ in more subtle forms than previously; the standard of proof applied in violation of the principle of the benefit of the doubt; the failure to apply the burden of proof according to UNHCR guidance; the continuing culture of disbelief; and the ongoing inadequacy of credibility assessment. Trust in the SOGI asylum decision-making systems across Europe has been repeatedly questioned in this research. Our fieldwork brought to light good reasons to doubt the quality and fitness of current systems. Some of our participants in Germany went so far as describing the system as ‘horrible’ (Fares, Germany), ‘unfair’, a ‘betting game’ and a ‘lottery’ (focus group no. 1, Hesse, Germany). Others call it ‘absurd’:

So there are such things as “It is well known that in Uganda gay men are being persecuted and threatened with jail, but that, it does not contradict that the refugee [claimant] settles in another part of the country.” Although there is police threat, so in his case and although his family is after him and Uganda is not USA or something, Uganda is Uganda. So completely absurd (Thomas, NGO volunteer, Germany).

Moreover, political pressures and limited resources mean that decision-makers often lack the capacity to make decisions sufficiently in light of claimants’ individual circumstances. For decision-makers, it is also a daunting task to deal with the amount and nature of claims lodged. Emilia, a judge in Germany, described deciding on SOGI asylum claims as ‘poking in the fog’. As lawyers told us: ‘there is also a lot of copy and paste. (...) we had thousands of grotesquely poorly written, template-decisions in recent years. (...) [false positives are] a joke compared to the whole false negatives [issue]’ (Elias, lawyer, Germany). This was confirmed by claimants themselves: ‘Even the grounds they gave us on why you’re rejected are the same for 15 people’ (Julian, focus group no. 5, Bavaria, Germany).

Ostensibly, the Italian system appears to be the most ‘friendly’ towards SOGI asylum claimants, compared to Germany and the UK, based on the facts that the ‘alternative approach’ is adopted in relation to the notion of PSG, criminalisation of same-sex conduct is considered persecution in itself, and internal relocation is not considered in asylum claims. The overall picture is, however, much more complex. From a legal perspective, the latest Italian reforms (Chaps. 4 and 6) have introduced elements that are likely to be highly detrimental for SOGI asylum claimants, in particular the removal of a second degree of appeal and the replacement of a hearing in person with a video-recorded administrative interview. Furthermore, the broader SOGI legal framework and social environment in Italy is arguably far less welcoming than in most other EU countries.

Nonetheless, whichever country is dealing with a SOGI claim, there are risks for claimants. Often there is also the sense that ‘in becoming an asylum officer, you relinquish all imagination and wonder’ (Nayeri 2019, p. 158). Even worse, there is a fear that decision-makers can – if they so wish – distort the evidence submitted in order to deny international protection:

that is the crux of the matter, because people who come from Georgia are rarely doubted about being queer. For people who come from Cameroon, however, it is much more often doubted that they are queer. And of course, the impression I have is that, in Georgia, there is no persecution, no prosecution, even if there is massive social [discrimination]. So one can calmly say, “the person is homosexual, but there is no persecution.” On the other hand, in Cameroon, the people have to explain their sexuality very... yes... credibly, so to speak (Sabrina, NGO worker, Germany).

Elias, a lawyer in Germany, confirmed this by saying that ‘[i]f a judge really wants to discredit a client, then they succeed’. This happens both at administrative and judicial levels, as reported to us in Germany: ‘The whole [judicial] hearing was about looking for reasons to reject’ (Thomas, NGO volunteer).

Although we found no evidence of this, the high levels of refusals make some NGOs and claimants believe decision-makers are given quotas for acceptance and refusal rates (Sofia and Emma, NGO workers, Germany; S130, NGO volunteer, UK). Even if that may not be the case, it seems that decision-makers search for the weakest element of the claim (PSG, persecution, credibility, etc.) and reject the claim on that basis. As explained by Kadir, an NGO worker in Germany, the question decision-makers ask themselves is not whether they should grant international protection, but whether there is any grounds *not* to grant international protection. For this purpose, we present a hypothetical ‘charter of denial’. A cynical view of the system – collecting all the flawed aspects of decision-making explored in this chapter and applied in different ways to each country – might characterise the worst kind of decision-making mind-set in the following way:

- (a) You are not who you say you are [gay/lesbian/bisexual/trans/queer/etc.] and/or your testimony is not credible, because [not enough evidence, claim submitted a long time after arrival, evidence submitted is staged/self-serving, etc.];
- (b) [If a religion applies] You cannot be LGBTIQ+ because your religion frowns upon such identities/behaviours;
- (c) Even if you are who you say you are, you can go back to your country because there is no law affecting you;
- (d) Even if there is a law criminalising same-sex acts (or LGBTIQ+ identities / behaviours), it is not enforced or not enforced systematically;
- (e) Even if the law is enforced, you would be ‘naturally discreet’ or ‘discreet’ through your own ‘choice’, so you would not run any risk upon return;
- (f) Even if you were to run a risk, you can always relocate to another part of the country to avoid it;
- (g) Even if the country may be dangerous for SOGI minorities, you lied about x or were inconsistent about y, so we cannot believe you in general;
- (h) Etc.

In short, when there is the will to discredit a claim, there is a way. As Fernandez puts it, ‘even when the credibility of both identity and persecution is reasonably established, immigration officials are often inconsistent in their interpretation of case law and can be surprisingly inventive in their contorted counter-explanations justifying the denial of eligibility for asylum’ (Fernandez 2017, p. 205).

SOGI asylum thus becomes a striking illustration of the broader issue of the epistemic injustice produced by asylum systems: asylum systems are designed and operationalised in a way that privileges adjudicators' epistemic resources over claimants' resources, in order to legitimise the prerogative decision-makers have to 'arbitrarily and ambiguously misinterpret asylum applicants' experiences, cultures, and countries' – the so-called 'institutional comfort' enjoyed by decision-makers (Sertler 2018, p. 3). This is particularly evident in testimonial injustice (which includes denying claimants' experiences, ignoring available information, and deciding which information/criteria to use) and contributory injustice (which consists in knowingly and voluntarily employing prejudiced hermeneutical resources to undermine the epistemic agency of the claimants) (Sertler 2018, pp. 2 and 16). All these phenomena apply to SOGI asylum, as seen in this chapter, and the result is an excessive and inappropriate use of autonomy in decision-making by asylum adjudicators.

It may be beyond the power of asylum law and practice to completely overcome such testimonial and contributory injustices in SOGI claims. The task may simply be too complex and insurmountable in size and nature. The economic, resource and logistic pressures on current asylum systems are recognisably very significant. And they are not likely to diminish to any significant extent, so asylum adjudicators need to be supported in developing the necessary skills and competences that will allow them to offer decisions of better – even if not perfect – quality, more aligned with our theoretical and analytical underpinnings (Chap. 3), avoiding to a great extent the pitfalls discussed in this chapter. Recommendations to this effect will be explored in Chap. 11.

More generally, a claimant's life is not reduced to 'obtaining papers', no matter how important those 'papers' may be. In fact, for many LGBTIQ+ people we met during our fieldwork, their accommodation (Chap. 8), health, education and employment (Chap. 9) were greater priorities. We now turn to those areas of concern.

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# Chapter 8

## Housing and Accommodation



*Lesbians shouldn't be taken to villages where they are not wanted. They should stay here in the town where they are wanted. (...) They can't express themselves in villages.*

(Winifred, Germany)

*We are here for freedom, but in this case almost two years I am in the camp, there is nothing like freedom still. Because I am caged like a chain, could not go out, could not go sleep out, could not go to a club, that is out of me.*

(Mamaka, Italy)

*The first night I had to go up and down with the night bus because I didn't know where I would sleep. So I would rather get this bus, from [location A] to [location B], drop off, wait for another one so that the driver would not see me.*

(Meggs, UK)

### 8.1 Introduction

The SOGI claimants we interviewed were often more or as concerned about their living conditions in the host country than they were with the asylum process. This was especially the case in the interviews in Germany and Italy, where issues around housing and accommodation often dominated the discussion, both in interviews with SOGI claimants and with professionals. For instance, Elias, a lawyer in Germany, told us that his clients were often less concerned about the legal procedure and more about ‘the problems around it. Less legally, less tangibly in relation to the procedure, but rather: “What about the accommodation situation?”; “How can I rebuild a life appropriate to my sexual orientation?”’.

In our European-wide online survey, most respondents (59%) were accommodated in reception or accommodation centres provided by the government or local authority, followed by privately rented accommodation (19%), and a small percentage of respondents (7%) were staying with friends and family. Forty-four per cent

of the respondents said they felt safe in their accommodation, while a staggering 41% did not feel safe (15% were not sure).

While there has been an increase in research on SOGI asylum claims in Europe and beyond – as the previous chapters have demonstrated – there has been less of a focus on the social experiences of LGBTIQ+ claimants and refugees. Some research on the experiences of SOGI asylum touches upon housing issues (Bennett and Thomas 2013; Dyck 2019; Jansen and Spijkerboer 2011), and other research has looked specifically at SOGI claimants' physical and mental health needs (Alessi et al. 2018; Allsopp et al. 2014; Namer and Razum 2018). In this chapter we aim to address this gap by offering an in-depth analysis of LGBTIQ+ asylum claimants' experiences with housing and accommodation in Germany, Italy and the UK.

As we explored in Chap. 5, arrival and reception are often not easy for SOGI claimants, who do not receive the support they need to deal with their trauma and feel safe. As we outlined, none of the three countries has specific policies in place with regard to the initial reception of SOGI claimants. This is not untypical for EU member states, as the EU Reception Directive also fails to refer to SOGI (Ferreira 2018). Reception conditions for SOGI claimants has now been recognised as an important issue by EU policy-makers. As Alfred, a European Parliament staff member, told us, members of the European Parliament are trying to bring in a reference to LGBTI asylum claimants so that their specific needs are taken into account, and 'there can be measures during the reception conditions provision, such as specific housing or perhaps protective measures'. If successful, this will be the first time such a provision has been mentioned in a legal instrument. As Terry, a member of the European Parliament, explained, 'just letting it go [homophobic and transphobic attacks in reception centres] is not the answer, so you have to have a proactive, preventive stance on how can you protect LGBTI people in such situations'.

Beyond EU law, all three countries are bound by human rights treaties that, directly or indirectly, protect a right to adequate housing. Besides what emerges from the ECtHR's jurisprudence in relation to reception of asylum claimants belonging to sexual minorities (Sect. 5.4.3, Chap. 5), universal human rights bodies have specified the scope of this right as well as how to implement it effectively. For instance, the 'Guidelines for the Implementation of the Right to Adequate Housing' by the UN Special Rapporteur on adequate housing specify that:

[T]he right to adequate housing should not be interpreted narrowly, as a right to mere physical shelter or to housing conceived as a commodity. Rather, the right to housing must be understood in relation to the inherent dignity of the human person (Human Rights Council 2019, p. 4).

This includes the right to be treated equally with regard to housing and not to be discriminated against on grounds of gender, 'race', sexual orientation, gender identity, disability, age, 'refugeeness', religion and/or intersectional discrimination (Human Rights Council 2019, pp. 10–12).

This chapter explores SOGI claimants' and refugees' experiences with housing by first outlining the asylum accommodation policies in Germany, Italy and the UK (Sect. 8.2) and discussing general issues that SOGI claimants have with housing

(Sect. 8.3), before looking at specific SOGI-related issues such as sharing accommodation, being in the closet and experiencing discrimination and hate crime (Sect. 8.4), rural vs. urban accommodation (Sect. 8.5), homelessness and destitution (Sect. 8.6), accommodation after the asylum process (Sect. 8.7), SOGI-specific accommodation (Sect. 8.8), and detention (Sect. 8.9).

## 8.2 Asylum Accommodation Policies

Different housing policies exist in Germany, Italy and the UK. In Germany, claimants are placed in one of the three main types of accommodation: initial reception centres, collective accommodation centres and decentralised accommodation. The federal states are required to establish and maintain the initial reception centres and there is at least one centre in every state. The branch offices of the BAMF are usually located in these centres, and some of these offices deal with particular nationalities.<sup>1</sup>

In all of the interviews with professionals the ‘EASY-roulette’ (Frank S., legal advisor) was a major topic of conversation. Germany operates a distribution system called ‘EASY’ (‘Erstverteilung der Asylsuchenden – Initial Distribution of Asylum Seekers’), which allocates asylum claimants to reception centres in a certain federal state and then accommodation within certain municipalities within that state, according to the capacity of the reception facilities, nationality of the claimant and the ‘Königstein Key’ (‘Koenigsteiner Schluessel’), which determines the reception capacity of the 16 federal states.<sup>2</sup> Consequently, it is a ‘roulette’ where a claimant ends up. According to a 2019 parliamentary request (BMI 2019, p. 5), when claimants are distributed according to the EASY process, no criteria exist for considering sexual orientation or gender identity.

While the ‘allocation of the asylum seeker to a particular area is not a formal decision that can be legally challenged by the individual’ (ECRE, AIDA & Asyl und Migration 2018, p. 72), it is possible to request relocation on the basis of specific needs, but it has become increasingly difficult to have such requests approved (Kadir, NGO worker; Marlen, legal advisor; Matthias, social worker). When relocation requests to the federal state administration are made, the authorities often argue that it is the responsibility of the municipality to make sure that people feel safe, but as Matthias (social worker) explained, the situation puts an enormous strain on SOGI claimants’ mental health (Chap. 9). Some participants were positive about the regulations in Saxony, which was seen as a relatively good example of a federal state, where SOGI claimants are usually housed in one of the three big cities (Chemnitz, Dresden and Leipzig) after leaving the reception centre (Matthias, social worker). Here, NGOs work together to inform the authorities about vulnerable

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<sup>1</sup>For instance, the BAMF office in Munich deals with claimants from Uganda and Nigeria.

<sup>2</sup>Their capacity depends on the size and economic strength of the federal State in question.

persons, and then the Federal Directorate of Saxony ('Landesdirektion Sachsen') decides to which city the person is allocated. Local civil servants in Leipzig then also check with NGOs which claimants they can put together, and they offer flats specifically for SOGI claimants. Yet, this was not always effective and there had been cases where people were allocated to rural areas even though the authorities knew about their vulnerabilities. Two reasons why accommodation provision appears to work better in Saxony than in other federal states are that one of the Ministers of state ('Staatsministerin') is very supportive of SOGI refugees and that the housing market in general in cities such as Leipzig, is still not as stretched as in other urban areas (Sabrina, NGO worker).

Kadir (NGO worker), for instance, campaigns for smaller LGBTIQ+ decentralised accommodation in all of the cities in each federal state, not just the biggest. This would also make the whole process easier as claimants would not have to make a relocation request in the first place, if there is LGBTIQ+ accommodation in their municipality. For this to work, however, local authorities need to be supportive of such projects and have an understanding of why SOGI refugees may be vulnerable and in need of specific accommodation in urban areas. In Leon's (NGO worker) view, the Frankfurt am Main City Council, for instance, is supportive, while other city councils would argue that 'homosexuality is completely normal in our society, that's why we treat people totally normal'.

Once someone is allocated to a different municipality, it is difficult to relocate, not only during the asylum claim but also after (Sabrina, NGO worker). After receiving status, and if they rely on state benefits, claimants have to stay for 3 years in the federal state where their claim was processed, and in some federal states even within the municipality to which they were assigned, under the residence obligation legislation.<sup>3</sup> On 13 May 2019, the German Parliament (Bundestag) decided to render this residence obligation ('Wohnsitzauflage') an indefinite policy (it was initially introduced in July 2016 for a period of 3 years). During the debate in the German parliament, it was argued that this policy has proven to be successful for integration (Deutscher Bundestag 2019). However, with this regulation the federal government is reducing the choices of refugees and further increasing their social isolation.

In general, policies vary considerably between the federal states, and there is no common standard for reception centres. The 'Federal Initiative for the Protection of Refugee People in Refugee Accommodation', founded jointly under the auspices of the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth and the United Nations Children's Fund (UNICEF), has developed guidelines with minimum standards for the protection of refugees in refugee accommodation, including an annex on the implementation of minimum standards for SOGI refugees (BMFSFJ 2018). This includes the development of an internal protection concept and the sensitisation of all persons working in accommodation facilities to the needs of SOGI

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<sup>3</sup>These specific regulations were introduced on 1 April 2018 in Bavaria, Baden-Wuerttemberg, North Rhine-Westphalia, Hesse, Saarland and Saxony (ECRE, AIDA & Asyl und Migration 2018, p. 102).



refugees. However, there is no monitoring of the extent to which these non-binding guidelines are applied. The government has confirmed it has no plans to establish an independent complaints office, which SOGI refugees could contact in case of accommodation problems (BMI 2019, pp. 6–7).

The distribution policies and new reforms that allow claimants to be kept in reception centres for up to 24 months (rather than 6 months, as before, Chap. 4) can exacerbate social isolation, as claimants often end up in ‘the middle of nowhere’ (Angel, Ibrahim, Trudy Ann). This is in particular difficult for SOGI claimants, as we explain in Sect. 8.6. For instance, Tina was only supposed to stay in the camp for 6 months, but then the law changed:

they said they made another law that said you have to stay two years in the camp before you leave. No school, no working, just stay (...) For somebody to be in this situation, you’re just in one place, one position, your life is on hold, you’re not allowed to do anything, school, work... in that aspect it’s frustrating, in that way.

In addition, there is a ‘residence obligation’ (‘Residenzpflicht’) in place that restricts the movement of claimants outside the area of the reception centre for a period of (usually) 3 months (ECRE, AIDA & Asyl und Migration 2019, p. 71). In most federal states, claimants need special permission to travel to other parts of the state or to other parts of Germany during that time.<sup>4</sup>

Similarly to Germany, Italy is bound by the EU recast Procedures and Reception Directives. Here, the Directive was implemented through the introduction of new legislation on reception conditions and procedures in 2015, which identifies SOGI claimants as vulnerable if they are victims of torture, rape or serious violence. This means that SOGI asylum claimants may now benefit more easily, always as individuals rather than as a group, from services addressing their specific needs.<sup>5</sup> However, whether or not a person is considered in need of specific protection always depends on whether they receive a careful individual evaluation of their case on arrival, as SOGI claimants are not comprehensively identified and treated as a ‘vulnerable’ group (Chap. 5).

Italy has two distinct forms of reception, which are very different in terms of services provided to people claiming asylum. On the one hand, the CAS (‘centri di accoglienza straordinaria’ – extraordinary reception centres) are basic and temporary reception centres, set to deal with the growing number of arrivals. CAS are established by agreements between the government and private bodies (through local authorities, the ‘prefettura’), which can manage these centres with a considerable degree of liberty. Their size and services provided vary considerably, depending on the professionalism of the management. On the other hand, a more structured form of reception is provided through the SPRAR system (‘Sistema di Protezione per i Rifugiati e i Richiedenti Asilo’ – System of Protection for Refugees and Asylum Claimants), which brings central authorities together with local entities and

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<sup>4</sup>One SOGI claimant who lived in Bavaria and wanted to come to the SOGICA conference in Frankfurt in July 2019 was not able to come, as she did not obtain the permission in time.

<sup>5</sup>See Legislative Decree no. 142, 18 August 2015.

associations working in the field to provide asylum claimants with more than the basic material conditions provided in the CAS.<sup>6</sup> The SPRAR aims to provide people in need of international protection with a wider range of social and life support services.<sup>7</sup> Those hosted in such reception centres are indeed involved in a variety of activities associated with social inclusion and integration, for example, acquiring better language skills, and more easily accessing basic services, including health assistance. In parallel, they also provide assistance during the RSD process through the preparation for personal interviews before the territorial commissions (Chap. 6). However, because of the SPRAR's overall capacity, it should be noted that a very limited number of people are included in this kind of reception system (Anci et al. 2016, p. 71).

While SOGI minorities in the process of claiming asylum were potentially entitled to access these reception centres where they fell into one of the vulnerable groups mentioned above, the 2018 reform reserved SPRAR centres only for those already granted international protection, leaving asylum claimants with few options (Chap. 4).<sup>8</sup> Even more worrying, the new system privileges large centres instead of the small-scale facilities that had previously existed. The implications of the new policy for people claiming asylum, including those who flee homophobia and transphobia, appear to be extremely negative (Ziniti 2018). As Vincenzo (LGBTIQ+ group volunteer) described:

So, these two last reforms, the one that has eliminated a degree of appeal and the one that has completely revised access for example to the SPRAR, all unfortunately have an important impact on people seeking international protection on grounds of sexual orientation and gender identity. Because the SOGI factor in relation to the time factor is not considered in any way, as it is an aspect that is not self-evident, not easy to narrate, not easy to recognise, not easy to legitimise, can emerge belatedly, (...) can be hindered by the presence of an interpreter or translator, it can be distorted because the person was afraid to tell something else in a certain way compared to what was said previously.

As Daniele (decision-maker) explained, the reception system in Italy needs improving, but authorities are trying to deal with a large number of arrivals and it was positive that the government tried to avoid large-scale accommodation facilities by generally distributing only 12–15 refugees to each accommodation centre, thus it is easier to have close relationships with claimants and respond to their needs. One issue that was highlighted was that the people who run the reception centres were often not interested in the well-being of refugees or in supporting their integration, rather 'there are many who open a reception centre to make money' (Antonella, LGBTIQ+ group volunteer). Owing to this profit-based approach, managers of centres would also try to save money on psychologists, lawyers, etc.:

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<sup>6</sup> See [www.sprar.it](http://www.sprar.it).

<sup>7</sup> Decree of the Minister of Internal Affairs, 10 August 2016, which contains guidelines for the functioning of SPRAR: [www.gazzettaufficiale.it/eli/id/2016/08/27/16A06366/sg](http://www.gazzettaufficiale.it/eli/id/2016/08/27/16A06366/sg).

<sup>8</sup> Article 12 of Decree Law no. 113/2018 (converted into Law no. 132, 1 December 2018), so-called 'Decreto Salvini'.

All the reception system that was also given to private individuals, to people who were not in the social sector and who saw each other from day to day to do a social job that must be enormously prepared and instead they do it for profit, so they look to save on the psychologist, the mediator, the lawyer and therefore they are managing people who have a whole complexity of problems that are sometimes, because many structures are completely isolated from society, so how can we involve migrants, integrate them if in a year they are lost in the mountains (Susanna, social worker).

Moving to another area is also difficult in Italy: ‘relocation is difficult; if you are under the prefecture of Vicenza, I cannot send the person to Emilia-Romagna where perhaps there is a centre for LGBT claimants’ (Giulio, LGBTIQ+ group volunteer). Here, the support given by lawyers and NGOs is invaluable. For instance, Ken needed the intervention of his lawyer to be able to move out of the reception centre, where he faced discrimination by other residents (Chap. 6).

In the UK, ‘accommodation is a huge issue’ (Nath, lawyer) too and SOGI claimants can face abuse and harassment in their shared housing (David, official). Accommodation and subsistence support, known as ‘section 95 support’, is provided to claimants pending a first decision on their application (Home Affairs Committee 2018). In 1999, the UK government introduced the policy of ‘dispersal’, with the intention of relocating people seeking asylum who tended to go to London and the South East to areas of the country where accommodation was cheaper (House of Commons Home Affairs Committee 2017, p. 16). However, claimants with support networks in particular places may choose to stay with friends rather than taking the accommodation provided by the Home Office (Olivia, government official). Since 2012, under COMPASS (Commercial and Operational Managers Procuring Asylum Support Services), asylum accommodation has been contracted out to private companies, including Serco, which also runs detention centres such as Yarl’s Wood (House of Commons Home Affairs Committee 2017). In response to dissatisfaction with the operation of COMPASS on the basis of efficiency and quality of service, the system was replaced with new asylum contracts awarded in 2019 and renamed AASC (Asylum Accommodation and Support Services Contracts).<sup>9</sup> There is – theoretically – a ‘cluster limit’ of no more than one asylum claimant per 200 residents in an area (House of Commons Home Affairs Committee 2017, p. 16). However, distribution of claimants is unequal, with less than a third of local authorities ‘actively supporting dispersal’ (Home Affairs Committee 2018, p. 23).

The Scottish Refugee Council reported that, in 2018, there were 2859 asylum claimants in ‘dispersed accommodation’ in Scotland (Scottish Refugee Council 2019). Until 2001, relatively low numbers of asylum claimants and refugees settled in Wales compared to some parts of the UK. This changed in 2001, when Cardiff, Newport, Swansea and Wrexham became official dispersal areas and, by 2016, it was estimated that Wales had provided sanctuary to 397 Syrian refugees and nearly 3000 asylum claimants from other countries (Equality, Local Government and Communities Committee 2017, p. 12). There are no official yearly figures for the number of people claiming asylum in Northern Ireland, but in the period of April to

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<sup>9</sup><https://www.gov.uk/government/news/new-asylum-accommodation-contracts-awarded>.

June 2015 there were 497 people living in asylum support accommodation, while in the same time period the figures were 24,791 for England and 2649 for Scotland (Fergus 2015).

SOGI-related issues are not taken into account when people are dispersed and accommodation is chosen for them, as:

essentially the Home Office policy is that when deciding on the dispersal of individuals to asylum accommodation who have declared as homosexual or whatever, it makes no difference to where to house them and so they will put someone who has declared, into a house with another male from perhaps a country where culturally this is going to be a really difficult thing. And then rely on the LGBTI individual to raise an issue about it, to say this isn't going to work. Which does seem to me to be rather risky and remarkably unnecessary. (...) I am not sure that there is, there is a recognition of issues around LGBTI (David, official).<sup>10</sup>

A Home Office Guide to Living in Asylum Accommodation was published in July 2019 in English and ten other languages.<sup>11</sup> It specifies that residents need to treat housemates with respect regardless of characteristics including sex, gender and gender identity, but does not mention sexual orientation (Home Office 2019, p. 19). There are specific concerns for SOGI minorities relating to failings in accommodation provision, as a report on asylum accommodation by the Independent Chief Inspector in 2018 demonstrated. It identified SOGI minorities as 'particularly vulnerable' and on that basis recommended that the government kept data on them and reviewed the appropriateness of providing no-choice accommodation and forced bedroom-sharing (ICIBI 2018, p. 14). The inspection team heard of LGBTIQ+ people being harassed and abused by other accommodation receivers (ICIBI 2018, p. 60). The Home Office was not able to provide the inspection team with figures for the number of LGBTIQ+ asylum claimants provided with accommodation on a 'no choice' basis.<sup>12</sup> In its response, the Home Office accepted all the ICIBI's recommendations (Home Office 2018, p. 6).

While policies on asylum accommodation differ between and within the three countries, so do the standards of accommodation, as we now explore.

<sup>10</sup> However, as David described, one of the three main housing providers came up with an initiative to house SOGI claimants together in a 'Rainbow' house.

<sup>11</sup> <https://www.gov.uk/government/publications/living-in-asylum-accommodation>.

<sup>12</sup> '[A] Home Office senior manager explained that the Home Office's current position with regard to the allocation of asylum accommodation was that LGBTIQ+ asylum seekers should be "mainstreamed" (routed in the normal way), and if problems arose the individual should inform the Provider. This appeared to ignore the fact that the individual may not feel able to complain, and that the strong message from the Home Office was that asylum accommodation was provided on a "no choice basis"' (ICIBI 2018, pp. 60–61).

### 8.3 Standard of Asylum Accommodation

Many of the SOGI claimants we interviewed talked about general issues with regard to housing that affect all claimants, such as the quality of housing, hygiene and the food offered. Nonetheless, SOGI claimants experience these general issues together with more specific issues that relate to their SOGI. We briefly discuss the former as the basis for then exploring SOGI-specific experiences.

In Germany, as housing policies vary between the federal states, there is no common standard for reception centres. Generally, the initial reception centres have at least several hundred places, while some facilities can host large numbers of persons (one AnKER centre in Bavaria has a capacity of 3400 and has accommodated 1500 people at a time: ECRE, AIDA & Asyl und Migration 2018, p. 79). William, for instance, told us that he stayed in a reception centre that housed around 1100 people.

These centres are often (re-furnished) former army barracks, reported as sometimes being cockroach infested (Scott 2014). According to Komaromi (2016), security at reception centres is sub-contracted to private companies, usually on the basis of the cheapest bid, in all federal states other than Bavaria. This is highly problematic, as staff generally lack training in reception centres (Chap. 6). These companies can also attract neo-Nazi employees, and cases of racist abuse and violence against asylum claimants by these security guards are known, but not always taken seriously by the state and rarely penalised (Komaromi 2016). While the policies in place usually include housing single women and families in separate buildings or wings of buildings, this is not always the case. A shower can be shared by 10–12 people (sometimes more), and there is rarely shared kitchen space available (food is provided and served in canteens). Asylum claimants often have to report to security personnel when leaving and re-entering. In 2015 and 2016, Germany was overwhelmed and unprepared for the high number of asylum claimants, and people were often put in emergency shelters such as gyms, schools, containers, office buildings, warehouses and tents. This situation has changed considerably owing to the decreasing number of claimants reaching Germany and many reception centres have closed or have vacant places (ECRE, AIDA & Asyl und Migration 2018).

After the initial period in reception centres (which may now be up to 24 months), asylum claimants are sent to local accommodation centres, known as ‘collective accommodation’ (‘Gemeinschaftsunterkuenfte’), usually in the same federal state, where they stay for the rest of their claim (including appeal procedures, but this is handled differently in different municipalities). These accommodation centres are also often former barracks or (formerly empty) apartment blocks and are either managed by the responsible authorities themselves or by NGOs or private facility management companies. As AIDA reports: ‘Because different policies are pursued on regional and local level, it is impossible to make general statements on the standards of living in the follow-up accommodation facilities’ (ECRE, AIDA & Asyl und Migration 2018, p. 80). The living conditions in these accommodation centres differ significantly between regions and even between towns. These centres,

especially the larger ones, are often referred to as ‘camps’ by asylum claimants and refugees. Although conditions in these centres are often far from ideal, some claimants have to stay in them for several years (including asylum claimants who have ‘tolerated stay’/‘Duldung’). As Mariya (NGO worker) described, ‘from the initial reception facility to the accommodation centres, the conditions of refugee accommodation are still terrible’. Asylum claimants and refugees have actively campaigned against these conditions, especially in Berlin (Bhimji 2016).

In our interviews, most participants did not give positive reports of their accommodation. Angel’s experiences in different types of asylum accommodation led her to conclude that: ‘How I feel personally is like we refugees, and I’m not just saying Jamaicans or Black people, we refugees on a whole, we are treated less than human, to me. Based on my observation’. At the time of the interview, Angel had been living with her teenage daughter in asylum accommodation, a remote army barracks in the woods in deep Hessen (Sect. 8.6). She asked to be moved and a social worker from an LGBTIQ+ organisation, who visited her regularly, helped her with the application for transfer (‘Umverteilungsantrag’). However, it seemed unlikely that the application would be approved, as they had already offered her accommodation once in a nearby town that she had refused to take. Angel had gone there with a friend, who helped her and her daughter with the move. Angel described to us how she felt when she arrived in the accommodation centre:

As soon as I saw the room, I called the social worker and I was like, “no”, I burst into tears, I couldn’t control my emotions, I was like, “no”. I know I’m a refugee and I know I’m seeking protection from Germany, but I wouldn’t let my dog live in that room.

Instead, she took all her belongings and went back to her accommodation in the army camp, paying for the taxi herself. At the time of the interview she was still desperate to move out. She was told by the local authorities that she could rent private accommodation, but she struggled to find any owing to her refused asylum claim and limited residence permit. Her accommodation choices were also restricted because she needed to stay within the specific district (‘Landkreis’) which had only one or two reasonably large towns.

Trudy Ann described the reception centre where she and her partner had to stay for 10 days as ‘[t]hat place is like a prison there’. She said that the camp was smelly and dirty, and that women and men were mixed: ‘I hated it there (...) that place is not for human beings. It’s dirty. Very filthy. The people there are nasty, very nasty’. Trudy Ann described the beds in the reception and accommodation centre as ‘prison beds’. She found her living conditions distressing: ‘Sometimes I’m at school and my mind is not there. I’m like saying, I left my own country to come here, went through so much. Sleep here, sleep there, eat this, eat that’. At the time of the interview, she and her partner were sharing a room in an accommodation centre in Hessen, where they could cook for themselves, however, under rather unhygienic conditions. Also other participants talked about inadequate and unhygienic conditions. Rosette told us that the toilets in the reception centre were always blocked, so ‘you can stay for a week without visiting a toilet’ or go to the nearby McDonalds to use the toilet there. And yet, claimants are expected to take what they are offered

without complaining. As William described, when he went to the regional office for foreigners' affairs (Landesamt fuer Auslaenderangelegenheiten) to ask for a transfer, he was told: 'You came [here] thinking that Germany is heaven. Now you want a big house'.

As people do not have privacy in the reception and accommodation centres, there is also the risk of their belongings being stolen. This happened to Marhoon and Prince Emrah. Prince Emrah had their mobile phone and other items, including shoes, stolen. In the accommodation centre, Marhoon's roommate had a friend visiting; when he woke up in the morning, they were both gone and had stolen his rucksack, which he always kept under the bed, and new boots that he had just bought:

What else can I handle...you know? I was disowned by my family, I was threatened, I can't go back to my country, and all of this and now this. Treated like shit in the camp, nobody cares, and this asshole who had been preaching about [religion] (...) and then eventually steal from me and runs away.

As Marhoon's account demonstrates, some of the negative experiences SOGI claimants have in reception and accommodation centres (like their belongings being stolen) might affect all claimants, and are not related to claimants' SOGI. Yet, for SOGI claimants, such experiences can be particularly difficult, as they often cannot fall back on family support, and because of their SOGI they are often isolated in the accommodation centres.

Another issue is that specific SOGI-support is often not available, especially when claimants are accommodated in rural areas (Sect. 8.6). The women who participated in the focus groups no. 3 and no. 4 (both in Bavaria), and who lived in the South of Bavaria, felt that the system gave the owners of their hotels, which now functioned as asylum accommodation centres, too much power which could be abused. In their view, '[t]he housemasters are the problem' (Lynn, focus group no. 4). Jolly described the roles of their 'housemaster': 'At one point he was our security guard, he was the office messenger, he was the administrator, he was every[thing], the social, everything in one person'. There were no groups or NGOs, like Caritas, present in the hotel, such as was the case in other accommodation centres (for example, Hilda, focus group no. 4). Because there was no Caritas or social workers coming to the hotel, there was no one to go to, when the housemaster mistreated them, or for additional help (for example, in getting health insurance to see a doctor, as we heard from Winifred). One of the hotel owners harassed the residents by checking what they had bought, and forcing people to carry out cleaning when they were ill or had back problems (Jolly, focus group no. 3; Lynn, focus group no. 4). This harassment was possible due to the hotel owners' power to have residents' asylum support cut; they just had to tell the authorities that the residents were not fulfilling their house tasks or not respecting the house rules. Chidera talked about the relief she felt when she finally left the hotel and the housemaster she was afraid of. After what she had experienced in the hotel, she was overwhelmed by how welcome she felt in her new place: 'Like I've never felt such acceptance in my life before. I was given a separate room, self-contained, everything inside the room. They were treating me like a princess, like seriously. I was like "God..."'.



Women were particularly vulnerable to sexual exploitation by the housemasters. Mayi (focus group no. 4) told us that the housemaster had made sexual advances towards her, which she rejected: ‘This man has slept with all the women on the compound’. Women expressed their sense of powerlessness (Lynn, Hilda, focus group no. 4) as they felt unable to take any kind of action. We were told that, were they to call the police, they would not be able to communicate with them, and the housemaster would start talking to the police in German.

Others recounted positive experiences with their housemasters, and said of the ones who were more supportive, ‘those ones are not racist’ (Nana, focus group no. 3). The feeling of members of focus group no. 4 was also that the bad housemasters were racist (Ayeta), while other people were really caring and supportive (Ayeta, Mayi, Violet).

Also in Italy, asylum claimants are dispersed throughout the country, without being able to choose where to live (and they cannot appeal against the decision of being placed in a certain centre as this is not done through a formal decision). Claimants are dispersed depending on the availability of places, and according to the criteria to house 2.5 claimants per thousand inhabitants in each region (ECRE, AIDA & ASGI 2019, p. 90). Most asylum claimants are hosted in governmental initial reception centres and CAS accommodation, including SOGI claimants, in light of the lack of dedicated reception centres for people asking asylum on these grounds. As AIDA reports: ‘In practice, reception conditions vary considerably among different reception centres and also between the same type of centres. While the services provided are the same, the quality can differ depending on the management bodies running the centres.’ (ECRE, AIDA & ASGI 2019, p. 96). In the absence of widespread monitoring and consistency standards, life in these centres may vary considerably for SOGI claimants, who reported both highly positive experiences thank to the presence of trained staff (Odosia), and extremely negative episodes of racism and a total lack of services (Mamaka).

As Daniele (decision-maker) described:

[T]here is a certain difference between those who go through the SPRAR and those who do not. Because those who go through the SPRAR, which has a reduced number of places, compared to this there is a more developed subsequent system made up of agreements with local authorities. (...) For others, it depends on the ability of the local authority to organise itself, say, on a large scale.

As only a small number of claimants overall are given SPRAR accommodation, it is no coincidence that only a few of our participants were hosted in these reception centres (Alain A., Nelo, Kamel, Silver, Kennedy).

Participants in Italy, as well as in Germany, struggled with not being able to cook for themselves in the reception centres. This was also difficult because of cultural differences: ‘they serve you what they want, Italian and African food is very different’ (Nelo, Italy; also Odosia and Buba). In Germany, participants mentioned that they were offered a lot of bread: ‘in the morning it is bread, in the afternoon it is bread, in the evening it is bread’ (Tina, focus group no. 4, Bavaria; also Trudy Ann

and Rosette). For Dev (Italy), not being able to decide what food he ate was one of the things that restricted his freedom:

Because already perhaps, you are not free, because already the food is essential, already for the fact that we are not fed as we want, consequently we do not eat food like meat, we are forced to eat cookies, pizzas, and it's not food, the body needs fats and all that, and we do not find them in cookies, so that's the first factor, and the second is the fact of feeling imprisoned, because we are in prison, we are adults we are not minors, a father of 36 years like me.

Nonetheless, the food schedule in reception centres can at least give some structure to the endless days where you just 'eat and sleep and wait for Monday, Saturday, this is how we live (...) anytime we wait for food, you wait for dinner, you wait for lunch, you know this is under control, you know' (Franco, Italy).

In the UK, a parliamentary committee report in 2017 found accommodation for asylum claimants was often sub-standard and unfit, with reports of vermin, asbestos risks, overcrowded conditions and insufficient food: 'Some of this accommodation is a disgrace and it is shameful that some very vulnerable people have been placed in such conditions' (House of Commons Home Affairs Committee 2017, p. 49). And yet, 2 years later, in August 2019 the Guardian still reported the inhumane conditions of asylum accommodation in London, where claimants lived in overcrowded housing that was infested with cockroaches, mice and rats (Taylor 2019). The Labour party has called for 'the return of responsibility for asylum accommodation, and the billions that come with it, to local authorities' (House of Commons 2018).

Claimants are expected to accept what is provided without complaint. Jayne's example is illustrative of that. When she was moved to Birmingham with her son (who was 14 at the time), a people carrier car was provided to transport them:

so we thought we are taken to somewhere where at least would be liveable. So, we go to an address in [town] and the driver said, "it is here, we have arrived", and this car was parked in the front garden (...) and flats that looked dilapidated, and my son started like shaking, refusing to get out of the car, he said "maybe you should take us back where you took us from, it is ok, I am not getting out of the car if this is where you are taking us". So, we went upstairs to the flat with the G4S man, and it was very, very bad. It looked like maybe the place was used by homeless people, with... smears on the walls, with what looked like, maybe to me, it looked like even bullet holes in the walls, it was quite scary.

Jayne told the G4S driver she was unhappy with the accommodation, so he called the area manager who then came and said it was 'OK' and asked her what was wrong with it.

So I remember I asked him, I said "can you live here yourself", he said "yes". At that point then he said, "you know, if you continue to refuse to stay here, I am going to call Home Office for you and you don't want that". I said, "you know what, if it was just me on my own, I really wouldn't have minded staying here, but as a parent I am not going to put up with my son in a place like this.

She insisted on obtaining another opinion:

So, he rang the Home Office guy, who came, very tall, well-built man, came and like stood in my face like this and said, "what do you expect?" At that time I just broke down, I just

started crying and I didn't know what to say, because I was thinking maybe this is the person coming to rescue me, so when I broke down crying (...) I couldn't get any word out of my mouth.

Eventually, Jayne and her son were taken to a hostel where they stayed for two nights and then went back to the flat, which was now in a more liveable condition. Even though it was not ideal, they did not mind as the hostel where they had had to stay 'was also worse': they had to use the toilet facilities at a nearby branch of McDonalds.

Not only the conditions of asylum accommodation but also the practice of forced bedroom-sharing in dispersal accommodation has been a concern for parliamentarians (House of Commons 2018). The House of Commons Home Affairs Committee report on asylum accommodation recommended that particularly vulnerable claimants (including expectant mothers, those living with mental health needs and victims of trafficking, rape and torture) should not have to share a room, and that room sharing in general should be phased out (House of Commons Home Affairs Committee 2017). The government responded that:

Room sharing allows the Providers to use their portfolio to meet the demands of asylum intake and ensure that destitute asylum seekers are housed safely and securely. There are strict criteria set out in the Statement of Requirements around when room sharing can take place and who can share a room (House of Commons Home Affairs Committee 2017, p. 14).

Some city councils have banned forced room sharing but accommodation providers do not necessarily comply with the ban (Bulman 2018). However, in the UK, forced bedroom sharing is not as problematic as in Germany and Italy, as we explore in the next Section.

## 8.4 Living in Shared Accommodation, Being 'in the Closet' and Experiencing Discrimination and Hate Crime

In all three countries, asylum claimants are mainly accommodated in shared housing, and often also have to share bedrooms. This is particularly true in Germany, where claimants usually need to share rooms with strangers over extended periods of time, which can be even more difficult for SOGI claimants. As Mariya (NGO worker, Germany) explained:

Generally I find the concept that people who have just gone through terrible things in their country of origin come here and somehow just want to have a rest and want a stable, somehow, new life, that they have to share a room for several months and sometimes years with unknown people and unfortunately this is not just the exception for queer people. And yes, because that's just such a sensitive topic, "how do I deal with my sexuality", and often they are super tight spaces – sometimes it's six-square-metre, eight-square-metre, where it is also a bit difficult to hide things from each other, what you look at on the laptop or on the phone, with whom you chat, and such spaces or situations force you to get in touch with each other and people ask each other: "Why are you here?" "What happened to you?" And if people do not want to come out, it's psychologically very difficult.

SOGI claimants’ difficult experiences with asylum accommodation have been highlighted by NGOs and others (Awadalla and Rajanayagam 2016), and ‘there are hundreds of newspaper articles about violent incidents’ (Marlen, legal advisor). SOGI claimants may experience discrimination, verbal and physical violence, not only at the hands of other claimants, but also of security personnel, administrative staff and interpreters (Emanuel 2016). All the participants who supported LGBTIQ+ claimants provided examples of claimants facing difficulties in reception and accommodation centres, and many of the LGBTIQ+ claimant participants told us of such difficult experiences from a general fear to ‘be out’ in their shared accommodation to experiencing verbal and/or physical abuse. This fear of being out is often due to the heteronormative environments of the accommodation centres as well as their surroundings, as these two survey respondents described:

At my place of residence, I [live] with straight people and my roommates and the people around always talk evil things about gay people, and because of this reason I don’t feel free to open up. But I always feel free when I am at [NGO] during our meetings. (C55, Germany)

It’s not easy to open up about my sexual orientation because of the surrounding and the stigma. (C39, Germany)

When Emroy (focus group no. 1, Hesse) arrived in Germany, he first had to stay at Frankfurt airport’s detention centre. There, he felt protected, as the staff looked out for him. Despite being in a detention centre, he felt safe, a feeling which changed in subsequent accommodation. When he was moved to the reception centre in Giessen, he feared homophobic fellow claimants:

And I feel threatened. And I am scared for my life because I am coming from a country where I’ve been through a lot (...) In Jamaica you have to hide, and I’m sick and I’m tired of hiding my sexuality (...) Germany is a good place, but it’s not safe for gay people because you’re mixing us up with people who are not gay, even people from Jamaica. They might not be the ones who attack us before, but as soon as they find out that we’re gay, they’re going to attack. Even if they don’t attack, they will say things, and they will try to tell their friends that “oh, so you are gay”, so that whenever they see you, they will try to attack you.

As William (Germany) explained: ‘That is why when we’re in the reception centres we try to hide. You live “in the closet”. Because you don’t know who is your neighbour’. Stephen (focus group no. 2, Bavaria, Germany) described how an incident in his accommodation centre made him fearful of ‘coming out’. He was glad that other gay men lived in the accommodation centre and were, like him, part of the LGBTIQ+ support organisation Rainbow Refugees Munich. Together they put up some posters about the organisation, thinking there might be others in the accommodation centre who would like to join the group, but the next morning the posters were gone: ‘so that gave me a lot of fear if that, if I’d come out’ (Juliane, a public official, told us of a similar incident in a reception centre in Hannover).

Alphaeus talked about being threatened in his reception centre: ‘They start discriminating against you, they start treating you like you’re not a human being’. Gisela, a lawyer, thought that if you ‘out’ yourself or are ‘outed’, then ‘life there is hell’. She had a gay client from Sierra Leone who experienced such a high degree of harassment from the people he lived with – including being spat at and prevented

from using the shared facilities – that he attempted suicide and was eventually sent to a psychiatric institution. An official of the Bavarian government suggested that it had been his own fault for being ‘out’. According to Gisela, the government tends to move the trouble-makers but not the victims, instead of providing accommodation for vulnerable people. Another one of Gisela’s clients was in a reception centre when the mass shooting in the gay club in Orlando happened in 2106 and found himself surrounded by people cheering and celebrating the event. When Gisela’s client spoke up and effectively ‘outed’ himself, he had to be transferred for his own protection. One survey respondent was particularly affected by an incident with her roommate: ‘My roommate told me face to face that he wished all gay people would be denied asylum and that he wished the worse for all of us, a statement that can never go off my mind’ (C38, Germany).

Even where SOGI claimants had managed to secure a place in an LGBTIQ+ accommodation centre, following experiences of bullying, violence, homo- and transphobia, and even death threats in ‘mainstream’ accommodation centres, their relocation claims were often rejected. They might even be dispersed to another district, disrupting any mental health (for instance, therapy sessions) or other kinds of support they were receiving. In the LGBTIQ+ accommodation centre in Berlin, for instance, some claimants were only able to stay a few days before dispersal to a rural area in another federal state (Frank S., legal advisor). The Bavarian government, in turn, does not even provide LGBTIQ+ accommodation and does not consider these individuals to be members of a vulnerable group. In this context, Thomas (NGO volunteer) was concerned that it would take a violent death in asylum accommodation to prompt authorities to act appropriately. Thomas told us of one member of his organisation who was violently assaulted in their accommodation and was removed by the authorities in the middle of the night. NGOs tried to raise awareness among accommodation staff by distributing posters, talking to them and offering them training (Thomas, NGO volunteer; Knud, NGO worker; Juliane, public official). Yet, as Thomas (NGO volunteer) said, this is likely to take a long time, particularly given that SOGI minorities are still not fully accepted in wider German society.

Participants told us that when they experienced harassment, they did not feel they received adequate support in reception and accommodation centres. For instance, Mahmoud experienced verbal and physical abuse by people in his accommodation centre, but when he told social workers about it, they said they could not do anything. Here, incidents escalated to the point of Mahmoud asking the police to intervene. Eventually an organisation helped him to move out. Similarly, Veronica and Julia (Germany), who lived in an eight square meter room with only two beds in their reception centre, which they shared with their children, experienced verbal abuse from other residents. When they reported it to a member of security staff and a social worker, both individuals merely advised them to be careful and not to disclose their sexual orientation to anyone. The security staff worker added that they should be glad that it was ‘just’ verbal abuse and that in other centres people experience sexual violence. The social worker, who was also from Russia, told them: ‘What do you want? In Germany 80% of people are against it as well. No one is

going to help you, so you better not say that you are lesbians'. The social worker suggested that they pretend to be sisters. Veronica and Julia were shocked by these responses:

It was really hard to hear, because you were trying to save yourself, to lead another, normal life. You are in another country and there people say almost the same as in Russia. "Everyone is against it"; "Be glad that there is no sexual violence". Where are we, Julia? (Veronica)

Because of the re-traumatising effects of the abuse she experienced in the accommodation centre, Julia saw a psychologist, who also told her that it would be better if she was not 'out' in the centre.

As we explore in Chap. 9, such experiences of housing put a strain on SOGI claimants' mental health and prevent them from thinking about their future, as William (Germany) explained: 'And when life is safe you can have a future to think about. We sit down and think about what next'. He argued that the large accommodation centres are counter-productive to fostering acceptance, as refugees are segregated from wider society and cannot familiarise themselves with German ways of life: they 'cannot accept it when you are still together like this'.

In Italy too, we heard of examples of verbal and physical violence experienced by SOGI claimants in reception and accommodation centres, and also of NGOs trying to raise awareness of these issues (Giulia, LGBTIQ+ group volunteer, Italy). Here once again the major issue was the failure to consider the identities of individuals allocated shared housing. Some participants, for instance, found it problematic that people were housed in reception centres according to nationality (Silvana, judge). Similar to Germany, claimants have to share rooms, often with many people. Mamaka, for instance, told us she was housed in a room of four, where previously six claimants were, and that there were also rooms of eight in the accommodation centre. She found it very difficult to live there; the women in her room would be drinking and smoking and there were 'lots of fighting'. At the time of our interview, she had been waiting for 5 months for an answer to a transferral request. Gbona shared a room with six other men, he said it was 'not easy, but it's OK'. He had lived there for a year. Silver lived in a house in Florence for 7 months that accommodated 15 young men and spoke of the troubles he faced once they found out that he was gay. They normally cooked for each other and when it was his turn, they told him that they did not want to eat his food and that everything in the kitchen needed to be separated: 'they said it was an abomination for our culture and: "You can't cook for me to eat, but we have to separate everything. You take your pot, your glass, your spoon, your plate and you don't have to touch this." You don't have to cross this part or else they kill you'. He told a centre staff member, but she did not believe him and thought he was exaggerating. One day, when one of the other residents started a fight with him in the kitchen, the social worker intervened and finally agreed to move Silver to another accommodation facility. Although he went back 'into the closet' in the new accommodation, he again suffered discrimination from other asylum claimants when they found out he was gay, however here he felt supported by accommodation managers. Nicola and Giulio (LGBTIQ+ group volunteers) talked about one of their clients being discriminated against in his housing and suffering

harassment. He then was transferred to SPRAR as a vulnerable person. Also Susanna (social worker) had a client who was beaten up in the reception centre and had to be transferred.

Some LGBTIQ+ claimants told us that ‘hiding’ their SOGI was their only coping strategy. For instance, Ken (Italy) had experienced problems in the first camp where he stayed, where other men harassed him verbally and physically started fights with him. Therefore, in his second accommodation he stayed ‘in the closet’ and the situation was better because he was:

pretending to be a “normal” young man. (...) because I have to live a fake life, I have to hide, I have to behave like a “normal” young man, I have to behave like others, so it is ok for now (...) It is difficult to live a life you are not, just because you don’t want people to start talking and I am coping, I am trying.

Also Alain A. (Italy) told us of his experience of being in the closet in the reception centre, where he had to stay for almost a year, and was afraid that the other African people in the camp would find out about his sexuality:

So I lived a quiet life there. I think... my identity was not exposed, nobody knew like I was gay so I was, I still lived like I was in Africa, still trying to hide a lot of things (...) I have a lot of my friends they don’t feel free in their camps, because the people maltreat them because they found out that they are LGBT.

Other claimant and refugee participants had similar experiences, and, in fact, did not discuss their SOGI in their reception and accommodation centres. For instance, Moses was living in a flat that accommodated six claimants, all from Nigeria, and he was sharing a room with another person. Nobody knew about his sexuality and he was careful that they should not find out: ‘It is not really easy, it is, it is not really easy’. Diarra lived in small camp of only four people in the countryside and was very careful that the other three men did not find out about his sexual orientation. For Fred, it would take time to find people with whom he could be open and tell his story: ‘that’s my own story, my story I’ve never told anyone, since I have not found a good person to listen to me yet. In any camp I went through, I did not find someone so open that I could tell him my story; so I always have my story in my heart’.

Participants struggled with their situation: they fled their country of origin because of facing SOGI-related discrimination and violence. Having had to live most of their lives ‘in the closet’, they then are often put in an environment similar to the one in the country of origin.

As Nice Guy (focus group no.1, northern Italy) explained:

LGBT life for we asylum seekers here in Italy is somewhat terrible, very, very, to an instance (...) because we left our country for the sole purpose of discrimination and persecution, and that is exactly what we find here, but in the camps that we are and even outside too. No, no, no, not from white people, from, but from the same, our fellow blacks, because we are everywhere. You see? It’s not easy for somebody, the country you are comfortable in, living your life, and one day you have one or two big problems and you leave, or you think that’s OK, after going through hell, you are going to somewhere you will be comfortable. Only getting there. There is no, there is no separation, we are still in the midst of the same people that criticise and crucify you. It’s impossible for you to release, OK, here I am in Europe, I’m free, no, you are not free. (...) So for me, I’m not finding it fun...



However, other participants acknowledged that the situation was still better than in their country of origin. For instance, Siri, who shared a room with one person and was not 'out' in the camp, but at the same time was not hiding as he was not afraid nor ashamed, told us that in Italy he knew he was free. Dev (focus group no. 5) told us that in the camp, he 'was stigmatized verbally because maybe they had an idea about my sexual orientation, they stigmatized me verbally but they did, it's not physically, verbally'. However, he said that in contrast to living in Africa, he knew he had rights and that such behaviour was not acceptable in Italy. At the same time, he cautioned that Italy was also not very progressive with regard to LGBTIQ+ issues: 'Homosexuality in Italy, I think it's still a taboo subject – even Italians are not 'out' [in town x]. It means that Italy is similar to Africa ... just on the paper legalised, so go *bene* [well], but at the mental level Africa and Italy *uguale* [the same]'. Also other participants thought that living in Italy as an LGBTIQ+ person was generally not easy. Kennedy told us that he also had Italian gay friends who did not come out and were afraid of him visiting their house, as they were afraid that their parents would find out about their sexuality, so they would also be hiding. One of the survey respondents explained that he was open about his sexual orientation, but that 'it's difficult here like it is in everywhere in the world to be a gay person' (C63, Italy).

Not everyone felt the need to be open about their SOGI in the accommodation centres. For instance, Gbona and Fido did not see any reason why they should be 'out' as 'everyone has his story' (Gbona, Italy). Others said that for them it was easy to be open about their sexuality (Cyrus and Patrick, focus group no.2, northern Italy). Cyrus felt confident about telling people in the reception centre that he was gay when they asked him, seeing that he went to gay Pride events: 'I'm proud to be gay'. In that respect, the importance of meeting other gay men for not feeling ashamed to be out (Fido, focus group no. 4, northern Italy) and connecting with NGOs to feel safer in accommodation centres and be able to talk about sexuality (Bakary, focus group no. 2, northern Italy) was also mentioned.

We also heard some positive examples of SOGI claimants living with non-SOGI claimants, indicating that 'people should always have the choice' about their accommodation (Jonathan, LGBTIQ+ group volunteer, Italy). For instance, Junio (Italy), who arrived in Europe as a child, felt 'very looked after' by social services and shared 'very good accommodation' with another girl. Similarly, Momo lived in a hotel, along with two other gay friends; other residents knew they were gay, but '[t]here are no problems there. There everyone respects'.

In the UK, not only the report on asylum accommodation by the Independent Chief Inspector referred to LGBTIQ+ claimants being harassed and abused by other accommodation receivers (ICIBI 2018, p. 60; Sect. 8.2), but research conducted by Citizens Advice Liverpool also found that 9 of the 17 LGBTIQ+ claimants interviewed reported being abused, bullied or discriminated against in shared housing. The study found that especially initial accommodation was unsuitable for LGBTIQ+ claimants (Citizens Advice Liverpool 2018, p. 17). In the many years working with SOGI claimants, Melisa (NGO worker) witnessed how 'they were facing bullying, they were being beaten up, they were facing extreme homophobia'. When we asked

Amadin whether he felt safe and comfortable in his asylum accommodation, he responded: 'I do not really feel safe because I live with people who are not LGBT so I am scared to tell them what was my case and who I am, so I was scared and hide my life here.' At the time of his interview with us, Lutfor had problems with one of the men living in his house, and he had been physically assaulted by him, to the point of calling the police. However, the solution of SERCO, the accommodation provider, was to move Lutfor, rather than his persecutor and despite Lutfor's wish to stay because of his good relationship with the other residents.

Some of the participants did not experience verbal or physical abuse directly but were fearful because of what other people had told them. For instance, Selim (UK) was afraid to accept Home Office accommodation, as he had heard other asylum claimants talking about their experiences of being abused and raped by people from their own country with whom they had to share rooms in asylum accommodation:

Can you imagine putting, let's say, an Iraqi guy here because he is gay, escaping from straight people in Iraq, in the same room with another Iraqi who is here escaping the war? And he is straight. So there was a lot of abuse, there was a lot of stories about abuse and rape and threatening and all these things, so the last thing I wanted to do is to be in this accommodation with those asylum seekers, because I don't know what reason they are claiming asylum upon.

The housing providers might think that they are doing something positive when they put together people from the same country/community, but this can be problematic for SOGI claimants (Joseph, NGO volunteer, UK; Mariya, NGO worker, Germany).

Some participants talked about the consequences of 'coming out' or having their SOGI found out. When Meggs (UK) started to feel more comfortable about her sexuality after a few months living in the UK and 'outed' herself to the two women with whom she shared a house:

they also started to exclude themselves from me, like they were really, really against my sexuality I would say. Though they would not like say, when I say it they were kind of shocked like "wow, really, we have not seen any boyfriend coming here" (...) So we used to like, as girls we were just, if it is hot we would just go bra top naked and things like that, but everything started to change and you know when people look at you like you raped them or something, like that, yes. So, I started to feel like excluded as well, but I didn't know I had a right to complain about it with SERCO.

Yet, being 'out' or being 'in the closet' might not only be a problem in asylum accommodation. Sometimes, SOGI claimants stay with relatives or friends and they might have to move out once their SOGI is found out. For instance, Rosa (NGO, UK) said that during the transition period, during which claimants granted international protection only have 28 days to find accommodation, people might be 'forced back into the closet', if they are dependent on someone else for accommodation.

As shared bedrooms are less common in the UK, in contrast to Germany and Italy, SOGI claimants here may have better accommodation experiences. Participants in the North West of England we spoke to were positive about the support structures in place, especially from self-organised groups, and the social life that existed for SOGI refugees (Amelia, NGO worker; Meggs, focus group no. 1, Manchester). In

some instances, we heard that bisexual and lesbian women had been (purposefully?) put together by the accommodation providers and that despite the problems with housing that many people faced, there were some SERCO staff ‘who are trying really hard, and who are on the side of, and who want these refugees to have a decent quality house and a safe house and kind of demonstrate kindness’ (Chloe, NGO worker).

These accounts illustrate that most LGBTIQ+ asylum claimants experience their current ‘home’ as a heteronormative space, where they do not represent the ‘sexual norm’, and therefore any reference to their sexual identity will be experienced as a ‘coming out’. We now look in a bit more detail at the intersectional dimension of accommodation and how these spaces are experienced by trans and non-binary claimants as well as couples.

### ***8.4.1 Accommodation of Couples***

Hiding SOGI is particularly difficult when having a partner. As Vincenzo (LGBTIQ+ group volunteer, Italy) explained, one of the main issues here is that asylum claimants are:

de-sexualized in some way, or if sexuality emerges, it does so in forms considered more “problematic”, such as pregnancy, like the person who has a sexually transmitted disease. In those cases it may emerge and there is an emergency taking charge, but the right to sexuality, the right to pleasure and affection and intimacy, no. So these things are problematic.

Fred and his boyfriend Dev (Italy) were living in the same accommodation centre but were not allowed to share a room with each other. Even though people had to share rooms, the manager of the camp argued that the accommodation was only for single people and not for couples. Luckily, Dev’s roommates were understanding, and one of them knew they were a gay couple and was accepting, so they could spend time together in Dev’s room.

We also heard from other LGBTIQ+ claimants who had difficulties being housed with partners (Damiano, lawyer, Italy; Stephen, focus group no. 2, Bavaria, Germany). Giulio (LGBTIQ+ group volunteer, Italy) told us that individuals would need to prove that they were part of a couple, and even show a marriage certificate. As Jonathan (LGBTIQ+ group volunteer, Italy) argued, being housed together might be difficult for an unmarried heterosexual couple too. However, one difference is that gay couples will not have had the chance to marry in their country of origin. Some of the couples we interviewed described feeling as if they were still back in their country of origin, as they were not able to openly show affection towards each other (Dev and Fred, Italy; Veronica and Julia, Germany): ‘we still feel like in Africa’ (Dev).

Because claimants have to share accommodation, couples lack privacy and being with a partner is extremely difficult, especially when that partner also lives in shared asylum accommodation (Tina, Germany). In addition, when they have met during

their asylum process, it is difficult for one person to be relocated so the couple can be together, as Liz (focus group no. 5, Bavaria, Germany) and her partner experienced. Each lived in remote areas far away from each other, and neither had the financial means to pay for costly public transport tickets. They asked to be relocated closer to one another, but this request was rejected: ‘We have tried everything and there is no way out’ (Liz, focus group no. 5, Bavaria, Germany).

It was also problematic for claimants to have partners outside their accommodation centres. Buba (Italy) talked about his difficulties in talking to his boyfriend in the Gambia, as no one in the camp (a hotel) knew about his sexuality and he shared a room with four people. Kennedy (Italy) also described being very careful so that the other men in his room would not find out about his sexuality; he was not able to talk to his boyfriend freely, and always had to watch out in case someone came into the bedroom. He was also afraid that someone would see messages from his boyfriend on his phone. As he described it: ‘It makes me feel bad, it makes me feel very, very bad, because sometimes I don’t have the, the freedom to chat with my loved one’.

Whether in an intimate relationship or not, SOGI claimants’ experiences in accommodation are shaped by the intersections of different social categories such as gender, sexuality, disability and religion, as we demonstrate in the following section.

#### ***8.4.2 Intersectional Dimensions of Accommodation***

Owing to their intersecting experiences of exclusion and discrimination, SOGI claimants may feel unsafe for different reasons. For some participants, it was the intersection of gender and sexuality that shaped their experience. Tina (Germany) lived in a large camp where only around ten women were single like her (without a partner or children). Most of the people there were in families with children, pregnant women, or mothers with babies. She had to share a room with four heterosexual women and a baby, and had lots of problems with her roommates and faced discrimination: ‘I don’t feel comfortable at all’. She tried to stay out of the room until it was time to go to bed, because ‘there are times you want to relax, [but] you can’t, it’s really terrible’. As her asylum claim was refused, she was likely to stay in that camp for a long time, and although there seemed to be places available in a safe women’s house, she struggled to be accommodated there, as it was in a different district.

The heteronormative environment of reception and accommodation centres is difficult for non-heterosexual (cis-)women, who get ‘advances’ from men, and are often also pressured by the other women with whom they live to have a relationship with a man (Tina and Hilda, focus group no. 4, Bavaria, Germany). As Tina (focus group no. 4, Bavaria, Germany) described her situation:

And yeah, [laughs] I would stay [with] four people in the room and wherever I had... very many people had their boyfriends that they move on with, but for me I had no-one. So they

could force me, saying "why not have a man?" This kind of things. My roommate would be on me.

The often mixed-gendered accommodation centres can bring women into unsafe situations, as Julian's (focus group no. 5, Bavaria, Germany) example demonstrates. She was living 'in the closet' in the accommodation centre as she was told in her first interview to keep her sexuality as a secret, but men harassed her and were irritated when she did not respond to them, leading them to assume that she was a lesbian. For a few nights she was alone in her room as the woman with whom she shared her room and who was pregnant had gone to the hospital. One night she woke up to find in her room a man who lived in the room next door: 'We are not allowed to lock ourselves in. So I was sleeping. I woke up from a dream and the man was sitting in the room. So I felt "I am dreaming"'. When she told the staff in the office the next day, they did not take it seriously, did not want to give her a bedroom key and told her that if something were to happen, she should scream and then security would come:

The next time, I woke up, there were now two [men]. So I had to scream. So that security this time finds evidence for themselves. When security came, they said "but they are just seated, they are not touching you, they are not forcing you." I told them "yes, they are not touching me, but it's funny, if we are not friends, ask them do they know my name? They don't know my name, so how can you say we are friends? I just met them because in the camp we eat together. Please tell them not to come back here." So those security people never took it seriously (...) for them, they didn't think of me maybe in that angle, that I'm a lesbian. I have grounds why I'm scared.

Feeling desperate, Julian packed her belongings and went to speak with the woman in charge of the camp to tell her that:

"if I am to stay here give me a key to lock myself up when I'm sleeping, or else they could rape me, and the next time they will rape me, you will say the same thing, I'm being dramatic, I'm being chaotic, I'm being scared." (...) she refused [the request for a bedroom key]. So they called the police. Because now I was being dramatic. And when the police came, I told the police officer "I don't want to talk to a man, I'm kindly requesting if a policewoman [can talk to me]".

The policewoman helped Julian contact an organisation that hosted her for a week, before she was transferred to another place. Julian's account demonstrates how vulnerable women can be in mixed-gender camps. Julian was very outspoken and she felt for the women who were not: 'But imagine I had not insisted on fighting'.

Accommodation centres are not only heteronormative spaces but they are also spaces where the 'somatic norm' (Puwar 2004) is able-bodied, as Betty's (focus group no. 3, Bavaria, Germany) experiences demonstrate. At the time of the interview, she had been living in the asylum accommodation centre (a hotel) in a small village for 2 years and 3 months and felt 'like a prisoner' because of not being able to walk for long distances. In addition, it was difficult for her to walk with all her pots to the kitchen, which was far away from her room, and she had to use a crutch. When she asked to be relocated, they wanted to offer her a place in another village, where she would not have to cook, not understanding that her problem was not

having to cook but being expected to carry her kitchen utensils all the way to the kitchen. With the people living in the hotel, she experienced another layer of discrimination:

The problem is really how they put us with other people, people discriminate us. People, they do not want to stay with me, they think I am a curse and that they will have to help me every time, people think I am useless, they do not want to associate with us, most of the time. They just see that I move differently from them. And when you talk, they do not let you talk, as they think you have to be oppressed, that you be under that person. I think that Europeans and natives, they are different, they are happy to help you. And I do not get any support. If I tell the housemaster, he says that I need to share a room with somebody. He does not know what I am going through, he does not know what is happening inside the room, and he doesn't want to hear.

As a Black, disabled, lesbian refugee, she felt out of place everywhere: in the hotel, in the village, and even at the lesbian refugee organisation she attended, where she also felt like the other women did not treat her as equal but assumed that she belonged to 'another category of people'. Betty's account reminds us of how important it is to look at the intersectional experiences of SOGI refugees, not to treat them as a homogenous group, but like any other group based on identity, where membership is shaped by inclusions and exclusions (Butler 1991).

For some participants, it was the combination of their sexual and religious or non-religious identity that shaped their experience. When Marhoon (Germany) was moved from the reception centre to an accommodation centre, he told the Red Cross that he was gay and an atheist and asked whether he could share a room with like-minded people. Two days later, a room became vacant and they gave it to him. But then later two more people were put in the room: 'And then came a third roommate, from Iraq, and I was surprised they put us together because I'm atheist, the guy from Iran is Shia and then the guy from Iraq is Sunni. And as you know the Sunni and the Shia don't get on very well. So I was really confused, why have they put them in the same room?' Although there had been some tension between his two roommates because of their different religious backgrounds, they were both all right with him being gay and an atheist:

I told them because I wanted to see their reaction. If it was negative, I'd kick them out or force the camp to send someone else. Because the camp also told me not to talk about it. (...) They told me not to tell people that I'm gay or atheist, which apparently is illegal, or they don't have the right to tell me to say that. So I told them both, no problem whatsoever. I was impressed, ok, there is hope. So both had no issues with it.

Yet, Marhoon did have problems because of his atheist beliefs when another resident felt offended by a picture that Marhoon had painted in an art project. He perceived it to be an insult to God and Islam and came into Marhoon's bedroom and threatened him, leaving Marhoon shaking: 'It was terrible, but from that moment everyone in the building distanced themselves from me. "Oh, you are one of these atheists, because now you're an atheist you think now you can offend Islam"'

When looking at the intersectional dimensions of accommodation, it is important to look not only at LGBTIQ+ claimants' experiences *within* accommodation centres but also *outside* of them. As Halim's (Germany) experience demonstrates, SOGI

claimants might feel unsafe in both situations, with different aspects of their identity, or a particular combination of identities making them targets of violence and abuse in different spaces (Chap. 3). Being housed in a refugee camp in an area in East Berlin known for increasing numbers of neo-Nazis, Halim felt unsafe in the accommodation because of his queer identity, while outside the accommodation centre he felt visible and threatened as a refugee. He talked about having split identities: 'it's all part of me but depending on where I am, I feel uncomfortable or unsafe because of certain things'. Halim did not 'out' himself in the camp: 'I had the privilege that maybe I can hide somehow, I'm not so visibly queer in that sense'. Yet, he struggled because of the hostile surroundings, and was 'always scared of going in and out'. As he had to share a room, he did not have any private sanctuary to which he could retreat: 'it was very bad for my mental health, I was very depressed at the time'. He was then moved to another refugee camp even further East, in Marzahn, an area which 'has since the 1990s had an image as a no-go area for foreigners' (Young 2017). There, an old school had been turned into refugee accommodation, and there had been anti-refugee protests against it (Spiegel online 2013). Halim described seeing German flags displayed on the balconies of local tower blocks. He was there for two and a half months, and had to share a room with five other people. Some of them were from the same country as him and this made it even more difficult as 'it felt even harder for me to hide who I am because they can read me better'.

Lesbian women who participated in focus groups no. 3 and no. 4 in Germany, who lived in rural areas in southern Bavaria (Sect. 8.5), told us of experiences with high levels of racism in the surroundings of the accommodation camps. People in the area would not even look at them when they greeted them and that '[s]uddenly, they keep their space. They don't want to come near you' (Hilda, focus group no. 4, Bavaria, Germany). Sometimes, on public transport, people would not sit next to them, or they would move away once you sit next to them and we were told of occasions when fellow passengers pulled their nose to indicate that our participants smelled bad (focus group no. 4, Bavaria, Germany). In shops, our participants' bags would be checked to make sure they had not stolen anything (Hilda and Liz, focus group no. 4 Bavaria, Germany). Ayeta (focus group no. 4, Bavaria, Germany) described walking around in the town where she stayed and 'there was a lady coming towards me. When she saw (...) I was Black she held her nose, then she turned and spit. I just turned to her and told her "God bless you"'. In these focus groups there was a sense that Black refugees are treated differently to other refugees, and that there was what Haritaworn has called a specific 'anti-Black racism in Germany' (Haritaworn 2015, p. 14).

At times, they experienced a combination of homophobia and racism, as Jolly's, Betty's and Winifred's (focus group no. 3, Bavaria) account demonstrate. They were accommodated in a hotel in a small town in south Bavaria, more than 2 h away from Munich, surrounded by mountains. It had been a tourist area before the hotel closed down and reopened to accommodate asylum claimants. They described the town as mainly White and populated by older people: 'We are few Blacks there. And most of them are the natives around there, yeah. They are the natives, and actually not



really young natives. Elderly only. Then maybe their children come once in a while' (Jolly). They told us that within, as well as outside their accommodation, people would assume that the few single Black women housed there were all lesbians. As Jolly described:

Different reasons bring people to Europe, or in Germany. And whenever they get any suspicion about you that you're a lesbian, they tend to backbite, to push you away. There's a way they look at you, as someone who's... as if you're not a person, you get it, right. So discrimination is too high, yeah. And maybe not only from the Blacks, even from the Whites, yeah. Still even in the area where we are putting up right now, it's not easy. People around there, they think that we are contaminating their children, contaminating the area around where we are.

They felt a combination of racism and homophobia in their everyday lives. The women were upset by their experiences. As Winifred explained, they were already suffering from mental health problems, so:

When I find this person and he doesn't want to associate with me, or I'm seated somewhere, you don't want to sit with me, it hurts me. It's like I'm still in my country where I'm neglected for my status.

In shared accommodation, the intersectional dimension of experiences is problematic in particular because claimants do not have the choice of where to live and with whom. This is especially difficult when social identifiers are very visible, which increases the risk of experiencing harassment and violence, as is often the case for non-binary, trans and intersex claimants.

### ***8.4.3 Accommodation of Non-binary, Trans and Intersex Claimants***

While some LGBTQ people might be able to hide their SOGI, for non-binary, trans and intersex people this may be considerably harder. Trans claimants are often allocated accommodation according to the sex indicated in their legal documents, so they become very visible and vulnerable to physical, sexual and verbal abuse (Jules, staff member at ILGA-Europe; Kadir, NGO worker, Germany; TGEU 2016, p. 5). From Maryia's (NGO worker) experience, in Germany sometimes trans claimants' self-identification is accepted, but this is not always the case. However, Kadir (NGO worker, Germany) also cautioned that placing trans women in cis-women accommodation, for instance, might not always be the best solution, as it can be difficult for the cis-women (depending on their past experiences). Considering the small number of trans refugees and their vulnerability, Kadir advocated for decentralised housing for them, and reception centres in Lower Saxony, where he works, have increasingly dealt with these cases in more flexible ways, leading to trans claimants obtaining individual accommodation or being offered small flat shares (see also Matthias, social worker; Juliane, public official). At least trans refugees' need for a single room should thus be respected, as well as their wish to be in urban areas,

where support structures and health services for trans claimants are available, and where 'people do not hear for the first time of hormone treatment' (Louis, NGO volunteer, Germany).

As TGEU highlights: 'Using the toilets, showers or common areas can pose a daily risk' to trans claimants' (TGEU 2016, p. 5). As bathrooms are usually binary-gendered (in asylum accommodation as well as in public spaces in general, see Spade 2015, Chap. 3), if people are non-binary or in transition, this can become a topic for conversation and conflict, and claimants' gender may be questioned by staff and other residents (Mariya, NGO worker, Germany). This was the experience of Trudy Ann's partner, who was often challenged when she wanted to use the female bathroom for 'looking like a man'. Both Trudy Ann and her partner usually went to the bathroom together, as they did not feel safe otherwise, also because there were men around (as families were housed in the accommodation centre). Such experiences might be re-traumatising for people who have fled their country of origin because of abuse on grounds of their gender identity. Staff in the camps might also 'out' trans claimants, for instance, when they call out the wrong name/sex (Ibrahim, Germany; Jules, staff member at ILGA-Europe).

In Germany, the trans claimants we interviewed all had negative experiences with asylum accommodation because of being placed in the wrong gendered accommodation and/or because of being housed rurally (also Sect. 8.6). Diana was placed together with three men in accommodation, as her passport revealed her male birth sex. She later received her own room but had to share a kitchen and bathroom. She was so scared of transphobic violence that she went to a friend's house when she wished to have a shower. At night she would receive knocks at her door and people would threaten her. Similarly worrying, Bebars was put in a mixed-gender accommodation centre. He tried to explain with the help of an interpreter that he was not accepted by anyone in the accommodation centre. He also reported this to the welfare office, but was not taken seriously. He felt that the main problem in the accommodation centre was that there was 'no contact person for us [SOGI claimants]'. He tried to explain to staff why it was difficult for him to undress and change clothes in front of the (heterosexual) married couple, who were also from Syria, and with whom he had to share a room. This was especially difficult for him because he wore a bandage around his breasts, 'but they did not care'. He was then moved to a second accommodation facility that was completely for women. Despite putting pressure on the social services every few days to move to another accommodation, nothing happened for 4 months: 'they did not want to do it, I got on their nerves'. When he was finally moved, he was placed in accommodation in a small village, where he was incredibly isolated (Sect. 8.6). Trans claimant Rolla (focus group no. 6, Lower Saxony, Germany) was also accommodated in a small village for some time. The security there felt sorry for her as they saw how people treated her, so they gave her a cat to look after, which she loved. She was glad when she was moved to a big city but here then she experienced a very hurtful transphobic incident, when someone abused her verbally and spat at her on the street.

Also in Italy, shared accommodation is extremely difficult for trans claimants. Kamel lived in small apartment together with five (cis-)men and had to share a room

with one of them. He was scared of his roommate, had a panic attack and couldn't sleep. He told us: 'I spent a year and a half like a wolf. I slept with one eye open and the other one closed. Always with that feeling of risk'. He wore a bandage to tighten his breasts, which should only be used for a maximum of 6 h, but because he did not have any privacy and could not even lock the bathroom, he wore the bandage 24 h a day. He told the housing managers that '[i]n fact, you put me more at risk', as they did not allow locks on the bathroom. Because of wearing the bandage all day, he had developed serious health problems, including not being able to breathe well and feeling hot all the time (Bebars, in Germany, had similar problems). He also witnessed a fight where one of the residents was holding a knife to another resident saying "you're gay, that sucks!". He tried to call the housing manager, but no one answered. Like Bebars (Germany), Kamel did not receive any support in the accommodation centre but rather felt that the managers were 'too ignorant, they don't know what trans means', and were also unable to provide contacts to relevant organisations that could offer specialised support and advice to Kamel. While he did not feel safe inside the accommodation centre, he was also worried about his safety outside the accommodation centre, and feared racist attacks, especially after the general elections on 4 March 2018, which were won by a centre-right coalition led by Matteo Salvini's right-wing League:

That is on the 4th March, I felt sick. I felt again what I felt before in Libya, because I am afraid of going out into the street at night, alone, that someone is beating me. I'm afraid of those people. I mean, if anyone happens to wear a black shirt, I'm scared.

He told us that he also experienced racism at the Pride in Bologna in 2016, where he was on stage with a LGBTIQ+ migrant organisation (MigraBo) and heard two women shouting "first the Italians, go back to your home!" Someone shouted "Vive Salvini!", I felt bad.'

In the UK, the lack of choice was also patent. Christina, for example, was never asked what kind of accommodation they preferred. For almost 3 years they had to share a house with three men, which was 'very, very uncomfortable'. Christina thinks that mixed accommodation centres are not safe for SOGI claimants and that trans claimants should be placed in private accommodation:

It is not safe. I think if you identify as homosexual, you should be living with homosexuals. If you identify as lesbian, you should be living with lesbians. If you identify as trans, you should get your own space. Because you need to feel safe, and comfortable.

Similarly, Janelle was also not consulted about her accommodation preferences. She would have preferred trans or LGBTIQ+ accommodation, but was put in male accommodation because of the male name on her passport. She was housed with three men, 'they tried to like attack me within the house and they were like calling me names'. She reported it to the housing provider G4S, but they did not do anything about these incidents. As she did not feel safe in the house, she stayed mainly in her room.

Not neatly fitting the expected gender performances in cis-gendered accommodation can also be problematic for intersex clients. One of Melisa's (NGO worker, UK) intersex clients, whose passport stated male as their birth sex but presented as

a woman, was put in accommodation facilities with men on more than one occasion, and in each facility faced bullying and sexual harassment:

at some point they [client] had to leave the house in the night and take a walk in the night or try and find a friend who was available where they could stay on their sofa. In some instances they were forced to just stay in the kitchen, you know, to just sit there and wait until the other person slept, so it was a continual harassment and... they tried complaining to different departments within the housing provider, the COMPASS providers, and they were not supported or they didn't get the help that they needed.

Only when Melisa's organisation stepped in, did the Home Office act promptly, and the client was then moved to the organisation's safe accommodation: 'the first thing they said when I went to pick them up, they cried, so much'.

As this section has shown, shared accommodation can be extremely difficult for SOGI claimants, who often try to hide their SOGI because of fear of homophobic and transphobic verbal and physical violence. Hiding becomes more difficult when claimants have partners or when their gender expression does visibly not confirm to strict gender norms. We now want to look at experiences of discrimination and hate crime, not only within reception and accommodation centres, but also in the surrounding areas. It is important to explore these experiences to highlight the intersections of experienced sexism, homophobia, transphobia and racism.

As shown above, in Germany, Italy and the UK, many SOGI participants had difficult experiences of asylum accommodation. In Germany, for some participants these experiences were even more difficult where they were accommodated in extremely rural areas, as we now explain.

## 8.5 Rural/Urban

When we visited Angel (Germany), it was snowing heavily and we had to walk along a main road to get from the small village where the bus left us to the accommodation centre (the bus that stopped at the centre came only three times per day). Angel shared a flat there with a heterosexual couple and a baby, and with another gay man from Jamaica. Her room was small, containing a bunk bed, a wardrobe and a small table. When Angel's teenage daughter came back from school, she would do her homework and then go to bed as she had nothing else to do. Outside the barracks, there was a path that led into the woods with a sign 'trespassing forbidden, army shooting territory' (Figs. 10 and 11).

Angel told us that they regularly heard shooting, even at three in the morning. Both Angel and her daughter seemed to us to be depressed, and Angel said she felt hopeless. Her claim had been refused and she was waiting for her court hearing. Living so remotely, she could not attend any LGBTIQ+ group gatherings and events. Any visit to a bigger city involved a long and expensive journey with public transport but with no way to get back to the accommodation centre, as the bus only ran until early evening. To go shopping, Angel had to take the bus to the next town and then wait several hours for the bus to return:



Fig. 10 Signs outside accommodation



Fig. 11 'Trespassing forbidden, army shooting territory'



When [I arrived to this accommodation], to be honest... I was terrified before I reached here, because I noticed the more I drive, the more landscape I see and the less civilisation I see, you understand? And it's not something that I'm used to. I was born in the city, I was grown in the city, I don't know no other life than city life. (...) Even though I was isolated in Jamaica, it was by choice because I wanted to protect myself and my child. Here, I have no choice. (...) I am from a minority group that go through a lot of negativity, and I am not able to participate in any form of social groups because of my location.

Angel described her surroundings as somewhere even German people find too isolated:

The middle of nowhere. A wilderness, you know? It's like... I don't even know what to say [laughs], because, it's like, I don't even see animals here, you understand? So it's just like basically in the middle of – even Germans, when I give them my address they're like, “Oh you live in the middle of nowhere”, you understand? And they are born Germans.

As Marlen (legal advisor, Germany) put it, it is hard for German LGBTIQ+ people to live in a small village where they do not fit with the heteronormative lifestyles. Consequently, many LGBTIQ+ people who grow up in villages move to bigger cities: ‘and they can easily do that, there are no restrictions; you cannot say that about the refugees, they are very bound and cannot decide freely where they want to live’ (Matthias, social worker). Angel was not even housed in a village, but some miles distant from the closest village. She was the first person we interviewed in Germany who was accommodated so remotely, but during the course of our research we became aware that her situation was, in fact, quite common.

Germany consists of 16 federal states, of which three are city states. When people are allocated to one of the three city states, living remotely is not a significant issue (Kadir, NGO worker; Maryia, NGO worker; Barbara, lawyer), but when they are allocated to one of the 13 non-city states (‘Flaechenlaender’), they can end up in ‘the middle of nowhere’ (Angel). Submitting an application for a transfer (‘Umverteilungsantrag’) was one of the main support needs, as all NGO workers and some of the lawyers confirmed, however the success rate of such applications was variable. Elias (lawyer in Hessen), for instance, said that when he worked on a claim, if he demonstrated the claimant's family connections and particular vulnerabilities, then it would often be successful. In North Rhine-Westphalia, it was estimated that in about two thirds of the cases a request to be allocated to a bigger city was accepted (Joachim, NGO worker). In contrast, Leon (NGO worker), who worked in the same federal state, had only two claims accepted in 4 years, out of approximately 15–20 submitted. In Lower Saxony, it had also become increasingly difficult to get such requests accepted, and requests seem to take longer than in other federal states (Kadir, NGO worker; Matthias, social worker). One reason for refusals to such requests is likely to be that bigger municipalities are reluctant to take asylum claimants from smaller municipalities, yet at the same time, LGBTIQ+ people usually want to move to the bigger cities (Kadir, NGO worker). Claims for relocation in Bavaria also seemed to have an extremely low likelihood of success. Amis (focus group 2, Bavaria, Germany), for instance, had been offered a place for vocational training (‘Ausbildung’) in a care home in Munich (an area of work where people are very much needed), but was not allowed to move out of ‘the forest’ in

southern Bavaria. As he explained: ‘We people staying in Oberbayern [southern Bavaria], we are not allowed to do Ausbildung [training] in Munich. We have to do it there, but it’s a village. Where to do it from? So it’s a torture, a psychological torture’. Amis was housed in a small container (Fig. 12) together with only a few other asylum claimants. There were only fields around the containers (Fig. 13) and he had to walk for 40 minutes through the forest to get to a bus stop and felt extremely isolated: ‘you can’t even stay there for a week’. In addition, he felt extremely unsafe, as he had received death threats from one of the residents. Although Amis had lived there for one and a half years, he sometimes chose to sleep on the streets in Munich, as he felt safer there.

While NGOs have put pressure on the government and municipalities and some positive changes have been made in some federal states, in many cases, even if the person is experiencing abuse and harassment in rural accommodation, the Regional Administrative Council (‘Regierungspraesidium’) argues that the municipality needs to offer adequate support. So, the Council staff refuse to relocate the individual to a town or city where LGBTIQ+ support is available, on the basis that if they do, then everyone will make such claims (Noah, NGO social worker). As Leon (NGO worker) argued, the situation for SOGI claimants is very different from other



© Amis

**Fig. 12** Accommodation in Bavaria – containers





© Amis

**Fig. 13** Accommodation in Bavaria – field

refugees, as they usually do not have a connection to their ethnic community, and often even try to avoid members of their ethnic community:

Because of the break with the community of origin, what gays have been doing for centuries, or the queer community, LGBTIQ community for centuries, we've sort of built our structures. This is our family. And one must not separate people from this lifeline. Because the inner peace, the identity, the self-realisation, which one needs in order to provide the integration performance that is expected, depends on that. When I find myself in my environment, when I can be at peace with myself by being able to reflect myself in my environment, then I have a self-confident sexuality, then I protect myself, then I have access to information, then I am enlightened, then I exercise my rights, then I have the mind free to integrate, because the pressure from the outside is manageable. And that offers, so to speak, the connection to the community. And that's what people need to understand in social care. Social care must take this into account. It is not a privilege to enable an LGBTIQ refugee to access his community, but I don't, so to speak, cut the lifeblood.

How that 'lifeblood' was cut became obvious in many of our participants' accounts, who also described how the social isolation they experienced from living in rural areas impacted on their mental health. For instance, after the initial reception centre, Zouhair (focus group no. 6, Lower Saxony, Germany) was housed alone in a two-bedroom flat in a small village in Lower Saxony, about 16 km away from the next bigger town. Only 50–70 people lived there, and half of the houses were empty: 'Well, they are all empty. Houses are empty. Who wants to live there?

Nobody!’ His social isolation was striking: ‘And I just went crazy, because I did not have any contact with anyone. I had to sit at home all day’. Public transport was expensive but there was not even a supermarket in the village, so Zouhair had to take a bus or walk for 30–40 min to the next village. He stayed there for 11 months, without an internet connection or any way of learning German. He explained that LGBTIQ+ refugees’ social isolation is exacerbated by not fitting in:

because for Germans, we are refugees, we are refugees like the others or asylum seekers like the others, but for the others [refugees] we are ... we are [laughing] gays and lesbians and inter and trans, so we do not belong to the German society (...) for other refugees we are, we are not refugees. We also do not belong to this parallel society. So we are totally isolated. (...) As queer refugees, I think we are out of category, so we do not belong to one, or the other, it’s just, it’s difficult.

Zouhair’s expression of queer refugees being ‘out of category’ reminds us of Crenshaw’s (1989) description of Black women falling through the gaps. In her seminal 1989 article, where she coined the term intersectionality, she talked about anti-discrimination law not suiting Black women because they experience discrimination on grounds of being women *and* being Black (Chap. 3). We can see from Zouhair’s account that queer refugees’ experiences are shaped by being queer *and* being refugees, meaning they belong neither to the refugee community nor to the host community, and this is particularly evident in rural locations. For Zouhair, ‘we are victims in our countries, and we are victims here as well’. At the time of the interview, Zouhair was working for a queer refugee group and estimated that 70–80% of those who come for support bring up issues related to accommodation in isolated locations: ‘People are always isolated and far away from everything, they have no contact. They are alone’. He witnessed how people become depressed and unhappy without any support. One group member travelled for 4 h to attend group meetings simply to have some contact with people he could relate to: ‘And if you are in a small village and everyone knows that you are gay or lesbian or intersex or trans, that is, that’s really terrible, believe me’.

Living rurally, opportunities to learn German, work, or volunteer for an organisation and socialise with Germans were limited: ‘So it’s literally being dead there as you wait. Yeah. You can’t do anything’ (Lynn, focus group no. 4, Bavaria, Germany). More crucially, claimants who were refused needed to find legal representation for their appeal; it is far harder to find a lawyer with expertise in SOGI claims in rural areas. It is also difficult to find romantic or sexual partners. Trans claimant Rolla (focus group no. 6, Lower Saxony, Germany) was lucky to find a partner in her rural accommodation, but because of limited mobility, most SOGI claimants housed in rural areas find it impossible. Yet, during the asylum process they are often asked whether they have sexual relationships (Chap. 7). As Nana (focus group 3, Bavaria, Germany) described: ‘We can’t go to parties because like me, in the interview they say I have to look for a girlfriend. Every time I go to look for a girlfriend when I’m in the village, how am I going to do that?’

As Gisela (lawyer) and many other participants argued, when allocating people to accommodation centres, the importance of a protected environment and access to LGBTIQ+ support groups, etc., needs to be taken into consideration. As Ibrahim

explained, SOGI claimants have ‘already faced isolation because of their sexuality (...) they came here to have at least a social life’. Where people are housed also makes a difference if they experience difficulties *within* the accommodation centre. In a city, people can then, at least, be out all day and keep themselves busy, but in a small place:

you have to stay with those people, you have to always hear what they say, or their comments (...) It is easier for you, when you are connected in the city, you can escape the reality of the camp. You can go out, you can go to organisations, to groups. You can go anywhere. Just walk around. But if you are in the middle of nowhere, there is nothing to do (Ibrahim).

Veronica and Julia faced homophobic comments in the reception and accommodation centres where they were housed in a rural area, but when they were accommodated in Cologne they received support within the gay area: ‘you do not feel alone’ (Veronica and Julia). Similarly, Milad explained that, for the first one and a half years of his time in Germany, while he lived in a rural location, he did not see, let alone visit, a gay club:

I did not even know something like that exists in Berlin. After that, uuuuahh! For example, [name of club]. There is a disco, cafe only for gay and lesbian people... Oh, awesome – I have something like that – so it was amazing for me. But after a while, I see half Berlin is gay-friendly or LGBT-friendly. You can see the flyer on the REWE [supermarket] entrance or the Lidl [supermarket] entrance. You feel better: “Oh, that’s nice, I’m happy about that” and so.

For SOGI claimants, being accommodated in rural areas is especially difficult due to their intersectional experiences of homophobia, racism and transphobia (Marlen, legal advisor; Mariya, NGO worker). However, being located in a town or city was no guarantee that claimants felt safe (Sect. 8.4). For instance, Lutfor (UK) experienced homophobia and racism in Manchester, hearing things like ‘go back to your country’ and ‘look at the ugly fags’. Janelle (UK) talked about her experiences of transphobia on the streets of Sheffield, which might not be separate from other forms of hate crime, as TGEU highlights:

While xenophobia, racism and Islamophobia are on the rise [in Europe], trans asylum seekers and refugees are even more vulnerable to discrimination or violence. (...) Trans asylum seekers and refugees often face intersectional discrimination on the basis of their gender identity and expression, gender, race or ethnicity, religious background, migrant status and perhaps other factors as well. (TGEU 2016, p. 8).

With regard to being accommodated in rural areas, we have focused on examples from Germany, as in Italy and the UK not many participants discussed this issue. In Italy, some NGO workers and lawyers mentioned the issue of SOGI claimants being accommodated in rural areas, like Anna (LGBTIQ+ group volunteer) who said that SOGI claimants ‘are scattered, lost in places that are not accessible by public transport’. Being housed rurally was seen as problematic especially because of the difficulties of accessing LGBTIQ+ support and attending events (Anna, Antonella, and Jonathan, all LGBTIQ+ group volunteers; Livio, lawyer). It was generally seen as counter-productive for integration to accommodate claimants in rural areas: ‘[B]ecause many structures are completely isolated from society, so how can we

involve migrants, integrate them if in a year they are dispersed in the mountains' (Susanna, social worker). A number of SOGI claimants told us that they were accommodated in small towns or villages (Diarra, Gbona, Ken, Kennedy, Odosa), and they briefly talked about issues such as not being able to access LGBTIQ+ events (Odosa, Italy) or organisations (Ken), and having poor mobile phone connections (Kennedy). However, they did not talk in depth about these experiences and some, like Diarra liked living in a small town.

In the UK, some claimants had been dispersed to smaller towns, but these generally had good transport links and therefore mobility and accessing LGBTIQ+ support and groups was not a significant issue. However, here we heard many accounts of homeless and destitution, to which we turn now.

## 8.6 Homelessness and Destitution

When we analysed our fieldwork data, it was shocking to see how many of our participants had experienced homelessness during or after their asylum claims in the UK, where destitution can happen at four points for claimants:

on arrival, before making a claim; when they claim asylum and there are administrative errors and S95 [section 95 subsistence support] doesn't come through; during the application, when problems arise including trying to live on a very small S95 sum; and after the decision – even if it's positive, when support ends, but especially for people who are Appeal Rights Exhausted, the majority of whom become destitute (Gareth, consultant, UK).

For those who are classified as Appeal Rights Exhausted (ARE) but remain in the UK, the risk of becoming destitute is high following the removal of section 4 support under the Immigration Act 2016. Research by the Refugee Council showed that a high number of those using their destitution services came from five countries: Sudan/South Sudan, the Democratic Republic of Congo (DRC), Eritrea, Somalia and Zimbabwe. With the exception of DRC, homosexuality is illegal in all these countries (Ramón Mendos 2019; Refugee Council 2012). While issues of homelessness and exploitation are likely to be common to all asylum claimants, they take a specific form for SOGI claimants. SOGI claimants who do find themselves ARE but stay in the UK are more likely than others to find it difficult to seek support from families and community organisations, where they may experience discrimination. They may also be more vulnerable to sexual exploitation when they become destitute (Meggs, focus group no. 1, Manchester, UK; Melisa, NGO worker).

The participants who told us about their experiences with homelessness, stayed in different places over night. Selim slept a couple of nights in a cemetery; Mary and Zaro were homeless for 1 month and slept in a park in London; Meggs spent a night on a night bus, when she was evacuated from her accommodation. Lutfor was evicted from his house, after his claim was refused and before he submitted a fresh claim. He was homeless and slept in different parks; in 4 days he lost everything, including his papers. He talked about being out of place as an Asian person:

oh, I mean, it is a real experience when I was living in the street. I saw people around me who are homeless, nobody is Indian or Asian, and you know in homeless people they have a like, community like this, but I was outcast from this, so I was travelling on my own.

When he submitted his papers, he was allowed back into his old accommodation: ‘Same house. When I was homeless my room was empty, but I don’t know why they made me homeless. When I went to court appeal to London, they send me to the same home’.

Research on housing and homelessness experiences of LGBT people seeking asylum in 2009 found that SOGI asylum claimants were at a particular disadvantage, as ‘most interviewees lived with people who would take them into their own accommodation on a rent-free basis, knowing their sexuality and often expecting sexual favours in return’ (Bell and Hansen 2009, p. 16). Bell and Hansen’s report (2009) demonstrates the importance of collecting data on homelessness from an intersectional perspective; however, there is no more recent research on LGBTIQ asylum claimants’ and refugees’ experiences of homelessness. A survey commissioned by The Guardian in 2017 found general high levels of destitution and homelessness among newly-recognised refugees, but did not discuss any SOGI-related experience (Refugee Council 2017). A report commissioned by the Metropolitan Community Church of North London (Dyck 2019, pp. 12, 48) touches upon housing issues, and especially SOGI claimants’ fear of being ‘outed’ when staying with family or people who are not LGBTIQ+-affirming and potentially losing their accommodation.

As Melisa (NGO worker) explained, when SOGI claimants experience violence and harassment in asylum accommodation, they often prefer to leave their accommodation and be homeless, as they are afraid to report the abuse suffered and risk having to continue to live in the same accommodation if no action is taken to address the issues. People may also be afraid to report to the police because of their experiences in their country of origin (also Sabrina, NGO worker, Germany). Many of our participants were vulnerable to exploitation and abuse in order to keep a roof over their head:

not only are they homeless, but they also face sexual exploitation... you know, just for a roof over their head. In terms of women, we have seen a lot of domestic servitude, where LGBT women are looking after children, doing domestic chores, and just for a roof over their head. Sometimes they are given a little bit of money but sometimes they are not (Melisa, NGO worker).

SOGI claimants may be afraid to access general housing charities, where they would have to disclose their sexuality or be worried that they would have to share accommodation with people who are homophobic (Debbie, NGO worker). Trans claimant Amber was homeless for two-and-a-half months after falling out with their ex-boyfriend. They slept at friends, strangers, moved around, and sometimes did not even have a blanket: ‘I did get involved with sex work and asked strangers for money to help me get by, it was one of the darkest time in my life if I’m honest’. Kamel (Italy) also risked being homeless because, as a trans claimant, accommodation centres based on a binary ratio were not able to fit them in.

Irma (UK) had to leave NASS accommodation and became homeless because her benefits had been cut and she received a letter ordering her to move out: ‘I was crying. Nowhere to go. It was hard. And it is a journey’. Before becoming homeless, Lutfor lived in a houseshare without paying rent, and cooked and cleaned for his housemates in exchange for board and lodging, explaining that ‘sometimes we can even offer our services for free, just so that we can get accommodation’ (focus group 6, Manchester). Sadia (UK) lived in someone’s garden house and did housework for them and looked after their children. Selim (UK) had to move around a lot, was homeless, stayed in hostels and people’s houses and then met a ‘gay guy’ who ‘was quite crazy but of course I had to swallow the [pride], you know, I had to, I needed a place to stay, so even if he is crazy I had nothing else to do’.

Meggs (focus group no. 1, Manchester, UK) talked to other young bisexual and lesbian women in preparation for a conference presentation she was giving on the topic and was shocked to hear about their experiences of destitution:

And in those cases, on the refusals the judge will have clearly said, “I believe she has been raped”, “I believe she is HIV+”, it is sensitive issues that they believe on, but still they kick that kind of a person out of the accommodation.

Women would often end up in abusive relationships ‘because you have got nowhere to go, you just have to put your head down and just go along with everything they do’ (Meggs, focus group no. 1, Manchester; see also Chap. 9). Many other participants in the UK would have ended up homeless, and in potentially exploitative situations, if they had not received help from friends and LGBTIQ+ or LGBTIQ+ friendly organisations (Diamond, Ibrahim A., Edith, Miria, Martin, Jayne, Ximena, Stephina).

One of the key triggers for destitution is the transition period, after people are granted international protection: ‘So, on the Monday you get your letter from the Home Office saying you have been granted leave to remain. On the Tuesday you have a party, a month later you are homeless’ (Oliver, NGO worker). In fact, for many of our participants, issues with accommodation and homelessness were not resolved once they received refugee status, but in some cases, were made worse, as we now discuss.

## 8.7 Housing After the Asylum Claim Process

Most research on SOGI asylum focuses on the time during the asylum process, but it is also important to look at what happens when SOGI claimants are finished with their asylum claims. In all three countries life is not necessarily becoming easier after the asylum claim.

In Germany, the social isolation that SOGI claimants face during the asylum process often continues after their claims have been successful due to the residence obligation legislation (Sect. 8.2). The requirement to stay in the same municipality where the claim was processed (as it is the case in some federal states) is especially



difficult for SOGI refugees (Marlen, legal advisor). As Noah (NGO social worker) described: ‘I do not want to live in [town x] as a gay man. I would perish there. There is nothing there’. Again, under special circumstances, people can request permission to move to a different area. For instance, at the time of the interview, Bebars, a trans claimant with refugee status, had been waiting for 4 months to receive a response to his relocation request. He regularly had to travel almost 3 h to see his doctor (for hormone treatment, etc.), who was based in the city where he would like to move to. He had also signed up for a German language class where he lived, but had been waiting for almost a year and still had not been given a place.

The downside of living in larger cities however is that it is generally difficult for anyone to find affordable and acceptable housing, but SOGI refugees face multiple layers of discrimination in the housing market (Frank S., legal advisor; Diana, Ibrahim, Milad, Zouhair). They may have to stay in asylum accommodation for years (Ibrahim), if they do not find alternative accommodation, and there is often no social housing available (Finn, representative of a German municipality). In addition, council housing is tied to the legally established rental levels (‘Mietspiegel’), but property owners often request more for their flats (Juliane, public official).

While all refugees are likely to face discrimination, for SOGI refugees there are often additional issues, for instance if they are visibly trans (Frank S., legal advisor), or when ‘there is a mismatch’ between their gender expression and their ID document, thus trans refugees face more challenges than other refugees, or other trans people, when trying to find housing because of the intersection of their gender, their legal status, their race, ethnicity or religion (TGEU 2016, p. 10).

Diana was looking for a flat in Berlin for about 7 months after being granted international protection. She said that there were always around 40 people at the flat viewings and ‘obviously Germans were in front’. When she finally found a flat, she told us it was because she had an advantage, as the estate agent was a lesbian. In larger and more expensive German cities, the situation is particularly difficult, as ‘the housing market looks very bad anyway and obviously refugees have no chance at all’ (Thomas, NGO volunteer). As William described it:

we the people who are Black, it’s very hard to get a house to stay. To the extent that when you get a house, an apartment up there, and the Markler [estate agent] tells the property owner that “you know what, the person who is coming to this house is a Black man, or a Black woman or a Black family”, they say “eh, eh, eh, I don’t have a house.

Mayi (focus group no. 4, Bavaria) also thought that once you have been granted international protection, ‘you look for a room. They never give you [one] if you are Black, they say you are dirty, they don’t want you dirtying their house. Then you can never get a house’. As Diana described, the situation is rendered more difficult because refugees have a blue (rather than red) passport and only 3-year residence permit, and property owners are ignorant and fearful of this type of documentation.

There is a dearth of organisations specifically tasked with helping (SOGI) refugees to find housing (Diana, Alphaeus, William), but the LGBTIQ+ community can sometimes help in this regard. Rainbow Refugees Munich have managed to get



some of their members into housing through private contacts (Thomas, NGO volunteer). Marhoon had to spend 8 months in the accommodation centre, then LSVD helped him to find a flat through a property owner who was an ‘ally’. Marhoon was lucky that when he received refugee status and collected his papers, the public authorities asked him where he wanted to live in the federal state, and he chose the biggest city in the state: ‘I think maybe they know in the document that I’m gay and atheist, so they will not send me to a village’.

Houseshares are very common in Germany (called ‘Wohngemeinschaft’). Halim, Alphaeus, Fares, Zouhair, Ahmed and Rolla (focus group no. 6, Lower Saxony) all lived in this type of accommodation. Yet, when people are severely traumatised, it is more difficult for them to find a flat or a room in a houseshare, and they then need to stay in asylum accommodation, where they have to share rooms, for a long period, despite the likely negative impact on their mental health and recovery (Frank S., legal advisor).

In Italy, life after being granted international protection may be difficult too. Limited support is provided to refugees unless they are accommodated through SPRAR. Some kind of support is sometimes granted in CAS accommodation, but this depends on the specific CAS. Even when people are supported by SPRAR accommodation, it is not guaranteed that they will be able to find housing. For instance, Alain A. was moved to SPRAR after he was granted refugee status, but he was worried about finding a place where to live: ‘And I have seen so many people in the project and they leave, they don’t have a place to stay and they stay on the street. And now, I am thinking like, when I leave, where will I go to’. He explained that SPRAR would cover the costs for initial accommodation, but people need to obtain a housing contract. He was worried that because he was so young, he would not be able to obtain one.

Those not moving into SPRAR accommodation on receiving status risk eviction from the reception centre irrespective of the availability of alternative accommodation. Usually claimants have 6 months from being granted international protection to look for alternative accommodation, but we also heard of occasions where claimants had to leave earlier. For instance, Just Me (focus group no. 3, northern Italy) had to leave the reception centre very suddenly:

I wasn’t even told I am going to leave, it was just early in the morning, they came with the letter from the Questura [police local headquarters] say that I have to leave today, now. I have to take my bag and things. So strange. Yes, I wasn’t informed maybe in three days’ time you are going to leave, or I should know what to do. It was so sudden. (...) to say you have to leave the camp, you are going to the city, into the community, without no work, without no place to stay, with nothing, without not even money to even get support yourself or your wellbeing. It is like they are telling you they are exposing you to crime.

In addition, nobody informed Just Me that he could apply for a place at SPRAR. He added that he was ‘strong enough not to force myself into doing something, into committing crime or going against the law. But it is not easy’. Once homeless, he tried to survive with the help of friends and his supporting group, and then lived on a farm, where he worked (focus group no. 3, northern Italy). During the focus group, his dire situation and the pain that he felt recounting this experience

was evident. His eyes were empty and every word he pronounced was followed by silence. Everyone in the group was emotionally affected by his account.

Many claimants also thought that because of racism, it was more difficult for refugees to find housing. Silver said that he would like to find a job and a room in a houseshare, but thought that this would be difficult as a Black gay refugee:

I mean, if I were an Italian, when I see Blacks, maybe like they do things that are bad, maybe then I have to be afraid. I do the same. Whites think that Blacks are all the same, but it is not. There are Blacks who are better than others, but Italians think they are all the same.

Indeed, Giulia (LGBTIQ+ group volunteer) said that their organisation has witnessed ‘many young people who have obtained the documents to whom nobody rents, even if they have a job, because they are Black’. Kamel also described how some private property owners said ‘we rent to Italians’ and ‘only to Italians’. Cyrus (focus group no. 2, northern Italy) described accompanying a friend to rent housing, but the man who showed them the accommodation said to them ‘the owner of the house told me not to give the house to foreigners, to Blacks, not to give the house to Blacks’, which Cyrus promptly qualified as discriminatory and abnormal.

In the UK, housing problems are not necessarily resolved when SOGI claimants are granted international protection. The transition period can be especially difficult for claimants in the UK, who, as mentioned above, have only 28 days to leave their asylum accommodation. Debbie and Gary (NGO workers) explained that sometimes official documentation does not come through in time for the person to move to the general benefits system. There are other obstacles too, for instance, delays in issuing the UK identity card without which individuals cannot access housing and benefits. Refugees are likely to find it difficult to rent accommodation in the private sector following the extension of immigration responsibilities to private landlords (Home Office 2016). A survey by the Residential Landlords Association in 2018 found that ‘half of landlords are now less likely to consider renting to someone without a British passport because of the government’s Right to Rent policy’ (Smith 2017). In March 2019, the UK High Court ruled that this legislation was incompatible with Article 14 read with Article 8 of the ECHR.<sup>13</sup>

When their asylum support stops many claimants 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, p. 43). Research with 50 lesbian and gay refugees in London and Manchester found the majority living below the poverty line (Micro Rainbow International 2013). Most reported feeling discriminated against on the basis of their sexual orientation both in their country of origin and the UK. The isolation resulting from being member of a sexual minority can lead to low self-esteem, depression or other mental health problems (Micro Rainbow International 2013). For many individuals:

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<sup>13</sup>R (*Joint Council for the Welfare of Immigrants*) *Claimant and Secretary of State for the Home Department* [2019] EWHC 452 (Admin). Appeal against this decision was allowed in *The Secretary of State for the Home Department v R (on the application of) Joint Council for The Welfare of Immigrants* [2020] EWCA Civ 542 (21 April 2020).

the land of opportunity merely represents a downward social mobility ladder. It emerged from the study that often the material circumstances and conditions to live a “dignified life” in the new country were far worse than those the refugee had in their country of origin (Micro Rainbow International 2013, p. 28).

The dispersal policy is also problematic here. SOGI claimants might have established social support networks and are then dispersed and moved away from that source of support: ‘So you could end up being quite isolated in a small town somewhere just because of the vagaries of the system’ (Gary, NGO worker). In addition, when applying for council housing in a particular area, people need to demonstrate ties to the community, but if they have only lived for 2 years in that area, they will not be eligible for council housing and will then need to find private accommodation (Melisa, NGO worker).

Thus, life does not necessarily become easier once SOGI claimants are granted international protection. Short timeframes to leave asylum accommodation makes life hard especially in Italy and the UK, while in all three countries they may face transphobia and racism on the housing market. Separate SOGI accommodation may help to make life a little easier for SOGI claimants, especially during, but also after the asylum process.

## 8.8 SOGI Accommodation

Because of the discrimination SOGI claimants experience in shared accommodation, most participants thought that ‘[t]o open centres for only LGBT community, it is one of the best ideas. Yes, it is one of the best ideas, because it is an environment where they will feel safe’ (Alain A., Italy). In our European-wide survey for people who support SOGI claimants, 65% of the respondents considered the provision of separate accommodation for LGBTIQ+ people seeking asylum or who have been granted asylum to be a good idea (8% did not think so, and 27% were not sure). All three of our case countries have some LGBTIQ+ accommodation established, however limited, and some of our participants had experience of living in such type of accommodation (Michael, UK; Amber, UK; Mahmoud, Germany; Prince Emrah, Germany).

In Germany, since 2015 NGOs have put pressure on the federal governments to fund specific LGBTIQ+ accommodation projects and in many cities such projects have been established. The largest of these is an LGBTIQ+ accommodation centre in Berlin, run by the NGO Schwulenberatung (‘Gay Counselling’), which accommodates 122 SOGI claimants (Nina, legal advisor). Other significant LGBTIQ+ accommodation centres are located in Dresden and Leipzig, which each accommodate approximately 100 SOGI claimants, and in Chemnitz, which accommodates approximately 80 SOGI claimants (Thomas, NGO volunteer). In other cities, such as Frankfurt am Main, Cologne and Hannover, there are either ‘official’ accommodation centres or beds in flats for SOGI asylum claimants, and in some other cities there are unofficial arrangements to the same effect (Awadalla and Rajanayagam

2016; Benirschke 2016; Queer.de 2017; The Local 2016). In Cologne, SOGI claimants are seen as a vulnerable group and specific flats are offered, accommodating 20–25 people in total (Ibrahim). Hannover accommodates nine SOGI claimants in smaller flats (Kadir, NGO worker; Matthias, social worker; Juliane, public official), and Frankfurt am Main has an accommodation centre for SOGI claimants that accommodates 21 SOGI claimants and with social workers based there (one full-time equivalent, according to Knud, NGO worker). In some of these accommodation centres people need to share rooms (Berlin, Frankfurt am Main), and as participants argued, the aim should then be to move people on as quickly as possible into private accommodation, as shared accommodation, whoever one's room-mate, is 'just an extreme burden for all people and therefore also for LGBTI and maybe even in particular for LGBTI, having to share a room with people over such a long period of time' (Nina, legal advisor).

Specific LGBTIQ+ accommodation was not supported in all federal states. For instance, the Bavarian government did not provide it. In Nuremberg, there was only a small amount of LGBTIQ+ accommodation (20 places), and the city of Munich had agreed to create 19 places for LGBTIQ+ claimants (in smaller flats), but had only made eight available at the time of our fieldwork. This was a very small allocation in comparison to other federal states (Thomas, NGO volunteer).

However, claimants who had lived in SOGI accommodation facilities did not always have positive experiences. For instance, Prince Emrah (Germany) experienced physical violence in the SOGI accommodation centre in Berlin, and had their nose broken by another resident. They were critical of the LGBTIQ+ accommodation centre and said that while they had faced discrimination in the general accommodation centre, in the LGBTIQ+ centre it had been worse. Mahmoud had also lived in LGBTIQ+ accommodation for 18 months. He told us that he felt that not everyone there was a member of a SOGI minority, and that he had lots of problems with other residents (Awadalla and Rajanayagam 2016; Benirschke 2016; Queer.de 2017; The Local 2016).

Some participants favoured smaller LGBTIQ+-specific accommodation, for example, flats or houseshares (Frank S., legal advisor; Kadir, NGO worker). This was the approach taken in Hannover and Cologne, where the 'idea was to have separate flats in the city, so they [residents] feel integrated, they feel they are in a home place, but they have social workers who always check up on them' (Ibrahim). And although in Germany we learned of many more SOGI asylum accommodation projects than in Italy and the UK, participants still felt that the LGBTIQ+ accommodation that existed was insufficient.

In Italy, two reception projects specifically for SOGI minorities have been developed by the two main Italian LGBTIQ+ NGOs. A proposal by the transgender organisation MIT – Movimento Identità Transessuale ('Transsexual Identity Movement') has led to the opening of the first facility for transgender asylum claimants and refugees in Italy (QMagazine 2017). The project 'Raise the Difference – Accogli la differenza' was funded by local and central authorities, including the national anti-discrimination office (UNAR). MIT is in charge of the management of the centre and assists, together with the social cooperative Camelot, in hosting

asylum claimants during and after the RSD procedure. While it is the first European reception centre dedicated to people claiming asylum on grounds of their gender identity and is part of the SPRAR reception system, it does not seem to be permanent (its contract being regularly renewed on a temporary basis). Moreover, it can only host a few claimants and by no means meets the needs of trans claimants in the whole of Italy.<sup>14</sup> The second SOGI accommodation project in Italy aims to open a reception facility based on collaboration between local authorities and the NGO Arcigay (national umbrella LGBTIQ+ rights platform). Apart from these two initiatives, there is a centre already open in the northern Italy, run by the social cooperative Kaleidoscop, but it caters only for gay men and is not reserved for those claiming international protection (it also hosts Italian gay men disowned by their families, for instance).<sup>15</sup> Moreover, this centre too has limited capacity.

In the UK, in 2017 the NGO Micro Rainbow International opened its first safe house for SOGI claimants and refugees in London, with a second safe house subsequently established in the West Midlands.<sup>16</sup> The demand for this accommodation exceeds availability, and there is a waiting list. After being homeless for 2 months, Amber was offered a space at one of the Micro Rainbow accommodation facilities, 'where it's all safe and for the first time in months I could inhale the air with a clear head, because it is with other LGBT asylum seekers and refugees and I don't have to worry about my safety anymore'. Melisa (NGO worker) talked about the importance of their accommodation for their clients. For instance, one of the clients who moved in told them that they 'can't believe I am in a space where I can finally be free to be myself'. They also said that 'I couldn't sleep when I was there [previous accommodation], because the other person had the bed opposite and they kept wondering if they are going to wake up and attack them'. Melisa (NGO worker) explained that the organisation first aimed for a larger accommodation facility, but smaller flats had the advantage that they were less visible.

In general, many of the asylum claimant and refugee participants were in favour of LGBTIQ+ specific accommodation to feel safe and not have to hide their SOGI (Ham and Stephen, focus group no. 2, Bavaria, Germany; Ken, Kennedy, Odosa, Gbona, Buba, Moses, Mamaka, all in Italy; Nice guy, focus group no. 1, Italy), and many of the NGO workers were supportive of such projects (Antonella, Diego, Riccardo and Giulia, all LGBTIQ+ group volunteers, Italy; Mara, lawyer, Italy). As one survey respondent argued:

LGBTQI asylum seekers need to have a place where they can feel safe and supported; this is often not the case where they are placed in NASS housing, with potentially homophobic housemates, a situation which contributes to further stress and sometimes mental health problems (S130, LGBTIQ+ organisation member, UK).

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<sup>14</sup>No official information is, however, available, due to the choice of the MIT – the association that manages this centre – to ensure the privacy of the guests (especially in light of the new political context).

<sup>15</sup>This information has been collected during a conversation with Giorgio Dell'Amico, SOGICA Advisory Board member, who has been directly involved in these projects.

<sup>16</sup><https://microrainbow.org/housing/>.

Some participants argued that accommodation specifically for trans claimants was also important (Celeste, social worker, Italy; Kamel, Italy). Kamel (Italy) felt that because of their heightened visibility, trans claimants are in particular need of separate accommodation:

It's something I often say – we trans people need a special structure for us. Not a male structure, not a feminine structure. I will not accept to fit into a feminine structure, but neither will I be in a male structure.

There was also some caution expressed that the visibility of larger LGBTIQ+ centres might increase the risk of violence, if homophobic or right-wing groups find out about their location (Maryia, NGO worker, Germany). In the focus group discussions we held, there were different opinions on LGBTIQ+ housing. While in some groups, participants cheered enthusiastically and applauded the idea (focus groups no. 3 and 4, Bavaria, Germany), or generally liked the idea (focus groups no. 2, 3 and 4, northern Italy), in others there was less consensus. For instance, in focus group no. 1 in Hesse, Germany, Emroy said that after having lived with three heterosexual men who would make homophobic comments, and worrying whether he would wake up the next day, he would be happy to live in LGBTIQ+ accommodation. For Sandy, in contrast, LGBTIQ+ housing was not so important; it was more important to be housed near LGBTIQ+ organisations, groups and people. In other focus groups, it was also argued that the visibility of LGBTIQ+ accommodation centres may make them unsafe (focus group no. 4, northern Italy; Nelo, Italy), and that it should not be mandatory for SOGI claimants to be separately housed (focus group no. 2, northern Italy).

As well as those who were undecided, there were also some voices against the creation of separate accommodation centres for SOGI claimants. For instance, for Siri (Italy) the need was not obvious, as in Italy, the same rules and regulations about how to behave apply to everyone. Giulio (LGBTIQ+ group volunteer, Italy) also argued that when there are problems in a reception centre, more work needs to be done in that centre. In his view, segregating SOGI claimants would also give a wrong impression: 'an LGBT person does not relate all his life with LGBT people'. He agreed that there needed to be accommodation for particular vulnerable claimants, but that this should focus on an 'all-round vulnerability... not only linked to being [a member of a] SOGI [minority]'. Silvana (judge, Italy) was also against the idea as 'it would ghettoise them'. Instead, there should be 'cultural mediators' in the centres, who 'are indispensable to try to mediate the differences that are still huge', not only in terms of SOGI but also in terms of religion, politics and other differences that occur between any individuals forced to share living space. Others saw the main problem as simply that of shared asylum accommodation: 'I think people whenever possible should get out of camps as soon as possible, because it's not good for people, it's a solution but it's a temporary solution, and it doesn't help people feel like their safety and individuality' (Halim, Germany).

SOGI refugee housing is created on the basis of residents sharing a common SOGI, thus being a purposefully constructed sexualised space (Chap. 3). Yet, these spaces are not only sexualised but also gendered, racialised, classed, and so on, and



organisations providing SOGI housing often do not pay sufficient attention to the intersecting identities of the people living in these facilities. As Juliane (public official) described:

And then we realised that these are all gay men, but that's the only thing that connects them! These are also different people. Since we did not think about it in the beginning, that these are also different people from different countries of origin, what just connects them is that they are just gay, and they also handled it quite differently.

Some of the NGO workers we interviewed stressed the point that SOGI asylum claimants and refugees are not a homogenous group and that there are differences related to language, education, etc. Even having eight people living in a flat (like in Hannover) can be challenging, similarly to a student houseshare (Kadir, NGO worker). In other SOGI accommodation centres, it was also reported that people sometimes did not get on with each other. Louis (NGO volunteer) described potential tensions within the community of SOGI refugees – between gay men and trans people for instance, owing to preconceptions about gender roles. So, from an intersectional perspective, such differences between SOGI claimants need to be born in mind and duly considered. As in general, it '[d]epends on the situation; some feel safe[r] in separate housing some don't; it should be offered and then be up to the person' (S141, LGBTIQ+ organisation member, Germany).

Rather than establishing SOGI accommodation projects as akin to 'ghettos' (Chiara, NGO worker, Italy), some participants suggested establishing LGTIQ+-friendly, rather than LGBTIQ+ accommodation (Nicola, LGBTIQ+ group volunteer, Italy). Some participants preferred mixed accommodation to help SOGI claimants integrate with wider society (Celeste, social worker, Italy; Marhoon, Germany; Nicola, LGBTIQ+ group volunteer, Italy; William, Germany), or suggested LGBTIQ+ accommodation as only a short-term or temporary measure (Alphaeus, Germany; Halim, Germany; Mariya, NGO worker, Germany). In fact, the LGBTIQ+ accommodation centre in Berlin was intended as just such a temporary solution for claimants in the asylum process, but became a longer-term solution for individuals unable to find move-on accommodation or needing continuing social and psychological support (Nina, legal advisor, Germany).

Focus group no. 5 in southern Italy began with members agreeing with the idea of LGBTIQ+ accommodation centres, but concerns developed, with some even arguing that such provision would constitute discrimination:

Alain B.: Well, for me, the idea is that it's a good idea, to design a reception centre for gays, but if we design a reception centre only for gays, it wants to say that the population does not agree that they accept you as you are, so it is not quite easy. For me it's not good.

Dev: Indeed! It means that the population is still homophobic! We cannot accept everything, we cannot force others to live together.

Alain B: It's not good.

Dev: It's discrimination.



Although not everyone was in favour of specific LGBTIQ+ accommodation, the majority of our participants felt that the current provisions that exist were not sufficient. Like any other LGBTIQ+ space, the construction of these spaces is on the basis of a shared sexual identity and can foster certain forms of homonormativity. We now look at very different kinds of spaces, namely spaces of incarceration, and how these were experienced by our participants.

## 8.9 Detention

As we have addressed in Chaps. 4 and 5, questions of vulnerability are paramount when looking at issues of detention. In our survey, 23% of SOGI claimants were detained; 15% for less than a month and 8% for more than 6 months. There were stark differences with regard to the experiences of detention in the three case countries. This is no surprise as Germany and Italy are both bound by the current Reception directive, which restricts the use of detention, while the UK is bound by the original Reception directive, which does not refer to detention (Chap. 4).

As discussed in Chap. 4, detention is not a significant issue in Italy except for the situation of ‘irregular migrants’ in centres of identification and expulsion. Similarly, in Germany, detention is not a widespread practice, only affecting a very limited number of asylum claimants. Amongst our participants in Germany, only a few people had had experiences of detention (Emroy, Junior and Sandy, focus group no. 1, Hesse; Angel; Shany; Trudy Ann), and in most cases they were detained only briefly at the time of their arrival. One of these participants was from Morocco, and the others were from Jamaica. The maximum time someone had spent in detention was 2 weeks. While most participants did not have positive experiences of accommodation overall, those participants who had been detained were positive about the conditions and the staff in detention centres. For instance, Angel was detained for a week at Frankfurt airport after she arrived, and astonishingly she described this experience as the best she had with regard to living conditions:

Since I’ve been here the best living condition was Frankfurt, even though that was the detention centre. And yet, still, that was the cleanest, the most, under the circumstances, the most comfortable, the most liveable, everything. Even though you couldn’t go out on the road and see people.

This was confirmed by other participants who had had similar experiences (focus group no. 1, Hesse). Junior – who stayed in the detention centre in Frankfurt airport for about 2 weeks (sharing a room with other gay men) – said that whereas he felt safe and ‘there were people there who protected me and everything’, this changed once he arrived at the reception centre, where ‘it was like, no-one cares about me’. The difference was that in the detention centre there was a church group, security officers and workers ‘that treat us or treat me how I’m suppose... as a human, how I feel I’m supposed to be treated. So yes, I felt like I was safe’. Junior also felt that staff in the detention centres ‘looked out’ for gay people and protected them.

Participants in the focus group agreed that they were well looked after in the detention centre, something that was not the case in subsequent accommodation facilities. Emroy told us he thought that if the security or police officials from his detention centre had made the decision on his claim, he would have been granted international protection. Sandy had wanted to take the interpreter she had in the detention centre with her to the main interview, because the interpreter spoke:

perfect English, she explained everything to me and let me understand that, you know, “this is what we’re going to do, this is what we want to know, you don’t have to go into details, leave that for your big interview, just tell us your main reason why...”. She was really nice.

Trudy Ann was in the same detention centre with her girlfriend for a week after they arrived: ‘It was kind of okay, but worrying. Feel like a prisoner. But then we have to go through that process anyway’. Some of the other people in the centre ‘would make up them faces’ when they saw them, but a security person told her not to ‘pay them any mind because [in] Germany [being LGBTIQ+] is not taboo’.

In the UK, detention is far more widespread than in Germany or Italy. Moreover, the treatment of immigration detainees in general has long been a concern, also gaining media attention.<sup>17</sup> For instance, an undercover documentary in 2015 by Channel 4 News highlighted the mistreatment of women detainees at Yarl’s Wood and staff referring to them as ‘animals’, ‘beasties’ and ‘b\*\*ches’ (Channel 4 News 2015). The UN special rapporteur on violence against women was refused entry to Yarl’s Wood in 2014.<sup>18</sup> In 2018, a BBC Panorama programme revealed malpractice and abuse by staff at Brook House, a centre run by G4S (Shaw 2018). Crucially, in 2018, the High Court found that some conditions at Brook House did not comply with the Equality Act 2010 or the ECHR.<sup>19</sup> The account of one of our survey respondents illustrates this mistreatment:

This was my worst nightmare. At first I was in [an] open dormitory with about 50 people. Just like beds in [a] hall. Then taken to another detention. To be honest I really don’t want to talk about it. I was told to take off my clothes to be checked. I remained totally naked (C59, UK).

There have been concerns about ‘vulnerable’ detainees in particular. In 2008, the Independent Asylum Commission expressed concern that ‘LGBT detainees are not adequately protected in detention’ (Independent Asylum Commission 2008, p. 84). The Shaw report on the welfare of vulnerable people in detention was commissioned by the then Home Secretary Theresa May and published in 2016. Replies to Freedom of Information requests in 2016 showed that a minimum of 76 SOGI asylum claimants were detained throughout the UK between 1 January and 18

<sup>17</sup>In 2008, the Independent Asylum Commission expressed concern that ‘LGBT detainees are not adequately protected in detention’ (2008, p. 84).

<sup>18</sup>See Parliamentary Question on 6 May 2014 by Lord Ramsbotham asking ‘why the United Nations special rapporteur on violence against women was refused access to Yarl’s Wood immigration detention centre while on an official visit to the United Kingdom.’ The Government’s answer was that the visit ‘was never agreed as part of this fact-finding mission’ (House of Lords 2014).

<sup>19</sup>*Hussein v Secretary of State for the Home Department & Anor* [2018] EWHC 213.

November 2016 (UK Parliament 2017). Lesbian women and transgender people appear particularly vulnerable to mistreatment in detention. It has been estimated that 340 lesbian women are detained each year (House of Commons et al. 2015). Yet, while the Shaw report highlighted instances of bullying and harassment of LGBT detainees, it recommended only that ‘transsexual people should be presumed unsuitable for detention’ (Shaw 2016, p. 194). Moreover, as discussed in Chap. 4, there are acknowledged inconsistencies in the way the term vulnerability is understood and used.

Research by UKLGIG and Stonewall also found that ‘LGBT asylum seekers face discrimination and harassment in detention centres’ and that ‘[t]rans asylum seekers face particular threats of violence in detention’ (Stonewall and UKLGIG 2016, p. 8). This is the case in particular when they are placed in detention centres that do not relate to their gender identity but the sex on their passport. As Zadeh (2019) argues: ‘Detention centres are possibly the most dangerous places in the country for LGBT+ people’.

Allan, a lawyer, pointed out that SOGI claimants do not only face homophobic abuse in detention, but their vulnerability also makes it more difficult to work on their claim, for instance if they ‘are worried about a fax from UKLGIG coming in’. Preparation for their cases is also more difficult: phone and internet access is limited, many websites are blocked in detention centres, and the remote location of the centres means that detainees often cannot get support to retrieve the evidence that they may need (Singer 2019, p. 11; Stonewall and UKLGIG 2016, p. 25).

Often the lawyers assigned to SOGI claimants in detention (if they do not already have one) may not have experience with SOGI cases or have limited time available to prepare often complex cases (Stephina). While SGW (focus group no. 4, London) was in detention, her solicitor dropped her case. She said he told her that ‘he can’t do anything else’. She told us:

All that was going in my head was deportation, that was what I was thinking, because I think a few weeks after I got there, there was a charter flight and I just saw how many women were taken out and deported and I just thought that would be me. So, it was, it was, it was hard, it was very painful, and I had now realised that I was getting more depressed the way I got in, but what else can you do.

She was not able to find another solicitor, so she ‘ended up having to be in the detention centre sitting before a judge, with my little paperwork, you know’. She felt that this situation ‘has progressively gotten worse now with the strains with the legal aid. So that is a big problem’.

Nine of our asylum claimant and refugee participants in the UK spoke of their direct experiences with detention (Irma, Lubwa, Luc, Lutfor, Miria, Patti, SGW, Stephina, Wabz), and there may have been others who did not talk about it in our interviews with them. Several NGO participants also talked about their examples of clients being detained (Chloe; Amelia; Ashley; Oliver). We heard that people were detained for variable but often considerable periods, ranging from 1 week (Miria) to a shocking 32 months (Luc). The duration of detention is not surprising, as the UK is the only country in the EU that does not have a time limit on detention (Chap. 4).

Yet, as NGO worker Oliver told us, it is not always clear what the reasons are for detaining someone. He always assumed that the decision to detain somebody was based on the potential risk of absconding, but then witnessed examples of ‘inappropriate use of detention’, for instance, when one woman seemed to have been detained purely for the purpose of collecting proof of her nationality and issuing her with a travel document (even though she was released afterwards): ‘I don’t know what that was about’.

Lutfor thought that LGBTIQ+ people should not be detained, as they have faced ‘too much violence for their sexuality’. Because of the fears they have around their sexual orientation, and the difficulties of talking about it, they should instead be offered counselling. When Lutfor applied for asylum, he found that he ‘was not welcome at all’, but instead treated ‘like a criminal’ and put into detention. His lawyer made an application for bail on the basis that he was vulnerable and ‘fortunately they accepted the bail and they released me on like the next day’.

Hearing participants’ accounts of detention raises questions about the kinds of ‘abuse of the system’ and ‘risks to the public’ invoked by the Home Office to justify indefinite detention (Chap. 4). All nine UK participants who were detained were subsequently released with no explanation and proceeded with their asylum claims. Nor did the NGO workers we interviewed have any SOGI (or other) claimants who had been detained before being removed from the UK, though there were situations that came close: ‘I have on a couple of occasions been on the phone to someone as they are boarding, being boarded on a plane, before the next injunction to get them off has come through’ (Ashley, psychotherapist). Amelia (NGO worker) also had a similar experience:

I mean, certainly it has come very close sometimes, yes, there was quite a few members detained and a couple of members, you know, were very close to the plane... sort of booked on a flight and it has been right down to the wire a couple of times.

It is noticeable that most of the SOGI claimants we interviewed were supported by NGOs and, therefore, perhaps had a higher chance of being released from detention. Meggs told us that three women at the Lesbian Immigration Support Group (LISG) had been detained when they signed in with the authorities, as requested to do regularly and got support immediately:

So, unless the organisations that are out there know you are in there, then they will start to, to do the petition for you to fight for you, so that you can be released while you are waiting on your claim, then it helps a lot. But if no one knows anything about you, definitely you are gone.

Amelia (NGO worker) explained that many members of LISG had experiences of detention and that the impact on the women detained was ‘devastating’, having a huge impact on women’s mental health. Usually women were detained when they went to report at the Home Office centre Dallas Court in Greater Manchester, which some were required to do every fortnight or every month and ‘then the next time they go to Dallas Court to sign on and it is just, it just keeps that fear, all wrapped up’. This fear was described by Edith, who had not been detained, but said that she

was ‘afraid of being detained and because I have suffered even being in jail in Kenya, I don’t like even going to Home Office itself, it makes me sick’.

It is clear that the absence of a time limit for detention ‘adds to the already traumatising experience of the government taking away your liberty’ (Zadeh 2019). Even after their release, the experience of incarceration often continues to have a detrimental effect on claimants’ physical and mental wellbeing (Zadeh 2019). Miria, who was detained in Yarl’s Wood when she claimed asylum, does not remember much from her time in detention, only that she mostly stayed in her room and was comforted by a young woman who she met there. Even though she was detained for ‘only’ a week:

by that time when I got out of that detention, I was just touching the walls to walk, I couldn’t manage to stand on my own, I was very weak, very sick, because I was not eating. I was not sleeping, so it wasn’t, it was really, really bad time. It was really, really hard time for me.

As Meggs (focus group no. 1, Manchester), who had not been detained herself but had seen the effects on friends, explained:

So, they will be going through NHS counselling, maybe for the whole year or for two years and taking antidepressants, and all things like that, because of the tortures that they experienced back home. So, and then it becomes a process you slowly get to trust people (...). On First Wednesday [social support group in Manchester] sometimes, something about 80 or 60 of us were going to counselling. And then when you are up there, when you are trying to find your feet for your own health and benefit, then you get detained. You drop, you drop, you go back to zero. You know, and then when you come out there, you are even worse. (...) you are starting to have flashbacks, it becomes even worse. So that particular person has to start again, with the counselling, if she will ever recover, suicidal thoughts and all that.

Meggs also spoke about the irony of the government supporting SOGI claimants with their mental health by providing them free NHS counselling, while then destroying that mental health recovery work and worsening the trauma by detaining asylum claimants. As Lubwa (focus group no. 1, Manchester), who was detained for 2 months, explained:

I remember when I was in detention, like, I felt like I am being targeted for no reason and (...) my emotional state was so bad, like, and I wanted to like, you know, commit suicide and I said I wanted, I don’t want to live anymore, I just want to like kill myself, and get away from it.

Lubwa did not understand why he had to be detained. He told us that his solicitor was convinced that Lubwa did not need to be in detention, and wrote to the Home Office to say her client was vulnerable. Lubwa met all bail conditions (including a financial guarantor and accommodation), but officials argued that he was likely to abscond, and it was only when a judge intervened that he was freed from detention:

At the end they have to give me bail, so all I wonder is why would you waste my two months inside, why? Because now I still go for counselling, because it is, it wasn’t something good for me and, you know, you have got nightmares, you have got like, you know, it was bad experience over there and I feel like I was the one who faced torture and everything I faced, I faced like I was the victim of like torture back home as well, so as here, and why would you put me in prison. I wasn’t a criminal, I have not done any crime, I was the one who was at risk.

Lutfor said he felt lucky because he was detained for only 26 days (as other people in detention had told him that people usually stay for 3 or 4 months before they even obtain legal advice) and he thought that the ‘staff there who was working there, they were really nice (...) the detention, I don’t know, it affected me somehow’. However, he told us that he had ‘[t]raumatic distress, I didn’t want to go out, I don’t want to talk to anyone. Then, after therapy, I went for therapy, counselling, then I found LGBT Foundation, I start to come here, talk to them, then I start to do voluntary works’. Recovering from a period in detention is clearly a long and arduous journey, which is added to a usually already difficult set of mental and physical issues. This will be further explored in the next chapter.

## 8.10 Concluding Remarks

If we define the ‘right to adequate housing’ as including respecting the dignity of the person and ensuring equality and non-discrimination (UNHCR 2013, sec. 1), then we can say that this right is not respected or implemented in all its dimensions when it comes to asylum accommodation for SOGI claimants in Germany, Italy and the UK. There are often poor material conditions in reception and accommodation centres and SOGI claimants have to live in accommodation and in areas where they experience homophobia, transphobia, racism and disablism, and at times intersecting discrimination.

There are no specific policies relating to the accommodation of SOGI claimants in Germany, Italy or the UK. Yet all three countries have seen the establishment of LGBTIQ+ accommodation projects, however limited and whether managed by the state or NGOs or by a partnership of the two. Campaigns for LGBTIQ+ accommodation can be delicate and contentious, potentially reinforcing stereotypes that other (non-SOGI) asylum claimants are sexist and homophobic, feeding a homonationalist depiction of an LGBTIQ+-welcoming Europe (in contrast to homophobic countries of origin). This discourse risks homogenising both SOGI and non-SOGI claimants. Our theoretical and analytical frameworks, explored in Chap. 3, debunk such simplistic binaries, and many participants helped us gain a more sophisticated understanding of such complex realities.

While it is important to demonstrate the specific needs of SOGI claimants in accommodation centres, and perhaps campaign for SOGI housing, from an intersectional perspective these needs should be assessed on an individual basis. It is important to avoid homonationalist discourses that depict (White) Western nations and people as liberated and gay-friendly and (non-White) non-Western nations and people as homophobic and transphobic. There is a danger that the struggles of LGBTIQ+ refugees are instrumentalised for racist discourses (Awadalla and Rajanayagam 2016). As Maryia (NGO worker, Germany) pointed out, simplistic distinctions between LGBTIQ+ refugees on the one hand, and homo and transphobic refugees on the other, do not correspond to reality:

Because I think it's a lot more complex and there are a lot of differences within very different social groups and other things like "race", class, education, health, all sorts of things play a role too, so for sure it is very important to talk about what kind of discrimination people experience among each other in the accommodation, but it is more important to look at how the society receives them, how it treats them, and what opportunities there are, so to speak, to start a new life.

We therefore rather want to consider asylum accommodation centres to be like many other spaces, namely heteronormatively structured. As geographers of sexualities have shown, everyday spaces (such as the street, the home, the workplace) are constituted as heterosexual through repetitive heterosexual performances (Bell and Valentine 1995; Johnston and Longhurst 2009; Valentine 1996; Chap. 3).

SOGI claimants may also have specific needs because of other dimensions of their identity, such as religion (as in Marhoon's case, Germany) or disability (Betty, Germany). One claimant referred to 'being out of category' being LGBTIQ+ and also being a refugee (Zouhair, Germany). While SOGI claimants often experienced difficulties in their accommodation, they were also often lucky to have effective support structures in place (at least in urban areas). Many participants were helped by LGBTIQ+ organisations, for example, when they were homeless, or when they were harassed or victimised in their accommodation. Such practical and emotional support was indispensable to SOGI claimants' well-being. As has been highlighted, community support is invaluable to decrease isolation (TGEU 2016).

From our interviews, it also became clear that authorities (and housing providers) need greater awareness of and sensitivity to the housing needs of SOGI claimants, in particular the issues of where (and with whom) individuals are housed. Particularly in Germany, many of our participants experienced extreme social isolation, often accommodated in rural areas, where they encountered homophobia, transphobia and racism. The UNHCR 'Resettlement Assessment Tool' for LGBTI refugees describes that: 'In most cases, LGBTI refugees will gravitate towards major urban centers as they offer greater opportunities for social support networks, and more specific resources. However, LGBTI refugees can be successfully resettled to more rural communities' (UNHCR 2013, p. 12). Our research shows that this is often difficult, and all the LGBTIQ+ claimants and refugees we talked to, who were living in rural areas, were quite isolated and preferred to live in more urban areas. However, also cities can do more to 'foster cultures of diversity and inclusion', for instance through cultural festivals and neighbourhood gatherings (Ruckstuhl 2016, p. 5).

While NGOs campaign for LGBTIQ+ accommodation centres and generally smaller accommodation centres, some participants were concerned that the far right trends in Germany and Italy will not make things better, and reforms introduced in the meantime have indicated that such concerns are warranted. In Germany, as of January 2020, claimants have to stay for up to 24 months in 'arrival centres' in Bavaria, and this might become the case in other federal states. In Italy, support offered in accommodation during the asylum process is also likely to diminish with recent reforms only offering SPRAR accommodation to people who have been



recognised refugee status. In the UK, we will have to see what impact Brexit will generally have on asylum policies.

We now turn to an analysis of the range of physical and mental health issues SOGI claimants face, as well as challenges they deal with in relation to work and education.

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# Chapter 9

## Health, Work and Education



*You think I don't value what I lost, to come and start from zero?  
I went to school for fifteen years and I come here to  
kindergarten here in Deutschland?*

(William, Germany)

*[s]ome people go to bed for money, you know those kind of  
people, they want to eat and they need house, you understand.*

(Edoardo, focus group no. 3, northern Italy)

*I know that self-medicating is not illegal but there are risks to it,  
but as long as you know what you're taking and confident  
enough which I am, go for it. I have some complications with it  
in the past, but I need to keep going as it's good for my mental  
health and it alleviates my gender dysphoria massively.*

(Amber, UK)

### 9.1 Introduction

In this chapter, we look at the experiences of SOGI minorities who are claiming asylum or who have reached the end of the asylum process in relation to health, work and education. We define these three spheres broadly, including, for example, volunteering and impacts from having experienced sexual violence torture, as well as sex work. Ostensibly, LGBTIQ+ asylum claimants experience the same difficulties in applying for work and accessing health and education as most other asylum claimants. In reality, this is not always the case. Here, referring back to our theoretical underpinnings, including intersectionality, highlights some particular areas of need, in many cases relating to the discrimination they encounter on the basis of SOGI in addition to other characteristics. As with the previous chapter, we again show that SOGI minorities encounter particular problems outside the legal asylum process as well as within it.

To provide some context, we first briefly outline the international legal framework relating to the needs and entitlements discussed in this chapter, developing the contours of international protection that were identified in Chap. 4. While the 1951

Refugee Convention defines employment and educational entitlements for refugees (Articles 17–19 and 22), it does not address the rights of individuals while their claim is being assessed. Here, the main reference is the recast 2011 Reception Directive and in the case of the UK, the 2003 Reception Directive, underpinned by the ECHR and the CFR, as well as other international human rights treaties and domestic laws, all of which may complement or exist in tension or conflict with one another (Chap. 4).

During the period that individuals are claiming asylum, the recast Reception Directive requires member states to: provide education to children in line with that of nationals (Article 14); grant access to employment within nine months from the date of application for protection with some qualifications, including that member states may prioritise citizens and nationals (Article 15); and offer emergency health-care and treatment for ‘serious mental disorders’ (Article 19). General provisions also require member states to consider the specific needs of vulnerable persons, including those ‘who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence...’ (Article 21), and to assess whether claimants have such ‘special reception needs’ (Article 22) (Chap. 5).

While all three of our case study countries have some version of a welfare state system (Ferrera et al. 2013; Kennett and Lendvai-Bainton 2017), they also all have legislation and regulations in place controlling access to healthcare, employment and further education based on immigration status (European Commission 2020). Full discussion of these is beyond the scope of this chapter, although some details will be mentioned below. However, it is important to keep sight of the fundamental rights relating to health, employment and education under the ECHR and wider IHRL that all individuals are entitled to on a non-discriminatory basis (UNHCR 2020). We emphasise this universality precisely because of the failure to apply ‘every day’ human rights instruments to asylum claimants and refugees. Indeed, there are many international instruments that do not distinguish between citizens, nationals, asylum claimants and refugees and, when considering access to health, work and education, these need to be better recognised and vindicated.

In Sect. 9.2, we discuss health, beginning with access to healthcare and continuing to consider access to specialist treatment, where the needs of transgender people were clearly a particular concern, as well as those with HIV support requirements. The following Section addresses sexual violence and torture, and their impact on SOGI minorities. We then identify some of the specific mental health issues that we heard about from our participants. Section 9.3 discusses work and defines it broadly to include voluntary work and community involvement (Section 9.3.2) as well as sex work and the sexual exploitation some of our participants experienced (Section 9.3.3). We also look at other kinds of exploitation that our participants encountered. The chapter concludes with a short discussion about education and training where there were relatively few SOGI-specific concerns compared to other areas.

## 9.2 Physical and Mental Health

### 9.2.1 Access to Healthcare

We begin by considering the access to basic health care by SOGI minorities claiming asylum which, of course, is the same as that of any claimant. Health entitlements for asylum claimants and refugees vary between and within the countries under comparison.

In Germany, asylum claimants have only restricted access to healthcare, defined as ‘necessary medical and dental treatment’ for ‘acute illnesses and pain conditions’.<sup>1</sup> As the law is not clearly defined, health professionals and local authorities have some leeway; however, the main obstacle is the need for asylum claimants in many municipalities, but not all, to secure a health insurance voucher – ‘Krankenschein’ – from social welfare offices, something that is difficult for people accommodated in rural areas. Those without a voucher are likely to encounter delays in health provision, and may even be refused treatment (ECRE, AIDA & Asyl und Migration 2019, pp. 85–86). In Italy, asylum claimants and beneficiaries of international protection must register with the National Health Service and should then enjoy the same treatment as Italian citizens. On registration, asylum claimants receive a European Health Insurance Card, but delays and obstacles to issuing this have been aggravated by the 2018 asylum reform (ECRE, AIDA & ASGI 2019, p. 104). In the UK, asylum claimants are entitled to register with a medical General Practitioner (GP) and receive free hospital treatment; however, individuals often experience difficulty in accessing these healthcare entitlements (ECRE, AIDA & Refugee Council 2019, pp. 74–75; EHRC 2019).

Reception service-providers may be charged with responsibility for informing asylum claimants about their health entitlements and putting them in contact with doctors and other health services. This form of support also took place in the CAS and SPRAR centres in Italy, prior to the reforms restricting access to healthcare beneficiaries of international protection (ECRE, AIDA & ASGI 2019, p. 80). In the UK, the companies contracted to provide accommodation for asylum claimants (Serco, Mears Group and Clearsprings) are also responsible for supporting individuals through the asylum system, including explaining how to register with a local doctor and access other National Health Service (NHS) treatment (ECRE, AIDA & Refugee Council 2019, p. 58).

Nonetheless, in all three countries under comparison, access to healthcare is reported as inconsistent from one location to another. In Germany, there is a health insurance card scheme but it has only been implemented in some municipalities (ECRE, AIDA & Asyl und Migration 2019, p. 85). In Italy, practices vary throughout the country and from one reception centre to another; for example, exemptions from medical charges are reportedly not applied in Lazio, Veneto and Tuscany in the same way as in Piedmont and Lombardy (ECRE, AIDA & ASGI 2019, p. 105). In

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<sup>1</sup> §4 of Asylbewerberleistungsgesetz (AsylbLG, Asylum Seekers Benefits Act).



the UK, charges for those without leave to remain were introduced in April 2015 (ECRE, AIDA & Refugee Council 2019, pp. 75–76). Not only does the UK government’s policy of dispersal of asylum claimants disrupt continuity in healthcare (EHRC 2019, p. 7), but there are also national differences: in Scotland, all asylum claimants, including those whose claims have been refused, are entitled to full free healthcare, while in England, free hospital treatment is theoretically not available to asylum claimants who are not receiving benefits (Piwowarczyk et al. 2017).

In all countries under comparison, regional differences, language barriers, repeated changes in entitlements and lack of awareness by both providers and receivers of healthcare are reasons why many refugees and asylum claimants are unable to access the healthcare they need, particularly given that asylum claimants often experience poverty to a degree that damages their health (EHRC 2018). Yet, SOGI minority individuals face some particular obstacles. There is not as much understanding of these obstacles as is needed – research on the physical and mental health of SOGI minorities rarely addresses asylum, while research on the health of migrants and refugees rarely covers SOGI issues (Ohonba 2017, p. 1; Piwowarczyk et al. 2017, p. 724).

In a rare piece of research concentrating on the health of SOGI asylum claimants, the UNHCR identified ‘(p)rejudicial health care and lack of access to HIV prevention and treatment’ as particular concerns, and also pointed out that ‘(t)ransgender individuals often do not have access to the treatment they need, including transition-related care’ (UNHCR 2013, p. 4). The particular problems in the area of health for SOGI claimants that arose in our research related to: trans people’s healthcare needs (Sect. 9.2.2); torture diagnosis and treatment (Sect. 9.2.3); and mental health (Sect. 9.2.4). While torture, sexual violence and mental health problems are not unique to people from SOGI minorities seeking asylum, they were experienced in a particular way by our participants. HIV status was also a factor highlighted by participants, though not necessarily in the context of lack of provision in the host country.

## 9.2.2 *Access to Specialist Treatment*

Problems of access to appropriate healthcare were most evident for transgender participants in our research, corresponding to reports by NGOs (Action for Trans Health 2015). Delays in obtaining the documents necessary to access treatment are a particular problem for transgender people who may have started or wish to start regular hormone treatment. Furthermore, ‘[w]orryingly the immigration detention centre protocols do not explicitly mandate access to hormones and other transition related healthcare’ (Action for Trans Health 2015). Transgender Europe also points out that:

Many trans refugees are likely to have already started HRT [hormone replacement therapy] before arriving in Europe, either under medical supervision or by self-medicating using hormones purchased through the black market. (...) Interrupting hormone intake can have serious consequences and is by definition a decision to be taken by the individual concerned,

on medical advice. (...) The continuation of HRT and all necessary monitoring is therefore essential to ensure the health and wellbeing of trans asylum seekers and mitigate against the risks of self-medication (TGEU 2018).

In addition, and in particular for trans people who are detained in Immigration Removal Centres in the UK, there are often deficiencies in access and provision:

The protocol allows trans people in detention centres to wear wigs, packers, binders, and breast-forms. Unlike the protocol for UK prisoners, these do not have to be provided by the institution, so it is likely that many trans detainees will be forced to make do with makeshift equipment/prosthetics (Action for Trans Health 2015).

Participants in all countries highlighted difficulties in access to and continuity of hormone treatment. In Germany, there are daunting complexities for trans people claiming asylum and trying to access treatment that is designed for German citizens. The provision of only basic healthcare is a ‘bitter’ problem for people who have had hormone treatment in their country of origin or transit and are unable to continue with it in Germany (Noah, NGO social worker). Furthermore, medical practitioners and NGO workers struggle to provide support in specialist areas, especially when there are also language and cultural barriers (Leon, NGO worker).

Even when individuals are granted refugee status, ‘it remains a common struggle to wrest these funds from the health insurance funds and find doctors who follow this path’ (Noah, NGO social worker). One individual, Bebars, was told by his doctor that health insurance would not continue to cover his hormone treatment, because he had not received sufficient psychotherapeutic care; he needed to see a psychotherapist for three months, otherwise he would need to pay for treatment himself. Surgery for gender reassignment is covered through health insurance only after completion of a year and a half of psychotherapy (Nina, legal advisor). People who had come to Germany via Turkey are often particularly affected:

They come here, they stop their hormone process. It is easy for them to have it in Turkey, you just directly go to the pharmacy. You can directly have your hormones. It’s not like here, where it’s a procedure. As a result of this and other reasons, we heard of people choosing to go back to Turkey (Ibrahim, Germany).

In Italy, access and cost were also concerns, as were regional variations. Whereas in Emilia Romagna treatment was free:

in Sicily, in Calabria, Naples, in Milan, they pay. Not only the ticket to visit and do the analysis, but also the hormones. And hormones are expensive! For example, if we talk about Nibido, which is a drug for testosterone, hormones that trans FtM take every three months, with the safety of the endocrinologist, I mean, it even reaches 150–200 euros! (Kamel, Italy).

As a result, Kamel, a transgender claimant, was no longer receiving the medical supervision he needed for hormone treatment, had heart problems and his weight had reached almost 100 kg. He pointed out that ‘[a] refugee who escaped from war or from any other country is stressed and suffers... he’s not a prince charming who comes with a bag full of money’.

Amber had started transitioning before she came to the UK:

and then for the whole two months when I was homeless, I couldn't get any bridging hormones because my pills has run out. I didn't bring enough, because I didn't have time to get that from Malaysia before I fly. So the whole two months, I was really struggling on how to, what do I do, because I had no pills and my body is going backwards now. Because I made the decision to transition because it was either transitioning or, or I would kill myself.

GPs are advised to collaborate with a Gender Identity Clinic (GIC) to provide 'effective and timely' treatment for trans patients. They may provide bridging prescriptions, which are 'intended to mitigate a risk of self-harm or suicide' (General Medical Council 2020). However, in 2019 it was reported that 'GPs are facing increasing difficulties addressing patient requests for "bridging" prescriptions, particularly for those patients who have self-started medication, including medication which they have procured over the internet' (General Medical Council 2020, p. 6). Trans asylum claimants are likely to feel the impact of this acutely, perhaps compounded by language and communication problems, disruptions in hormone treatment received in countries of passage, and dispersal to areas within the UK particularly lacking in expertise.

Amber's experience exemplifies the difficulties caused by frequent relocation in conjunction with inconsistencies in GP support. As she explained: 'You just have to hop [between] GPs if they aren't helpful, because it's up to them to prescribe this kind of hormones'. She had registered with a GP in Canterbury who had referred her to a Gender Identity Clinic (GIC), but she had not been prescribed any medication. Amber then moved to Croydon temporarily before moving on again to Essex, where she registered with another doctor. During this period, she had difficulty obtaining a prescription for bridging hormones and felt 'really stressed out and frustrated about how I was treated'.

Because accessing NHS treatment had been difficult, Amber had been self-medicating with supplies from friends:

I know that self-medicating is not illegal but there are risks to it, but as long as you know what you're taking and confident enough, which I am, go for it. I have some complications with it in the past, but I need to keep going as it's good for my mental health and it alleviates my gender dysphoria massively.

Amber ended up resorting to private healthcare and explained she had been lucky enough to have friends willing to cover some of her medical costs. Registering with a private doctor cost Amber an initial set-up fee of GBP50, a monthly registration of GBP25, plus there were costs for prescribed medication. She was unable to afford initial counselling and, as she was already self-medicating, she knew what she wanted. Looking ahead, she was on the waiting list for treatment and intended to request removal of her Adam's apple and full body laser hair removal. Breast augmentation would need to be done privately.

The common experience for trans people was of inconsistencies in access and provision within and between countries, meaning that individuals were dependent on luck in finding individual doctors who would support them. Others resorted to non-regulated private sources and, for some, the lack of access to continuous

hormone treatment caused them to leave the EU (as we heard from Ibrahim, UK; Ximena, UK; Jules, staff member at ILGA-Europe).

While a greater number of our participants shared with us problems relating to hormone treatment, we also talked to several individuals with an HIV diagnosis, for whom access to medical treatment was also a priority and a cause of anxiety. As Susan (focus group no. 3, Bavaria, Germany) explained:

I don't have medicine, I don't have anything. They told me I have to go to some doctor. I went to that doctor. Doctor wants insurance. I have to come back to the same doctor. That doctor told me I have to wait. HIV, I have to take medicine every day. Every day! I don't have medicine, they told me I have to go. I walk, I walk, I walk... Whenever I go to the hospital they give me insurance for three months, so on 10th it's going to be the last insurance, if the government does not put meds on me.

HIV status was also a factor in some individuals' asylum claim. Diamond was studying hotel management in the UK and near completion of his course when he was diagnosed with HIV and found himself unable to cope with his studies:

But when I realised I am HIV [positive], I was scared because (...) I know now you need every six month or yearly to get a check-up what is your CD4 count viral and some point you need a medication even so what, definitely the doctors and the people will come to know [if I returned to my country of origin], so that is why I decided to claim asylum in UK, so at least I can get a right here and I can continue with my studies and even medication I can get it, without any problems. Back home that is a really very big problem.

However, this was not enough to eliminate his fears about his future: he told us that when he returned home from the group he would have daydreams about people killing or beating him and was unable to sleep at night. The impact of trauma on people's mental health, including their ability to sleep, is something we look at again below.

### 9.2.3 *Experiences of Sexual Violence and Torture*

While statistics are not available, many asylum claimants experience sexual violence and torture as part of the experiences that lead to their flight. One study suggests that more than a quarter of 'forced migrants' in high-income countries are torture survivors (Sigvardsson et al. 2016, p. 47).<sup>2</sup> There is also evidence of higher rates of sexual trauma among SOGI asylum claimants (Alessi et al. 2016; Hopkinson et al. 2017; Reading and Rubin 2011). Similarly, one small-scale study found that of 'the 61 LGBT asylum seekers identified, 66% had experienced sexual violence as part of their persecution history' and there was a significantly higher incidence of suicidality among this group (Hopkinson et al. 2017, p. 1658). If torture is defined as broadly as it should be under Article 3 ECHR jurisprudence, then we would argue

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<sup>2</sup>The target population for this review – forced migrants – was taken to include refugees, quota refugees, internally displaced persons (IDPs), persons under temporary protection, asylum claimants and people whose asylum claims were refused (Sigvardsson et al., 2016, p. 43).

that many more individuals from SOGI minorities claiming asylum should be recognised as having experienced torture or the threat of torture in the form of rape and other forms of sexual violence, beatings or in other ways than is the present case.

Our findings confirm this body of literature. One survey respondent in Germany reported that '[m]y front teeth and right arm were broken and they hurt time to time' (C55). We heard about individuals surviving mock executions (Frank S., legal advisor, Germany). In Italy, NGO workers and volunteers have worked with children who had been raped (Chiara, NGO worker). In the UK, one participant told us he 'thanked God' that he had marks on his body from torture, as they had been the basis for a doctor providing verification of his trauma (focus group no. 1, Manchester, UK). The degrading expectation that asylum claimants display their scars to show credibility has already been discussed (Chap. 7).

While many asylum claimants experience torture, it came up repeatedly as part of SOGI asylum claimants' reasons for flight (Chap. 5). A policy worker with a mainstream refugee agency in the UK, when asked about the specific needs and experiences of SOGI asylum claimants, said: 'maybe more people claiming on those grounds [have] experienced sexual violence and torture' (Eleanor, NGO worker).

Lesbian, bisexual and trans women claiming asylum and with refugee status in the UK told us of being raped, sometimes by family members:

[T]he whole community is mocking me, talking about me, you know, and some girls were even saying what kind of, because, everybody expects that when you get to a certain age as a girl you get married to man. So they would always mock me, like, what kind of man is going to want a girl that has been, you know, damaged by her father. You know, and I was 13, for crying out loud (Stephina, UK).

A trans woman told us of being sexually abused by her brother-in-law and another woman had also been raped by a close family member. Two women had had children as a result of being sexually abused, children who were either still in the country of origin or with them in the UK.

A UK barrister, speaking of her clients who were claiming asylum on SOGI grounds, told us: 'There is a significant proportion of people who have experienced torture. I cannot put a percentage on it, but it is significant' (Annabelle, barrister and NGO chair, UK). She connected this with the mental health problems that many of these individuals experienced:

In the many years of working in this field, I have met only a couple of LGBTQI claimants who did not report at least some degree of mental ill health normally associated with their experiences in their country of origin, even where those do not amount to physical abuse (long term fear, isolation, discrimination...).

In the UK, medical professionals in NGOs such as Freedom from Torture and the Helen Bamber Foundation provide asylum claimants and refugees who have experienced torture, with expert counselling and, on the instruction of the legal representative, also write medico-legal reports for individuals to inform the decision-making process. However, as the demand for medico-legal reports and specialist therapeutic support is significant, there can be a long wait for the reports and, if the claimant

does not qualify for legal aid, they may be unaffordable or unavailable to claimants – particularly at the initial decision-making stage:

Some lawyers will also be hesitant to arrange for these reports earlier than the appeal stage, because the Legal Aid Agency may refuse to grant funding on the basis that such move would be pre-emptive, that is, “why should we fund a report to prove your client’s case, when there is no proof that the HO will refuse their claim?” (Mateo, solicitor and NGO worker, UK).

This contributes to unnecessary delays in the asylum process. Individuals who have experienced violence and sexual abuse in private, as is often the case in SOGI asylum claims, are unlikely to have documentary evidence to support their claim and then ‘everything turns on their account which might be rejected for reasons of lack of coherence or consistency, which should be expected from a torture victim or a person suffering from poor mental health’ (Annabelle, barrister and NGO chair, UK). Medico-legal reports will be particularly important in such cases, but as they are, usually only available at the appeal stage, it is likely that many strong claims for protection will initially be refused only to succeed on appeal when the critical medico-legal report has been provided. This extends the time decision-making takes from start to finish, unnecessarily increasing the stress and difficulty for claimants, as well as the cost to the state. Moreover, the definition of ‘torture’ used by some NGOs may not cover abuse at the hands of family members as often experienced by SOGI minorities (Freedom from Torture 2019).

There are also concerns that when they are commissioned, these reports are not recognised as authoritative in the way that they should be. Freedom from Torture is one organisation providing these services, and, as mentioned in Chap. 7, has highlighted strong concerns about the UK government’s mishandling of medical evidence of torture. The organisation claims that the Home Office Asylum Policy Instruction on how expert medical evidence should be treated is being ignored, that clinical expertise is questioned by untrained caseworkers, and that the wrong standard of proof is applied (Freedom from Torture 2016).

The services of organisations such as Freedom from Torture are not specifically for SOGI minorities and the organisation does not monitor its clients on the basis of SOGI identity. Yet, another participant whose organisation provides medico-legal reports in cases of human rights abuse estimates that, of the organisation’s clients, ‘[a]round 90% of females and more than 50% of males have been raped as part of what has happened to them, either during trafficking or in their home country’ (Carl, doctor with an organisation providing medico-legal reports, UK). This is true regardless of SOGI. However, he also believes that a quarter of his and the organisation’s clients are LGBTIQ+. While this is only one individual’s estimate, it suggests that the problems that Freedom from Torture have identified in relation to decision-makers’ misuse of medical evidence of torture have a strong significance for SOGI minorities seeking asylum, many of whom have experienced torture.

It is clear from our fieldwork that SOGI minorities need both expert therapeutic care as torture survivors and medico-legal experts to provide evidence in their cases. While the above findings from organisations providing medico-legal reports and

support to torture victims comes from the UK, the experiences of torture, violence and sexual violence were more widespread and came from participants and their supporters in all three countries (Chap. 5). This suggests that specialist support for LGBTIQ+ survivors of torture is a vital need. Yet, we found little such support in Germany or Italy, and in the UK demand outstrips supply, with one psychotherapist estimating that ‘even when we were taking one new client [referring to general provision] every fortnight, we would be turning away eight others’ (Ashley, psychotherapist). A similarly dire situation can be observed in relation to mental health, as we will now consider.

### **9.2.4 Mental Health**

Asylum claimants, particularly those who have experienced sexual violence and torture, have a heightened risk of mental health problems such as PTSD, severe depression, isolation, and feelings such as shame and helplessness (Hopkinson et al. 2017; Longacre et al. 2012; Reading and Rubin 2011). For members of SOGI minorities, it has been suggested that the relationship between early victimisation and negative mental health outcomes may be more pronounced (Hopkinson et al. 2017, p. 1650).

The combination of persecution by family or community in their country of origin with alienation from diaspora communities in the host country means that SOGI claimants are likely to experience isolation, both voluntary and self-imposed isolation, as well as PTSD, depression and other mental health problems (Alessi and Kahn 2017; Hopkinson et al. 2017; Micro Rainbow International 2013, pp. 27–28; Shidlo and Ahola 2013; Tabak and Levitan 2013; UNHCR 2013). Sexual violence can cause feelings of self-blame and self-hatred (Women’s Refugee Commission 2019). This research supports our findings, where the most commonly recurring health needs in our study related to mental health. Mental and physical health problems relating to the persecution they had experienced or the process of claiming asylum were reported by 56% of the respondents in our claimants’ survey. This is not surprising in the context of the experiences of some SOGI claimants: one anonymised medico-legal report we were given access to documented the physical evidence of torture experienced by a lesbian woman from an East African country. She had been raped at the age of 12, forced into marriage at 15, and she and her partner had had acid thrown at them alongside other attacks. The report documented evidence of PTSD, problems with ‘intrusive memories and visual and tactile flashbacks to her adverse experiences, particularly the rape’. The report stated that ‘[s]he also displays evidence of depression and panic attacks, which are often found among survivors of torture and related abuses’ (anonymised report from January 2019 provided by Carl, doctor with an organisation providing medico-legal reports, UK).

Such experiences of torture, violence and sexual abuse were connected to experiences of PTSD in the accounts we heard from asylum claimants and also from the



NGOs and professionals working with or supporting them. Lutfor (UK) explained how having PTSD jeopardised his study plans, preventing him from going to college on the student visa that was how he originally entered the UK. Ximena (UK) also told us that:

I suffer about the post traumatic disorder, for all those things happening in my life. Sometime, when sometime I say when I remember all those things happening to me, I feel sad. Because I remember my friend, I would like they were here, but they pass away. They were killed just for being transgender woman. But I am trying to continue with my life.

Carl explained that ‘[p]atients [who have been tortured] often think they are going crazy. They need to be reassured that they are having a normal human reaction to an intolerable situation. That, for me, is what actually PTSD is’.

Many people described how they felt to us. For example, in Germany, Halim explained:

And it’s not really visible, and people think that now because I’m traumatised I’m going to be sitting home crying all the time. I’m trying to function, however it really affects my ability, or has affected for me my ability to function for a long time. And when I think back about it, of course the first year I was traumatised and it reflected on my energy, my concentration in a lot of ways. Yeah, but people don’t really understand this.

In Italy, we were told that ‘[a] lot of us have temporary madness, which can be treated, caused by the Sahara Desert [their route to Italy], temporary madness. It’s not easy to watch your friends dying around, and they expect you to be normal’ (Nice Guy, focus group no. 1, northern Italy). And in the UK, someone who had come through the worst of her mental ordeal said: ‘at the height of it, I wanted to take my brain and rip it out because it was a mental pain that you couldn’t put your hand on, but it hurts like someone chopping you on the hand’ (SWG, focus group no. 4, London, UK).

Shame and guilt also featured in our participants’ stories. Ximena (UK) told us she was sexually abused by a teacher but did not tell her mother because she felt scared and ashamed. Shame is also the justification for the abuse she experienced. She told us of her father’s violence towards her and her mother: ‘and he told me “I don’t want to have a son who will be a shame for me, for my last name. For me you are die, it is your fault, you are feminine child”’. He blamed Ximena’s mother for raising a ‘very feminine’ son and asked Ximena to leave home when she was 14.

Most common were accounts of depression like Sandra’s (Germany): ‘I felt empty, defeated, lost, tired, very, very tired. I lost all the motivation and all the thinking that I had about life and what I wanted to achieve and everything’. Very often, people talked about their depression unprompted, for example when talking about being unable to work, which, according to one focus group participant makes you feel worthless ‘and that messes with you mentally’ (focus group no. 1, Hesse, Germany). Other people, like Christina, felt hopeless. They had suffered a great deal from depression since arriving in the UK. At one point, they said ‘I was contemplating if I should go back home because they are going to send me home anyway and I might as well just do it and if I have to die, just die, I don’t really care anymore, I

was going through that whole depression'. We asked Christina if they had felt able to get support and they said:

To be honest, I am always the one who gives advice. I never get advice. So it was, for me it was really hard to open up to people and say: "Oh look, I am struggling mentally, I need help".

This shows how difficult many people find it to be dependent, and to feel unable to control their own lives, a theme we analyse further in Chap. 10.

There were many accounts of the known symptoms of depression such as sleeplessness. Rosette (Germany) told us:

Most of the time I don't even sleep. Most of the time I think that I'm old, I should at least be at my place enjoying my life. (crying) At my age people are just enjoying their life. Why can't I enjoy my life (whispering, very upset).

Survey respondents reported similar experiences, such as this lesbian woman from Uganda who was appealing against her refusal in Germany:

I have developed a sickness mentally I think it's because of over thinking and I can no longer sleep. I have sleepless nights and am on drugs per now. If I don't take drugs I can't sleep (C44).

Sometimes, people were unable to sleep because of recurring flashbacks. Water, for example, was unable to find peace because 'if I am sleeping, I see the pictures of everything, you know' (focus group no. 4, northern Italy). Sometimes, sleeplessness was due to real and present fears. Marhoon, for instance, was scared that the male members of his family would come after him to Germany: '[I]n the dream, I see, OK my family has found me and they're coming here to kill me'. He had developed agoraphobia and had panic attacks when he went out in public.

We heard many accounts of suicidal thoughts and behaviours from lawyers, NGO workers and claimants themselves (for example Ali, UK; Amber, UK; Sandra, Germany). This was often linked to the asylum process and was sparked by a refusal of the claim (Lutfor, UK; Sadia, UK). People who had been detained also talked about how these experiences contributed to suicidal feelings:

I remember when I was in detention like I felt like I am being targeted for no reason and like you know, my emotional state was so bad like and I wanted to like, you know, commit suicide and I said I wanted, I don't want to live anymore, I just want to like kill myself, and get away from it (Lubwa, focus group no. 1, Manchester, UK).

Avoiding public places and social engagement was another common symptom of depression for our participants, though often difficult to separate from practical reasons for isolation such as the lack of accessible SOGI-friendly spaces (Chap. 8). Several people described staying in their rooms and doing nothing: 'Because I barely talk, I don't talk to people, I was just all alone. I could just sit in the room, all day long not coming out' (Just Me, focus group no. 3, northern Italy). Other examples were given by Halim (Germany), Sandra (Germany), Selim (UK), Meggs (focus group no. 1, Manchester, UK), and Joyce (focus group no. 5, Nottingham, UK).

The conditions in which people lived aggravated their mental health issues. Halim was in a reception camp in Germany:

I was having a very difficult time of my life and I couldn't close the door and say I'm on my own now, I didn't have a chance to do that. So it was very hard, the system and the people treating you, it felt like part of a herd of people, so it just didn't feel... it was very bad for my mental health I was very depressed at the time.

Two further phenomena are important to note here. The first is the impact of mental health and health factors on the asylum process. It is clear that the impact of suffering from PTSD or depression needs to be recognised by decision-makers. Research shows how trauma affects memory (Herlihy and Turner 2007). This was confirmed by our participants. While trying to secure documentation of mental health problems in advance of the asylum interview for people who are vulnerable, Chiara, an NGO worker in Italy, recognised that 'people can be in a confused state, they can be extremely, how can I say, inaccurate when you ask them questions about, say, particularly difficult moments in life, so it is possible that there are contradictions'. As previous chapters have shown, it is difficult for SOGI claimants to provide the evidence decision-makers require to be convinced they are 'genuine' – genuinely LGBTIQ+ and genuinely at risk of persecution (as discussed in Chap. 7). Being severely depressed or suffering from PTSD compounds the difficulty in presenting a convincing testimony:

You know, my mind was not working and I was, my mind was like pushing me to stand there and watch that thing. Nothing else I remember. But when we went for our interview, when I told them "look, I am not mentally fine, I know when we came here [UK], what happened to us, I can tell you, but few things I really don't remember". But they did not believe me (Mary, UK).

Mary's partner Zaro, jointly claiming with her, confirmed her account. In another case that illustrates insufficient awareness of claimants' mental health issues, in one appeal hearing in the UK, the claimant's barrister told the judge of the claimant's longstanding depression and suicidal thoughts. The Home Office presenting officer acting for the Secretary of State subsequently said to the claimant: 'you said when [your representative] asked that you lived openly as gay man, in what ways?'. The claimant explained in his response that because of his depression he had found it difficult to relate to people, and go to gay bars and find a boyfriend – and he also could not afford to do this (First Tier Tribunal observation, London, November 2018). The lack of resources and mental health problems combined for this man in a way that made it harder to prove his claim in the ways that the UK asylum system expects. However, in this instance the appeal was successful and he received refugee status.

A government official in the UK also confirmed the impact of mental health in interviews and explained that if somebody has PTSD, then 'you have got to take that into account that they may not remember stuff' (Olivia, UK). Yet, as we saw in Chaps. 6 and 7, inconsistency is a frequent basis for refusal based on lack of credibility. We were told by one NGO worker:

and then they [people whose claim is refused] will be told "your language was vague, you didn't specify your feelings". I think sometimes it is people's mental health that causes them not to be able to say much about their feelings, as well, you know, they are withdrawn (Debbie, NGO worker, UK).

In terms of treatment and support, the mental health of asylum claimants and refugees is recognised both as an area where specialist services and expertise are needed, and also as an area where needs are not being met and there is not enough evidence (Basedow and Doyle 2016; Mind 2009; Piwowarczyk et al. 2017; Slobodin and de Jong 2015). Other research suggests that SOGI asylum claimants are often likely to have experienced childhood persecution and are survivors of childhood trauma, meaning that particular forms of clinical treatment such as art and music therapy may be appropriate (Hopkinson et al. 2017, p. 1662).

The need for mental health support is recognised as being high among LGBTIQ+ populations and, similarly, there is a high demand for therapeutic work with people who have been tortured (Eleanor, NGO worker, UK). A further complication is that healthcare, even if it is available, is often not culturally appropriate. An NGO worker in Italy pointed out that the standardised [diagnostic] tests used by psychologists and psychiatrists are modelled on Italian or Western patients and cannot be used with foreign patients (Chiara, NGO worker, Italy). Compounding this, it was suggested that cultural factors sometimes make it harder for SOGI minority asylum claimants to ask for mental health support:

I have done some work with BAME [Black, Asian and minority ethnic] communities across Greater Manchester and the biggest barrier was the stigma around mental health. So you have that cultural stigma, as well as being LGBT, so people find it really difficult to access services (Justina, NGO worker, UK).

However, some of the people we talked to had received counselling (Ibrahim A., UK; Meggs, UK), but far more common were references to being prescribed antidepressant medication:

My GP, bless him, at that time he was also very supportive, yes, and he give me a lot of advice and I am still on antidepressants, until today, so like that was a big, big part, because I went suicidal as well at that time (Selim, UK).

In the UK, in particular, people told us they were taking medication to combat depression. Lutfur was taking ‘mirtazapine, zopiclone, paroxetine, or paroxetine something, and iron’. Ibrahim A. had been taking anti-depressants but stopped, because he did not like the changes they caused to his behaviour. Joyce and Selim gave us similar accounts of lives that consisted of staying in their rooms and taking their medication.

Non-medicinal support or talking therapies was not always provided through formal counselling. Melisa (NGO worker, UK) told us:

We have a group called “Sister Sister”, which is a support group for women only, LBT women, and we also have a choir, and sometimes we have theatre groups, we do some theatre work. We believe in tackling all trauma through, we take a holistic approach in tackling the trauma of LGBT asylum seekers and refugees.

Similarly, SGW (focus group no. 4, London, UK) also found it uplifting to join a support group: ‘But the thing for me what worked was like I found [a local lesbian support group], so I used to go to Manchester every month to look forward to being in a surrounding’.

A less positive phenomenon that emerged in the research is that many people are re-traumatised – rather than supported – by the process of claiming asylum. This corresponds to research showing that LGBTIQ+ refugees are exposed to trauma not only prior to leaving their country of origin, but throughout the entire transit and reception process (Alessi et al. 2018). In Germany, Leon described this as almost inevitable: ‘And then it is mutually dependent. If you already have a trauma and you are in a hopeless situation, the trauma will be amplified’ (Leon, NGO worker, Germany). Similarly, a SOGI group volunteer in Italy told us:

let’s not open the Pandora’s box on how the system makes people sick. Because the system makes people sick. (...) The system brings out the post-traumatic disorders, the fact of continually reliving the negative element, continuously telling how I was beaten, the non-recognition of what I claim to be. It has effects on asylum claimants. The continuous expectation, the need to be identified by an external subject with respect to what I am, creates a disturbance to people (Giulio, LGBTIQ+ group volunteer, Italy).

Chiara (NGO worker, Italy) also explained that the Italian reception system ‘creates pathologies’. While people bring with them trauma from their country of origin, she felt that this then becomes chronic or more acute as a result of the reception system. Likewise, a doctor confirmed that ‘[t]he Home Office practice of disbelief on top of people’s past experiences frequently causes re-traumatisation’ (Carl, doctor with an organisation providing medico-legal reports, UK).

This suggests that there needs to be both more sensitivity within the asylum decision-making and reception system to trauma-related needs, and also greater specialist provision outside these systems for individuals, and provision that is tailored to their needs in terms of SOGI, country of origin, gender and other characteristics. As with health, there are SOGI-specific aspects to employment, the subject of the next Section.

## 9.3 Work

### 9.3.1 *The Right to Work*

The right to work and to freely choose one’s work is recognised as fundamental to human existence.<sup>3</sup> Despite this, and despite the requirements of Article 15 of the Reception Directive mentioned above, all our three case study countries prevent – legally or in practice – asylum claimants from working for some or all of the period that they are waiting for a decision on their application. In Germany, claimants may not work for the first three months of their application (§61(2) Asylum Act Germany), and those from ‘safe countries’ placed in reception centres are unable to work for the entire period that their claim is being decided. After three months, they can apply for work but many will not speak German to the level needed for

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<sup>3</sup>Article 23(1), UDHR; Article 6 ICESCR.

employment. In Italy, asylum claimants can start work within 60 days of making an asylum application, but in practice they face problems securing the residence permit needed to work. Moreover, Decree Law no. 113/2018, abolished the provision of vocational training for asylum claimants that existed under the former SPRAR system (ECRE, AIDA & ASGI 2019, p. 102). In the UK, asylum claimants are prohibited from working, although they can apply for permission to work if their claim is outstanding after a year. However, even then, they can only apply for jobs where workers are in short supply and these are narrowly defined (for example, consultant in neuro-physiology) (ECRE, AIDA & Refugee Council 2019, p. 72). There is one exception: people in immigration detention are able to work for a fixed rate of £1 per hour for 'routine activities' (Home Office 2019, p. 5), a policy seen as exploitative but that was unsuccessfully challenged in 2019.<sup>4</sup> In the UK, research has found that asylum claimants are susceptible to forced labour and that payment below the national minimum wage is normal for asylum claimants and refugees, with or without permission to work (Lewis et al. 2013).

Those with refugee status should have equal access to the labour market but, in reality, asylum claimants and people with refugee status experience similar barriers to finding a job in terms of language, negotiating the bureaucracy of the host country, employer prejudice, lack of recognised qualifications, and lack of what may be called social capital or networks – the kinds of connections that often enable citizens and established residents to find out about and secure jobs. More than one respondent pointed out the importance of language in finding work. For example, Moses (Italy) said 'you have to perfect the Italian language before they can probably employ you, and on the other hand, scouting for job here it is not really that easy'.

Location plays a role in employment prospects. No country under comparison had a comprehensive package of employment support for refugees. The UK's Refugee Integration and Employment Service (RIES) funding ended in 2011 (Hill 2011) and refugees' access to support in finding a job is determined largely by dispersal location during asylum, or by where they go after recognition if they are able to move. If people are able to find work, it is often at a much lower level of pay and status than their occupation in their country of origin. Alphaeus (Germany), working as a care provider for older people, had been an engineer, owning his own construction company. Sandra (Germany) also talked about building a new life, but one that is 'way far from being the same level' as she was used to (Chap. 5).

The inability to work is a huge cause of frustration for all asylum claimants, as was well documented through our fieldwork. In Germany, one participant said: 'Put me somewhere where I can even babysit a child, take care of an old person. You know? Clean somebody's house and get paid. It's still a job, you know?' They continued 'As a nail technician, I'm used to working long hours. I'm not used to being at home, looking at the ceiling every day' (focus group no. 1, Hesse, Germany).

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<sup>4</sup>*Morita & Ors v The Secretary of State for the Home Department* (2019) EWHC 758 (Admin). Toufique Hossain, director of public law at the law firm Duncan Lewis, which brought the legal challenge on behalf of the five former detainees, said: 'Being paid £1 an hour for essential work is obscene' (Taylor, 2019).

A claimant in Italy described the period when some people claiming asylum were housed in camps as a missed opportunity to provide people with training and education:

when you leave the camp, you can be able to be useful to yourself. Not selling, you see some boys doing nonsense in the street, selling nonsense, some are doing, some girls are doing prostitution, why? Because they have to pay their house rent, they have to feed, they have to do all that things (Bella, Italy).

In the UK, a coalition has campaigned around the call for the government to ‘lift the ban’ on asylum claimants working.<sup>5</sup> There is both a financial imperative to people’s wish to work and a psychological one: being denied a fulfilling occupation and the means to support oneself is demoralising, particularly over a long period. Silver put it very simply: ‘I have to be autonomous. I have to pay for myself’ (Silver, Italy).

A lack of work often continued after the grant of international protection. A report by the Refugee Council in the UK on the problems people experience in moving on with their lives on being granted status found that no participant managed to get a job within their ‘move on’ period of 28 days: ‘participants voiced frustration at their experiences of searching for work and their interactions with staff at the Jobcentre and they felt were not giving them the support they needed’ (Basedow and Doyle 2016, p. 20). However, both before and after a decision on their application, many individuals became involved in community organisations or other voluntary activities, as we consider in the next Section.

### 9.3.2 *Voluntary Work and Community Involvement*

Many of our participants chose to become involved in community engagement or voluntary work – either working with existing civil society organisations or helping to establish new ones. These unpaid contributions sometimes continued after the grant of international protection and provided the basis for or a stepping stone to paid employment. As this unpaid campaigning or support or advocacy work was often with LGBTIQ+ migrant groups, this was the basis for individuals from SOGI minorities moving into this area of work. This was the case with Jayne, in the UK, who experienced a lengthy legal battle for asylum, during which time she helped to establish a local branch of a larger African-led LGBTIQ+ asylum organisation. Jayne said:

maybe those are the kinds of things that help me to keep sane... Trying to occupy myself. Yes, because you need to have a purpose in life and this whole system that is, what it does, you live a purposeless life, so it takes, I didn’t come here educated, but I have met mid-wives, teachers, who are just now reduced to nothing, go to foodbank and come back and that is it. Even to get to volunteer, it is difficult because the documentation hinders doing a DBS [the government certification needed to work with vulnerable people in the UK] application, yes, so it is... it is difficult, a lot of people will lose it [mental health] along the way.

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<sup>5</sup> <https://www.refugee-action.org.uk/lift-the-ban/>



Other people's experiences led them to pursue volunteering and undertake training to enable them to help people through the difficulties they had experienced, or as Lubwa explained, 'to give back to society' after people had supported him when he needed it (focus group no. 1, Manchester, UK). Joyce (UK) did a course on mental health and wellbeing so she could help people who had gone through the same problems as she had, having realised how common depression is.

Voluntary work was seen as a way to get experience, engage with people and fill the time while waiting for a decision. For example, Angel (Germany) said: 'So I want to start volunteering my time, like now that I can't work, volunteer my time, so that when I can work, I will have the experience'. However, there were no opportunities to do this in the rural area where she was accommodated (Chap. 8). In the UK, Lutfor told us about four different charities he had volunteered with, including the Red Cross, over more than two years while waiting for his claim to be decided.

At the same time, some participants felt exploited by the expectation they carry out unpaid work – one person even said they felt forced to take on voluntary work (Nice Guy, focus group no. 1, northern Italy). Furthermore, Wendy, an NGO worker in the UK, reported confusion on the part of officials as to whether asylum claimants barred from paid employment were also barred from volunteering – which they are not. Wendy had to have several 'robust conversations' with UKBA staff to inform them of people's rights to volunteer and claim expenses that do not constitute payment. Not surprisingly, the difficulties individuals experienced in joining the formal job market often led them to situations where they were exploited or at risk, as we go on to consider.

### 9.3.3 *Sexual Exploitation and Sex Work*

The UNHCR has recognised the 'specific protection risks that LGBTI refugees may experience in the country of asylum', including '[r]eliance on survival sex work, exposing individuals to various physical dangers and health risks, including sexual and physical violence, and sexually transmitted diseases' (UNHCR 2013, p. 4).

This was confirmed by our research. A number of people we talked to – both people claiming asylum and people working with them – gave us accounts of sexual or other forms of exploitation and suggested that this might be a problem of particular concern for SOGI claimants, especially transgender claimants. Bringing this point home, Ibrahim (Germany), a beneficiary of subsidiary protection entitled to work and was involved with an LGBTIQ+ organisation, said that, in 2015, he had been in contact with seven male-to-female transgender refugees, one of whom was in sex work in Berlin while the other six had returned to Turkey (the country through which they had travelled to reach Europe). He explained that, in Germany:

[t]hey don't have any working opportunities. But when they were working in prostitution, they had an income, they had money, they were able to satisfy themselves, to go out and do things. But when they come here, you know, a woman needs a lot of expensive, like, make-up and all this stuff. And with this small amount of money and the lack of knowledge in the

language, and they are not allowed to work, they were in a lot of depression and so... imagine at some point, some people go “look how I was looking in Turkey. How I look here.” Imagine. So that is why a lot of people went back (Ibrahim, Germany).

Jules, staff member at ILGA-Europe, pointed out that the costs of medical treatment were another reason why transgender claimants were more likely to resort to prostitution.

Unsurprisingly, accounts of sexual exploitation and sex work were more commonly given by NGO workers or lawyers, rather than by claimants themselves. An NGO worker in Germany talked about casual prostitution or ‘sugar daddy’ relationships involving local German White men (Noah, NGO social worker). In Italy, we were told by Giulia (LGBTIQ+ group volunteer, Italy) that this was ‘the easiest way to make money’ She went on:

[t]here are (countrymen) homosexuals who make the rounds in front of the reception centres, they load two and leave twenty euros. The boys tell me almost all of these things happen, then if they do it voluntarily and it’s okay to take those €20, I will never judge them.

Some claimants did talk about this kind of exploitation. One of our participants said that after she broke up with her partner, she got involved in sex work to help her survive, describing it as ‘one of the darkest time in my life, if I’m honest’.

Sometimes, as we saw in Chap. 5, sexual abuse or exploitation – sexual or other – was a factor in people’s journey to and arrival in Europe. We heard of SOGI asylum claimants – usually women – who were trafficked to Europe and either claimed protection (initially) as victims of trafficking or escaped and claimed protection on a SOGI basis. One UK participant had been brought to the UK on the promise of work, but on arrival found that the ‘job’ was prostitution, which is when she ran away to claim asylum. Another, also in the UK, told a similar story:

I will cut it a bit short because it is a bit emotional (...) I came to this country very young, in my 20s and it was, I passed through a lot in Cameroon. I was forced to get married very young, age of 17/18 years, I had a lot of domestic violence... And then I came to England through someone who brought me into the country. After the man brought me here, I had a lot of, I mean was forced to prostitution which I mean, because I never wanted to go back to Cameroon...

There were also accounts of sexual abuse and even sexual violence at the hands of supporters or individuals claiming to be allies. Ibrahim was working as an activist to empower refugees to prevent this kind of abuse. However, this kind of exploitation is widely recognised. Jules (staff member at ILGA-Europe) also told us of people offering help ‘under the guise of being volunteers or supporters’ and exchanging sexual favours for money or medication.

These kinds of accounts of sexual exploitation were common and based on inequalities in power and assets of those concerned:

Yeah, that power, that power relation... yeah, yeah. So I had cases too. But thank God not many. So a few cases were reported to me, where in fact older, White, gay men have approached very young refugees waiting for an asylum decision and have offered support, such as offering their flat. But not only out of pure kindness, they also wanted something in return. So they quite explicitly have also put their terms on the table. These are the better

ones. Because then there are also those that package it as a kind-hearted offer, but where then actually something more is required, but that is not openly framed as “trade”. Such cases happened, but fortunately they were not so many, not so often. Well, that happens (Kadir, NGO worker, Germany).

In the UK, we were also told about people becoming sex workers or providing sex services, either formally or informally through transactional relationships in which sex was exchanged for accommodation or some kind of assistance with ‘strings attached’ (Gary, NGO worker; we also heard this from Eleanor, NGO worker, and Joseph, NGO volunteer). Moreover, exploitation did not necessarily end with the asylum decision, even if it was a positive one. Selim (UK) described how the lack of support on receiving asylum exposed him to sexual exploitation: ‘I need to sleep with someone to be able to sleep on their couch. And that was never, never the case before’.

Meggs (focus group no. 1, Manchester, UK) had been doing her own research on vulnerability in preparation for a feminist conference she was helping to organise and was shocked to find out what young women were going through: ‘In this country. I am not talking about back home. In this country. I have been destitute since last year March when my accommodation... I was kicked out of because my case was finished’. She compared her situation to other women claiming asylum:

so some of the girls, because there is no accommodation, they will spend most of the times in Piccadilly going up and round with their bags full of Home Office files thinking that “after 8 o’clock where am I going to sleep? Which door can I knock on so I can sleep?” (...) any men who is going to approach them, they will have to take you because it is the survival of the fittest. (...) And it is now happening in this country, where we are expecting to be safe.

Not surprisingly, NGOs working with SOGI asylum claimants identify the risk of sexual abuse as an important one to address. In our survey we heard from one respondent that there was sexual abuse within and outside ‘their own community’ and that there had been cases of sexual favours demanded in exchange for giving witness evidence (S122, UK). It is not surprising if people with no income sometimes resort to such means of making money. However, not all exploitation we heard about was sexual as considered in the Section that follows.

### ***9.3.4 Discrimination and Exploitation in Employment***

Exploitation is not always sexual, we encountered situations where people were given work but underpaid or supported on an ‘in kind basis’ – in both situations, on the basis that people claiming asylum had no alternative but to accept these conditions. Here it is impossible to identify whether SOGI is a reason why these individuals were targeted in this way. What is easier to say with confidence is that their status as both asylum claimants or people who had yet to claim asylum, in combination with their SOGI minority status deprived them of alternatives and sources of support.

Zena thought she was coming to the UK to study, but instead was made to work as an unpaid nanny and domestic servant by a couple who took away her passport and would not let her leave the house alone (Zena, First Tier Tribunal Appeal, London, 2018 decision paper). But abuse is not always this blatant. Melisa, an NGO worker in the UK, said:

in terms of women, we have seen a lot of domestic servitude, where LGBT women are looking after children, doing domestic chores, and just for a roof over their head. Sometimes they are given a little bit of money but sometimes they are not.

Melisa's organisation provided life coaching for SOGI female asylum claimants in this situation, helping them to move on, be proactive and find employability and educational support:

because if she has been in domestic servitude for a long time, you sometimes forget yourself. Forget your ambitions, you forget the things that you are able to do. So what life coaching does, it brings that out, you know, they will talk to you about what you want to do, your ambitions, and you can actually make a journey path with your coach...

In the case of Lutfor (UK), mentioned in the previous chapter, he left his home country to escape persecution, but was unaware that he could claim asylum on that basis in the UK. He became destitute and was taken in by fellow nationals, who were unaware of his sexual orientation. He lived with them for two years, cleaning and cooking and only leaving the house to go to the shops, receiving food and accommodation in exchange. He felt fondly about his hosts:

They were really nice people. I mean, they helped me [in] the situation when no one else did, I didn't get any kind of support from my family, but they did as much as they can. Sometimes they gave me their old clothes to wear... there is an open market in [location x], I go buy some groceries, come home, that was my life. Like every two or three days later I go for shopping, because there are too many people, like nine, including me in this house, four bedroomed house, nine guys, living here, so even too many vegetables, fish and meat, everything, and that is why I go out, otherwise I don't. I didn't go out of the house. That is all, that was my life.

Lutfor was detained when he eventually claimed asylum and taken to Harmondsworth, where his mobile phone was taken away from him. When he was released and returned to the house, the people in the house had packed up his possessions, having replaced him: 'they said we already got another one'.

Some of our participants also worked informally while waiting for a decision. For example, Prince Emrah (Germany), a belly dancer, worked sometimes on a paid and sometimes on an unpaid basis, including by dancing at Soli parties ('solidarity' fundraising events), such as a fundraiser for someone to pay for breast reconstruction surgery. Payment for informal work is likely to be below the national minimum wage and irregular, especially in Italy, where many claimants and refugees are exploited in the agriculture sector working without a contract: 'they pay me *giornata*' – by the day (Franco, Italy).

Exploitation could be at the hands of European nationals, but sometimes also by people from the same diaspora community and sometimes based on prejudice:

The second difficulty is in the world of work because the world of work, obviously in some contexts, can still be homophobic, especially if in that world of work you come... unfortunately they are very exposed to the phenomenon of the ethnic *capolarato* [illegal migrant labour or gangmaster system based on ethnic or national ties]. So when a Bengali young man is inserted in a context of Bengali young men, who is hosted by a fellow countryman, who is inserted into the world of work by a compatriot, revealing his sexuality to them could be strongly negative, precisely because they are his social and labour integration (Silvana, judge, Italy).

For those in a position to seek formal employment, there were two stages of discrimination: when looking for work and once they were in post. For some job-seekers, SOGI was clearly a reason why they could not find work. Sylvia, in Germany (focus group no. 5, Bavaria), described what happened with one potential employer:

the would-be boss said “I want to give you a chance to try and see if you could fit this job”. When I went to this lady and said “OK, I’m here, I would want to try”, she requested my Facebook account. She had appreciated my working skills, but when the lady realised on Facebook that I’m a lesbian, she called me on the phone and asked “Are you really a lesbian?” I am not scared to say that I am a lesbian. Indeed, I confirmed to her that I am one. And she lost interest in employing me. So we still have challenges. There are people who still don’t understand us here.

Discrimination might also be on the basis of migrant, refugee or minority ethnic status. To combat the discrimination or simply the bureaucratic problems facing someone with refugee status, Selim (UK) had developed a strategy to avoid being rejected at the outset and which he used to get a post as a flight attendant with British Airways: ‘I learnt my lesson, I don’t go ahead and tell my employer before I start working with them that I am a refugee, because that is a dead start, they will not accept me. I wait until I pass all the interviews...’ When he was offered a job and asked for his passport, he offered his travel document instead, because the Home Office had retained his passport. British Airways were initially uncertain about his entitlement to work and, although he was eventually taken on, it took two months of waiting before they confirmed his job offer, showing the difficulties facing newly recognised refugees. Water (focus group no. 4, northern Italy) reported seeing their CV thrown away before their eyes: ‘They just take it from you, and dump it. In your presence, they just tear it...’.

Similarly, once in work, LGBTIQ+ refugees were not always treated as equal to other citizens or residents, and would not necessarily know whether SOGI was a factor. Nelo, with refugee status in Italy, had been working as an interpreter for the police (‘carabinieri’) in Bologna and reported being paid only EUR4 per hour, however, for him it was a good experience because ‘it was a way to express my... decency... and decency, the kind of person you are. Like, I don’t have the interest of come here to spoil your country’.

We also heard about discrimination when employers and work colleagues discovered individuals’ SOGI. Alphaeus (Germany) explained that:

I work and I’m working... my boss came to know that I’m gay and somehow the attitude changed with the co-workers, the colleagues at work. Yeah, people who used to laugh with me before they get to know that, because how they get to know that is when we had a CSD

[Christopher Street Day] march here, German for the Gay Pride. And I was like, I had to participate in that. And somehow I had to ask for permission from my boss, and then of course she has to ask “what are you going to do, what is it all about?” and all that stuff. So when I explained that it’s a CSD, then she came to know that I am gay, and she maybe shared it with the colleagues at work, whereby some people felt it uncomfortable.

Sadia (UK), with refugee status, described how, after her employer – a fellow national – saw her taking part in a Pride event, he moved her from her job on the shop floor of a shoe shop to the stock room and reduced her hourly pay from GBP10 to GBP8.50, telling her: ‘You are very bad girl, if you are like this [a lesbian]’.

As with many of the concerns identified in this chapter, such problems affect all asylum claimants and refugees, but have specific dimensions for those with SOGI-based claims. Most obviously, the number of grounds on which they experience discrimination may be difficult to discern and therefore address. But they may also lack access to community support and the kinds of diasporic social networks that often enable newly arrived people to find work. In the UK, members of SOGI minorities may benefit from the kind of support offered by one NGO that provides accommodation for SOGI asylum claimants and accompanies it with one-to-one ‘moving on support’ for a period of 6–12 months to help find employment. The organisation provides further employment support:

We also give support in business support to some LGBTI refugees who started small businesses, we have had quite a few successes. A lesbian from Nigeria, for example, started a cleaning business, and it grew, she started working on her own and now she employs other people (Melisa, NGO worker, UK).

Finally, when people did secure work, it could be a great source of personal satisfaction for members of SOGI minorities as with any other claimant: ‘So I am happy with this, because I am independent, and I am proving that, no, I am equal to anybody else, I am a productive person, I am working, I am working hard to stay here’ (Ibrahim, Germany).

There is, of course, a strong connection between employment on the one hand, and education and training – the subject of the following and final Section of this chapter.

## 9.4 Education and Training

This chapter concludes with a brief discussion of education: brief because we came across fewer SOGI-specific dimensions here than in other areas. Education was sometimes the first step in claiming protection for claimants, particularly in the UK, like Martin, who came on a student visa to study Mechanical Engineering but was forced to leave his country of origin because of civil unrest and who subsequently made a sur place (in-country) application (Chap. 5).

Here, it is important to distinguish children's schooling from higher or further education: children and young people claiming asylum, whether on an unaccompanied basis or with their families, are entitled to educational provision as a fundamental right recognised in all the countries covered by this project.<sup>6</sup> They will inevitably have specific needs and experiences in schooling based on their SOGI, however, our research mainly focused on adults seeking asylum. In this context, education was a concern in two ways: access to and provision of language classes in the host country, and access to further and higher education. While for the most part these did not emerge as areas where SOGI minorities had different experiences to other asylum claimants, there were some particularities relating to SOGI.

Gaining fluency in the language of the host country is a fundamental need for all people attempting to establish themselves in a new country (ECRE, AIDA & ASGI 2019, p. 85). Provision differs between Germany, Italy and the UK and within each of these countries, and it also changes depending on the policy of the government of the day. In Germany, the federal government provides language classes as part of the integration course that beneficiaries of international protection are usually obliged to attend on receipt of their residence permit and that is also provided to asylum claimants 'with good prospects of remaining in the country' (Federal Ministry of Labour and Social Affairs 2015). This last point has a particular bearing on SOGI claimants, as few of the countries where SOGI claimants come from correspond to a good 'staying perspective' ('Bleibeperspektive'), that is, an acceptance rate of 50% (Gisela, lawyer, Germany). In Italy, following the implementation of Decree Law no. 13/2017, language courses are no longer part of the reception package for asylum claimants (ECRE, AIDA & ASGI 2019, p. 85). In the UK, the cost and availability of ESOL provision (English for Speakers of Other Languages) for adult learners differs between England, Scotland, Wales and Northern Ireland, and also varies depending on how an individual came to the UK, with the government announcing a GBP ten million funding boost for English language tuition in 2016, but only for those arriving as part of the Syrian Vulnerable Persons Resettlement Scheme (Home Office 2017).

Our participants had the same problems as other people claiming asylum in learning the language of their new country: 'I'm just like a baby, learning language, learning... all A, B, C, D. It's difficult for me...' (Kennedy, Italy). Access to classes is often a problem and one that relates to location. In Germany, one NGO working with lesbian, bisexual and transgender women told us 'there are women who are, for example, in a small village in Donau-Ries-Kreis, there's no German course at all' (Sofia and Emma, NGO workers).

Where people were able to find language lessons, fears of hostility or discrimination by other students based on homophobia or transphobia were mentioned as a concern. One participant in Germany described a German language class where the teacher asked students why they had left their home country and, to avoid discussing his SOGI, he said: 'it's politics, it's a political matter' (William, Germany). A

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<sup>6</sup>Article 28 of the UN Convention on the Rights of the Child.



German NGO worker explained that many trans women abandon or do not attend their German courses, because they feel uncomfortable (Kadir, NGO worker). Another participant in Germany told us about his friend who barely attended school because ‘he was always called a faggot... and that’s not motivating anyone to learn German’ (Zouhair, Germany).

Turning to access to further or higher education, entitlements vary, partly based on whether an individual has refugee status or is still waiting for a determination, but the critical barrier for most people is financial. Each of the countries we are comparing has some scholarship or bursary schemes available to asylum claimants and/or refugees, but these are limited and not easy to access.<sup>7</sup> Given that the process of claiming asylum can last several years, schemes to enable asylum claimants to access higher education are valuable and need to be expanded. We found that continuing their education was important for many people. Several of our participants were forced to flee before completing their studies: ‘I went to college for finishing my graduation in Bangladesh but I couldn’t, I had to flee after the first year’ (Lutfor, UK).

Not surprisingly, education was often connected to training and improving one’s employment prospects. A number of our participants had a strong wish to resume their education with this as a factor:

My plans, if I get the papers, I will go back for some study so that I can get some certificates, because I don’t think that I can manage to go on university, but I will try for the certificates so that I can get something professional... (Edith, focus group no. 3, London UK).

Finally, as we explained in detail in Chap. 7, the level of education people had in their countries of origin and their grasp of European languages inevitably affected the ease with which they were able to familiarise themselves with the legal system and support structures in the host country and also, importantly, their ability to make a claim and access necessary support. This was less of a problem for our participants in the UK, partly because some of them came from Commonwealth countries or countries that had been colonised by the UK and where English was widely spoken.

To sum up, education featured as a small but very important element in much of our fieldwork, encompassing the role of SOGI in disrupting people’s education in their home countries, the role of education for people who make SOGI-based asylum applications having entered the EU originally to study, and the potential fear or actual experience of discrimination from fellow-students or nationals in language classes as a factor undermining the development of new language skills.

Lack of access to language classes, training, employment and education was difficult in various ways, but with one common outcome for many: the sense of time being wasted while they waited for a decision, but being unable to move on with their lives in terms of acquiring an education, language or work skills, or earning money. If and when refugee status is granted, individuals have to rebuild their lives

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<sup>7</sup>For example, Unibo for Refugees in Italy (<http://viedifuga.org/unibo-for-refugees-rifugiati-universita-bologna/>) or the Article 26 scholarships provided by the Helena Kennedy Foundation in the UK (<http://article26.hkf.org.uk/>)

from scratch, having been denied access to work and usually to education and training as well during the time that their claim is pending. SOGI claimants and refugees are likely to have few sources of support in rebuilding their lives, as they may have been less able to avail themselves of the usual refugee community organisation support.

## 9.5 Concluding Remarks

The areas of entitlement, need and service provision explored in this chapter again highlight the failure within reception provision to fully recognise the rights and needs of SOGI asylum claimants and refugees and the extent of discrimination and marginalisation they encounter.

The problems people experience in relation to education, work and health, in particular mental health, are not always easily identifiable as a direct result of being a member of a SOGI minority. When people experience depression or panic attacks, it is not usually possible to trace the cause back to their experiences of fleeing homophobia or transphobia, for example. Equally, when people are entitled to work but are not offered a job interview for a position for which they are clearly highly qualified, they may not know whether it is because of their SOGI, their ethnicity or their refugee status. If the latter, this may be due as much to confusion on the part of the employer about the identity document legally required to employ someone as it is to prejudice. What is clear from the testimonials we received is that belonging to a SOGI minority often contributes to people's experiences and, importantly from a policy and practice perspective, may mean that specific expertise and services are needed which are often not available at present.

There are implications in terms of a joined-up reception system that makes important connections between different areas of policy and service delivery: for example, recognition of the need for continuity of medical care for trans people claiming asylum to avoid repeated relocation with new doctors would require immigration officials to, first, systematically record applications with a gender identity basis and, second, liaise with providers of asylum reception and health services, with implications for confidentiality. These implications are revisited in our recommendations.

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**Part III**  
**Forging a New Future for SOGI Asylum**  
**in Europe**

# Chapter 10

## SOGI Asylum in Europe: Emerging Patterns



*I don't like labelling people, judging people.*

(Sandra, Germany)

*I decided to leave my country because I did not have the same right to live as others. That's why I had to leave my country.*

(Silver, Italy)

*Just find organisations that help people in the situation, reach out, talk to people, make friends, you will feel a lot better. Don't just stay at home and be depressed like what I did.*

(Christina, UK)

### 10.1 Introduction

This chapter brings together some of the recurring but not always visible phenomena relating to SOGI asylum that have remained below the surface in the previous chapters. We are keen not to conflate or homogenise what are often very different individual experiences in Germany, Italy and the UK. Rather, we identify themes and common factors that may take diverse forms but that, at the same time, shaped the experiences of our participants and are the basis for the targeted recommendations in our final chapter. We group these phenomena under four headings: identities, discrimination, place and agency. By doing so, this chapter draws together the recurring or more significant findings from the chapters that constitute Part II, and presents and analyses them using the theoretical approaches in Chap. 3 to show that what may appear to be discrete phenomena in fact derive from systemic failures to apply an intersectional, queer, feminist and human rights based understanding to SOGI asylum.



## 10.2 Identities

Chapter 3 looked to feminism and queer theory to disrupt essentialist portrayals of marginalised individuals and groups, specifically women and SOGI minorities. This approach resonates with the experiences of SOGI asylum claimants addressed in Part II of this work. It is particularly helpful in understanding how stereotypes based on SOGI, but also on SOGI in relation to other characteristics – such as age, gender, religion, education – come together to create expectations of how a particular claimant should present themselves for their claim to be successful.

### 10.2.1 *Homogenisation*

SOGI asylum is very often based on extrapolating the needs and experiences of a minority – generally young gay men – to the wider and diverse group of individuals claiming asylum based on SOGI. Throughout our fieldwork, the acronym LGBT (or a variation of it such as LGBTIQ+ as we use) was used by decision-makers, lawyers, NGO staff and often claimants themselves. However, on further questioning, the claimants speaking or being discussed were generally members of a narrower group: ‘One has to say that we have relatively few lesbians...’ (Nina, legal advisor, Germany); ‘We have no lesbian or transgender experience’ (Giulia, LGBTIQ+ group volunteer, Italy); ‘I have only had gay and lesbian [claimants], so I have never had transgender. Oh, we have had one, I have had one bi client...’ (Deirdre, lawyer, UK).

Bisexual claimants were especially absent and we were not able to contact any claimant who identified as intersex or having intersex variations. The lack of research and awareness of bisexual individuals’ experiences of claiming asylum has been identified in a North American and Australian context by Sean Rehaag (2009). It is likely that in Europe the same difficulty applies in reconciling bisexuality with the immutability generally looked for as contributing to credibility:

I think there is still the reliance on stereotypes is another thing. And that for example particularly for the bi community then that erases them entirely. Because if you have a person who identifies as bisexual, then you will have responses along the lines of “oh, well, but if you like both the opposite sex and the same sex you can go back home and just be with someone of the opposite sex”, that simple (Jules, staff member at ILGA-Europe).

Laurie Berg and Jenni Millbank (2013) have explained the harm done by miscategorising trans asylum claims as a subset of sexual orientation claims, resulting in trans invisibility and the inappropriate application of COI. Similar harm is caused by homogenising all SOGI claims based on stereotypes of gay men’s experiences: the persecutory experiences of lesbian women, bisexual men and women, and trans people are obscured, and appropriate COI is neither sourced nor adequately used for these groups (Chaps. 6 and 7). In the UK, for example, women from countries where only male same-sex behaviour is criminalised may encounter problems.

Meggs (UK) told us how unexpected this was at her first appeal when she was told [Meggs' words]: 'Ok, even if you are gay in Zimbabwe, it is legal for women to be gay according to law, but it is illegal for male....' While women's experiences are often ignored, as in this example, they may also be heard but used to undermine a claim, as is typically the case where women have been married – often through a forced marriage – or had children:

There is also that problem of... if you come from countries where young marriages or forced marriages are common, then you have issues like... I mean the recent very prominent case in, recent, long on-going case in the UK with Aderonke... where her claims of being a lesbian were doubted because she was once married and had kids, but that fails to recognise the local context of the country of origin that in many cases people don't have a choice (Jules, staff member at ILGA-Europe).

Women also told us about their pain at being separated from their children and how an important motive in securing refugee status was to then be able to bring their children to Europe to join them through family reunion (Meggs, UK; Stephina, UK): 'It was the most difficult thing for me to leave my daughter because I love her to death like, every fibre in me appreciates that I have got a child as brilliant as she is' (Stephina, UK).

### 10.2.2 *Stereotypes*

These experiences of the harsh impact of asylum rules are only one example of why the category of SOGI asylum needs to be disaggregated to recognise the different paths and needs of different individuals within this grouping. Following our theoretical frameworks (Chap. 3), here we consider it in relation to the complex layering of stereotypes, norms and expectations displayed by decision-makers and which affect their decision-making. An example of this is the case of Zena, UK, where the judge in her first appeal did not find her credible because:

Although [Zena] has a slightly "mannish" appearance, I place no real weight on that, in determining whether she is reasonably likely to be a lesbian, if only because

- (a) That slightly "mannish" appearance was substantially attributable to the manner in which her hair was cut and the fact that she wore no (or very little) "make up" and, to a degree, to her age (she is now 39 years old),
- (b) The manner in which [Zena's] hair was cut and her appearance are (obviously) very much matters over which she has substantial control,
- (c) [Zena] is not a large, muscular and/or well-built woman, but, on the contrary, is slightly built, so that her appearance is not striking, and
- (d) since her claim to asylum is based on the contention that she is a lesbian, it would not be surprising if, whether or not she is, in reality, a lesbian, she would take steps to ensure that, at the hearing of her appeal, her appearance was consistent with her claim.

Nor do I place any weight on [Zena's] evidence that, when she had been c. 14 or 15 years old, she had had a brief lesbian relationship with a school friend, [name], a relationship which, on the basis of what [Zena] stated, lasted only c. 3 weeks at or about the [month] holiday in 1996. Many young women (and young men) at that age are confused about their

sexuality. The fact (if fact it be) that at that age (or even slightly older) they involve themselves in homosexual activities with other young women (in the case of women) or young men (in the case of young men) says nothing of any consequence about whether 20 years or more later they are homosexuals (whether male or female) (First Tier Tribunal, London, 2018, decision paper).

Zena's case was first discussed in Chap. 7, but this passage is worth quoting in full because it brings together a number of different assumptions based on gender, age, sexuality and culture or country of origin. Zena's claim depended on her credibility as a lesbian, as so many claims do. The judge deconstructed her appearance and manner to argue that she could safely return because, whether or not she was a lesbian, she did not need to look like one: she was 'mannish' but at the same time had a small physique, so with a more feminine haircut could avoid persecution. This stereotype is (hetero)sexist but also culturally specific, based on Western portrayals of a typical lesbian appearance. As a matter of legal accuracy, there is no evidence that such stereotypes are prevalent in the East African country of origin in this case, meaning there is no evidence that this is relevant to how Zena would be perceived if she were returned. Similarly, the assumption that young people are 'confused' about their sexuality and flirt with homosexuality is another culturally-specific trope. Finally, Zena's age is used against her as a further reason why her 'mannish' appearance would not reveal her to be a lesbian; she would simply be seen as old. In addition, her age would mean that her single childless status would not attract attention:

If [Zena] were returned to Kenya, she would (plainly) not live with a husband or male "partner" and she would have no dependent children. But I am not satisfied that those facts would lean any person who did not know her, or her history, to conclude that she was, or might be, a lesbian. Widowhood and marital breakdown are by no means uncommon. Because [Zena] is now c. 39 years old, the fact that she has no dependent children is not reasonably likely to cause questions to be asked, or suspicions to arise (she is of an age at which formerly dependent children might themselves have grown up) (First Tier Tribunal, London, 2018, decision paper).

The implication here is that, in Kenya, for a young woman, having dependent children is evidence that one is not a lesbian, while for a woman in her thirties this is not the case. No evidence to support these assumptions is given in the decision paper. We have already heard that the Home Office may find it harder to believe older people are gay (Chap. 7). One plausible reason for this is that stereotypes for the LGBTIQ+ community in the UK rarely depict older people, so there are no templates for decision-makers to use when assessing the credibility of an older person.

Zena's case also highlights the particular susceptibility of SOGI claimants where a number of different stereotypes – not only based on SOGI – come together in a system so heavily dependent on 'credibility', which is, at the end of the day, an individual judgment. It also shows how gender and sexuality are intrinsically linked (Chap. 3). In fact, the extreme prejudice showed by this judge ultimately worked to Zena's advantage. This decision was appealed and the judge found to have materially erred and failed to apply the guidance in the Equal Treatment Bench Book.

However, a fair system should not allow decisions to be made on the basis of such biases in the first place.

Moreover, Zena's case was just one example of the humiliating and demeaning nature of the appeal process for some SOGI claimants and the way SOGI claims are managed, particularly when, on appeal, they reach the sometimes public arena of a courtroom (Sect. 6.4 of Chap. 6). It is difficult to think of another situation where an individual who has not been charged with a crime may find themselves in a courtroom with lawyers and government representatives debating across them whether they are indeed a lesbian, a process in which the claimant generally has little opportunity to speak for themselves.

Many less startlingly egregious examples than the case of Zena remain unchallenged. These relate to characteristics other than sexuality, for example religion, where we found assumptions about the relationship between religious and SOGI minority identities that, again, are culturally specific. As discussed in Chap. 7, and as one of our survey respondents explained: 'Applicants whose religions are generally intolerant of sexual minorities are expected to provide an intellectual explanation for their own faith. If they cannot do so their claims are then liable to be rejected as incredible' (S4, lawyer, UK).

Ibrahim A. (UK) explained how religion was addressed in his main Home Office interview:

[the interviewer] asked if I am consider myself religious and I just answered her "what do you mean by religious?" Because there is not something called like, there is no blue print of religious. (...) it is differs from a person to another. And then she asked me a very specific questions: "are you praying five times a day?" I was like, "I used to, but not now." "Were you going to mosques regularly?" I told her, "well, I used to, but not now." Ok, at some point I felt like she was profiling me if I am an extremist (laughs) or something like that.

However, Ibrahim A.'s solicitor explained to him that was not the case. She told him:

they thought that if you are truly gay, you will have this ... LGBT, you will have this kind of ... internal discussion between your sexual orientation and your religion and if you didn't have it, so you are not serious enough about what you are doing. So that was her questions I guess about... she asked me about practicing, prayers, she asked me about going to mosques, I don't remember if she asked me about fasting or not ... then she asked me about how do, how do Islam look to the LGBT and gays, and I told her, "well, there are many opinions on that, it depends on the interpretation of the text itself".

What we encountered were assumptions about identity that influenced decision-makers and acted as a barrier, preventing SOGI claims from being heard as individual narratives without the imposition of culturally specific assumptions about how SOGI claimants behave depending on whether they are gay or lesbian, young or old, male or female, Muslim or Christian, etc. As Jules (staff member at ILGA-Europe) told us, in every country we can find:

this Westernised perception of what it is to be homosexual. And that you have to behave in a certain way and you have to act in a certain way, and if you don't live up to these expectations, then you are viewed as not being credible.

Jules pointed out that this is harmful in two ways: it reinforces stereotypes and forces people to perform their SOGI. As Ibrahim (Germany) explained: ‘I told them what they want to hear [in an asylum interview]. Because they want to hear violence, discrimination, your fears of going back, your prostitution’. This corresponds to the concerns in the literature on homonationalism (Chap. 3), and generates a cyclical process where claimants are encouraged to conform to the culturally-specific and heteronormative stereotypes that decision-makers impose upon them in order to maximise the chances of a successful claim.

### *10.2.3 Language and Culture*

The requirement to conform to a particular narrative is more difficult for some claimants than others. Language and interpretation issues were explored in Chap. 6, but what might be described as cross-cultural differences are not always easy to pin down, particularly when they come up against the hard certainties of legal systems.

Rudi (UK), whose case was first touched on when we discussed the notion of PSG (Sect. 7.2.2 of Chap. 7) did not identify as transgender when he first came to the UK, but as a lesbian. His Upper Tribunal appeal was partly based on the fact that although he no longer identified as a lesbian, because of his birth-assigned gender, he would be perceived to be a lesbian in his country of origin – Kenya. The appeal succeeded because in this instance the Upper Tribunal judge was sensitive to the specificities of the case, and it was held that the judge in his First Tier Tribunal appeal had failed to take into account ‘the evidence documenting the risks to transgender men or to women perceived to be masculine lesbians, and also failed to take into account crucial evidence, setting out the unique risks which faced a transgender man or a lesbian woman perceived to be masculine’ (Upper Tribunal, London, 2018, decision paper, para. 8). However the case, in which attributions of SOGI – as well as the claimant’s self-definition – changed over time, shows how difficult it is for asylum law to capture individual identity through permanent labels such as ‘lesbian’. As Cristina (UNHCR officer, Italy) pointed out, ‘very often it happens that trans people talk about sexual orientation rather than gender identity, or they define themselves as gay or as lesbians’. Most importantly, it shows why the question of whether claimants are ‘truly’ members of a SOGI minority should be recognised as redundant, not only because SOGI is fluid and complex, but also because identity, regardless of SOGI, is never definitively fixed. SOGI identities in the context of asylum, as in many other contexts, are negotiated in the context of the state, of the surrounding environments, and through personal relationships. Furthermore, identification may evolve in a process of intense ‘subjectivation’, in other words, transformation by one’s own practices (Fassin and Salcedo 2015, p. 1124).

The relationship between identity and the language used to describe identity came up in several accounts. Roberto (decision-maker, Italy) explained that:

a young man who speaks Wolof, who was born and raised speaking Wolof, he does not have a term to self-identify that is not an insult. I continuously hear guys who can't get to an awareness of themselves, because they can't, there is no "coming out from the closet"... because there aren't even "closets".

Similarly, and as mentioned in Chap. 6, we heard from Celeste, a social worker in Italy, about a client's self-description:

It was not "I am" or "I was lesbian" but "I do lesbian", as if it were a practice ... there is no awareness of "I am this". I mean, I'm doing it, it's what I do... rather than what I am.

The differences in how SOGI identity are experienced across cultures and countries were also analysed by Ashley (psychotherapist, UK):

I know from gay Iranian friends, for example, but also clients that I have worked with, that the issue of trans and gay might be conflated because of one is more acceptable than the other, rather than the powerful attachment of identity choices and features that goes with some of the Western levels of identity.

As these reports illustrate, an asylum system that requires claimants to deploy the language and terminology for SOGI minorities used in European societies will unfairly fail to recognise the very real but different ways that they experience or are threatened with persecution. As Allan (lawyer, UK) described the situation:

You have got some languages and cultures where they don't have a concept of being gay. The concept of having sex with your own sex might exist, but the concept of being gay doesn't, so often you get this confusion about what that is. If it [is] not confusion, it is disbelief. You often get clients who say that they only realised they were gay when they came to the UK, even though they may have had a relationship in their country of origin or at least sexual encounters. Then there is this confusion. The Home Office will say, "You couldn't have realised you were gay when you came here because you were having sex in Pakistan." No, they didn't realise they were gay. It's not really a concept. That is in loads of countries. That is Pakistan, Bangladesh. Less so in the African countries, but also in the African countries. Cameroon, etc., it is not really a concept as much as we have it here. Here you have got identity politics. There it is not seen as an identity. There is a clash there.

This experience of sexuality as behaviours rather than claimed identities is in tension with the expectation by decision-makers that claimants describe a journey of self-discovery, or have gone through a process of awareness and self-acceptance (Jansen 2019, p. 168; Wessels 2016). Yet, as we saw in Chap. 7, not all participants can provide such an account of sexual self-discovery in the emotional or sentimental terms that decision-makers want to hear. Giulia (LGBTIQ+ group volunteer, Italy) described this in the context of questioning by the Commission:

So, they often ask him "when did you understand?", "do you remember how it was when you realised you were homosexual?" Because young men tend to tell when it was their first homosexual sexual experience. So always facts and not feelings. From this point of view, however, the Commission tries to investigate the path of discovery with the Western mentality.

On the receiving end of such expectations, Ibrahim A. (UK) told us about a particular line of questioning by his Home Office interviewer who found it difficult to

comprehend that a relationship he had had with a classmate had been based entirely on sex:

Somehow she didn't accept that. She asked me like, I stayed with him like two years, and she was like "how come two years you don't know what he is interested in?" And at this point actually when I get very, I have to say upset, I just told her, "I need to explain something, I just was meeting him for sex, and that is it. Outside this I was just his classmate".

As the success of SOGI claims appears increasingly to depend on articulating an internal and emotional journey to decision-makers, those who are not equipped with the language (and cultural) skills to do that are more likely to fail. In Chap. 7 we highlighted the prohibition on sexually explicit material in evidence as a positive development in European and domestic law and policy. There is no question that this is a welcome change, however, it corresponds to the privileging in its place of a particular kind of account of gay persecution based on the claimant's inner life and not their outer behaviour – and not everyone can provide this account.

In the above accounts, a common factor is the contrast between the reality of sexuality and gender identity as experienced by our participants and the desire on the part of officials to discover a claimant's 'true' identity – gay or dissembling – once and for all. Also apparent from the above accounts is the often demeaning way in which this process takes place, through interrogating people about their earliest and most personal experiences, which are often then discredited and devalued.

Several participants described cultural communication problems as having a particular bearing on SOGI claims, because of their inevitable focus on sexual activity:

I remember the silly question that they asked me and it is still on my refusal is that, "when the police came in, what were you doing?" I said, "I was sleeping with my partner". [She] Said, "oh, you were sleeping with your partner", I said, "yes, I was sleeping with my partner, naked, you know". I couldn't say we were having sexual intercourse, I was still holding back on that thing that, you know, so on my refusal they said, "she said they were just sleeping. So, as girl child or they can just sleep as friends" (Meggs, UK).

Meggs went on to say: 'So, most of the times, the most important information you just withhold out of respect, out of cultural beliefs, out of the way you have been raised but not intentionally'. Gary confirmed this:

I am not sure sometimes if the interviewer gives due weight to how difficult it is for people from some cultures to talk about sexuality. I mean, I don't just mean about being gay or lesbian, but about anything to do with sex really. And I think it is not in, like, African culture, you don't particularly talk about it in your families or anything. That is certainly true of Pakistan, I think, so I think sometimes people [claimants] say, you know, "I met somebody and he was a very nice person", and then people [decision-makers] say "well, that is not a sexual relationship" in their report. So, I think being a little bit more aware of the cultural reticence and, I mean, I am always saying to people I know it is really difficult, but you are just going to have to say what you mean (Gary, NGO worker, UK).

Many of the legal and NGO advisors we spoke to explained that they told their clients and members how important it is to be open about their experiences precisely because they understood how difficult this would be in two ways: first, the very natural reluctance to talk about subjects often seen as private, and more likely



to be seen as such in many of the countries from which SOGI claimants come; second, the understandable fear that many people will have about sharing with officials the kind of information that they have tried to keep concealed for years.

As well as misunderstandings and misrecognition based on culture, there were also difficulties for people who, for whatever reason, simply rejected the kinds of identity labels that they needed to embrace for the purposes of claiming asylum. A focus group participant in Germany described herself as an ‘immigrant’, not a refugee:

Watching the television and you see refugees, you see flies all over them, they’re bare-footed, they’re dirty, they’re malnourished and that’s what we see in Jamaica as refugees. That’s what we see on our TV screens when we hear about refugees, you know? I came to Germany well-dressed. When I see refugees on the TV, they just throw on something, they’re in boats for days. I rode comfortably in a plane. You know? Lufthansa. Slept all night, and stuff like that (Sandy, focus group no. 1, Hesse, Germany).

Christina (UK) had gradually come to identify as non-binary, but was relaxed about identifiers: ‘I don’t have a problem with pronouns so I use male and female pronouns. I have also got a female person which is Christina. She / he, I am not fussed. I am ok with pronouns’. As we saw in Chap. 7, both Sandra and Christina would be well-advised to avoid such thoughtful questioning of identity categories, at least until their credibility is established in the eyes of decision-makers.

While this section has considered the complexities of identity and identifiers in SOGI-based asylum claims, the next section identifies the experiences of discrimination and prejudice that our participants had experienced in different contexts and at different times in their journeys to and in Europe.

## 10.3 Discrimination

Many of our participants shared with us overt experiences of discrimination and hostility. We look at these experiences first in terms of discrimination by the host community and then in terms of discrimination within the diaspora community, with the proviso, however, that ‘host’ and ‘diaspora’ are not discrete categories and that this may be increasingly true over time as individuals who were once asylum claimants settle and take on roles in policy and service provision within the ‘host’ community to support a later cohort of claimants.

### 10.3.1 Racism

Discrimination was often experienced in terms of racism as well as homophobia or transphobia. In a focus group in Germany, Jackie told us:

Well, yeah, it makes you think before exposing yourself, because you are cautioning yourself. I am Black and I am gay, so it's like you can't expose yourself. So racism is like, it's racism. But as for me, yeah, there is... I mean, you cannot be in a White man's land for even a year and you don't experience a little bit of racism. That won't happen. And maybe it is like on a train or something, you go and sit down, there are German people, White people, sitting in front of you. They will get up and change seats, you know? So it happens. But as long as no-one is hurting me physically, I just look at it and move on (focus group no. 2, Bavaria, Germany).

And Halim in Germany was worried about racist attacks and right-wing politics:

Now that I can read German and I read the news, I'm really scared sometimes. Recently there was this demo against AfD [Alternative für Deutschland, extreme right-wing party] and it was really nice to see all the people show up against it, but yeah, I don't know.

Angel's descriptions of some of her school-age daughter's experiences were also distressing: 'Oh God. She has been called a "Black bitch". She have been called [the N-word]. She have been called a monkey. She have been standing at the bus stop and a football was kicked on her purposely' (Angel, Germany). Her daughter was not the only child from an asylum or refugee background at the school; however, she was the only one who was Black.

Similarly, Stephen (Germany) had the unpleasant experience of realising that his presence was unwelcome and that he was viewed with suspicion:

Then another very bad experience was in winter, I was at a bus stop. Now, a lady came with a "Kinderwagen" [baby pram] [baby pram] and she had two kids. One was seated in the "Kinderwagen", and another one was playing. It was a bus stop. So when I moved towards the front to check the time, so I went towards her. The closer I moved that was when she was showing me, she was holding a handbag and pulling the "Kinderwagen" towards her and calling the kids. You know, kids always play and go to an extent, so I was like looking at the kid now. I realised there was something happening to the mum, and the mum was like calling the kid away. To me, I didn't take it like something that was serious, but then after two or three minutes I understood that my presence there was causing a discomfort to them. So what happened was, I had to leave the bus stop and move, like, some metres away. And immediately the bus came and they were the first people to enter inside. To tell you the truth, I didn't enter that bus.

In Italy, as well, Kamel had a bad experience at his third Pride event in Bologna, where two girls shouted 'go back to your home' and someone else shouted 'Viva Salvini' [leader of extreme right-wing party]. Also in Italy, Alain A. had become used to discrimination:

Living in Italy as a Black, you face many difficulties first. So many, many, many difficulties as a Black. I have never been discriminated as an LGBT but as a Black, yes. Normally you face discrimination every day as a Black even on the buses, so it is not even something I talk about again because it is just like a normal way of life, but I think with time things will change.

In the UK, Mary and Zaro had eggs thrown at the exterior of their accommodation and 'Fuck you' written on their door while their application was pending. There were several accounts of people moving away from asylum claimants on buses, trains and in public spaces (also mentioned in Chap. 8), including C49, a survey

respondent in the UK, who wrote: ‘Most of the time especially in the trains people rather stand than sit next to you’.

Some of our participants reported being targeted because they were Black, and some because they were Black and gay: ‘You face two things at a go, you are Black and you are gay...’ (Alphaeus, Germany); ‘One old woman in the S-Bahn [suburban train], they say “Blacks are smelling” [laughter]’ (Mayi, focus group no. 4, Bavaria, Germany). And again in Germany, Liz said ‘I think us Blacks, the way they are treating us is very different from the way they treat the Asians’ (Liz, focus group no. 5, Bavaria, Germany).

While racism was common in our participants’ accounts, equally, they endured homophobic and transphobic abuse that was often not only distressing but also frightening as recounted in the next Section.

### ***10.3.2 Homophobia, Transphobia and Cross-Cutting Discrimination***

Alongside overt racism, SOGI minorities claiming asylum shared their experiences of different kinds of hostility and harassment. These occurred in public and social spaces and were not necessarily connected to status as an asylum claimant or refugee, as Amber’s experiences highlight:

[Location X] is kind of creepy actually. I was cornered several times when I went for a walk, like I was crossing a road and there was a car that came and then stopped me from crossing and then the driver gestured me to come inside his car. I was in a quiet neighbourhood, so that was a bit scary. Then you get people calling you names sometimes, when you walk in public. I was walking with one of my housemates and she identify as non-binary, and she does attract attention and I experience weird interactions from strangers with her. But, I think that can happen anywhere (Amber, UK).

Janelle (UK) had had at least two unpleasant homophobic and transphobic experiences:

I was walking on the streets in Sheffield, and a guy was driving and he wanted to know what is my identity and he was like, “are you a boy or a girl?” So I just started walking faster. And I had this particular time I was going to the grocery store and there were like two Jamaican kids, and they were using like terms like batty man and like faggot and stuff...

We were also told of varying degrees of unfriendliness and exclusion from within LGBTIQ+ spaces in the host countries. Ibrahim, in Germany, said that, ‘[f]or example, we have this issue here in Cologne. A lot of gay people are not allowed to go to them [LGBTIQ+ venues] because they are brown-skinned’. In Italy, LGBTIQ+ group volunteer Giulio said: ‘I have never had so much discomfort entering an LGBT night club as much as when I entered with a Black person. I mean, it seemed like it was bad, bad because I’m White dancing with a Black...’.

We also heard of discrimination within UK LGBTIQ+ communities:

There is still racial discrimination in some parts of the UK LGBTQ+ community. There is also still [a] drink/drug culture in parts of the LGBTQ+ community, including issues around chemsex etc, that would make it difficult for LGBTQ+ refugees to integrate into the LGBTQ+ community here (S83)

A number of accounts were of discrimination by other asylum claimants. This is not surprising, as their main day-to-day contact for most SOGI claimants will be with other asylum claimants. In such cases, hostility and discrimination tended to be on the basis of SOGI. For example, Chloe, a worker with a refugee women's organisation, described how the women using the service had started a choir. Chloe said:

I run the choir and everybody loves the choir and it is a really big part of the drop-ins and we sing at various different events and it is really great, and we were singing at a Pride event, or we got invited to a Pride event, and... when we told the choir what it was, none of them wanted to do it. And that was just really shocking. And upsetting. Because I just had no idea, which was so naïve of me. And nobody turned up. And we couldn't explore it because they didn't want to talk about it.

In Chap. 8 we described some experiences of discrimination in shared accommodation. We heard accounts of hostility from flat or house mates from Trudy Ann and Alphaeus in Germany, Ken and Kennedy in Italy, Meggs and Lutfor in the UK, among others. A survey participant stated: 'My roommate told me face to face that he wished all gay people would be denied asylum and that he wished the worse for all of us, a statement that can never go off my mind' (C38, Germany). One NGO worker at an LGBTQ+ organisation also told us that they sensed the 'gay village' [in Manchester] was quite racist: 'They don't really want them [asylum claimants] here' (Caroline, NGO worker, UK). According to one survey respondent:

In 2016 July, me and some gay friends of mine were denied entrance to one gay club in Munich because we were Blacks. They first claimed that three of us didn't have the membership card like the one issued at SUB [gay communication- and culturecentre Munich] (S36, Germany).

It is possible to generalise to some degree about types and sources of discrimination, as Nicola (LGBTIQ+ group volunteer, Italy) did: 'SOGI [minorities] are discriminated outside the cooperative [camp] because they are Black and within the cooperative [camp] because they are gay, among other refugees'. Diane, in Germany, expressed it differently: 'I also get transphobia here. In Iran, too, is transphobia, but here is transphobia with racism about it'. She had been turned away by a lesbian counsellor who told her 'You are not a woman'; she found that the White trans community also had no interest in trans refugees. Likewise, Kamel (Italy) told us: 'So, I'm a trans, but nobody thinks I'm trans; I am a refugee and of colour'. These comments highlight the peculiar situation of many SOGI claimants and refugees who experience abuse on the basis of different aspects of their identities which they, and their abusers, may not always be able to distinguish. While in some places and contexts asylum claimants' identity as part of a SOGI minority would be the target of hostility, at other times it would be their ethnicity, but there was also a perception of a specific dislike of migrants, perhaps even specifically of refugees. Failing to

recognise these intersections leads to failures to recognise the totality of individuals' experiences, as highlighted in Chap. 3.

As soon as one looks at participants' accounts of experiencing discrimination and harassment, it is clear that they – like anyone else – cannot enter the mind of their harasser to identify the grounds on which they have been targeted. Is it because they are Black, gay, a woman, Muslim, a refugee, short, fat, young, some, all or none of these? In any case, it is beyond doubt that the experience of being member of a SOGI minority seeking asylum in Europe makes individuals more exposed to abuse in various ways. As Julian (focus group no. 5, Bavaria, Germany) said: 'And also when you're under the refugee status, and you add the word "lesbian", then you are Black... me, I'm being realistic [laughing]. It's like, you've killed yourself with three bullets at once. That's the fact'.

The experiences of discrimination that our participants recounted varied significantly depending on their location, showing how important a factor 'place' is, both within and outside the decision-making process.

## 10.4 Place

The previous chapters have highlighted notable variations in the three countries under comparison, including variations in the treatment of SOGI claims and in the wider social experiences of individuals claiming asylum on these grounds. In understanding why wide variations persist despite many regulations and measures designed to facilitate consistency, we look back to Chap. 3, where we used queer geographies to highlight how focusing on space can help us to understand SOGI asylum experiences – space understood from macro to micro level.

### 10.4.1 *Receiving Country and Region*

In understanding persistent variations in decision-making and non-legal experiences in the face of attempts to facilitate consistency, we look back to Chap. 3, where we used queer geographies to highlight how focusing on space can help us to understand SOGI asylum experiences – space understood from macro to micro level. Our fieldwork affirmed the value of thinking in this way, as we saw how both country of origin and host country determined people's experiences, with applications relating to particular countries treated with greater scepticism than others (Chap. 6). We have compared the policies, laws and practices that deal with SOGI asylum in each country (Chaps. 4, 5, 6, and 7) and in the sections above we show how country of origin combines with SOGI to create different trajectories for individuals. Nonetheless, where claimants settle or are settled within each country is equally important both to the outcome of their claim and to their broader experiences as we consider here.

Despite key asylum instruments being defined by the central authorities in all three of our case study countries, participants reported regional differences in decision-making and wider support that inevitably affect the likelihood of a claimant's claim succeeding. In Germany, one participant identified 'huge differences' between courts: 'I would say that with these, the cases that I'm negotiating about Chechens in Berlin, of which I win many here, I do not win in – I would not win all those in Frankfurt (Oder) and Potsdam' (Barbara, lawyer). Regional differences were also visible in relation to support outside the asylum decision-making process. Frank S. (legal advisor) explained that in Germany there is still much progress to be made across the country:

Well, let's just say that basically I think Berlin is already halfway well positioned in terms of financial resources and counselling services, but of course [it] is a very big problem that other federal states are not equipped with a counselling infrastructure with special accommodation or housing offers or queer shelter ready or queer shared flats.

There were two specific concerns in Bavaria: one was the lack of state-supported sheltered accommodation for SOGI refugees and the other was the state government's reluctance to authorise work permits (Thomas, NGO volunteer, Germany). In contrast, asylum claimants in Saxony are likely to receive more comprehensive support, perhaps surprisingly, given the incidence of racist hate crime reported in this area (AFP 2019):

Saxony, so if you are a queer refugee and come to Saxony, then everything is actually secured. (...) they are all sent to Dresden, queer refugees, there is a street in Dresden, since the 23 apartments have been rented for the accommodation of queer refugees. And that is all organised by the community through the CSD [LGBTIQ+] club Dresden (Knud, NGO worker).

In Italy, distinctions were made between the services and expertise available to SOGI claimants in Calabria and Emilia-Romagna (Titti, decision-maker), and Damiano, a lawyer, told us that '[t]hose who come to the centre [of Italy] are luckier, especially in Emilia Romagna, Tuscany, all in all in Liguria, in certain areas of Lombardy and Piedmont'.

In the UK, immigration (including asylum) is a reserved matter, meaning that policy is made centrally and not devolved to any of the UK's constituent nations. Yet, approaches to integration do vary within the four nations (Chap. 4). For example, Scotland's 'New Scots' strategy states explicitly: 'The key principle of the New Scots strategy is that refugees and asylum seekers should be supported to integrate into communities from day one of arrival, and not just once leave to remain has been granted' (Scottish Government 2018, p. 11). In this light, we heard that while the asylum policy structure and immigration rules are the same across the UK, there may be differences in how officials engage with external partners:

So I have engaged in a number of forums where... we have Scottish asylum seekers forum that SRC [the Scottish Refugee Council] co-chair with myself, so we have that. We have the new Scots forum, new Scots integration forum, so I'm involved in I think probably every one of the strands of the new Scots integration forum. So, we are very visible and we are very willing to engage (Olivia, government official, UK).

There are no official statistics on LGBTIQ+ asylum claims (other than the UK's 'experimental' data) and consequently there are no published statistics for decisions on SOGI claims at a regional level. Nor are there figures available on the concentration or dispersal of SOGI claimants to different parts of Germany, Italy or the UK. It is therefore not possible to analyse differences in acceptances and refusals based on location within each country. Nonetheless, as highlighted here, interviews with NGO workers and volunteers and with lawyers in each country suggest significant differences do exist within each country.

It is easier to demonstrate the personal and social impact of location for individuals if we consider whether they moved or were moved to a city or large town, or to a small town or village. In none of our countries was SOGI a consideration in where people were sent or accommodated by the authorities (Chaps. 5 and 8). The impact of living in a rural or remote location was particularly striking in Germany, as discussed in Chap. 8. One participant told us: 'I feel like a fish out of water, I'm the only lesbian in [small locality] as far as I see it. When I hear about a lesbian group, it's either in Frankfurt, in Kassel, in Fritzlar, in somewhere' (Sandy, focus group no. 1, Hesse, Germany).

Marhen (Germany) was asked about gay life in Saarbrücken and whether it was possible to integrate into the gay community. He said: 'No, here most of them speak only German. And the ones I met who spoke English, there is a socialising code that I couldn't crack'. At 37, age was a further barrier: 'And to find gay Germans my age who share similar interests... no. There is [NGO X], but then [NGO Y], all of them are in their twenties'.

In Italy, better services and support are available in cities such as Bologna (Anna, LGBTIQ+ group volunteer, Italy). Similarly, in Milan, for two men to walk hand-in-hand would be acceptable in a way that it would not be elsewhere (Livio, lawyer, Italy). In the UK, Ibrahim A. contrasted the environment at the university where he was studying with that of the nearest town:

my experiences wasn't nice, because the campus is very international environment and it is kind of isolated from the city, it's on the borders of the town, the town or the city. And the town is conservative, White, people were still giving you the looks of like how you look like if you are different person. Sometime I was getting like the feeling like that we are not belong to here, we are not speaking English the same way I am speaking. I was getting this a lot from the bus drivers, in specific. If I am asking to go to specific station and I am not pronouncing it the right accent, that he is using too, he claim he doesn't understand me. It happened many times that other people on the bus, British, like tell him he said this station. And then he just understands (Ibrahim A., UK).

It is unsurprising that people we interviewed found it easier to 'settle', make friends, and become part of communities in cities and large towns than they did in rural locations and smaller conurbations, and that location was a significant factor in whether or not they reported feelings of isolation.



### 10.4.2 *Isolation*

The impacts of isolation and dispersal were a recurrent feature in our participants' accounts:

I mean, you have cities where there is a big group that is organising support for LGBTI asylum seekers, that you know is also specifically looking at their stories, at the traumatisa-tion, the traumas they might have, at the specific needs they might also have, that is integrat-ing them into the community in the city, they are sometimes or often at least in Germany also supported by the state, but then you have places where if you are sent there, there is nothing. Yes and you are really like looking into the void (Terry, member of the European Parliament).

As well as the personal and emotional impact of living in a small town without established LGBTIQ+, migrant, or LGBTIQ+ migrant communities, there is a very practical implication for individuals in terms of their application. One survey respondent summed up the combination of problems experienced in this context:

Recently I have come across many cases of LGBT+ people seeking asylum had been dis-persed to areas which are not diverse and there is no LGBT+ community and that has had an enormous impact on their mental health and in proving their case and Home office want to know if they had been to any LGBT+ bars or clubs since coming to UK (S145, Community Development Worker, UK).

Such expectations from decision-makers were explored and found problematic in Chap. 7. Anna's account of how this affected the work of NGOs reiterated such concerns:

[T]he most difficult problem that we are sincerely meeting to integrate, at the level of inclu-sion, is that these guys are scattered, lost in places that are not reachable by public transport. Obviously, they are not equipped with their own vehicles and they are badly connected with the cities where we generally do events, we organise events. So what happens? That we have a problem. Even if they can come, then they don't know how to get back (Anna, LGBTIQ+ group volunteer, Italy).

We were told about a young Syrian refugee who had been dispersed to Northern Ireland with his family, but who was not 'out' to his family. He was getting support from LGBTIQ+ organisations locally, but keeping that part of his life separate from his family relations (Lucas, NGO worker, UK). Given the absence of dedicated SOGI asylum support groups and networks outside of the main cities in Great Britain (England, Scotland and Wales), it is likely that claimants in other locations will find it expedient to compartmentalise their lives as this young man has done, seeking different kinds of support from different and unconnected networks and organisations. In this way, we can see that some individuals feel forced to fragment their identities, having very few spaces available to be open about their identity. This is more likely to be the case for individuals dispersed to areas where there is no LGBTIQ+ asylum support network, but it was a wider phenomenon, and we now address these experiences of isolation, whether physical or mental, externally or self-imposed.

While for some people feelings of isolation corresponded to and were shaped by their remote location, others experienced a sense of separation and inability to be themselves in the world despite living in a city and in constant contact with others. Chloe, working for a women's refugee NGO in a large city in the UK, told us she thought there were women using their general services who were not open about their sexuality because of their need for support from the network. Justina (NGO worker, UK) told us something similar: 'And they might not be out, they might be seeking asylum, but are not out and they may never be because actually it is more important for them to have that network within the cultural and / or faith'.

There were also very practical reasons why claimants felt unable to be open about their SOGI: 'for me, because I've not been accepted, I don't want to tell all the world that I am a lesbian, [in case] tomorrow I am sent back to my country' (Juliet, Germany). Similarly, Halim, also in Germany, did not tell the people in his accommodation that he was gay:

I kept a distance from people. I always ate on my own, there were always groups of people... Yeah, I didn't really, I just tried to maintain a distance because I was worried about what could happen. I was worried that people would start to ask me a lot of questions.

Ashley (psychotherapist, UK) told us of similar experiences of isolation that many people have because they live with people who – for religious or cultural reasons – would not offer practical support to a SOGI claimant:

[these SOGI asylum claimants] find themselves in the new "closet" of not talking about their cases in the asylum accommodations that they have (...) with all the limitations that any asylum seeker has of access to life in the UK, it becomes even more problematic to access a life in the UK for someone LGBTQI with all the risks that goes on, with the costs that goes on with it as well. So it is incredibly isolating.

Alongside this, many of our participants were keen that their experiences be used to support others in their situation in combatting isolation. In this respect, Christina (UK) told us that:

a lot of people go through what I am going through and they feel really alone, nobody to talk to, especially if you are going through asylum and you have, you are getting support, you feel alone, you don't have any friends, you can't really pick yourself up and say "you know what, I am going to go to a gay pub and sit and try to make some friends", because you barely get enough money to survive, much alone go and have a drink. Just find organisations that help people in the situation, reach out, talk to people, make friends, you will feel a lot better. Don't just stay at home and be depressed like what I did.

In contrast, one very positive spatial dimension for some SOGI claimants was the strong affection for and sense of identification that they developed with their new home area. This was particularly true in the UK. Daphne said she wanted to stay in Manchester 'forever' and Luc told us 'Glasgow is the best place to live'. Jayne, as well, said that 'I love it [Birmingham]. When I first came, it was a little town [I came from], it was so overwhelming I did not like it, but I have grown to like it and it is... a very friendly city' (Jayne, UK). Similarly, Amos (focus group no. 5, Nottingham, UK) said that:

Nottingham itself has been quite amazing, because I am even able to run in the morning without fearing and it is maybe dark at around 5, and I am running, jogging that there is no one who will harm me.

Similar accounts were shared in Germany and Italy. Odosa (Italy), for example, said: ‘I like Italy, I like Italy seriously’. Halim (Germany) also said that:

I think Berlin as a city offers a lot of great opportunities. I’m a person that enjoys culture and there’s a lot of cultural events, like film, Brazilian film festival for example. A lot of spaces... there’s now much more spaces where queers and not only queers, people of colour are organising. It gives me a lot more spaces and options to move in and to feel comfortable and be myself.

While it is pleasing to be able to end this section on so positive a note, the important point to note about these feelings of attachment to place is that they tend to develop when claimants – whether pre- or post-determination of their claim – are able to develop an identity in their new home. This often corresponds to feeling a sense of agency, and that they are contributing to improving the lives of themselves and others in a similar situation.

## 10.5 Agency

The final section of this chapter identifies some of our participants’ experiences relating to agency and lack of agency. By this we mean the ability to act autonomously and in a way that is self-determining (Friedman 2003, pp. 4–5).

### 10.5.1 *Losing Agency*

A very important factor contributing to individuals’ feelings that they had no control over events in their lives was, of course, the length of time they often had to wait for a final decision on their claim, particularly those who needed to go through the appeal process. As explored in Chap. 6, Susanna, a social worker in Italy, told us that what she more often heard from the people with whom she worked and who were appealing against negative decisions was ‘I can’t take it anymore’. She gave the example of one person who had been due to have their appeal in December and it was delayed until July: ‘and he told me over the phone “I can’t wait any longer, I don’t know what to do with my life”’. Claimants feel powerless and deprived of their agency during these long waiting periods.

For people in detention, mainly in the UK, the indeterminate length of their detention was often a specific problem in impeding their access to the sources of advice and information needed to strengthen their claims, but for all asylum claimants, waiting for often unknown and faceless officials to make decisions determining the course of their lives was made more stressful by the uncertainty about how

long they would have to wait. In none of the countries studied were precise time-frames for making an initial decision applied and adhered to. For example, a parliamentary question in the UK elicited the fact that in December 2018 more than 12,000 claimants had been waiting for a decision for longer than the Home Office target of 6 months and in May 2019 it was reported that this target had been abandoned (Allison and Taylor 2019).

Prolonged waiting contributes to the dehumanising and sometimes cruel treatment people experience during the asylum process. In Chaps. 6 and 7, we heard of the long probing interviews people, some of whom had experienced rape, had to endure in attempting to establish credibility. We also heard how stressful they find the experience. Some participants had a sense that their life was slipping away from them: ‘Yeah, I feel that at my age I’ve not achieved the things I wanted to achieve. I’m still living in a student area with some young people. I wish to have my own space and be happy’ (Sandra, Germany).

The denial of the right to work in law or in practice – discussed in Chap. 9 – was a further frustration during this waiting period, preventing them from making the kinds of career and life plans that most citizens take for granted in the EU:

I don’t want to be here in Germany and dependent on social [welfare] all the days of my life. No. I want to go out, I want to work, [have] my own money. I want to pay taxes, I’m getting older. I need a pension (Sandy focus group no. 1, Hesse, Germany).

These words were paralleled in a group discussion in the UK:

I need freedom... you can’t, you feel like you are suffocating inside because you are held somewhere in a cage, you can’t do anything, it is about freedom, they just let us free, should have let us live freely like everybody else and you can only feel, live that way if you are able to provide for ourselves. We want more education, the years are going by, so we just don’t want to get, we feel stagnant, you know, we are just stuck there, can’t move right or left (focus group no. 3, London, UK).

While all asylum claimants will suffer from the uncertainty of waiting and it is impossible to quantify this suffering, there will be particular difficulties for SOGI claimants who may not be or feel able to access the kinds of community support that other claimants can.

SOGI claimants we talked to had gone from being dynamic agents instigating change in their lives to being dependents of the asylum system. We asked Angel (Germany) what she did all day and she said: ‘Nothing, I just lay here and smoke’. Shany (Germany) also explained that ‘I used to be like “fleißig” [diligent], like somebody worked very hard, and I can do everything, and I don’t like to have this name, this nickname of “victim”, you know’.

Halim, also in Germany, reiterated similar feelings, saying he felt frustrated and had found his experiences ‘really dehumanising (...) People talk about integration all the time as if it’s just the duty of us. But how do we do it if we’re never seen as equal or never seen as someone who can give back?’ Halim was clear that he was not asking for favours but for protection that he was entitled to and that would enable him to start contributing to society again:

for a person like me, I had a lot of experiences before I moved here. I moved here with like (...) 30 years old, at this point I've travelled a lot. I was working, and I perceived this whole asylum thing as for me, claiming my right to asylum and safety. I don't see it as a gift, as somebody's giving something I don't deserve. So I feel that this makes my prospective things a bit different. Because I feel I am entitled to protection and being supported until I become a person who is giving back to society as I'm doing now.

Such awareness of their rights on the part of SOGI claimants was hard to hold onto in the face of often insurmountable obstacles imposed by the asylum system and society more generally. In the UK, for example, Ali found it difficult to gather the evidence he needed for his case without compromising his sense of independence:

it is difficult because I had to ask my friends including not close friends, and to me, in my nature I like to be independent. I don't like to be dependent on somebody else. I really am always independent so, if I want to do something, the last thing is to ask somebody else or make them involved in my struggles and problem particularly when it is so personal, the first thing would be is to try to do it by my own. But since I had no choice and totally intimidated and fearful of the possibility of being sent back home then I had to make my private and personal life to be an open book and having to open up and also live my past traumas every day throughout the process. Well, I have got close friends who I am happy to actually tell them anything, but still not everyone. I hate being, well, I had so many incidents when I was fallen a victim, though, I hate the word victim. Because me seen as a victim is, as to me it reflects the vulnerability and the weakness that I'm always trying to overcome and since we have no choice but to be strong and brave during the tough times, is not an option in order to survive.

The desire to retain a sense of individual agency and independence is unsurprising in the face of legal and regulatory systems in which all control lies with the decision-maker and is exercised inconsistently: while asylum claimants in all countries must comply with many deadlines (dates on which they need to sign in with the authorities, dates on which they must attend interviews, deadlines for appealing), decision-makers either have no targets for decision-making or breach them with impunity, as in the UK.

The experience of flight and claiming asylum is often portrayed in simple terms, with persecution replaced by security. Yet in contrast with our approach based on a HR reading of the Refugee Convention that was not how our participants necessarily perceived the asylum journey, which very often further damaged their agency. Sandy (focus group no. 1, Hesse, Germany) talked about why some asylum claimants return to their country of origin:

Safety was my issue, why I leave to come here. Not only safety for me, but safety for my child. But I was working, I was living in a city, I could socialise, I could communicate, I could go to the clubs if I wanted to go to the clubs, you know? I could go get ice cream if I want. So even though [now] I'm safe, I still feel in prison.

For Sandy, and others like him, the result of claiming asylum was a trade-off, with some gains and some losses.

### 10.5.2 *Taking Control*

Many of the people we spoke to were trying to achieve what they articulated as freedom – but were restricted as much within the host country as in their country of origin, including in concrete physical ways, for example by camp life in Italy, rural isolation in Germany, and detention in the UK. In contrast, several participants described ways in which their lives had become freer and they were able to express themselves. Marhoon, in Germany, talked about his changing experience of going to Pride and how he used to act as an agent for change:

And this year I enjoyed it more. The first time, my first gay Pride ever was here in Saarbrücken in Germany and I was so nervous, although I didn't go in my traditional clothes I had a sign that said "Queer refugees". (...) this year, I went but this time I decided to go full traditional clothes, to show, not only here in Germany, but also my gay community in Oman, to show them that they're not alone, that I'm here marching on their behalf. Well, some of them, because for many of them I don't represent them. I did it, I was nervous again this year, but yeah, again I was fine, nobody harassed or anything.

Janelle (UK) also said that 'Yes, I am very open with my identity. I don't hide [it]. I used to hide [it] when I was back home, now I can just be free'. For Amis (focus group no. 2, Bavaria, Germany), freedom and agency were experienced in an ambiguous way. On the one hand:

[T]he best thing is that I am protected and I am free to be who I am. I am out of the closet, I am gay and I am proud to be gay, because even if I walk on the street I tell everyone who I am. If I am with a boy, I kiss him. I feel like, calling him my "boyfriend", that's okay.

Yet, at the same time, Amis also acknowledged:

I have that psychological torture. Like, I could say being traumatised, but it's a torture anyway. Because I am not that free anyway. I am free when I'm in Munich, in that area. But when I'm in my place, I am totally not free.

In general, for those participants who talked about ways in which their lives had improved, this was due to two elements. The first, as Amis' words show, was living in a country where they were able to be open about their SOGI, usually for the first time, despite the continuing mental trauma. The second was the feeling of strength and agency that people found through their own developing self-confidence and from engaging with others in a similar situation. Christina (UK) explained that:

when I moved here, that's when I started learning about different things and I always liked dressing up, because I would do back home but secretly and then, now that I have got a wider spectrum to explore here, and a lot more avenues to get information from, that is how I start understanding that I am non-binary.

Rosette (Germany) also felt a sense of freedom:

Nobody is going to take maybe a razor blade to cut me, so that the devil gets out. I will say whatever I want because now I feel that I have a paper which I can show that I'm a free person.

Stephina (UK) also highlighted the importance of the sense of freedom she developed while claiming asylum:

I knew I would be fighting my case, but at least I am outside, I have got that freedom to go places, meet people, hang out with people and because I am coming from a country where you can't say out loud that you are LGBT and being here, it was like I can breathe. I don't even have to explain myself. I can date whoever I want to date, go places where I want to go, if I go to a gay bar, whoever sees me I really don't care, because I didn't have to explain myself to them. So I think that freedom is what kept me going, even when I knew my case was still going, because you can see from 2014 I just got my stay now [2018], so it has been a journey but (laughs) yes.

These positive accounts may be connected to the confidence and enhanced agency that comes with being aware of rights and how to exercise them. One volunteer described this to us:

I see a radical change between the young people who arrive and contact the association and those who perhaps then leave because they find work somewhere else. The evolution of these people thanks to the group factor (...) is incredible in the awareness of oneself but also in one's self-confidence (Giulia, LGBTIQ+ group volunteer, Italy).

Meggs (focus group no. 1, Manchester, UK) confirmed this sense of increasing self-confidence that derives from greater rights awareness: 'I have always been that person who will sit back, but now I have learnt to stand up and fight not only for myself but for other people as well who come after us'. She also had a very clear idea of what she wanted to do with her life:

I want to work with people. I want to work with underprivileged people, and in due time I want to open an organisation back home for young women, because (...) where I grew up no telly in the village, no telly, no Wi-Fi, they know nothing what is happening around the world. So I want an organisation where they will know they are more important, they come first and education is the key, they should not be groomed to be somebody else's wives, they should have their own decisions and make their own decisions.

In Meggs' case, we can see the kinds of fluctuations in life that many claimants must experience: taking the difficult decision to seek a safer, freer life but then, paradoxically, losing all individual autonomy and often experiencing new forms of persecution in the country of supposed refuge. Finally – if international protection is granted – it may be possible to regain the sense of control of one's life and even be an agent of positive change for others. Alain A., in Italy, also shared a renewed sense of agency:

I would still choose Italy because it wasn't about choosing a place, it wasn't, it was about being where you are accepted, where you can live the life you want to live, without judgement, without persecution, so anywhere would have been good and thank God it is Italy. I didn't ever think of that. I didn't ever think of there will be a day when I will tell somebody like I am gay and the person accepts me and just smile and live with me no matter, I didn't ever think of that. (...) when I came to Italy, I got so much support and especially the support of acceptance, when people accept you for who you are, that is so big, it gives you, like, freedom to be able to express your mind and freedom to be able to sit with people and talk.

A number of the SOGI asylum claimants and refugees who made time to talk to us were either working to support others in their situation or planning to do so.



Jayne (UK), for example, told us that '[m]y moto now is I don't want to see anyone going through what I went through'. They did it to support others, but also recognised the benefits to themselves:

I am involved with [group X], I am involved with, I also volunteer with the [group Y], through the weekend I was doing a peer mentoring programme with [group Z], I am involved with nationally director with [group W] ... Yes, so maybe those are the kind of things that help me to keep sane, to be fair (Jayne, UK).

In this section, we have attempted to highlight how much all our participants valued their independence and their desire to take back control of their lives. Of course this is not unique to SOGI asylum claimants, but a feeling likely to be common to all refugees. However, we have also illustrated some of the distinct ways in which the agency of SOGI claimants is both undermined and may – eventually – be enhanced in their European host country. Particularly striking was the increasing number of NGOs and community organisations set up and managed by SOGI asylum claimants, either during their wait for a decision, or upon finally receiving refugee status (where that was the case). These efforts may have started as a response to the prohibition on asylum claimants taking paid employment on the part of people committed to using this period of waiting in a constructive way. However, such endeavours often developed into permanent career pathways for people keen to improve the asylum process for others following in their footsteps.

## 10.6 Concluding Remarks

In this chapter, as in our whole work, one difficulty has been separating the experiences of SOGI minorities claiming asylum that relate specifically to their SOGI from those experiences that relate more generally to their identities as asylum claimants in Europe. This is unsurprising: as our focus on intersectionality and queer theories shows (Chap. 3), identities are fluid, with different characteristics mattering more or less at different points in life and in different contexts. That means that improving the experiences of SOGI asylum claimants will require addressing their experiences in a holistic way, recognising the impact of age, religion, gender, ethnicity and many other factors, as we consider in our next and final chapter.

Laying the basis for that, this chapter has been considered under four headings: identities, discrimination, place and agency. Our argument is that these, broadly speaking, are helpful ways to think about the obstacles for SOGI minorities claiming asylum in Europe – obstacles in terms of having a fairly assessed claim and

obstacles in terms of wider integration and engagement in a new society. Addressing our participants' experiences through these four lenses highlights many potential areas for improvement based on validating identities, reducing discrimination, creating supportive spaces and enhancing agency. We do this in more concrete ways in the final chapter that follows.

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# Chapter 11

## Believing in Something Better: Our Recommendations



*I have the impression that the topic is getting more and more important. And there is also a commitment to do it better in the future.*

(Kadir, NGO worker, Germany)

*It takes trained staff, who have the time, who rotate and who are prepared to do this job.*

(Roberto, decision-maker, Italy)

*But the only thing I would say to people is just like, keep on pushing. Keep on pushing.*

(Patti, UK)

### 11.1 So What?

The previous chapters have offered an in-depth, empirically and theoretically informed analysis of a broad range of issues affecting SOGI asylum claimants and refugees in Europe, with a focus on Germany, Italy and the UK. This analysis has applied new insights to findings unearthed by previous research and shone light on issues that have so far been relatively neglected. But the question often posed to us as academics is ‘so what?’ To address this question, this chapter offers a range of recommendations addressed to decision-makers, policy-makers, governments, NGOs and service providers, aimed at improving the socio-legal framework that applies to SOGI asylum. These apply mainly at a domestic level, but also refer to the European level, where relevant, to offer proposals that recognise the intersections of national, European and international frameworks. As in the previous analysis, we are strongly guided by our participants’ voices, complemented by broader scholarly debates and our analysis and views of these. Our data and analysis thereof also shed light on broader issues in the asylum system, and many of the recommendations set out here would benefit non-SOGI asylum claimants and refugees as well. We hope they will be of wider value in this way.

The context for this chapter is the clear sense that ‘[t]he world no longer speaks of refugees as it did in my time [1980s]. The talk has grown hostile, even unhinged, and I have a hard time spotting, amid the angry hordes, the kind souls we knew’ (Nayeri 2019, p. 12). And although ‘[i]t is changing and I would say that we have achieved an incredible amount, and yet... It’s not all that good by far, so... basic things, things just do not necessarily get better’ (Sabrina, NGO worker, Germany). There is much work still to be done to render the SOGI asylum system ‘fit for purpose’, both in terms of rendering the legal adjudication process more appropriate (Daniele, decision-maker, Italy) and to create a more supportive process of social integration (Titti, decision-maker, Italy).

The issues that need to be addressed are different in each domestic and even regional context, and any recommendations need to be tailored to a particular situation. Our recommendations address two broad problems. On the one hand, there are systematic and structural issues that require legal and policy reforms, including changes to asylum reception conditions and procedures. On the other hand, there is a widespread concern that these systems are arbitrary, and that decision-making in all countries is worryingly inconsistent: ‘it is often remarked it is luck of the draw and that seems to be the, the biggest problem. It is so difficult to surmount because we are dealing with human beings’ (Bilal, presenting officer, UK). Recommendations need to address both systemic issues and the ‘lottery’ functioning of the current SOGI asylum system.

Any set of recommendations also needs to reckon with the tensions that exist within any asylum system, for example, the difficulty in protecting the human rights of persecuted individuals within a hostile context where asylum is politicised for propaganda purposes and the state imperative of border control. Further tensions exist between promoting the welfare of claimants without invoking disempowering discourses of victimhood and vulnerability. Moreover, we should endeavour to undermine homonationalist discourses (Puar 2013). In this chapter, building on the approach set out in Chaps. 2 (Sect. 2.3) and 3, we make recommendations that attempt to reconcile such tensions so far as possible.

Our recommendations in this final chapter are divided into sections that approximately mirror the analysis in Chaps. 4, 5, 6, 7, 8, and 9. In Sect. 11.2, we discuss how to improve people’s journeys to Europe and their reception in countries of arrival. In Sect. 11.3, we focus on how to enhance the RSD process, both in terms of procedures and substantive analysis. In Sect. 11.4, the focus shifts to the improvement of accommodation, housing and detention, and Sect. 11.5 is dedicated to recommendations concerning three main areas of life beyond the RSD process, namely in the fields of health, work and education. In Sect. 11.6, we put forward recommendations to ensure that the legal and social dimensions of SOGI asylum claimants and refugees’ experiences are less disjointed and better aligned. Finally, in Sect. 11.7 we set out what we see as the underpinning values needed to guide a fair SOGI asylum system.

## 11.2 The Journey to Europe and Reception

As explored in Chap. 5, members of SOGI minorities seeking asylum in Europe often undergo horrifying experiences in their countries of origin forcing them to undergo long and risky journeys in the attempt to escape. European countries have a responsibility to reduce the risk of persecution in countries of origin through their external relations policies, including through EU structures and mechanisms:

the European Union, in the past 10 years I think, has improved on working on LGBTI issues in third countries, but I think there is still a long way to go. So when we look at the situation of LGBTI people in many countries all over the world... it is still so deplorable, and I think that if we want to be credible... we really need to put a focus on this and say “no, these are really the minorities also that show you if there is an acceptance of human rights, if there is real democracy, if people are given the freedom to decide about their own lives.” I would say that next to having an asylum system in place that meets the needs both of SOGI claimants as well as others... we also need to look at what can we actually do in the home countries to improve the situation (...) So, also really to do something about that, and to highlight that and to make this a priority of external, of the external action service. (Terry, member of the European Parliament)

The same point was made by refugee participants:

So, if possible, European government can share this idea [of respect for SOGI minorities' rights] with African leaders to make their law, they can amend the law, they are the one who make the law, they can amend it, it is possible for them. So to amend the law, so that it is at least the country can be a little bit favourable to people, if not just favour them in a big way, just little bit. (Fido, focus group no. 4, northern Italy)

In line with the need to protect human rights and freedom while avoiding cultural essentialism (Chap. 3), such pressure through the EU's and domestic external relations policies needs to promote greater awareness of and respect for SOGI minorities' rights and needs, without exacerbating perceptions that human rights are a Western imposition serving economic interests and with little genuine wish to address the global inequalities that create (SOGI) asylum claims in the first place (Danisi 2017).

While the risk of persecution for members of SOGI minorities is the driver for flight from many countries, we also need to address the perilous journeys that these individuals undertake and the degrading conditions in which they are received on arrival in Europe:

one must realise that a humanitarian catastrophe is already happening in Libya, but partly also from what happens to people in Greece, Hungary and Italy... This is really a humanitarian disaster that happens there. So that you do not then push more people into this, into this hell. (Sabrina, NGO worker, Germany)

To avoid these journeys, it is essential that humanitarian tools are introduced as a matter of urgency to allow asylum claimants – SOGI or otherwise – to reach Europe safely, in parallel to already more established mechanisms such as resettlement. This can be done through humanitarian admission programmes and, in particular, humanitarian visas that provide documentation to people in flight – a

mechanism with a strong historical basis as well (Politzer and Hylton 2019). They could be operated through ‘humanitarian corridors’, similar to those facilitated by the Community of Sant’Egidio (Community of Sant’Egidio 2019). Some countries, like Germany,<sup>1</sup> already possess a legal basis for such initiatives, and these need to be used more systematically. Such humanitarian initiatives are, however, not yet regulated at a EU level and domestic authorities generally do not make such provision (Moreno-Lax 2019). This has prompted the European Parliament to support the creation of a Protected Entry Procedure (European Parliament 2018a, b), but binding measures are yet to be introduced.

In terms of reception, and in light of the context of general hostility to migrants in Europe, juxtaposed with persistent and in some cases increasing homophobia and transphobia and lack of information on SOGI asylum upon arrival (Chap. 5), it is essential to promote a more friendly and welcoming environment for SOGI asylum claimants and refugees. For these purposes, awareness efforts addressing potential and actual claimants and the wider public need to be intensified, through national and local dissemination of materials about the asylum system, and the rights of claimants. This should include information about SOGI asylum provided in different languages, graphic and easy-read formats, made available in places accessed by SOGI claimants – or by individuals entitled to claim asylum on a SOGI basis but who may not be aware of this fact. This might include airports and other transport hubs, medical facilities, schools and colleges, LGBTIQ+, refugee and migrant NGOs, and public spaces such as libraries (Fares, Germany; Knud, NGO worker, Germany; Juliane, public official, Germany).

Upon arrival and at the point of lodging an asylum claim, it is essential to offer claimants the opportunity – and indeed encourage them – to disclose any potential reason for needing protection, including their SOGI. One suggestion is to include a box about SOGI in a form alongside other optional questions (Kadir, NGO worker, Germany). Support in completing forms from trained staff and interpreters would be useful. However, there would need to be guidance for officials, to ensure there were no negative consequences for claimants who disclosed their SOGI only at a later stage in the asylum process, as many claimants will not feel sufficiently confident to mention their SOGI at this time. As we see in Italy (Chap. 6), such questions can be asked at the screening stage, without main interviewers or decision-makers penalising claimants who chose not to answer. Obtaining information on a voluntary basis in this way could facilitate the provision of more appropriate information and services throughout the remainder of the asylum process. More generally, forms should be designed to give as much flexibility to claimants to complete them based on their particular circumstances in terms of SOGI, as well as in all other aspects of their lives (ORAM 2016b). The identification of SOGI asylum claimants should lead to the automatic signposting of claimants to relevant groups,<sup>2</sup> in order to ensure

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<sup>1</sup> §22 of the German Asylum Act regulates admission from abroad ‘in accordance with international law or on urgent humanitarian grounds’.

<sup>2</sup> Regarding the training and funding required by these groups, see Sect. 11.6.

they receive more tailored and effective legal advice and social support (focus group no. 1, Hesse, Germany). This approach is reflective of a fairer sharing of responsibility amongst all asylum system actors, with asylum officers taking a more proactive approach to identifying SOGI claimants than is currently the case.

Whether SOGI asylum claimants should generally fall within a legal category of ‘vulnerable’ or not remains a contentious issue (Chap. 3). While this is not the case under the current EU legal framework, some local and regional practices and policies identify SOGI claimants as ‘vulnerable’ (Chap. 4). Some of the participants we interviewed were adamant that SOGI asylum claimants should be considered ‘vulnerable’ for purposes of the asylum process (Ibrahim, Germany; Matthias, social worker, Germany). Others were opposed to it because of the stigmatising effects of this kind of labelling and the risk of creating a hierarchy among asylum claimants, encouraging competition as to who is considered the ‘most vulnerable’ to obtain some ‘advantage’ in terms of support or provision (Noah, NGO social worker, Germany). Finally, the ‘vulnerable’ label can be seen as an easy remedy, but one that conflates vastly different kinds of disadvantage, discrimination and exclusion (Peroni and Timmer 2013, p. 1071). If the designation ‘vulnerable’ is retained in relation to asylum claimants, it should only be with the recognition that vulnerability is not an inherent characteristic but derives from circumstances and experiences and is – it is to be hoped – a temporary state (Peroni and Timmer 2013, pp. 1059–1061; Chap. 3).

The move to the notion of ‘specific needs’ in the current CEAS reform largely addresses the shortcomings of the notion of ‘vulnerability’ (Chap. 4), as it shifts the debate from ‘labelling’ someone as vulnerable (or more vulnerable than other claimants) to addressing the specific needs of each individual, in this way avoiding stigmatising whole categories of asylum claimants as somehow lacking in capacity or resourcefulness. Rather than creating hierarchies built upon generalisations, actors in the asylum system should strive to make individual assessments that address the needs of each claimant in a sensitive manner (Noah, NGO social worker, Germany), as already required by human rights law (Chap. 3).

To this extent, we favour including SOGI claimants amongst those likely to have specific needs, which may trigger adaptations to make the asylum system more responsive to SOGI needs. This would ensure SOGI claimants receive information and services tailored to their circumstances, such as details about the legal framework relating to SOGI in the host country, the availability of SOGI specific accommodation, confidentiality obligations, freedom to ‘come out’, etc. (Gisela, lawyer, Germany). This also has an impact on the RSD process, to which we now turn.

### 11.3 The Asylum Application Process

RSD processes have the pernicious ability ‘to flatten out difference, demand simplicity over nuance, and compel the distillation of messy, complicated lives down to a manageable set of narrative fragments’ (Macklin 2011, p. 137). SOGI asylum



claims are generally anything but simple, and the legal process needs to recognise and deal with that in a respectful and targeted manner, compatible with the human rights, feminist and queer analytical underpinnings outlined in Chap. 3.

### ***11.3.1 Institutional and Policy Framework***

Asylum adjudication agencies should be immune from the ‘politics of the day’ in delivering human rights compliant decisions, and one way to achieve this may be moving towards independent or semi-independent UNHCR-like models. The inclusion of UNHCR representatives as members of the Italian territorial commissions increases the quality of decision-making, at least to the extent of ensuring that decisions adhere to relevant UNHCR guidelines. We thus espouse ECRE’s recommendation that:

caseworkers should work in an institutional environment that is adequately human rights and protection-oriented, regardless of any EU or national interest. The main objective for determining authorities should always be protection, namely to identify applicants who qualify for international protection. ECRE thus warns against the placement of determining authorities within Ministries which follow certain objectives at the expense of the asylum seekers’ right to a fair and transparent asylum procedure. (AIDA and ECRE 2019, p. 57)

Although our decision-maker participants said that the rules of individual assessment were followed (Olivia, UK), there was a strong suspicion amongst many of our participants – both claimants and supporters – that public authorities operate some kind of quota system (Chap. 4). We also saw in our fieldwork that claims regarding some countries of origin are more rigorously inspected, viewed with scepticism and have a higher rate of refusal. Despite the lack of objective evidence that quotas exist, the perception on the part of some claimants that they do reflects the broadly hostile climate that exists towards migrants and refugees in Europe, and the not unreasonable belief that this leads to attempts by decision-makers to minimise the number of successful claims. Any sort of quotas or targets should be eliminated, as they are in contravention with international refugee law and our human rights analytical underpinnings (Chap. 3).

As we saw in Chap. 4, not all domestic asylum systems provide SOGI guidelines, which leaves decision-makers unsupported and claimants at the mercy of unreliable and inconsistent standards of decision-making. Even when SOGI guidelines exist, their application is often inadequate:

The Home Office’s own published policy is extremely well informed, I mean, it is a very good [policy], people would be quite amazed, and if anyone who is transgender had a claim, and the Home Office applied its own policy, they would very, very likely succeed. (Adrian, judge, UK)

All asylum adjudication authorities should introduce SOGI guidelines (where there are none) and ensure they are applied consistently (when there are guidelines but they are applied inconsistently, as in the UK), to ensure consistency within each jurisdiction (Giuseppe, lawyer, Italy).

Any transparent and accountable asylum system needs to keep and publish rigorous and up-to-date statistics on different types of asylum claims and their outcomes, including SOGI-based claims. Statistics should not only include the number of SOGI claims submitted, but also what grounds are used to refuse or accept them (Kadir, NGO worker, Germany). This would also provide an evidence basis for measuring the successes and shortcomings of SOGI asylum decision-making. Reasons put forward to avoid the production of such statistics – for example, costs, confidentiality, data privacy, etc. – remain unconvincing and can be easily addressed.

As much as policy and guidance, the successes and shortcomings of any determination process depend on who the decision-makers are. Our fieldwork and analysis prompt a number of recommendations in relation to decision-makers. In terms of the selection process, the qualifications required for UK Home Office officials were a concern:

some of my colleagues are... have a legal background, so they have done a law degree and they have either done the bar or they have done the LPC [legal practice course] and they seem to have, again just observationally, they seem to have an advantage over new entrants that don't have any such background. (...) I thought it was better when we asked for a legal background, because it makes much more sense, obviously, and it [UK] is such a case law heavy jurisdiction, so, very peculiar choice [not to require a law degree], I think. (Bilal, presenting officer)

A legal qualification should not necessarily be a requirement to become a decision-maker, as good decision-makers may have different academic and professional qualifications (Vincenzo, LGBTIQ+ group volunteer, Italy; Filippo, senior judge, Italy). Yet, appropriate qualifications are necessary to ensure a high standard of decision-making. Participants were practically unanimous that, once selected, decision-makers at both the administrative and judicial level should receive a minimum level of training in SOGI asylum – including not only asylum law and policy, but also more general matters such as equality and unconscious bias – and undergo a period of shadowing before making decisions autonomously on asylum claims (Sect. 11.6). As analysed in Chap. 6, the duration of training at administrative level was also of concern. For example, the 5-week general training received by the caseworkers at the UK Home Office, including one single day on SOGI matters, was believed to be insufficient by decision-makers themselves, even if complemented by 'shadowing' more experienced decision-makers and mentoring (David, official). A positive development in this respect is the new systematic training programme started in 2018 in Italy, in cooperation with the UNHCR.

The task of adjudicating asylum claims is an arduous and complex one, and, as a result, asylum agencies should ensure they have sufficient senior caseworkers to provide effective mentoring and oversight of new and junior caseworkers. Something similar to the 'bulletin of jurisprudence for the Cour Nationale du Droit d'Asile'<sup>3</sup> (Amanda, NGO worker, Brussels) could help decision-makers at both

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<sup>3</sup>A regular summary of asylum case law developments to support the work of asylum practitioners and decision-makers: <http://www.cnda.fr/Ressources-juridiques-et-geopolitiques/Actualite-jurisprudentielle/Bulletins-et-notes-juridiques-de-la-CNDA>.

administrative and appeal levels to remain up-to-date with latest developments in specific asylum areas, including SOGI asylum. Governments should provide flexible working conditions, career breaks, and appropriate forms of staff support to help caseworkers avoid burn-out, recover from vicarious trauma and prevent desensitisation. As Helena, an EASO staff member, shared with us, counselling or support for decision-makers is not common, not even in the wealthiest administrations. We heard that those working in the asylum system for more than 2 years are highly likely to experience vicarious trauma or burn out. As Helena pointed out, it is almost impossible not to be affected by listening to stories of war, rape and torture, and the easiest response is to stop believing those stories. Deirdre, a lawyer in the UK, shared similar concerns about Home Office staff:

I think they can become desensitised. I mean, that is what can happen. That's the risk, that you become so exposed to it, so exposed to it that you do to protect yourself and how you are feeling, you almost try and close the door and it is just words, it is just words.

It should go without saying that career progression in decision-making bodies should in no way be related to the number of rejections or grants of international protection that officers produce, as some of our participants suspect happens in some countries, even if unofficially (Thomas, NGO volunteer, Germany).

We heard different opinions about who is best placed to make SOGI asylum decisions, recognising the inevitable limitation of any individual decision-maker in light of the intersecting characteristics of each claimant:

you can provide training but I think there is a limit to the amount that you can provide, because you cannot also expect each officer to be fully versed in LGBTI issues but in also issues to do with minors and to do with different races and religions and so on. (Jules, staff member at ILGA-Europe)

A corollary of this may be that caseworkers should specialise in one area, for example SOGI asylum, and all such claims should be allocated to those caseworkers; such specialised caseworkers might then form units specialising in and pooling expertise on SOGI claims (Frank S., legal advisor, Germany; Diana, Germany; Milad, Germany). This is already the case in some countries: for example, Sweden and Switzerland have SOGI specialist caseworkers, Belgium and France have specialised Gender and SOGI Units, and Germany covers SOGI under the umbrella of gender-specific units (AIDA and ECRE 2019, p. 11; European Migration Network 2016). This could also apply to the judiciary, with a survey respondent suggesting that 'LGBTQI people should be judged by judges who are experts in lgbtqi issues' (S152, NGO volunteer, Italy), however our focus is on better training for all judges.

Different types of cases may indeed require different skill-sets and even mind-sets: 'every now and again you might get an LGBT claim thrown in, in my diary, my scheduling, so if I haven't done any LGBT for a couple of months, then all of a sudden "right, Monday morning, I have got an LGBT interview", it is really difficult because you are trying to get back into that frame of mind' (Qasim, decision-maker,

UK). Nonetheless, specialisation is not a guarantee of quality, and has risks relating to saturation and the development of cynicism regarding certain narratives and types of issues (Evelyne and Anne, lawyers, Germany). Consequently, while there may be arguments in favour of specialisation – in relation to SOGI asylum – the priority should instead be on improving training, shadowing, mentoring and staff welfare measures. Specialised units could be framed broadly, for example encompassing gender-based violence and SOGI (as is the case in Germany), to ensure decision-makers have the necessary skills to deal with more complex but often interrelated and overlapping claims. However, as important as expertise on the part of decision-makers is the willingness to reach out and network with other ‘experts’:

but in a large part also facilitating really good connections between them and organisations that are specialised in LGBTI issues (...) So, recognise that no single organisation and no single person can be an expert in everything, but that if you can network the organisations with their respective expertise, that they can then support each other in that way. (Jules, staff member at ILGA-Europe)

SOGI awareness and competences should, in any case, be mainstreamed across all public (as well as NGO and support) services, as any asylum claimant may be LGBTIQ+ and any LGBTIQ+ person may be an asylum claimant (Portman and Weyl 2013, p. 45).

As explored in Chap. 6, some participants have suggested that more decision-makers should be LGBTIQ+ themselves (William, Germany; Veronica, Germany; Alphaeus, Germany). A caseworker’s SOGI is obviously no assurance of the quality or fairness of their decision-making, and during our fieldwork we heard of LGBTIQ+ decision-makers relying excessively (even inappropriately) on their personal experiences and beliefs to assess SOGI asylum claims. Whether or not some form of positive discrimination would be viable or useful, it is important to ensure decision-makers dealing with SOGI claims do not hold homophobic or transphobic views, as has been done in the USA (Sridharan 2008). Aside from any specific measures to ensure that decision-makers on SOGI asylum claims are aware of and sensitive to the needs of these groups of claimants, they should, of course be complying with equality and human rights law and guidance more broadly, relating to sexual orientation and gender identity, but also to ‘race’, gender, disability, age, and religion or belief. In the UK, employees in public bodies should go further than simply refraining from discrimination to positively promote equality of opportunity under the Equality Act 2010. And recruiting a diverse workforce is now recognised as good practice in most employment contexts, whether in the public, private or voluntary sector: the Home Office, the BAMF and the territorial commissions in Italy should be encouraging recruitment of SOGI minorities, just as they should be encouraging applications for decision-making posts from members of all under-represented groups in society.

Finally, country of origin knowledge is so critical to SOGI (and other) claims that asylum authorities should explore the possibility of allocating caseloads on the basis of staff members’ country-specific understanding. This already happens to some extent in Germany and ‘enables caseworkers to gain in-depth knowledge of

the general situation prevailing in the countries of origin of applicants, which helps to ensure an accurate and appropriate assessment of the circumstances surrounding the application' (AIDA and ECRE 2019, p. 12). To combat possible desensitisation, this approach again needs to be complemented by high-quality training, shadowing, mentoring and staff welfare measures.

Once criteria are established to allocate cases to certain caseworkers – including a certain degree of specialisation, as described above – the screening interview should be used to identify the most appropriate interviewer for the main, substantive interview (Alphaeus, Germany), as already done, at least informally, in some territorial commissions in Italy. Guidance should prompt selected caseworkers (and also judges) to be honest in recognising their limited knowledge and skills (Titti, decision-maker, Italy). This may mean suspending interviews on occasions, or calling in a more experienced colleague, or postponing the interview until such a colleague is available, or scheduling a second interview to ask for further clarification and build on previous questions on the basis of knowledge the interviewer may have acquired subsequently. The same is true for appeal hearings.

Finally, on the matter of whether the interviewer and the decision-maker should be the same person or not, those participants who expressed an opinion about it favoured combining both roles in the same individual (Daniele, decision-maker). This solution facilitates the comprehensive use of all evidence gathered throughout the interview, including non-verbal cues and the claimant's demeanour, although it is important that these are not interpreted on the basis of cultural, hetero or cis-normative or any other kind of stereotype. This may help to avoid depersonalising the claim and objectifying the claimant. Combining the role of interviewer with that of decision-maker should also contribute to quicker, but no less rigorous, decision-making. A peer-review mechanism can help avoid any risk of loss of objectivity, especially in case the first decision proposed is negative (Jansen 2019, p. 124).

### ***11.3.2 Procedural Rules***

Asylum adjudication procedures are one of the key elements of SOGI claimants' overall experiences, and have therefore been a focus for recommendations (Hruschka 2019; Jansen and Spijkerboer 2011). Although the nature of the procedure – adversarial, inquisitorial or mixed – was used as one of the criteria to choose the country case studies (Chap. 2), our analysis did not reveal significant differences for SOGI claimants on account of that element in particular. Instead, a problem that very many of our participants raised was the length of time that the asylum process takes (Chap. 6). We heard of the terrible impact this has on claimants:

at least to consider the amount of time they keep people in asylum, because now they are psychologically damaging people who would have made a positive impact on the economy

or something, but people now get out of this and end up just maybe being on benefits because they have forgotten themselves, they have lost themselves. (Jayne, UK)

Many of the participants in our research thus highlighted the need for ‘quicker decision making’ (S8, NGO worker, UK), a ‘clearer process, less dragged out’ (S74, NGO volunteer, UK), and believed that to ‘make the process quicker definitely helps’ (C50, UK). Speed should be complemented by greater consistency: ‘And I think in general the system needs to have clear dates and outlines of... this waiting without knowing when [you will get a decision] is very difficult for people to deal with’ (Halim, Germany).

Nonetheless, speed should not come at the price of lower standards in decision-making or fewer procedural safeguards, as it is often the case in accelerated procedures (Chap. 6). Shorter procedural deadlines may undermine the capacity of SOGI claimants to prepare adequately and present their case effectively:

give them time to be prepared for the asylum or how to present their case, and don’t use the fact of that we have to do it fast, fast, fast, to finish the procedure. Because some people don’t know what to speak, don’t know what to say. Maybe they faced violence, maybe they faced discrimination, but they don’t know that they have to say it. (Ibrahim, Germany)

Ibrahim, along with several other participants, thus advised against placing SOGI claimants in fast-track or accelerated procedures (S119, NGO worker, Germany; Noah, NGO social worker, Germany). A quicker process must never be at the expense of a fair and individualised assessment.

An important aspect in this respect is the notion of ‘safe country of origin’, which is often the basis for fast-tracking an asylum claim (Chap. 6). Importantly, countries listed as ‘safe’ by domestic authorities are anything but safe for SOGI minorities:

look at how many trans women have been killed in Turkey in the last five years (...). So, as long as we accept that as a reality, I think more and more people will say “then I have no choice but to leave this country”. (Terry, member of the European Parliament)

Our recommendation is that the notion of ‘safe country of origin’ is inappropriate in general, but certainly for SOGI claims, as even countries with a generally good human rights record may be unsafe for SOGI minorities (Ferreira et al. 2018). Our participants were also of this opinion, arguing that asylum claims should rely purely on individual assessments, according to IRL and IHRL (Chap. 3).

Alongside the speed of the procedure, participants were generally adamant that the interview environment needs to be considerably improved: ‘Making the process gentle is very important!’ (C50, UK) The interviewing technique needs to be made less intimidating and decision-makers should adopt a kinder and more empathic style, as well as being more open to hearing the claimant (Evelyne and Anne, lawyers, Germany). As Mara, a lawyer in Italy, recommended, ‘they [interviewers] should have adequate preparation to do the interview with serenity and try to understand who is in front of them’. She stressed the need for empathy to be established in the interview.

Following the example provided by Titti, a decision-maker in Italy, which was explored in Chap. 6, this may entail using more neutral locations, the

decision-maker should introduce themselves, ask if the claimant has any questions before starting the interview, explain that the claimant should feel confident and secure in expressing their opinion and thoughts. It may help to start with some ‘small talk’, ensure claimants feel at ease by offering them breaks, a glass of water, etc., and perhaps even say something like ‘you know, we’re both here, [I know] it’s not going to be easy, [but] try to give as much as you can’ (Emily, decision-maker, UK). Participants also emphasised that ‘[w]e should be given enough time during the interview and with some time to relax’ (C38, Germany). To ensure this empathetic environment, decision-makers should adopt the terms used by SOGI asylum claimants to describe themselves (unless the terms are pejorative) and refer to their circumstances in a manner consistent with the relevant COI, avoiding Eurocentric perceptions (Helena, EASO staff member). Creating an atmosphere conducive to open disclosure by the claimant also means ensuring interviews are carried out in a private setting, confidentiality is respected by the interviewer and also by any interpreter or third part present, and explaining this to claimants to make sure that they are confident that this is the case (Breen and Millo 2013, p. 56). This is an issue that particularly needs to be addressed in the context of the first, ‘screening’ interview (Livio, lawyer, Italy), often held in large and semi-public spaces.

Integral to building a trusting relationship is adopting a ‘stage-by-stage approach’ during the main interview, whereby each time period of the claimant’s journey and each relevant issue is dealt with in turn and at an appropriate pace. This allows for adequate exploration of issues (Sofia and Emma, NGO workers, Germany), gives the opportunity to claimants to clarify any apparent contradictions, and renders the overall interview experience less stressful and traumatising for the claimant. SOGI asylum interviews should be based on neutral, open-ended questions that interviewers can adapt as they see fit, but which are the starting point for the interview.

Some participants also suggested that claimants should be able to ask for a different interviewer, not only on grounds of gender but also religious belief and ethnic or national origin, where the interviewer’s identity is likely to inhibit the claimant in responding. Although respecting such preferences could be seen as discriminatory towards the interviewer and would in many contexts be considered unjustifiable (Chap. 6), we submit that the asylum system’s core concern should be to deliver fair decision-making. If that requires – under certain limited circumstances and without breaching equality principles or law – the replacement of an interviewer to facilitate more open testimony, then asylum agencies should allow it (Ferreira et al. 2018).

Besides the interviewer, another key actor in the interview setting is the interpreter, whose role was a concern for many participants (Chap. 6). Such concerns related to the interpreter’s gender, religious beliefs, ethnicity and, more importantly, their sensitivity towards SOGI matters. All these factors may have an impact on the quality of the interpretation and atmosphere of the interview, so great care needs to be taken in the choice of interpreter (Shany, Germany). Public authorities should also ensure interpreters have appropriate training (Sect. 11.6) and be open to replacing them when claimants do not feel confident speaking openly not only because of the interpreter’s sex/gender but also religious belief or ethnic or national origin (Ferreira et al. 2018).



Another important participant in the process – sometimes striking for their absence – is the legal representative. Our participants' concerns about asylum legal representation are the basis for a number of important recommendations. In light of the issues discussed in this regard in Chap. 6, legal representation should be not only available, but also compulsory and supported through legal aid from the start of the process; in other words, not only at appeal, but also at administrative level (C3, Germany; S57, NGO volunteer, UK; S141, NGO worker, Germany; Noah, NGO social worker, Germany; Nazarena, lawyer, Italy; Hruschka 2019). By securing free legal representation even before the screening process, potential claimants will be able to understand the possible grounds on which they can claim asylum and how to prepare their initial claim (Sofia and Emma, NGO workers, Germany; Giuseppe, lawyer, Italy; Daniele, decision-maker, Italy; Right to Remain 2019). Moreover, if members of SOGI minorities receive legal support before they submit their claims, they are more likely to file well prepared and credible asylum claims, avoiding the likelihood of a refusal and the costs to all parties of going through an appeal (Held et al. 2018).

This approach extends to ensuring access to legal representatives and to NGOs offering legal advice for claimants living in detention and accommodation centres, as well as at hearings. In Germany and Italy, in particular, the presence of the legal representative in interviews was seen as important (Thomas, NGO volunteer, Germany; Nazarena, lawyer, Italy). Where no free legal representation is available at administrative level, then independent legal advice and information by NGOs should be guaranteed. Alternatively, reception staff and accommodation centres' staff should be trained to assist claimants in producing their personal statements, as happens in the Italian accommodation system, providing that the quality and independence of such support can be ensured (Chap. 8). In short, participants were adamant that the quality and availability of legal advice and representation must improve (S74, NGO volunteer, UK).

Although the claimant, interviewer and interpreter (or language mediator) are usually the only actors present at the interview, several participants argued for allowing supporters to be present, at least at the main interview. This helps reducing the power imbalances that characterise an asylum interview (Daniele, decision-maker, Italy; Giuseppe, lawyer, Italy). Where supporters are present at appeal hearings, the positive effect this has on claimants' confidence is palpable (Court observation, Hesse, 2018; Tribunal observation, northern Italy, 2018). A further way of empowering claimants, while also improving the credibility and transparency of asylum systems, would be to introduce and effectively establish an accessible and accountable complaints system (Noah, NGO social worker, Germany; Frank S., legal advisor, Germany; Barbara, lawyer, Germany), covering the roles of interviewers, decision-makers or interpreters. This should go hand-in-hand with strong quality assurance and control mechanisms (AIDA and ECRE 2019, p. 58).

In any asylum claim, the claimant's testimony and evidence should be considered alongside the available COI, as discussed in Chap. 6. In this regard our participants recommended that the quality of COI urgently needs to be improved, that there should be more SOGI-specific information available, and that similar COI

should be available and used more widely throughout the EU. As pointed out by Roberto, a decision-maker in Italy, the poor quality of COI in some countries, as in Germany and Italy, seems to coexist with the danger, particularly in the UK, of using COI as ‘mathematical models’ leading to automatic conclusions regarding asylum claims. It is therefore necessary not only to improve the quality of COI, but also to use it in an appropriate and individualised manner. Even when SOGI-specific COI exists, its focus on persecution can be problematic when the country in question does not criminalise same-sex acts, does not enforce those laws, or has just recently repealed them. SOGI-specific COI needs to cover a range of aspects related to the legal and social experiences of SOGI minorities and go well beyond broad-brush generalisations about country conditions for them. To achieve this, and inspired by practices and proposals of some social and NGO workers in Italy (Valentina, social worker; Vincenzo, LGBTIQ+ group volunteer), NGOs in the countries of origin concerned might be invited to contribute to the production of COI, always recognising that the quality of any contributions would need to be assessed (McNeal 2019). Finally, in terms of rendering COI of greater European application, EASO has made a significant contribution, including in relation to SOGI-specific matters (EASO 2015), and we recommend that EASO further develops the provision of accurate SOGI-specific COI, and that decision-makers make better use of this material.

The Dublin system was another matter of concern and basis for recommendations from our participants. The pending reform of the Dublin Regulation will need to review the criteria in place for allocation of responsibility to a state for a given asylum claim, while addressing the specific needs of asylum claimants, including SOGI claimants, and ending the inhumane practice of transfers of people between EU countries. As analysed in Chap. 6, current Dublin rules throw claimants – very often SOGI claimants as well – into situations of stark uncertainty and although many claimants cannot be returned to the country of first entry in the EU for practical or legal reasons, they become involved in protracted legal and administrative processes while efforts at their social integration are inadequate (Louis, NGO volunteer, Germany; Susanna, social worker, Italy). We recommend that EU institutions collaborate in the context of the CEAS reform to achieve a more humane system, one that allocates responsibility for asylum adjudication to member states in light of criteria that are more in tune to SOGI claimants’ needs and rights, such as family and other personal connections, cultural background, linguistic knowledge and protection of SOGI minorities.

At the appeal stage, and as with administrative-level interviews, improvements need to be made to the environment in which hearings take place. There needs to be greater consistency in the way that judges treat claimants: they should always be respectful, demonstrate cultural sensitivity, and use the pronouns preferred by the claimants. All judicial authorities should develop a code of conduct that encompasses rules on these matters, with a focus on equality, diversity and fairness, similar to the UK Equal Treatment Bench Book (Judicial College 2018). There must also be measures in place, such as induction and training, to ensure that all judges are familiar with and apply such codes.

A question of particular importance in the Italian context is the removal of the claimant's entitlement to be heard in person in case of appeal. This is no longer a statutory obligation, and only happens when the judge (or legal representative) asks to hear the claimant rather than simply relying on the recording of the claimant's interview with the territorial commissions (Chap. 6). Although this can have advantages such as not re-traumatising the claimant, it prevents the judge from requesting clarification and eliciting further information directly, and risks depersonalising the asylum claimant in the eyes of the judge. We recommend that judges ask to hear the claimant in person whenever possible, and particularly when they are inclined to reject the appeal.

The recommendations above would contribute to fairer asylum procedures that, in turn, may influence positively the asylum claim determination.

### ***11.3.3 The Asylum Claim Determination***

As we discussed in Chap. 7, asylum adjudicators need to engage with the range of international protection alternatives available within their legal system and the requirements for each one of these alternatives. The ultimate aim for SOGI – as for all – claimants is to obtain refugee status under the Refugee Convention, and reach a point of stability and security, where the full spectrum of their human rights is respected in the host country. To provide meaningful international protection, the narrow definition of a refugee under the Refugee Convention should be broadened by encompassing human rights law more consistently than is currently the case, in line with the approach outlined in Chap. 3. As such a development is unlikely in the current political context, here we concentrate on more realistic and pragmatic possibilities.

The first logical step in the substantive assessment of a SOGI asylum claim – determining the ground that is the basis for claiming asylum – generally consists in establishing the claimant's membership of a PSG (Chap. 7). Our first recommendation in this regard is for decision-makers to also consider grounds for claiming asylum besides membership of a PSG, such as political or religious belief. Recognition of the multiple and intersecting grounds for claiming protection would better recognise the many factors and identities that are the basis for persecution, in line with our feminist and queer theoretical underpinnings (Chap. 3), and as supported by a large body of literature on intersectional discrimination and beyond (Macklin 1995; Markard 2016; Solanke 2009; Verloo 2006). Some of our participants (Sofia and Emma, NGO workers, Germany) argued that establishing membership of a SOGI minority in case of countries of origin where persecution of SOGI minorities is widespread should suffice to grant international protection, without the need for evidence of individual persecution. While this may be desirable, establishing individual persecution is at the heart of IRL, and in that context, our recommendations focus more, not less, on the specific circumstances of the individual. However, we do recommend that establishing membership of a SOGI minority be done on two

bases, as has been already recognised in case law at EU and national level: first, the recognition that ‘objectively proving’ a claimant’s SOGI is an impossible task, no matter whether the focus is placed on the claimant’s identity or behaviour, as identities are complex, fluid, and develop in culturally specific contexts (Chap. 3); second, actual membership of a PSG is secondary, as *perceived* membership is the relevant issue (Ferreira and Venturi 2018; UNHCR 2012, para. 41).<sup>4</sup>

The second logical step in the asylum claim assessment – assessing the risk of persecution – has also been the object of recommendations by our participants. The most important of these relates to the need to follow the law in adopting a more appropriate (lower) threshold for determining what constitutes persecution (Elias, lawyer, Germany; Chap. 7). Furthermore, the risk of persecution needs to be assessed using the human rights analytical underpinnings delineated in Chap. 3. Although it is a battle that appears to have been won in most legal systems, there is still a need to increase awareness of the role, importance and impact of persecution by private actors in the context of international protection (Gisela, lawyer, Germany), as well as of the need for adequate verification of the reasons why protection by country of origin’s authorities is not available in these cases.

Whether or not the criminalisation of same-sex acts in the country of origin should suffice to make a finding of persecution was a concern for our participants. Such criminal laws – whether enforced or not – lead to stigmatisation, victimisation, blackmail and increased vulnerability to degrading treatment, sometimes including torture. The mere existence of criminal laws should therefore, according to several authors, be recognised as persecutory (Bejzyk 2017; Jansen and Spijkerboer 2011). The fact that Italian Supreme Court case law has also taken this approach gives SOGI asylum researchers and activists a weapon for campaigning to extend this approach (Danisi 2019; Jansen and Spijkerboer 2011).<sup>5</sup> We add our voice to theirs in recommending that criminalisation of same-sex acts should suffice to make a finding of risk of persecution for the purpose of granting international protection.

Similarly, it is indisputable that there remain traces of ‘discretion reasoning’ in asylum adjudication in Europe when determining the risk of persecution (Chap. 7). These traces need to be eliminated (Elias, lawyer, Germany; Beth, lawyer, UK), because decision-makers should ‘not tell people to change who they are so that [they can] live’ (C59, UK). To achieve this, greater abidance by CJEU jurisprudence prohibiting ‘discretion reasoning’ – namely the decision in *X, Y and Z* – is recommended (Louis, NGO volunteer, Germany). Still in the context of assessing the risk of persecution, we also recommend that decision-makers develop a more acute understanding that there are no internal relocation alternatives in most cases of SOGI asylum claims (Sofia and Emma, NGO workers, Germany).

Our recommendations relating to the standard and burden of proof are largely prompted by our participants’ direct experiences. First, decision-makers must keep

<sup>4</sup>Case C-473/16, *F v Bevándorlási és Állampolgársági Hivatal*, Judgment of the Court of Justice of the EU, 25 January 2018, ECLI:EU:C:2018:36, paras. 31–32; Italian Supreme Court, decision no. 2875, 6 February 2018.

<sup>5</sup>Decision no. 15981, 20 September 2012; judgment no. 11176, 27 February 2019.

uppermost in their minds that the applicable standard of proof is only to a ‘reasonable degree’ and take far more seriously than at present the principle of the benefit of the doubt (Chap. 7). As one participant said, there needs to be ‘[p]roper adherence to the low standard of proof (refusals are made too often without real reason)’ (S114, lawyer, UK). The burden of proof is to be shared between the claimant and asylum authorities, as clearly stated by the UNHCR (1998, para. 6, 2011, para. 196) and recognised by high judicial instances.<sup>6</sup> In this respect, ECRE rightly points out that ‘it is crucial that determining authorities have sufficient financial resources at their disposal to conduct a thorough and rigorous assessment of the application, especially where it includes gathering information and evidence by their own means’ (AIDA and ECRE 2019, p. 26). There are, however, proposals for going further than this and using the reversal of the burden of proof in asylum law, as happens in discrimination law (Network of Legal Experts in the Non-Discrimination Field 2015). One of our participants (who asked to remain anonymous) argued that we should reverse the burden of proof and that it should be for the authorities to prove that a claimant should not be granted international protection once claimants put forward what – at least at first – seems to be an overall believable claim.<sup>7</sup> This is a bold, but interesting avenue of reform, which has the potential to rebalance the power dynamics in the asylum process. Whether or not it is explored further, adjudication authorities need to adopt a more proactive approach in collecting information that may confirm claimants’ claims (as the Italian judiciary has defended – Sect. 7.4, Chap. 7), and not dispute minor facts and small points of evidence submitted in order to dismiss a claim, as so often happens at present.

As for forms of evidence, here there is much scope for improvement. One of the gravest concerns is decision-makers’ expectation to have evidence – even if only in the form of personal testimony – pertaining to very personal and private aspects of claimants’ lives. Although decision-makers should by now be aware that no evidence of a sexual nature should be elicited or accepted, we saw in Chap. 7 (Sect. 7.4.2) that in all three country case studies lines of questioning may be excessively sexualised. Our participants were adamant that decision-makers need ‘[t]o stop asking private sex questions to asylum seekers who are LGBT just to prove that they’re LGBT people’ (C53, UK) and that ‘during the interview asking people questions to do with their bedroom should stop because most of these are so embarrassing not only to us but also to the interviewers’ (C38, Germany), something reiterated by several other participants (C59, UK; S121, lawyer, UK; Christina, UK). While sexually explicit evidence is rarely solicited or accepted, the dismissive attitude of authorities in relation to other evidence provided then puts indirect pressure on claimants to provide details of an intimate nature (ICIBI 2014, p. 29). More generally, the type of evidence expected and how it is elicited need to be more culturally

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<sup>6</sup> Italian Supreme Court, decisions no. 9946, 19 April 2017; no. 26921, 28 September 2017.

<sup>7</sup> In technical terms, this is termed establishing a *prima facie* case, in other words, creating the appearance of a case.

and socially sensitive, requiring a greater level of sophistication and tailoring by decision-makers:

So it is one thing I would emphasise, BAMF should look at that, the evidence that it asks for people, normally it is hard to get. Or people were not in the position of getting it. You are running for your life, you're in big trauma, you're in fear and now you're taking a selfie or you're recording voices?!. (William, Germany)

I've been dealing with 16/17 year olds who can't read or write, you have a greater perception of how to interview them if you know the context. I mean, a person who can't read the clock, you'll know that you'll have to ask him if it was day or night, "was it before or after Ramadan?"... and not "what month was it". (Roberto, decision-maker, Italy)

In order to respect claimants' sense of personhood and autonomy, self-identification should be the default position (Hinger 2010, p. 405) and starting point for any asylum determination process. The burden of proof should then be on the authorities to find evidence negating the claimed SOGI, and any such evidence would need to be carefully analysed. More generally, lines of questioning should avoid implicitly assuming the claimant's lack of credibility:

if you feel that you are under a lot of pressure, if you feel that this is an interrogation, and not so much an open discourse or something like that, probably the stress level is absolutely high and then maybe also wrong findings are much more likely. So I think it is actually in the interests of both sides that there is a process and a procedure put in place that gives the space to tell the stories, and then to grant asylum on the basis of that. (Terry, member of the European Parliament)

An open line of questioning is essential to develop the trusting relationships that lead to good decision-making:

And then to open up about something that makes you even more vulnerable, that just takes time and it takes trust and so if you have... officials and/or interpreters who really understand it and actually are able to express it and convey it and develop this trust with people, I think that is honestly the only real way, [it] is through conversation, because each individual is individual. (Jules, staff member at ILGA-Europe)

Credibility assessment, being the crux of the matter in most asylum claims (Chap. 7), deserves careful consideration. First and foremost, the '[c]ulture of disbelief must go' (C58, UK). Determination systems need to change so that decision-makers do not adopt as default position that asylum claimants are lying, a point that was made repeatedly during our fieldwork – and in all three countries (Kadir, NGO worker, Germany; Maria Grazia, decision-maker, Italy; S74, NGO volunteer, UK). Credibility assessment also needs to be conducted in a culturally sensitive manner and responsive to individual circumstances, rather than based on stereotypes related to SOGI (or any other characteristics). This affects how interviews are carried out and decisions reached: besides not basing the credibility assessment of claimants on stereotypes, authorities need to 'give more context to the applicant's history' (S106, lawyer, Italy). We reject the CJEU's assertion that 'questions based on stereotyped

notions may be a useful element'.<sup>8</sup> On the contrary, stereotypes should have no bearing on the assessment of a claimant's membership of a SOGI minority; any stereotypes will necessarily rely on Western understandings of SOGI, and also be racialised, gendered and class-based (Chap. 3). Accepting stereotypes is in inherent conflict with the individualised approach that is the basis of refugee law, and should be abandoned as a component of decision-making (ICIBI 2014, pp. 26–27).

Decision-makers also need to move away from the range of prejudices explored in Chap. 7, such as the belief that proving SOGI depends on having a partner: 'I wish the decision makers would change their mentality of expecting that every LGBTQI person should have a partner before going to the interview. For someone who went through a traumatising situation it's not that easy' (C37, Germany). It should also be irrelevant how a claimant 'performs' their SOGI, for instance how they dress or socialise (Helena, EASO staff member), and little weight should be placed on 'late disclosures' as such, in line with the CJEU decision in *A, B and C* (Ferreira et al. 2018). In short, credibility assessment needs to be carried out more carefully, negative assessments of credibility need to be better justified by making appropriate use of COI (Nazarena, lawyer, Italy) and more trust needs to be placed on evidence – particularly the personal testimony – submitted by claimants (Amanda, NGO worker, Brussels).

If a decision to grant international protection is made, then it should most commonly be refugee status, as subsidiary protection and humanitarian protection are in most circumstances not legally appropriate for SOGI claimants. Furthermore, legal statuses should entail residence permits of longer duration than currently exists in most states,<sup>9</sup> so that beneficiaries of international protection have enough time to recover from the ordeals many of them have gone through and can start to integrate in the host country (Bebars, Germany). Freedom of movement within the host country, as well as within the EU, should be facilitated (Marlen, legal advisor, Germany). If international protection is denied, it is unacceptable that 'people [are] removed before they can properly explore avenues to stay' (S57, NGO volunteer, UK). Removal is also frequently connected to detention and accommodation, to which we now turn.

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<sup>8</sup> Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*, 7 November 2013, ECLI:EU:C:2013:720, para. 62.

<sup>9</sup> EU Member States issue residence permits to beneficiaries of refugee status for a period of 3 years (ten countries), 4 years (one country), 5 years (eight countries), 10 years (two countries) and permanent duration (six countries) (ECRE 2016, p. 10). We recommend residence permits be of permanent duration, and at any rate of the longest duration possible, but never shorter than 5 years.



## 11.4 Detention and Accommodation

Accommodation and detention issues explored in Chap. 8 were the focus of much concern by our participants.

The question of whether or not there should be SOGI-specific accommodation became an increasingly live issue during our fieldwork. The majority of our participants recommended the provision of accommodation exclusively shared by SOGI claimants, across Germany (Veronica; Thomas, NGO volunteer; Frank S., legal advisor; Milad; focus group no. 1, Hesse), Italy (Kennedy; Odoa; Antonella, LGBTIQ+ volunteer) and in the UK (Melisa, NGO worker). This would ensure ‘that people can support each other and [do] not have to be “in the closet” in their own homes for fear of discrimination’ (S74, NGO volunteer, UK). We share this recommendation to the extent that we believe that SOGI-specific accommodation should be made available, but also believe that such accommodation facilities need to be discreet, of small scale, and only used upon confirmation that the claimants in question prefer it to general asylum or refugee accommodation, to ensure the safety and self-determination of claimants. Good experiences have been reported by refugees in Nairobi (Kenya) who have chosen to live in separate LGBTIQ+ accommodation with their costs covered (Breen and Millo 2013, p. 55).

In line with our human rights, feminist and queer analytical lenses, we would thus put the emphasis on safety, on the one hand, and on autonomy and freedom (Chap. 10), on the other, rather than endorsing assumptions about what is best for claimants. To ensure safety, we recommend a system of certification of accommodation facilities as ‘LGBTIQ+ friendly’, as already in place in Sweden (European Migration Network 2016), although one might well argue that *all* accommodation should be SOGI-friendly, welcoming and safe. This would require, amongst other things, mandatory training for staff and regular monitoring. Accommodation should be tailored to meet claimants’ needs, and claimants should have as much choice as possible about the area where they live and the type of housing they live in. To avoid putting claimants in situations of social isolation and hostility, access to appropriate information, support groups and social activities needs to be ensured (Ibrahim, Germany; Louis, NGO volunteer, Germany; Kadir, NGO worker, Germany; Jonathan, LGBTIQ+ group volunteer, Italy; Gary, NGO worker, UK): ‘People should not be given accommodation far away from the places where there are facilities for LGBT people such as advice centres, places of worship’ (S86, NGO volunteer, UK). There are particular concerns for trans claimants, making trans-specific accommodation upon request a priority (Kamel, Italy; Celeste, social worker, Italy).

We have some recommendations that are common to SOGI-specific and general accommodation facilities. First, ‘camp-style’ accommodation should be discontinued where it still exists, and ‘regular’, less conspicuous accommodation should be provided to facilitate social integration for both claimants and refugees (Halim, Germany; Tina, Germany; Chiara, NGO worker, Italy). Second, consideration should be given to individual and group dynamics in accommodation design, to reduce instances of the kinds of harassment, bullying and violence that our

participants have experienced (Chap. 8). There may be tensions between SOGI claimants and their co-nationals: ‘There should be greater attention to the problems that can be created within the reception centres between LGBTIQ+ people and compatriots’ (S106, lawyer, Italy). Third, when issues and conflicts do arise in the accommodation allocated, it is important that these be addressed in a way that respects minorities, equality and diversity (Kennedy, Italy). If wished, transfer to more appropriate accommodation should be facilitated, especially to larger cities to avoid social isolation (S119, NGO worker, Germany; Fares, Germany). Fourth, privacy should be respected (Dev and Fred, Italy), including in shared toilet and bathroom areas. Fifth, accommodation facilities and housing more generally – when not managed by public entities – should not be contracted out to organisations that reflect excessively conservative or religious values (Celeste, social worker, Italy) or who recruit staff from extremist (racist or homophobic) organisations (Komaromi 2016), where there is a risk that SOGI claimants will feel coerced to stay ‘in the closet’. Accommodation providers, whether public bodies or private contractors, need to be compliant with LGBTIQ+, gender, ‘race’ and other domestic equality law and good practice. This needs to be monitored and publicised to ensure that claimants have confidence in their accommodation-providers. Sixth, and relating to the previous point, information dissemination and awareness raising in accommodation facilities is crucial. This concerns asylum in general, but also SOGI in particular:

It is also important that in accommodations, there are various flyers or something like that, [to make it clear that] there are LGBT people, this is quite normal, maybe that is not normal for you but still you need to get used to that, they [SOGI claimants] want to have some support here, you shall behave yourself as it is stated in the law, and for other people in the accommodation say that it is also quite OK. (Julia, Germany)

As further explored in Sect. 11.6, accommodation facilities should support training and events led by LGBTIQ+ organisations to raise awareness of SOGI equality and rights (Giulia, LGBTIQ+ group volunteer, Italy).

Detention is a matter that, although affecting the UK in particular, merits general attention. If we had to choose a single recommendation here, it would undoubtedly be that ‘no asylum seeker should be detained’ (S83, religious minister, UK) and to ‘end immigration detention for all’ (S74, NGO volunteer, UK). Detention may be particularly traumatic for SOGI asylum claimants as we saw in Chap. 8, and we were told on several occasions that there should be ‘no detention of LGBTIQ+ asylum seekers’ (S57, NGO volunteer, UK). Unsurprisingly, therefore, our recommendation is that there should be no detention of SOGI claimants. This is supported by a presumption that detention is an injustice to any individual who has not been charged with or found guilty of a crime, and that includes all asylum claimants, although our focus here is on SOGI claimants.

Finally, provision of accommodation should not cease as soon as, or soon after, international protection is granted to SOGI claimants. Rather, it is essential that SOGI claimants – as asylum claimants more generally – retain access to publicly-funded accommodation for a period sufficiently long to allow them to find

alternative accommodation, while searching for work, accessing education or making other suitable arrangements for their particular circumstances.

These recommendations should go a long way to improving SOGI claimants' accommodation experiences. Yet, outside the place where they live, they also meet considerable challenges, including in the fields of health, work and education.

## 11.5 Life 'Beyond Papers'

Asylum claimants and refugees often live in precarious conditions, with insufficient resources and close to destitution: 'not being able to work, having to survive on very little money – this all forces people into poverty' (S110, NGO volunteer, UK). As we discussed in Chaps. 4 and 9, the social integration of asylum claimants and refugees in general, and those who claimed international protection on SOGI grounds in particular, is under-planned and under-resourced. Countries should move towards an individualised and tailored approach to social integration, to ensure each claimant and refugee is welcomed and quickly recognised as an appreciated member of the host society. Here we make relevant recommendations particularly relating to health, work and education.

Access to health services should be universal, and not restricted to emergency provision. Privacy and specific training stand out as the priorities in this field. To ensure effective access to such services, however, the costs of interpretation and travel need to be publicly provided (whether through health insurance schemes or otherwise). Two particular areas of healthcare must be more responsive to SOGI asylum claimants' needs. First, mental health (Halim, Germany; Ashley, psychotherapist, UK), where there is a need for '[b]etter access to psychological therapies – many [SOGI claimants] are traumatised' (S74, NGO volunteer, UK). Second, hormonal treatment for trans claimants and refugees, including continuity of medical care, confidential treatment of data and respect for claimants' choices to a greater extent (Kamel, Italy).

Access to the labour market has also been highlighted as essential by our field-work participants:

I don't know any refugee who doesn't wish to work (...) social benefits and asylum support are pretty good at the beginning, but people realise very quickly that everything that people would really like to afford is not affordable with that money and people must simply work. (Thomas, NGO volunteer, Germany)

Rules on access to the labour market should be interpreted according to the aim of the EU Reception Directive, rather than in a narrowly restrictive way. In other words, any job should in principle be accessible to asylum claimants after 6 months of filing an asylum claim. Reception centres and accommodation facilities should play a role here: 'the accommodation centre should always provide a training programme in order to enable them [claimants and refugees] to find a job when they go out of the camp' (S4, lawyer, UK). Broader public policies in the field of

employment should facilitate these efforts, including through the creation of part-time jobs and paid training schemes such as the German one (Chap. 9), to allow claimants and refugees to gradually integrate into the labour market and provide them with an independent income. Such efforts would help SOGI claimants and refugees to avoid exploitation, including through working illegally (Just Me, focus group no. 3, northern Italy).

Finally, access to education for SOGI claimants and refugees needs improvement. While education has less of an overt SOGI dimension than the other aspects of service provision and public policy discussed, it is included here because it contributes to the employment potential, social integration and general wellbeing of SOGI (and all) claimants and refugees, in particular their mental health (C50, UK). Participants highlighted the need for better access to language courses, especially where claimants are unlikely to speak the host country language, as was common in Italy and Germany (S8, NGO worker, UK; Diana, Germany; Susanna, social worker, Italy). The right to education of SOGI claimants needs to be respected in a non-discriminatory manner, including on grounds of their 'refugeeness' and the intersection of their various characteristics.

These kinds of educational integration measures should include easier recognition of academic and vocational qualifications from countries of origin, in line with the Qualification Directive (Article 28). This would enable claimants to further their education in the host country and also facilitate integration in the labour market.

A great deal of social care and what we may call 'cultural interpretation' is required to support the social integration of SOGI asylum claimants and refugees in the areas explored above and others. Where appropriate, such social care and cultural interpreting work can be carried out by people of the same country of origin or ethnicity as the asylum claimant or refugee in question, as that may facilitate understanding and rapport (Angel, Germany). These and other aspects transversal to both social integration and the legal adjudication process are now discussed.

## **11.6 Building Capacity and Enhancing Competences**

While legal adjudication and social integration processes are, for the most part, considered separately for analytical purposes, they sometimes pose similar challenges for SOGI claimants and refugees and coordinated action may be needed to address those challenges. As highlighted by our participants, social care needs to go hand-in-hand with the legal process and start simultaneously (Noah, NGO social worker, Germany). Previous chapters in this work have shown that SOGI has a significant bearing on the experiences of claimants and refugees at a legal and social level, suggesting that specific expertise, services and measures are required to address the shortcomings identified at both levels. Here we make recommendations to build the capacity and enhance the competences of different categories of actors encountered by SOGI claimants and refugees, first focusing on training.

Once recruited and trained, good staff need to be retained. Burnout, short-term contracts, low salaries, insufficient funding and promotions make careers in the asylum system short-lived and this has a negative impact on the quality of decision-making and services provided (Sabrina, NGO worker, Germany; Cristina, UNHCR officer, Italy). High turnover of staff also makes it difficult to make the best use of the training that individuals receive, and the skills and experience they develop. Support for those working in the asylum system is essential, to prevent vicarious trauma, burnout and desensitisation, but this generally does not exist (Evelyne and Anne, lawyers, Germany). Employee self-care needs to be adequately resourced, as a corollary of the duty of care that the state has towards its civil servants, just as any employer or service-provider does. It is in the interests of employees and employers but also the basis for sensitive case-work and service provision in the asylum field.

This applies not only to public servants, but also to NGOs and support groups, a point raised by several of our participants and which generated a number of recommendations. Participants saw a need for ‘more support groups within the community’ (S57, NGO volunteer, UK) and with better access to accommodation centres to support residents who wished it (focus group no. 1, Hesse, Germany). Support groups and small LGBTIQ+, asylum and migrant organisations need better resources to provide this kind of individual support, as well as use their experience in lobbying, campaigning and policy work. We were also told that ‘more awareness raising [is] needed in LGBT communities about how they can support LGBT asylum seekers – why people are fleeing persecution, and just how traumatising and unjust the system is’ (S110, NGO volunteer, UK), to address the discriminatory attitudes that subsist within the LGBTIQ+ community (Chap. 10). As with any area of support and service provision, strong protection and safeguarding policies need to be in place in NGOs and support groups that work with SOGI asylum claimants and refugees, to prevent abuse by support workers and volunteers and improve ‘awareness and empowerment for refugees regarding sexual violence’ (Ibrahim, Germany).

Measures to empower SOGI asylum claimants and refugees themselves are crucial. For this to be possible, there needs to be ‘better investment in community development projects for LGBT asylum seekers and refugees – to enable them to effectively self organise, provide an effective social support network and to campaign’ (S5, NGO worker, UK). SOGI beneficiaries of international protection:

should also be supported to give back to the community. They have a lot of experiences and... yeah... people should be accessing some sort of spaces to organise for their communities. And there are definitely natural leaders and people who show up and can start projects and start initiatives or spaces. So there will be empowerment and also helping the new ones to integrate or to make their way. (Halim, Germany)

Across all areas of what we might call the SOGI asylum system – decision making, appeals, accommodation, and other public services – there was a consensus amongst our participants about the need for more and better SOGI asylum training, as already pointed out by the UNHCR (2012, para. 60(iv)). This applies to officials and public employees working in asylum, but also to those acting on behalf of the state (where services have been contracted out, most obviously in accommodation

and reception services) and those offering legal advice and representation to SOGI claimants. SOGI asylum training materials should cover all aspects of an asylum journey, including terminology, procedural safeguards, interviewing technique, substantive status determination, housing, work, health and education, and incorporate the recommendations outlined in this chapter. Training should include how to adopt a caring and sensitive approach (Mariya, NGO worker, Germany), including acquiring skills in empathy, as well as competences in equality and human rights law and policy, and an understanding of confidentiality requirements (Cristina, UNHCR officer, Italy). Furthermore, it should include how to avoid micro-aggressions and minimise power dynamics and imbalances (Kadir, NGO worker, Germany), where to signpost claimants who have particular needs, tools to combat homonormativity (Vincenzo, LGBTIQ+ group volunteer, Italy) and content covering SOGI matters in the most common countries of origin (Nazarena, lawyer, Italy). Importantly, training should address how to avoid re-traumatising claimants:

programmes to train the staff to be more sensitive, not to laugh when these people come through who have been traumatised. I didn't have to go through war to leave my country but I was traumatised in a different way. So you laughing when I mention my country doesn't help me. I might look poised and confident but I'm struggling, I'm panicking, I developed agoraphobia now since I came to Germany. I get panic attacks every now and then in public spaces. (...) It's training with how to deal with traumatised people. (Marhoon, Germany)

Training needs to be adapted to different categories of decision-maker or service-provider. Several organisations have produced good quality SOGI asylum training materials (Gyulai et al. 2013, 2015; IOM and UNHCR 2019; ORAM 2015; Rumbach 2013), but besides the need to ensure these materials are regularly updated and culturally appropriate, there is undoubtedly room to improve their dissemination and impact.

However, adequate training and training materials are unlikely to be a complete solution, as decision-makers and other SOGI asylum system actors may become 'training-resistant' (Barbara, lawyer, Germany). Training needs to take such factors into consideration, it needs to be in-depth and it should be revised and repeated on a regular basis (Breen and Millo 2013, p. 55; Rumbach 2013, p. 42). In the case of Italy, this needs to include all territorial commission members (Maria Grazia, decision-maker, Italy; Chiara, NGO worker, Italy). Owing to the large number of people working or in some way involved in asylum systems in Europe, there may be call for a cascade approach to training; in other words, states should ensure that key officials at a domestic level receive the necessary training, and these officials should then disseminate it to their colleagues. With time, an across-the-board requirement should be introduced that all employees and officials acting on behalf of the state who are responsible for decision-making and/or in direct contact with claimants need to have received training, including a SOGI-specific component, based on UNHCR and EASO guidance.

Having regard to the trends emerged in Chap. 6, different kinds of training are needed for the many different actors that a SOGI asylum claimant will encounter during the asylum process. Staff meeting new arrivals in reception and accommodation centres, or responsible for administering initial or screening interviews, will



need to be well-trained in how to create a safe and relaxed space for people who find themselves in an unfamiliar environment. Asylum adjudicators were also singled out as needing training: ‘They do not have to do diversity training, they do not have to do awareness training, they do not have cultural competence training, nothing, none of this’ (Barbara, lawyer, Germany). As a particular example, Marlen, a legal advisor in Germany, said that ‘it may not be normal in your [decision-maker’s] own life reality that lesbian women have children, but there are other realities in life, and you should probably have already learned that if you go into this [asylum system]’. Equally, in the UK, we heard:

there should be training within the HO [Home Office] on understanding sexuality and gender identity issues. There are often very stereotypical and westernized ideas regarding how someone realizes they [are] LGBTQI and also stereotypical ideas of how they should then live their life. (S126, NGO worker)

Judges hearing SOGI appeals were often recognised as having the required legal expertise, but not the necessary life experience or human skills to deal with these cases (Elias, lawyer, Germany), making ‘more training on unconscious bias for all courts’ a requirement (S57, NGO volunteer, UK) and, more generally:

The people who conduct hearings need to be well trained in LGBTIQ lifestyles. And not only lesbian, gay and bisexuality, but maybe – but not maybe, but certainly – pansexuality, asexuality and gender outside the binary gender system and not ask questions about it, but simply accept how people define themselves. (Mariya, NGO worker, Germany)

Similarly, training for asylum adjudicators needs to raise ‘awareness of LGBTQI+ issues, the difficulties faced by individuals from different cultural backgrounds and encourag[e] questioning of heteronormative assumptions’ (S147, barrister, UK), in line with our queer theoretical underpinnings (Chap. 3). Decision-makers themselves acknowledged the need for greater training, particularly in relation to interrogation techniques, and went so far as suggesting individual coaching by psychologists on how to conduct hearings and interviews (Emilia, judge, Germany; Filippo, senior judge, Italy). Judges may require training in asylum law in general, as very often they are general administrative or family law judges, for example, with no particular knowledge in the field of asylum or even migration (Emilia, judge, Germany). As Filippo, senior judge in Italy, said, ‘preparation means being self-taught’. A more systematic, comprehensive and sophisticated approach to the training of judges is necessary.

Those offering legal advice and representation to SOGI claimants should also benefit from training to be able to deliver their services with the necessary quality: ‘legal professionals should [be trained to] have specific competences in knowing how to identify LGBTQI+ people and how to support users in preparation for the Commission with greater professionalism’ (S106, lawyer, Italy).

Ensuring better trained interpreters and translators (where relevant) was also identified as a priority (S119, NGO worker, Germany; Zouhair, Germany). Considering the importance of the interpreter’s role (Chap. 6), ‘it has to be made sure that... also for the interpreters there is this specific form of training and an awareness around the situation of people who flee on the grounds of sexual



orientation and gender identity’ (Terry, member of the European Parliament). This includes ensuring interpreters are appropriately trained in terms of cultural competences and confidentiality.

NGOs working in this area also have training needs. We were told of the need for ‘equalities awareness within the LGBTI scene to improve migrant integration’ and that ‘LGBTI groups should receive immigration training’ (S8, NGO worker, UK). Conversely, ‘immigration support organisations and immigration solicitors should receive training to increase their LGBTI sensitivity’ (S8, NGO worker, UK). SOGI claimants and refugees themselves might benefit from some training, such as ‘general sensitisation workshops, where not only LGBT themes are treated, but also other forms of discrimination, such as sexism, ableism and, yes, racism’, as well as some knowledge about asylum law and policy (Louis, NGO volunteer, Germany). As part of any training, organisations should develop and implement codes of conduct to ensure SOGI asylum claimants are treated respectfully and adequately (ORAM 2016a).

The quality of training, and the skills and experience of training providers is critical. SOGI asylum claimants and refugees are the main source of expertise here, and should be involved in training decision-makers and service providers to a far greater extent than they currently are, if at all. Other potential trainers include, for example, UNHCR officers, therapists and psychologists, SOGI support groups, NGO and academic researchers (Anne, lawyer, Germany; Barbara, lawyer, Germany; Cristina, UNHCR officer, Italy; Mara, lawyer, Italy; Qasim, decision-maker, UK). NGOs and support groups should give each other training and support, especially when new groups are being set up who may benefit from the experience of more established activists (Giulia, LGBTIQ+ group volunteer, Italy). Good quality training can be complemented by establishing telephone advice lines for everyday queries by lawyers, decision-makers and claimants (Barbara, lawyer, Germany), as well as networks of asylum supporters such as the SOGIESC network hosted by ILGA-Europe.<sup>10</sup>

Frequency of training is another concern. Training courses need to be regularly reviewed and updated, particularly where there is a high staff turnover, with refresher training addressing knowledge and skills in particular areas (Vincenzo, LGBTIQ+ group volunteer, Italy; Cristina, UNHCR officer, Italy), in a form of continuous professional development programme. Both initial and refresher training should be compulsory (Jonathan, LGBTIQ+ group volunteer, Italy). This area of need was highlighted by public officials themselves:

We did do [have follow-up training on SOGI asylum], several years ago, but surprisingly and actually disappointingly we haven’t had any follow-up on that and that is no doubt going to be, should be one of your recommendations, if I could be so bold to mention that, because we haven’t had it for years. (...) And it would be very helpful because these are extremely sensitive and extremely complicated areas. (Bilal, presenting officer, UK)

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<sup>10</sup><https://www.ilga-europe.org/sogiesc-asylum>.

Given the importance of training in the context of SOGI (and other forms of) asylum, this should be an area of public provision and not dependent on volunteer initiatives (Giulia, LGBTIQ+ group volunteer, Italy). Training is not only important to SOGI claimants and refugees, but also benefits decision-makers and service providers. Better awareness of SOGI and SOGI asylum will help them feel more confident about their work, in how they conduct themselves and in the quality of their decisions (Anne, lawyer, Germany; Kadir, NGO worker, Germany).

Crucially, training should encourage all actors in the asylum system, particularly decision-makers, to adopt an intersectional approach in their work, in line with our theoretical approach (Chap. 3):

[it] is absolutely important to look at the person as a whole, and to see this individual and to look at the different aspects of why they were forced to flee the country, what kind of discriminations they were facing, what kind of persecution they were facing, what kind of difficulties they had in their lives in general, and then on the basis of this to make a decision. (...) there can be multiple discriminations that come together, because of your sexual orientation, gender identity but also because of other aspects that actually force you to leave the country and then look for asylum somewhere else. So I think it is very important to have this more holistic image in order to take a decision in the end. (Terry, member of the European Parliament)

We look forward to a time when Europe's asylum systems look at asylum claimants through such an intersectional, holistic lens.

## 11.7 Something to Look Forward To

At this final stage of these volumes, readers may feel that they have accompanied SOGI asylum claimants on a long and terrible journey – albeit one that is unimaginable to most of us. It is true that SOGI asylum claimants and refugees face ordeals that no one should undergo, but there is also scope for hope. This hope – and determination in the face of negative experiences – is patent in our participants' testimonies and recommendations. We met an absolute and inspiring determination in many of our participants to protect the rights of SOGI minorities and a resistance to efforts to 'homogenise society' (Kadir, NGO worker, Germany). We also heard of individuals' passionate commitment to improving asylum for those who followed them, so that their bad experiences became the basis for making improvements to help other people in a similar situation.

For this to happen, we need more material and human resources across the whole asylum system, from the initial reception stage through to social integration. A better-resourced system, would not only bring immediate benefits in protecting claimants' human rights (Chap. 3), but would also benefit host societies both socially and economically.

Change also needs to occur in asylum law and policy, as highlighted throughout these volumes and specifically in the recommendations above. Not only are shortcomings in the SOGI asylum system visible, but there is also a striking contrast

between the law and policy that applies to ‘domestic’ SOGI minorities and those that apply to SOGI asylum claimants. Such differential treatment is unwarranted and unacceptable from an equality and human rights perspective. On a positive note, ‘there is kind of like a stubbornness in certain countries for the better’ (Amanda, NGO worker, Brussels), for example on criminalisation of same-sex acts where currently only Italy recognises this as persecution in itself. On a more gloomy note, the scope for countries to be different ‘for the better’ may disappear if the current CEAS reform transforms the Qualification and Procedures Directives into Regulations, as EU regulations offer far less flexibility to EU member states in implementing EU standards. By limiting EU member states’ scope to set higher standards, this harmonisation effort entails a serious risk of lowering, rather than raising current standards (Ferreira et al. 2018, pp. 6–7; Peers 2017). The Brexit process may also have a negative impact on the asylum system for SOGI claimants in the UK and lead to fewer options for SOGI claimants elsewhere: ‘I think Brexit will make everything worse for migrants, for equality supporters, for refugees and asylum seekers. I think the question now is how to ride the current’ (S112, NGO volunteer, UK).

To counteract these risks at European level, we may look to the UN Global Compact for Safe, Orderly and Regular Migration (UN 2018) and the UN Global Compact on Refugees (UNHCR 2018). The Migration Compact will be monitored, unlike the Refugee Convention, but neither Compact includes any actionable commitments in relation to SOGI minorities or the causes of migration at global level (Apap 2019). Despite making no explicit reference to SOGI (Chap. 5), these instruments contain some promise for SOGI minorities owing to their multiple references to ‘gender’, ‘equality’ and ‘empowerment’. However, lacking any enforcement mechanism, they are unlikely to bring about any radical change in the current situation of SOGI – or any other – refugees. A far more promising approach in our view is to put the Refugee Convention and human rights treaties – and the values that underpin them – at the heart of Europe’s asylum systems, and read them jointly as the basis for raising standards of protection.

Yet, no injection of funding or change in statutes or policies will, in themselves, solve all the problems we have highlighted. A more fundamental and colossal shift in the social and political mind-set is required. We need to stop using asylum claimants and refugees as pawns in political debates:

refugees should not be misused as an election campaign theme. Because I honestly think that it’s an absurdity, people are always talking about [refugees] and they just do not speak for themselves. (...) And that’s such a nonsense. I mean, that’s in the Basic Law [constitution], what – what are we even discussing?! Alas, for me it’s just right-wing populist abuse of people who have come here in need and that is an absurdity. (Louis, NGO volunteer, Germany)

The only way to achieve a better mind-set at an institutional and systemic level is to start with the individual and a humane concern for their experiences. We heard that ‘if you are not an LGBT person, you may not know how to put yourself [in their shoes]... that is, you need great empathy to put yourself in the shoes of a minority if you don’t belong to it’ (Anna, LGBTIQ+ group volunteer, Italy). So besides greater investment, improvements at a legal and policy level, and radical changes to

the social and political mind-set, we need a great deal more empathy at an individual level and on the part of every single actor in the system. More empathy by all actors involved can impact positively on policy-making, decision-making and social practices, leading to a kinder asylum system.

It may seem simplistic to conclude with allusions to empathy and kindness, but in the words of Aldous Huxley, '[i]t's a bit embarrassing to have been concerned with the human problem all one's life and find at the end that one has no more to offer by way of advice than "try to be a little kinder"' (quoted in Smith 1964). This does not mean any less a determination to improving the lives of SOGI asylum claimants and refugees. Indeed, in the words of Maya Angelou, 'we may encounter many defeats, but we must not be defeated' (Angelou 2009). We trust these volumes will make some contribution to the fight for a better world for SOGI claimants and refugees.

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