

Rejection motivations in SOGIESC asylum cases in Sweden

A Case Law Analysis of the Migration Agency's, the Migration Courts' and the Migration Court of Appeal's Assessments of Sexual Orientation, Gender Identity and Gender Expression Asylum Claims



Author: Aino Gröndahl, RFSL
Lawyer - legal advisor and training, SOGIESC asylum and migration law.

Graphic Design: Haris Eloy

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The Migration Court in Stockholm, judgement 2023-04-25, SOGIESC case from Iraq

Regarding the medical statement, contrary to what the Migration Agency has stated, it contains the diagnosis “gender dysphoria”. The diagnosis, i.e. that the gender identity does not corroborate with the gender that one was assigned at birth, gives, according to the court, support for A’s story. However, this type of diagnosis, where it is about how one identifies themselves, depends on which information the patient chooses to give about themselves. [The medical statement] appears to be based on A’s own information and a personal examination [by doctors] on only two occasions. [...] A has also claimed to risk persecution because of gender expression [and] dressing, behaviours, appearance and having a body language that deviates from the norm. [...] The court concludes that A has mentioned that they before only wore female clothes when going to clubs but now wears them all the time. A has not elaborated on this, the information is general, lacks in detail and is vague. [...] It is unclear how often and on which occasions A actually wears typical female clothes [...] A has not elaborated on their feelings or experiences relating to their gender expression in a convincing way. A has [only] said that they feel happy when wearing female underwear or a new dress and that they feel proud of themselves. [...]

Rejection, deportation to Iraq.

The Migration Court in Luleå, judgement 2021-10-27, SOGIESC case from Nigeria

As written evidence, A has submitted two medical statements. The court finds no reason to question their content; that A physically has androgynous body features with a development of breasts and only one testicle which is smaller than normal for that age. However, it can not be concluded from the medical statements that A is intersexual or that his gender would be medically unclear. [...] The Migration Court finds, as the Migration Agency, that A – when asked questions about his intersex condition – has been consistently vague and incoherent. He has not elaborated on how his intersexuality has affected his life and how it has been for him to grow up and live in the Nigerian society. He has not deeply and reflectively described how his intersexuality has affected his relations [...] [A has not] elaborated on his thoughts and feelings regarding his intersexuality. He has had difficulties elaborating his emotional reflections on how it has been to live in Nigeria as an intersexual. Instead, he has repeatedly said that he wants to be examined by a doctor and that he doesn’t know how to explain his physical attributes connected to his intersexuality. [...] The Migration Court finds that it can be expected that the realisation of having a gender identity that is dangerous [...] should have led to reflections.¹

Rejection, deportation to Nigeria.

The Migration Court in Stockholm, judgement 2024-04-03, SOGIESC case from Afghanistan

To assess an applicant’s sexual orientation is essentially a question about credibility. The assessment needs to be made individually and respectfully, by examining circumstances related to the applicant’s personal perceptions, emotions and experiences of difference, stigma and shame, rather than focusing on sexual activities. [...] According to his own information, A realised his [bi]sexual orientation in 2017. [...] A can reasonably be expected to describe his thoughts and feelings around this, in a detailed manner. [...] The Migration Court finds that A has not on a deeper level been able to elaborate on how his feelings developed from when he realised to when he accepted his sexual orientation.

¹ The terms “intersexuality” and “intersexual” were used by the Migration Court, which also used the pronoun “he” about the applicant. The case was not part of the decisions and judgements examined in the Swedish edition of this report 2020, but was analyzed in the follow-up report in 2023.

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Author's preface



Aino Gröndahl, RFSL

*Lawyer - legal advisor and training,
SOGIESC asylum and migration law.
She / Her*

The day after the Swedish edition of this report was published in November 2020, my work with a follow-up report began. The follow-up report was published in August 2023, examining 1 360 decisions and judgements in SOGIESC asylum cases between November 2020 and May 2023. In the follow-up, I examined especially whether the requirements in the credibility assessments are also applied when the applicant's main or only asylum claim is gender identity, gender expression or sex characteristics. When working on the English edition of this report, published in 2020 and translated by Karin Åberg in 2023, I have tried to include as much as possible from the Swedish follow-up report and give examples of decisions from 2024, when finalising this English edition.

Altogether, I have studied more than 3 360 individual decisions and court rulings in SOGIESC asylum cases in Sweden, between 2012 and 2024. Most of the decisions and judgements I access through a legal database where they are accessible to the public. However, in my work as RFSL's lawyer, I also read the Swedish Migration Agency's decisions and the Migration Courts' judgements on a daily basis, when I meet LGBTIQ+ asylum seekers and read protocols from their interviews. Until a few years ago I personally still attended asylum interviews at the Migration Agency and oral court hearings in the Migration Courts. I colla-

borate with other lawyers in Sweden specialising in SOGIESC asylum cases. This allows me to continue gaining insight in how oral asylum interviews are conducted, what questions the applicants are asked, how they are phrased and – maybe most importantly – on what grounds the decisions are made to grant asylum, refugee status and residency, or to deny and decide about deportation, often to countries where LGBTIQ+ people are persecuted, tortured or executed.

When writing my follow-up report, published in 2023, and especially when finalising this English edition in 2024, I had hoped to see a difference in case law during the years following my first report, especially as the Swedish Migration Agency, with whom RFSL has a regular dialogue, initiated several measures to improve its assessments and decision-making in SOGIESC asylum cases. However, at the time of writing, which the follow-up report also showed; no change or improvement has happened. Even though this is disheartening, I am convinced that there is a need for research on SOGIESC asylum case law, to identify unlawful assessments and decisions, so that the necessary solutions can be found. This in collaborations across countries, as the issues identified in Swedish SOGIESC asylum case law are far from unique for Sweden. This research can hopefully contribute to ongoing international discussions and work to implement the recommendations from the UNHCR's Global Roundtable.²

² 2021 Global Roundtable on Protection and Solutions for LGBTIQ+ People in Forced Displacement – Summary Conclusions, 16th of August 2021. Co-organized by the United Nations High Commissioner for Refugees and the United Nations Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity (IE SOGI) 07 – 29 June 2021, available at [https://www.unhcr.org/fr-fr/en/media/2021-global-roundtable-protection-and-solutions-lgbtqi-peoples-forced-dis-](https://www.unhcr.org/fr-fr/en/media/2021-global-roundtable-protection-and-solutions-lgbtqi-peoples-forced-displacement)

I want to express my deepest gratitude to those who assisted me in finalising the English edition of this research. Thank you Karin Åberg for your enormous work translating this research, and my dear colleague Yasmin Asteroth at RFSL, for your support and for making the layout and the translation into English possible in the first place. Thank you also my lawyer colleague at RFSL, Patrick Bazanye, for your invaluable legal input on the research conclusions, my additions in 2024, including the cases dated and analysed after the original translation.

This research is dedicated to all the thousands of applicants with SOGIESC asylum claims, who were and continue to be denied and deported by Sweden.

Aino Gröndahl

Translator's preface

Looking at the last decades, SOGIESC refugees appear to constantly be hindered in their search for asylum. While most people in Sweden, I would like to think, agree that no one should be persecuted because of their gender or sexual orientation, it seems that in practice, we are continuously failing to ensure this protection. In the process of translating this report, two things particularly stood out as problematic in these asylum decisions.

The first is that the verdicts are very difficult to read. Apart from often being grammatically incorrect, the decisions or written judgements are characterized by words and sentences that are only intelligible to others in this small branch of Swedish bureaucracy. Even as a native Swedish speaker and migration lawyer, I would often find myself struggling with interpreting what the person writing these decisions tried to convey. I am mentioning this partly as criticism and partly as an explanation. In translation, there is a constant, inescapable, balancing act between staying true to the original version and making the new version a pleasure to read. In the work with this report, I have tried to take the middle way between keeping the migration authorities' terrible writing and making their reasoning possible to understand for a non-Swedish audience. However, while it might seem like an excessively formalistic point to make to complain about the writing rather than the outcome, there is something particularly cruel and upsetting about ending another person's journey to Sweden, deporting them to a country where their life or health is at risk, and not even bother to draft a proper decision when doing so.

This leads me to the second point I wish to make, which concerns the reasoning of these cases. While little effort is put into the drafting of the judgments and decisions, it would seem extensive effort is put into rejecting the asylum applications of SOGIESC asylum seekers. More specifically, the migration authorities constantly bend the law backwards in order to deny migrants asylum in Sweden. None of the law's integrity is spared in this pursuit. While it is popular to trace this phenomenon to the fluidity of SOGIESC, rendering gender or sexuality

a difficult fact to prove, I would like to point out that this difficulty appears specifically present in asylum cases. In other legal situations where SOGIESC or same-sex relationships are relevant, such as in discrimination law, family law or insurance law, self-identification is the most common starting point. While this has been recommended in asylum law as well, it seems unthinkable in the asylum context. While the 'fluidity' of SOGIESC might create flexibility for the migration authorities, we would do well to remember that asylum law as a whole is characterized by mistrust of migrants, especially from the Global South, in a way that does not apply to citizens. Credibility assessments in asylum law were not always such a big issue as it is today but have increasingly become central to the asylum procedure as Europe over the last decades have become less and less welcoming to migrants.

Finally, I would like to give a big thanks to Aino and everyone who has assisted her in authoring this very important report. It is rare to come across such expertise, and a person who is ready to do both the practical work of representing so many asylum seekers as well as writing down and collecting these experiences in a report. Thank you to my friends and colleagues at Gothenburg University for listening to my complaints about the state of Swedish asylum law, and for being upset together with me. Thank you to my supervisors for reluctantly accepting that I took on the translation of this report when I should have written my dissertation. Finally, thank you to my partner. I am, in many ways, very lucky who get to spend every day with you.

Karin Åberg

Summary of conclusions

The work presented in this extensive report, which is both unique as well as the most extensive research on the subject in Sweden so far, began in 2018 and was completed in 2020 by RFSL's asylum lawyer Aino Gröndahl. The research identifies and analyses the requirements in case law in the credibility assessments, by examining decisions from the Swedish Migration Agency and rulings from the Migration Courts and the Migration Court of Appeal, in SOGIESC asylum cases; when sexual orientation, gender identity, gender expression and/or sex characteristics are claimed as grounds for asylum. The research' conclusions regarding the Swedish assessments of SOGIESC asylum claims, are similar to those shown in recent research from other European countries as well as from countries outside of Europe, where the same or similar models or methods as in Sweden are applied to assess credibility in SOGIESC asylum cases. The credibility assessments and the de facto criteria applied have been criticised by lawyers and researchers.³ A number of recommendations are given in this report to the Swedish migration authorities and the government, with the aim of improving the assessments of SOGIESC asylum claims and making them compatible with national and international law.

The research shows that a number of explicit requirements are made by the Swedish migration authorities in the credibility assessments in SOGIESC cases.

One explicit requirement made in SOGIESC asylum cases is that the applicant has experienced a deep, inner, emotional journey leading to self-awareness about their sexual orientation, gender identity and/or gender expression. The research shows that the migration authorities always, without exception, require that such a process has taken place. This requirement presupposes that all LGBTIQ+ people have certain universal experiences, which obviously is not true. The requirement has no bearing on reality and lacks support in the Swedish Aliens Act. It violates the Migration Agency's judicial guidelines and the UNHCR's Guidelines No. 9.

Another explicit requirement is that the applicant is able to describe the required inner, emotional journey in an oral asylum interview – before an interpreter, a public counsel, as well as state officials from the migration authorities. Moreover, the oral account of the inner process leading to this realisation must be very detailed and coherent.

³ See, in particular, chapter 10.8 and 11.1, research from Norway, Greece, the Netherlands, the U.K., Germany; Establishing a Sexual Identity: The Norwegian Immigration Authorities Practice in Sexuality-Based Asylum Cases, Gustafsson Grønningsæter, A., 2017, in *Out & Proud? LGBTI asylum in Europe* Conference COC Netherlands, Amsterdam, October 5–6, 2017, available at: <https://www.coc.nl/wp-content/uploads/2017/04/Norwegian-practices-Andrea-Gustafsson-Grønningsaeter.pdf>, Credibility Assessment in Asylum Claims Based on Sexual Orientation by the Greek Asylum Service: A Deep-Rooted Culture of Disbelief, Zisakou, S., *Frontiers in Human Dynamics*, 2021, available at <https://www.frontiersin.org/articles/10.3389/fhumd.2021.693308/full>, Pride or Shame? Assessing LGBTI asylum applications in the Netherlands following the XYZ and ABC judgments, 2019, Jansen, S., available at <https://www.refworld.org/reference/themreport/cocnld/2018/en/122503>, Still Falling Short. The standard of Home Office decision-making in asylum claims based on sexual orientation and gender identity, Asanovic, A., Bruce-Jones, E., Peirce, J., Zadeh, L., *Rainbow Migration* (previously UKLGIG) 2018, available at https://www.rainbowmigration.org.uk/wp-content/uploads/2022/03/Still-Falling-Short-Jul-18_0.pdf, Assessing the Refugee Claims of LGBTI People: is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?, Dawson J., Gerber, P., L Berg and J Millbank, *Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants*, 2007, *Journal of Refugee Studies*, Between queer liberalisms and Muslim masculinities: LGBTIQ+ Muslim asylum assessment in Germany, Tschaeler, M. *Ethnic and Racial Studies* 2019, available at <https://research-information.bris.ac.uk/en/publications/between-queer-liberalisms-and-muslim-masculinities-lgbtqi-muslim->

It must describe the applicant's expected thoughts, feelings and reflections about the sexual orientation, gender identity and/or gender expression. This requirement is also based on the erroneous assumption that all LGBTIQ+ people share a universal ability to express themselves verbally in a detailed, coherent, reflective manner and that they are able to give an oral account of a linear inner process, which is presumed to exist due to a Western understanding of sexuality and gender.

A third requirement made by the migration authorities is that the applicant is able to account for specific feelings, thoughts and reflections. The migration authorities require that the applicant is able to describe their own (negative) feelings of difference, stigma and shame, as part of the required inner process leading to self-awareness of their SOGIESC. If the applicant does not personally have such feelings, the applicant has to at least be able to relate to and deeply reflect upon such negative feelings.

A fourth explicit requirement identified in this report is that in the negative decisions based on credibility, the migration authorities state that the more taboo and stigmatised LGBTIQ+ people are in the applicant's country of origin, the more reasonable it is to require that the applicant has reflected upon their own SOGIESC. The more stigmatised LGBTIQ+ is in the country of origin, the more detailed the oral account of the required reflections needs to be. The idea that it should be easier to express oneself verbally on a subject the more taboo or prohibited it is, is a stereotypical notion of LGBTIQ+ people having universally common experiences of deep emotional reflections and a certain capacity to account for them. The research shows that also this requirement lacks legal and scientific support, is illogical and goes against the preparatory work of the Swedish Aliens Act.

The requirements identified in the research lack support in Swedish and international asylum law. Neither from the preparatory work of the Swedish Aliens Act, the Migration Agency's legal guidelines, the UNHCR's Guidelines

No. 9, nor in the EU directives or the case law from the CJEU can it be concluded that such requirements can or should be made in the context of a credibility assessment in SOGIESC asylum cases. The Swedish migration authorities' requirements are based on the stereotypical notion that LGBTIQ+ people share universal characteristics and life experiences such as an inner, linear journey with negative feelings about themselves, and a universal ability to account for that emotional journey and those negative feelings.

Apart from the explicit requirements, the research shows that the migration authorities have a number of often applied expectations on LGBTIQ+ people. In practice, these expectations often turn into requirements in the credibility assessment of SOGIESC asylum claims. A specific behaviour, certain life experiences, or the lack of them, are generally viewed as not credible for LGBTIQ+ people. For example, the migration authorities expect that LGBTIQ+ people do not take risks, for example by telling someone about their SOGIESC. LGBTIQ+ persons are expected by the migration authorities to always make careful, detailed, well-calculated risk assessments. The applicant is required to account for the risk assessments they are expected to have made prior to acting in a way deemed risky by the migration authorities. The argument that someone who takes risks have themselves to blame, is neither new nor unique in the justice system. In criminal law, the credibility of victims of sex crimes has for long been questioned. The crime victim is blamed and made partly responsible for having been for example raped through questions by the police, prosecutors and defence attorneys about what they were wearing, if they acted in a sexually 'provocative' way, if they were drunk when they were raped, etc. The excessive focus on the crime victim's behaviour before the crime was committed against them, places the burden of proof on the crime victim and makes it more difficult to find the accused person guilty in cases when the crime victim's oral account is not considered credible in the legal procedure.⁴ In a similar manner, in SOGIESC asylum cases excessive focus is put on the applicants'

⁴ Anthology: Seven Perspectives on Rape [Antologi: Sju perspektiv på våldtäkt], National Centre for Knowledge on Men's Violence against Women, 2020, Report 2010:2, p. 140f.

behaviour before they were subjected to harm and fled. LGBTIQ+ applicants who have taken ‘too big’ risks are not considered credible according to the Swedish migration authorities, and they are therefore denied asylum.

Another common expectation on LGBTIQ+ people in the credibility assessments is that the Swedish migration authorities expect the applicant to have made realistic, long-term future plans for how they intend to live as LGBTIQ+ persons. The plans should not seem ‘unrealistic and short-term’. The migration authorities also expect LGBTIQ+ people to always internalise the LGBTIQ+-phobia of people around them. According to the migration authorities, it is not credible to ‘easily’ have become aware of and accepted one’s sexual orientation, gender identity and/or gender expression. Applicants who describe that ‘they were born this way’, who did not go through a painful emotional journey of realisation, or any inner process at all, are not considered credible regarding their SOGIESC. The absence of negative feelings of difference, stigma and shame is generally considered non-credible. It is not considered credible to feel exclusively positive feelings about one’s own SOGIESC. The report also shows that to be a religious LGBTIQ+ person requires particularly deep reflections, thoughts, and feelings about combining the religion with being LGBTIQ+, according to the migration authorities.

The research shows that the migration authorities require that applicants in SOGIESC cases investigate laws about LGBTIQ+ in Sweden. It is neither considered credible nor acceptable to be in Sweden without knowing or finding out that sexual orientation, gender identity and gender expression are legal grounds for asylum. The report also shows that the migration authorities argue, that if a heterosexual cis person could feel or enjoy something that the applicant describes as an important part of their SOGIESC – for example same sex acts or participating in Pride – it makes the applicant’s SOGIESC less credible. Thus, LGBTIQ+ applicants must relate to straight cis people.

The research identifies that the migration authorities apply several unlawful knowledge requirements. Applicants are expected to be aware of and use Western LGBTIQ+ terminology to describe themselves. In the negative decisions, it often is stated that the applicant ‘shows fundamental incomprehension’ or ‘lacks knowledge’ about LGBTIQ+ terminology or uses (Western) SOGIESC terminology incorrectly. In this way, the Swedish migration authorities claim the right to interpret and define terminology from the applicant regarding their own SOGIESC and asylum grounds. The migration authorities create a divergence between identity and physical, sexual relationships, applying a Western understanding and definition of sexuality and gender, where sexual orientation and gender are defined as an ‘identity’. To cohabit and have a sexual relationship with someone of the same sex does not make one homosexual, according to the Swedish migration authorities, if the applicant does not account for a deep, emotional journey of self-awareness about the sexual orientation. Applicants who define and describe their sexual orientation based on sexual practice and/or same sex relations are therefore denied asylum and can be deported to countries where these relations are punished with the death penalty. The research shows that Western definitions and models rarely are suitable or applicable to most asylum applicants. They risk being assessed as ‘not credible’ already from the start, despite having a need for, and being entitled to, international protection because of their SOGIESC. Requirements establishing that applicants must know of and use Western LGBTIQ+ terminology to describe themselves in order to be credible, violates the UNHCR’s guidelines No. 9, the Swedish Migration Agency’s legal guidelines and case law from the Swedish Migration Court of Appeal, where the court reminded the lower instances that not all applicants are aware of or identify with specific SOGIESC terminology.⁵

⁵ At the UNHCR’s Guidelines No. 9, para. 11: “Not all applicants will self-identify with the LGBTI terminology and constructs as presented above or may be unaware of these labels. [...] It is also important to be clear about the distinction between sexual orientation and gender identity. They are separate concepts and, as explained above at paragraph 8, they present different aspects of the identity of each person”, and the Swedish Migration Agency’s legal position paper RS/015/2021, section. 2.2, the Migration Court of Appeal, MIG 2016:30, case no. 5663-15.

Another illegal knowledge requirement identified through the research is the migration authorities' requirement that the applicant should be aware of and engaged in LGBTIQ+ organizations. Lack of knowledge or lack of interest in LGBTIQ+ organizations is to the applicant's disadvantage in the credibility assessment. To have a child to care for, or to be controlled and beaten by one's family, are examples of 'not acceptable reasons' for being uninformed of and not contacting LGBTIQ+ organisations, according to the migration authorities. This requirement also violates the UNHCR's guidelines No. 9 and EU law.

So-called discretion reasoning⁶ has been explicitly prohibited for two decades in Sweden. The UNHCR emphasised this prohibition several times in their guidelines from 2012 and the CJEU clearly stated in 2013 that an applicant must never be returned to hiding their sexual orientation to avoid persecution. This research shows that the Swedish migration authorities use discretion reasoning in negative decisions to reject asylum seekers in SOGIESC asylum cases. In such cases, the applicant's SOGIESC or them living in same sex relationship is not questioned. The migration authorities argue that the applicant is able to avoid the persecution, which they admit that country of origin information reports show exists, by continuing to hide their SOGIESC or same sex relations. The migration authorities also argue that an applicant who will not live 'openly' or 'publicly' propagate for LGBTIQ+ rights are not at risk of persecution. The argument that only 'open' LGBTIQ+ people who 'publicly propagate' for LGBTIQ+ rights can risk persecution presumes that they hide their SOGIESC to avoid persecution. These are classic examples of unlawful discretion requirements. They are applied even when the migration authorities do not question that the country of origin applies criminalising laws, imprisonment of LGBTIQ+ people, or that they are subjected to anal tests that have been classified as torture by the UN. In several cases, the migration authorities have stated that the applicant is able and obligated

to turn to the authorities in the country of origin – the very same authorities that apply criminal laws to LGBTIQ+ people that amount to persecution. Referring LGBTIQ+ applicants to the authorities in criminalising countries should not be an option and is not in accordance with neither Swedish nor international law.

It is very common that LGBTIQ+ people do not disclose their SOGIESC grounds for asylum at the beginning of the asylum procedure. In SOGIESC asylum law this is often referred to as 'late disclosure'. It has been established in Swedish and international law since many years back that merely the fact that the SOGIESC asylum claims were not presented from the beginning by the applicant, can not lead to a conclusion that they are not credible. Since the CJEU clarified this, there were indications of some improvement towards a positive development in for example the Netherlands.⁷ This research, however, shows a development in Swedish case law where the initial approach of the Swedish migration authorities is to doubt and distrust an applicant's information about their SOGIESC explicitly because these claims were not brought forth earlier. This violates the Swedish Aliens Act, The Migration Agency's legal guidelines and the CJEU's case law. Furthermore, when applicants disclose their SOGIESC late, the same requirements are applied despite formally different burdens of proof in the Swedish Aliens Act.

Similar to what RFSL's asylum report showed in 2012, this research also shows that trans people's asylum grounds are assessed incorrectly or not assessed at all. The UNHCR's guidelines, the Swedish Alien's Act and the Migration Agency's legal guidelines all clearly state that sexual orientation, gender identity and gender expression are separate, independent, asylum grounds that under no circumstances should be confused with each other. Despite Swedish and international law being clear, there is a widespread ignorance about the difference between sexual orien-

⁶ The term refers to reasoning that presumes that the applicant, upon return to their country of origin, could avoid persecution by concealing or 'living discreetly' with their SOGIESC.

⁷ Pride or Shame? Assessing LGBTI asylum applications in the Netherlands following the XYZ and ABC judgements, Jansen, S., CoC Netherlands, 2019, p. 120, available at <https://www.refworld.org/reference/themreport/cocnld/2018/en/122503>

tation, gender identity and gender expression. The study shows that gender identity is erroneously confused with sexual orientation by the migration authorities. For example, a minor trans girl who clearly described herself as a trans woman, was tried and assessed as a 'homosexual man' despite submitting extensive evidence about her gender-affirming treatment. She was denied asylum since she had not made credible "his transsexual orientation". Another example concerned a trans man who described himself as a "man in a woman's body who wants to undergo gender-affirming treatment". He was assessed as a lesbian woman and referred to as "she" in the negative decision, where it was claimed that "she had not made credible her sexual orientation". In both these as well as in other similar cases, the asylum grounds were not assessed correctly by the migration authorities. As a result, the self-identified trans applicants were denied asylum and deported to countries that enforce criminalising laws, including imprisonment and the death penalty for LGBTIQ+ people. The research also finds that it is common that gender expression is erroneously confused with or assessed as a part of sexual orientation or misinterpreted as 'personality characteristics' by the migration authorities. When applicants clearly describe a risk for persecution based on gender expression, the migration authorities' lack of knowledge and erroneous confusion between sexual orientation, gender identity and gender expression lead to their conclusion that the applicant was not credible for example because their self-identification and description about themselves was 'stereotypical'.

In the asylum procedure, questions must be objective and an individual assessment should be made. However, this research shows that stereotypical notions, subjective assumptions and speculative arguments are frequent in SOGIESC asylum cases and are often applied as reasons to refuse the applicant based on credibility. This is shown in how questions are phrased in oral asylum interviews and in the negative decision's refusal motivations. Examples of this is when a Western female case officer tells an applicant in the asylum interview how she would have felt "if she were

a homosexual man in The Gambia", or when a case officer tells an applicant that "16-17 years is a rather late age to become aware of one's homosexual orientation in Bangladesh", or the statement that a parent in Uganda who is ashamed of their homosexual child would never report them to the media and the police. Speculations about how someone should have acted or felt are unavoidably always subjective and therefore prohibited, which is clearly stated in the Swedish Migration Agency's own legal guidelines. The research shows that the right to an objective and individual assessment established by the UNHCR's guidelines No. 9, the EU's Qualification Directive and the EU's Asylum Procedures Directive is not guaranteed in SOGIESC asylum cases.

Apart from stereotypical notions, subjective assumptions and speculative arguments being very common in SOGIESC asylum cases, the research shows a consistent lack of uniformity in the investigation and assessment of SOGIESC asylum claims in Sweden. Different interpretations are made of the same country of origin information reports and of the same objective evidence. Identical circumstances and nearly identical oral accounts are assessed differently by different case officers at the Migration Agency and by different Migration Courts. The lack of a specific circumstance in one case is considered to make the applicant less credible whilst the existence of the same circumstance in another case also is considered to make the applicant less credible about their SOGIESC. Applicants with SOGIESC asylum claims are subjected to a double jeopardy when both the existence and the lack of the same circumstance is used against them in the credibility assessment. The research also shows that in several cases, the invoked SOGIESC asylum claims are not examined, and no assessment is made of the invoked sexual orientation, gender identity and/or gender expression. A result of this lack of uniformity is that some LGBTIQ+ applicants are granted asylum and refugee status while others, with an equal need for protection, are denied asylum and deported to countries where LGBTIQ+ people are subjected to persecution, torture, inhumane treatment or the death penalty. Fundamental principles in administrative law about legal coherence and legal certainty are not upheld in SOGIESC asylum cases in Sweden.



1. Introduction!

Why a research study?

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On the left:

A member of RFSL Ungdom wearing a "Newcomers Youth" sweatshirt, part of the organization's clothing collection.

Photo: Arseny Selov & Andra Berciu

1.1 Aim

In 2012, the first research study specifically focusing on the legal assessment of sexual orientation as an asylum claim was published in Sweden: *The Refugee Status Determination Procedure Relating to Sexual Orientation: An Analysis of the Risk Assessment and Access to Protection in the Country of Origin*. Later the same year RFSL published a report with the same title by the same author, summarizing the legal study.⁸ Since then, much has happened in SOGIESC asylum law, in Sweden and internationally. Legal guidelines have been issued, both by the UNHCR and the Director-General of Legal Affairs at the Swedish Migration Agency.⁹ The Agency's case officers and decision-makers have received special training and LGBTQ specialists¹⁰ have taken part in the decision making. The Swedish Migration Court of Appeal granted leave to appeal in 2013 in a case regarding the credibility assessment of the applicant's claimed homosexual orientation.¹¹ The Court of Justice of the European Union, CJEU, has clarified how the EU directives¹² should be interpreted by EU member states through several rulings regarding the assessment of sexual orientation as grounds for refugee status. Politicians, the general public, authorities and civil society have become more aware of the thousands of LGBTIQ+ refugees who flee to

Europe every year to seek protection. There have been several calls from authorities, lawmakers and civil society for updated research about the legal situation of LGBTIQ+ applicants, the asylum procedure and the legal assessments of sexual orientation, gender identity and gender expression as grounds for asylum in Sweden. This report aims to meet the need of research about the legal assessments of SOGIESC asylum claims in Sweden. Following its conclusions, a number of recommendations are made to the Swedish migration authorities.

1.2 The research study's queries

The main aim of this research is to examine the Swedish migration authorities' examinations, assessments and decision-making in SOGIESC asylum cases. The relevant research question is whether the examinations, assessments and decision-makings are compatible with Swedish and international law. Asylum applications in Sweden are tried and assessed by the Migration Agency, the Migration Courts, and the Migration Court of Appeal. The legal protection grounds that are relevant in LGBTIQ+ or SOGIESC asylum cases are sexual orientation, gender identity and gender expression. In order to answer the research' queries, it is necessary to examine what requirements are actually made and applied in case law of the Swedish Migration Agency, the Migration Courts and the Migration Court of

⁸ Asylprövningen vid flyktingskap på grund av sexuell läggning. En analys av riskprövningen och möjligheten till skydd i hemlandet, Gröndahl, A., 2012, RFSL's asylum report with the same title is based on the thesis and is available at https://www.rfsl.se/dlp_document/asylprovningen-vid-flyktingskap-pa-grund-av-sexuell-laggning-en-analys-av-riskprovnigen-och-mojlighet-en-till-skydd-i-hemlandet/.

⁹ UNHCR's Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. Several position papers were issued relating to SOGIESC asylum claims, by the Swedish Migration Agency's Legal Affairs Department, which are instructions to the case officers and decision-makers about how certain asylum claims should be assessed, for example RCI 03/2011 issued 2011-01-13, and SR 38/2015 issued 2015-10-02, later replaced by RS/015/2021, available at <https://lifos.migrationsverket.se/dokument?documentSummaryId=45289>.

¹⁰ Until the end of 2019, LGBTQ specialists participated in the decision-making in SOGIESC asylum cases at the Swedish Migration Agency, in addition to a regular case officer and a decision-maker.

¹¹ The Migration Court of Appeal is the highest instance in asylum cases in Sweden, and its precedential judgements form the basis for the decisions of the Swedish Migration Agency and the Migration Courts in similar cases. The Migration Court of Appeal's ruling MIG 2013:25, case number UM 3853-13, has so far been the only case where leave to appeal was granted regarding how to assess sexual orientation as grounds for protection. The Migration Agency's summary of the ruling is available at <https://lifos.migrationsverket.se/dokument?documentSummaryId=31809>.

¹² 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, and Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, also called the Qualification Directive and the Asylum Procedure Directive.

Appeal. What are the de facto criteria in Swedish asylum case law in order for the applicant to make their need for protection probable, based on sexual orientation, gender identity and/or gender expression? Are these criteria in accordance with Swedish law, case law from the CJEU and the UNHCR's Guidelines No. 9?

1.3 Method, sources and material

In order to identify the applicable law, doctrinal legal research method is applied, so-called "black letter" methodology. This means that the study starts out from the legal sources, the legislation, case law, preparatory works and legal doctrine. Relevant legislation is Chapter 4, Section 1 of the Swedish Aliens Act and the preparatory works of this specific article. The Migration Agency's legal guidelines are relevant to the Migration Agency's assessments of sexual orientation, gender identity and gender expression as grounds for asylum. EU law and the CJEU's rulings on the application of the EU Qualification Directive and Asylum Procedures Directive are important legal sources when identifying applicable law regarding the assessment of SOGIESC asylum claims. The CJEU case law is legally binding on the Swedish Migration Agency, the Migration Courts and the Migration Court of Appeal.

The UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees have been given the status of source of law in Swedish case law of the Migration Court of Appeal and in the preparatory works of the Aliens Act. The UNHCR has issued guidelines regarding the interpretation of sexual orientation and gender identity as grounds for refugeehood: Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012. These guidelines have the same legal status as the Handbook and are important sources of law in the refugee status determination in Swedish

migration law.¹³

Swedish asylum case law consists of the Swedish Migration Agency's decisions and judgments by the Migration Courts and the Migration Court of Appeal. The Migration Agency is the first instance. The Migration Agency's decisions can be appealed to the Migration Court. Their decisions may in turn be appealed to the Migration Court of Appeal, which is the final court of appeal. The precedents it sets are binding on, and of great importance to, the Migration Courts and the Migration Agency.

The cases decisions and court rulings selected for this study encompasses all LGBTIQ+ and SOGIESC cases in which the author, RFSL's asylum lawyer, has acted as a legal representative during the years 2012 to 2020 as well as asylum cases regarding which the asylum lawyer has been consulted during the same period. The majority of the decisions and rulings studied, consists of a large number of decisions and judgments from the legal database JP Migrationsnet.¹⁴ The author gained access to SOGIESC cases by subscribing to judgements from the Migration Courts that include keywords such as LGBTQ, LGBTIQ+, homosexual, bisexual and trans person for several years. The majority of the judgments also have the appealed decisions from the Migration Agency attached. The total material covers over 2 000 unique decisions by the Migration Agency and rulings by the Migration Courts and the Migration Court of Appeal. This extensive material lay the foundation of the research study's conclusions. Because of the large number of individual decisions and judgments in SOGIESC asylum cases, collected over a timespan of about eight years, the conclusions of this study are well substantiated.

National and international legal research in the area of asylum law, especially SOGIESC asylum law, is applied to analyse and understand the conclusions in the research. Relevant national and international legal doctrine is used to analyse the Swedish case law in SOGIESC asylum

¹³ Quality in Swedish Asylum Assessments. A Study about the Migration Agency's Examination of and Decision-making about international Protection [Kvalitet i svensk asylprövning, En studie av Migrationsverkets utredning av och beslut om internationellt skydd], Feijen, L., Frennmark, E., UNHCR, 2011, p. 8

¹⁴ JP Migrationsnet, a Swedish company providing information and education related to different legal fields, such as asylum and migration law, including access to judgements and legal publications, <https://www.jpinfo.net/se/JP-RattsfallsnetMigration/start/>

cases, and whether or not it is compatible with Swedish law, international law such as CJEU case law and the UNHCR's guidelines.

1.4 Quotations and confidentiality

The selection of quotations and excerpts of decisions and judgments cited in the study illustrates examples of commonly occurring arguments in the reasoning in LGBTIQ+/SOGI-ESC asylum cases. I as RFSL's asylum lawyer am bound by confidentiality in relation to my former clients. Even though the majority of the cited judgments and decisions are available to the general public in Sweden, names and personal information have been anonymised to protect the individual applicant's integrity. For reasons of confidentiality and respect for the individual applicant's integrity, only excerpts of relevant parts of decisions and judgments are cited. The case numbers have been anonymised and replaced by digits.



2. General facts about LGBTIQ+ refugees and SOGIESC asylum cases

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On the left:

A member of RFSL Ungdom wearing a “Newcomers Youth” sweatshirt, part of the organization’s clothing collection.

Photo: Arseny Selov & Andra Berciu

2.1 SOGIESC specific persecution¹⁵

In order to understand why LGBTIQ+ people need and seek international protection, it is important to understand what they are fleeing from. LGBTIQ+ people are discriminated against, harassed, punished, persecuted and killed in many different parts of the world. LGBTIQ+ refugees' asylum stories are often characterised by experiences of serious physical, mental and sexual abuse. The motive behind the abuse is often to "cure" and/or punish an actual or perceived sexual orientation, gender identity, gender expression and/or sex characteristics which are not accepted by society. Many LGBTIQ+ asylum seekers describe being subjected to years of violence, rape, torture, genital mutilation, forced marriages and threats. The person may have been "caught" having a same-sex relationship or dressing in a way that society perceives as gender transcending. They may have been locked up and starved by family members for long periods of time, the family may have ordered rapes to be committed in order for children to be born. LGBTIQ+ youth who were assigned female at birth may have been subjected to ordered rapes in order to "cure" their attraction to girls or to "convert" a gender identity as a boy and/or a gender expression that is not accepted by the family or society. Applicants with an intersex variation may describe an ignorant environment that has subjected them to horrendous sexual assaults and forced "medical" interventions because of their sex characteristics. Many LGBTIQ+ applicants describe different forms of "conversion rituals", where the aim is to "cure" the LGBTIQ+ person. It might be traditional medicine men, witch doctors, or pastors who claim to "drive out demons" and "cure" what is seen as evil or as a disease. Some may have experienced abuse committed for a long time, sometimes even since their childhood, and/or sudden incidents that have triggered the need to flee their country of origin. Often, the closest family poses the greatest threat. Society and/or the authorities may also have perse-

cuted the asylum seeker. That LGBTIQ+ people are persecuted by state authorities and punished in accordance with criminal law may happen but is a less common experience among LGBTIQ+ women, trans and intersex people, who often lack access to public spaces compared to gay and bisexual men. In cases where the LGBTIQ+ person has tried to turn to the authorities for protection against family members, many describe that the police refused to accept reports of hate crimes or violence with a homophobic motive. In some cases, the authorities themselves committed crimes such as verbal harassment, extortion, physical violence, sexual assault and arbitrary arrests of LGBTIQ+ people. Many LGBTIQ+ people flee from countries where the persecution is committed and/or legitimised by the state and imprisonment and/or physical punishment is prescribed. The CJEU has established that the implementation of laws criminalising same sex acts constitutes persecution in a legal sense, which is a ground for the right to international protection.¹⁶

Many LGBTIQ+ applicants describe that they fear the general population more than they fear the authorities, since people may take the law into their own hands. LGBTIQ+ applicants who have survived lynching often describe angry masses of people who may burn car tires, throw stones, use sticks, machetes and other weapons to batter and kill LGBTIQ+ people. The asylum applicant is often the surviving partner of someone who did not manage to escape the mob that attacked the couple. Another common form of assault of LGBTIQ+ people is when the media "outs" a person and publishes the name, photograph and area of residence of someone who is suspected of being LGBTIQ+, accompanied by texts about "crimes" they are suspected of having committed against laws that criminalise same-sex sexual relationships. The development of technology, increased access to the internet and social media has led to new forms of persecution. Information about an LGBTIQ+ person's sexual orientation, gender identity, gender expression and/or sex characteristics spreads quickly across national borders. Dating apps for LGBTIQ+ people can also be used to identify, assault and/or arrest them.

¹⁵ The section on SOGIESC-specific persecution is based on the thousands of personal stories and testimonies that RFSL's asylum lawyer has heard and read during the many over 12 years while working as a public counsel for and giving legal advice to a LGBTIQ+ asylum seekers.

¹⁶ CJEU, in Joint cases C-199, C-200 and C-201/12 X,Y and Z v Minister voor Immigratie, Integratie en Asiel, para. 61

Many LGBTIQ+ applicants are severely traumatised when they arrive in Sweden. Many suffer from PTSD and some from hallucinations and paranoia. Others have injuries from torture, they may have been mutilated and/or have other types of injuries stemming from the abuse they have suffered. Some are incapable of expressing or showing emotions, while others cry a lot. Some, especially young LGBTIQ+ people, may suffer from resignation syndrome triggered by abuse in the country of origin. It is essential that the asylum authorities fulfil their duty to investigate by conducting a torture investigation where required. The legal representative should, as part of their task, assist their client by giving them the best possible preconditions to show the migration authorities their need for protection. It is extremely important that the legal representative is competent in the complex and diverse asylum claims and protection grounds that are often relevant in SOGIESC asylum cases.

2.2 LGBTIQ+ people's asylum claims

LGBTIQ+ people may have very diverse grounds for asylum. Often, more than one legal ground for asylum is relevant in these cases. Actual and/or perceived sexual orientation, gender identity and gender expression might all be separate grounds for asylum for the same applicant. The persecutors seldom differentiate between sexual orientation, gender identity, gender expression and sex characteristics. Therefore, these grounds for asylum claims often intertwine in order to form a person's need for international protection. The legally relevant terms in the Swedish Aliens Act are "sexual orientation or other membership of a particular social group".¹⁷ The term "gender" in the Swedish Aliens Act includes trans people and intersex people¹⁸. Apart from LGBTIQ+ people often risking persecution because of their actual sexual orientation and/or gender identity, there may also be

attributed characteristics that constitute one or more grounds for persecution. Perceived sexual orientation or gender also constitute legally acknowledged and protected grounds in asylum law. Trans people who do not have access to gender-affirming treatment may be perceived as having a gender identity and/or a sexual orientation that may lead to persecution, regardless of how they themselves personally identify their sexual orientation or gender identity. This is also the case of intersex people, who may risk persecution, such as forced medical interventions, because of their gender identity, gender expression and/or a perceived or real sexual orientation.

Family members, children, siblings and partners of LGBTIQ+ people may be perceived as having a certain sexual orientation or gender affiliation due to their relationship with the LGBTIQ+ person or because they do not distance themselves from the LGBTIQ+ person or family member. Siblings and children of LGBTIQ+ people may be perceived as having the sibling's or parent's sexual orientation in societies where there are widespread ideas of LGBTIQ+ people as LGBTIQ+ "contagious" or eager to "recruit" others to their "lifestyle". LGBTIQ+ activists may risk political persecution. Many LGBTIQ+ people convert or see themselves as atheists and may therefore be risk of persecution. LGBTIQ+ women may be at risk of gender-specific violence, forced marriage, genital mutilation, and sexual violence. Such forms of abuse may be, but are not always, connected to the person's SOGIESC. It is essential that separate legal grounds for asylum in an SOGIESC asylum case are not confused with each other, forgotten or overlooked in the process, but that they are properly examined and assessed separately. A comprehensive assessment of the different reasons for the applicant's need for international protection needs to be made. It is essential that the migration authorities and as well as the applicant's legal representa-

¹⁷ Chapter 4, Section 1 of the Swedish Aliens Act, available at https://www.government.se/contentassets/784b3d-7be3a54a0185f284bbb2683055/aliens-act-2005_716.pdf

¹⁸ In the preparatory works of the Swedish Aliens Act, the terms biological and social gender are used, in the Government Bill 2005/06. Refugeehood and persecution because of gender or sexual orientation [Flyktingskap och förföljelse på grund av kön eller sexuell läggning], p. 34, referred to in the Migration Agency's legal position paper RS/015/2021, section. 2.

tive bear in mind that LGBTIQ+ applicants do not necessarily know about, identify with or use certain LGBTIQ+ terminology. This type of knowledge may not be requested from the applicant, according to the UNHCR Guidelines No. 9 and the Swedish Migration Agency's legal position paper.¹⁹

¹⁹ The UNHCR's Guidelines No. 9, para. 11: "Not all applicants will self-identify with the LGBTI terminology and constructs as presented above or may be unaware of these labels. [...] It is also important to be clear about the distinction between sexual orientation and gender identity. They are separate concepts and, as explained above at paragraph 8, they present different aspects of the identity of each person", and the Swedish Migration Agency's legal position paper RS/015/2021, section. 2.2: "[...] There is therefore reason to interpret these terms [sexual orientation, gender identity and gender expression] broadly [...] and it is not required that the applicant themselves is aware of or uses certain terms."



3. The legal development in SOGIESC asylum cases: “From discretion to disbelief”

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On the left:

Members of RFSL Ungdom wearing “Newcomers Youth” sweatshirt, part of the organization’s clothing collection.
Photo: Arseny Selov & Andra Berciu

From Discretion to Disbelief²⁰

3.1 Then: “Have you been open or concealed your sexual orientation?”

The thesis *The Refugee Status Determination Procedure Relating to Sexual Orientation: An Analysis of the Risk Assessment and Access to Protection in the Country of Origin*²¹ was published in 2012, and reached a number of conclusions regarding how the Swedish Migration Agency and the Migration Courts applied the law in cases concerning sexual orientation as grounds for asylum. The first conclusion was that gender identity and gender expression were not assessed as grounds for asylum in any of the studied 148 decisions and judgments. In all of the reviewed SOGIESC asylum cases, sexual orientation was investigated as the only ground for asylum, even when it was obvious to the author of the report that the risk for persecution described by the applicant was connected to gender identity and/or gender expression. The report from 2012 showed that the Swedish migration authorities did not perceive or understand when the applicant described gender identity and/or gender expression as grounds for persecution. Instead, these asylum claims were assessed as “homosexual orientation”. This is also why the title of the report only refers to sexual orientation.

Trans people have historically been made invisible in SOGIESC asylum law. Their asylum claims have been assessed in an incorrect manner, or not at all. This practice has partially changed since 2012. The Swedish Migration Agency’s legal position paper, the Migration Court of Appeal and the UNHCR’s Guidelines No. 9 have clarified that gender identity, gender expression and sexual orientation are separate grounds for asylum that should be tried and assessed independently of each other. Today, trans people’s asylum claims are not as systematically overlooked as in 2012. Trans people, non-binary people and intersex people

have a better chance of having their asylum claims examined and assessed correctly, as the separate grounds that gender identity and gender expression are. However, this study from shows alarming indications of a return to an erroneous confusion of gender identity or gender expression with sexual orientation. In those cases, the applicant’s need for international protection due to gender identity and/or gender expression is assessed incorrectly or not assessed at all. In many cases, this has resulted in erroneous negative decisions and subsequent deportations of the applicants to countries where LGBTIQ+ people are criminalised.

The study from 2012 showed that the assessed Migration Agency and the Migration Courts put excessive focus on the applicant’s lifestyle. The decisive question at the time was whether the applicant upon return, intended to live “openly” with their sexual orientation and thereby would be at risk of persecution. In the risk assessment, the migration authorities examined whether the applicant, before fleeing, had lived openly or concealed their sexual orientation from people around them, and whether they in the future intended to be open with their sexual orientation, and also whether the applicant lived openly with their sexual orientation in Sweden. The focus on the applicant’s way of living meant in practice that the applicant had to prove that they were going to be so “open” about their “deviant” sexual orientation that the reactions from society reactions would amount to persecution. Applicants who had previously concealed their sexual orientation were refused international protection, with the motivation that there was no knowledge of their sexual orientation in the country of origin, and that they therefore were not at risk of persecution. The migration authorities’ way of reasoning presupposed that the applicant would continue to conceal their sexual orientation upon return to avoid persecution. This type of so-called discretion reasoning has been illegal in Sweden for nearly two decades, and was explicitly prohibited in 2005 in the preparatory work of the Swedish Aliens Act²². The CJEU, the UNHCR and the Swedish

²⁰ From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom, Millbank, J., January 2009, *The International Journal of Human Rights* 29 (11).

²¹ *The Refugee Status Determination Procedure Relating to Sexual Orientation: An Analysis of the Risk Assessment and Access to Protection in the Country of Origin* [Asylprövningen vid flyktingskap på grund av sexuell läggning. En analys av riskprövningen och möjligheten till skydd i hemlandet], Gröndahl, A., 2012. A thesis and an RFSL report summarising the thesis, with the same title. Available at https://www.rfsl.se/dlp_document/asylprovningen-vid-flyktingskap-pa-grund-av-sexuell-laggning-en-analys-av-riskprovningen-och-mojligheten-till-skydd-i-hemlandet/.

²² Government Bill 2005/06:6: *Refugeehood and Persecution based on gender or sexual orientation* [Flyktingskap och förföljelse på grund av kön eller sexuell läggning], p. 27: “[...] it can never be required that the person should abstain from such a basic trait upon a return.”

Migration Agency's Director-General of Legal Affairs have repeatedly stated that discretion reasoning is not allowed under any circumstances.²³ However, this study shows that discretion reasoning is still being applied by the Swedish migration authorities.²⁴

The report of 2012 also showed that the Swedish migration authorities, in their negative decisions, systematically referred applicants in SOGIESC asylum cases to seek protection from the state authorities in countries of origin where LGBTIQ+ people were criminalised. LGBTIQ+ people seeking asylum were considered to have both a possibility and an obligation to seek protection from the authorities even in cases where these authorities were able and obligated to arrest LGBTIQ+ people, who were criminalised by law. Applicants in SOGIESC asylum cases were often referred by the Swedish migration authorities to internal flight alternatives in other parts of the country of origin, to avoid the persecution that the migration authorities admitted that they were at risk of. References to internal displacement were made despite a criminalising legislation being implemented in the entire country. When applicants stated that they had turned to the police in the country of origin and that the police officer(s) also had committed abuse against them, the migration authorities generally wrote in the rejection motivations that the police had done so in their role "as private individuals". Therefore, the applicant was still considered to have a possibility and an obligation to seek protection from the state authorities in their country of origin.

3.2 Today: "You did not make your SOGIESC credible"

Today, the reasons to reject LGBTIQ+ asylum applicants can often be divided into two main categories:

1. Not sufficient: Does not amount to Persecution. In this category of rejection motivations, the applicant's claimed reasons for needing protection are not considered enough to meet the requirements for asylum. What the applicant risks at a return to the country of origin, is not assessed as amounting to protection-worthy persecution. In this category we find for example cases where the LGBTIQ+ applicant comes from a country where the migration authorities assess that there is effective and accessible protection from the state authorities, available to LGBTIQ+ people.

2. SOGIESC is not credible. In the other category, there are cases where it is clear from available COI reports²⁵ that LGBTIQ+ people are persecuted in the country of origin, and that the country's authorities lack the will or capacity to protect LGBTIQ+ people from harm. In these cases, the negative decisions are almost exclusively based on the issue of credibility: The applicant is not considered to have made credible that they belong to the particular social group LGBTIQ+ people, and therefore, they do not risk persecution, according to the migration authorities.

These two grounds for rejection are almost never combined. Only in a handful out of the over 2 000 studied judgments and decisions in SOGIESC asylum cases does the Migration Agency or the Migration Court claim both that there was effective and accessible state protection for LGBTIQ+ people in the country of origin and that the applicant had not made credible their sexual orientation, gender identity and/or their gender expression.

²³ CJEU, 7 November 2013, X, Y and Z v Minister voor Immigratie en Asiel, C-199/12, C-200/12 and C-201/12, ECLI:EU:C:2013:720, para. 46, UNHCR's Guidelines No. 9, paras. 12 and 31, the Swedish Migration Agency's General-Director of Legal Affairs' legal position paper RS/015/2021.

²⁴ See chapter 7.1, and the follow-up report published in August 2023, Rejection Motivations in SOGIESC Asylum Cases in Sweden. A Follow-up of the Case Law Analysis of the Migration Agency's, the Migration Courts' and the Migration Court of Appeal's Assessments of SOGIESC Asylum Claims, [Avslagsmotiveringar i hbtqi-asylärenden. En uppföljning av rättsutredningen] Gröndahl, A., RFSL August 2023, available at <https://www.rfsl.se/wp-content/uploads/2023/08/2023-AVSLAGSMOTIVERINGAR-I-HBTQI-ASYLARENDE-EN-UPPFOLJNING-AV-RATTSUTREDNINGEN-.pdf>

²⁵ The Swedish Migration Agency and the Migration Courts normally use country of origin reports accessible in the Migration Agency's database Lifos: <https://lifos.migrationsverket.se/>

3.3 Examples of when the grounds for asylum are not sufficient

Below are illustrative examples of grounds for rejection from the Migration Agency and the Migration Courts where they conclude that the authorities in the country of origin offer effective protection for LGBTIQ+ people:

The Migration Court at the Administrative Court in Stockholm 2019-02-26. Case number 2609 [The Court finds] that it is clear that X's and Y's sexual orientation, bisexuality, constitutes grounds for protection in relation to Chechnya. The question is therefore if there is a reasonable and relevant internal flight alternative for them [...] Regarding this matter, the Court concludes that even though the situation for bisexuals in other parts of Russia is problematic, it does not constitute grounds for international protection. It has not been shown that X and Y would be more vulnerable because of their sexual orientation than other bisexuals in Russia. It is therefore possible for them to move to another city in Russia outside Chechnya. It has not been shown that X and Y would have difficulty finding accommodation and work upon a return to Russia. Since the Migration Agency according to the Court has shown that there is a reasonable and relevant internal flight alternative they are not in need of international protection because of their sexual orientation.

The Migration Court at the Administrative Court in Stockholm 2019-05-21. Case number 3453 According to the country of origin information in the case, the situation for sexual minorities in Russia is problematic and the police does not always offer adequate protection against harassment. The Migration Court finds that it remains evident that the situation in Russia is not such that the authorities generally can be considered to lack willingness or ability to protect the inhabitants of the country. This also applies to homosexual people. [...] X has reported the policemen to both the police and the public prosecutor. It does not follow from the investigation of the case that the authorities have refused to accept his reports or in any other way have been unwilling to investigate the reports. The circumstance that the reports have not prompted any action from the authorities is not enough for them to be viewed as lacking willingness or ability to grant him protection. The Migration Court finds [...] does not find that X has exhausted the possibilities of state protection in his country of origin or that he upon a return would risk being subjected to abuse that he can not receive protection from.

The Migration Court at the Administrative Court in Stockholm 2019-05-02. Case number 1057

X states that he is openly homosexual with a feminine gender expression. [...] According to the country of origin information in the case, discrimination and harassment of homosexuals occur in Turkey. However, homosexuality is not criminalised, and the Court considers, based on the country of origin information, that the situation in Turkey is not such that all homosexuals generally are at risk of being subjected to persecution. [...] The Migration Court finds [...] that there in general is adequate state protection in Turkey, even for homosexuals and other LGBTIQ+ people. [...] The Migration Court notes that the fact that X has been arrested and assaulted by the police on two occasions when participating in Pride parades is not enough to warrant international protection. [...] It is a basic principle in asylum law that national protection always takes priority over international protection. [...] As shown above, the Court finds that it is generally possible to receive adequate state protection in Turkey.

The above cited cases well represent the majority of decisions and verdicts in which the grounds for refusal are based on the migration authorities' assessment that the asylum claims are not sufficient to amount to persecution. The migration authorities refer to state protection and sometimes to internal flight alternatives. Only in very rare cases is the assessment that there is efficient and adequate state protection in a certain country of origin coupled with an assessment that the applicant has not made their SOGIESC credible. In these cases, the authorities rarely conduct an adequate, individual investigation of whether the state protection or internal displacement alternative is reasonable and relevant for LGBTIQ+ persons seeking asylum. We see an example of this in a case concerning a parent and child from Armenia, where RFSL's asylum lawyer acted as legal representative. The parent sought asylum after the child had developed resignation syndrome. The resignation syndrome developed as a result of the systematic violence and abuse of the child and his family had suffered because of his sexual orientation, carried out by his relatives, the other parent, preschool staff, fellow students, teachers and the parents' colleagues. The abuse culminated in a gang rape of the child, after which the police in Armenia threatened to arrest the child if they tried to report the act. After this incident, the child ended up

in a coma-like condition and developed a severe resignation syndrome²⁶. The child was unable to participate in the asylum interview at the Swedish Migration Agency because of their medical condition. Therefore, the parent had to represent the child and make their sexual orientation credible. The Migration Agency questioned neither the child's homosexual orientation, nor the events described by the parent or the violence and severe abuse that the child had been subjected to since childhood, or the police officer's threats and unwillingness to accept a police report. Swedish doctors confirmed in medical statements that the child risked dying upon a return. An Armenian LGBTIQ+ organisation testified that the type of specialised medical care that the child needed was not available in Armenia, and that doctors regularly refused to treat homosexual patients. A deportation to the homophobic environment that had caused the child to develop the life-threatening resignation syndrome would mean that the child would be deprived of every possibility to recover. The absence of health care would inevitably lead to the child dying. After many years of investigation, the Swedish Migration Agency refused the asylum application on the grounds that there was state protection in Armenia. The Migration Court made the following assessment:

The Migration Court at the Administrative Court in Luleå 2019-09-30. Case number 6503

[...] the general situation for homosexuals in Armenia is difficult and there are serious deficiencies in the law enforcement authorities [...] LGBTIQ+ people who openly declare their sexual orientation may expose themselves to the risk of being subjected to discrimination, threats and violence. [...] The national authorities often overlook attacks and describe them as expressions of traditional values instead of condemning them. [...] However, the Court finds that the actions directed at the family and particularly [the child] should be considered as criminal acts perpetrated by private individuals and officers who have acted outside of their professional capacity [...] The treatment that the family may risk [...] does not amount to persecution [...] Altogether, the Migration Court finds that the [Swedish] state's interest in regulating migration in this case takes priority over the family members' interest in the protection of their private life.

In the assessment of the family's right to a private life the Migration Court referred to the interest of regulating migration in Sweden. Based on the case study carried out in this report, it would appear this kind of wording have become more common in recent years. After the Swedish version of this research study was first published in November 2020, the Swedish Migration Agency has published an official list of so-called safe countries of origin²⁷. When the English translation of this report is being finalised in 2024, it appears as though reasonings similar to those cited above have become much more common in SOGIESC asylum cases from countries of origin listed on the Migration Agency's list of safe countries of origin.

²⁶ Earlier, children with resignation syndrome were referred to as "apathetic children".

²⁷ The Swedish Migration Agency's list of safe countries of origin is available on their website: I <https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Applying-for-asylum/Safe-country-of-origin.html>



4. What is required to make SOGIESC credible?

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On the left:

Members of RFSL Ungdom wearing “Newcomers Youth” sweatshirt, part of the organization’s clothing collection.
Photo: Arseny Selov & Andra Berciu

“You have not made your belonging to the particular social group LGBTIQ+ people credible”²⁸

In the previous chapter, negative decisions were described in SOGIESC asylum cases where the asylum claims were not deemed sufficient and enough to be protection-worthy. The other type of grounds for refusal is often applied to cases where the situation for LGBTIQ+ people is so serious that referrals to state protection for LGBTIQ+ people is out of the question. In these cases, the grounds for refusal state that the applicant has not made their sexual orientation, gender identity and/or gender expression credible. In the following, the report examines whether these assessments are compatible with applicable law.

4.1 An inner process of self-realisation must have taken place

The substantial material that forms the basis of this case study shows that the person who claims SOGIESC as grounds for needing asylum, is expected to have experienced an inner emotional journey leading to realisation of the sexual orientation, gender identity and/or gender expression. At both the Swedish Migration Agency and the Migration Courts, there is an explicit requirement that the asylum seeker has gone through an inner process. A detailed oral account of the expected inner process is also required. That an inner process has taken place and can be described by the applicant is crucial and a strict requirement in order for them to make their belonging to the particular social group LGBTIQ+ people credible. These requirements are explicit in the vast majority of all the decisions from the Migration Agency and verdicts from the Migration Courts, analysed in this study. Often, the Migration Agency and the Migration Courts explicitly write that it is “reasonable to require” that an inner process has taken place and can be described by the applicant. The following case illustrates how most of the negative decisions are phrased by the Swedish Migration Agency when the applicant has not made their sexual orientation credible:

The Migration Agency, Asylum Unit 2 Uppsala. Decision 2018-04-06. Case no. 6012

Your account regarding the development of your sexual orientation lacks a description of your inner thoughts and feelings that reasonably should have arisen when you came to realise your sexuality, especially taking into account society’s negative image of people who have same-sex relationships in Iraq. [...] You have also not been able to account for how you would like to express your sexual orientation. You have on several occasions been encouraged to elaborate your thoughts and feelings regarding the development of your sexual orientation, but you have not been able to give a more detailed account of such an inner process.

The Migration Agency writes that certain thoughts and feelings “should reasonably have arisen” in connection to the boy’s realisation of his sexuality, “especially” since there is a negative image of people who have same-sex relationships in Iraq. This is a common example of how the Swedish Migration Agency expresses the assumption that certain inner thoughts and feelings “should” arise in all homosexual persons, especially if the situation for LGBTIQ+ people in the country of origin is difficult. The Migration Agency does not provide any motivation behind the expectation that LGBTIQ+ people should have certain thoughts and feelings and be able to describe them. The closest thing to an explanation that can be found in the sentence “a person’s sexuality, or lack thereof, constitutes a fundamental part of human nature and a deviation from the heterosexual norm should be especially palpable in a country like Iraq”²⁹. The Migration Agency does not explain why the circumstance that a trait is “fundamental” and “deviates from the norm” has to be preceded by an inner process or why this process can be accounted for in a certain way.

Apart from the Swedish Migration Agency, also the Migration Courts explicitly require that an inner emotional process leading to a realisation of the claimed SOGIESC should have taken place. In the same way as the Migration Agency,

²⁸ An example of the most commonly stated reason for rejection in LGBTIQ asylum cases, except for cases where the asylum claims are ‘not sufficient’.

²⁹ The Migration Agency, Asylum Unit 2 Uppsala. Decision 2018-04-06. Case no. 6012

the courts express that it is “particularly reasonable” to require that such an inner process has taken place when the applicant originates from a context or a culture where homosexuality is illegal. The applicant should be able to account for the inner process verbally. The Migration Courts also require that the applicant has reflected upon feelings of stigma, difference and shame, which is further analysed in chapter 4.3. The following excerpts from two different SOGIESC asylum cases are representative of the many, many hundreds of rejection motivations in decisions and rulings that the study is based on, regarding the credibility assessment of the applicant’s SOGIESC:

The Migration Court at the Administrative Court in Luleå 2019-11-28. Case number 3680

In the opinion of the Court, it is, in particular when the applicant comes from a society and a culture where homosexuality is illegal, reasonable to require that such an inner process has occurred and can be described by the applicant.

The Migration Court at the Administrative Court in Luleå 2020-04-02. Case number 4267

In the opinion of the Court, it is, in particular when the applicant comes from a society and a culture where homosexuality is illegal, reasonable to require that such an inner process has occurred and can be described by the applicant. Altogether, the Migration Court finds that A has not made his homosexual orientation credible, or that he, in the country of origin, would be at risk of being perceived to have such a sexual orientation.

The first two rulings concerned the assessment of whether the applicants had made their sexual orientation credible. The Migration Courts explicitly write that it is reasonable to require that an inner process has taken place and can be described by the applicant. According to the Migration Court this is a particularly reasonable requirement in cases where homosexuality is illegal in the applicant’s country of origin. The following argumentation in a negative decision by the Swedish Migration Agency discusses whether the applicant’s gender identity has been made credible:

The Migration Agency Malmö. Decision 2019-02-15. Case no. 527

Based on your interview and your answers, the Migration Agency finds that you have not provided credible information about your gender

identity. You have not been able to account for your own individual ideas, feelings, or reflections, but your story has been throughout vague and of a general nature. You have throughout your story come back to that you have dressed in a dress and dressed as a woman and liked to wear a wig, but you have not been able to elaborate on your feelings and thoughts about your gender identity. You have repeatedly been encouraged by the case-officer to elaborate your answers, but you have consistently referred to that you have dressed in a dress and painted your nails. Neither have you been able to talk about how your gender identity has affected you in your daily life or how you realised you were a woman and what that made you feel. You have only claimed that it has not significantly affected you during your childhood and that you felt happy when wearing women’s clothing. Moreover, you have not been able to account for your thoughts about the risks of being a trans person in Ghana or how you perceive your future in Ghana taking into account your own information that it is not accepted in your country of origin.

[...] You have also been asked to talk about how you live in Sweden and how you would like to live in Ghana with regards to your gender identity and how you would be limited there. You have not been able to give a proper account on these issues, but have only stated that you can dress as a woman in Sweden whenever you want, and that this is not possible in Ghana. The Migration Agency finds that your account is not of an individual character but is general in nature, even though you, through a large number of general and specific questions, have been encouraged to describe your individual reflections and feelings. [...] The information provided about your gender identity, which is central to your story, is limited, without individual reflections, and is of a general nature.

As described in chapter 3.1, trans people’s specific asylum claims used to often be overlooked and missed by the Swedish migration authorities in the assessments in SOGIESC asylum cases. Instead, their claims were examined and assessed as homosexual orientation. This has partially improved, and the Swedish Migration Agency’s legal position paper RS/015/2021 explicitly states that gender identity and gender expression constitute separate asylum claims within the term “gender”, in Chapter 4, Section 1 of the Swedish Aliens Act. It follows from the above cited grounds for rejection that when gender identity is invoked as an

asylum claim the applicant is also required to have experienced an inner process leading up to a realisation about their gender identity, similar to cases when sexual orientation is claimed as grounds for asylum. The applicant is also required to account for that inner process of self-realisation with detailed descriptions of thoughts, feelings and reflections. According to the Migration Agency, the applicant in the case cited above has been vague and failed to elaborate on the thoughts and feelings that the Migration Agency presupposes and assumes that she must have experienced as a trans person. It is, according to the Migration Agency, not sufficient and enough that the applicant has consistently repeated that she has worn dresses, used a wig, painted her nails and that this made her happy.

According to the Migration Agency in the above cited decision, the applicant “has not described how she realised that she was a woman and how that made her feel”, but “she only claimed that this has not affected her significantly during her childhood and that she felt happy dressing as a woman”. The Migration Agency does not consider this answer credible. It is obvious that the Migration Agency expects that a trans person should have experienced an inner, emotional process leading up to realisation and that this process should contain other feelings than feelings of happiness when expressing a certain gender expression and gender identity. However, many trans people feel that they have always known that they have a certain gender identity without it having been preceded by a specific inner process that affects the person in certain way. In addition, it is of course possible to only experience positive emotions such as happiness regarding one’s gender identity, despite that the Swedish Migration Agency does not find this credible.

Generally, in their negative decisions, neither the Migration Courts nor the Migration Agency provide an explanation of the argument that LGBTIQ+ people are expected to have a universally common experience of an inner process leading up to a realisation of their sexual orientation or gender identity. However, it is

apparent that the inner process which the Migration Agency and the Migration Courts require to have taken place is also expected to contain certain elements. In other words, some feelings and thoughts are deemed more credible than others. The Migration Agency and the Migration Courts often require the applicant to be able to reflect upon feelings of difference, deviation from the norm, stigma, shame and fear. The only identified sources of the idea that LGBTIQ+ people may be expected to have certain experiences, thoughts and feelings seem to be ruling MIG 2013:25 by the Migration Court of Appeal and one sentence from the UNHCR’s Guidelines No. 9. These are analysed more closely in chapter 10 in this report. The argument that the applicant has not accounted for an inner, emotional process and reflected upon certain expected emotions and thoughts in detail, is the single most common ground for rejection in SOGIESC asylum cases in Sweden.

4.2 Detailed oral account for the expected inner process

“Against this background, the Court finds that A’s sexual orientation should have caused an inner process with many thoughts and feelings regarding this part of his identity. High demands can therefore be placed on his oral account in this regard.”³⁰

The citation above in a ruling from the Migration Court illustrates how the migration authorities expect that having a homosexual or bisexual orientation always means that an inner process has taken place with “many thoughts and feelings”. Apart from requiring that a specific process leading to realisation has taken place, the migration authorities also expect the applicant to describe this inner process in a certain way. The Migration Court writes in the above cited ruling that “high demands can therefore be placed on his oral account” since the court assumes that an inner process has taken place with numerous thoughts and emotions. The description should be made verbally by the applicant, it should be detailed and describe thoughts, feelings and reflections as part of an inner process leading up to a realisation about the sexual orientation or

³⁰ The Administrative Court in Stockholm 2020-02-04, UM 6879

gender identity. As was found in the previous chapter, the courts often state that these two requirements are particularly relevant when the applicant comes from a society where LGBTIQ+ is taboo and prohibited. The more taboo LGBTIQ+ is in the country of origin, the more the applicant is expected to have reflected upon and be able to express themselves about their own SOGIESC and the realisation of it. The following reasoning in a negative decision from the Migration Agency is an example of this requirement:

The Migration Agency Asylum Unit 2 Uppsala. Decision 2018-04-06. Case no. 6012

It is difficult for you to account for what your life as a homosexual has been like in your country of origin. You have not been able to provide any extensive account of how you have felt and thought about your sexual orientation over the years. Neither have you elaborated on your feelings and thoughts regarding the relationship you have had with a same-sex partner in your country of origin, even though a person's sexuality, or lack thereof, constitutes a fundamental part of human nature and a deviation from the heterosexual norm should be particularly palpable in a country like Iraq.

The above cited case concerned a minor from Iraq. It clearly follows from the reasoning that the Migration Agency expects this young person to have had specific, deep, thoughts and feelings. The Migration Agency also requires that he should have the ability to account for these thoughts and feelings in a detailed, reflective oral account before a state authority and an interpreter from Iraq. The Migration Agency states that sexual orientation is a “fundamental part of human nature” and that a “deviation from the heterosexual norm would be particularly palpable in a country like Iraq”. By “a country like Iraq” the Migration Agency seems to be referring to that there is a negative view of LGBTIQ+ people in the country. With this statement, the Migration Agency makes the assumption that the young man should have been able to elaborate on his feelings and thoughts about his sexual orientation. It is not motivated by the Migration Agency, why the Agency assumes that a deviation from the heterosexual norm in Iraq, or something being a fundamental part of human nature, would mean that the person concerned has an ability to reason in-depth about thoughts and feelings regarding their sexual orientation. This assump-

tion is not explained any further, in this decision or in other similar decisions examined in this study. In fact, it is a subjective assumption that all LGBTIQ+ people share certain universally common experiences and are able to make deep emotional reflections about the thoughts and feelings that the Migration Agency assumes that all LGBTIQ+ people have experienced.

4.3 The inner process is expected to include specific elements

“Having a non-normative sexual orientation should generate an inner process of reflections, even in young people, around themes such as shame, social difference and also risks”

From the decisions and court rulings that this research study examines, it is clear that the Swedish migration authorities generally expect that LGBTIQ+ people have experienced a linear, inner, emotional process with feelings of being different and with negative feelings of stigma and shame. LGBTIQ+ people are expected to have experienced, or at least be able to reflect upon and relate to, feelings of difference, fear, shame and guilt. Furthermore, the Swedish migration authorities expect that LGBTIQ+ people have experienced an inner struggle that has led them to a final destination – self-realisation. This inner emotional journey is expected to include several different steps, deep thoughts, feelings and reflections that should be accounted for verbally by the applicant. The account must be sufficiently detailed, seem individual and self-lived, emotional, reflective and coherent. This study investigates whether these requirements have a legal ground and whether they are compatible with the sources of law that the migration authorities refer to. The following three verdicts from the Migration Courts illustrate the expectation of the occurrence of some specific feelings within the inner process:

The Migration Court at the Administrative Court in Gothenburg 2019-12-11. Case number 3348

[The Court concludes] that X has not been able to make reliable statements about how he came to realise his sexual orientation. The statements provided by him about having found it easier to socialise with boys in Afghanistan lacks reflections about the experience of difference, shame and stigma regarding his sexuality. [...]

In the first cited case, the Migration Court explicitly writes that the applicant’s story “lacks

reflections about the experience of difference, shame and stigma” regarding the applicant’s sexual orientation. The Court’s use of the word “lacks” implies that reflections about and feelings of difference, stigma and shame are something that the Court expects an LGBTIQ+ person to have. A similar reasoning can be seen in the following case:

The Migration Court at the Administrative Court in Gothenburg 2019-12-11. Case number 6897

The Migration Court considers X to have given a detailed account for when he discovered his sexuality, and how his feelings about his orientation have changed after different events in his life, and how his relationships with two different people have affected him as a person. [...] He has been able to reflect upon feelings of difference, shame and difference. He has reflected upon the risks regarding his sexual orientation and how others perceive him because of his sexual orientation.

In this case, the applicant’s story is deemed credible and reliable because the applicant has accounted for a realisation about his sexual orientation, different “steps” in an inner process leading to realisation, and has “reflected upon feelings of difference, stigma, shame and difference”. The expectation of such feelings is also apparent in the following case:

The Migration Court at the Administrative Court in Stockholm 2019-02-19. Case no. 6706 [Appeal of the Migration Agency Uppsala’s Decision 2018-04-06. Case no. 6012]

Even if X has not personally experienced, for example shame, it can be expected that a person who has lived in a society where homosexuality is stigmatised has reflected upon these feelings or at least would have been able to give a more nuanced and individual account than X has done. X has had a relationship that lasted for over a year, but has mainly only been able to tell us that they were childhood friends, and that he then felt that he wanted him and that they had sex on a few occasions.

In this case, the young applicant had described that he and his partner were childhood friends, that he then felt an attraction towards his

friend, that they started a physical relationship and that they had sex on a few occasions. The applicant thus talked about his personal experience of a same-sex sexual relationship that formed the basis when defining his own sexual orientation. From the court’s reasoning, it can be concluded that if a young person’s self-defined homosexual orientation consists of, and is based on, the sexual experiences he thus far has had with another boy, the migration authorities have precedence over the applicant regarding how a homosexual orientation is defined and what it consists of. The fact that the case concerned a minor and not an adult, who already therefore may have fewer lived experiences and may not be as able to account for those as an older applicant, was not considered by the court. Chapter 6 investigates how the migration authorities define sexual orientation and what the consequences are for applicants with SOGIESC asylum claims. In the above cited case, the court writes that “even if X has not personally experienced, for example shame” it “can be expected” that a person living in a society where homosexuality is stigmatised has reflected upon these feelings. The court does not explain where this assumption comes from. From this, it can be concluded that even if the applicant has not experienced the feelings of difference, stigma and shame that the court expects LGBTIQ+ people to have experienced, the applicant is still required to be able to reflect upon and relate to these feelings.

4.4 The more stigmatised, the more detailed the account should be

“The Migration Agency also finds that your reflection should be more comprehensive since, according to you, same-sex relationships are stigmatised.”³¹ “

“The Agency had also expected a reflection regarding feelings of shame”³²

From the decisions and rulings examined in this study, it clearly follows that the migration authorities believe there to be a causal link between an LGBTIQ+-phobic society and the occurrence of certain common thoughts and feelings in all LGBTIQ+ people in that society. There is also an expectation that LGBTIQ+ people

³¹ The Migration Agency Stockholm. Decision 2019-10-24. Case no. 8863.

³² The Administrative Court in Malmö, 2019-03-28, Case no. 1170.

have an ability to verbally account for and reason about these thoughts and feelings. This can be described as follows: The more stigmatised LGBTIQ+ is in the country of origin, the more the applicant is expected to have reflected upon their own sexual orientation, gender identity and/or gender expression. The more stigmatised SOGIESC is in the country of origin, the higher the requirements are on the oral account for these reflections. The following reasoning from a negative decision from the Migration Agency illustrates this expectation from the migration authorities:

The Migration Agency Stockholm. Decision 2019-10-24. Case no. 8863

The Migration Agency has asked questions about your feelings regarding you being attracted to women. In spite of repeated questions, you have only been able to give short answers that lack in detail. The Migration Agency finds these answers to be vague, taking into account that your sexual orientation must be viewed as one of your fundamental traits, and that you therefore should be able to account for this information in a more detailed way (compare MIG 2013:25). The Migration Agency also finds that your reflection should be more comprehensive as, according to you, same-sex relationships are stigmatised in the Mongolian society.

The Migration Agency expresses that sexual orientation is “a fundamental trait” and that the applicant therefore should have been able to account for feelings in a “more detailed way”. The Migration Agency further writes that her “reflections should be more comprehensive” as same-sex relationships are stigmatised in Mongolia. The Migration Court reasons in the same way in the following case:

The Migration Court at the Administrative Court in Malmö 2019-03-28. Case no. 1170

Relevant circumstances that are to be assessed are therefore the personal perception of the sexual orientation and, in addition, feelings of stigma and shame are of importance in the assessment of the applicant’s credibility of the applicant’s claimed sexual orientation. [...] The answers provided are short and there are no deeper reflections regarding his orientation and feelings. Moreover, the answers are mechanical and mostly about A’s sexual relationships and sexual acts. Considering that it is stigmatised and taboo to be homosexual in Jordan, the Migration Agency finds that A should have been able to give more in-depth answers and

also be able to describe his reflections regarding the anxiety of having to hide his identity and the loss of the family. The Migration Agency had also expected a reflection regarding feelings of shame. [...] Taking into account that homosexuality is stigmatised and taboo in Jordan, the Court believes that A should have been able to describe his previous situation, feelings and thoughts more in-depth. [...] In conclusion, the Court does not find that A has made it credible that he is homosexual and that he thereby would risk persecution upon a return to Jordan.

The grounds for rejection show that the Migration Court expects the applicant to have experienced stigma and shame. Furthermore, the court cites the Migration Agency’s assessment that since homosexuality is “stigmatised and taboo”, the applicant should have been able to describe feelings of anxiety more in-depth. According to the Migration Court, the Migration Agency “had also expected a reflection regarding feelings of shame”, which the court refers to. A similar assessment is made in the following case:

The Migration Court at the Administrative Court in Luleå 2019-03-19. Case no. 604

Regarding A’s asylum claim, which is linked to his sexual orientation, he has stated that ever since he was caught with his boyfriend, his family and the society in Bangladesh pose a threat to him since homosexuality is not accepted there. [...] To assess an applicant’s sexual orientation is mainly an issue of credibility. The assessment must be made by investigating factors concerning the applicant’s personal perception, feelings and experience of difference, stigma and shame, rather than focusing on sexual activities (see MIG 2013:25 and the UNHCR’s Guidelines regarding the assessment of claims about persecution based on sexual orientation). The Migration Court, thus, concludes that an important part of the assessment regarding the credibility of an applicant’s sexual orientation is the inner process leading up to a realisation. In the eyes of the Court it is, especially when the applicant comes from a society and culture where homosexuality is prohibited, reasonable to require that such an inner process has taken place and can be described by the applicant. The Migration Court finds that A has not made it credible that he is homosexual and that he therefore has a well-founded fear of persecution upon return to his country of origin.

The Migration Court refers to MIG 2013:25 and the UNHCR’s guidelines No. 9. Also in this case,

the court expresses that it is particularly “reasonable to require that an inner process has taken place and can be described” when the applicant comes from a country where homosexuality is prohibited. No such arguments, however, can be found in the UNHCR’s guidelines No. 9 or in MIG 2013:25. The migration authorities’ interpretation and application of these legal sources are analysed in chapter 10 of the report. The expectation that the applicant should be able to give a more extensive account of their sexual orientation the more taboo it is in the country of origin is also evident in the following grounds for rejection:

The Migration Agency Stockholm. Administrative Process Unit 3. Decision 2019-10-23. Case no. 1417

The Migration Agency finds it unclear how you have realised that you are homosexual, how you have come to understand that it is accepted to be homosexual in Sweden, and what this has meant to you personally. Based on that it must be considered a big step for a person with your social and cultural background to talk about their sexual orientation, the Migration Agency also considers that you, also in this regard, should have been able to describe in a more elaborated manner what feelings and thoughts this has evoked in you on a personal level.

The Migration Agency writes that since “it must be considered a big step” for the applicant to talk about their sexual orientation because of their “social and cultural background”, they should be able to “describe in a more elaborated manner what thoughts and feelings” they have had. It appears contradictory that someone should be able to talk more about a topic, the more taboo it is according to their “social and cultural background”. This contradictory notion, however, forms the basis of the Migration Agency’s negative decision:

The Migration Agency Stockholm. Administrative Process Unit 3. Decision 2019-10-23. Case no. 1417

The Migration Agency understands that different people relate differently to their sexual orientation and have different experiences of having reached such an insight. The fact that you have lived almost your entire life in the Ivory Coast, where traditional values are common and homosexuality is not accepted, might impair your ability to account for your sexual orientation more extensively. However, the Migration Agency still finds, given your current age and that your feelings appeared as early as when you were 10 years old, that you should have been able to describe the thoughts and feelings that you reasonably should have had when you realised

that you were homosexual. This is in particular the case, since you claim to have a sexual orientation that deviates from the norm in the Ivory Coast.

The reasoning presented above is so common in SOGIESC asylum cases today that it appears to be applied in a standardised manner as grounds for rejection. The argument in this case, as in the above cited cases, is that the applicant should be able to describe, in detail, their thoughts and feelings regarding their homosexuality, since they have grown up in a country where it is taboo and prohibited. The migration authorities, thus, mean that the more stigmatised and taboo something is, the more capable the applicant should be to talk about it before Swedish state authorities and interpreters who often come from the applicant’s own country of origin.

Apart from the strange notion that it should be easier to talk about a subject the more taboo it is, the following is also obvious in the above cited grounds for rejection: The Migration Agency writes that they “understand that different people relate differently to their sexual orientation and have different experiences of having come to that insight”. This, however, is contradicted by the Migration Agency’s explicit expectation and requirement that every LGBTIQ+ individual has experienced an inner process, since this is simply not true: Not all LGBTIQ+ people have experienced an inner process leading to realisation or are able to account for such a process. According to the Migration Agency, the issue that traditional values are common in the country of origin and that their family does not accept homosexuality may impair the applicant’s ability to account for their sexual orientation. The Migration Agency, however, argues that since the applicant’s feelings appeared when he was ten years old, he “should” be able to describe in more detail “the thoughts and feelings that [he] reasonably” should have experienced when he realised that he was homosexual. That a boy of ten years of age feels attracted to another boy does not mean that he as an adult has the ability to account orally for an inner process that he might not even have experienced, before state authorities and interpreters who are fellow countrymen. The negative decision illustrates the following expectations by the migration authorities: An inner, emotional

process leading to realisation should have taken place and contain thoughts and feelings that the applicant should be able to account for. The account should be more extensive and detailed the more taboo LGBTIQ+ is in the applicant's country of origin. The following excerpt from a verdict by the Migration Court illustrates the same assumptions:

The Migration Court at the Administrative Court in Luleå 2019-01-29. Case number 5797

During the investigation at the Migration Agency, as well as at the oral hearing [in the Migration Court], A has received questions about his thoughts and feelings regarding growing up with a sexuality that deviates from the norm and is prohibited, but he has not managed to describe this in greater detail than that he had to keep his relationship with [the boyfriend] and his sexual orientation secret since homosexuality is prohibited in Afghanistan. Neither has he been able to describe his boyfriend and the close relationship he claims they have had for about 6-7 years, more than that he thought the boyfriend was good-looking and that they enjoyed each other.

According to the court, the applicant has been asked questions about his thoughts and feelings about growing up with a "sexual orientation that deviates from the norm and is prohibited", but he has not been able to say more than that he "had to keep his relationship with [the boyfriend] and his sexual orientation secret since homosexuality is prohibited in Afghanistan". Further, the court writes that the applicant has not been able to describe his boyfriend and their relationship, besides that he found the boyfriend good-looking and that they enjoyed each other. Thus, also in this case an applicant's personal description of their relationship is deemed inadequate because of the migration authorities' expectation that LGBTIQ+ people always make deep, emotional reflections. The court then writes the following in the grounds for rejection:

The Migration Court at the Administrative Court in Luleå. 2019-01-29. Case number 5797

The Court further finds that there, in his description of his relationship with his boyfriend, is no explanation as to how they have been able to see each other and keep their relationship secret for so many years without being caught. His story also lacks descriptions of emotional reasonings and considerations in general, which, based on the universally known risks of living as a homosexual

in Afghanistan, makes his story about his sexual orientation and the long relationship he claims to have had in the country of origin not seem self-experienced.

The Migration Court's statement that there is "no explanation" as to how the applicant has been able to keep his relationship secret, implies that the applicant is expected to give such an explanation. It remains unclear whether the applicant has received specific questions about this, which makes it seem as though the Migration Court expects that this should be a part of the applicant's story. Also in this case the court expresses an expectation of "emotional reasonings and considerations" due to "the risks of living in Afghanistan as a homosexual". The higher risks connected to being homosexual, the more extensive description of "emotional reasonings and considerations" is required, according to the Migration Court. The court also implies, in the same way as the Migration Agency in the above cited grounds for rejection, that it understands the difficulty involved in speaking about one's sexual orientation:

The Migration Court at the Administrative Court in Luleå 2019-01-29. Case number 5797

Even though there might be culturally conditioned factors that may affect the ability to reflect and reason, the Court finds that this can not sufficiently explain that A consistently during the Migration Agency's interview as well as during the oral hearing [in court], has given vague information regarding his claimed sexual orientation and his reflections and feelings regarding this. In an overall assessment of these circumstances, the Migration Court does not find that A has given reliable and credible information about his claimed sexual orientation. He has therefore not made his belonging to a group that risks persecution in Afghanistan credible.

The court states that "culturally conditioned factors may affect the ability to reflect and reason" but according to the court, these do not explain why the applicant has not been more detailed regarding his feelings and reflections regarding his sexual orientation. The Migration Court, thus, still assumes that the applicant, if he, as he claims, is homosexual, must have made emotional considerations and should have the ability to account

for reflections, feelings and considerations regarding his sexual orientation because of the “risks of living in Afghanistan as a homosexual”. Again: The more dangerous and taboo LGBTIQ+ is in the country of origin, the stricter the requirement is for reflections and detailed descriptions of the subject. It is a stereotypical notion to assume that all LGBTIQ+ people always make deep, emotional reflections. It is of course entirely possible that the boy in the case has not experienced any deeper feelings or made deeper emotional reflections about his physical relationship with another boy. All people are different and to not have made such deep reflections or not being able to describe them does not mean that one is not at risk being persecuted because of a same-sex relationship. The boy seems to have described the experiences he personally had had; his sexual experience with another boy, that the boyfriend was good-looking and that they enjoyed each other. These experiences obviously do not meet the court’s expectation and assumption that LGBTIQ+ people to always make deep, emotional reflections and that they are able to account in detail for them. The boy’s story about his personal experiences is therefore deemed insufficient and thus not credible, resulting in a negative decision and deportation to Afghanistan. In the following excerpt of another negative decision, the Migration Court uses the exact same wording as in the case above:

The Migration Court at the Administrative Court in Luleå 2019-05-03. Case number 8797

A has both during the interview at the Migration Agency and the oral hearing [in court], been asked questions about his thoughts and feelings about growing up with a norm-deviating and unaccepted sexual orientation. Even though A, during the oral hearing, to some degree has elaborated on his story in some parts, the Court finds that his information about his sexual orientation and how it has affected him is vague and lacks detail. Even though culturally conditioned factors may affect the ability to reflect and reason, the Court finds that A could reasonably be expected to have been able to elaborate on his thoughts and feelings regarding this issue in a more detailed way, especially since he has stated that he has had two longer romantic relationships with other men that he has had to conceal.

In both the above cited rulings the Migration Court writes about a “norm-deviating sexual

orientation” and how “culturally conditioned factors may affect the ability to reflect and reason”. The court’s conclusion is that taking into account that the applicant has had two longer same-sex romantic relationships that he has had to conceal, he should be able to elaborate on his thoughts and feelings in a more detailed way. The Migration Court’s argument is again that since the applicant has concealed his sexual orientation in an environment where it is not accepted, he should be able to talk about it even more. No explanation or motivation is given for this strange assumption, which appears both illogical and unrealistic. The latter case concerned a man from Ghana. It appears very illogical that a person who has hidden their sexual orientation their whole life, as well as their long-term romantic relationships in Ghana, would have an “easier” time elaborating on their thoughts and feelings about the sexual orientation he has struggled to conceal. It seems more reasonable to assume that he, under these circumstances, likely would struggle with speaking for the first time about his sexual orientation in a foreign country, especially in front of state authorities’ officials and an interpreter who is a fellow countryman. The migration authorities’ assumptions are explicitly stated also in the following excerpts from two different negative decisions:

The Migration Court at the Administrative Court in Luleå 2019-03-14. Case number 604

Assessing an applicant’s sexual orientation is mainly an issue of credibility. The credibility assessment must be made by investigating factors connected to the applicant’s personal perception, feelings and experiences of difference, stigma and shame, rather than focusing on sexual activities (compare MIG 2013:25 and the UNHCR’s Guidelines regarding the assessment of claims of persecution based on sexual orientation). The Migration Court therefore finds that the applicant’s account of an inner process leading up to such a realisation is of importance when assessing credibility. If an applicant comes from a society and a culture where homosexuality is prohibited, it is reasonable to require that such an inner process has taken place and can be described by the applicant.

The Migration Agency, the Administrative Process Unit 1 Stockholm. Decision 2019-05-23 Case no. 3343

Taking into account [...] that you have said that you accept yourself and your sexual orientation, and your information about how stigmatised it is in Afghanistan to be attracted to people of the same sex, the Migration Agency expects, in accordance with the UNHCR's guidelines, that you would be able to talk more about your inner process when you came to realise your sexual orientation.

The reasoning in the excerpts from two different negative decisions correspond with the other examples of judgments and decisions in this chapter. From the reasoning in the decisions, it follows that the migration courts and the Migration Agency explicitly require that an inner process has taken place and can be described in detail by the applicant, “especially” if they come from a society where homosexuality is prohibited and taboo. The courts and the Migration Agency furthermore state that credibility must be assessed taking into account the applicant’s experience of difference, stigma and shame, with reference to MIG 2013:25 and the UNHCR’s Guidelines No. 9. These references are analysed further in chapter 10 in this report. In addition, the migration authorities often claim that sexual orientation is a “fundamental trait”, as in the following case:

The Migration Court at the Administrative Court in Stockholm 2019-04-03. Case number 8989

A person's sexual orientation must be considered a fundamental trait of that person. Considering this, and the social stigma of being homosexual in a country like Iraq, it can be expected that a person who has come to realise that they are homosexual has made some introspective reflections regarding this. This is particularly the case when the sexual orientation is not accepted by society or religion.

The Migration Court first states that sexual orientation is a basic trait and that it “can be expected” that the applicant has reflected upon their sexual orientation, in particular “when the sexual orientation is not accepted by society” and taking into account the social stigma of being homosexual in Iraq. Also in this case, the Court holds that the more stigmatised and unaccepted homosexuality is, the more the applicant can be expected to have made introspective reflections about their sexual orientation and the more able they

should be to account for these before Swedish state authorities. A similar view is taken by the Migration Court in the following case:

The Migration Court at the Administrative Court in Malmö 2019-03-07. Case number 4781

For example, it appears extraordinary that A only at the third meeting with the Migration Agency stated that he had had a two-year relationship with a boy in the country of origin, despite previously claiming that he was unsure of his sexual orientation. In this context, the Court finds that A's story regarding the process of realisation of his homosexuality lacks deeper thoughts and reflections. The lack of reflections and emotions is especially remarkable since a person's sexual orientation must be considered as something very significant for a person, in particular considering the religious context A has grown up in.

According to the Migration Court, the lack of reflections and emotions is “especially remarkable” given that sexual orientation is “something very significant for a person” and given the religious context the applicant has grown up in. Reading the Migration Courts’ reasoning, once again it can be concluded that the more stigmatised, taboo and prohibited LGBTIQ+ is in the applicant’s country of origin, the more the Migration Court requires them to have reflected upon and be able to account for emotional considerations regarding their own SOGIESC. An identical reasoning is written in the following case:

The Migration Court at the Administrative Court in Malmö 2019-03-04. Case number 5707

During the Migration Agency's interview and at the oral hearing in court, A has been asked questions about his thoughts and feelings regarding his sexual orientation and how it has affected him to have a norm-breaking and in the country of origin prohibited sexual orientation. However, he has not been able to describe this in any more detail, apart from that he had to conceal his sexual orientation because of the family's attitude and that homosexuality is prohibited in Morocco. His story also lacks descriptions of emotional reasoning and considerations, which is particularly remarkable considering that a person's sexual orienta-

tion must be viewed as something fundamental in a person, and also considering the context from which A originates.

According to the Court, it is “particularly remarkable” that the boy has not given the detailed descriptions of emotional reasonings and deliberations which the court assumes that he has made. This because his sexual orientation, according to the court, is “something fundamental for a person” and because the boy comes from a context where homosexuality is prohibited. Yet again, the Migration Court equals homosexuality being prohibited with a homosexual person therefore having reflected upon and be able to express themselves in detail about their sexual orientation. In this case, there was a dissenting lay assessor who stated the following:

The lay assessor’s dissenting opinion, Migration Court at the Administrative Court in Malmö 2019-03-04. Case number 5707:

I find that A has spoken about his sexual orientation to the best of his ability. A person who comes from a place where homosexuality is illegal takes very small steps when he or she eventually chooses to open up. Therefore, it should not be a requirement that his story should contain large expressions of emotions. I find that his claim of being homosexual is credible, and that he therefore has made it credible that he belongs to a particular social group that, because of their sexual orientation, is in need of protection. This is based on the country of origin information about this group in Morocco. He should therefore be considered a refugee and be granted residence permit and a travel document.

The lay assessor reasons in an opposite way compared to how the migration authorities usually argue. According to the lay judge, high demands should not be placed on a person’s emotional expression and description of their homosexual orientation when they come from a place where it is illegal. The applicant had therefore, according to the lay judge, made his homosexual orientation credible to the best of his ability. Since homosexuals are subject to treatment that constitutes persecution in Morocco, the boy should be granted refugee status and residence permit. Outvoted by the majority, however, the boy’s asylum application was rejected and he was deported to Morocco.

4.5 Analysis and conclusions

In this chapter, a number of conclusions have been made regarding what is required by the applicant

for them to make their sexual orientation, gender identity and/or gender expression credible as asylum claims. The migration authorities require that a deep, inner, emotional process leading up to a realisation has taken place regarding the SOGIESC. The negative decisions show a requirement of an inner process through wordings in decisions such as “it is reasonable to expect that an inner process has taken place”. Further, the migration authorities require that the inner, emotional process can be accounted for verbally in a coherent, detailed description that appears self-experienced. The inner process leading to realisation is expected to have included thoughts and feelings about difference, stigma and shame. In cases where the asylum seeker has not experienced these feelings, they are still required to reflect upon and relate to feelings of difference, stigma and shame. The reflections must be accounted for verbally. These are explicit requirements that are clearly stated in the majority of the migration authorities’ grounds for rejection in the decisions and court rulings that this case study is based on. There is also an assumption expressed by the migration authorities that the more taboo and stigmatised LGBTIQ+ is in the applicant’s country of origin, the more they should have thought, felt and reflected upon their own SOGIESC. The more difficult the situation is for LGBTIQ+ people in the country of origin, the more detailed the migration authorities require them to be in their oral descriptions of these thoughts, feelings and reflections.

The Swedish migration authorities express an assumption that people who have had to conceal their SOGIESC their whole life in an LGBTIQ+-phobic environment, have thought even more about and are able to easier express themselves verbally regarding, the required inner process about their taboo and stigmatised SOGIESC. The migration authorities’ only motivation for this assumption seems to be that sexual orientation and gender identity are “fundamental traits” and something “significant for a person”. Why that would give rise to certain reflections and an ability to express oneself in detail, is not clear. It seems a remarkable and illogical idea that it would be easier to talk about something the more stigmatised and taboo it is. It appears more logical and more in line with the preparatory works of the Swedish Aliens Act that it would be even more difficult to speak about one’s SOGIESC the more hostile the environ-

ment is towards the SOGIESC. The Migration Agency's Director-General of Legal Affairs refers in the legal position paper RS/015/2021 to the preparatory works of the Swedish Aliens Act, which state that the Migration Agency should consider the difficulty in talking about issues concerning sexual orientation and gender identity. The Director-General of Legal Affairs emphasises in several sections of RS/015/2021 that sexuality and gender identity are taboo and stigmatised in many countries, which can make it difficult for the applicant to talk about asylum claims connected to their sexual orientation, gender identity and/or expression.³³ In the preparatory works of the Alien Act, the Swedish Government states the following:

Government Bill 2005/06:6. Refugeehood and Persecution based on gender or sexual orientation, p. 29:

For example people with a homo- or bisexual orientation are often a very vulnerable group. Often, these persons come from countries where homosexuality is taboo, and they may have experienced harassments from their families as well as from state authorities because of their sexual orientation. A person's sexual orientation may be related to strong feelings of guilt. Examinations of these asylum cases must therefore be carried out taking into consideration that it may be hard for the applicant to talk about their experiences, especially in front of a case officer.

The above cited preparatory works of the Swedish Aliens Act emphasises that the inquiries in these asylum cases must be conducted considering that it might be hard for the applicant to talk about their experiences, especially before a state official. The preparatory works emphasise that the more taboo LGBTIQ+ is in the person's country of origin, the more difficult it can be expected to be for the applicant to talk about their experiences. However, the grounds for rejection presented in this chapter clearly show that a case law has developed, where the expectation of the Migration Agency and the Migration Courts is that the more taboo LGBTIQ+ is in the country of origin, the higher demands are placed on the person's ability to describe their own SOGIESC

verbally in a detailed manner. The migration authorities' requirement of a more detailed account the more stigmatised LGBTIQ+ is in the country of origin, violates the preparatory works of the Aliens Act, and this requirement goes against the intention of the lawmaker. The migration authorities' requirement of emotional reflections and more detailed accounts the more taboo LGBTIQ+ is in the country of origin appears paradoxical, contradictory, illogical and incompatible with the preparatory work and the Swedish Migration Agency's legal position paper RS/015/2021. The requirements in the Swedish SOGIESC asylum case law which have been identified in this chapter, seem to completely lack support in the preparatory works of the Swedish Aliens Act, the Swedish Migration Agency's own legal guidelines, the UNHCR's guidelines No. 9 and case law of the CJEU³⁴. These sources of law emphasise the sensitive nature of questions relating to SOGIESC and the importance of respecting how difficult it can be for applicants who come from countries where LGBTIQ+ is stigmatised, or maybe even criminalised, to talk about their own SOGIESC.

The requirement that an inner emotional journey with specific feelings has taken place and can be described more detailed the more stigmatised SOGIESC is in the country of origin, is based on stereotypical notions about LGBTIQ+ people. It is based on an idea that there are certain universally common characteristics and experiences among "all" LGBTIQ+ people around the globe. However, not all LGBTIQ+ people have experienced a deeply emotional inner journey leading to self-awareness. Many for example feel that they are born a certain way, that their SOGIESC just "is" and has not been preceded by any specific emotional journey or inner process. The next chapter examines other common assumptions that affect the assessment of SOGIESC asylum cases and LGBTIQ+ asylum claims.

³³ The Swedish Migration Agency's legal position paper RS/015/2021, sections 2 and 4.1.2.

³⁴ Government Bill 2005/06:6. Refugeehood and Persecution based on gender or sexual orientation [Flyktingskap och förföljelse på grund av kön eller sexuell läggning], p. 29, the Swedish Migration Agency's legal position paper RS/015/2021, section 4.1.2, UNHCR's Guidelines No. 9, for example, para. 59. See also the CJEU's judgment December 2 2014 in the Joint cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, para. 69



5. Other stereotypes and preconceptions in SOGIESC asylum cases

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On the left:

Members of RFSL Ungdom wearing “Newcomers Youth” T-shirts, part of the organization’s clothing collection.

Photo: Arseny Selov & Andra Berciu

In the previous chapter, the report examined what requirements the Swedish migration authorities apply in practice in SOGIESC asylum cases. As a part of the credibility and reliability assessment, the migration authorities require that an inner process leading to a realisation of the SOGIESC has taken place, that the applicant has felt, or at least can reflect upon, feelings of difference, stigma and shame and that the applicant has the ability to give a verbal, detailed account of this process and these feelings. It is thus a requirement for making one's belonging to the particular social group LGBTIQ+ people credible, that an inner process has taken place and that the applicant has the ability to verbally account for this in a detailed, reflective and coherent manner. Further, it was concluded that the more stigmatised LGBTIQ+ is in the country of origin, the more the Swedish migration authorities require that the applicant has reflected upon their own SOGIESC, and the more details are required from the verbal account of these reflections.

In addition, the study found that the migration authorities' requirement of an inner process with specific emotions, which should be described more extensively the more stigmatised LGBTIQ+ is, is based on stereotypical notions about LGBTIQ+ people. These requirements take their starting point in the false assumption that there are certain universal characteristics and experiences that "all" LGBTIQ+ people share. This chapter investigates other common preconceptions and expectations in SOGIESC cases that are of great importance in the migration authorities' credibility and reliability assessment in LGBTIQ+ asylum cases.

5.1 LGBTIQ+ people do not take risks and always make risk assessments

"The Migration Court therefore does not find it credible that a person would dare to dress as a woman in the way that has been described, in a

country where harassments due to sexual orientation has escalated in the last years and where homosexual acts are criminalised.³⁵

"The risk of being caught must reasonably have appeared as significant to the applicant."³⁶

"You also state that you and your boyfriend had forgotten to close the door to your apartment when you were together in bed. Based on the country of origin information presented above about the situation for homosexuals in Uganda, the Migration Agency finds this behaviour remarkable."³⁷

"The Migration Agency finds it contradictory [...] that you were constantly scared but still chose to express your physical relationship in a public place. This implies a lack of reflection regarding what risks such an act can entail in a country like The Gambia."³⁸

Even though a lot has changed in the assessments of SOGIESC asylum claims since RFSL's asylum report from 2012,³⁹ this study finds that the migration authorities continue to make far-reaching assumptions about risk-taking. Previously, the migration authorities used to focus on whether the applicant had taken risks in a way that did not seem credible or plausible. Taking risks that were 'too big' were viewed as 'not credible' or implausible and would often lead to rejection and deportation of the applicants. The decisions and court rulings that this case study examines clearly show that the preconception that LGBTIQ+ people do not take risks is still in use. The Swedish migration authorities' reasoning regarding LGBTIQ+ persons' risk-taking and risk assessments appear to still have a major impact on the credibility and reliability assessments in SOGIESC asylum cases. This follows from the Migration Agency and the Migration Courts often writing in their negative decisions that the applicant has not described their risk assessments in enough detail, or that they have engaged in what the migration authorities considers to be

³⁵ The Migration Court at the Administrative Court in Malmö, 2013-03-27. Case no. 763.

³⁶ The Migration Court at the Administrative Court in Malmö, 2013-02-14. Case no. 2666.

³⁷ The Migration Agency Malmö. Decision 2012-01-04. Case no. 651.

³⁸ The Migration Agency Gothenburg. Decision 2017-05-12. Case no. 3813.

³⁹ The Refugee Status Determination Procedure Relating to Sexual Orientation: An Analysis of the Risk Assessment and Access to Protection in the Country of Origin [Asylprövningen vid flyktingskap på grund av sexuell läggning. En analys av riskprövningen och möjligheten till skydd i hemlandet], Gröndahl, A., available at https://www.rfsi.se/dlp_document/asylprovningen-vid-flyktingskap-pa-grund-av-sexuell-laggning-en-analys-av-riskprovningen-och-mojligheten-till-skydd-i-hemlandet/.

precarious behaviour. The explanations given by the applicants are seldom considered sufficient to ‘excuse’ or explain the risk-taking. In the written assessments and grounds for rejection in SOGIESC asylum cases there is mistrust, as well as blaming and shaming of applicants who are deemed to have taken too big risks. There is a preconception that LGBTIQ+ people are cautious and calculating in all situations, all the time. An asylum applicant deemed to have taken a ‘too big’ risk is usually not considered credible or reliable about their SOGIESC asylum claim, according to the migration authorities. Any explanation to the requirement of the applicant’s risk assessment, apart from the situation for LGBTIQ+ people in the country of origin being difficult, is not given by the migration authorities. The following excerpt from a verdict by the Migration Court serves as an example:

The Migration Court at the Administrative Court in Stockholm 2020-03-18. Case number 7550

He states that he has thought about not showing emotions or physical affection openly and to meet in desolated places. He has stated that it has been obvious to him that there are risks involved in having homosexual relationships in Iraq due to the general attitude to homosexuality in Iraq being stern and connected to terror and death. The Migration Court, however, finds that he, according to his own story, has acted in a way that shows poor awareness of risks. The Court especially notes that he has recorded a video on his phone with sexual content with his partner, has saved it on his work computer and on his phone and also left this phone with his niece without supervision. He has said that he took this risk because he wanted to save the video as a memory and that he later removed the video from his computer. The Court finds, based on the serious situation for homosexuals in Iraq and his alleged cautiousness, that he has given a short and unreflective explanation for why he has acted in this way.

The Migration Court first writes that the applicant has said that he did not show his relationship openly in Iraq. Thereafter, the court states that he has “acted in a way that shows poor awareness of risks” by having saved a sex video of himself and his partner. The Migration Court finds the justification that “he wanted to save the video as a memory and that he later removed the video from his computer” to be “a short and unreflective explanation for why he has acted in this way”. It clearly follows from the Migration Court’s reasoning that the court considers that the man’s actions – the risk-taking of having a sex video of himself and his partner – is not in line with “the serious situation

for homosexuals in Iraq and his alleged cautiousness”. The court’s obvious opinion is that it is contradictory that the man has exercised caution in public places to conceal his relationship while at the same time having saved a sex video of himself and his partner. However, it is of course possible for a person to exercise caution in some contexts while at the same time, during a limited period of time, save a sex video on their own private phone and a computer. The court’s conclusion assumes that homosexuals in Iraq do not take risks, and if they do, they need to have an explanation that is not short and unreflective. These arguments in the negative decisions can easily be perceived as a kind of punishment of the applicant for having, according to the court, shown “poor awareness of risks”. The punishment is that the applicant is denied asylum and deported to Iraq. The Migration Agency made a similar assessment in another SOGIESC asylum case from Iraq:

The Migration Agency, Gothenburg. Decision 2017-06-15. Case number 2167

You have also been given the opportunity to talk about how you viewed the risks connected to being homosexual and having a homosexual relationship in Iraq. You did not say any more than that there still are people who do it, but in secret. Thus, you have not talked about your own reflections regarding these risks. Your statement regarding everything being done secretly is not supported by the fact that you consented to record an intimate video on a mobile phone. In sum, you have not shown self-awareness regarding the discovery of your sexuality or expressed feelings about being deviating from a norm. You have only talked about this in brief, and you have not been able to account for feelings and thoughts about your orientation, despite repeated encouragement from the Migration Agency to elaborate on your story regarding this theme. You have also not been able to account for your thoughts regarding the risks of being caught having a same-sex sexual relationship in Iraq. The Migration Agency therefore concludes that you have not submitted reliable information about your belonging to a particular social group because of your sexual orientation.

In this case, the Migration Agency finds that the applicant’s description of having concealed his relationship is contradictory to him having recorded an intimate video on a mobile phone. Recording a video on a private mobile phone is of course not necessarily the same as not keeping

one's relation secret from one's surroundings. It can of obviously be completely possible to conceal a relationship and record a video on one's private phone. It is evident that the Migration Agency's definition and interpretation of the applicant's statement that "everything was done in secret" has precedence over the applicant's own experience. In this way, the Migration Agency creates a contradiction in the applicant's story that does not necessarily exist. The Migration Agency also writes in the decision that the applicant has not accounted for a "self-aware line of thoughts" regarding his insight of his sexual orientation and being a "norm-breaker".⁴⁰ Since the requirements of a detailed verbal account of an inner process leading to a realisation, emotions, thoughts⁴¹ and risk assessments were not considered met, the applicant was assessed as not credible regarding his SOGIESC asylum claims. He was therefore denied and deported to Iraq. The Migration Agency reasons in a similar manner in the following decision:

The Migration Agency confidential. Decision 2017-12-01. Case no. confidential.

You have stated that you have lived discreetly and have been careful because you were scared. However, you have not been able to elaborate on what your fear was based on. The Migration Agency also concludes that the submitted statement on your fear and caution contradicts the submitted information on your actions. You have for example stated that you dared to reveal your sexual orientation to a man in Senegal whom you did not even know was homosexual. Based on the information on your fear and the knowledge of Muslims' views on homosexuality in Senegal, you have not been able to account for whether, or how, you have reflected upon the risks of showing your sexual orientation to someone you barely knew. Therefore, the Migration Agency finds that you have given contradictory information about what you have felt and how you have acted in relation to your sexual orientation.

The Migration Agency considers the applicant's claim of being afraid and being cautious is contradictory to his submitted information about how he acted, since he showed his sexual orientation to another man "he did not even know was homosexual". This is an example of one of the Migration Agency's stereotypical notions, that homosexual people do not make contact with other people or show their SOGIESC without ensuring that the other person also is an LGBTIQ+ person. According to the Migration Agency it is contradictory that a homosexual person can be afraid while at the same time show their SOGIESC to another person. To feel scared and be cautious of course does not mean that an LGBTIQ+ person would never show or talk about their SOGIESC with someone else during an entire lifetime. It is perfectly possible to both be afraid and/or be cautious and still make contact with a person that one has feelings for and is attracted to, especially if one feels that this attraction is reciprocated. The Migration Agency's argument that the applicant should be able to account for reflections about risks because of "the Muslim view on homosexuality in Senegal" is a textbook example of an illegal stereotype that violates the EU's Qualification Directive.⁴² A similar assumption that LGBTIQ+ people do not talk to each other in countries where they are oppressed can be found in the following rejection grounds regarding an unaccompanied child from Somalia:

The Migration Agency, Unit for Children. Decision 2015-01-28. Case no. 3171

You explained that X [the applicant's boyfriend] told you [that he was homosexual] since he somehow knew that you were homosexual too. The Migration Agency does not find this information plausible, since you have also stated that you had never met X before. Furthermore, according to country of origin information from Lifos, homosexuality is taboo in Somalia. You and X having been able to talk about it in such an open manner that you have described does not therefore seem credible.

⁴⁰ The Migration Agency, Gothenburg. Decision 2017-06-15. Case number 2167

⁴¹ See chapter 4 about the Swedish migration authorities' requirement of the experience of an inner process leading to realisation, including specific thoughts and feelings.

⁴² Advocate General E. Sharpston emphasised in her opinion in Joint Cases C-148/13-C-150/13, that a negative decision would violate the EU's Qualification Directive if it was solely based on the stereotypical notion that "because B is from a Muslim family and a country where homosexuality is not accepted he should be able to give details about his feelings and how he came to terms with his homosexuality", ECLI:EU:C:2014:2111, available at <https://curia.europa.eu/juris/document/document.jsf?docid=155164&doclang=en>.

The Migration Agency finds that it is not credible that X told the applicant that he was homosexual since they had not met before. The applicant described that X “somehow knew” that he too was homosexual. The Migration Agency’s finding that this is not credible, is remarkable. Even though it is the first time that two homosexuals meet, there can of course be a mutual attraction and trust, just like between heterosexual people. This is neither unthinkable nor un-credible. Heterosexual people who meet each other for the first time can of course also pick up if the other person is sexually or romantically interested by interpreting ‘vibes’ or body language. Apart from that, ways of moving, expressions, the use of certain words or clothing can be used as sub-cultural codes to express sub-cultural kinship. Such signs can be recognised by those belonging to a certain group, but not by outsiders. X may very well have understood and felt that there was a mutual attraction between him and the applicant, and therefore felt confident in showing his sexual orientation. In some circles, people use the somewhat outdated term “gaydar” as a description of when they sense that someone else is also an LGBTIQ+ person. The Swedish Migration Agency’s reasoning in the two cases cited above is based on the erroneous assumption that LGBTIQ+ people do not talk to each other about or express their sexual orientation, gender identity and/or gender expression. This assumption is solely based on a stereotypical notion about LGBTIQ+ people. It is also a generalizing preconception that people who are oppressed always react and act in silence, secrecy and isolation. Instead, it would be more nuanced and also more attuned to reality, to think that oppression, taboo and criminalisation may lead to seeking a community as well as strength in others. The migration authorities also expect LGBTIQ+ people to reflect upon risks before they start a relationship and while being in a relationship:

The Migration Agency Gothenburg. Decision 2017-06-09. Case no. 2408

To the question on your thoughts about the risks with your relationship, you have answered that you often spoke about having fun together and moving in together and that you played together. You usually met at home, since it is illegal in Cameroon, and you could be beaten up if you were caught. Regarding the question on how you talked to each other regarding the risks, you have stated that you mostly talked of your relationship and music. You have also stated that you were aware of that what you did was illegal, and that you therefore met in secret. The Migration Agency finds this contradictory since you

also have stated that you regularly went to a club and danced with each other. Furthermore, you can not talk about how you have reasoned regarding your choice to spend time with X in clubs and have sex, knowing what the risks were. The Migration Agency further finds that you have difficulties describing your feelings and thoughts more deeply regarding your relationship with X and the risk you took by being together. [...] The Migration Agency finds that you have not been able to elaborate on your thoughts about having a relationship with a person of the same sex in relation to the risks.

To the Migration Agency it is of crucial importance whether and to what degree the applicant has considered the risks connected to being in a same-sex relationship in Cameroon. In the credibility assessment, the fact that that the applicant has “chosen” to spend time with his partner at clubs and had sex with him “even though he was aware of the risks involved”, is used against his credibility. The Migration Agency finds the applicant’s statement that they kept their relationship secret as contradictory to the claim that they often spent time at a club dancing with each other. The Migration Agency does not explain why this would be contradictory. Dancing with someone at a club of course does not mean that people around automatically know or understand that they have a romantic relationship. The cultural context is also of great importance: In many cultures where same-sex sexual relationships are taboo and criminalised, people of the same sex can dance with each other without it being perceived to have anything to do with homosexuality. The applicant having danced with his partner at a club does not have to give rise to a risk of revealing their relationship. Thus, this does not necessarily equal a risk-taking on the part of the applicant. That it would be dangerous for the applicant to be at a club with his partner is the Migration Agency’s own subjective interpretation and conclusion. It does not clearly follow from the decision what the Migration Agency bases this assumption on. Reasonably, the applicant should take precedence over the Migration Agency regarding defining what is a risk for him in his country of origin. Even so, the absence of detailed accounts for risk assessments regarding a same-sex relationship was essential in concluding that the applicant had not made credible his sexual orientation. Also in this case was the applicant rejected and deported to a country where LGBTIQ+ people are persecuted

through imprisonment.⁴³ A similar assessment was made in the following case:

The Migration Agency confidential. Decision confidential. Case no. confidential [Appealed to the Migration Court at the Administrative Court in Malmö 2019-03-07. Case number 4781]

You also have not brought up the risk of having a same-sex relationship in Iran. You have stated that it was in Sweden that you began to consider the risk of being in a same-sex relationship in Iran. This information is not in coherence with your claims of having suffered maltreatment by your mother and others in Iran because of your sexual orientation. You have not to a satisfactory extent explained why you only considered the risk in Sweden. This too is a flaw in your account.

The Migration Agency does not find it credible that the young man did not consider the risk of having a same-sex relationship in Iran, but only thought about it in Sweden. This is yet another example of the migration authorities' assumption that LGBTIQ+ people always think deeply about the risks of being an LGBTIQ+ person. The claim that the young man had been treated badly by his mother because of his sexual orientation was, according to the Migration Agency, inconsistent with the information that he only in Sweden thought about the risks of living in a same-sex relationship in Iran. The Migration Agency's assessment that this is contradictory is based on the erroneous assumption that ill-treatment from a parent always causes an LGBTIQ+ person to think about the risks of having a same-sex relationship. No motivation for this assumption is made by the Migration Agency in the grounds for rejection. It appears to be yet another generalising assumption that LGBTIQ+ people act and react in the same way to being mistreated by a parent. According to the Migration Agency, it is a "flaw" in the applicant's story that he has not given a satisfactory explanation to why he began to think about the risks of having a same-sex relationship first when being in Sweden. The Migration Agency's requirement of a satisfactory explanation

appears remarkable. It is perfectly possible for an LGBTIQ+ person to start to think about their life as an LGBTIQ+ person in Sweden after having lived there for a while, and then begin to compare it to the life in their country of origin. It can be completely normal to not reflect much upon what you perceive as your normal everyday life, until it changes and you have something else to compare it to. Despite the requirements of risk assessment and detailed accounts for these being based on stereotypical notions about LGBTIQ+ people, these requirements were crucial also in this case. The boy was denied asylum and deported to Iran where same-sex sexual acts may be punished by execution.⁴⁴ Seven short examples illustrate similar rejection grounds in other SOGIESC asylum cases:

The Migration Court at the Administrative Court in Stockholm 2019-02-19. Case number 6706 [Appeal of the Migration Agency Uppsala Decision number 2018-04-06. Case no. 6012]

The Court concludes that X does not seem to have reflected much upon the risk it must have meant to have a relationship that lasted for over a year, and to engage in sexual acts at his boyfriend's house even though he knew it was prohibited. In addition, X has not been able to talk more in-depth about why he dared to start such a relationship with his friend.

The Migration Court at the Administrative Court in Gothenburg 2019-02-28. Case number 9532

The Migration Court finds that X has provided vague statements that lack in detail in his asylum claims, about for example thoughts and feelings regarding his sexual orientation and the risk assessments he has made by living in a relationship with another man. Neither has he demonstrated reflections regarding the risks he took when he and Y allegedly were caught in public. Even though the Migration Court does not question that it can be difficult to talk about one's sexual orientation when coming from a country where same-sex relationships are criminalised and taboo, the Court still finds that X after having been in Sweden for a while should be able to elaborate on this further.

⁴³ State-Sponsored Homophobia 2020: Global Legislation Overview Update, Ramon Mendos, L., Botha, K., Carrano Lelis, R., López de la Peña, E., Savelev, I., Tan, D., ILGA World, p. 312ff, available at <https://ilga.org/wp-content/uploads/2023/11/ILGA-World-State-Sponsored-Homophobia-report-global-legislation-overview-update-December-2020.pdf>

⁴⁴ State-Sponsored Homophobia 2020: Global Legislation Overview Update, Ramon Mendos, L., Botha, K., Carrano Lelis, R., López de la Peña, E., Savelev, I., Tan, D., ILGA World, p. 46ff., available at <https://ilga.org/wp-content/uploads/2023/11/ILGA-World-State-Sponsored-Homophobia-report-global-legislation-overview-update-December-2020.pdf>

The Migration Court at the Administrative Court in Luleå 2019-05-03. Case number 8797

According to the Court, A has not been able to explain in detail how he has reflected upon the risks it must entail to live as a homosexual in Ghana, apart from that he has concealed his sexual orientation and his relationships with other men. The fact that he has not been able to give a more elaborate account in this part seems remarkable to the Court, taking into account other statements he has made about his own perception of the attitude to homosexuality within his family and society in general in Ghana.

The Migration Court at the Administrative Court in Gothenburg 2019-02-28. Case number 9532

The Migration Court finds that X has given vague statements that lack in detail about his asylum claims, for example regarding his thoughts and feelings about his sexual orientation and the risk assessments he has made regarding living in a relationship with another man. In addition, X appears to not have reflected upon the risks he took in connection to that he and [his boyfriend] allegedly were caught in public.

The Migration Court at the Administrative Court in Malmö 2019-03-28. Case number 3849

The applicant has not been able to give further descriptions of his feelings and thoughts about his sexual orientation and the risk assessments he has made regarding being in relationships with other men. His description of the perceived risk factors is general in nature and describe the prevailing perception of homosexuality in Nigeria. The applicant has not demonstrated that he has considered the risks he took by living in homosexual relationships.

The Migration Court at the Administrative Court in Malmö, 2019-03-28. Case number 1170

Considering that homosexuality is stigmatised and taboo in Jordan, the Court concludes that A should have been able to describe his situation, feelings and thoughts more extensively. [...] According to the Court, A also does not describe in detail how they reasoned about the risk of being caught.

The Migration Agency confidential. Decision 2019-11. Case no. 2186

The Migration Agency finds that you should have been able to elaborate on your thoughts about [becoming attracted to a boy] given how taboo bisexuality, and especially same-sex attraction, is in Afghanistan and the risks such a step therefore can entail. [...] Based on this, you should have had the opportunity to reflect upon and think about the

consequences. You have not reflected upon the risks it entails to start a relationship with a person of the same sex, nor have you assessed the different aspects and consequences connected to this [...]

The seven cited decisions are illustrative of the majority of the SOGIESC asylum decisions and judgements that form the basis for this case study, as they contain arguments about risk-taking and risk assessments. The common denominator of the above cited negative decisions is that the applicants in all cases failed to account in enough detail for what risk assessments they – according to the migration authorities – should have made regarding initiating or being in same-sex relationships. The grounds for rejection clearly demonstrate the migration authorities' perception that LGBTIQ+ people do not take risks and always make detailed risk assessments. In the last one of the cited rejection grounds, the Migration Agency writes that the applicant "has not reflected upon the risks it entails" to enter a same-sex relationship. The Migration Agency writes that the applicant has not "assessed the different aspects and consequences connected to this" and that he "should have had the opportunity to reflect upon and think about the consequences". This repeating of the argument that the applicant should have reflected upon the risks and thought about the consequences of having a same-sex relationship appears to blame the applicant. The statement implies that the applicant has himself to blame for the persecution he claims to risk since he, according to the Migration Agency, has not reflected enough upon the risks and consequences of living as an LGBTIQ+ person. The applicants in all the cited cases were refused asylum as they, according to the Migration Agency or the Migration Courts, had not reflected enough upon their risk-taking. It appears difficult to interpret this in any other way than that the applicants in practice are being punished for taking risks and are therefore denied asylum.

As was mentioned initially in this chapter, the migration authorities used to make far-reaching and speculative arguments about how certain risks that the applicant was found to have taken made their SOGIESC not credible. Two illustrative examples of this are the reasoning from two older SOGIESC asylum cases with applicants from Uganda, from 2012 and 2013:

The Migration Court at the Administrative Court in Malmö 2013-02-14. Case number 9703

According to the applicant, she and her partner have, ever since they met in 2007, taken precautions to prevent anyone from finding out about their sexual relationship. For example, they never met at home, but at hotels, and their families had no knowledge about the relationship. It therefore seems difficult to explain why the applicant, after having taken precautions for four years every time she met her partner, would engage in a sexual act with the partner in an unlocked room in the family's house at her sister's wedding and with a number of invited guests present in the home. The risk of being discovered must reasonably have been perceived as significant to the applicant.

The Migration Court at the Administrative Court in Malmö, 2013-03-27. Case number 763

The Migration Court therefore concludes that it is implausible that a person would dare to dress in women's clothing in the way that has been described in a country where the harassment against people based on sexual orientation has escalated in recent years and where homosexual acts are criminalised.

In the first case, the court found it "difficult to explain" that the applicant had taken safety precautions for several years and then on one occasion had sex with her partner in an unlocked room during a party at the family's house. According to the Court, the risk of being caught "should have been perceived as significant". In the second case the Migration Court concluded that it was not credible that someone "would dare to dress in women's clothing" in a country where LGBTIQ+ people are harassed and criminalised. In both these cases, the Migration Courts' reasonings are based on an assumption that LGBTIQ+ people do not take risks, ever.

The consequence of the migration authorities mistrusting LGBTIQ+ asylum seekers that they consider to have taken "too big risks", is that the applicants are denied asylum and deported. In addition, there is a stereotypical notion that LGBTIQ+ people do not take risks and that they always make careful risk assessments. It appears unrealistic to think that people in their everyday lives never would expose themselves to any risks. Such an assumption is based on the notion that people, in this case LGBTIQ+ people who live in a LGBTIQ+-phobic environment, always are calculating, cautious, reclusive and that they live in isolation. The consequence of applying this

stereotypical notion in the credibility assessment is in practice that LGBTIQ+ people who have taken risks "have themselves to blame" and that they are punished in the form of a negative decision and deportation.

The importance of the asylum seeker's risk assessment in SOGIESC asylum cases, is also clear from this longer excerpt from the Migration Court's reasoning:

The Migration Court at the Administrative Court in Gothenburg 2019-03-13. Case number 81

[X has] provided more detailed information in the oral hearing than during the asylum interview at the Migration Agency. The appellant has explained that this is because he now feels more safe talking about his sexual orientation, even though he is still in the middle of his "coming out process". Given the sensitive nature of the information, the Migration Court finds this to be a reasonable explanation. The appellant has talked about how he realised that he was interested in boys when he had a sexual relationship with a man who worked at the same mechanic shop as his brother. [...] The Migration Court concludes that his statements have been reasonably detailed in this respect.

However, the appellant has not been able to answer questions regarding how he has reflected upon the risks involved in starting a relationship with another man, or generally account for reflections he had in connection to realising that he was homosexual. He means that he at that age [15, according to his own information] did not think about what problems it could entail but decided to focus on the positive feelings he had. According to the Migration Court, this information does not correspond with also having claimed to have been well aware that homosexuality is illegal in Iran and may be punished by the death penalty [...] In sum, the Migration Court's finds that the lack of information about his reflections his own sexuality, and the risks it poses, affects the story's credibility. The applicant, therefore, is not found to have made his sexual orientation credible.

These grounds for rejection differ from the majority of SOGIESC asylum cases as the Migration Court finds that large parts of the story are detailed and reasonable. The claim that the applicant is in a "coming out process" is, according to the court, a reasonable explanation for him having been more detailed during the court proceedings, than two years earlier at the asylum interview at the Migration Agency. The Migration

Court also finds that the story about his relationship and the feelings surrounding the realisation of his homosexual orientation, are “reasonably detailed”. However, to the Migration Court, it is crucial that he has not accounted for his risk assessments regarding initiating a same-sex relationship. The applicant responded to this by stating that he was 15 at the time, that he did not think about what problems it might entail and that he decided to focus on the positive feelings he had. However, the Migration Court concluded that since he knew that homosexuality could be punished by death in Iran, this did not explain why he at 15 had not reflected more upon risks. The Migration Court thus found that a teenage boy in love focusing on his positive emotions does not excuse him from not having thought more about the risks and problems surrounding his sexual orientation. Also in this case, the applicant appears to be punished for not having thought enough about risks. The consequence is, also in this case, that he is not found to have made his sexual orientation credible, meaning that he is denied asylum and deported. To focus on positive feelings rather than risks and problems seems to be a reasonable behaviour to expect from a 15-year-old boy in love. It appears unreasonable, unrealistic and almost cruel to expect and require from a 15-year-old teenager in love to think about and focus on risks and problems instead of his positive emotions, with the threat of otherwise being deported to a country where homosexuality may be punished by death.⁴⁵ The lack of risk assessments was considered enough to deny asylum and deport the young man to Iran. In the following grounds for rejection regarding a self-identified lesbian woman from The Gambia, the Migration Agency reasons in a similar way:

The Migration Agency Gothenburg. Decision 2017-05-12. Case no. 3813.

You also have not been able to describe the deliberations you and your partner made

before you decided to enter a relationship, apart from stating that you liked each other and talked about getting married. In this context, the Migration Agency notes that you have stated that you used to go to the beach and lie in each other’s arms. You have also stated that you were always afraid, since there allegedly were policemen there, looking for homosexuals. The Migration Agency finds it contradictory that you have stated that you were always afraid but still chose to express your relationship physically in a public place. Further, the Migration Agency finds that you also in this context show a lacking risk assessment given what such a behaviour can entail in The Gambia.

In support of the assessment that the woman was not credible regarding her SOGIESC, the Migration Agency argued that it was contradictory of the woman to have stated that she was frightened on the one hand and that she and her partner “chose to express their relationship physically” in a public place on the other. It is not clear from the decision if the woman was given the opportunity to refute the claimed inconsistencies before the Migration Agency made its decision. Applicants have an absolute right to be given the opportunity to refute issues that the Migration Agency deem contradictory.⁴⁶ In the grounds for rejection, there is an explicit expectation that the couple should have made certain “deliberations before the woman and her partner decided to enter a relationship”. To “like each other and talk about getting married” is according to the Migration Agency not enough to start a relationship. According to the Migration Agency, the person claiming SOGIESC as a ground for asylum can be required to have made certain considerations before entering into a relationship and be able to account for those. The Migration Agency does not find it credible that two women in The Gambia can start a relationship without any other considerations than that they like each other and talk about getting married. It is a stereotypical and generalising assumption that LGBTIQ+ people always make deep considerations and deliberations. The Migration Agency also states that the claim of the applicant having been fearful contradicts her behaviour. According to the Migration

⁴⁵ State-Sponsored Homophobia 2020: Global Legislation Overview Update, Ramon Mendos, L., Botha, K., Carrano Lelis, R., López de la Peña, E., Savelev, I., Tan, D., ILGA World, p. 46ff., available at https://ilga.org/wp-content/uploads/2023/11/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf

⁴⁶ Quality in Swedish Asylum Assessments. A Study about the Migration Agency’s Examination of and Decision-making about international Protection [Kvalitet i svensk asylprövning, En studie av Migrationsverkets utredning av och beslut om internationellt skydd], Fejjen, L., Frennmark, E., UNHCR, 2011 p. 76f.

Agency it is contradictory to fear the police and at same time lay in one's partner's arms on the beach. From this reasoning, it is clear that the Migration Agency considers the risk the woman and her partner took when laying in each other's arms to be neither approvable nor credible. However, the fact that a person is capable of feeling fear does of course not mean that they can not do anything dangerous or risky. This does not have to be contradictory, but rather channels an expression of being human – a person that shows affection for a person they love. Even if the Migration Agency finds it contradictory to both be scared of the police and hold one's partner at the beach, this does not mean that it is unthinkable for a couple to embrace each other at the beach. Even if they are scared. Is it unthinkable that an LGBTIQ+ person, in this case a lesbian woman from The Gambia, shows affection to her partner despite being scared? Of course not. LGBTIQ+ people are all individuals who feel afraid and do things that might be dangerous, just like all people do. This does not have to be preceded by specific considerations or risk assessments simply because they happen to be for example lesbian. The Migration Agency's credibility assessment in this case, as in many other SOGIESC asylum cases, is based on the incorrect and stereotypical notion that LGBTIQ+ people do not take risks.

Finally, the Migration Agency writes that the asylum-seeking woman shows “a lacking risk assessment given what such a behaviour can entail in The Gambia.” A reasonable question that arises in response to the Migration Agency's requirements of special deliberations, risk assessments and minimal risk-taking is if the Migration Agency expects same-sex couples to conceal their love around the clock, all the time, everywhere, towards everybody, in order to be credible and for their asylum story to not be deemed contradictory? The reasoning in this case can not be interpreted in any other way than as yet an example of that “too much risk-taking” is not considered credible and leads to the applicant being assessed as not credible regarding their SOGIESC.

If an applicant in a SOGIESC asylum case can not demonstrate having made risk assessments, they must have a good enough explanation for why they have not done so. Applicants who can

not account for risk assessments or, according to the migration authorities, do not have a valid excuse for not having made detailed risk assessments as an LGBTIQ+ person, run a high risk of being found non-credible and non-reliable regarding their SOGIESC asylum claims. As concluded above, it is a stereotypical notion that LGBTIQ+ people always calculate risks before for example entering a same-sex relationship, merely because they live in a country where such relationships are not allowed. It is also a stereotypical notion that LGBTIQ+ people never take risks. The consequence of using these stereotypical notions in the credibility assessments in LGBTIQ+ asylum cases is that LGBTIQ+ people in need of and entitled to protection are denied when their life experiences and actions do not meet stereotypical preconceptions of LGBTIQ+ people and their lives. It appears as if the Swedish Migration Agency and the Migration Courts consider them to have themselves to blame if they have taken risks and thereby finds them undeserving of protection. To apply stereotypical notions to conclude that an applicant is not credible about their SOGIESC is illegal. This was established by the Court of Justice of the European Union, CJEU, 2014, in the Joint cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie. Also, the UNHCR Guidelines emphasise that there are no universal characteristics or qualities that define LGBTIQ+ individuals, and that the credibility assessment should not be based on stereotypical notions.⁴⁷ The migration authorities' frequent use of requirements of risk assessments and the assumption that an applicant who has taken “too big risks” is not credible, violates both the CJEU's ruling and the UNHCR's guidelines No. 9. The requirement that the applicant should have made risk assessments and be able to account for them in detail is one of many examples of how the crucial point in the migration authorities' assessments of SOGIESC asylum cases, seems to be whether the applicant has the “right” experiences and can account for them, rather than assessing their need for protection.

5.2 Self-acceptance too easily is not credible

“On the question of why he only associates positive feelings with his sexual orientation [...] he has given the answer that it is his fate and that he therefore must accept it. A has [not] elaborated or

⁴⁷ The UNHCR's Guidelines No. 9, para. 60.ii.

talked in greater detail about his feelings and thoughts about his sexual orientation.”⁴⁸

“The Migration Agency finds that it, considering the cultural context you come from [Somalia], is not credible that you have not had other feelings [than joy] regarding your sexual orientation.”⁴⁹

Chapter 4 described the migration authorities’ requirement in SOGIESC asylum cases that an inner process leading to realisation should have taken place and that applicants should have felt or that they at least can relate to negative feelings of difference, stigma and shame. From the decisions and court rulings examined in this research study, it is clear that there is an expectation from the migration authorities of LGBTIQ+ people always having internalised the LGBTIQ+-phobia of their surroundings. Applicants who describe that they have not experienced an inner process, that they were “born that way”, that they accepted themselves without an inner struggle with negative feelings, run a high risk of being denied asylum, since they are often deemed non-credible regarding their SOGIESC. The same is true for those who describe that they have had only positive feelings regarding their SOGIESC. The realisation of their SOGIESC is expected to be preceded by an emotional process consisting of an inner struggle and internalised LGBTIQ+-phobia. The following examples of grounds for rejection illustrate when the migration authorities do not find it credible that the applicant has accepted themselves without negative feelings.

The Migration Court at the Administrative Court in Malmö 2019-03-15. Case number 262
Furthermore, A’s information about his sexual orientation has generally been vague and lacking in detail. [...] He has instead briefly and without nuance stated that he accepts himself. To the question of why he only associates his sexual orientation with positive feelings, even though having stated that he was subjected to continual abuse, he has given the answer that it is his fate and that he therefore must accept it. A has therefore not elaborated or talked in greater

detail about his feelings and thoughts about his sexual orientation during the hearing in court.

The Migration Court makes the assumption that the applicant should associate something different than “only positive feelings with his sexual orientation” since he has experienced abuse because of it. This is a strange assumption. Being abused because of one’s sexuality does not necessarily mean that one internalises the perpetrator’s homophobia. Even the question “why” someone only has positive feelings about being LGBTIQ+ indicates that the migration authorities expect that LGBTIQ+ people should feel something different than positive feelings towards their own SOGIESC. The Court’s finding of the applicant’s answer not being detailed enough shows that the answer, in essence, was “wrong”. The Migration Court did not find the applicant’s answer credible. The Migration Agency made a similar assessment regarding an unaccompanied child from Somalia:

The Migration Agency, the Unit for Children.

Decision 2015-01-28. Case no. 3171

Among other things, you only answered that you were happy when you realised that you were attracted by boys. Despite a number of follow-up questions, you have not elaborated on your answer. The Migration Agency finds that it, based on the cultural context you come from and your age, is not credible that you have not had any other thoughts [than joy] regarding your sexual orientation. The subject is taboo, and homosexuality is not discussed in any part of Somali society.

In this decision, the Migration Agency’s expectation that applicants should have felt negative emotions because homosexuality is “taboo” in Somalia, is explicit. The boy’s answer was not deemed credible, he was not found to have made his homosexual orientation credible, why he was refused asylum and deported to Somalia, where homosexuality is punishable by death.⁵⁰ In both of the above cited grounds for rejection, the migration authorities did not find it credible or reliable that the applicant simply had accepted or exclusively felt positive feelings about their homosexuality. The following negative decision

⁴⁸ The Administrative Court in Malmö, 2019-03-15, Case no. 262

⁴⁹ The Migration Agency Decision 2015-01-28, The Asylum Unit for Children, Case no. 3171.

⁵⁰ State-Sponsored Homophobia 2020: Global Legislation Overview Update, Ramon Mendos, L., Botha, K., Carrano Lelis, R., López de la Peña, E., Savelev, I., Tan, D., ILGA World, p. 75ff, available at <https://ilga.org/wp-content/uploads/2023/11/ILGA-World-State-Sponsored-Homophobia-report-global-legislation-overview-update-December-2020.pdf>.

from the Migration Agency are another example of this:

Migration Agency confidential [Appealed in Case no. 262 cited above]

The Migration Agency finds that you can not elaborate on your answers regarding what thoughts and reflections you had when you became aware of your sexual orientation, but have only stated that you realised that you were homosexual by having sex with other men, that you only thought about lust, that it was easy for you and that you have never cared what others think about it. Furthermore, you have stated that you did not think anything in particular about yourself when you realised that you were attracted to other men, which seems remarkable given that you are an LGBTIQ+ person and the attitude to LGBTIQ+ in Iraq. Neither have you in a detailed manner been able to talk about the insight that made you accept your sexual orientation, but only stated that you like having sex with men and that you do not know why.

The applicant claimed that he “realised that he was homosexual by having sex with men” and “that he has never cared about what others think about it”, that he did not think anything special about himself when he realised that he was attracted to men. According to the Migration Agency, this is “remarkable”, given the view on homosexuality in Iraq. The Migration Agency thus concludes that it can not have been “easy” or unproblematic, as they assume that he should have internalised the homophobia of his environment. The man’s self-identification as homosexual and his unproblematic relationship to his sexual orientation was, according to the Migration Agency, not credible or reliable, and he was denied asylum and deported. The Migration Court makes a similar assessment in an SOGIESC asylum case from Nigeria:

The Migration Court at the Administrative Court in Malmö 2020-02-18. Case number 3953

Although A has received questions about this during the oral hearing, he has not been able to

describe any complex emotions regarding the parents’ and the other family member’s attitude to his sexual orientation, like for example shame, guilt and frustration. Nor has he been able to express any worry or fear regarding his parents’ reaction to his sexual orientation if they would find out about it. The Migration Court can understand that people’s ability to express their emotions varies, and that there might be cultural circumstances that affect the ability to reflect in this regard. However, according to the Court, it must be presumed that someone who grows up in a country like Nigeria, where homosexuality is a big taboo as well as criminalised, would have many thoughts about their deviating sexual orientation and what the future consequences might be.

According to the Migration Court, it can be “presumed” that someone who has grown up in Nigeria has “many thoughts about their deviating sexual orientation” and what “future consequences” this might entail. As an explanation of this, the court states that homosexuality is taboo and criminalised in Nigeria. No explanation is given of why criminalisation and taboo would automatically lead to specific thoughts of future consequences of one’s sexual orientation. According to the court, the applicant should be able to account for “complex emotions” regarding for example “shame, guilt and frustration”. The lack of such feelings was deemed non-credible, why the applicant was denied asylum and deported to Nigeria. The Migration Court’s expectation, that a man in Nigeria must have had thoughts about his “deviating orientation”, is a textbook example of an illegal stereotypical notion that the Advocate General at the CJEU has established would violate the EU’s Qualification Directive.⁵¹ Nevertheless, the stereotypical notion that LGBTIQ+ people always have a problematic relationship with and negative emotions towards themselves, still prevails:

The Migration Agency Stockholm. Decision 2019-10-18. Case no. 2186

[...] considering, in particular, that you have lived in a society where same-sex relationships are taboo and illegal, and noting the general oppression homosexuals are subjected to in Afghan society, the

⁵¹ Advocate General E. Sharpston emphasised in her opinion in Joint Cases C-148/13–C-150/13, that a negative decision would violate the EU’s Qualification Directive if it was solely based on the stereotypical notion that “because B is from a Muslim family and a country where homosexuality is not accepted he should be able to give details about his feelings and how he came to terms with his homosexuality”, ECLI:EU:C:2014:2111, available at <https://curia.europa.eu/juris/document/document.jsf?docid=155164&doclang=en>. See chapter 10.9 in this report

Migration Agency finds that you should be able to reflect upon your fear in a more profound way than you have done at the asylum interview.

The Migration Agency assumes that the applicant has felt and can account for fear, since same-sex relationships are taboo and illegal in Afghanistan. A similar assessment is made in the following case:

The Migration Agency Stockholm. Decision 2019-10-23. Case no. 1417

The Migration Agency finds that you, at the asylum interview, have not been able to describe or explain your feelings about being homosexual in a society where heterosexuality is the norm, or what difficulties you have experienced as a result. [...] Your thoughts, feelings and reflections do not appear self-experienced. This is because you have not been able to account for your feelings about the difference and vulnerability you faced, having a norm-breaking sexuality.

The Migration Agency seems to imply that claiming sexual orientation as grounds for asylum automatically means that the applicant has experiences of “difference and vulnerability” based on a “norm-breaking sexuality”, which the applicant therefore must be able to account for. The Migration Agency finds that the applicant’s account of such thoughts, feelings and reflections that the Migration Agency assumes that applicants in SOGIEC asylum cases have experienced, “do not appear self-experienced”, as they have not accounted for “feelings of difference and vulnerability”. Being at risk of persecution because of one’s sexual orientation does not necessarily mean that the affected individual personally has experienced difference or vulnerability. Also in this case the grounds for rejection are based on the Migration Agency’s assumption that the applicant must have experienced feelings of difference and vulnerability because of the difficult situation for homosexuals in Afghanistan. Again, this is a stereotypical assumption that lacks support in the UNHCR’s Guidelines No. 9, the Migration Agency’s position paper RS/015/2021SR and, furthermore, it violates the EU’s Qualification Directive.⁵²

5.3 Realistic and long-term future plans

It is clear from the many decisions and court rulings examined in this study, that applicants with SOGIESC asylum claims are often asked questions by the Swedish migration authorities about how they imagined and thought about their future as an LGBTIQ+ person while still in their country of origin. The migration authorities expect that all LGBTIQ+ people have thought about their future and made plans for how they intend to live as an LGBTIQ+ person. The harsher the situation is for LGBTIQ+ people in the country of origin, the more the applicant is expected to have thought about their future, and the more in detail they are expected to describe these plans. The plans must appear realistic and long-term, according to the migration authorities. Applicants in SOGIESC asylum cases who state that they have not thought about or planned for the future are met with surprise or mistrust. To not have thought about one’s future as an LGBTIQ+ person is generally not considered credible by the migration authorities. The following grounds for rejection may serve as an example:

The Administrative Court at the Migration Court in Stockholm 2019-03-18. Case number UM 9616-18

X has been asked to talk about what he wants his future to look like. He has stated that he wants to get married to a man and adopt a child. Regarding his relationship to his parents, he has stated that he can never tell them that he is homosexual. On the question of how he intends to incorporate his parents into his future plans he has said that his parents might come and visit him in Sweden for one or two weeks at a time, and that they then would not suspect that he is homosexual. Taking into account that he wants to have children with a future husband, his reflections on this topic seem short-term and unrealistic. While noting that X is still young and does not yet have any children, his statement regarding this subject indicates that he has not thought profoundly or for a very long time about the issue. In conclusion, the Court finds that X has not made it credible that he is homosexual.

⁵² Advocate General E. Sharpston emphasised in her opinion in Joint Cases C-148/13–C-150/13, that a negative decision would violate the EU’s Qualification Directive if it was solely based on the stereotypical notion that “because B is from a Muslim family and a country where homosexuality is not accepted he should be able to give details about his feelings and how he came to terms with his homosexuality”, ECLI:EU:C:2014:2111, available at <https://curia.europa.eu/juris/document/document.jsf?docid=155164&doclang=en>. See chapter 10.9 in this report.

This case concerned a then 20-year-old man from Morocco who was 17 when he came to Sweden and sought asylum. From the grounds for rejection in the judgment it appears that the young man “has been asked questions about what he wants his future to look like”. Based on the wording, the question appears to have been open; about what the young man wants and wishes his future to look like, and not about how he planned to realise plans he had already made. To want or wish are not the same as planning the execution of plans already made. Yet, it appears obvious from the Court’s reasoning and conclusion that the young man was expected to have thought more profoundly and planned his future as an LGBTIQ+ person and be able to account for these plans.

According to the arguments of the court, the plans for the future need to appear realistic and long-term. The young man in the above cited case has answered what he wanted his future to look like, that he wanted to adopt a child and get married to a man. He had also stated that he could not tell his parents that he is homosexual. The Migration Court repeats the question made to the man: “On the question of how he intends to incorporate his parents into his future plans.” Even the wording of the question presupposes that the young man should have a complete, ready-to-go, thought out plan for how he, in a potential and distant future, will live without his parents being informed about his sexual orientation. The Migration Court writes that the young man’s considerations are “short-term and unrealistic” and that he does not appear to have “thought profoundly or for a very long time about the issue”. The court does not explain why it would be unrealistic for a person’s parents to come visit for one or two weeks without finding out that the person is homosexual. It can of course be completely possible for a person to take measures to conceal their family constellation for a limited period of time such as one or two weeks. However, the most problematic issue with this reasoning by the Migration Court, is that there is no legal support for requiring an asylum-seeking young man, merely because he claims homosexuality as a ground for asylum, to have made “long-term and realistic future plans” and thought “profoundly and for a long time” about how these can be realised.

To require a young person to have long-term and realistic plans and “have thought profoundly and for a long time about the issue” is of course both unreasonable and completely irrelevant in determining whether the applicant has a need for protection based on sexual orientation. Nonetheless, the

Migration Court concluded based on this finding, that the young man had not made his claimed sexual orientation credible, why he was refused asylum and deported to Morocco. The Migration Agency argues in the same way in the following case:

The Migration Agency Malmö. Decision 2018-05-16. Case no. confidential

On questions about what your family situation would look like, taking into account that you have your parents and siblings in Sweden, you have answered that they have no knowledge about your orientation and will not find out. You have said that your mother is the most important thing to you, and that it is not worth living if your family disowns you. However, it is not clear how you plan to live with a man without your family finding out about your sexual orientation. The Migration Agency finds that the lack of personal and emotional reflections is particularly significant in your account of how you plan to live your life in Sweden in relation to your family, who are also in Sweden. Noting that you came to realise your sexual orientation seven or eight years ago, and that you have stated that your family is the most important thing to you, and that your thoughts have developed a lot since you came to Sweden, the Migration Agency finds that you should be able to elaborate on your answers further.

In its reasoning, the Migration Agency emphasises that the applicant has not accounted for how he plans to live in a same-sex relationship without the family finding out. The issue that the young man could not account for extensive, well thought-through plans for the future regarding his sexual orientation, a possible, hypothetical future partner and how he would hide this partner from his family, was used as an argument against his credibility regarding his sexual orientation. The assessment that he could not “elaborate on his answers” about the prospect of living with a man without his family’s knowledge, contributed to the assessment that he had not made his homosexual orientation credible. LGBTIQ+ youth are however, just like anyone else, individuals with different experiences and characteristics. To have thought at such a young age, long and hard and to have made realistic, long-term future plans about how one plans to live is not something that distinguishes LGBTIQ+ people. This is simply another generalising, stereotypical notion about LGBTIQ+ people, that the migration authorities apply when assessing credibility in SOGIESC asylum cases.

Below is an excerpt from an asylum interview protocol in a SOGIESC asylum case where the applicant is from Nigeria. It illustrates how applicants who claim a particular sexual orientation, gender identity and/or gender expression as grounds for asylum, are often asked detailed questions about how they imagine their future as an LGBTIQ+ person. The woman in this case has described how she has concealed her relationship with another woman. C refers to “case officer” and A to “applicant”:

The Migration Agency Uppsala. Asylum Interview 2019-03-01 Case no. 77

C: *When you realised that you could not change [that you are a lesbian], how did you think about your future in a country that does not accept a person with your sexual orientation?*

A: *I thought that I do not have a future, I only thought of the consequences, that if I am caught, I would be killed.*

C: *Did you have any thoughts about what you wanted your life as a homosexual in Nigeria to be like?*

A: *Can you explain? As a lesbian? I would like to live openly and kiss my partner in public. But that is not allowed in the country I live in.*

C: *You then started a relationship with a woman called X. [...] Did you talk about your future together?*

A: *We had no future together, we knew that. In the country where we lived, we could not get married or kiss openly.*

C: *So, imagine your future, as a lesbian woman in Nigeria, not in relation to X, what did you think?*

A: *I knew my life was at risk, that if I was caught, what the consequences would be.*

C: *Did you and X talk about plans for how you could live together without fear?*

A: *We did not talk like that. Instead, I said that what we are doing is not allowed.*

C: *So, how come you kept a relationship going when you felt fear and that what you did was not allowed?*

A: *I can not change myself. That is why.*

C: *Based on what you have told me, that she was rich and could help you out of the country relatively quickly, why did you not plan to do this, when you seem to have had the opportunity? [...] I mean before you were caught, why did not you discuss leaving Nigeria to live in a country where you could be openly homosexual and live together?*

A: *She had a good life and her job and did not want to go anywhere. Neither did I want to leave before that man saw us. [...]*

C: *What plans for the future does you and Y [the applicant's girlfriend in Sweden, also a lesbian asylum seeker from Nigeria] have?*

A: *We have a good plan, and if we get residence permits, we will get an apartment together and be together as a couple. We are going to study. Live openly, as we have started to feel alive, hopeful and happy here.*

C: *If you do not get residence permits, hypothetically, what will your future be like then? Have you talked about that?*

A: *If we can not stay here, we have no future at all. Here, we can live openly and participate in Pride and meet other homosexuals who accept us for who we are. In Nigeria you can not live openly, and if you are caught, you can be punished which means death.*

It is obvious from the case officer's many questions that the Migration Agency expects the applicant to have thought deeply about and made plans for the future as a lesbian in Nigeria. The case officer is not “satisfied” with the applicant's answer that she and her girlfriend did not make plans since their relationship was not allowed. The case officer also seems to have a hard time believing that the couple never planned to leave Nigeria: “how come you did not plan [to leave the country] when you seem to have had the opportunity? [...] I mean before you were caught, why did you not discuss leaving Nigeria to live in a country where you could be openly homosexual and live together?”. The phrasing of the questions indicates an underlying expectation that a lesbian couple could not possibly want to stay and live in Nigeria. This reflects a widespread Western idea; that LGBTIQ+ people in general always want to leave their LGBTIQ+-phobic countries of origin.

5.4 Religion, faith and LGBTIQ+ requires specific reflections

“The Migration Agency finds [that your statements on] your thoughts and reflections regarding Islam's view on your sexual orientation lack the depth that can reasonably be expected from a person who is a practicing Muslim and homosexual.”⁵³

⁵³ The Migration Agency in Malmö. Decision confidential. Case no. confidential. Appealed to the Migration Court that affirmed the Migration Agency's negative decision in judgment 2020-02-06, Case no. 8525.

The cases examined in this study show that the greater the importance of religion in the applicant's country of origin and if the applicant is a believer and/or practices a religion, the more detailed they are expected to account for their reflections, thoughts and feelings about their religion, faith and the religion's view on LGBTIQ+ people. The reasons for rejection in the analysed SOGIESC asylum cases show that applicants are expected to have made deep reflections about their faith and/or religion in relation to the sexual orientation, gender identity and/or gender expression. Applicants who describe that they have never thought about or experienced a contradiction between their faith, religion and their SOGIESC are generally not considered credible. This is yet another example of how the credibility assessment in SOGIESC asylum cases requires the applicant to account for specific experiences which they do not necessarily have. The following grounds for rejection exemplify this:

The Migration Agency Malmö. Decision 2017-12-01. Case no. confidential

You have stated that Muslim societies do not accept homosexuality, but that you have a different view of the religion. Therefore, you did not experience it as problematic for you to be a homosexual and a practicing Muslim. The Migration Agency has repeatedly encouraged you to explain how you have reflected upon the religion's and other Muslims' views on homosexuality in relation to your own view. You have, however, not been able to account for your reflections about this, or how you have reached this conclusion.

In this case, the applicant stated that for them personally, it had never been a problem to be a Muslim and homosexual, and that they had a different view on religion than in Muslim societies. This is neither credible nor reliable according to the Migration Agency, which "repeatedly has encouraged" the applicant to "explain how [they] have reflected upon the religion's and other Muslims' view on homosexuality". The Migration Agency thus requires the applicant to account for reflections they do not appear to have made, since they have not perceived their personal faith and other Muslims' views on homosexuality, as

problematic. The applicant was assessed to not have made their sexual orientation credible and was deported to The Gambia. A similar reasoning can be found in the following grounds for rejection:

The Migration Agency Stockholm. Decision 2019-10-04. Case no. 3875

You have been able to account for the Senegalese society's view on homosexuality and how Islam views homosexuality, but the Migration Agency still finds that you have not been able to talk about your own reflections and thoughts on what it was like for you to live in a society that does not accept homosexuality or how the religion's view on this affected you. The Migration Agency has repeatedly encouraged you to try to explain and describe how the society and the religion's view has affected you or how you have felt about it, but you have been vague and given information that lacks detail as well as more profound reflections.

Also in this case, the Migration Agency has "repeatedly encouraged" the applicant "to try to explain and describe" reflections that the Migration Agency assumes that the applicant has made, merely because he is from a religious society. The core of this reasoning is that the applicant should be able to describe specific thoughts and feelings – which he has not necessarily experienced – because he comes from a Muslim society. The Migration Agency concludes that the applicant is not credible, since he can not do so. This is exactly the kind of unlawful argument that the CJEU's Advocate General warned would violate the EU's Qualification Directive, since it is based on stereotypical notions.⁵⁴ The right to an individual assessment is therefore not fulfilled. A similar assessment is made in the following case:

Decision 2019-05-17. Case no. 6939

The Migration Agency has also asked you to reflect upon how you have perceived your sexual orientation in relation to your religious identity as a Muslim. You have stated that you felt that your sexual orientation was completely normal and something personal and that you have not

⁵⁴ Advocate General E. Sharpston emphasised in her opinion in Joint Cases C-148/13-C-150/13, that a negative decision would violate the EU's Qualification Directive if it was solely based on the stereotypical notion that "because B is from a Muslim family and a country where homosexuality is not accepted he should be able to give details about his feelings and how he came to terms with his homosexuality", ECLI:EU:C:2014:2111, available at <https://curia.europa.eu/juris/document/document.jsf?docid=155164&doclang=en>. Chapter 10.9 examines this in detail.

thought about people who perceive homosexuality as unnatural according to their religion. According to the country of origin information, homosexuality or homosexual acts are punishable by three years' imprisonment in Morocco. [...] The Migration Agency further finds, based on the flaws in your oral account, that your claim of being a homosexual is not credible.

Also in this case, the Migration Agency requires the applicant to describe his reflections on his sexual orientation in relation to his identity as a Muslim. The applicant's answer is that he felt that his sexual orientation was normal and something personal, that he "has not thought about those who perceive homosexuality as unnatural according to their religion". The Migration Agency finds both the applicant's story and claimed homosexuality non-credible and he was therefore denied asylum and deported to Morocco. Yet another similar assessment is made in the following case:

The Migration Agency Stockholm. Decision 2019-10-03. Case no. 6845

Neither have you been able to account for what reflections you have had regarding the relationship between your sexual orientation and Islam, despite having stated that you come from a religious family and that you yourself practiced Islam during your childhood with your family. The Migration Agency finds that you, to a greater degree than what you have done during this interview, should be able to talk about your own thoughts and reflections, since you, growing up, knew that homosexuality is prohibited according to Islam and that you were breaking the rules of the religion and deviating from the strong heterosexual norm in society.

The Migration Agency writes that the applicant should have been able to talk more about thoughts and reflections "about the relationship between [his] sexual orientation and Islam" since he "knew that homosexuality is prohibited according to Islam and that [he was] breaking the rules of the religion". This appears to be yet another example of an argument that clearly

violates the EU's Qualification Directive.⁵⁵ The Migration Court often argues in a similar way:

The Migration Court at the Administrative Court in Stockholm 2018-09-18. Case number 5909

During the Migration Agency's interview, X has stated that he does not know much about how Islam views same-sex relationships. He has stated that the religion forbids it and that he has felt as a sinner and has questioned why he is not attracted to the opposite sex. The Migration Court finds it remarkable that he has not been able to elaborate on his thoughts about the sexual orientation and his religion. This is especially the case since he has grown up in a strictly Muslim country where homosexuality is punishable by death and deviates from the norm. The Court finds it "remarkable" that the applicant "has not been able to elaborate on his thoughts about the sexual orientation and his religion" since he has grown up in a "strictly Muslim country where homosexuality is punishable by death and deviates from the norm". The Court's conclusion that the applicant therefore is not credible is yet another example of the unlawful arguments that the Advocate General warned about.⁵⁶ The following, longer, excerpt from a negative decision illustrates arguments about faith, religion and LGBTIQ+ that are repeatedly made by the migration authorities in SOGIESC asylum cases:

Decision confidential Case no. confidential

Already when you were living in Afghanistan you knew about Islam's view on homosexuals. You thought that it was not your fault that you were born that way. You feel like a Muslim. You do not know how to resolve the tension between your faith and your sexual orientation. You do not agree that it is unfaithful to the religion to be together with a man. When asked what it felt like when you found out that boys who like boys risk being killed in Afghanistan, you said that you do not know why they think like that and that it is inhumane to think that homosexuals should be killed. Everybody has the right to live.

⁵⁵ Advocate General E. Sharpston emphasised in her opinion in Joint Cases C-148/13-C-150/13, that a negative decision would violate the EU's Qualification Directive if it was solely based on the stereotypical notion that "because B is from a Muslim family and a country where homosexuality is not accepted he should be able to give details about his feelings and how he came to terms with his homosexuality", ECLI:EU:C:2014:2111, available at <https://curia.europa.eu/juris/document/document.jsf?docid=155164&doclang=en>. See chapter 10.9 of the report.

⁵⁶ Ibid.

First, the Migration Agency gives a summary of what the applicant has said. According to the Migration Agency, these are “shallow and brief answers”:

Decision confidential. Case no. confidential.

The Migration Agency further finds that the statements you have given on your thoughts and reflections regarding Islam’s view on your sexual orientation, lacks the depth that reasonably can be expected from a practicing Muslim and homosexual. In this part, you have given shallow and brief answers, such as that it was not your fault that you were born like that, that you do not know how to resolve the tension between your faith and your sexual orientation and that you do not believe that you are being unfaithful to the religion if you are together with a boy.

Yet again, the Migration Agency makes the stereotypical and unlawful assumption that “a practicing Muslim and homosexual” should be able to give detailed accounts of their thoughts and reflections. Apart from the fact that the reasoning violates the EU’s Qualification Directive, it is difficult to understand why and how the Migration Agency can find the applicant’s detailed description of the thoughts and feelings he has experienced as “shallow and brief”. It seems as though the Migration Agency expects that religious people identify mainly with their religion, and that a homosexual Muslim primarily relates to Islam’s view of homosexuality. Many religious people, however, perceive their faith as mainly related to their own relationship with God. Many LGBTIQ+ people believe that God has created them the way they are. The reflections, thoughts and experiences of an inner conflict that the Migration Agency and the Migration Courts require from for example Muslim LGBTIQ+ applicants, do not always exist. Moreover, many grounds for rejection are based on the concept that since the applicant is a Muslim from a country where homosexuality is not accepted, their story is not credible without a detailed account of their feelings and reflections about their homosexual orientation. The illegal stereotypical assumption that the CJEU’s Advocate General early warned would violate the EU’s Qualification Directive has become a common reason for rejection by the Swedish migration authorities.

5.5 Subjective assumptions and speculative arguments

“Even in countries with a less conservative view on homosexuality, this is associated with a process involving for example self-reflection.”⁵⁷

From the large number of decisions and court rulings examined in this study, it is clear that stereotypical notions, subjective assumptions and speculative arguments are very common in SOGIESC asylum cases. These notions, assumptions and speculations become visible in the way questions are phrased in oral asylum interviews and in how the negative decisions are motivated. The following excerpt from a SOGIESC asylum case from Nigeria illustrates the most reoccurring reasoning in grounds for rejection in SOGIESC asylum cases:

The Migration Agency Uppsala. Decision 2019-10-24. Case no. 9878

Furthermore, the Migration Agency finds that you have not been able to account for more profound thoughts or reflections in relation to the realisation of your sexual orientation, even though people were being killed because of their sexual orientation at the time.

The first sentence shows the Migration Agency’s requirement of an oral account for “more profound thoughts or reflections” as part of the required inner process leading to realisation. From the sentence “even though people were being killed because of their sexual orientation at the time” it is obvious that the Migration Agency expects the account to be more profound, especially since the situation for LGBTIQ+ people was so difficult that they were even being killed. The migration authorities’ requirement of a more detailed account the more difficult the situation for LGBTIQ+ people is in the country of origin was analysed in the previous chapters. The Migration Agency writes in the next sentence:

The Migration Agency Uppsala. Decision 2019-10-24 Case no. 9878

Given your cultural background this [the realisation about your sexual orientation] can be expected to be a transformative event in your life. Even in countries with a less conservative view of homosexuality, this is associated with a process invol-

⁵⁷ The Migration Agency Uppsala. Decision 2019-10-24. Case no. 9878.

ving for example self-reflection.

In the last sentence the Migration Agency writes: “Even in countries with a less conservative view of homosexuality, this is associated with a process involving for example self-reflection.” Here, the Migration Agency makes a statement and an assumption that homosexuality always, everywhere in the world, is associated with a process that includes self-reflection. This assumption is not objective, and the statement is also not true. It is not an objective truth or fact, but a stereotypical assumption that all homosexuals always experience an inner process “involving for example self-reflection”. This is a stereotypical assumption about homosexuals which, when not met by the applicant, leads to them and their claimed sexual orientation being assessed as non-credible. The stereotypical assumption that all homosexuals share certain universally common experiences of for example an inner process involving self-reflection, inevitably leads to that applicants without these experiences are deemed non-credible. They are thereby denied asylum and deported in the same way as the man from Nigeria in the above cited case. The stereotypical assumption about inner, emotional processes most likely can be explained by the DSSH model, which will be analysed further in chapters 10.6 and 10.7. The following excerpt from another negative decision is yet another example of common assumptions in SOGIESC asylum cases:

The Migration Agency Stockholm. Decision 2019-10-28. Case no. 927

The case officer also asks you to explain the feelings and thoughts you have had regarding your sexual orientation. The case officer asks you to explain if you thought about your sexuality in Afghanistan. You then reply that you can not do that, because then it would become known to the public. The case officer asks you if you, given how dangerous you claimed it is to have a same-sex relationship, that you must have thought about it. You then only answer that you did not think about the problems that could occur.

The Migration Agency cites the case officer’s questions and the applicant’s answers from the asylum interview. The quote illustrates how questions that should be objectively phrased at the asylum interview, instead build on stereotypi-

cal assumptions and biased statements. The last sentence cites the case officer’s “question”; that the applicant “must have thought about it [having a same-sex relationship]”. This is not an objectively phrased question. It is a statement that contains a claim and an assumption that the applicant “must” have had certain thoughts on having a same-sex relationship since he had claimed it was dangerous in his country of origin. This is a stereotypical, and possibly also subjective, assumption made by the case officer – that LGBTIQ+ people always have deep thoughts about having a relationship. In addition, it is also stereotypical and illogical to expect these thoughts to be more pronounced and that the applicant should be able to describe them in greater detail the more hostile the environment is for LGBTIQ+ people. The applicant’s personal experience in this case does not correspond with the Migration Agency’s assumptions that LGBTIQ+ people from Afghanistan must have specific thoughts about having a same-sex relationship, since it is dangerous there. The applicant’s “wrong” answers to questions containing stereotypical assumptions lead to him being assessed as non-credible regarding his sexual orientation.

Stereotypes such as these do not take into account cultural differences in the definition and understanding of what sexuality, relationships and sexual orientation are about. What is unusual or unreasonable in a Swedish context may be completely normal somewhere else in the world. Someone having deep thoughts about their same-sex relationship in Sweden, where this is usually not dangerous, and even an ability to describe these thoughts, does not automatically mean that someone else has similar thoughts and reflections in Afghanistan. To rely on vague assumptions in order to argue that something can not have happened the way that the applicant claims is dangerous, since it often leads to decisions being based on pure prejudice.⁵⁸ Stereotypical notions about LGBTIQ+ people appear also in other parts of the Migration Agency’s grounds for rejection in the same case cited above:

The Migration Agency Stockholm. Decision 2019-10-28. Case no. 927

You were asked if you and X ever discussed your relationship. You then answer that you did not do

it often, but that you knew that you needed to conceal your relationship since you knew that people had been stoned because of their sexual relationships. When the case officer asks you to describe in more detail how it felt that your actions could lead to you being stoned to death, you only answered that you had not thought that much about it.

Furthermore, the case officer asked if you had been ashamed about being attracted to men. You answer that your relationship was kept secret and that therefore, nobody knew about it. The case officer then asks you to describe what it was like for you to have to keep it secret, and you answer that it has not affected you much. Even though the case officer asked you to explain what it was like for you to live in Afghanistan and conceal your feelings and thoughts, you did not describe it in much detail.

The case officer has asked questions about what it was like concealing the relationship in Afghanistan. It seems obvious that the case officer has not accepted the applicant's initial answer that he had not thought much about it: "Even though the case officer asked you to explain what it was like for you to live in Afghanistan and conceal your feelings and thoughts, you did not describe it in much detail." The wording "even though" in the negative decision indicates that the Migration Agency expects the applicant to describe "his feelings and thoughts in more detail" about having to conceal his feelings in Afghanistan. The case officer's questions rely on an assumption and an expectation that the applicant should have thought and felt particular things about living in Afghanistan and concealing his feelings and thoughts. When the applicant describes that he has not, his story is assessed as neither credible nor reliable. It is not considered credible that he would have lived and concealed his sexual orientation in Afghanistan without it affecting him that much.

It would absolutely be possible to assess the credibility and reliability of the applicant's story without basing it on stereotypical, Western notions about LGBTIQ+ people. For example, the applicant has described that "people have been stoned because of their sexual relationships", not

that only same-sex sexual relationships were punished by death. Based on the applicant's own story, it is possible that in the context of Afghanistan, it may be both common and thereby reliable and credible, to conceal every sexual relationship outside a marriage, regardless of whether it is homosexual or heterosexual, without thinking much about it. Taking an approach that understands that the concealment of a sexual relationship does not necessarily give rise to any particular thoughts, since it is a normal and common way of acting in Afghanistan, the applicant's personal experiences appear reliable. The questions during the interview and the statements in the negative decision are not objective. They are based on the assumption that the applicant "should" have had certain thoughts and felt a certain way, because he had a same-sex relationship in Afghanistan, where this is dangerous. The Migration Agency's conclusion is again that the applicant has not made his sexual orientation credible because his personal experiences do not meet the case officer's assumptions about what experiences, thoughts and feelings an LGBTIQ+ person in Afghanistan should have. Grounds for rejection such as these are systemic in Swedish SOGIESC asylum cases today.

In summary, it can be concluded that speculative arguments, subjective and stereotypical assumptions are frequently applied in SOGIESC asylum cases in Sweden. This conclusion can be made based on the over 2 000 SOGIESC asylum decisions and court rulings that this case study has analysed, the hundreds of interview protocols that have been read by RFSL's asylum lawyer and the oral hearings that the asylum lawyer have participated in between 2012 and 2020. Speculative arguments, subjective and stereotypical assumptions appear systemically throughout the asylum procedure and are visible in interviews, inquiries, assessments and in the decisions in SOGIESC asylum cases. This research study holds that this is an unavoidable result of applying models where the starting point is a stereotypical assumption that there are universally common characteristics and experiences among LGBTIQ+ people that can be examined, tried and assessed.⁵⁹

⁵⁸ Reliable Criteria? A Review of Reliability Assessments of Asylum Stories [Tillförlitliga kriterier? En granskning av tillförlitlighetsbedömningar av asylberättelser], Andersson, E., Swedish Refugee Law Center, 2019, p. 13.

⁵⁹ See chapters 10.6-10.7 about the DSSH model.

5.6 Expectations to learn about LGBTIQ+ in Sweden

“You have not provided an acceptable explanation to why you have lived for so long in Sweden as a homosexual without seeking information about whether this is allowed in Sweden or not.”⁶⁰

“The Migration Agency notes that the Swedish society is liberal in regards of sexual orientation. [You are] a well-educated young man who has studied computer science in Afghanistan, where you can be expected to easily find information about your sexual orientation and the situation of homosexuals in Sweden.”⁶¹

The decisions and court rulings examined in this study show that the migration authorities expect LGBTIQ+ asylum seekers to, before fleeing or shortly after arriving in Sweden, seek information about Swedish legislation on SOGIESC and LGBTIQ+ issues. The migration authorities argue that the applicant is not credible regarding their SOGIESC if they have not made such inquiries. The migration authorities assess that it is not acceptable or understandable to be in Sweden for a longer period of time without knowing that SOGIESC constitutes grounds for asylum. The consequence of this is that LGBTIQ+ refugees in practice are obligated to find out that SOGIESC is an asylum claim according to the Swedish Aliens Act. This is especially blatant in cases where the applicant has not disclosed their SOGIESC from the beginning of an asylum procedure. Late disclosure of SOGIESC as asylum claims is investigated further in chapter 8. The following grounds for rejecting an application for a new trial,⁶² illustrate the migration authorities' expectation that the applicant should investigate Swedish legislation about SOGIESC:

The Migration Agency Stockholm. Decision 2020-03-10. Case no. 739

The Migration Agency finds that the statements you have made [about your homosexuality] could prompt the granting of a new assessment [based on the new circumstances]. However, the Migration Agency finds that you, as a homosexual, at an

early stage can be expected to acquire basic knowledge about possible risks of persecution or other hardships when applying for a residence permit in a country. This is particularly the case taking into account the information you provided on how homosexuals are treated in Iraq.

The Migration Agency “finds that, [the applicant] as a homosexual, at an early stage can be expected to acquire basic knowledge” regarding that SOGIESC constitutes grounds for asylum under the Aliens Act. The Agency does not justify or motivate this applied expectation on homosexual applicants. The question of how long a period in Sweden may be to be sufficient for the applicant to find out that being LGBTIQ+ is legal in Sweden and that it may constitute grounds for asylum, varies between different negative decisions. It is not clearly stated in the decisions why a certain time is deemed long enough to get information about the legislation, or where this information is supposed to be found by the asylum seeker. In the following decision, regarding another young man from Iraq, the Migration Agency finds that nine months “should be enough to learn that homosexuality is not prohibited” in Sweden:

The Migration Agency Uppsala. Decision 2018-04-06. Case no. 6012

You have stated that you did not dare to speak about [your sexual orientation] before, since you were afraid that it was prohibited in Sweden. The Migration Agency finds this explanation unreasonable. You had been in Sweden for about nine months before the first asylum interview, which should be enough to learn that homosexuality is not prohibited in Sweden. You have also voluntarily travelled to Sweden to seek protection and therefore should have been aware of LGBTIQ+ people's rights in the country. The Migration Agency also notes that only two months passed between the asylum interview where you were afraid to speak about your sexual orientation and the appeal, when it was disclosed. You have not given a reasonable explanation to why you went from not daring to speak about your sexual orientation to daring to do so.

⁶⁰ The Migration Agency, 2016-06-14, Administrative Procedural Unit 1, Boden, 3453.

⁶¹ The Migration Agency, Administrative Procedural Unit 1, Malmö. Decision confidential. Case no. confidential.

⁶² SOGIESC can be such new circumstances that may, according to the Swedish Aliens Act, lead to a new trial where it is examined and assessed whether they are obstacles to the enforcement of a previously given expulsion order.

The Migration Agency does not explain why they expect the applicant to be able and obligated to seek information about Swedish legislation. There is no legal ground for requiring the applicant to learn about Swedish legislation on LGBTIQ+ issues. Nor does the Migration Agency explain why residing in Sweden for nine months would automatically lead to knowledge on homosexuality not being prohibited in Sweden and constituting grounds for asylum. The applicant was an unaccompanied minor from Iraq, which obviously can affect an ability to seek and access information about Swedish legislation and LGBTIQ+ people's legal rights in Sweden. With regards to the principle of rule of law, it is problematic that the Migration Agency does not have a legal ground for requiring this type of knowledge. It is also problematic that the Migration Agency does not explain why or how the applicant is expected to have gathered this information about Swedish laws, especially when this is used as a reason to deny a child asylum. The asylum procedure should be adapted to children and lower requirements should be placed on a child's story compared to those of adults.⁶³ Circumstances such as whether the child can read, seek and understand information, if they lack access to or can not use the internet, are crucial to the child's ability to understand that homosexuality constitutes legal grounds for asylum in Sweden. Whether the child is in a family home or at an accommodation with homophobic countrymen obviously can also have an impact on their ability and possibility to gather information about homosexuality. The child might expose themselves to a risk of violence if they ask questions about homosexuality to intolerant fellow countrymen. Lacking knowledge about Swedish LGBTIQ+ legislation without providing a "reasonable explanation" is generally considered to lower the applicant's credibility in SOGIESC asylum cases. The following three different cases' decisions and grounds for rejection are other representative examples of this:

The Migration Agency Stockholm. Decision 2019-10-23, Case no. 1417

You have stated that you did not know anything about homosexuals' rights in Sweden. For the Migration Agency, it is not clear how you came to realise that you are homosexual, how you found

out that it is widely accepted to be homosexual in Sweden and what this has meant to you.

The Migration Agency Malmö. Decision 2019-11-28. Case no. 7429

X states that he has lived as a homosexual for over a year. X has thus had a relatively long time to learn about homosexuals' situation in Sweden compared to in his country of origin. Similarly, X should have been able to learn that homosexuality constitutes grounds for asylum. Considering what X now claims, he has therefore had reason a long time ago to disclose his sexual orientation, even considering the difficulties that can be connected to speaking about such matters.

The Migration Agency Boden. Decision 2016-06-14. Case no. 3453

The Migration Agency finds that you have not given a satisfactory explanation for why you have lived as a homosexual in Sweden for so long without seeking information about whether it is allowed in Sweden or not.

The last cited decision concerned one of the RFSL's asylum lawyer's cases. The applicant had been afraid to talk about his sexual orientation when he first arrived in Sweden and applied for asylum. Later, one of his friends found out about his sexual orientation and helped him present his SOGIESC as new grounds for asylum, whereby he was granted a new asylum procedure. During the oral asylum interview, the applicant described how he had been terrified to talk to anyone in Sweden about his sexual orientation. He had fled from Nigeria where his boyfriend was murdered by a lynch mob before his eyes. In Sweden, he was placed in an asylum accommodation in a small community in northern Sweden, where there was no RFSL branch or any other way to access information about LGBTIQ+ people's rights in Sweden. In the negative decision, the Migration Agency wrote that he had not given a "satisfactory explanation" to why he had not sought information about whether it is allowed to be homosexual in Sweden. The Migration Agency obviously did not deem the circumstances in his case to be enough to "explain" why he had not sought information about homosexuality in Sweden. From this, it can be concluded that the Migration Agency assessed that he should have asked his Nigerian country men at

⁶³ The Swedish Refugee Law Center, Children's Asylum Law Center, "What requirements are placed on you?", available at <https://sweref.org/vilka-krav-stalls-pa-dig/>

the asylum accommodation about homosexuality in Sweden, since this in practice would have been the only way for him to “seek information about homosexuals in Sweden”.

It is obviously unreasonable to expect an LGBTIQ+ refugee to ask his fellow countrymen at their asylum accommodation about homosexuality, when they come from a country where homosexuality may be punished with death.⁶⁴ The preparatory works of the Swedish Aliens Act and the Swedish Migration Agency’s own legal position paper emphasise the importance of understanding how difficult it can be for someone who has fled from a country where homosexuality is criminalised to talk about this with the migration authorities.⁶⁵ To ask your fellow countrymen about the legality of homosexuality in the asylum country may also put the person at risk of being subject to the very same treatment that they have fled from in the country of origin. The Swedish migration authorities’ knowledge requirement have no legal ground. The conclusion that the man’s homosexuality was less credible because he had not turned to fellow countrymen and asked them about homosexuality in Sweden, appears both unreasonable and contradicts the preparatory works as well as the Migration Agency’s own legal position paper.⁶⁶ The expectation that LGBTIQ+ people should search for information about homosexuals’ situation in Sweden are also expressed in the following grounds for rejection from the Migration Agency:

The Migration Agency Malmö. Decision confidential. Case no. confidential.

Regarding your statement that you in Sweden did not have knowledge about Swedish society’s attitude towards homosexuality, the Migration Agency makes the following assessment: The Migration Agency notes that the Swedish society is liberal with regards to sexual orientation. Further,

you are a well-educated young man who has studied computer science in Afghanistan, why you can be expected to easily find information about your sexual orientation and the situation of homosexuals in Sweden. The explanations that you have given for not gathering information about your sexual orientation, i. e., that you did not dare to speak about it, that you did not have time to study the legislation about homosexuality in Sweden, that you did not know how to seek information and that you did not think anyone would have written about homosexuality since you thought you were alone in the world having these feelings, are, according to the Migration Agency, not reasonable.

According to the Migration Agency, the young boy’s studies in computer science in Afghanistan meant that he could be expected to “easily” search for and find information about his sexual orientation and homosexuals’ situation in Sweden. Neither in this case does the Migration Agency explain why or how the applicant should have gathered information about homosexuals in Sweden. The Migration Agency does not explain why having studied computer science in Afghanistan would make a young boy automatically know how or where he can look for information on homosexuality in Sweden. The boy described that he had felt ashamed, was afraid to talk to anybody, that he did not know where to look for information about laws on homosexuality in Sweden, that he perceived himself as being sick and that he thought he was the only one in the world who was homosexual and had such feelings. According to the Migration Agency, these explanations were not “reasonable”, without any further comment about why not. Assessments on “reasonableness” are always at risk of being subjective and should, according to the UNHCR, be carried out with caution.⁶⁷ Assessments of whether something in the applicant’s story is reasonable, should not

⁶⁴ State-Sponsored Homophobia 2020: Global Legislation Overview Update, Ramon Mendos, L., Botha, K., Carrano Lelis, R., López de la Peña, E., Savelev, I., Tan, D., ILGA World, p. 25 and 38, available at https://ilga.org/wp-content/uploads/2023/11/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf

⁶⁵ Government Bill 2005/06:6. Refugeehood and Persecution for Reasons of Gender or Sexual Orientation [Flyktingkap och förföljelse på grund av kön eller sexuell läggning], p. 29, RS/015/2021, for example section. 4.1.2.

⁶⁶ A case where RFSL’s asylum lawyer acted as the legal representative. The refusal decision was appealed in Case no. 3453 and was reversed by the Migration Court at the Administrative Court in Luleå, after which refugee status and residency was granted.

⁶⁷ Quality in Swedish Asylum Assessments. A Study about the Migration Agency’s Assessment of and Decisions about International Protection [Kvalitet i svensk asylprövning, En studie av Migrationsverkets utredning av och beslut om internationellt skydd], Feijen, L., Frennmark, E., UNHCR, 2011, p. 192.

be based on speculations about how the applicant should have acted in a certain situation. The conclusion that the boy's explanations were not reasonable appears to be a typical example of a subjective, unlawful assessment of reasonableness. The Migration Court overturned the Migration Agency's decision with the finding that the boy's feelings of fear and shame were a valid excuse for not having declared his sexual orientation at the beginning of his asylum procedure.

The examples of grounds for rejection in this chapter show that the migration authorities' requirement of reasonable explanations to why someone has not searched for information about LGBTIQ+ people's rights in Sweden, is based on stereotypical notions. It is a stereotypical notion that LGBTIQ+ refugees always and immediately upon arrival start investigating Swedish legislation and LGBTIQ+ people's rights in Sweden. Stereotypical notions do not take into account the applicant's personal or cultural background or their individual ability to search for and access knowledge about their legal rights in Sweden.

5.7 Must relate to heterosexual cis people

"The most important common element is that the applicant is not living a 'heterosexual narrative'"⁶⁸

Chapter 4.3 in this report showed that the Swedish migration authorities' expectation in SOGIESC asylum cases, is that the applicant has experienced or at least can reflect upon feelings of difference, stigma and shame. From the many decisions, court rulings and rejection motivations studied, it is clear that applicants in SOGIESC asylum cases often are expected to talk about experiences of feeling different by comparing themselves to heterosexual cis people. The migration authorities expect that LGBTIQ+ people describe themselves based on the environment's way of viewing them as deviating from the heterosexual norm. This expectation is based on the notion that LGBTIQ+ people's life experiences and asylum stories always contain experiences of feeling different. This expectation can be traced to the DSSH model, i.e. that "a non-heterosexual narrative" is a universally common element for LGBTIQ+ people.⁶⁹

Among the many decisions and court rulings

studied in this research, there are several grounds for rejection that are based on the assumption that the applicant's SOGIESC is less credible if their story about their experiences and feelings does not deviate enough from the heterosexual norm. The migration authorities can reason that if heterosexual cis people could have felt or acted the same way that an applicant describes to have felt or acted, the applicant's account for their SOGIESC is less credible. Thus, the applicant is expected to relate to heterosexual cis people's potential actions and feelings and explain how their own experiences differ from those of heterosexual cis people. Currently, the migration authorities claim that participation in RFSL's activities, Pride and other meeting spaces for LGBTIQ+ people is of low evidential value in the credibility assessment. As such, LGBTIQ+ applicants' oral stories and written evidence about participation in RFSL and Pride, are dismissed with brief motivations on how this has of low evidential weight and/or does not make credible their belonging to the particular social group LGBTIQ+ people. This argument appears to be based on the migration authorities' assumption that also heterosexual cis people can participate in Pride and be members of RFSL. The applicant's personal motivations to become active, for example in order to express their SOGIESC and meet other LGBTIQ+ people, are thus not considered in an individual assessment of their grounds for asylum. The following reasoning is an example of the migration authorities' expectation that LGBTIQ+ applicants should relate to heterosexuals:

The Migration Agency Stockholm. Decision 2019-11-21. Case no. 4828

You also speak about a tradition that Baganda, your ethnic group, practices, which you connect to your sexual orientation. You state that your mother hired a woman who helped you with the tradition, which aims to prepare young girls' genitalia for marriage and enjoyment of intercourse within the marriage. You state that you enjoyed this tradition, and if the woman did not show up you were sad and missed her. You have been asked to explain

⁶⁸ Credibility assessment in asylum procedures. A multidisciplinary training manual, vol. 2, Hungarian Helsinki Committee 2015, "The DSSH model: a framework to understand asylum claims based on sexual orientation and gender identity", p. 77, available at: <https://helsinki.hu/wp-content/uploads/CREDO-training-manual-2nd-volume-online-final.pdf>.

⁶⁹ Ibid.

what connection you make between this tradition and your sexual orientation, since a heterosexual person might also be able to enjoy this tradition. You only answer that this is because the instructor was a woman. The Migration Agency finds that you, despite being asked, have not been able to explain how you associate this experience with your thoughts on your sexual orientation. The Migration Agency finds that you should be able to elaborate further on this topic, as you claim to have thought a lot about your sexual orientation and what it means to you.

The case officer at the Migration Agency has first asked the applicant to describe her personal experiences that led to her realisation regarding her sexual orientation and attraction to women. Thereafter, the Migration Agency uses these very personal experiences to make the conclusion that her story is not credible, making strange speculations about heterosexual people: The applicant has been asked to describe her personal experiences that led to her identifying as a lesbian. The applicant has done so by describing that she enjoyed the tradition because it was performed by a woman. The applicant's own personal experience of the tradition and the woman performing it with her was an important part of her personal realisation of her sexual orientation. Nothing in the applicant's story about her personal experiences can be right or wrong, since they are merely her personal experiences that she was asked to talk about by the Migration Agency. This, however, is not credible or enough since the Migration Agency expects the applicant to relate to the Agency's speculation that a heterosexual woman could also be able to enjoy the tradition. Even if this was true, which is irrelevant in this context, it appears unreasonable that the applicant is expected to adjust her asylum story and account for her personal experiences of realizing her sexual orientation, due to the Migration Agency's belief that also heterosexuals could enjoy a situation that, to the applicant,

was an important part of her self-identification as a lesbian.

To rely on irrelevant, strange and subjective speculations about heterosexual cis people in the credibility assessment of SOGIESC asylum claims, means that the right to an individual and objective assessment is not fulfilled.⁷⁰ In chapters 10.6-10.7 the DSSH model is analysed further, along with its starting point regarding feelings of difference, stigma and shame, as well as the most important common denominator in asylum cases regarding SOGIESC: The applicant not living a "heterosexual narrative".⁷¹

5.8 Speculations about how someone should have acted and felt

"Neither is it credible that your boyfriend by mistake would have sent a compromising photo to your cousin, given that he should have been aware of the importance of keeping your relationship a secret."⁷²

"16-17 is a rather late age to discover one's feelings as a homosexual in Bangladesh."⁷³

The decisions and court rulings examined in this study show that in SOGIESC asylum cases, the Swedish migration authorities do not only require that the applicant has certain experiences.⁷⁴ The migration authorities also expect the applicant's family, parents, siblings, friends, partners etc. to have acted and felt in a way that is considered reliable and credible by the migration authorities. The actions by people around the applicant in SOGIESC asylum cases often have a great impact on whether the applicant is considered to have made their SOGIESC credible. Subjective speculations about how someone should have acted are unlawful, but very common in SOGIESC asylum cases. An example of this is when case officers during the oral asylum interviews tell the applicant how the case officer themselves would have acted or felt if

⁷⁰ The EU's Asylum Procedures Directive Art. 10 3a), the EU's Qualification Directive Art. 4.3, the Migration Agency's legal guideline RS/015/2021, section 4.2.3, the UNHCR's Guidelines No. 9, see paras. 60.ii and 62, RS/015/2021, section. 4.2.4.

⁷¹ Credibility assessment in asylum procedures. A multidisciplinary training manual, vol. 2, Hungarian Helsinki Committee 2015, "The DSSH model: a framework to understand asylum claims based on sexual orientation and gender identity", p. 77, available at: <https://helsinki.hu/wp-content/uploads/CREDO-training-manual-2nd-volume-online-final.pdf>.

⁷² The Migration Agency Asylum Unit 2 Uppsala. Decision 2019-10-25. Case no. 9786.

⁷³ Asylum interview protocol in Case no. 8577. The Migration Agency Stockholm. Asylum Unit 4.

⁷⁴ The experiences that this report shows are required include an inner emotional process leading to self-awareness, with thoughts, feelings of and reflections about difference, stigma and shame, that the applicant has made risk assessments and

they were an LGBTIQ+ person in a certain situation in the applicant's country of origin. RFSL's asylum lawyer and the author of this report, has participated as a legal representative and a public counsel in numerous asylum interviews between 2012 and 2020, where the applicant has talked about an incident or a situation they experienced in their country of origin. After the applicant having explained the incident or situation, the Migration Agency's case officer, in several cases made speculative statements about how they themselves would have acted, felt or reacted in the situation described by the applicant. By saying that they, the case officer, would have acted differently, the case officer questions the applicant's credibility. This is of course not allowed, but happens frequently.⁷⁵ The following excerpt from an asylum interview protocol in a SOGIESC asylum case is one example of this. The applicant, a self-identified lesbian woman from Nigeria, described how she was caught kissing her girlfriend, fled the scene, and thereafter had a short phone call with her 10 years younger brother:

The Migration Agency in Uppsala. Asylum interview 2018-09-03. Case no. 77

C: What did your brother think about what had happened? [referring to that the applicant was caught kissing her same-sex partner]

A: It was my younger brother, and because he is my younger brother, he did not dare insult me about what had happened. [...] I am much older. [...]

C: Based on that your previous explanations of how serious it is to get caught being a homosexual in Nigeria, I do not understand why your brother would not dare to express his thoughts about what you had done?

The case officer says that they do not understand why the brother "did not dare to express" the negative emotions that the case officer appears to assume that he must have felt. The case officer assumes that the applicant's sibling, a 10-year younger brother, must have a negative attitude towards his older sister kissing a woman. This assumption is generalising, as it is based on the notion that everyone

in Nigeria share one and the same view on homosexual family members. Such a stereotypical notion does not take into account factors such as age difference and sibling hierarchies. The applicant is thus disbelieved because her experiences do not correspond with the case officer's assumption that "everyone" in Nigeria is negative and homophobic towards lesbian family members. The conception is also generalising, stereotypical and racist, as it is based on prejudice against people in Nigeria; an idea that "everyone" is homophobic and always express their homophobia. Also in other parts of the same asylum interview protocol, the case officer expresses personal, subjective speculations about how an applicant should have acted in a certain situation:

The Migration Agency in Uppsala. Asylum interview 2018-09-03. Case no. 77

C: What I do not understand is why you flee immediately after one single person sees you in the car, instead of maybe staying and explaining to your family what happened [that the applicant kissed her same-sex partner] and that there might be another version of what had happened and explain that?

A: We already knew the consequences of being caught. If we did not flee immediately, our families might only have found our dead bodies. We could not wait, we just had to flee.

C: You describe it as very serious, that you could have been killed if you did not flee, but then I do not understand what you were thinking about the consequences of kissing each other in a car near your house?

A: We did not do it on purpose. It was not something we thought would happen, it just happened.

This case is an example of when all the applicant's answers are clearly interpreted as "wrong", even though she describes her own, personal experiences which already therefore can not be wrong. The applicant says that she fled from the place where she was caught kissing her girlfriend. The case officer questions this and suggests to her that she could have gone to her parents instead and "explained". This despite the fact that the applicant's same sex relationship was criminalised in Nigeria, a country where homosexuals risk being lynched or even executed.⁷⁶ When the applicant

⁷⁵ UNHCR's Guidelines No. 9, para. 60.ii, RS/015/2021, section 4.3.

⁷⁶ State-Sponsored Homophobia 2020: Global Legislation Overview Update, Ramon Mendos, L., Botha, K., Carrano Lelis, R., López de la Peña, E., Savelev, I., Tan, D., ILGA World, p. 25, 31, 33, 37, 55 ff., available at https://ilga.org/wp-content/uploads/2023/11/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf

describes that her life was at risk when being caught, the case officer questions this in a blaming tone, asking why she kissed her partner in the first place and why they did not think about the consequences. In chapter 5.1, an in-depth analysis was made of the migration authorities' assessments of risk-taking in SOGIESC asylum cases. The case officer's subjective speculations about how the applicant should have acted, are unlawful. They are comparable to the earlier questioning regarding the applicant's brother not reacting according to the Migration Agency's assumption that everybody in Nigeria has a negative, homophobic attitude towards homosexual family members, that they always express. In the following grounds for rejection, these commonly occurring subjective speculations in SOGIESC asylum cases appear once again:

The Migration Agency Uppsala. Decision 2019-10-25. Case no. 9786

Neither is it credible that your boyfriend by mistake would have sent a compromising photo to your cousin, given that he should have been aware of the importance of keeping your relationship a secret.

According to the Migration Agency, it is not credible that the applicant's boyfriend by mistake could have sent a photo of himself kissing the applicant. The Migration Agency finds that the applicant's boyfriend "should have been aware of the importance of keeping [the] relationship secret". That he would have accidentally sent the photo is therefore, according to the Migration Agency, not credible. This assumption is based on the strange belief that the applicant's boyfriend could not have made a mistake. The Migration Agency's argument is based on an idea that someone who knows the importance of keeping a relationship secret can not make a mistake, ever. The argument seems to be based on the idea that LGBTIQ+ people do not make mistakes. As mentioned above, speculations about what risks someone should or should not expose themselves to are unavoidably subjective and therefore unlawful, which is clearly stated in the Swedish Migration Agency's legal position paper, issued by the Director-General

of Legal Affairs.⁷⁷ Despite it being prohibited, this very type of illegal, subjective speculations lead to the conclusion that the applicant is not reliable and their SOGIESC is non-credible, also in the above cited case. In these cases, the applicant's siblings' or partners' actions were assessed as non-credible. In other cases, it is the parents of the applicants that are not considered to have acted in a reliable or credible manner:

The Migration Agency Uppsala. Decision 2018-04-06. Case no. 6012

You have stated that your friend's father has told different people that you and his son had had intercourse. On the question about why a parent in Iraq would tell others that his son has had intercourse with another young man you have only stated that you do not know what he said, but that it was written in a letter that you have received from your clan that he has said this. The Migration Agency questions that a parent, in the context that he comes from and in which he is now, would act as you describe and accuse a person of having had intercourse with his son, as this would reflect badly upon him and his family.

The applicant has held that he does not know what his partner's father has said, but that it is written in a letter to the applicant that the father has told others that his son has had intercourse with the applicant. In the negative decision, it reads: "The Migration Agency questions that a parent [...] would act as you describe [...] as this would reflect badly upon him and his family." The statement that "this would reflect badly" upon the parent and their family is a mere guess and a speculation made by the Swedish Migration Agency, without reference to for example country of origin information. It is both inappropriate and unlawful to draw the conclusion that the applicant's story, and thereby his sexual orientation, is not credible based on speculations about a third party's actions in a situation where the applicant was not even present. Subjective speculations about the actions of a third party are nevertheless often used as indicators of credibility in SOGIESC asylum cases. A similar assessment is made in the following case, regarding the actions of a parent to a young self-identified gay man from Uganda:

The Migration Agency Stockholm. Decision

⁷⁷ RS/015/2021, section 4.2.4: "The assessment [concerning past persecution] may not rely on assumptions about what risks a person could take or how someone should have acted in a certain situation. Such assumptions are inevitably subjective and it is not allowed to base the assessment of whether the applicant's story is credible or not, on them."

2018-03-20. Case no. 2538

[You] suspect that it is your father who has given the photo of you in the article to the police. He was ashamed of his son being homosexual. The Migration Agency asked you during the interview to explain why your father wanted to share a photo of you where it clearly follows from the context that you are homosexual. You have answered that you think he wanted you to be arrested. The Migration Agency assesses that the information that your father was ashamed of you and wanted the police to arrest you is contradictory. If he was ashamed of your sexual orientation, he would not want to share information about your orientation with the police or to the media.

In this SOGIESC asylum case, which was one of RFSL's asylum lawyer's cases, Ugandan media had "outed" the applicant together with his name and photos of him, as homosexual, a criminal and as wanted by the Ugandan police. The young boy drew the conclusion that it probably was his father who had reported him to the police, since he had disowned him as his son due to the boy's sexual orientation. The Swedish Migration Agency's reasoning in the grounds for rejection, that it was "contradictory" of the father to be ashamed of his homosexual son and to inform the Ugandan police and the media, is based solely on speculations. The decision-maker speculates about how the father should have felt and acted instead: "If he was ashamed of your sexual orientation, he would not want to spread information about your orientation to the police or to the media." This is yet another example of unlawful, subjective speculations.⁷⁸ The same boy was later, after his first negative decision, granted a new trial, as more Ugandan newspapers "outed" him. During this new trial and the oral interview, the same decision-maker questioned why the boy's friends in Sweden had shared an article about him and other Ugandan LGBTIQ+ persons. "A" refers to the applicant, and "C" refers to the case officer and decision-maker:

The Migration Agency Stockholm. Asylum Interview 2019-06-28. Case no. 2538

A: One of my friends in [a Swedish town] read

the article online and started to share it. Then, other people saw it and told me. [...] I saw my pictures. The photo they had taken in [the town] as well. And a photo where it says I was involved in Pride. So, I called [friend X] immediately, since we had just become friends and they told me how they had found the article. They said they read articles online all the time.

C: So, this friend in [town] was called X. What is their surname?

A: I do not know.

C: And it was they who had shared?

A: Yes, because they are in the photo too. People started to tag.

C: But why did they share? What was the purpose?

A: I do not know, but they were afraid, it could be dangerous for us.

C: But why would they share then?

A: Do not know.

C: From my perspective, you would not share things with others on Facebook if you believe that the content might be dangerous for you.

A: I can not say why they did it. People are different. I do not know how they think or why they did it. But my legal representative [RFSL's asylum lawyer] found out about it and told me that they needed to erase everything from the web. I do not know why X shared it.

C: [...] Is X also from Uganda?

A: Yes, but I met them in [the Swedish town].

C: Did they contact you about this article when they found it?

A: We were not that close, but they live in [Swedish town], but they tagged me [on Facebook] so that I could see the article. And I asked how they had found it. And they said they read a lot online.

C: But what was the purpose of tagging you?

A: I do not know what the purpose was. But when they said it, the legal representative [RFSL's asylum lawyer] had also found it.

The Swedish Migration Agency's decision-maker asked repetitive questions in an interrogative manner about why and for what purpose "X" shared the article, something that the applicant reasonably neither could know nor should have to answer for. The decision-maker officer rejected an almost identical SOGIESC asylum case from Uganda, where a young man had come to Sweden as an unaccompanied minor some years earlier. The young man had, like in the case cited above, been outed as a homosexual and a criminal, with his name and photos published, in the Uganda's

⁷⁸ The UNHCR's Guidelines No. 9, para. 60.ii, RS/015/2021, section 4.2.4.

biggest newspaper Red Pepper. The boy was refused asylum by the same decision-maker, with the following grounds for rejection:

The Migration Agency Stockholm. Decision 2016-12-29. Case no. 5828

You have submitted a copy of the Ugandan newspaper Red Pepper dated X. In the paper there is an article regarding a certain Y who is accused of having fled because of his sexual relationships with boys. [...] In the asylum interview, you have stated that you do not know how the newspaper got the photo of you, but that it has been in your aunt's photo album and that your aunt has given the picture to the newspapers when she found out that you were homosexual. The Migration Agency finds that you have not given a credible explanation to why your aunt chose to give this information about you to the newspaper two years after you left Uganda.

The applicant had responded to the Migration Agency's questions by explaining that his conclusion was that it was his aunt who gave the photo of him to Red Pepper, because the specific photo in the newspaper had been kept in her photo album. Also in this case, the same decision-maker uses the applicant's own and only reasonable conclusion about how things happened in Uganda against him in the grounds for rejection: "The Migration Agency finds that you have not given a credible explanation to why your aunt chose to give this information about you to the newspaper two years after you left Uganda." Once again, the case officer and decision-maker had during the oral interview asked several detailed questions about how relatives, family, friends etc. had acted after the applicant had fled and left the country. The Swedish Migration Agency asks the applicant to speculate about events and other people's actions, whose intentions the applicant can not reasonably know since they were in Sweden at the time. Thereafter, the decision-maker denies the asylum application with the argument that the applicant's "explanations" about events they do not and can not have knowledge of are not credible. The main issue with this course of action in the assessment and decision-making, is that the asylum applicant can not know and account for how and why someone else has acted in a certain way. All of the applicant's answers and conclusions about someone else's actions are used by the case officer to draw the conclusion that the applicant is not credible or reliable about their SOGIESC. The decision-maker's

speculations about other people's actions are unlawful but such speculations occur regularly in Swedish SOGIESC asylum cases as grounds for rejection. This is neither reasonable, in line with rule of law, nor compatible with the Swedish Migration Agency's legal guidelines in their position paper RS/015/2021. The Migration Agency makes a similar assumption in the following case:

The Migration Agency Stockholm. Decision 2017-09-22. Case no. 8577

On the one hand, you have said that you come from a religious background and that you did not dare to tell anyone about your sexual orientation, but on the other hand, you have told your mother that you are interested in boys, but you stated that she did not believe you. You have also been in contact with your mother since you told her. The Migration Agency finds this contradictory.

Already during the oral interview at the Migration Agency, the case officer questioned why the applicant, a self-identified homosexual man from Bangladesh, had told his mother about his sexual orientation. He described that his mother did not believe him and that she was the only one whom he was in touch with after fleeing from Bangladesh. In the grounds for rejection, the Migration Agency does not explain why it would be contradictory to tell one's mother, who does not believe you, but not tell anyone else about your homosexual orientation. The Migration Agency also seems to find it contradictory and not credible that the mother has stayed in touch with her son after he fled, when his homosexuality was disclosed to the public. The idea that a mother in Bangladesh would not want to be in contact with her homosexual child is of course a stereotypical notion that all parents in Bangladesh are homophobic. The Swedish Migration Agency expressed subjective assumptions already at the asylum interview. The case officer asked why the applicant did not develop feelings towards the same sex earlier than at 16-17 years. After that, the case officer said that 16-17 "is a rather late age to discover one's feelings" as a homosexual in Bangladesh. This is a representative example of how unlawful, subjective and stereotypical assumptions are expressed during oral asylum interviews and in the written grounds for rejection. The questions are not phrased objectively and the applicant's personal experiences are deemed non-credible and non-reliable. The consequence is that the applicant is denied asylum and deported, in

this case to Bangladesh, where same-sex sexual relationships between men are punishable by life imprisonment.⁷⁹

According to Swedish and international law, questions should be phrased objectively, and every assessment should be individual in SOGIESC asylum cases. According to EU law, the member states' migration authorities shall ensure that applications are examined and decisions are taken individually, objectively and impartially. The person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability.⁸⁰ The assessment of an application for international protection is to be carried out on an individual basis, taking into account the applicant's individual position and personal circumstances.⁸¹ All questions should be formulated in an objective manner and the assessment should be individualised and not be based on stereotypes.⁸² Even though the Swedish Migration Agency in theory requires a personal story about individual experiences, the decisions and court rulings studied in this report show that in practice the applicant needs to have "right" story and the "right" experiences to make their SOGIESC credible to the migration authorities. In the following excerpt from a protocol of an asylum interview, the Migration Agency's case officer, who was an LGBTQ specialist, expresses subjective assumptions which are interwoven in the questions to the applicant, a self-identified homosexual man from The Gambia:

The Migration Agency, asylum interview 2016-05-31. Case no. 3539.

C: I would like you to elaborate on how you thought and felt when you realised that you were attracted to X?

A: We had intercourse from the beginning.

C: You do not have to talk about your intimate relationship. You have lived in a country where homosexuality is prohibited, and you enter a relationship with another man. I think you must have had many thoughts and feelings about that,

perhaps felt worried or something similar. It is the emotional process I want you to tell me about.

A: It was difficult for us. It was hard being homosexual in the country since it was prohibited. But still we knew we would fight all the way. But we had thoughts about how to solve everything since we had to hide.

C: How did you feel during this time when you lived in The Gambia knowing that you could be discovered at any time?

A: Since we knew that it was prohibited and that people did not like it, we just decided to keep it a secret. You can live like that if you agree to it.

C: If I were to live like that, having to keep it secret that I had a relationship with someone, that would affect me in different ways. In what way did it affect you to conceal your relationship?

A: The situation is not easy. But still, we loved each other, and there was no return, and therefore we just kept going. It was difficult to hide and just keeping it between us.

The first example of a subjective assumption is visible in the case officer's question preceded by a personal statement: "I think you must have had many thoughts and feelings about that, perhaps felt worried or something similar." After that, the sentence: "It is the emotional process I want you to tell me about", shows the Migration Agency's expectation that all homosexuals have experienced an emotional process. The stereotypical requirement of an emotional process was analysed in chapter 4.1. The next example of a subjective assumption is: "If I were to live like that, having to keep it secret that I had a relationship with someone, that would affect me in different ways." The case officer, who was an LGBTQ specialist at the Migration Agency, tells the applicant what she herself thinks and speculates about what she would have felt if she were a homosexual man in The Gambia. It appears both inappropriate and irrelevant what a Western, female, white representative of a state authority tells an asylum applicant what she personally thinks that she would have felt as a homosexual man in The Gambia. Such speculations are inevitably subjective and already therefore unlawful according to the Swedish

⁷⁹ State-Sponsored Homophobia 2020: Global Legislation Overview Update, Ramon Mendos, L., Botha, K., Carrano Lelis, R., López de la Peña, E., Savelev, I., Tan, D., ILGA World, p. 129, available at <https://ilga.org/wp-content/uploads/2023/11/ILGA-World-State-Sponsored-Homophobia-report-global-legislation-overview-update-December-2020.pdf>

⁸⁰ The EU's Asylum Procedures Directive, Art. 10.3 a) and Art. 15.3 a)

⁸¹ The EU's Qualification Directive, Art. 4.3 c), the Migration Agency's legal guideline RS/015/2021, section 4.2.3.

⁸² The UNHCR's Guidelines No. 9, see paras. 60. ii. and 62, RS/015/2021, section 4.1.3.

Migration Agency's own legal position paper. Through these statements, the case officer clearly shows the applicant that the Migration Agency expects that he has had the specific experiences, thoughts and feelings that the case officer states that she would have had if she, hypothetically, were a homosexual man in The Gambia. Thus, the applicant is expected to account in detail for experiences that he personally might not even have had. The fact that the case officer from the beginning of the asylum interview expects the applicant to have had specific experiences that he must account for, means that the requirement of an individual, objective assessment of the applicant's personal experiences is not fulfilled.

5.9 Analysis and conclusions

Chapter 4 concluded that the following requirements are made by the Swedish migration authorities in SOGIESC asylum cases: An inner emotional process should have taken place and the applicant should have felt or at least be able to relate to or reflect upon feelings of difference, stigma and shame, even if they have not personally experienced these feelings themselves. This chapter has shown other common expectations placed on the applicants in SOGIESC asylum cases, which have great impact on the credibility assessment. These are for example that LGBTIQ+ people do not take risks and always make careful risk assessments that can be accounted for at the asylum interview. Taking "too big risks" is generally considered non-credible by the Swedish migration authorities and will usually be held against the applicant in the credibility assessment. The notion that LGBTIQ+ people do not take risks and that those who do have themselves to blame, is not new. It is reasonable to compare this to an approach that has characterised criminal law for a long time, in which the credibility of victims of sexual crimes is questioned and the victim is blamed throughout the legal procedure. The crime victim is made partly responsible for being raped through the questions asked by the police, the prosecutor and defence lawyer, regarding what the victim wore, whether they acted in "a provocative way", how drunk they were, etc. Since long, focus has been on the victim's behaviour before the crime committed against them. The burden of proof

has been placed on the victim, which has made convictions difficult in cases where the victims' stories are not deemed credible in the criminal legal procedure.⁸³ In a similar way, in asylum law, the focus is on the applicant's behaviour before they for example were subjected to violence, and LGBTIQ+ people who have taken "too big" risks are denied asylum, as they are deemed non-credible.

Furthermore, there is an idea that the inner emotional process leading to realisation, that the migration authorities require that the applicant has experienced, has been full of problems and included negative emotions. It is in general not considered credible nor reliable to always or early on have accepted one's SOGIESC. Applicants who describe that they "are born that way", that they have not experienced any negative feelings and/or exclusively have felt positive feelings about their SOGIESC, are generally considered non-credible about their SOGIESC asylum claims.

Another common notion that is often expressed in written protocols from the oral asylum interview and in negative decisions is that LGBTIQ+ people should have thought about their future as an LGBTIQ+ person already at a young age. These plans are expected to be realistic and long-term, for example regarding how to keep their SOGIESC secret from their family. Another common expectation is that LGBTIQ+ people should have planned to leave their country of origin. Moreover, it clearly follows from the migration authorities' rejection grounds in SOGIESC asylum cases that applicants who are religious and/or come from religious countries are expected to have reflected specifically upon the relationship between their religion and their SOGIESC. The migration authorities generally expect religious LGBTIQ+ people to experience an inner conflict between their faith and their SOGIESC. These applicants are expected to relate mainly to the religion and its view on LGBTIQ+, rather than their own personal faith.

Further, it has been shown that subjective, stereotypical assumptions and statements about how someone should have felt or acted are frequent in SOGIESC asylum cases. These statements are expressed by case officers at asylum interviews as well as in the written grounds for rejection. An example of this is when case officers speculate about what they themselves would have done or

⁸³ National Centre for Knowledge on Men's Violence against Women (2010). *Antologi: Sju perspektiv på våldtäkt* [Anthology: Seven Perspectives on Rape]. Report 2010:2, p. 140f.

felt in a certain situation if they were an LGBTQ+ person in the applicant's country of origin. Speculations about how the applicant, their partner, friend or parent should have acted or reacted are common in SOGIESC asylum cases. Since such speculations are inevitably subjective, the Swedish Migration Agency's Director-General of Legal Affairs emphasises in the legal position paper that they are unlawful. Yet, such subjective speculations are often expressed and applied within the credibility assessment and they lead to the migration authorities' conclusion that the applicant is not credible regarding their SOGIESC.⁸⁴

A recurring notion among the Swedish migration authorities is that LGBTQ+ people do research in Sweden about Swedish LGBTQ+ legislation. To be in Sweden for a certain period of time without looking for and finding detailed information about for example SOGIESC constituting legal grounds for asylum, is not acceptable according to the migration authorities. In general, it leads to the conclusion that the applicant's SOGIESC asylum claims are not credible nor reliable. Furthermore, this study identifies an expectation made by the Swedish migration authorities, namely that LGBTQ+ applicants should relate to heterosexual cis people and "explain" how their own experiences and self-identification differs from those of a heterosexual cis person. This can most likely be explained by the assumption that all LGBTQ+ people share a universal, non-heterosexual narrative.⁸⁵

The questions that the Swedish Migration Agency's case officers ask as part of their duty to investigate should be objective and not be based on stereotypical, incorrect or inappropriate notions of LGBTQ+ people. This is stated in the UNHCR's guidelines.⁸⁶ This chapter, however, shows that stereotypical notions about LGBTQ+ people as well as subjective and speculative assumptions about LGBTQ+ people's behaviour and reactions are often present in every step of the investigations of SOGIESC asylum claims. These have a major impact in the assessment of the applicant's credibility about their SOGIESC asylum claims. The application of stereotypical notions and subjective assump-

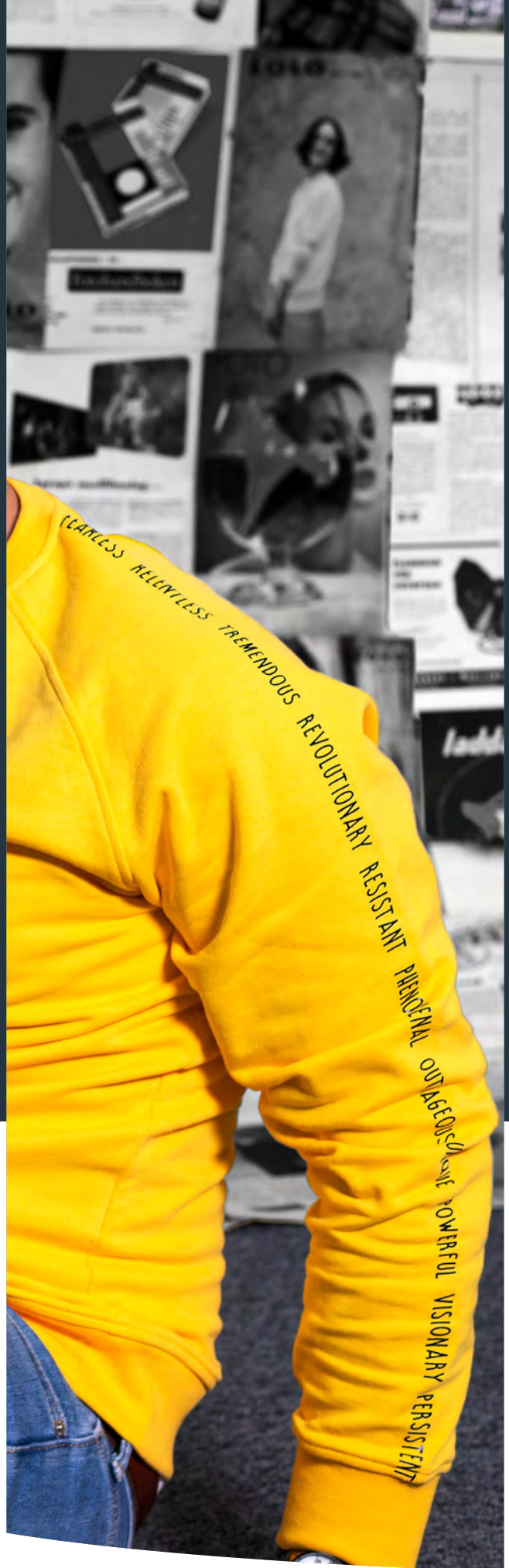
tions means that the right to an objective, individual assessment as established in the UNHCR's Guidelines No. 9 and the EU's Qualification Directive and Asylum Procedure Directive, are not fulfilled.⁸⁷

⁸⁴ The Migration Agency's legal position paper RS/015/2021, section 4.2.4.

⁸⁵ Credibility assessment in asylum procedures. A multidisciplinary training manual, vol. 2, Hungarian Helsinki Committee 2015, "The DSSH model: a framework to understand asylum claims based on sexual orientation and gender identity", p. 77, available at: <https://helsinki.hu/wp-content/uploads/CREDO-training-manual-2nd-volume-online-final.pdf>

⁸⁶ The UNHCR's Guidelines No. 9, paras. 60.ii and 62.

⁸⁷ Ibid. and the EU's Asylum Procedures Directive Art. 10 3a), the EU's Qualification Directive Art. 4.3, the CJEU's judgment in the Joint Cases C-148/13–C-150/13 paras. 60-62.



6. Western Norms and Terminology: Who owns the right to define SOGIESC?

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On the left:

A member of RFSL Ungdom wearing a “Newcomers Youth” sweatshirt, part of the organization’s clothing collection.

Photo: Arseny Selov & Andra Berciu

“You do not seem to understand that gender identity is not connected to a person’s actions in sexual contexts, rather, you seem to think that people in a same-sex relationship mirror the behavioural patterns of a stereotypical heterosexual relationship. [...] You have given stereotypical descriptions characterised by a fundamental lack of understanding of what bisexuality is. [...] [You show] substantial shortcomings when it comes to understanding the fundamental aspects of sexual orientations.”⁸⁸

6.1 Requirements of knowledge of Western SOGIESC terminology

The material of this research study shows that the migration authorities often in practice require the applicant in SOGIESC asylum cases to know about and use Western LGBTIQ+ terminology, i. e. the “correct” meaning of terms related to SOGIESC. An applicant’s lack of knowledge about Western SOGIESC terminology, or their use of the terms in an “incorrect” way, reduces their credibility and reliability regarding their SOGIESC asylum claims, according to the Swedish migration authorities. Below are examples of this:

The Migration Agency Malmö. Decision confidential. Case no. Confidential. [Appealed to the Migration Court at the Administrative Court in Malmö 2019-11-07. Case no. 995]

When she was given the chance to speak freely about her sexual orientation [X has] repeatedly stated that she is homosexual. The Migration Agency has, at a later stage of the interview, asked what her sexual orientation is. She has then stated that she is bisexual, since her father forced her to get married, that she is not attracted to men, only women, and that she, because she was raped, became attracted to men and that she now is attracted to both men and women. The Migration Agency has thereafter asked her why she, in her application for impediments to enforcement [of a decision to deport her], has stated that she is a lesbian. X has answered that she began when she was young and that she liked it. Therefore, she wrote that she was a lesbian. The Migration Agency notes that X has given contradictory information about her sexual orientation and that she seems to lack understanding of what it means to be bisexual, as she has stated that she became attracted to men because she was raped.

The woman identifies as lesbian because she began to feel attracted to girls when she was young. She uses the term bisexual to describe her sexual practice, where she includes an experience of being raped by a man and being forced to marry a man. It is common that LGBTIQ+ people from different countries, for example in West Africa, define “sexual orientation” based on sexual practice, even in cases of forced marriage or sexual assault. The Swedish Migration Agency applies a Western definition of sexual orientation as being an “identity”, i.e. as something emotional, consisting of feelings. The asylum-seeking woman describes a sexual practice and how her attraction towards women has varied over time. The Migration Agency writes that she seems to “lack understanding of what it means to be bisexual”. This is done even though it can not be required that she knows about or uses the Western LGBTIQ+ terminology that the Swedish Migration Agency applies. According to the UNHCR and the Swedish Migration Agency’s own legal position paper RS/015/2021, it is not allowed to require of an applicant that they know about or use specific SOGIESC terminology, and there are no right or wrong answers when describing oneself. According to the Migration Agency, the woman’s self-identification is “contradictory” because she uses both the terms “lesbian” and “bisexual” about herself. The Migration Agency’s reason for rejection, i.e. that she lacks understanding of the (Migration Agency’s Western definition of the) term bisexual, is illegal. It violates the UNHCR’s guidelines and the Migration Agency’s own legal position paper, which states that it can not be expected of an applicant that they know about or use specific SOGIESC terminology. Nevertheless, a similar assessment was made in the following case:

The Migration Agency Gävle. Decision 2013-03-12. Case no. 9570.

You have repeatedly during the asylum interview used the word homosexual, but when asked if you are attracted only to men or to both men and women, you have said that you are attracted to both sexes. In the written application, you have stated that you are bisexual. The Migration Agency finds that if you have really realised that you no longer were heterosexual, it is remarkable that you can not separate the terms homosexual and bisexual.

⁸⁸ The Migration Agency 2017-05-04. Case no. 9062

In this case, a Ugandan man is assessed as non-credible regarding his sexual orientation, since it is according to the Migration Agency “remarkable” that he “can not separate the terms homosexual and bisexual”. This is yet another example of how an applicant’s answer is deemed non-credible because he lacks knowledge about the Migration Agency’s Western terminology and he uses SOGIESC terms in a different way than the Migration Agency. The applicant uses both the term bisexual and homosexual to describe himself. This is neither strange, unusual nor “remarkable”, as the Migration Agency claims, but since he does not use the terms in the same way as the Migration Agency, he is deemed non-credible regarding his sexual orientation and his relationships with men. He is therefore denied asylum and deported to Uganda. It appears belittling that someone’s self-identification is reduced to them “not understanding” the, according to the Migration Agency, “correct” Western definition of different terms. These grounds for rejection are also unlawful, since they are based on the expectation and requirement that the applicant should know about and use Western LGBTIQ+ terminology. The following case is another example:

The Migration Agency Arlanda. Decision 2020-03-13. Case no. 683.

The Migration Agency further notes that you, in your description of your sexual orientation, often fall back on stereotypical notions about homosexuality. Among other things, you have said that you lacked male role models, which made your feelings towards boys stronger, and that you felt more feminine than masculine, and that you do not “have the strength a normal boy has”. You have also stated that you, because of these characteristics, felt alienated and different from other people in your environment. However, you have not been able to elaborate on how this feeling of difference affected you or your feeling of being different.

According to the Swedish Migration Agency, the applicant describes their sexual orientation based on “stereotypical notions about homosexuality”. This is a very peculiar and incorrect line of reasoning. The applicant had in fact described that they – apart from their sexual

orientation – felt more feminine than masculine, that they used to paint their nails and had been subjected to violence in Morocco because of this. The applicant thus clearly described their gender expression, and, possibly, also their gender identity. Despite this, the Migration Agency assessed the asylum case as if the applicant had only claimed to be a “homosexual man”, without investigating the described gender identity and gender expression as (separate) grounds for asylum. Instead of understanding the applicant’s description of their gender expression and gender identity and examining these grounds for asylum, the Migration Agency incorrectly confuses them with sexual orientation and claims that the applicant’s description this, is “stereotypical”. The Migration Agency, thus, uses its own confusion and lack of knowledge about the different SOGIESC asylum claims, to conclude that the applicant’s self-identification is “stereotypical” and not credible.⁸⁹ The applicant is denied asylum and deported because the Migration Agency concluded that they described homosexuality in the “wrong” way, despite the fact that the applicant was actually describing their gender expression and gender identity, which are independent grounds for asylum. A similar assessment is made in the following case:

The Migration Agency Gothenburg. Decision 2017-05-04. Case no. 9062

Furthermore, the Migration Agency finds that you have showed a lack of understanding of what a sexual orientation is. You have stated that you were introduced to a sexual relationship by an older schoolmate whom you trusted, and that it was there that your sexual orientation began. And that when you left school, you became fully bisexual. You have also, when replying to a question on how you define your sexual orientation, stated that most of the time you are the man. You have stated that you are attracted to both sexes, but that you use women as a cover-up. Regarding this part of your oral account, the Migration Agency finds that it is characterised by an understanding of bisexuality which defines it in relation to a person having sexual relationships with people from both sexes, rather than a person who experiences a physical and emotional attraction to people of both sexes. Further, you identify bisexuality as a behaviour you seem to have adopted, rather than as a fundamental part of your identity.

⁸⁹ See chapter 7.2 about the unlawful confusion of sexual orientation, gender identity and gender expression as grounds for asylum.

According to the Migration Agency, the applicant has “showed a lack of understanding of what a sexual orientation is”. This alone shows that, according to the Swedish Migration Agency, there is a “correct” definition and meaning of sexual orientation. The Migration Agency writes that the applicant’s oral account is characterised by the understanding of bisexuality “which defines it in relation to a person having sexual relationships with people from both sexes, rather than a person who experiences a physical and emotional attraction to people of both sexes.” The Migration Agency thus defines sexual orientation as “a physical and emotional attraction”, which, according to the Migration Agency, is different from the sexual relations that the applicant defines and describes his sexual orientation as being based on. Also in this case, the Migration Agency assesses the applicant as non-credible because his definition and description of his own bisexuality does not correspond with the Migration Agency’s definition of the term. However, sexual orientation does not have one objectively “correct” or “true” meaning that is universal for all individuals across the world. The Swedish Migration Agency’s Director-General of Legal Affairs has emphasised in the legal position paper RS/015/2021 that for these reasons, the term “sexual orientation” should be interpreted broadly. However, in the above cited cases, the Migration Agency takes precedence over the applicant, whose asylum claims and sexual orientation is concerned, in interpreting the meaning of the term. The applicant is considered to have given “wrong” answers about his own sexual orientation and what it means to him personally. This violates the Migration Agency’s own legal position paper, which obviously is not applied correctly in the many SOGIESC asylum cases where the reason for rejection is that the applicant is not credible regarding their sexual orientation because they “do not understand the correct meaning” of the Migration Agency’s SOGIESC terminology. Also these rejection grounds are based on the argument that the applicant defines their sexual orientation in the wrong way, since they describe sexual practice and relations “instead of” identity, feelings and emotions. Furthermore, the Migration Agency writes the following in the same decision cited above:

The Migration Agency Gothenburg. Decision 2017-05-04. Case no. 9062

In addition, you identify your sexual orientation in terms of that you most of the time are the man, and that your first partner was the woman. You do not seem to understand that a gender identity is not connected to a person’s behaviour in a sexual context, rather, you seem to believe that people in a same-sex relationship mirror behaviours from a stereotypical heterosexual relationship. A person who, as you have said you have, has known about their sexual orientation for a long time, is expected to be able to account for it in a vivid and self-experienced way. You have given stereotypical descriptions characterised by a fundamental lack of understanding of what bisexuality is. [...] Due to the substantial shortcomings you have shown when it comes to understanding the fundamental aspects of sexual orientations, and the lack of reflection regarding your own sexual orientation, the Migration Agency finds that an additional oral interview is unnecessary.

Instead of understanding what the applicant is indicating when he describes himself as the “man” in his same-sex relationship, the Migration Agency wrongly interprets this as if he is talking about his gender identity and concludes that he is not credible. Anyone who has a little knowledge about LGBTIQ+ people’s situation in countries where MSM⁹⁰ are being persecuted, would know that it is common, in the absence of SOGIESC-specific, positive or neutral terms, that MSM can use heteronormative, stereotypical terms such as “man, woman”, “passive, active”, “top, bottom” to describe different sexual relationships and situations. The use of such terms within the group MSM, also in Sweden, is neither unusual, nor does it make an MSM less credible – on the contrary. It should not appear unusual or strange to the Migration Agency that stereotypical, heteronormative terms are used by LGBTIQ+ people. This does not make them less credible. The UNHCR emphasises that some LGBTIQ+ people only know derogative or stereotypical terms to describe themselves. That does not make them less credible. The Migration Agency uses something that in fact supports the applicant’s credibility about their relationships with other men, against their credibility and as grounds for rejection. The Migration Agency concludes that the applicant is not credible regarding his sexual orientation because he uses

⁹⁰ MSM is an abbreviation used to describe men who have sex with men.

terms that are albeit stereotypical, heteronormative and even sexist, but that nonetheless are commonly used within the group MSM, especially in countries where they lack other, positive terms to describe sexual relationships between men. The Migration Agency's reasoning indicates a serious lack of knowledge about LGBTIQ+ people and MSM's situation in different countries and cultures. It violates the UNHCR's Guidelines No. 9 and the Swedish Migration Agency's own legal position paper which both emphasise that the applicant is not required to know about or use a certain terminology to describe themselves.⁹¹

6.2 Constructing a dichotomy between identity and practice

“Instead, he talks about sexual activities, which is not the same as sexual orientation.”⁹²

“A's information about his sexual orientation is mainly an account of his sexual experiences and thoughts [...] Taking into account the lack of a deeper inner process of thoughts and reflections [...] his statements appear as merely stereotypical notions of LGBTIQ+ people.”⁹³

The rejection grounds in the previous chapter showed how the migration authorities apply a Western definition and understanding of the concept sexual orientation, according to which sexual orientation is a matter of identity and emotions. This does not always correspond with the asylum-seeker's definition and description of their own sexual orientation. Those who describe their sexual orientation in terms of sexual practice and sexual relationships are deemed non-credible about their SOGIESC and are often denied asylum. Below are representative examples of rejection grounds where the applicant is expected to describe feelings and an emotional process rather than or as opposed to physical and sexual relationships. The first example concerns a young self-identified homosexual applicant from Morocco:

The Migration Court at the Administrative

Court in Gothenburg 2019-02-26. Case no. 317
X has problems describing the feelings he had when he realised that he was attracted to men. Instead, he talks about sexual activities, which is not the same as sexual orientation. He has grown up in a country where homosexuality is not generally accepted but can despite this not elaborate on his thoughts or reflections.

The Migration Court explicitly writes that sexual activities are not the same thing as sexual orientation. Then the court expresses the migration authorities' expectation on LGBTIQ+ asylum seekers to be able to describe thoughts and feelings more in detail, the less accepted LGBTIQ+ is in their country of origin.⁹⁴ The court defines sexual orientation as something other than “sexual activities”, why the applicant's description of his sexual orientation in terms of his sexual activities causes him to be considered non-credible regarding his sexual orientation. However, in fact, who a person has sex with can be an important part of that person's sexual orientation. Sexual orientation is a personal matter that only the person concerned should have the right to define. It is common to define one's own sexual orientation based on who one has sex with or is attracted to. The fact that same-sex sexual relationships between men are criminalised and punishable in Morocco in a way that meets the legal definition of persecution follows from the country of origin information in the case cited above. The Migration Court does not question the applicant's same-sex sexual relationships but claims that these are not the same thing as his sexual orientation. However, the criminalisation of sexual acts between men and the persecution of MSM in Morocco does not pay any regard to whether these men have experienced certain thoughts or reflections or can express them verbally. The Migration Court does not question that the applicant has sex with men but does not appear to consider his same-sex relationships worthy of protection, since they, according to the court, do not make him homosexual, unless he can give a verbal account for certain “thoughts and reflections”. The court, thus, deports a man who has sexual relationships with other men to a country where

⁹¹ The UNHCR's Guidelines No. 9, para. 11, RS/015/2021, sections 2, 4.1.2 and 4.1.3.

⁹² The Migration Court, the Administrative Court in Gothenburg, 2019-02-26, Case no. 317.

⁹³ The Migration Court, the Administrative Court in Luleå, 2019-10-18, Case no. Case no. 7942.

⁹⁴ See chapter 4.4 of the report. According to the Migration Court, the applicant should be able to elaborate on his thoughts because he has grown up in a country where homosexuality is not accepted.

these relationships are criminalised and where the penalties constitute persecution. This violates the UNHCR's guidelines, according to which it is commonplace for men who have sex with men to not define themselves as homosexuals, which does, however, not mean that they are not at risk of persecution because of their way of living.⁹⁵ In the following case, the Migration Court argues in a similar way:

The Migration Court at the Administrative Court in Luleå 2019-10-18. Case no. 7942.

The Migration Court finds that A's statements regarding his sexual orientation mainly is an account of his sexual experiences and thoughts. When his identity is described, it is in a sweeping description of his thoughts during adolescence. In the absence of a deeper inner process of thoughts and reflections, which reasonably can be expected to have come about in relation to the realisation of his sexual orientation, his statements appear as merely stereotypical notions of LGBTIQ+ people.

According to the Migration Court, the applicant's description of his sexual orientation is mainly an account of his "sexual experiences and thoughts," and that "when his identity is described", the narrative is sweeping. Thus, the Migration Court differentiates between, on the one hand, his sexual experiences, and on the other, his "identity". According to the Court, a description of one's sexual experiences and thoughts is not a description of one's identity. It appears obvious that the Court applies a different definition of what sexuality and sexual orientation "is" than the applicant, who describes his sexual orientation in terms of who he has sex with and fantasises about. The Court writes that there is an "absence of a deeper inner process of thoughts and reflections" that "can reasonably be expected" and concludes that the applicant expresses "stereotypical notions of LGBTIQ+ people". He is therefore not considered credible regarding his sexual orientation and is denied asylum and deported. A similar assessment is made in the following case:

The Migration Agency Uppsala. Decision 2019-10-15. Case no. 8364

You have not been able to talk about your feelings and thoughts apart from a purely sexual desire. You have not disclosed any information about the inner process or the development of your

self-awareness that occurred when you realised that you were attracted to people of the same sex.

According to the Swedish Migration Agency, "a purely sexual desire" is mutually exclusive to "the inner process or the development" which the Migration Agency assumes has taken place and can be described by the applicant. The main issue is the Swedish migration authorities' strict requirement in SOGIESC asylum cases; that a sexual orientation or gender identity always, without exception, is preceded by a deep inner, emotional process that can be described by the applicant. As a consequence, all other personal experiences and ways to define and describe one's SOGIESC – for example as a "sexual desire" as in the case above – are considered indicators of the applicant not being credible. The following case is yet another example of this:

The Migration Agency Stockholm. Decision 2018-12-10. Case no. 6073

During your first interview you had the opportunity to describe your feelings and reflections regarding your sexuality. Since you repeatedly referred to sexual acts rather than to your personal reflections, you were called to a second, complementary, interview with the Migration Agency.

The Migration Agency's statement in the first sentence "you had the opportunity to describe your feelings and reflections regarding your sexuality" is once again based on the incorrect assumption that all non-heterosexual people have experienced deep emotions as well as reflected upon their sexual orientation. Then, the Migration Agency places these expected emotions and reflections in opposition to "sexual acts". The fact that the applicant was called to a complementary interview because he was considered to have focused on the "wrong" aspects of his sexual orientation during the first interview illustrates how the Migration Agency expects all LGBTIQ+ people to have made personal reflections that can be accounted for:

The Migration Agency Stockholm. Decision 2018-12-10. Case no. 6073

However, at this [complementary] interview you once again chose to focus on sexual acts – even after receiving repeated instructions from the Migration Agency to focus on feelings, thoughts and reflections. You stated, during both the

⁹⁵ The UNHCR's Guidelines No. 9, paras. 11 and 63.i.

interviews, that you often developed “feelings”, but you did not manage to describe these feelings in detail. Instead, you talked about your libido. You have not been able to talk about your personal experiences as a homosexual man in Iraq, nor have you managed to relate these experiences to your life in Sweden. In addition, you have not been able to describe your thoughts about the realisation, your strategies or your relationships.

The Migration Agency implies that the applicant has been given “many chances” to describe his feelings, but that he instead “chose to focus on sexual acts”. These statements are based on the erroneous, incorrect assumption that LGBTIQ+ people can choose between describing their sexual orientation in terms of sexual practice or in terms of feelings, thoughts and reflections. This approach erroneously assumes that all LGBTIQ+ people have deep emotions, thoughts and reflections, and that these are clearly separated from sexual relationships. As previously concluded in this research study, claiming that all LGBTIQ+ people share certain universal experiences of deep emotions, thoughts and reflections about their SOGIESC is a stereotypical assumption. It is not always possible to describe one’s sexual orientation only in terms of feelings, thoughts and reflections. For a lot of people, sexual relations are crucial to, and may even be the main element of, how one defines their sexual orientation, without these relationships being preceded by specific feelings, thoughts and reflections. The Migration Agency did not question in the above cited case that the applicant had had sexual relationships with men in both Iraq and Sweden. Since the Migration Agency found that he had not described his feelings, “but rather” his sexual relationships, he was not found credible regarding his sexual orientation. He was therefore denied asylum and deported to Iraq, despite same-sex sexual acts between men – regardless of whether these men can describe their feelings verbally or not – being criminalised there.⁹⁶ This case illustrates how the Swedish migration authorities’ stereotypical requirements of experiences

of feelings and thoughts as well as the ability to account for these, results in deportations to countries that apply the death penalty, in cases where the applicant’s personal experiences and self-identification do not correspond with the Swedish migration authorities’ Western definition of SOGIESC. A similar assessment was made in the following case:

The Migration Agency Gothenburg. Decision 2017-05-12. Case no. 3813

The Migration Agency finds that your narrative regarding your sexual orientation is characterised by a lack of emotional reflection, and that you, when you have discussed your sexual orientation, instead have accounted for physical attraction to people of the same sex.

The Migration Agency writes that the asylum-seeking woman’s story is characterised by a lack of emotional reflection, and that she “instead” has accounted for her physical attraction to other women when describing her sexual orientation. Once again, the Swedish Migration Agency constructs a dichotomy between feelings and physical attraction. This is problematic since the woman’s experienced attraction to other women may be a central and for her crucial part of her lesbian identity, why it influences her description of it. Asylum applicants’ life experiences and thereby their descriptions of them are personal, subjective and can not really be questioned or considered “wrong”. The Migration Agency, however, apparently considers itself to have a greater entitlement and right than the asylum seeker to define what a sexual orientation “is” and how it should be described. This is not compatible with the Migration Agency’s Director-General of Legal Affairs’ legal guideline RS/015/2021, which emphasises that the applicant’s experiences and feelings about their sexual orientation are very individual and that there are no right or wrong answers to the questions.⁹⁷

6.3 Sexual Orientation and self-identification in the “correct” (Western) way

⁹⁶ State-Sponsored Homophobia 2019, Ramón Mendos, L., ILGA World, p. 523-525, available at https://ilga.org/wp-content/uploads/2023/11/ILGA_State_Sponsored_Homophobia_2019.pdf, State-Sponsored Homophobia 2020: Global Legislation Overview Update, Ramon Mendos, L., Botha, K., Carrano Lelis, R., López de la Peña, E., Savelev, I., Tan, D., ILGA World, p. 131, available at https://ilga.org/wp-content/uploads/2023/11/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf

⁹⁷ RS/015/2021, section 4.1.3.

“Overall, the Swedish Migration Agency finds that you have not been able to account in a detailed and reflective way for your view on your sexual orientation and how it, since you discovered it, has affected your life.[...] The Migration Agency does not question that you have had sexual relations with the man you live with.”⁹⁸

“Same-sex intercourse is not enough to make your sexual orientation credible. In the Court’s opinion, it is important to differentiate between sexual relations and sexual orientation.”⁹⁹

In the previous chapter it was concluded that the migration authorities define homo- and bisexuality as identities, consisting of and defined by feelings, thoughts and reflections. Applicants whose self-identification and description of their sexual orientation are based on, or focuses too much on, sexual practice and physical relations, are assessed as non-credible. In the grounds for rejection, the Swedish migration authorities construct a dichotomy between sexual practice and sexual orientation, which is not necessarily experienced by the applicants themselves.

Even in cases where the Swedish migration authorities do not question that the applicant has same-sex sexual relations in the country of origin and/or in Sweden, this fact is not enough or sufficient to make homo- or bisexuality credible. If an inner process with thoughts, feelings and reflections has not taken place or can be described in enough detail, the sexual orientation is not deemed credible and reliable, according to the Swedish migration authorities. Below is an example that illustrates how the migration authorities require an intellectual ability to verbally reflect upon an inner process which is expected to have taken place, even in cases when the applicant’s lifestyle or same-sex relationships are not questioned:

The Migration Agency Stockholm. Decision 2017-12-28. Case no. 1296

Overall, the Swedish Migration Agency finds that you have not been able to account in a detailed and reflective way for your view on your sexual orientation and how it, since you discovered it, has affected your life. You have made vague statements about how you became aware of your sexual orientation and what thoughts about

yourself and your identity it leads to.

Sexual relation: The Migration Agency does not question that you have had sexual relations with the man you live with. Your information in this part is found credible and will therefore form the basis of the continued assessment of your need for protection.

Overall assessment: The Migration Agency has found above that your statements regarding your sexual orientation and your romantic relationship with your roommate is not credible.

The Migration Agency finds that the applicant, a self-identified homosexual man from Jordan, has been credible regarding having had a sexual relationship with the man he lives together with in Sweden since many years back. However, since the applicant has not been able to account in a detailed and reflective manner for his sexual orientation or thoughts and feelings of an inner process leading to a realisation of his sexual orientation, he is, according to the Migration Agency, not credible regarding his sexual orientation. The Migration Agency did not question that the applicant and the man whom he was cohabitating with had a sexual relationship but concluded that he had not shown that they (also) had a romantic relationship. Having a sexual relationship with someone you live with does thereby not mean that the claimed sexual orientation is credible, according to the Migration Agency. The Migration Court made a similar assessment in the following case:

The Migration Court at the Administrative Court in Luleå 2019-05-06. Case no. 5830

At the interview with the Migration Agency, A has struggled to answer questions about his thoughts and feelings regarding his sexual orientation and how it has affected his life, and the statements he has made have been vague, general and lacking in detail. [...] At the oral hearing, A has been given the opportunity to elaborate on his thoughts regarding these parts, but in the Migration Court’s opinion, he has continued to present vague and general reflections that lack depth regarding his sexual orientation. [...] Despite several questions, he has not been able to elaborate on his thoughts about for example the time in his life when he became aware of his sexual orientation, or how he

⁹⁸ The Migration Agency, Asylum Unit 3, Stockholm. Decision 2017-12-28. Case no. 1296.

⁹⁹ The Migration Court at the Administrative Court in Stockholm 2018-09-18. Case no. 5909.

and his boyfriend in the village met and how they developed emotions. [The Court finds that] A should reasonably be able to elaborate on his thoughts and feelings regarding his sexual orientation in a more detailed way. His story also generally lacks emotional considerations and reflections about what it has been like living as a homosexual in Afghanistan. In sum, the Migration Court finds that A has not been able to make it credible that he would be a homosexual.

Also in this case, a same-sex relationship in Sweden was not enough to make the applicant's sexual orientation credible. The asylum-seeking man's boyfriend had testified at the oral hearing at the Migration Court. The court concluded that the boyfriend's and the applicant's statements about their relationship and about how they met were coherent. The Migration Court found that the testimonies as well as other evidence were "indicative" but did not consider it credible that the applicant would be homosexual. The Migration Court concluded that the lack of "emotional considerations and reflections" as well as a detailed account of thoughts and feelings meant that the applicant had not made his sexual orientation credible. Also in the following case, it is obvious that the Migration Court differentiates between same-sex relations and sexual orientation:

The Migration Court at the Administrative Court in Stockholm 2018-09-18. Case no. 5909

X has mixed feelings about his sexual orientation. Good, since he enjoys being with men, he is emotionally and sexually attracted to people of the same sex, and this makes him happy. He has negative feelings because of the stigmatisation he was subjected to in his country of origin. He fears that this will happen in Sweden too. The Court finds that X's statements regarding his feelings towards his sexual orientation have been vague and general. He has repeatedly been asked by the Court, his legal representative as well as the Migration Agency's case officer about his feelings and reflections about being homosexual and his emotions towards the people he has had relationships with. Despite repeated instructions, he has instead reverted to talking about his sexual relationships. Same-sex intercourse is not enough to make one's sexual orientation credible. In the Court's opinion it is important to differentiate between sexual relationships and sexual orientation.

The Migration Court finds that the young man's

statements about his feelings are "vague" and that he "despite repeated instructions" instead has reverted to talking about his sexual relationships. The Migration Court explicitly emphasises that it is "important to differentiate between sexual relationships and sexual orientation". In this way, the court creates a dichotomy between sexual practice and sexual orientation, which the applicant may not necessarily experience himself. From this argument it can be interpreted, yet again, that the Swedish migration authorities define sexual orientation as something exclusively emotional that must be separated from sexual relationships. Another example of this approach can be found in the following negative decision by the Migration Agency, concerning an applicant from Iraq:

The Migration Agency Stockholm. Decision 2018-12-10. Case no. 6073

You have stated that you were 14 years old when you began to realise that you liked boys, but you did not dare to take any actions as you were afraid of how people around you would react. You felt that it was right for you, but you were still aware of your society's attitude to homosexuality. When you were 15, you often spent time with a boy who lived next door. You used to go for walks and smoke together, as neither of you were allowed to smoke at home. One day, the two of you were at your house when your family was away. After watching a pornographic film together, you had intercourse. You had a secret relationship for about a year. You have also had sexual relationships with men in Sweden. [...] You have not been able to talk about your personal experiences as a homosexual in Iraq, nor have you been able to relate these experiences to your life in Sweden. Moreover, you have not been able to describe your thoughts about the realisation, your strategies or your relationships. [...] As you have not given a valid explanation to why you have not been able to account for your thoughts, feelings and reflections in these parts, the Migration Agency considers this to impact your credibility negatively regarding your claimed affiliation to a particular social group [homosexuals]. The Migration Agency does not question that you have had sex with men but finds, in sum, that you have not provided reliable information about belonging to the group homosexual men in Iraq.

The Migration Agency writes that the boy has not been able to describe "thoughts about the realisation [of his sexual orientation], your strategies or your relationships". The Migration

Agency does not explain further what they mean with the word “strategies”. The boy is not considered to have given a valid explanation to why he has not accounted for his thoughts, feelings and reflections, and that this affects his credibility negatively in regard to his claimed homosexual orientation. The Migration Agency does not question that he has had sex with men but finds that he has not provided reliable information about being a homosexual. Again, according to the Migration Agency, the fact that the applicant has same-sex sexual relations, does not mean that he is homosexual, if he can not account for his thoughts, feelings and reflections. Further, the Migration Agency writes the following in the decision, in the assessment whether he risks being perceived as a homosexual:

The Migration Agency Stockholm. Decision 2018-12-10. Case no. 6073

To be a man who has sex with men is not in itself worthy of international protection. In order to be considered in need of protection, there has to also be an individual risk of persecution. You have not claimed that there is a current personal and concrete threat against you in Iraq because of you having sex with men. You have not told your family or other relatives that you have or have had sex with other men. Moreover, you managed to keep a same-sex relationship secret in Iraq for almost a year, which implies that others do not know of your sexual relations. [...] The Migration Agency finds that you have not made it credible that there is a personal and concrete threat against you in Iraq because you are a man who has sex with other men.

According to the Swedish Migration Agency, it is not worthy of protection to be a man who has sex with men in Iraq. This is a remarkable statement that appears flagrantly incorrect. The Iraqi Criminal Code contains several articles which may be applied to LGBTIQ+ people. Imprisonment is imposed for disorderly conduct. A seven-years prison sentence may be imposed for sexual acts outside of marriage. Since same-sex couples and men who have sex with men can not marry in Iraq,

same-sex sexual relations are in practice illegal.¹⁰⁰ Country of origin information shows that same-sexual relations with men may result in execution in Iraq.¹⁰¹ As such, the punishment for same-sex sexual relations between men meets the legal definition of persecution, and is therefore worthy of protection.¹⁰² The implementation of the Criminal Code in Iraq does not consider whether the person having same-sex sexual relations is able to account for certain thoughts, feelings, reflections and for an inner, emotional process. It is the same-sex sexual acts that are criminalised, and therefore it is irrelevant what emotional experiences or which sexual orientation the person has. The Swedish Migration Agency does not question the claim that the applicant has had sex with other men. Moreover, it is a matter of the fact that his same-sex relations can be punished by imprisonment or death in Iraq and that this legally constitutes persecution. The Migration Agency’s reasons to refuse asylum results the applicant being deported to a country where his same-sex relations may be punished by imprisonment or death, which means that he risks persecution. The Migration Agency’s argument that is not worthy of protection to be a man who has same-sex relations in Iraq, is therefore legally incorrect. The reasons for rejection inevitably lead to an unlawful discretion requirement. The Migration Agency argues that the man has previously concealed his same-sex relations, and that these are therefore not generally known in Iraq and that he, thereby, is not at risk of persecution.¹⁰³ This is a textbook example of discretion-reasoning, which has been illegal for many years as it expects the applicant to go back to hiding his same-sex relations to avoid persecution. A similar assessment is made below:

The Migration Agency confidential. Decision confidential. Case no. Confidential. [Appealed to the Administrative Court in Malmö, 2019-10-17. Case no. 1838]

You have claimed that when you grew up you had many sexual relationships with men. Since

¹⁰⁰ Iraq: Human Rights, Democracy and the Rule of Law as per the 30th of June 2019 [Mänskliga rättigheter, demokrati och rättsstatens principer: situationen per den 30 juni 2019], The Swedish Ministry of Foreign Affairs, 2019-12-18, Lifos 43923, available at <https://lifos.migrationsverket.se/dokument?documentSummaryId=43923>.

¹⁰¹ ILGA State Sponsored Homophobia 2019, 2019-03-19, p. 523-525, Lifos 42986.

¹⁰² That criminalising legislation that is being implemented constitutes persecution has been established by the CJEU in its judgment in the Joint cases C-199, C-200 and C-201/12 X,Y and Z v Minister voor Immigratie, Integratie en Asiel, para. 61.

¹⁰³ Unlawful discretion reasoning is analysed in greater detail in chapter 7.1 of the report.

you enjoy having sex with men, you have concluded that you are homosexual. [...] Furthermore, the Migration Agency notes that you continuously describe your sexual orientation by referring to sexual activities with men, without describing your own thoughts and feelings regarding it. For example, you have said that you felt different during your childhood, and that this was because you liked having intercourse with other men. However, you have not been able to account for how you felt about this or explained how it affected you. The Migration Agency further notes that you have not been able to explain how you became aware of your sexual orientation. You have only stated that it is crystal clear that you are homosexual because you like having intercourse with other men. In sum, the Migration Agency concludes that your description of your thoughts and feelings about feeling different due to your sexual orientation lacks depth.

The man's self-identification, that it is "crystal clear" that he is homosexual since he enjoys having sex with men and that this makes him happy, does not, according to the Migration Agency, make his sexual orientation credible. It is not sufficient that he has described feelings of difference because of his same-sex sexual relations. The Migration Agency finds that he has not described how he felt about his feelings of being different and how they have affected him. These rejection grounds are yet another example of how the lack of an account of an inner, emotional process with thoughts, feelings and reflections, causes an applicant to be found not credible regarding their sexual orientation. Further, the Migration Agency writes, in the negative decision:

The Migration Agency confidential. Decision confidential. Case no. Confidential. [Appealed to the Administrative Court in Malmö, 2019-10-17. Case no. 1838]

Furthermore, the Migration Agency finds that you have not been able to define your sexual orientation, but that you also in this regard refer to your sexual experiences. The Migration Agency has considered that you are young and understands that it can be difficult to describe one's sexual orientation. However, the Migration Agency finds that your account for your sexual orientation is shallow, given that your description of it only covers that you enjoy sex with other men. [You] have not explained why or how you define yourself as homosexual. Against this background, the Migration Agency concludes that your belonging

to the group LGBTIQ+ people, as previously stated, is only based on your sexual experiences with men.

The Migration Agency finds that the applicant "has not been able to define his sexual orientation" since he "refers to his sexual experiences". The Migration Agency writes that he "has not explained why or how" he defines himself as homosexual and that his "belonging to the group LGBTIQ+ people is only based on his sexual experiences with men". By claiming that one's sexual orientation can not be defined by the applicant's descriptions, the Migration Agency's definition of sexual orientation yet again takes precedence over the applicant's own way of defining his sexual orientation. The applicant's definition and description of his own sexual orientation, defined by his sexual relations, is "wrong", according to the Migration Agency's definition of sexual orientation as consisting of emotions. To self-identify as a homosexual due to sexual practice and same-sex relationships does not, according to the Swedish Migration Agency, make someone homosexual. A deep, linear, inner, emotional process leading to a realisation is always, without exception, required, as well as an ability to give a detailed account for one's thoughts, feelings and reflections. The following rejection grounds are yet another example of this:

The Migration Agency Stockholm. Decision 2019-10-23. Case no. 1417

[...] Your answers have in general been vague, brief and lacked deeper personal reflections. [...] You have for example only referred to your sexual relations without giving any description of your thoughts and feelings about when you realised that you had another sexual orientation than the one generally accepted in your country of origin. The Migration Agency has explained to you that the most important factor when assessing your sexual orientation concerns your feelings and thoughts when you realised that you were homosexual. [CJEU judgment C-148/13, C-150/13].

The Migration Agency writes that the applicant has referred to his sexual relations "without giving any description of thoughts and feelings", which the Migration Agency assumes that he has experienced. To assume that all homosexuals have reflected deeply about or have had specific thoughts and feelings with a realisation of their sexual orientation is a stereotype. In the decision, the Migration Agency writes that they have "explained" to the applicant what he needs to

talk about in order to make his sexual orientation credible, namely, his feelings and thoughts when he realised that he was homosexual. In support of this, the Migration Agency refers to the CJEU's ruling in the Joint cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie. This is both remarkable and incorrect. The CJEU has not stated in its ruling that an applicant can be required to account for an inner process with feelings and thoughts in a SOGIESC asylum case. On the contrary, the CJEU ruled that credibility assessments based solely on stereotyped notions about homosexuals are unlawful, as they violate the EU's Qualification Directive and the right to an individual assessment.¹⁰⁴ Further, the Swedish Migration Agency writes in the decision:

The Migration Agency Stockholm. Decision 2019-10-23. Case no. 1417

You talk about the reactions from the people around you rather than your own inner process. You have for example talked about how you were punished when you were caught with [your boyfriend in your country of origin] and how you were chased by a gang in [a Swedish city]. Despite repeated requests by the Migration Agency, you have not explained how you think and feel about yourself, but only state that you felt bad about not having feelings for girls, and that you have had a difficult time in Sweden. Thereafter, you once again bring up sexual acts.

The Swedish Migration Agency emphasises that the applicant "rather" has talked about the reactions from people around him and the punishment of him and his partner when they were caught. In this case as well, the applicant's own story about his personal experiences is set against what the Migration Agency claims to want to hear. The Migration Agency implies that there is a divergence between the applicant's personal story and his personal life experiences, and the inner emotional process leading to a realisation that the Migration Agency requires. The applicant has explained what it means to him personally to be homosexual, what he has been subjected to because of this, and that he has felt bad about not being attracted to women. In the rejection grounds, a dichotomy is

constructed between, on the one hand, the applicant's experiences of relationships, physical acts, the reaction and punishment from other people and, on the other hand, what the Migration Agency refers to as thoughts, feelings and reflections. Once again it is obvious that the Swedish Migration Agency's definition of sexual orientation and what experiences and feelings the applicant should account for (regardless of whether he actually has them or not) takes precedence over the applicant's own personal experiences, his way of describing them and his description of his own sexual orientation. It appears both belittling and degrading that a case officer of a state authority "informs" an applicant what his personal homosexual orientation should look like. It seems even more unreasonable that if the applicant does not personally have the experiences that the Swedish Migration Agency requires, such as specific thoughts, feelings and an inner process of self-realisation regarding their sexual orientation, the applicant is considered to not be homosexual "in the right way" and thereby their claimed sexual orientation is not considered credible.

6.4 Analysis and conclusions

In this chapter, it has been shown how the Swedish migration authorities in practice require LGBTIQ+ applicants to know about and use LGBTIQ+ terminology in the same way that the Swedish migration authorities do, in order to be considered credible regarding their claimed SOGIESC. This follows from the many rejection grounds, in which the reasons for rejection are that the applicant "does not understand" the "correct" meaning of a certain sexual orientation, gender identity and/or gender expression when describing themselves. The Swedish migration authorities phrase this in their reasoning by for example writing that the applicant's self-identification is "contradictory" because they use both the terms "lesbian" and "bisexual" about themselves.¹⁰⁵ They find it "remarkable" that an applicant "can not differentiate between the terms homosexual and bisexual",¹⁰⁶ and that the applicant "shows a lack of understanding

¹⁰⁴ The CJEU's judgment in the Joint Cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, paras. 60-62.

¹⁰⁵ The Migration Agency Malmö. Decision confidential. Case no. confidential.

¹⁰⁶ The Migration Agency Gävle. Decision 2013-03-12. Case no. 9570.

regarding what sexual orientation means”.¹⁰⁷ Another recurring situation is when the applicant clearly describes their gender identity and/or their gender expression, and that this is misinterpreted by the migration authorities as a description of homo- or bisexuality. In these cases, the Swedish migration authorities conclude that the applicant’s self-identification is “stereotypical” and therefore not credible, based on their own lack of knowledge about and confusion of different legal asylum grounds.¹⁰⁸ Also in these cases, the applicant is denied asylum because they “do not understand the correct meaning” of homo- or bisexuality since they, according to the migration authorities, describe their sexual orientation in a stereotypical way, when in fact, what they are actually describing is their gender identity and/or gender expression, which are different legal grounds for asylum than sexual orientation.

In several cases, the fact that the applicant has same-sex sexual relations is not questioned by the Swedish Migration Agency or the Migration Courts. However, according to the Swedish migration authorities, these relations do not mean or make it credible that the applicants are homo- or bisexual. The applicant’s self-identification as for example homosexual, based on their same-sex sexual relations, does not make their claimed homosexuality considered credible. This is according to the migration authorities not the “correct” way to define and describe one’s sexual orientation. Instead, the Swedish migration authorities define sexual orientation as an identity, consisting of inner thoughts, feelings and reflections. To define sexual orientation based on and/or as consisting of sexual practice does not correspond with the Swedish migration authorities’ stereotypical notion that all LGBTIQ+ people have experienced an inner process with deep thoughts feelings and reflections. This clearly follows from the rejection grounds in which the migration authorities state that the applicant “talks about sexual activities, which is not the same as sexual orientation”, that it is

“important to differentiate between sexual relations and sexual orientation”, and that the applicant’s “story focuses on physical attraction and physical practices” rather than thoughts, feelings, reflections and an inner process leading to self-realisation. According to the Swedish migration authorities, a “lack of a deep inner process of thoughts and reflections” means that the applicant’s self-identification and definition of their own sexual orientation based on their same-sex relations, is not credible or reliable.¹⁰⁹

The Swedish migration authorities’ definition of SOGIESC clearly takes precedence over the asylum seeker’s own definition and description of their own SOGIESC. It is clear from the studied rejection motivations that the applicant’s description of their SOGIESC is not considered credible in cases where they talk about their SOGIESC by using the terminology in a different manner than the migration authorities – for example by emphasizing their physical relationships and sexual attraction. It is very common that negative decisions where the claimed SOGIESC is not considered credible are motivated by the applicant describing sexual practice and relations “instead of” identity, thoughts, feelings and reflections. Therefore, in practice, the applicant is required to define and describe their sexual orientation, gender identity and/or gender expression in the same way as the Swedish migration authorities, i.e. as an identity consisting of feelings, thoughts and reflections. The migration authorities’ emphasis on feelings “as opposed to” physical relations can most likely be traced to the CJEU’s prohibition for national authorities to ask detailed questions about the applicant’s sex life,¹¹⁰ as well as the DSSH model.¹¹¹ It would appear that, as a result of these developments, the migration authorities have created a dichotomy between identity and physical practice, such as sexual relations. This dichotomy is not necessarily experienced by all asylum-seeking LGBTIQ+ people, or by LGBTIQ+ people (or by straight cis people) in general. The consequence is that applicants who describe the “wrong” aspects

¹⁰⁷ The Migration Agency. Case no. 9062

¹⁰⁸ See chapter 7.2 about the illegal confusion of sexual orientation, gender identity and gender expression as grounds for asylum.

¹⁰⁹ The Migration Court at the Administrative Court in Luleå, 2019-10-18. Case no. 7942.

¹¹⁰ The CJEU’s judgment of December 2 2014, in the C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie.

¹¹¹ See chapter 10.6-10.7 about the DSSH model, where the purpose was to shift focus from the physical to the psychological, and to experiences of an inner process with feelings of difference, stigma and shame.

of their SOGIESC are considered not credible regarding their SOGIESC asylum claims. They are thereby denied asylum and deported.

This study has shown that the migration authorities in SOGIESC asylum cases require the applicant to have experienced an inner process leading to a self-realisation about their SOGIESC, and that this inner process should be accounted for orally in a very detailed manner. These requirements are based on the stereotypical notion that LGBTIQ+ people share certain universally common experiences and characteristics. The requirements are unlawful as they are contrary to EU law and the right to an individual assessment, and the UNHCR Guidelines No 9.¹¹² All LGBTIQ+ people in need of protection have not experienced an inner process or identify themselves using certain specific and Western SOGIESC terminology. A common reason why LGBTIQ+ people have to flee their countries of origin is that they are caught having same-sex sexual relationships. As such, they do not necessarily have much else to describe or talk about apart from the physical relationship which placed them at risk for persecution. The Swedish migration authorities' definition of sexual orientation is also based on the stereotypical idea that all LGBTIQ+ people have experienced a deep, inner process with certain feelings, thoughts and reflections, and that these can easily be separated from physical relations. However, for many people, these aspects are inseparable. Sexual orientation, self-identification and a possible awareness of it are often strongly connected to physical attraction and intimate relationships. In fact, many people define and describe their sexual orientation based on whom they are attracted to, have sex with and relationships with. Moreover, in SOGIESC asylum cases, the Swedish migration authorities regularly in practice take the right to interpret and define what sexual orientation "is" and how it should be described by the applicant in order to make it credible, deriving the applicant of this right. This despite the fact that it is the applicant's asylum case and asylum claim, and the applicant's own personal SOGIESC and possibly their life which is at

stake. There is neither any legal nor scientific support of an approach that holds that there is only one correct way of defining sexual orientation, gender identity or gender expression. A person's SOGIESC is something individual and therefore, always subjective. As such, it should not even be possible to question people's personal self-identification based on for example their sexual practice, who they are physically attracted to or who have sex with. It appears both belittling and unreasonable that an asylum applicant's self-identification is reduced to them "not understanding" the "correct" Western meaning of different terms to describe themselves. These types of rigid interpretations and applications of the term sexual orientation, as well as requiring applicants to know about and use specific terms to define and describe their own SOGIESC, violates Swedish and international law.¹¹³

A conclusion that can be drawn from the examined rejection grounds in this chapter is that a knowledge requirement is de facto applied in SOGIESC asylum cases. The applicants are required to describe their own SOGIESC based on how the migration authorities define homo- and bisexuality, gender identity and gender expression. The requirement that applicants have to define and describe themselves based on the migration authorities' definition of SOGIESC, in order to be considered credible and reliable, is not compatible with the Swedish Migration Agency's own legal position paper, which states:

RS/015/2021 Section 2.2:

[...] In many cultures, sexuality and matters of gender identity are taboo and connected to stigma, which can make it difficult for applicants to talk about these grounds for asylum. Therefore, these terms should be interpreted extensively when applying these legal guidelines, and applicants should not be required to know about and use specific terms. [...] Attitudes to sexuality and gender identity differs between different cultures, and terms that are used in Sweden and in other Western countries may not have any equivalent terms in the applicant's country of origin. For a lot of people, it can be difficult to talk about issues related to sexual orientation and gender identity. In the preparatory works of the Swedish Aliens Act, it is emphasised that the assessments in these asylum cases must be conducted taking into account that it can be

¹¹² See chapter 10.9 of the report, the CJEU's judgment in the judgement C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, paras. 60-62, UNHCR Guidelines No. 9, para. 60.ii.

¹¹³ UNHCR Guidelines No. 9, para 11, RS/015/2021, section 2.2

difficult for an asylum seeker to talk about their experiences, especially with a state official

[...] It is important to recall that experiences and emotions that a person may have regarding their sexual orientation or identity are highly personal, and there are no right or wrong answers to the questions. A good starting point for the assessment in this regard is to examine how the person describes themselves. How an applicant describes themselves is however affected by the applicant's social or cultural background, gender, ethnicity or age. Some people might also feel ashamed of their orientation or gender identity, which might cause the person to not identify themselves, for example, as homosexual or as a trans person.

The Swedish Migration Agency's Director-General of Legal Affairs establishes in the legal position paper that all applied terms that concern sexuality and gender identity should be interpreted extensively. The Director-General of Legal Affairs emphasises that "attitudes to sexuality and gender identity differs between different cultures, and terms that are used in Sweden and in other Western countries may not have any equivalent terms in the applicant's country of origin." According to the Director-General of Legal Affairs it is "important to recall [...] that there are no right or wrong answers to the questions". It is also emphasised that "applicants should not be required to know about or use specific terms". The UNHCR's guidelines also emphasise that the applicant can not be expected to know about or identify with specific terms:

UNHCR Guidelines No 9, para 11:

Not all applicants will self-identify with the LGBTI terminology and constructs as presented above or may be unaware of these labels. Some may only be able to draw upon (derogatory) terms used by the persecutor. Decision-makers therefore need to be cautious about inflexibly applying such labels as this could lead to adverse credibility assessments or failure to recognise a valid claim. For example, bisexuals are often categorised in the adjudication of refugee claims as either gay, lesbian or heterosexual, intersex individuals may not identify as LGBTI at all (they may not see their condition as part of their identity, for example)

and men who have sex with men do not always identify as gay. It is also important to be clear about the distinction between sexual orientation and gender identity. They are separate concepts and, as explained above at paragraph 8, they present different aspects of the identity of each person.

Also the Swedish Migration Court of Appeal has referred to the UNHCR guidelines and reminded the lower instances of that not all applicants are aware of or identify with specific SOGIESC terminology.¹¹⁴ In the above cited paragraph, the UNHCR warns against a rigid use of the terminology since it may lead to inaccurate credibility assessments where the migration authorities do not recognise a legitimate need for protection. What the UNHCR warned about in 2012 has, however, become an integrated part of the Swedish migration authorities' credibility assessments, in which the applicants are required to know about and use specific SOGIESC terminology in the same manner as the migration authorities. The migration authorities' requirement on the applicants to know about and identify with the migration authorities' SOGIESC terminology violates the Swedish Migration Agency's legal position paper RS/015/2021, the UNHCR's guidelines and case law from the Swedish Migration Court of Appeal.

An unavoidable consequence of the migration authorities' definition of SOGIESC as something exclusively emotional, is that self-identified LGBTIQ+ asylum seekers entitled to protection are deported to countries where their SOGIESC and/or relationships is punished in a manner that meets the legal definition of persecution. In many of the countries where LGBTIQ+ people are persecuted through imprisonment or execution, the country's Criminal Code does not take into account whether people with same-sex relationships have experienced inner processes with thoughts, feelings and reflections, or if someone self-identifies as for example homo- or bisexual. Often, it is the same-sex sexual relationships that is punishable by imprisonment or death. The implementation of laws that criminalise LGBTIQ+ people constitute persecution, which is legally a ground for protection, which means that these asylum seekers are in need of and legally entitled to

¹¹⁴ MIG 2016:30, case no. 5663-15. The court granted leave to appeal in a case where the Migration Court had neglected to assess an applicant's gender identity, why the Migration Court of Appeal referred the case back for a new trial.

asylum. This was established by the CJEU a decade ago, a ruling which is legally binding on Sweden.¹¹⁵ The enforcement of imprisonment and death penalty for same-sex relationships makes it irrelevant to examine how the applicants identify themselves, what sexual orientation they have or what terms they use about themselves. They risk persecution because of their same-sex relationships and therefore they have the right to international protection. Nevertheless, the Swedish migration authorities deny asylum and deport applicants who risk imprisonment or the death penalty because of their same-sex relations, unless they know of and use certain SOGIESC terminology, have experienced an inner process and can account in detail for deep thoughts, feelings and reflections.

¹¹⁵ That criminalising legislation that is being implemented constitutes persecution has been established by the CJEU in its judgment in the Joint cases C-199, C-200 and C-201/12 X,Y and Z v Minister voor Immigratie, Integratie en Asiel, para. 61



7. Other types of unlawful reasoning in SOGIESC asylum cases

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On the left:

A member of RFSL Ungdom wearing a “Newcomers Youth” T-shirt, part of the organization’s clothing collection.

Photo: Arseny Selov & Andra Berciu

This research study claims that the Swedish migration authorities' continuous use of stereotypes as the starting point and as requirements in the credibility assessment of SOGIESC asylum claims, is unlawful. It violates the EU's Qualification Directive, the UNHCR's guidelines as well as the Swedish Migration Agency's own legal position paper RS/015/2021.¹¹⁶ Furthermore, the study has shown that speculations about how the applicant or someone else should have acted or felt are common in SOGIESC asylum cases. Such speculations are unavoidably subjective and therefore unlawful. In addition, the study shows that illegal requirements of knowledge are applied, where for example the applicant is expected to know about, use and describe themselves according to the Swedish migration authorities' terminology on SOGIESC. This requirement violates the UNHCR's guidelines and the Swedish Migration Agency's legal position paper.¹¹⁷ This chapter presents other illegal arguments in the rejection grounds of SOGIESC asylum cases, which have been found in the cases and decisions examined in this study.

7.1 Discretion reasoning

“Even though you identify as bisexual, you have lived according to the norm in your country of origin, which you can continue to do upon return.”¹¹⁸

The migration authorities are not allowed to argue that an applicant could avoid persecution by concealing their sexual orientation, gender identity and/or gender expression. The granting of international protection may not be conditioned through

arguments about how the applicant could avoid harm by “living discretely”. This principle has been established in Swedish and international law since many years. An established legal term for such arguments in asylum law is discretion reasoning. This was emphasised two decades ago in the preparatory works of the Swedish Aliens Act.¹¹⁹ The UNHCR have stressed the principle that a person never should be forced to conceal their SOGIESC several times in the guidelines from 2012.¹²⁰ The CJEU has emphasised the same principle in a ruling from 2013.¹²¹ An applicant can never be required to hide their SOGIESC to avoid persecution. To base a negative decision on that type of arguments has been strictly prohibited for two decades in Swedish law, and for over one decade in international law. In RFSL's asylum report from 2012,¹²² a distinct reduction was identified regarding the number of decisions and rulings from the Migration Agency and the Migration Courts that applied the argument that the applicant could reduce the risk of persecution by living “discretely”. This was a positive legal development, in line with Swedish Aliens Act's preparatory works, the UNHCR's guidelines, EU law and the Swedish Migration Agency's Director-General of Legal Affairs' legal guidelines. However, the examination of decisions and court rulings in this study from 2020 show that illegal discretion reasoning is still applied by the Swedish migration authorities. Below are examples of rejection grounds that expect the asylum seeker to hide their SOGIESC upon return to their country of origin:

¹¹⁶ The EU's Asylum Procedures Directive Art. 10 3a), the EU's Qualification Directive Art. 4.3, the Migration Agency's position paper RS/015/2021, section 4.1.3, The UNHCR's Guidelines No. 9, paras. 60 ii. and 62.

¹¹⁷ The Migration Agency's legal position paper RS/015/2021, section. 4.2.4, The UNHCR's Guidelines No. 9, paras. 60 ii and 62.

¹¹⁸ The Migration Agency 2019-12-13 Case no.no. 4876

¹¹⁹ Government Bill 2005/06. Refugee status and persecution because of gender or sexual orientation [Flyktingskap och förföljelse på grund av kön eller sexuell läggning], p. 27: “[...] it can never be required that the person should abstain such a fundamental trait upon a return.”

¹²⁰ The UNHCR's Guidelines No. 9, para. 12: “[...] applicants are entitled to live in society as who they are and need not hide that”, para. 31: “That an applicant may be able to avoid persecution by concealing or by being ‘discreet’ about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. As affirmed by numerous decisions in multiple jurisdictions, a person can not be denied refugee status based on a requirement that they change or conceal their identity [...] in order to avoid persecution.”

¹²¹ The CJEU's judgment of November 7 2013 in the Joint cases C-199, C-200 and C-201/12 X,Y and Z v Minister voor Immigratie, Integratie en Asiel, para. 46: “[...] a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it.”

¹²² The Refugee Status Determination Procedure Relating to Sexual Orientation: An Analysis of the Risk Assessment and Access to Protection in the Country of Origin [Asylprövningen vid flyktingskap på grund av sexuell läggning. En analys av riskprövningen och möjligheten till skydd i hemlandet], Gröndahl, A., available at https://www.rfsl.se/dlp_document/asylprovning-vid-flyktingskap-pa-grund-av-sexuell-laggning-en-analys-av-riskprovningen-och-mojligheten-till-skydd-i-hemlandet/.

The Migration Court at the Administrative Court in Luleå 2020-02-07. Case no. 9551

It has not been shown that X's claimed sexual orientation has led to any previous cases of persecution. She has, however, stated that she told her [parent] that she is bisexual, and that [the parent] considers this to be shameful. [The parent] is also claimed to have tried to "cure" X and thereafter [the parent] moved away, according to X. [...] X has stated that she is afraid that her [parent] has told friends and acquaintances in Ethiopia about her sexual orientation. However, no other evidence has been brought before the Court that indicate that this would be the case, and neither has X received any information regarding this. Taking this into account, the Court finds that there is nothing in particular in this case that indicates that X's sexual orientation has come to anyone's attention in the country of origin and that there would be a threat against her for this reason. Therefore, in sum, the Court finds that there are no objective grounds in the case to support accepting the claim that that A's bisexuality would constitute impediments to the enforcement of her expulsion order.

The Migration Court does not explicitly write that the applicant can hide her sexual orientation. However, a concealment of the sexual orientation is an inevitable consequence of the court's reasoning, since the court neither questions that the applicant is bisexual, nor that LGBTIQ+ people may risk persecution in the country of origin, Ethiopia. The rejection grounds hold an indirect discretion requirement, since the court emphasizes in its' reasoning that no previous persecution has taken place. This even though the applicant is considered shameful by the parent and that the parent has tried to "cure" her bisexual orientation. The court's argument is that since the applicant's sexual orientation seems to not (yet) be known in the country of origin, there is no threat against her. This argument leads to a discretion requirement, as it is assumed that the applicant upon return would continue to hide her bisexual orientation to avoid persecution. The claim that

an applicant would not risk persecution in cases where the sexual orientation is not (yet) known in the country of origin resemble the previously very common reasons for rejection in Swedish SOGIESC asylum case law.¹²³ According to these, only "open" LGBTIQ+ people can risk persecution, which meant that applicants who had previously concealed their SOGIESC and thereby avoided persecution, were denied asylum and deported back to a life in hiding, as in the above cited case from Ethiopia. This is an illegal discretion requirement. The Swedish Migration Agency makes a similar assessment in the following case:

The Migration Agency Stockholm. Decision 2018-12-10. Case no. 6073.

You have not told your family or other relatives in Iraq that you have or have had sex with men. In addition, you managed to keep a same-sex sexual relationship in Iraq secret for almost a year, which indicates that this fact is not known to others. [...] The Migration Agency finds that you have not made it credible that you, upon return, would be at risk because you are a man who has sex with men.

The Swedish Migration Agency places great emphasis on its' finding that the applicant's same-sex relations were not known in the country of origin. The Migration Agency concludes that he "has not told his family or other relatives in Iraq that he has or has had sex with men" and that he "managed to keep a same-sex relationship in Iraq secret for almost a year". The Migration Agency therefore concludes that his same-sex sexual relationships "are not known to others" in Iraq, why he would not be "at risk because he is a man who has sex with men". The Migration Agency does not take into account the reasons why the applicant has concealed his relationship and not told his family that he has sex with men. Country of origin information shows that it is lethal to openly present your homosexuality and same-sex relationships in Iraq and that homosexual men are subjected to systematic, state-sanctioned persecution. Same-sex sexual relations may be punished by death by both ISIS and Sharia

¹²³ The Refugee Status Determination Procedure Relating to Sexual Orientation: An Analysis of the Risk Assessment and Access to Protection in the Country of Origin [Asylprövningen vid flyktingskap på grund av sexuell läggning. En analys av riskprövningen och möjligheten till skydd i hemlandet], Gröndahl, A., available at https://www.rfsi.se/dlp_document/asylprovningen-vid-flyktingskap-pa-grund-av-sexuell-laggning-en-analys-av-riskprovningen-och-mojligheten-till-skydd-i-hemlandet/.

¹²⁴ State-Sponsored Homophobia 2019, Ramón Mendos, L., ILGA World, p. 523, available at https://ilga.org/wp-content/uploads/2023/11/ILGA_State_Sponsored_Homophobia_2019.pdf, State-Sponsored Homophobia 2020: Global Legislation Overview Update, Ramon Mendos, L., Botha, K., Carrano Lelis, R., López de la Peña, E., Savelev, I., Tan, D., ILGA World, p. 131, available at https://ilga.org/wp-content/uploads/2023/11/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf

courts.¹²⁴ The Migration agency does not question that the applicant has had same-sex sexual relationships, which he previously had managed to conceal in Iraq. As such, the decision to reject his asylum application rests on the expectation that he will continue to conceal his same-sex relations to avoid the persecution described by the country of origin information. The Migration Court denied the appeal of the Migration Agency's negative decision, with a short motivation stating that no circumstances had been shown that would prompt a different assessment than the one made by the Migration Agency. The Migration Court thus approved the Migration Agency's reasons for rejection and did not seem to note that it was based on discretion reasoning, which has been unlawful for two decades in Swedish law and over a decade in international law. The short judgment by the Migration Court indicates that the court either simply "trusted" that the Migration Agency had made a legally correct and lawful assessment, or that the court agreed with the Migration Agency's illegal discretion reasoning, which violate Swedish law, EU law and the UNHCR's guidelines.¹²⁵ The reasoning in the SOGIESC cases from Ethiopia and Iraq assume that the applicants will return to concealing their sexual orientation and their same-sex relationships to avoid persecution. These are textbook examples of indirect discretion requirements that should not be applied, since it is illegal to require that the applicant should conceal their sexual orientation to avoid persecution. A third example illustrates yet another requirement of discretion:

The Migration Agency Stockholm. Decision 2019-12-13 Case no. 4876

You have, in a credible and self-experienced way, talked about your life in Morocco, the difference you experienced as a street child, and the normalisation of sexual abuse of boys that took place in your environment. You have also given a detailed account of how you, as a child and an adult, wanted to dress in women's clothing, how you were perceived as different by people around you, and that your different way of acting was not accepted by your family. [...] You have said that you have experienced shame and fear, and that you have experienced difference in your country of origin. You have talked about your thoughts on how you can not live in a society that does not accept homo-

sexuals. Based on this, the Migration Agency finds that you have given credible information regarding your sexual orientation. The Migration, however, notes that you, during the time you have lived in Sweden, both as an applicant and with permanent residence permit, have not lived fully according to your sexual orientation, but have tried to appear masculine. You also have not, since you accepted your sexual orientation in Sweden, chosen to dress in women's clothing, something that you have wanted to do since you were ten. [...] Even though you identify as bisexual you have lived according to the norm in your country of origin, which you can continue to do upon return. For these reasons, the Migration Agency believes that you, upon returning to Morocco, would not be subjected to treatment that warrants international protection.

The Swedish Migration Agency explicitly writes that the applicant, who previously has "lived according to the norm" and concealed his sexual orientation and feminine gender expression, should "continue to do" so upon return. This is a direct requirement of discretion, which of course is illegal. The applicant stated that he had forced himself to act "tough" and "manly" to avoid violence in Morocco and that he has not expressed his feminine gender expression in the way he could in Sweden. In their grounds for rejection, the Migration Agency seems to indicate that since the applicant is bisexual, he can "choose" to be with women. This as well presupposes that he conceals his bisexuality. By "continuing to live according to the norm", i.e., hide his bisexuality and his feelings for men, he can, according to the Migration Agency, avoid persecution. The fact that the applicant had had a relationship in Sweden with a person of a different sex seems to have been to his disadvantage. The Migration Agency's statement, that the man has previously "lived according to the norm" in his country of origin, refers to that the man has concealed his sexual orientation and feminine gender expression in Morocco. The Migration Agency finds it credible that his feminine gender expression was perceived as deviant, that the family did not accept him, that he has "experienced shame, fear and difference". This, apparently, is what the Migration Agency argues that he should return to. The

¹²⁵ The UNHCR's Guidelines No. 9, paras. 12, 31, The CJEU's judgment of November 7 2013 in the Joint cases C-199, C-200 and C-201/12 X,Y and Z v Minister voor Immigratie, Integratie en Asiel, para. 46, Government Bill 2005/06. Refugeehood and persecution because of gender or sexual orientation [Flyktingskap och förföljelse på grund av kön eller sexuell läggning], p. 27.

reasoning is based on that he should return to a context where he “lives according to the norm”, i.e. does not have relationships with men, “acts manly” in accordance with the norm, hides his feminine gender expression and does not wear women’s clothing.

Apart from the rejection grounds being based on an explicit requirement of discretion, the Migration Agency in the above cited decision confuses sexual orientation with gender expression. The Migration Agency implies, incorrectly, that there is a contradiction between accepting one’s sexual orientation and not dare to openly express one’s gender expression: “You also have not, since you accepted your sexual orientation in Sweden, chosen to dress in women’s clothing.” The fact that the man has accepted his sexual orientation does not necessarily mean that he automatically dares to dress in “women’s clothing” publicly in Sweden. He might of course feel both shame and fear about dressing in female-coded clothing publicly in Sweden even though he has accepted his sexual orientation, since sexual orientation and gender expression are different things and two different legal grounds for asylum. These have, however, incorrectly been confused by the Swedish Migration Agency, which has been to the applicant’s disadvantage in the assessment.¹²⁶

Yet another example of an illegal requirement of discretion in an SOGIESC asylum case is a case regarding a self-identified lesbian woman from Kenya:

The Migration Court at the Administrative Court in Stockholm 2020-01-16. Case no. 5899

[The Migration Court finds] that X’s asylum claims regarding her sexual orientation are not sufficient to make it probable that she, upon returning to the country of origin, risks such treatment that warrants international protection, and that there is a real risk that she would be subjected to such treatment. The invoked country of origin information shows that sexual acts between men are criminalised, but does not state that this would be the case for women. However, it is evident from

the document that homosexual women in Kenya experience prejudice and discrimination, but since no other individual and concrete circumstance have been brought forth, which imply that X has suffered persecution previously because of her sexual orientation, it does not appear credible that there is a threat against her in the country of origin. The Court, thus, finds, when conducting a forward-looking assessment, that what X has told is not sufficient to make it credible that she is at risk of persecution in Kenya.

The Migration Court did not question that the applicant was a lesbian. However, according to the court, only same-sex relationships between men were criminalised in Kenya, while lesbian women only experienced “prejudice and discrimination”. This is incorrect. Available country of origin information clearly shows that LGBTIQ+ people, including lesbian women, are subjected to police brutality, sexual violence, arrests and lynching, situations which all constitute persecution. The state-sanctioned persecution of LGBTIQ+ people, including lesbians, in Kenya is well documented in the country of origin information in Lifos, the Swedish Migration Agency’s database with country of origin information reports, available to and used by the Agency and the Migration Courts.¹²⁷ The finding that lesbians generally do not risk persecution in Kenya deviates from how the migration authorities normally assess the situation for LGBTIQ+ people in Kenya.¹²⁸ The rejection grounds presuppose that the woman in the future will live in a way that conceals her homosexuality. Also in this case, the court emphasises the fact that the woman had not experienced persecution earlier because of her sexual orientation. Therefore, it did not appear “credible that there is a threat against her in the country of origin”. The argument is, that since she had not been exposed to persecution when she concealed her sexual orientation, she would be able to protect herself in future by continuing to conceal her sexual orientation. Such arguments are, without exception, illegal. A fifth example of a negative decision that presupposes discretion is the following:

¹²⁶ See chapter 7.2 about the migration authorities’ confusion of sexual orientation, gender identity and gender expression as different grounds for asylum.

¹²⁷ State-Sponsored Homophobia 2019, Ramón Mendos, L., ILGA World, p. 334ff, available at https://ilga.org/wp-content/uploads/2023/11/ILGA_State_Sponsored_Homophobia_2019.pdf

¹²⁸ See chapter 9.2 for non-uniform assessments of country of origin information and the situation for LGBTIQ people in a country.

The Migration Court at the Administrative Court in Stockholm 2019-08-09. Case no. 9368

X has claimed that he is at risk of persecution in Guinea because he is homosexual and that he fled from his country of origin because he was caught having sexual relations with a man. [...] From the country of origin information in the case, it is evident that homosexuality is taboo in Guinea and that it is penalised under the law to have same-sex sexual relations. [The general] situation for homosexuals in Guinea, even if it is problematic, is not such that it in itself constitutes reasons for protection [...] The isolated circumstance that X is homosexual does not mean that he should be considered in need of protection. Furthermore, the Court finds that it has not been shown that X has suffered persecution in Guinea because of his sexual orientation. Neither has it been shown that he, as a consequence of having had same-sex sexual relations, has been reported or is wanted in the country of origin. [...] In sum, the information brought forth is not considered sufficient to find that X runs a personal risk of experiencing persecution because of his sexual orientation upon returning to Guinea.

The Migration Court does not question the Guinean man's homosexuality. However, the court considers the prohibition of same-sex sexual relations to not be implemented systematically enough for the general treatment of LGBTIQ+ people in Guinea to amount to persecution. The court notes in particular that the applicant has not experienced persecution before, since he concealed his homosexuality until he was caught having same-sex sexual relations and then fled the country. The court's conclusion, that he thereby does not risk persecution, presupposes that he would go back to concealing his sexual orientation to avoid putting himself at risk of injuries. The Court does not seem to have taken into account that he fled because his same-sex relationship was revealed and that his homosexuality therefore no longer was a secret. The rejection grounds presuppose discretion upon return. The following is the sixth example of discretion reasoning:

The Migration Agency Stockholm. Decision 2017-02-21. Case no. 4100

According to available information on Tunisia, some same-sex sexual acts are punishable under Tunisian law. In some cases, people are sentenced to prison and in some instances people are subjected to examinations that the UN has condemned as torture as part of the criminal investigation. [...] [You have] stated that you no longer are in contact

with Tunisian society and that your family no longer wishes to have contact with you. However, you have not been able to account for that you would be at specific and personal risk because of your sexual orientation, which makes you afraid of returning to your country of origin. In addition, you have not been able to account for any personal risks or dangers that you fear upon return. It has not been shown that you previously have been subjected to anything in Tunisia due to your sexual orientation. Therefore, the Migration Agency finds that you do not have a fear of persecution in your country of origin because of your sexual orientation. [...] Nothing has been shown that indicates that you would not be able to ask for protection from the state. The Migration Agency thereby finds that you are not unable to avail yourself to state protection in the country of origin.

The Migration Agency clearly indicates that the man should conceal his sexual orientation, since the Agency does not question his sexual orientation nor the country of origin information showing that same-sex sexual relations are punishable by imprisonment and that suspects are subjected to a forced anal examinations, which have been classified as torture by the UN. The CJEU established long ago that criminalising legislation that is being implemented, as well as imprisonment, constitutes persecution. The Swedish Migration Agency does not question the country of origin information that holds that LGBTIQ+ people are being persecuted and tortured. Nevertheless, the Migration Agency emphasises that he has not been subjected to anything, which is remarkable since the Agency writes in the same paragraph that his family has distanced themselves from him. The argument is yet another textbook example of an illegal, indirect requirement of discretion. According to the Migration Agency, the applicant can avoid the persecution and torture that they admit is referenced to in the country of origin information, by continuing to conceal his sexual orientation. The Migration Agency also argues that he is obliged to turn to the same authorities who, according to the Migration Agency's own country of origin information, criminalise same-sex sexual relations and carry out anal exams that are classified as torture by the UN. References to state protection in countries with criminalising legislation should normally be ruled out, according to the Swedish Migration Agency's own legal position paper RS/015/2021 and UNHCR's Guidelines

No. 9.¹²⁹ The expulsion order is solely based on legally obsolete reasons for rejection. It presupposes discretion and refers to state protection in a country where the same state authorities criminalise and torture LGBTIQ+ people. The following is the seventh example of an indirect requirement of discretion:

The Migration Court at the Administrative Court in Stockholm 2020-05-04. Case no. 883

The Migration Court finds that, according to the country of origin information, sexual acts between men are criminalised in Kenya. According to the country of origin information, there are two registered cases where the law has been implemented. There is, however, no information indicating that someone actually has been convicted of the crime “unnatural offenses” after the year of 2011. For these reasons, the Court finds it unlikely that X would be prosecuted and sentenced for that crime as long as he is not open about his sexual orientation upon returning to the country of origin. No individual circumstances have been brought forth that indicates that he would be at a greater risk than other LGBTIQ+ people of being prosecuted and convicted of crime. [...] Furthermore, the Court finds that X has not expressed that he would advocate LGBTIQ+ people’s rights publicly or that he, in any other way, risks being targeted by the authorities or private individuals.

The Migration Court does not question the man’s sexual orientation but does not find that the situation for LGBTIQ+ people in Kenya amounts to persecution. This finding alone violates the CJEU’s case law, which establishes that the implementation of criminalising legislation constitutes persecution.¹³⁰ The Migration Court argues that the man is not “open about” and does not “advocate LGBTIQ+ people’s rights publicly” and that he therefore does not risk persecution. This is a classic, since long rejected and illegal argument of discretion which is based on the notion that only “openly homosexual” people who “publicly advocate” LGBTIQ+ people’s rights risk persecution. The reasoning presupposes that the man, upon return, hides his sexual orientation to avoid being arrested,

prosecuted and convicted according to the criminalising legislation that the court admits is implemented in Kenya and that the CJEU has established constitutes persecution. It seems remarkable that the Swedish migration authorities have turned back to rejection grounds that have been strictly prohibited in Swedish law for two decades and international law for more than one decade. That means that LGBTIQ+ applicants in need of asylum are deported to countries where they are persecuted through criminalising legislation and torture.

7.2 Confusion of sexual orientation, gender identity and gender expression

Sexual orientation, gender identity and gender expression are separate grounds for asylum that should be examined individually. The Swedish Migration Agency’s legal position paper RS/015/2021 clarified that gender identity and gender expression constitute protected grounds as part of the term “gender” under Chapter 4 Section 1 of the Swedish Aliens Act. The UNHCR highlights that these are different elements that may develop over time and constitute asylum grounds.¹³¹ In 2016, the Swedish Migration Court of Appeal emphasised the importance of keeping apart these “separate concepts which express different aspects of every person’s identity”.¹³² Even though Swedish and international law is clear on this point, ignorance is widespread among the Swedish migration authorities regarding the difference between sexual orientation, gender identity and gender expression. The decisions and court rulings examined in this study show how gender identity and gender expression are regularly confused with sexual orientation. The first example is a case where the applicant was a minor trans girl from a state in the Arabian Peninsula. She described her gender identity and that she risked being killed because she is a trans person – terms that she herself used during the oral asylum interview at the Migration Agency. Comprehensive written evidence was added to the case regarding her gender identity and her gender affirming treatment, such as doctor’s certificates regarding hormone- and laser treatment and a certificate from experts in trans issues at

¹²⁹ RS/015/2021, section 4.2.3 “State protection: criminalising legislation normally indicates that state protection is not available for LGBTIQ people”, The UNHCR’s Guidelines No. 9, paras. 36 and 27.

¹³⁰ The CJEU in the Joint cases C-199, C-200 and C-201/12 X,Y and Z v Minister voor Immigratie, Integratie en Asiel, para. 61.

¹³¹ The UNHCR’s Guidelines No. III, Terminology, paras. 10 and 57.

¹³² MIG 2016:30, Case no. UM 5663-16.

RFSL. Even though the applicant declared that she was a trans person, the Swedish Migration Agency wrote the following in its negative decision:

The Migration Agency 2019. Case no. 3573

You claim that you are transsexual and that you therefore can not return to [country X]. The Migration Agency finds that it is you, the applicant, who should make it credible that you belong to a group which risks persecution because you have a sexual orientation that deviates from the norm, and thereby belong to a particular social group.

The Migration Agency first writes “transsexual”, since the girl has used the term about herself. The term “transsexual” is also used in the Migration Agency’s legal position paper RS/014/2021, which establishes that “transsexualism is considered a matter of gender affiliation”.¹³³ To be transsexual has nothing to do with one’s sexual orientation. RS/014/2021 and the preparatory works of the Swedish Aliens Act confirm that transsexualism is a matter related to gender affiliation. Nevertheless, the Migration Agency confuses the trans girl’s gender identity with her sexual orientation and concludes that she has to make her affiliation to a particular social group credible because of her sexual orientation. The Migration Agency refers to the UNHCR’s guidelines and the preparatory works of the Swedish Aliens Act regarding the meaning of sexual orientation. The Migration Agency, thus, misinterprets the trans girl’s asylum claim as sexual orientation and incorrectly assumes that “transsexual” refers to sexual orientation, even though the guidelines from the UNHCR, the preparatory works of the Swedish Aliens Act and RS/014/2021 are crystal clear on that sexual orientation and gender identity are two separate, independent legal asylum claims that have nothing to do with each other and should never be confused. Neither the Migration Agency’s case worker nor the decision-maker seem to have read the Migration Agency’s own legal guidelines, nor the other sources of law referred to in their decision. The Migration Agency has wrongly assessed whether the girl has made her “transsexual orientation” credible, not her gender identity. The negative decision is a consequence of how the questions asked by the Migration Agency were concerned with her sexual orientation and

her feelings, thoughts and reflections about that. However, the applicant both explicitly claimed and described her gender identity. The applicant had both verbally described her asylum claim as gender identity and she had provided extensive written evidence regarding her gender affirming surgery and treatment. The written evidence was not even reviewed by the Migration Agency, who wrongly thought that it was her sexual orientation that should be investigated and assessed. The Migration Agency finds the girl’s oral account for her “sexual orientation” to be vague and not credible. The Migration Agency has investigated the wrong asylum claim and confused transsexualism and gender identity with homosexuality. The Migration Agency writes the following in its negative decision:

The Migration Agency 2019. Case no. 3573

The Migration Agency initially notes that you, in your application interview, did not declare that you are transsexual. This was brought to the Migration Agency’s attention after receiving a letter from you and your counsellor. [...] As support of the provided information regarding your sexual orientation, you have submitted a certificate from RFSL. The certificate supports your statements to some extent but is not considered sufficient to make your affiliation to the group “transsexuals” credible, since it does not account for your thoughts, reasoning or deliberations regarding your sexual orientation. The Migration Agency assesses that you have given vague and brief answers to questions about how you became aware of your sexual orientation.

The Migration Agency refers to the girl’s oral account for having felt like a girl, rather than a boy, since she was little, that people around her questioned her for not acting like “other boys”, that she felt ashamed about having a body she was not comfortable with, that she wanted breasts, that the body she has does not belong to her, that she expresses who she is through words, clothes and make-up, and that the most important thing to her was to feel like a woman, buy feminine things, wear make-up and have a relationship with a man she loves. After a long summary describing her oral account from the asylum interview, the Migration Agency

¹³³ Description of the term transsexual in RFSL’s glossary: Transsexualism/gender dysphoria is a medical diagnosis by which a person is assessed to undergo gender confirming/affirming treatment within the Swedish healthcare system. The glossary is available at <https://www.rfsl.se/en/lgbtq-facts/glossary/>

briefly concludes: “The Migration Agency finds that your answers regarding your thoughts and feelings about your claimed sexual orientation lack detail and deeper reflections.” The Migration Agency has assessed the girl’s asylum claim as if it concerned her sexual orientation and not her gender identity. The fact that the girl was given a negative decision and an expulsion order was a direct consequence of the Migration Agency’s case worker, decision-maker and even the LGBTQ specialist,¹³⁴ confusing gender identity with sexual orientation. A similar erroneous confusion of sexual orientation and gender identity is made in the following case:

The Migration Agency. Decision 2019-11-28. Case no. 6008

The Migration Agency finds that you, partly, have been able to account for your thoughts and feelings about your sexual orientation, but that you have not been able to elaborate. Furthermore, the Agency notes that you on multiple occasions were asked to elaborate on your thoughts and feelings at the oral hearings, but that you continued to be brief. [...] Even though your sexual orientation is taboo in Morocco, the Migration Agency finds that you, who, according to your own information struggled with your sexual orientation for 10 years before you accepted it, should be able to account for more profound reflections in a self-experienced, coherent and detailed manner regarding your thinking process and your feelings. Furthermore, you have said that you want to change the way you look. The Migration Agency finds this contradictory, as you, even though you say that you have accepted yourself and your sexual orientation, want revenge on your body and say that your body is not in accordance with your soul.

The applicant described feelings from their childhood and adolescence of not liking their body, wanting to change it and wanting revenge on their body as it was not in accordance with their soul. It is obvious that this relates to the applicant’s gender identity and possibly also gender expression, which is something else than sexual orientation. The applicant is not required to use or know about certain LGBTIQ+ or SOGI-

ESC terminology to describe themselves.¹³⁵ According to the Migration Agency’s legal position paper RS/015/2021, it is the Migration Agency’s task to investigate asylum claims in cases where it is indicated that the applicant has a certain sexual orientation, gender identity and/or gender expression. The applicant in the above cited case is not required to use the term trans about themselves. Their description of having disliked and wanting to change their body should have prompted the Migration Agency to, in accordance with their duty to investigate, assess gender identity as the independent asylum claim it is, separated from sexual orientation. Instead, the Migration Agency, also in this case, confuses the applicant’s description of gender identity with sexual orientation. This clearly follows from the Migration Agency’s reasoning, especially that it would be “contradictory” that the applicant wants to change their appearance at the same time as they have accepted their sexual orientation. A person can of course have accepted their sexual orientation without having accepted their gender identity and/or their gender expression, since these are different things. Unlike the Migration Agency claims in its decision, there is no contradiction in the applicant’s story. On the contrary, it is very common that trans people accept their love to for example a partner, while at the same time suffering severe gender dysphoria. A consequence of the Migration Agency’s ignorance regarding the difference between sexual orientation, gender identity and gender expression, is that the latter have not been investigated as the legal grounds for asylum that they are, in the above cited case. The result in this case, as well, was a negative decision and deportation, motivated by the Migration Agency’s finding that the applicant “had not made their sexual orientation credible”. The Migration Agency’s confusion of different grounds for asylum, thus, formed the basis of the conclusion that the applicant was not credible.

A third example of an illegal confusion of sexual orientation and gender identity is the following SOGIESC asylum case regarding an applicant and his child from Iraq, where the parent decla-

¹³⁴ Until the end of 2019, the Swedish Migration Agency had so-called LGBTQ-specialists who participated in the decision-making in SOGIESC asylum cases, together with the case officer and the decision-maker. Sometimes, the case officer who held the oral asylum interview was an LGBTQ-specialist, but in most cases the LGBTQ-specialist never met the applicant in person, and only read the written material in the case when participating in the decision-making.

¹³⁵ RS/015/2021, section 2.2, The UNHCR’s Guidelines No. 9, para 11.

red that they were a trans man:

The Migration Agency Malmö 2019. Case no. confidential.

X has had feelings for women since she was 17 years old. Before she married her husband at the time she had feelings for a woman, Y, who was X's neighbour. It started as a regular friendship, which evolved into a romantic relationship. [...] X feels that she is a man in a woman's body, and she wants gender affirming care, but she does not know how to go about it because of the miniscule knowledge about sexuality in Iraq and in her own social circle. Being transsexual is taboo to everybody X knows, and it may make her life harder.

The applicant is wrongly investigated and assessed by the Swedish Migration Agency as a lesbian woman. Even though the applicant describes himself as a man in a woman's body who wants to undergo gender affirming care, the Migration Agency consistently uses the pronoun "she" and "mother" when describing him. The Migration Agency only assesses and tries his sexual orientation and barely mentions the claimed gender identity:

The Migration Agency Malmö 2019. Case no. confidential.

Considering what is known about the situation in Iraq, it can not be denied that it may be perceived as sensitive to talk about one's sexual orientation, and that it may be a characteristic that a person does not readily reveal. [...] Based on what X now says, she has had reason to declare her sexual orientation much earlier, even considering the difficulties that may be involved in talking about such a matter. When X received the expulsion order, she had a clear indication that she might not be able to stay in Sweden, and that there was a risk that she and her daughter had to return to Iraq. Not even in this situation did she bring forth an asylum claim regarding sexual orientation.

The Migration Court briefly referred to the Migration Agency's negative decision and rejected the appeal. Gender identity was clearly described by the applicant, besides sexual orientation. The applicant can not receive gender affirming care

or change his legal gender in Iraq. Thereby, he is forced to live as a woman, be perceived as and attributed a female gender. Since he has relationships with women, he is perceived as having a homosexual orientation as a lesbian woman. Also in this case, the Migration Agency does not realise or understand that two different grounds for asylum are relevant and should be examined; gender identity and perceived homosexual orientation, which are separate from each other and should be assessed individually. This even though it is clear in the Swedish Migration Agency's own legal position paper RS/015/2021, the preparatory works of the Swedish Aliens Act, the UNHCR's guidelines and the Migration Court of Appeal's case law.¹³⁶ In this case as well, the consequence was a negative decision and deportation to a country where LGBTIQ+ people may be punished by imprisonment or execution.¹³⁷

It is common that LGBTIQ+ people are subjected to violence because of their gender expression, as people around them perceive them as deviating from the norm, regardless of their sexual orientation and/or gender identity. This is clear in many of the asylum stories that are investigated in this study, as well as in the many, many hundreds of accounts from applicants who have contacted RFSL over the years. In some countries, it may be criminalised or taboo to dress as the "wrong gender"; the gender that people do not perceive someone to be. People whose gender expression deviates from the norm may be at risk of persecution. Gender expression can include both chosen attributes like make-up, clothes, hairstyle and accessories, as well as aspects that are usually not chosen, such as one's voice, body language, the way of speaking, body shape, etc. The Swedish Migration Agency's legal position paper RS/015/2021 refers to the preparatory works of the Swedish Aliens Act, stating that gender expression, or "social gender", is encompassed by the term gender: "gender expression refers to the way a person expresses their gender, for example through clothes, body language and voice. Intersex people may also risk persecution connected to gender." That gender expression

¹³⁶ RS/015/2021, section 2.2, Government Bill 2005/06:6 Refugeehood and Persecution for Reasons of Gender or Sexual Orientation [Proposition 2005/06:6, Flyktingskap och förföljelse på grund av kön eller sexuell läggning], p. 21, the UNHCR's Guidelines No. 9, paras. 10 and 57 and the Swedish Migration Court of Appeal's ruling MIG 2016:30, Case no. UM 5663-16.

¹³⁷ State-Sponsored Homophobia 2019, Ramón Mendos, L., ILGA World, p. 523ff, available at https://ilga.org/wp-content/uploads/2023/11/ILGA_State_Sponsored_Homophobia_2019.pdf

is covered by the term “gender” in the Swedish Aliens Act is thereby clear. Gender expression may also refer to when a person is perceived as having a sexual orientation or gender affiliation, which may result in a risk for persecution. Even though the risk of persecution can be a result of only gender expression, it is common for the Swedish migration authorities to not investigate or assess gender expression at all, and gender expression is often misinterpreted as a part of sexual orientation. The following is an example of this:

The Migration Agency Arlanda 2018-09-03. Case no. 4243

In support of your application, you have, in sum, stated the following: [...] You are attracted to both men and women and have sexual relations with both men and women. You also like to dress in women’s clothing and to use make-up. You view yourself as homosexual.

In this case, an underage self-identified LGBTIQ+ person has in a clear manner described how his feminine gender expression is perceived as deviant, taboo and shameful for a man in Morocco. He has described how he dresses in “women’s clothing” and uses make-up and is therefore at risk of being killed. Even though he claims to be at risk of persecution for reasons of his gender expression, the Swedish Migration Agency only assesses his declared sexual orientation:

The Migration Agency Arlanda 2018-09-03. Case no. 4243

You have claimed to be attracted to both men and women, and that you therefore risk persecution. [...] You have, on multiple occasions, been asked to describe the thought process you had as you became aware of your sexual orientation. [...] You have been asked to talk about your feelings about being more attracted to men than women, but you keep coming back to sexual acts and to your sexual preferences. You have been told what kind of information the Migration Agency wants but have not complied. You do not demonstrate an inner thinking process regarding your sexual orientation, but the statements provided revolve around intimate physical activities rather than thoughts or feelings. The statements you have made about your sexual orientation are vague and lacking in detail.

The Swedish Migration Agency only examines the young man’s sexual orientation, without

assessing his gender expression. The decision was appealed in the Migration Court, which made the following assessment:

The Migration Court at the Administrative Court in Stockholm 2019-04-02. Case no. 615

The country of origin information does not, according to the Court, support the claim that homosexuals in Morocco generally run a risk of being persecuted for reasons of their sexual orientation. In this case, it has not been shown that X would be especially targeted in this respect. At the Migration Agency, he has said that in the future, he would like to live with a woman and try to have a child. Based on this, the Court finds that X has not made it credible that he risks being subjected to persecution for reasons of his sexual orientation.

The court does not even mention the young man’s gender expression, but adds that he, as a bisexual, is not “especially targeted” as he can live with a woman in Morocco. Even though the applicant states that he risks being killed because he dresses in women’s clothing and uses make-up, neither the Migration Agency nor the Migration Court examine gender expression as an asylum claim. Both instances seem to assume that gender expression is a part of sexual orientation, which is incorrect since gender expression is covered by the legal protection ground “gender” in the Swedish Aliens Act, which is a different legal ground for asylum than sexual orientation. A similar assessment was made in the following case:

The Migration Court at the Administrative Court in Luleå 2020-04-02. Case no. 4267

A has now stated that, upon a return to Afghanistan, he risks persecution or other ill-treatment since he is homosexual and has a gender expression that deviates from the norm in Afghanistan.

The applicant and their legal representative had expressly cited gender expression and sexual orientation as two separate grounds that may give rise to a risk of persecution. In the appeal, the applicant stated that he is both homosexual and has a gender expression that deviates from the norm in Afghanistan. Nevertheless, the court only investigated one of the two different legal grounds for asylum – sexual orientation:

The Migration Court at the Administrative Court in Luleå 2020-04-02. Case no. 4267

Taking into account the country of origin information in the case, The Migration Court finds that A can not be deported to Afghanistan if he has

made it credible that he is homosexual, or if he risks being attributed such a sexual orientation. [...] Assessing an applicant's sexual orientation is mainly a question of credibility. The credibility assessment must be done in an individual and respectful way, by investigating factors related to the applicant's personal views, feelings and experiences of difference, stigma, and shame, rather than sexual activities.

The Migration Court only investigates sexual orientation without even mentioning gender expression as grounds for asylum. The court seems to interpret gender expression as "perceived homosexual orientation", which also constitutes grounds for asylum, but is not the same thing as risking persecution because of a norm-breaking gender expression. A boy's feminine gender expression may put him at risk of persecution because he is perceived as a girl and/or because he dresses and acts "like a girl". In such cases, it is the gender expression itself that is the reason why the person risks persecution, not perceived (homo)sexual orientation. The fact that the court misinterprets or confuses gender expression with homosexuality and/or perceived homosexuality, means that gender expression is not examined as the independent legal asylum claim it is. The court thus makes an incomplete investigation and assessment of the applicant's asylum claims. In another case, the Migration Court makes a similar assessment:

The Migration Court at the Administrative Court in Stockholm 2019-12-20. Case no. 6747

Furthermore, he has said that he used to view himself as homosexual, but that he later, in Sweden, realised that he is pansexual, after having read up on what the different letters in LGBTIQ+ stand for and mean, and discussed his sexual orientation with his friends. On the question of how it is noticeable that he is pansexual, he has said that he likes doing things that other guys do not, and that he listens to another kind of music than guys normally do. He says further that he likes to help out and do "female" chores in the kitchen. He has also claimed that he used to be bullied in Pakistan because he liked playing with girls instead of boys, talked silently, sang with a light voice and wore bright-coloured clothes.

The applicant describes that he first saw himself as homosexual, but now as pansexual — a term

that he has learned from the LGBTIQ+ community in Sweden. During the Swedish Migration Agency's investigation and the asylum interview, the applicant described his gender expression and how he was treated badly in his country of origin because people around him as well as his family thought that he was acting "un-manly", "like a girl". The applicant described that he has a light, high-pitched voice, talks silently, wears bright-coloured clothes and did "female chores". Gender expression was obviously claimed as a ground for asylum, as the applicant described that he had been maltreated because of his gender expression. Nevertheless, neither the Migration Agency nor the Migration Court assessed gender expression as a ground for asylum. In the next excerpt, the Migration Court describes the gender expression as "a personality trait":

The Migration Court at the Administrative Court in Stockholm 2019-12-20. Case no. 6747

The Migration Court finds that what X has described mainly is a personal characteristic that can not be directly linked to a certain sexual orientation. The Court does not question that he, during his childhood, may have been treated differently because he has a more gentle and calm personality and that he, because of the culture in Pakistan, has found it difficult to fit in with other boys. However, the Court does not consider this to be something that supports that he has a certain sexual orientation.

The Migration Court does not acknowledge or realise that the applicant is describing a risk of persecution because of his gender expression. The court does not seem to understand that gender expression is connected to the legal asylum ground "gender", and not sexual orientation. The Migration Court misinterprets the applicant's description of his gender expression as if it was a part of his sexual orientation, which the Migration Court claims that the "personality trait" can not be connected to. This case is one out of many where gender expression is erroneously confused with sexual orientation. The result is that not all asylum claims are investigated, tried and assessed. The Swedish migration authorities' ignorance regarding that gender expression is covered by the legal ground "gender" in the Swedish Aliens Act, not sexual orientation, resulted in the deporta-

tion of the applicant to a country where LGBTIQ+ people may be punished by death.¹³⁸

7.3 Other unlawful requirements of knowledge

“X has further described that he [...] has not sought contact with any support group or network for homosexuals during his years in Sweden. The fact that he also has stated that he has had two long relationships in the country of origin, despite the risks associated with being a homosexual there but has been withdrawn in Sweden [...] is remarkable and reduces the credibility of his claim that he would be homosexual. That he, because of the language barrier, has found it difficult to get in touch with other people in Sweden, homosexuals included, is not a valid explanation according to the Court, especially since he has been in Sweden for many years. The applicant’s explanations in these parts appear unreasonable.”¹³⁹

“[The Migration Agency finds] that a total lack of knowledge about homosexual people’s rights in Sweden indicates that your claimed sexual orientation is not really a central part of your identity.”¹⁴⁰

The cases examined in this study show that it is common in LGBTIQ+ asylum cases for the applicant to be asked if they have researched and contacted LGBTIQ+ organisations. The impact of the answers is clear when reading the grounds for rejection, such as in this case:

The Migration Agency Stockholm. Decision 2019-05-16. Case no. 156

During the asylum procedure, you have been asked if you have been in touch with any LGBTIQ organisation. You have answered that you have not. You have named one organisation, Shams, and apart from that you have stated that there are no other organisations. You have also said that Shams mainly is for men. The country of origin information shows that Shams is the best-known LGBTIQ organisation in Tunisia, and mainly advocates the abolishment of the Criminal Code section 230. Beside Shams, there are other organisations such as Damj, Without restrictions,

Mawjoudin and Chouf. [...] You have not been able to explain why you do not have any knowledge about LGBTIQ organisations in Tunisia. Moreover, you have not been able to explain why you have no knowledge of this, given that you are well-educated and have lived an independent life in Tunisia for the last years.

The Swedish Migration Agency holds that a self-identified lesbian woman’s lack of knowledge regarding LGBTIQ+ organisations in Tunisia means that she has not made her sexual orientation credible. The Migration Agency’s Director-General of Legal Affairs has established in the legal position paper RS/015/2021, that questions about knowledge of organisations and meeting-places can be asked, but that such knowledge can not be expected from all LGBTIQ+ people. The Director-General of Legal Affairs emphasises that women often have completely different preconditions and access to meeting places and organisations compared to men, as women are often confined to the home and to the private sphere. The clear instruction in RS/015/2021 was not followed in this case, as it was not enough to be a woman confined to the home and controlled by the men of the family, whom the applicant described as Islamist fundamentalists. The Migration Agency expected her to, despite her isolation, have collected detailed knowledge about LGBTIQ+ organisations and contacted them. During the period when the Migration Agency claims that she “lived an independent life”, she herself described that her father and brothers controlled every aspect of her life, harassed, threatened and abused her, for example when she left for work. The period that the Migration Agency refers to as “an independent life”, she herself described as a short period just before she fled, after managing to divorce the man she was forcibly married to by her family, as they suspected she was a lesbian. The Migration Agency calling that time in the applicant’s life “an independent life” demonstrates an ignorance about violence in close relationships as well as honour-related violence perpetrated by male relatives towards a lesbian woman who was considered to have brought shame to the family.

¹³⁸ State-Sponsored Homophobia 2020: Global Legislation Overview Update, Ramon Mendos, L., Botha, K., Carrano Lelis, R., López de la Peña, E., Savelev, I., Tan, D., ILGA World, p. 31, available at https://ilga.org/wp-content/uploads/2023/11/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf

¹³⁹ The Migration Court at the Administrative Court in Gothenburg 2020-04-07. Case no. 8285

¹⁴⁰ The Migration Agency confidential. Appealed in Case No 3763, the Migration Court in Malmö 2019-10-16.

In the above cited case, the Swedish Migration Agency questioned that the woman lacked knowledge about other LGBTIQ+ organisations apart from the biggest one in Tunisia during the period when she claimed that her relatives controlled, threatened and regularly abused her. Her claim that she was controlled and abused by male relatives because she was a lesbian was not assessed to be a valid explanation for why she did not know about more LGBTIQ+ organisations. The Migration Agency argued that since she has studied at a university, she ought to know more LGBTIQ+ organisations in Tunisia. The Migration Agency does not explain what this assumption is based on, why a university education in Tunisia would enable a lesbian woman to gain knowledge about all the country's LGBTIQ+ organisations. It does not appear likely that the Migration Agency assumes that universities in Tunisia educate students in LGBTIQ+ organisations in the country. The fact that the applicant thought that the one LGBTIQ+ organisation she knew about only worked for homosexual men should be perceived as an explanation to why she, as a lesbian woman, would contact the organisation, since it works with a group she does not belong to. The Migration Agency's expectation of her to have detailed knowledge about LGBTIQ+ organisations in practice becomes a requirement of knowledge, since her lack of this knowledge leads to her sexual orientation being assessed as non-credible. The following is a similar example:

The Migration Agency Arlanda. Decision 2020-01-12. Case no. 6674

For example, you have been asked questions about how you and [your boyfriend] kept your relationship secret, and you have answered that you made sure that no one would catch you without being more precise about how you did it. [...] You have been asked questions about your knowledge of organisations who work for homosexuals' rights in Nigeria, and possible meeting places for homosexuals in the country, to which you have briefly answered that you do not know about those things. [...]

This reasoning is one example among many where an applicant's lack of knowledge about LGBTIQ+ organisations and meeting places for homosexuals has an impact on the credibility assessment. Their lack of knowledge as well as of a detailed account of what precautions they took to conceal their relationship form the basis of the finding that their sexual orientation is not credible. The grounds for rejection show that, according to the Migration Agency, it is not acceptable to answer that one does not know about any meeting places

or organisations for LGBTIQ+ people. This is highly problematic since meeting places and organisations for LGBTIQ+ people do not exist in many parts of the world. It appears completely unreasonable to require an applicant to describe "why" they do not know about meeting places and organisations that do not exist, or which they do not know exist. In a similar negative decision concerning an applicant from Afghanistan:

The Migration Agency Stockholm. Decision 2019-12-19. Case no. 2941.

You have stated that you accept yourself and your sexual orientation today, and that it is an important part of your identity. Despite this, you have never participated or been active in any LGBTIQ+ contexts during your time in Sweden. What is more, you have not researched LGBTIQ+ people's rights in Sweden. On the question why, you initially stated that your daughter is a big part of your life, and that it takes a lot of time to care for and raise her. You have, therefore, not felt that you can spend time looking for such information. [...] It should be noted that being active in an LGBTIQ+ context is not required to make your affiliation to the group LGBTIQ+ people credible. However, the Migration Agency finds that your answers regarding why you have not done any research about LGBTIQ+ groups or LGBTIQ+ people's rights are contradictory and non-reliable.

In its decision, the Swedish Migration Agency concludes that "being active in an LGBTIQ+ context is not required" to make one's SOGIESC asylum claim credible. At the same time, the Migration Agency requires a "valid" excuse for why an applicant has not researched LGBTIQ+ organisations and LGBTIQ+ people's rights in Sweden. To have a child to care for is not considered a valid reason not to spend time researching and participating in LGBTIQ+ organisations. As such, it is hard to imagine what other circumstances that would be considered a valid explanation. The consequence of reasoning like this is that, in practice, applicants are required to research LGBTIQ+ organisations and legislation, in order to not risk being found non-credible about their SOGIESC asylum claims. Yet another negative decision that confirms this is the following:

The Migration Agency Stockholm. Decision

2016-11-17. Case no. 3957

You have stated that you do not know anything about the legislation regarding homosexuality in Trinidad and Tobago. The Migration Agency finds it remarkable that you have no knowledge about what the legislation looks like, apart from homosexuality not being permitted in the country of origin. You have further stated that there are no organisations or meeting places in the country of origin where homosexuals can meet. From the existing country of origin information, it is evident that there are such organisations and meeting places. [...] The Migration Agency finds it remarkable that you have not looked for this kind of information during your stay in your country of origin.

The Migration Agency finds it “remarkable” that a self-identified bisexual woman is not aware of the legislation about homosexuality in Trinidad and Tobago. According to her, there are no LGBTIQ+ organisations. The Migration Agency refers to the country of origin information, according to which there are LGBTIQ+ organisations and meeting places, and claims that it is “remarkable” that she has not looked for information about “organisations and meeting places in the country of origin where homosexuals can meet”. The Migration Agency holds the fact that she has not looked up information about LGBTIQ+ organisations against her. Also in this case, this applicant’s lack of knowledge about LGBTIQ+ organisations contribute to the finding that her claimed sexual orientation is not credible. The Migration Agency’s assumption that all LGBTIQ+ people are interested in and know about LGBTIQ+ organisations is based on a stereotypical idea about LGBTIQ+ people, which is also expressed in the following rejection grounds:

The Migration Agency confidential. Decision confidential. Case no. confidential. [Appealed in case no. 3763 The Migration Court in Malmö 2019-10-16]

Furthermore, the Migration Agency notes that you, according to your own statements, have no knowledge about homosexuals’ rights in Sweden, have no insight into the different kinds of sexual orientations that exist, and that you are not active in any LGBTIQ+ organisation. To know about Swedish legislation about homosexuals’ rights or to be active in an organisation for homosexuals is not a requirement that needs to be met to make one’s sexual orientation credible. However, the Migration Agency assesses that a total lack of knowledge about homosexuals’ rights in Sweden indicates that your claimed sexual orientation is not really a central part of your identity.

Again, the Migration Agency writes that it is not a requirement to know about the legislation, or to be active in LGBTIQ+ organisations. At the same time, “a total lack of knowledge about homosexuals’ rights in Sweden” is considered to imply that the applicant’s sexual orientation “is not central” to the [their] identity, why the claimed sexual orientation is found non-credible. The Migration Agency, thus, makes the assumption that a homosexual orientation always is a central part of one’s identity. This is, of course, not true, since sexual orientation is something personal and subjective. Not everybody views or experiences their sexual orientation as central to their identity. The Migration Agency also erroneously assumes that homosexuals always have an interest in reading legislation and being involved in LGBTIQ+ organisations. As mentioned above, these are examples of stereotypical notions about homosexuals that keep occurring in negative decisions:

The Migration Agency Stockholm. Decision 2018-03-27. Case no. 2425 [Appealed to the Migration Court 2018-05-23. The Administrative Court in Stockholm. Case no. 781]

The Migration Agency understands that it can be difficult to talk about matters of sexual orientation, especially with the authorities, and that it therefore can take time for a person to disclose asylum claims connected to sexual orientation. However, you have claimed that you saw the Pride parade in Norrköping when you had only been in Sweden for 25 days. You were surprised and wondered if they were mad or drunk. You were afraid of even asking what it was, and you did not find out until after you were detained. The Migration Agency questions that you, not until you were detained, and never before, during your two years in Sweden, would have gotten any information about Pride and LGBTIQ+ rights. [...] The Migration Agency does not find it is likely that nobody would have told you there and then, nor that you yourself would not have found out what event it was, and thereby realised that it was about LGBTIQ+ people and their rights. [The Migration Agency] finds that you have not given a reasonable explanation for why you found out about Sweden’s [...] liberal view on LGBTIQ+ issues only when you were detained, and why you previously did not know under what conditions homosexual people may live in Sweden.

The negative decision contains a commonly

occurring reason for rejection in LGBTIQ+ asylum cases: It is not credible that applicants have not been informed by others about LGBTIQ+ organisations in Sweden and LGBTIQ+ people's rights. Again, the decision expresses the expectation that often, in practice, becomes a requirement; that the LGBTIQ+ person should research Pride and LGBTIQ+ people's rights in Sweden. A similar argument is here expressed by the Migration Court:

The Migration Court at the Administrative Court in Stockholm 2020-02-06. Case no. 8029

Something that further warrants doubt of A's statements is that he, during the oral hearing, exhibited gaps in his knowledge about homosexuals. He has stated that you can tell that he is a homosexual since he, unlike his brothers, preferred kitchen chores, had a feminine appearance and since he has found it difficult to bond with other guys. His answer reflects a stereotypical image of homosexuals based on prejudice. Furthermore, it is remarkable that A, according to his own statement, has not researched homosexuals' rights in Sweden, and that he did not know about the organisation RFSL.

As was concluded in chapter 6, it can not be required of the applicant to know about, or use certain terms about, their LGBTIQ+ asylum claims. Therefore, it is crucial that the asylum authorities understand what legal claim the applicant is describing to ensure that the correct asylum claim is investigated, processed, and assessed. Even though gender expression is a separate asylum claim, it is often confused with sexual orientation and gender identity.¹⁴¹ In the case above, the applicant has described his gender expression (a "feminine appearance") as a reason to why he was perceived as different from his brothers. The court, however, does not understand that he is describing his gender expression, but confuses it with his sexual orientation. Due to their own

confusion of different asylum claims, the court concludes that the applicant "exhibits gaps in his knowledge about homosexuals". This even though it is illegal to require knowledge of LGBTIQ+ or of Western LGBTIQ+ terminology.¹⁴² The Migration Court finds it "remarkable" that the applicant does not know about RFSL, even though the CJEU has established that such expectations are based on stereotypical notions about homosexuals that can not form the basis of the credibility assessment.¹⁴³

7.4 Analysis and conclusions

The UNHCR highlights in its Guidelines that a lack of knowledge about LGBTIQ+ organisations does not necessarily indicate that one's LGBTIQ+ identity is less credible, and that the assessment should not be based on stereotypical notions about LGBTIQ+ people.¹⁴⁴ The CJEU has established that to request detailed knowledge about LGBTIQ+ organisations is an example of such stereotypical treatment that should not be applied in the credibility assessment.¹⁴⁵ The main issue in the CJEU case concerned whether the applicant could answer questions about national organisations working for homosexuals' rights. The CJEU concluded that such questions were based on stereotypical notions about homosexuals, and that an applicant's inability to answer such questions can not be used to conclude that the applicant is not credible. The Swedish migration authorities' application of a requirement that expects all LGBTIQ+ people to know about, be interested in, have access to and want to be involved in LGBTIQ+ organisations, is based on a stereotypical assumption about LGBTIQ+ people. An applicant's inability to answer such questions may not lead to that the applicant is deemed non-credible regarding their SOGIESC, according to case law from the CJEU. The negative

¹⁴¹ See chapter 7.2 about the Swedish migration authorities' erroneous confusion of sexual orientation, gender identity and gender expression.

¹⁴² See chapter 6 about the Swedish migration authorities' knowledge requirement regarding SOGIESC terminology, which violates Swedish and international law.

¹⁴³ The CJEU's judgment December 2 in the Joint cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, para. 29. The question in the case concerned whether the applicant could answer questions about national organisations working for homosexuals' rights, and the CJEU established that such questions were based on stereotypical notions about homosexuals and that an inability to answer such questions should not be used to conclude that the applicant is not credible.

¹⁴⁴ The UNHCR Guidelines No. 9 at paras. 63.viii, 4, 49 and 60.ii

¹⁴⁵ The CJEU's judgment December 2 in the Joint cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, para. 29.

decisions cited above, however, show that an applicant's lack of knowledge about LGBTIQ+ organisations has an impact on the credibility assessment. Even though both the UNHCR and the CJEU are clear on this point, the Swedish Migration Agency and the Migration Courts require reasonable and reliable explanations for the lack of a detailed knowledge about LGBTIQ+ organisations on the part of the applicant. Lack of knowledge is a disadvantage in the credibility assessment of SOGIESC asylum claims. To, as an LGBTIQ+ person, simply be uninterested in LGBTIQ+ organisations is not considered acceptable according to the Swedish migration authorities' stereotypical notion that all LGBTIQ+ people want to and can be involved in LGBTIQ+ organisations. To, as a lesbian woman, think that an organisation does not work for lesbians but only gay men, or to have a child to care for, are other examples of invalid explanations for not doing research about LGBTIQ+ organisations. Being controlled and abused by relatives is also not considered a valid excuse for not learning about LGBTIQ+ organisations. The rejection grounds prompt the question of what the Swedish migration authorities consider are valid, reasonable and reliable explanations for not having detailed knowledge about and investigating LGBTIQ+ organisations, as an LGBTIQ+ asylum seeker.



8. Late disclosure of SOGIESC asylum claims

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On the left:

Members of RFSL Ungdom wearing “Newcomers Youth” sweatshirts, part of the organization’s clothing collection.
Photo: Arseny Selov & Andra Berciu

“You have stated that you did not dare to state [that you are homosexual] before because you were afraid it was prohibited in Sweden as well. The Migration Agency finds this explanation unreasonable.”¹⁴⁶

“When one’s sexual orientation is declared this late, it gives the Court reason to doubt the credibility of these statements. [...] He has not [...] elaborated on these statements, but only stated that he has felt ashamed and insecure.”¹⁴⁷

It is very common for LGBTIQ+ people to not disclose their sexual orientation, gender identity or gender expression to the authorities immediately upon arrival in the asylum country. This is noted in Swedish and international law, CJEU case law and in the UNHCR’s guidelines. The term usually used for this in SOGIESC asylum law is late disclosure. This may be because of fear, shame and/or lack of knowledge of that sexual orientation, gender identity and gender expression constitute grounds for asylum. It might be because a person, only after having been in Sweden for a while, learns new words that describe their identity, their relationships, how they live and/or express themselves, that might not have existed in their country of origin. Furthermore, it might be only in Sweden that the person realises or starts to define their sexual orientation, gender identity or expresses a gender expression that constitutes risk of persecution. The CJEU, the UNHCR, the Swedish legislator and the Migration Agency’s Director-General of Legal Affairs all express understanding for late disclosure of SOGIESC asylum claims and emphasise that this should not affect the credibility of the claim.¹⁴⁸

8.1 The assumption of low credibility in cases of late disclosure

It is clear from the extensive material and the large number of decisions and court rulings examined in this study, that a practice has developed during the past years where SOGIESC asylum claims that have not been declared immediately are of “low credibility”, according to the Swedish migration authorities. There is a general tendency of the migration authorities to question and mistrust new

information about SOGIESC asylum claims because they are declared at a late stage in the asylum procedure. It has become more difficult to be granted a residence permit according to Chapter 12 Section 18 of the Swedish Aliens Act or to be granted a new procedure in accordance with Chapter 12 Section 19 of the Swedish Aliens Act. It has also become more difficult to be granted residence permit if a new assessment is granted under Chapter 12 Section 19. Feelings of shame, fear, guilt or lack of knowledge about legislation are no longer considered valid excuses for not having declared and invoked the SOGIESC claims earlier, according to the Swedish migration authorities. Below are rejection grounds that are representative for cases where the SOGIESC claims have not been disclosed “from the beginning”. In some cases, SOGIESC is invoked as a new ground for asylum, or as impediments to enforcement of expulsion under Chapter 12 Sections 18-19 of the Swedish Aliens Act. In other cases, SOGIESC is examined and assessed as part of a new procedure under Chapter 12 Section 19. In one case, the SOGIESC claims were invoked “late” but during the original asylum procedure. The common denominator in all situations is that the credibility and reliability of the SOGIESC claims, decreases because of the late disclosure, according to the migration authorities:

The Migration Court at the Administrative Court in Gothenburg 2019-03-01. Case no. 7241

When sexual orientation is invoked at such a late stage, it gives, according to the Court, strong reasons to doubt the truthfulness of the statements. [X has], furthermore, not given any detailed statements about his sexual orientation. He has only stated that he is homosexual, that he has felt ashamed of his sexual orientation and has not felt safe enough to talk about it. Neither has he, in the appeal to the Court, elaborated on his statement, but only held that he has felt ashamed and insecure. [The Migration Court concludes] that what the claimant holds

¹⁴⁶ The Migration Agency Uppsala Asylum Unit 2. Decision 2018-04-06. Case no. 6012.

¹⁴⁷ The Administrative Court in Gothenburg, the Migration Court 2019-03-01. Case no. 7241.

¹⁴⁸ RS/015/2021, section. 4.5, Government Bill 2005/06, Refugeehood and persecution because of gender or sexual orientation [Flyktingskap och förföljelse på grund av kön eller sexuell läggning], p. 34, Report by the Committee on Social Insurance 2009/10:SfU14, Migration and asylum politics [Socialförsäkringsutskottets betänkande. Migration och asylpolitik], 2009/10:SfU14, p. 22, The CJEU judgment on December 2 in the Joint cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, paras. 69-71, The UNHCR’s Guidelines No. 9, paras. 59 and 63.

regarding his sexual orientation is not a circumstance that can be perceived as impediments to enforcement [...]

The applicant was detained before expulsion and from the detention center he invoked SOGIESC as new circumstances. He described strong feelings of fear, shame and insecurity as reasons for not having disclosed them before. Feelings of shame and fear are generally considered to meet the requirement of a valid excuse according to statements in the preparatory works of the Swedish Aliens Act and the Swedish Migration Agency's legal position paper.¹⁴⁹ However, in this case, the Migration Court explicitly writes that the late disclosure of homosexuality gives "strong reasons to doubt" the truthfulness of the statement. The court does not present any reason to question the credibility, apart from the late disclosure of the sexual orientation. This argument and conclusion that statements are not credible because they have not been brought forth earlier, is unlawful. The preparatory works of the Swedish Aliens Act, the case law of the CJEU and the UNHCR's guidelines expressly state that the claimed SOGIESC should not be considered non-credible because it is invoked at a late stage of the asylum procedure, or just before expulsion. In addition, the preparatory works of the Swedish Aliens Act emphasise that feelings of shame and the experience of having concealed one's SOGIESC one's whole life are common among LGBTIQ+ people, and that this normally means that there is a valid excuse for not having invoked these reasons earlier. Having strong feelings of shame, fear and insecurity, as the applicant described in the case cited above, should therefore be considered a valid excuse. Despite the crystal-clear statements in the preparatory works of the Swedish Aliens Act, the case law of the CJEU and the UNHCR's guidelines, the young man was denied a new asylum procedure of his claims and was deported to Morocco. A similar assessment was made in the following case:

The Migration Court at the Administrative Court in Malmö 2019-03-07. Case no. 4781
The Court shares [...] the Migration Agency's view that A, during the entire procedure, has made

vague statements that lack in detail, and that they have changed throughout the process. For example, it seems strange that A, only during the third meeting at the Migration Agency, stated that he had been in a romantic same-sex relationship with a boy in the country of origin for two years, despite having claimed earlier that he was unsure of his sexual orientation.

The Migration Court expressly writes that it is "strange" that the applicant at the third meeting at the Migration Agency mentioned his same-sex relationship. This is one out of many examples of how the migration authorities generally perceive it as non-credible of the applicant to not disclose their sexual orientation immediately. That is clear in the following case as well:

The Migration Agency Administrative Unit 1 Stockholm. Case no. 4964. Decision 2020-01-20
You came to Sweden about five years ago. You say that you, before coming to Sweden, knew that you had feelings for men, which gave rise to a lot of thoughts. Taking into account that you have been residing in Sweden since 2015, and gone to school here, the Migration Agency concludes that you reasonably must have understood that homosexuality is not taboo here in the same way as it is in Afghanistan. Apart from going to school, you have regularly visited the church, and have been aided by a legal representative. You have, thus, had the opportunity to find someone to turn to with your thoughts, or to confide in. You also stated that you chose to become a Christian partly because Christianity had a more liberal view on homosexuality than Islam. This must be interpreted as you were aware of your sexual orientation as far back as in 2017, when you decided to become a Christian. However, you did not mention your sexual orientation during the new asylum procedure regarding your asylum claims that you were granted in May 2019. Based on the aforementioned circumstances, the Migration Agency concludes that you have not made it credible that you are homosexual. Your new asylum claim is instead interpreted as an attempt to stall the enforcement of your expulsion order. The Migration Agency, therefore, does not find that your claim constitutes such new circumstances which mean that you have made it probable that there are impediments to enforcement within Chapter 12 Sections 1-3 of the Aliens Act.

¹⁴⁹ Report by the Committee on Social Insurance 2009/10:SfU14, Migration and asylum politics [Socialförsäkringsutskottets betänkande. Migration och asylpolitik], 2009/10:SfU14, p. 22, the Swedish Migration Agency's position paper RS/015/2021, section. 4.5.

The Migration Agency assesses that five years in Sweden, access to a lawyer and being in contact with a church and a school means that an Afghan boy “reasonably must have understood” that homosexuality is not taboo in Sweden. According to the Migration Agency, he had “the opportunity” to find someone in whom to confide that he was an LGBTIQ+ person. The Migration Agency makes extensive arguments as to what the boy should have understood based on the contacts he had and who he should have turned to. He is not considered credible about his sexual orientation. The last sentence shows that the Migration Agency applies the standard of proof “made credible” to the impediments to enforcement (Chapter 12 Sections 1-3 of the Aliens Act). This standard of proof is too strict as well as legally incorrect. It is sufficient to make new circumstances that may result in impediments to enforcement reasonable or plausible in order to be granted protection or a new assessment of the new circumstances. Apart from applying a legally erroneous standard of proof, the Migration Agency does not explain how and why contact with a school or church automatically would make the boy know that homosexuality is accepted and constitutes grounds for asylum. To “have access to a legal representative” does not mean that the legal representative informs all their current or former clients that homosexuality is allowed and constitutes grounds for asylum. Lawyers are often busy and difficult to reach and generally do not always inform all applicants they meet or undocumented immigrants that sexual orientation is an asylum claim. It seems unreasonable to require that an unaccompanied minor, who has concealed his sexual orientation his whole life in a country where homosexuality is punishable by death,¹⁵⁰ should, of his own accord, inform the state authorities in a new country about his sexual orientation. The Swedish Migration Agency’s assessment violates the preparatory works of the Aliens Act and the Director-General of Legal Affairs’ legal position paper RS/015/2021. These documents establish that a person who has concealed their sexual orientation their whole life and is afraid to talk about it, normally has a valid excuse for not having brought it up earlier. A similar assessment was made in the following case:

The Migration Court at the Administrative Court in Malmö 2019-03-15. Case no. 262.

Through the appealed decision, the Migration Agency rejected A’s application for residence permit after being granted a new procedure according to Chapter 12 Section 19 of the Aliens Act. [...] The decision was based on the finding that A had not made it credible that he is homosexual, and thereby, the claimed events connected to his sexual orientation were not deemed credible. [...] A invoked his sexual orientation as grounds for asylum only when he, in April 2018, claimed impediments to enforcement. At this time, he had been in Sweden for about two and a half years, and his expulsion order had gained legal force about eight months earlier. As a reason for not having talked about his sexual orientation earlier, A has stated that he feared his relatives in Sweden, and that they are monitoring him. This, however, does not correspond with what he said during the asylum procedure, namely that he, for one year and nine months, has been living openly as a homosexual in Sweden, and that he for two and a half years, since March 2017, has not had any contact with his relatives in Sweden. [...] Nor has A been able to give a reasonable explanation for why he, during the investigation at the Migration Agency, could say that he was homosexual but not that he identified as a woman. Based on this, the Migration Court concludes that A has not given a valid explanation for why the information that he has a gender transcending identity has not been brought forth earlier.

In this case, the legal representative was specialised in SOGIESC asylum claims. A new asylum procedure was granted under Chapter 12 Section 19 because of homosexual orientation, which was a new ground for asylum. In the new procedure, the Migration Agency rejected the application claiming that the applicant had not made the sexual orientation credible. In the appeal, the applicant also declared her gender identity; that she identifies as a woman, has a female gender expression and that she, due to a fear of others’ reactions, had not expressed it anywhere but at home, to her friends at RFSL and in other LGBTIQ+ contexts. In the appeal, she gave a detailed description of how she had expressed her gender identity in secret, and

¹⁵⁰ State-Sponsored Homophobia 2020: Global Legislation Overview Update, Ramon Mendos, L., Botha, K., Carrano Lelis, R., López de la Peña, E., Savelev, I., Tan, D., ILGA World, p. 75ff, available at <https://ilga.org/wp-content/uploads/2023/11/ILGA-World-State-Sponsored-Homophobia-report-global-legislation-overview-update-December-2020.pdf>

how she was punished in Iraq when she was caught wearing a wig and make-up. She described a fear of showing her gender expression in Sweden and wanted to start gender-affirming treatment. Since gender identity is a separate ground that had not been examined, assessed nor tried before, the correct course of action would have been to refer the case back to the Migration Agency as the first instance to try gender identity as a new asylum ground that had not been examined before. However, the Migration Court rejected the case, claiming that neither sexual orientation nor gender identity had been made credible. The court uses the pronoun “he” and the male name stated in the applicant’s identity documents instead of the female name used by the applicant as well as by her family and friends. The court questioned “his” credibility because gender identity had not been disclosed until the appeal to the court. The court does not explain why the applicant’s openness about her sexual orientation “does not correspond with” that she has been afraid of relatives who monitored her behaviour. That relatives monitoring her behaviour does not seem to contradict that she had chosen to cut all contact with them, which the court seems to imply. The main reason why her gender identity was not deemed credible appears to be that it was not declared earlier. The court did not find that the explanation of having been afraid was a valid excuse. The verdict illustrates how feelings of fear and shame are no longer enough in cases of late disclosure. The Migration Agency made a similar assessment in a case concerning a minor from Iraq:

The Migration Agency Asylum Unit 2 Uppsala. Decision 2018-04-06. Case no. 6012

The Migration Agency notes that you, during your first asylum procedure, have stated that there have been false rumours about your sexuality, but that these are false. Shortly after the Migration Agency had rejected your application, you instead stated that it was not a false rumour; that you were homosexual and had had a same-sex relationship in your country of origin. You have said that you did not dare to state this before, as you were afraid that it was prohibited in Sweden as well. The Migration Agency finds this explanation unreasonable. You had lived in Sweden for about nine months before the first asylum procedure, which should reasonably be enough to

understand that homosexuality is not prohibited in Sweden. You have willingly travelled to Sweden to seek protection and should have been aware of LGBTIQ+ peoples’ rights in the country. The Migration Agency also concludes that only two months have passed between the asylum investigation, where you were too afraid to talk about your sexual orientation, and the appeal, where it is revealed. You have not given a reasonable explanation for why you, during these two months, have gone from not daring to talk about your orientation to daring to do so. Based on the above, the Migration Agency finds that you have not made your affiliation to a group that risks persecution because of sexual orientation credible.

The boy’s asylum application was first rejected, whereby the Migration Court referred the case back to the Migration Agency since he, in the appeal to the Court, claimed that he was homosexual. The Migration Agency emphasised that the boy, in the first procedure, had not described himself as homosexual, but “only” that he was perceived as homosexual. The Migration Agency rejected the asylum claim again, stating that the explanation of why he had not mentioned homosexuality in the first procedure “was not credible”. The boy’s explanation was that he did not know that sexual orientation was an asylum claim, he was scared and thought that homosexuality was illegal in Sweden, just like in Iraq. According to the Migration Agency, nine months in Sweden “should reasonably be enough to understand that homosexuality is not prohibited in Sweden”. The Migration Agency does not explain its strange expectation that the boy “should have been aware of LGBTIQ+ people’s rights in Sweden”. Nor does the Migration Agency explain why nine months would mean that an asylum-seeking child would automatically find out that homosexuality is not illegal in Sweden. These assumptions, in practice, lead to the unreasonable requirement that children from countries where same-sex relations are punishable by death¹⁵¹ have to research legislation on homosexuality in the asylum country. Similar requirements are made in the following case:

The Migration Agency Administrative Unit 1 Malmö. Decision confidential. Case no. confidential, [Appealed to the Migration Court at the Administrative Court Malmö 2019-03-22. Case no. 9712]

¹⁵¹ State-Sponsored Homophobia 2019, Ramón Mendos, L., ILGA World, p. 523ff, available at https://ilga.org/wp-content/uploads/2023/11/ILGA_State_Sponsored_Homophobia_2019.pdf.

Even though X has been aware of the risk of deportation since he, in August 2017, received the expulsion order, he has waited until now to invoke new circumstances [his sexual orientation]. He has lived as an asylum seeker in Sweden for about two and a half years. He has for a long time had the opportunity to gather information about homosexuals' rights and to understand that such a sexual orientation could have an impact on the outcome of an asylum case. It is difficult to understand how he could not have realised the importance of the alleged sexual orientation already at the appeal and the Migration Court's assessment of the [original asylum] case. He has not given a reasonable explanation for why he, for so long, has waited with declaring a circumstance of crucial importance to the assessment of his need for international protection. It is therefore remarkable that the new circumstances [the sexual orientation] are disclosed at a late stage, and after more than two months in detention. Based on this, X's statements lack in reliability.

In this case as well, the Swedish Migration Agency emphasised the lack of knowledge about homosexuals' rights in Sweden. The LGBTIQ+ claims were not deemed credible, and the application for a new assessment of the new circumstances according to Chapter 12 Section 19 was rejected. According to the Migration Agency, two and a half years in Sweden as an asylum seeker meant that he had for "a long time had the opportunity to gather information about homosexuals' rights". The Migration Agency seems to imply that the boy should have mentioned his sexual orientation in the first appeal in the original asylum process, as the Agency writes that it is "difficult to understand" why he had not done so. The Migration Agency does not even respond to or comment the boy's explanation that he during that time lived with fellow countrymen according to whom homosexuality is forbidden and taboo. The fact that the Migration Agency uses expressions like "waited with declaring" implies that the boy would have done so deliberately. However, this would presuppose that he knew that homosexuality is a legally valid ground for asylum in Sweden, which he described that he only found out when the non-profit organisation visited him in detention. The Migration Agency does not explain in what

way the boy has had "the opportunity to gather information about homosexuals' rights". The Migration Agency seems to argue that this knowledge should have been gathered from the Afghan countrymen who thought that homosexuality should be punished with death. In addition, the Migration Agency does not pay any regard to the boy's strong feelings of fear and shame. Experiencing such feelings is subjective and may pose a psychological barrier in disclosing the sexual orientation if the person thinks it might cause them harm. The Migration Agency's legal position paper RS/015/2021 and its references to the preparatory works of the Swedish Aliens Act are clear: Those who feels shame, fear and have concealed their sexual orientation all of their lives generally have a valid excuse for not having brought it up earlier.¹⁵² These statements have not been followed in this case. The Swedish migration authorities' arguments in the above referred cases are representative of how the majority of cases are assessed where SOGIESC claims are disclosed late. Feelings of shame, fear and lack of knowledge about Swedish legislation are generally no longer considered valid excuses or reasonable explanations for not having invoked the SOGIESC claims earlier. This even though the preparatory works of the Swedish Aliens Act, the Swedish Migration Agency's legal position paper, the CJEU and the UNHCR's guidelines emphasise that late disclosure should not lead to that the information is deemed non-credible, and that people who have been forced to conceal their sexual orientation, gender identity and/or gender expression normally have a valid excuse for not bringing up these claims earlier. The development in the Swedish SOGIESC asylum case law clearly shows that this is no longer taken into consideration, even though Swedish and international law are clear on this point.

8.2 The same criteria despite different standards of proof

Normally, the standard of proof "probable" is applied within Swedish asylum law and the asylum procedure.¹⁵³ The applicant should make their asylum claims and need for pro-

¹⁵² RS/015/2021, section. 4.5.

¹⁵³ The Swedish term is "sannolik", which in the Swedish Courts' glossary from 2019 is translated to "probable". The glossary is available at https://www.domstol.se/globalassets/filer/gemensamt-innehall/for-professionella-aktorer/svensk-engelsk_ordlista_2019.pdf

tection probable, by for example making it credible and reliable that they belong to or are perceived as belonging to the societal group LGBTIQ+ people. “Reasonable” is a lower standard of proof than probable. In the enforcement of an expulsion order, SOGIESC claims that have not been examined before can constitute new circumstances and thereby impediments to enforcement of a deportation. If the applicant can show a reasonable reason to assume that they risk being punished by death, being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment, a valid excuse is not needed to grant a new asylum procedure. “Plausible” is a lower standard of proof than reasonable, in Swedish asylum law. If the applicant can make it plausible that they risk being punished by death or be subjected to corporal punishment or other inhuman or degrading treatment or punishment, and if they have not been able to bring forth these circumstances earlier, or if they have a valid excuse for not having done so, a new assessment of the new circumstances should be granted according to Chapter 12 Section 19 of the Swedish Aliens Act. The decisions and court rulings examined in this research study shows a shift in the Swedish migration authorities’ assessment of SOGIESC claims that are invoked as new circumstances. The following case is an example of this:

The Migration Agency Administrative Unit 1 Stockholm. Decision 2020-01-20. Case no. 4964
Based on that you have been in Sweden since 2015 and gone to school here, the Migration Agency finds that you reasonable should have understood much earlier that homosexuality is not taboo here in the same way as it is in Afghanistan. [...] Your current asylum claim connected to your orientation is instead interpreted as an attempt to stall the enforcement of your expulsion order. The Migration Agency, therefore, does not find that what is now brought forth [homosexual orientation] would constitute circumstances that mean that you have made probable that there is an impediment to enforcement according to Chapter 12 Sections 1-3 of the Aliens Act.

The Swedish Migration Agency concludes that the claimed homosexual orientation does not mean that it has “been made probable” that

there are impediments to enforcement. The Migration Agency, thus, applies the term and standard of proof “make probable”, even though the lower standard of proof “make plausible” should be applied. The applicant only has to make their sexual orientation plausible, not probable, to be granted a new assessment of the new circumstances, in this case homosexual orientation. The Migration Agency rejected the application for a new assessment by applying a too high and legally incorrect standard of proof. In this case, the Migration Court noted the lower instance’s erroneous decision and reversed the negative decision. The court referred to the wording in the Swedish Aliens Act and concluded that the standard of proof “make plausible”, as part of the assessment of whether a new procedure should be granted under Chapter 12 Sections 1-3 of the Aliens Act, is lower than “make probable”. According to the court, an in-depth examination of the new asylum circumstances, i.e., the sexual orientation, should not be made at this stage, as the main issue is whether a new assessment should be granted or not. The higher standard of proof, i.e. to “make probable” one’s sexual orientation, should only be applied when a new procedure is granted. The Migration Court reversed the negative decision and referred to the Swedish Aliens Act, its preparatory works and the case law of the CJEU to conclude that there are limited possibilities to deny an applicant a new procedure.¹⁵⁴ In the decisions and rulings studied in this report, there are many examples of how the Migration Agency, in the same way as in the decision above, in practice applies a standard of proof that is too high when the assessing a claim of impediments to enforcement. In the assessment of whether SOGIESC asylum grounds have been made plausible, and thereby should prompt a new procedure, the Migration Agency nowadays makes a detailed assessment of whether the applicant already in their claim of impediments to enforcement, has in a detailed manner accounted for the experiences that the migration authorities require in a regular asylum procedure, where the LGBTIQ+ grounds are to be made probable: Namely that an inner process has taken place and can be accounted for.¹⁵⁵ Thus, the standard of proof “make probable” is applied, instead of the lower standard of proof

¹⁵⁴ The Migration Court at the Administrative Court in Stockholm, 2020-01-22, Case no. 9684

¹⁵⁵ See chapter 4 about the requirement of an inner process leading to a realisation and experiences of feelings of difference, stigma and shame.

“plausible”, which should be applied according to Chapter 12 Sections 1-3 of the Swedish Aliens Act. The following two cases are examples of this:

The Migration Court at the Administrative Court in Stockholm 2020- 01-22. Case no. 9684 [Appeal of the Migration Agency’s decision 2020-01-20. Case no. 4964]

X has, when applying for impediments to enforcement, among other things, described how he, early on in his life, felt different and had feelings for boys, but did not accept it or dare to tell anyone about it, and how he has thought about his sexual orientation in the country of origin and later in Sweden. He has also described the culture in his country of origin and the widespread view on homosexuality there. Moreover, he has explained the reason why he did not dare to bring up his sexual orientation earlier. The fact alone that X has disclosed his sexual orientation at a late stage does not mean, according to the Migration Court, that his statements should be viewed as non-reliable. Against this background, the Migration Court finds that the ground that has been brought forth may be perceived as impediments to enforcement, as stated in Chapter 12 Sections 1-3 of the Aliens Act. The Migration Court finds [...] that there is reason to further examine whether he may make probable that he risks persecution because of his sexual orientation. The conditions for trying the question of residence permit are thereby fulfilled.

The Migration Court holds that the Migration Agency has applied a too high standard of proof for making one’s sexual orientation plausible. The Migration Court also seems to require that the applicant, already in the application for impediments to enforcement, should have made a written, detailed account of an inner process with thoughts and feelings about his sexual orientation, and described why he had not mentioned his sexual orientation before. In this case, the applicant meets these high standards, why he is granted a new assessment. The Court’s standard of proof is high as well, and it is impossible to know if the Court would have granted a new asylum procedure even if the applicant had not given such a detailed account in his application for impediments to enforcement. In the following case, the Migration Court made a similar assessment:

The Migration Court at the Administrative Court in Malmö 2019-11-06. Case no. 8609

Even though it is clear that A for the past two years seems to have self-identified as a homosexual, it must be taken into account that it can both be complex and difficult to talk to others, especially

to the authorities, about one’s sexual orientation, and that the process to identify oneself as having a certain sexual orientation can take time. Against this background, the Court finds that A has a valid excuse for not having invoked his homosexuality before. Based on aforementioned circumstances, the Court finds that A should be granted a new asylum procedure regarding the matter of residence permit, in accordance with Chapter 12 Section 19 of the Aliens Act.

The Court considered the difficulty in “talking to others” and especially the authorities about one’s sexual orientation, and the applicant was found to have a valid excuse for not having invoked his sexual orientation earlier. However, the decisions and court rulings studied in this report show that in many identical cases similar circumstances are not considered sufficient to meet the requirements of a valid excuse. In the application of impediments to enforcement, when SOGIESC is invoked as a new ground for asylum, the Swedish Migration Agency refers to the lower standard of proof “make plausible”, but in practice applies the higher requirement “make probable” to deny the application. In practice, the Migration Agency applies the same requirements as in a regular asylum procedure: That the applicant must have experienced an inner, emotional process leading to self-realisation, which should be accounted for in detail, in the written application for impediments to enforcement due to new circumstances; the SOGIESC. The account is expected to include a detailed description of an inner process with thoughts, feelings and reflections. In an assessment of impediments to enforcement, where the applicant should be expected to make their SOGIESC plausible, the same requirements are in practice made as in a regular asylum procedure where the applicant has to make their LGBTIQ+ asylum claim probable, which is the higher standard of proof. The Migration Court does not always pay attention to that the lower instance, in practice, has applied a higher standard of proof than “make plausible” by requesting a detailed account of an inner process already at this stage. The following rejection grounds show how the Migration Agency refers to the standard of proof “make plausible”, but in practice applies the higher standard of proof “make probable”:

The Migration Agency confidential. Decision confidential. Case no. confidential.

However, the Migration Agency expects that a person who claims to belong to the group LGBTIQ+, in an application for impediments to enforcement, should at least briefly be able to account for their thoughts, feelings and reflections about their sexual orientation, taking into account their individual preconditions. In your application for impediments to enforcement, you have not accounted for what thoughts, reflections and feelings you have experienced around your sexual orientation in a way that makes your sexual orientation plausible.

The Migration Agency requires a written account in the application for impediments to enforcement, of an inner process with thoughts, feelings and reflections, to “make plausible” the applicant’s sexual orientation. Normally, such requirements are made in a regular asylum procedure, where the applicant has to make their SOGIESC claim “probable”. The Migration Agency refers to a lower standard of proof but in practice applies the same criteria as in a procedure covered by a higher standard of proof. In a similar case, where sexual orientation was invoked a new circumstance in an application for a new procedure in accordance with Chapter 12 Section 19 of the Swedish Aliens Act, the Migration Agency made the following assessment:

The Migration Agency Malmö. Decision 2019-10-22. Case no. 1272

The fact that the claimed sexual orientation was not invoked before the deportation stage, more than four years after he came to Sweden, and after he had gone through an asylum procedure that ended as late as in June 2019, makes the statements considered less reliable. The Migration Agency finds that he, even in a simplistic way, has not given a valid excuse for why his sexual orientation was disclosed at this stage. Moreover, the Migration Agency notes that the written account, besides lacking in personal reflection, is vague and contradictory.

The Migration Agency writes that there are no reasons to assess if the applicant has a valid excuse, while at the same time as using late disclosure as reasons to reject the application:

The Migration Agency Malmö. Decision 2019-10-22. Case no. 1272

Furthermore, the Migration Agency finds that the statements X has made about his sexual orientation are so flawed in regards of reliability that,

even in the limited assessment made as part of impediments to enforcement, the standard of proof “plausible” is not met. Overall, no such new grounds have emerged that can be perceived to constitute impediments of enforcement, as referred to in Chapter 12 Sections 1,2 or 3 of the Aliens Act. There is therefore no reason to further investigate the question whether X has a valid excuse for not having declared the asylum ground earlier. Notwithstanding, it can be mentioned that X, even considering the sensitive nature of the information, has not given a valid excuse.

The Migration Court made the following assessment of the Migration Agency’s negative decision:

The Migration Court at the Administrative Court in Malmö 2019-11-11. Case no. 2614

X has further claimed that he, upon a return to Afghanistan, risks persecution since he is homosexual. Initially, the Migration Court can conclude that this claim has been made at a late stage of the asylum procedure, after X was detained, which speaks against its reliability. [...] What X has stated about his thoughts and reflections, his sexuality and who he is, does not make the Migration Court find his claim of being homosexual reliable.

The Migration Court argued that the man’s statements were not reliable, nor credible, as he had invoked his sexual orientation “at a late stage”. His story, in a written account by proxy, was deemed to be “vague”. The case is an example of when the same circumstances – the account of an inner process in the application of impediments to enforcement – are assessed differently in different cases. A similar assessment is made in the following case:

The Migration Court at the Administrative Court in Malmö 2019-06-14. Case no. 3529

Regarding A’s claimed sexual orientation, he has mainly stated that he had a young male neighbour in Afghanistan. He developed strong feelings for the boy, which eventually became sexual. A has continued to be drawn to guys in Sweden but has not been able to accept his sexual orientation until now. The reason why he did not accept himself earlier is because of fear and a lack of information. He has also felt ashamed and guilty. The Migration Court does not make a different finding regarding A’s sexual orientation than the Migration Agency made in the appealed decision. What A has said

about his feelings and thoughts regarding his sexual orientation is strikingly vague and has only been invoked after he was detained. The given statements do not make it plausible that there would be lasting impediments to enforcement. In this case as well, the application was refused due to sexual orientation not having been invoked earlier, which affected the applicant's credibility and reliability, and that the written account of thoughts and feelings of an inner process was "vague". The rejection grounds are representative of the majority of decisions and verdicts in the material of this research report in which SOGIESC has been invoked as new circumstances. The Swedish migration authorities conclude already at the start, that the late disclosure is to the applicant's disadvantage. It always affects the reliability of the claimed SOGIESC and the applicant's credibility in a negative manner. The migration authorities also require that the inner, emotional process that should have taken place is described in detail already in the written application for impediments to enforcement. The standard of proof "make plausible" is significantly lower than "make probable". The condition that an inner process should have taken place and can be described in detail is usually made in a regular asylum procedure where the applicant should make their SOGIESC+ credible, reliable and thereby probable. This is a higher standard of proof than to make a claim plausible. Nevertheless, the Swedish migration authorities apply the same high standard of proof in terms of content, even though the question is whether a new assessment of the new circumstances should be granted or not, which means that the lower standard of proof "plausible" should be applied.

The preparatory works of the Swedish Aliens Act and the Swedish Migration Agency's legal position paper RS/015/2021 establish that a valid excuse normally is fulfilled when someone has concealed their sexual orientation their whole life, especially if they come from a country that implements the death penalty, like for example Afghanistan. Not in a single one of the cases above was this considered to be a valid excuse. The migration authorities seem to not consider the preparatory works of the Swedish Aliens Act, the CJEU's case law, the UNHCR's guidelines or the Migration Agency's legal position paper RS/015/2021, which all state that late disclosure of LGBTIQ+ claims should not affect the credibility of the statement. In some cases from 2019, the Migration Court reversed the Migration Agency's decision and found that the Agency had erroneously applied a standard

of proof that was too high at this stage of the investigation, as the standard of proof "plausible" is lower than "probable". The Migration Court has established that the Migration Agency erroneously has applied a standard of proof that is too high, which led to the applicant not being granted a new procedure where the new circumstances are assessed. The following excerpt illustrates how many Migration Courts reason in such cases:

The Migration Court at the Administrative Court in Malmö 2019-12-12. Case no. 4837

Regarding A's asylum claim based on his sexual orientation, this has not been examined as part of the procedure leading up to the expulsion order and is to be viewed as new circumstances in accordance with Chapter 12 Section 19 of the Aliens Act (2005:716). In the assessment of whether the new ground can be considered lasting impediments of enforcement, it should be noted that the standard of proof "plausible" is lower than "probable", which is the standard of proof normally applied in asylum law. The lower requirement indicates that a deeper investigation of the new ground should not be made when assessing whether the foreigner should be granted a new procedure regarding the matter of residence permit. A has, among other things, stated that he has not invoked the asylum ground earlier since he fears that his relatives in Sweden would find out about his sexual orientation, and that someone in the family would tell the leaders of their tribes. His fear to disclose should also be understood in the context of the taboo and stigma regarding homosexuality in the country of origin. Given what A so far has said about his sexual orientation, and what is known about the situation for homosexuals in his country of origin, the Migration Court finds that he has met the low standard of proof, and that it is plausible that he will be exposed to such treatment as is referred to in Chapter 12 Sections 1-3 of the Aliens Act.

In the following case as well, the Migration Court found that the low standard of proof indicated that a more in-depth assessment of the applicant's sexual orientation should not be carried out at this stage:

The Migration Court at the Administrative Court in Malmö 2019-03-22. Case no. 9712

When assessing whether A's sexual orientation can be considered lasting impediments to enforcement, it should be noted that the stan-

dard of proof “plausible” is lower than “probable”, which is the standard of proof normally applied in asylum cases. This indicates that a more profound examination of the new circumstance should not be made when assessing whether the foreigner should be granted a new asylum procedure. What the CJEU has established in the cases C-148/13 - C-150/13, i.e. that the isolated circumstance that sexual orientation is disclosed late in the process should not affect the applicant’s credibility, should also be considered. [...] A has explained that he has been afraid and ashamed even after coming to Sweden, and that he therefore has not wanted to talk about his sexual orientation earlier. Only when in detention did he dare to talk about it with people from non-profit organisations that visited the detention centre to support the detainees. Taking into account how difficult it can be to talk about one’s sexual orientation, the Migration Court concludes that a person who has concealed their sexual orientation their whole life should generally be considered to have a valid excuse for not addressing it earlier in the process. The possibilities to deny him a new asylum procedure by referring to his actions is, thus, to be considered limited. [...] The conditions to try the question of residence permit in a new procedure are therefore fulfilled.

The following case illustrates, again, how the Migration Court sometimes requires a detailed account of an inner process with thoughts and reflections, already in the application for impediments to enforcement.

The Migration Court at the Administrative Court in Gothenburg 2020-01-23. Case no. 2213

Even though the standard of proof “plausible” is low, and the claimant themselves has written the application for impediments to enforcement, the Migration Court finds that more concrete statements than has already been submitted are required regarding how he has undergone inner change regarding thoughts and feelings in order for it to be considered plausible that there is a need for protection upon a return to Iraq.

RFSL’s asylum lawyer stepped in as a legal representative at the appeal after the applicant had written his own application for impediments to enforcement, where he referred to his sexual orientation as a new circumstance. In the appeal, it was pointed out that the standard of proof “plausible” is lower than “probable”, and that an in-depth exami-

nation of an inner process can not be required at this stage according to a number of rulings from the Migration Court from 2019 and 2020. Nevertheless, the Migration Court made a completely different assessment and agreed with the Migration Agency’s requirement, i. e. that an inner process with feelings and thoughts should be accounted for in detail already in the application for impediments to enforcement. The negative decisions in this chapter show that a detailed, written, account for an inner process leading to realisation is required when SOGIESC claims are invoked as new circumstances. At the same time, other rulings and decisions show that an in-depth examination of SOGIESC claims should not be made in cases where the standard of proof is “plausible”, and that the possibility to deny the applicant a new procedure is very limited in these cases. This shows that the assessments are unpredictable, that the application of the law is not uniform and that similar or almost identical cases are assessed differently in different enforcement cases where SOGIESC is disclosed late.

8.3 Summary and analysis of conclusions

The Migration Court rulings and decisions from the Swedish Migration Agency examined in chapter 8 show that the migration authorities apply very high standard of proofs when SOGIESC is invoked as a new circumstance, in the assessment of whether a new procedure should be granted or not. Identical or similar requirements are made as part of the two different standard of proofs “make plausible” and “make probable”. This shows how the Swedish migration authorities to an increasing extent require, when SOGIESC is invoked as a new circumstance, that the application for impediments to enforcement contains a written, detailed account of an inner process with thoughts, feelings and reflections about how the applicant has lived with and thought about their LGBTIQ+ identity. These are requirements that, as this study shows, are made when the applicant has to “make probable” their SOGIESC, which is the higher standard of proof applied in the regular asylum procedure.¹⁵⁶ However, this chapter has shown that the same requirements are now made when the applicant only has to

¹⁵⁶ See chapter 4 of the report.

“make plausible” SOGIESC in an application for impediments to enforcement. In some cases, the migration courts reverse the lower instance’s decision to deny a new procedure, concluding that “make plausible” is a significantly lower standard of proof than “make probable”, which is normally applied within the regular asylum process. In those cases, the courts conclude that the Migration Agency’s standard of proof is legally incorrect and that an in-depth examination of the asylum claims should not be done at this stage, but only when a new asylum procedure is granted. The Migration Courts refers to the preparatory works of the Swedish Aliens Act and the CJEU’s statements regarding the credibility assessment of LGBTIQ+ asylum claims made at a late stage and concludes that the possibilities to deny a new asylum procedure are limited. The Migration Courts’ assessments are not uniform but rather vary greatly.

Furthermore, it has been shown that if an applicant is assessed to have a valid excuse for the late disclosure of the SOGIESC claims, and that a new asylum therefore has been granted in accordance with Chapter 12 Section 19 of the Swedish Aliens Act, it is common for the migration authorities to still, as part of the new procedure, discuss whether or not it was acceptable to disclose the SOGIESC claims at a late stage. Even when a valid excuse has been established, the applicant risks, again, at a later stage in the new trial, to be considered not credible because of the late disclosure.

In all situations where SOGIESC claims are invoked late in the procedure, this always affects the applicant’s credibility and reliability in a negative manner. The Migration Agency and the Migration Court often initially state that the applicant’s credibility, and thereby the reliability of the claim, is negatively affected because of the late disclosure. That SOGIESC claims are made at a late stage generally reduces the credibility, according to the migration authorities, and leads to the claims being deemed non-credible and non-reliable. The following excerpt is representative of these rejection grounds:

The Migration Court at the Administrative Court in Stockholm 2019-03-07. Case no. 8952
The Migration Court notes that X applied for asylum in Sweden during spring 2015, and that he claimed asylum due to sexual orientation and religion only in July 2017, after his expulsion order had gained legal force. This circumstance alone warrants caution in the assessment of the asylum claims. The Migration Court finds it highly remarkable that he, only at such a late stage of the procedure, accounts for events that are claimed to have occurred before he left the country of origin. According to the Court, X has not been able to give a valid explanation for why he has not disclosed the new circumstances earlier in the process.

The Migration Court initially writes that “the circumstance alone”, i.e. that sexual orientation is disclosed after a negative decision has gained legal force, “warrants caution in the assessment” of the credibility of the sexual orientation. As stated above, the argument that the credibility decreases only because of late disclosure violates the preparatory works of the Swedish Aliens Act and EU law. Further, the court writes:¹⁵⁷

The Migration Court at the Administrative Court in Stockholm 2019-03-07. Case no. 8952
[The] flaws regarding credibility are of such a magnitude that they can not be overcome in an oral hearing. It is therefore not relevant to have an oral hearing in the case. [...] What X has stated does not mean that he, upon a return to the country of origin, because of his sexual orientation [...] risks such persecution that he is to be considered a refugee.

The applicant was denied an oral hearing, and thereby every opportunity of having his SOGIESC asylum claim examined and assessed, despite the risk of death penalty in Afghanistan for LGBTIQ+ people.¹⁵⁸ The court’s reasoning, that it is “highly remarkable” that an Afghan youth discloses his bisexuality “late”, is neither grounded in reality nor in a legal basis. The preparatory works of the Swedish Aliens Act,

¹⁵⁷ Preparatory works of the Swedish Aliens Act; Government Bill 2005/06:6 Refugeehood and Persecution for Reasons of Gender or Sexual Orientation [Proposition 2005/06:6, Flyktingskap och förföljelse på grund av kön eller sexuell läggning], p. 34, Migration Agency’s position paper RS/015/2021, The CJEU in the Joint cases C-199, C-200 and C-201/12 X,Y and Z v Minister voor Immigratie, Integratie en Asiel, para. 69-71.

¹⁵⁸ State-Sponsored Homophobia 2020: Global Legislation Overview Update, Ramon Mendos, L., Botha, K., Carrano Lelis, R., López de la Peña, E., Savelev, I., Tan, D., ILGA World, available at https://ilga.org/wp-content/uploads/2023/11/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf, p. 39ff.

contrariwise, emphasises that it is common for homo- and bisexuals from countries where their sexual orientation is punishable by death to not talk about it from the beginning:

Report by the Committee on Social Insurance 2009/10:SfU14, Migration and asylum politics, p. 22

The Director-General of Legal Affairs at the Migration Agency has, in a legal position paper from October 12, 2009, (RCI 04/2009), stated, among other things, that it is not uncommon that persecution because of homo- or bisexuality is invoked at a late stage of the asylum procedure, or after the expulsion order has entered into force. The Director-General of Legal Affairs notes that if sexual orientation is disclosed at a late stage of the procedures, this alone should not affect the credibility of the statements. Nor should the fact that the claims are made only during the implementation of an expulsion order decrease the credibility of the statements. [...] That persecution based on homo- or bisexual orientation is brought forth at a late stage of the asylum procedure does not, according to the legal guideline, decrease the credibility. Even if the cases are difficult to assess, the Committee concludes that there is no reason to question the legislation.

The Swedish Migration Agency's position paper RS/015/2021 repeats and confirms the since long effective principle, and refers to the case law of the CJEU:

RS/015/2021, section 4.5 Risk of persecution or serious abuse claimed late in the process or in a case of enforcement [of a deportation]

[...] When new asylum claims are invoked late in the procedure, this may sometimes be reason to question the applicant's credibility. However, when it comes to sexual orientation or gender identity, it must be taken into account that this concerns something that might be experienced as shameful to talk about, even in reasonably liberal communities, and that therefore might be difficult to address. Moreover, many of the Migration Agency's cases concern applicants who come from cultures where homo- and bisexuality is very taboo and penalised, in some cases even reason for execution. If the applicant can present an explanation for why these asylum claims were not addressed previously, the statements should not be considered less credible merely for reasons of the late disclosure. It has been confirmed by the CJEU (cases C-148/13-C-150/13)

that the isolated circumstance that the sexual orientation is invoked as an asylum ground late in the procedure should not entail that the applicant's statements are not found credible.

In cases when LGBTIQ+ is invoked as impediments to enforcement of expulsion and the question is raised whether the applicant had a valid excuse for not addressing it earlier, the Director-General of Legal Affairs has referred to the ruling from the Swedish Migration Court of Appeal, MIG 2007:13, noting that the term "valid excuse" should be interpreted restrictively, but that this should be balanced against that a valid excuse can be accepted in exceptional cases, and statements in the preparatory works establishing that a person who has been subjected to trauma may find it difficult to talk about sexual orientation, gender identity and/or gender expression. "Also sexual orientation or gender identity may in some cases be difficult to talk about. A person who has concealed their sexual orientation or gender identity all their life should, therefore, generally, have a valid excuse for the late disclosure."¹⁵⁹ The rejection grounds in this chapter show, however, that not even in cases where the applicant has concealed their SOGIESC their whole life and come from a country where LGBTIQ+ people may be punished by death, is this considered a valid excuse for a late disclosure. The CJEU established in the Joint cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, paras. 68-71:

68. It is clear from Article 4(1) of Directive 2004/83 that Member States may consider it the duty of the applicant to submit 'as soon as possible' all elements needed to substantiate the application for international protection.

69. However, having regard to the sensitive nature of questions relating to a person's personal identity and, in particular, his sexuality, it can not be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset.

70. Moreover, it must be observed that the obligation laid down by Article 4(1) of Directive

¹⁵⁹ The Swedish Migration Agency's position paper RS/015/2021, section 4.5.

2004/83 to submit all elements needed to substantiate the application for international protection 'as soon as possible' is tempered by the requirement imposed on the competent authorities, under Article 13(3)(a) of Directive 2005/85 and Article 4(3) of Directive 2004/83 to conduct the interview taking account of the personal or general circumstances surrounding the application, in particular, the vulnerability of the applicant, and to carry out an individual assessment of the application, taking account of the individual position and personal circumstances of each applicant.

71. Thus, to hold that an applicant for asylum is not credible, merely because he did not reveal his sexual orientation on the first occasion that he was given to set out the grounds of persecution, would be to fail to have regard to the requirement referred to in the previous paragraph.

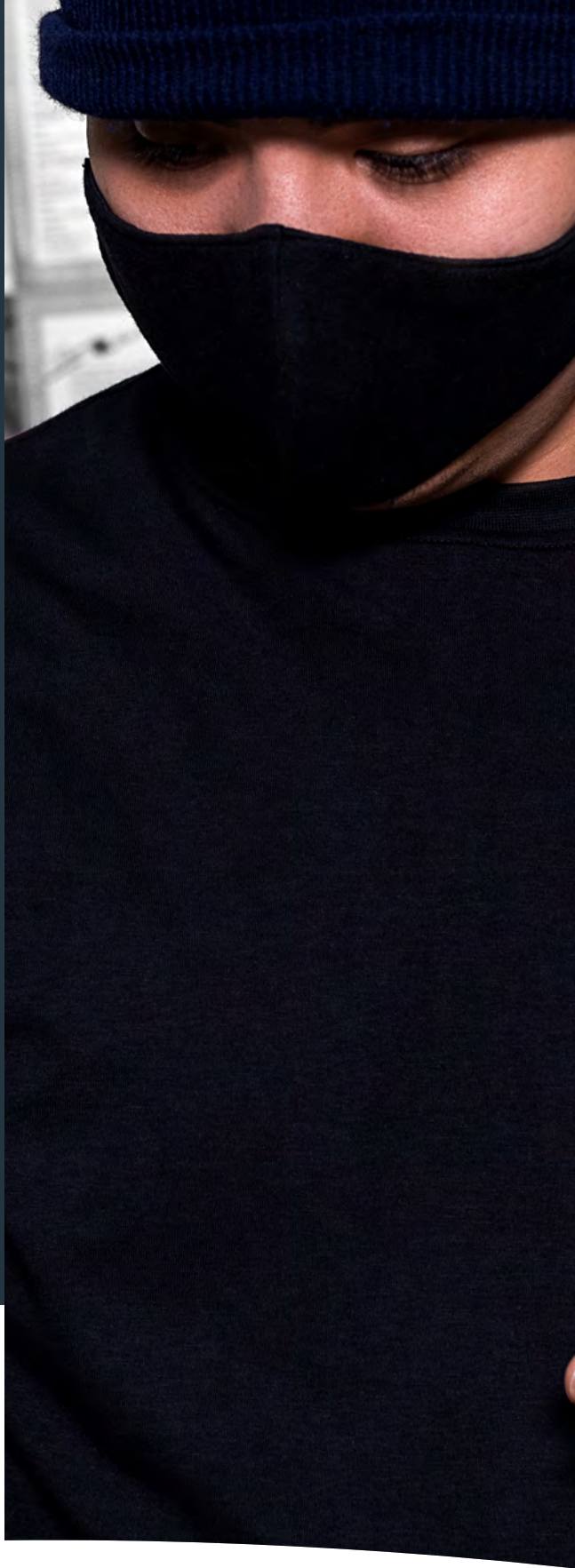
The CJEU clarifies that the obligation to "as soon as possible" present one's asylum grounds should be interpreted taking into account the applicant's personal and general circumstances, including their vulnerable position. An individual assessment should be made based on the applicant's individual position and life conditions. The CJEU establishes that to make the conclusion that the applicant lacks credibility only because of the late disclosure violates the EU directive. The UNHCR's Guidelines No. 9 describes how LGBTIQ+ people may be in need of international protection, even though they do not associate with the term LGBTIQ+, or without having accepted their sexual orientation, gender identity and/or gender expression, in paragraphs 59 and 61.i:

59. [...] Where the applicant is in the process of coming to terms with his or her identity or fears openly expressing his or her sexual orientation and gender identity, he or she may be reluctant to identify the true extent of the persecution suffered or feared. Adverse judgements should not generally be drawn from someone not having declared their sexual orientation or gender identity at the screening phase or in the early stages of the interview. Due to their often-complex nature, claims based on sexual orientation and/or gender identity are generally unsuited to accelerated processing or the application of "safe country or origin" concepts.

63.i Self-identification: [...] Some LGB individuals, for example, may harbour deep shame and/or internalised homophobia, leading them to deny their

sexual orientation and/or to adopt verbal and physical behaviours in line with heterosexual norms and roles. Applicants from highly intolerant countries may, for instance, not readily identify as LGBTI. This alone should not rule out that the applicant could have a claim based on sexual orientation or gender identity where other indicators are present.

According to the UNHCR, no conclusions should be drawn regarding the person's credibility simply on the basis that they have not declared their sexual orientation, gender identity and/or gender expression as asylum grounds in the beginning of an asylum procedure. The UNHCR also emphasises that many applicants from LGBTIQ+-hostile environments may not identify as LGBTIQ+, but that this does not mean that they do not need protection. In sum, Swedish as well as international establish that late disclosure alone should not lead to the applicant not being considered credible. The applicant's personal circumstances and vulnerable position must be considered by the asylum authorities. Swedish law emphasises that applicants from countries where LGBTIQ+ is taboo and/or criminalised, who have hidden their SOGIESC their whole life, normally have a valid excuse for not invoking it from the beginning. The legal development in Sweden, where the migration authorities' regular practice nowadays is to question and mistrust the invoked SOGIESC claims because they are disclosed at a late stage, lacks a legal basis. The Swedish migration authorities' arguments and assessments, that feelings of shame, fear and having concealed one's SOGIESC are no longer sufficient for a valid excuse, is not compatible with the legislator's intention, the Migration Agency's legal position paper, the UNHCR's guidelines or the CJEU's case law. The Swedish migration authorities' assumptions and findings that a late disclosure of SOGIESC claims reduces credibility violates Swedish and international law, which state that the circumstance that SOGIESC claims are not declared earlier does not mean that the statement is not credible. Nevertheless, the decisions and court rulings examined in this study show that such arguments are very common in Swedish SOGIESC asylum case law today.



9. Lack of consistency and legal certainty in SOGIESC asylum cases

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On the left:

A member of RFSL Ungdom wearing a “Newcomers Youth” T-shirt, part of the organization’s clothing collection.

Photo: Arseny Selov & Andra Berciu

This chapter examines an issue that the many decisions and court rulings studied in this research show are pervasive in Swedish SOGIESC asylum case law, which is the absence of uniformity and thereby legal certainty in SOGIESC asylum cases. The research has shown that the assessments of late disclosure lack uniformity.¹⁶⁰ Apart from inconsistency when applying the same standard of proof, as was shown in the previous chapter, there are many examples of inconsistency in cases with near identical asylum stories. There are also many examples of inconsistent assessments of same submitted written evidence, as well as cases where SOGIESC asylum grounds are invoked without even being examined and assessed. It is also common that a lack of a certain circumstance in one case is considered to decrease an applicant's credibility regarding their SOGIESC asylum claims, while the existence of the same circumstance in another case also is considered to decrease an applicant's credibility regarding their circumstance asylum claims. Both the existence and the lack of the same circumstance can, thus, be disadvantageous to the applicant in the Swedish migration authorities' assessment of their credibility and reliability regarding their SOGIESC asylum claims.

9.1 Different assessments of the same circumstances and similar asylum stories

It is common in Swedish SOGIESC asylum cases that the lack of a certain circumstance is used as reasons for rejection, while the existence of the same circumstance in another case also constitutes reasons for rejection. One first example of this is a negative decision from the Migration Agency:

The Migration Agency Asylum Unit 4, Stockholm. Decision 2019-11-19. Case no. 7439

The Migration Agency finds, noting the strong heterosexual norm in Kenya, that you have not been able to elaborate on your thoughts and feelings regarding what it meant for you to be homosexual in such a society. Furthermore, the Migration Agency finds that you do not seem to have reflected on what this heterosexual norm would mean for you and X, but that you instead thought about a future with him, even though

you were aware of the risks of your relationship.

Chapter 5.3 showed how LGBTIQ+ applicants often are expected to have made future plans regarding their life as an LGBTIQ+ person. The lack of such plans, or plans that are considered unrealistic or short-term, are common reasons for finding an applicant non-credible regarding their claimed SOGIESC, according to the migration authorities. However, in the negative decision cited above, the existence of the same circumstance – i.e. the applicant having stated that he had made plans together with his partner – was interpreted to his disadvantage in the Migration Agency's credibility and reliability assessment. LGBTIQ+ applicants who have not made future plans risk being found not credible because of it, while LGBTIQ+ applicants who have made such plans risk being found not credible because they have done so. Another example of an inconsistent assessment is cited below, in a negative decision from the Migration Agency:

The Migration Agency Stockholm. Decision 2018-05-08. Case no. 769

After Y was arrested by the police, X escaped to Uganda with a female friend. In Uganda, X became involved in the LGBT organisation Pride Sports Africa. The Migration Agency concludes the following: X fled to Uganda when her same-sex relationship had been revealed. When X comes to Uganda, a country where same-sex relations are criminalised and prohibited, X chooses to get involved in an LGBT organisation. The Migration Agency notes that, since X throughout her asylum interviews has expressed a deep fear of her sexual orientation becoming known to the public, it appears strange that she would have manifested this openly, in a country with such strict legislation against LGBT people.

Chapter 7.3 showed how LGBTIQ+ applicants often are expected to know about and be involved in LGBTIQ+ organisations. To not have researched or contacted LGBTIQ+ organisations are common grounds for rejection in SOGIESC asylum cases. In this case, however, the Migration Agency argues that it is "strange" that the applicant has been involved in an LGBTIQ+ organisation in Uganda, since she has claimed to have felt fear. To fear that one's sexual orientation

¹⁶⁰ See chapter 8 about the migration authorities' incoherent and non-uniform assessments regarding what is required under the standard of proof of "making plausible" LGBTIQ claims in cases when these are invoked as new circumstances and as impediments to enforcement against a deportation order.

will be exposed does of course not rule out that an LGBTIQ+ person contacts an organisation that helps vulnerable LGBTIQ+ people. To be scared as an LGBTIQ+ individual and therefore turn to an organisation that supports LGBTIQ+ people rather increases the applicant's credibility. The case shows that LGBTIQ+ applicants who have not contacted LGBTIQ+ organisations risk being found not credible regarding their SOGIESC, and that LGBTIQ+ applicants who have contacted LGBTIQ+ organisations also risk being found not credible for the same reason.

The cases examined in this study show that some asylum stories told by applicants in SOGIESC asylum cases are considered detailed enough, and meet the requirement of a coherent description of an inner process with thoughts, feelings and reflections.¹⁶¹ At the same time, another decision-maker at the same Migration Agency or different Migration Court in another SOGIESC asylum case, may find a nearly identical story about an inner process with thoughts, feelings and reflections to be "vague and lacking in detail". One story leads to refugee status and a residence permit, while the other, identical story, leads to a negative decision and deportation. Below are examples of when detailed oral asylum stories are not found credible although similar or less detailed stories generally are considered detailed enough to make the applicant's SOGIESC credible. The following decision is an illustrative example:

The Migration Agency confidential. Decision 2018. Case no. confidential.

In support of your asylum application you have, in sum, stated the following: You are homosexual. Already as a boy you realised and accepted your sexual orientation. You discovered your sexual orientation by feeling it. You thought that you were not like other boys but were receptive to boys. You are different but you have accepted it. When asked to describe the thoughts and feelings you had when you realised your sexual orientation in as much detail as possible, you stated that you accepted yourself, that you were happy that you like boys but that you thought that you could not live as a homosexual when you learned that it was prohibited. When asked what led you to accept your sexual orientation, you replied that it was

because you were attracted to boys. Because your sexual orientation is not accepted in your country of origin, you were both scared and worried there. When you realised that you liked boys and that it was not considered normal in your country of origin, you became scared, worried and sad, but also happy. It felt weird to not be like everyone else. You felt like a stranger in your society. When encouraged by the Migration Agency to talk about your personal development from when you understood that you were homosexual until today, you said that the feelings came naturally when you were a child, that you could not talk to anyone about it, and that you, in Sweden, realised that you wanted to act on your emotions. When asked about how it felt and what you thought about being different from boys who want to have sex with girls, you stated that you are who you are, and that your feelings will not change. You can not change your sexual orientation. When people say that it is not normal or not allowed to be homosexual, you feel oppressed. It feels difficult to be restrained while at the same time you feel happy and satisfied about your sexual orientation. It has been difficult to not be allowed to talk about your sexual orientation. The Migration Agency's case officer has asked what it felt like – your thoughts, feelings and deliberations – to deviate from the norm, and you have stated that you want to live freely and not be restricted. Your thoughts follow your feelings and your body. In Morocco, you did not dare to get close with anyone or start a relationship. When asked what it is like not to be able to show your feelings, you stated that you were sad, that you thought about it and that you had feelings of hopelessness. You also thought that you, once you can live on your own, will be able to show who you are. Your mother has seen pictures of naked men on your phone, which she reacted negatively to. Your family suspects that you are homosexual. They will never accept your sexual orientation, which feels difficult and sad. You had wanted to meet your family's expectations of men, but you can not. You have to do what feels right for you. In Sweden, you have tried to kiss a boy. He has told others about it, and thereby it might have come to your family's knowledge. You want to live openly with your sexual orientation. Upon a return to Morocco, you risk being exposed to persecution or ill-treatment by private individuals as well as the authorities because of your sexual orientation.

¹⁶¹ See chapter 4 about the requirements made in case law regarding making one's SOGIESC credible according to the Migration Agency and the migration courts; that an inner process has taken place with certain thoughts, feelings and reflections, and the requirement of being able to account for these verbally and in detail.

The Swedish Migration Agency's summary is formatted as one single, very long, paragraph, but takes up more than a full page of the decision. The Migration Agency accounts for its questions during the asylum procedure as well as the applicant's answers, including descriptions of his thoughts and feelings regarding the realisation of his sexual orientation and how he has felt, thought and lived with his sexual orientation. Based on the Migration Agency's own summary of his oral asylum story, he appears to have answered all the Migration Agency's questions about inner thoughts and feelings. The answers show that the applicant's experiences match the Migration Agency's requirements¹⁶² of what experiences should be accounted for to make one's sexual orientation credible. He has described, in detail, an inner process as well as feelings and thoughts connected to it. The description, as it is summarised by the Migration Agency, mainly covers the applicant's thoughts and feelings regarding his realisation, acceptance, feelings of fear, worries and sorrow regarding having been forced to conceal his sexual orientation. The applicant has not, for example, talked about sexual activities, which often contributes to the sexual orientation being found not credible in other cases. Even though the personal experiences and the description of them meets the Swedish migration authorities' requirements and expectations that this report has shown need be met in order to make one's sexual orientation credible, the asylum application was denied. The Migration Agency found that the applicant "constantly has given vague and general information about his sexual orientation and how it has affected his life". The Migration Agency wrote that he "can not elaborate on his answers in more detail regarding thoughts and reflections" and that he had not elaborated on in what way he felt different: "You also have not been able to elaborate on how it feels to deviate from the norm in Morocco, but only stated that you want to live freely and not be restricted." Lastly, the Migration Agency wrote in its negative decision: "The Migration Agency concludes that a person your age, in a nuanced and reflective way, should be able to elaborate

and account for the thoughts and feelings that you have had to a greater extent than you have been able to."¹⁶³ The applicant's very detailed description of thoughts and feelings was, thus, considered not detailed enough. It is not clear what the Migration Agency means when stating in its negative decision that the applicant should be able to account in a "relatively detailed" manner. According to the Migration Agency, a person who is the same age as the applicant should be able to, in a more "nuanced and reflective" way, elaborate on and account for thoughts and feelings. This is remarkable, since the applicant at the time of the asylum procedure was 17 years old, and therefore legally a child. Already for this reason, the same requirements should not be applied when assessing an asylum-seeking child's oral asylum story, as to the one of an adult, contrary to what the Migration Agency erroneously claims in the decision. The asylum procedure should be adapted to children and lower requirements should be applied to a child's story.¹⁶⁴

The applicant's description of his feelings and thoughts was not considered detailed enough. The Migration Agency places very strict and high requirements on the applicant, a minor, of an even more detailed account of the thoughts, feelings and reflections which the Migration Agency erroneously assumes that all LGBTIQ+ people have as a universally common experience. The Migration Agency's requirement of and assumptions about universal experiences and characteristics among LGBTIQ+ people are contrary to the UNHCR's Guidelines No. 9.¹⁶⁵ They are exclusively based on stereotypical notions about LGBTIQ+ people. The CJEU's Advocate General warned early on that stereotypical notions violate the right to an individual assessment in the EU's Qualification Directive. The CJEU has established that it is unlawful to draw the conclusion that an applicant is not credible because they can not answer questions or live

¹⁶² See chapter 4 about the requirements made in case law regarding making one's SOGIESC credible according to the Migration Agency and the migration courts; that an inner process has taken place with certain thoughts, feelings and reflections, and the requirement of being able to account for these verbally and in detail.

¹⁶³ The Migration Agency confidential. Decision 2018. Case no. confidential.

¹⁶⁴ The Swedish Refugee Law Center, Children's Asylum Law Center, "What requirements are placed on you?"; available at <https://sweref.org/vilka-krav-stalls-pa-dig/>

¹⁶⁵ See chapter 10.2 of the report and the UNHCR's Guidelines para. 60.ii.

up to expectations based on such stereotypical notions.¹⁶⁶ However, the case above shows that even when an individual story meets the stereotypical requirements made by the Swedish migration authorities in SOGIESC asylum cases, they still risk being considered not credible. The decisions and court rulings examined in this study show that in other comparable cases, similar or even less detailed descriptions of an inner process with thoughts and feelings have been considered enough to make the claimed SOGIESC credible. What is a detailed enough description of the required experiences in SOGIESC asylum cases obviously varies between different decision-makers.

9.2 Different assessments of written evidence and country of origin information

Between 2012-2020, RFSL's asylum lawyer has been in contact with and acted as legal representative in a large number of SOGIESC cases from Uganda where the applicant has been outed in Ugandan media. The assessments of these cases have become less uniform regarding for example the risk of persecution for applicants who have been outed as homosexuals in the media with their name and picture. Individual decision-makers at the Swedish Migration Agency may argue that the Ugandan police probably does not read the Red Pepper, even though it is the country's largest newspaper and reaches the most readers. This misconception led to a negative decision in one of RFSL's asylum lawyers' cases. The Migration Agency found that the fact that Red Pepper had published the applicant's full name and facial picture, along with the information that they were homosexual and wanted by the Ugandan police, did not mean that "the authorities or private individuals" in Uganda had knowledge about the content of the newspaper.¹⁶⁷ The asylum application was rejected, even though many other Ugandan SOGIESC asylum cases with identical facts and circumstances, where the applicant had been outed by the very

same newspaper, were accepted and asylum was granted.¹⁶⁸

It also varies what measures the Swedish Migration Agency take as part of their duty of investigation in cases where the applicant has been outed in the media. In some cases, the Migration Agency makes a facial analysis of the photos of the applicant in the newspaper where they are outed, to investigate whether they in fact appear to show the applicant's face. In other cases, no facial analysis is made, and the application is denied with the motivation that it has not been made credible that the photos in the newspaper can be connected to the applicant. In some cases, the Migration Agency contacts the Swedish Embassy in Kampala to verify the authenticity of the written evidence. The embassy may be asked to verify whether the publication in Red Pepper has taken place, or to investigate an arrest warrant issued by the Ugandan police. In other cases, the Migration Agency does not take of these measures, and the case officer may then dismiss the evidence with a brief motivation and statement that it has "low evidential weight". An explanation of why certain measures are taken or not taken when assessing the same objective evidence in SOGIESC asylum cases from Uganda, is not provided.¹⁶⁹ It appears to be up to every individual case officer to decide if or what measures they take or not regarding written evidence that can be crucial to the outcome of the case. The cases cited below are other examples of the great variation among assessments when the applicant has been outed by the media.

Different case officers at the Swedish Migration Agency and different Migration Courts in Sweden make different interpretations of the same country of origin information when assessing whether LGBTIQ+ people risk persecution in a certain country. These two judgments were made on the same day by the Migration Court in Stockholm and the Migration Court in Gothenburg concer-

¹⁶⁶ Sharpston, E., Opinion of 17 July 2014, A, B and C v Staatssecretaris voor Veiligheid en Justitie, C-148/13, C-149/13 and C-150/13, ECLI:EU:C:2014:2111, available at <https://curia.europa.eu/juris/document/document.jsf?docid=155164&doclang=en> and the CJEU's judgment December 2 in the Joint cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, paras. 62-63.

¹⁶⁷ The Migration Agency Administrative Procedure Unit 2, Stockholm. Case no. 5828. Decision 2016-12-29.

¹⁶⁸ The Migration Agency Administrative Procedure Unit 2 Stockholm. Case no. 2538. Decision 2020-05-27.

¹⁶⁹ The Migration Agency's decision 2019-09-05, Case no. 8094, and a number of SOGIESC cases where the applicant originates from Uganda and where RFSL's asylum lawyer has acted as a public counsel, which have been part of the examined decisions in this report.

ning SOGIESC cases from Lebanon:

The Migration Court at the Administrative Court in Stockholm 2014-12-17. Case no. 924

The country of origin information available in the case indicates the following: According to Lebanese law, all sexual relations that contravene the laws of nature are punishable by imprisonment for up to a year. In 2009, one national court held that homosexual acts between persons of the same sex could not be considered unnatural, as long as they were consensual. Many judges began to follow this case law. According to the Swedish embassy in Amman, Jordan, there were in 2013 no on-going legal processes concerning “unnatural sexual relations”. Assaults committed by the police in connection to arrests has received media attention, and caused an intervention from the interior minister in Lebanon.

After that, the court concluded that the claimant did not risk persecution in Lebanon:

The Migration Court at the Administrative Court in Stockholm 2014-12-17. Case no. 924

Thus, it can be concluded that the Lebanese authorities do not apply such prison sentences that are prescribed for unnatural sexual activities. Thereby, there is no reason to assume that the claimant risks persecution because of their sexual orientation. Furthermore, it has been shown in this case how the government, NGO's and the media are working to change the public opinion. As a result, the Migration Court finds that it has not been shown that the claimant risks persecution because of their sexual orientation upon return to Lebanon.

Furthermore, the Migration Court also stated in its ruling that the “discrimination” of homosexuals did not indicate that the Lebanese state authorities lacked ability to or interest in protecting LGBTIQ+ people. The Migration Court found that the claimant had the opportunity to turn to Lebanese authorities if they were “subjected to reprimands, assault or discrimination based on their sexual orientation”. On the same day of this ruling from the Migration Court in Stockholm, the Gothenburg Migration Court concluded the following in a SOGIESC case from Lebanon:

The Migration Court at the Administrative Court in Gothenburg 2014-12-17. Case no. 9831

However, the country of origin information shows that article 534, also in recent times, has been applied by the courts as legal grounds for punishment of homosexual acts. There is a list of judgments

against people who have been convicted, merely because they were suspected of homosexuality. In cases where clear evidence of homosexual relations is lacking, those arrested are subjected to assault by the police and the security forces in order to bring about some sort of confession. [...] The country of origin information, as well as the submitted documents, support that Article 534 is applied in practice. It also shows that accusations are made on arbitrary grounds. The clause can be applied in other situations than when there is evidence of homosexual acts and when the person can not be convicted of any other crime (cf Lifos 30424). [...] There is thus not sufficient evidence to conclude, in a forward-looking assessment, that individuals with a homosexual identity do not risk persecution because of their sexual orientation. In the Migration Court's opinion, it is evident that Article 534 - occasionally and currently - is applied in practice. A legislation such as this one is disproportionate and discriminatory, and when it affects individuals, it constitutes persecution.

The two Migration Courts made completely different assessments of the same country of origin information about LGBTIQ+ people in Lebanon, which resulted in opposite outcomes for the applicants. In both cases, the applicant was considered to have made their homosexual orientation credible. The same country of origin information was available at the Migration Agency and at the Migration Courts. According to the Migration Court in Stockholm, article 534 in the Lebanese Criminal Code criminalises “all sexual acts that violate the laws of nature”, as stated by the Ministry for Foreign Affairs' report *The Situation of LGBTQ People in Lebanon* [HBTQ-personers situation i Libanon], 2013-06-03, Lifos 30424, but even so, the court did not consider the applicant to be “at risk of persecution upon return to Lebanon” The Migration Court in Gothenburg instead held that the Ministry for Foreign Affairs' report showed that LGBTIQ+ people were being arrested and subjected to abuse by the police and security forces. The court also considered country of origin information from, among others, US State Department, Lifos 32045. According to the Migration Court in Gothenburg, there was not sufficient support of the finding that homosexuals did not risk persecution as the country of origin information showed that the Criminal Code was enforced in relation to homosexual acts. The court in Stockholm made the opposite finding; that the country of origin

information showed that the authorities did not apply the Criminal Code, why the applicant was not considered to be at risk of persecution. The judgments show how different courts, at the same time and the very same day, make different assessments of the situation for LGBTIQ+ people in a certain country. In one case, the situation is not considered to constitute persecution and the applicant is referred to seek protection from the same state authorities that criminalise their sexual orientation. Another Migration Court, on the same day, concluded that the claimant risked persecution because of the Criminal Code, which, according to that Migration Court, based on the same country of origin information, showed that LGBTIQ+ people are being persecuted. In one case, the claimant was given a negative decision and deported, and in the other, the claimant was granted refugee status and a residence permit.

Apart from Lebanon, Kenya is a country that is assessed differently by the Swedish migration authorities even though the same country of origin information is available in Lifos. One example is the following judgment from the Migration Court:

The Migration Court at the Administrative Court in Stockholm 2020-01-16. Case no. 5899

[The Migration Court finds] that X's invoked asylum claims regarding her sexual orientation are not sufficient to show that she risks persecution upon a return to the country of origin. The invoked country of origin information shows that sexual acts between men are criminalised, but does not state that this would be the case for women. However, it is evident from the document that homosexual women in Kenya experience prejudice and discrimination, but since no other individual and concrete circumstance have been brought forth, which imply that X has suffered persecution previously because of her sexual orientation, it does not appear credible that there is a threat against her in the country of origin. The Court, thus, finds, when conducting a forward-looking assessment, that what X has told is not sufficient to make it credible that she is at risk of persecution

in Kenya.

Neither the Swedish Migration Agency, nor the Migration Court, assesses that lesbians risk persecution in Kenya. The applicant was therefore denied asylum, even though her homosexual orientation was not questioned. In Lifos, there are a great number of country reports from among others ILGA and the Ministry for Foreign Affairs, which show that LGBTIQ+ people, including LGBTIQ+ women, are punished based on the criminalisation of "unnatural sexual acts".¹⁷⁰ The same country of origin information shows that mob justice is common, as well as honour-related violence and abuse of LGBTIQ+ women and lesbians. RFSL's asylum lawyer has represented and been in contact with both asylum-seeking lesbians and homosexual men from Kenya who have been granted refugee status based on the difficult situation for LGBTIQ+ people in the country, which obviously constituted persecution according to the Swedish migration authorities in those cases. The court rulings and decisions examined in this report show that applicants from Kenya who have made their SOGIESC credible according to the migration authorities, usually are granted refugee status. Nevertheless, there are other examples, besides the case cited above, where the applicant's homosexual orientation is not questioned, but where the situation for LGBTIQ+ people in Kenya is not considered serious enough in order for the applicant to be entitled to protection.¹⁷¹ That enforcement of criminalising legislation constitutes persecution of homosexuals was established by the CJEU long ago.¹⁷² The Migration Court's finding, i.e. that LGBTIQ+ people's situation in Kenya is not serious enough, is therefore incorrect and violates CJEU's case law. The extremely varying assessments of SOGIESC asylum cases from Kenya illustrate a lack of uniform assessments of the situation for LGBTIQ+ people in some countries. These assessments are crucial to the outcome of the case and thereby, to the applicant's life. The migration authorities' deportations of applicants, whose sexual orientation is undisputed, to countries where the enforcement

¹⁷⁰ Kenya: Human Rights, Democracy and the Rule of Law [Kenya - Mänskliga rättigheter, demokrati och rättsstatens principer: situationen per den 30 juni 2019], The Swedish Ministry for Foreign Affairs, 2019-12-18, Lifos 43900, State-Sponsored Homophobia 2019, Ramón Mendos, L., ILGA World, available at https://ilga.org/wp-content/uploads/2023/11/ILGA_State_Sponsored_Homophobia_2019.pdf.

¹⁷¹ The Migration Court at the Administrative Court in Stockholm, 2020-05-04, Case no. 883.

¹⁷² The CJEU's judgment the Joint cases C-199, C-200 and C-201/12 X,Y and Z v Minister voor Immigratie, Integratie en Asiel.

of criminalisation of same-sex relationships constitutes persecution, violate the Swedish Aliens Act, EU law and the UNHCR's guidelines.¹⁷³

Another example of non-uniform assessments of the situation for LGBTIQ+ people in a specific country concerns an applicant from Senegal who claimed to be at risk of persecution because of perceived homosexual orientation, since he was working for homosexuals' rights at a Senegalese LGBTIQ+ organisation. He had been physically abused and threatened by Muslim groups in the country, who had called him homosexual. The Migration Court did not question the man's asylum story, but wrote in its grounds for refusal that he had only reported "a few incidents" to the police, and therefore had not exhausted the access to state protection in the country of origin.¹⁷⁴ The way in which the court referred to the Senegalese police for protection from homophobic violence since the applicant was perceived to be homosexual and worked for homosexuals' rights, deviates from how state protection should be assessed in SOGIESC cases. To refer the applicant to protection from the same authorities that criminalise LGBTIQ+ people should usually not be considered as an option. Negative asylum decisions with reference to state protection in countries that criminalise LGBTIQ+ people were common until 2012, when the UNHCR's guidelines were issued, and later also the Swedish Migration Agency's position paper RS/015/2021, which specifically address this.¹⁷⁵ Among the court rulings and decisions examined in this study, there are many SOGIESC cases from Senegal where the migration authorities find the country of origin information to show that LGBTIQ+ people and especially homosexuals, are persecuted because of the criminalising legislation on sexual acts between men. If the applicant has made an actual or perceived homosexual orientation credible, they are generally granted refugee status. The above cited negative decision is therefore a clear exception from this case law.

The Swedish migration authorities also make

varying assessments of the situation in Ethiopia and reject many cases by holding that LGBTIQ+ people do not risk persecution there. In one case, the Migration Court in Luleå did not question the applicant's bisexual orientation, nor that criminalising legislation prescribes imprisonment for same-sex sexual acts in Ethiopia. However, the court concluded that there "are no known cases where people have been prosecuted because of sexual acts" and that "it is same-sex sexual acts, not the orientation itself, which is punishable". The applicant was therefore not considered to be at risk of persecution because of their sexual orientation.¹⁷⁶ A completely different assessment was made by the Migration Court in Stockholm in the following case:

The Migration Court at the Administrative Court in Stockholm 2019-06-26. Case no. 8113

The country of origin information [...] shows that the group LGBTIQ people is a very discriminated group in Ethiopia. For those few who are open about their sexual orientation, the situation is undoubtedly difficult. The group is considered to be especially exposed to violence. It is also stated that it is unlikely that homosexuals have access to state protection when they are discriminated against by civilians, the police, or other authorities. The Migration Court finds [...] that X does not have the opportunity to turn to the authorities in the country of origin for protection, as she belongs to a discriminated group in Ethiopia. Based on the country of origin information in the case, the Court finds that there is no reasonable and relevant access to internal displacement.

Neither in this case was the applicant's sexual orientation questioned, why the relevant question was if she had access to state protection in Ethiopia. According to the Court, neither state protection nor internal flight alternative was an option because of the difficult situation for LGBTIQ+ people in Ethiopia. Therefore, the woman was granted refugee status. In deci-

¹⁷³ Chapter 4 Section 1 of the Swedish Aliens Act, the CJEU's judgment the Joint cases C-199, C-200 and C-201/12 X,Y and Z v Minister voor Immigratie, Integratie en Asiel, the UNHCR's Guidelines No. 9, paras. 26-27 and 34.

¹⁷⁴ The Migration Agency 2019-09-24, Case no. 787. The Administrative Court in Stockholm 2019-10-25. Case no. 2184.

¹⁷⁵ The UNHCR's Guidelines No. 9, para. 27: "[criminal laws] can also hinder LGB persons from seeking and obtaining state protection", SR/015/2021, section. 4.2.3 "State protection: That, for example, homosexuality is prohibited in a country obviously affects the availability of state protection to LGBT people even if punishments are not enforced in practice. Laws that criminalise relations between people of the same sex are therefore normally indicate that state protection is not accessible for LGBT people."

¹⁷⁶ The Administrative Court in Luleå, 2020-02-07, Case no. 9551.

sions and court rulings studied in this report, there are many SOGIESC asylum cases from Ethiopia where refugee status is granted, while others are rejected. The Swedish migration authorities do not make uniform assessments of the situation for LGBTIQ+ people in many cases where LGBTIQ+ people are criminalised. For the applicants, the lack of uniform assessments leads to legal uncertainty. An unavoidable consequence of this is that LGBTIQ+ people in need of and entitled to protection are instead deported because of erroneous, inconsistent assessments of their access to state protection in the country of origin.

9.3 SOGIESC is invoked but not assessed

The final example of a clear lack of uniformity in the assessment of SOGIESC asylum cases is when SOGIESC is invoked but the asylum claim is not examined and assessed. The reasoning in these cases does not include any investigation or assessment of whether SOGIESC has been made credible and reliable. One example is the following:

The Migration Agency 2018-09-21. Case no. 9411

You have claimed that you were bullied because of your feminine appearance at school. You have also tried to conceal your sexual orientation in Kenya because of the social pressure, but you have still managed to have a relationship and meet like-minded people at clubs. It has not been brought forth that you have previously suffered persecution, neither by private individuals nor the authorities in the country. You have further stated that you have no contact with your relatives since the story about you was spread on Facebook, and that you think this is because of your sexual orientation. In support of this, you have submitted two stories about you by the magazine X and a screenshot from Facebook about a story written about you by the magazine X. The Migration Agency notes that the texts are written in Swedish, that it does not clearly follow from the submitted evidence that they have reached an audience in Kenya, and that it has not been established that you, because of these stories, would run an increased risk of persecution in Kenya. In sum, it has not been established you would be at risk of persecution in Kenya because of sexual orientation. Based on the above, the Migration Agency concludes that you have not made credible that you, upon a return to Kenya, risk persecution because of actual or perceived sexual orientation.

The Migration Agency first concludes that the applicant has talked about and therefore invoked, his homosexual orientation and his feminine gender

expression as reasons to why he risks persecution in Kenya. In its assessment, the Migration Agency account for what might constitute persecution according to commentaries of the Swedish Aliens Act and CJEU case law. The Migration Agency refers to extensive country of origin information and concludes that homosexuals are persecuted in Kenya. Thereafter, in the paragraph cited above, the applicant's story is summarised without any assessment being made of whether his sexual orientation or his feminine gender expression has been made credible and reliable. In the negative decision, the otherwise common assessment of whether the applicant has accounted for an inner process leading to a realisation of their sexual orientation, is absent. The often-re-occurring arguments of whether the applicant has accounted for thoughts, feelings and reflections are also absent from the decision. Nowhere in the decision is it stated whether the applicant has made his homosexual orientation credible, reliable and therefore probable. The only claim that the Migration Agency investigates is perceived homosexual orientation. The Migration Agency finds that the applicant "has not made credible that [he], upon a return to Kenya, risks persecution because of actual or perceived sexual orientation", without having examined, tried or assessed the actual invoked homosexual orientation and gender expression. The Migration Court rejected the appeal, briefly concluding that it agreed with the lower instance's assessment. The Court, thus, did neither examine nor assess whether the applicant had made his SOGIESC credible.

In another case, impediments to enforcement of an expulsion to Egypt were invoked, based on new circumstances. Severe mental illness was invoked, as a doctor assessed that the applicant suffered from acute psychosis with hallucinations and severe PTSD. The Migration Agency also made a written service note in the applicant's case file, stating that he had told the staff at the detention center that he was homosexual. The note about his claimed homosexual orientation was submitted in the case as a new assessment and impediments to enforcement. The Migration Agency decided not to grant a new investigation even though sexual orientation constitutes a new circumstance according to the Swedish Aliens Act. In the negative decision, the Migration Agency only assessed his health, without even mentioning the claimed homosexual orientation.

He was therefore refused a new trial and was deported to Egypt, without his homosexual orientation being examined, tried or assessed. It appears as though the Migration Agency simply accidentally “missed” assessed the man’s homosexual orientation, even though the Agency’s own staff had made a note that he had told the detention center staff that he was homosexual, and that the note was submitted as written evidence along with the doctor’s certificate about his mental health. The Migration Court did not appear to have noticed that homosexual orientation had been invoked and rejected the appeal.¹⁷⁷

There are examples of when the Swedish Migration Agency does not examine or assess SOGIESC asylum claims in a second asylum procedure. When a deportation order is subject for statutory limitation, four years after the decision gained legal force, the applicant can seek asylum again, and a new asylum procedure is initiated. All the previous and new asylum claims should be examined and assessed, regardless of whether or not they were assessed in the first procedure. The Migration Agency’s duty to investigate is not limited, nor less extensive in a second asylum procedure. Nevertheless, the court rulings and decisions examined in this study show that, all the more often, the Migration Agency erroneously neither examines nor assesses SOGIESC asylum claims in a second asylum procedure. RFSL’s asylum lawyer acted as legal representative and a public counsel in a case in 2020 regarding a young person from a country where LGBTIQ+ people are punished with execution. The case officer at the oral asylum interview initially said already at the beginning of the interview that the Migration Agency would not examine, assess or take a stand regarding the SOGIESC asylum claims, and referred to that the SOGIESC claims “already had been tried” in the first asylum procedure, where the then unaccompanied child’s homosexual orientation was not deemed credible. The Migration Agency, thus, erroneously stood by the assessment made leading to the now expired deportation order, even though a new asylum procedure had been initiated, within which the SOGIESC claims evidently should be investigated again, together with new claims. This is particularly the case since SOGIESC claims can be made credible and reliable in a new procedure by applying the new investigation

method that the Migration Agency issued in RS/015/2021, which was not in place when the boy first applied for asylum many years earlier. The case officer at the new asylum interview did not seem to be aware of that a new asylum procedure after the first negative decision has expired is not the same as a new assessment granted based on new circumstances that are invoked as impediments to enforcement of a valid expulsion order under Chapter 12 Section 19 of the Swedish Aliens Act. In such a new trial, only the new invoked circumstances are examined and assessed, and not asylum claims that were previously assessed in the original asylum application and procedure. In the case with the young boy who applied for asylum again, his SOGIESC asylum claims had also developed and his need for protection increased, as he no longer only claimed homosexual orientation, but also being an open LGBTIQ+ activist who had appeared in an internationally known LGBTIQ+ movie. He also now had a very visible female gender expression, which had already led to his countrymen in Sweden reacting by beating him up several times leading to hospitalisation and surgeries. He had received numerous death threats in person by countrymen in Sweden and also from people in his country of origin. Police reports regarding the homophobic assaults in Sweden, medical statements from doctors, medical journals and photos showing his severe injuries and surgeries after the homophobic violence, the many written death threats and a large amount of evidence showing his LGBTIQ+ activism and same sex relationships in Sweden were part of the written evidence. In this new asylum application, he invoked not only his homosexual orientation, but also his female gender expression, perceived homosexual orientation and his LGBTIQ activism. There were therefore new legal SOGIESC asylum grounds that did not exist at the time of the original asylum procedure when he was still a child, and that had never been examined. Despite this, the Migration Agency’s case officer’s initial decision to not examine neither the previous nor the new SOGIESC asylum claims, meant that the applicant’s right to have his asylum claims examined was not fulfilled. In this case, RFSL wrote an official letter to the Swedish Migration Agency’s Legal Affairs Department where the lawyer in the case, i.e. author of this report, explained the situation. 20 minutes after the emailed

¹⁷⁷ The Migration Agency Malmö, Decision 2020-03-09, Case no. 580, the Migration Court in Malmö, 2020-03-24, Case no. 1537.

letter, the case officer called the applicant and the lawyer for a second interview to examine the applicant's SOGIESC claims, after which he was granted asylum and refugee status. This is one of several examples of how what appears to be a pure lack of knowledge about the Swedish legislation among inexperienced case officers leads to incorrect legal assessments of SOGIESC asylum cases, erroneous negative decisions and deportations to countries that apply the death penalty to LGBTIQ+ people. An older case shows the same, legally incorrect assessment after an expulsion order had expired:

The Migration Court at the Administrative Court in Stockholm 2012-11-27. Case no. 6961

X applied for asylum [...] in 2006. His application was rejected by the Migration Agency. [...] in 2011, the expulsion order expired and X applied for residence and work permit once again. [...] In this application, he claimed to be homosexual and therefore at risk of persecution upon a return to Uganda. The Migration Agency has not investigated whether X's sexual orientation can be reason to grant international protection. The Migration Agency refers to an earlier assessment under Chapter 12 Section 19, where the Migration Court found that X had not provided a valid excuse for not having invoked his sexual orientation earlier. Since the previous deportation order has been subject for statutory limitation, this is now a new procedure. The rules in Chapter 12 Sections 18 and 19 should not be applied. The Migration Agency should therefore have tried whether X's sexual orientation can constitute grounds for asylum.

The Swedish Migration Agency had not assessed the SOGIESC asylum claims after the previous decision expired. The Migration Agency referred to the last negative decision, where the man was not considered to have a valid excuse for not having invoked his homosexual orientation earlier. The Migration Court reversed the legally negative decision, stating that this case concerned a new asylum procedure, why the invoked sexual orientation should have been examined and assessed. These kinds of legal errors appear to become more common today, which demonstrates the importance of a committed legal representative who can ensure the client's

right to have all their asylum claims, including all different SOGIESC claims, tried in a new asylum procedure. Failure to do so can lead to rejections on legally incorrect grounds, without the LGBTIQ+ person having had their asylum claims examined and assessed.

9.4 Analysis and conclusions

The decisions and court rulings examined in this study show that there is a lack of uniformity in Swedish SOGIESC asylum cases. Very different assessments are made of nearly identical asylum stories, with the same country of origin reports and the same written evidence. Often, the lack of a certain fact is considered to decrease the applicant's credibility regarding their SOGIESC asylum claims in one case, while at the same time, the presence of the same fact, in another case, is also considered to decrease the applicant's credibility regarding their SOGIESC claims. Both the presence and the lack of the same fact can thus put the applicant at a disadvantage in the credibility and reliability assessment of their SOGIESC asylum claims. A certain life experience sometimes leads to the applicant being considered non-credible regarding their SOGIESC asylum claims, while at the same time, the lack of the same life experience in other cases also leads to the applicant not being assessed as credible. The lack of uniformity of the Swedish migration authorities' assessments means that all facts, circumstances and personal life experiences risk being assessed as not credible and to the applicant's disadvantage in the asylum procedure. The consequence is an unpredictable and legally uncertain asylum procedure where some LGBTIQ+ applicants are granted asylum and refugee status, while others are refused and deported.

The requirements of how detailed a story has to be, varies. Based on the rejection grounds presented in this chapter, it can be concluded that detailed oral accounts where the applicants' personal experiences meet the migration authorities' requirements¹⁷⁸ in SOGIESC asylum cases, nevertheless risk being deemed too "vague". This shows a lack of uniformity in the assessments and that the discretion of individual case officers is big, regarding how detailed an account should

¹⁷⁸ See chapter 4 about the requirements established in case law regarding proving one's sexual orientation, gender identity and/or gender expression; according to the Migration Agency and the migration courts; the requirement of that an inner process has taken place with certain thoughts, feelings and reflections, and the requirement of being able to account for these verbally.

be even in cases when the personal story happens to meet the stereotyped expectations of what experiences LGBTIQ+ people according to the migration authorities, should have. Chapter 5.5 showed that credibility and reliability assessments based on subjective, stereotypical notions unavoidably risk leading to that LGBTIQ+ people who have a need for and a right to protection, instead are incorrectly given negative decisions and after that deported.

There are big differences in the assessment of the same circumstances and of the same written evidence. Different case officers at the Swedish Migration Agency take different measures as part of the same duty to investigate. In some cases, facial analyses are made, and Swedish embassies abroad are contacted to verify submitted written evidence. In other cases, the Migration Agency does not take any of these measures, and they instead merely conclude that the evidence has low evidential weight. No explanation is given of why some measures are taken and others not, regarding the same evidence in different asylum cases. It appears to be at the discretion of every individual case officer to decide whether and what measures should be taken regarding written evidence that can be of crucial importance to the outcome of the case.¹⁷⁹

Furthermore, this chapter has shown that the Swedish migration authorities make different interpretations of the same country of origin information. The assessments of the situation for LGBTIQ+ people in some countries vary greatly. In some cases, LGBTIQ+ people are considered to be at risk of persecution in a certain country, why the applicant is granted refugee status, while others from the same country are given negative decisions and deported. The migration authorities do not make uniform assessments of the situation for LGBTIQ+ people in several of the countries where LGBTIQ+ people are criminalised. For LGBTIQ+ applicants, the lack of uniform assessments results in great legal uncertainty, and LGBTIQ+ people in need of protection are deported because of incorrect assessments, holding that they can seek state protection in the country of origin. There are also rejection

grounds holding that the applicant – whose SOGIESC is not questioned – should turn to the very same state authorities in the country of origin who criminalise LGBTIQ+ people. This lack of uniform assessments of the situations of LGBTIQ+ people in certain countries has crucial impacts on the outcome of the case, and the applicant's life. To deport applicants, whose homosexual orientation is not questioned by the migration authorities, to countries where the enforcement of the Criminal Code against same-sex relations meets the definition of persecution, violates the Swedish Aliens Act, CJEU case law and the UNHCR's guidelines.¹⁸⁰

This chapter has also shown that sometimes SOGIESC asylum claims are invoked without being properly assessed by the Swedish migration authorities. In some cases, the migration authorities appear not to notice that SOGIESC asylum claims have been invoked. In other cases the Migration Agency incorrectly does not examine or assess SOGIESC asylum claims after a previous negative asylum decision has expired. When a negative decision and a deportation order is expired, the person can seek asylum again, in a new asylum procedure. All previous and all new asylum claims should be investigated and assessed, regardless of whether they have been tried in the previous procedure several years earlier. The Swedish Migration Agency's duty to investigate is not limited, nor less extensive, after the earlier decision has expired. Nevertheless, the cases and decisions examined in this report show that the Migration Agency, with increased frequency, erroneously "refuses" to investigate SOGIESC asylum claims after an earlier decision expires. This has resulted in several negative decisions, as well as deportation to countries where LGBTIQ+ people may be punished by imprisonment or death.

The reoccurring lack of uniformity in the Swedish migration authorities' investigations, assessments and decision-making regarding SOGIESC asylum cases means that fundamental principles of administrative law about predictability and coherence are not fulfilled.

¹⁷⁹ The Migration Agency's decision 2019-09-05, Case no. 8094, and a number of SOGIESC asylum cases where the applicant originates from Uganda and where RFSL's asylum lawyer has acted as legal representative, which have been examined in the research behind this report.

¹⁸⁰ Chapter 4 Section 1 of the Swedish Aliens Act, the CJEU's judgment the Joint cases C-199, C-200 and C-201/12 X, Y and Z v Minister voor Immigratie, Integratie en Asiel, the UNHCR's Guidelines No. 9 paras. 26-27 and 34.



10. How did we end up here? Reasons behind the legal development

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On the left:

A member of RFSL Ungdom wearing a “Newcomers Youth” sweatshirt, part of the organization’s clothing collection.

Photo: Arseny Selov & Andra Berciu

“To assess an applicant’s sexual orientation is mainly a question of credibility. The assessment must be carried out by examining [...] feelings and experiences of difference, stigma and shame, rather than focusing on sexual acts.”¹⁸¹

In the final two chapters, the reasons behind the legal development of the Swedish migration authorities’ assessments of SOGIESC asylum cases are analysed, and a number of recommendations are made to the Swedish migration authorities.

10.1 MIG 2013:25 and the UNHCR’s Guidelines No. 9

“To assess a person’s sexual orientation is mainly a question of credibility. The assessment must be carried out in an individual and respectful way, by examining the circumstances surrounding the person’s individual perception, feelings and experiences of difference, stigma, and shame, rather than focusing on sexual acts (cf MIG 2013:25). An important part of the assessment of whether an applicant has made their sexual orientation credible is the person’s inner process connected to such a realisation.”¹⁸²

This research study shows that the Swedish migration authorities have a number of requirements and expectations within their credibility and reliability assessments in SOGIESC asylum cases. Explicit requirements that are expressed in the grounds for rejection are that the applicant must have experienced an inner, emotional process leading to self-realisation about their SOGIESC, and that the applicant has an ability to account for this a very detailed and coherent way. Furthermore, the Swedish migration authorities express in their decisions a requirement that the applicant has experienced or at least is able to relate to and reflect upon feelings of difference, stigma and shame. The applicant is expected to have thought about risks and it is required that they are able to account for risk assessments that they are expected to have made in their country of origin. The more stigmatised and taboo LGBTIQ+ is in the country of origin, the more the applicant is expected to have reflected upon their own SOGIESC. The more difficult the situation is for LGBTIQ+ people in the country of origin, the more detailed the applicant’s account for their reflections about their own SOGIESC needs to be. Aside from these explicit requirements, there are

a number of implicit expectations that often are applied as requirements in practice, since they are of crucial importance to the credibility and reliability assessment. For example, applicants in SOGIESC asylum cases are expected to not have taken unnecessary risks, and to have made realistic, long-term future plans regarding how they intend to live as an LGBTIQ+ person. Examples of other common expectations are that the inner process which is required to have taken place, should have been problematic and included negative feelings towards the person’s own SOGIESC. LGBTIQ+ applicants are expected to be interested in, have knowledge of, and involve themselves in LGBTIQ+ organisations as well as research both such organisations and LGBTIQ+ legislation in the country of origin and in Sweden. In practice, it is also often a required of the applicant in a SOGIESC asylum case to have knowledge of, use and identify with the Western LGBTIQ+/SOGIESC terminology that the Swedish migration authorities apply.

To understand how these requirements and expectations have developed in Swedish SOGIESC asylum case law, it is necessary to examine the sources of law that the Swedish migration authorities refer to. These are, primarily a case by the Swedish Migration Court of Appeal, and its interpretation of the UNHCR’s guidelines. The Migration Court of Appeal has granted leave to appeal in a few cases that have concerned sexual orientation and gender identity as asylum claims. MIG 2013:25 is the first, and when the English version of this report is published, so far the only precedent where the Migration Court of Appeal has specifically assessed sexual orientation as a legal ground for protection. The Swedish Migration Agency and the Migration Courts refer to MIG 2013:25 when carrying out credibility and reliability assessments of SOGIESC asylum claims and when assessing if the applicant has made probable that they belong to the particular social group LGBTQ+ people. In MIG 2013:25, the Migration Court of Appeal appears to have intended to summarise the UNHCR’s Guidelines No. 9, issued

¹⁸¹ An example of a common phrase in decisions where the applicant is not considered to have proven their sexual orientation, gender identity and/or gender expression. This is a quote from the Migration Court 2019-03-13, Case no. 2762.

¹⁸² Yet another common phrase in the credibility and reliability assessment in a SOGIESC asylum case, the Migration Court 2020-06-18, Case no. 4896.

the year before its precedent, in 2012. In the years following the Migration Court of Appeal's precedent MIG 25:2013, the lower instances referred to this specific paragraph where the Migration Court of Appeal summarises the UNHCR's Guidelines No. 9. The Migration Court of Appeal has made the following short summary of the UNHCR's guidelines regarding the assessment of SOGIESC asylum claims:

MIG 2013:25. The Migration Court of Appeal. Case no. UM 3853-13

To assess an applicant's sexual background is mainly a matter of credibility. The assessment of credibility has to be carried out in an individual and respectful manner, by examining the circumstances regarding the applicant's personal perception, emotions and experiences of difference, stigma and shame, rather than focus on sexual activities. The applicant's own story is the main and often only source of evidence. Both general and specific questions that are phrased in a non-judgmental manner allow the applicant to explain their statements. Circumstances such as the applicant being married, divorced or having children do not mean they are not homosexual. It may be relevant to ask a few questions about the reason behind the marriage. If the applicant can give a coherent and reasonable explanation for the marriage and/or children, that part of the story should be accepted. It can also be useful to ask questions about the applicant's knowledge of homosexual contacts, groups and activities in the country of origin, such as meeting places for homosexuals.

After MIG 2013:25, a case law has developed in the lower instances, the Migration Agency and the Migration Courts, where one sentence in the Migration Court of Appeal's short summary of the UNHCR Guidelines No. 9 is quoted by the Migration Courts and the Migration Agency in their decisions: "The assessment of credibility has to be carried out in an individual and respectful manner, by examining the circumstances regarding the applicant's personal perception, emotions and experiences of difference, stigma and shame, rather than focus on sexual activities." This sentence is quoted in nearly all of the Migration Agency's decisions

and the Migration Courts' judgments in relation to the assessment of whether the applicant has made their sexual orientation, gender identity and/or gender expression credible and reliable.

10.2 Does the Migration Court of Appeal's interpretation align with UNHCR guidelines?

"The UNHCR does however describe that applicants may come from countries with stigmatisation, which, at some point of their life, may lead to the applicant struggling with their sexual orientation or gender identity, something that can give rise to a conflict with society, and, that this in turn, may lead to feelings of shame, stigmatisation or isolation. Thus, according to the UNHCR, it is a possible area of questioning, not a requirement to be credible as an LGBTIQ+ person."¹⁸³

This report shows that the Swedish migration authorities, in SOGIESC asylum cases, explicitly require that an inner process has taken place, which can be accounted for in great detail, and that the applicant has felt, or at least can reflect upon feelings of difference, stigma and shame. These requirements are clearly expressed in the written grounds for rejection, in the decisions and court rulings.¹⁸⁴ The Swedish Migration Court of Appeal's misleading summary of the UNHCR's guidelines No. 9, in its precedent MIG 2013:25 has, in practice, developed into explicit requirements in the credibility assessment of SOGIESC asylum claims. The lower instances apply what the UNHCR describes as possible areas to ask questions about as explicit requirements of life experiences and characteristics in the applicant, that must be accounted for in detail. However, the UNHCR's guidelines emphasise that "feelings and experiences of difference, stigma and shame" are areas that can be explored and asked about but that there is "no magic formula of questions to ask and no set of 'right' answers in response."¹⁸⁵ Therefore it can not be expected or required that certain experiences are part of each individual applicant's story. The UNHCR's guidelines suggest possible areas for questioning that may be useful to investigate sexual orientation, gender identity and gender expression as asylum claims. Nowhere in the extensive guidelines does the UNHCR imply that any specific themes must be asked about

¹⁸³ Fear and Shame. A Case Study of the Migration Courts' Assessments of LGBTIQI Asylum Cases [Fruktan och skam. En granskning av migrationsdomstolarnas bedömningar av HBTQI-asylärenden], 2016, Malmquist, V., p. 22.

¹⁸⁴ See chapter 4.

¹⁸⁵ The UNHCR's Guidelines No. 9, para. 63.

in the questioning or that some experiences always can be expected from the applicant, such as an inner emotional process of self-realisation. Instead, the UNHCR emphasises that there is no conclusive list of questions to ask, and no “right” answers that can be expected from the applicant.¹⁸⁶ The UNHCR’s guidelines emphasise that there are “no universal characteristics or qualities that typify LGBTI individuals any more than heterosexual individuals. Their life experiences can vary greatly even if they are from the same country.”¹⁸⁷ The requirements in Swedish migration authorities’ SOGIESC asylum case law, that the applicant must have experienced an inner process with specific thoughts and feelings, and the requirement that the applicant has an ability to account for the required experiences in a detailed way, clearly violate the UNHCR’s guidelines.

The Migration Court of Appeal’s precedent from 2013 has been criticised in Swedish jurisprudential research. A thorough legal analysis was made by Malmquist, V. in *Fear and Shame: A Case Study of the Migration Courts’ Assessments of LGBTIQ Asylum Cases*, in 2016. The research examined 100 judgements and showed that the Swedish Migration Courts systematically refer to and discuss feelings of shame, based on MIG 2013:25. The Migration Court of Appeal only refers to paragraph 62 in the UNHCR guidelines, and takes it out of context from the other paragraphs under the same heading. According to Malmquist, this is both misleading and an incorrect interpretation of the UNHCR’s Guidelines No. 9. Some Migration Courts refer directly to paragraph 62 in the same way as the Migration Court of Appeal does in MIG 2013:25. Many rejection grounds cite the Migration Court of Appeal’s misleading summary of paragraph 62 word by word. According to Malmquist, that means that a seemingly strict requirement is made; that the applicant must know and reflect upon these feelings [difference, stigma and shame], and particularly shame. Malmquist’s legal investigation shows that, according to the Migration Courts, the applicant is required to have experienced or at least be able to reflect upon feelings of shame. The investigation shows that this requirement lacks support in the UNHCR’s guidelines.¹⁸⁸ Malmquist’s conclusions are in line

with the conclusions made in this report about the requirements made in SOGIESC asylum cases, and that the requirements lack support in Swedish and international law.

According to the Swedish Migration Court of Appeal, in its precedent MIG 2013:25, sexual orientation is a “fundamental characteristic” which therefore entails a personal awareness of and feelings related to it. The court writes that it appears “remarkable” that the applicant in the case has made vague statements about their personal perception of and feelings related to the claimed homosexual orientation, since “the sexual orientation must be considered to be a fundamental trait of every individual”.¹⁸⁹ That a fundamental trait automatically would mean that the individual has specific perceptions and feelings about it, and an ability to account for them, can not be interpreted from in the UNHCR’s Guidelines No. 9. It appears more reasonable to imagine that if something is a fundamental trait, it is not preceded by any particular process with certain feelings, it simply is.

The assumptions, expectations and requirements in SOGIESC asylum cases that can be traced to the Migration Court of Appeal’s arguments and assumptions in MIG 2013:25, can not be found in the UNHCR’s Guidelines No. 9. They violate the UNHCR’s guidelines, which instead explicitly emphasise that there are no universal experiences or qualities that typify LGBTIQ+ people. Neither does the preparatory works of the Swedish Aliens Act state that specific perceptions or feelings, and an ability to account for these, can be expected or required from an applicant claiming SOGIESC as grounds for asylum. The Migration Court of Appeal does not motivate or explain its assumption that certain perceptions and feelings, as well as an ability to account for these, exist because SOGIESC is a “fundamental characteristic”, according to the court. Being an LGBTIQ+ person does not necessarily mean that one has any specific perceptions or feelings about it. The Migration Court of Appeal’s reasoning and assumptions have no bearing on reality, and lack support both in the UNHCR’s guidelines and the preparatory works

¹⁸⁶ The UNHCR’s Guidelines No. 9, para. 63.

¹⁸⁷ The UNHCR’s Guidelines No. 9, para. 60.ii.

¹⁸⁸ *Fear and Shame. A Case Study of the Migration Courts’ Assessments of LGBTIQ Asylum Cases* [Fruktan och skam. En granskning av migrationsdomstolarnas bedömningar av HBTQI-asylärenden], Malmquist, V., 2016, p. 21–22.

¹⁸⁹ MIG 2013:25. The Migration Court of Appeal. Case no. UM 3853-13

of the Swedish Aliens Act.

10.3 MIG 2013:25 is not suitable to provide legal guidance in SOGIESC asylum cases

Apart from the misleading summary of the UNHCR's guidelines, there are many other aspects of MIG 2013:25 that make it unsuitable to provide legal guidance on SOGIESC asylum cases, as it was intended to do. Several of the sources of law that the Migration Court of Appeal refers to are not only outdated, but cancelled and nullified. The Migration Court of Appeal refers to the Swedish Migration Agency's legal position paper RCI 03/2011, which described a 7-step method to examine and assess sexual orientation as grounds for asylum. RCI 03/2011 was however revoked in 2015 and replaced by SR 38/2015, which was later changed to RS/015/2021. Already in SR 38/2015 most of the central questions described in RCI 03/2011, were removed. One such question that was to be examined according to RCI 03/2011 was "how the applicant will manifest their affiliation to the group upon a return, and how others (private individuals and the public) will react to this behaviour". According to RCI 03/2011, a decisive question to be asked in SOGIESC asylum cases was how the applicant had previously lived in their country of origin, i.e. whether they had lived "openly"¹⁹⁰ or concealed their sexual orientation. A central issue was also how they lived in Sweden, whether they were "open" about or concealed their sexual orientation. The applicant's lifestyle and whether they have lived "openly" or "concealed" was crucial to the outcome of the asylum application.¹⁹¹ This section of RCI 03/2011 was criticised by RFSL and RFSL's asylum lawyer because of its focus on the lifestyle of the applicant. In practice, it meant

that if the applicant had previously concealed their sexual orientation, the asylum application could be refused on the grounds that nobody in the country of origin (yet) knew about the sexual orientation, and that there therefore was no risk of persecution. This led to refusals and deportations on the grounds that the applicant had previously concealed their SOGIESC, why they could continue to do so in order to avoid persecution. This reasoning, that the applicant could or should continue to conceal their SOGIESC, were textbook examples of unlawful discretion reasoning.¹⁹² The thesis and RFSL's report *The Refugee Status Determination Procedure Relating to Sexual Orientation: An Analysis of the Risk Assessment and Access to Protection in the Country of Origin* showed that discretion reasoning was systematically applied as a result of the contradictory statements of the Swedish Aliens Act's and the Migration Agency's legal position paper RCI 03/2011. This element in RCI 03/2011 was removed in the updated assessment method SR 38/2015 and discretion reasoning has been strictly prohibited in Swedish and international law since many years back.¹⁹³ Even so, the Swedish Migration Court of Appeal, in MIG 2013:25, quotes this revoked step in RCI 03/2011 and, in a detailed way, accounts for it as an important part of the assessment of SOGIESC asylum claims. The Migration Court of Appeal, thus, enables the use of unlawful discretion reasoning as a ground for rejection. In other words, if the applicant conceals their SOGIESC because of "social pressure", the asylum application is rejected.¹⁹⁴ MIG 2013:25 enables the application of rejection motivations in SOGIESC asylum cases that have been unlawful for two decades. In the precedent, MIG 2013:25, the guidelines of the Migration Agency, intended to

¹⁹⁰ The problematic concept of "living openly as a homosexual" was interpreted in case law as equal to "more or less regularly meeting other homosexuals", which became an indirect requirement for being granted asylum as an LGBTIQ person.

¹⁹¹ See the conclusions in the thesis and RFSL's asylum report with the same title: *The Refugee Status Determination Procedure Relating to Sexual Orientation: An Analysis of the Risk Assessment and Access to Protection in the Country of Origin* [Asylprövningen vid flyktingskap på grund av sexuell läggning. En analys av riskprövningen och möjligheten till skydd i hemlandet], Gröndahl, A., available at https://www.rfsl.se/dlp_document/asylprovningen-vid-flyktingskap-pa-grund-av-sexuell-laggning-en-analys-av-riskprovningen-och-mojligheten-till-skydd-i-hemlandet/.

¹⁹² Read more about discretion reasoning in chapter 7.1 of this report.

¹⁹³ The CJEU's judgment in the Joint cases C-199, C-200 and C-201/12 X,Y and Z v Minister voor Immigratie, Integratie en Asiel, para. 46, the UNHCR's Guidelines No. 9, paras. 12 and 31, the Migration Agency's Director-General of Legal Affairs' legal position paper RS/015/2021.

¹⁹⁴ According to step 6 in RCI 03/2011, it should be investigated why a person who said that they would "choose" to be discrete rather than "publically manifesting" their sexual orientation would do so. If the applicant said that they planned to conceal their sexual orientation because of "social pressure" from parents or society, refugee status would not be granted. "Social pressure" has long been criticised.

be used by its case officers, is given the status of an important source of law; a status that was never intended by the Migration Agency's Director-General of Legal Affairs'. The Migration Agency's internal legal guidelines are not binding on higher instances, such as the Migration Courts or the highest instance in migration law; the Migration Court of Appeal. For this reason, MIG 2013:25 has been criticised in jurisprudence for overthrowing the legal hierarchy in asylum law.¹⁹⁵

The lower instances apply MIG 2013:25 also in cases where the asylum claims are gender identity, gender expression and/or sex characteristics, even though MIG 2013:25 concerned a cis man's self-identified homosexual orientation. MIG 2013:25 has become precedent even in cases where gender identity and/or gender expression are the main or the only asylum claim/s. Regardless of whether the applicant's gender identity is man, woman, non-binary, whether it is a trans person, an intersex person and regardless of whether they are lesbian, bisexual, queer, pansexual and/or something else, the Swedish Migration Agency and the Migration Courts refer to MIG 2013:25 in all SOGIESC asylum cases. However, it is not necessarily appropriate to apply the same method to investigate, examine and assess different convention grounds which are independent of and different from each other. It is often problematic to apply models based on stereotypical notions about Western cis men on for example LBTIQ+ women and trans people whose self-identification and life experiences often differ from Western notions about homosexual cis men. The very small selection of specific brief sentences from the UNHCR's guidelines shows that the Migration Court of Appeal in MIG 2013:25 has chosen questions based on what in the court's opinion ought to be relevant questions to a homosexual cis man:

MIG 2013:25. The Migration Court of Appeal. Case no. UM 3853 13.

It can also be useful to ask questions about the applicant's knowledge of homosexual contacts, groups and activities in the country of origin, like, for example, meeting places for homosexuals.

The fact that the Migration Court of Appeal selects one sentence about homosexual men who visit public meeting places may be explained by that the assessment in MIG 2013:25 concerned a self-identified homosexual cis man. LBTIQ+ women are often confined to the home and, in many parts of the world, seldom have the freedom of movement that men more often have. Some GBTIQ+ men can move freely in public spheres and access "homosexual contacts, groups and activities in the country of origin, like, for example, meeting places for homosexuals", as the Migration Court of Appeal suggests can be asked about. However, women and trans people rarely have access to the same opportunities. Research shows that LBTQ+ women and intersex people's experiences and the type of persecution they may be subjected to differ from those of homosexual men.¹⁹⁶ The quote above is an example of how the Migration Court of Appeal selects questions that may be relevant to G(BTIQ)+ men's asylum stories but may be completely irrelevant and unsuitable for LBTIQ+ women and trans people, as they often lack such life experiences. This report has shown that LGBTIQ+ people whose personal experiences do not match the experiences that the Migration Court of Appeal, incorrectly, implies can be required according to the UNHCR, are found not credible. The study has shown that the knowledge about LGBTIQ+ organisations often is of great importance in the credibility assessment, and that LBTIQ+ women and others who lack knowledge about and are not involved in LGBTIQ+ organisations regularly are assessed as non-credible regarding SOGIESC.¹⁹⁷

In MIG 2013:25, the Migration Court of Appeal first presents its misleading and incorrect summary of the UNHCR's guidelines. The Migration Court of Appeal also revives and "elevates" a revoked, unlawful investigation method from a lower instance, and presents

¹⁹⁵ Fear and Shame. A Case Study of the Migration Courts' Assessments of LGBTIQ+ Asylum Cases [Fruktan och skam. En granskning av migrationsdomstolarnas bedömningar av HBTQI-asylärenden], Malmquist, V., 2016, p. 23, Law: Need for Protection and Credibility – Assessments in Asylum Cases [Migrationsrätt: skyddsbehov och trovärdighet – bedömning i asylärenden], Thorburn Stern, R., Wikström, H., Migration, p. 47.

¹⁹⁶ Queer? Prove it. Should the EU Create a Framework for the Credibility Assessment of Asylum Claims Based on Sexual Orientation and Gender Identity?, Gould, A., 2019, p. 51.

¹⁹⁷ See chapter 7.3 in this report.

its several steps as important in the assessment of SOGIESC asylum cases. It also enables unlawful discretion reasoning. Altogether, this makes MIG 2013:25 inappropriate to apply as legal guidance in SOGIESC asylum cases, as. Nevertheless, MIG 2013:25 is still in 2024 the only national precedent in SOGIESC asylum cases that the Swedish Migration Courts and the Swedish Migration Agency base their assessments on.

The assessment method in the Swedish Migration Agency's old and long ago revoked legal position paper RCI 03/2011 was launched as a response to the lack of legal guidance from the Migration Court of Appeal regarding the assessment of sexual orientation as an asylum claim. When the Migration Court of Appeal finally granted leave to appeal and for the first time assessed sexual orientation as a ground for asylum, the Migration Court of Appeal referred back to the lowest instance's investigative method in RCI 03/2011. However, this method was intended for the case officers of the authority, and was neither legally binding on the Migration Courts, nor on the highest instance, the Migration Court of Appeal. MIG 2013:25 overthrows the legal hierarchy in asylum law and revives an assessment method which has been revoked and nullified in national and international law, as it leads to discretion reasoning.

In summary, it can be concluded that MIG 2013:25 is not up to date, nor mirrors the CJEU's case law. The CJEU has, in several precedents that are legally binding on Sweden as an EU member state, clarified the EU member states' legal framework when assessing sexual orientation as an asylum claim. MIG 2013:25 only refers to the judgment in 2013, establishing what constitutes persecution based on "homosexual activities".¹⁹⁸ The CJEU has, however, in several complementary judgments established what measures are unlawful for member states when assessing SOGIESC asylum claims. The fact that all case law of the CJEU is binding on Sweden, is not reflected in MIG 2013:25. Furthermore, the CJEU's judgement from 2013 is the last one referred to out of all sources of law in MIG

2013:25, even after the national Migration Agency's position paper RCI 03/2011. It appears as if EU law was lower in the legal hierarchy than a national authority's internal guidelines for its employees. This might provide an explanation of the Migration Agency and the Migration Courts' general restrictiveness in applying and referring to the CJEU's judgments in SOGIESC asylum cases. If Sweden as an EU member state, and its national authorities, have the opinion that they do not have to follow the CJEU's case law, and in practice violate this case law, this is very problematic.¹⁹⁹ Not in a single one of RFSL's asylum lawyer's appealed negative decisions, has the Migration Court or the Migration Agency commented on the main argument of the appeal, namely that the reasoning in the negative decisions violate the CJEU's judgment on the 2 of December 2014 in the Joint cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, where the Court established that it is illegal to rely solely on stereotypical notions about homosexuals to conclude that the applicant is not credible regarding their sexual orientation. Advocate General E. Sharpston emphasised in her opinion, that a negative decision would violate the EU's Qualification Directive if it was solely based on the stereotypical notion that "because B is from a Muslim family and a country where homosexuality is not accepted he should be able to give details about his feelings and how he came to terms with his homosexuality."²⁰⁰ This report shows that the Swedish migration authorities' strict requirements of an inner process with detailed accounts for feelings, violate the CJEU's judgment December 2 2014 in the Joint cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, paras. 62-63, in the way that the Advocate General warned about many years ago.²⁰¹

10.4 The assessments violate the UNHCR's guidelines

"...the Migration Agency expects, in accordance with the UNHCR's guidelines, that you should be able to describe further your inner process when you became aware of your sexual orientation."²⁰²

"The UNHCR has [...] stated that, in the credibility assessment, emphasis should be put on whether the

¹⁹⁸ CJEU's judgement in the Joint cases C-199, C-200 and C-201/12 X,Y and Z v Minister voor Immigratie, Integratie en Asiel.

¹⁹⁹ See also chapter 10.9 of this report.

²⁰⁰ Sharpston, E., Opinion of 17 July 2014, A, B and C v Staatssecretaris voor Veiligheid en Justitie, C-148/13, C-149/13 and C-150/13, ECLI:EU:C:2014:2111, available at <https://curia.europa.eu/juris/document/document.jsf?docid=155164&doclang=en>

²⁰¹ For details, see chapter 10.9 of this report.

²⁰² The Migration Agency Administrative Unit 1, Stockholm. Decision 2019-10-07. Case no. 2130.

*applicant can describe themselves and their sexual orientation, and [...] explain how they came to that realisation [...] and account for thoughts and reflections regarding their sexual orientation.*²⁰³

In the previous chapter, it was concluded that the Migration Court of Appeal's precedent MIG 2013:25 appears inappropriate to apply as guidance for how to examine and assess SOGIESC asylum cases. An important reason for this is the selective, misleading summary of the UNHCR's guidelines. Below is an analysis of what consequences MIG 2013:25 has had for the lower instances' assessments of SOGIESC asylum cases. Three representative examples of reasoning leading to negative decisions in different SOGIESC asylum cases from the Swedish migration authorities are presented below:

The Migration Agency Administrative Procedural Unit 1 Stockholm. Decision 2019-10-07. Case no. 2130

However, the Migration Agency emphasises that it is not the Migration Agency's task to establish your sexual orientation, but to assess whether you can make your affiliation to a group that risks persecution because of actual or attributed sexual orientation probable. The UNHCR has [...] developed guidelines for the assessment of asylum claims related to sexual orientation. The UNHCR holds that, in order to assess an applicant's sexual orientation, the case officer should focus on the applicant's personal perception, feelings and experiences of difference, stigma and shame.

The Migration Agency writes in its decision that the UNHCR states that the case officer "should focus on the applicant's personal perception, feelings and experiences of difference, stigma and shame". This is incorrect. The UNHCR states that exploring elements around these themes are usually more likely to help the decision-maker than focusing on sexual practices.²⁰⁴ Nowhere in the UNHCR's guidelines is it written that case officers "should" focus on these specific themes and experiences of these feelings. Thereafter, the Migration Agency writes in the negative decisions:

The Migration Agency Administrative Procedural Unit 1 Stockholm. Decision 2019-10-07. Case no. 2130

[The Migration Agency finds] that your description of your sexual orientation has been vague and lacking in detail. Furthermore, the Migration Agency finds that you, based on that you have claimed to fear for your life upon a return to Ghana because of your sexual orientation, should be able to account to a greater extent for your feelings regarding your sexual orientation and what it was like to deviate from the norm as well as the process leading up to you accepting your sexual orientation. [...] Taking this into account, as well as your statements on how stigmatised it is to be attracted to a person of the same sex in Ghana, the Migration Agency expects, in accordance with the UNHCR's guidelines, that you should be able to describe further your inner process when you became aware of your sexual orientation.

The Migration Agency writes that "in accordance with the UNHCR's guidelines", they "expect" the asylum-seeking man to be able to talk more about the inner process that they erroneously assume that he must have experienced, considering how stigmatised homosexuality is in Ghana. This approach is also incorrect. The Migration Agency's statement and conclusion has no support whatsoever in the UNHCR's guidelines. Nowhere in the UNHCR's guidelines is it established that it can be "expected" of LGBTIQ+ applicants to have experienced an inner process, or that they should be able to account in detail for one. The Migration Agency's claim, that an inner process can be expected and is required "in accordance to the UNHCR's guidelines", is an incorrect interpretation that violates the UNHCR's guidelines. Instead, the guidelines emphasise that there are no universal experiences and characteristics of LGBTIQ+ people,²⁰⁵ and thereby, no such experiences or characteristics should be investigated or required of the applicant to describe. The Migration Agency refers to "statements" in the UNHCR's guidelines that do not exist, and therefore makes an assessment and a conclusion that lacks support in the guidelines. This kind of reasoning is systematic in Swedish SOGIESC asylum cases and represents the vast majority of grounds for rejection in the decisions and court rulings examined in this study. The Migration Agency makes a similar

²⁰³ The Migration Court at the Administrative Court in Stockholm, 2020-02-24. Case no. UM 6879.

²⁰⁴ UNHCR Guidelines No. 9, para. 62

²⁰⁵ UNHCR Guidelines No. 9, para. 60.ii

misinterpretation of the guidelines in another case:

The Migration Court at the Administrative Court in Stockholm 2020-02-24. Case no. UM 6879

The UNHCR has, in its guidelines, stated that, in the credibility assessment, emphasis should be put on whether the applicant can describe themselves and their sexual orientation and how the sexual orientation has affected their life, explain how they came to that realisation, as well as account for thoughts and reflections regarding their sexual orientation in relation to the situation in the country of origin, family relations and thoughts about the future (UNHCR, "Guidelines on International Protection No. 9", p. 15-17).

The Migration Court writes that the UNHCR states that the credibility assessment should focus on "whether the applicant can describe themselves and their sexual orientation and how the sexual orientation has affected their life, explain how they came to that realisation, as well as account for thoughts and reflections regarding their sexual orientation in relation to the situation in the country of origin". The statements referred to by the Migration Court refers to statements appear to be made-up. Nowhere on the pages referred to, nor anywhere else in the guidelines, does the UNHCR state that the credibility assessment should focus on whether the applicant can describe themselves. Nowhere in the guidelines is it established that the applicant can be expected to have experienced, and be able to explain, "how they came to [the] realisation" of their sexual orientation. Nowhere does the UNHCR state that the credibility assessment should emphasise if the applicant can "account for thoughts and reflections regarding the sexual orientation in relation to the situation in the country of origin".

The sentences that the Migration Court claims to cite can not be found anywhere in the UNHCR's guidelines. The Migration Court refers to statements in the UNHCR's guidelines that do not exist. The Migration Court's claim of how the credibility assessment should be made "in accordance with the UNHCR's guidelines" does not have support in the guidelines. Nevertheless, these unfounded statements – which violate the UNHCR's guideli-

nes – are applied to draw the conclusion that applicants, "in accordance with the UNHCR's guidelines" have not made their sexual orientation credible. In the above cited case from the Migration Court, the applicant was denied asylum and deported to Iraq, where LGBTIQ+ persons can be punished by death.²⁰⁶ In a third example, the Migration Court writes the following:

The Migration Court at the Administrative Court in Stockholm 2020-05-06. Case no. 584

According to the guidelines, credibility assessments should be carried out individually and with caution in cases like these. The investigation should focus on factors related to the applicant's personal perceptions, feelings and experiences of difference, stigma and shame. Relevant themes to touch upon include how the applicant identifies themselves, their childhood and family relationships, the realisation of their sexual orientation, the feeling of not conforming to society's expectations, as well as thoughts and wishes about romantic relationships and/or sexual relations. Questions can also be asked about the claimant's knowledge of meeting places, organisations for LGBTIQ+ people in the country of origin, and the applicant's thoughts and feelings regarding their sexuality and religious affiliation (see the UNHCR's Guidelines paras. 62-63).

Before assessing the applicant's credibility and reliability, the Migration Court states that the investigation, in accordance with the UNHCR's guidelines, should focus on the applicant's "personal perceptions, feelings and experiences of difference, stigma and shame". The Court refers to the guidelines in a misleading way that implies that experiences of difference, stigma and shame, according to the guidelines, are requirements in the credibility assessment. This is once again incorrect. The UNHCR's guidelines state that these are possible themes of questioning, which may be brought up in the asylum procedure.²⁰⁷ The Migration Court writes that relevant themes to "touch upon" include how the applicant identifies themselves, the realisation of their sexual orientation and the feeling of non-conformity. The UNHCR's guidelines do not state that these are questions

²⁰⁶ State-Sponsored Homophobia 2020: Global Legislation Overview Update, Ramon Mendos, L., Botha, K., Carrano Lelis, R., López de la Peña, E., Savelev, I., Tan, D., ILGA World, p. 131, available at https://ilga.org/wp-content/uploads/2023/11/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf

²⁰⁷ The UNHCR's Guidelines No. 9, para. 62.

and themes that should be discussed and asked about, but that they are areas of questioning that may be useful, but that it is important to remember that there is “no magic formula of questions to ask and no set of “right” answers in response” that can be expected.²⁰⁸ In the same way as in the decision cited above, the Migration Agency and the Migration Courts present the UNHCR’s suggestions for possible themes of questioning as necessary questions about experiences that the applicant can be “expected” to have. Such an interpretation and such an application of the guidelines is incorrect and lacks support in as well as violates the UNHCR’s guidelines, which emphasise that there are no universal experiences in LGBTIQ+ people.²⁰⁹

UNHCR’s Guidelines No. 9 para. 60.ii:

Interviewers and decision makers need to maintain an objective approach so that they do not reach conclusions based on stereotypical, inaccurate or inappropriate perceptions of LGBTI individuals. The presence or absence of certain stereotypical behaviours or appearances should not be relied upon to conclude that an applicant possesses or does not possess a given sexual orientation or gender identity. There are no universal characteristics or qualities that typify LGBTI individuals any more than heterosexual individuals. Their life experiences can vary greatly even if they are from the same country.

The three negative decisions quoted above are representative of how the absolute majority of rejection grounds are phrased in Swedish SOGIESC asylum cases. The Migration Court of Appeal’s summary of the UNHCR’s guidelines is misleading and give an incorrect impression of the guidelines. The lower instances’ referrals to, interpretation and application of the guidelines become even more misleading and incorrect. The Migration Courts and the Migration Agency explicitly require that an inner process has taken place; that the applicant has felt or at least can reflect upon feelings of difference, stigma and shame. The migration authorities refer to the UNHCR’s guidelines and state, incorrectly, that these establish that the credibility assessment should focus on investigating whether these experiences have taken place and can be described in detail by the applicant. The migration authorities’ assessments lack support in, and violates, the UNHCR’s guidelines, as the UNHCR explicitly emphasise that there are no universal experiences that typify

LGBTIQ+ people. Therefore, such experiences can not and should not be investigated and required, as there is no formula of questions to ask or right answers to expect.²¹⁰

UNHCR’s Guidelines No. 9, para. 63:

Both open-ended and specific questions that are crafted in a non-judgmental manner may allow the applicant to explain his or her claim in a non-confrontational way. Developing a list of questions in preparation of the interview may be helpful, however, it is important to bear in mind that there is no magic formula of questions to ask and no set of “right” answers in response.

Nowhere in the guidelines is it even implied that an inner process with feelings of difference, stigma and shame, and an ability to account in detail for these, would be a universal experience shared by all LGBTIQ+ people. Nowhere in the guidelines is it therefore implied that the migration authorities can or should investigate such experiences and abilities in the way that Swedish migration authorities systematically describe in their negative decisions. This report has provided a comprehensive analysis of how the migration authorities’ requirements and expectations are enforced in practice and lead to negative decisions in SOGIESC asylum cases. Noting how the credibility assessments are carried out, i.e. through misinterpretations of the UNHCR’s guidelines, it appears obvious that LGBTIQ+ people entitled to international protection, are refused asylum if and when they do not fulfil the Swedish migration authorities’ incorrect requirements of specific life experiences and abilities, within the credibility assessments.

10.5 Is the position paper RS/015/2021 applied adequately?

This chapter examines whether the legal guideline, the Swedish Migration Agency’s position paper, RS/015/2021 is applied in correctly. RS/015/2021 is issued by the Migration Agency’s Director-General of Legal Affairs and should be applied in the assessment of cases where actual or perceived sexual orientation,

²⁰⁸ The UNHCR’s Guidelines No. 9, para. 62.

²⁰⁹ The UNHCR’s Guidelines No. 9, para. 62.ii.

²¹⁰ The UNHCR’s Guidelines No. 9, para. 63.

gender identity and/or gender expression are the claimed grounds for asylum, i. e. SOGIESC asylum cases. RS/015/2021 is not binding for other instances than the Swedish Migration Agency. The Migration Agency's interpretation and application of RS/015/2021 is however crucial to the material that the Migration Courts considers when the Migration Agency's negative asylum decisions are appealed. In that way, RS/015/2021 very much influences the material which the higher instance will examine and assess, such as protocols from the asylum interviews and the Migration Agency's decision. This report shows that those experiences that the migration authorities explicitly write are "reasonable to expect" from LGBTIQ+ people are, among other things, an inner process leading to self-realisation. This inner process should be accounted for in detail, and the applicant should have felt or at least be able to reflect upon feelings of difference, stigma and shame. The more stigmatised LGBTIQ+ is in the country of origin, the more the applicant is expected to have reflected upon, and be able to talk about, their own SOGIESC.²¹¹ RS/015/2021 generally states that when examining an applicant's affiliation to a certain group because of sexual orientation, gender identity or gender expression, it is common that the applicant's oral account is the only evidence available. The Director-General of Legal Affairs emphasises that the approach to sexual orientation and gender varies greatly between cultures, and that terms used in Western countries may lack equivalent terms in the applicant's country of origin. The Director-General of Legal Affairs also emphasises, referring to the preparatory works of the Swedish Aliens Act, that it can be difficult to talk about things connected to sexual orientation and gender identity, and that the asylum interviews must be carried out taking into account that it can be difficult for the applicant to describe their experiences, especially in front of state officials.²¹²

Regarding relevant themes in the assessment, the Director-General of Legal Affairs states in RS/015/2021 that the applicant should be given the opportunity to talk about their experiences and their need for protection. Moreover, the Director-General states that themes described in the UNHCR's guidelines regarding the assess-

ments of claims of persecution based on sexual orientation or gender identity can function as a starting point, but stresses that it is "important to remember that experiences and feelings about one's sexual orientation or identity are very individual and that there are no right or wrong answers to the questions." It is stated that how a person describes themselves is a starting point, but that this may be influenced by the applicant's social or cultural background, gender, ethnicity or age. Furthermore, the position paper holds that some applicants might feel ashamed of their sexual orientation or gender identity, and that this in turn may cause them to not identify as, for example, homosexuals or trans people. According to RS/015/2021, applicants in some cases may describe having experienced a feeling of being different at a young age, and that that this in turn may have led to feelings of stigmatisation, and that negative attitudes from other people may lead to feelings of shame and isolation. It is stated that "questions about the applicant's childhood may be asked" and that "questions about when the applicant became aware of their affiliation to a vulnerable group may also be asked".²¹³

The Director-General, thus, describes possible questions about different themes that may, but do not have to (not even "should"), be asked during the asylum procedure. Nowhere in RS/015/2021 is it established that questions about an inner process leading to a self-realisation should be asked during the interview. Nowhere in the legal guideline is it written that it can be expected, or even required, that the applicant has experienced an inner process leading to a self-realisation of SOGIESC. Nowhere in RS/015/2021 is it written that the applicant has to be able to account for such a process. Nor is it implied that an inner process is required to have taken place, at all. Furthermore, it is not stated in RS/015/2021 that an oral account of such an inner process must describe reflections about risks or risk assessments, or specific thoughts and feelings as part of an expected realisation of the SOGIESC, in order to make the SOGIESC credible. Instead, the Director-General of Legal Affairs emphasises that the perspective on sexuality and gender differs greatly between different cultures, that terms used in Sweden

²¹¹ See chapter 4.4 in this report.

²¹² RS/015/2021, section 4.1.2.

²¹³ RS/015/2021, section 4.1.3.

can lack equivalents in the applicant's country of origin, and that the assessment must be carried out considering that it often can be very difficult for applicants to talk about their experiences and identities, especially with state officials. The Director-General of Legal Affairs emphasises the following:

RS/015/2021, Section 4.1.4 Assessment

The experiences of people who belong to the group [LGBTIQ+ people] in this guideline can be very different depending on what country a person comes from, and what environment they have lived in. Patriarchal structures in society may, of course, mean that the situation for a homosexual man can look very different compared to the situation of a homosexual woman, due to expectations on how men and women are expected to live.

The Director-General of Legal Affairs emphasise that the themes mentioned are examples of areas of questioning that may be discussed during the interview, but that every "person's thoughts on and feelings about these themes are very individual, and there are no right answers regarding what indicates affiliation to the group or not, but an individual assessment must be made in each case." The Director-General of Legal Affairs states that the individual experiences of applicants, as previously mentioned, can vary greatly because of different factors, such as what country and what environment they have lived in. RS/015/2021 refers to the UNHCR's guidelines and emphasises the importance of an individual assessment that takes into consideration that the applicant's experiences are highly individual and that there are no right or wrong answers. To return to the question asked in the heading of this section of this chapter, the following example is cited from a motivation for rejection in a negative decision in a SOGIESC asylum case:

The Migration Agency Gothenburg. Decision 2019-01-21. Case no. 5777

Noting how you have described the risks connected to being homosexual in Afghanistan, it is reasonable to expect more concrete and personal statements on your thoughts and feelings regarding how you became aware of your sexual orientation. In the absence of such reflections, the statements appear general, vague and incoherent. The story does not appear self-experienced.

The Migration Agency writes that it is "reasonable to expect" more concrete and personal statements on the applicant's thoughts and feelings

as part of the inner process of self-awareness, which the Migration Agency requires has taken place. No explanation or motivation is provided as to why the Migration Agency finds it reasonable to expect that an inner process has taken place, and that the applicant would have the ability to account for thoughts and feelings regarding their sexual orientation. Such requirements of elaborative and detailed descriptions of reflections, thoughts and feelings regarding an awareness of a person's SOGIESC can not be found in RS/015/2021. There are no sentences indicating that all LGBTIQ+ people can be expected to have a universal experience of an inner process leading to self-realisation, nor an ability to account for deep reflections, thoughts and feelings regarding such a process. On the contrary, RS/015/2021 emphasises that every person's experiences are highly individual and that there are no right or wrong answers to the questions. Nowhere in RS/015/2021 is it held that it can be expected nor that it is "reasonable to require" that all LGBTIQ+ people have experienced an inner process leading to a realisation, or that an account of such a process should describe specific reflections, thoughts and feelings in order for SOGIESC to be made credible.

The requirements explicitly written by the Migration Agency in its negative decisions, i.e. that LGBTIQ+ people should have experienced an inner process leading to a realisation and that they have the ability to describe these thoughts and feelings in great detail, lacks support in RS/015/2021. The requirements violate the General-Director of Legal Affairs' instructions in the position paper, that there are no right answers to the questions. The Migration Agency's starting point and assumption in SOGIESC asylum cases, that the LGBTIQ+ applicants always have certain experiences and characteristics, leads to a situation where the lack of these experiences and an ability to account for them in detail, inevitably means that the applicant's answers in the asylum interview will be "wrong". The absence of an inner process and/or the experience of feelings of difference, stigma and shame, and/or the lack of an ability to describe these experiences in a specific way, are the "wrong answers" to the questions asked in the asylum interview. The "wrong answers" and inability to describe the required life experiences then become grounds for refusal, later expressed in the written negative decisions. Applicants

who answer that they have not experienced an inner process, or that they have only had positive emotions towards their SOGIESC, have the “wrong” experiences based on the requirement that an inner process with feelings of being different, stigma and shame should have taken place. LGBTIQ+ people who have not experienced an inner process leading to a realisation, or who have not experienced difference, stigma and shame, or who can not reflect on these feelings in detail, are found not credible regarding their SOGIESC. This violates the Director-General of Legal Affairs’ statement that every person’s thoughts and feelings regarding the themes mentioned in the legal guideline are highly individual, and that there are no right answers that indicates affiliation to the group. The themes mentioned by the UNHCR and the Director-General of Legal Affairs are in practice used as a questionnaire where the right answers have to be worded in the right way, and will form the basis of a negative decision when the requirements are not fulfilled.

The requirements that the Migration Agency explicitly writes in its negative decision are not compatible with the legal guideline RS/015/2021. Thus, the legal guideline is not applied correctly. The requirements violate the Director-General of Legal Affairs’ statement that every person’s thought and feeling regarding the possible areas of questioning are highly individual, and that there are no right or wrong answers. An asylum procedure that already at the starting point requires certain pre-determined life experiences and abilities from the asylum-seeker, can not be considered an individual assessment taking into consideration individual and personal circumstances, experiences and abilities. The requirements also violate the UNHCR’s guidelines, they lack support in the preparatory works of the Swedish Aliens Act, and violate the right to an individual assessment in asylum law.

10.6 The DSSH model and its starting points

The Swedish Migration Agency applies a speci-

fic model in SOGIESC asylum cases, DSSH, an acronym for Difference, Stigma, Shame, Harm. The DSSH model was developed by Dr. S. Chelvan, a practising barrister in the U.K. The DSSH model was presented in 2011, with aiming to shift focus from discretion reasoning and inappropriate, intrusive questions focusing on sexual acts, to instead focus more on the applicant’s inner, such as their feelings. Its purpose was to provide “a positive (not negative) determinative tool, to establish sexual or gender identity (or expression) in a humane manner, with the voice of the person seeking asylum being the only non-corroborated source necessary to ‘prove’ actual or imputed identity”²¹⁴. The starting points are that these four themes; difference, stigma, shame and harm, can be applied in and facilitate the investigation of SOGIESC asylum claims. Chelvan describes these as “basic characteristics or elements that are likely to be common” among LGBTIQ+ applicants, “while all ‘journeys’ are different”²¹⁵. “Difference” is according to the model related to that “all lesbian, gay, bisexual and trans persons live their life in heteronormative societies (where being straight and identifying with one’s biological sex is the norm). Therefore the journey usually starts by discovering that an individual is, in some way, different.”²¹⁶ According to the model, “having identified ‘difference’ leads to the recognition and experience of stigma. Gay and trans people suffer from or recognise the stigma attached to their difference, as they do not conform to the social, cultural and religious norms of their host country.”²¹⁷ Stigma is according to DSSH connected to the applicant’s non-conformity and society’s intolerance or non-acceptance of non-heteronormative behaviours and identities. Furthermore, according to the model, “Shame is a natural consequence of stigma. The disapproval and other negative messages of society are inevitably internalised, and thus lead to a feeling that the difference of the person, coupled with stigma, is something wrong, which needs to be changed or at least hidden. In some cases, this internalisation process is so strong that it leads to explicitly homophobic attitudes and beha-

²¹⁴ The Emotional Journey and the DSSH model: a positive tool for credibility assessment, Chelvan, S., abstract for the SOGICA conference 7-9 July 2020, p. 4, available at http://www.sogica.org/wp-content/uploads/2020/07/SOGICA-conference-abstracts_v6.pdf

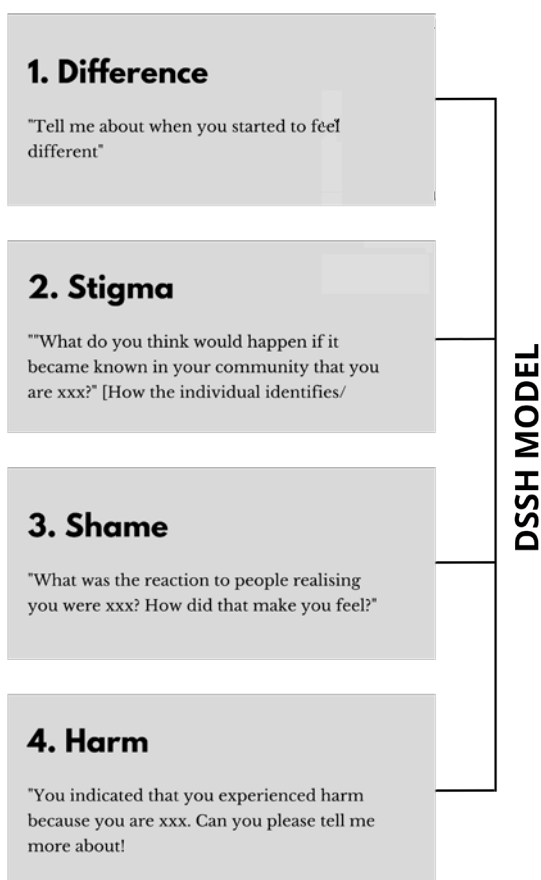
²¹⁵ Credibility Assessment in Asylum Procedures: A Multidisciplinary Training Manual, Volume 2, 2015, Gyulai, G. (ed.), Singer, D., Chelvan, S., Given-Wilson, Z., p. 77, available at: <https://helsinki.hu/wp-content/uploads/CREDO-training-manual-2nd-volume-online-final.pdf>

²¹⁶ Ibid.

²¹⁷ Ibid. p. 81f.

viour. The feeling of shame does not need to reach the level of severe mental anguish and suffering. It is a natural consequence of stigma, that as a human being, they will then experience shame.”²¹⁸

According to the model, questions can be asked about these experiences, how the person realised that they were different, how, or by whom, the person was stigmatised,



questions about feelings of shame and strategies to conceal, or being discrete about, their sexual orientation or gender identity. According to Chelvan, the model is based “not based on ‘the presence or absence of certain stereotypical behaviours or appearance’ to conclude, or disprove, a claim, but is designed to address broad themes in order for the applicant to tell their own narrative, in their own words.”²¹⁹ According to Chelvan, the “model is based on an emotional journey of the Queer Refugee”, and by an “exploration of these four broad categories the decision-maker, and more importantly the Queer Refugee, is able to hang the individual emotional journey leading to the refugee claim. This model requires the examination of the introspective individual experience, rather than the examination of the ‘overt’, a question which reinforces the narrative of difference.”²²⁰ The image below illustrates examples of “trigger questions”, that the DSSH model relies on.²²¹

The UNHCR’s guidelines refer to three of the DSSH model’s themes as possible areas to ask about.²²² The Swedish Migration Court of Appeal, in turn, selects this one sentence and takes it out of its context in the precedent MIG 2013:25, without referring to all the many other things that the UNHCR guidelines state about how to conduct the asylum investigation. In MIG 2013:25 it is for example not mentioned that the UNHCR emphasises that there is no questionnaire, no “magic formula of questions to ask and no set of ‘right’ answers in response”, and that “interviewers and decision makers need to maintain an objective approach so that they do not reach conclusions based on stereotypical, inaccurate or inappropriate perceptions of LGBTI individuals”. The Migration Court of Appeal does not mention in MIG 2013:25 that the UNHCR also explicitly emphasise that “are no universal characteristics or qualities that typify LGBTI individuals any more than heterosexual individuals. Their life experiences can

²¹⁸ Ibid. p. 80.

²¹⁹ The Emotional Journey and the DSSH model: a positive tool for credibility assessment, abstract for the SOGICA conference 7-9 July 2020, Chelvan, S., p. 4, http://www.sogica.org/wp-content/uploads/2020/07/SOGICA-conference_abstracts_v6.pdf

²²⁰ The Emotional Journey and the DSSH model: a positive tool for credibility assessment, abstract for the SOGICA conference 7-9 July 2020, Chelvan, S., p. 4, http://www.sogica.org/wp-content/uploads/2020/07/SOGICA-conference_abstracts_v6.pdf

²²¹ The image is from the article Assessing the Refugee Claims of LGBTI People: is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?, Dawson J., Gerber, P., p. 4.

²²² The UNHCR’s Guidelines No. 9, para. 62: “[...] Exploring elements around the applicant’s personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision-maker ascertain the applicant’s sexual orientation or gender identity, rather than a focus on sexual practices.”

vary greatly even if they are from the same country.”²²³ The application of the DSSH model and the Swedish Migration Court of Appeal’s unfortunate, misleading and very brief summary of the extensive UNHCR’s guidelines has led to that these themes; difference, stigma and shame, suggested as possible themes to ask about, are instead applied as strict requirements by the Swedish migration authorities: the Swedish Migration Agency and the Migration Courts explicitly require that the applicant has experienced an inner, emotional process leading to a self-realisation of the claimed SOGIESC, and that they have felt or at least can reflect upon feelings of difference, stigma and shame. LGBTIQ+ people who do not have these specific life experiences, or who do not have an ability to verbally describe them in a detailed way, are assessed as non-credible regarding their claimed SOGIESC. They run a great risk of being refused asylum and deported, despite having a need for and the right to international protection.

10.7 Criticism of the DSSH model

When the original Swedish edition of this report was first published in 2020, it identified a number of issues with the DSSH model. Since then, the model has been further analysed by other researchers and lawyers, and its potential problems have been discussed several times in international research in the last few years.²²⁴ This English edition of the original report, which was finalised in 2024, will therefore attempt to summarise the issues identified in the original report in Swedish from 2020, and other relevant research published since then. The model’s starting point is the idea that difference, stigma, shame and harm are common themes in LGBTIQ+ people’s stories globally, that all LGBTIQ+ people have experienced an emotional journey, even if “all ‘journeys’ are different.”²²⁵ An expectation that “all” LGBTIQ+ people globally have a universally common

experience of an inner, emotional journey – even if the journeys are different – is problematic, because it is simply not true. Not every individual who risks persecution because of – “real” or perceived – SOGIESC, has experienced an emotional journey of self-awareness. The model appears to suggest that all LGBTIQ+ people have experienced and are able to – if given the right conditions – account for an inner, emotional journey leading to a self-realisation. The model is presented as being based not on the ‘presence or absence of certain stereotypical behaviours or appearance’ to conclude, or disprove, a claim, but is designed to address broad themes in order for the applicant to tell their own narrative, in their own words.”²²⁶ However, even if the themes are claimed to be “broad”, they are still specific themes suggested that case officers ask about in asylum interviews, after which the answers are assessed as the basis of the asylum decision. Especially together with the expectation expressed in the presentation of the model; that all LGBTIQ+ people have experienced emotional journeys, this is still unavoidably in itself based on the stereotypical notion that there are universally common experiences among LGBTIQ+ people. This report has shown how the Swedish Migration Agency and the Migration Courts apply this expectation as a strict requirement of having experienced an inner process, and when the applicant personally does not have the on forehand required life experiences, they are denied asylum, despite having a need for and the right to protection. The report has shown that these strict requirements of inner emotional journeys are applied when the asylum claim is for example gender expression and perceived homosexual orientation, when the need for protection is based on something physical, why inner emotional journeys would appear particularly irrelevant to require from the applicant.

²²³ The UNHCR’s Guidelines No. 9, paras. 63 and 60.ii.

²²⁴ See for example *Improving SOGI Asylum Adjudication: Putting Persecution Ahead of Identity*, Dustin, M., Ferreira, N., *Refugee Survey Quarterly*, 2021, 40, 315–347 doi: 10.1093/rsq/hdab005 Advance Access Publication Date: 19 July 2021 see particularly pages 329–335 where different approaches to the DSSH model are presented. Available at <https://doi.org/10.1093/rsq/hdab005>, *A Requirement of Shame: On the Evolution of the Protection of LGB Refugees*, Åberg, K., *International Journal of Refugee Law*, Volume 35, Issue 1, March 2023, Pages 37–57, <https://doi.org/10.1093/ijrl/ead008>

²²⁵ *Credibility Assessment in Asylum Procedures: A Multidisciplinary Training Manual*, Volume 2, Gyulai, G. (ed.), Singer, D., Chelvan, S., Given-Wilson, Z., p. 77, available at: <https://helsinki.hu/wp-content/uploads/CREDO-training-manual-2nd-volume-online-final.pdf>

²²⁶ *The Emotional Journey and the DSSH model: a positive tool for credibility assessment*, Chelvan, S., abstract for the SOGICA conference 7–9 July 2020, http://www.sogica.org/wp-content/uploads/2020/07/SOGICA-conference_abstracts_v6.pdf

The DSSH model suggests that the first question should be: “When did you realise that you were different?”, which should be followed by questions such as “describe how this led to feelings of stigma, shame and harm (persecution)”²²⁷. Already this creates a risk of the migration authorities violating the UNHCR’s guidelines, which emphasise that there are no universal experiences or qualities that typify LGBTIQ+ people and that their experiences may vary greatly, even when they come from the same country.²²⁸ In the same vein, there is a risk that the authorities violate EU law and the CJEU’s prohibition against relying solely on stereotypical notions about homosexuals in the assessment of the applicant’s credibility regarding their sexual orientation.²²⁹ Legal scholars regularly criticise the DSSH model and similar methods applied to investigate sexual orientation. Gerber, Dawson, Berg, Millbank, Cover and Prosser state the following in their respective research:

*[W]hen presented with models such as the DSSH, there is a risk that what is intended to be a guide becomes ‘calcified in an interrogation style which assumes that there is a typical evolution of self-identity.’*²³⁰

*[...] what is being looked for is heavily influenced by Western conceptions of the linear formation and ultimate fixity of sexual identity.’*²³¹ Such models encourage the understanding of SOGII experiences as having an ‘end point’;

*where past experiences need to be reinterpreted as evidence of an applicant always having been queer.*²³²

A common criticism of the DSSH model is that it is based on male homosexuality as norm, and that it is not a suitable method to investigate, process and assess for example women, trans- and intersex people.²³³ In international legal research the model has been criticised for being based on a Western, stereotypical, understanding of male homosexuality. Models such as the DSSH are based on the belief that sexuality and gender can be examined from a perspective holding that there is always a certain self-awareness as well as a linear inner process that precedes it. One can expect there to be (negative) feelings of confusion, shame and self-hatred, that, through a linear process, evolve into a static endpoint and self-acceptance. Focus on difference, stigma and shame risks leading to, and encourage, a sort of checklist where these experiences are expected or even required. Focus on the presence of feelings of difference, stigma and shame as universal denominators for LGBTIQ+ people does not recognise sexuality, gender identity and gender expression as the complex, individual, personal experiences they are. The focus on difference, stigma and shame excludes other stories about sexuality, gender identity and gender expression, which therefore risk being deemed non-credible.²³⁴ Four different researchers express concern for countries where the model is applied to investigate LGBTIQ+

²²⁷ Assessing the Refugee Claims of LGBTI People: is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?, Dawson J., Gerber, P. p. 10.

²²⁸ The UNHCR’s Guidelines No. 9, para. 60.ii.

²²⁹ The CJEU’s judgment December 2 2014 in Joint cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, paras. 62-63. Advocate General E. Sharpston emphasised in her opinion in Joint Cases C-148/13–C-150/13, that a negative decision would violate the EU’s Qualification Directive if it was solely based on the stereotypical notion that “because B is from a Muslim family and a country where homosexuality is not accepted he should be able to give details about his feelings and how he came to terms with his homosexuality”, ECLI:EU:C:2014:2111, available at <https://curia.europa.eu/juris/document/document.jsf?docid=155164&doclang=en>

²³⁰ Assessing the Refugee Claims of LGBTI People: is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?, Dawson J., Gerber, P. p. 13.

²³¹ Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants, Berg, L., Millbank, J., 2007, 22 Journal of Refugee Studies, p. 197.

²³² Queer Young Men, Identity and Contemporary Coming Out Narratives Online, Cover, R., Prosser, R., 2013, 28 Australian Feminist Studies 75, p. 81.

²³³ Assessing the Refugee Claims of LGBTI People: is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?, Dawson J., Gerber, P. p. 14, Queer? Prove it. Should the EU Create a Framework for the Credibility Assessment of Asylum Claims Based on Sexual Orientation and Gender Identity?, Gould, A., 2019, p. 47f.

²³⁴ Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants, Berg, L., Millbank, J., 2007, 22 Journal of Refugee Studies, p. 195, p. 206.

asylum claims, since it is based on a Western understanding of male homosexuality and a linear inner process leading up to a static endpoint with self-acceptance:

*Dangers can also attend a list of topics such as these in exploring identity if they become calcified in an interrogation style which assumes that there is a typical evolution of self-identity. We are concerned that this has in fact occurred in decision-making forums in Canada, Australia and the UK. Western understandings of minority sexual identity development have been deeply influenced by the idea of a linear process of self-knowledge moving from denial or confusion to 'coming out' as a self-actualised lesbian or gay man.*²³⁵

*The model risks imposing Western gay male narratives on other sexual minorities. For the model to be effective, there needs to be a concerted effort to account for the diversity of identity and lived experiences within the category of LGBTI applicants, and not just in reference to stereotypical 'mainstream' heterosexual identity.*²³⁶

In their in-depth study of DSSH, Dawson and Gerber criticise the model for being blind to gender aspects and cultural differences. It is criticised for claiming to be gender neutral, and therefore applicable on "everybody" covered by the umbrella term LGBTIQ+ people: homosexual men, bisexual men, women, trans and intersex people. This despite research showing that for example lesbian women's development, insights and self-identification as lesbians often happens later in life, compared to homosexual men. There may be many reasons for this, but the important conclusion is that LGBTIQ+ women's life experiences often deviate from the norm in a manner that does not match Western homosexual men's stereotypical life experiences:

The 2015 DSSH revisions now address the possibility that '[e]xperiencing difference can happen at any age' [...] While it is helpful that the different influences on sexual identity development in men and women in oppressive societies are mentioned, the model still fails to consider differences in how

*sexuality is developed and expressed by men and women. For example, the tendency for some lesbians not to recall childhood memories or feelings that they can connect with their later same-sex attraction is not considered. Such an omission makes it more likely that decision-makers will continue to apply male-based stereotypes of sexual identity development to lesbians' claims for asylum, leading to an increased likelihood that they will fail the credibility test.*²³⁷

Dawson and Gerber also point out that persecution (harm) might look very different for different groups of LGBTIQ+ people. The DSSH model does not fully recognise that persecution in the "private sphere" also is a ground for asylum. LGBTIQ+ women, who are at risk of another kind of persecution than men (who more often are subjected to violence in public), become invisible:

*While the DSSH model does mention family-based violence, in the form of honour killings, it fails to adequately recognise the full extent of 'private' forms of harm that lesbians face. The DSSH Guidelines need to include a detailed exploration of the intersections between gender, gender norms, and sexuality, and the way they relate to one another in a lesbian applicant's experience of persecution.*²³⁸

Also trans people and intersex people are often at risk of other forms of persecution than homosexual men. That is not sufficiently acknowledged by the DSSH model. A fifth researcher, Gould, analyses the DSSH model and criticises it for claiming to be as relevant when investigating sexual orientation as gender identity and gender expression. Gould problematises that sexual orientation and gender identity would be comparable:

The way in which men and women's sexual identities progress are extensively different, with regards to time, rapidity and structure. It is also problematic to take for granted that the way sexual identities progress is comparable to that of gender identities. Furthermore, none of these

²³⁵ Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants, Berg, L., Millbank, J., 2007, 22 Journal of Refugee Studies, p. 195, p. 206.

²³⁶ Assessing the Refugee Claims of LGBTI People: is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?, Dawson J., Gerber, P. p. 17.

²³⁷ Ibid. p. 16ff.

²³⁸ Ibid. p. 27.

*progressions of difference are analogous to the process faced by intersex people, whose gender minority status comes from a biological difference that could be clear from birth or puberty.*²³⁹

Intersex people do not necessarily experience any kind of inner process leading to self-awareness, since being intersex is a physical condition. Trans- and intersex people's asylum claims risk being reduced to a search for a realisation about homosexual orientation, even though their need for protection is often connected to a physical condition, gender identity and/or gender expression, and what gender or sexual orientation other people attribute to them. A person with a gender expression that deviates from the norm and/or a person with an intersex variation who is at risk of persecution, has not necessarily experienced an inner process leading to realisation about their body language, their physical appearance and/or their intersex variation. They might never have thought about, or know about, that it is an intersex variation and/or their gender expression that is a reason why they risk the persecution. This criticism is also made by Gould:

Failing to recognise the differences of how SOGI develops with gendered concepts in mind, particularly when it is inferred that 'difference' is often first acknowledged in childhood, meant that sexual minority women and bisexuals claims could seem less credible, as they are outside of the homosexual male narrative that the DSSH model imposes. Furthermore, trying to compress trans and intersex persons within the same model as LGB persons without clear guidance as to the differences they face is similarly problematic. This inclusion of the term 'gradual recognition' as a definitive assumes that all SOGI minorities develop an understanding of their SOGI in the same linear and structured way, which does not fit with post-modern sociological theories of SOGI. For the DSSH model to take into account this, and in particular to women's claims which tend to develop differently, the DSSH model must take the fluidity of sexuality into account, rather than considering sexuality as immutable and unchangeable. [...] Overall, for the

*DSSH model to be used as a basis for credibility assessment, it must be made clear that there are a multitude of ways recognition can occur. Instead of focussing on a particular age or 'speed' of recognition, the assessing authority should listen to the self-identification and narrative of the applicant in their own words.*²⁴⁰

The DSSH model does not appear to be a suitable or effective method for investigating intersex people's diverse need for protection. Neither does the DSSH model appear suitable or relevant for people whose need for protection is related to their gender expression, since it rests on an assumption about the existence of inner thinking processes and certain feelings. The idea that all LGBTIQ+ people have experienced a linear journey from confusion, self-hatred and shame to a fixed endpoint of self-awareness and self-acceptance, is based on a Western understanding and description of sexuality and gender. The person who best meets the stereotypical expectations that follow from that explanatory model is a Western homosexual cis man. This presupposes that refugees who flee persecution because of sexual orientation, gender identity or gender expression have experienced and can describe "an emotional journey" reaching the final destination of "the true identity"; a journey from unhealthy feelings of shame and confusion to a healthy realisation and acceptance of a fixed, clearly defined, identity, categorised under the LGBTIQ+ term.²⁴¹ Regarding the DSSH models' applicability to LGBTIQ+ women's need for protection, Dawson and Gerber have the following criticism:

*The model would be improved by recognizing the diverse and complex nature of human sexuality, rather than being primarily based on the Western gay male experience. Above all, there needs to be a broader understanding of sexuality that recognises that humans, and especially women, do not always experience their sexual orientation as immutable and linear.*²⁴²

According to Dawson and Gerber, the DSSH

²³⁹ Queer? Provet it.. Should the EU Create a Framework for the Credibility Assessment of Asylum Claims Based on Sexual Orientation and Gender Identity?, Gould, A. 2019, p. 49.

²⁴⁰ Ibid. p. 51.

²⁴¹ Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants, Berg L., Millbank, L., 2007, 22 Journal of Refugee Studies, p. 197 and 215.

²⁴² Assessing the Refugee Claims of LGBTI People: is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?, Dawson J., Gerber, P. p. 30

would improve by acknowledging the diversity and complexity of human sexuality, instead of applying a Western, male perception of homosexuality. The model needs to take into account that not everybody experiences their sexual orientation as constant and linear. Gould criticises the updated DSSH model²⁴³ by noting when and how an inner process starts:

*In addition to when awareness of difference starts, how it starts is also problematic. The 2015 report describes a '[g]radual recognition of sexual and emotional attraction to members of the same sex' and a 'gradual recognition of [difference]' insinuating a slow and linear progression. Women are more likely to 'suddenly' realise that they are gay, and studies have shown sexual minority women do not follow a gradual trajectory. Therefore, if the DSSH model is to be used as a basis for credibility assessment, this reference to a gradual assessment should be removed.*²⁴⁴

Gould problematises how the DSSH model assumes that an inner process takes place, which should be slow, gradual and linear. Since research shows that for example women often experience their sexuality as fluid, and not necessarily as a gradual, slow process, Gould argues that this assumption should be removed from the DSSH model. Gould also criticises its focus on, and assumption, that feelings of difference and shame would be universal to LGBTIQ+ people. For many LGBTIQ+ people, such a realisation is not connected to a long and difficult process with negative feelings such as shame. Even though many LGBTIQ+ people have at some point felt alienated in a cis/heteronormative society, this does not mean that they have experienced shame. Gould suggests that also "shame", should be removed from the DSSH model. Feelings of being different also vary greatly. Europe has experienced an LGBTIQ+ movement that communicate that sexual orientation, gender identity and/or gender expression is not a choice. At the same time, many LGBTIQ+ applicants describe that they have

chosen to be, or live, in a certain way.²⁴⁵ If a certain model should be applied, it is crucial that it does not presuppose and assume that there are common experiences of specific feelings, but is open to that descriptions of sexual orientation, gender identity and gender expression, always will vary greatly.

Even though research shows that women's sexuality often is experienced as more fluid and situational than men's sexuality, this is not reflected in models such as the DSSH model.²⁴⁶ Rather, it claims to be applicable also to attributed LGBTIQ+ affiliation, gender expression and intersex people. From the research about and criticism of the DSSH model, a conclusion can be drawn that it is not a suitable, applicable or relevant investigative method for all LGBTIQ+ people, since some do not have the experiences and characteristics the model incorrectly implies are universal to LGBTIQ+ people. Since the DSSH model assumes that an emotional journey, with feelings of difference and shame has taken place in most or all LGBTIQ+ persons, it does not appear suitable in investigating and assessing for example intersex people's need for protection or gender expression as an asylum claim, where the need for protection is connected to something physical rather than emotional. For the same reasons, the DSSH model does not appear suitable when assessing a need for protection based on perceived sexual orientation or perceived gender affiliation. This is also the case for people who experience and define their sexual orientation as based on their sexual practice, rather than as an emotional and fixed identity. A realisation about a non-heterosexual orientation is not necessarily comparable to gender dysphoria and gender identity, either. The notion of a linear inner process leading to a clear, fixed, unchangeable identity excludes all LGBTIQ+ people in need of protection whose sexuality, gender identity and/or gender expression is experienced as

²⁴³ The DSSH model was updated in 2015 by Dr. S. Chelvan through the publication *Credibility Assessment in Asylum Procedures – A Multidisciplinary Training Manual Volume 2*, Hungarian Helsinki Committee, <https://helsinki.hu/wp-content/uploads/CREDO-training-manual-2nd-volume-online-final.pdf>

²⁴⁴ *Queer? Prove it. Should the EU Create a Framework for the Credibility Assessment of Asylum Claims Based on Sexual Orientation and Gender Identity?*, Gould, A., 2019, p. 47f.

²⁴⁵ *Queer? Prove it. Should the EU Create a Framework for the Credibility Assessment of Asylum Claims Based on Sexual Orientation and Gender Identity?*, Gould, A., 2019, p. 56f.

²⁴⁶ *Assessing the Refugee Claims of LGBTI People: is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?*, Dawson J., Gerber, P. p. 19.

fluid and/or non-linear, i.e. whose processes have no endpoint. It excludes everybody who moves back and forth, or between, different “steps” in a Western construed linear process – everybody whose gender identity or sexuality develops in a non-linear way. Their life experiences and stories are viewed as non-credible, and they are denied they protection to which they are entitled according to the Refugee Convention.

Like mentioned above, the DSSH model is described it as “not [being] based on the existence or absence of stereotypical behaviours or expressions, but addresses four themes as part of which the applicant, in their own words, should tell their story”²⁴⁷. However, this presupposes that everybody who risks persecution because of actual or perceived SOGIESC share universal experiences, e.g. an emotional journey, and have an ability to present “narrative about difference”, and not being “straight enough”.²⁴⁸ This report as well as legal practitioners and researchers from five European countries conclude that these experiences are exactly the kind of stereotypical notions that the presentation of the model argues that the DSSH model is not based on. These can be called new, or the second generation of, stereotypical notions²⁴⁹. It is difficult to see how the model in practice would allow for the applicants’ individual stories “in their own words” since the model itself presupposes that the stories should touch upon, relate to and describe specific themes, i.e. experiences of feelings of difference, stigma, shame and harm. Stories that do not cover or relate to these themes unavoidably risk being considered not credible. The assumption that these themes are common denominators that should be covered, invariably leads to that the story does not become a free, individual description of personal experiences, but has to conform to a framework and describe certain expected themes. The biggest challenge and problem in using

models like the DSSH model is the assumption that there are universal experiences among LGBTIQ+ people that should be investigated by the asylum authorities and be made credible by the applicants. In fact, not all LGBTIQ+ people have experienced a linear process leading to a realisation of a fixed, non-fluent SOGIESC. Nor have all LGBTIQ+ people experienced feelings of difference, stigma and shame. These are stereotypical notions that, according to the CJEU, can not solely be relied upon to assess the applicant’s credibility.²⁵⁰ The UNHCR’s guidelines specifically emphasise that there are no universal experiences or qualities that typify LGBTIQ+ people. To apply a method to assess credibility that assumes this does not appear to be compatible with the UNHCR’s guidelines. This unavoidably leads to that LGBTIQ+ people in need of protection and people who are attributed LGBTIQ+ affiliation, whose experiences and characteristics do not correspond with the model’s assumptions, are at risk of being denied the protection that they are entitled to.

10.8 Sweden is not unique in applying stereotypes

When the Swedish original edition of this report was published in November 2020, there had been several international SOGIESC asylum conferences. Legal practitioners, researchers and LGBTIQ+ organisations from different countries presented almost identical conclusions about stereotypical notions in the countries’ credibility assessments of SOGIESC asylum claims. These conclusions concern ideas about universal experiences of an inner process, the definition of sexuality and gender as a fixed identity, and requirements of feelings of difference, stigma and shame. In the international panels with researchers, legal prac-

²⁴⁷ The Emotional Journey and the DSSH model: a positive tool for credibility assessment, Chelvan, S., abstract for the SOGICA conference 7-9 July 2020, http://www.sogica.org/wp-content/uploads/2020/07/SOGICA-conference_abstracts_v6.pdf

²⁴⁸ Ibid.

²⁴⁹ Panel 2020-08-25 at the international LGBTIQ asylum conference WE Connect Europe, arranged by CoC Netherlands, Asylum Procedures: Recent research from various European countries reveals similar stereotypes in the assessment of the credibility of people claiming asylum based on sexual orientation. In this panel, experts from five different countries will share their findings.”

²⁵⁰ The CJEU’s judgment December 2 2014 in the Joint cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, paras. 62-63, Advocate General E. Sharpston emphasised in her opinion in Joint Cases C-148/13-C-150/13, that a negative decision would violate the EU’s Qualification Directive if it was solely based on the stereotypical notion that “because B is from a Muslim family and a country where homosexuality is not accepted he should be able to give details about his feelings and how he came to terms with his homosexuality”, ECLI:EU:C:2014:2111, available at <https://curia.europa.eu/>

tioners and organisations held digitally, these were referred to as new or second generation of stereotypes.²⁵¹

After the original Swedish edition of this report was published in November 2020, several reports and articles from different countries have since then been published about the credibility assessments and the use of stereotypes in assessing SOGIESC asylum claims. The findings in the Swedish edition of this report in 2020 are still relevant in 2024. Therefore, the overview that was given in the report in 2020, of earlier research about credibility assessments of SOGIESC asylum claims, is also given below in this English edition published in 2024.

From an international perspective, Sweden is far from unique in applying stereotypical notions about LGBTIQ+ people in the assessment of SOGIESC asylum claims. Reports and articles have been published by researchers and legal practitioners in different countries about the assessment of SOGIESC asylum claims. Research shows that stereotypical notions based on the experience of white, Western homosexual men serve as a template in asylum investigations and credibility assessments where the appli-

cant claims SOGIESC as grounds for asylum²⁵². At the international SOGICA conference in July 2020, a digital panel was held, called “Similar Stereotypical Constructions of Sexual Orientation in Different European Countries”²⁵³. Four legal practitioners and experts presented their respective research about asylum procedures for LGBTIQ+ people. In another international asylum conference that took place online in August 2020, arranged by CoC Netherlands, WE-Connect Europe. A conference about LGBTIQ+ asylum and migration, another panel was held about similar stereotypes in different countries’ credibility assessments. Lawyers and researchers from Norway, the Netherlands, the U.K., Greece and Sweden participated. The research from the five countries show identical conclusions about the applicability of stereotypical notions in the countries’ credibility assessments in SOGIESC asylum cases. In all countries a requirement was identified of an account of an inner, emotional process leading to a self-realisation, which could directly or indirectly be traced to the DSSH model.²⁵⁴

A report in 2018 from Rainbow Migration (previously UKLGIG), shows that asylum authorities in the U.K. – in the same way as for example in

²⁵¹ The SOGICA Conference, 7-9 July 2020, Session 20 – Credibility III. Similar stereotypical constructions of sexual orientation in different European countries: “The UK: Excessive focus on articulation of ‘self-realisation’ and development of identity - Leila Zadeh, The Netherlands: Assumptions of an emotional process of awareness, from shame to self-acceptance - Sabine Jansen, Norway: Expectations of ‘self-actualisation’ and detailed reflections on one’s sexual orientation - Andrea Gustafsson Grønningssæter, Sweden: Criteria in the Swedish credibility assessments of SOGIE asylum claims - Aino Gröndahl” conference program available at https://www.sogica.org/wp-content/uploads/2020/07/SOGICA-conference_programme_v17.pdf, WE Connect Europe. A conference about LGBTIQ+ asylum and migration, panel held digitally 2020-08-25, “Asylum Procedures: Recent research from various European countries reveals similar stereotypes in the assessment of the credibility of people claiming asylum based on sexual orientation. In this panel, experts from five different countries [The Netherlands, Sweden, Norway, U.K., Greece] will share their findings.” Information about the conference is available at <https://sites.google.com/view/weconnecteurope>.

²⁵² Assessing the Refugee Claims of LGBTIQ People: is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?, Dawson J., Gerber, P., Queer? Prove it. Should the EU Create a Framework for the Credibility Assessment of Asylum Claims Based on Sexual Orientation and Gender Identity? Gould, A., Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants, 2007, Berg, L., Millbank, J., Journal of Refugee Studies, Between queer liberalism and Muslim masculinities: LGBTIQ+ Muslim asylum assessment in Germany, Tschaeler, M.

²⁵³ “Similar stereotypical constructions of sexual orientation in different European countries”, 2020-07-09, SOGICA Conference. The four participants were Sabine Jansen, COC Netherlands, Leila Zadeh, Rainbow Migration in U.K., Andrea Gustafsson Grønningssæter, Norway and RFSL’s asylum lawyer and author of this report, Aino Gröndahl. http://www.sogica.org/wp-content/uploads/2020/07/SOGICA-conference_programme_v17.pdf

²⁵⁴ WE – Connect Europe, “Asylum Procedures: Credibility assessment in LGBTIQ asylum cases.” 2020-08-25. “Recent research from various European countries reveals similar stereotypes in the assessment of the credibility of people claiming asylum based on sexual orientation. In this panel, experts from five different countries will share their findings.” The same participants as during the SOGICA conference, joined by Sophia Zisakou, Greece. <https://projectwe.nl/session/2020-08-25-asylum-procedures/>

Sweden and in the Netherlands²⁵⁵ – require that the applicant is able to give a detailed account of inner processes leading to a realisation:

[...] excessive focus on claimants being able to articulate sophisticated accounts of self-awareness (stories of recognising one's identity), searching for evidence of a particular account of development of identity. In many cases this expectation of sophistication is erroneous as it relies on stereotypes of LGBTIQ+ people, which in addition to being sexual stereotypes are culturally misaligned. Not everyone will have experienced introspective soul-searching and retrospective interpretation of their experiences, so as to be able to offer a narrative identifying their own emotions as central to their identity, or containing milestones which might be recognisable in some Western contexts. [...]

Where a person is not imbued in the Western context of self-focus (as opposed to focus on family or communal duty as core founding features of identity), expectations of emotional journeys will often be culturally inappropriate. A market trader from Kampala is most unlikely to give an account of their sexual identity (be it heterosexual or any other) which could be in any way comparable to an account given by a Shoreditch blogger. Many people would not have had an experience of their identity which includes an emotive narrative, or where emotions are central. Many people strongly associate their sexual orientation with sexual preference, while others associate it with feelings toward their partners, or with their social interactions.²⁵⁶

According to the report from Rainbow Migration, the requirement of an inner, emotional process is a stereotypical notion that many LGBTIQ+ applicants do not recognise or have not experienced. Few experience their identity as a matter of emotions. For many, sexual orientation is mainly experienced as a matter of sexual preferences, feelings for a partner and/or social contacts. Most of the migration authorities in European

countries apply a Eurocentric viewpoint and a Western, stereotypical perspective in the investigation of SOGIESC asylum claims. There is also a cultural blindness and lack of understanding of the complexity covered by the SOGIESC concept. An individual case officer's subjective views are often of crucial importance to the focus of the asylum procedure, which affects the final decision and its legal certainty. The following quote is from in a report from 2017 from the European Union Agency of Fundamental Rights (FRA), Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex applicants:

In a number of Member States - such as Finland, France and Sweden - interviewees noted that questions about a person's sexual life are not allowed as this would infringe on the right to respect for private life. However, one French NGO indicated that this approach - designed to guarantee respect for private life - leads to more abstract questions about sexual orientation being asked, which are poorly understood by applicants for international protection. [...] According to NGO's in the Member States covered in this report, asylum officers tend to have stereotypical and Eurocentric views - for example, in France. They tend to have the same image of the social lives of lesbian and gay persons, whether they are from Kenya or Russia, the city or the countryside. NGO's say that asylum interviewers lack culturally sensitive knowledge of LGBTI issues and criticise asylum decisions for ignoring the complexity of sexual orientation. [...] individual asylum case officers' attitudes significantly influence the course of interviews and, therefore, the fairness of the procedure.²⁵⁷

RFSL's asylum lawyer has participated in hundreds of oral hearings and read hundreds of investigation protocols issued between 2012 and 2020. Along with the decisions and court rulings examined in this study, it is clear that the conclusions from the report cited above from FRA, also concern asylum procedures

²⁵⁵ Jansen, S. *Pride or Shame? Assessing LGBTI asylum applications in the Netherlands following the XYZ and ABC judgments*, 2019, CoC Netherlands, January 2019, available at <https://www.refworld.org/reference/themreport/cocnld/2018/en/122503>

²⁵⁶ *Still Falling Short. The standard of Home Office decision-making in asylum claims based on sexual orientation and gender identity*, Asanovic, A., Bruce-Jones, E., Peirce, J., Zadeh, L., Rainbow Migration (previously UKLIG) 2018, p. 23, available at https://www.rainbowmigration.org.uk/wp-content/uploads/2022/03/Still-Falling-Short-Jul-18_0.pdf

²⁵⁷ European Union Agency for Fundamental Rights, *Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex applicants*. March 2017. p. 5 and 8, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-march-2017-monthly-migration-report-focus-lgbti_en.pdf

in Sweden²⁵⁸. There are great similarities between stereotypical notions in the assessment of SOGIESC asylum claims in Sweden, the Netherlands, Norway, Greece, Germany, U.K. and Australia²⁵⁹. In a report from the Netherlands 2019, which was followed up in 2023²⁶⁰, Sabine Jansen showed how commonly reoccurring stereotypical notions about Western, homosexual cis men are applied to examine and assess LGBTIQ+ people's asylum claims in the Netherlands. The following conclusions are made in the report regarding credibility assessments of SOGIESC asylum claims in the Netherlands:

Stereotypes

Apart from the stereotype that is the focus of the policy, this study shows that many of the stereotypes that were brought to light by the Fleeing Homophobia research in 2011, still play a part in asylum practice. For instance, it is presumed that:

- all LGBTIs are well informed about LGBTI organisations in the country of origin and in the Netherlands and about the exact criminal provisions in the country of origin;
- people never take risks;
- LGBTIs always have deep feelings;
- coming out in Kabul happens in a similar way as coming out in Amsterdam;
- somebody having sex is always aware of having a sexual identity and will also talk about it;
- all gay boys and men are sexually active when they are given the chance;
- religion and homosexuality can not go together.

In addition, policy contains several stereotypical expectations:

The stereotypical expectation that LGBTI applicants have always experienced a process of awareness and

*a process of self-acceptance [...] LGBTI applicants are expected to experience an awareness process consisting of various stages that culminate into self-acceptance. In this context, they are supposed to take their own identity very seriously. They are considered to be people with an identity that differs from the heterosexual or cisgender standard. They are expected to have struggled with this, and so they have a lot of explaining to do.*²⁶¹

The conclusions in Jansen's research about the requirements made in the credibility assessments of SOGIESC asylum claims, are nearly identical to the conclusions made in this report regarding the Swedish migration authorities' assessments. According to Jansen, the assessment's starting point is the stereotypical notion that LGBTIQ+ applicants always have experienced an inner process leading to a realisation and to self-acceptance. It is, among other things, assumed that LGBTIQ+ people know about LGBTIQ+ organisations and legislation, that they do not take risks, that they always have profound emotions and are aware of their sexual identity when they have sex. This report shows that all of these assumptions are also applied in Swedish assessments of SOGIESC asylum claims. It is further concluded in the report from the Netherlands:

An applicant who says 'I was very happy when I discovered I was a lesbian' is not believed. This light-hearted attitude is not consistent with the stereotypical image, which is one of a person steeped in guilt and self-blame. Additionally, the State Secretary speaks

²⁵⁸ Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex applicants, European Union Agency for Fundamental Rights, p. 6, March 2017

²⁵⁹ Establishing a Sexual Identity: The Norwegian Immigration Authorities Practice in Sexuality-Based Asylum Cases, Gustafsson Grønningsæter, A., 2017, in Out & Proud? LGBTI asylum in Europe Conference COC Netherlands, Amsterdam, October 5-6, 2017, available at: <https://www.coc.nl/wp-content/uploads/2017/04/Norwegian-practices-Andrea-Gustafsson-Gronning-saeter.pdf>, Credibility Assessment in Asylum Claims Based on Sexual Orientation by the Greek Asylum Service: A Deep-Rooted Culture of Disbelief, Zisakou, S., Frontiers in Human Dynamics, 2021, available at <https://www.frontiersin.org/articles/10.3389/fhumd.2021.693308/full>, Assessing the Refugee Claims of LGBTI People: is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?, Dawson J., Gerber, P., Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants, Berg, L., Millbank, J., 2007, Journal of Refugee Studies, Between queer liberalisms and Muslim masculinities: LGBTIQ+ Muslim asylum assessment in Germany, Tschaeler, M. Ethnic and Racial Studies 2019, available at <https://research-information.bris.ac.uk/en/publications/between-queer-liberalisms-and-muslim-masculinities-lgbtqi-muslim->

²⁶⁰ Pride or Shame? The new Work Instructions and the Assessment of LGBTI Asylum Applications in the Netherlands, Jansen, S., CoC Netherlands, 2023, available at <https://coc.nl/wp-content/uploads/2023/04/Pride-or-Shame-The-follow-up.pdf>

²⁶¹ Pride or Shame? Assessing LGBTI asylum applications in the Netherlands following the XYZ and ABC judgments, 2019, Jansen, S. CoC Netherlands, 2019, p. 168, available at <https://www.refworld.org/reference/themreport/cocnld/2018/en/122503>

of 'the process of self-acceptance' and 'the process of awareness' as if these processes actually exist. It appears from the examined files, however, that these concepts are not in line with the experiences many applicants have, and so they do not recognise themselves in these.²⁶²

The emotional self-awareness is expected to have been preceded by an inner, difficult struggle that can be accounted for before the authorities. Jansen describes that applicants do not necessarily have these experiences or can relate to the assumptions. The same finding is made in this report. Regarding the negative emotions expected to be present among LGBTIQ+ applicants, Jansen concludes:

The stereotypical expectation that they have struggled with feelings of shame, guilt and insecurity before they could accept themselves
*The idea that the person concerned has experienced a process of self-acceptance implies that it takes applicants huge effort to accept their orientation or identity. It is an unacceptable starting point to expect from LGBTIs, under threat of incredibility of the sexual orientation, that they have a negative opinion about themselves, that they are ashamed and feel guilty. What is more, this appears to be incorrect. In many of the examined files, the person concerned says they have not struggled with the sexual orientation and did not have any problems with self-acceptance.*²⁶³

To assume that LGBTIQ+ people always experience an inner process with negative feelings is a stereotypical notion. According to Jansen, it is an unacceptable starting point to expect LGBTIQ+ people to feel bad about, or ashamed of, their sexual orientation, gender identity or gender expression. The following conclusion is also identical to this report's findings of what requirements are made as part of the credibility assessment in SOGIESC asylum cases.

The stereotypical expectation that the more LGBTI-hostile the environment, the more expe-

rience an LGBTI will have with processes of awareness and self-acceptance

*[...] The stereotypical expectation that LGBTI applicants can speak in detail about the aspects mentioned above [...] During the research, there was the impression that the applicant's educational level played a (major) role in all of this. [...] For applicants with little or no education it is very difficult, if not impossible, to reflect on their own sexual orientation and provide a satisfactory answer to questions about awareness and self-acceptance processes.*²⁶⁴

Chapter 4.4 of this report showed how Swedish migration authorities expect, and in practice require, that the more stigmatised LGBTIQ+ is in the country of origin, the more the applicant is expected to have thought about, and be able to talk about, their own SOGIESC. According to Jansen, it is very difficult, if not impossible, for an applicant with little or no education to at all reflect on these aspects and give detailed answers to the migration authorities' questions about self-awareness and self-acceptance. To require a more detailed story the more stigmatised LGBTIQ+ is in the country of origin, is not only based on stereotypes, but also illogical. The more taboo and more stigmatised a topic is, the less ought a person be able to talk about it. All of the stereotypical notions that Jansen identifies that the Dutch credibility assessment is based on, are also present and applied in Sweden.

10.9 Conclusions and analysis: Violations of Swedish and international law

The Swedish Migration Agency's and the Migration Courts' expectations and requirements in SOGIESC asylum cases²⁶⁵, can be seen as a consequence of Migration Court of Appeal's precedent MIG 2013:25 and the use of the DSSH model. The requirements and expectations lack support in the UNHCR's guidelines, the preparatory works of the Swedish Aliens Act and the Swedish Migration Agency's position paper RS/015/2021, issued by the Director-General of

²⁶² Ibid. p. 169.

²⁶³ Pride or Shame? Assessing LGBTI asylum applications in the Netherlands following the XYZ and ABC judgments, Jansen, S. 2019, p. 169, available at <https://www.refworld.org/reference/themreport/cocnld/2018/en/122503>

²⁶⁴ Pride or Shame? Assessing LGBTI asylum applications in the Netherlands following the XYZ and ABC judgments, Jansen, S. 2019, p. 168ff., available at <https://www.refworld.org/reference/themreport/cocnld/2018/en/122503>.

²⁶⁵ See chapter 4 in this report about the requirement that an inner emotional process has taken place, that the applicant has felt, or can relate to, feelings of difference, stigma and shame, and chapter 5 about expectations that in practice often become requirements, for example that LGBTIQ people do not take risks and can account for risk assessments.

Legal Affairs'.²⁶⁶ In MIG 2013:25, the Migration Court of Appeal misinterprets the UNHCR's guidelines and summarises them in a brief, misleading way. Migration Court of Appeal also refer to an annulled, legally obsolete investigation method from a lower instance. The cancelled method enables unlawful discretion reasoning, but is referred to as if it was an important source of law, by the Swedish Migration Court of Appeal. After MIG 2013:25 was issued, the CJEU has in several cases, established and clarified what is allowed in the national authorities' assessments of SOGIESC asylum cases. The CJEU's judgments are binding on Sweden, but its more recent case law²⁶⁷ is not reflected in MIG 2013:25. The international and national criticism from legal practitioners, researchers and organisations is growing against the DSSH model. Research shows that the assumptions made by asylum authorities applying the model are stereotypical, and neither are applicable, nor suitable in the assessment of all SOGIESC asylum claims. The migration authorities' notion and assumption – in Sweden and other countries that appear to apply the DSSH model – that there are certain universal characteristics and experiences that typify LGBTIQ+ people – violate the UNHCR's guidelines, which state the following:

UNHCR Guidelines No. 9, para. 60.

ii. Interviewers and decision-makers need to maintain an objective approach so that they do not reach conclusions based on stereotypical, inaccurate or inappropriate perceptions of LGBTI individuals. The presence or absence of certain stereotypical behaviours or appearances should not be relied upon to conclude that an applicant possesses or does not possess a given sexual orientation or gender identity. There are no universal characteristics or qualities that typify LGBTI individuals any more than heterosexual individuals. Their life experiences can vary greatly even if they are from the same country.

The UNHCR emphasises that there are no universal characteristics that typify LGBTIQ+ people from others, and that their experiences can vary greatly, even between people who come from the same country. The CJEU has among other things established that the member states are

prohibited from relying exclusively on stereotypical notions in the credibility assessments of the applicant. Assessments based on questions about the applicants' knowledge of LGBTIQ+ organisations are examples of such stereotypical notions that may not be relied solely upon, but which are still being applied by the Swedish migration authorities:²⁶⁸

The CJEU's Decision December 2, 2014, in the Joint cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, paras. 60-63:

60. As regards, in the first place, assessments based on questioning as to the knowledge on the part of the applicant for asylum concerned of organisations for the protection of the rights of homosexuals and the details of those organisations, such questioning suggests, according to the applicant in the main proceedings in case C-150/13, that the authorities base their assessments on stereotyped notions as to the behaviour of homosexuals and not on the basis of the specific situation of each applicant for asylum.

61. [...] In that respect, it should be recalled that Article 4(3)(c) of Directive 2004/83 requires the competent authorities to carry out an assessment that takes account of the individual position and personal circumstances of the applicant and that Article 13(3)(a) of Directive 2005/85 requires those authorities to conduct the interview in a manner that takes account of the personal and general circumstances surrounding the application.

62. While questions based on stereotyped notions may be a useful element at the disposal of competent authorities for the purposes of the assessment, the assessment of applications for the grant of refugee status on the basis solely of stereotyped notions associated with homosexuals does not, nevertheless, satisfy the requirements of the provisions referred to in the previous paragraph, in that it does not allow those authorities to take account of the individual situation and personal circumstances of the applicant for asylum concerned.

²⁶⁶ See analysis and conclusions in chapters 10.1-10.5.

²⁶⁷ The CJEU's judgment December 2 2014 in the Joint cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, CJEU's judgement in January 25 2018 in Case C-473-16.

²⁶⁸ See chapter 7.3 in this report.

63. Therefore, the inability of the applicant for asylum to answer such questions can not, in itself, constitute sufficient grounds for concluding that the applicant lacks credibility, inasmuch as such an approach would be contrary to the requirements of Article 4(3)(c) of Directive 2004/83 and of Article 13(3)(a) of Directive 2005/85.

The CJEU establishes that the investigation can not be based solely on stereotypical notions about homosexuals, since that prevents an assessment of the individual and personal circumstances in each case. Applying stereotypical notions as the basis and starting point of the investigation of the applicant's need for protection, violates the right to an individual assessment. As demonstrated above, this report shows that the Swedish migration authorities' requirements in their credibility assessments and decisions violate the UNHCR's guidelines and the Swedish Migration Agency's own legal position paper. They lack support in the preparatory works of the Swedish Aliens Act. The requirement of an inner emotional process leading to self-realisation, and of that the applicant has felt or at least can reflect upon feelings of difference, stigma and shame, and the requirement of a more detailed account the more stigmatised LGBTIQ+ is in the country of origin, are solely based on stereotypical notions about LGBTIQ+ people. The requirements made by the Swedish migration authorities in the credibility assessment in SOGIESC asylum cases are solely based on the stereotypical notion that LGBTIQ+ people have certain universally common experiences. They constitute the kind of stereotypical notions that according to the CJEU are prohibited under EU law, and which the Advocate General warned would violate the Qualification Directive.²⁶⁹ A

credibility assessment based on the assumption that LGBTIQ+ people share certain universal experiences and characteristics violates the right to an individual assessment, established in the EU's Qualification Directive and Asylum Procedures Directive.²⁷⁰

As mentioned several times in this report, research shows how stereotypes based on a homosexual, white, Western cis man as the norm, are applied in credibility assessments of SOGIESC asylum claims. Stereotypical notions about homosexuals are frequent occurrences in the assessments of SOGIESC asylum cases in several European countries.²⁷¹ The type of requirements that the Swedish migration authorities have in SOGIESC asylum cases violates CJEU case law, which has also been concluded in other legal research about assessments of SOGIESC asylum cases. The assumption that all LGBTIQ+ people experience an inner emotional process leading to self-awareness and self-acceptance is a stereotypical notion. Jansen highlights the following in the report from 2019:

It is fundamentally unacceptable to expect from LGBTIs that they think badly of themselves, that they are ashamed and feel guilty, and in this way to push them into the role of the victim. Furthermore, Dutch policy violates the ABC judgment, in which the Court ruled that no conclusions can be drawn solely on the basis of stereotypical opinions about homosexuals, which is exactly what is happening here. The core of the policy is based on the stereotypical idea that LGBTIs are in the first place ashamed of themselves. It follows that decisions based on this policy also violate law, because they are contrary to the ABC judgment. Finally, this stereotypical policy is not suitable as a

²⁶⁹ The CJEU's judgment in the Joint cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie p. 60-63, Sharpston, E., Opinion of 17 July 2014, A, B and C v Staatssecretaris voor Veiligheid en Justitie, C-148/13, C-149/13 and C-150/13, ECLI:EU:C:2014:2111, available at <https://curia.europa.eu/juris/document/document.jsf?docid=155164&doclang=en>

²⁷⁰ The applicant's right to an individual assessment is established in the EU's Qualification Directive, Art. 4.3, in Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), and in the EU's Asylum Procedures Directive Art. 10 3a), in 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 (recast).

²⁷¹ Queer? Provet it. Should the EU Create a Framework for the Credibility Assessment of Asylum Claims Based on Sexual Orientation and Gender Identity?, Gould, A. p. 28f., 34, 40f., available at <https://repository.gchumanrights.org/server/api/core/bitstreams/dc8b52a1-b96e-4779-acfd-92e438533e6b/content>, Good Practices Related to LGBTI Asylum Applicants in Europe, Jansen, S., Le Déroff, J., ILGA Europe, 2014, p. 24, available at <https://www.ilga-europe.org/report/good-practices-related-to-lgbt-i-asylum-applicants-in-europe/>, Jansen, S. Pride or Shame? Assessing LGBTI asylum applications in the Netherlands following the XYZ and ABC judgments, 2019, p. 171.

tool to determine who is LGBTI and who is not.²⁷²

According to Jansen, the basis of the credibility assessment in the Netherlands, i.e. that the applicant is expected to feel shame and have a negative self-image, is a stereotypical notion, which is thereby unlawful according to the CJEU. Like Jansen also emphasises in her research²⁷³, this was confirmed by the CJEU's Advocate General E. Sharpston's opinion regarding what would violate the EU Qualification Directive:

Opinion of Advocate General E. Sharpston, 17 July 2014, joint cases C-148/13-C-150/13

90. *The Minister refused B's application because (i) he found B's account to be inadequate and (ii) B did not meet expectations as to how a homosexual man from a Muslim family and a country where homosexuality is not accepted might react in becoming aware that he himself is homosexual. In so far as the Minister's decision was based upon (i), it will be for the relevant national court as sole judge of fact to determine whether B was given an adequate opportunity to provide all relevant information in accordance with Article 4 of the Qualification Directive. In order to ensure that B's right to good administration is respected, it is important for the national authorities to ensure that B has been informed of the points where elements to substantiate his account were deemed lacking and that he has been afforded the opportunity to address such concerns. However, in relation to (ii), it would be inconsistent with Article 4(3)(c) of the directive for the national authorities to base their decision solely on the stereotypical assumption that because B is Muslim and from a country where homosexuality is not accepted his account can not be credible without a statement giving details about his feelings and how he came to terms with his homosexuality.*²⁷⁴

According to the Advocate General, a negative decision would violate the EU's Qualification Directive if it were only based on the stereotypical notion that "because B is a Muslim and from

a country where homosexuality is not accepted his account can not be credible without a statement giving details about his feelings and how he came to terms with his homosexuality." The finding that the applicant is not credible without a detailed account of feelings and of how he realised his homosexuality since he is a Muslim and comes from a country where homosexuality is not accepted, is a prohibited, stereotypical notion. These types of stereotypical notions that the Advocate General ten years ago warned about would violate the directive, today form the basis of credibility assessments in Sweden in SOGIESC asylum cases. They, thus, violate EU law. The Advocate General also emphasises that the assumption that the applicant is not credible if they did not experience anxiety when they realised that they were homosexual, or that they lack knowledge of political issues that concern homosexuals, are stereotypical notions that are inconsistent with Article 4.3 in the Qualification Directive.²⁷⁵

Opinion of Advocate General E. Sharpston, 17 July 2014, joint cases C-148/13-C-150/13

68. *All parties making observations to the Court accept that sexual orientation is a complex issue. Therefore, in conducting the credibility assessment the national authorities should not apply stereotypical notions to applicants' claims. Determinations should not be predicated on the assumption that there are 'correct' and 'incorrect' responses to an examiner's questions – for example, that an applicant is not credible if he did not experience anxiety when he realised that he was homosexual rather than heterosexual, or fails to display knowledge of political issues or particular activities that concern homosexuals. Such practices are inconsistent with Article 4(3)(c) of the Qualification Directive which requires the competent authorities to take account of the individual and personal circumstances of the applicant in question. I add for the sake of good order that the purpose of the interview is to invite the applicant to give his account. If in so doing he*

²⁷² Pride or Shame? Assessing LGBTI asylum applications in the Netherlands following the XYZ and ABC judgments, Jansen, S., 2019 p.171, Jansen, S., available at <https://www.refworld.org/reference/themreport/cocnld/2018/en/122503>

²⁷³ Pride or Shame? Assessing LGBTI asylum applications in the Netherlands following the XYZ and ABC judgments, 2019, p.169, Jansen, S., available at <https://www.refworld.org/reference/themreport/cocnld/2018/en/122503>

²⁷⁴ Sharpston, E., Opinion of 17 July 2014, A, B and C v Staatssecretaris voor Veiligheid en Justitie, C-148/13, C-149/13 and C-150/13, ECLI:EU:C:2014:2111, available at <https://curia.europa.eu/juris/document/document.jsf?docid=155164&doclang=en>

²⁷⁵ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

volunteers, for example, explicit sexual information about himself, that situation is distinguishable from the competent authorities posing such questions to him. However, it still remains incumbent on those authorities to assess his credibility bearing in mind that information of that nature can not establish his sexual orientation. In that respect I draw attention to the UNHCR guidelines.²⁷⁶

This report shows that the Swedish migration authorities explicitly request a detailed account for an inner, emotional process of self-realisation. The more stigmatised LGBTIQ+ is in the country of origin, the more the applicants are expected to have reflected on, and be able to describe, their SOGIESC. The migration authorities require that the applicant has felt or at least can reflect on, difference, stigma and shame. The requirements and assumptions in Swedish migration authorities' credibility assessments are what the Advocate General warned would be based on stereotypical notions. They violate EU law in the way the Advocate General foresaw. Jansen describes how stereotypical notions, which the Advocate General warned about would be unlawful, have become the major ground for rejection in SOGIESC asylum cases also in the Netherlands:

Advocate General Sharpston stated it would be inconsistent with the Qualification Directive if a negative decision was based solely on 'the stereotypical assumption that because B is Muslim and from a country where homosexuality is not accepted, his account can not be credible without a statement giving details about his feelings and how he came to terms with his homosexuality.' The stereotype the advocate general warns against has meanwhile become the major ground for rejection for LGBTIs in Dutch practice.²⁷⁷

In the same way as in the Netherlands, credibility assessments in Sweden are based on stereotypical assumptions. This report shows that the majority of the negative decisions are based on the applicant not fulfilling the stereotypical expectations of an inner, emotional process with feelings of difference, stigma and shame, and that a more detailed account is required the more stigmatised LGBTIQ+ is in the country of origin. The stereotypical notions

are applied as requirements and violate EU law and the CJEU's case law prohibiting assessments solely based on stereotypical notions. They also violate the UNHCR's guidelines, which expressly state that there are no universal experiences or qualities that typify LGBTIQ+ people, and that the assessment should not be based on stereotypical notions.²⁷⁸

²⁷⁶ Sharpston, E., Opinion of 17 July 2014, A, B and C v Staatssecretaris voor Veiligheid en Justitie, C-148/13, C-149/13 and C-150/13, ECLI:EU:C:2014:2111, available at <https://curia.europa.eu/juris/document/document.jsf?docid=155164&doclang=en>

²⁷⁷ Pride or Shame? Assessing LGBTI asylum applications in the Netherlands following the XYZ and ABC judgments, Jansen, S. 2019, p.169f, available at <https://www.refworld.org/reference/themreport/cocnld/2018/en/122503>

²⁷⁸ The UNHCR's Guidelines No. 9, paras. 4, 49, and 60.ii.



11. The way forward and recommendations

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On the left:

A member of RFSL Ungdom wearing a “Newcomers Youth” T-shirt, part of the organization’s clothing collection.

Photo: Arseny Selov & Andra Berciu

11.1 Discussions internationally and new research

After the Swedish original edition of this report was published in 2020, new research, several articles and reports about credibility assessments of SOGIESC asylum claims have been published²⁷⁹. Also, in 2021, the UNHCR held its Global Roundtable on Protection and Solutions for LGBTIQ+ People in Forced Displacement, for the first time since the time when the Guidelines No. 9 were developed. This time, the roundtable was accessible to and attended by far more participating experts, as it was held digitally. Around 300 experts from different parts of the world participated in discussions for three weeks in June 2021. Many discussions took place regarding the current issues in many countries' credibility assessments. A few of the most relevant recommendations that the discussions led to, to which RFSL and the author of this report contributed to, were the following:²⁸⁰

SUMMARY CONCLUSIONS: 2021 GLOBAL ROUNDTABLE ON PROTECTION AND SOLUTIONS FOR LGBTIQ+ PEOPLE IN FORCED DISPLACEMENT

F. Refugee Status Determination and Building Asylum Capacity

LGBTIQ+ persons seeking international protection in forced displacement experience a myriad of barriers to the adjudication of their asylum claims. A lack of systematic and comprehensive data on SOGIESC-based protection claims makes it difficult to assess overall refugee recognition rates by country or region. According to stakeholders, practices vary, and some jurisdictions are more restrictive than others. It is reported that some caseworkers, lawyers and asylum adjudicators lack a sufficiently nuanced understanding of what sexual orientation, gender identity, gender expression and sex characteristics entail. Notable challenges in the legal protection of LGBTIQ+ asylum seekers include evidentiary burdens in asylum claims; challenges

in satisfying criteria for well-founded fear and/or membership of a particular social group; jurisprudential and credibility challenges; and, implicit biases and/or stereotypes held by caseworkers, lawyers and asylum adjudicators.

1. Recommendation: Improve the asylum process for SOGIESC asylum claimants by:

a. Rendering procedures – including border and accelerated procedures – more appropriate by fostering a friendly and welcoming environment; ensuring claimants' privacy during interviews; ensuring decision-makers are specially trained on SOGIESC matters; engaging interpreters who are unquestionably neutral and have received SOGIESC-specific training; avoiding harm and re-traumatization by authorities (for example through intrusive questioning or repeated interviews); and avoiding excessively long asylum procedures (instead ensuring timely main interviews and first decisions on asylum claims), without detriment to the quality of the decisions.

b. Ensure high-quality and free-of-charge legal counseling and representation for all asylum claimants by lawyers with SOGIESC-specific expertise and sensitivity, as well as psychological and social support to help claimants (especially if traumatized) structure their personal narratives, complemented by a greater support role in the legal procedure for UNHCR and LGBTIQ+ and refugee CSOs, support groups and activists.

2. Recommendation: Increase levels of localized research, training, support and evaluation in SOGIESC asylum by:

a. Ensuring all decision-makers undertake good quality and accessible training on intercultural awareness, general SOGIESC matters and SOGIESC asylum claims, reflecting appropriate and culturally sensitive terminology and understanding of the diverse, subjective, intersectional and complex

²⁷⁹ For example *Queering asylum in Europe: Legal and social experiences of seeking international protection on grounds of sexual orientation and gender identity*, Springer, 2021, Dustin, M., Ferreira, N., Held, N., *Improving SOGI Asylum Adjudication: Putting Persecution Ahead of Identity*, Dustin, M., Ferreira, *Refugee Survey Quarterly*, Volume 40, Issue 3, September 2021, Pages 315–347, *Credibility Assessment in Asylum Claims Based on Sexual Orientation by the Greek Asylum Service: A Deep-Rooted Culture of Disbelief*, Zisakou, S., 2021, *Front. Hum. Dyn.* 3:693308. doi: 10.3389/fhumd.2021.693308, *Pride or Shame? The new Work Instructions and the Assessment of LGBTI Asylum Applications in the Netherlands*, Jansen, S., CoC Netherlands, April 2023, available at <https://coc.nl/wp-content/uploads/2023/04/Pride-or-Shame-The-follow-up.pdf>, *A Requirement of Shame: On the Evolution of the Protection of LGB Refugees*, Åberg, K., *International Journal of Refugee Law*, Volume 35, Issue 1, March 2023, Pages 37–57, <https://doi.org/10.1093/ijrl/eead008>

²⁸⁰ The relevant parts are marked in bold, by the author of the report.

nature of the experiences of SOGIESC claimants, heavily relying on the real-life experiences of SOGIESC refugees and their support groups, and allowing for some decision-makers to become specialised on SOGIESC matters.

b. Increasing the integrity and quality of decision-making to eliminate the culture of disbelief and avoid inappropriate lines of questioning and use of stereotypical assumptions in interviewing techniques and credibility assessment (for instance, the expectation of universally common experiences and characteristics among all LGBTIQ+ people, such as negative feelings about oneself), as well as avoiding the reductive or exclusive use of guidelines/models or approaches that excessively rely on a culturally insensitive interpretation of LGBTIQ+ identities.[...]

3. Recommendation: Enhance the quality of analysis and decision-making in SOGIESC asylum by:

a. Committing to urgently and periodically revising the UNHCR 2012 Guidelines for International Protection N°9 and existing training materials in light of the latest academic, policy and research findings on SOGIESC matters and human rights law, so as to ensure asylum procedures are sensitive to the heterogeneity, rights and needs of SOGIESC asylum claimants, avoid adopting any model for the assessment of the credibility of the claimant's asserted SOGIESC, and are more solidly grounded in LGBTIQ+ refugees' real-life experiences.

b. Assessing credibility on the basis of an individual, balanced, intersectional and holistic evaluation of all the evidence submitted by the claimant (including their testimony and other corroborative evidence) and other available evidence (such as Country of Origin Information), placing due value on the claimant's self-identification, without expectations of 'emotional journeys' or reliance on culturally unsound and

inappropriate stereotypes, and respecting the principle of the benefit of the doubt.

c. Carrying out the assessment of the risk of persecution on the basis of future risk of harm (as opposed to focusing only or mainly on past persecution), fully taking into account the extent to which claimants would enjoy effective protection upon return, the levels of social discrimination, the access to social, economic and cultural rights, the role of private actors, the diversity of SOGIESC refugees (not only in terms of SOGIESC, but also in terms of age, socio-economic and educational background, religion, disability, health, etc.), the cultural/relational/intersectional nature of SOGIESC, and an understanding of the complex detrimental impact of criminalizing laws – both secular and religious – on everyday life, independent of whether or not prosecutions occur or the law is officially implemented.²⁸¹

The recommendations emphasise the need of eliminating the culture of disbelief in SOGIESC asylum cases, and several times mention that stereotypes should be avoided, such the expectation of emotional journeys and universally common experiences and characteristics among all LGBTIQ+ people. The recommendations also emphasise a commitment to urgently and periodically revising the UNHCR 2012 Guidelines No 9, in light of the latest academic, policy and research findings on SOGIESC asylum law, and avoid adopting any model for the assessment of the credibility.

The year before the UNHCR Global Roundtable 2021 and the Summary Conclusions with recommendations from the Roundtable were published, a number of – in many ways similar – recommendations had been issued by SOGICA²⁸², to the EU and national asylum authorities, concerning the assessment of SOGIESC asylum claims. For example, SOGICA recommended that “decision-makers should be more open to hearing individual accounts and their interviewing tech-

²⁸¹ 2021 Global Roundtable on Protection and Solutions for LGBTIQ+ People in Forced Displacement – Summary Conclusions, 16th of August 2021. Co-organized by the United Nations High Commissioner for Refugees and the United Nations Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity (IE SOGI) 07 – 29 June 2021, available at <https://www.unhcr.org/fr-fr/en/media/2021-global-roundtable-protection-and-solutions-lgbtq-people-forced-displacement-summary>

²⁸² SOGICA – Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge, was a four-year project funded by the European Research Council. It set out to produce the necessary evidence base for a more just and humane asylum process for individuals seeking refuge in Europe on the basis of their SOGI. Available at <https://www.sogica.org/en/the-project/>

nique needs to be made less intimidating and to include an open line of questioning in SOGI cases. Eurocentric perceptions and stereotypes on sexual minorities should be avoided when decision-makers judge SOGI claimants' circumstances"²⁸³. SOGICA also recommended that the asylum authorities stop asking questions that presuppose a linear inner process and a development of a person's sexual orientation or gender identity:

13. General procedural needs

[...] Interviewers and judges should avoid questions that seek a linear evolution or moment of discovery such as 'when did you realise you were gay (or lesbian/bisexual/transgender/etc.)' in favour of open-ended questions that allow the claimant to tell their story in their own time and terms. We recommend that claimants be allowed to take a supporter or friend, as well as their legal representative, to their interview to provide moral support. To improve accountability and claimants' trust in proceedings, there should be accessible complaints procedures as there are in most areas of public service.²⁸⁴

In their final recommendations, SOGICA problematises how decision-makers rely on prejudices and stereotypes, and the asylum authorities' aim and attempt to objectively determine a person's sexual orientation or gender identity, which often leads to the applicant being considered unreliable early in the procedure:

23. Stereotyping

Decision-makers often fail to understand the individual claimant, because of assumptions and prejudices. These include, among others, expectations that claimants have a partner or are sexually active, take part in LGBTIQ+ activism, provide a 'coming out' narrative, and have difficulty reconciling their SOGI with their religious beliefs. Conforming to such stereotypes undermines the individual premise of refugee decision-making. Asylum and judicial authorities should not make use of 'stereotyped notions' neither during the interviews, nor in their decisions.

24. Credibility

Credibility is a key element in many, if not most, SOGI asylum decisions, by which we mean overall belief in the claimant's testimony. Decision-making is too often based on an attempt to objectively 'prove' a claimant's SOGI and starts from a position of scepticism that the claim is 'genuine'. Time and again during the SOGICA project fieldwork, claimants asked us, despairingly or wearily: 'So how can I prove my SOGI?' EU bodies and institutions - in particular EASO and CJEU - should guide Member States' asylum and judicial authorities to take the evidence, particularly the personal testimony, submitted by claimants as the starting point for credibility assessment. The default position should be belief in claimants' account of who they are and what has happened to them.²⁸⁵

SOGICA recommends that the credibility assessment should be based on the applicant's invoked evidence and their oral account. The starting point should be to believe the applicant's self-identification, their description of who they are and what they have experienced. In her research 2019, regarding cases where self-identification is not accepted as the only and best way, Jansen proposes a number of recommendations that may, to some degree, limit the problems that are the unavoidable result of trying to investigate someone else's sexual orientation or gender identity. One important recommendation is to abandon the idea that LGBTIQ+ people have experienced processes of awareness and self-acceptance and can speak about these in detail: "Naturally, there are asylum seekers who do meet this stereotype, but it can no longer apply as the core of this policy. [...] Western models of male sexuality development should no longer be used as a basis, and much more attention should be paid to cultural differences in this field."²⁸⁶ Jansen also recommends that besides the asylum applicant's statement, other evidence should no longer be disregarded: "As long as self-identification is not regarded as a starting point, it is consistent with an integral credibility assessment not to attach

²⁸³ SOGICA, no. 8, p. 2, available at <http://www.sogica.org/wp-content/uploads/2020/03/EASO-evidence-on-SOGI-2020-SOGICA-FINAL.pdf>

²⁸⁴ SOGICA, <https://www.sogica.org/wp-content/uploads/2020/03/EASO-evidence-on-SOGI-2020-SOGICA-FINAL.pdf>

²⁸⁵ Final Recommendations. SOGICA, available at <https://www.sogica.org/en/final-recommendations/>

²⁸⁶ Pride or Shame? LGBTI asylum in The Netherlands, Jansen, S., p. 124, 171, available at <https://www.refworld.org/reference/themreport/cocnld/2018/en/122503>

significance virtually exclusively to the statement of the person concerned. Partners' statements, (non-pornographic) photographs, and statements of witnesses (including COC and other interest groups and aid providers) also need to be included in the assessment. This is also in line with Article 4 of the European Qualification Directive.²⁸⁷

Dawson and Gerber argue in their research 2017 that models like the DSSH model – even though they are better than earlier methods – which rests on the assumption is that there are universal characteristics and experiences in LGBTIQ+ people, always risk being reduced to a questionnaire that should be answered correctly. Dawson and Gerber suggest that emphasis should be moved from a focus on experiences of feelings of difference:

Given the strong tendency, as discussed above, for models such as the DSSH to be reduced to a list of questions that must, on the whole, be answered satisfactorily, it is suggested that there be a shift of emphasis away from the narrative of difference approach. The focus should not be on obtaining an account of a linear, staged, and ultimately immutable or static identity. This is unrealistic and often unattainable for non-heterosexual women, and possibly also for gender-diverse and intersex applicants.²⁸⁸

The concept of a linear inner process, leading to a final state of being where self-awareness of a fixed identity and self-acceptance are attained, is unrealistic and often impossible for many LGBTIQ+ people to achieve, especially women, non-binary people, trans and intersex people. Dawson and Gerber suggest that focus in the asylum investigation should be shifted to investigating, processing, and assessing the fear of persecution because of the inability, or perceived inability, to live or act according to hetero/cis-normative expectations:

Rather, an applicant should be guided towards providing a narrative that explains their experience or fear of harm, based on their inability, or attributed inability, to adhere to dominant gendered norms or behaviours. While subtle, this is a significant shift from attempting to describe or assess a credible identity, as is dominant in the current approach to LGBTI claims. It is better to explore a narrative of the experience of harm or persecution faced by the applicant in relation to their (actual attributed) non-conformity to strict heteronormative gender-based norms. [...] In the case of claims for asylum by non-heterosexual women, the emphasis should be on women's specific relationship to societal norms in the country they are fleeing, rather than on immutable characteristics embodied by women worldwide.²⁸⁹

There is a big difference between trying to describe a credible identity in the “right way” and to examine an already experienced fear of persecution that the applicant risks because of actual or perceived deviation from binary cis/heteronormativity. Dawson and Gerber suggest that emphasis should be on the applicant's relation to the norms of the country they have fled from rather than on investigating unchangeable characteristics that are claimed to be universal.

In August 2023 a follow-up report was published by RFSL, examining 1 360 decisions and rulings from the Swedish Migration Agency and the migration Courts, between November 2020 and May 2023²⁹⁰. 96 % of the examined decisions and court rulings were negative, and asylum was denied. Out of those, 75,5% were based on credibility; that the applicant was assessed to not have made their SOGIESC claims credible, reliable and therefore probable, why they were denied asylum. The main conclusions of the report were that all the requirements shown in the first report in

²⁸⁷ Pride or Shame? LGBTI asylum in The Netherlands, Jansen, S., p. 124, 171, available at <https://www.refworld.org/reference/themreport/cocnld/2018/en/122503>

²⁸⁸ Assessing the Refugee Claims of LGBTI People: is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?, Dawson J., Gerber, P. p. 28.

²⁸⁹ Ibid. p. 28f.

²⁹⁰ Rejection Motivations in SOGIESC Asylum Cases in Sweden. A Follow-up of the Case Law Analysis of the Migration Agency's, the Migration Courts' and the Migration Court of Appeal's Assessments of SOGIESC Asylum Claims, [Avslagsmotiveringar i hbtqi-asylärenden. En uppföljning av rättsutredningarna] Gröndahl, A., RFSL August 2023, available at <https://www.rfsl.se/wp-content/uploads/2023/08/2023-AVSLAGSMOTIVERINGAR-I-HBTQI-ASYLARENDE-EN-UPPFOLJNING-AV-RATTSUTREDNINGEN.pdf>

2020²⁹¹, were still being applied by the Swedish migration authorities. The follow-up report specifically examined how the requirements of an inner process, detailed descriptions about feelings, thoughts and reflections, are also applied on trans and intersex applicants, and when the main or only claimed asylum ground is gender expression.²⁹² The follow-up report concluded that not only is it particularly problematic and inappropriate to require this, but that it is also irrelevant when the need for protection and the asylum ground is based on something physical. One out of many similar examined cases in the report, concerned an applicant who had submitted several medical statements from Swedish doctors, describing the applicant's intersex condition. The applicant, a person from Nigeria, assigned male gender at birth and in their identity documents, was described by the doctors as having androgynous body features, a development of breasts and only one testicle, which was smaller than what could be expected considering the person's age. Neither the Migration Court nor the Swedish Migration Agency questioned the content of the several doctors' medical statements, but concluded that they did not make it credible that the applicant was an intersex person (or "intersexual", as the court wrote, while consistently referring to the applicant with the pronoun "he"). The applicant was denied with the following motivation from the Migration Court:

The Migration Court 27th of October 2021, judgement no. 16

The Migration Court finds, as the Migration Agency, that A – when asked questions about his intersex condition – has been consistently vague and incoherent. He has not elaborated on how his intersexuality has affected his life and how it has been for him to grow up and live in the

*Nigerian society. He has not in a deep and reflective manner described how his intersexuality has affected his relations [...] [A has not] elaborated his thoughts and feelings regarding his intersexuality. He has had difficulties to elaborate his emotional reflections around how it has been to live in Nigeria as an intersexual. Instead, he has repeatedly said that he wants to be examined by a doctor and that he doesn't know how to explain his physical attributes connected to his intersexuality. [...] The Migration Court finds that it can be expected that the realisation of having a gender identity that is dangerous [...] should have led to reflections.*²⁹³

As the court concludes, the applicant had "repeatedly said" that they wished to be examined by a doctor, as they did not know how to verbally explain their "physical attributes connected to [their] intersexuality." The Migration Court did not question the doctors' descriptions of the applicant's body, their physical development of breasts, only having one testicle that was small and having an androgynous appearance. The fact that the court held that these undisputed facts about the applicant's body and physical development did not make it credible that they had an intersex condition, shows that the court obviously does not know what an intersex condition is, and how it is defined. The UNHCR establishes the following in their Guidelines No. 9:

III. TERMINOLOGY

Paragraph 10 [...] Intersex. The term intersex or "disorders of sex development" (DSD) refers to a condition in which an individual is born with reproductive or sexual anatomy and/or chromosome patterns that do not seem to fit typical biological notions of being male or female. These conditions may be apparent at birth, may appear at puberty, or may be discovered only during a medical examination. [...] An intersex person may

²⁹¹ The Swedish edition of this report, Rejection Motivations in SOGIESC Asylum Cases. A Case Law Analysis of the Swedish Migration Agency's, the Migration Courts' and the Migration Court of Appeal's Assessments of SOGIESC Asylum Claims, [Avslagsmotiveringar i hbtqi-asylärenden. En rättsutredning av Migrationsverkets, migrationsdomstolarnas och Migrationsöverdomstolens prövning av sexuell läggning, könsidentitet och könsuttryck], Gröndahl, A., November 2020, available at <https://www.rfsl.se/wp-content/uploads/2020/11/Rapport-AVSLAGSMOTIVERINGAR-I-H-BTOI-ASYLA%CC%88RENDEN-2020.11.09-1.pdf>

²⁹² Rejection Motivations in SOGIESC Asylum Cases. A Follow-Up of the Case Law Analysis [Avslagsmotiveringar i hbtqi-asylärenden: En uppföljning av rättsutredningen], Gröndahl A., RFSL, 2023, available at <https://www.rfsl.se/wp-content/uploads/2023/08/2023-AVSLAGSMOTIVERINGAR-I-HBTQI-ASYLARENDE-EN-UPPFOLJNING-AV-RATTSUTREDNINGEN-pdf>

²⁹³ This case and other similar negative decisions are analyzed in the follow-up report, chapter 3.1, "Are the Requirements applied when Gender Identity, Gender Expression and Intersex are Grounds for Asylum?", Gröndahl A., RFSL, 2023, p. 21ff, available at <https://www.rfsl.se/wp-content/uploads/2023/08/2023-AVSLAGSMOTIVERINGAR-I-HBTQI-ASYLARENDE-EN-UPPFOLJNING-AV-RATTSUTREDNINGEN-pdf>

identify as male or female, while their sexual orientation may be lesbian, gay, bisexual, or heterosexual. Intersex persons may be subjected to persecution in ways that relate to their atypical anatomy. They may face discrimination and abuse for having a physical disability or medical condition, or for non-conformity with expected bodily appearances of females and males. Some intersex children are not registered at birth by the authorities, which can result in a range of associated risks and denial of their human rights. In some countries, being intersex can be seen as something evil or part of witchcraft and can result in a whole family being targeted for abuse. Similar to transgender individuals, they may risk being harmed during the transition to their chosen gender because, for example, their identification papers do not indicate their chosen gender. People who self-identify as intersex may be viewed by others as transgender, as there may simply be no understanding of the intersex condition in a given culture.

The Swedish migration authorities' strict requirements of elaborated oral descriptions of feelings, thoughts and emotional reflections, are applied also when the asylum claim and need for protection is based on physical appearance such as the intersex condition in the above cited case. The applicant was denied asylum and deported to Nigeria, where LGBTIQ+ people can be punished with the death penalty.²⁹⁴ The case shows how these requirements are particularly inappropriate and irrelevant to apply on intersex and trans applicants, and/or when gender expression and/or physical appearance are the main or only grounds for asylum. It also shows a continued lack of knowledge about SOGIESC asylum claims among the Swedish Migration Courts and the Migration Agency, who apparently neither knew nor found it relevant to find out what the claimed asylum ground – an intersex condition, proven by several doctors' medical statements – actually is.

Considering the findings in the latest report in August 2023 and its findings, and that no chances or improvements in Swedish SOGIESC asylum case law can be seen in the follow-up report or in the beginning of 2024 when this English edition is finalised, the recommendations in this chapter have been edited so that they are in line with the follow-up report in Swedish.

11.2 Recommendations to the Swedish migration authorities

- The Swedish Migration Agency is recommended to urgently issue a new, updated legal position paper, as the content in the current one, RS/015/2021, has not changed since 2015 and is therefore nearly ten years old. It does not reflect or refer to the latest case law of the CJEU, the European Court of Human Rights or the Swedish Migration Court of Appeal.²⁹⁵ Considering that this report in 2024 and the follow-up report in 2023 to the Swedish edition shows that the UNHCR guidelines are applied incorrectly, it is recommended that a new position paper clarifies how the guidelines should and should not be applied, by for example clarifying that the use of stereotypes is not allowed. The new position paper is recommended to build on the recommendations in the Summary Conclusions from the Global Roundtable, especially considering that they emphasise the need to avoid specific models, stereotypes and assumptions about universally common experiences and characteristics among LGBTIQ+ people, such as emotional journeys, and that the assessment should be individual and that all evidence, not only the oral account, must be considered.

- Considering the critique in international and national research against models like DSSH, a critique which is also included in the EUAA's judicial analysis providing an overview of the EU legal framework and jurisprudence that pertains to evidence and credibility assessment,²⁹⁶ and considering that the UNHCR's recommendations from the Global Roundtable 2021 explicitly

²⁹⁴ State-Sponsored Homophobia 2020: Global Legislation Overview Update, Ramon Mendos, L., Botha, K., Carrano Lelis, R., López de la Peña, E., Savelev, I., Tan, D., ILGA World, p. 25, 31, 33, 37, 55 ff., available at https://ilga.org/wp-content/uploads/2023/11/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf

²⁹⁵ The Migration Court of Appeal in MIG 2016:30 reminded the lower instances of that sexual orientation and gender identity are different concepts that should not be confused with each other.

²⁹⁶ Evidence and credibility assessment in the context of the Common European Asylum System. Judicial analysis. Second edition, EUAA, 2023-02-17, p. 266 f., available at <https://euaa.europa.eu/publications/judicial-analysis-evidence-and-credibility-context-common-european-asylum-system>

state that the use of models and expectations of universally common experiences should be avoided in the credibility assessments,²⁹⁷ the Swedish Migration Agency is recommended to stop using the DSSH model in their internal trainings of case officers and decision-makers.

- Unlike the Swedish Migration Agency, the Swedish Migration Courts have not made any efforts such as training or educating judges and lay assessors, following the reports from RFSL showing how their assessments of SOGIESC claims contradict Swedish and international law. The Migration Courts are therefore recommended to take necessary measures to ensure that judges and lay assessors receive the necessary training in SOGIESC asylum to, to come to terms with unlawful credibility assessments and improve the quality of their decision-making.

- More than a decade has passed since the Swedish Migration Court of Appeal granted leave to appeal in and assessed a case regarding an applicant's claimed homosexual orientation. The precedent, MIG 2013:25, has been criticised in jurisprudence for overthrowing the legal hierarchy in asylum law. It also revives nullified assessment method from a lower instance, which enables prohibited discretion reasoning. The Migration Court of Appeal makes a selective, misleading summary of the UNHCR Guidelines No. 9, and selects questions that the court finds relevant to ask a homosexual man. Furthermore, the assessment method established in MIG 2013:25 was regarding a self-identified homosexual man, and yet, it is being applied by the lower instances also to assess all other SOGIESC asylum claims, regardless of whether the applicant is female, non-binary, trans and/or intersex. This despite the fact that sexual orientation, gender identity and gender expression are different legal asylum grounds. Lastly, MIG 2013:25 is outdated as it does not reflect case law from the CJEU or the European Court of Human Rights, from the last decade. Therefore, the Swedish Migration Court of Appeal is recommended to grant leave to appeal in a SOGIESC asylum case, to give the

lower instances guidance on how to assess SOGIESC asylum claims.

- The last recommendation given to the Swedish migration authorities in the follow-up report in August 2023, was that considering the absence of any improvement in the assessments of SOGIESC asylum cases, and that over 3 years had passed since the first report showing systematic unlawful assessments, the Swedish Migration Agency should consider temporarily stopping decision-making in these asylum cases, until they can guarantee that the assessments of SOGIESC asylum claims are done in accordance with Swedish and international law.

11.3 Recommendations to the Swedish Government and the legislator

- The Government is recommended to give the Swedish Migration Agency the assignment to educate case officers and decision-makers on a regular basis, in examining and assessing SOGIESC asylum claims. The trainings should be in collaboration with experts in SOGIESC asylum law. The Government should assign the Swedish Migration Agency to follow up and report back how they ensure that assessments are in accordance with Swedish and international law, in SOGIESC asylum cases.

- The Government is recommended to give the Swedish Migration Agency the assignment to keep statistics over SOGIESC asylum cases, on which legal ground an application is granted or denied.

- During Stockholm Pride 2023, where the follow-up report was presented and its conclusions discussed, RFSL arranged a political debate between the parties in the Swedish Parliament. During this debate all parties were in favor of an investigation of the legality of the migration authorities' assessments of SOGIESC asylum cases. The Government had also promised²⁹⁸ to appoint such an investigation in SOGIESC asylum cases. The Government was therefore recommended to urgently assure that the investigation

²⁹⁷ 2021 Global Roundtable on Protection and Solutions for LGBTIQ+ People in Forced Displacement – Summary Conclusions, para. F 3 a), <https://www.refworld.org/docid/611e20c77.html>

²⁹⁸ The Tidö Agreement [Tidöavtalet], 14th October 2022, is the agreement between the governing parties in the Swedish parliament with the Sweden Democrats p. 45, available at <https://via.tt.se/data/attachments/00551/04f31218-dccc-4e58-a129-09952cae07e7.pdf>

is conducted. At the time of finalizing this English edition, the Swedish Government has appointed the investigation of the Swedish Migration Agency's assessments of SOGIESC asylum cases, which is conducted by The Swedish Agency for Public Management. RFSL's asylum lawyer and the author of RFSL's SOGIESC asylum reports, is interviewed as part of the investigation, which is to be reported back to the Government on 7th of October 2024.²⁹⁹

²⁹⁹ Information about the instruction from the Government to the Swedish Agency for Public Management is available at: <https://www.statskontoret.se/pagaende-uppdrag/gora-en-oversyn-av-asyllprocessen-och-utreda-behovet-av-tillsyn-in-om-migrationsomradet/>



Bibliography

On the left:

A member of RFSL Ungdom wearing a “Newcomers Youth” T-shirt, part of the organization’s clothing collection.

Photo: Arseny Selov & Andra Berciu

Public documentation, legislative texts, preparatory works etc.

The Swedish Aliens Act (2005:716) [Utlänningslagen], https://www.government.se/contentassets/784b3d7be3a54a0185f284bbb2683055/aliens-act-2005_716.pdf

Government Bill 2005/06:6 Refugeehood and Persecution for Reasons of Gender or Sexual Orientation [Proposition 2005/06:6, Flykting-skap och förföljelse på grund av kön eller sexuell läggning]

Report by the Committee on Social Insurance. Migration and Asylum Politics [Socialförsäkringsutskottets betänkande. Migration och asylpolitik.] 2009/10:SfU14

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

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

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

Position paper by the Director-General of Legal Affairs of the Migration Agency RS//0152021 Regarding the Examination and Assessment of the Future Risk of People who Claim Asylum on the Basis of Sexual Orientation, Gender Identity or Gender Expression [Migrationsverkets rättschefs rättsliga ställningstagande RS//0152021 angående utredning och prövning av den framtidsytande risken för personer som åberopar skyddsskäl på grund av sexuell läggning, könsöverskridande identitet eller könsuttryck] 2021-02-25, <https://lifos.migrationsverket.se/dokument?documentSummaryId=45289>

Position paper by the Director-General of Legal Affairs of the Migration Agency RCI 03/2011 Regarding the Method for Examining and Assessing the Future Risk of People who Claim Asylum for Reasons of Sexual Orientation [Migrationsverkets rättschefs rättsliga ställningstagande RCI 03/2011 angående metod för utredning och prövning av den framtidsytande risken för personer som åberopar skyddsskäl på grund av sexuell läggning] 2011-01-13

Position paper by the Director-General of Legal Affairs of the Migration Agency RCI 04/2009 About Persecution for Reasons of Homo- or Bisexuality [Migrationsverkets rättschefs rättsliga ställningstagande RCI 04/2009 om förföljelse på grund av homo- eller bisexuell läggning] 2009-10-12

2021 Global Roundtable on Protection and Solutions for LGBTIQ+ People in Forced Displacement – Summary Conclusions, 16th of August 2021. Co-organized by the United Nations High Commissioner for Refugees and the United Nations Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity (IE SOGI) 07 – 29 June 2021, available at <https://www.unhcr.org/fr-fr/en/media/2021-global-roundtable-protection-and-solutions-lgbtqi-people-forced-displacement-summary>

The Tidö Agreement [Tidöavtalet], 14th October 2022, available at <https://via.tt.se/data/attachments/00551/04f31218-dccc-4e58-a129-09952cae07e7.pdf>

Literature

Andersson, E, Tillförlitliga kriterier? En granskning av tillförlitlighetsbedömningar av asylberättelser, Asylrättscentrum 2019

Asanovic, A., Bruce-Jones, E., Peirce, J., Zadeh, L, Still Falling Short. The standard of Home Office decision-making in asylum claims based on sexual orientation and gender identity., Rainbow Migration (previously UKLGIG) 2018, available at https://www.rainbowmigration.org.uk/wp-content/uploads/2022/03/Still-Falling-Short-Jul-18_0.pdf

Berg, L., Millbank, J., Constructing the Personal

Narratives of Lesbian, Gay and Bisexual Asylum Claimants, 2007, *Journal of Refugee Studies*, 20, 2009, pages 195-223.

Chelvan, S., The Emotional Journey and the DSSH model: a positive tool for credibility assessment, 2020-07-08, SOGICA Final Conference, https://www.sogica.org/wp-content/uploads/2020/08/SOGICA-conference_programme_v18.pdf

Commissioner for Human Rights; Human Rights Comment, Open minds are needed to improve the protection of LGBTI asylum seekers in Europe, 2018-11-10 <https://www.coe.int/en/web/commissioner/-/open-minds-are-needed-to-improve-the-protection-of-lgbti-asylum-seekers-in-europe>

Cover, R., Prosser, R., Queer Young Men, Identity and Contemporary Coming Out Narratives Online, *Australian Feminist Studies* 2013, volume 28, issue number 75

Dawson J., Gerber, P., Assessing the Refugee Claims of LGBTI People: is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation? *International Journal of Refugee Law*, volume 29, issue 2, June 2017, pages 292-322

Dustin, M., Ferreira, N., Improving SOGI Asylum Adjudication: Putting Persecution Ahead of Identity, *Refugee Survey Quarterly*, 2021, 40, 315-347 doi: 10.1093/rsq/hdab005 Advance Access Publication Date: 19 July 2021. Available at <https://doi.org/10.1093/rsq/hdab005>

European Union Agency for Fundamental Rights, Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers. 24 March 2017. <https://fra.europa.eu/en/publication/2017/current-migration-situation-eu-lesbian-gay-bisexual-transgender-and-intersex-asylum>

EUAA, Evidence and credibility assessment in the context of the Common European Asylum System. Judicial analysis. Second edition, 2023-02-17, p. 266 f., available at <https://euaa.europa.eu/publications/judicial-analysis-evidence-and-credibility-context-common-european-asylum-system>

Feijen, L., Frennmark E., Kvalitet inom svensk asylprövning: en studie av Migrationsverkets utredning av och beslut om internationellt skydd, Migrationsverket, Stockholm 2011

Gould, A. Queer? Provet it. Should the EU Create a Framework for the Credibility Assessment of Asylum Claims Based on Sexual Orientation and Gender Identity? Université Libre de Bruxelles 2019

Gyulai, G. (ed.), Singer, D., Chelvan, S., Given-Wilson, Z., Credibility Assessment in Asylum Procedures: A Multidisciplinary Training Manual, Volume 2, 2015, 2015, available at: <https://helsinki.hu/wp-content/uploads/CREDO-training-manual-2nd-volume-online-final.pdf>

Gröndahl, A., The Refugee Status Determination Procedure Relating to Sexual Orientation: An Analysis of the Risk Assessment and Access to Protection in the Country of Origin, original title in Swedish: Asylprövningen vid flyktingskap på grund av sexuell läggning. En analys av riskprövningen och möjligheten till skydd i hemlandet, 2012. <https://www.rfsl.se/wp-content/uploads/2020/04/Asylprovningen-vid-flyktingskap-pg-a-sexuell-laggning-En-analys-av-riskprvningen-och-mjiligheten-till-skydd-i-hemlandet-RFSL-Asylrapport.pdf>

Gröndahl, A., Rejection Motivations in SOGIESC Asylum Cases. A Case Law Analysis of the Swedish Migration Agency's, the Migration Courts' and the Migration Court of Appeal's Assessments of SOGIESC Asylum Claims, [Avslagsmotiveringar i hbtqi-asylärenden. En rättsutredning av Migrationsverkets, migrationsdomstolarnas och Migrationsöverdomstolens prövning av sexuell läggning, könsidentitet och könsuttryck], November 2020, available at <https://www.rfsl.se/wp-content/uploads/2020/11/Rapport-AV-SLAGSMOTIVERINGAR-I-H-BTQI-ASYLA%C3%88RENDEN-2020.11.09-1.pdf>

Gröndahl, A., Rejection Motivations in SOGIESC Asylum Cases in Sweden. A Follow-up of the Case Law Analysis of the Migration Agency's, the Migration Courts' and the Migration Court of Appeal's Assessments of SOGIESC Asylum Claims, [Avslagsmo-

tiveringar i hbtqi-asylärenden. En uppföljning av rättsutredningen] RFSL August 2023, available at <https://www.rfsl.se/wp-content/uploads/2023/08/2023-AVSLAGSMOTIVE-RINGAR-I-HBTQI-ASYLARENDE-EN-UPPFOLJNING-AV-RATTSUTREDNINGEN-.pdf>

Gustafsson Grønningsæter, A., Establishing a Sexual Identity: The Norwegian Immigration Authorities Practice in Sexuality-Based Asylum Cases, 2017, in Out & Proud? LGBTI asylum in Europe Conference COC Netherlands, Amsterdam, October 5-6, 2017, available at: <https://www.coc.nl/wp-content/uploads/2017/04/Norwegian-practices-Andrea-Gustafsson-Grønningsaeter.pdf>

Jansen, S. Pride or Shame? Assessing LGBTI asylum applications in the Netherlands following the XYZ and ABC judgments, CoC Netherlands, English edition 2019

Jansen S., Spijkerboer, T., Fleeing Homophobia. Asylum claims related to sexual orientation and gender identity in Europe, Vrije Universiteit Amsterdam 2011

Jansen, S., Good Practices Related to LGBTI Asylum Applicants in Europe, ILGA Europe 2014, <https://www.ilga-europe.org/report/good-practices-related-to-lgbti-asylum-applicants-in-europe/>

Malmquist, V. Fruktan och skam. En granskning av migrationsdomstolarnas bedömningar av HBTQI-asylärenden, 2016, <https://lup.lub.lu.se/studentpapers/search/publication/8897538>

National Centre for Knowledge on Men's Violence against Women, 2010. Antologi: Sju perspektiv på våldtäkt [Anthology: Seven Perspectives on Rape]. Report 2010:2, <https://kunskapsbanken.nck.uu.se/nckkb/nck/publik/fil/visa/491/nck-rapport-antologi-sju-perspektiv-pa-valdtakt-2010-2.pdf>

Politidis Palm, A., Naji, A., RFSL Youth, I want to be free! A legal review of asylum cases of LGBTIQ youth and nine stories about Sweden, <https://new-comersyouth.se/i-want-to-be-free/>

Ruppacher, R. Not that kind of gay. Credibility assessment and the concept of sexual orientation in European asylum law, Universidade Nova de Lisboa 2015

SOGICA - Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge, [https://www.sogica.org/wp-content/](https://www.sogica.org/wp-content/uploads/2020/03/EASO-evidence-on-SOGI-2020-SOGICA-FINAL.pdf)

[uploads/2020/03/EASO-evidence-on-SOGI-2020-SOGICA-FINAL.pdf](https://www.sogica.org/wp-content/uploads/2020/03/EASO-evidence-on-SOGI-2020-SOGICA-FINAL.pdf)

SOGICA Final Conference, Similar stereotypical constructions of sexual orientation in different European countries, 2020-07-09, <https://www.sogica.org/wp-content/uploads/2020/08/SOGICA-conference-programme-v18.pdf>

SOGICA Final Recommendations, 2020-07-21, <http://www.sogica.org/en/final-recommendations/>

SOGICA, Submission to EASO's 2019 Annual Report on the Situation of Asylum in the European Union, 2020, <http://www.sogica.org/wp-content/uploads/2020/03/EASO-evidence-on-SOGI-2020-SOGICA-FINAL.pdf>

Sussner, P., "Why Heteronormativity Matters: The not so lost Requirement of Discretion in (Austrian) Asylum Law", 2020-07-09, SOGICA Final Conference, <https://www.sogica.org/wp-content/uploads/2020/08/SOGICA-conference-programme-v18.pdf>

Thorburn Stern, R., Wikström, H., Migrationsrätt: skyddsbehov och trovärdighet: bedömning i asylärenden, 1. uppl., Liber, Stockholm, 2016

Tschaeler, M., Between queer liberalisms and Muslim masculinities: LGBTIQ+ Muslim asylum assessment in Germany, 2019-07-24, Journal Ethnic and Racial Studies, volume 43, issue 7

Tschaeler, M., Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants, 2007, Journal of Refugee Studies, Between queer liberalisms and Muslim masculinities: LGBTIQ+ Muslim asylum assessment in Germany, Ethnic and Racial Studies 2019, available at <https://research-information.bris.ac.uk/en/publications/between-queer-liberalisms-and-muslim-masculinities-lgbtqi-muslim->

Wessels, J., HJ (Iran) and another - Reflections on a New Test for Sexuality-Based Asylum Claims in Britain, 24(4) International Journal of Refugee Law 815, 2012

Zisakou, S., Credibility Assessment in Asylum Claims Based on Sexual Orientation by the Greek Asylum Service: A Deep-Rooted Cul-

ture of Disbelief, *Frontiers in Human Dynamics*, 2021, available at <https://www.frontiersin.org/articles/10.3389/fhumd.2021.693308/full>

Zisakou, S., Zisakou, S., Proving gender and sexuality in the (homo)nationalist Greek asylum system: Credibility, sexual citizenship and the 'bogus' sexual other, 2023, *Sexualities*. Advance online publication. <https://doi.org/10.1177/13634607231208043>

Åberg, K., A Requirement of Shame: On the Evolution of the Protection of LGB Refugees, *International Journal of Refugee Law*, Volume 35, Issue 1, March 2023, Pages 37–57, <https://doi.org/10.1093/ijrl/ead008>

Case law etc.

MIG 2013:25. Case no. UM 3853-13. The Administrative Court of Appeal in Stockholm 2013-12-19

MIG 2016:30. Case no. UM 5663-16. The Administrative Court of Appeal in Stockholm 2016-12-21

MIG 2019:5. Case no. UM 12194-18 The Administrative Court of Appeal in Stockholm 2019-04-10

Case no. UM 14407-18 The Administrative Court of Appeal in Stockholm 2019-06-11

CJEU, Joint cases C-148, C-149 and C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie (2014) ECLI:EU:C:2014:2406

CJEU, Joint Cases C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel (2013) ECLI:EU:C:2013:720

Sharpston, Opinion of 17 July 2014, A, B and C v Staatssecretaris voor Veiligheid en Justitie, 148/13, C-149/13 and C-150/13, ECLI:EU:C:2014:2111. ECLI:EU:C:2014:2111, available at <https://curia.europa.eu/juris/document/document.jsf?docid=155164&doclang=en>

ECtHR 12 June 2003, Van Kück v Germany, 35968/97; ECtHR 11 July 2002, Goodwin v United Kingdom [Grand Chamber], 28957/95.

HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department, UK, [2010]

UKSC 31, Supreme Court, 7 July 2010.

Electronic sources, data bases, country of origin information reports etc.

ILGA World: Lucas Ramon Mendos, Kellyn Botha, Rafael Carrano Lelis, Enrique López de la Peña, Iliia Savelev and Daron Tan, State-Sponsored Homophobia 2020: Global Legislation Overview Update (Geneva: ILGA, December 2020), available at <https://ilga.org/wp-content/uploads/2023/11/ILGA-World-State-Sponsored-Homophobia-report-global-legislation-overview-update-December-2020.pdf>

ILGA World, State-Sponsored Homophobia 2019, 2019-03-19, p. 523: De facto criminalisation: Iraq, <https://lifos.migrationsverket.se/dokument?documentSummaryId=42986>

JP Infonet: <https://www.jpinfonet.se/>, <https://www.jpinfonet.se/JP-RattsfallsnetMigration/start/>

Lifos, The Migration Agency's Database for Country of Origin Information: <https://lifos.migrationsverket.se>

RFSL's Glossary: <https://www.rfsl.se/hbtqi-fakta/begreppsordlista/>

The Swedish Courts' glossary, 2019: https://www.domstol.se/globalassets/filer/gemensamt-innehall/for-professionella-aktorer/svensk-engelsk-ordlista_2019.pdf

The Migration Agency's website for LGBTIQ+ people applying for asylum: <https://www.migrationsverket.se/Privatpersoner/Skydd-och-asyl-i-Sverige/For-dig-som-ar-hbtq-person-och-soker-asyl.html>

The Swedish Ministry of Foreign Affairs, Iraq: Human Rights, Democracy and the Rule of Law as per the 30th of June 2019 [Mänskliga rättigheter, demokrati och rättsstatens principer: situationen per den 30 juni 2019], 2019-12-18, Lifos 43923, available at <https://lifos.migrationsverket.se/dokument?documentSummaryId=43923>.

The Swedish Ministry for Foreign Affairs, Kenya: Human Rights, Democracy and the Rule of Law [Kenya - Mänskliga rättigheter, demokrati och rättsstatens principer: situationen per den 30 juni 2019], 2019-12-18

The Swedish Ministry of Foreign Affairs, Iraq – Human Rights, Democracy and Rule of Law: The Situation on the 30 June 2019 [Irak – Mänskliga rättigheter, demokrati och rättsstatens principer: situationen per den 30 juni 2019,], 2019-12-18, Lifos 43923

The Swedish Refugee Law Center, Children's Asylum Law Center, "What requirements are placed on you?", available at <https://sweref.org/vilka-krav-stalls-pa-dig/>

Pictures

RFSL Ungdom Clothing Collection Library
A self-fundraising initiative to support Newcomers Youth members in Sweden. Find all items at <https://webbshop.rfslungdom.se/>

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