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PRIDE

OR SHAME?

ASSESSING
LGBTI ASYLUM
APPLICATIONS IN
THE NETHERLANDS
FOLLOWING
THE XYZ AND ABC
JUDGMENTS



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ORIGINAL TITLE IN DUTCH:
TROTS OF SCHAAMTE? De beoordeling
van LHBTI asielaanvragen in Nederland na
de arresten XYZ en ABC

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PREFACE

First of all, I would like to thank several people without whom this report would never have come about.

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Sabine Jansen LLM
Amsterdam, April 2018

1. INTRODUCTION

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1.1 History and backgrounds

In a large part of the world, people are persecuted for their sexual orientation or gender identity. Performing sexual acts with somebody of the same sex is criminalised in 72 countries, and the sanctions range from several months in prison to life sentences or even the death penalty.¹ These criminal penalties are actually applied and enforced. Additionally, there are many countries where such criminal provisions have been abolished, but where lesbian, gay, bisexual, transgender and intersex (LGBTI) people are still persecuted. In many cases, this leads to their decision to flee.

The report *Fleeing Homophobia, asylum claims related to sexual orientation and gender identity in Europe*² was published in 2011. It was the result of a study conducted in 2010-2011 into the position of LGBTI asylum seekers in 25 European countries. Huge differences were found in the ways in which the individual Member States of the European Union deal with the specific problems of people who have fled their country because of their sexual orientation or gender identity. Italy, for instance, was the only EU Member State where criminalisation of same-sex sexual acts in the country of origin was sufficient reason for granting refugee status to LGBTIs who had fled their country.³ In addition, asylum practice in the Member States did not meet the standards prescribed by international and European human rights and refugee law in several respects. In at least seventeen countries, asylum seekers' applications were rejected on the ground that they could conceal their sexual identity to a greater or lesser extent in the country of origin.⁴ In many cases, decisions about credibility were based on stereotypes concerning LGBTI asylum seekers. In some countries, the assistance of sexologists, psychologists and psychiatrists was called in. A late disclosure towards the asylum authorities, too, was treated in widely different ways, with the Netherlands standing out in a negative sense.

In the period that followed, the Dutch Council of State (*Raad van State*) apparently had so many doubts as to how to deal with asylum applications on the basis of sexual orientation, that it submitted preliminary questions about this subject to the Court of Justice of the European Union twice. These questions led to the XYZ⁵ and ABC⁶ judgments and eventually to an amendment of the Dutch policy as well.

1. In the latest edition of the annual ILGA report *State-Sponsored Homophobia*, 72 states are referred to as 'criminalising states' (p. 8). See also <https://76crimes.com/>.

2. In the footnotes, this study is referred to as the 'Fleeing Homophobia report 2011' instead of 'Jansen & Spijkerboer 2011'. See also Jansen 2013b for a summary of the study.

3. Fleeing Homophobia report 2011, p. 23; see also Corte Suprema di Cassazione 20 September 2012, 15981/ 2012, English translation on www.refworld.org/pdfid/5062c59f2.pdf.

4. Fleeing Homophobia report 2011, p. 34.

5. CJEU (Court of Justice of the EU) 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, and ABRvS [Administrative Jurisdiction Division of the Council of State] 18 December 2013, ECLI:NL:RVS:2013:2423, (X).

6. CJEU 2 December 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, C-148/13, C-149/13 and C-150/13, ECLI:EU:C:2014:2406.

1.2 Question and aim of the study

CENTRAL RESEARCH QUESTION

The central research question is: how does the IND deal with applications of lesbian, gay, bisexual, transgender and intersex asylum seekers and with the specific problems related to such applications, like those that emerged from the Fleeing Homophobia study in particular, since the XYZ and ABC judgments?

SUBQUESTIONS

With reference to XYZ: What is the role of criminalisation of sexual orientation or same-sex sexual acts⁷ in the country of origin when assessing whether the qualification ‘persecution’ is in place? How does the IND assess the expression of sexual orientation or gender identity? Are people still forced, directly or indirectly, to return to the closet?

With reference to ABC: How is the credibility of a stated sexual orientation or gender identity assessed by the IND in Dutch practice? On which grounds are the decisions made? What attempts are made to find the truth? To what extent are presumptions and/or stereotypes involved in the process?⁸ To what extent are decisions based on such stereotypes? How is a late disclosure assessed?

Is there anything else that is relevant in the context of assessing asylum applications of LGBTIs?

AIM OF THE STUDY

The aim of this study is to gain insight into the current decision-making practice with respect to applications of LGBTI asylum seekers and use it as a basis for making recommendations to enhance the quality of the asylum procedure for this group.

1.3 Report set-up

After Chapter 1, in which a description is provided of what the report entails and how the report has come about, the relevant European and national regulations and case law are described in Chapter 2. The XYZ and ABC judgments of the Court of Justice of the European Union on handling asylum applications based on sexual orientation and the case law and regulations that resulted from this in the Netherlands are of special

7. This is about consensual sexual acts between adults.

8. A definition of ‘stereotype’: ‘an established idea, especially of a certain type of person or a certain community or group, which is often based on prejudice and cliché’ (onzetaal.nl). A definition of ‘prejudice’: ‘an opinion based on a lack of knowledge’ (Van Dale).

interest. The major part of the report is about the new policy in Working Guidelines (WI) 2015/9, which pertains to assessing the credibility of sexual orientation. The content of the policy as well as its sources are discussed, followed by an analysis. In Chapter 3, the execution of the policy is discussed in detail, with quotes from files and case law. Chapter 4 is about the severity of the applications. In this chapter, the subjects of criminalisation and ‘discretion’ are discussed, as well as protection by the authorities and – briefly – safe countries of origin. The conclusions and recommendations of the report are provided in Chapter 5.

1.4 Methodology and reading guide

From a first exploration on the basis of case law it became apparent that nowadays especially the question about credibility of sexual orientation is particularly relevant when LGBTI asylum applications are assessed. Especially with respect to applications from countries of origin where criminal provisions in this field are in place, not believing the sexual orientation appears to be a major reason for rejecting the asylum application.

File research is the key part of the study. Additionally, relevant case law and relevant literature have been examined. This study is indicative and qualitative. No quantitative figure-based results are provided, and it is limited in volume and time. The study provides an indication of the development of asylum policy and practice concerning LGBTI asylum applications since the XYZ and ABC judgments and includes frequent references to the findings of the Fleeing Homophobia study.

PRESELECTION FILE RESEARCH

The IND granted the researcher access to INDiGO (ICT system of the IND) to inspect the files. As a new policy had just been formulated at the time, files were examined in which the decision on the asylum application was made between 1 October 2015 and 1 April 2016, so after the Working Guidelines 2015/9 had been issued. The IND was asked for a list of all decisions in LGBTI asylum cases from that period. Providing this list was not possible, however, since for the sake of privacy the ‘sexual orientation’ ground is not stated separately.⁹ As a result, the LGBTI files had to be selected from the system manually. Keywords¹⁰ were used to look for LGBTIs in each individual file.

9. According to the investigation report ‘Evaluatie gendergerelateerd vreemdelingenbeleid in Nederland’ (evaluation of gender-related immigration policy in the Netherlands) (p. 19) published by INDIAC in July 2018, ‘homosexual’ could be used as a search word in the system. However, the ICT system INDIS was used at the time, and in 2010 the transition to the INDiGO computer system was made. In this system, it is no longer possible to search the entire system using such keywords.

10. The following keywords were used: *homo, homoseksuele, lesbische, biseksuele, transseksuele, transgender, seksuele, geaardheid, gerichtheid* (gay, homosexual, lesbian, bisexual, transsexual, transgender, sexual, inclination, orientation).

The IND supplied an Excel file with 20,220 files from the selected period. All of these were files in which the first decision was made between 1 October 2015 and 1 April 2016, including follow-up applications. The selection did not include any files in which a subsequent decision was made in the selected period in a procedure that had started earlier and was still in progress. Consequently, any files in which a new decision was made after an appeal won by the asylum seeker are outside the scope of this study.

From the Excel file, fifty countries of origin were selected that looked suitable for being searched for LGBTI files, because the researcher knew by experience that these are countries LGBTIs flee from. Eight other countries of origin were left out of consideration, because the number of asylum seekers from these countries, and hence the number of files, was so large that it was unfeasible to open the files one by one to investigate whether they were about an L, G, B, T or I.¹¹ In 15 of the countries that were scanned, no LGBTI cases were found.¹² In the 35 remaining countries of origin, LGBTI files were found. The files from these countries were processed into the table in section 1.5. Children born in or after 2000 are not included in the selection.¹³

11. These countries are Afghanistan, Albania, Eritrea, Ethiopia, Iraq, Somalia, Sudan, and Syria.

12. These countries are Algeria, Bangladesh, Brazil, Chad, Congo DRC, El Salvador, Jordan, Kazakhstan, Kenya, Libya, Myanmar, the Palestinian territories, Tajikistan, Turkey, and Yemen.

13. This does not mean, however, that there are no minors among the LGBTI asylum seekers. For instance, there was a file, not included in the selection, of a lesbian Burundi girl of fourteen who was granted asylum immediately on the basis of her traumatic experiences. Furthermore, the selected forty files include four files concerning people who were minors at the time of their arrival in the Netherlands.

14. The term 'cisgender' is used for people whose self-perceived gender identity matches the sex that they were assigned at birth.

15. It is also known that the number of women in the total number of people who flee to western countries is clearly smaller than the number of men, whereas worldwide the number of female refugees and the number of male refugees are equal. See Spijkerboer 1999, pp. 16-17.

EXAMINED FILES

At the IND, forty files in total were examined as a whole. Additionally, a small number of partial files were included in the study, which were brought to the researcher's attention through COC. The files and case law are discussed per subject. For reasons of readability, the asylum seekers whose file was examined have been given a fictitious name. For reasons of increased unidentifiability, several asylum seekers have two fictitious names as an extra safeguard. The number of pseudonyms is therefore larger than the number of files examined.

At the selection of the files to be examined, every attempt was made to achieve the best possible spread of positive and negative decisions, gays, lesbians and bisexuals, transgenders and cisgenders,¹⁴ first applications and subsequent applications. Among the forty files examined, there were 21 positive and 19 negative decisions. Although it is no news that gay men are the largest group by far among the total group of LGBTI asylum seekers,¹⁵ an attempt was made to involve as many representatives of the various subgroups in the study as possible. Consequently, the number of files of women is

relatively high (17 women, of whom 9 lesbian, 3 bisexual and 5 trans women; 23 men of whom 19 gay and 4 bisexual). Files of individuals with an intersex condition were not found. 7 files of bisexuals were examined: 4 men and 3 women. 5 files of transgenders were found, and all 5 were examined. All 5 of them were trans women. For reasons of possible recognisability their country of origin is not mentioned. They are not included in the table as transgender but in the category of women. At the IND's request, the country of origin has been replaced in most cases by the continent.

CASE LAW

Via the Dutch Legal Aid Board (*Raad voor Rechtsbijstand*), a large quantity of LGBT case law was made available for the study. The documents included 796 court judgments from the period from 1 October 2015 till 31 December 2017¹⁶ and 183 judgments from the Council of State from the same period (in some cases with a decision and an appeal), including 43 cases in which the State Secretary had lodged an appeal. VluchtWeb, the online knowledge base of the Dutch Council for Refugees (*Vereniging Vluchtelingenwerk Nederland*), was also put to good use. This case law collection was used to illustrate the findings from the files.

'LGBTI'

Strictly speaking, this study is about 'stated LGBTIs', or people who state that they are L, G, B, T or I, although this may not be true. For reasons of readability, this report uses the term 'LGBTIs'. It should be noted that no asylum applications were found from people with an intersex condition, but now that COC has recently decided not to use the term of LGBT any longer but to use LGBTI instead, this inclusive term is used in this report. The letter combination LGBTI might well be extended, since the Court of Utrecht held recently: 'All in all, the court has the impression that the indication of LGBTIs pertains at least partly to (the risk of) social discrimination for 'not being heterosexual', so there might be a more broadly described vulnerable group to which other gender identities or sexual orientations belong.'¹⁷

QUOTES

In this report, quotes from files are printed in blue. Asylum files (interviews and other file documents) are full of spelling errors and other language errors. As these errors distract the reader from the content, and as this study is not about the IND officials' command of language, any evident spelling and

16. These are 50 judgments from the period from 1 October 2015 till 31 December 2015; 333 judgments from 2016; 413 judgments from 2017.

17. District Court of Utrecht 5 April 2017, ECLI:NL:RBDHA:2017:4449, appeal allowed. The case was about an asexual Algerian who had refused to marry his female cousin. Next, he was turned out of his father's house and threatened by his father. The State Secretary lodged an appeal.

language errors have been corrected in this report. Apart from such corrections, the quotes from interviews, intentions to reject, decisions and other file documents (such as reports of court hearings) are always verbatim. The purport of internal documents is paraphrased. Passages from judgments of the court are sometimes verbatim, sometimes paraphrased and slightly simplified for readability purposes. For instance, 'respondent' has often been replaced by 'the State Secretary', and 'claimant' by 'the asylum seeker'. Where working guidelines are discussed, these are sometimes paraphrased.

The study was closed on 1 January 2018. Only in a few cases, information of a later date has been processed.

1.5 Overview of files

CRIMINALISED/NOT CRIMINALISED: same-sex sexual acts are criminalised in the country of origin or not.

TOTAL: the total number of files from this territory.

LGBTI: the number of people who call themselves LGBTI.

POS/NEG/OT.: positive: status; negative: rejection or procedure is pending; other: no procedure pending.¹⁸

SUBS APPL: subsequent application.

DUBLIN ETC.: rejected on non-asylum-related grounds: because they had to apply for asylum in another EU country pursuant to the Dublin Regulation, because their stated nationality was not believed, and/or because they had left for an unknown destination.

OTHER: rejected on grounds other than incredibility of sexual orientation or gender identity.

In the table, it is shown that a majority (146 = 55%) of the 267 LGBTI files found ended with a positive decision. A total of 119 applications of LGBTIs was rejected. 105 of these applications were from a country where same-sex sexual acts are criminalised, and 14 were from a country where this is not the case.¹⁹ In total, 34 applications were rejected on grounds not related to the substance of the asylum application (Dublin etc.). This number of 34 rejections could be left aside and could be deducted from the total number of rejected applications: $119 - 34 = 85$. A total of 85 rejections remains. If this number is compared with the number of positive decisions (146), the percentage of positive decisions is 63%.

18. One person was granted a residence permit on account of human trafficking and this person is considering lodging an asylum application. The other person was abused in another EU country and preferred returning to the country of origin to being transferred to the said EU country.

19. Whether the country is mentioned as such in the report of ILGA 2017, is used as a benchmark.

CRIMINALISED	TOTAL	LGBTI	POS/NEG/OT.	MALE/FEMALE	SUBS APPL	DUBLIN ETC.	OTHER
Africa	356	160	71/87/2	123/37	57	25	1
Asia	461	35	23/12	29/6	3	4	
Other	98	52	46/6	36/16	5		
SUBTOTAAL	915	247	140/105/2	188/59	65	29	1
NOT CRIMINALISED							
Former Sovjet states	457	10	4/6	7/3	4	3	3
Other	104	10	2/8	5/5	3	2	5
SUBTOTAL	561	20	6/14	12/8	7	5	8
TOTAL	1476	267	146/119/2	200/67	72	34	9

CRIMINALISED

Africa: Angola, Burundi, Cameroon, Egypt, Gambia, Ghana, Guinea, Lebanon, Morocco, Nigeria, Senegal, Sierra Leone, Tanzania, Togo, Tunisia, Uganda, Zimbabwe.

Asia: Iran, Pakistan, Sri Lanka.

Other: Jamaica, Russia, Trinidad & Tobago.

NOT CRIMINALISED

Former Soviet states: eastern Europe, South Caucasus.

Other: Africa, Asia, Latin America.

Of the remaining 76 (105 - 29) rejected asylum applications from the 23 countries where same-sex sexual acts are criminalised, the application was rejected in 75 cases because the sexual orientation on which the application was based was regarded as not credible. In this group, there was only one case in which the application was rejected on other grounds than incredibility of the sexual orientation.

From the countries where a non-heterosexual sexual orientation is not criminalised, 14 of 20 applications were rejected. 5 of these 14 applications were rejected on non-asylum-related grounds (Dublin etc.). In the cases of the remaining 9 rejections, there *were* asylum-related grounds. In 8 of these 9 cases, the sexual orientation or gender identity was believed, but the narrative was not considered sufficiently serious. In this group, there was only one case in which the application was rejected on the ground of incredibility of the sexual orientation.

The details from files from 35 countries of origin are processed in the table: Angola, Armenia, Azerbaijan, Belarus, Burundi, Cameroon, Colombia, Cuba, Ecuador, Egypt, Gambia, Ghana, Guinea, Iran, Ivory Coast, Jamaica, Lebanon, Mexico, Mongolia, Morocco, Niger, Nigeria, Uganda, Ukraine, Pakistan, Russia, Senegal, Sierra Leone, Sri Lanka, Tanzania, Togo, Trinidad & Tobago, Tunisia, Venezuela and Zimbabwe.

In 23 of these countries, same-sex sexual acts are criminalised.²⁰ From this group of countries, 28 files were examined. 12 files were examined from countries of origin where same-sex sexual acts are not criminalised but where LGBTI-phobia is still widespread. These files are from a group of 12 selected countries of origin. Rather than one file per country, several files were examined from one country, and from some other countries none at all.

20. In Russia, 'only' the propagation of homosexuality is punishable, strictly speaking, but in practice this boils down to criminalisation of homosexuality. This is why Russia is included in this category.

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2.1 Introduction

In this chapter, a sketch of the international and the Dutch national legal framework is provided. After a brief discussion on the EU directives in the field of asylum, the case law of the European Court of Justice is dealt with. The judgments *XYZ versus the Netherlands* (about criminalisation of same-sex sexual orientation and ‘discretion’ or restraint in expressing sexual orientation or gender identity) and *ABC versus the Netherlands* (about credibility of sexual orientation) arose from the so-called preliminary questions asked by the Council of State to the Court about the way in which applications from LGBTI asylum seekers are to be handled. Both judgments of the Court were transposed by the Council of State into judgments of 18 December 2013²¹ and 8 July 2015²² respectively. Next, the State Secretary implemented these judgments of the court into policy.²³

2.2 EU directives

In as early as 1981, the Council of State recognised that sexual orientation can be ground for asylum.²⁴ In 2004, this was incorporated in the EU Qualification Directive,²⁵ and in 2011 gender identity was added.²⁶

How the relevant facts and circumstances are to be established and how the narrative has to be assessed is set out in Article 4 of the Qualification Directive.²⁷ The asylum seeker has to submit all ‘elements’ as soon as possible. Elements consist of ‘the applicant’s statements and all documentation at the applicant’s disposal regarding the applicant’s age, background, (...), identity, nationality(ies), (...) and the reasons for applying for international protection.’²⁸

When the asylum application is assessed, country of origin information has to be taken into account, including laws and regulations and the way in which they are applied; the relevant statements and documentation presented by the applicant, including information on whether the applicant has been or may be subject to persecution or serious harm; the applicant’s individual position and personal circumstances, including factors such as background, gender and age.

It is prescribed in the recast Procedures Directive²⁹ that there should be special guarantees for vulnerable asylum seekers and

21. ABRvS (Council of State) 18 December 2013, ECLI:NL:RVS:2013:2423, (X.).

22. ABRvS (Council of State) 8 July 2015, ECLI:NL:RVS:2015:2170.

23. WBV [Decision Amendment Aliens Circular] 2014/22 and WI 2015/9.

24. ARRvS [Jurisprudence Division of the Council of State] 13 August 1981, case nr A-2.113, *Rechtspraak Vreemdelingenrecht* [Jurisprudence Aliens Law] 1981/5.

25. Directive 2004/83/EC, Article 10, paragraph 1, sub d.

26. Directive 2011/95/EU, Article 10, paragraph 1, sub d.

27. Directive 2011/95/EU.

28. This is also included in WI 2014/10.

29. Directive 2013/32/EU.

30. Preamble Procedures Directive, point 29: 'Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken. Those applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.'

31. See WI 2015/8, paragraph 3.1; https://ind.nl/Documents/WI_2015-8.pdf.

32. Directive 2013/32/EU, Article 24.

33. WI 2015/8, paragraph 3.

34. The answer to the first question was 'Yes'. This answer is not discussed in further detail in this report, since it has been standing policy in the Netherlands since 1981. In Bulgaria, this answer from the Court did lead to a major improvement in the policy (see *Fleeing Homophobia* report, 2011, p. 14, and European Council on Refugees and Exiles (ECRE), 2017, p. 7: 'The X.Y.Z. judgment contributed to a substantial change in practice in Bulgaria, where the Sofia City Administrative Court referring to the CJEU decision, found homosexual asylum seekers, whose countries of origin criminalised homosexual acts, as members of a particular social group').

pursuant to the Preamble LGBTI asylum seekers are among the group that may need special procedural guarantees.³⁰ It should be noted that people who belong to this group or to one of the other potentially vulnerable groups mentioned in the Directive are to be considered vulnerable by definition.³¹ Yet, Member States have to assess within a reasonable period of time after an asylum application is made whether the applicant is an applicant in need of special procedural guarantees. In that case, they are provided with adequate support, including sufficient time. The need for special procedural guarantees is also addressed where such a need becomes apparent at a later stage of the procedure.³²

As from the first registration and throughout the asylum procedure, the IND officer has to be attentive to the need of a procedural guarantee that may arise. Once it is clear that the applicant is vulnerable, the IND is held, pursuant to the Directive, to provide adequate support. This concept has not been defined in further detail. The way in which 'adequate support' is interpreted is therefore at the IND's discretion. This has to be tailored to each individual case, according to WI 2015/8.³³

2.3 XYZ judgment: 'discretion' and criminalisation

2.3.1 INTRODUCTION

On 18 April 2012, the Administrative Jurisdiction Division of the Council of State (referred to hereinafter as: 'Council of State') asked three preliminary questions to the Court of Justice of the European Union, which come down to the following:

1. Do homosexual asylum seekers belong to a particular social group? ³⁴
2. May homosexuals be expected to conceal their sexual orientation or to exercise restraint in expressing their sexual orientation?
3. Does the criminalisation of homosexual activities in the country of origin constitute an act of persecution in itself?

The answer of the Court was judgment *XYZ versus Minister voor Immigratie en Asiel*. This paragraph is about this judgment and the consequences it had for Dutch asylum policy with respect to 'discretion' and criminalisation.

35. Actually, 'discretion' is not an adequate term (because it is veiled) for the situation in which people have to conceal their sexual orientation or gender identity, sometimes throughout their life. As the term has taken hold, it is used in this report, but consistently in quotation marks.

36. Motion Dittrich et al. of 28 September 1999, *Kamerstukken II* [Parliamentary Documents] 1999-2000, 19637, nr 474.

37. *Vreemdelingencirculaire* [Aliens Circular] Vc 2000, C2/2.10.2. With reference to parliamentary questions by Lambrechts (D66), 3 October 2006, *Aanhangsel Handelingen* [Appendix Proceedings of the Lower House of the Dutch Parliament] II 2006-2007, nr 394. See also Jansen 2006.

38. 'Discretion' has been compared to a mutating virus and with a monster with multiple heads. After you have cut off one, you find that there are more. For further details, see Jansen & Spijkerboer 2012a. See also Weßels 2013.

39. *Fleeing Homophobia* report 2011, pp. 33-39.

40. 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, and ABRvS 18 December 2013, ECLI:NL:RVS:2013:2423, (X.).

41. CJEU, XYZ paragraph 75.

42. ABRvS 18 December 2013, ECLI:NL:RVS:2013:2423, (X.).

43. UK Supreme Court 7 July 2010, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, [2010] UKSC 31; Bundesverwaltungsgericht 20 February 2013, BVerwG 10 C20.12, ECLI:DE:BVerwG:2013:200213U10C20.12.0. See also CJEU (Grand Chamber), *Y. and Z. v Bundesrepublik Deutschland*, C-71/11 and C-99/11, 5 September 2012, ECLI:EU:C:2012:518.

44. See Vermeulen & Woltjer 2013; see Den Heijer 2012; see also Spijkerboer 2017b; Spijkerboer 2016.

45. *SW (Jamaica) v Secretary of State for the Home Department*, CG [2011] UKUT 00251.

2.3.2 'DISCRETION'

The so-called 'discretion' requirement,³⁵ or the idea that LGBTI asylum seekers can return to their country of origin when they behave 'discreetly', conceal their sexual orientation or exercise 'restraint', has quite a history in the Netherlands. In 1999, a motion from member of the Dutch Parliament Boris Dittrich was an attempt to bring this demand up for discussion³⁶ and in 2007 the following was included in the Aliens Circular (*Vreemdelingencirculaire*): 'Persons with a homosexual orientation are not required to conceal that preference on their return.'³⁷ Nevertheless, in the years that followed, the 'discretion' idea appeared tough to eradicate.³⁸ This concept also appeared to manifest itself in different forms in different countries.³⁹

Therefore, it was very important that with the XYZ judgment the Court of Justice of the EU put an end to returning LGBTI asylum seekers to the closet.⁴⁰ The Court ruled that neither concealment nor restraint should be required. 'The fact that he could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect,' according to the Court.⁴¹ Next, the Dutch Council of State interpreted the XYZ judgment in a complicated way to the effect that restraint still plays a role.⁴² Inspired by German and British case law⁴³ the Council of State ordered the State Secretary to ask asylum seekers how they intend to express their sexual orientation after their return to their country of origin and to establish if the statement thus obtained from the asylum seekers is consistent with the statement about the way in which they expressed their sexual orientation earlier, in the Netherlands or elsewhere.

This interpretation by the Council of State might be based on the idea that since the XYZ judgment, the normative variant of 'discretion' (Get (back) into the closet!) is no longer allowed but that the factual form of 'discretion' (Stay in the closet!) is acceptable.⁴⁴ In other words: people are no longer returned to the closet, but if they are or were in the closet of their own accord they might just as well be returned to that situation. In British asylum law, this variant of living in the closet is also called 'natural discretion'.⁴⁵

According to the policy text prepared by the State Secretary following the judgments of the Court and the Council of State, the IND does not require of the asylum seeker:

‘any restraint in expressing his sexual orientation (...). The starting point is that somebody will express his orientation and enter into relationships in a way that is not essentially different from the way that is accepted from heterosexuals in the respective country of origin. Additionally, in its assessment of the risk of persecution the IND presumes that the immediate circle of the alien is or could become aware of his sexual orientation.’⁴⁶

By presuming that the environment will become aware of the sexual orientation, the State Secretary shows that, like the Court of Justice, he does not want to return people to the closet any longer, neither in a normative nor in a factual variant. In the explanation to this policy, the State Secretary also wrote:

‘Furthermore, the IND will not refrain from granting a permit because an LGBT asylum seeker indicates he will conceal his orientation because of social pressure or shame, for instance from his parents, whereas it would lead to persecution if he did not.’⁴⁷

In the same policy text, however, it also says:

‘When assessing the alien’s individual situation, the IND also takes into account the way in which the alien intends to express his sexual orientation in his country of origin and the likelihood of this. To this end, the IND investigates how the alien has expressed his sexual orientation in the Netherlands or elsewhere, nowadays and in the past.’⁴⁸

This latter passage is consistent with the factual ‘discretion’ variant of the Council of State, so consequently the policy text is torn between two ideas.⁴⁹

2.3.3 CRIMINALISATION

The Court of Justice held that the mere criminalisation of homosexual acts in itself does not constitute an act of persecution.⁵⁰ However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin, must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution (§ 61). It is for the authorities in the country of asylum to determine whether in the asylum seekers country of origin the term of imprisonment is applied in practice (§ 59). In its final judgment, the Council of State held that the State Secretary has to investigate how regulations according to which homosexuality or homosexual acts are punishable in the country of origin are enforced or how these turn out in practice. In this investigation, the focus is not only

46. WBV 2014/22, 18 July 2014; Vc C2/3.2.

47. Letter from the State Secretary for Security and Justice to the Chairman of the Second Chamber of the Dutch Parliament, 4 June 2014, *Kamerstukken II* 2013-2014, 19637, nr 1848.

48. WBV 2014/22; Vc C2/3.2.

49. See for further details Jansen 2015.

50. CJEU 7 November 2013, *X, Y and Z v Minister voor Immigratie en Asiel*, C-199/12 - C-201/12, ECLI:EU:C:2013:720. In the Fleeing Homophobia report, the recommendation is made (on p. 79) that LGBTIs from countries where homosexuality or engaging in homosexual acts is criminalised should be granted refugee status. In this context, see also the concurring opinion of judge De Gaetano of the European Court of Human Rights at the judgment *M.E. v Sweden* (ECtHR, 26 June 2014, 71398/12) and ICJ (International Commission of Jurists) 2014.

51. ABRvS (Council of State) 18 December 2013, ECLI:NL:RVS:2013:2423, (X.).

52. WBV 2014/22; Vc C2/3.2. See also the letter from COC Netherlands to the members of the Parliamentary Standing Committee for Security and Justice of 11 April 2014.

53. This was at the request of COC. Letter from the State Secretary to COC Netherlands, 10 June 2014. At any rate, the IND grants an asylum residence permit on the ground in the following situation: '(...) in the country of origin, criminal provisions apply on the grounds of sexual orientation, these criminal provisions are actually enforced in practice by the authorities, and the criminal provision has a certain degree of severity.'

54. It should be noted that the European Asylum Support Office (EASO) has prepared a report on investigating the situation of LGBs in countries of origin: EASO, 2015.

55. An asylum application from an Iranian LGBT can only be rejected, if he says that his sexual orientation has not caused any problems in Iran and that he does not expect that this will happen. See the letter from the State Secretary to COC Netherlands of 10 June 2014. It should be noted that a special Dutch policy for LGBTIs - called 'homosexuals' at the time - from Iran has been in place since 2006, WBV 2006/38.

56. The IND presumes that it is not possible for LGBTIs from the Russian Federation to obtain protection from the authorities or international organisations. The IND is reticent in rejecting LGBT applications based on the assumption of an internal flight alternative in the Russian Federation.

57. ABC Country of Origin Policy December 2017, Dutch Council for Refugees, VluchtWeb. COC has contributed to establishing the policy for LGBTIs from several of these countries.

58. See Rafi 2014.

on the actual imposition of criminal penalties but also on police and criminal investigations and the effects of criminalisation on the social position of homosexuals.⁵¹

The State Secretary has largely transposed this judgment of the Council of State into a new policy.⁵² In the process, the vague term 'active enforcement' (of criminal penalties) used previously has been replaced by the less severe 'effective enforcement'.⁵³ In practice, this means that the State Secretary has an investigation obligation, which requires a thorough investigation into the situation in the country of origin.⁵⁴

The increasing importance attached to the situation of LGBTIs in the country of origin also becomes apparent in special policies for several countries of origin. LGBTs from Afghanistan, for instance, are regarded as both a 'group at risk' and a 'vulnerable minority group' (Decision Amendment Aliens Circular (WBV) 2017/2), and this also applies to LGBTs from Libya (WBV 2015/8); LGBTs from Iraq are granted *prima facie* refugee status (WBV 2017/2); in principle, LGBTs from Iran are granted refugee status (WBV 2017/7),⁵⁵ and this also applies to LGBTs from Uganda (WBV 2015/8); LGBTs from Russia are a 'group at risk' (WBV 2017/10),⁵⁶ and LGBTs from Chechnya are granted refugee status (WBV 2017/10).⁵⁷

2.4 ABC judgment: credibility

2.4.1 INTRODUCTION

In this paragraph, a brief discussion is provided on some general policy rules that apply to the way in which the credibility of a narrative is assessed. Next, the jurisprudence and the policy concerning the assessment of the credibility of sexual orientation are dealt with.

2.4.2 CREDIBILITY IN GENERAL: WI 2014/10

When a narrative is assessed by the IND, credibility is the first criterion. Once the credibility of the narrative has been established - in whole or in part - the narrative is investigated for being sufficiently serious to justify granting a status.

In Working Guidelines 2014/10, the 'integral credibility assessment' introduced on 1 January 2015 is described, which replaced the 'positive persuasiveness' examination which had prevailed until then.⁵⁸ This new method was introduced to implement the recast Procedures Directive, in which a full

and *ex nunc* judicial examination is prescribed.⁵⁹ Therefore, it is important that the credibility examination by the IND is as insightful as possible, according to the working guidelines.

First, the IND establishes the ‘relevant elements’ (e.g. nationality, identity, sexual orientation) and next the credibility is assessed per element.⁶⁰ If there is no objective evidence in support of relevant elements, which is mostly the case when people have fled their country because of their sexual orientation or gender identity, the IND examines the elements using so-called internal and external ‘credibility indicators’, which pertain to everything the asylum seeker has submitted and everything that can be examined by means of other sources.

The credibility assessment of the narrative has to be conducted in an objective, structured and transparent way. According to the working guidelines, this means that sources used are to be objectifiable and that the motivations should be cognisable. Cultural differences are to be taken into account as well. The alien’s condition (mental, physical, intellectual, etc.) and the decision-maker’s condition (mental, physical, professional, etc.) both play a part in this. A subjective assessment has to be avoided, and the IND officer has to realise that there will hardly ever be any certainty about the correctness of the asylum seeker’s statements. These statements must be detailed and specific, and there are to be no contradictions, incongruities or inconsistencies. Contradictions between statements in the first and subsequent interviews can only be objected to once the person involved has been confronted with these. Mitigating circumstances, such as age, educational level, shame and intercultural obstacles, are to be taken into account. At the end of the assessment, it has to be made known which relevant elements are credible and which are not.⁶¹

Since asylum seekers are often not able to support their narrative with evidence, the benefit of the doubt should be given if in general the narrative can be considered credible, according to WI 2014/10.⁶²

On 13 April 2016, the Council of State held that the court examines the State Secretary’s point of view on the credibility of the narrative more thoroughly than before. The State Secretary only retains some margin of appreciation when assessing an asylum seeker’s statements which are not substantiated by evidence. In doing so, he has to motivate

59. Procedures Directive, Article 46, third paragraph. This article has been implemented in Article 83a of the Vreemdelingenwet [Aliens Act] 2000: ‘The judicial review includes a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs.’

60. WI 2014/10, Substantive assessment (asylum), 1 January 2015, https://ind.nl/Documents/WI_2014_10.pdf. See also Kok 2016 for general information about the assessment of the credibility of a narrative; Strik & Terlouw 2015; UNHCR 2013; Geertsema 2012.

61. WI 2014/10, pp. 5-11.

62. UNHCR Handbook § 196: ‘There may also be statements that are not susceptible to proof. In such cases, if the applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.’ See also § 203 and § 204.

the manner in which he uses this margin properly, so that the administrative court can check the decisions.⁶³ For instance, the State Secretary is not allowed to state without any motivation that certain behaviour in a social context is unusual and therefore not plausible.⁶⁴ This is important for all asylum cases and especially for the handling of LGBTI asylum cases.

Severity

If one or more elements of the narrative are considered credible, the next assessment will be on whether there is a plausible risk upon the applicant's return (is the fear well-founded?). In this respect, it is important whether the asylum seeker has experienced any acts of past persecution, how much time has passed between the events that led to the flight and the actual departure, and if – in the event of LGBTIs – those who are in fear of being persecuted are or can become aware of the sexual orientation or gender identity. A conclusion has to be drawn about each of these parts individually.⁶⁵

Next, it is assessed whether the credible elements and the related plausible presumptions are so serious that there is a well-founded fear of persecution in the meaning of the Refugee Convention or a real risk of violation of Article 3 of the European Convention on Human Rights (ECHR). If there is a threat of persecution from the side of fellow citizens, an assessment is made as to whether the authorities in the country of origin are willing and able to offer the asylum seeker effective protection. There might also be an internal flight alternative within the country of origin. If this is not the case, a status will be granted.

2.4.3 ABC JUDGMENT

Whereas the preliminary questions the Council of State had asked previously about the handling of asylum cases based on sexual orientation had not been answered yet, the Council of State asked the Court of Justice of the European Union for its opinion about a matter concerning asylum applications based on sexual orientation again, this time in March 2013: what limits does EU law impose on the method of assessing the credibility of a declared sexual orientation?⁶⁶

The lawyer of A argued before the Court that it is not possible to establish objectively what somebody else's sexual orientation is. How should the State Secretary do this?⁶⁷ If somebody says: 'I am a lesbian,' how could an IND officer assess if this is true or not? In the Yogyakarta Principles,

63. ABRvS (Council of State) 13 April 2016, ECLI:NL:RVS:2016:891; see also Geertsema 2016.

64. ABRvS (Council of State) 15 November 2016, ECLI:NL:RVS:2016:3009.

65. WI 2014/10, pp. 13-15 and WBV 2014/22.

66. Interlocutory judgment ABRvS (Council of State) 20 March 2013.

67. Jansen 2013a; see also Middelkoop 2010.

68. Yogyakarta Principle 3. The Yogyakarta Principles consist of various principles in which international human rights standards are applied to sexual orientation and gender identity. They were prepared in Yogyakarta in 2006 by a group of human rights experts and were endorsed by the Council of Europe. [http:// www.yogyakartaprinciples.org/](http://www.yogyakartaprinciples.org/).

69. Fleeing Homophobia report, 2011, p. 53. This is also COC's point of view. See the letter from COC Netherlands of 11 April 2014 to the members of the Parliamentary Standing Committee on Security and Justice.

70. UNHCR, *Guidelines No. 9*, paragraph 9: 'Sexual orientation and gender identity are broad concepts which create space for self-identification' and paragraph 63, i: 'Self-identification as an LGBTI person should be taken as an indication of the applicant's sexual orientation and/or gender identity.'

71. ECtHR 12 June 2003, *Van Kück v Germany*, 35968/97. See also ECtHR 11 July 2002, *Christine Goodwin v United Kingdom* [Grand Chamber], 28957/95.

72. Advocate General E. Sharpston, Opinion of 17 July 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, C-148/13, C-149/13 and C-150/13, ECLI:EU:C:2014:2111, § 36, 39, 40.

73. The Charter of Fundamental Rights of the European Union (2012/C 326/02); Court of Justice EU, 2 December 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, C-148/13, C-149/13 and C-150/13, ECLI:EU:C:2014:2406; Terlouw 2014; CJEU, ABC, paragraph 64: 'While the national authorities are entitled to carry out, where appropriate, interviews in order to determine the facts and circumstances as regards the declared sexual orientation of an applicant for asylum, questions concerning details of the sexual practices of that applicant are contrary to the fundamental rights guaranteed by the Charter.' See also UNHCR, *Guidelines No. 9*, paragraph 64: 'Applicants should never be expected or asked to bring in documentary or photographic evidence of intimate acts.'

it says: 'Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.'⁶⁸ One of the conclusions of the Fleeing Homophobia study is in line with this: 'As a general principle, establishing sexual orientation or gender identity should be based on self-identification of the applicant.'⁶⁹ In the UNHCR Guidelines, too, self-identification is assigned a central role.⁷⁰

Advocate General Sharpston concurred in this to some extent when she argued that all parties agree that an individual's sexuality is a highly complex issue and that there is no objective method to verify a stated sexual orientation. Moreover, in the case *Van Kück versus Germany*, the European Court of Human Rights ruled that with respect to gender identity and transsexuality the idea of 'personal autonomy' is an important underlying principle of the guarantees of the right to private life as set out in Article 8 of the European Convention on Human Rights (ECHR).⁷¹ Although Carola van Kück had taken legal action about the reimbursement of the expenses for her gender reassignment operation, which had nothing to do with an asylum case, this case is also important for the assessment of the sexual orientation of asylum seekers. In this case, the Court in Strasbourg ruled that sexual self-determination is one of the most basic essentials of private life and that a person's own identification as female or male is not to be called into question by the government. Advocate General Sharpston, as well, inferred from the *Van Kück* judgment that individuals have a right to define their own identity, which includes defining their own sexual orientation. This is within the scope of Article 7 of the EU Charter of Fundamental Rights.⁷²

The Court of Justice, however, opts for another angle, namely a list of *don'ts*. The Court ruled that no conclusions are to be drawn solely on the basis of stereotyped notions associated with homosexuals. Questions about the details of sexual practices are not allowed, and the Court prohibits any proof such as the performance of homosexual acts, the submission to 'tests' to proof homosexuality, or video recordings of intimate acts, as this would infringe human dignity, the respect of which is guaranteed by Article 1 of the Charter.⁷³

In general, the methods used by the competent authorities to assess the statements and documentary or other evidence submitted in support of asylum applications, have to be

consistent with the fundamental rights guaranteed by the Charter, such as Article 7: the right to respect for private and family life.

Finally, the Court holds that any statements concerning sexual orientation are not incredible for the mere fact that they were not made immediately. Having regard to the sensitive nature of questions relating to a person's personal identity, and, in particular, his sexuality, it cannot 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 (§ 69). The asylum seeker's obligation to submit all elements needed to substantiate the application 'as soon as possible' is tempered by the requirement imposed on the authorities to take personal and general circumstances into account during the interview, including the asylum seeker's vulnerability, and to carry out an individual assessment taking account the individual position and personal circumstances of each applicant (§ 70).

Questions of the Hungarian Supreme Court

Following the ABC judgment, on 8 August 2016 the Hungarian Supreme Court also posed preliminary questions to the EU Court of Justice.⁷⁴ The Fleeing Homophobia study brought to light that in several Member States, including Hungary, psychologists were called in to assess the credibility of a stated sexual orientation. In Hungary, *Rorschach* and *Szondi* tests were being used for this purpose.⁷⁵

In the ABC judgment, the Court of Justice ruled that 'tests' to establish homosexuality infringe human dignity. The Hungarian court wants to know if European law precludes reliance on psychologists' expert opinions when assessing the credibility of a stated sexual orientation, and, if so, whether it is possible to call in the assistance of an expert in the examination.⁷⁶

In his opinion published on 5 October 2017, Advocate General Wahl of the Court of Justice of the EU argued that EU law does not preclude the use of a psychologist's expert opinion and methods like the *Rorschach* tests in the assessment of the credibility of the sexual orientation of asylum seekers, provided that: the examination is done with the consent of the applicant and is carried out in a manner that respects the asylum seeker's dignity and private life; the opinion is based on reliable and relevant methods and principles; and the expert's opinion is not binding for the national courts reviewing the decisions.⁷⁷

74. Request for a preliminary decision submitted by the Szegedi Közigazgatási és Munkaügyi Bíróság (Hungary) on 29 August 2016, *F v Bevándorlási és Állampolgársági Hivatal* (case C-473/16-F).

75. Fleeing Homophobia report, 2011, p. 50.

76. (1) In the light of Article 1 of the Charter of Fundamental Rights of the European Union, must Article 4 of Directive 2004/83/EC be interpreted as not precluding a forensic psychologist's expert opinion based on projective personality tests from being sought and evaluated, in relation to LGBTI applicants for asylum, when, in order to formulate that opinion, no questions are asked about the applicant for asylum's sexual habits and that applicant is not subject to a physical examination? (2) If the expert opinion referred to in question 1 may not be used as proof, must Article 4 of Directive 2004/83 be interpreted, in the light of Article 1 of the Charter of Fundamental Rights of the European Union, as meaning that when the asylum application is based on persecution on grounds of sexual orientation, neither the national administrative authorities nor the courts have any possibility of examining, by expert methods, the truthfulness of the applicant for asylum's claims, irrespective of the particular characteristics of those methods?

2.4.4 JUDGMENT COUNCIL OF STATE 8 JULY 2015

After the ABC judgment of the EU Court, the Council of State noted in the judgment of 8 July 2015 that the questions asked by the State Secretary in this context do not arise from an established examination system. Because a policy rule or an established practice for examining and assessing a stated sexual orientation is also lacking, the administrative court cannot examine effectively how the State Secretary conducts the examination into and the assessment of the credibility of the sexual orientation in a specific case.⁷⁸

In August 2015, the State Secretary announced that as from 14 April 2014 he had been working with an 'established practice' or 'internal working guidelines' all the same. Pending the answers from the Court to questions from the Council of State, he had not waited to adjust his policy. The – non-public – working guidelines were said to include a questionnaire for hearing LGBT asylum seekers. As a result of the judgment of the Council of State, the Working Guidelines 2015/9 – that *were* public – appeared in early October 2015.

According to the Court of Justice, questions based on stereotyped notions on sexual orientation may be a useful element for the purposes of the assessment. 'The State Secretary's opinion that he is allowed to ask such questions and to include the answers to these questions in his examination, is consistent with the judgment. In court, the State Secretary explained that in his point of view he only included correct answers to such questions in his examination, so that, in a case of doubt about an alien's stated sexual orientation it could still be considered credible. However, the State Secretary did not clarify which questions he qualifies in a general sense as questions that are based on stereotypical opinions about sexual orientation,' according to the Council of State.⁷⁹

At the sitting of the Council of State on 18 December 2014, the question was asked: what are stereotypical questions with respect to LGBTI asylum seekers?: 'The question about coming out can be useful, but presuming that it is difficult for a homosexual in a Muslim country to present himself as gay, and that consequently the person concerned has undoubtedly struggled with his sexual orientation, is a stereotypical way of reasoning,' as René Bruin, Head of Office of UNHCR Netherlands at the time, recorded at the sitting.⁸⁰

77. Conclusion Advocate General Wahl, 5 October 2017, case C-473/16, *F v Bevándorlási és Menekültügyi Hivatal*, request from Szegedi Közigazgatási és Munkaügyi Bíróság (administrative and labour judge Szeged, Hungary) for a preliminary decision, ECLI:EU:C:2017:739. For a critical comment on the Advocate General's conclusion see: Ferreira & Venturi 2017. Meanwhile, the Court has given a decision: Court of Justice 25 January 2018, case C-473/16, *F v Bevándorlási és Állampolgársági Hivatal*, ECLI:EU:C:2018:36, EHRC 2018/54, comment Den Heijer which is worth reading.

78. ABRvS (Council of State) 8 July 2015, ECLI:NL:RVS:2015:2170, paragraph 7.

79. ABRvS (Council of State) 8 July 2015, ECLI:NL:RVS:2015:2170, paragraph 71.

80. Bruin 2015, p. 73.

Late disclosure

Following the ABC judgment, the Council of State ruled that regarding the question as to whether the sexual orientation is a new fact, it should not be held against an alien that he has not spoken about his sexual orientation previously.⁸¹

2.5 Working Guidelines 2015/9

2.5.1 INTRODUCTION

In this paragraph, the Working Guidelines 2015/9 are discussed. The content of the working guidelines, the judgment of 15 June 2016 in which the Council of State judges the guidelines, and the question of what the policy incorporated in the guidelines is based on are discussed successively. The policy concerning converts, which has some similarity with the policy on LGBTIs, is also dealt with. Finally, it is discussed whether the ABC judgment has affected the policy regarding a late disclosure.

2.5.2 CONTENT WORKING GUIDELINES

As a reaction to the judgment of the Council of State of 8 July 2015, Working Guidelines 2015/9 'Interviewing and decision-making in cases in which LGBT orientation has been put forward as an asylum motive' appeared in October 2015.⁸² Despite this broadly formulated title, the working guidelines are almost entirely about the credibility of the asylum motive LGBT orientation: 'The IND examines if the sexual orientation is credible or whether the alien only feigns the orientation to obtain a residence permit.' This sentence is remarkable, as an expression of suspicion like this is not found in any other working guidelines, like WI 2014/10 about the integral credibility examination.

In the working guidelines, the IND acknowledges that conclusive evidence is not possible here and that not everything can be clarified by objectively measurable criteria. However, the mere statement that the person involved is L, G, B, T or I is not considered sufficient either. The interviewers and decision-makers have to steer a course between these two extremes.

The examination by the IND is a matter of asking questions. The criteria of the ABC judgment are used as a starting point. Hence, no medical tests are conducted to establish sexual orientation, and no psychological examination is used.⁸³ The IND does not ask for any documentary evidence, such as

81. ABRvS ABRvS (Council of State) 8 July 2015, ECLI:NL:RVS:2015:2170, paragraph 5.1. 'For an alien from a country where a stated sexual orientation is culturally not or hardly accepted or even punishable, it can be difficult to respond to questions about this sexual orientation, because of the vulnerability of such aliens and given the sensitivity of the subject. Therefore it follows from the nature of the asylum motive and the way in which the State Secretary examines the credibility of the alien's statements on this, that for answering the question as to whether this sexual orientation is a newly appeared fact or circumstance, it is not to be held against an alien that he has not spoken about his sexual orientation earlier.'

82. Working Guidelines 2015/9, 7 October 2015, https://ind.nl/Documents/WI_2015_9.pdf

83. The working guidelines refer to Yogyakarta Principle 18: 'No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.' In the same sense, the Fleeing Homophobia report 2011, p. 9 and pp. 49-53.

photos or videos in support of the sexual orientation, and if asylum seekers submit any photos or videos of their own accord, these will not be included in the assessment. No explicit questions are asked about sexual acts or activities. If asylum seekers talk about this themselves, the IND will point out that this is not necessary. Stereotypical questions are allowed, but if these questions are not answered it does not mean that the sexual orientation will not be considered credible. Meeting the 'stereotypical picture of LGBT' may be taken into account in a positive sense, according to the working guidelines.⁸⁴

The IND uses an internal questionnaire that is based on the working guidelines. It is not intended as a checklist but rather as a guideline and framework, according to the working guidelines.

In WI 2015/9, five themes are mentioned which the IND uses in the interviews and in assessing the credibility of someone who says he is LGBT:

1. Private life (including family, friends and relations) and religion. 'This is about the own experiences, such as becoming aware of the sexual orientation, the process (of self-acceptance), the reactions from the environment, and any relationships;'
2. Current and previous relationships, homosexual contacts in the country of origin and contact with or knowledge of homosexual groups in the country of origin;
3. Contact with homosexuals in the Netherlands and knowledge of the Dutch LGBT community;
4. Discrimination, repression and persecution in the country of origin;
5. Future after (forced) return to the country of origin.

Under the heading 'Credibility assessment' (3), WI 2014/10 is referred to.⁸⁵ According to WI 2015/9, the weight attached to the answers depends on the individual case, but in general it can be said that in the assessment the focus is on the own experiences concerning the sexual orientation (awareness process and self-acceptance, for instance), what this has meant for the person concerned and his environment [emphasis added SJ], what the situation is like for LGBTs in the country of origin, and how the narrative fits in with the general picture. 'This applies all the more, when an alien is from a country where homosexuality is socially unacceptable or criminalised,' according to WI 2015/9. The following passage from the final judgment of 8 July 2015 has been copied to the policy text:

84. In note 2 of Working Guidelines 2015/9, 'feminine behaviour and appearance among gay men and masculine behaviour and appearance among lesbians, always being active in the gay scene and nightlife, and a certain style of dress etc.', are mentioned as examples of stereotypes.

85. Working Guidelines 2014/10, Substantive assessment (asylum), 1 January 2015, see above.

'In the assessment of the credibility of the sexual orientation, the IND does not use as a starting point that in all cases there must have been an internal struggle before the alien accepted his LGBT orientation. It can be expected, though, that an alien from a country where LGBT orientation is not accepted and where this may be criminalised, has experienced a process of awareness. In this respect, the alien, among other things, will face the question of what it means to be different from what is expected/demanded in society. In assessing the credibility of the LGBT orientation, the process of discovering the orientation and the way in which the alien states he has dealt with this will be taken into account and considered. These elements will weigh heavier, if the alien is from a country of origin where an LGBT orientation is not accepted.'⁸⁶

In the working guidelines, the following was added: 'This does not mean that it is not allowed to ask why the alien has not mentioned this in any previous procedure(s) (and how this fits in with his previous narrative) and that this cannot be included in the assessment of the application.'⁸⁷

Comment

'The purpose of the interview is to give people who base their fear of persecution on their sexual orientation the possibility to tell their story,' according to the working guidelines, whereas giving people the opportunity to tell their story is the purpose of every asylum interview. In the case of the LGBTI asylum seeker, the interview seems to be largely focused on assessing the credibility of the sexual orientation or gender identity.

86. The fact that, according to the Working Guidelines, an internal struggle is not expected in all cases, is possibly a reaction to the letter from COC Netherlands of 20 April 2015 to the State Secretary for Security and Justice: 'In many cases the sexual orientation is considered incredible, because the respective asylum seeker does not make any detailed statements about what the discovery of being gay, lesbian or bisexual did to her or him. Apparently, it is expected that people from an LGBT-phobic society have gone through an extensive awareness process and an internal struggle by definition to accept their orientation. This may happen, of course, but the idea that struggles like these are always the case is considered a thought that is both stereotypical and incorrect.'

87. Working Guidelines 2015/9.

88. See for instance District Court of Utrecht 17 February 2016, ECLI:NL:RBDHA:2016:1879.

2.5.3 JUDGMENT COUNCIL OF STATE 15 JUNE 2016

After the publication of WI 2015/9, the courts were divided on the question of whether the new policy provided the clearness and examination system sought by the Council of State.⁸⁸ To gain some clarity or an answer to the question if the examination into and the assessment of a stated sexual orientation had become insightful, the Council of State sent some written questions to the IND on 3 March 2016. The Council of State wanted to know whether the examination was now conducted in a different way and if so, whether this had led to the examination system laid down in WI 2015/9. What kinds of questions are being asked now? Are the questions open-ended or closed? Do the IND-officers also ask for confirmation and clarification of, and any additions to the answers? Are credible and incredible statements explicitly compared in the context of the various themes? What is the value of a membership card of an LGBTI organisation, an (ex)

partner's statement, or photographs on which the alien can be seen at LGBTI events? The Council of State also wants to know why the main focus is on the alien's own experiences and what the State Secretary expects with respect to statements on the alien's own experiences, such as the process of awareness and self-acceptance.⁸⁹

On 15 June 2016, the Council of State held that WI 2015/9 had come about in a careful way and that in the new situation the examination into a stated sexual orientation is conducted carefully by means of a set examination method. As a result, according to the Council of State, the shortcomings pointed out in the judgment of 8 July 2015 have been removed.

The Ghanaian asylum seeker in this case had argued that the State Secretary should pay more attention to insights from cultural anthropology and psychology with respect to the unjustified starting point that LGBTI asylum seekers always have to go through a struggle to accept their sexual orientation and have to be able to speak about this. In the State Secretary's opinion, however, any cultural and psychological factors in the case had been taken into account to a sufficient extent. This passage from the judgment is important:

'In this assessment, the State Secretary justifiably sets great store by the alien's statements about his own experiences. Every alien who puts forward a sexual orientation as an asylum motive, must have become aware of this orientation at some point and must have realised that in his environment or country of origin his orientation is not – generally – accepted or is even punishable. Therefore, he has to be able to talk about the moment at which or the period in which he became aware of his sexual orientation, what this sexual orientation meant to him, and how this affected the way in which he has expressed his sexual orientation – all of this against the background of his country of origin and the environment he comes from, in which the moment of awareness and other important moments, such as entering into a relationship, are relevant. The respondent rightly does not expect that in all cases an alien has gone through an extensive process of awareness or an inner struggle, as such an expectation would be based too much on stereotypical opinions about a sexual orientation or a specific country [emphasis added SJ]. At the Council of State hearing, the State Secretary put forward that the circumstance that an alien has not spoken sufficiently about his own experiences without there being any justification for this, does not mean in all cases that his sexual orientation is considered incredible. Here it may be relevant that the alien was able to speak convincingly about other aspects concerning his sexual orientation as an asylum motive.'⁹⁰

89. Letter from the Council of State to the Dutch Immigration and Naturalisation Service, 3 March 2016.

90. ABRvS ABRvS (Council of State) 15 June 2016, ECLI:NL:RVS:2016:1630, paragraph 2.9.

91. This is why Bruin is of the opinion that the policy needs to be amended on the basis of this passage in the judgment. Bruin 2016, p. 380.

92. WI 2015/9, note 3. In the judgment of the Council of State of 15 June 2016, the list of sources which is said to be at the basis of the Working Guidelines is extended with the Fleeing Homophobia report by Jansen and Spijkerboer: ABRvS ABRvS (Council of State) 15 June 2016, ECLI:NL:RVS:2016:1630, paragraph 2.3. 'The following documents are referred to, which are also at the basis of WI 2015/9: the article 'Sexual Orientation and the Refugee Determination Process: Questioning a Claimant About Their Membership in the Particular Social Group' by Prof. Dr N. LaViolette, the reports 'Pink Solutions, Inventarisatie situatie LHBT asielzoekers' [Pink Solutions, Inventory situation LGBT asylum seekers] by drs. L. Luit, and Fleeing Homophobia. Asylum claims related to sexual orientation and gender identity in Europe' by Prof. mr. T.P. Spijkerboer and mr. S. Jansen, and the 'Guidelines on International Protection No. 9' of the United Nations High Commissioner for Refugees.' In 2.6 of the judgment, it is added that WI 2015/9 is based on 'insights obtained by collaboration with COC Netherlands and participation by IND officials to master classes, international meetings and training sessions based on modules of the European Asylum Support Office (EASO).'

Comment

The State Secretary and the Council of State presume that LGBTI asylum seekers have become aware of their sexual orientation or gender identity and of the circumstance that the environment did not accept this, and that consequently they can explain what happened, what this meant to them and to the way in which they expressed their sexual orientation or gender identity. It is not expected that the asylum seeker went through a long process of awareness or an inner struggle, for the Council of State thinks this is a stereotypical idea.

This raises several questions. A process of awareness or struggle is not necessarily expected in all cases, but in which cases is it expected and in which cases is it not expected? Can a less extensive awareness process *be* expected? What is the limit to the degree of extensiveness? True, in WI 2015/9 it says that an internal struggle is not expected in all cases, but a process of awareness is expected. Furthermore, according to the working guidelines, the main focus actually lies here. It is not clear how the passages about struggles in the working guidelines and in the judgment of the Council of State of 15 June 2016 are to be interpreted.⁹¹

One also wonders what has changed since the situation at the time of the judgment of the Council of State of 8 July 2015. The internal working guidelines have been published, and the State Secretary has promised to ask open-ended questions and, if necessary, ask for clarification, elaboration and confirmation.

2.5.4 WHAT IS THE BASIS FOR THIS POLICY?

In a footnote in WI 2015/9, three sources are mentioned to the themes used by the IND when hearing the applicants and assessing the credibility of their sexual orientation:

'These themes/directives are based, among other things, on the article "Sexual Orientation and the Refugee Determination Process: Questioning a Claimant About Their Membership in the Particular Social Group" by Prof. Dr LaViolette from 2004, the report of Pink Solutions "Inventory situation LGBT asylum seekers" (*Inventarisatie situatie LHBT asielzoekers*) by Lieneke Luit of COC, and the UNHCR Guidelines 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; <http://www.unhcr.org/refworld/docid/50348afc2.html>.'⁹²

However, nowhere is stated to which passages of these texts would be referred to.

On closer inspection of these sources, it appears that in LaViolette's article themes and questions are proposed that are very similar to questions asked in the asylum interviews by the IND. It is remarkable that the concept of 'self-acceptance' is not mentioned by LaViolette and that she does not say anything about religion or the connection between religion and sexual orientation. LaViolette's article does not offer any answer to the question of why the focus of the assessment should be on processes of awareness and self-acceptance. Relevant comments by LaViolette have not been adopted in Dutch policy either, for instance: 'It cannot be stressed enough that there are no true answers to these questions' and 'In some cases, claimants have asked their current partner to testify or submit an affidavit attesting to their relationship.'

In 2013, LaViolette herself said about this document:

'Outlined in this document is a suggested approach to questioning a claimant about their sexual orientation. The purpose of this model is to provide decision-makers with a range of issues that they may explore with a claimant when it is determined that membership in a particular social group is an issue to be determined in the refugee claim.'⁹³

In UNHCR's Guidelines No. 9, it says:

'Non-conformity: LGBTI applicants may have grown up in cultures where their sexuality and/or gender identity is shameful or taboo. As a result, they may struggle with their sexual orientation or gender identity at some point in their lives. This may move them away from, or place them in opposition to their families, friends, communities and society in general. Experiences of disapproval and of 'being different' or the 'other' may result in feelings of shame, stigmatisation or isolation' [emphases added SJ].⁹⁴

From the consistent use of the word 'may' in this passage it is clear that UNHCR is aware of the possibility that LGBTI asylum seekers do not struggle with their sexual orientation or gender identity and that they are not ashamed of it.

This quote from UNHCR's Guidelines is taken from a passage from another article by LaViolette, in which she also writes that probably the one universal aspect of the lives of sexual minorities is the pervasive societal rejection of their sexual orientation or gender identity.⁹⁵ LaViolette suggests that

93. The article by LaViolette can be found via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294763, 17 July 2013. In fact, it is only the first part of the introduction and the last part of the article from 2004. LaViolette deleted part B with the comment: 'Only the questioning model is included in this version. The legal issues are more fully canvassed in later papers.'

94. UNHCR, *Guidelines* No. 9, paragraph 63, v.

95. LaViolette 2013, p. 28.

inquiries into areas that touch upon the claimant's personal experiences as LGBTI will provide the strongest basis for assessing the credibility of the claimant on the issue of whether he or she is a member of the particular social group. In this respect, according to LaViolette, it is important to remember that how people experience sexuality and persecution may differ markedly from one claimant to another, even if they are from the same country.⁹⁶

96. LaViolette 2013. Cf. UNHCR, *Guidelines No. 9*, paragraph 60, ii. See also UNHCR 2013, p. 71: 'It is important to ensure that credibility assessment contains no superficial understandings of the experiences of LGBTI individuals, or erroneous, culturally inappropriate, or stereotypical assumptions. The experiences of LGBTI individuals vary greatly and are strongly influenced by their cultural, economic, family, political, religious, and social environment. (...) It is therefore essential that decision-makers understand both the context of each refugee claim, as well as the individual narratives that map uneasily onto common, notably Western, experiences or labels.'

97. UNHCR, *Guidelines No. 9*, paragraph 63: 'there is no magic formula of questions to ask and no set of 'right' answers in response.'

98. LaViolette 2010, pp. 173-208: '(...) there are no universal characteristics and qualities that typify sexual minorities. This is particularly true of the multinational and multicultural context of the refugee hearing room, where stereotypical views of sexual minorities are even more likely to be inaccurate and misleading due to the different cultural context. UNHCR needs to underline that the experience of sexual minorities around the world is extremely diverse. Human sexuality is strongly influenced by social, cultural, religious, and even political environments. It is an aspect of human experience that is poorly understood and which is repressed in many countries. Given the diversity of the global context, it is indeed dangerous to make assumptions about the lives of members of a sexual minority.'

99. Berg & Millbank 2009, p. 13.

100. Cass 1979; Berg & Millbank 2009; see also Middelkoop 2010; for criticism on the model of Cass in a Belgian context, see Peumans 2011, pp. 33-34.

101. Or 'identity pride' and 'identity synthesis'.

This means that UNHCR and LaViolette say it should be taken into account that people may struggle with their sexual orientation and that this may be a subject for questions in an asylum interview. According to UNHCR, however, the occurrence of such struggle is not a hard and fast rule, and according to LaViolette it cannot be stressed enough that there are no true or uniform answers and that questions about this are only intended to elicit evidence of the claimant that will assist in determining credibility.⁹⁷ Sexual minorities do not have any universal characteristics and neither have heterosexuals. LaViolette cautions for stereotypes, especially in the multicultural setting of the asylum interview.⁹⁸

Laurie Berg and Jenni Millbank have pointed out the danger that a list of topics in exploring identity as proposed by LaViolette can become calcified in an interrogation style which assumes that there is a typical evolution of self-identity. From their study it appears that this in fact has happened in asylum procedures in Anglo-Saxon countries. Berg and Millbank note that Western understandings of minority sexual development have been deeply influenced by the idea of a linear process of self-knowledge, and as this plays an important role in the assessment of LGBTI refugee claims, Berg and Millbank contend that refugee advocates and advisers should understand and problematise such an approach.⁹⁹

In this context, Berg and Millbank discuss the model for homosexual identity formation, developed by psychologist Vivienne Cass.¹⁰⁰ In this model, the development is in stages or phases, starting with a stage of denial and confusion, which is often coupled with self-loathing, via a stage of comparing this identity with that of other individuals and a stage of recognition of the own identity, to a stage of acceptance, eventually culminating in the stage of coming out as a self-confident L, G, B, T or I.¹⁰¹ In an asylum context, according to Berg and Millbank, there is the tendency to assume that the final stage of identity synthesis coincides with the start of the

asylum procedure.¹⁰² In Millbank's opinion, answers to questions about personal experiences with sexual orientation need to be handled sensitively, also if the narratives do not match the cultural experiences and expectations of the interviewers and decision-makers.¹⁰³

This staged model of homosexual identity development poses the problem that it is based on the experience of white, middle-class men in the United States.¹⁰⁴ Although it is presented as generally valid, a model like this cannot be applied to other groups, such as women or people from non-western countries. Even in western countries alone, there are big differences between the experiences of lesbians and those of gay men. For instance the idea that people always become aware of their sexual orientation in puberty is much less true for women than for men. American psychologist Lisa Diamond says that far too little research has been done but that we do know that the development of female sexuality is entirely different from that of men,¹⁰⁵ so consequently, wrong expectations are abundant.

It is a problem that such theories are based on the presumption that there are important milestones in the development of a non-heterosexual sexual identity in a heteronormative world. According to such theories, everybody follows more or less the same trajectory in a staged development, with the same stages, in the same order, and that the final point of the process is the same for everybody, namely to accept her or his one and only sexual identity and then announce it to the world. This reflects the essentialist point of view that sexual orientation is innate or fixed early in life, even though there is no agreement on this point in the scientific world.¹⁰⁶ As LaViolette has written earlier: 'If courts can be persuaded that sexual orientation can not be satisfactorily explained by either immutability or social construction, they may stop assigning rights on the basis of simplistic categories that reduce lesbian and gay lives to single common factors.'¹⁰⁷

The last source mentioned in the working guidelines for the themes/directives is the Pink Solutions report by Lieneke Luit. However, it is unclear what this source quotation is based on. The Pink Solutions report pertains to 29 interviews conducted with asylum seekers, with the aim to take stock of what LGBT asylum seekers think of the way in which the asylum procedure takes place. Apart from arguing that knowledge of and understanding for LGBTs are important, that stereotypes

102. Berg & Millbank 2009, p. 14.

103. Millbank 2009b.

104. Berg & Millbank 2009, p. 14.

105. Diamond 2008, p. 18 ff. For a review of this book, see Claus 2013.

106. LaViolette 1997.

107. A choice for sexual orientation as a social construction does not mean that LGBTI asylum seekers no longer need to be protected (LaViolette 1997, p. 33): 'It is not the immutability of characteristics such as race, sex, or sexual orientation that is key to a group's eligibility for protection from discrimination or persecution. Rather, it is the role this characteristic plays in self-perception, group affiliation, and identification by others. It is not because race cannot be changed that an individual deserves rights; it is because society treats members of that racially distinct group differently for having that characteristic.'

are to be discouraged, and that the interview has to take place in a safe and open atmosphere, this report is not about methods to determine a sexual orientation. Consequently, it is incomprehensible why this report is mentioned as a source for the policy.

Perhaps this can be explained by a consideration that is used in decisions: 'It cannot be stated that the new working guidelines have not come about in consultation with interest groups. After all, the working guidelines are based on various sources, including the report Pink Solutions 'Inventory of the situation of LGBT asylum seekers' (*Inventarisatie situatie LHBT asielzoekers*) by Lieneke Luit of COC. Therefore, it is concluded that the points of view of COC and other interest groups are given due consideration.'¹⁰⁸ Possibly, this sentence is a reaction to a suggestion of the Council of State in the judgment of 8 July 2015.¹⁰⁹ Be that as it may, it is clear that referring to the Pink Solutions report as a source cannot lead to the conclusion that the working guidelines have come about in consultation with COC.

2.5.5 ACT OR IDENTITY?

In the previous subparagraph, the model of sexual identity development of psychologist Cass was discussed and criticised, which, though popular in the western world, is not undisputed. The model is also recognisable in Dutch policy in WI 2015/9, with its emphasis on processes of awareness and self-acceptance. In this subparagraph, the work of some other scientists is used to discuss ideas on act and identity with respect to sexuality in further detail, ideas which might shed some light on presuming awareness processes in intercultural situations.

Peumans argues that models like Cass's model have the benefit that in a pragmatic way they give reality a meaning and that they offer the possibility of conceiving a complex subject like homosexuality in a clear manner. Their drawback, however, is that they presuppose a linear and purposive process of a negative heterosexual identity towards that of a positive, merry gay or lesbian who is 'out' in most situations, whereas the social world is a far more complex one. These models also underestimate the importance of social context and do not recognise that these processes are a lifelong matter. Additionally, they do not take into account the wide range of experiences resulting from the context, 'race'/ethnicity, gender, social class, and other characteristics.¹¹⁰

108. For instance in a decision of 21 January 2016 (Burkina Faso), followed by the District Court of Amsterdam, 30 January 2017, 16/1515, appeal unfounded, and ABRvS (Council of State) 13 March 2017, 201701675/1/V2, appeal unfounded.

109. ABRvS (Council of State) 8 July 2015, ECLI:NL:RVS:2015:2170, paragraph 7.3. 'On being asked for an explanation at the hearing, the State Secretary could only explain which questions are not allowed to be asked in the interviews. Although the Council of State gave him the opportunity to do so, he did not provide any insight into which types of questions he does ask in the interviews and whether or not these questions have come about in consultation with an interest group, such as the Dutch Association for Integration of Homosexuality (COC).'

110. Peumans 2011, pp. 33-34.

The study conducted by Gloria Wekker among Afro-Surinam working-class women and the various ways in which they shape their sexuality, *I Am a Gold Coin (Ik ben een Gouden Munt)* (1994) and *The Politics of Passion* (2006), shows that talking about sexual activity – to the family or people in the environment – is not the proper way to deal with ‘the sexual Self’. In the working class, where many different sexual repertoires circulate without any of the variants being heavily stigmatised, sexuality is primarily something you do, not necessarily something to talk about or to straighten out.¹¹¹

In her article *Exporting Identity*, American professor of law Sonia Katyal also points out that there are many groups of people in the world to whom the concept of sexual identity does not apply.¹¹² Hausa men in Nigeria, for instance, consider homosexuality an activity rather than an identity.

There is the tendency to regard a western model of homosexual identity as something that is universally applicable to people all across the world.¹¹³ In the western world, sexual conduct, sexual orientation and sexual identity are mostly seen as interchangeable, and Katyal calls this the ‘substitutive identity model’.¹¹⁴ She shows how strategies based on identity have developed within the gay rights movement and how they played a part for some time, but that it has become clear that they offer insufficient protection to large groups of sexual minorities since these are not covered by the substitutive identity model. Katyal gives some other examples in addition to the Hausa men: MSMs (men who have sex with men but do not identify as gay), Indian *hijras* (transgender women, also referred to as ‘the third gender’), Thai *kathoeys* (biological men with a female identity), and transgenders. I think that in the year 2018, *gender queers* and people with an intersex condition can be added to the list – among others.

From an intercultural perspective, many people cannot be classed among the specifically described categories of sexual identity. Katyal’s analysis indicates that in this respect there is too strong an emphasis on western models, which are not applicable to refugees. Katyal is in favour of focusing on sexual autonomy and sexual self-determination rather than sexual identity.¹¹⁵

According to Alice Miller, (asylum) law has a preference for clear-cut identities, which can be linked to behaviour nicely and recognisably.¹¹⁶ She also puts forward that asylum law distinguishes between *worthy* and *unworthy* queer asylum

111. Wekker 2009.

112. Katyal 2002.

113. Katyal 2002, p. 175.

114. Katyal 2002, p. 109. This model is also used in Belgium. Gérard & Parrein 2011.

115. Katyal 2002, p. 168 ff.

116. Miller 2005.

seekers, where *worthy* asylum seekers are those whose persecution is deemed likely because of their sexual identity and not because of their gay behaviour.¹¹⁷ Asylum law came into being as a global response to genocide, the targeting for destruction of a group of people because of their identity, and asylum law still tends to favour identity to conduct or behaviour as the touchstone of what is essential to protect. In asylum law, identity is considered something that is ‘findable’, and new identities are only understood by analogy with identities already known.¹¹⁸

Deniz Akin speaks of ‘reverse essentialism’ where sexual identity is favoured at the expense of sexual act and practices. She interviewed Norwegian UDI officers (the Norwegian equivalent of the IND) about the way in which they handle LGBTI asylum applications. In Norway there seems to be a preference for sexual identity as well. ‘We focus a lot on what is inside of the person. We do not focus on sexual acts or stuff like that,’ one of the officers said. In this way, sexual conduct and activities are rendered irrelevant – or even misleading – when the credibility of an asylum seeker’s sexual orientation is verified, Akin says.¹¹⁹

In this context, the report of the Rotterdam expertise bureau for intercultural communication Buro KleurKracht (ColourPower), prepared with respect to a case of a lesbian asylum seeker from Uganda, is interesting.¹²⁰ It appears from this report that western terms for sexual identities cannot be used 1-on-1 for Ugandans. In Uganda, the existing western terminology is not considered a set identity category but rather a tool for describing somebody’s experiences in a specific context. The District Court of Zwolle has qualified this report as an expert report.¹²¹

2.5.6 LIKE CONVERTS?

When formulating the policy on assessing the credibility of sexual orientation, the State Secretary also seems to have looked for an analogy with converts. In several appeals, the State Secretary writes:

‘In the assessment of a stated conversion, importance is attached to the social acceptance of changing the religious conviction. Regarding the alien who bases his narrative on an LGBT orientation this is not different. One may expect that with an alien from a country where LGBT orientation is not accepted and where this may be punishable, there will be a process of awareness and self-acceptance.’¹²²

117. Miller 2005, p. 146.

118. Miller 2005, p. 167.

119. Akin 2015.

120. Buro KleurKracht, expertise bureau intercultural communication, *Culturele analyse, inzake XX* [Cultural analysis concerning XX], 13 June 2016.

121. District Court of Zwolle 5 April 2017, 17/429, appeal allowed (Uganda). See also Court of Amsterdam 13 December 2017, NL17.5465, appeal allowed (Nigeria); however, see also Court of Zwolle 30 June 2017, 17/11422, appeal unfounded (Uganda). Court of Rotterdam 22 June 2017, 17/11032, appeal unfounded (Nigeria).

122. Notice of appeal State Secretary 4 March 2016 v. the District Court of Haarlem 26 February 2016, ECLI:NL:RBDHA:2016:3080 (Uganda); appeal State Secretary 9 March 2016 v. the District Court of Amsterdam 11 February 2016, 16/1405 (Uganda); appeal State Secretary 26 February 2016 v. the District Court of Zwolle 19 February 2016, 15/12923 (Uganda). Here, reference is made to paragraph 7.2 of the judgments ABRvS (Council of State) 8 July 2015, ECLI:NL:RVS:2015:2170, in which the judgment ABRvS (Council of State) 24 May 2013, ECLI:NL:RVS:2013:CA0955 on the assessment of credibility of a stated religious conviction is referred to.

123. The judgment ABRvS (Council of State) 24 May 2013, ECLI:NL:RVS:2013:CA0955 implies, however, (3.1) that the State Secretary also sees differences between the two asylum motives. He states that a religious conviction is interwoven with an alien's person and identity to a lesser extent than a sexual orientation and that questions about a stated religious conviction are emotionally less confronting than questions about a stated sexual orientation.

124. ABRvS (Council of State) 24 May 2013, ECLI:NL:RVS:2013:CA0955. In this context, the State Secretary also refers to UNHCR 'Guidelines on international protection No. 6: Religion-Based Refugee Claims', 2004.

125. ABRvS (Council of State) 30 December 2016, ECLI:NL:RVS:2016:3502, ground 71. 'The State Secretary has explained that since roughly the year 2010, the points of departure of the Rambo model have been part of the examination method he has used in his examination into the credibility of a stated conversion. He has developed his examination method into an established practice, which contains a questionnaire.' By judgment of 24 May 2013, ECLI:NL:RVS:2013:CA0955, the Council of State considered his examination method lawful, according to the State Secretary.

126. Fleeing Homophobia report 2011, pp. 65-69.

127. About the *ne bis in idem* principle see also Reneman 2015; Spijkerboer 2014, pp. 290-308. See also Jansen & Spijkerboer 2012b.

It is not immediately clear what this analogy is based on. The term 'self-acceptance' implies that initially the sexual orientation was not accepted. If the environment is hostile towards the individual, it is apparently expected that this individual internalises this hostility.

Also in the judgment of the Council of State of 8 July 2015 there are similarities in the examination of the asylum motives of religious conviction and sexual orientation with respect to the nature of the asylum motives and the evidence issues the asylum seeker might be facing. Here, the judgment of the Council of State of 24 May 2013 is referred to.¹²³ In this judgment, it says:

'3.3. (...) After all, a conversion is always preceded by an alien's deliberate and well-considered choice. In the event of a conversion, the State Secretary sets special store by the alien's answers to questions about the motives for and the process of the conversion. This applies in particular when the alien is from a country where people predominantly have a different religious conviction or where an alien's former religious conviction is the only accepted religion or state religion and where conversion to another religious conviction is socially unacceptable or criminalised.'¹²⁴

In the examination of the credibility of a stated conversion, the State Secretary has, since 2010, used the points of departure of the so-called 'Rambo model', a model created by American psychologist Rambo which is used for establishing various kinds of conversion. In the Rambo model, various stages of development are distinguished in the conversion process. A similar model seems to be used implicitly in sexual orientation cases as well.¹²⁵

2.5.7 LATE DISCLOSURE IN DUTCH POLICY

At the time of the Fleeing Homophobia study (2011), a formal *ne bis in idem* principle (no legal action can be instituted twice for the same cause) was applied in the Netherlands, which had the result that the applications of asylum seekers who said they were L, G, B, T or I only after the first decision, were mostly rejected, because this aspect was not considered a 'new fact' within the meaning of Article 4:6 of the Dutch General Administrative Law Act (*Algemene Wet Bestuursrecht, Awb*).¹²⁶ They had been LGBTI during the first procedure already, and besides, they had been told in the interview that they had to tell everything. Their sexual orientation or gender identity was therefore not taken into account.¹²⁷

After many years of criticism by COC, an exception was made in the policy with respect to Article 4:6 Awb:

‘If an alien at a second or subsequent asylum application indicates that he is homosexual and the IND considers this information credible, the IND does not hold it against him that he did not mention his homosexual orientation during a previous procedure.’¹²⁸

The problem with this text is that it seems to imply that the IND first has to consider the orientation credible, which may well lead to a circular argument: we do not believe you because you are too late with this information.¹²⁹ In René Bruin’s opinion, the phrase ‘and the IND considers this information credible’ had better be removed.¹³⁰

As judges consider themselves bound to the *ne bis in idem* principle, this amendment initially did not apply to the judicial review. Due to the recast Procedures Directive,¹³¹ however, the Council of State departed from the *ne bis in idem* principle on 22 June 2016. From now on, a full and *ex nunc* judicial review applies in Dutch asylum law, which means that the asylum motive sexual orientation has to be taken into account, also when it has been submitted later.¹³² When somebody talks about his sexual orientation or gender identity later on, this statement cannot be ignored any longer. However, the fact that the information was submitted in a later stage of the procedure can be taken into account when the credibility of the sexual orientation or gender identity is assessed, even though this cannot be the sole ground for rejection.

2.6 Conclusion

To gain insight into the way in which applications from LGBTI asylum seekers should be handled, the Council of State asked several questions to the EU Court of Justice in 2011 and 2012. These questions were answered in the XYZ and ABC judgments, which were translated into Dutch asylum practice by the Council of State in its final judgments of December 2013 and July 2015 respectively. Next, the State Secretary converted these insights into policy. A lot happened while these translations were in progress. On the one hand, the XYZ judgment led to a policy in which people are no longer returned to the closet and in which it is presumed justly that people in the country of origin are aware of the sexual orientation or gender identity. On the other hand, based on

128. WBV 2012/21; Vc C1/4.6.

129. See also the letter of COC Netherlands to the State Secretary for Security and Justice, February 2013, and the answer of State Secretary Teeven in which he says that the IND explicitly takes into account the fact that the alien may have good reasons to mention his homosexual orientation only later. ‘This is precisely the kind of case for which this policy rule was written.’

130. Bruin 2015; Bruin 2016.

131. Directive 2013/32/EU, Article 46, third paragraph.

132. ABRvS (Council of State) 22 June 2016, ECLI:NL:RVS:2016:1759.

this same policy, questions are still asked about the planned expression of sexual orientation and gender identity in the event of an unplanned return to the country of origin. This is not consistent with the XYZ judgment. With respect to the question of criminalisation and LGBTI-phobia in the country of origin, the XYZ judgment and the interpretation by the Council of State have led to more attention for the situation in the country of origin.

With respect to the ABC judgment the main issue was how to assess in an objective way the credibility of another person's sexual orientation, in this case an asylum seeker. The most honest answer would be that this is impossible, since sexual orientation can only be determined by the respective person herself or himself. The European Court of Justice, however, held that such an assessment is possible, provided that several matters are avoided. The Court prohibits certain methods that were used previously: no phallometry, no pornography, no explicit questions about sex, and no decisions solely on the basis of stereotypes. The Council of State and the State Secretary followed the judgment of the Court, and one year and a half later they agreed on the way in which the examination should be conducted. The Council of State wanted the State Secretary to make the examination more systematic. According to Working Guidelines 2015/9 the main focus of the examination is on the asylum seeker's personal experiences. The asylum seeker has to be able to speak about processes of awareness and self-acceptance, especially if they originate from a homophobic country.

This link between the environment and the asylum seeker's inner life is not new. In a Pakistan case in 2009, the State Secretary argued 'that it can be expected that somebody who states he is gay in a society in which this orientation is considered a sin, will have to deal with an inner struggle.'¹³³ The fact that the – public – policy in this respect is now based on three sources mentioned specifically, however, is new. On closer inspection of these sources, however, it is found that this is chiefly a matter of a selective and one-sided interpretation of Nicole LaViolette's work and the UNHCR Guidelines No. 9. There is the impression that mentioning the Pink Solutions report as a source is primarily intended to insinuate that the policy has come about in consultation with COC.

The concepts of a 'process of awareness' and a 'process of self-acceptance' seem to be based on the stereotypical idea

133. See District Court of Haarlem 29 September 2009, ECLI:NL:RBSGR:2009: BK1399. The provisional court held that 'it has not been shown what the statement is based on that homosexuals in a society like Pakistan society can be expected to go through a phase of inner struggle.' See also Middelkoop 2010 with respect to this case.

that the development of same-sex sexuality takes place in set stages or phases. The problem of this is that models like these mainly apply to white, middle-class, western men. Consequently, it is very likely that people from other groups, including most refugees, cannot meet the expectations. The fact that asylum law prefers identity to behaviour is another problem, while many people all across the world are not used to thinking in terms of sexual identity. Therefore, it might be better to emphasise sexual autonomy and sexual self-determination instead.

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3.1 Introduction

In the large majority of cases, rejections of asylum applications from LGBTIs are nowadays unmistakably due to the matter of incredibility of the sexual orientation.¹³⁴ In the past, this was different. In the article with the telling title *From discretion to disbelief*,¹³⁵ Millbank writes that in the assessment of LGBTI asylum cases there is a shift in focus towards doubt about the credibility of the sexual orientation, once other obstacles by which granting a status is blocked have been removed. This trend is also discernible in the Netherlands. Only 7 out of 69 LGB cases recorded on VluchtWeb from 2003 until and including 2011 are about credibility of the sexual orientation. This is just over 10%.¹³⁶ Before 2012, other matters predominated: Are the problems experienced serious enough? Is protection by the authorities in the country of origin available or is there an internal flight alternative within the country of origin? Applications were also rejected because it was held that the asylum seekers could find safety in the country of origin by returning to the closet. The ‘scanned’ files (see the table in paragraph 1.5) and case law offer a possibility to estimate the ratio between rejections on the basis of incredibility of the sexual orientation and rejections on other grounds at 5:1 or 6:1. Approximately 85% of the total number of rejections of asylum applications from LGB(TI)s is based on incredibility of the sexual orientation.

With respect to the files, slight reservation has to be made, because some countries are not included (e.g. Afghanistan, Albania, Iraq) and because the files are from a limited period (1 October 2015 until 1 April 2016). However, in the collected case law, which covers all countries of origin as well as a much longer period, it is also about (in)credibility of the sexual orientation in approximately 85% of LGBTI cases.¹³⁷ This is why this percentage does seem to be a reasonably reliable estimate.

Assessing the credibility of a narrative plays a major part in all asylum procedures, and many books have been written about the problems that can occur during such assessments. All kinds of misunderstandings caused by cultural differences and language problems wait in ambush.¹³⁸ In addition to this, assessing somebody else’s sexual orientation causes specific problems. How should this be done? If, in daily life, somebody wonders if someone else is heterosexual, homosexual or bisexual (or trans or gender queer), the best and most direct way would be to ask the respective person and to accept the

134. None of the examined files were about cases in which a stated gender identity was not believed.

135. Millbank 2009a.

136. On VluchtWeb (the Dutch Refugee Council’s database), the first judgment about sexual orientation dated from 2003 (ABRvS (Council of State) 200300763-1, Kenya). The first judgment in a case of credibility of sexual orientation is District Court of Utrecht 8 May 2009, 08/31993; 08/31995, appeal allowed (Iran): Given the fact that the claimant has submitted false documents, the respondent doubts the correctness of the claimant’s statements concerning his homosexuality and the resulting problems from this in Iran. The court considers it plausible that this is a matter of homosexuality. See further District Court of Haarlem 9 March 2010, 201010/6920, 10/6922; 10/6923, appeal allowed, (Pakistan); District Court of Groningen 3 September 2010, 10/6506, appeal allowed (Iraq); District Court of Maastricht 23 May 2011, 10/44972, appeal dismissed (Iraq); District Court of Maastricht 23 May 2011, 10/44974, appeal allowed (Iran); ABRvS (Council of State) 7 October 2011, 201012756/1/V4, appeal minister allowed (Iraq, appeal of the District Court of The Hague 1 December 2010, 10/31535; 10/31536); District Court of Rotterdam 13 October 2011, 11/25156, appeal dismissed (Afghanistan).

137. Here, too, Dublin cases have been left out of consideration.

138. See Doornbos as example.

answer as true. In asylum law, however, there are some who strongly distrust this so-called self-identification, especially in the past few years. It is argued that everybody can say that he belongs to a sexual minority that is suppressed in the country of origin, and a statement like this could be lucrative for straight asylum seekers from certain countries who have exhausted all legal procedures (e.g. Iraq, Iran, Afghanistan). As a result, there is a huge fear of fraud.¹³⁹ Although it is not possible to determine somebody else's sexual orientation, this fear leads to attempts to do just that. Besides, EU law,¹⁴⁰ the case law of the Court of Justice and the Council of State prescribe that this is to be done objectively and not (solely) on the basis of stereotypes. To this end, WI 2015/9 has been drawn up and approved by the Council of State in the Netherlands.

How the application of this policy takes shape in practice is discussed in this chapter by means of quotes from the examined files. The files are dealt with per subject. First, several general and procedural cases are discussed as well as some aspects that are relevant at the beginning of the interview (3.2). Next, attention is briefly paid to certain impertinent questions asked (3.3) and to definitions of homosexuality (3.4). Paragraph 3.5 is about the awareness process and the process of self-acceptance. The internal struggle and the influence of the environment are dealt with in this paragraph. The next paragraph (3.6) concerns the connection between sexual orientation and gender identity on the one hand and religion on the other hand. Holding risky behaviour against the applicant is discussed in paragraph 3.7; in 3.8, LGBTI subjects and the knowledge of LGBTI organisations is discussed, 3.9 discusses the role of possible relationships and contacts, and 3.10 is about submitted documentary evidence: photographs/ letters, statements made by witnesses, and statements about attending LGBTI meetings and membership of LGBTI interest groups. In 3.11, the focus lies with the late disclosure in a subsequent procedure. The conclusions drawn from the foregoing are discussed in 3.12.

139. ABRvS (Council of State) 20 March 2013, ECLI:NL:RVS:2013:BZ4986, par. 11.3: The State Secretary expects that if the approach is opted for that the mere statement of an alien about his sexual orientation is taken as a basis, aliens will feign a certain sexual orientation to obtain a residence permit asylum, given the interests for themselves, family members and others in the country of origin who depend on obtaining the permit.

140. Procedures Directive, Directive 2013/32/EU, Article 10, par. 3: Member States shall ensure that decisions by the determining authority on applications for international protection are taken after an appropriate examination. To that end, Member States shall ensure that: - a) applications are examined and decisions are taken individually, objectively and impartially.

3.2 General and procedural findings

The file research brought cases to light, some of a procedural nature, that do not fit in one of the other categories but that are interesting enough to briefly pay some attention to. These subjects are described in this paragraph.

Influence of ‘view’ and ‘corrections & additions’

In its report *De geloofwaardigheid gewogen* (Credibility assessed), the Advisory Committee on Aliens Affairs (*Adviescommissie voor Vreemdelingenzaken, ACVZ*) writes that the arguments in the ‘view’ (reaction to intention to reject application) submitted by lawyers are not sufficiently taken into account by the IND in their decisions.¹⁴¹ In the file research by Stefan Kok, it was indicated that the lawyer’s documents – ‘corrections & additions’ and ‘view’ – seldom lead to a positive assessment of the credibility of a relevant element. According to Kok, the IND officers insufficiently regard these documents as part of the qualification of facts.¹⁴²

In the current study, however, the ‘view’ or the ‘corrections & additions’ in some cases contributed to a positive decision. From one file, for instance, it became apparent that the extensive ‘corrections & additions’ made it clear that the asylum seeker struggled with his feelings and his environment. In another case, the report of the institute for Human Rights and Medical Assessment (iMMO) seems to have been decisive for the positive result.¹⁴³ There was also a case in which it was probably due to the lawyer’s ‘view’ that the causal connection between the asylum seeker’s gender identity and her involuntary hospitalisation in a psychiatric institution was acknowledged.

On the other hand, if an asylum seeker is ill-prepared by his lawyer for the interview, if no ‘corrections & additions’ are submitted, and if the ‘view’ is not to the point, it will be hard to repair this damage with another lawyer later on in the procedure.

Additional interview

In eleven of the forty examined files, an additional interview took place.¹⁴⁴ Six of the asylum seekers who were additionally interviewed were granted refugee status, five had their application rejected (two of these five were not believed; in the other three cases, the account was considered not serious enough).

141. ACVZ 2016, pp. 49-50.

142. Kok 2016, p. 55.

143. This trans woman was eventually granted a status. Yet, in this case a status was almost denied because the iMMO report showed that she was raped but not that the perpetrators were policemen. The medical practitioners and psychologists of the iMMO investigate torture and inhumane treatment in the context of the asylum procedure.

144. Kok notes that additional interviews occur more often in LGBT cases than in other asylum cases. Kok 2016, p. 41.

145. Ronald Uganda, interview March 2015, additional interview July 2015, status October 2015.

146. Interview November 2015, additional interview December 2015, status February 2016.

147. Because the requirements of ABRvS (Council of State) 8 July 2015, ECLI:NL:RVS:2015:2170 were not met. Feedback memo IND, April 2016: 'New intention to reject and new decision required. Decision to be made in conformity with WI 2015/9, with more emphasis on awareness and self-acceptance. In the interview, it should be clear that the questions were asked in conformity with the questionnaire of WI 2015/9. Additional interview if necessary.' The additional interview was conducted in August 2016, after which asylum was granted.

148. ABRvS (Council of State) 28 September 2016, ECLI:NL:RVS:2016:2667. Appeal of District Court of Rotterdam 26 May 2016, ECLI:NL:RBROT:2016:3914 (unpublished).

149. A trans woman was infected with the HIV virus when she worked as a prostitute in the Netherlands.

150. UNHCR Handbook, § 196: 'There may also be statements that are not susceptible to proof. In such cases, if the applicant's narrative appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt' and § 203 'it is hardly possible for a refugee to 'prove' every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognised. It is therefore frequently necessary to give the applicant the benefit of the doubt.'

151. For instance in *F.G. v Sweden*, 'the Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof,' ECtHR (Grand Chamber) 23 March 2016, *F.G. v Sweden*, 43611/11; see also Kok 2016, p. 33.

In the case of Ronald from Uganda, the interviewer did not believe he was bisexual, but the second IND officer had a different opinion. After an additional interview, Ronald was believed and a status was granted.¹⁴⁵

In one case, subversive journalist activities initially seemed to be the main issue. At the end of the interview, the asylum seeker remarked he was bisexual although this was not the reason of his flight. However, in the corrections & additions, his lawyer stated that an important reason why he had left his country of origin was the fear that his sexual orientation would become known there. Next, he was interviewed again for a whole day about his bisexuality, and he was granted refugee status on this ground.¹⁴⁶

In the examined files, asylum seekers were sometimes interviewed additionally, following a judgment of the court, in which reference was made to the new policy in WI 2015/9.¹⁴⁷ However, the Council of State ruled on 28 September 2016 that it cannot be inferred from its judgment of 8 July 2015 that interviews that took place before the Working Guidelines 2015/9 came into effect, had not been conducted properly or that statements made during these interviews cannot be included in the assessment of the credibility of a stated sexual orientation.¹⁴⁸

Medical emergency

While their asylum application was rejected, some asylum seekers did obtain a right of residence, because the medical treatment they required was not available in the country of origin. In one case, this concerned psychiatric treatment, another was about HIV medication.¹⁴⁹ They were granted a residence permit for one year based on their medical condition (Article 64 of the Aliens Act).

Involuntary hospitalisation in a psychiatric institution

Two asylum seekers told how they had been hospitalised in a psychiatric institution in their country of origin in the past. Their sexual orientation was to be cured by means of forced medication (antipsychotics). Both people were eventually granted refugee status.

Benefit of the doubt

Although the UNHCR Handbook¹⁵⁰ and the European Court of Human Rights¹⁵¹ emphasise that applying the benefit of the doubt is often necessary, this principle barely appears in

the examined files. In April 2012, the IND issued an internal guideline in which it was advised to be reluctant in deciding that a stated claim of homosexuality is not credible, both in initial and in subsequent applications. ‘In cases of doubt, it is advised to accept the homosexual orientation.’ In 2015, it was found that this guideline was still effective, as it had never been withdrawn.¹⁵² However, in most files, the guideline was not mentioned.

Samantha from Africa was granted a status in December 2015, presumably influenced by the benefit of the doubt. As the file indicates, she was questioned extensively about various aspects of her orientation in accordance with the guideline questionnaire LGBTs, but according to the IND her stated bisexuality remains doubtful. The picture that emerges about her relationships with women is clearer than that of her interest in men. For instance, she does not speak about the relationship with her children’s father, but no further questions were asked about this either.¹⁵³

Asking more detailed follow-up questions

The ACVZ advises that in case of doubt the interviewer should ask more detailed follow-up questions in the (additional) interview, in order to get a full picture of the narrative.¹⁵⁴ In case law, this is mentioned too: ‘The State Secretary asks as many open-ended questions as possible and, if necessary, will ask for clarification, addition and confirmation.’¹⁵⁵ Sometimes IND officers note that their colleagues had not asked sufficiently detailed questions and that it is therefore not possible to reject the application without an additional interview.

Martin, Africa

As Martin’s file indicates, homosexuality only came into view when he had sex with X, who was later killed by the police. This caused fear in Martin, and this was the main reason of his flight. To spike rumours, he said he had a girlfriend. More detailed questions were asked about this, to examine the credibility of his homosexuality.¹⁵⁶

Frank, Uganda

Frank stated that he became aware that he felt attracted to boys when he was about thirteen years old. Only eleven years later, he had a relationship for the first time, he said. In the intention to reject, it says: *Although it is of course not impossible that he has had only one relationship as a homosexual in his whole life, this circumstance is regarded as remarkable in the context of his other statements, also considering the fact that he did not state either that he has ever been in love with boys or men. Neither does it become apparent that he has*

152. For instance in the file of Elroy from Africa.

153. Samantha Africa, December 2015.

154. ACVZ 2016, p. 48.

155. ABRvS (Council of State) 15 June 2016, ECLI:NL:RVS:2016:1630, par. 2.7; about the importance of asking more detailed questions, see also ABRvS (Council of State) 5 October 2017, ECLI:NL:RVS:2017:2706.

156. Martin Africa, 2015. He was believed and he was granted a status. In his country of origin, homosexuality is criminalised.

157. Frank Uganda, intention to reject, December 2015. Frank's application was rejected.

158. After two previous applications together with his parents, he made an independent application in September 2015 and received refugee status three months later.

159. District Court of Zwolle 28 March 2017, ECLI:NL:RBOVE:2017:1368, appeal allowed (Belarus). The appeal was allowed because the interviewer had not taken the since 2012 compulsory course Interviewing Vulnerable People (IVP), and therefore the interview did not comply with the demands made by the State Secretary himself. The State Secretary successfully lodged an appeal against this judgment. The Council of State held that the mere circumstance that the interviewer had not taken the IVP course does not automatically imply that the interview did not meet the applicable requirements of due care. ABRvS (Council of State) 3 October 2017, ECLI:NL:RVS:2017:2692, appeal allowed. The case was referred back to court.

160. Luit 2012, p. 7: 'More than half of the respondents did not feel at ease with the interpreters who were present at their interview. This percentage was even higher if the interpreter was from the same country of origin as that of the respondent.' See also Bruin 2014.

161. Joe Africa, additional interview, third procedure. Joe had been in the Netherlands for a very long time and understood Dutch.

ever approached another man than X, whereas gays, so Frank says, can feel whether somebody else is gay as well.¹⁵⁷ Frank was not asked if he has ever been in love or has ever approached other men.

Refugee sur place

There was one refugee sur place case: someone who had come to the Netherlands with his parents as a twelve-year-old child and who realised several years later that he was bisexual. His parents' asylum application was rejected. He was interviewed in Dutch, because he speaks the language well, and he preferred not to have an interpreter from the country of origin.¹⁵⁸

Bisexuals

Of the forty examined files, seven were about bisexuals. Five of them submitted a subsequent application. A similar number of bisexuals (five) was granted asylum status. No examples of stereotypes concerning bisexuals were found in these files.

Credibility gender identity

In the examined files, there was no disbelief concerning a stated gender identity. In the Fleeing Homophobia study, this hardly occurred either. From case law it becomes clear that at least one asylum seeker's stated gender identity (and bisexuality) was not believed.¹⁵⁹

Interpreters

In several instances, asylum seekers had major problems with interpreters from the country of origin. This seemed to confirm the findings of the Pink Solutions report in this respect.¹⁶⁰ Sometimes, this problem can be solved creatively.

In the presence of the interpreter and the VWN officer (*Vereniging VluchtelingenWerk Nederland*, Dutch Council for Refugees), Joe did not want to talk about the sexual abuse he had suffered: *You have indicated that you felt embarrassed to tell everything in the presence of the interpreter and the VWN officer. They have temporarily left the room, and my female IND-colleague has come to join us briefly. Please tell us everything that may be relevant for your application. So which new facts and/or circumstances do you want to present to underpin the subsequent application you have decided to submit?*¹⁶¹

The beginning of the interview

Asylum interviews mostly begin with a talk by the interviewer, in which they explain the purpose of the interview. No questions are asked about sexual orientation in the interview as standard. In the next case, the subject was brought up by

the interviewer after the lawyer had announced this on the preceding day.

Sam, Asia

Have you ever experienced any problems due to your religion, religious convictions or personal lifestyle? – I did not want to go to the mosque. What do you mean by ‘personal lifestyle’?

Certain behaviour, clothing or sexual orientation, for instance. – I did have some problems on account of my lifestyle. I like having sex with another man, and this is not allowed in my country of origin. (...) It is not possible due to the circumstances with my family. This was basically the biggest problem I had in my country of origin.¹⁶²

Sometimes, an interview begins with a kind of disclaimer concerning Dutch directness: *With respect to the questions I will ask you, I want you to know that my questions are intended to understand your statements better and to examine their credibility. It is also possible that, if something is unclear, I will ask you multiple questions about the same subject, or maybe that I repeat the questions if the answer is not clear to me. As a result, my questions may sound more direct and critical than you are used to from your (cultural) background. These questions are not in the least intended to offend you or hurt your feelings, or to influence your statements in any way whatsoever. I only want to get a clear picture of the reason of your asylum application. Do you understand what I have just explained?*¹⁶³

There is also a shorter form: *Maybe it is difficult for you to discuss this, but as it is the reason of the asylum application, I have to pursue the question in greater depth. Please let me know if you consider some specific questions offensive, so that I can adjust my questions.*¹⁶⁴

Talking about sexual orientation

Despite the polite phrases used, the asylum seekers are expected to speak extensively about their sexual orientation. For many people, however, this topic is anything but natural.

For instance, an African man said: – It has not been on my mind consciously. This is the first time I talk about it openly, I think. Just because I have to.¹⁶⁵

Thomas, Asia

Why didn't you mention your homosexuality in the first procedure? – I am from an entirely different culture. In the culture of [country of origin] you don't talk about your feelings that easily. You are a little bit ashamed to tell somebody else that you are different from other men.

162. Sam Asia, interview July 2015.

163. Barry Africa, interview, March 2015; Jeremy Africa, subsequent interview, February 2016.

164. John Africa, interview June 2014.

165. Barry Africa.

It has to do with standards and values, my actual backgrounds. When I came here, I noticed that this society is very open with respect to expressing your personal feelings. (...) In [country of origin], you don't talk about them. You are never allowed to express your feelings. Here you can. If you talked about your feelings openly in [country of origin], your life would be at risk.¹⁶⁶

In his subsequent interview, Charles from Africa said: – I had never unveiled this subject. Today I have.¹⁶⁷

Talking about sex

Since the ABC judgment, explicit questions about sex have been forbidden.

This is said in the following way: *I should like to point out that neither in this additional interview nor in your asylum process we will ask you for medical or documentary evidence concerning your sexual orientation. Neither will we ask any explicit questions about sexual acts or activities. If such questions were asked in previous interviews, these questions or the answers to them will not be taken into account in the assessment of your asylum application.*¹⁶⁸

If the asylum seeker talks about sexual acts of his own accord, the interviewer is to stop this pursuant to WI 2015/9 by pointing out to the asylum seeker that such statements are not required and that they will not be included in the assessment.¹⁶⁹

This is done in the following way: *It is important that you talk about your problems and about your relationships. You do not need to provide any intimate or physical details.*

In the examined files, however, it happened a few times that an account was not interrupted, although it could have been on the basis of the policy rule described above. However, this had a positive effect for a proper understanding of the narrative. Although asking questions about sexual practices is prohibited according to the ABC judgment, the judgment does not clarify what should happen when the asylum seeker talks about sexual practices of his own accord.¹⁷⁰ In one or two cases, there was the impression that the prohibition on questioning about sexual acts had negative results for the asylum seeker, because it was not clear what the sexual acts, the credibility of which was discussed, actually were.

Form of addressing transgenders

Interviewers address transgender asylum seekers often by the

166. Thomas Asia, subsequent interview December 2015. As he was not believed, his application was rejected.

167. Charles Africa, subsequent interview, November 2015. Charles was granted refugee status.

168. Alex Asia, additional interview, September 2015; John Africa, November 2015.

169. See WI 2015/9 paragraph 2.1 ad 3.

170. Also in Sweden, stories about sex are sometimes cut short: 'No, do not talk about your sex life. It is not relevant. Talk about your emotions instead,' according to an e-mail of 14 September 2017 from Swedish asylum lawyer Aino Gröndahl. In the British policy text, sexually explicit matters seem to be banned from asylum practice altogether. See United Kingdom Home Office, 'Asylum Policy instruction, Sexual orientation in asylum claims', version 6.0, August 2016, pp. 24-32. This is probably a reaction to the former excrescences in this respect. See UKLGIG 2013.

gender stated in the documents, mostly the gender stated at their birth. It would be more respectful to address the asylum seeker by the preferred gender. In case of doubt, it is best to ask the person involved by which personal pronoun they want to be addressed in the interview.¹⁷¹

In Bridget's interview, this was done in the following way:

Note from the reporting IND officer: Mr X arrives at the interview dressed as a woman. I ask him if he wants to be addressed as 'Mrs X' or as 'Mr X'. She indicates that she wants to be addressed as 'Mrs X'. I indicate I will do so but that she will be referred to in the report of the interview as 'Mr X', because she is registered in our system as a man.¹⁷²

Sometimes, people initially say they fled their country because of their sexual orientation, and only at a later stage it becomes apparent that they identify as transgender. Crystal, a trans woman, first referred to herself as a gay man. As from shortly after the beginning of the subsequent interview in the third procedure, she is addressed as 'madam'.¹⁷³ Angela, a trans woman who fled her country after her transition, is addressed as 'madam' and referred to as 'she'. In the intention to reject of October 2015, she is alternately referred to with 'she' and 'he'.¹⁷⁴ Another trans woman, Paula, is consistently referred to as 'she' in her first asylum procedure, but in her second procedure, she is referred to with 'he' in the intention to reject and the decision.

Valerie, a trans woman too, gets a positive decision with the motivation: [The statements of the person involved about his sexual orientation and the events in \[country of origin\] are considered credible.](#)¹⁷⁵

In case law, this is also dealt with in different ways. In the judgment of the District Court of Utrecht, a Jordanian trans man is consistently referred to as *eiser* (the masculine version of the Dutch noun, meaning 'claimant'; the feminine noun is *eiseres*) and 'he'.¹⁷⁶ In the judgment of the District Court of Rotterdam, a Bengal trans man is consistently referred to as *eiseres* and 'she'.¹⁷⁷

Assessing by appearance

The credibility of a stated sexual orientation is not supposed to be assessed on the basis of appearance, but sometimes appearance plays a part. In the file of an asylum seeker, for instance, it says that given his life and statements it is credible that he is bisexual but that, although appearance is actually

171. Berg & Millbank (2013) state that the refusal to address people by the gender of their choice 'could interfere with both the quality of evidence obtained and the ability to properly assess it if it infuses the analysis of the claim.'

172. Bridget, additional interview, March 2016. In the interview report, she is consistently referred to as a woman.

173. Crystal, subsequent interview, 2016.

174. This leads to passages like this one: '(...) is considered that the applicant apparently believes that she can ask for protection to the authorities of his country.' Angela, intention to reject, December 2015.

175. Valerie, positive decision, October 2015.

176. District Court of Utrecht, 3 November 2016, 16/23543, appeal allowed. He was granted asylum.

177. District Court of Roermond, 7 April 2015, 12/4042, appeal allowed; and ABRvS (Council of State) 13 November 2015, 201503759/1/V2, appeal State Secretary dismissed.

not used as an assessment criterion, you can also tell from his appearance and attitude.

As another file indicates, for the examination of a certain boy you do not need a gaydar, because he is the epitome of homosexuality, also according to the interpreter.¹⁷⁸

As indicated in yet another file, the respective asylum seeker is dressed in a kind of T-shirt/dress and is stared at by many people. When asked in the interview if he had ever had a relationship with a woman, he laughed and made it patently obvious that he was not interested in that at all.¹⁷⁹

It should be noted that it is allowed to take into account the 'stereotypical picture of LGBT' in a positive way, according to the working guidelines. Of course, this poses the risk that it has an unfavourable effect for people who do not meet the stereotypical picture. In the files, no stereotypical comments were found about somebody's appearance.¹⁸⁰

3.3 Impertinent questions

Questions like 'What exactly did you do when you were having sex?' were not mentioned in the files. Nevertheless, some very impertinent questions were asked, maybe to a higher extent than questions about sexual positions. These questions may be a violation of human dignity, which is guaranteed in Article 1 of the Charter.¹⁸¹

Arthur, Asia

*Wat did you feel or what did you like when a boy touched you?*¹⁸²

John, Africa

You said that you have had sexual contacts with boys from a very young age. Can you describe what it felt like, how it made you feel?
- It is this feeling that comes from within. It is hard to describe, because it's a feeling. You are attracted to men, and this is what you experiment with. (...)

*How often did you have a sexual relationship? - I don't know. There were many.*¹⁸³

This interview took place before the ABC judgment of December 2014 but after the internal code of conduct of April 2014. Already in those days, it was prescribed in Dutch policy

178. On the day of the subsequent interview (May 2016), he was granted a positive decision. 'Gaydar' is a portmanteau of 'gay' and 'radar' and refers to a supposed intuitive ability to recognise gays, lesbians and bisexuals.

179. This man was granted a status in October 2015.

180. Compare the Pink Solutions report in which two girls are referred to who, according to the IND, looked too womanly to be lesbians. Luit 2013. An article in *Het Parool* (an Amsterdam newspaper) is about an Iraqi asylum seeker who suspects that the IND does not believe him on account of his appearance. 'If men do not wear any make-up or nail polish, they are not gay.' <https://www.nhnieuws.nl/nieuws/206219/homoseksuele-asi-elzoeker-uit-alkmaar-moet-terug-naar-irak-daar-word-ik-zeker-gedood>.

181. These questions are probably in violation of Article 3 (integrity of the person) and Article 7 (private life) of the Charter of Fundamental Rights of the European Union.

182. Arthur Asia, interview, July 2015.

183. John Africa, interview subsequent application, June 2014.

not to ask any explicit questions about sexual acts.¹⁸⁴ Yet, not so long ago a man who said that in his search for his sexual identity he had sex with both men and women, was asked the following:

I apologise if you find my question inquisitive, but how did you feel when you had intercourse with men? (...)

Can you describe how you felt while you were intimate with a woman? (...)

Can you describe the difference in experience/feeling between having intercourse with a man and having intercourse with a woman? (...)

Why did you feel more attracted to men than to women? - Because I am gay.¹⁸⁵

In this study, there were some files that cover several years because subsequent applications are involved. As a result, some older interviews were examined as well.

In an interview in 2010, the following question was asked: *Can you explain to me why the policemen raped you, although they are against homosexuals and there is a taboo on gays?*¹⁸⁶

This question comes across as archaic, and it is to be hoped that questions such as these are not asked anymore nowadays. It may be taken for granted by now that rape does not stem from a positive interest in the victim.

A woman who was forced to be married off to a boy two years her senior, was asked: *Can you tell me how you experienced this in relation to the fact that you were actually attracted to women?*¹⁸⁷

A trans woman who, working in prostitution out of necessity, got infected with HIV, was asked: *Do you know who infected you?*¹⁸⁸

Oliver, Africa

In Oliver's interview, he was asked: *What did you think when X and you were going to have sex? - The first time, I liked it, because I had come too. So, it was all right with me.*

Didn't you think: 'What's going on here? What is this?' - I had my thoughts, but I thought it was normal.

*You had heard that a homosexual had been murdered, so what made you think it was normal?*¹⁸⁹

184. Letter from the State Secretary for Security and Justice to COC Netherlands, 10 June 2014.

185. Interview (April/May 2016) which the researcher could peruse via COC Netherlands. The man also experienced these questions as humiliating, as he said during the interview. Eventually, he was granted refugee status.

186. Interview, November 2010.

187. Pamela, subsequent interview, April 2015.

188. Interview, March 2016.

189. Oliver Africa, interview, January 2016.

In the Iranian Criminal Code, there are very detailed descriptions of which penalty is inflicted for various kinds of sexual acts. For Dutch asylum law it is sufficient to know that same-sex sexual acts are criminalised in Iran, that even the death penalty can be imposed and that this actually happens.

In the case of an Iranian, the IND officer deemed it necessary, on the basis of the answers in the interview, to look up what exactly the penalty for the 'receiving partner' is in that country. This information is superfluous.¹⁹⁰

3.4 Defining homosexuality

Whereas the main object of the interview with an LGBTI seems to be that the State Secretary can make a decision about whether the asylum seeker is gay, lesbian or bisexual, it is also asked how the asylum seeker recognises LGBTs or what his or her definition of homosexuality is. There seems to be an exchange of roles in such cases, which is sometimes very confusing.

Arthur, Asia

When did you realise that what you liked was homosexual? – When I had sex for the first time, I liked it. I have had sex with a boy ever since.

Did you realise you were homosexual at that moment, or had you known this earlier on? – Before I had sex with this boy, I liked it when I was touched. I had no experience with sex, and I didn't know about how and what. When I had sex, I liked it a lot. (...)

Did you have a struggle with your feelings when you found out that what you felt was homosexuality? – Every time I was caught or hit, I said to myself: 'Okay, I won't do it anymore.' I couldn't stop myself.

How did you know that what you felt was homosexuality? – Do you mean why I was attracted to men?

For instance, there are men who have sex with men, but they are not homosexual. How did you know you were homosexual? – Can you explain what homosexuality is?

I explain.¹⁹¹ – I also have feelings for men, so I am homosexual.

What do you mean by homosexuality yourself? – When I had sex for the first time, I did have feelings for the men. I didn't know much about

190. Iran, February 2016.

191. How it is explained is not mentioned.

having sex with men. When I had sex, I liked it a lot. After that, I couldn't do without anymore. (...)

Do you consider yourself homosexual because you asked me earlier what homosexuality is? – Yes, I do.

Can you explain to me why you consider yourself homosexual?
– Because I feel attracted to men and I like men a lot.¹⁹²

John, Africa

In some countries/cultures, it is customary and accepted that men kiss each other and have other physical contact. That does not mean they are considered homosexual for that reason. Can you describe what this is like in [country of origin]? When is somebody considered homosexual in your country? – Kissing is not permitted in our country, let alone having sex with men.¹⁹³

When is somebody considered homosexual in your country of origin?
– When you get caught. When you ask somebody questions, they can also consider you homosexual. If someone sleeps with another man, you consider it homosexual.¹⁹⁴

Grace, Nigeria

When is somebody considered homosexual in your country? – I don't think you can see it. But you can ask. Then you know. Or you go to a party together.¹⁹⁵

Bridget, trans woman

You have said several times that you 'became' homosexual. Is homosexuality or being transgender in your point of view something that is innate, or is it something you become at a later age? – When I grew up, I always wanted to be a girl and do girly things. I didn't really know what transgender was.¹⁹⁶

Sophie, South Caucasus

What makes someone homosexual, do you think? – There are various types of lesbians: passive, active and universal. They don't have contact with men, and they don't like men.

What does it mean to you to be a lesbian? – What do you mean?

When is somebody a lesbian, in your opinion? – There are some who also have children, and there are some who live like lesbians.

What does it mean for you to be a lesbian? – I had agreed with X at the time to stay together for ever. (...)

192. Arthur Asia, interview, July 2015. After his lawyer had protested and had stated that the interviewer had complicated the case with his questions, the decision in which it was held against him that he did not know the meaning of homosexuality was withdrawn. Eventually, his application was still rejected, because his sexual orientation was not believed.

193. John Africa, subsequent interview, June 2014. In his country of origin, homosexuality is criminalised.

194. John Africa, additional interview, November 2015.

195. Grace Nigeria, subsequent interview, May 2016.

196. Bridget, additional interview, March 2016.

When do you consider somebody a lesbian? – Sometimes you can tell from their appearance, but sometimes you've guessed wrong. You can also tell from the behaviour.

How can you tell from the behaviour that someone is a lesbian?
– They behave coarsely, a bit masculine. They smoke cigarettes, like men do, and they sit like men. (...)

Have you ever tried to have contact with women who have the same feelings like you? – I have tried but without any success.

Have you ever had a relationship with a man? – No, I never have.

Why not? – I am not attracted to men; I am attracted to women.¹⁹⁷

Alex, Asia

Are you homosexual or bisexual? – Homosexual.

What do you mean by that? – It is nothing special. It is like a man with a woman, and in my case, a gay case, that a man does it with a man.¹⁹⁸

Anthony, Africa

What do you mean by homosexuality? – I like it, and I think it's a good thing.

What does homosexuality mean? – That men and men sleep together. It doesn't stress you out, and I like it.¹⁹⁹

Charles, Africa

How do you know that homosexuality is a taboo? – I found out by how people reacted to me, at the moment that people began to spit on me. When someone says to you that you have brought a curse on the village and on the entire family.²⁰⁰

Jeremy, Africa

When is somebody considered homosexual in your country of origin?
– When he does what is normal here: walking hand in hand, two men kissing one another in the street.²⁰¹

197. Sophie South Caucasus, interview in her first procedure.

198. Alex Asia, interview subsequent application, March 2014.

199. Anthony Africa, interview, January 2016. Homosexuality is criminalised in his country.

200. Charles Africa, subsequent interview, November 2015. Homosexuality is not criminalised in his country.

201. Jeremy Africa, subsequent interview, February 2016. Homosexuality is criminalised in his country.

3.5 Process of awareness and process of self-acceptance

3.5.1 INTRODUCTION

According to Dutch policy, the main focus of the assessment is on processes of awareness and self-acceptance. From the examined files it becomes apparent that if such processes are mentioned in interviews the interviewer and the asylum seeker often talk at cross-purposes. Asylum seekers often do not understand what a 'process of awareness or self-acceptance' is, because they have never heard of it and/or because they have not experienced anything like that, although the interviewers and decision-makers speak about the process of awareness and the process of self-acceptance as if it is something actually existing, almost tangible and very obvious, rather than an idea or a concept. This is sometimes a cause for peculiar dialogues.

In the following paragraphs, some examples are discussed of ways in which the asylum seekers and IND staff deal with these processes. After the first few examples of how this subject is dealt with, the presumption that the asylum seeker has gone through an 'internal struggle' is discussed in further detail (3.5.2). Paragraph 3.5.3 is about the difference between the asylum seeker's reaction and the reaction of the environment on the sexual orientation or gender identity. The question of whether sexual orientation is about feelings or conduct is discussed in 3.5.4, and the moment of awareness is described in further detail in 3.5.5, followed by a conclusion.

Michael, Africa

What did it do to you, when you noticed you had feelings for a boy, even though it is a taboo? - We did a lot together.

My brother often hit me, because I like boys.

Let me ask you the question again and explain it better. You said that a relationship between two boys is a taboo in your country of origin. I can imagine that it was difficult for you to find out you like a boy although this is not customary in your country of origin and it is considered wrong by people. Can you tell me what this felt like for you? - Yes. It was difficult, it is hard over there, homosexuality. But I was with somebody I loved, somebody I love. So actually, I was prepared to go a long way for him and bear the consequences too. If I were in my country of origin now, and he too, we would still be together. That's it, really.²⁰²

202. Michael Africa, additional interview, October 2015.

Jeremy, Africa

You were fond of boys. You knew that what you did was a taboo, that it was forbidden. How did you deal with this? – We did it secretly in the forest.

I mean: how did you deal with it emotionally? How could you accept this? – I found it difficult, but I couldn't change myself.²⁰³

Whereas doubt about a stated gender identity does not appear in the examined files and hardly appears in case law, transgenders are also questioned about (processes of) self-acceptance and awareness.

Crystal, trans woman

When did you accept the fact that you feel you are a woman? – I have always accepted it, but it was always a secret. I dressed in women's clothes but didn't dare to tell anyone.²⁰⁴

For IND officers it is sometimes difficult to decide that someone is actually gay if there are few stories about processes of awareness and self-acceptance. Albert's account is primarily about many years' discrimination and persecution due to his sexual orientation.

Albert, eastern Europe

It appears from the file that according to the IND Albert is actually gay. Although the manner in which he makes his statements is very plausible, there is no 'real support' since no questions have been asked about the details of the processes of awareness and self-acceptance or about homosexual relationships. In this context, WI 2015/9 and the judgment of the Council of State of 8 July 2015 are referred to.²⁰⁵

3.5.2 INTERNAL STRUGGLE

According to WI 2015/9, it is not a starting point of the IND that an internal struggle must have taken place in all cases before the alien has accepted his LGBT orientation. Furthermore, the Council of State pointed out that expecting an internal struggle would be a stereotypical opinion (see paragraph 2.5.2 of this report).

Yet, it becomes clear from the examined files that the 'internal struggle' plays a major part in the assessment, and the absence of a struggle or other negative emotion is often held against the person concerned. Crying seems to be helping too.

In one file, for instance, it says that it was difficult to learn more

203. Jeremy Africa, subsequent interview, February 2016.

204. Crystal, subsequent interview, 2016.

205. Albert eastern Europe, November. It is a general principle of good administration that negative decisions are motivated well. This does not apply to positive decisions, though. Albert was granted a status a few months later.

about the asylum seeker's inhibitions, his feelings, his struggle about his homosexual feelings in view of the prevailing African culture and opinions about LGBT. His struggle between feelings and religion did not become clear either.²⁰⁶

Some examples from the files are used below to relate whether or not going through a struggle to rejecting the asylum application or giving a positive decision.

A struggle and a status

Sometimes there *is* a struggle: somebody fits the State Secretary's picture wonderfully well and can also talk about it well. Four examples:

Lisa, Uganda

What did you think when you found out? – In the beginning, it was very difficult. I thought that Satan had taken possession of my body. I was confused. I also found it hard to tell people I was in love. When they asked me in the Netherlands if I was a lesbian, I denied it because I couldn't trust anyone. It hurt.²⁰⁷

Matthew, South Caucasus

When did you become aware of your bisexual orientation? – It was not like waking up one day, feeling: 'Yes, I'm bisexual.' It took a long time. It's quite a process, really. Is it of any use to you, telling you this? (...)

You have stated that you have gone through a process of self-acceptance. Can you describe it? – I can only say I felt terrible. I almost couldn't believe myself. I contemplated suicide very often. I had to cry a lot, and I called myself names.²⁰⁸

Mark, Iran

Can you tell me if it would have made any difference for you if you had known earlier what bisexuality is? – It's like this: it is about the clarity you get and the struggle you have with yourself. Because you don't know yourself yet, you have an inner struggle. You wonder what's going on. Nowadays, I read on the Internet that youngsters already know this about themselves at a young age. They get the support and guidance from their environment in their development. And it helps you in your development, because you know yourself better then. You won't have this inner struggle anymore.²⁰⁹

Sarah, Africa

From Sarah's file it becomes apparent that according to the IND she has spoken sincerely about her orientation. She described the process from discovering her sexual orientation until the acceptance well. She

206. Jeremy Africa, February 2016. He was granted a status later.

207. Lisa Uganda, interview subsequent application, late 2015. A few days later, she was granted a status.

208. Matthew South Caucasus, subsequent interview, September 2015. A few months later, he was granted refugee status. Homosexuality is not criminalised in his country.

209. Mark Iran, additional interview, December 2015. Two months later, he was granted a status.

declared in detail about her emotions and struggle. She described how she started to avoid contacts with girls as an adolescent to prevent something from happening, and how she tried to find ways in her faith to get rid of her homosexuality. Precisely because she had doubts about her feelings and who she was, her story was considered convincing by the IND.²¹⁰

These four people, who talked about their struggle in detail, were believed, and all were granted a status. In this respect, it is probably not surprising that all four of them were highly-educated and able to tell their story remarkably well.

No struggle and not believed

Some examples of people who had not had a struggle and who were not believed are provided below.

Frank, Uganda

Although there does not need to be a struggle with self-acceptance, this does not apply at all to the individual involved here. To the question about a struggle he answers: 'No, I didn't have a struggle with it. I have just remained who I was.'²¹¹

Linda, Africa

Did you have any difficulty with realising you were a lesbian?

- Personally, I had no difficulty with this, because from a very young age I played with girls. But when I grew older, it became more difficult. I was in a society in which I couldn't be honest about my feelings. I couldn't say that I felt more for women than for men.²¹²

Arthur, Asia

Of a man who has had homosexual contacts for twelve years now, one may expect that he can describe more extensively and in more detail how he experiences his stated orientation and which process he has gone through in his disclosure. He only indicates that he liked having contact with boys and that he liked it when boys touched him. When he had sexual contact with a man for the first time, he liked it. The statements of the person concerned that he had no difficulty accepting his homosexuality and that he only liked it, render insufficient insight into how he experienced his orientation and feelings.²¹³

Joe, Africa

Can you describe the feeling when you actually found out that you were attracted to boys? - Exactly like how it feels for a woman when she is attracted to a man. That's how I feel.

Can you explain what this feeling is like? - I liked it, and it made me

210. Sarah Africa, December 2015. A few days after the interview, she was granted a status. She is highly educated.

211. Frank Uganda, intention to reject December 2015. His application was rejected due to incredibility. Frank attended primary school.

212. Linda Africa, March 2016. Linda has a low level of education. In her country of origin, homosexuality is criminalised.

213. Arthur Asia, intention to reject, January 2016. His application was rejected due to incredibility. He has a low level of education. In his country of origin, homosexuality is criminalised.

happy. When I saw somebody I liked, I was happy. I couldn't express it then; this is what I mean by saying it was very difficult. Even if I wanted, I couldn't tell it to anyone. (...)

Do I understand you correctly, that at the moment you actually realised it, you had a happy and pleasant feeling? – Yes.

Did you have any other feelings at that moment? – Nothing else, except the pain I felt that I couldn't make it public.

You were twenty when you found out you were attracted to men. How did you deal with this? – I did everything in secret, because I couldn't make it public.

How did you deal with this emotionally? – I liked it in my body. All my problems have to do with how other people feel about it.

Have you gone through a process of self-acceptance? – I have accepted that I am like this.

Let me repeat my question (with additional explanation). – No, I have never gone through a process like that.²¹⁴

It appears from the file that it is not believed that Joe is gay, because he has not been able to explain why he is attracted to men. The IND expects that someone who states that he has had homosexual feelings from a young age can say more about his awareness process and the acceptance of his homosexual feelings. Joe has given consistent answers to all questions, and this is considered superficial and not convincing.²¹⁵

Thomas, Asia

What did you think about homosexual orientation when you realised you are homosexual? – That I knew almost for certain that I liked boys better than girls. This was when I had turned twenty.

What did you think when you realised you liked boys better? – I felt at ease when I discovered I love boys more than I love girls. I felt at ease.

Did you actually accept it for yourself, that you are homosexual? – I felt at ease, but at the same time I was afraid. If someone found out that I am different from other men, I'll be in danger. Our culture doesn't allow this. My family was very strict about homosexuality. Both circumstances scared me.

Have you also gone through a process to be able to accept this?

214. Joe Africa, additional interview, June 2015. As he was not believed, his application was rejected.

215. Joe Africa, July 2015. Joe has not had any schooling and is illiterate. Homosexuality is not criminalised in his country.

- No, I haven't. I haven't had any difficulty with this. These feelings didn't occur all of a sudden. I had lived with them for a very long time. I didn't have any problems with these.²¹⁶

In the intention to reject that follows, it says: 'The person concerned has not gone through an acceptance process, which is surprising now that homosexual acts have been criminalised in his country of origin. One may expect that he would have had fear of being cast out, of not being accepted, fear of the future or fear of his life. None of this has become apparent. It appears from his statements that he did not have any doubts. From a person in this kind of situation one would expect that he can speak at length, convincingly and clearly about the emotions he had experienced then. A progressive line should be discernible in this. The person concerned has not been able to do this. From the foregoing it becomes clear that the person concerned cannot indicate which emotions he experienced during his awareness process and his process of self-acceptance. Of someone who is actually gay one would expect that he can indicate which emotions he experienced, since this has a profound effect in somebody's personal life. In this respect, the person concerned is not convincing.'²¹⁷

Comment

The applications of all of the five people mentioned above were rejected because their sexual orientation was not believed. Additionally, four of these five individuals had a low level of education. Two examples of people who had not had a struggle and who were not believed initially, are provided below. This changed after an additional interview, and they were finally granted a status.

No struggle, yet a status

John, Africa

What were you told about homosexuality by your family, your school and society in general? - It is a taboo, and it's not accepted by anybody. (...)

When something is a taboo, it is often hushed up. Actually, my question is: how did you find out that something like homosexuality exists? - It is something natural. I had the feeling that I love boys more than I love girls. After this one time, I liked it better than with a woman. After I had had this sexual act with this friend of mine, we fell in love. This is how God created me. I can keep on denying it, but this is how it is.²¹⁸

Then, the decision came: Perhaps it is difficult for the person concerned to explain which sex he is attracted to, because by its

216. Thomas Asia, subsequent interview, December 2015. These *are* open-ended questions, by the way.

217. Thomas Asia, intention to reject December 2015. As he was not believed, his application was rejected. Nothing is known about his education.

218. John Africa, subsequent interview (third application), June 2014.

very nature the aspect of sexual orientation, other than nationality or identity for instance, is difficult to support with evidence. One may expect, however, that the person concerned can speak extensively and consistently about his awareness process and his experiences. In the examination of these statements, certain expectations may be taken as a point of departure, provided that these are based on circumstances that can be determined objectively.²¹⁹

Due to the judgment of the Council of State of 8 July 2015 and WI 2015/9, this decision was withdrawn in September. During the subsequent interview, there were not enough questions about the awareness process and the self-acceptance, and Article 4:6 Awb may no longer be held against the person concerned. John is interviewed additionally:

And what kind of feeling did you have about the fact that you liked boys better, whereas the other boys in your class liked girls better? I can imagine that you had a certain feeling about this? - It was just difficult for me. It's in me. This is how I was born. It's something from God. It was just difficult.

What was difficult about it? - It's the community you live in. If they know you are gay, you may lose your life, and it's a disgrace on the family. (...)

Did you immediately accept it that you were attracted to boys, even though you knew that it was not accepted by the community? - I have accepted myself for who I am. The community doesn't accept it.²²⁰

Pamela

Pamela, too, said she was a lesbian only in a subsequent asylum application. Initially, she was not believed and therefore her application was rejected. After WI 2015/9, she was interviewed again, and this time she was believed.

What did you like about being with girls? - Maybe because I was born a lesbian.

What did you like? - Everything girls do. Talking and being with each other. Communicating and lying together, talking. (...)

In what way and how did you experience this? - This is something that happens on the inside. My inner self told me that I feel more attracted to women than to men.

Have you gone through a process of self-acceptance? - When I realised

219. John Africa, decision April 2015. John completed secondary school.

220. John Africa, additional interview, November 2015. One month later, he was granted a status.

I felt attracted to women, I knew inside who I was, because I felt nothing for men. Women were fun.

Have you gone through a process of self-acceptance, and can you describe what this process was like? – I realised I was different, that I liked women better and that I felt attracted to them, and I also realised I should not tell anyone, because I would put my life in jeopardy. So I had to adapt myself a bit to the circumstances.

Can you explain how you became aware of your homosexuality? – The realisation that I was a lesbian came with a sense of danger, but on the other hand I was happy that I was different. I realised it would not be easy to walk in the street with my partner. (...)

What did you think about homosexuality when you realised you were a lesbian? – It didn't scare me. It was as if I was predestined to be a lesbian. Clearly, this was me. I was very quiet.

What did this mean to you and your environment? – I felt I was born this way. I felt more and more attracted to women, and I realised life wouldn't be easy. My friends found it strange that I didn't have a boyfriend. If my family finds out, they will kill me.²²¹

Peter from Iran is another example of somebody who had not struggled noticeably but who was believed. He is highly educated and can express himself verbally very well.

Peter, Iran

Have you gone through a process of self-acceptance? Can you describe it? – (...) As a boy I found it hard to come in contact with women. As you know, they are in separate schools in Iran. I attended a boys' school, and so I only had contact with boys. At the age of eighteen, I knew for one hundred per cent I was gay. I contacted the organisation for people who are sexually different in Iran. I felt attracted to men, and I noticed that I had better contacts with men than with women. I noticed that I was better able to make emotional and sexual contact with men than with women. (...)

What were you told about homosexuality by your family, your school and society in general? – It was never discussed in the family. At school, I concealed my sexual orientation. If they find out, they would offend and bully me. I was compelled to lead a double life. I kept my orientation concealed. When I wanted to make contact with somebody, it took me several months to gain confidence and to know for sure that he was gay too. I had a computer and access to the Internet. You can read everywhere that homosexuality is forbidden and that

221. Pamela, additional interview 2016 (her previous subsequent interview was before WI 2015/9). One month after this interview, she was granted a status. Pamela has a low level of education. The fact that she had had a female partner for several years was probably the decisive factor that her sexual orientation was eventually considered credible.

it is a capital offence.²²²

In Martin's case, the IND realised that a low level of education – Martin is illiterate – may affect the capability to make statements on awareness processes.

Martin, Africa

As the file indicates, Martin cannot tell much about awareness and self-acceptance. He finds it difficult to describe what he felt, but the IND understands that this is hard and that it is difficult to describe intangible matters, such as feelings. It is not easy either to talk about the process, especially one that began with involuntary sex. Several aspects seem to play a role, including his low level of education.²²³

Struggle, but not believed

Sexuality can be complicated and comes in many forms, as illustrated by the following quote.²²⁴

Barbara, Uganda

When did you notice your sexual orientation? – In the beginning of the 21st century, with X.

What did you think about it? – I thought it was kind of strange, and I was confused a little. I did not understand why I was attracted to girls. I thought it was just a phase I was going through, that I would grow out of it, that it would pass.

When did you realise it would not pass? – In my latest relationship. (...) In the Netherlands, I thought it might yet pass. This is why I started a relationship with the father of my youngest child. But during this relationship, I understood that I felt attracted to women anyway. Only now I can say it will never change, actually. (...)

How is it possible that after three relationships with women you still think it will pass? – That was caused by the way everybody looked at it. I didn't meet that many women who were like me. It makes you doubt again and again.

How come that in the Netherlands you understood it would not pass? – (...) One day, I asked one of my contact persons (staff of the reception centre) if she was married, and she said: 'Yes, with a woman.' I broke into tears, and then I told her my story. She then said I could come out of the closet.²²⁵

The IND also seems to be struggling with the internal struggle.

222. Peter Iran, interview, February 2016. He was granted refugee status soon afterwards.

223. Martin Africa, 2015. Martin is illiterate. In 2015, he was granted a status.

224. In this context, see also Berg & Millbank 2009, p. 210 ff.

225. Barbara Uganda, interview before WI 2015/9. She was not believed, and her asylum application was rejected. Barbara had attended boarding school.

As the file of an African woman indicates, it becomes apparent that the IND may consider an internal struggle a situation in which somebody accepts her own sexuality but also faces the fact that the environment is opposed to this. The awareness process is also regarded as such: I am a lesbian, and the world around me is negative about it. As this is an essential aspect of the personality of the person concerned, one might expect specific and detailed statements about this. In addition, she is a Christian: all the more reason to expect some more depth in her statements on the awareness process, since Christianity, unfortunately, does not take a positive view on homosexuality.²²⁶

The report of the court sitting in this case: 'Respondent: From the working guidelines it becomes apparent that not every homosexual goes through an internal struggle. An LGBT does not need to be troubled by his orientation but can still be troubled by his environment. An LGBT grows aware of the fact that his orientation is different. (...) It is not really the internal struggle but rather the process of awareness. Becoming aware of the fact that you are homosexual and belong to a minority. (...) The respondent's presumption that every LGBT goes through a process of awareness is a stereotype, according to the lawyer, but why? Not everybody has to put up an internal struggle of self-acceptance, but everybody does go through a process of awareness, realising that she is a lesbian and that people take a negative view on this. One would expect some concrete statements about this. It is an essential aspect of the identity.'²²⁷

In the next case, the question of whether expecting a process of awareness is a stereotype was discussed as well.

Thomas, Asia

As the file indicates, the IND believed the question as to whether or not there was an awareness process was not a stereotype, because the following examples are mentioned in the working guidelines as examples of stereotypes: feminine behaviour and appearance among gay men, always being active in the gay scene and nightlife, a certain style of dress, etc.²²⁸

Jurisprudence

Some jurisprudence is provided below about whether or not requiring an internal struggle as well as a judgment about the connection between the asylum seeker's mental ability and his ability to speak about the awareness process.

District Court of Amsterdam, Cameroon

According to the State Secretary, a man from Cameroon had made varying statements about the moment of his becoming aware and had

226. African woman, April 2016.

227. Linda Africa, report of the court sitting, April 2016. She was not believed, and her asylum application was rejected. Linda has a low level of education.

228. Thomas Asia, January 2016. He was not believed, and his application was rejected.

provided vague and scanty information about the self-acceptance process. The court assessed the situation differently. 'As from the age of sixteen, the claimant had feelings for boys, which resulted in the relationship with X. Initially, he was not certain, but gradually he became more and more aware. The claimant broke off the relationship intentionally, because he wanted to know if he could have a relationship with a woman. After this, he slept with several women. He had struggled with this question since he was sixteen, and he had tried and tried. Eventually, he tried a regular relationship of one year and a half with a woman (Y). During this relationship, he intentionally had no goings-on with men, to see if it would work. He wanted to give it a try all the way to the end. He did not feel like he did with X. This is how he found out that he was only attracted to men. He cried a lot. He asked himself many questions; why is this happening to me? Later on he accepted it. The court does not consider this information scanty or vague and does not think that the claimant gets stuck in commonplaces. (...) The court held that the claimant's statements did reflect a process of awareness and acceptance.'²²⁹

District Court of Middelburg, Pakistan

The State Secretary did not consider it likely that a Pakistan man has had no doubt about his homosexual orientation at all. The man stated that he went through a process of awareness but that he had accepted his homosexual orientation from the beginning. There was no inner struggle, but his environment (parents and classmates) made things difficult for him. (...) As to his stated inner struggle, he declared that he was afraid to talk about his homosexuality because it was forbidden in his faith and culture. He was not understood by anyone.

From these statements the District Court of Middelburg infers that there had been a process of awareness in the claimant's case but that this had not resulted in an inner struggle. He had no doubt about his sexual orientation. (...) Now that it has become apparent from WI 2015/9 that in the assessment of the credibility of the stated sexual orientation an inner struggle does not apply as a starting point and that every case is to be judged on its merits, the court held that the respondent's motivation of the contested decision at this point has been insufficiently motivated. This judgment was supported by the judgment of the Council of State of 15 June 2016 (paragraph 2.9) mentioned earlier, in which it was considered that the respondent rightly does not expect that in all cases an alien has gone through a process of awareness or an inner struggle, as such an expectation would be based too much on stereotypical opinions about a sexual orientation or a specific country.²³⁰

229. District Court of Amsterdam
2 March 2017, 17/3076, appeal allowed
(Cameroon). The Council of State
confirmed this judgment on appeal,
ABRVS (Council of State) 20 February
2018, ECLI:NL:RVS:2018:617.

230. District Court of Middelburg
26 October 2016, 15/10869, appeal allowed
(Pakistan).

District Court of Haarlem, Tunisia

'The claimant argues that it is not clear how the State Secretary has assessed the credibility of his sexual orientation. (...) According to the claimant, the State Secretary has ignored that the awareness process of his sexual orientation expected by the State Secretary is unknown to him. As a result, he has not been able to answer the stereotypical questions about his awareness process adequately. The State Secretary seems to take it for granted that every homosexual in a homophobic country must have gone through an inner struggle to be credible as a homosexual. However, the claimant stated several times that he was not troubled by a sense of guilt and that he accepted himself, but that he nevertheless concealed his orientation to the outside world because of the social opinions about homosexuality in Tunisia. (...) As confirmed by the State Secretary at the court sitting, he presumed that the claimant, on account of the fact that he is from a country where homosexuality is not accepted, must have gone through an inner struggle before he had accepted his sexual orientation himself. This starting point, however, cannot be based on Working Guidelines 2015/9, contrary to what the State Secretary contended. On the contrary, from the working guidelines it becomes clear that a presumption that in all cases an internal struggle must have taken place before the alien has accepted his LGBT orientation is not taken as a starting point by the State Secretary in assessing the credibility of the sexual orientation. (...) The State Secretary has wrongly attached no weight to the claimant's statements in this context, by emphasising one-sidedly the lack of an internal struggle with respect to the self-acceptance of his homosexual orientation.'²³¹

The State Secretary lodged an appeal against the judgment, and the Council of State held that 'the alien (...) [had] spoken about his own experiences insufficiently, as he had not provided any insight into the moment at which or the period in which he became aware of his sexual orientation, what this meant for him and what effect this had on the way in which he has expressed his sexual orientation. This point of view, therefore, was not based on going through an inner struggle or not, so that the court had incorrectly considered that the State Secretary expected the alien had gone through such struggle. (...) The State Secretary had not incorrectly taken the position that the alien had not made his sexual orientation plausible.'²³²

In other words: while the State Secretary said in court that he expected an internal struggle from the asylum seeker, the Council of State bends over backwards to argue that the State Secretary had not expected this struggle.

231. District Court of Haarlem 22 December 2016, ECLI:NL:RBDHA:2016:16792, appeal allowed (Tunisia).

232. ABRvS (Council of State) 10 May 2017, ECLI:NL:RVS: 2017:1256, appeal State Secretary allowed (Tunisia).

District Court of Haarlem, Senegal

The claimant commented that in his case there was no profound process of awareness. Additionally, the claimant states that the respondent has not examined his intelligence, although this *is* relevant, in the claimant's opinion. If somebody is intelligent, he is more aware of the consequences and problems and will be better able to speak about it than a less intelligent individual.²³³

Comment

It appears from the files that all of the individuals concerned struggle with the internal struggle and its meaning. In accordance with the working guidelines and the Council of State, the internal struggle is not the starting point in the assessment, because it would boil down to a stereotype, but the concept has obviously not disappeared from the decision practice. The concept of 'internal struggle' seems to mean more or less the same as the 'process of self-acceptance'. At any rate, it is clear that a negative emotion is expected. Too gay is not credible to the State Secretary. Berg and Millbank also pointed to the phenomenon that many asylum authorities expect that discovering one's own homosexual orientation in the homophobic country of origin goes hand in hand with negative emotions: 'the progress narrative assumes that there can be no joy or freedom in the experience of homosexuality in the country of origin, only fear. When persons concerned have stated that they were happy, content, or had no regrets about discovering their sexuality, decision-makers disbelieved them on the basis that the discovery could not be attended by such positive emotions in a persecutory environment.'²³⁴

In the interviews, the parties sometimes talk at cross purposes, especially when it comes to the subjects of 'process of awareness', 'process of self-acceptance', and 'internal struggle'. For instance, the question 'How did you feel about this?' was answered with 'My brother often hit me.' This asylum seeker does not understand what the interviewer is talking about, and his lack of education may well have something to do with this.²³⁵ A great deal is demanded from the asylum seeker: he is supposed to understand these abstract concepts, recognise himself in these, and also speak about it in detail, perhaps for the first time in his life. A lot can go wrong in the communication between the interviewer, the asylum seeker and the interpreter with respect to becoming aware of the sexual orientation or gender identity, and in all of this the asylum seeker's level of education has to be taken into account.

233. District Court of Haarlem, 2 November 2016, 16/9469, appeal dismissed (Senegal). See also District Court of Amsterdam, 30 January 2017, 17/1081, 17/1096, in which a man from Sierra Leone unsuccessfully puts forward that due to his poor mental abilities he could not speak more extensively about his process of awareness and self-acceptance.

234. Berg & Millbank 2009, p. 21.

235. Michael from Africa has not had any schooling.

3.5.3 INFLUENCE OF ENVIRONMENT

It frequently occurs that the asylum seeker is presumed to have had an inner, mental struggle, but that no clear distinction is made between the person concerned and the hostile environment. In WI 2015/9, it says three times that there is a correlation between the expectation that an awareness process has taken place and the degree of acceptance of LGBT orientation in the country of origin: this expectation increases as the acceptance is less. In other words: the more homophobic the environment, the stronger the expectation that the asylum seeker speaks about processes of awareness and self-acceptance. Although, pursuant to the working guidelines, attention should be paid to the environment separately, the environment seems to be brought up especially as an extra argument to expect a detailed story about processes of awareness and self-acceptance.²³⁶

In its document *LHBT & Asiel voor advocaten* (LGBT & asylum for lawyers), COC stated: 'The effect of the situation in the country of origin differs per person. On the one hand, a homophobic, bi-phobic or transphobic environment can affect the behaviour of LGBTs. This does not mean, however, that all LGBT asylum seekers are struggling with their sexual orientation or gender identity. For instance, the presumption that an LGBT from an Islamic country has always experienced a hard, inner struggle before daring to recognise her or his own sexual orientation or gender identity, is incorrect.'²³⁷

Some examples about the influence of the environment are provided in this paragraph.

Ronald, Uganda

How did the process of self-acceptance develop? - In my heart, I had already accepted the fact that I was gay. The problem is rather letting others know, telling people I am gay.

What were you told about bisexuality by your family, your school and society? - That it is bad, a sin and not African.

What did you think about it personally? - I felt fine.²³⁸

Giovanni, Uganda

Have you been able to accept the fact that you were different? - Yes, I have, because I am happy to be gay. It is unpleasant that I've had problems, but I am happy to be gay.²³⁹

236. Kok gives an example of a decision in which a connection is made between the realisation of sexual orientation, starting a relationship and being able to speak about it on the one hand and the homophobic climate in the country of origin on the other hand. Kok 2016, p. 27: 'The statements of the person concerned reveal that within a very short period he realised he was gay, started a relationship and told his brother he was gay. This development was most remarkable, given the fact that homosexuality in Nigeria is not tolerated and is even prohibited by law.' It is unclear what the connection between one thing and another is based on or why the sketched development should be so remarkable.

237. COC Netherlands, Zadelhoff and Luit 2014.

238. Ronald Uganda, interview March 2015. Ronald was granted a status.

239. Giovanni Uganda, interview October 2015. Two days later, he was granted a status. Until he fled his country, he had attended secondary school.

Rachel, Africa

When did you become aware of your lesbian orientation? – At the age of thirteen. I had a friend who came to me regularly, and I loved her. But I had never reached the stage of actual sex.

In which way and how did you experience this? Have you gone through a process of self-acceptance? Can you describe it? – No, I didn't have any contradictions in my feelings. The feeling was very strongly focused on other girls, and from the age of eighteen I also had sexual relationships with girls.

I don't think you have understood the question correctly. I repeat my question. – It was a process that grew until I had sexual contact with other girls.

How did you feel about it when you found out that you are a lesbian? What did it feel like for you? – I did have relationships with men and on the other hand with girls. Those with the girls were particularly terrific.

I still don't know how the process of self-acceptance developed. What did it do to you? – I began slowly, touching other girls, and my desire went further and further until I really had a sexual relationship.

Actually, the question was: was it difficult for you to find out that you were attracted to girls? – I don't know how to explain this, but I felt that the feeling was right. For instance, you love men, and I get the same feeling with girls.

What did it do to you? Was it hard for you to accept or not? – It was easy to accept.

How come? – For me it was just a relationship, feelings. Like somebody else falling in love with a man; for them it is also normal. (...)

If it was unacceptable for everybody in your environment, why was it so easy for you to accept? What made it easier for you? – It's about my feelings.

But you know that nobody will accept it, and your feelings made it easy for you? – I had this kind of growing feeling, and I didn't think about the negative consequences.²⁴⁰

After this, Rachel receives an intention to reject, in which it says: 'Additionally, she has not been able to provide any insight into the process of becoming aware and possible self-acceptance. (...) The person concerned states she has not had any problem with this, which

240. Rachel Africa, interview, November 2015. As she was not believed, her application was rejected. Rachel has not had any schooling.

is fully inconsistent with her statement that in the country of origin she cannot express or practise her orientation because of the homophobic climate in that country.’²⁴¹

Anthony, Africa

You grew up in a society where homosexuality is forbidden. What did you think about it, when you did something that was forbidden? – I did have some feelings then. We did it in secret.

You did something that was forbidden, and you did it in secret. How did you feel about this? What did you think about this? – At that moment, I didn’t think about it. I thought it was normal.

You also knew it was forbidden, so I don’t really get it. Can you explain? – I accepted it. I have lived my life like this.

Have you ever thought about the possibility that they could put you in jail? – I have thought about it. That’s why I have always been on the run.’²⁴²

In the intention to reject, it says: The person concerned has not been able to make a reasonable case for the situation that he, a Christian boy, who grew up in an environment where homosexuality was a taboo and forbidden, embraced homosexuality without any scruples. The person concerned was asked several times to explain this process, which the person concerned, with his vague, scanty and sometimes evasive answers, has failed to do.²⁴³

Neal, Uganda

An internal struggle is not always required. However, since the person concerned comes from Uganda and he is familiar with the fact that homosexuality has not been accepted by society for many years, it is expected that he has been aware of his homosexual feelings and of the possibility or impossibility to express these in Uganda. Therefore, one would expect that there is some process of becoming aware and of acceptance about which the person concerned can speak in detail.²⁴⁴

Arthur, Asia

The person concerned states that his family is opposed to homosexuality but that he had no difficulty accepting the fact that he is gay and that he has not experienced any moment of self-acceptance. This is surprising, especially for somebody in a country like [country of origin] where homosexuality is not tolerated and where it is even prohibited by law. The mere statement of the person concerned that when he was caught and hit he thought he would never do it again, does not detract from the implausible statement of the person

241. Rachel Africa, intention to reject, December 2015. In her country of origin, homosexuality is criminalised.

242. Anthony Africa, interview January 2016. Anthony is illiterate.

243. Anthony Africa, intention to reject February 2016.

244. Neal Uganda, decision December 2015. As he was not believed, his application was rejected. Neal had a few years of secondary education.

concerned that he had no difficulty accepting his orientation.²⁴⁵

One would expect that the person concerned provides insight into how he has experienced this contrast between his feelings and what is accepted by society. To the various questions asked about the subject, the person concerned only answered that he liked having contact with boys and that he had no difficulty accepting his orientation. One would have expected from the person concerned, however, that he would provide some insight into his awareness process. (...) With respect to 'being different' from other boys, it is surprising that the person concerned does not say anything that indicates he had some difficulty with this. One would expect that a gay boy growing up thinks about what it is like to be different from most boys and that he can speak about how he experienced that period. It is also surprising that he states he did not want anybody to know he was different, although he indicated several times that he never had any problems with accepting his homosexuality.²⁴⁶

Sierra Leone

In another decision, it says: The person concerned also states that it has not been motivated why she would be expected to talk convincingly about her feelings and emotions because she comes from a homophobic country like Sierra Leone. (...) She declared that from the age of ten she has been aware of her lesbian feelings. She also spoke about homophobia in her country. Then it is expected that she can tell something about how she came to self-acceptance and which feelings and emotions she had at the time, knowing the opinion of society about lesbians. In this case, however, this has not become apparent.²⁴⁷

Tunisia

Also, in the following decision about a Tunisian, it is expected that he talks about his inner self rather than about the reaction of the environment: 'With the answer that he will be in difficulty if people find out about his orientation, the person concerned does not indicate any process, as he is not discussing his feelings. The question was if the person concerned had a hard time with respect to his feelings when he realised he was gay. The question was not how he would feel if people found out about his orientation. Here and at other moments in the interviews, the person concerned is given the opportunity to provide insight into the process of awareness and self-acceptance. The person concerned gives an answer, but it is not an answer to the question actually asked.'²⁴⁸

Walt, Afghanistan

In the intention to reject, the State Secretary states that moment

245. Arthur Asia, intention to reject January 2016.

246. Arthur Asia, decision March 2016. He was not believed, and his application was rejected.

247. Decision February 2016, preceding ABRvS (Council of State) 28 March 2017, 201609247/1/V2, appeal asylum seeker dismissed (Sierra Leone), unpublished.

248. Decision January 2016, preceding ABRvS (Council of State) 24 June 2016, 201601622/1/V2, appeal State Secretary allowed (Tunisia).

of becoming aware of the homosexuality must have been a very important event or 'tipping point' for the person concerned, about which he should be able to say more.²⁴⁹

In the decision, it says: His statements that there has not been a tipping moment because he kept his orientation concealed from his social environment do not lead to another judgment, as what matters is not the point of view of the environment but how he experienced it personally.²⁵⁰

Bridget, trans woman

In an additional interview with Bridget, a process of self-acceptance or inner struggle does not become apparent: *Homosexuals and transgressors were spoken about negatively in your environment. What did this do to you?* – I was a bit scared. If my family did not accept it, then the community and society would not accept it at all.

Did you find it difficult in the period from your childhood till late 2010 that you were different from other boys? – No, it was not difficult, because I was what I wanted to be. I did realise, however, that in my community and family I couldn't be who I wanted to be, because they were against it.

What did it do to you, that you could not be yourself in your own environment and family? – I felt unhappy. I didn't enjoy life then, and I felt sad. I didn't get the chance to live the life I wanted. I didn't want to live for other people; I wanted to live for myself. So I wasn't happy, and every now and then I was depressed.

Have you ever felt it was something you had to suppress? – What does that mean?

Have you ever tried to be like other boys? – No, I haven't. I kept on behaving girlish. (...) When they started threatening me, I had to leave. That's how I ended up on the streets. There, I started to behave even more effeminately, and there I started to live my life the way I wanted to. Then, everything became more difficult.²⁵¹

Despite the fact that Bridget says she has not experienced any processes, the conclusion is drawn that she can speak very well, extensively and in detail about her period of becoming aware, her self-acceptance, her previous relationships, and how her family and society refused to accept her relationship/orientation. To this end, she declared much of her own accord. In addition, her statements are consistent with what is already known about the situation of LGBTs in her country of origin.²⁵²

249. Walt Afghanistan, intention to reject February 2016.

250. Walt Afghanistan, decision February 2016. Walt is illiterate.

251. Bridget, additional interview, March 2016. Two weeks later, she was granted a status.

252. Bridget, March 2016. In her country of origin, the criminal penalties for homosexuality are severe.

It is true that Bridget stated she became unhappy and depressed by her environment, but she also says that she had no difficulty with it. Like most other LGBTI asylum seekers, she makes a clear distinction between herself and her environment.

Jurisprudence

District Court of Zwolle, Liberia

With regard to the circumstance that homosexuality is not accepted in Islam and in countries like Liberia, it may be presumed, according to the District Court of Zwolle, that somebody with feelings like those of the person concerned will be facing an inner struggle, given the fact of how the (immediate) environment may react to this.²⁵³

District Court of Haarlem, Senegal

One would have expected the claimant to relate an account of a profoundly experienced process, also given the circumstance that homosexuality is not accepted at all in his country. In this context, one would have expected some concrete and clear statements from the claimant evidencing at least a substantive process of discovery and consideration and acceptance of everything involved.²⁵⁴

District Court of Den Bosch, Guinea

Besides, the claimant has made scanty statements about his feelings for men. He only stated that he had more fun with men and that his heart is open to them. By this statement, the claimant has not provided any insight into the process of self-acceptance. The claimant has not said anything about his doubts and emotions, while homosexuality may have far-reaching consequences for the claimant, given the country he is from, and as stated by the claimant personally. One might expect that he would speak about what his homosexuality means from his inner feelings, observations and experiences, but the claimant has failed to do this. What he said was only superficial.²⁵⁵

Comment

The State Secretary presumes causality between the environment and the supposed mental processes in the asylum seeker. He presumes that an LGBT-phobic society leads to problems with self-acceptance and awareness, which the person concerned can and has to speak about. It is just as legitimate, perhaps even more so, to contend the opposite: the more LGBTI-phobic the environment, the more difficult it is for the person concerned to speak of her or his sexual orientation.

In this context, COC wrote that the organisation – fortunately – knows of many LGBTs who, despite the fact that they come

253. District Court of Zwolle 19 July 2017, 17/12422, appeal dismissed (Liberia). See also Court of Amsterdam 12 July 2017, NL16.907 (Sierra Leone).

254. District Court of Haarlem 2 November 2016, 16/9469, appeal dismissed (Senegal).

255. District Court of Den Bosch 6 January 2017, 16/19523, appeal dismissed (Guinea).

256. Letter from COC Netherlands to INLIA, 15 July 2016, to be found on VluchtWeb, (the Dutch Refugee Council's database).

257. For instance Arthur Asia: *Did you have a struggle with your feelings when you found out that what you felt was homosexuality?* – Every time I was caught or hit, I said to myself: 'Okay, I won't do it anymore.' John Africa: – If someone sleeps with another man, you consider it homosexual. See also (below) Joe Africa: *Are there any laws on homosexuality in your country of origin?* – Homosexuality is not done there.

258. See also Jansen 2013a.

259. Akin 2015; Gustafsson Grønningsæter 2017. The French NGO ARDHIS reports that due to the ban on asking explicit questions about sex in the ABC judgment, the asylum seekers are now asked abstract questions about sexual orientation which they do not understand well. FRA report 2017, p. 5.

260. Gustafsson Grønningsæter 2017; Chelvan 2014.

261. Anthony Africa, interview, January 2016.

262. Anthony Africa, intention to reject, February 2016. Anthony has a low level of education.

263. Anthony Africa, 'view' (reaction to intention to reject), February 2016.

from a country where they have to fear persecution due to their sexual orientation, have *not* internalised the LGBT-phobia of their environment.²⁵⁶

3.5.4 TALKING ABOUT SEX OR FEELINGS

Asylum seekers (and other people) often regard homosexuality as something you do instead of something you are, which becomes clear from the quotes mentioned earlier in this report.²⁵⁷ On the other hand, the files also reveal that interviewers and decision-makers have a strong preference for feelings, processes and identities. Asylum seekers who talk too much about sexual acts, do not meet the expectations and therefore run the risk of being disbelieved and their application consequently being rejected.²⁵⁸ In this respect, Dutch asylum practice is remarkably similar to practice in Norway, as described by Deniz Akin and Andrea Gustafsson Grønningsæter.²⁵⁹ Grønningsæter says that the strong emphasis on romance and feelings might be a consequence of the use of S Chelvan's DSSH model. In this model, the emphasis is on Difference, Stigma, Shame and Harm.²⁶⁰ In this paragraph, several examples are provided in which this discrepancy between the officers' expectations and the asylum seekers' statements is involved.

Anthony, Africa

When was the first time you thought: 'I am attracted to men'? – This was when we had finished secondary school. Before that time, we had been doing things, but I didn't really know what it was. But later, when I was caught by my father, I knew.

*Do I understand you correctly, that at the time you had sex that first time with X you did not know you were gay? – We hadn't done anything yet, then. But after we had seen some photographs, we did it for the first time.*²⁶¹

In the intention to reject that follows, it says: 'It should be noted it is remarkable that the person concerned easily and explicitly speaks about sexual acts but makes vague and scanty statements about his inner feelings and the inner process he has gone through.'²⁶²

In the 'view' (reaction to intention to reject application), Anthony's lawyer comments: 'The contact officer should have indicated that statements about sexual acts are not required, but the contact officer did not stop him from talking. As a result, the interview took an entirely different turn.'²⁶³

Linda, Africa

In the intention to reject Linda's application, it says: The person concerned has not been able to speak sufficiently, concretely and in sufficient detail about her own experiences concerning her process of awareness and self-acceptance of her homosexuality. The person concerned initially did not get much further than describing sexual activities she had engaged in from the age of ten with women, whereas the awareness process primarily pertains to feelings [emphasis added SJ].²⁶⁴

Apparently, this occurs so often that the IND has devoted a standard text box to it. Several months later, the following appeared in a intention to reject in another case:

Grace, Nigeria

The person concerned has not been able to speak sufficiently concretely and in sufficient detail about her own experiences concerning her process of awareness and self-acceptance of her homosexuality. The person concerned initially did not get much further than describing sexual activities she had engaged in from the age of ten with X, whereas the awareness process primarily pertains to feelings [emphasis added SJ].²⁶⁵

That engaging in lesbian sex is not enough to underpin an asylum application on grounds of lesbian orientation becomes apparent from the following quotes from Linda's file too. Being in love is a requirement, as well as telling friends and aid providers about it.

Linda, Africa

Since your arrival in the Netherlands, you have had relationships with A, B and C. Were you really in love with them or were these relationships more sexual, actually? - I think this was caused by the circumstances, as I told you earlier. Again and again, we had to separate. I did want a relationship, but it didn't succeed. In Africa, I had a woman, but here it has not worked so far.

So you were in love with them? - Yes, it was very nice.

Were these women in love with you too, or was it only sexual for them? - No, we loved each other. I could enjoy the short period in which I had these relationships. (...)

What did you do with your homosexuality [in those years, as from the moment you arrived in the Netherlands until the moment at which you didn't conceal it anymore], apart from the fact that you had girlfriends with whom you had short-lived affairs? - Nothing, this was all. (...)

264. Linda Africa, intention to reject March 2016. Linda has a low level of education.

265. Grace Nigeria, intention to reject June 2016. Grace is illiterate.

In the past, during previous procedures, you had the assistance of aid providers and friends. Do they know about your sexual orientation too?
 - No, this is not something that a person with my background tells to somebody just like that.

I notice that you easily meet new friends with whom you have a sexual affair. You indicate that in the Netherlands you have had several sexual relationships with women. So in this respect, you make contact quite easily. What is the difference between the fact that you do meet new women for sexual affairs but that you did not tell any personal friends or aid providers about your orientation until one and a half years ago?
 - My personal friends and aid providers help me with other things. I don't need to tell them about my private life. It's private.²⁶⁶

The intention to reject follows next: The person in concern realised that here everyone is free, but she has not informed any aid provider or personal friend about her sexual orientation. On the other hand, she has met other women for sexual affairs easily in spite of her strong restraint. In its entirety, the picture that is sketched in this way by the person concerned with respect to her restraint in the Netherlands is one that raises some eyebrows.²⁶⁷

As the file indicates, the IND believes 'that her statements pertain especially to sexual activities', but the IND 'doubts if this can be linked to her homosexuality, because it might also be consistent with harmless games about exploring the body. Given the fact that girls at that age mainly play with girls, this is not considered odd or awkward.'²⁶⁸

During the court sitting, the State Secretary's lawyer stated: 'The claimant engaged in sexual acts with young women at a very young age. Perhaps she was not aware of any harm at the time, but later she must have been. She only declared little. The statements are mainly related to sexual acts and affairs but not to feelings.'²⁶⁹

Jurisprudence

In jurisprudence, there are many examples in which talking too much about sex undermines the credibility of the sexual orientation.

District Court of Utrecht, Nigeria

The court held that the State Secretary could hold it against a Nigerian man 'that he had explained the awareness process exclusively by his wish of having sex with men.' This is not indicative of a process of awareness or self-acceptance but rather of a sense of lust that could not really be linked to any orientation.'²⁷⁰

266. Linda Africa, interview subsequent application, March 2016.

267. Linda Africa, intention to reject March 2016. In the 'view' (reaction to intention to reject), it is stated that this is not strange at all, for Linda was used to having secret relationships in Africa, but she was not used to talk about it.

268. Linda Africa, March 2016. In her country of origin, homosexuality is criminalised.

269. Linda Africa, report of the court sitting, April 2016. Linda's application was rejected. Linda has a low level of education.

270. District Court of Utrecht 4 January 2017, AWB 16/10196, appeal dismissed (Nigeria).

District Court of Rotterdam, Iraq

The respondent was right to include the claimant's statement in his decision that he had only short-lived affairs and that he was not in love with the boys with whom he engaged in sexual acts, because – so the respondent argues – the mere fact that having sex with men does not mean that somebody is actually gay.²⁷¹

District Court of Den Bosch, Uganda

With respect to becoming aware, he has said that when he saw an attractive boy, he had the feeling he wanted to do something with this boy. In the respondent's opinion, this is not consistent with a deep feeling regarding men.²⁷²

District Court of Amsterdam, Iraq

'Since it has far-reaching consequences in Iraq to have feelings for other men, the claimant could be expected to speak about his process of becoming aware and self-acceptance more than he has done. Additionally, the respondent could include in his assessment that the claimant primarily emphasised the physical aspect of his orientation. In no way did the claimant provide any insight into how, apart from the physical aspect, he has experienced his homosexuality.'²⁷³

District Court of Roermond, Afghanistan

'According to the respondent, the claimant has not made any clear and convincing statements about the process of discovering the stated orientation or the awareness process.' According to the respondent, the claimant made scanty, vague, contradictory, superficial and stereotypical statements. According to the respondent, the claimant's statements are limited to statements about sexual intercourse and his feelings of pleasure in this context, and they do not provide any insight into the development the claimant has gone through towards accepting his homosexuality. The statements about his relationship provide little support for the actual existence of a relationship, according to the respondent. The statements rather show there were many sexual contacts with men and boys. In addition, the respondent took into account that the claimant only engages in unidimensional affairs. Although this does not mean by definition that the stated homosexual orientation is incredible, this does not automatically point to the opposite either.²⁷⁴

Judges do not always agree with this one-sided emphasis on emotions and acceptance processes.

District Court of The Hague, Iran

It was held against an Iranian woman that she had spoken little about her feelings at the interview but that she emphasised the 'physical/

271. District Court of Rotterdam 25 July 2017, NL 17.2020, appeal dismissed (Iraq).

272. District Court of Den Bosch 17 February 2017, AWB 16/12355, appeal dismissed (Uganda).

273. District Court of Amsterdam 19 July 2017, AWB 17/6305, appeal dismissed (Iraq).

274. District Court of Roermond 12 June 2017, NL16.3915, appeal dismissed (Afghanistan).

sexual aspect'. The District Court of The Hague held that she really spoke about her emotional life, 'quite apart from the fact that physical desires are also part of somebody's sexual orientation.'²⁷⁵

District Court of Rotterdam, Iran

The claimant has described his sexual acts with persons of the same sex as his own experiences. The respondent considers these acts credible but takes the position that it does not serve for the claimant to make his stated homosexual orientation credible. In this context, the respondent refers to the claimant's statements about the emotional side of the awareness process, which are considered too superficial and too general. (...) The court held that it had not been motivated sufficiently why the respondent deemed it possible that someone, other than for payment, would engage in sexual acts with a person of the same sex without having any homosexual or bisexual feelings at the same time.²⁷⁶

District Court of Rotterdam, Afghanistan

When asked by the respondent what it was like for him personally when he realised he was attracted to boys, the claimant answered: 'I had the feeling that my body just needed to be with boys and associate with boys.' In the opinion of the court, the respondent has not unjustly regarded this as a ground for judging the claimant's statements about his experiences, the acceptance of his sexual feelings and his sexual affairs scanty and superficial.²⁷⁷

Comment

The credibility of the sexual orientation can be jeopardised if asylum seekers speak too much about sex and too little about emotions. Physical desire is called 'vague and superficial'. To be believed, the feelings must be deep. On the one hand, the asylum seeker has to communicate openly but, on the other hand, they should not speak about sex too much, even though it is simultaneously clear that sex plays a major part in the interview, even if it is implicit.²⁷⁸

3.5.5 MOMENT OF AWARENESS

'Every alien who puts forward a sexual orientation as an asylum motive, must have become aware of this orientation at some point,' according to the Council of State in the judgment of 15 June 2016.²⁷⁹ At first sight, this sounds logical, yet this view quite frequently causes problems. If the person concerned mentions several moments of awareness, this is considered contradictory far too quickly and in this respect it is often unclear what the expectation that there can be only one moment of awareness is actually based on. Could any

275. District Court of The Hague 24 July 2017, ECLI:NL:RBDHA:2017:8298, appeal allowed (Iran).

276. District Court of Rotterdam 17 October 2016, 16/21132, quoted in District Court of Zwolle, 8 December 2017, 17/11460, appeal allowed (Iran).

277. Afghanistan, District Court of Rotterdam 24 April 2017, NL17:1544, appeal dismissed.

278. Sedgwick says that LGBTIs always do something wrong, for pursuant to the *double bind* they are to be both open and close-lipped about their sexuality, Sedgwick 1990, p. 69 ff. See also Spijkerboer 2013.

279. ABRvS (Council of State) 15 June 2016, ECLI:NL:RVS:2016:1630.

heterosexual point out this one specific moment at which they became aware of their sexual orientation?

It looks as if in his assessment the State Secretary – whether or not consciously – bases his opinion on a Cass-like model, where the development of sexual identity takes place in stages.²⁸⁰ A process of awareness is expected, furthermore it is expected that clear moments can be pointed out within this process.

Alex, Asia

In the intention to reject, it says: In all reasonableness one would expect that he can speak clearly and concretely about the moment at which he found out he was homosexual and that he can talk about his inner experience from the early stage of the process until actually having a relationship with a man.²⁸¹

Dorothy, Sierra Leone

In the intention to reject with respect to Dorothy, it says: Finally, the fact that the statements of the person concerned with respect to the finale of her awareness process, namely the moment at which the person concerned decided to be open about her orientation, are contradictory is taken into account in the overall assessment of the awareness process.²⁸²

By speaking of ‘the finale of her awareness process’ in this way, it becomes clear that here, too, a development that takes place in stages is presumed.

Joe, Africa

In the intention to reject Joe’s application, the State Secretary states: From the person concerned, who has stated that he lived as a homosexual for many years in [country of origin] while homosexuality was a taboo in [country of origin], it could be expected that he could unequivocally speak about whether he realised that he was homosexual at the age of fifteen or at the age of sixteen or seventeen. After all, realising that one is homosexual is not an everyday discovery and has major consequences. That the person concerned cannot speak about this unequivocally is not consistent with what could be expected from the person concerned under these circumstances. Furthermore, it cannot be understood how, on the one hand, the person concerned realised that he was homosexual at the age of fifteen, sixteen or seventeen, if, on the other hand, he allegedly had feelings for men for the first time when he was twenty years old. After all, homosexuality is characterised explicitly by having sexual feelings for members of the same sex.²⁸³

280. See paragraph 2.5.4 of this report: What is the basis for this policy?

281. Alex Asia, intention to reject, March 2014. Alex’s sexual orientation was not believed, and his application was rejected. Alex worked in a factory. In his country of origin, homosexuality is criminalised.

282. Dorothy Sierra Leone, intention to reject, 2016. Her application was rejected, for it was not believed she is a lesbian. She has a low level of education.

283. Joe Africa, intention to reject, July 2015. Joe’s application was rejected, because it was not believed he is gay. Joe is illiterate and has not had any schooling. In his country of origin, homosexuality is not criminalised.

The following is stated in the decision concerning a Nigerian: In the event of a process, it is up to the person concerned to indicate when this process started, how this process developed and when he completed the process. The fact that in the Working Guidelines 2014/10 [WI 2015/9 is probably meant, SJ] a process rather than one moment is spoken of, does not explain the varying statements of the person concerned about the moment at which this process started in his case.²⁸⁴

Jurisprudence

District Court of The Hague, Senegal

A woman from Senegal had submitted a report from which had become apparent that she is illiterate and therefore understands abstract matters less well and reproduces exact data of events with difficulty. Nevertheless, the District Court of The Hague held that the State Secretary justifiably took the position that the woman had made vague and scanty statements about the moment at which she became aware of her homosexual orientation. For instance, she declared that she became aware a long time ago that she felt attracted to women. However, she did not know when exactly this awareness occurred. (...) That she became aware when she was playing with girls cannot be regarded as sufficient information. The claimant could be expected to indicate roughly when she became aware of her orientation.²⁸⁵

District Court of The Hague, Ivory Coast

The District Court of The Hague held that a man from Ivory Coast had spoken extensively about his awareness process. The man indicated that it was a slow and difficult process, and he sketched roughly and in great outline how this process developed. The court did not deem it incomprehensible, given the nature of the awareness process, that the claimant could not mention any exact dates and stages of this awareness process.²⁸⁶

District Court of Amsterdam, Pakistan

In his interview, a man from Pakistan said he was sixteen when he became aware of his homosexuality. In the subsequent interview, he said he became aware at the age of eleven, when the film *Titanic* was released and he liked the actor who played the part of the main character. He also stated that he became aware of his homosexuality when he was fourteen or fifteen. In the corrections & additions, he said he did feel attracted to men until he was seventeen but that he was not aware in those days that he was homosexual. These 'contradictions' were the main reason to reject his subsequent application.²⁸⁷

284. Decision 20 September 2016 (Nigeria), followed by District Court of Amsterdam, 24 October 2016, 16/21921,16/21931 and ABRvS (Council of State) 3 February 2017, 201608141/1/V2.

285. District Court of The Hague 8 February 2017, NL17.68, appeal dismissed (Senegal).

286. District Court of The Hague 18 March 2016, 16/13277 (Ivory Coast). Appeal dismissed all the same, because the problems stated were not credible.

287. District Court of Amsterdam 12 October 2017, NL17.7732, appeal dismissed (Pakistan). This man had a low level of education.

District Court of Haarlem, Iran

The court held that an Iranian was consistent in his statement that his awareness that he felt attracted to boys only occurred when he was about eighteen years old. According to the court, it is not clear why the respondent regarded the fact that at the age of thirteen he played sexually tinged games with his friends as inconsistent with this.²⁸⁸

District Court of Amsterdam, Jordan

A Jordanian is said to have made contradictory statements about his process of awareness and self-acceptance. 'For instance, he stated that he had feelings for boys when he was about fourteen or fifteen years old. He liked watching them. He did not know what these feelings meant to him. He thought it was normal. The claimant also stated that he was in dialogue with himself at the time, about whether this was normal and what kinds of feelings these were. Additionally, he stated that he realised he was gay when he was at university at the age of nineteen. He also stated that several months before he went to university he had tried for a while to 'get rid of his homosexuality.' In addition, the claimant has not given any concrete answer to the question of what the 'eye-opener' was that made him realise he was gay.'²⁸⁹

District Court of Haarlem, Nigeria

The State Secretary considered a Nigerian man's statement that he had accepted his sexual orientation when he was about sixteen or seventeen years old vague and not very concrete. He also took into account the fact 'that accepting a homosexual orientation in a society that does not tolerate and actively punishes this with a death sentence can be considered a unique moment in a person's life.' The District Court of Haarlem held, however, that the man cannot be expected to have become aware at one specific moment that he was gay, as there was a process of awareness and acceptance.²⁹⁰

Comment

It is understandable that decision-makers seize apparent contradictions in moments of awareness as an argument to deem the narrative incredible. However, this is risky because – if there is such a thing that could be labelled as an awareness process in the first place – there would be several moments that were relevant and because it is impossible to capture everything into one single pattern. In the case of the Jordanian above, for instance, it is difficult to understand what is contradictory about the statements made. The idea that there has to be one moment that serves as an eye-opener seems counterproductive.

288. District Court of Haarlem 29 March 2017, 16/23349, appeal allowed (Iran).

289. District Court of Amsterdam 20 December 2017, NL17.5588, appeal dismissed (Jordan).

290. District Court of Haarlem 17 October 2017, NL16.3689, appeal allowed (Nigeria).

3.5.6 CONCLUSION

Although there is much variation in how sexual identity develops for various people, it has become clear that in Dutch asylum practice the assessment of truth in a stated sexual identity is mainly based on presumed, set processes of awareness and self-acceptance and the asylum seeker's capability to speak about this in detail. The *Buro KleurKracht* (ColourPower) report, however, reveals that a question such as 'How did you feel when you discovered you were gay?' can be interpreted in a non-western context quite differently from what would be the common interpretation in the Netherlands.²⁹¹ Unlike the purport of the policy text, a lack of struggle or other negative emotion is often held against the person concerned, and some files seem to convey a Calvinistic sounding condemnation. The asylum seeker is expected to be aware that these forbidden and sinful matters cannot be accepted unscrupulously. Sometimes, however, a sexual orientation is believed without any stories about awareness processes being brought into play.²⁹²

In general, the asylum seekers in the examined files do make a distinction – unlike the State Secretary – between themselves and their environment. In many cases, they had no difficulty accepting themselves, and they had no inner struggle, let alone that they had gone through processes related to this. On the contrary, they are often relieved when they realise their sexual orientation and things finally fall into place. In most cases, they were troubled by the LGBTI-hostile environment. This is hardly surprising, since these people are asylum seekers who have fled their country precisely because of a hostile environment.

3.6 Connection between sexual orientation and religion

Sometimes, people fear persecution on account of their sexual orientation or their religion. In either case, the question of credibility of the stated persecution ground is relevant. This paragraph is about something else: in the assessment of the credibility of sexual orientation, the connection with religion is often brought into the equation. Many asylum seekers answer the question of whether they adhere to a religion in the affirmative. The parents' religion is mostly also inquired about as well as the extent to which it is practised. Next, they are asked about the connection between the respective religion and their sexual orientation.

291. Buro KleurKracht, expertise bureau for intercultural communication, *Cultural analysis, with regard to XX*, 13 June 2016.

292. For instance in the case of Albert from eastern Europe. It should be noted that homosexuality is not criminalised in his country of origin and that this examination reveals that the sexual orientation of people from these countries is generally believed. See paragraph 4.2 below for further information.

In the UNHCR Guidelines No. 9, it says: ‘Where the applicant’s personal identity is connected with his/her faith, religion and/or belief, this may be helpful to examine as an additional narrative about their sexual orientation or gender identity. The influence of religion in the lives of LGBTI persons can be complex, dynamic, and a source of ambivalence.’²⁹³ This may be true, but it does not mean a struggle can be expected in all cases in which there is any kind of connection between the LGBTI asylum seeker and religion. Some examples of how the connection between religion and sexual orientation is dealt with are provided below.

John, Africa

How do you perceive religion? – I am and remain a Muslim, but my religion does not accept gays.

What do you think about the fact that homosexuality is not accepted in your faith? – I think it is not right. This is how God has created me, and this is my life. (...)

You are now talking about the fact that it is difficult that people do not accept you due to your religion and orientation. Do you think the combination of Muslim and gay is also difficult for you personally, regardless of what other people think? – It is also difficult for me personally. People cannot accept me. This is what I find so hard.

Now you are talking again about acceptance by others. But what do you think about the fact that your religion renounces your orientation? – I don’t feel good about it. (...)

On the one hand, you stated that being gay is something natural and that it was created by God, and on the other hand, that it is a taboo and that it is not accepted by anyone (it is forbidden and damned by God). What does this contrast do to you? I do not mean that other people do not accept you, but I mean what this does to you or what this has done to you, apart from other people. – It stresses me out, I am depressed. It is difficult for me. (...)

Do you consider yourself a worshipper? – Yes, I do.

Then what does it do to you that God actually denounces you? – That’s what other people say. But God has created me. This is what I am. (...)

Doesn’t it say in the Koran or other holy books that homosexuality is not permitted? – I don’t read the Koran, but I do believe in God. I am a Muslim. People do say that it is written in the Koran that a man marries

293. UNHCR, *Guidelines No. 9*, paragraph 63, ix.

a woman. God has created me like this Himself. Nobody can assess me. Only God can.²⁹⁴

Sophie, South Caucasus

You are a Muslim woman. How does your religion relate to your sexual orientation? How do you deal with this? – I don't mind. I was born this way. It makes no difference to me. I am a normal human being.

Islam does not accept homosexuality, so how can you adhere to this religion if you are a lesbian? Isn't it inconsistent with your religion?

– For me it is consistent. I do pray five times a day, but I consider myself normal.

So in this respect, you do not agree with Islam? – I don't agree with how Muslims interpret Islam on certain issues. I am a proud Muslim woman and a proud lesbian. I would also be proud if I were a Jewess or a Christian.²⁹⁵

Adam, eastern Europe

You are a Christian. What is the role of your religion in connection with your sexual orientation? – It is clearly written in the bible that God has created a man and a woman, and that they must have contact with each other and produce children. Anything different is not normal.

How have you dealt with this? – Of course, it was very contradictory to me. On the one hand, I was ashamed as a Christian that I had these feelings. On the other hand, these were my true feelings. It is very hard to change that. (...)

What was it like for you to go to church, knowing that bisexuality was denounced by the church? – You know, I have arrived at my own explanation. I have thought about it a great deal, and to my mind it is like this: if I am a bisexual, this does not mean that God does not exist. Nobody can forbid me to believe in God, despite the fact that I am different.²⁹⁶

Thomas, Asia

You are a Muslim. What is the role of your religion in connection with your sexual orientation? – I am a Muslim, not an extremist Muslim but just a Muslim. I visit the mosque, and I pray every now and then. I have different feelings, but all the same I'm a Muslim.

What does your religion say about homosexuality? – According to the faith, it is not good. It is wrong.

How come that you still adhere to your faith? – I don't understand the

294. John Africa, additional interview, November 2015. One month later, he was granted a status.

295. Sophie South Caucasus, additional interview in the second procedure, seven years later. Sophie's application was rejected, because the situation for lesbians in her country of origin was estimated as not severe enough.

296. Adam eastern Europe, interview November 2015. Adam's bisexual orientation was believed, but his application was rejected on other grounds.

question about religion and homosexuality. I don't see the connection.

What is it like for you to go to the mosque and pray there, although you know that in your religion homosexuality is considered wrong? – I have already told you I'm not a strict Muslim. When I feel that I want to pray, I go to the mosque, and sometimes I pray. It does not cause any change in me. I keep on having the feelings I have now. In the context with religion and homosexuality, I regard them as two separate things. You enter the mosque with different feelings. You can say I'm a modern Muslim. (...)

What is it like for you to believe in a religion that considers homosexuality wrong? – More things are forbidden in my religion, and I do them too. I don't always pursue my faith.

What kinds of things do you do that are forbidden by Islam? – Smoking is not permitted; you have to pray five times a day, and I only pray once a week.

Why do you go to the mosque and continue to pray? – It has to do with my feelings. When I feel fine, I go to the mosque.

In Islam, homosexuality is wrong. Yet, you go to the mosque where people come who have negative feelings about homosexuality. How does that make you feel? – It has to do with my own preference. They opt for regarding homosexuality as wrong; I don't. This is my own choice.

Do I understand you correctly that going to the mosque is not unpleasant for you, although there are people there who have negative thoughts about homosexuality? – It does not cause any problems. What other people think about it is irrelevant to me. I do what I like. (...)

Homosexuality is at odds with your faith. What is the reason that you don't turn away from your faith, but that you continue to pray and go to the mosque where you are among people who totally disapprove of homosexuality? – There are many people who go to a mosque, and they do things their faith has forbidden. They do these things anyway. It is my choice to go to the mosque. It has nothing to do with the faith; it is freedom of thought and freedom of expression.

Do I understand you correctly that you don't think you should comply with the prohibitions and commandments in the Koran? – Yes, that's right.

What does your faith mean to you? – What do you mean exactly?

You state that you don't need to comply with the commandments and prohibitions of the Koran. So what does your faith mean to you? – I'm not going to the mosque for any special benefits. It is the feeling you have.

What does being a good Muslim mean to you? – I cannot answer this question. You should ask a good Muslim.

Do I understand you correctly, that you don't think you are an example of a good Muslim? – That's correct.²⁹⁷

Despite this extensive questioning, the subject of religion is not mentioned anymore in the intention to reject or the decision.

Julia, Africa

You are a Muslim woman, and you indicate that homosexuality is forbidden in Islam. How have you dealt with homosexuality in connection with your religion? – No one has seen Allah. I do not believe what people say. No one has gone to Allah to find out if a homosexual actually goes to hell. They have no way of knowing this.

So why do you say that it made you think and that you were afraid of it? – Nobody has given me the guarantee that as a homosexual you go to hell, but I am afraid of it.²⁹⁸

Dorothy, Sierra Leone

How do you deal with the combination of your faith and your orientation nowadays in the Netherlands? – Nowadays, I go to church together with my girlfriend.

But how does the church in the Netherlands look upon homosexuality? – I don't think it's a problem for the church. My church hasn't said anything about it. Besides, I don't go to church every Sunday.

Sorry, my question was not so clear. The question is about how faith in general looks upon homosexuality, apart from somebody who is running a church in Africa or the Netherlands. Does your faith, the Christian faith, have an opinion about homosexuality in general? – Not that I've heard of, but I assume they are against it.

Has your orientation had any influence on the extent to which you believe? – No, it hasn't.²⁹⁹

Intention to reject 2016

The person concerned could be expected to provide a more extensive and well-considered answer with respect to her Christian faith and the position of homosexuality in her faith.³⁰⁰

297. Thomas Asia, interview subsequent application, December 2015. In the corrections & additions, it says that Thomas wonders why the IND officer laughed after this answer. Thomas' asylum application was rejected, because he was not believed to be gay. In his country of origin, homosexuality is criminalised.

298. Julia Africa. As she was not believed, her application was rejected. In her country of origin, the criminal penalties for homosexuality are severe.

299. Dorothy Sierra Leone, subsequent interview, 2016.

300. Dorothy Sierra Leone, intention to reject 2016. She was not believed, and her asylum application was rejected. Dorothy has a low level of education.

Alex, Asia

You are a Muslim. What is the role of your religion in connection with your sexual orientation? – According to my faith it is bad. But according to what I believe, I can't say it is bad. What I can say about it now is: this is what I am, so I just keep my mouth shut.

How have you dealt with homosexuality in connection with your religion? – I don't have a right to pray, I think, because what I do is not allowed, and yet I do it. I do experience a sense of shame, though. But now I am so deeply involved in it, that I can't do anything. I don't observe Ramadan, and I don't go to the mosque or celebrate any Muslim holidays.

Are you still a religious Muslim? – I can't say that I am anymore, but I am a Muslim. I am not going to be converted or anything like that. But I do feel ashamed calling myself a Muslim, considering what I do.³⁰¹

Intention to reject: It is also remarkable that with respect to the impact of his religion on his orientation, he only says that it is not allowed, that he experiences shame, and that he is not a practising Muslim. Now that the person concerned says he fears persecution or discrimination on account of his orientation and that he therefore wants to be protected by the Dutch state, he could be expected to speak in a more subtle and personal way about what it means for him to be gay in both his country of origin and the Netherlands, and how he has dealt with this. After all, he is from a country where Islam is the state religion, and it is generally known that Muslims are not tolerant with respect to homosexuality.³⁰²

Pamela

You are a Muslim. What is the role of your religion in connection with your sexual orientation? – I am a Muslim woman, and I was born a lesbian. This is how Allah created me. (...)

Do you mean that homosexuality does not clash with your religion?
– As a Muslim I am not allowed to smoke, drink alcohol, or wear trousers, and I have to cover my hair. I smoke, drink alcohol during holidays, wear trousers, and I don't wear a headscarf. So I'm not a strictly religious Muslim. I am a moderate Muslim, unlike my family. They observe fast during Ramadan, they pray five times a day. If I were at home with my parents, I would have to wear a dress and a headscarf, and I wouldn't be allowed to smoke. So at home, I have to be a Muslim for one hundred per cent because I am forced to it, and here I don't need to behave like I have to at home.

Do you mean that your homosexuality and your religion can go together? – Yes, for me they can. I have no problems with that.³⁰³

301. Alex Asia, additional interview, September 2015.

302. Alex Asia, intention to reject, November 2015. He was not believed, and his application was rejected.

303. Pamela additional interview, 2016. After this interview, she was believed, and one month later she was granted a status. Pamela has a low level of education.

Jeremy, Africa

You kissed with a boy for the first time when you were twelve. You knew that according to the culture in [country of origin] and according to your faith this was not allowed. What did you feel? – I felt dirty. And I had to cry, because what I did was not allowed. I thought it was strange what I did. I was crying in bed all night.

How did you deal with your sexual orientation in connection with your faith, a religion that forbids homosexuality? – I concealed it. I didn't tell anyone.

What you did was forbidden, in principle. How did you deal with it emotionally, with respect to your inner self? – I couldn't express myself or tell anyone.

I am not talking about telling others, but I am talking about you and your feelings. How did you deal with it emotionally, with respect to your inner self? – That it was dirty and unclean. One didn't know any better at the time.

In the mosque, you heard that homosexuality was forbidden, that it was a sin. How did you think about homosexuality and about gays when you heard this? – When you feel something for someone, it is something normal.

I ask the question again. – It was a hard time for me. I couldn't talk about it with anyone, there. I felt dirty and unclean. (...)

You were fifteen when you came to the Netherlands. How did you deal with your feelings at that time? – I concealed everything. I didn't know anyone here, and I didn't trust anybody.³⁰⁴

Martin, Africa

You are a Muslim. What is the role of your religion in connection with your homosexual orientation? – My religion doesn't accept this.

How have you dealt with homosexuality in connection with your religion? – We went to the mosque only on Friday.

Have you experienced any problems with the fact that you are homosexual and Muslim? – No, I accept what I am. Homosexuality is imposed by God, and I can't help that.

What was/is it like for you to go to the mosque, while you know that homosexuality is disapproved of in the mosque? – If I didn't pray, things would only get more difficult.³⁰⁵

304. Jeremy Africa, subsequent interview, February 2016. Two days later, he was granted a status.

305. Martin Africa, interview, 2015. He has a low level of education. Martin was granted a status in the same month as his interview. In his country of origin, homosexuality is criminalised.

Jurisprudence

District Court of Utrecht, Nigeria

The court held that the State Secretary could hold it against a Nigerian man 'that he had spoken too little about the role of his religion in the process of awareness and acceptance of his orientation. The claimant had stated that he is a Roman Catholic and that he also practises his faith. Therefore, the claimant must have known what the Catholic church thinks of homosexuality. In this light, the respondent may have considered the claimant's statement that he *has* spoken about the role of religion in his orientation, namely that his feelings are not inconsistent with his homosexuality, insufficient.³⁰⁶

Comment

It is generally known that most world religions do not preach sexual diversity. Yet, there are many people who combine a non-heterosexual orientation or non-cisgender identity with religion. That the connection between religion and sexual orientation was frequently dealt with in a very stereotypical way becomes apparent from the examples provided above. In some cases, the interviewers extensively drilled on the subject. Similar to the presumed processes of awareness and self-acceptance, there also appears to be an implicit presumption concerning the connection between religion and sexual orientation that it is a struggle for the person concerned. Jeremy's sexual orientation, by the way, was believed. It cannot be ruled out that the fact that he was known to have struggled with his orientation worked in his favour.

3.7 Risky behaviour

Sometimes, somebody's 'homosexual behaviour' in the country of origin is considered too risky to be true. Some examples from files in which the sexual orientation was not believed partly for this reason, are provided below.

Thomas, Asia

When is somebody considered homosexual in your country? - If somebody performs sexual acts or other acts of intimacy, it will be considered a gay person's act. If somebody like that is caught red-handed, his chances of survival are nil. This person gets killed.

What impact did this have on you? - I was very scared.

*Did it also cause you to have no sexual intimacy anymore?
- I had sexual contacts with other men.*

306. District Court of Utrecht 4 January 2017, AWB 16/10196, appeal dismissed (Nigeria).

You took a certain risk by continuing this. Why did you take this risk?

- I haven't understood your question.

You state that if you get caught, you will probably pay for it with your life. So by doing this anyhow, you took a certain risk. Why did you take this risk? - I do understand the question, but you can't suppress feelings at a certain moment. You can't act as if you are different from who you are.³⁰⁷

Rachel, Africa

- In Africa, it is normal that two persons sleep in one room. Because I have a passion for girls, I made contact with her. (...)

You didn't know how she would react to your touches. Wasn't that a bit dangerous? – She had no objection. She liked it. I didn't rape her.

You started to touch someone without knowing if she liked girls too?

- I thought she was cute, and she had no objection. She didn't know what my feelings were, and I didn't know anything about her, but everything went very smoothly.³⁰⁸

Frank, Uganda

How did you find out that X is gay or the other way around? - You can see he is different from other men. I also told him I liked him.

You didn't know for sure about him. Didn't you take a risk? - Yes, I did. After I had been with him and had talked with him for some time, I knew he was gay too. The risk is always there, but I did have this feeling.³⁰⁹

Oliver, Africa

X and you had to do everything secretly, because one time you had been caught. Yet, his mother caught you again in their home, so you were not that sly, in my opinion. Why did you do this at home? - We had decided not to tell anyone, but later on we found out that the sister had seen us first and after that the mother had too. We couldn't hide anymore.

The mother left by car. Why did you opt for having sex at home if you wanted to do it in secret? - Because the mother had left. We didn't know she would be coming back.³¹⁰

In the intention to reject that followed, it says: It can be reasonably stated that the statement about being caught three times while being engaged in sexual acts can be regarded as surprising for the high degree of improbability alone.³¹¹

307. Thomas Asia, subsequent interview, December 2015. His homosexual orientation was not believed, and his application was rejected.

308. Rachel Africa, interview, November 2015. She was not believed and her application was rejected. Rachel has not had any schooling. In her country of origin, homosexuality is criminalised.

309. Frank Uganda, interview, early December 2015. Frank was not believed, and his application was rejected.

310. Oliver Africa, interview, January 2016. Oliver was not believed, and his application was rejected. Homosexuality is criminalised in his country of origin.

311. Oliver Africa, intention to reject, February 2016.

Neal, Uganda

Neal's homosexual orientation was not believed, among other things because he started kissing another boy on the beach in Uganda just like that. This does not mean that he tried to keep his feelings concealed, as he had stated earlier. On the contrary, he would have run enormous risks by kissing X in public in a country like Uganda. 'That he dared to do this, so he said, because it was dark, is not believed since with his behaviour he was running the risk of a prison sentence or even the death penalty, and he knew.'³¹²

Edwin, Afghanistan

In a decision, it says: What with his secret sexual orientation and his stated fear, it is incomprehensible that the person concerned takes a disproportionately high risk by having sex in a public park in the open with an unknown/strange man who allegedly made advances to the person concerned. The secret orientation of the person concerned might have been discovered easily by possible passers-by.³¹³

Jurisprudence**District Court of Amsterdam, Cameroon**

In a case, the State Secretary commented that an LGBT from Cameroon could be expected to 'exercise restraint and be concerned about any negative consequences that might cost him his life. (...) The court does not agree with the respondent in this respect and explicitly refers to what the claimant stated in the interview: "It is very dangerous to do something like this [making advances] in Cameroon, of which you know it is illegal. It is quite a strategy; you have to feel safe." (...) And if his advances would fail: "I would try in another way by using another strategy." According to the court, his statements indicate that the claimant calculated his advances to X and used a strategy. This strengthens the picture that the claimant was aware of the danger involved in the advances and that the claimant was careful. The fact that a rejection could have negative consequences does not mean that somebody could not do anything.'³¹⁴

Comment

All asylum seekers quoted above had to deal with a rejection that was partly based on disbelief due to their risky behaviour. It seems as if the IND officers thought it was very dangerous and could not imagine that people can be so reckless. In the LGBTI asylum seeker's country of origin, however, it is probably dangerous in most cases to engage in gay sex or to express sexual orientation or gender identity in other ways. This is why they fled their country. In this context, Jenni Millbank wrote: 'On such reasoning the claim of virtually every asylum seeker who

312. Neal Uganda, decision, December 2015. Both his relationship with X and his sexual orientation were considered incredible.

313. Afghanistan, decision 2016. This took place in a park in the Netherlands. The researcher could inspect part of this file via COC Netherlands.

314. District Court of Amsterdam 19 April 2017, 17/6423, appeal allowed (Cameroon).

has had, or attempted, a same-sex relationship in their country of origin is implausible because of the inherent risk it entailed.’³¹⁵

3.8 Knowledge of LGBTI organisations and LGBTI subjects

According to WI 2015/9, one of the themes on which questions were asked in the interview is contact with or knowledge of LGBTI support groups in the country of origin and in the Netherlands. If the asylum seeker has some knowledge of these organisations, it could contribute to the credibility of the stated sexual orientation. Also, knowledge about the exact criminal penalties established by the authorities in the country of origin on same-sex sexual acts could help to make the sexual orientation plausible.

Lawrence, Angola

Have you ever tried in Luanda to have contact with other homosexuals, or with organisations in which homosexuals are active? – The situation over there is different from what you have in this country. There are many places where you can go here. Where could you go in Angola in 1996? (...)

Do you know any LGBT organisations in your country of origin? – Since the moment I left Angola, I haven’t looked back. I was not interested.(...)

When you lived there, why didn’t you seek contact with LGBT organisations? – You think like a European.³¹⁶

Arthur, Asia

He could have been expected to speak more extensively about the position of homosexuals in [country of origin]. It could be expected that he wants to know the punishment for homosexuality and what exactly happens to homosexuals. (...) From somebody who states that he has been attracted to boys all of his life, it could be expected that he has thought about homosexuality, its meaning and consequences.³¹⁷

Joe, Africa

Did you know other homosexuals in your country of origin, besides X? – No, I didn’t.

Are there any secret places for homosexuals in the area where you live? – No, there is no secret place for homosexuals.

How is homosexuality expressed in your country of origin? – I have

315. Millbank 2009b, p. 22. See also Haagsma 2017; ICJ report 2016, pp. 64-65; UKLGIG 2013.

316. Lawrence Angola, interview 2015.

317. Arthur Asia, decision, March 2016. Arthur’s sexual orientation was not believed, and his application was rejected.

never seen a gay who expressed it. I don't know how somebody else does it. I only know what I did.

Do I understand you correctly, that in your country of origin nobody knows about your orientation? – That's right. Not that I know of.

Do you know any LGBT organisations in your country of origin? – No, I don't. I only know the organisations here.

Aren't there any LGBT organisations in your country of origin? – I have never seen any, and I have never heard of any.³¹⁸

Mabel, Latin America

Do you know any organisations in your country of origin that stand up for the interest of homosexuals? – I know there are some organisations in my country of origin, but I couldn't mention them for I know it is dangerous to visit them. If you do so, you make yourself a target.³¹⁹

In the following passage, it becomes clear that Dorothy is expected to collect the lacking knowledge about the LGBT community in Sierra Leone, after she has been ordered to return to that country. It is totally unclear what this expectation is based on or what its purpose is.

Dorothy, Sierra Leone

Now that she has been told several times that she has to return to Sierra Leone, it cannot be understood that she has not gained any knowledge of this information after all. 'Now that the person concerned has little or incorrect information about the LGBT community in Sierra Leone and the law of Sierra Leone with respect to homosexuality, the lack of the said information can be held against the person concerned as a surprising circumstance.'³²⁰

Walt, Afghanistan

Can you mention the name of the Dutch celebratory event for homosexuals? – There is a day on which everybody comes together, but I don't know what it's called.

How come you don't know? – I have never participated, and I have never met anyone who did.

You have just told me that you have gone through this struggle because homosexuality is not accepted in your society. I can imagine that it must be of special significance that there is so much freedom in the Netherlands in this respect that it is celebrated. I would expect that your interest in this is above average. I am surprised that you cannot

318. Joe Africa, additional interview, June 2015. His application was rejected because his sexual orientation was not believed. In his country of origin, homosexuality is not criminalised.

319. Mabel Latin America, interview, August 2015. Mabel was granted a b-status (subsidiary protection).

320. Dorothy Sierra Leone, decision 2016.

mention the name of this event. (...) Do you know how this event is celebrated? Could you tell me something about this? - It's a day on which they come together in Amsterdam and celebrate it in all openness.³²¹

Anthony, Africa

You lived in [country of origin], you were homosexual, and that was forbidden. You always had to keep it concealed. Why haven't you checked if there was an organisation that could help you?

You have been homosexual since secondary school. How is it possible that you have never figured out this sort of thing and didn't know?

You just said that you don't know what the rights of homosexuals in the Netherlands are. How is it possible that you have not tried to find out?

I don't really understand why you don't know what your rights are. You always had to do things in a concealed way, and now you are in a different country where this may not be necessary. This is why you were taken to Europe. Why don't you know what the rights of homosexuals are in this country? - I haven't found anyone I could ask.³²²

The intention to reject follows next: It is also surprising that the person concerned states that he has lived as a *homosexual* in [country of origin] for many years but that he does not know of the existence of LGBT organisations in his country of origin. Additionally, the person concerned stated that he does not know about LGBT organisations in the Netherlands, that he does not know about the rights of homosexuals in the Netherlands, that he does not know if homosexuals are discriminated against in the Netherlands, and that he has not sought contact with other homosexuals in the Netherlands. (...) The foregoing statements are not indicative of any interest in (the position of) homosexuals.³²³

In the decision, it says: Although the person concerned has come to the Netherlands only recently, he cannot state anything at all about the climate with respect to LGBTs in the Netherlands. Someone who states he always had to do everything in a concealed way in his country of origin could be expected to know/find out what the climate with respect to LGBTs is in the country he has fled to.³²⁴

Comment

In this reasoning, both the so-called *rescue narrative* can be recognised, or the stereotypical expectation that the LGBTI asylum seeker must be happy and relieved that he is in the 'free western world' and will enthusiastically mingle with the gay

321. Walt Afghanistan, additional interview, February 2016. Walt was granted a status after he had won his appeal.

322. Anthony Africa, interview, January 2016.

323. Anthony Africa, intention to reject, February 2016.

324. Anthony Africa, decision, February 2016.

scene,³²⁵ and the stereotypical expectation described by Berg and Millbank that the end point of the homosexual identity development Cass-style (the coming out) coincides with the start of the asylum procedure.³²⁶ The same applies to the expectation of Walt's above-average interest in the Gay Pride (see above).

Joe, Africa

You mentioned the Gay Pride. When does it take place? - I went every year.

What is the date of the Gay Pride? - It's in the first weekend of August. The Canal Parade is on the Saturday.

Can you mention some gay symbols? - They have a rainbow flag. There is another one with a lot of blue in it.

Anything else? - The person concerned draws a symbol. [SJ: two men signs entwined].

What does this symbol represent? - When you see someone with this symbol, you know he is gay.

Does it have any underlying meaning? - It means two men. (...)

Are gays discriminated against in the Netherlands? - Yes, they are.

What do you base this on? - You can see it on TV. Sometimes people give you a bad look. Sometimes they spit on you when you pass by. Sometimes they say 'bloody faggot' (the word used was *kankerhomo*; Dutch swearwords often include references to diseases, in this case cancer).

Have you experienced this yourself? - Yes, I have.

What exactly did you experience? - I came out of the tram and saw these boys. When I walked passed, they said: 'Bloody faggot!'

How do you know you were abused for your orientation and not for other reasons? - I don't know if they know I am gay, but they did say this. (...)

Are there any laws on homosexuality in your country of origin?
- Homosexuality is not done there. It is prohibited by law, and it is forbidden by the faith too.

325. See Bracke 2012 about rescue narratives.

326. Berg & Millbank 2009, p. 14.

How do you know it is prohibited by law? – The people don't want it, so the law doesn't allow it.

Has it been laid down somewhere that homosexuality is forbidden?
– I don't know. In my country, we are all Muslims, and we all work in compliance with the Koran. The Koran says you mustn't do it.³²⁷

As the file indicates, in the intention to reject, the answers to the questions asked about Joe's knowledge about the situation in the Netherlands are not pursued any further, because he might have looked up information about homosexuality in the Netherlands without much difficulty.³²⁸

Jurisprudence

District Court of Amsterdam, Cameroon

The State Secretary had observed: 'That just because the claimant knows two gay bars, does not mean that his orientation is credible. Everybody can visit such places. It cannot be ruled out either that he could gather his basic knowledge by searching the Internet and by making inquiries among his fellow reception centre residents.'

The court reacted as follows: 'The respondent rightly states there is the possibility that the claimant has obtained his knowledge via public sources. However, there is not a single objective clue for this assumption, and for this reason it is rejected.'³²⁹

District Court of Haarlem, Iran

In an Iranian's case, the District Court of Haarlem held that the State Secretary could not have held it against him without any further motivation 'that he has not tried to find out more about the LGBT community in the Netherlands. He led a withdrawn life and lived in great fear of being sent back to Iran, which made him avoid getting into contact with the gay community in the Netherlands.'³³⁰

District Court of Zwolle, Tunisia

The court agrees with the claimant that the respondent has insufficiently motivated why the claimant can be expected to have cognisance of interest groups for LGBTs in the Netherlands, to know what the abbreviations LHBT (Dutch for 'LGBT') and LGBT are short for, and to have sought contact with these organisations. The respondent's statement that this is all the more surprising given the fact that the claimant has come to the Netherlands to have contact with other bisexuals is deemed insufficient by the court, because this does not imply that this contact has to be via an interest group. The court does not find any clues for this in Working Guidelines 2015/9 either.³³¹

327. Joe Africa, interview second procedure. He has been in the Netherlands for a very long time. Joe's application was rejected, because his homosexual orientation was not believed. His appeal was also dismissed. In his country of origin, homosexuality is not criminalised.

328. Joe Africa, July 2015. Joe is illiterate.

329. District Court of Amsterdam 19 April 2017, 17/6423, appeal allowed (Cameroon).

330. District Court of Haarlem 29 March 2017, 16/23349, appeal allowed (Iran).

331. District Court of Zwolle 31 May 2017, NL17.1740; NL17.1741, appeal dismissed (Tunisia).

District Court of Zwolle, Liberia

Neither has the respondent considered wrongly that the claimant, who stated that since the age of nine he has known that he felt attracted to men and has been sexually active, may be expected to have cognisance of Liberian criminal law and can speak about this.³³²

District Court of Den Bosch, Guinea

The asylum seeker has not contested the fact that the State Secretary includes the contact with gays in the Netherlands and knowledge of the Dutch situation in his assessment. Neither does he contest the fact that he has not shown any interest in further contacts here in the Netherlands with the LGBT community. He *is* of the opinion, however, that any causality between an asylum seeker's homosexuality and interest in LGBT organisations cannot be presumed. From the decision and the explanatory notes, however, it becomes clear that the State Secretary does not make this connection. He includes the contact with gays and the knowledge of the Dutch situation in his assessment to the extent that if these exist they *can* serve in support of his sexual orientation. This is in conformity with WI 2015/9.³³³

Comment

The expectation that LGBTIs will by definition try to find out more about LGBTI subjects is debatable. There can be all sorts of reasons why somebody does not seek contact with LGBTI organisations. Not everybody likes going out, and not everybody has the opportunity to go out. Somebody knowing little about the gay scene, therefore, is of little significance.³³⁴

The Guinean in the judgment above is right: there can be no causal connection between somebody's sexual orientation and his knowledge of or interest in LGBTI organisations and the LGBTI community. It is interesting that the State Secretary denies having made such connection in this case, but this statement is not supported by the other examples in this paragraph. It should be noted that it is quite shocking that if somebody can tell a lot about Dutch LGBTI matters, he is still not believed because he may have obtained his information from the Internet. The idea that making inquiries among fellow residents at the reception centre is a good way of gathering knowledge about gay bars shows little sense of reality.

There are several stereotypes with respect to this aspect. Sometimes, the so-called *rescue narrative* can be recognised, or the stereotypical expectation that the LGBTI asylum seeker is undoubtedly happy that he has been rescued and is safe and sound in the Netherlands and will enthusiastically plunge into the gay scene. This was expected from Walt and Anthony. Also,

332. District Court of Zwolle 19 July 2017, 17/12422, appeal dismissed (Liberia).

333. District Court of Den Bosch 21 November 2017, NL17.11550, appeal dismissed (Guinea).

334. See also Fleeing Homophobia report, pp. 57-63.

the expectation that LGBTIs are well informed about the exact criminal provisions that may be imposed on them in their country of origin still appears to exist in the Dutch asylum practice, even though it is an extremely stereotypical thought.

3.9 Relationships and contacts

In the Netherlands, a boy from Africa had told his friends that he was gay. His friends, who were all from the same country of origin, rejected him. The interviewer does not seem to understand much of coming out.

Jeremy, Africa

Why do you tell your friends? – In my country of origin, one doesn't talk about these things. I had expected their support, that I could speak about this with them. We have all been in the Netherlands so long. They have also been here long. I had thought their opinions had changed, but I was wrong.

I don't understand why you would tell people of whom you know they curse homosexuality, people who consider this a sin. – They were friends. I thought they would understand me. I wanted to be myself.

To be yourself you do not have to tell others what you are or what you feel. You knew what your friends thought about the situation. Why do you tell them nonetheless? – Just because. I wanted to be myself, and I hoped they might think again after I had told them about it.³³⁵

Elroy tells about his first sexual experience with a boy. He was fourteen at the time.

Elroy, Africa

Could you tell me in further detail how your relationship with X came about? – It's a day I will never forget. I felt comfortable and at home with him.

Some further detail please. How did you know he liked men? What did you like about him? Could you give me some more details? – We were in the same group. We saw each other a lot. We told each other a great deal. To share these kinds of things you need a lot of trust. We had this trust. I had never had a relationship with women. It was with X that I had sex for the first time.

What did you like about him? – There was love between the two of us.

335. Jeremy Africa, subsequent interview, February 2016. Homosexuality is criminalised in his country of origin.

We made love. With him I discovered what sex was. In short, X taught me a lot I didn't know.

Still I don't know what you liked about X. You had sex, you learned a lot, but what did you like about him? – He had a unique way of being in touch with things. What I liked so much about him is that if I told him a secret, he never let on about it. I liked the way we kissed.³³⁶

It is not unusual that a gay person enters into a heterosexual relationship or gets married under social pressure or as a cover. In many files, this is recognised and not regarded as a problem.

Sam, Asia

Why did you get married anyhow? – Marriage is an obligation over there. You don't make any choices for yourself. My marriage was arranged.

Didn't you decide to get a divorce when you had relationships with men? – When I get divorced, no one will look after my children. This is why I kept my wife. (...)

How would the family react if they knew about your sexual orientation? – My wife would seek a divorce, my married daughters would be sent back, and nobody would like to marry my other daughters. My sons would sever relations with me. I might get hit or killed by the community. It is not permitted in our culture.³³⁷

Dorothy, Sierra Leone

In the 'opinion', it says: It is not strange she didn't get divorced. She would never want to live without her children of her own free will. Additionally, she depended on her husband financially. In Sierra Leone, an open relationship with her girlfriend X is impossible. So, the only option she had was to stay married and have a relationship with X at the same time.³³⁸

Julia, Africa

The person concerned also states that the considerations in the intention to reject regarding the fact that it is remarkable that since her relationship with X she has not had any relations with a woman, that she has not had any contact with other LGBTs, and that she has no knowledge of organisations for this group, are clear indications of stereotypical thinking. (...) The statements above that many homosexuals do not enter into a relationship, whether or not sexual, or feel the need to have contact with like-minded individuals, are unconvincing. After all, still no insight has been provided into what her personal process in this matter would be.³³⁹

336. Elroy Africa, subsequent interview, May 2015. His homosexual orientation was believed, but his application was rejected because his narrative was not considered serious enough. In his country of origin, homosexuality is criminalised.

337. Sam Asia, interview, July 2015. Half a year later, Sam was granted a status. In his country of origin, homosexuality is criminalised.

338. Dorothy Sierra Leone, 'view' (reaction to intention to reject). Dorothy's application was rejected, because it was not believed that she is a lesbian.

339. Julia Africa, decision, January 2017.

Sometimes, the IND officer and the asylum seeker have different ideas about what a relationship entails.

George, Iraq

When did you enter into a relationship with a man for the first time? (...)

Reporter's comment: I notice that the person concerned misunderstands me. The person concerned interprets a relationship as sex.

When did you have a relationship with a man for the first time in which you stayed with one and the same person for a longer period of time and experienced love?³⁴⁰

John, Africa

The relationships you mentioned were all short-lived. Have you ever had a relationship with someone you would like to have a long-term relationship with and in which you felt real love? – I was strongly attached to X. I had good contact with him.³⁴¹

Have you told friends in your country of origin about your sexual orientation? – No, I haven't. I didn't trust anyone. Only those I had a relationship with.

What do you mean by a relationship? – Physical contact with a person.

Could love be involved too? – Yes. A relationship is when you have feelings for someone, and then we have physical contact. This is what I call a relationship.

Your first answer was 'physical contact.' Then you said, when I asked you about it, that there could also be love. Is physical contact more important than being in love? – First, you are attracted by someone, then you have physical contact, and then you have a relationship.³⁴²

Robert, Nigeria

So if I understand you correctly, you have never had a longer homosexual relationship? – It depends on what you mean by a relationship. I have had contact with someone for a longer period of time, but what is a relationship?

To the extent that you want to live together with him.³⁴³

Sometimes, people have sex too infrequently to be credible as a gay person in the opinion of the State Secretary, as purported in the intention to reject that Walt received:

340. George Iraq, interview (April 2016) which the researcher could inspect via COC Netherlands. Eventually, he was granted asylum.

341. John Africa, interview, June 2014.

342. John Africa, additional interview, November 2015. One month after this interview, he was granted a status.

343. Robert Nigeria, interview, November 2015. Robert was granted a status too.

Walt, Afghanistan

It is taken into consideration that the person concerned has had only one contact in his life with a man that was also sexual. Now that the person concerned has been in the Netherlands for five and a half years, it can be expected that he has given expression to his stated orientation more extensively and that he would have gone in pursuit of his identity, especially now that homosexuality in the Netherlands is accepted more than in Afghanistan and the person concerned could have moved more freely in this respect. The person concerned has failed to do this. The fact that the person concerned stated that due to his feelings of fear he has not undertaken anything in this field in the Netherlands, does not detract from the foregoing. The passive behaviour the person concerned, according to his own statements, has shown in this country with respect to his stated orientation, detracts from the credibility.³⁴⁴

No cases were found, in which women were reproached for being too passive sexually.

3.10 Documentary evidence

Pursuant to Article 4 of the Qualification Directive, the asylum seeker has to submit all documentation in his possession with respect to his background, identity and the reason for applying for international protection.³⁴⁵ One would expect that the asylum authorities do something with the documentation submitted. In this context, it says in the Guidance Note of UNHCR: 'Some applicants will be able to provide proof of their LGBT status, for instance through witness statements, photographs or other documentary evidence.'³⁴⁶

One of the written questions the Council of State asked the State Secretary on 3 March 2016 was: what is the value of a membership card for an LGBTI organisation, an (ex) partner's statement, or photographs on which the alien can be seen at events for LGBTIs?³⁴⁷ The judgment of 15 June 2016 does not show that the State Secretary has answered this question. The Council of State held, however, that in light of the 'integral credibility assessment' the State Secretary explicitly looked at the statements about the aspects mentioned in WI 2015/9 in their mutual context and in the light of other statements and submitted evidence and that he expressed these considerations in his decision-making [emphasis added SJ].³⁴⁸ How these other statements and this submitted evidence are dealt with in asylum practice, is discussed in this paragraph.

344. Walt Afghanistan, intention to reject, February 2016. After he won his appeal to the Council of State, he was granted asylum. The researcher could inspect part of this file via COC Netherlands.

345. Directive 2011/95/EU; see also WI 2014/10.

346. UNHCR 2008, paragraph 35.

347. Letter from the Council of State to the Dutch Immigration and Naturalisation Service, 3 March 2016, 201509454/1/V2.

348. ABRvS (Council of State) 15 June 2016, ECLI:NL:RVS:2016:1630, ground 2.8. Additionally, it is stated in WI 2014/10 that the alien's statements are compared with the statements of others.

The following will be discussed respectively: photographs, statements by witnesses or experts, partners' statements, participation in LGBTI meetings or organisations, and COC membership.

3.10.1 PHOTOGRAPHS

'The IND does not ask for documentary evidence, such as photographs or videos, in support of the sexual orientation. If the alien submits photographs or videos of his own accord in support of his sexual orientation, these will not be included in the assessment. Material submitted by the alien is returned immediately and without the alien's request,' according to WI 2015/9. In this paragraph, 'photographs or videos in support of the sexual orientation' probably refers to pornographic material, as referred to in the judgments of the Court of Justice and the Council of State. Other photographs, for instance of parties or outings with friends or partners, could be taken into account, as LaViolette also noted.³⁴⁹ In regular aliens law, submitting such photographs is a common way of supporting the existence of a relationship.³⁵⁰ However, the text of the working guidelines sometimes seems to be interpreted in a way that non-pornographic photographs are also included. This happened in the case of Grace from Nigeria, for instance.

Grace, Nigeria

Also Grace's lawyer points to the photographs: 'At the interview, she offered some photographs of her and her girlfriend as well as invitations to LGBT parties she went to. This is not mentioned in the report. No copies were made of these either.'³⁵¹ 'The photographs the client wanted to submit were not received. Apparently, you do not attach any value to this, but it remains to be seen if this is correct.'³⁵²

The State Secretary's later reaction to the photographs was: 'She states she has photographs of and invitations to LGBT parties. These documents do not have the value attached to them by the claimant. Everybody can obtain invitations to such parties relatively easily. One photograph on which the claimant is pictured with a woman does not imply that she is a lesbian.'³⁵³

Linda, Africa

After Linda complained in the 'opinion' that it was inaccurate, that the photographs she had submitted had not been included in the assessment, the decision referred to the intention to reject, in which it only says in this respect that it is up to the person concerned to substantiate her sexual orientation by means of statements further.³⁵⁴

349. LaViolette 2004, the document on which WI 2015/9 is based.

350. In the instructions to the questionnaire to be completed for an application for a residence permit as a partner, it says: 'You are to support your answers with as much documentary evidence as possible, such as letters, photographs, e-mails (...). If you do not answer the questions in detail and do not enclose any documentary evidence, the IND will not be able to assess your relationship properly.'

351. Grace Nigeria, corrections & additions, May 2016.

352. Grace Nigeria, 'view' (reaction to intention to reject), June 2016.

353. Grace Nigeria, District Court of Rotterdam 1 July 2016, 16/12712, appeal dismissed.

354. Linda Africa, intention to reject, April 2016.

At the sitting of the court, the State Secretary said: ‘About documentary evidence: in line with the judgment of the Court of Justice, photographs and videos are not accepted; memberships are assessed on an individual basis. A COC membership card has to be supported by statements about the awareness process.’³⁵⁵

With respect to the photographs and the COC membership card submitted by Linda and her participation in the buddy programme Cocktail, the court held ‘that the respondent is rightly and in conformity with the Working Guidelines of the opinion that these documents and this circumstance need to be included in the integral credibility assessment, but that her statements have more weight. Although limited value can be attached to this, the respondent is justly of the opinion that in the first place it is up to the claimant to make her orientation plausible by means of her statements.’³⁵⁶

3.10.2 OTHER PEOPLE’S STATEMENTS: WITNESSES AND EXPERTS

‘In the assessment, the State Secretary rightly attaches great value to an alien’s statements about his own experiences,’ the Council of State says.³⁵⁷ Yet, other people’s statements that might help support the sexual orientation should also be accepted. According to WI 2014/10, what matters in statements are ‘external credibility factors’, concerning which the aspect, among other things, as to whether the third party ‘can make statements about relevant events with some authority’ is looked at. It is obvious that the first thing that comes to mind here are the partner’s statements. Other statements, including those by witnesses such as COC and other interest groups that state they have witnessed that the person concerned has participated in LGBTI activities, could be taken into account as well. Statements by witnesses are relevant here, not those by experts. After all, the only expert is the person concerned themselves. However, it should be noted that statements of people who treat the asylum seeker for a mental or physical trauma could be used as additional evidence.³⁵⁸

A man from Africa had exhausted all legal procedures and was in a so-called ‘bed-bath-bread’ shelter. After some time, he took the Protestant pastor of the Worldhouse (a centre for and run by undocumented migrants) into his confidence. He told him that he was gay and that he did not feel safe enough in the Netherlands to disclose his orientation. The pastor wrote a letter in support of his case. The man’s sexual orientation was believed. It is unknown to what extent the pastor’s letter had contributed to the result.³⁵⁹

355. Linda Africa, report of the sitting of the court, April 2016.

356. Linda Africa, District Court of The Hague, 11 April 2016, 16/5048, appeal dismissed.

357. ABRvS (Council of State) 15 June 2016, ECLI:NL:RVS:2016:1630.

358. For this exception to the principle ‘no involvement of medical or psychiatric experts’ see the Fleeing Homophobia report, p. 52. See also ICJ 2016, pp. 32-35.

359. This man was granted a status in November 2015, shortly after his subsequent interview. Cf. District Court of Roermond Uganda, 16 June 2017, 17/76: the submitted letter by the pastor of the St Paul’s Voice Centre cannot serve as evidence, but given the international organisation and the pastor, it cannot be brushed aside just like that.

A man submitted statements from two COC collaborators. The State Secretary's reaction was: *The letters from COC do not provide any insight into the claimant's awareness process and were prepared on request and are, partly for this reason, no new facts. It is true that COC statements may serve in support of the alien's statements, but he himself is to make his sexual orientation and the corresponding awareness process plausible.*³⁶⁰

An asylum seeker submitted a statement from SHOUT Wageningen (an association for LGBTQ+s), another asylum seeker submitted a letter from a gay couple who were his friends, and yet another submitted a statement from ASKV Refugee Support (*Amsterdams Solidariteits Komitee Vluchtelingen*). None of these testimonies had the desired result. The State Secretary was not convinced of the credibility of their sexual orientation. Sometimes, LGBTI asylum seekers submit a letter of support from an LGBTI organisation from the country of origin. For instance, an asylum seeker from Jamaica had a long letter from J-Flag,³⁶¹ and an asylum seeker from Iran submitted a letter from IRQO.³⁶²

3.10.3 PARTNERS' STATEMENTS

The connection between credibility of the sexual orientation and credibility of the related problems sometimes has the characteristics of the chicken-and-egg problem, for instance with respect to love relationships. According to WI 2015/9, the incredibility of the events in principle enhances the incredibility of the orientation, but the working guidelines do not say what will happen if other parts of the narrative *are* credible. Based on the examined files, it becomes apparent that incredibility of the orientation mostly brings on incredibility of all statements related to it. It can be argued if this is always in conformity with an integral assessment.

Sometimes the asylum seeker whose sexual orientation is not believed has a partner in a subsequent application, but in most cases a relationship like this is not believed, because 'it is established judicially that the sexual orientation is incredible.' In the file study, only one example was found of a stated sexual orientation that was deemed credible in second instance due to a lesbian relationship. In fact, the incredibility in this case was repaired by the relationship.³⁶³ This decision was also influenced by the fact that the Central Agency for the Reception of Asylum Seekers (*Centraal Orgaan opvang Asielzoekers*, COA) and the Repatriation and Departure Service (*Dienst Terugkeer en Vertrek*, DT&V) had known about this

360. See also the Court of Zwolle 18 April 2017, 17/6288, appeal dismissed (Afghanistan). The declaration of the director of COC Friesland can only serve as support for the alien's account.

361. J-Flag is an LGBTI NGO in Jamaica. This asylum seeker was granted refugee status.

362. The Iranian Queer Organisation (IRQO) is an LGBTI NGO with registered office in Canada. This man was granted refugee status.

363. The opposite was found in case law: the residence permit of a woman from Uganda was withdrawn, because she and her female ex-partner had allegedly made contradictory statements in the interview for a provisional residence permit (*machtiging tot voorlopig verblijf*, MVV) reunification. However, her appeal was allowed. District Court of Den Bosch 11 May 2017, NL17.868 (Uganda).

relationship for a long time, as the file indicates. Apparently, the services had not bothered to share this knowledge with the IND.

Alex, Asia

Alex submitted a letter from his elder partner from [country X], in which the latter states that they have a relationship together and that he misses him a lot. In the decision, it says: 'In the first place, no value can be attached in an assessment based on aliens law to a single subjective statement without any objectively verifiable substantiation. (...) Finally, the remarkable differences between the cultural background of his partner's country of origin and that of his country of origin and between the ages of the persons concerned ought to be mentioned. Such arguments in themselves cannot lead to any reasonable doubt about a stated love relationship, for in principle anything is possible in love, but they *can* be taken into account.'³⁶⁴

Pamela

About the love letter X wrote to Pamela, a lawyer said: 'Of course, X's letter is not from an objective source, but what better way to convince someone she is a lesbian than by means of a testimony from the partner? When you see them together, it is clear they are a couple in love. The letter is the best proof.'

The State Secretary's reaction was: 'No, the letter is not the best proof, because the letter is not an objective source. The best source is when she makes a convincing statement herself, and so far she has not succeeded in doing this.'³⁶⁵

William, Africa

William submitted a statement from his partner. In the decision, it says: The lawyer has submitted a statement from one of William's sexual partners. The lawyer has spoken with this person, and to the lawyer he came across as sincere. The person preparing the statement said that William was shaken by the fact that his homosexual orientation was deemed not credible. (...) It is taken into consideration that the statement only included the handwritten text 'herewith I declare that we, William and X, have been friends for about 1.5 years now and that we have sexual contacts with each other.' With this statement, however, William has not made his sexual orientation and conversion plausible. Apart from the circumstance that this statement could have been prepared by everybody, a sexual partner is not considered an objective and verifiable source.³⁶⁶

364. Alex Asia, decision, January 2016.

365. Pamela, report/notes court sitting, eight months after the subsequent interview.

366. William Africa, decision, November 2015. William has exhausted all legal procedures now. His homosexual orientation was not believed.

3.10.4 COC MEMBERSHIP

LGBTI asylum seekers often become COC members.

An example: In addition, it is considered that pursuant to the website of COC Netherlands (<http://www.coc.nl/steun-ons>) the COC membership does not require any specific conditions and that the mere COC membership does not render the stated sexual orientation of the person concerned plausible.³⁶⁷

3.10.5 JURISPRUDENCE

Council of State, Togo

In a subsequent application, a woman from Togo submitted statements from two collaborators of COC in Leiden. The appeal was allowed, among other things because the State Secretary had failed to assess the statements in a recognisable manner. The State Secretary appealed, and the Council of State held 'that these statements can serve as support for the alien's statements, but that she is to make her sexual orientation and the related awareness process plausible herself.'³⁶⁸

Council of State, Tunisia

In a later judgment, the Council of State held that in principle the State Secretary can attach decisive value to an alien's insufficient statements about his own experiences. In the process, it is not necessary for the State Secretary to indicate how he takes into account the alien's other objections and his other statements about the other aspects from the working guidelines in his assessment of the sexual orientation.³⁶⁹

Comment

Again, there is an analogy with the assessment of the credibility of converts. Earlier, in the case of an Afghan convert, the Council of State held: 'The State Secretary is free to attach a decisive value to the motives for and the process of conversion.'³⁷⁰ Rafi comments that in this way the integral credibility assessment becomes a dead letter.³⁷¹ It appears from these judgments that the Council of State allows little room for other evidence than the asylum seeker's statements about awareness processes. Consequently, in most court judgements most of the attention by far is devoted to the applicant's own statements on awareness processes and self-acceptance, and statements made by partners or others carry little weight:

District Court of Zwolle, Liberia

A Liberian man submitted statements from an employee of the Dutch Council for Refugees and from a sheltered housing mentor and LGBTI co-worker of the COA. The court held: 'What these statements make

367. John Africa, intention to reject, November 2014. One month after his additional interview, he was granted a status.

368. ABRvS (Council of State) 27 October 2016, ECLI:NL:RVS:2016:2940, appeal of the State Secretary after District Court of Middelburg, 21 July 2016, ECLI:NL:RBDHA:2016:8438 (Togo), appeal allowed.

369. ABRvS (Council of State) 10 May 2017, ECLI:NL:RVS:2017:1256, appeal of the State Secretary after District Court of Haarlem 22 December 2016, ECLI:NL:RBDHA:2016:16792 (Tunisia), appeal allowed. See also ABRvS (Council of State) 6 October 2017, ECLI:NL:RVS:2017:2715.

370. ABRvS (Council of State) 15 July 2014, ECLI:NL:RVS:2014:2801.

371. Rafi 2017.

clear in particular is how the claimant currently expresses his stated orientation and why the sheltered housing mentor/LGBTI co-worker does consider the claimant's stated orientation credible from his own observation. However, no insight has yet been provided into the claimant's awareness and acceptance process.³⁷²

District Court of Amsterdam, Sierra Leone

In the case of a man from Sierra Leone, the State Secretary stated: 'That the claimant has submitted statements from Mr X and priest Y, has stated he had frequent contacts with Secret Garden, has provided a description of their membership card, has mentioned his favourite places of gay entertainment, and has submitted photographs of his presence at the Gay Pride, cannot lead to taking the stated orientation for granted on the basis of these aspects. Less value is attached to third-party statements, whether or not prepared on request, and to photographs than to the claimant's own, in this case considered incredible, statements.'

The court held: 'As appears from the contested judgment, these elements have been taken into consideration in the credibility assessment, but in this case the respondent has rightly attached less value to these elements than to the other elements, such as the awareness and acceptance process.'³⁷³

District Court of Groningen, Uganda

With respect to COC and Rainbow Nijmegen, documents have been submitted that make it apparent that the claimant attends the meetings. In respect of this, the court noted that attending such meetings and keeping in touch with homosexuals does not render her sexual orientation plausible.³⁷⁴

District Court of Middelburg, Jamaica

The respondent has rightly considered that the letter from J-Flag is not a new fact, since the content of the letter is from the claimant herself and therefore not from an objective source. The statements from her stated partner and a friend cannot be deemed new elements or findings either. As rightly considered by the respondent, what matters is whether the claimant has been able to make her stated orientation plausible by means of her own statements, which is not the case. That she has lesbian contacts in the Netherlands does not lead to another assessment now that she has not rendered her awareness process and self-acceptance process plausible in this way.³⁷⁵

District Court of Rotterdam, Iraq

With respect to the photographs and films submitted, the respondent additionally takes the accurate position that having sex with men

372. District Court of Zwolle 19 July 2017, 17/12422, appeal dismissed (Liberia).

373. District Court of Amsterdam 21 November 2016, 16/16710, appeal dismissed (Sierra Leone).

374. District Court of Groningen 17 July 2017, 17/4678, appeal dismissed (Uganda).

375. District Court of Middelburg 13 July 2017, ECLI:NL:RBDHA:2017:8102, appeal dismissed (Jamaica).

does not mean that the claimant is gay and that in principle it is up to the claimant himself to make statements that render a given sexual orientation convincing.³⁷⁶

District Court of Arnhem, Sierra Leone

The respondent has taken the right position on good grounds that the claimant's contacts with COC and other organisations and his knowledge about the rights of LGBTs in the Netherlands do not alter the fact that the claimant has to make statements about his orientation himself in a convincing way. The statements from COC and LGBT Asylum Support collaborators submitted by the claimant do not change this.³⁷⁷

Nevertheless, there are courts that do believe a homosexual orientation can be substantiated by means of a homosexual relationship.

District Court of Amsterdam, Sierra Leone

A man from Sierra Leone had a relationship with another man who had been granted asylum on the ground of his homosexual orientation. The District Court of Amsterdam held 'that a relationship statement and photographs as supporting evidence can serve to make the claimant's homosexual orientation plausible.' The statements of the two men and the photographs were consistent. If the State Secretary 'in spite of this has doubts as to whether this is an affective relationship, he has the means to examine this, for instance by hearing the persons concerned. (...) For the very reason that a relationship or having contacts is an objective way to support the orientation, it would have been the respondent's task to examine this before making a decision.'³⁷⁸

On appeal, the Council of State held, however: that by attaching decisive value to the statements of the alien's stated partner and the documents submitted in that context the court has not recognised that this information, although it can serve in support of the stated sexual orientation, does not alter the fact that the alien has to make his sexual orientation plausible (also) before the State Secretary by means of his statements. Therefore, there is no ground for the judgment that the State Secretary should have conducted some further examination into the alien's stated current relationship. The judgment of the District Court of Amsterdam is quashed.³⁷⁹

District Court of Amsterdam, Pakistan

In his subsequent application, a man from Pakistan submitted various statements, including statements from COC and Secret Garden. The State Secretary took the position that these were not new elements, as 'the court had already judged the credibility of the claimant's stated

376. District Court of Rotterdam 25 July 2017, NL17.2020, appeal dismissed (Iraq).

377. District Court of Arnhem 20 December 2017, NL17.12792, appeal dismissed (Sierra Leone).

378. District Court of Amsterdam 20 January 2017, ECLI:NL:RBAMS:2017:2672, appeal allowed (Sierra Leone). See also District Court of Haarlem, 8 June 2017, NL17.2344, appeal allowed (Iran), and District Court of Amsterdam 13 December 2017, NL17.5465, appeal allowed (Nigeria).

379. ABRvS (Council of State) 1 September 2017, ECLI:NL:RVS:2017:2376 (Sierra Leone).

sexual orientation and that consequently it has been established judicially that the claimant has not made it plausible that he is homosexual.' The District Court of Amsterdam ruled: 'Although these documents are not suddenly decisive, they do say something about the extent to which the claimant is part of the LGBT community in the Netherlands, his relationships with other men, and his awareness process and self-acceptance.'³⁸⁰

District Court of Rotterdam, Ghana

According to the court, the asylum seeker, with his statements about his relationship and the documents submitted, including a letter from his partner explaining how they had met and that they intend to get married, (...) has at least provided a beginning of evidence that he has had a long-term relationship with a man and that they had the intention of getting married to each other. The court does not agree with the State Secretary's statement in court that the letter and declaration of intent cannot lead to a different assessment of the credibility, because pursuant to established jurisprudence of the Council of State the State Secretary only needs to base his decision on the asylum seeker's own statements. This point of view does insufficient justice to the documents submitted by the alien in support of his relationship.³⁸¹

District Court of Haarlem, Gambia

Given the other statements made by the alien about his relationship, the visa procedure followed previously and their encounters in Gambia and the Netherlands, which are not contested by the State Secretary, the State Secretary has not been able to state without providing any further support that the relationship is incredible. Furthermore, the witness confirmed the relationship in court. Despite the contradictions with respect to the number of visits of the witness to Gambia, the State Secretary cannot arrive at the conclusion that the love relationship is incredible without providing any further support.³⁸²

District Court of Rotterdam, Iraq

In the decision yet to be renewed, the respondent has to take into account that the claimant has submitted written statements and photographs to support the fact that he is gay and that he is regarded as such by people in his environment. The respondent will also have to take into account the purport of the statement which his Dutch partner X made in court.³⁸³

District Court of Middelburg, Zambia

A Zambian woman based her subsequent application on her lesbian orientation. She had only recently found out that it is not a taboo in the Netherlands, and as a result she dared to tell her lawyer about it. On appeal, she submitted a certified statement from her Dutch partner in

380. District Court of Amsterdam 27 June 2017, appeal allowed, NL17.2598 (Pakistan). Next, the man received a negative decision, which was followed by District Court of Amsterdam 12 October 2017, NL17.7732, appeal dismissed.

381. District Court of Rotterdam 10 April 2017, 17/5132, appeal allowed (Ghana).

382. District Court of Haarlem 29 November 2017, NL17.739, appeal allowed (Gambia).

383. District Court of Rotterdam 14 June 2017, 16/29954, appeal allowed (Iraq).

which the latter stated she is her life partner and has a love relationship with her. Her partner has been known to the State Secretary for quite some time.

The State Secretary takes the view that legally speaking more value can be attached to a certified statement but that this statement still cannot have any decisive relevance. The court held: 'Although it is up to the claimant to make it plausible that she is a lesbian by means of her statement, the respondent should not have just taken it for granted, that all the claimant has submitted about her orientation, including the love relationship with a woman that has come about in the Netherlands, is incredible.'³⁸⁴

District Court of Haarlem, Gambia

After the sexual orientation of a man from Gambia was not believed in his first procedure, he submitted a letter in a subsequent procedure written by the asylum seeker with whom he had a homosexual relationship. In the State Secretary's opinion, however, the relationship was not a new fact. The letter is not from an objectively verifiable source, and there is nothing about the claimant's homosexuality in the letter. 'After all, the mere description of a stated homosexual relationship with the claimant cannot confirm the claimant's stated homosexuality. The letter does not provide any profound insight into the stated relationship and does not provide any support that there actually is a mutual, deep emotional bond between the partners which is also felt as such by both partners.' The court held that on the basis of the previous procedure it was established judicially that the claimant's homosexual orientation was not credible. 'However, this does not rule out that the claimant can still make his stated homosexual orientation plausible. Pursuant to established jurisprudence, the respondent in this assessment rightly sets great store by an alien's statements about his own experiences. Having a homosexual relationship, however, can also be a way to support the stated homosexual orientation. Therefore, it cannot be ruled out beforehand that the stated relationship with X detracts from the previous decision and the considerations this is based on.'³⁸⁵

384. District Court of Middelburg, 21 September 2017, NL17.3861, appeal allowed, unpublished (Zambia).

385. District Court of Haarlem 3 October 2017, NL17.8170, appeal allowed (Gambia). The court also commented that examining the plausibility was not about the depth of the relationship but about its authenticity. The respondent did not argue that the partners had made contradictory statements or that they know too little about each other, criteria used in assessing the veracity of relationships. The respondent could have mentioned in his interview that his partner X was also going through an asylum procedure.

District Court of Arnhem, Sierra Leone

The court held that the way in which the respondent has assessed the claimant's lesbian orientation for credibility was not compliant with the policy laid down in Working Guidelines 2015/9. Pursuant to this policy, having a lesbian relationship is an (independent) part of the assessment of the lesbian orientation. It also follows from the previously mentioned judgment of the Council of State of 10 May 2017 (ECLI:NL:RVS:2017:1256) that an alien's convincing statements or other aspects of the awareness and acceptance process, such as

having a lesbian relationship, can lead to the stated lesbian orientation as being considered credible despite the fact that the alien has not spoken sufficiently about her own experiences without there being any justification for this. In court, the respondent confirmed that it is possible that the awareness and acceptance process was not deemed credible in a previous procedure, but that the lesbian orientation *is* deemed credible in a later procedure due to new developments. By taking the position that the relationship is incredible because the lesbian orientation is incredible due to the claimant's insufficient statements about her awareness process, the respondent has chosen to ignore this. The respondent was wrong to not assess the credibility of the relationship in its own right and has not taken all elements submitted by the claimant into account when doing this.³⁸⁶

District Court of Middelburg, Pakistan

From the written statements and the statements of the witnesses at the sitting of the court, the court infers that the claimant has been active in the LGBT community in the Netherlands for a long time. Partly given the WI 2015/9 this is relevant for the assessment of the credibility of the claimant's sexual orientation. (...) The respondent will have to assess again, with observance of this judgment, whether the claimant's stated homosexual orientation can be deemed credible. In this assessment, the respondent also has to take the statements made by the witnesses into account. It should also be assessed which relevance is to be attached to the asylum permit granted to the claimant's former partner.³⁸⁷

District Court of Den Bosch, Gambia

The District Court of Den Bosch held that the statement of the psychologist and psychiatrist treating a woman from Gambia could not be brushed aside without any further motivation: 'Eventually, her sexual orientation came up after many specific questions by yours truly. The level of shame and fear was high. Initially, she did not want anything about this to be recorded in her file or spoken about with any third party.' The reaction of the District Court of Den Bosch to this statement was: 'This does not mean that the claimant's stated lesbian orientation is to be considered credible, but it does mean that the letters of those treating her need to be involved in the integral credibility assessment.'³⁸⁸

386. District Court of Arnhem 7 December 2017, NL17.12524, appeal allowed (Sierra Leone).

387. District Court of Middelburg 26 October 2016, 15/10869, appeal allowed (Pakistan). The NGOs Secret Garden, COC Amsterdam and COC Eindhoven attended the sitting of the court.

388. District Court of Den Bosch 29 January 2016, ECLI:NL:RBDHA:2016:1761, appeal allowed. Next, another negative decision followed, in which her lesbian orientation was not believed. See also ABRvS (Council of State) 5 October 2017, ECLI:NL:RVS:2017:2710 (Nigeria). Unlike the court, the Council of State held in this case that the State Secretary did not need to consider the statements plausible which the asylum seeker made to the GGZ (Mental Health Care institution) about the search she had undertaken with respect to her lesbian orientation.

3.10.6 CONCLUSION

In general, what is remarked about this type of documentary evidence in the examined files is that it is not objective and that the sexual orientation needs to be supported by means of the statements by the person concerned.

It is a good thing that with the ABC judgment the Court of Justice has ensured that pornographic material is no longer accepted as evidence for a stated sexual orientation, because admitting or accepting such evidence is a violation of human dignity, safeguarded in Article 1 of the Charter. Furthermore, it could stimulate other asylum seekers, and it could actually become the case that such evidence is expected from them.³⁸⁹ Yet, an exception may have to be made for pornographic material that already existed before there was an asylum application and that is submitted by the asylum seeker voluntarily and of her or his own accord.³⁹⁰ The prohibition on pornographic material is not to be explained so strictly that it also includes non-pornographic material. Photographs of parties, outings et cetera must be taken into account as well. In this context, it should be noted that in the opinion of the ACVZ (Advisory Committee on Aliens Affairs) the IND must use 'external credibility indicators' as much as possible to objectivate the assessment.³⁹¹

In addition, it would be more consistent with an integral credibility assessment to attach more value to statements by witnesses, in which their own observations are mentioned, for instance that the person concerned is active in an LGBTI organisation or that the witness has noticed that the asylum seeker and her girlfriend are inseparable.

Statements made by others than the partner are explicitly exclusive of expert statements, also called 'gay statements' (*homoverklaringen*), by interest groups or aid providers which on the basis of their experience could determine somebody's sexual orientation. However, this subject is not suitable for being determined by an expert, since sexual orientation or gender identity can only be established by the respective person herself or himself. In WI 2015/9, it says rightly, with reference to the Yogyakarta Principles, that medical or psychological tests will not be used.

On the other hand, it is obvious to suppose that especially someone who has a sexual or love relationship with the asylum seeker can speak with some authority about the sexual orientation of the person concerned. Tanja Ineke, the chairwoman of COC Netherlands, said about this in an interview: 'It seems logical, but so far it has not been logical to the IND.'³⁹²

Several judgments have appeared recently in which courts

389. CJEU 2 December 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, C-148/13, C-149/13 and C-150/13, ECLI:EU:C:2014:2406, paragraph 66.

390. See ICJ 2016, pp. 41-42. Here, the situation in which publication of the image material was the reason of the flight is mentioned as an example.

391. ACVZ 2016, p. 52.

392. *RTL Nieuws*, 26 June 2017, with reference to District Court of Rotterdam 14 June 2017, 16/29954, appeal allowed (Iraq).

attach more value to the statements of witnesses and partners, including partners whose sexual orientation was considered credible earlier on in an asylum procedure. There is also more attention for third-party (witness) statements. Unfortunately, the Council of State takes a fairly rigid view in this respect.

3.11 Late disclosure and credibility

In many cases, LGBTI asylum seekers do not tell immediately after they have arrived in their country of refuge that their sexual orientation or gender identity is the reason for their flight. They may have good reasons for this, originating from fear, shame or ignorance.³⁹³ In this paragraph, the files and case law studied are used to find an answer to the question of to what extent a disclosure in a later procedure has an effect on the assessment of the credibility of the sexual orientation or gender identity.

In twenty of the forty files that were examined, the sexual orientation or gender identity was mentioned for the first time in a subsequent application. In twelve of these twenty cases, the subsequent application was rejected; in eight cases the reason was incredibility of the sexual orientation. The other four asylum seekers were believed, but their narrative was not considered severe enough. In the eight other files, the decision on the subsequent application was positive. Among the people involved, there were three who were minors when they arrived in the Netherlands and who applied for asylum only later in a subsequent procedure on the ground of their sexual orientation. Two were trans women who filed a subsequent application. The credibility of their gender identity was not disputed.

Next, some examples are provided of files in which a late disclosure was involved and the reasons the applicants gave for this delay. To start with, here are some examples of asylum seekers whose sexual orientation was (eventually) believed.

John, Africa

In his third procedure, thirteen years after his arrival in the Netherlands, John said he was gay. In April 2015, Article 4:6 Awb was held against him, because he had stated that he had had homosexual feelings from a young age. His homosexuality was not considered a new fact and was therefore not believed. The decision was cancelled, however, under the influence of the judgment of the Council of State of 8 July 2015.

393. Jansen & Spijkerboer, 2012b.

He was interviewed additionally about the awareness process of his sexual orientation and the connection with religion, after which he was believed and he was granted a status.³⁹⁴

Pamela's case took a similar course. In her third procedure, it was for the first time that she disclosed she was a lesbian.

Pamela

New facts: You are homosexual. Is that correct? – Yes, it is. It has to do with the fact that I am a lesbian. But first, I just want to ask if no one will find out. I have concealed this all my life, and now I have to talk about it. (...)

Why haven't you spoken about this before? – I didn't want to speak about it this time either. I wanted to start a new procedure, and I went to another lawyer. He didn't see any reasons for an application. I have thought about this for a long time. I have had these feelings since I was a child; it has always been inside me. But in [country of origin] it is not accepted. If they find out, they will kill you. In our society, this does not exist publicly. After I had given it a long thought, I hinted at it to the lawyer. He said that the Netherlands offers people like me protection. Then I told him what I had experienced. The lawyer made an appointment with a special organisation for people like me.³⁹⁵

Haven't you talked about it before because you were afraid? – That's right. Now, I'm scared too, but I'm telling you anyhow. I have no other choice, now. Today is an important day for me, and I have to tell you everything I can.³⁹⁶

In the intention to reject, which appeared a week after this interview, it is held against Pamela that she had not said anything about lesbian feelings during her two previous procedures, not even in a summary way. One and a half years and an interview later, she was finally granted refugee status. This was probably mainly due to the relationship with her girlfriend.

Sometimes, a subsequent application is granted fairly easily, as in the cases of Robert and Charles:

Robert, Nigeria

Robert's file indicates that although he was aware of his homosexuality many years ago – and this was one of the reasons for him to leave Nigeria, he says – the IND does not hold it against him on the ground of Working Guidelines 2015/9 that he should have spoken about his homosexual orientation earlier.³⁹⁷

394. John Africa, additional interview, November 2015. In his country of origin, homosexuality is criminalised.

395. COC is meant.

396. Pamela, interview subsequent application, before WI 2015/9.

397. Robert Nigeria, November 2015.

Charles, Africa

In his third procedure, Charles is asked: *Why didn't you mention your homosexual orientation in the first procedure?* - It is not easy to talk about a subject like that. When I came here, I didn't know if it was accepted. In my country, it is a taboo, so I didn't dare.³⁹⁸

In a subsequent asylum procedure more than ten years after the first procedure, Elroy spoke about his sexual orientation for the first time.

Elroy, Africa

Since the age of twelve you have been convinced of your orientation. Why then is it a problem to share this information so many years later in a country like the Netherlands, where homosexuality is so accepted? - We don't have a culture that is similar to yours. What was first and foremost for me was contact with family. I had been alone for so long. Here, it should be easy, but in our culture, if the family knows, you will be cast out.³⁹⁹

As the file indicates, the IND regards it as remarkable that Elroy mentions his sexuality more than fifteen years after his previous asylum application. This long period somewhat detracts from the credibility of his stated sexuality. On the basis of the Council of State judgment of 8 July 2015, especially ground 69 ('Given the sensitive nature of questions about somebody's private sphere, and his sexuality in particular, the mere fact that this person, due to his reticence in disclosing intimate aspects of his life, did not indicate immediately that he is homosexual, does not warrant the conclusion that he is not credible'), it has been decided not to hold this against him.⁴⁰⁰

Some examples of subsequent applications that were rejected because the sexual orientation was not believed are provided below.

Thomas, Asia

In an introductory letter, Thomas' lawyer stated that Thomas filed a subsequent application on the ground of his sexual orientation. He had not spoken about this before, because this was not an asylum motive previously. Until his departure from the country of origin he had managed to conceal his sexual orientation, out of necessity. He could not be honest about his sexual orientation in all openness. In the Netherlands, he grew used to the openness concerning homosexuality, and now that the client has a relationship with a man, he understands he is out of the closet and he does not want to return to the closet in [country of origin] anymore.⁴⁰¹

398. Charles Africa, additional interview, November 2015. Two days after this interview, he was granted a status. Homosexuality is not criminalised in his country.

399. Elroy Africa, interview subsequent asylum application, May 2015.

400. Elroy Africa, November 2015. Elroy's sexual orientation was believed. His asylum application was rejected due to lack of severity. In his country of origin, homosexuality is criminalised.

401. Thomas Asia, lawyer's letter, October 2015.

Why didn't you mention your homosexuality in the first procedure?

- I am from an entirely different culture. In the culture of [country of origin], you don't talk about your feelings that easily. You are a little bit ashamed to tell somebody else that you are different from other men. It has to do with standards and values, my actual background. When I came here, I noticed that this society is open with respect to expressing your own feelings.

You only applied for asylum when you had been in the Netherlands for a couple of years. Why didn't you tell anything about your sexual orientation at that application? - Until that moment, I didn't have a friend or partner. I was a bit ashamed to speak about this openly. I wasn't ready for it yet at the time. Now, I feel comfortable to talk about it.

Is it easier now that you have a relationship? - Yes, that's right.

In which way did your relationship make it easier for you to talk about it? - Do you mean that beforehand I couldn't talk about it and now I can? What do you mean?

After some explanation. - My friend has helped me to talk about it. He stands beside me and supports me. This has changed. There is also a group of gays from [country of origin] in the Netherlands that meets every now and then.⁴⁰²

In the decision that follows, it says: 'To come to a proper assessment, the total picture of his statements needs to be considered. In this context, it is most certainly relevant that he has not spoken about his sexual orientation - an essential aspect of his identity - earlier. It should be noted that this fact (late disclosure) is not a supporting consideration in the rejection.'⁴⁰³

The court ruled: 'The respondent concluded that the claimant's homosexual orientation is considered not credible. The respondent considered that it is remarkable that the claimant did not speak about his homosexual orientation during his first procedure, especially because the claimant had been in the Netherlands for two years before he filed his first asylum application. In addition, the respondent has taken the position that the claimant did not speak convincingly about his process of awareness and self-acceptance, while this could have been expected from him.'⁴⁰⁴

402. Thomas Asia, interview subsequent application, December 2015.

403. Thomas Asia, decision, December 2015.

404. District Court of Zwolle 14 January 2016, NL15.271, appeal dismissed, unpublished.

Linda, Africa

After you had to hide your sexual orientation all your life, you came to the Netherlands five years ago. On the one hand, you indicated that after your arrival in the Netherlands you believed that everybody should

be able to do what he or she wants to do and that one should be who one is. On the other hand, you kept your sexual orientation hidden in the Netherlands for several years. Can you explain this? – I notice that it is true you have this freedom in the Netherlands, but I am from Africa and I am not used to dealing with this freedom openly. Initially, I didn't have these programmes that help me disclose my orientation. Only at Cocktail, I had the courage to deal with my own situation in the Netherlands. First, I was too scared, and I didn't trust anyone.

Since [month, year], you have dealt with your sexual orientation openly, and after that, in [month, year], you had a sitting in court in the framework of your residence in the Netherlands. Why didn't you indicate at the time, in any way whatsoever, that you were a lesbian? – I thought it was not the right moment. Although inside I was dealing with this at the time, I couldn't talk about it yet.⁴⁰⁵

In the intention to reject, it says: Although not of decisive relevance, some value has to be attached to the circumstance that only at her third application for residence the person concerned said she is a lesbian. After all, the person concerned states that in her country of origin she was already aware that she was a lesbian. Several times, she was caught red-handed while having sex with girls, and since 2003 she allegedly had a relationship with X. In the year when she came to the Netherlands, she was able again to enter into relationships and did not need to conceal her sexual orientation anymore for reasons of fear. (...) It cannot be understood that she has not spoken earlier about her sexual orientation or called upon her sexual orientation earlier as a reason for staying in the Netherlands. Nevertheless, she has been given the opportunity to provide insight into her process of awareness and self-acceptance in her personal words to support her stated orientation. However, the person concerned has not succeeded in doing this.⁴⁰⁶

William, Africa

William applied for asylum in the Netherlands in early 2000. Seven years later, he speaks for the first time about his homosexuality, in his second procedure. In his country of origin, nobody knows he is gay, including his family. He has kept everything concealed throughout his life, but he finds it difficult to continue living like this.

Why haven't you submitted or been able to submit this fact earlier? – First, I was ashamed to speak about it, and I was afraid. I couldn't talk about my feelings then, and I didn't know with whom I could talk about it.

In [...], you filed an asylum application. That was seven years ago. At your first application, you already knew you were homosexual and the

405. Linda Africa, subsequent interview, March 2016.

406. Linda Africa, intention to reject, March 2016.

problems this could cause upon your return to [country of origin]. You also knew it was relevant to speak about all your problems at the time of your asylum application. Why do you speak about this only now, after seven years? – The same answer. I really was so afraid, and I didn't dare, because I was ashamed. As I said before, due to your presence I couldn't say certain things either. (...) Everything had to be kept concealed all my life. When I arrived in the Netherlands, I could not speak about it just like that.⁴⁰⁷

In the intention to reject, it says: Now that the person concerned could and should have submitted his stated homosexual orientation at the time of his first procedure, on the basis of this it is already considered, since no argument has been put forward as to why he could not have been expected to do so, that the person concerned has not made his orientation credible.⁴⁰⁸

Caroline

If you have known since 2005 or 2006 that you are bisexual, why didn't you say so in early 2005 or when your appeal was heard in court, and why now, only one day before your deportation from the Netherlands? – My lawyer knew, and my lawyer also had the photographs of my current partner. Why my lawyer hasn't shared this information with the IND, I don't know.⁴⁰⁹

On the day of the subsequent interview, the State Secretary stated that the fact that Caroline submitted the information that she is bisexual only one day before her deportation, affected the credibility: 'Given the foregoing, your stated bisexuality is not believed, and it is not considered a legally relevant new fact either. You are to leave the Netherlands immediately.'⁴¹⁰

Julia, Africa

Although in general the person concerned has spoken consistently in the current procedure, it is finally observed that it is remarkable she accepted for herself that she is a lesbian only after the appeal she had lodged was dismissed. (...) The circumstance that the person concerned submitted a subsequent asylum application on the ground of her stated sexual orientation only after a stay in the Netherlands of more than seven years, further detracts from the credibility of her statements.⁴¹¹

Jurisprudence

Council of State, Uganda

In the opinion of the Council of State, the State Secretary when assessing the credibility of the stated sexual orientation can attribute

407. William Africa, subsequent interview.

408. William Africa, intention to reject, July 2015. In his country of origin, homosexuality is not criminalised.

409. Caroline, subsequent interview, June 2015.

410. Caroline, decision, June 2015.

411. Julia Africa, intention to reject, December 2016.

weight to the fact that the asylum seeker did not mention his sexual orientation at the first application. It is clear from the judgment of the Council of State of 8 July 2015 that the State Secretary is not allowed to consider a stated sexual orientation incredible for this reason alone and has to make an assessment that is tailored to the respective person. WI 2015/9 is consistent with this, as it follows that the State Secretary always conducts an integral credibility assessment, in which he can also include that an alien has not mentioned his sexual orientation earlier.⁴¹²

Council of State, Togo

More than eight years after her arrival in the Netherlands, a woman from Togo stated in a subsequent application that she was a lesbian. After a long process and a struggle and after contact with COC, she could finally be open about her sexual orientation. The District Court of Middelburg ruled that the State Secretary wrongly held it against her that she had not mentioned her sexual orientation earlier.⁴¹³ On appeal, however, the State Secretary states that he has not held this against the woman,⁴¹⁴ but he does believe that her statement that only in January 2015, after she had been living and had been having relationships in the Netherlands for several years, she was informed that homosexuality is not forbidden in the Netherlands, detracts from the credibility of her sexual orientation. Furthermore, she had waited for almost another year before she submitted her sexual orientation as an asylum motive in a subsequent application. In the opinion of the Council of State, the court has wrongly ignored this.⁴¹⁵

District Court of Haarlem, Afghanistan

In the case of an Afghan man who only in his fourth procedure disclosed he was gay, the District Court of Haarlem discussed the policy in the Aliens Circular (*Vreemdelingencirculaire*) Vc C1/4.6: 'If, at a second or subsequent asylum application, an alien indicates that he is homosexual and the IND considers this information credible, the IND does not hold it against the alien that he did not mention his homosexual orientation during a previous procedure.'

The court interprets this policy in a way that in a subsequent asylum application in which the asylum seeker states he is homosexual, the State Secretary first assesses the credibility of these statements. If the statements about the homosexual orientation are considered credible, the State Secretary will not hold it against the asylum seeker that he has not mentioned the fact that he is homosexual during a previous procedure. In the intention to reject, the State Secretary put first that the asylum seeker had already submitted three asylum applications in which he had not said anything about his homosexuality before he assessed the credibility of the homosexuality. According to the

412. ABRvS (Council of State) 5 July 2016, ECLI:NL:RVS:2016:1995 (Uganda), appeal (allowed) of the State Secretary v District Court of Haarlem 26 February 2016, ECLI:NL:RBDHA:2016:3080, followed by District Court of Haarlem 27 February 2017, appeal dismissed.

413. District Court of Middelburg, 21 July 2016, NL16.1543, appeal allowed.

414. Appeal State Secretary, 29 July 2016 (Togo).

415. ABRvS (Council of State) 27 October 2016, 201605777/1/V2, appeal of the State Secretary v District Court of Middelburg, 21 July 2016, NL16.1543 (Togo), appeal allowed.

State Secretary, this detracts from the credibility of the statement. In the opinion of the court, this way of assessment and motivation is in violation of the policy in paragraph C1/4.6 Vc. The court also held that the State Secretary's view that it makes a difference if an alien submits the fact that he is homosexual at the second asylum application or if he does so at the fourth asylum application and that the latter situation detracts from the credibility, was in no way supported in the policy.⁴¹⁶

Conclusion

On the basis of the jurisprudence discussed above, it can be concluded that in the circumstance that an asylum seeker mentions their sexual orientation only in a later procedure, it can be taken into account in the credibility assessment. However, a late disclosure is not to be put first in the credibility assessment. Neither shall this be the only reason for not believing the sexual orientation. Whether the sexual orientation is submitted in a second or a later procedure should not make any difference.

The files indicate that in some cases a late disclosure is no obstacle to considering an asylum seeker's sexual orientation credible. This is progress in comparison with the situation in 2011, which is a consequence of the COC lobby, the ABC judgments of the Court of Justice, and the abolition of the *ne bis in idem* principle. Still, there does not seem to be any sufficient understanding for the good reasons people may have to not put all their cards on the table immediately upon their arrival. Therefore, it would be better if the moment at which statements are made about the sexual orientation or gender identity for the first time is no longer relevant in the assessment.

3.12 Conclusion credibility

This study bears out that from a numerical perspective 63% of asylum applications from LGBTIs in the Netherlands are granted refugee status, but that 85% of the remaining rejections are due to incredibility of the sexual orientation. The large majority of the latter cases is about people from countries where homosexuality or same-sex sexual acts are criminalised. Additionally, it is remarkable that of LGBTI asylum seekers from countries where homosexuality or same-sex sexual acts have *not* been criminalised, the sexual orientation *is* believed in the large majority of cases. Their application is mostly rejected for lack of severity. The files and jurisprudence

416. District Court of Haarlem 14 March 2016, ECLI:NL:RBDHA:2016:3097, appeal allowed (Afghanistan). The Council of State confirmed this judgment after the State Secretary had lodged a notice of appeal. ABRvS (Council of State) 14 October 2016, 201602572/1.

analysed for this study indicate that various prejudices and stereotypical expectations still play a part in the assessment of asylum applications from LGBTIs.⁴¹⁷ Some examples:

- The biggest problem by far that came to light was the expectation that in a country with an LGBTI-hostile climate LGBTIs always go through a process of awareness and a process of self-acceptance. This is the main focus of the core of the policy, but it is also a stereotype.
- Someone who is out of the closet towards one person is also expected to be out toward others. This expectation is based on the stereotypical idea that coming out is a one-off event, but in reality every new contact requires that a new decision is taken.
- From a woman who has sex with multiple women it is expected that she will tell friends and aid providers about it. This is the stereotypical idea that somebody who engages in sex has a sexual identity about which this person will talk, and maybe also the stereotypical idea that women tell everybody everything.
- From an Afghan boy it is expected that he is active in the Dutch gay scene. This is an example of the stereotype that all gay boys and men will be sexually active if they are given the chance.
- In various files, there is astonishment that the person concerned still goes to church or mosque, whereas the respective religious teachings are strongly opposed to homosexuality. The idea that religion and homosexuality cannot go together is a stereotype.
- Kissing on the beach in Uganda in the evening with the boy you are in love with is too dangerous to be considered credible. The idea that people always behave sensibly and make sure they will not get into trouble, is also a stereotype.
- It is expected that there are deep feelings, whereas talking about sex can lead to disbelief. The idea that sexuality has more to do with identity than with acts plays a role here. This, too, is a stereotypical idea.
- The expectation that all LGBTIs are interested in the exact LHBTI-phobic provisions in criminal law is a stereotype.

417. Cf. Fleeing Homophobia report, pp. 57-61.

- Taking for granted that all LGBTIs are familiar with LGBTI interest groups and LGBTI places of entertainment in the country of origin and in the Netherlands is a stereotypical way of thinking.

Decisions sometimes seem to be based on what the IND-employees can personally imagine, how they think they themselves would behave in a certain situation.⁴¹⁸ This is imaginable, but at the same time it is rather problematic. In this context, the Advisory Committee on Aliens Affairs ACVZ warns against the human coping strategy, discarding events that do not fit in the frame of reference as incredible: 'The objectivity of the IND officer who is to decide about the narrative can be affected by this coping strategy, which insufficiently recognises the many differences between the IND officer and the asylum seeker. The decision-maker has to take into account the many underlying causes of gaps and contradictions in the narrative. For instance, these can pertain to the asylum seeker's ignorance due to his young age, wrong information from others, mental illness, low level of education, and cultural aspects,' according to the ACVZ.⁴¹⁹ Where LGBTI asylum seekers are concerned, the possibility that the decision-maker and the asylum seeker have different experiences with dealing with sexuality and sexual identities should also be taken into account.

In the policy formulated in Working Guidelines 2015/9, there is a strong focus on sexual identity and linear processes of sexuality development and clear-cut identity models. It is understandable that asylum authorities facing the not very appealing task of determining which asylum seeker is gay, lesbian or bisexual and which asylum seeker is not, and who are moreover charged by the highest national court to perform this task in a systematic way, it is inviting to use a fixed model with clear stages. Nevertheless, this is not a good idea, because it leads to too simplistic a view of things. Studies like those of Wekker and Katyal, for instance, indicate that in various parts of the world people consider sexuality as something you do rather than something you talk about. In the *Buro KleurKracht* report, it says that in Uganda questions like 'How did you feel when you discovered you were lesbian/gay?' are associated with sexual experiences rather than with identities.

On the basis of the current policy, it is expected that lesbian, gay and bisexual asylum seekers first go through a process of guilt and shame before they come to terms with their

418. At the conference 'Out & Proud? LGBTI asylum in Europe', organised by COC Netherlands in Amsterdam on 5-6 October 2017, Swedish lawyer Aino Gröndahl said that she had recently attended an interview in which the Swedish interviewer said: 'If I were a lesbian in Nigeria, I would certainly try to find out more about the exact criminal provisions that apply in that country for homosexual acts.'

419. ACVZ, 2016, p. 48.

sexual orientation. This is unacceptable. Strictly speaking, the question ‘What did it do to you, when you discovered you were gay/lesbian/bisexual?’ is an open-ended question, but the files clearly show that many asylum seekers do not understand this question. Of course, there are LGBTIs who are ashamed or feel unhappy because they are different from the rest, but it is stereotypical to expect negative emotions in all cases, so that people who state they have no difficulties with themselves, that Allah has created them this way,⁴²⁰ that they are glad to be gay, are not believed. The conclusion is therefore that the core of the policy is based on a stereotypical thought.⁴²¹

At the same time, LGBTI asylum seekers are often granted a positive decision. Sometimes, a person is not believed by one IND officer, while another does believe him. Sometimes, the IND officer has a ‘gut feeling’ that the asylum seeker’s narrative does not add up,⁴²² and sometimes the motivation of a rejection cannot be brought about, so that asylum is finally granted. While studying the files, I had the impression that most interviewers and decision-makers try to do the job in good faith. The administrative demand of motivating negative decisions often compels them to account for their task and substantiate their opinion. Sometimes, there are passages in internal documents like: ‘I find [...] very strange/improbable/incredible, but it *is* possible; it is not impossible.’ Such comments are indicative of an open mind among the IND officers involved. However, the open mind of some others could do with some further development.

So how *should* it be done?

How should the asylum seeker make her or his sexual orientation plausible? The best answer is that self-identification should be taken as a starting point: determining somebody’s sexual orientation or gender identity can only be done by the individual herself or himself. This is also consistent with the Yogyakarta Principles, the jurisprudence of the European Court of Human Rights,⁴²³ and the UNHCR Guidelines.

Since self-identification as the sole starting point apparently meets with objections among some people, some alternative (second-rate) suggestions are mentioned below. As long as the choice is not being made to assess sexual orientation through self-identification, these alternative (second-rate) suggestions can be used in order to restrict – to some degree – the problems associated with determining someone’s sexual identity by a government body.

420. Cf. Arib 2011.

421. As early as 20 April 2015, COC Netherlands wrote in a letter to the State Secretary for Security and Justice, Suggestions for a concrete LGBT policy in the fields of Security, Justice and Asylum: ‘Additionally, in many cases the sexual orientation is considered incredible, because the respective asylum seeker does not make any detailed statements about what the discovery of being gay, lesbian or bisexual did to her or him. Apparently, it is expected that people from an LGBT-phobic society have by definition gone through an extensive awareness process and an internal struggle to accept their orientation. This may occur, of course, but COC considers the idea that struggles like this are always the case a thought that is both stereotypical and incorrect.’

422. The role of intuition and the associated risks should be focused on continuously, according to the ACVZ. ACVZ 2016, p. 48; see also UNHCR 2013, pp. 75-77.

423. ECtHR 12 June 2003, *Van Kück v Germany*, 35968/97; ECtHR 11 July 2002, *Christine Goodwin v United Kingdom* [Grand Chamber], 28957/95.

- The Court of Justice and the Council of State have ruled that the civil servants of the IND are to determine the sexual orientation of asylum seekers. This impossible task currently leads to a struggle for all parties involved and to an assessment method which itself is based on a stereotype and which is therefore not acceptable and not workable. The idea that LGBTIs have gone through processes of awareness and self-acceptance and can speak about these in detail has to be abandoned. Naturally, there are asylum seekers who do meet this stereotype, but it can no longer apply as the core of this policy.
- Other stereotypes also need to be avoided to the utmost extent. 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. The asylum seeker's educational level and verbal ability need to be taken into account more. Additionally, more should be invested in countering stereotypes concerning sexual orientation and gender identity in the training of interviewers and decision-makers.
- Besides the asylum seeker's statement, other evidence should not be brushed aside so easily anymore. As long as self-identification is not regarded as a starting point, it is consistent with an integral credibility assessment not to attach 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.⁴²⁴ This is also in line with Article 4 of the European Qualification Directive.
- It is recommended that the internal guidelines of April 2012, in which restraint is advised in considering a stated homosexuality not credible, in first as well as in subsequent applications ('in cases of doubt, acceptance of the homosexual orientation is advised'), are included in the Working Guidelines and applied systematically.
- To restrict the subjectivity in assessing the credibility as much as possible, the Advisory Committee on Aliens Affairs ACVZ recommends a strict separation between the interviewer and the decision-maker. There are to be (at least) two persons operating independently from each other, the so-called *four-eye principle*. If an asylum seeker's sexual orientation

424. This is neither about expert statements nor about 'gay statements', but this exclusively concerns statements about what the person concerned has actually seen or experienced of and with the asylum seeker.

is not believed by a civil servant, the file should always be assessed by a second civil servant who is not informed of the assessment conducted by his or her colleague.⁴²⁵

Late disclosure

In the ABC judgment, the Court of Justice has drawn attention to the issue of asylum seekers who disclose their sexual orientation only after the decision. In Dutch practice, this judgment has clearly had a positive effect, as in the case of asylum seekers John and Pamela, mentioned in this report, who only disclosed their sexual orientation in a later procedure and who probably owe it to this judgment that the decision on their asylum application was positive. In comparison with 2011, asylum practice concerning disclosure in subsequent procedures has improved considerably in the sense that a sexual orientation submitted later is now assessed on its own merits and is no longer ignored because it would allegedly not entail a new fact.

However, it remains to be seen if understanding for the LGBTI asylum seeker's vulnerable position and the good reasons this asylum seeker can have not to disclose her or his sexual orientation or gender identity immediately, is now sufficiently safeguarded in Dutch policy. There are still cases in which it is held against an asylum seeker that they spoke about their sexual orientation (explicitly or implicitly) only in a later procedure and that this is put first in the credibility assessment. This is at odds with the ABC judgment.⁴²⁶ A late disclosure still plays a more important part in the procedure than it should. It would be better if the moment of disclosure is no longer relevant in the assessment.

425. ACVZ 2016, pp. 4 and 62.

426. It is also not in line with ABRvS (Council Of State) 14 October 2016, 201602572/1, either, the judgment in which the Council of State confirmed the judgment of District Court of Haarlem 14 March 2016, ECLI:NL:RBDHA:2016:3097, appeal allowed (Afghanistan).

4. SEVERITY

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4.1 Introduction

In this chapter, the next examination criterion will be discussed: severity. If the State Secretary considers the asylum seeker's narrative credible but not severe enough, the asylum application will still be rejected.⁴²⁷ This chapter is about people whose sexual orientation or gender identity is believed.

The following aspects are discussed successively: criminalisation, or the question whether homosexuality or same-sex sexual acts are criminalised in the country of origin and the consequences of this (4.2) and the so-called 'discretion', or the question as to how the asylum seeker wants to express their sexual orientation or gender identity if they would have to return to the country of origin (4.3). Section 4.4 is about the question if protection is available from the authorities in the country of origin. The subject of 'safe countries of origin' is discussed briefly. In determining the degree of severity country information plays a major part.

4.2 Criminalisation

In many countries, engaging in sex with somebody of the same sex is a criminal offence. The sentences prescribed often range from several years' imprisonment to life imprisonment. In several countries, the death penalty is imposed and executed.⁴²⁸ Apart from the risk that somebody with a non-heterosexual or non-cisgender identity runs of being arrested, these criminal provisions affect social life. There is always the chance of extortion, discrimination and abuse by fellow citizens, with the perpetrators going free.⁴²⁹

Following the XYZ judgment, the State Secretary has to investigate how provisions which criminalise homosexuality or same-sex sexual acts in the country of origin are enforced or how this plays out in practice. Are penalties actually imposed? What are the consequences of criminalisation for the social position of homosexuals?⁴³⁰

Most of the examined files are about people who fled countries in which homosexuality or same-sex sexual acts are criminalised: 28 of the 40 examined files concerned people from countries where same-sex sexual acts are criminalised. Apart from countries of origin for which the Netherlands devised a special policy with respect to LGBTIs,⁴³¹ the files bear

427. See also Working Guidelines 2014/10.

428. According to the annual ILGA report, the death penalty is imposed in eight (parts of) states on account of homosexual acts (Iran, Iraq, Nigeria, Saudi Arabia, Somalia, Sudan, and Yemen, and in IS-dominated areas in northern Iraq/northern Syria). In five other states (Afghanistan, Mauritania, Pakistan, Qatar and the United Arab Emirates) the death penalty can be imposed, although in practice - to any known extent - this does not happen (p. 40).

429. About the criminalisation of sexual orientation see also the Human Dignity Trust: <http://www.humandignitytrust.org/>.

430. ABRvS (Council of State) 18 December 2013, ECLI:NL:RVS:2013:2423 (X.). See paragraph 2.3 above.

431. See paragraph 2.3.3 for the special policy with respect to Iraq, Iran, Uganda, Afghanistan, Libya and Russia.

out that regarding several other ‘criminalising’ countries Dutch asylum practice leads to a similar result.⁴³²

It is apparent from this study that in most cases in which it is believed that the asylum seeker is gay, lesbian, bisexual or transgender *and* in which the person concerned is from a country where homosexuality or engaging in same-sex sexual acts is criminalised, refugee status is granted.⁴³³ A total of 247 LGBTI files were found concerning people from countries in which engaging in same-sex sexual acts is criminalised (see the table in paragraph 1.5). 140 of them were granted a status. 105 were rejected, including 29 for grounds not related to their asylum narrative. The applications of 75 people were rejected, because their stated sexual orientation was not believed. Of all files (28) examined in the context of this study from the 23 countries with a criminal provision which ended with a negative decision, there was only one in which the rejection was not based on incredibility of the sexual orientation but on a lack of severity. This was Lawrence from Angola. In his file, the criminalisation in Angola was doubted. The application of an asylum seeker from Guinea was initially rejected too, but eventually he was granted subsidiary protection (b-status, based on Article 3 ECHR). This means that if the obstacle of credibility has been overcome, in most cases a positive decision is given if the asylum seeker is originally from a country where homosexuality is criminalised. This also means that the ‘criminalisation’ element carries much weight. It should be noted that case law shows that besides Angola and Guinea some other countries are an exception to the foregoing. These exceptions are discussed later in this chapter.

Criminalised or not criminalised?

Sometimes, it is not so clear whether or not homosexuality or same-sex sexual acts are criminalised in the country of origin.

In the intention to reject in the case of Lawrence from Angola, it was stated that ‘it is clear from general country of origin information that although same-sex sexual acts are criminalised in Angola, there are no cases known that these are actually enforced by law.’⁴³⁴

In the decision that follows, however, it says: ‘To this end, it is first considered that the point of view that same-sex sexual acts are criminalised in Angola can no longer be upheld. The reports quoted by the person concerned himself reveal that according to the Ministry of Justice and Human Rights, sexual relationships between persons of the same sex are not criminalised in Angola. The judicial system uses

432. Asylum applications from LGBTs from several other African countries are treated like those from LGBTs from Uganda. This appears from frequently asked questions (FAQ) on refugee status: ‘The position of LGBTs from Jamaica, Gambia, Nigeria, Cameroon and Uganda in comparison with the general policy framework LGBT (in the framework of the Refugee Convention) leads to the conclusion that aliens who have made it plausible that they come from the said countries and that they are LGBT, easily qualify for a residence permit. This conclusion follows from the circumstance, among other things, that in these countries LGBT (activities) are criminalised, that there is a strong homophobic climate towards LGBTs, and that no restraint is expected from LGBTs in their expressions. There is still an individual examination, in the sense that on the basis of the statements from the (-) it is assessed how in conformity with Vc C2/3.2 he/she intends to express his/her LGBT orientation in the country of origin.’

433. The sexual orientation or gender identity of 17 of these 28 asylum seekers was believed, and 16 of these 17 were (eventually) granted a status.

434. Lawrence Angola, intention to reject, 2015.

435. Lawrence Angola, decision, 2016. The passage referred to is: US Department of State: Country Report on Human Rights Practices 2014 - Angola, 25 June 2015 [...] Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity 'According to the Ministry of Justice and Human Rights, the law does not criminalize sexual relationships between persons of the same sex.'

436. ILGA report 2017, pp. 81-82. In late February 2017, the Angolan parliament adopted the final concept of this act. While the ILGA report was being written, this process was still in progress and the former criminal code was still in place.

437. District Court of The Hague 16 June 2016, ECLI:NL:RBDHA:2016:660, appeal dismissed (Ghana).

438. District Court of Den Bosch 30 May 2016, 16/8668, appeal allowed (Ghana).

439. ILGA report 2017, pp. 89-90.

440. See WI 2014/22 and the State Secretary's letter to COC Netherlands, 10 June 2014.

441. Michael Africa, intention to reject, November 2015; Sam Asia, intention to reject, December 2015; District Court of Middelburg 5 July 2016, 16/12360 (Kenya); District Court of Arnhem 19 July 2016, 16/1981 (Guinea); District Court of Middelburg 10 August 2017, NL17.4733 (Belarus); District Court of The Hague 26 August 2016, NL16.1879 (Guinea). Also in the Terms of Reference for the country reports Somalia (20 April 2017), Russian Federation (10 January 2017) and Burundi (16 August 2016) the outdated term is used.

442. District Court of Middelburg, 13 November 2014, ECLI:NL:RBDHA:2014:17006, appeal allowed (Morocco).

a new criminal code in which the right to a homosexual relationship is recognised. Although sections of the criminal code of 1886 are regarded as discriminating with respect to homosexual activities, it is evident from the same report that these sections are no longer used by the judicial system.'⁴³⁵

According to the latest ILGA report, it is correct that a new criminal code is being prepared in Angola, in which voluntary sexual acts between people of the same sex are no longer criminalised.⁴³⁶ However, this act has not come into effect yet.

Also with respect to Ghana the criminalisation is not altogether clear to the State Secretary. In a judgment it says, for instance: 'His statement that homosexuality is criminalised in Ghana is not supported by public sources. The court follows the respondent who argues that – to the extent that it is unclear if the current legislation can be used to prosecute homosexuals – it has not become apparent that prosecution actually takes place in Ghana. This was not established by public sources, and the claimant has not made it plausible either.'⁴³⁷

However, in a judgment several weeks prior, the State Secretary recognises at the court sitting that same-sex sexual acts are criminalised in Ghana.⁴³⁸ According to the ILGA report, a prison sentence of up to three years is set for sex between men in Ghana.⁴³⁹

Actual prosecution

In the past the term 'active prosecution policy' was used in this regard, but on the recommendation of COC the State Secretary has replaced this term in the policy text by the less severe term 'actual prosecution', which is also more in line with the XYZ judgment.⁴⁴⁰ Nevertheless, the term 'active prosecution policy' still pops up frequently.⁴⁴¹ In this context, two countries should be looked at more closely: Morocco and Guinea.

There has been a legal battle about the question of whether or not Morocco actually enforces the criminalisation of same-sex sexual acts (a prison sentence of three years). According to various reports, gay men have been convicted in Morocco. The State Secretary, however, was of the opinion that the number of court cases and convictions, in proportion to the large population of Morocco, does not justify the conclusion that large groups of homosexuals are being prosecuted by the authorities. The District Court of Middelburg held that in Morocco persons are actually prosecuted and sentenced for their homosexual orientation.⁴⁴² The State Secretary lodged an appeal against this judgment and the Council of State

referred to its judgment of 18 December 2013: the State Secretary should investigate how provisions which criminalise homosexuality or same-sex sexual acts in the country of origin are applied in practice. 'By only relying on the number of court cases and convictions, the State Secretary does not provide any insight into what the chances are for a homosexual to become a subject of police and criminal investigations and what the consequences of such investigations are for the respective alien,' the Council of State ruled.⁴⁴³

The picture for Guinea is mixed. The application of an asylum seeker from Guinea was initially rejected because his narrative was not considered severe enough, however, eventually he was granted subsidiary protection (based on Article 3 ECHR: b-status). Other asylum seekers from Guinea were immediately granted refugee status. In one of these files, the risk is assessed by means of the country report evidencing that in Guinea LGBTs could be arrested and that they hardly ever disclose their orientation.⁴⁴⁴

In other cases, the State Secretary assesses the situation of LGBTs in Guinea differently. In two Guinean cases on 30 May 2016, the Council of State ruled that it had not become apparent that Guinean legislation, which criminalises same-sex sexual acts, is enforced in practice, nor that the criminalisation leads to the social position of homosexuals being intolerable. For this reason, the State Secretary could take the view that the persons concerned have not made it plausible that they have to fear persecution or a treatment in violation of Article 3 ECHR due to the penal provision, the Council of State held.⁴⁴⁵

In these judgements, the following passage from the country of origin report on Guinea was quoted: 'Like in many African countries, there are deep social, religious and cultural taboos in Guinea with respect to homosexuality. Homosexuality is often seen as a sickness or a defect. Consequently, LGBTs hardly ever disclose their orientation. The social pressure on men and women, both homosexuals and heterosexuals, to raise a family is strong.'⁴⁴⁶

In the country report, the organisation Afrique Arc-en-Ciel, which stands up for the interests of homosexuals, is also mentioned, and in Conakry there is said to be a small international gay community.

Next, on appeal another Guinean asylum seeker submitted

443. ABRvS (Council of State) 24 December 2015, ECLI:NL:RVS:2015:4062, State Secretary's appeal dismissed, judgment District Court of Middelburg 13 November 2014, ECLI:NL:RBDHA:2014:17006, confirmed. See also the Court of Utrecht 29 March 2016, 15/24875, appeal allowed (Morocco).

444. Ministry of Foreign Affairs, General Country Report Guinea, June 2014.

445. ABRvS (Council of State) 30 May 2016, ECLI:NL:RVS:2016:1450; ABRvS 30 May 2016, ECLI:NL:RVS:2016:1616.

446. Ministry of Foreign Affairs, General Country Report Guinea, June 2014, p. 52.

statements from the founder and president of Afrique Arc-en-Ciel, which made it clear that AAEC was not an interest group for homosexuals but an organisation that is dedicated to people infected with the HIV virus. Furthermore, the international gay community in Guinea was said to consist mainly of homosexuals who cannot find a job and therefore prostitute themselves. The District Court of Haarlem held that the State Secretary has not contested this information with motivations, and therefore the State Secretary should not have referred merely to the judgment of the Council of State and the country report.⁴⁴⁷

The minister lodged an appeal, and again the Council of State agreed with him: ‘Now that the alien has not supported his statement at all, the minister has rightly taken the view in the decision (...) that this statement does not offer any concrete clue to doubt the correctness or completeness of the country report. The court therefore wrongly considered that the minister could not have referred to the afore-mentioned judgment of 30 May 2016 and the country report included therein, without any further motivation.’⁴⁴⁸

In the previously discussed case, the new information about Afrique Arc-en-Ciel and the small gay community in Guinea was brushed aside, because it was based on a telephone call with the president and founder of the organisation. Yet, the information seems to be relevant as it causes doubt about the information in the country report on which the Council of State bases its judgement.

One of the two Guinean men from the judgments of the Council of State of 30 May 2016 discussed above submitted a subsequent application, providing information which showed that some homosexual men had recently been arrested in Guinea. The District Court of The Hague, however, held that the arrested individuals ‘are not homosexuals who would have been arrested merely on account of their homosexuality, but are transvestites who seduce men along the road or who prostitute themselves.’ The court held that there was no need for the State Secretary to conduct an investigation.⁴⁴⁹ After he had lost his appeal as well,⁴⁵⁰ the man lodged a complaint with the European Court of Human Rights.

From the judgment of the Court, it became clear that Amnesty International had also reported on the arrest of two gay men in Conakry, and according to a recent Canadian report,

447. District Court of Haarlem 7 February 2017, NL16.3055, appeal allowed (Guinea).

448. ABRvS (Council of State) 26 October 2017, ECLI:NL:RVS:2017:2917, State Secretary’s appeal allowed.

449. District Court of The Hague 26 August 2016, NL16.1879, appeal dismissed (Guinea).

450. ABRvS (Council of State) 9 November 2016, appeal dismissed.

members of sexual minorities in Guinea conceal their sexual orientation, among other things by leading a double life. Using the terminology previously scrapped, the Dutch authorities deduced from the available information that the Guinean authorities did not pursue an active prosecution policy and that the legislation is not systematically applied. The Court deemed Article 3 ECHR not violated and ruled that the complaint was inadmissible.⁴⁵¹

Jurisprudence other countries

The jurisprudence includes examples from other countries than Guinea and Angola, where the criminalisation was not considered sufficient for giving a positive decision on a credible LGBTIs application. These countries were Burundi, Ghana, Kenya and Liberia.⁴⁵²

District Court of Amsterdam, Burundi

'In Burundi, only one person, recently, has been convicted since the introduction of the respective legislation. This conviction did not concern a Burundian citizen but a foreigner and pertained to a fine and not to a prison sentence. Under these circumstances, one cannot speak of a well-founded fear of persecution on the basis of sexual orientation. The arrests of some gays and lesbians referred to by the claimant do not lead to this conclusion either. It is relevant that these are only a few cases, that the cause for the arrests has remained unclear and that the respective persons almost without any exception were released shortly after their arrest, without any further charges.'⁴⁵³

District Court of The Hague, Liberia

The State Secretary believed that a woman from Liberia was a lesbian, but he was of the opinion that she was not in danger of being persecuted. 'It is true that engaging in same-sex sexual acts is a crime in Liberia and that homosexual relationships are a taboo, but public sources reveal that this legislation is rarely applied and that there are no (social) incidents worth mentioning.'⁴⁵⁴

District Court of Middelburg, Kenya

In the case of a bisexual man, 'the respondent has taken the position that homosexuals in Kenya are not systematically persecuted. Although homosexuality is criminalised, actual criminal prosecution and actual conviction hardly or incidentally occur. Additionally, the respondent points out that interest groups, such as the National Gay and Lesbian Human Rights Commission, dedicate themselves actively to the interests of homosexuals. It has not become apparent that the work of these organisations is thwarted by the government or citizens, which, the respondent says, is indicative of a non-active prosecution policy by

451. ECtHR 21 December 2017, *M.B. v the Netherlands*, 63890/16.

452. In the Ghanaian LGBTI files examined for this research, the application was rejected because the sexual orientation was not believed. Consequently, the proceedings in these cases never reached the stage at which the severity was judged.

453. District Court of Amsterdam 1 September 2015, 14/13553, appeal dismissed, confirmed on appeal: ABRVS (Council of State) 17 November 2015, 201507496/1/V2 (Burundi). See also District Court of Utrecht 19 December 2017, NL1713409, appeal dismissed (Burundi); District Court of The Hague 16 June 2016, ECLI:NL:RBDHA:2016:660, appeal dismissed (Ghana); District Court of Den Bosch 30 May 2016, 16/8668, appeal allowed (Ghana).

454. District Court of The Hague 19 May 2017, 16/23589, appeal dismissed (Liberia).

the government. The court held that the claimant had not refuted this on appeal with other data.’⁴⁵⁵

Conclusion

The circumstance that same-sex sexual acts are criminalised in the country of origin is rightly considered highly relevant by the State Secretary in assessing LGBTI asylum cases. In the first place, this is reflected in the special Dutch policy in place for some of these countries. For a number of other countries there is a practice with a comparable outcome. Cases from another number of countries are examined individually to establish if the criminal provision is actually enforced. Apparently, the term ‘active prosecution’ is still being used, in breach of the policy text.

The examples above suggest that in Guinea, Kenya, Burundi and Liberia LGBTIs are actually prosecuted under criminal law. In principle it is irrelevant that the number of cases might be only small, as the Council of State has judged that the quantity of convictions is not the issue. Even if prosecution takes place rarely or every now and then, it is actual prosecution. In that case, the criminal provision is not a dead letter.

In 1981, the ECtHR needed less to declare the complaint in *Dudgeon versus the United Kingdom* allowed.⁴⁵⁶ The case was about the British provision under which same-sex sexual acts were criminalised at the time, and the European Commission commented that ‘the existence of the law will give rise to a degree of fear or restraint on the part of male homosexuals,’ whereas it was clear in the *Dudgeon* case that the number of convictions was so slight ‘that the law has in effect ceased to operate.’⁴⁵⁷ It is disappointing that the European Court of Human Rights applies double standards when it comes to human rights of EU citizens and human rights of asylum seekers.⁴⁵⁸

The question raised by the Council of State in the final judgment of 18 December 2013 – ‘What are the consequences of the criminal provision for the social position of LGBTIs in the country of origin?’ – is still very relevant today. This aspect is underrepresented in jurisprudence. In addition, it should be considered in this respect whether it is possible to express one’s sexual orientation or gender identity in the country of origin openly and whether protection by the authorities is available if the need arises. These subjects are discussed in the paragraphs below.

455. District Court of Middelburg 5 July 2016, 16/12360; 16/12362, appeal dismissed (Kenya), confirmed on appeal, ABRvS (Council of State) 17 August 2016, 201605287/1/V2.

456. ‘It cannot be said that the law in question is a dead letter (...). Although no proceedings seem to have been brought in recent years with regard to such acts (...), there is no stated policy on the part of the authorities not to enforce the law in this respect.’ (*Dudgeon*, paragraph 41).

457. European Commission’s report in *Dudgeon*, ECtHR 22 October 1981, *Dudgeon v United Kingdom*, 7525/76, borrowed from ICJ 2016, p. 147. Cf. also UNHCR, *Guidelines No. 9*, paragraph 27: ‘Even if irregularly, rarely or never enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution.’

458. See further Spijkerboer 2017a and ICJ 2014.

4.3 In the closet

This paragraph is about how so-called ‘discretion’ or ‘restraint’ in the expression of sexual orientation or gender identity has been dealt with in Dutch asylum practice since the XYZ judgment. To put it more plainly: are LGBTIs no longer sent back into the closet?

In the XYZ judgment, the Court held that ‘discretion’ or restraint should not play a part, and subsequently the Council of State came up with its own complicated interpretation, in which two ‘discretion’ variants can be distinguished: a normative variant (Get (back) into the closet!) and a factual variant (Stay in the closet!).⁴⁵⁹ As evidenced by the policy, the State Secretary now presumes that the immediate circle of the person concerned is or could become aware of the sexual orientation or gender identity. In the latter case, the question is: what will happen if the environment finds out? At the same time, however, the State Secretary inquires about the way of expressing the identity in the past, present and future.⁴⁶⁰ Is the person concerned ‘out’, or are they still in the closet? The answer to this question on expression is sometimes used as an additional credibility examination.

In the file of Robert from Nigeria, the examination is summarised:

- a. Interview on the basis of 2015/9. He told the interviewer a lot of his own account.
- b. He cannot be expected to exercise restraint in expressing his sexual orientation if he returns to Nigeria.
- c. Given the legislation in Nigeria, it is likely that the person concerned will be in trouble with the Nigerian authorities if he does not exercise restraint in expressing his sexual orientation upon return.
- d. It is likely that the person concerned will express his sexual orientation in all openness now that he is also doing so in the Netherlands.⁴⁶¹

459. See also paragraph 2.3.2 of this report; WBV 2014/22; Jansen 2015.

460. Spijkerboer indicated that the Dutch word that is used for ‘expression’ (*invulling*) is so unclear that it is hard to establish what this is all about, note Spijkerboer to ABRvS (Council of State), 27 December 2016, ECLI:NL:RVS:2016:3504.

461. Robert Nigeria, November 2015, after the interview in the subsequent application, he was granted refugee status.

4.3.1 EXPRESSING SEXUAL ORIENTATION OR GENDER IDENTITY

Some examples are provided below of people giving an affirmative answer to the question of whether they wish to express their sexual orientation or gender identity upon their return or in the Netherlands.

Ronald, Uganda

Maybe it is a strange question, but if you have to return to [country of origin], how will you express your sexual orientation?

- I can't express it, and I won't consider going back. (...)

Do you express your bisexuality in any other way, apart from this boy X? - In the Netherlands, I can be open. If someone asks me about my sexual orientation, I can just tell him. It has already happened at the reception centre.⁴⁶²

Pamela

Do people in your country of origin know that you are homosexual?
- No, and I don't want anyone to know.

What are you afraid of on your return? - I will be killed. I'm one hundred per cent certain.

In the Netherlands, you keep your sexual orientation concealed. Why couldn't you do that in [country of origin]? - It's impossible. I couldn't be outside with a friend. I wouldn't be able to go anywhere. In [country of origin], a woman has to stay inside and do her household chores. (...)

Did you have any problems on account of your sexual orientation in the past? - No, because I have always kept it hidden. (...)

Take the case that you had to return to your country of origin. How would you express your sexual orientation? - I wouldn't. I would have to hide it.

And if you could express your sexual orientation? - Then I would be very happy. I could live the way I want.⁴⁶³

One and a half years later:

You have indicated that upon your return you will exercise restraint in expressing your sexual orientation. How will you express it? - I can't conceal my sexual orientation anymore.⁴⁶⁴

Matthew, South Caucasus

If you had to return, how would you express your bisexuality?

- I wouldn't show it at all. I would return to the closet. That's the whole problem, actually. I would have to hide it, and that's exactly what I don't want to do. I want to be able to be myself.

You have just stated that you do not show your orientation in the Netherlands at all costs. In what sense is your country of origin different in this respect? - Here you are allowed to have a relationship. Here you can give someone a cuddle. I am allowed to feel love for somebody of the same sex. (...)

462. Ronald Africa, interview, March 2015. In July 2015, he was interviewed additionally, and in October 2015 he was granted a status.

463. Pamela, additional interview, 2016. After this interview, she was believed, and one month later (2016) she was granted a status.

464. Matthew South Caucasus, subsequent interview, September 2015. After this subsequent interview, Matthew was granted a status. In his country of origin, homosexuality is not criminalised.

*What are the differences between your country of origin and the Netherlands? – In my country of origin, I would never dare to come out of the closet in the way that I am out here. I think I would feel depressed and would contemplate suicide again. I don't even want to think about this.*⁴⁶⁵

As the file indicates, the IND also thinks it is almost impossible to avoid that he will encounter problems in his country of origin, now that he clearly indicates he does not want to conceal his orientation and wants to be open about it.

Mabel, Latin America

*You got into a lot of trouble by telling people you were a lesbian. Later on, when you got another job, you decided to inform your boss. Why did you decide over and over to inform people that you are a lesbian? If something got me into trouble, I would rather conceal it. – I told them because I wanted to remain true to myself. Maybe I was stubborn in doing so, but to me it seemed to be the right thing to do at that moment. There was another reason for telling this. Very often, if I got to know someone – a colleague at work, a friendship – things went well for a while. Until they found out in a roundabout way that I am a lesbian. Then it always went wrong. To prevent this from happening, that after you have known somebody for some time the relationship would deteriorate because of this, I thought it was better to be honest from the beginning and say: 'This is who I am.'*⁴⁶⁶

As the file indicates, the IND assumes that upon her return Mabel will express her orientation in the same way as she did before she left her country. Then, too, she had not exercised any restraint, and her environment knew about her orientation. This resulted in harassment, and this may happen again if she returns.⁴⁶⁷

John, Africa

*If you had to go back, would you give expression to your homosexuality in the same way as you are doing here in the Netherlands? – I am not going back into hiding. I would rather die. I want to be able to be myself. I can't conceal it.*⁴⁶⁸ (...)

*Do you fear the future? – Here, I kiss others in the street, and we walk hand in hand. You can't do this where I come from. It's too dangerous. If you are fortunate enough, you will go to jail. Otherwise you will lose your life.*⁴⁶⁹

Peter, Iran

As the file indicates, the IND believes Peter is gay and also that he was caught at a party. This makes it likely that the authorities have him in

465. Matthew South Caucasus, subsequent interview, September 2015. After this third, and first independent, application, Matthew was granted a status. In his country of origin, homosexuality is not criminalised.

466. Mabel Latin America, interview, August 2015. In her country, homosexuality is not criminalised.

467. Mabel Latin America, March 2016. She was granted subsidiary protection (based on Article 3 ECHR: b-status). In her country, homosexuality is not criminalised.

468. John Africa, interview, June 2014.

469. John Africa, additional interview, November 2015. One month later, John was granted refugee status.

their sights. Peter's behaviour is not low-profile, and we do not expect him to exercise restraint upon return. This is why he is considered a refugee.⁴⁷⁰

Valerie, trans woman

As Valerie's file indicates, the IND thinks it is plausible that she was discriminated against by the authorities when she was looking for a job and a home. In addition, she was discriminated against by citizens in her wish to dress and behave like a woman. It is likely that she would do this again if she had to return to her country of origin. This also makes it likely that her environment is aware of her sexual orientation. Since this pertains to a longer period and multiple violent events, it is sufficiently clear that the life she wants to lead has become intolerable for her in her country of origin.⁴⁷¹

Jeremy, Africa

As the file indicates, here in the Netherlands, he has a relationship with another man in all openness. If he wants to express his orientation in his country of origin in the same way as he does in the Netherlands, this will lead to problems, according to the IND, given what is known about that country. It will not be accepted. This means that he meets the conditions described in Vc C2/3.2. Next, he was granted refugee status.⁴⁷²

Albert, eastern Europe

As the file indicates, Albert has always concealed his homosexuality but he would like to express it in the future. No restraint can be expected from him. According to the IND, the question is now what problems he might face if his homosexuality does become known. In the past, he had various unpleasant experiences when people, primarily people he did not know, found out he was gay. Most of these incidents were considered credible. As he possibly already experienced problems on account of his orientation in the past, despite the fact that he kept it concealed, it cannot be ruled out that this will happen again in the future, and possibly more severely. Therefore, he was granted a status some months after his interview.⁴⁷³

Sometimes, somebody does not yet really know how they will express their orientation:

Adam, eastern Europe

If you had to return to your country of origin, how would you express your bisexuality? – In my country, I would never disclose my sexual orientation. (...)

Several people know you are bisexual. What do you mean when you

470. Peter Iran, February 2016. Two days after his interview, Peter was granted a status.

471. Valerie, October 2015. Next, Valerie was granted a status.

472. Jeremy Africa, February 2016.

473. Albert eastern Europe, February 2017. In his country, homosexuality is not criminalised.

say that you would not disclose your sexual orientation in [country of origin]? - Besides extremist groups, there are many people in [country of origin] who are unfavourably disposed towards people with a different sexual orientation. That's why I'm not really going to do this. They can react unpleasantly when they notice that somebody behaves differently. (...)

Again: if you had to return, how would you express your sexual orientation? - Of course, it would be safest to stay at home and not to have any contacts, but this would be very difficult. I don't know how I would express my sexual orientation.⁴⁷⁴

Comment

All people in the examples above were granted refugee status, except for Adam. The State Secretary was of the opinion that Adam could have sought protection from the authorities. The other nine people had expressed their sexual orientation or gender identity in the country of origin or in the Netherlands or intended to do so. They cannot be expected to conceal their orientation or identity in the future, and on the basis of the policy it is to be assumed that the environment in the country of origin will find out, with all its consequences. This is why the outcome of their application was positive.

4.3.2 NOT EXPRESSING SEXUAL ORIENTATION

In the next few examples, the question of whether people wanted to express their sexual orientation or gender identity openly was answered negatively. In this context, the question of 'What will happen if they find out?' was not asked or answered.

Sam, Asia

Sam from Asia had various secret homosexual relationships in Europe, and this was not known in his country of origin. He received an intention to reject in which it said: 'In conformity with Dutch policy it is not expected that the person concerned will keep his homosexual orientation concealed. In assessing the current question, it is relevant in this context if it is possible for him to give expression to his homosexual orientation in a meaningful way. (...) The person concerned has stated that he had not experienced any problems in his country of origin on account of his sexual orientation now that he has not disclosed it. (...) We emphasise that it cannot be expected from the person concerned that he exercises (any) restraint regarding his orientation. However, he stated that he does not want to disclose his sexual orientation in order to prevent his family from being insulted or from experiencing problems in other ways. Also in Europe, he kept

474. Adam eastern Europe, interview, November 2015. In his country, homosexuality is not criminalised.

his relationships hidden from the outside world so as not to run the risk that his family would find out about his homosexual orientation. (...) Therefore, it is concluded that for now, whether his family or others (countrymen in the country of origin or elsewhere) will find out about his sexual orientation, is qualified as an uncertain future event. Given the foregoing, the fear of the person concerned vis-à-vis his homosexuality is not considered severe enough to lead to granting a permit.’⁴⁷⁵

In the ‘view’, it is commented that actually it is said that he should return to the closet, while this is contrary to the policy. He has not said that he does not want to disclose his sexual orientation. And even if he *had*, it is clear from the context that this is not a matter of free will. He would be forced to hide his orientation, which is exactly what he cannot be expected to do, so the policy pertains. If keeping his sexual orientation concealed had been his own choice, he would not have fled. Meanwhile, he has also entered into a relationship with a gay asylum seeker he met at a reception centre. For the time being, they do not disclose their relationship, but they do express it in a way which, given the risk of discovery, would be unthinkable in his country of origin.⁴⁷⁶

Rose, Asia

Rose stated that she had been very careful for many years, but that her sexual orientation was discovered all the same, after which she fled to the Netherlands. The State Secretary believed she was a lesbian and also that she had had several relationships with women in her country of origin, but not that this was discovered. Instead of answering the question of what would happen if her sexual orientation were discovered, it says in the intention to reject: ‘that discrimination in [country of origin] against homosexuals can only come about after this has been discovered. In the current case, it has not been discovered that the person concerned is a lesbian and therefore it is not considered likely that there is sufficient fear of persecution. (...) It has not become apparent that the person concerned has expressed or will express herself openly and explicitly in a way that she would draw negative attention to herself.’⁴⁷⁷

In the decision that follows, it was stated: ‘that it has appeared from her statements that she always exercised restraint in her country of origin with respect to her orientation and that she never expressed herself in a way that she has drawn the negative attention of her environment. (...) It has appeared explicitly from her narrative that she has always exercised restraint and discretion with respect to her orientation and that she has always concealed her orientation. Therefore, no expectations are imposed on the person concerned in regard to how she should deal with her orientation according to the IND.’⁴⁷⁸

475. Sam Asia, intention to reject, December 2015.

476. Sam Asia, ‘view’ (reaction to intention to reject) January 2016. Soon after this, Sam was given a positive decision.

477. Rose Asia, intention to reject, April 2017. Rose is highly educated. The researcher could inspect part of her file via COC Netherlands.

478. Rose Asia, intention to reject, June 2017. In her country of origin, homosexuality is criminalised.

Whereas in many cases statements that the lesbian, gay or bisexual asylum seeker was caught red-handed are not believed, it also occurs that the statement that the asylum seeker was caught *is* believed, rendering the question of ‘What will happen if they find out?’ no longer relevant. After all, the environment knows and has not reacted with persecution. This happened in the case of Lee, for instance.

Lee, Africa

He received a decision in which it said: *The fact that homosexuality is a taboo and that homosexuals in [country of origin] cannot experience their sexual orientation openly is, however unpleasant for the person concerned, not sufficiently severe to lead to granting a status. (...) He may be considered sufficiently able to continue his life in [country of origin] as a homosexual like he has done before, as he himself has stated.*⁴⁷⁹

On appeal, the District Court of Arnhem held with respect to the risk of treatment in violation of 3 ECHR: that the State Secretary has motivated insufficiently that it can be inferred from his statements that the families have tolerated the homosexual relationship and that he has been able to express his homosexuality openly. (...) Additionally, the court considers it insufficiently motivated that from the circumstance that the community had a suspicion of the relationship it can be inferred that he could openly express his homosexuality without experiencing any problems. The State Secretary has insufficiently motivated why Lee’s statement that he has not had any problems because they have kept their relationship concealed and have therefore never been caught by the community, is not followed.⁴⁸⁰

In other words: after Lee and his partner were caught red-handed by their families, they were still allowed to live together, and this leads the State Secretary to assume that their homosexual relationship was tolerated by the environment without too many problems. Lee stated, however, that the relationship was not tolerated, but that it was continued in secret. He could not express his sexual orientation openly in his country of origin for fear of the consequences.⁴⁸¹

479. Lee Africa, decision, January 2016.

480. District Court of Arnhem, 19 July 2016, 16/1981, appeal allowed (Guinea). Followed by ABRvS (Council of State) 23 March 2017, ECLI:NL:RVS:2017:788.

481. Lee won both his appeal to the court and to the Council of State. Eventually, he was granted asylum.

Sophie, South Caucasus

Did you openly make yourself known as a lesbian in [country of origin]?
- I didn’t hide my orientation, but I didn’t just tell everybody either. If a man approached me, I just said I like women.

How did these men react? - They remained quiet. Sometimes it scared them off and they left.

*You say that you are not accepted in society because of your orientation. Why then do you dare to tell men you are a lesbian? – I didn't tell them initially, but sometimes they didn't take no for an answer and kept pushing. Then I had to say that I felt attracted to women. I said it to get rid of them.*⁴⁸²

Six years later: (...) I had concealed the fact that I was a lesbian altogether. When I was harassed at work, I told them. So I admitted it. I was laughed at.

*Would you give expression to your homosexuality in the same way as you do here in the Netherlands? – It's just impossible over there. It is unthinkable there that you are free to do as you please. I would have to live in fear again.*⁴⁸³

Anthony, Africa

How would you like to give expression to your homosexuality in the Netherlands? – I am going to tell people that I like doing it.

If you had to return to your country of origin, how would you express your homosexuality? – I am going to beg you to find me a place to stay. I can't go back to Africa anymore.

If you had to go back, would you give expression to your homosexuality in the same way as you do here in the Netherlands? – No, I wouldn't.

*What is the difference? – I can't tell them, because it's a secret over there.*⁴⁸⁴

In the decision that follows, it says: Also the statement about how he would like to express his stated homosexuality in the future does not show in the least any inwardly sincere homosexual conviction. (...) In this context, it is also commented that the person concerned makes (...) scanty and strange statements when he is asked how he would like to express his stated orientation in the future.⁴⁸⁵

Anthony's answers to the questions about expression are used as an argument for not believing his sexual orientation. His answer 'I am going to tell people that I like doing it' is apparently not consistent with the frame of reference of the interviewers and decision-makers. Something similar happened in the following case.

Alex, Asia

What if you have to go back? – Then I would rather commit suicide.

482. Sophie South Caucasus, interview in her first procedure. In her country, homosexuality is not criminalised.

483. Sophie South Caucasus, subsequent interview, second procedure, six years later.

484. Anthony Africa, interview, January 2016.

485. Anthony Africa, decision, February 2016. As he was not believed, he was rejected. Anthony is illiterate.

*What makes you so steadfast? You have been able to live in [country of origin] as a homosexual for many years. Without any problems, because you led a secret life. – I have lived here for so long. Here, I don't get any comments. I feel safe, here. That's why I don't want to go back to my country. There, you can't be like I am.*⁴⁸⁶

Bridget, trans woman

*Bridget was asked: Let's take the case that you have completed the transition from man to woman. Would it be possible for you in your country of origin to live safely as a woman?*⁴⁸⁷

This question implies that she will manage to keep her transgender identity concealed after her transition. It should be noted that the question as to what extent she wants to make the transition from man to woman in the first place was not discussed in the interview.

Angela

In her country of origin, trans woman Angela had undergone a gender reassignment operation, and she had also obtained a passport in her name as a woman.

Does your employer in [country of origin] or do your colleagues know that you are transgender? – No, they don't.

Why haven't you told them? – I haven't done that. With us, transgenders are treated differently. I am afraid of the talking and also of the abuse. They may see me as a prostitute. (...) A few years ago, a transgender activist was murdered, and this is why I don't want to come out of the closet. Transgenders who work on the streets are known to be abused.

The State Secretary is of the opinion that she does not have to fear persecution. The court, however, held: 'The circumstance that the transition into a woman has been completed and that she has been able to live in [country of origin] as a woman without anyone knowing that she is transgender, does not say anything about the possible risk she runs upon her return if it does become known that she is transgender. She cannot be expected to exercise continuous restraint upon her return in a way that her transgender identity will always remain a secret.'⁴⁸⁸

Next, the State Secretary again gives a negative decision, in which he states: 'The person concerned has stated that nobody in [country of origin], except some very close friends, know about the fact that she has changed her gender. The person concerned has also stated that she does not want this to be disclosed. Nowadays, the person concerned lives her life as a woman and has the appearance of a

486. Alex Asia, additional interview, September 2015. Alex was rejected too, because it was not believed he was homosexual.

487. Bridget, additional interview, March 2016. Two weeks later, she was granted a status.

488. District Court of Amsterdam 15 March 2017, 16/24662, appeal allowed.

woman. Furthermore, the person concerned has stated that she has not experienced any problems in [country of origin] with respect to her transgender identity.’⁴⁸⁹

Comment

The various ‘discretion’ variants were passed in review above. Both Sam and Rose were in fact returned to the closet. Initially, Sam’s application was rejected, but because it was explained in the ‘view’ that he did not conceal his sexual orientation out of his own free will, a permit could not be withheld. Rose’s application was rejected on the ground of a factual form of ‘discretion’ too. Her procedure is still in progress. In the cases of Sophie and Lee, the State Secretary was of the opinion they could go back to their country of origin because their environment already knew about the sexual orientation and had apparently not proceeded to persecution.

Alex and Anthony’s claims that they were gay were not believed. The way in which Anthony wanted to express his sexual orientation contributed to this disbelief: the answer of ‘I like doing it’ was not sufficient, for it was not considered an ‘inwardly sincere homosexual conviction’. In the case of Angela, the question needs to be answered of what will happen if the environment in her country of origin finds out that Angela was born a man. After all, she cannot be expected to conceal this for the rest of her life.

4.3.3 JURISPRUDENCE

Council of State, Morocco

In a case of a Moroccan man, the District Court of Rotterdam held that it appeared from the additional interview that the man will behave like homosexuals behave on average in Morocco, that he has not dressed obtrusively in the Netherlands either, and that he does not intend to manifest himself as an activist for the emancipation of homosexuals in Morocco. The State Secretary rightly states that the man will not need to exercise any restraint for this intended behaviour.⁴⁹⁰

On appeal, this man argues that he does not want to live a secret life anymore like he did in Morocco, where risk of persecution can only be avoided by returning to the closet. The man wins the appeal.⁴⁹¹ The Council of State refers to the judgment of the same day in another Moroccan case, in which it rules, in addition to an extensive explanation of the examination requirement with respect to criminalisation: ‘In this assessment, the State Secretary has to leave out of consideration whether an alien can avoid persecution by exercising restraint.’⁴⁹²

489. Angela, decision, May 2017.

490. District Court of Rotterdam 22 December 2014, 14/20064, appeal dismissed (Morocco).

491. ABRvS (Council of State) 24 December 2015, 201500470/1/V2, appeal District Court of Rotterdam 22 December 2014, 14/20064 allowed.

492. ABRvS (Council of State) 24 December 2015, ECLI:NL:RVS:2015:4062, State Secretary’s appeal dismissed, judgment District Court of Middelburg, 13 November 2014, ECLI:NL:RBDHA:2014:17006 confirmed.

District Court of Utrecht, Morocco

In another Moroccan case, the court held that by referring to the information from the International Lesbian, Gay, Bisexual, Trans and Intersex Association, which bears out that homosexuality in Morocco is only tolerated on the condition that ‘practitioners don’t flaunt their difference,’ the State Secretary has implicitly taken it for granted that it is possible for homosexuals in Morocco to avoid persecution by exercising restraint with respect to the expression of their sexual orientation. This is in violation of the policy included in paragraph C2/3.2.⁴⁹³

The following is another example in which the State Secretary rejects an application on the ground of a factual ‘discretion’ variant.

District Court of Amsterdam, Jordan

A homosexual man led a double life in Jordan, where homosexuality is not criminalised. He states that he does not have the possibility to be himself in the sense of expressing his orientation openly. The State Secretary reacts in the following way: ‘In the first place, it does not appear from the statements of the person concerned that his way of expressing himself here, in the Netherlands, is different from how he expressed himself in his country of origin at the time. Additionally, the person concerned was asked literally in the interview of the subsequent application if he wishes to give expression to his homosexual feelings upon his return in Jordan. The person concerned gives an evasive answer by stating that he has given up his work, his studies, his car and his family, that he cannot live like this, and that he has contemplated suicide multiple times.’ He also stated that he would love to live together with his boyfriend, but that this is impossible in Jordan.⁴⁹⁴

The provisional judge held that the man had been able to manage in Jordan society, as well as socially. ‘Essentially, the applicant wants to display his sexual orientation in social life more freely in a way that is common in the Netherlands for instance. The judge appreciates this wish, but a wish like this does not mean that the applicant runs a real risk of a treatment in violation of Article 3 of the ECHR upon his return to Jordan.’ If he should get into trouble, he can turn to the authorities for protection.⁴⁹⁵ The man lodged an appeal, and the Council of State ruled in his favour, referring to its final judgment of 18 December 2013.⁴⁹⁶

District Court of Rotterdam, Guinea

In the appeal of a man from Guinea, the court stated that in his examination the State Secretary had not included the question if the man, in the case that his direct circle would know about his homosexual

493. District Court of Utrecht 29 March 2016, 14/24875, appeal allowed (Morocco).

494. Jordan, decision 30 April 2015.

495. Provisional judge District Court of Amsterdam, 29 May 2015, 15/9003, 15/9004, appeal dismissed.

496. ABRvS (Council of State) 12 August 2015, 201504495/1/V2.

orientation, can have a relationship in Guinea in a similar way as a heterosexual man can. Furthermore, it is apparent from country reports that homosexuals in Guinea do not disclose their orientation. The State Secretary has not examined what the exact consequences are and to what extent this is relevant for this asylum seeker's situation and his right to enter into relationships, a right that can be considered a fundamental human right. The appeal is granted.⁴⁹⁷

The State Secretary lodged an appeal at the Council of State and states that he has taken as a starting point that the asylum seeker did not need to conceal his sexual orientation and that consequently it would come to the knowledge of his nearest family, but in the State Secretary's opinion the mere fact that his sexual orientation becomes or is known in Guinea is insufficient basis for refugee status. With respect to expressing his sexual orientation, in the Netherlands he had only made some very recent contacts and restricted himself to visiting gay discotheques. 'Looking at the way in which he gives expression to his homosexuality in the Netherlands, it has to be determined that if he gives expression to his sexual orientation in Guinea in a similar way, it is not likely on the basis of this that he has to fear for discrimination rising to a level of serious restrictions to his means of existence, which would make his life intolerable.'⁴⁹⁸

Comment

In other words: if he were to exercise that little bit of restraint in his 'expression', as he does in the Netherlands as well, it would be quite possible for him to return to Guinea. The State Secretary won the appeal, because the court should have examined the point of view about the (in)credibility of the narrative first. The Council of State conducts this examination and dismissed the appeal. The circumstance that the man is factually returned to the closet, given the fact that it appears from the country report⁴⁹⁹ that in Guinea LGBTs hardly ever disclose their orientation, is not pursued by the Council of State.⁵⁰⁰ The asylum seeker lodged a complaint with the Court in Strasbourg. The European Court declared his complaint inadmissible and did not consider the 'discretion' element either.⁵⁰¹ The Strasbourg Court has on more than one occasion demonstrated how it does not mind that asylum seekers have to hide their sexual orientation in their country of origin.⁵⁰²

District Court of Rotterdam, Guinea

The State Secretary believed that another man from Guinea was bisexual and that he was caught red-handed while engaging in same-sex sexual acts, but the State Secretary did not believe that the whole village and surrounding villages knew about his orientation. The

497. District Court of Rotterdam, 17 June 2015, 14/28694, appeal allowed.

498. Appeal State Secretary 14 July 2015.

499. In the General Country Report Guinea, 2014, it says: 'Like in many African countries, there are deep social, religious and cultural taboos in Guinea with respect to homosexuality. Homosexuality is often seen as a disease or a defect. Consequently, LGBTs hardly ever disclose their orientation. The social pressure on men and women, both homosexuals and heterosexuals, to raise a family is strong.'

500. ABRvS (Council of State) 30 May 2016, ECLI:NL:RVS:2016:1616. Also reference to the judgment of the Council of State of the same day in another Guinean gay case (ABRvS (Council of State) 30 May 2016, ECLI:NL:RVS:2016:1450). In this case, it was held that it is not likely that homosexuals in Guinea have to fear for persecution or treatment in violation of Article 3 ECHR. See also paragraph 4.2 about criminalisation.

501. ECtHR 21 December 2017, *M.B. v the Netherlands*, 63890/16.

502. ECtHR 26 June 2014, *M.E. v Sweden*, 71398/12, Spijkerboer 2017a.

future expression stated by the man was not believed: 'The claimant's statement that he wants to express his orientation upon his return, was rightly not considered plausible by the respondent. This expression is not consistent with the way in which the claimant has expressed his orientation until now. The claimant did not only keep it concealed in Guinea for many years, but also in the Netherlands he has not openly expressed his orientation. It has not become apparent that the claimant will have to behave differently upon his return and exercise restraint.'⁵⁰³

Comment

In the case above, it was believed that the man was caught red-handed, but simultaneously he was advised to conceal his sexual orientation. This sounds rather contradictory, because there seems to be little point in concealment now that he had been caught already. Was this perhaps about concealment from the other people in the village and the surrounding villages? Maybe it was also relevant that the man is not gay but bisexual. In any case, this man's application was rejected (among other reasons) on the ground of a factual form of 'discretion'. The question of what would happen if the people from the surrounding villages find out anyhow, was not asked in the judgment.

In the following judgment, also about a bisexual man, this question was not asked either. It is difficult to understand why these two appeals were not allowed. In case it has to do with the presumption that in Guinea and Kenya bisexuals are not actually prosecuted, the question 'What will happen if the environment finds out about the bisexual orientation?' could possibly be answered with: 'It will not lead to any problems.' But the question does need to be asked first.

District Court of Middelburg, Kenya

A Kenyan man based his subsequent application on the statement that he is bisexual and that he is still in the situation of hiding it. The court considered it not insignificant that the State Secretary 'has rightly considered it relevant that nobody in Kenya knows about the claimant's orientation, now that friends of the claimant in Kenya do not know about it and he has no family anymore.' According to the court, it is understandable that the State Secretary did not consider it likely on this ground that there would be a violation of Article 3 ECHR upon the man's return to Kenya.⁵⁰⁴

District Court of Roermond, Bangladesh

The State Secretary was of the opinion that a Bengal trans man did not have to fear any severe problems. The court held, however, that

503. District Court of Rotterdam 3 May 2017, 16/25645 (Guinea).

504. District Court of Middelburg 5 July 2016, 16/12360; 16/12362, appeal dismissed (Kenya), confirmed on appeal, ABRvS (Council of State) 17 August 2016, 201605287/1/V2.

now that upon his return he will not exercise restraint any longer, he wants to express his sexuality in public, and he no longer wants to lead a secluded life, as he did before, it cannot be taken for granted that he will be taken care of or assisted by his family. It has appeared from his statements that his family was only prepared to support him as long as he would accommodate, i.e. not behaving like a man, no smoking and wearing women's clothing.⁵⁰⁵

In his appeal at the Council of State the State Secretary put forward that general information showed that LGBTs in Bangladesh are rarely persecuted and that, due to concealment, public discrimination occurs only little and that there is no concrete information available about direct violence against people with a different sexual orientation. Furthermore, it appears from the interview that being dressed like a man is not automatically noticeable and does not automatically generate any negative attention. Only when he was body-searched at a confrontation with a policeman, it was found that he was not a man but a woman, and this confrontation didn't cause any problems.⁵⁰⁶

District Court of Utrecht, Jordan

A trans man from Jordan argued that the State Secretary had wrongly examined his narrative against a situation in which he does not manifest himself as transgender, whereas it arises from the XYZ judgment and the judgment of the Council of State of 18 December 2013 that this cannot be required of him. His asylum motives are to be examined against the situation in the country of origin for transgenders who manifest themselves openly as such. The court inferred from his statements that he exercised restraint in Jordan with respect to his gender identity. For instance, he paid attention to his choice of clothing, his way of moving, and his manner of speech. The court considered it likely that he wants to manifest himself more as transgender. The State Secretary has shown insufficiently that it has been examined what the position of transgenders in Jordan in general and of the claimant in particular will be like if he exercises less restraint.⁵⁰⁷

District Court of Rotterdam, Cuba

A Cuban trans woman was persecuted by fellow citizens and by the Cuban authorities. On appeal, she argued that the State Secretary incorrectly limited the assessment to the events in Cuba and had not explicitly motivated in the decision the fact that she cannot express her identity as transgender in Cuba. She stated that her problems would grow worse if she were to express her orientation more, (for instance) by always wearing clothing that is regarded as women's clothing instead of occasionally. Her appeal is allowed.⁵⁰⁸

505. District Court of Roermond
7 April 2015, 12/4042, appeal allowed
(Bangladesh).

506. Appeal State Secretary May 2015.
Followed by ABRvS (Council of State)
13 November 2015, 201503759/1/
V2, appeal State Secretary manifestly
unfounded (Bangladesh).

507. District Court of Utrecht 3 November
2016, 16/23543 (Jordan). Meanwhile, the
man has been granted asylum.

508. District Court of Rotterdam
11 December 2017, ECLI:NL:RBDHA:
2017:15056, appeal allowed (Cuba).

4.3.4 COMPARISON WITH HETEROSEXUALS

In policy, an explicit comparison is made with heterosexuals: 'The starting point is that somebody will express his orientation and enter into relationships in a way that is not essentially different from what is accepted from heterosexuals in the respective country of origin. (...) The IND includes in the assessment (...) the standards and customs that apply to both heterosexuals and homosexuals in the respective country.'⁵⁰⁹

Such examinations should be supported by specific country information about what is accepted with respect to heterosexuals and homosexuals in the country of origin. In the file of Sophie, this criterion is dealt with in a peculiar way.

Sophie, South Caucasus

In the intention to reject Sophie's application, it says: 'Although it follows from various sources, including the general country report [...] and the Human Rights Report by the US State Department [...] that in [country of origin] homosexuals are treated worse than heterosexuals, it also appears that homosexuality is not criminalised in her country of origin and that homosexuals are not discriminated against in legislation.'⁵¹⁰

Sophie stated that she did not want to hide her orientation. The State Secretary answers 'that this is not expected of her. (...) With respect to the person concerned it has not become apparent that she expresses her orientation in a way that would cause a risk of persecution.'⁵¹¹

As the file indicates, in this case the IND takes as a starting point that orientation is expressed against local standards and that local standards are also taken into account when the expression of sexuality is assessed. In Sophie's case, no expressions have been found that are incongruous altogether, nor any ways of expression that lead to a well-founded fear of persecution.⁵¹²

On appeal, the court held 'that the claimant has not stated that she will express her sexual orientation in a way that is essentially different from that which is accepted from heterosexuals in her country of origin.' The court also held that the State Secretary could consider that the situation for LGBTs in her country of origin is not so serious that she would risk persecution or a treatment in violation of Article 3 ECHR by the way in which she would express her sexual orientation in that country.⁵¹³

509. WBV 2014/22; Vc C2/3.2.

510. Sophie South Caucasus, intention to reject in the second procedure.

511. Sophie South Caucasus, intention to reject in the second procedure.

512. Sophie South Caucasus, at the time of subsequent procedure.

513. Interlocutory judgment District Court of Zwolle, 14 December 2016, 16/20674, unpublished.

Comment

In this case, it is examined if Sophie does not intend to behave differently from the straight people in her country of origin. It would be interesting, and more in line with WI 2014/22, to know what the reactions in her country of origin would be like if someone were to openly express her lesbian orientation, but unfortunately this information was not provided in the intention to reject. In this case, there was too much emphasis on the behaviour that was expected of her (Is she going to do something foolish, which might invite persecution?) rather than on an analysis of what is and what is not accepted of lesbians in her country of origin and of the consequences that can be expected if her orientation comes to light.

Jurisprudence

District Court of Den Bosch, United Arab Emirates

The State Secretary was of the opinion that an Iraqi gay man who had had a right of residence in the United Arab Emirates all his life could go back to that country, as there is no or hardly any criminal prosecution of homosexuality in the UAE.⁵¹⁴ (...) LGBT organisations do not go public in the UAE. The court held that it appeared from his statements that he was not able to express his orientation in the past and will not be able to do so in the future in a way that also applies to heterosexuals in the UAE. He cannot get married to his boyfriend, for instance. No restraint can be expected from him. His appeal was allowed.⁵¹⁵

District Court of Amsterdam, Egypt

The State Secretary believed that an Egyptian was gay and frequently engaged in same-sex sexual acts but considered 'that he himself stated that he wants to express his orientation within his own household and private life, and that he does not intend to propagate his sexual orientation in public or present himself as such. Therefore, it is incomprehensible that the claimant will draw the negative attention of the authorities.' The man realised he had to conceal his orientation in Egypt to prevent any problems. However, he also stated that he does want to exercise his orientation within his private life, but that this will extend beyond the walls of his own home. Eventually, he desires a life in which he can express his relationship publicly, just like people with a heterosexual relationship. He wants to be able to be himself at work, in the neighbourhood and when he visits family and friends.⁵¹⁶

514. In the UAE, under the Sharia sexual acts between persons of the same sex are punishable by the death penalty, and pursuant to general criminal law the maximum sentence is ten years imprisonment.

515. District Court of Den Bosch 5 April 2017 (Iraq/UAE).

516. District Court of Zwolle 22 June 2015, 15/5187. His appeal was allowed, and the man was granted refugee status.

4.3.5 RUSSIANS

Anna, Russia

In the case of Anna, it was stated in the intention to reject: 'To the extent that the claimant states that she cannot live safely in Russia as an openly practising homosexual, it is first considered that the person concerned has not stated that she wants to propagate her homosexual orientation. Additionally, not every infringement of the right to express a sexual orientation is an act of persecution. Besides, in the large cities there is a gay scene. This does not indicate that the person concerned could not express her sexual orientation in the Russian Federation. (...) Now that she has no relationship in the Russian Federation and the only lesbian relationship she has had is kept hidden from the outside world, the way in which she wants to give expression to any future lesbian relationship in the Russian Federation and any future infringement of this right does not automatically constitute an act of persecution in the sense of the Refugee Convention.'⁵¹⁷

District Court of Utrecht, Russia

In the assessment of the asylum application of a Russian gay man, the State Secretary commented that, apart from his mother, nobody in Russia knew about his homosexual orientation, including the Russian authorities. Additionally, he stated that upon his return to Russia he would exercise restraint and would not express his homosexuality openly. The State Secretary emphasised that this is the man's own statement and that this statement had not been dictated to him. It has not become apparent that he has experienced problems on account of his homosexuality. Furthermore, he has stated that he would not propagate his homosexuality upon his return, according to the State Secretary. He also said, however, that it will be very difficult to conceal his orientation and that in an ideal world he *would* give expression openly to his sexual orientation.

In the opinion of the court, his statement that he would not propagate his homosexual orientation is dictated by self-preservation. In addition, his disclosure took place in the Netherlands, so it cannot be held against him that he has never had any problems in Russia. (...) With reference to the judgment XYZ of the CJEU of 7 November 2013 and the Council of State judgment of 18 December 2013, the court held that the State Secretary did include in his assessment that the alien will not propagate his homosexuality upon his return, but not why he will not do this. As a result, the man is implicitly expected to comply with his own statement and which means that he will exercise restraint in order not to be recognisable as a homosexual. However, this is the exactly why he seeks protection. The court therefore held that the State Secretary's point of view is not consistent with the jurisprudence of the Court and the Council of State.⁵¹⁸

517. Anna Russia, intention to reject, early 2015. Later, Anna was finally granted a status.

518. District Court of Utrecht 19 August 2016, ECLI:NL:RBDHA:2016:16852; District Court of Utrecht 27 January 2017, ECLI:NL:RBDHA:2017:1759 (Russia).

Comment

It is probably due to the Russian 'gay propaganda' law that Russians are asked if they want to 'propagate' their sexual orientation. It is strange that this word has found its way into Dutch asylum practice, given the circumstance that it mainly reflects the particularly Russian way of thinking and given the fact that it is clear that the Russian 'gay propaganda' law has little to do with propaganda but is intended against people who are openly LGBTI.⁵¹⁹

4.3.6 CONCLUSION

All parties involved seem to be fully aware that since the XYZ judgment it is no longer allowed to expect restraint or to return people to the closet. This is reflected in the policy that presumes the sexual orientation or gender identity is known or will become known in the country of origin. Unfortunately, this clear starting point is obscured by the instruction from the Council of State to the State Secretary to ask the asylum seeker how they intend to express their sexual orientation or gender identity upon return to the country of origin and how they have done this until now. As a result, the 'discretion' concept has not disappeared from Dutch asylum practice, as evidenced by the files and case law.

In cases in which the asylum seeker expresses or intends to express her or his sexual orientation or gender identity openly, concealment or restraint is not required anymore. If the asylum seeker has actually exercised restraint in the Netherlands or in the country of origin and consequently the environment does not know about the sexual orientation or gender identity, the State Secretary should, in conformity with Dutch policy, answer the question of what will happen if the environment finds out. What will the consequences be if the asylum seeker openly expresses their orientation upon return and enters into relationships in the same way as heterosexuals do in that country? If this leads to fear of persecution, refugee status should be granted.

It appears from this study, however, that asylum applications were rejected by the State Secretary repeatedly with the argument that the asylum seeker had actually always kept their sexual orientation or gender identity concealed and that therefore there is no well-founded fear of persecution. Sometimes, it is explicitly stated in these cases that the concealment is not expected or imposed by the State Secretary. Also in trans cases, the idea that there is need for

519. General country report Russian Federation, July 2017, pp. 23 and 49 ff.

expressing the gender identity openly has not yet disappeared. If the environment in the country of origin does not know that the person concerned is transgender and for that reason no acts of persecution have (yet) occurred, the question needs to be answered: what will happen, if people find out?⁵²⁰

It is unclear why the question of what will happen if people in the country of origin find out is not asked in these cases. It is clear, however, that the difference between a factual variant and a normative variant of 'discretion' is negligible.⁵²¹ People do not conceal their sexual orientation or gender identity out of their own free will, and this is true for the normative as well as the factual 'discretion' variants. Discovery always lies in wait. In this respect, it is a misconception to establish a link between the asylum seeker's (intended) behaviour (the 'expression') and the persecution. In her opinion preceding the XYZ judgment, Advocate General Sharpston notes: 'the national court explains that the Netherlands' authorities consider that homosexual activities merit the same protection as heterosexual activities. However, I do not consider that the applicant's activities should be the focal point of the assessment. Articles 9 and 10 are essentially not concerned with the conduct of the person seeking refugee status. Rather, they are concerned with possible acts of persecution and with the reasons therefor, that is with the active conduct of possible actors of persecution, rather than with the everyday behaviour of the possible victim.'⁵²² By emphasising the victim's conduct nonetheless, the victim is made responsible for the persecution.

In most cases in which an application is rejected on the ground of factual 'discretion', the administrative court has corrected the State Secretary. Indeed, the 'discretion' reasoning, including the factual variant, is not only contrary to the XYZ judgment of the Court of Justice, which considered that restraint shall no longer be included in the decision, but it is also in violation of the State Secretary's policy. The courts therefore annul the decisions based on 'discretion'. It is remarkable that the Council of State, which had introduced the idea to examine the expression of sexual orientation to begin with, does the same in most appeal cases. Perhaps the Council of State also realises that 'discretion' reasonings, in any variant, are not a good idea. If this is true, the question about 'expression' can also be omitted, because this question will be irrelevant if the accused 'discretion' reasonings are abandoned.

520. Vc C2/3.2; Jansen 2015.

521. Millbank commented: "Discretion' may be articulated as a normative standard or requirement of 'reasonableness' but is often embedded as an assumption or factual finding that behavioural 'modification,' 'restraint' or 'adaptation' will simply 'happen.' There is often a narrow line in determinations between what is 'expected' as a finding of fact, and required as a matter of law." Millbank 2013.

522. Opinion Advocate General Sharpston, *X, Y and Z v Minister voor Immigratie en Asiel*, 11 July 2013, ECLI:EU:C:2013:474, § 56; Weßels, 2013, pp. 55-81.

523. ABRvS (Council of State) 18 December 2013, ECLI:NL:RVS:2013:2423, (X.).

524. WBV 2009/11. See WBV 2014/22 and Vc C2/3.2: 'If the sexual orientation or sexual acts are criminalised in the country of origin, the alien does not need to call in protection in conformity with Article 3.37c Aliens Regulation.' See also the letter from COC Netherlands of 30 July 2007 to State Secretary Albayrak and Minister of Foreign Affairs Verhagen and the answer from State Secretary Albayrak to COC Netherlands of 12 February 2009.

525. It appears from WBV 2015/8, for instance, that for LGBTs it is not possible to obtain protection in Guinea (prison sentence of three years for homosexual acts, actual prosecution, ILGA report 2017, p. 90). WBV 2015/16: for LGBTs from the Russian Federation it is not possible to obtain protection from the authorities. In WBV 2017/6 about Burundi (prison sentence of three months to two years for homosexual acts, actual prosecution, ILGA report 2017, p. 83), LGBTs are incorrectly not included as a group for whom no protection is available.

526. WBV 2015/8, 15.5.1: for LGBTs from Ivory Coast it is not possible to obtain protection from the authorities.

527. District Court of Den Bosch 30 May 2016, 16/8668, appeal allowed (Ghana): 'At the court sitting, the respondent recognised the fact that homosexual acts are criminalised. It is incomprehensible that he can be expected to report criminal offences committed against him if he is liable to punishment himself pursuant to Ghanaian criminal legislation when he expresses his orientation sexually. After all, he runs a real risk of being arrested.'

528. Directive 2011/95/EU. See also Battjes' comment to *J.K. v Sweden*, ECtHR 23 August 2016. Battjes indicates that the Grand Chamber of the Court directly refers to Article 7, second paragraph of the Qualification Directive.

4.4 State protection

Introduction

When the sexual orientation or gender identity is believed, the asylum application can still be rejected if the threat of persecution comes from fellow citizens and the authorities in the country of origin are willing and able to provide protection against it. In that case, it is not necessary that the person concerned is granted alternative protection in the form of asylum in the country of refuge.

In the decision following the XYZ judgment, the Council of State held that it might be dangerous or futile for 'homosexuals' to seek protection from a state that criminalises same-sex sexual acts.⁵²³ The State Secretary, however, had already realised earlier that this is indeed the case: since 2009, it has been standing policy that no protection needs to be sought if the LGBTI orientation or the same-sex sexual acts are criminalised in the country of origin.⁵²⁴ This is also set out in Dutch LGBTI asylum policy regarding specific countries of origin.⁵²⁵

This kind of exemption from the obligation to seek protection also applies to LGBTIs from some countries where same-sex sexual acts are not criminalised but where the circumstances are not particularly LGBTI-friendly, like Ivory Coast.⁵²⁶ This policy that LGBTIs from several countries are not expected to seek protection, is executed in practice. Sometimes, things go wrong all the same, like in Ghanaian cases (see below).⁵²⁷ It should be noted that this paragraph, and this chapter as a whole, is especially about countries in which the orientation or the acts are not criminalised.

What is sufficient protection?

Pursuant to Article 7, paragraph 2 of the EU Qualification Directive, protection should be effective and of a non-temporary nature. In general, this means that an effective legal system has to be in place for detection, prosecution and punishment. In addition, the person requiring protection should have access to this system.⁵²⁸

To determine whether protection is available to an LGBTI asylum seeker in the country of origin, the State Secretary must first establish whether protection is provided to LGBTIs in general in the respective country. If this is the case, the State Secretary assesses whether the asylum seeker has established that for him seeking protection would have been dangerous

or futile. Below some examples from the files are provided, in which no protection was provided by the authorities in the country of origin.

Matthew, South Caucasus

As the file indicates, Matthew was granted asylum in the Netherlands, because the authorities in his country of origin do not offer LGBTs protection. Perpetrators of violence or threats against LGBTs go unpunished.⁵²⁹

Sophie, South Caucasus

In the case of Sophie, the court held that the State Secretary had not actually examined if the authorities in her country of origin generally provide protection against hostile treatment with respect to homosexuality. Furthermore, it appears from the country report that violence and extortion of LGBTs by the police occur regularly and that LGBTs mostly do not dare to file complaints.⁵³⁰

Albert, eastern Europe

As the file indicates, Albert from eastern Europe has never reported the various incidents, but sources also reveal that the state mostly does not offer any protection to homosexuals, although it cannot be ruled out that it could happen. Furthermore, the question arises, provided that the authorities offer protection to homosexuals at all, if it can be expected from Albert that he actually calls in this protection. In fact, he had some very unpleasant experiences when he had contact with the authorities. In his country of origin, homosexuality is not criminalised by law. However, the government appears to provide homosexuals little protection. Additionally, a major part of the population is homophobic.⁵³¹

Comment

In the context of the availability of protection by the State, the comment is often that homosexuality and/or same-sex sexual acts are not criminalised. Sometimes it is argued that the country of origin is a signatory to several treaties, and discrimination is prohibited according to the constitution of this country. In addition, it needs to be determined if there is legislation under which discrimination against LGBTs is criminalised. This does not pertain to formal legislation alone, for how this is dealt with in practice is at least as important. If necessary, a country report must be drafted. In a decision in the case of Mabel, for instance, it says:

Mabel, Latin America

'That there is no legislation to protect LGBTs in [country of origin] does

529. Matthew South Caucasus, December 2015. In his country, homosexuality is not criminalised.

530. District Court of The Hague 21 April 2016, 16/6203, appeal allowed. In her country, homosexuality is not criminalised.

531. Albert eastern Europe, February 2017. A few months later, he was granted a status. In his country, homosexuality is not criminalised.

not lead to a conclusion that is different from that described in the intention to reject. After all, what happened to the person concerned, particularly the rape and the death threat, are also criminal acts under the criminal law of [country of origin]. It is therefore incomprehensible that the authorities would not have helped her if she had reported it.’⁵³²

The District Court of The Hague held ‘that the respondent had not actually examined if the authorities in [country of origin] offered protection in general against negative treatment with respect to homosexuality. That it has been considered in the intention to reject that, to put it briefly, the position of homosexuals in [country of origin] is improving, is insufficient to come to a different judgment. The respondent’s statement that little information could be found about possible protection of lesbians in [country of origin] by the authorities, does not alter the foregoing. Leaving aside that this should not be at the claimant’s risk, the respondent has various possibilities to obtain the required information, for instance by having a thematic country report prepared by the Ministry of Foreign Affairs.’⁵³³

Which group must be protected?

In short, not only should it be examined if the authorities in the country of origin in general provide protection against rape, but also if they provide protection to lesbians who become the victim of rape. In the case of Mabel, this was examined, after which she was granted subsidiary protection (b-status, based on Article 3 ECHR).⁵³⁴

As the file indicates, neither the mere element ‘woman’ nor the mere element ‘sexual orientation’ would lead to granting a status. The combination of these elements, however, leads to the assessment that the risk upon her return will be too high, considering there is no protection alternative. Therefore a status was granted.⁵³⁵

Also, in the judgment below, the issue was whether a lesbian could be protected against rape.

District Court of Arnhem, Armenia

An Armenian woman stated that she was raped by members of her family and members of the family of her neighbour with whom she had a lesbian relationship. In the country report on Armenia, it says: ‘The reaction of the authorities to cases of discrimination and violence against LGBTs is often slow and inadequate. They turn a blind eye to the violence and attribute it to keeping up traditional values. The perpetrators are not prosecuted either.’⁵³⁶

532. Mabel Latin America, decision, December 2015.

533. District Court of The Hague 18 March 2016, 15/22292, appeal allowed.

534. It would have been more just if she had been granted a refugee status for reasons of membership of the particular social group of lesbians in her country of origin.

535. Mabel Latin America, May 2016. In her country of origin, homosexuality is not criminalised.

536. General Country Report Armenia, October 2013, paragraph 3.7.6.

At the sitting of the District Court of Arnhem, the State Secretary acknowledged that it does not appear from this that LGBTs in Armenia can obtain protection. Earlier, the State Secretary had referred to paragraph 3.7.8.1 of the country report, about domestic violence against women, to argue that women *could* call in protection. The court held 'that it does not appear from the country report that in Armenia protection is provided for this specific problem. That it is set out in paragraph 3.7.8.1 that women can obtain protection in general, does not alter this. After all, this paragraph pertains to other and more general problems of (domestic) violence against women, rather than to the applicant's more specific situation.⁵³⁷ The woman's appeal was allowed, but the State Secretary lodged an appeal.

The Council of State agreed with the State Secretary: 'Although it says in the country report that the authorities often react slowly and inadequately to cases of discrimination and violence against homosexuals, it is also stated in the country report that the police are obliged to handle all reports and that, if the police are in default, there are various possibilities to seek protection from other (higher) authorities. Additionally, it appears from the country report, that there are several organisations in Armenia that can offer legal help to women if they report domestic and sexual violence. The mere fact that it does not explicitly say that these organisations also offer help if the violence is related to sexual orientation of the victim, is no reason to conclude that the State Secretary has incorrectly included the activities of these organisations in his opinion.'⁵³⁸

Comment

As opposed to the case of Mabel, in this Armenian case the elements 'woman' and 'homosexual' were not combined to assess the risk of persecution but separated and taken as a double chance of protection, and consequently a double chance of rejection. Apart from this, if the organisations mentioned are prepared to offer legal assistance to lesbians, this is of course no guarantee that the authorities will react adequately to an act of violence, once it is reported.

Who can provide protection?

Pursuant to Article 7, paragraph 1 of the EU Qualification Directive, protection against persecution or serious harm can only be provided by the State or by parties or organisations controlling the State or a substantial part of its territory.⁵³⁹ It is often said that the asylum seeker could have turned to the higher authorities to seek protection.

537. Provisional judge, District Court of Arnhem 10 July 2015, 15/12240, appeal allowed.

538. ABRvS (Council of State) Armenia 30 May 2016, ECLI:NL:RVS:2016:1617, appeal State Secretary allowed.

539. Directive 2011/95/EU.

Crystal, trans woman

Crystal was asked: *You have stated that you could not obtain any protection. Could you turn to the higher authorities? – That was really impossible. Do you think the higher authorities take a different view on homosexuality? Do you think they have a progressive mentality? The only reaction you can expect is that they are disgusted by you. This is the mentality of the country.*⁵⁴⁰

Andrew, eastern Europe

The State Secretary believed that Andrew was abused and threatened by unknown men for his bisexuality and also that he was laughed at by the police when he wanted to report the maltreatment. However, the incident was not characterised as an ‘action specifically targeted against the person concerned, but rather a random act on the part of the respective policeman, which was not imposed by the authorities.’⁵⁴¹

Andrew should have filed a complaint with the higher authorities. In the decision, it says: ‘The statement from the person concerned that this is impossible in [country of origin] is rejected. After all, a complaint about a policeman’s conduct can be submitted to the policeman’s direct superior or to the superior of the higher police body where the policeman works, up to the Minister of the Interior.’⁵⁴²

Angela is from a country with laws that protect the LGBTI community. Even so, many transgenders are killed in her country of origin.⁵⁴³

Angela, trans woman

*You have stated several times that since your gender change you have been afraid of problems. What exactly are you afraid of? – I am afraid that if someone discovers I am transgender, I will be attacked physically and that I cannot go to the police for protection. The police can arrest me for whatever reason. I know what has happened to other transgender women. (...) In my country, everybody knows that a transgender person does not have any rights.*⁵⁴⁴

The intention to reject follows next: The person concerned has never experienced any problems on account of the circumstance that she is transgender. (...) If and to the extent that she will experience problems on account of being transgender, it is noted that she can always call in the help of the authorities in [country of origin]. It has not been stated nor proved that they cannot or do not want to help her. Pursuant to the above, it is considered that if she should experience any problems all the same upon her return, she can turn to the (higher) authorities for protection.⁵⁴⁵

540. Crystal, interview, 2010. In 2016, she was granted asylum.

541. Andrew eastern Europe, intention to reject, December 2015.

542. Andrew eastern Europe, intention to reject, December 2015. After it was held against him in the decision too that he could have sought protection from the authorities, he returned to his country of origin.

543. For general information about murders of transgenders see: ‘Trans Murder Monitoring project’, Transrespect versus Transphobia Worldwide: <http://transrespect.org/en/trans-murder-monitoring/tmm-resources/Transgender-Murder-Project>.

544. Angela, interview, October 2015.

545. Angela, intention to reject, October 2015.

Paula, trans woman

In her country of origin, there are clinics which under the guise of addiction clinics offer ‘cures for homosexuality’. In these clinics, people are treated with electroshocks. Paula’s mother wants Paula’s hair cut off and her breasts removed and that she is ‘converted’ into a heterosexual man in such a clinic.⁵⁴⁶

What would you fear if you returned to your country of origin now?

- I would fear that my family puts me into a clinic. (...) I will never make it out alive. This is what I’m afraid of. (...) This is what is going to happen.⁵⁴⁷

In the report of the sitting of the court, it says: The State Secretary’s primary point of view is that protection from the State can be sought. There *are* clinics (centres for curing homosexuality), but the State takes action against these.⁵⁴⁸

Apart from (higher) authorities, various persons and institutions are mentioned, as possible ‘actors of protection’, in the examined files, such as employers, LGBT organisations, ombudspersons and social networks. In most cases, these potential protectors do not end up in intentions to reject and decisions. And this is a good thing too, for accepting the protection by NGOs, social networks or other non-State groups is in violation of Article 7, paragraph 2 of the Qualification Directive.

Sophie, South Caucasus

In a decision about Sophie, it says: From the statements of the person concerned during the interview it appears that she had a social network. If any problems occur in consequence of her homosexual orientation, she can call in the protection of the (higher) authorities in [country of origin], possibly with the support of persons from her social network.⁵⁴⁹

Mabel, Latin America

Mabel was asked: *Can’t you turn to a particular organisation if you are not helped by the police?* - Not that I know of. (...)

But couldn’t they help you in particular with your problems by offering some kind of protection? - I am not one hundred per cent sure, but it seems to be very risky to me to have dealings with such an organisation. Besides, moral support alone is not sufficient.⁵⁵⁰

Valerie, trans woman

Where did you seek protection in [country of origin]? - I wrote to the

546. Paula, grounds of appeal 2014.

547. Paula, subsequent interview, 2015.

548. Paula, report of the court sitting, 2015.

549. Sophie South Caucasus, second decision in her first procedure.

550. Mabel Latin America, interview, August 2015.

council of ministers and complained that I do not have the possibility to dress in women's clothing. They answered that I should see a psychiatrist.⁵⁵¹

A month later, an intention to reject was issued, saying: 'In addition, it has not become apparent that the authorities in [country of origin] are not able or willing to provide protection against these problems. That he has not turned to the authorities because he did not expect any good to come of doing so, leads to the assessment that he has not made a sufficient effort.'⁵⁵²

After the 'view', the State Secretary realises that this intention to reject is not tenable, partly because Valerie has submitted various documents that show that she had turned to the authorities unsuccessfully.⁵⁵³

Jurisprudence

Council of State, Congo DRC

With respect to the raised objection of Kinshasa as an internal flight alternative, the State Secretary stated that a homosexual man from Congo DRC could, as a Banyamulenge, obtain protection from the authorities in Kinshasa if problems occur. The Council of State ruled that his appeal was allowed, because the State Secretary has not examined whether he can get protection as a homosexual as well.⁵⁵⁴

District Court of Rotterdam, Cuba

In Cuba, a trans woman was called names and thrown stones at by fellow citizens, fined by police for wearing women's clothing, hit by a policeman, raped in detention several times by a fellow detainee, maltreated by jailers, and harassed and threatened by the district supervisor. Her hair was cut off by the police. She also received written summonses from the revolutionary national police. The State Secretary deemed her narrative credible but insufficiently severe. Neither had it appeared that she cannot call in the protection of the Cuban authorities. The court ruled that the State Secretary had insufficiently motivated his objection that the woman could have called in the protection of the (higher) authorities in Cuba, despite her problems with the authorities. He has based this on country of origin information from which it would appear that the situation for LGBTs in Cuba has improved in the past few years, that homosexuality and being transgender is not a criminal offence in Cuba, that discrimination has been forbidden since 2013, and that, led by Mariela Castro, a sexual revolution is slowly but surely in progress. However, the State Secretary has not addressed the country of origin information submitted by the woman or her explanation that she should have turned to the district supervisor who was the very last person she could turn to.⁵⁵⁵

551. Valerie, additional interview, July 2015.

552. Valerie, intention to reject, August 2015.

553. Valerie, October 2015. Next, Valerie was granted asylum. In her country of origin, homosexuality is not criminalised.

554. ABRvS (Council of State) 25 April 2017, ECLI:NL:RVS:2017:1163.

555. District Court of Rotterdam 11 December 2017, ECLI:NL:RBDHA:2017:15056, appeal allowed (Cuba).

District Court of Roermond, Ukraine

It has not become apparent that the claimant could not have turned to the Ukrainian (higher) authorities in case of problems, nor that they would not be willing or able to provide her protection. Also the quotation highlighted in the grounds of the appeal, in which it is stated that according to an LGBTI activist in Kiev LGBTIs are frequently the victim of extreme violence and that incidents of abuse and rape of LGBTIs take place that are not reported to the police, because the victims do not go to the police and because the Ukrainian police are reluctant in investigating violence against LGBTIs, cannot lead to another judgment. At the court sitting, the respondent added that the LGBTI organisations mentioned in the foregoing could assist the claimant.⁵⁵⁶

District Court of Den Bosch, Ukraine

In another Ukrainian case, the State Secretary stated that a gay man 'can turn to the authorities for protection against the hostile attitude of the population,' but the court held that from the country of origin information submitted it only appears 'that general offences, such as maltreatment, can be reported. In the opinion of the court, this cannot be considered protection in the sense of the judgment of the Council of State of 24 June 2015. After all, there are forms of discriminatory treatment that cannot be considered a general offence but of which, given their nature and frequency, it can certainly not be ruled out that these are to be regarded as persecution on account of sexual orientation. The respondent still has to conduct an examination into the protection the Ukrainian authorities offer to persons who actually give expression to their homosexual orientation.'⁵⁵⁷

District Court of Zwolle, Ukraine

Yet another Ukrainian man had been frequently attacked, bullied and threatened on account of his sexual orientation, however reports to the police had not been taken up. The State Secretary is of the opinion that Ukraine is a safe country of origin for this man and that he can obtain protection from the (higher) authorities if problems occur. However, the court held that prior to answering the question if the claimant could obtain protection in the future after his return to Ukraine, it should be assessed if the claimant's fear caused by the problems he has experienced are so severe that it amounts to discrimination in the sense of the Refugee Convention. The court held that the respondent had not considered this latter point at all in the contested decision.⁵⁵⁸

It is important to determine which (sub)group the person requiring protection belongs to. In the case below, this did not seem to go well.

556. District Court of Roermond 22 November 2017, NL17.9870, appeal dismissed (Ukraine).

557. District Court of Den Bosch 23 October 2015, ECLI:NL:RBOBR:2015:6076, appeal allowed. Confirmed on appeal: ABRvS (Council of State) 12 July 2016, ECLI:NL:RVS:2016:2059.

558. District Court of Zwolle 1 February 2018, NL17.14837, appeal allowed (Ukraine); see also District Court of Zwolle 23 January 2018, NL17.14839, appeal allowed (Ukraine); District Court of Haarlem 29 December 2018, appeal allowed (Ukraine).

District Court of Arnhem, Serbia

In the case of a trans woman and a bisexual man from Serbia, the court held that in Serbia there is still a negative attitude toward homosexuality, but that it has not become apparent that homosexuals in Serbia cannot count on the protection of the Serbian authorities anyhow.⁵⁵⁹

Conclusion protection

To find out if effective protection for LGBTIs is available in the country of origin, the State Secretary should not only examine if the police function reasonably well from a general perspective and take up reports of maltreatment and rape and if the authorities of the respective country are willing and able to protect their citizens, but also if the authorities are able to protect LGBTIs. Can discrimination against or persecution of LGBTIs be reported in that country? Are the perpetrators prosecuted? Is action taken against police officials who themselves commit discrimination against and persecution of LGBTIs? Or do LGBTIs never report such incidents for fear of reprisals or because these reports will only gather dust on a shelf?

In addition, it needs to be examined what the situation for the subgroup is like. If it is regarding a trans woman from Honduras or Serbia, the attitude of the police towards trans women will have to be examined. Do the Honduran and Serbian police provide effective protection to trans women who have been or are being harassed? If the police in a certain country are prepared to protect heterosexual women against domestic violence, this does not mean that they would do the same for lesbians and trans women.

Safe countries of origin

For some years, the State Secretary has been using the concept of 'safe countries of origin'. If a country is designated as 'safe', the people fleeing that country will face a heavier burden of proof. It is presumed that their application will not be granted, and the burden to rebut this 'presumption of safety' lies with the asylum seeker. Additionally, their procedure is accelerated, and they are not allowed to await the result of an appeal procedure in the Netherlands.

The countries designated as 'safe' include various countries from which LGBTI asylum seekers originate, and some of the files selected for this study pertain to 'safe' countries: Ghana, Jamaica, Mongolia, Morocco, Senegal, Togo, Trinidad & Tobago,

559. District Court of Arnhem 30 August 2016, 16/17427, appeal dismissed.

Tunisia, and Ukraine.⁵⁶⁰ For some of the countries considered 'safe countries of origin' the State Secretary has made an exception for LGBTIs: Algeria, Jamaica, Morocco, Senegal, Togo, Trinidad & Tobago, and Tunisia. 'Increased attention' for LGBTIs applies to Ghana and Brazil.

In the case of a Moroccan heterosexual man, the Council of State held that it is not in violation of the Procedures Directive to designate a country as a safe country of origin with the exception of one or more groups.⁵⁶¹ In this context, the Council of State speaks of a 'group of a particular size that is clearly identifiable in advance.' Apparently, the Council did not think of LGBTI asylum seekers who cannot or do not dare to disclose their sexual orientation or gender identity immediately. It is for good reason that the Court of Justice of the European Union in the ABC judgment recognised this problem. As some LGBTI asylum seekers are still in the closet at the time of their asylum application, it is very difficult to identify the group of LGBTIs in advance. This leaves the chance open that LGBTIs from the countries mentioned above have already been expelled and sent back to their unsafe country before they have disclosed their sexual orientation or gender identity to the IND. With respect to Ukraine, no exception has been made for LGBTIs in Dutch policy, although reports indicate this country is dangerous for LGBTIs.⁵⁶²

One of the conclusions of the Fleeing Homophobia research was that countries of origin in which a sexual orientation or gender identity is criminalised cannot be considered safe countries of origin.⁵⁶³ Unfortunately, the State Secretary has not adopted this conclusion. At the time of the Fleeing Homophobia research, a list such as this was not used in the Netherlands yet. For LGBTI (and other) asylum seekers the introduction of a list of safe countries of origin means a change for the worse.

Jurisprudence

District Court of Den Bosch, Ghana

A gay man from Ghana (a country designated as a 'safe country of origin with increased attention to LGBTs') was discriminated against, abused and threatened. His shop was vandalised and plundered on account of his homosexuality. As Ghana is designated as a safe country of origin, it is up to the asylum seeker, according to the State Secretary, to demonstrate that calling in protection is futile, even though the State Secretary recognises that Ghana is a homophobic country. At the

560. Additionally, Albania, Algeria, Bosnia and Herzegovina, Brazil, Georgia, India, Kosovo, Macedonia, Montenegro and Serbia have been designated as safe countries of origin.

561. ABRvS (Council of State) 1 February 2017, ECLI:NL:RVS:2017:210 (Morocco); Cf. also ABRvS (Council of State) 20 October 2017, ECLI:NL:RVS:2017:2781 (Tunisia), and ABRvS (Council of State) 14 September 2016, ECLI:NL:RVS:2016:2474.

562. See also parliamentary questions by member Buitenweg (GroenLinks) to the Minister of Security and Justice about the situation of LGBTI asylum seekers from Ukraine (sent in on 20 October 2017). Answer from State Secretary Harbers (Security and Justice) (received 13 November 2017). *Aanhangsel Handelingen II*, 2017/2018, 412.

563. Fleeing Homophobia report 2011, pp. 24 and 26. <http://www.refworld.org/docid/4ebba7852.html>.

court sitting, he also recognises the fact that same-sex sexual acts are criminalised in Ghana.

The court held that the State Secretary has not explicitly considered the application ‘with increased attention’. ‘It is incomprehensible that he was expected to report criminal offences committed against him, if he was liable to punishment himself pursuant to Ghanaian criminal legislation, if he were to express his orientation with acts of a sexual nature. After all, he runs a real risk of being arrested himself if he reports the incidents. The respondent’s statement that apparently no active prosecution takes place in practice makes no difference, because the claimant reports to the police in person when reporting the incidents and by reporting the incident implicitly confesses to committing criminal offences. The consideration that he could turn to non-governmental organisations is passed as incomprehensible. Finally, the court considered that it cannot be recognised how the consideration that there are discotheques for homosexuals in the capital is relevant for answering the question if the claimant could have or should have sought protection in Ghana.’⁵⁶⁴

District Court of Zwolle, Honduras

A Honduran transvestite/transgender was maltreated by the police and threatened by a gang. The court held that the State Secretary had rightly considered ‘that the maltreatment by police officers is not indicative of an action specifically targeted to the person of the asylum seeker but rather a random act that was not imposed by the authorities. It cannot be recognised that this incident would be representative for the entire police force, so that the State Secretary has considered on good grounds that it could be expected that the asylum seeker would call in the protection of the higher authorities in Honduras.’ (...) It appears from the country of origin information that in Honduras no investigation was conducted against 92% of criminal offences against LGBTs, but in 8% of cases there was an investigation. Ten persons were convicted for LGBT-related violence, and 42 cases were taken to court.⁵⁶⁵

In the following judgment, it was established again that seeking protection is not a good idea, in case the person concerned would risk persecution by expressing ‘his sexual orientation’.

District Court of Haarlem, Bosnia and Herzegovina

A trans woman in Bosnia and Herzegovina was discriminated against, maltreated, humiliated and fired. She turned to the authorities, the higher authorities and NGOs repeatedly, but to no avail. She cannot get any effective treatment or any medical coverage for her ‘transgender treatment’. She states that all in all, Bosnia and Herzegovina is not

564. District Court of Den Bosch 30 May 2016, 16/8668, appeal allowed (Ghana).

565. District Court of Zwolle 12 December 2016, NL16.2336, appeal dismissed, confirmed on appeal. ABRvS (Council of State) 1 February 2017, 201700259/1/V2.

566. District Court of Haarlem 10 March 2017, 17/3288, appeal allowed (Bosnia and Herzegovina).

a safe country for her personally. From the country information it appears that LGBTIs are often the victims of discrimination and that the authorities hardly offer any protection, if at all. According to the court, these events are of a structural nature.⁵⁶⁶

4.5 Conclusion severity

It is a direct consequence of the XYZ judgment and of the interpretation the Council of State gave of this judgment, that there is some better understanding for the situation in the countries of origin which criminalise same-sex sexual acts and for the fact that this kind of criminal provision has an impact on the attitude of society with respect to LGBTIs. It is quite worrisome that many LGBTIs from these countries (35%)⁵⁶⁷ do not get as far as the judgment about the severity of their narrative, because they fail because of the incredibility of their sexual orientation.

Although the XYZ judgment also put an end to the requirement of concealing the sexual orientation or gender identity or of exercising restraint to prevent persecution, the idea that LGBTIs could easily live in the closet in their country of origin has still not disappeared from Dutch asylum practice. Even though ‘discretion’ is no longer formulated as a hard and fast requirement – it is now said to be a free choice – this does not alter the fact that the starting point is unacceptable. Nobody returns to the closet out of their own free will, and there is always the lurking chance of discovery.⁵⁶⁸ It is disconcerting that 18 years after Boris Dittrich’s motion we still have not got rid of ‘discretion’. The thought that it is not an issue for people to conceal their sexual orientation to avoid persecution and that living in the closet is an acceptable situation for LGBTI people, ought to be a thing of the past for the Dutch government in the year 2018, also in asylum decisions.

Additionally, it is remarkable that of applicants from countries where homosexuality or same-sex sexual acts are *not* criminalised, in the large majority of cases the sexual orientation *is* believed. In these cases, the application is mostly rejected for lack of severity.

With respect to the question if effective protection is available in the country of origin, it should be borne in mind which subgroup it pertains to and what the situation of this group is like in the country of origin. With respect to a trans

567. The total number of negative decisions regarding people from countries where same-sex sexual acts are criminalised is 105 (see table paragraph 1.5). After deduction of the number of people who were rejected on grounds unrelated to their asylum narrative (29) and the asylum seeker who was rejected on account of severity (1), the resulting number is 75. This is 35% of the total number.

568. For extensive information, see Weßels 2013.

woman from Guatemala or a lesbian woman from Armenia, for instance, it has to be examined if the Guatemalan and the Armenian police provide effective protection to trans women and lesbians when they need it.

It is better not to designate a country as 'safe country of origin' as long as the human rights of LGBTIs are not respected sufficiently. As long as this has not been realised, an exception should be made for LGBTIs in asylum policy regarding Ukraine. Ukraine is not a safe country for LGBTIs.

5. GENERAL CONCLUSION

In order to qualify for refugee status in the sense of the Refugee Convention, one should, normally speaking, demonstrate a well-founded fear of persecution. However, this study shows that with respect to LGBTI asylum seekers there has been a shift in asylum policy and practice in the Netherlands. With the ‘discretion’ requirement largely disappeared and due to the acknowledgement that the situation for LGBTIs is dangerous in many countries in the world, the policy for LGBTI asylum seekers has become considerably more lenient since 2010. Simultaneously, a certain distrust has surfaced with respect to individual asylum seekers who state they fear persecution because of their sexual orientation or gender identity.

By far the biggest problem brought to light by this study is the expectation that in a country with an LGBTI-hostile climate, LGBTIs always go through a process of awareness and a process of self-acceptance. This stereotypical idea is the focus or the core of Dutch LGBTI asylum policy.

Many applications have a positive outcome

Among the total of 267 LGBTI files selected for this study, there were 146 in which the applicants received a positive decision. This is 63% of the total.⁵⁶⁹ The XYZ judgment of the European Court of Justice has led to more attention for the dangerous situation of LGBTIs in countries where the State criminalises homosexuality or same-sex sexual acts and to a specific policy for some of these countries.⁵⁷⁰ In addition, this judgment also ensured that asylum seekers are no longer expected to conceal their sexual orientation or gender identity in the country of origin.

However, the idea of ‘discretion’ has not disappeared from Dutch asylum practice yet. It still occurs regularly that the State Secretary rejects applications if asylum seekers declare they will keep their sexual orientation or gender identity concealed after return in the country of origin. This study also shows, however, that such decisions, factually entailing that people return to the closet, do not hold up in appeal, as they are contrary to policy.

While the XYZ judgment has removed some obstacles in Dutch practice so that more LGBTI asylum seekers will probably get a positive decision, it also becomes clear that in the past few years the application of a large number of LGBTI asylum seekers fail due to the incredibility of their sexual

569. See also paragraph 1.5.

570. See paragraph 2.3.3 for the special policy with respect to Iraq, Iran, Uganda, Afghanistan, Libya and Russia.

orientation. This percentage is estimated at 85% of the total number of rejections of LGBTI asylum applications. In response to the ABC judgment of the European Court of Justice, the State Secretary made a special policy to assess the credibility of sexual orientation or gender identity.

Stereotypes

Apart from the stereotype which 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 cannot go together.

In addition, policy contains several stereotypical expectations:

The stereotypical expectation that LGBTI asylum seekers have always gone through a process of awareness and a process of self-acceptance

Many LGBTI asylum seekers do not understand what is meant by the question 'What did it do to you when you discovered you were LGBTI?' For instance, a boy from an African country answered: 'My brother often hit me.'

LGBTI asylum seekers 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. An asylum seeker 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 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 asylum seekers have, and so they do not recognise themselves in these.

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 gone through 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. Sometimes, there is a sense of relieve when it becomes clear to them what is going on. The problems lie rather with the others, with their environment. Unlike what is suggested in the policy text, most asylum seekers are perfectly able to make the distinction between themselves and their environment.

An interview with Dutch singer and musician Rianne van Dorst, alias Elle Bandita, on the occasion of her coming out as a hermaphrodite, may serve as an illustration. To the question ‘When you were a child, didn’t you think: “I wish I was a boy”?’ she answered: ‘Not at all. I’m in the right body. I have always felt this way. I have never had any problems with myself. Problems always came from outside. I have masculine features, and this confuses people. It doesn’t confuse me.’⁵⁷¹

The stereotypical expectation that the more LGBTI-hostile the environment, the more experience an LGBTI will have with processes of awareness and self-acceptance

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 cannot be credible without a statement

571. Van Dongen 2017. See also the letter of COC Netherlands to INLIA, 15 July 2016, to be found on VluchtWeb.

giving details about his feelings and how he came to terms with his homosexuality.’⁵⁷² The stereotype the advocate general warns against has meanwhile become the major ground for rejection for LGBTIs in Dutch practice. The emphasis is too much on the asylum seeker’s psyche. In the asylum procedure, the most important question is: ‘Why did you flee?’ and not ‘What kind of problems did you have with yourself in the homophobic society you have fled?’⁵⁷³

Besides, it is more likely to reverse the comparison above and expect that somebody would be able to tell less about cases that are related to sexual orientation and gender identity if they have fled from an environment that is more LGBTI-hostile.

The stereotypical expectation that LGBTI asylum seekers can speak in detail about the aspects mentioned above

Most people do not normally give lengthy descriptions of their sexual orientation or gender identity to somebody they have never met before, and this likely applies to LGBTI asylum seekers to an even higher extent. Sometimes, the interview at the IND is the first time they speak about this subject. Perhaps they come from a culture where people are not used to talk about feelings. That the interpreter is usually from the same country of origin does not help either.

During the research, there was the impression that the asylum seeker’s educational level played a (major) role in all of this. The expectations appearing from the focus of the policy primarily fit in with the frame of reference of highly educated people, who are used to thinking and speaking in abstract terms. For asylum seekers 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.

The policy is stereotypical

The expectations discussed above are the focus or the core of the State Secretary’s policy – the policy that has been sanctioned by the Council of State. The focus of the policy is based on a stereotypical point of view: LGBTIs are presumed to struggle with their sexual orientation and to have internalised the homophobia and transphobia of their country of origin. If they are not ashamed but say they are ‘glad to be gay’, if they are happy and relieved, or if most of their problems are caused by the hostile environment, they run a high risk of not being believed.

572. Advocate General E. Sharpston, 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, § 90.

573. Cf. also Rehaag 2008: Not the sexual minority somebody specifically belongs to should be looked at but rather which heteronormative persecution the individual is exposed to.

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 tool to determine who is LGBTI and who is not.

Self-identification

The assessment of the sexual orientation or gender identity of asylum seekers should rely on self-identification. Determining someone's sexual identity is a highly personal matter that can only be undertaken by the person themselves and by nobody else. Therefore, burdening civil servants with this task is not a good idea.

In the event that self-identification is not accepted as the only and best way, several alternative (second-rate) suggestions are presented below, with which the problems inevitably associated with determining someone's sexual identity by a public body can be restricted to some degree:

- The idea that all LGBTIs have gone through processes of awareness and self-acceptance and can speak about this in detail should be abandoned. This stereotype can no longer apply as the focus of the policy.
- Western models of male sexual development should no longer be relied on, because they do not apply to most refugees. The asylum seeker's educational level needs to be taken more into account. More attention should be paid to discussing stereotypes with respect to sexual orientation and gender identity in the training of interviewers and decision-makers.
- In addition to the asylum seeker's statement, other evidence should be accepted: partners' statements, (non-pornographic) photographs, statements of witnesses (including COC and other interest groups), statements of aid providers.

- The internal guidelines of April 2012, in which it is advised to exercise restraint, in first as well as in subsequent applications, when it comes to considering a stated homosexual orientation as not credible ('in cases of doubt, acceptance of the homosexual orientation is advised'), should be included in the Working Guidelines and applied systematically.
- The *four-eye principle* should be taken seriously. If an asylum seeker's sexual orientation is not believed by an IND officer, the file should always be assessed by a second officer who is not informed of the outcome of the assessment conducted by their colleague.

Risk of arbitrariness

It was expected that by examining a large number of files, clear insight would be gained into the way the assessment of sexual orientation and gender identity takes place. This was not the case, however. To the researcher it is not always clear on which basis one asylum seeker is believed and another is not. The policy that came about as a result of the ABC judgment has not led to an unequivocal, transparent practice. Why all the hair-splitting with one asylum seeker, while another is believed straight away? Other influencing factors may not end up in the file, such as the looks, the attitude or the manner of speaking of the person concerned, and the question whether the IND officer, the asylum seeker and the interpreter have a good or a bad day. Partly given the circumstances that it is actually impossible to determine someone else's sexual orientation, arbitrariness may creep in and with it the risk that asylum applications are rejected erroneously.

Finally: pride or shame?

In this present day and age, LGBTIs in Dutch asylum procedure cannot yet live in a way that can be characterised as *Out & Proud*. The idea that life in the closet is actually quite acceptable, has still not disappeared altogether. In addition, it appears from this study that an asylum seeker who is ashamed about their sexual orientation or gender identity has better chances of recognition and understanding in the Netherlands and therefore on recognition as a refugee than someone who states they are proud of who they are. The core of the policy is a stereotypical opinion, causing people who embrace their sexual orientation or gender identity immediately and without any problems to be in risk of not being believed and of being sent back to their country of origin, with all dangers this entails.

RECOMMENDATIONS

1. Do not use processes of awareness and self-acceptance as the focus of the policy, for these concepts are stereotypical.
2. Rely on self-identification in assessing the credibility of the sexual orientation or gender identity of asylum seekers. Make self-identification the focus of the policy.
3. Stereotypes are to be avoided as much as possible.
4. Do not transfer the assessment to psychologists, psychiatrists, sexologists or other 'experts', as suggested by some. Sexual orientation and gender identity are not mental illnesses, and medical doctors are not experts in this field. Incidentally, this is already standing policy.
5. Accept other evidence in addition to the statement of the applicant: partners' statements, (non-pornographic) photographs, statements of witnesses (including COC and other interest groups), statements of aid providers. This is not about expert statements or 'gay statements' but exclusively about statements based on the witness's own observations.
6. With respect to the credibility assessment, take the educational level and verbal ability of the asylum seeker into account.
7. With respect to the credibility assessment, take cultural differences into account and do not rely on western models of male sexuality development.
8. Give the applicant the benefit of the doubt more often when assessing the credibility of sexual orientation.
9. Include the internal guidelines of April 2012 - in which it is advised to exercise restraint in first as well as in subsequent applications, when it comes to considering a stated homosexual orientation as not credible ('in cases of doubt, acceptance of the homosexual orientation is advised') - in the Working Guidelines and ensure they are applied systematically.
10. Take the four-eye principle seriously. If an asylum seeker's sexual orientation is not believed by an IND officer, the file should always be assessed by a second officer who is not informed of the outcome of the assessment conducted by their colleague.
11. Ask open-ended questions. The question of 'What was it like for you to find out you are a lesbian?' is a better question than 'How did the process of awareness develop?' The first question leaves the option open that no process has occurred.
12. Create the possibility of calling in a Dutch interpreter instead of an interpreter from the country or region of origin.
13. Address transgenders by the personal pronoun for their preferred gender, in the interview, the intention to reject, the decision, and in judgments of the court.

14. Invest more in countering stereotypes concerning sexual orientation and gender identity and in developing an open mind in the training of interviewers and decision-makers.
15. Dismiss every thought that is based on the idea that 'discretion' is acceptable. Nobody lives in the closet out of their own free will. Examine what the reaction of the environment will be if the sexual orientation or gender identity becomes known in the country of origin. Grant asylum if the expected reaction leads to a well-founded fear of persecution. Delete the question about expression of the sexual orientation or gender identity from policy and practice.
16. In situations in which the COA (Central Agency for the Reception of Asylum Seekers) knows about the sexual orientation of one of its residents, while at the same time the asylum application of this person is rejected on account of incredibility of the sexual orientation – as was the case in one of the examined files – have the COA, as the body that arranges the daily affairs, share this knowledge with the IND.
17. Ensure that the moment of coming out does not play a part in the assessment any longer.
18. Investigate if the police in the country of origin are prepared and able to provide lesbian, gay, bisexual, transgender and intersex people effective protection when they need it.
19. Collect country of origin information about the various subgroups.
20. When using country of origin information, make a distinction between the various subgroups. For instance, do not state that the situation for transgenders is good because same-sex marriage has been legalised in the country of origin.
21. Do not refer to a country as a 'safe country of origin' when the human rights of LGBTIs are not respected sufficiently.
22. As long as the previous aspect has not been realised, make an exception for LGBTIs in Dutch asylum policy concerning Ukraine. Ukraine is not a safe country for LGBTIs.

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