

Consistently and Rightly Queer.

Utilizing the UNHCR Guidelines on International Protection no. 9 as a human rights-focused common approach for assessing SOGI asylum claims in the EU?

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Abstract

This bachelor thesis examines the following research question: “To what extent is the legal framework of assessing SOGI asylum claims in the EU consistent with the UNHCR Guidelines on International Protection no. 9?”. The question was answered through a qualitative content analysis. It was conducted on the EU’s legal framework for assessing SOGI asylum claims and on the UNHCR guidelines to determine where the possible human rights gaps lie when assessing those claims. Furthermore, the legal framework’s application and interpretation by the CJEU and national courts were also assessed for providing further consistency and consideration of human rights. The analysis found some consistency between the EU legal framework and the guidelines, and no further amendments were necessary for some provisions. Other provisions were only consistent and human rights-focused after they were addressed in case law. However, some provisions are still inconsistent and infringe the human rights of SOGI applicants. Adopting the UNHCR guidelines as a common approach for assessing SOGI asylum claims could prevent those human rights violations and would represent a good step toward a true human rights-focused Common European Asylum System furthering the objectives of Articles 67 (1) and 78 (1) TFEU.

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List of Abbreviations

APD	Asylum Procedures Directive
AFSJ	Area of Freedom Security and Justice
CEAS	Common European Asylum System
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
COI	Country of Origin Information
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
EDAL	European Database of Asylum Law
EU	European Union
LGBTQ+	Lesbian, Gay, Bisexual, Transsexual, Queer
MS	Member States
PSG	Particular Social Group
QD	Qualification Directive
RCD	Reception Conditions Directive
SOGI	Sexual Orientation and Gender Identity
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees

1. Introduction

The European Union (EU) is a target destination for many refugees. Among those are also people fleeing their countries because of their sexual orientation or gender identity (SOGI) (European Union Agency for Fundamental Rights, 2017). To claim asylum, applicants must prove their need for international protection during the asylum procedure (Federal Office for Migration and Refugees, n.d.). Under the Common European Asylum System (CEAS), the EU has laid down standards on the criteria for claiming asylum in Directive 2011/95/EU and on asylum procedures in Directive 2013/32/EU. The common policies on asylum are written down as an objective in the Treaty on the Functioning of the European Union (TFEU). There it is imposed that the EU “shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement.” (TFEU, Article 78 (1)). Further, it is stated that asylum policies must be in accordance with the Convention relating to the Status of Refugees¹ (TFEU, Article 78 (1)) and with fundamental rights laid down in the Charter of Fundamental Rights of the European Union (CFR) and the European Convention on Human Rights (ECHR) (TFEU, Article 67 (1); TEU, Article 6). Credibility assessments, where the cause for a person to seek refuge is assessed, are part of the asylum procedure in the EU. The applicant must provide evidence that they² fear persecution because of their “race, religion, nationality, membership of a particular social group or political opinion in accordance with the 1951 Convention or would face a risk of suffering serious harm as defined in the Qualification Directive if returned to the country of origin or habitual residence.” (Odofin et al., 2013, p. 27). SOGI applicants must prove during this step that they are a member of this group and fear persecution because of it. To date, the EU has a slim legal framework for assessing SOGI asylum claims, mainly consisting of Directives 2011/95/EU, 2013/32/EU, and 2013/33/EU (EASO, 2019), leading to a fragmented application in the Member States (MS) and inappropriate ways of assessing those claims, according to scholars (Schittenhelm, 2018; Millbank, 2021; Tsourdi, 2013). It is, therefore, essential to find out where the gaps regarding SOGI claims and the applicants’ rights lie in the legal framework to address them adequately and to fulfill the objective of the TFEU. Thereby a harmonized asylum system in the EU can be guaranteed that protects LGBTQ+ (lesbian, gay, bisexual, transexual, and queer) individuals and their rights. This is crucial during the procedure as they are already a vulnerable group and should not be put in humiliating positions during the process (Ferreira & Danisi, 2021). Whilst there is a growing number of publications on assessing SOGI claims in the EU (Schittenhelm, 2018; Odofin et al., 2013; Jansen & Spijkerboer, 2011), an analysis of the consistency of the standards adopted in the EU’s legal framework with the UNHCR Guidelines on International Protection no. 9 is missing. More importantly, whilst the EU provides a framework of general application to all asylum claims, SOGI claims are not specifically addressed by EU legislation. However, the UNHCR has adopted guidelines that address SOGI claims, and since the EU asylum system must respect the Geneva Convention (TFEU, Article 78 (1)), it seems appropriate to investigate how the EU framework scores against them. Moreover, a need for a common approach for assessing SOGI asylum exists (Mrazova, 2019). Since the EU has not undertaken much effort to establish its own approach, the guidelines could function as a norm for a common human rights-focused approach for assessing SOGI claims to avoid fragmentation of these policies as well as an inappropriate assessment to ensure that the objectives of Articles 67 (1) and 78 (1) TFEU are met. This discussion has led to the following research question:

“To what extent is the legal framework of assessing SOGI asylum claims in the EU consistent with the UNHCR Guidelines on International Protection no. 9?”

Three sub-questions have been developed to give the research some structure. These sub-questions include:

How can the UNHCR Guidelines on International Protection no. 9 promote a fair assessment of SOGI asylum claims in the EU?

What are the current policies on the conditions for SOGI applicants to be able to claim asylum in the EU under Directive 2011/95/EU?

¹ Hereinafter referred to as the Geneva Convention

² The thesis uses gender neutral pronouns they/them/their for inclusivity

What are the current EU policies and procedures for assessing the credibility of SOGI asylum claims under the legal framework?

1.1 Body of knowledge

The idea of the CEAS derived from the will to establish an Area of Freedom, Security, and Justice (AFSJ) (Pirvu, 2018). However, the EU's cooperation on asylum began even earlier with the Schengen Implementing Convention of 1990 and the Dublin Convention of 1990 (Thym, 2022). Both created the necessity to address the challenge of asylum on a European level and work on harmonizing asylum policies to agree on who was responsible for the refugees entering the Schengen area (Bendel & Ripoll Servent, 2018). One of the most prominent EU integration theories can explain this willingness to harmonize asylum policies: neo-functionalism/supranationalism. The theory sees spillovers, supranational institutions, and transactional actors as drivers of European integration. A functional spillover occurs because the integration of one economic sector cannot be contained to that sector without integrating other aspects related to it, too (Buonanno & Nugent, 2021). Through the Schengen Convention, free movement of people was guaranteed, which led to a functional spillover, increasing the need to cooperate on asylum matters at the EU level. The Dublin Convention entailed that refugees could no longer choose the country they wanted to apply for asylum in, as they now must claim asylum where they first set foot in the EU. The need to harmonize asylum policies became apparent to ensure that the refugees would have the same prospects of being granted asylum in every MS (Bendel & Ripoll Servent, 2018). The actual harmonization process started with the Treaty of Maastricht, which foresaw asylum policies handled through intergovernmental decision-making and making the policy area a common interest. The CEAS was further developed in the Tampere Council Conclusions in 1999, which led to minimum standard setting asylum policies. These were the Asylum Reception Conditions Directive 2004/83/EC, the Asylum Procedures Directive 2005/85/EC, and the Dublin II Regulation (EC) No 2725/2000 (Thym, 2022). Directive 2004/83/EC was a landmark for SOGI asylum claims as it was the first asylum instrument in the EU to acknowledge sexual orientation as a ground for claiming asylum under the Convention ground of membership of a particular social group (PSG) (Millbank, 2021). With the The Hague and Stockholm Council Conclusions, the focus shifted to a more restrictive position on asylum policies following the 9/11 and Madrid terror attacks, putting further harmonization on hold (Bendel & Ripoll Servent, 2018). The instruments of the CEAS were replaced with new ones to move beyond the minimum standards and towards a harmonized system of asylum policies (Thym, 2022). The current instruments of the CEAS are Regulation (EU) no. 603/2013, Regulation (EU) no. 604/2013, Directive 2013/33/EU, Directive 2013/32/EU, Directive 2011/95/EU, Regulation (EU) no. 439/2010, and Council Directive 2001/55/EC (Pirvu, 2018). Through these newly adopted instruments, the existence of SOGI asylum claims was further acknowledged as gender identity was also now included under the Convention ground membership of a PSG (Ferreira & Danisi, 2021). Fitting to the attitudes reflected in the The Hague and Stockholm Council Conclusions, no substantial changes were made to create a more harmonized system and application (Bendel & Ripoll Servent, 2018). This intergovernmental approach, which sees the nation-states as the dominant actors deciding if and how much integration takes place (Buonanno & Nugent, 2021), can be seen in the past years of asylum policymaking. The Stockholm Council Conclusions and the 2014 Strategic Guidelines were guided by the MS' national (security) interests, slowing the harmonization process of asylum policies and reflecting a securitization of them (Bendel & Ripoll Servent, 2018). Various scholars have pointed out this securitization of EU asylum policies, where the emphasis is placed on safeguarding security rather than human rights (Lavanex, 2001; Huysmans, 2006; Bendel, 2016). They emphasize that this framing might make it difficult to protect refugees and their human rights during the asylum procedure (Bendel, 2016). Securitization is especially harmful to already vulnerable applicants like SOGI applicants. They face discrimination, violence, or even murder by other citizens or state authorities in many countries (Güler, 2019). Due to the securitization and derogatory views on LGBTQ+ individuals in some MS, SOGI applicants do not only have to endure discrimination in their home countries but also during the asylum procedure (Selim et al., 2022; Danisi et al., 2021). The securitization of (SOGI) asylum policies could infringe the provisions imposed by Articles 67 (1) and 78 (1) TFEU. Article 67 (1) states that the fundamental rights must be respected and ensured in the policies adopted for establishing the AFSJ; this includes SOGI asylum policies (TFEU, Article 67 (1)). Article 78 (1) does not only entail the objective of creating the CEAS, whose policies must be based on the principle of non-refoulement, but also imposes that the EU asylum policies must adhere to the Geneva Convention (TFEU, Article 78 (1)). With

securitized asylum policies, the EU may not adhere to the Convention's standards and fails to protect SOGI applicants and their rights, thereby violating its own laws. While the Geneva Convention does provide that security can trump human rights concerns in cases where the applicant poses a threat to national security (UNHCR, 2011, Articles 1 (F) & 32-33), making excessively and unjustified use of it, thereby harboring a culture of disbelief, infringes the leitmotif of the Geneva Convention, which seeks to protect refugees. A human rights-based approach could counter this development. Three features constitute this approach. First, human rights should be at the center of policies and drive their application. Second, the policies should acknowledge the rights of the rights holders, as well as the duty bearers' obligations. The position of the rights holders should be strengthened, and the duty bearers should be obliged to provide them with their rights (Social Protection Human Rights, 2015).

1.2 Scientific approach

1.2.1 Research design

This bachelor thesis aims to examine the consistency of the legal framework for assessing SOGI asylum claims with the UNHCR guidelines. To be more precise, the legal framework's approach for assessing SOGI claims is examined for its consideration of the vulnerability of SOGI applicants and it is assessed where the possible human rights gaps lie. The research question is answered through textual analysis, using an interpretative approach and hermeneutics. More specifically, a qualitative content analysis is conducted on the provisions of the Directives that form the legal framework for assessing SOGI claims. The content analysis is also conducted on the UNHCR guidelines. Lastly, a look is taken at the interpretation and application of the legal framework in EU case law and how it might have furthered the consistency and human rights focus. A qualitative content analysis is fitting for this research as it is helpful to identify the content and problems in the legal framework. Through the interpretative aspect of content analysis and the thorough reading of the chosen documents, insights can be drawn from the texts' content and unconscious messages, unveiling problems and gaps (Julien, 2008). Hermeneutics help to understand and interpret the studied documents since the approach does not only consider the contents of the texts but also their contexts and backgrounds (Freeman, 2008).

1.2.2 Data

Information was collected from articles, books, and chapters from edited volumes about the Geneva Convention, the UNHCR's role in the EU, the UNHCR guidelines, and the legal basis for assessing SOGI asylum claims in the EU. The articles were chosen from established, peer-reviewed journals such as 'European Papers' or 'The European Journal of Migration and Law' to ensure high quality. These are added on by reports from scholars, international organizations, and agencies such as the European Asylum Support Office (EASO) or the UNHCR. Data is derived from case law when looking at the application and interpretation of the framework. The case law includes cases judged by the Court of Justice of the European Union (CJEU) and cases from national courts. The judgments provide insight into what aspects are missing from the legal framework and how the gaps were addressed and possibly filled by courts. The case law and its summaries were obtained from the European Database of Asylum Law (EDAL), which was filtered for cases regarding sexual orientation/gender identity in asylum applications. The results were then examined for their relevance to the research question and the sub-questions. A discussion of all cases would lie beyond the scope of this thesis, so a selection was made from 59 to 13 remaining cases. The search results can be found in *Table 1* in the annex. Since some cases are not accessible in English, the thesis relies on the case law summaries provided by EDAL. The actual documents were examined for the judgments that are available in English. That is why some cases are discussed in fuller length than others.

After a first focused reading of the documents, the legal framework's provisions and their interpretation and application were compared to the UNHCR guidelines to check for consistency. The consistencies and inconsistencies of the provisions, and their implications, are pointed out throughout the sections. *Table 2* in the annex provides an overview of the consistencies and inconsistencies of the provisions of the guidelines and the legal framework.

2. The Geneva System

This chapter gives background information on the Geneva Convention, provides insight into what the guidelines impose for assessing SOGI asylum claims, describes the role of the UNHCR in the EU, and, lastly, answers how the guidelines can promote a fair assessment of SOGI asylum claims in the EU.

2.1 The 1951 Convention Relating to the Status of Refugees and its 1967 protocol

The Geneva Convention was agreed upon in 1951, ratified in 1954, and amended by its protocol in 1967 (Mayblin, 2014). Today, 149 countries have signed it (UNHCR, n.d.). It created refugees from a policy and legal perspective on an international level (Zamfir, 2015). Its implementation seeks to protect refugees and their rights in their host countries (Adebayo, 2015). It also lists contracting parties' obligations (Orav, 2015). The respective state has the autonomy to decide whether an applicant is granted asylum. However, the countries are prohibited from expelling applicants if they would be subjected to persecution in their home country. This principle of non-refoulement is the guiding principle of the Convention (Zamfir, 2015). The Convention was made post-second world war to address the increasing need for asylum of political activists and religious or ethnic minorities victimized during the second world war. However, seeking asylum on the ground of SOGI was not acknowledged. It took 30 years for SOGI claims to be recognized, as national courts started to interpret the Convention as SOGI applicants falling under the Convention ground of membership of a PSG (Ferreira & Danisi, 2021). The queering of the Convention's interpretation was possible as no specific authority interprets it (Zamfir, 2015). National courts were, thus, able to use a queer and progressive lens when interpreting the Convention (Ferreira & Danisi, 2021). The Convention plays a vital role in the EU by functioning as a cornerstone of the CEAS, whose policies must respect the Convention (TFEU, Article 78 (1)). The instruments of the CEAS and the CJEU, too, refer to the duty to abide by the Convention (García Andrade, 2019). The CFR also mentions the Convention as the foundation for ensuring the right to asylum (CFR, Article 18).

2.2 The UNHCR Guidelines on International Protection no. 9

Since claiming asylum on the ground of SOGI is not expressly mentioned in the Geneva Convention, the UNHCR adopted guidelines in 2012 to aid handling SOGI asylum claims (Ferreira & Danisi, 2021), which are, however, not binding to the countries that have signed the Convention. They heavily rely on international human rights law (Danisi, 2019), which can be seen in the reference to the Universal Declaration of Human Rights and the statement that LGBTQ+ individuals should be ensured the protection offered by international human rights law (UNHCR, 2012, para. 5). It is argued that the guidelines offer one of the best guidance to assess SOGI claims as they provide comprehensive advice on assessing those claims (Dustin & Ferreira, 2021). Furthermore, they exhibit sensitivity towards the claims by acknowledging the plethora of SOGI applicants' experiences (UNHCR, 2012, para. 4) by pointing out that applicants might not use the LGBTQ+ acronym as it might be unknown to them, and by mentioning the intersectionality of gender (UNHCR, 2012, paras. 11 & 14).

To be recognized as needing asylum, one must have a well-founded fear of persecution. The guidelines define it as serious human rights violations (UNHCR, 2012, para. 16). More specifically, violence, forcibly trying to 'cure' SOGI individuals, detention, or forced marriage can amount to such fear (UNHCR, 2012, paras. 20-23). Discrimination may also amount to persecution if it austere affects the applicant's life. This includes the infringement of family and socio-economic rights (UNHCR, 2012, paras. 17 & 24-25). However, serious harm that generally does not amount to persecution can amount to it if added up. Intersectional factors such as age or mental stability should be acknowledged when assessing what amounts to persecution (UNHCR, 2012, para. 16). A well-founded fear is also given when the country persecutes persons because of their SOGI. However, those laws must not be regularly enforced to constitute a well-founded fear. The applicant's circumstances and the country of origin information (COI) must be considered when assessing the claim (UNHCR, 2012, paras. 26-28).

The guidelines prohibit rejecting an applicant with the explanation that they could conceal their SOGI to avoid persecution (UNHCR, 2012, paras. 31-32). This highlights the uniqueness of SOGI applications as their reason for claiming asylum is their identity, which makes provisions used for other applicants, such as internal flight, often unsuitable. State and non-state actors can enact this persecution. Protection from the state must be unavailable if persecution is enacted through non-state actors (UNHCR, 2012, paras. 34-35). For protection to be available, authorities must respond to protection requests, investigate them, and prosecute or punish the offenders accordingly (UNHCR, 2012, para. 36).

The existence of LGBTQ+ organizations in the country and anti-discrimination laws do not always undercut the applicant's well-founded fear (UNHCR, 2012, para. 37). Furthermore, the guidelines impose that there must be a causal link between the fear of persecution and one of the grounds stated within the refugee definition of the Convention. For SOGI applicants, that ground is often membership of a PSG. However, SOGI asylum claims can also be based on political opinion or religion (UNHCR, 2012, paras. 38 & 40). One can also have a well-founded fear of persecution because of the perceived SOGI (UNHCR, 2012, para. 41). Two approaches are used alternatively to assess whether an applicant belongs to a PSG. The protected characteristic approach assesses if the group has an inborn and unchangeable characteristic that unites them. The social perception approach assesses whether society identifies a group as such because of a particular characteristic (UNHCR, 2012, para. 45).

The guidelines state that a relevance and reasonableness analysis must be conducted to examine whether an internal flight is feasible for the applicant. They should have minimum political, civil, and socio-economic rights in the place they relocate to (UNHCR, 2012, paras. 52-56). They also recognize that asylum needs may arise after the applicant has left their home country (*sur place* claims). This can be caused due to a change in SOGI or actions the applicant has been involved in after leaving (UNHCR, 2012, para. 57).

The environment of the credibility assessments should be supportive so applicants can effectively present their cases. Internalized homophobia or trauma can affect that ability and should be considered during the assessment. Furthermore, applications not made initially on the ground of SOGI should not negatively affect credibility (UNHCR, 2012, paras. 58-59). The interview's content should be treated confidentially. Stereotypes or offensive language should be refrained from. Questions about sensitive topics should be conducted sensitively. To do that, interviewers and interpreters should undergo special training. It is stated that the human dignity of the applicant always comes first. The applicant should also be able to request the gender of the interviewer and interpreter (UNHCR, 2012, para. 60).

The guidelines also guide the interview's contents. It should be done individually, and open-ended and non-judgmental questions should be used. A list of question areas that help assess SOGI claims is provided. These include self-identification, childhood, self-realization, gender identity, non-conformity, family relationships, romantic/sexual relationships, community relationships, and religion (UNHCR, 2012, paras. 62-63). Since many applicants will not have any other evidence, their statement should be the main evidence and enough to assess their credibility. Moreover, evidence like photos/videos of sexual practices or their live demonstration is prohibited. This includes medical tests (UNHCR, 2012, paras. 64-65). Lastly, it is indicated that the COI is often lacking regarding the situation of LGBTQ+ individuals. However, this does not mean the claim should be rejected since many acts of persecution are not documented (UNHCR, 2012, para. 66).

2.3 The UNHCR and the EU

The UNHCR does not only support applicants throughout the asylum process by providing them with information about the procedure and keeping an eye on their human rights but also provides decision-makers with COI, which is essential for assessing whether the applicant needs asylum. The UNHCR can also represent an applicant or provide legal assistance when appealing a decision. Furthermore, it can interfere in asylum cases if necessary (Tsourdi, 2017). It can also lobby its interests during asylum policy-making and make recommendations (Lavanex, 2016). Additionally, the UNHCR guides the MS if questions about their obligations regarding asylum occur (Orav, 2015).

As mentioned in the body of knowledge and section 2.1, the TFEU unilaterally commits the MS to respect and uphold the Geneva Convention (TFEU, Article 78 (1)), and so has the CJEU also held that the Convention functions as the cornerstone of the EU asylum *acquis* and that the adopted CEAS instruments have to be interpreted accordingly to the Geneva Convention (De Baere, 2013). Since the guidelines are adopted to promote a consistent interpretation of the refugee definition of the Convention regarding SOGI claims (UNHCR, 2012, para. 1) and are deemed as one of the best tools to guide the assessment of those claims (Dustin & Ferreira, 2021), adhering to its provisions, even though they are not binding, can be considered necessary to fully adhere to the provision of Article 78 (1) TFEU to interpret the refugee definition in SOGI asylum cases correctly. The guidelines promote a fair assessment of SOGI asylum claims through their international human rights law-focused guidance, which includes provisions on internal flight, the well-founded fear of persecution, *sur place* claims, the concealment approach, procedural issues, and establishing the applicant's credibility and takes into account intersectional factors and the vulnerability of the applicants. Therefore, they could be used to

counteract the uncertainty and disparity of the EU's framework's approach for assessing those claims. Thus, the answer to sub-question 1 is that they can and should promote the consideration of SOGI-specific interests in the application of the CEAS.

3. Claiming asylum as a SOGI applicant in the EU

This chapter answers sub-question 2 by introducing the EU's provisions for claiming asylum on the ground of SOGI. First, the provisions provided in Directive 2011/95/EU are examined and then checked for consistency with the guidelines. The application and interpretation of the provisions are then assessed for further consistency between the framework and the guidelines.

3.1 Legal framework for claiming asylum as a SOGI applicant in the EU

3.1.1 Treaties and Charter

As mentioned above, EU asylum policies must adhere to the rights of the CFR and ECHR (TFEU, Article 67 (1); TEU, Article 6). The rights that must be particularly considered when adopting (SOGI) asylum policies are respecting human dignity (CFR, Article 1) and the right to asylum (CFR, Article 18). Article 1 states that a person's human dignity must be respected and protected (CFR, Article 1). Procedures during the asylum process that could violate the applicant's human dignity are prohibited. Article 18 establishes the right to asylum, which must be guaranteed accordingly to the Geneva Convention and the constituting treaties (CFR, Article 18). Thus, all rights expressed in the Geneva Convention must be ensured to SOGI applicants during the asylum procedure and when asylum policies are adopted. Article 15 (2) ECHR lays down which rights are non-derogable. These include the right to life (Article 2), prohibition of torture (Article 3), and no punishment without law (Article 7) (ECHR, Article 15 (2)). Should these rights of an LGBTQ+ person be violated, claiming asylum becomes possible (Directive 2011/95/EU, Article 9). Recital 16 of Directive 2011/95/EU enumerates rights that the Directive must particularly respect besides Articles 1 and 18. These are, among others, Article 7 (Respect for private and family life), Article 11 (Freedom of expression and information), and Article 21 (Non-discrimination) (Directive 2011/95/EU).

Article 7 imposes that the right that family and private life must be respected (CFR, Article 7). This right is often compromised for SOGI applicants in their home country as they are subdued to discrimination or persecuted because of their SOGI (Güler, 2019). The infringement of this right can be the base of a SOGI asylum claim (Danisi et al., 2021). The right to express oneself freely is also essential for SOGI applicants since many are not allowed to live their SOGI or advocate for their rights openly and must fear persecution if they do so (Güler, 2019). The infringement of this right can constitute a ground for claiming asylum (Mrazova, 2019). It also plays a role if SOGI applicants are denied their application on the ground of the concealment approach, which suggests that SOGI applicants would not face persecution and thereby do not qualify for asylum if they would return to their home country and conceal their SOGI (Güler, 2019). It is their right to express themselves freely, and they should not be expected to conceal their identity to avoid persecution. Lastly, Article 21 imposes that sexual orientation discrimination is forbidden (CFR, Article 21). SOGI claimants cannot be discriminated against in the asylum process because of their sexual orientation and should not suffer discrimination because of it in their home country. Discrimination based on one's SOGI may also be a ground for claiming asylum (Jansen & Spijkerboer, 2011).

3.1.2. Directive 2011/95/EU

Directive 2011/95/EU, also called Qualification Directive (QD), lays down standards for qualifying for asylum in the EU to ensure a uniform status for refugees. It superseded Directive 2004/83/EC (Dörig et al., 2022). Its commitment to fundamental rights is reflected in recital 16, which states that it must respect the rights of the CFR (Directive 2011/95/EU). SOGI is mentioned only two times throughout the Directive. In recital 30, SOGI is mentioned to fall under the persecution ground of membership of a PSG (Directive 2011/95/EU). The other reference to SOGI is in Article 10 (d) (Reasons for Persecution) (Directive 2011/95/EU, Article 10 (d)).

The Directive puts forward a definition of a refugee. It uses the same definition as the Geneva Convention, with one small deviation. According to the Directive, a refugee is

“a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside

the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it [...]” (Directive 2011/95/EU, Article 2 (d))

While the Directive limits the term to third-country nationals and stateless persons, such a limit is not reflected in the Convention (Dörig et al., 2022), which the guidelines use as a reference for their definition (UNHCR, 2012, para. 1). The adaptation was made due to the presumption that all human rights are ensured within the EU so that no EU citizen could need asylum.

Article 3 states that the MS can adopt more favorable standards. However, these cannot go beyond the Directive’s scope (Dörig et al., 2022). MS are thereby allowed to use more favorable legislation for SOGI applicants and can include SOGI as a ground of persecution within their national legislation, as Spain did (Begazo, 2019).

According to Article 5, a well-founded fear of persecution may occur because of events after the applicant has left the country or because of the applicant’s activities since then. This is especially the case if the applicant would face persecution because of the expression of beliefs and orientations they already had back in their home country (Directive 2011/95/EU, Article 5). International and EU rules speak of ‘refugee *sur place*’ to cover this possibility. The guidelines agree with the views of the Directive on *sur place* claims. They, however, mention that *sur place* claims can occur due to a change in gender identity or expression (UNHCR, 2012, para. 57).

The well-founded fear of being persecuted can stem from the state, parties/organizations, or non-state actors. In the case of non-state actors inflicting the fear of persecution, the state or parties/organization must be either unable or unwilling to protect LGBTQ+ individuals to amount to a well-founded fear (Directive 2011/95/EU, Article 6). Including non-state actors as persecutors is important for SOGI applicants since they are often harmed by non-state actors such as their families (Ferreira, 2018). The list of actors of persecution follows what the UNHCR guidelines entail (UNHCR, 2012, paras. 34-36). For protection to be available, the following aspects have to be ensured: it must be accessible to the applicant and should include measures to prevent persecution, a legal system to expose persecution, and punishments for the offenders (Directive 2011/95/EU, Article 7 (2)). The guidelines have a similar view on what adequate protection is. The existence of anti-discrimination laws and LGBTQ+ organizations in the country of origin does not necessarily evade the well-founded fear of the applicant (UNHCR, 2012, paras. 36-37). This aspect is not mentioned in the Directive and could lead to SOGI claims being denied even though the applicants suffered harm and could not get protection.

Article 8 states provisions on internal relocation. The applicant may not need asylum if they could relocate to another part of their country where they would not have to fear persecution or would be guaranteed protection. To investigate whether such an internal flight alternative exists, the MS should base their decision on COI and the applicant’s circumstances (Directive 2011/95/EU, Article 8). The guidelines also put the burden of proof on the decision-makers. Furthermore, they provide for a relevance and reasonableness analysis when assessing the possibility of internal flight and that the applicant should enjoy minimum political, socio-economic, and civil rights where they relocate to (UNHCR, 2012, paras. 51-56), which is not expressly mentioned in the Directive. It is, however, stated that the decision-makers should assess whether it makes sense for the applicant to relocate internally and whether it can be expected of them since the MS have to acknowledge the COI and the applicant’s circumstances (Directive, 2011/95/EU, Article 8).

Acts of persecution that amount to a well-founded fear are defined in Article 9. The Directive and the guidelines both see persecution as acts that seriously violate an individual’s human rights (UNHCR, 2012, para. 16; Directive 2011/95/EU, Article 9). They also agree that violations that are not as serious can reach a sufficient level of severity if the applicant had to endure multiple infringements of their rights (Directive 2011/95/EU, Article 9; UNHCR, 2012, paras. 16-17). According to the QD, a serious violation of human rights occurs when the rights, stated as non-derogable under Article 15 (2) ECHR, are violated (Directive 2011/95/EU, Article 9). The QD also enumerates acts of persecution. For LGBTQ+ individuals, these are physical or mental violence (including sexual violence), prosecution or punishment, or acts of gender-specific nature (Directive 2011/95/EU, Article 9 (2)). The guidelines go beyond what the Directive sees as persecution, as they include discrimination and infringement of family and social-economic rights (UNHCR, 2012, paras. 20-25). The infringement of those rights could fall under the category of acts of gender-specific nature, but as it is not clarified which acts fall under that

category, SOGI claimants who have suffered discrimination might not be able to claim asylum. The guidelines also impose that age, gender, and the applicant's mental state must be considered when assessing the well-founded fear (UNHCR, 2012, para. 16). The QD does not mention anything on that matter and thereby ignores the intersectionality that those factors might have. Furthermore, the acts of persecution in Article 9 have to be linked with a reason for persecution enumerated in Article 10 (Directive, 2011/95/EU, Article 9 (3)). This causal link provision can also be found in the guidelines (UNHCR, 2012, para. 38).

Article 10 lays down the recognized reasons for persecution. SOGI applicants fall under the category membership of a PSG. The Directive defines it as follows:

“a group shall be considered to form a particular social group where in particular – members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and – that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society” (Directive 2011/95/EU, Article 10 (1) (d)).

Here SOGI is mentioned for the second time. The Article imposes that, first, it must be inspected if the PSG is unified by an unchangeable characteristic central to the individual's identity (protected characteristic approach). Second, it must be assessed if the group has said characteristic in common, which discerns them from the rest of society (social perception approach). There has been some dispute over the interpretation of the Article. Scholars are unsure whether it should be read cumulatively or alternatively (Begazo, 2019). It is argued, since the Directive uses the word ‘and’ between the two conditions, that it should be applied in a cumulative manner (Dörig et al., 2022). This interpretation clashes with the guidelines' definition of membership of a PSG. It uses the definition of the UNHCR, which reads as follows:

“a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights” (UNHCR, 2012, para. 44).

Contrary to the Directive, the UNHCR applies an alternative approach (UNHCR, 2012, para. 45). The ground of membership of a PSG might be the most used for SOGI applicants, but they can also apply for asylum on the grounds of religion or political opinion (Güler, 2019). Furthermore, it is not decisive if the applicant is a member of the LGBTQ+ community. An applicant can also claim asylum based on their perceived SOGI. It suffices that the persecuting actors see them as LGBTQ+ (Directive 2011/95/EU, Article 10 (2); UNHCR, 2012, para. 41).

The paragraphs that preceded show that there are some consistencies between the QD and the guidelines. They agree on *sur place* claims, actors of persecution, the causal link, and not actually having to be an LGBTQ+ member. There have also been some inconsistencies between the guidelines and the QD, which, however, do not have a significant impact. For example, even though the QD does not expressly mention a relevance and reasonableness analysis for the internal flight alternative, it is still provided that the decision-makers should assess whether the option of internally fleeing is feasible for the applicant and whether it could be expected of them by acknowledging COI and their circumstances. Inconsistencies that have a more severe effect are that the QD uses the cumulative approach when assessing whether the applicant belongs to a PSG. This more restrictive approach recognizes fewer applicants as belonging to a PSG, leaving them without asylum and infringing the principle of non-refoulement. The same holds for acts of persecution. The QD does not acknowledge discrimination or the infringement of social-economic and family rights to amount to persecution. This could also lead to SOGI applicants being denied asylum even though they are discriminated against and cannot enjoy all their rights. The answer to sub-question 2 is that the applicant has to meet the criteria laid out in the previous paragraphs to be granted asylum (Directive 2011/95/EU, Article 13). It will now be examined if the judgments of the CJEU and national courts have furthered the consistency of the framework for claiming asylum on the ground of SOGI and the guidelines.

3.2 Interpretation and application of EU norms in the case law on SOGI asylum claims

According to the available data, 50 judgments have been made in cases regarding SOGI claims since 2006. The main topic discussed in the case law is membership of a PSG (36 cases). The issues of persecution ground (20 cases), acts of persecution (14 cases), refugee status (14 cases), and well-founded fear of persecution (10 cases) were also often present. Only a few cases were about actors of protection (3), non-state actors of persecution (5), actors of persecution (6), *sur place* claims (1), and internal protection (5).

The CJEU was reached on one occasion. The judgment dealt with three asylum claims in the Netherlands on the ground of legislation criminalizing homosexuality leading to imprisonment in the applicants' home countries. None of the asylum seekers could show evidence that they feared persecution because of their homosexuality. They still feared persecution if they had to return to their home countries. The Dutch Raad van Staat was unsure how to handle the cases and posed three questions to the CJEU. First, if homosexual third-country nationals can be considered as members of a PSG and thereby qualify for asylum under Article 10 (1) (d) of Directive 2004/83/EC³, second, if homosexual asylum applicants can be expected to conceal their orientation to evade persecution, and third, if criminalizing homosexual activities and the subsequent imprisonment can be seen as an act of persecution as stated in Article 9 (1) (a) & (2) (c) of Directive 2004/83/EC (Fraser, 2013). The CJEU ruled, regarding the first question, that laws criminalizing homosexuality qualify them for claiming asylum on the ground of belonging to a PSG (Minister voor Immigratie en Asiel v X (C-199/12), Y (C-200/12), and Z v Minister voor Immigratie en Asiel (C-201/12), 2013, para. 48). For this ruling about the PSG, the cumulative approach was followed (Dörig et al., 2022). The CJEU ruled on the second question that SOGI applicants should not be expected to conceal their SOGI in their home country since it constitutes an integral part of a person's identity, and one should not be expected to hide it (Minister voor Immigratie en Asiel v X (C-199/12), Y (C-200/12), and Z v Minister voor Immigratie en Asiel (C-201/12), 2013, paras. 70 & 76). This part of the judgment is in line with the guidelines (UNHCR, 2012, para. 31). Regarding the third question, the court stated that the existence of laws criminalizing homosexuality is not enough to amount to persecution; the laws must also be enforced. Imprisonment because of one's homosexuality can be considered as amounting to persecution since it violates Article 7 CFR and depicts a discriminatory punishment (Minister voor Immigratie en Asiel v X (C-199/12), Y (C-200/12), and Z v Minister voor Immigratie en Asiel (C-201/12), 2013, paras. 57 & 61). Not every human rights violation is severe enough that the act can be considered an act of persecution. The infringement of respect for private and family life (CFR, Article 7) and non-discrimination (CFR, Article 21 (1)) does not reach the severity (Minister voor Immigratie en Asiel v X (C-199/12), Y (C-200/12), and Z v Minister voor Immigratie en Asiel (C-201/12), 2013, para. 54). The national authorities must investigate the situation concerning the criminalizing legislation against LGBTQ+ individuals in the country of origin (Minister voor Immigratie en Asiel v X (C-199/12), Y (C-200/12), and Z v Minister voor Immigratie en Asiel (C-201/12), para. 58). The guidelines agree that imprisonment amounts to persecution. They, however, disagree that the criminalizing laws must be enforced. Even if not regularly enforced, criminalizing laws can amount to persecution as they can still make the lives of LGBTQ+ individuals unbearable and infringe their human rights. The guidelines also state that infringing family rights and discrimination can amount to persecution (UNHCR, 2012, paras. 20-29).

In a Hungarian case⁴, the issue of internal flight was discussed. A Nigerian applied for asylum based on his bisexuality, but his application was rejected as it was found that he could relocate to the Christian parts of Nigeria, where he would not have to fear persecution. The Administrative and Labour Court identified the Nigerian citizens as the main threat to LGBTQ+ people in Nigeria, disqualifying the internal flight alternative (European Database of Asylum Law, 2016a). This follows the guidelines as they provide for a relevance and reasonableness analysis of whether relocating within the country of origin makes sense for the applicant (UNHCR, 2012, paras. 50-56). By using the analysis, it is made sure that internal flight is a viable option and that it would not cause any violations of human rights.

The internal flight alternative and the well-founded fear of persecution were also addressed in a case involving a Nigerian asylum applicant in Luxembourg⁵. The applicant was attacked in his home

³ At that time, Directive 2004/83/EC was still in force, but the judgment is still applicable to Directive 2011/95/EU

⁴ Hungary - Administrative and Labour Court of Decree, 02.09.2016, 8.K.27.394/2016/4

⁵ 338530

because of his sexual orientation. This incident and that homosexuality was criminalized in Nigeria were found to amount to persecution (Passerell a.s.b.l., 2017). The guidelines agree with that assessment (UNHCR, 2012, paras. 20 & 26). The Administrative Tribunal found that he could relocate to another part of the country under three conditions. The applicant cannot be at risk of being persecuted there, he must be able to enter the area, and it must be reasonable for him to relocate (Passerell a.s.b.l., 2017). This assessment follows the guidelines and prevents further human rights violations by checking if relocating is reasonable and does not lead to further infringements (UNHCR, 2012, paras. 50-56).

The Upper Tribunal of the United Kingdom addressed the question under which conditions having to live discreetly can amount to persecution (Kasapi, 2016). It held that having to live discreetly to avoid persecution amounts to a well-founded fear. It will, however, not if a person lives discreetly to avoid societal pressure (OO v The Secretary of State for the Home Department, 2016, para. 186 (b)). This judgment is in line with the guidelines (UNHCR, 2012, paras. 30-31). It was found that even though homosexuality was criminalized in Algeria, the authorities rarely enforce those laws, so it would be feasible for LGBTQ+ persons to relocate within Algeria (OO v The Secretary of State for the Home Department, 2016, paras. 128 & 234). This part of the judgment is not consistent with the guidelines. They state that if criminalizing laws exist, it does not matter if they are enforced. Their existence can lead to unbearable situations and human rights violations for the applicant, which can then amount to persecution (UNHCR, 2012, para. 27). To protect them and their human rights, they should be granted asylum.

The Greek Piraeus Administrative Court of Appeal⁶ ruled, in a case involving a Ghanaian, who only participated in same-sexual relations because of financial reasons, that even though the applicant did not meet the definition of the guidelines (homosexuality being an integral part of his identity), the fact that other people perceive him as gay and persecuted him because of it in a country where homosexuality is criminalized, makes his fear of persecution well-founded (Spentzou, 2019). This judgment is in line with the guidelines as they also state that the applicant's perceived SOGI can amount to a well-founded fear (UNHCR, 2012, para. 41).

The preceding paragraphs show that the interpretations of the legal framework have led to more consistency between the framework and the guidelines, safeguarding the human rights of the SOGI applicants. The judgments concerning the concealment of one's SOGI furthered the EU's framework by safeguarding the rights to identity, freedom of expression, and human dignity. This is a good step, as the CEAS is committed to protecting the rights of asylum applicants, and such fundamental rights as human dignity must be ensured (TFEU, Article 67 (1)), especially in cases involving vulnerable applicants like SOGI applicants. The interpretations also furthered the consistency of the framework and guidelines regarding the internal flight alternative. Even though the QD does not expressly mention a relevance and reasonableness analysis, the courts did apply it to consider whether it is a viable option. This ensures that the applicant is not just sent somewhere where their human rights are infringed. However, no consistency was accomplished regarding membership of a PSG. The courts confirmed the cumulative interpretation of the QD, leading to possibly fewer SOGI applicants recognized as needing asylum even though their fundamental rights are violated. This also holds for acts of persecution as the interpretation of the QD only sees regularly enforced laws amounting to persecution. The applicants still fear persecution, and their fundamental rights are constrained even when laws are not regularly enforced. The findings are added in *Table 2*. In the next section, the legal framework for credibility assessments is examined and analyzed for its consistency with the guidelines.

⁶ Greece - Appellant v Ministry of Migration Policy, Piraeus Administrative Court of Appeal A401/2019, 12 June 2019

4. Credibility assessments of SOGI applicants

This chapter answers sub-question 3 by examining the EU's legal framework for SOGI credibility assessments. First, a look is taken at the framework's provisions, which are then checked for consistency with the guidelines. Finally, the application and interpretation of the framework are looked at and examined for further consistency with the guidelines.

4.1 Legal framework for SOGI credibility assessments in the EU

4.1.1 Charter of Fundamental Rights of the European Union

The rights of the CFR and ECHR must also be guaranteed during the credibility assessments and when SOGI credibility assessment policies are adopted (Odofin et al., 2013). Recital 60 of Directive 2013/32/EU and recital 35 of Directive 2013/33/EU mention that they respect the CFR and list rights that must be particularly considered. These include, among others, human dignity (CFR, Article 1), right to the integrity of the person (CFR, Article 3), prohibition of torture and inhuman or degrading treatment or punishment (CFR, Article 4), respect for private and family life (CFR, Article 7), equality before the law (CFR, Article 20), and non-discrimination (CFR, Article 21). According to a systematic interpretation of Article 1 CFR with Directive 2011/95/EU and 2013/32/EU, the right to human dignity prohibits practices during the credibility assessments that could violate the human dignity of the applicant (CFR, Article 1). Article 3 states that each person has the right to physical and mental integrity. Therefore, free and informed consent must be given when medical tests are conducted (CFR, Article 3). This is crucial when tests are used to determine the SOGI of an applicant. The methods used to assess the applicant's SOGI must also respect the right to respect private and family life and the prohibition of inhuman and degrading treatment (CFR, Articles 4 & 7). Articles 20 and 21 impose that SOGI applicants should not be discriminated against during the credibility assessment because of their sexual orientation (CFR, Articles 20 & 21).

4.1.2 Directive 2011/95/EU

The QD imposes some rules on the assessment of asylum claims. This provision is laid out in Article 4. It states that applicants must carry the burden of proof, but the MS must examine the evidence in cooperation with the applicant (Directive 2011/95/EU, Article 4 (1)). The evidence includes the applicant's statement and documentation regarding former asylum requests, identity, and nationality (Directive 2011/95/EU, Article 4 (2)). The guidelines do not provide anything on the matter. The assessment has to be individualized, and the following aspects have to be taken into account: the COI, statements, documentation, and personal context of the applicant, whether the applicant's actions since arriving were based on establishing a ground to claim asylum, whether their actions would put them in danger of persecution if they would return, and if the applicant could request asylum in another country of which they are a citizen (Directive 2011/95/EU, Article 4 (3)). The guidelines only impose that the assessment must be individualized and that the applicant's circumstances must be considered (UNHCR, 2012, para. 16). Suppose the applicant cannot submit evidence other than their statement. In that case, no confirmation of those aspects is needed when first, the applicant has shown exertion trying to prove their asylum request, second, when the lack of documents can be explained, third, when the story of the applicant is deemed to be coherent, fourth, when the application was made on time, and lastly when the applicant has been considered credible (Directive 2011/95/EU, Article 4 (5)). This provision considers that SOGI applicants may be unable to provide evidence since they are often persecuted by private actors or leave their country in a rush (Danisi et al., 2021). That should not diminish their ability to claim asylum. The guidelines agree that the applicant's statement is sufficient and that no further confirmation is needed (UNHCR, 2012, para. 64).

4.1.3 Directive 2013/32/EU

Directive 2013/32/EU, also called Asylum Procedure Directive (APD), establishes harmonized asylum procedure standards for the MS (Vedsted-Hansen, 2022). SOGI is mentioned three times in the APD. Recital 29 states that SOGI applicants might require special procedural guarantees (Directive 2013/32/EU). The term 'applicant in need of special procedural guarantees' is defined as an applicant who cannot fulfill the requirements of the provisions stated in the APD due to their circumstances (Directive 2013/32/EU, Article 2 (d)). The MS must assess whether the applicant needs those guarantees and provide them with the necessary support (Directive 2013/32/EU). The other two times SOGI is

mentioned are in Article 11 (Requirements for a decision by the determining authority) and Article 15 (Requirements for a personal interview) (Directive 2013/32/EU, Articles 11 & 15).

Article 4 states that the determining authorities' personnel must be appropriately trained. The MS are responsible for providing the personnel with the training to consider the needs of the applicants and that certain aspects like having experienced torture in the past might affect the applicant's ability to be interviewed (Directive 2013/32/EU, Article 4). The guidelines agree with that (UNHCR, 2012, para. 60 (iv)).

Article 10 (3) provides that the determining authorities must examine the claimant's application before deciding on the claim. To do so, they should rely on COI and the legal standards of asylum and refugee law, including the Geneva Convention. Furthermore, the personnel can get expert counsel on gender issues to ensure an appropriate investigation of SOGI applications (Directive 2013/32/EU, Article 10 (3)). The guidelines also state that the decision-makers should rely on COI but warn that it might not display the actual reality as information regarding the situation of SOGI individuals is often lacking (UNHCR, 2012, para. 66). Since the guidelines are a tool to guide assessing SOGI claims accordingly to the Geneva Convention, they also foresee that legal standards of asylum and refugee law must be considered.

Provisions regarding the personal interview are stated in Article 14. The applicants are entitled to a personal interview before a decision on their application is made. The duty to conduct such an interview might be neglected if the applicant cannot be interviewed due to personal circumstances (Directive 2013/32/EU, Article 14). The guidelines also mention an interview for the applicants and how past experiences can affect their ability to make their case (UNCHR, 2012, paras. 59 & 62-63).

In Article 15, the requirements for the interview are laid out. First, the interview should be conducted without family members, except if their presence is needed (Directive 2013/32/EU, Article 15 (1)). For SOGI claimants, it can hinder speaking freely about their reasons for fleeing if family members are present. The matters discussed in the interview must be handled confidentially so that the applicant feels safe to share their story (Directive 2013/32/EU, Article 15 (2)). The interview's atmosphere should allow the applicant to present their claim effectively, which is why certain conditions must be ensured. First, the interviewer must consider the general and personal circumstances of the claimant's application, including the applicant's vulnerability. Here SOGI is expressly mentioned again. Second, the applicant can request the gender of the interviewer and interpreter. Third, the interpreter should be competent to avoid misunderstandings, whereby the claimant chooses the language. Lastly, the interviewer should not wear a uniform (Directive 2013/32/EU, Article 15 (3)). The guidelines agree mostly with what the APD lays out (UNHCR, 2012, para. 60).

Article 16 offers insights into the contents of the interview. The claimant needs to get the chance to present their case, explain why documentation might be lacking, and clarify any inconsistencies (Directive, 2013/32/EU, Article 16). Regarding the interview's content, the guidelines provide more specific information. The interviewer should pose open-ended questions without any judgment. They also provide areas of question helpful for determining the applicant's claim (UNHCR, 2012, para. 63).

Article 24 provides provisions on the special procedural guarantees for vulnerable applicants. The MS must determine within reasonable time whether a claimant needs those guarantees; no further specification is made (Vedsted-Hansen, 2022). If a SOGI applicant is deemed to need special procedural guarantees, the MS must ensure it throughout the asylum procedure. This also applies if the need becomes apparent later during the procedure. The applications where special procedural guarantees are needed due to rape or violence cannot be accelerated, nor does the safe third country principle apply (Directive 2013/32/EU, Article 24). The Article does not enclose which groups are entitled to special procedural guarantees (Vedsted-Hansen, 2022) nor specifies what those guarantees entail (Tsourdi, 2022). However, recital 29 states that SOGI claimants should be considered to need those guarantees. The guidelines' mere existence shows that SOGI claimants are vulnerable and in need of special guarantees. They provide, similarly to the APD, that accelerated procedures and the safe third country principle are unsuitable for SOGI claimants (UNHCR, 2012, para. 59). The guidelines list a bit more clearly which procedural guarantees are necessary for SOGI claimants (UNHCR, 2012, paras. 58-60).

4.1.4 Directive 2013/33/EU

The Reception Conditions Directive (RCD) (Directive 2013/33/EU) provides the MS with standards on the reception conditions of asylum applicants (Directive 2013/33/EU, Article 1). Although reception conditions are not particularly part of assessing SOGI claims, the Directive does provide some provisions for the assessment for special procedural guarantees.

Article 21 states that the circumstances of vulnerable people, such as people who had to endure torture or violence, must be considered when the Directive is implemented (Directive 2013/33/EU, Article 21).

Article 22 provides that only vulnerable applicants, mentioned in Article 21, should be considered to need special guarantees (Directive, 2013/33/EU, Article 22). SOGI is not mentioned to fall under the category of vulnerable persons. However, people who fell victim to violence can be considered vulnerable and should be granted special guarantees. Since SOGI claimants often experience violence, torture, or rape (Güler, 2019), they can be considered vulnerable under Article 21. The Article provides unspecific standards and does not specify what the guarantees entail, which could endanger the support the applicants will receive (Tsourdi, 2022).

Through the more favorable provision, MS can recognize SOGI claimants as a vulnerable group that needs special procedural guarantees in their national legislation (Ferreira & Danisi, 2021), as Croatia did (Mouzourakis et al., 2017). However, some SOGI applicants did not experience violence as they lived discreetly in their home country out of fear of persecution. Those claimants are still vulnerable and should be granted special procedural guarantees. The RCD may not expressly mention SOGI claimants needing special guarantees, but the APD does in recital 29. It is argued that this could indicate that SOGI applicants require special guarantees during the asylum procedure but not for their reception conditions. However, as both are non-exhaustive lists and rely on the same assessment tool, this difference should not be problematic (Mouzourakis et al., 2017).

To summarize the previous sub-chapters, there is some consistency between the guidelines and the framework. The individual assessment of the claim, the adequate personnel training, and the interview's provisions and requirements follow the guidelines. Both agree that SOGI applicants need special guarantees, but the APD and RCD do not specify what those entail, which could lead to inadequate support and could mean that the applicants cannot effectively make their case. The QD also does not enumerate the specific content of the personal interviews. Since the APD provides provisions for all asylum grounds, it may not be possible to include specific lists of the interview's contents for every ground. This could lead to insensitive, stereotyped, human rights infringing questions. The guidelines and the framework agree that accelerated procedures and the safe third country principle are unsuitable for SOGI applicants. However, the framework only thinks so in the cases of applicants who had to endure violence. Not acknowledging these aspects could lead to applicants not being recognized as needing asylum and sent back to their home countries, where they continue to fear persecution, infringing the principle of non-refoulement.

The following sub-chapter looks at the interpretation and application of the legal framework on SOGI credibility assessments and puts the mentioned concerns to the test.

4.2 Interpretation and application of EU norms in the case law on SOGI asylum claims

Since 2006, 28 judgments have been made about the assessment of SOGI asylum claims, according to the available data. The issues most discussed were credibility assessments (21 cases) and the usage of reports (8 cases). Other issues discussed were individual assessment (5 cases), personal circumstances (4 cases), the concept of vulnerable persons (3 cases), personal interview (2 cases), procedural guarantees (2 cases), and accelerated procedures (1 case).

The CJEU has been reached on two occasions. In the A, B, and C judgment, three SOGI applications in the Netherlands were denied as the applicants' statements were not deemed credible. They appealed the decision. Subsequently, the Dutch Raad van State asked the CJEU whether Articles 3 and 7 CFR limit Article 4 QD⁷ and whether those limitations deviate from those when assessing the credibility of claims on other grounds of persecution (European Database of Asylum Law, 2014). The CJEU found that the QD must be interpreted consistently with the Geneva Convention and the CFR (A (C-148/13), B (C-149/13), C (C-150/13) v Staatssecretaris van Veiligheid en Justitie, 2014, para. 46).

⁷ At that time, Directive 2004/83/EC was still in force, but the judgment is still applicable to Directive 2011/95/EU

The methods used to conduct credibility assessments have to respect the human dignity of the applicant as well as the right to respect private and family life (A (C-148/13), B (C-149/13), C (C-150/13) v Staatssecretaris van Veiligheid en Justitie, 2014, para. 53). Some guidance on prohibited evidence and the interview's contents was also given when assessing the claimant's credibility. Neither stereotypes, photos/videos, and questions about sexual practices nor submitting tests to confirm the SOGI of an applicant are allowed. National authorities should neither demand nor accept those elements if the applicant offers them. Accepting them could lead to other applicants feeling pressured to do the same to heighten their chance of being granted asylum even though they feel uncomfortable doing it (A (C-148/13), B (C-149/13), C (C-150/13) v Staatssecretaris van Veiligheid en Justitie, 2014, para. 56). While it was stated that stereotyped questions are not fit for establishing an applicant's SOGI, the CJEU stated that stereotyped questioning can be helpful but should not be the only tool relied on (A (C-148/13), B (C-149/13), C (C-150/13) v Staatssecretaris van Veiligheid en Justitie, 2014, para. 52). Furthermore, an asylum application should not be denied because the applicant did not initially state SOGI as the ground for claiming asylum (A (C-148/13), B (C-149/13), C (C-150/13) v Staatssecretaris van Veiligheid en Justitie, 2014, para. 72). The guidelines also prohibit the evidence listed in the judgment and relying on stereotypes (UNHCR, 2012, paras. 49 & 64-65). They also agree that applications should not be rejected when SOGI was not initially mentioned as the ground for claiming asylum (UNHCR, 2012, para. 59). This judgment provided a more human rights-focused approach to SOGI credibility assessments and furthered consistency between the legal framework and the guidelines. Rights like human dignity and respect for private and family life are now more ensured during the assessments.

The French National Court of Asylum⁸ also ruled that using recordings/photographs of sexual practices to prove an applicant's SOGI is prohibited under the EU's legal framework and should not be accepted as evidence. This kind of evidence violates the human dignity of the applicant (Linklaters LLP, 2015).

The second judgment that reached the CJEU concerned a Nigerian who applied for asylum in Hungary because of his sexual orientation. His request was rejected after an expert's report denied his homosexuality. The applicant argued that the test violated his human dignity and appealed the decision. The Administrative and Labour Court of Szeged asked the CJEU for guidance (European Database of Asylum Law, n.d.). It was asked whether Article 4 QD, interpreted accordingly with Article 1 CFR, prohibits forensic psychologists' expert opinions, like those used in this case, based on personality tests that do not involve physical examinations or questions about sexual practices to assess an applicant's SOGI. Furthermore, the court wanted to know if no expert methods can be used to verify an applicant's SOGI no matter the methods (F v Bevándorlási és Állampolgársági Hivatal, 2018, para. 26). Regarding the first question, the CJEU mentioned that if people would consent to undergo such tests, that consent may not always be given out of their free will since they might think that if they do not undergo such tests, their application might be denied. In those cases, the use of psychological expert reports infringes the right to respect their private life (F v Bevándorlási és Állampolgársági Hivatal, 2018, paras. 53-54). Furthermore, the court provided that the results of such tests may only be seen as suggesting the applicant's SOGI but can never be used to prove it. Therefore, a decision cannot be made by relying on a test (F v Bevándorlási és Állampolgársági Hivatal, 2018, para. 69). The CJEU ruled that the use of psychologists' expert reports, like those used in this case, is precluded from Article 4 QD, interpreted according to Article 7 CFR, for assessing an applicant's SOGI (F v Bevándorlási és Állampolgársági Hivatal, 2018, para. 71). Regarding the second question, the CJEU laid out that decision-makers can use expert methods to assess SOGI asylum applications if they are consistent with the EU asylum *acquis* and the CFR, and are scientifically recognized (F v Bevándorlási és Állampolgársági Hivatal, 2018, paras. 34-35 & 58). The national authorities should not be bound by the report's outcome or base their decision solely on it (F v Bevándorlási és Állampolgársági Hivatal, 2018, para. 46). This judgment also provides a more human rights-focused credibility assessment through the prohibition of tests that infringe the applicants' rights like human dignity, integrity of the person, and respect for private and family life. It also furthered the consistency between the legal framework and the guidelines since they also prohibit (medical) testing (UNHCR, 2012, para. 65). The CJEU did not give guidance on conducting a SOGI credibility assessment and which evidence the applicants should bring forward to substantiate their claims. It is, however, not the court's duty to fill this gap but the job of the policymakers.

⁸ CNDA, 29 October 2015, Mr. H., N° 15006472 C+

Psychological reports for assessing the SOGI of an applicant were also prohibited in a case involving a Nigerian applying for asylum in Hungary. The authorities did not find the applicant credible and arranged an examination by a psychologist to assess the applicant's sexual orientation. The applicant was not found to be gay, and the application was rejected (European Database of Asylum Law, 2016b). The Győr Administrative and Labour Court ruled that the SOGI of an applicant cannot be assessed by tests and excluded the psychological report from evidence, as they interpreted Article 4 QD, read in light of Article 7 CFR, as prohibiting authorities from expecting applicants to undergo tests to prove their SOGI (13.K.27.101/2016/7, 2016).

Whereas the cases above provided guidance on the prohibited practices during the credibility assessments, the cases involving a Moroccan⁹, a Kurd¹⁰, and an Iraqi¹¹ give some insights into what is considered good evidence. The applicants talked about their self-realization, self-acceptance, non-conformity, romantic/sexual relationships, and the consequences they suffered because of their SOGI (Gough, 2019; European Database of Asylum Law, 2018a; European Database of Asylum Law, 2018b). These question areas are also reflected within the guidelines (UNHCR, 2012, para. 63). This is a good step toward a more human rights-focused credibility assessment since questions about the applicants' self-realization are posed instead of insensitive questions about sexual practices that would infringe the applicants' rights to human dignity and right to respect private and family life.

SOGI applicants often have no evidence for their claim except for their statement. In those cases, the applicant's demeanor also becomes of interest to the decision-makers. This can negatively affect the applicant's credibility, as shown in an Italian case¹², in which a Ghanian was denied asylum due to a lack of emotional engagement when telling his story. The Tribunal of Genova ruled, after the applicant's appeal, that it cannot be expected of an applicant who has PTSD to show emotional engagement, as it can cause a lack of emotional involvement and memory loss (Venturi, 2016). The notion of trauma affecting the capacity of an applicant to share their story is also described within the guidelines (UNHCR, 2012, para. 59). Acknowledging the applicant's trauma when conducting the credibility assessment is essential, and not expecting them to behave a certain way. Their claim should not be rejected, and their protection not be endangered due to certain expectations that decision-makers might have.

In conclusion, it can be recognized that courts took the rights of the applicants seriously by interpreting the applied framework with a human rights lens providing more human rights-focused credibility assessments. The interpretation also led to more consistency with the guidelines. Both the guidelines and the interpretation of the framework prohibit photos, videos, or the live performance of sexual practices. They also prohibit questions about it. Thereby, the human dignity and respect for private and family life of the applicant are ensured. Furthermore, the use of tests to confirm the SOGI of an applicant is prohibited if they are not consistent with the CFR. The guidelines go beyond that and prohibit testing in general. This also ensures human dignity, integrity to the person, and respect for private and family life. They agree that trauma must be acknowledged when assessing a claim and that applications should not be denied when SOGI was not initially stated as the ground of persecution. Thereby the applicant's right to asylum and the principle of non-refoulement is ensured. A matter that was not addressed in the framework but filled through its interpretation was the interview's contents. Questions regarding self-realization, non-conformity, and romantic/sexual relationships help assess the credibility of a SOGI claim. Using these questions instead of questions about sexual practices safeguards the applicant's rights to human dignity and respect for private and family life. No consistency was furthered regarding stereotypes used to assess SOGI claims. The interpretation of the framework still allows them if they are not the only tool used, which could lead to applicants who do not conform to those (western) stereotypes as not being recognized as needing asylum, infringing the principle of non-refoulement. The findings were added to *Table 2*.

⁹ Council of Alien Law Litigation, X v. Commissioner General for Refugees and Stateless Persons, No. 220 190, 24th April 2019

¹⁰ Denmark – Refugee Appeals Board's decision of 6 March 2018

¹¹ NL 17.11921

¹² Italy – Tribunal of Genova, 13 May 2016, no. 15023/15

5. Conclusion

This thesis aimed to answer the research question: “To what extent is the legal framework of assessing SOGI asylum claims in the EU consistent with the UNHCR Guidelines on International Protection no. 9?”. Its purpose was to find out where the possible human rights gaps lie in the EU’s legal framework for assessing SOGI claims and whether the guidelines could be used as a common human rights-focused approach to fill those gaps and achieve the objectives of Articles 67 (1) and 78 (1) TFEU. As can be seen in *Table 2*, out of the 18 assessed provisions, seven have been consistent, nine have been inconsistent, and two have been mostly consistent. Some of these provisions, like *sur place* claims or agents of persecution, were already consistent and needed no further amendment to consider the human rights of SOGI applicants. Sometimes consistency and a more human rights-focused approach were reached through the interpretation of the legal framework. This was the case with the prohibition of expecting applicants to conceal their SOGI to prevent persecution and the prohibition of using photos/videos or the live demonstration of sexual practices as evidence. There are, however, still some inconsistencies between the legal framework and the guidelines. These inconsistencies negatively affect SOGI claims and even infringe the applicants’ human rights. This can be seen in the approach used to assess the membership of a PSG and acts that amount to persecution. The framework continues to use the cumulative approach for assessing membership of a PSG and does not include discrimination, infringed family and socio-economic rights, and not regularly enforced laws criminalizing homosexuality as acts of persecution. Due to these inconsistencies, rightful asylum applications could be rejected even though the applicants could face persecution on return to their home country. In turn, this violates the principle of non-refoulement, which constitutes the cornerstone of the EU asylum *acquis* and the Geneva Convention. If the guidelines were adopted as a common approach for assessing SOGI claims in the EU by including its provisions in the proposed third phase instruments of the CEAS, violations of the principle of non-refoulement and human dignity, respect for private and family life, and non-discrimination could be prevented, and SOGI applicants would be granted the protection that they need. This would be a step toward a harmonized human rights-focused CEAS instead of a securitized one, as the new QD and APD are proposed as Regulations instead of Directives, which do not have to be implemented into national law and are universally binding throughout the EU (Dörig et al., 2022; Vedsted-Hansen, 2022), thereby furthering the objectives of Articles 67 (1) and 78 (1) TFEU. This can counter the culture of disbelief in SOGI asylum applications and hinders MS with derogatory views on LGBTQ+ individuals from discriminating against them. However, one must acknowledge that even though the guidelines would address most human rights gaps of the legal framework, they are not exempt from criticism. For example, they do not provide thorough guidance on evidentiary matters (Ferreira & Danisi, 2021). It is also important to mention that this research exhibits certain limitations. The word count restrictions allowed for no in-depth discussion of every provision and case law. Furthermore, by using an interpretative approach, other researchers might attach different significance to the findings and have diverging views on how to best address the issue. Further research could assess the proposed third phase instruments of the CEAS for a more human rights-focused approach for assessing SOGI claims and their consistency with the guidelines.

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Annex

Table 1

Results European Asylum Law Database Search for Case Law using the keywords Sexual Orientation and Gender Identity, last accessed 16.06.2022

no.	Case Name	Country of Decision	Country of Applicant	Date of Decision	Keywords	Link
1	I. v IBS [2020] 2364/18.0BELSB	Portugal	Sierra Leone	14.05.2020	Dublin Transfer, Individual assessment, personal interview, inhuman or degrading treatment or punishment, vulnerable person	https://www.asylumlawdatabase.eu/en/case-law/portugal-i-v-immigration-and-borders-service-no-2364180belsb-14-may-2020
2	Council of State, 27 February 2020, N° 247156	Belgium	Unknown	27.02.2020	Credibility assessment, Gender-Based, Medical Reports/Medico-legal Reports, Persecution Grounds/Reasons, Serious harm, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/belgium-council-state-27-february-2020-n%C2%B0-247156
3	Greece – Appellant v Ministry of Migration Policy, Piraeus Administrative Court of Appeal A401/2019, 12 June 2019	Greece	Ghana	12.06.2019	Gender-Based Persecution, Inhuman or degrading treatment or punishment, Membership of a particular social group, Unaccompanied minor, Well-founded fear, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/greece-piraeus-administrative-court-appeal-decision-a4012019-12-june-2019
4	Council of Alien Law Litigation, X v. Commissioner General for Refugees and Stateless Persons, No. 220 190, 24th April 2019	Belgium	Morocco	24.04.2019	Assessment of facts and circumstances, Credibility assessment, Individual assessment, Membership of a particular social group, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/belgium-%E2%80%93-x-v-commissioner-general-refugees-and-stateless-persons-no-220190-24th-april-2019
5	Denmark – the Refugee Appeals Board’s decision of 17 May 2018	Denmark	Uganda	17.05.2018	Discrimination, Refugee Status, Relevant Facts, Membership of a particular social group, Well-founded fear, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/denmark-refugee-appeals-board%E2%80%99s-decision-17-may-2018
6	NL 17.11921	Netherlands	Iraq	19.03.2018	Assessment of facts and circumstances, Credibility assessment, Medical Reports/Medico-legal Reports, Personal circumstances of applicant, Membership of a particular social group, Well-founded fear, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/court-hague-19-march-2018-nl-1711921#content

no.	Case Name	Country of Decision	Country of Applicant	Date of Decision	Keywords	Link
7	Case C-473/16	CJEU	Nigerian	25.01.2018	Assessment of facts and circumstances Credibility assessment Medical Reports/Medico-legal Reports Membership of a particular social group Persecution Grounds/Reasons Sexual orientation	https://www.asylumlawdatabase.eu/en/content/cjeu-case-c-47316-f#content
8	No. 21417/17	Switzerland	Sierra Leone	18.01.2018	Discrimination Credibility assessment Individual assessment Manifestly unfounded application Inhuman or degrading treatment or punishment Refugee Status Safe country of origin Persecution Grounds/Reasons Sexual orientation	https://www.asylumlawdatabase.eu/en/content/ik-v-switzerland-no-2141717-18-january-2018#content
9	European Court of Human Rights, E.S. v. Spain, Application no. 13273/16, 26 September 2017	EctHR	Senegal	26.09.2017	Country of origin Credibility assessment Manifestly unfounded application Well-founded fear Sexual orientation	https://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93-es-v-spain-application-no-1327316-26-september-2017#content
10	National Court of Asylum, 31 May 2017, Mr. O. v OFPRA, No. 16014463	France	Mongolia	31.05.2017	Assessment of facts and circumstances, Country of origin information, Discrimination, Previous persecution, Real risk, Refugee Status, Membership of a particular social group, Well-founded fear, Persecution (acts of), Persecution Grounds/Reasons, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/france-%E2%80%93-national-court-asylum-31-may-2017-mr-o-no-16014463
11	[2017] EWCA Civ 351	United Kingdom	Albania	09.05.2017	Assessment of facts and circumstances, Refugee Status, Unaccompanied minor, Persecution Grounds/Reasons, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/uk-lc-albania-v-secretary-state-home-department-and-united-nations-high-commissioner#content

no.	Case Name	Country of Decision	Country of Applicant	Date of Decision	Keywords	Link
12	France – Council of State, 21 April 2017, n° 399780	France	Bangladesh	21.04.2017	Country of origin information, Refugee Status, Membership of a particular social group, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/france-%E2%80%93-council-state-21-april-2017-n%C2%B0-399780
13	338530	Luxembourg	Nigeria	27.06.2017	Internal protection, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/luxembourg-administrative-tribunal-338530-27-june-2017
14	France – A.B. v Council of State, 8 February 2017, No. 396695	France	Côte d’Ivoire	08.02.2017	Actor of persecution or serious harm, Credibility assessment, Gender-Based, Membership of a particular social group, Persecution (acts of), Persecution Grounds/Reasons, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/france-ab-v-council-state-8-february-2017-no-396695
15	Hungary – Administrative and Labour Court of Debrecen, 2 September 2016, 8.K.27.394/2016/4	Hungary	Nigeria	02.09.2016	Internal protection, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/hungary-administrative-and-labour-court-debrecen-2-september-2016-8k2739420164#content
16	Hungary – Administrative and Labour Court of Szeged, 8 August 2016, 10.K.27.565/2015/28.	Hungary	Nigeria	08.08.2016	Medical Reports/Medico-legal Reports, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/hungary-%E2%80%93-administrative-and-labour-court-szeged-8-august-2016-10k27565201528#content
17	Spain: Supreme Court. Chamber for Contentious-Administrative Proceedings, 18 th July 2016, M, Appeal No. 3847/2015	Spain	Cameroon	18.07.2016	Country of origin, Inadmissible application, Refugee Status, Subsidiary Protection, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/spain-supreme-court-chamber-contentious-administrative-proceedings-18th-july-2016-m-appeal#content
18	European Court of Human Rights, O.M. v. Hungary, Application no. 9912/15, 5 July 2016	EctHR	Iran	05.07.2016	Detention Individual assessment Relevant Documentation Reception conditions Nationality Vulnerable person Sexual orientation	https://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93-om-v-hungary-application-no-991215-5-july-2016#content

no.	Case Name	Country of Decision	Country of Applicant	Date of Decision	Keywords	Link
19	[2016] EWHC 1345 (Admin)	United Kingdom	Gambia	17.06.2016	Accelerated procedure, Effective access to procedures, Credibility assessment, Detention, Legal assistance / Legal representation / Legal aid, Medical Reports/Medico-legal Reports, Procedural guarantees, Reception conditions, Vulnerable person, Sexual orientation, Torture	https://www.asylumlawdatabase.eu/en/case-law/united-kingdom-r-application-lmc-v-secretary-state-home-department-17-june-2016#content
20	U-I-68/16, Up-213/15	Slovenia	Kosovo, Serbia	16.06.2016	Family member, Family reunification, Family unity (right to)	https://www.asylumlawdatabase.eu/en/case-law/slovenia-constitutional-court-republic-slovenia-16-june-2016-judgment-u-i-6816-21315#content
21	13.K.27.101/2016/7	Hungary	Nigeria	01.06.2016	Credibility assessment, Medical Reports/Medico-legal Reports, Persecution Grounds/Reasons, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/hungary-gy%C5%91r-administrative-and-labour-court-13k2710120167-1-june-2016#content
22	Italy – Tribunal of Genova, 13 May 2016, no. 15023/15	Italy	Ghana	13.05.2016	Credibility assessment, Membership of a particular social group, Well-founded fear, Persecution (acts of), Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/italy-tribunal-genova-13-may-2016-no-1502315
23	I Up 49/2016	Slovenia	Kosovo	09.03.2016	Non-state actors/agents of persecution, Previous persecution, Protection, Membership of a particular social group, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/slovenia-supreme-court-republic-slovenia-i-492016-9-march-2016
24	Pajić v Croatia [2016] EctHR application no. 68453/13	EctHR	Bosnia and Herzegovina	23.02.2016	Discrimination Family reunification Family unity (right to)	https://www.asylumlawdatabase.eu/en/content/ecthr-paji%C4%87-v-croatia-application-no-6845313-23-february-2016#content
25	CNDA, 29 October 2015, Mr. H., N° 15006472 C+	France	Bangladesh	29.10.2015	Country of origin, Gender-Based, Personal interview, Relevant Facts, Membership of a particular social group, Serious harm, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/france-national-court-asylum-cour-nationale-du-droit-d%E2%80%99asile-29-october-2015-mr-h-n

no.	Case Name	Country of Decision	Country of Applicant	Date of Decision	Keywords	Link
26	R. G. no. 4522/2015	Italy	Liberia	05.03.2015	Final decision, Refugee Status, Persecution (acts of), Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/italy-%E2%80%93-court-cassation-civil-division-vi-5-march-2015-n-4522#content
27	A (C-148/13), B (C-149/13), C (C-150/13)	CJEU	-	02.12.2014	Credibility assessment Procedural guarantees Refugee Status Standard of proof Membership of a particular social group Sexual orientation	https://www.asylumlawdatabase.eu/en/content/cjeu-joined-cases-c%E2%80%91c%E2%80%91114813-c%E2%80%91115013-b-and-c-v-staatssecretaris-van-veiligheid-en-justitie-2#content
28	M.E. v. Sweden – 71398/12	EctHR	Libya	26.06.2014	Credibility assessment Family reunification Persecution (acts of) Sexual orientation	https://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93-me-v-sweden-application-no-7139812#content
29	[2014] EWHC 1914 (Admin)	United Kingdom	Albania, Iran, Pakistan, Sudan	11.06.2014	Access to the labour market, Accommodation centre, Dublin Transfer, Personal circumstances of applicant, Inhuman or degrading treatment or punishment, Integration measures, Material reception conditions, Safe third country, Reception conditions	https://www.asylumlawdatabase.eu/en/case-law/uk-queen-application-mr-mohsen-pourali-tabrizagh-mr-tahir-syed-mr-saeed-ali-mr-ali-omar#content
30	C-199/12, C-200/12, and C-201/12	CJEU	Senegal, Sierra Leone, Uganda	07.11.2013	Discrimination Membership of a particular social group Well-founded fear Persecution (acts of) Persecution Grounds/Reasons Sexual orientation	https://www.asylumlawdatabase.eu/en/content/cjeu-c-19912-c-20012-and-c-20112-minister-voor-immigratie-en-asiel-v-x-y-and-z#content
31	U1268/2013	Austria	Nigeria	16.09.2013	Assessment of facts and circumstances, Country of origin information, Final decision, Individual assessment, Obligation to give reasons, Subsequent application, Membership of a particular social group, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/austria-constitutional-court-vfgh-16-september-2013-u12682013

no.	Case Name	Country of Decision	Country of Applicant	Date of Decision	Keywords	Link
32	N° 3186/2013	Spain	Cameroon	17.06.2013	Child Specific Considerations, Legal assistance / Legal representation / Legal aid, Membership of a particular social group, Unaccompanied minor, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/spain-supreme-court-17-june-2013-no-31862013#content
33	CCE, arrêt n°101.488	Belgium	Senegal	24.04.2013	Benefit of doubt, Country of origin information, Real risk, Persecution (acts of), Sexual orientation	https://www.asylumlawdatabase.eu/fr/case-law/belgique-cce-24-avril-2013-no-101488
34	V SA/Wa 910/12	Poland	Cameroon	07.03.2013	Actor of persecution or serious harm, Duty of applicant, Medical Reports/Medico-legal Reports, Refugee Status, Membership of a particular social group, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/poland-regional-administrative-court-warsaw-7-march-2013-v-sawa-91012
35	Italy – Court of Appeal of Bari, 5 March 2013, n. 299	Italy	Gambia	05.03.2013	Credibility assessment, Membership of a particular social group, Well-founded fear, Persecution (acts of), Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/italy-court-appeal-bari-5-march-2013-n-299
36	E1 432053-1/2013	Austria	Pakistan	29.01.2013	Actor of persecution or serious harm, Country of origin information, Discrimination, Gender-Based, Internal protection, Non-state actors/agents of persecution, Previous persecution, Refugee Status, Membership of a particular social group, Persecution (acts of), Persecution Grounds/Reasons, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/austria-asylum-court-29-january-2013-e1-432053-12013
37	5349/2012	Spain	Cameroon	27.12.2012	Accommodation centre, Assessment of facts and circumstances, burden of proof, COI, Credibility assessment, Obligation to give reasons, standard of proof, sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/spain-high-national-court-judgment-27-december-2012-53492012#content

no.	Case Name	Country of Decision	Country of Applicant	Date of Decision	Keywords	Link
38	V SA/Wa 873/12	Poland	Uganda	01.10.2012	Credibility assessment, Refugee Status, Standard of proof, Membership of a particular social group, Subsidiary Protection, Well-founded fear, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/poland-regional-administrative-court-warsaw-1-october-2012-v-sawa-87312
39	No. 15981/2012	Italy	Senegal	20.09.2012	Country of origin information, Discrimination, Refugee Status, Persecution (acts of), Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/italy-court-cassation-20-september-2012-no-159812012
40	CE, 27 juillet 2012, n° 349824, M.B.	France	Congo (DRC)	27.07.2012	Actor of persecution or serious harm, Refugee Status, Membership of a particular social group, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/france-council-state-27-july-2012-n%C2%B0-349824-mb
41	Application No. 95/56266	Greece	Iran	22.06.2012	Actor of persecution or serious harm, Benefit of doubt, Death penalty / Execution, Country of origin information, Discrimination, Credibility assessment, Internal protection, Real risk, Inhuman or degrading treatment or punishment, Well-founded fear, Religion, Serious harm, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/greece-special-appeal-committee-22-june-2012-ag-v-general-secretary-former-ministry-public
42	RdU-495-2/S/11	Poland	Uganda	12.03.2012	Assessment of facts and circumstances, Medical Reports/Medico-legal Reports, Relevant Facts, Standard of proof, Membership of a particular social group, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/poland-polish-council-refugees-12-march-2012-rdu-495-2s11
43	KHO:2012:1	Finland	Iran	13.01.2012	Death penalty / Execution, Membership of a particular social group, Persecution Grounds/Reasons, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/finland-supreme-administrative-court-13-january-2012-kho20121#content

no.	Case Name	Country of Decision	Country of Applicant	Date of Decision	Keywords	Link
44	[2011] IEHC 473	Ireland	Uganda	13.12.2011	Credibility assessment, Subsequent application, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/ireland-high-court-13-december-jk-uganda-v-minister-justice-and-equality-2011-iehc-473#content
45	18 K 6103/10.A	Germany	Guinea	15.09.2011	Assessment of facts and circumstances, Country of origin information, Credibility assessment, Non-state actors/agents of persecution, Previous persecution, Personal circumstances of applicant, Membership of a particular social group, Persecution Grounds/Reasons, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-k%C3%B6ln-15-september-2011-18-k-610310a
46	Nr. 57.425	Belgium	Mauritania	07.03.2011	Benefit of doubt, Assessment of facts and circumstances, Credibility assessment, Internal protection, Membership of a particular social group	https://www.asylumlawdatabase.eu/en/case-law/belgium-%E2%80%93-council-alien-law-litigation-7-march-2011-nr-57425
47	A4 213316-0/2008	Austria	Egypt	24.02.2011	Actor of persecution or serious harm, Actors of protection, Discrimination, Gender Based Persecution, Non-state actors/agents of persecution, Refugee Status, Refugee sur place, Membership of a particular social group, Persecution (acts of), Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/austria-asylum-court-24-february-2011-a4-213316-02008
48	VG 4 K 772/10.A	Germany	Cameroon	11.11.2010	Discrimination, Membership of a particular social group, Persecution Grounds/Reasons, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-frankfurt-oder-11-november-2010-vg-4-k-77210a
49	[2010] UKSC 31	United Kingdom	Cameroon, Iran	07.07.2010	Discrimination, Non-state actors/agents of persecution, Membership of a particular social group, Persecution (acts of), Persecution Grounds/Reasons, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/uk-supreme-court-7-july-2010-hj-iran-v-secretary-state-home-department-2010-uksc-31#content

no.	Case Name	Country of Decision	Country of Applicant	Date of Decision	Keywords	Link
50	1Sža/7/2010	Slovakia	India	23.02.2010	Membership of a particular social group, Persecution Grounds/Reasons	https://www.asylumlawdatabase.eu/en/case-law/slovakia-s-v-ministry-interior-slovak-republic-23-february-2010-1s%20C5%BEa72010
51	Cour nationale du droit d'asile, 23 décembre 2010, M. K., n°08014099	France	Algeria	23.01.2010	Membership of a particular social group, Persecution Grounds/Reasons, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/france-cnda-23-december-2010-mr-k-n%20B008014099
52	Nr. 31.311	Belgium	Gambia	09.09.2009	Actors of protection, Membership of a particular social group	https://www.asylumlawdatabase.eu/en/case-law/belgium-council-alien-law-litigation-9-september-2009-nr-31311
53	Trieste Court of First Instance, Decision of 8.09.2009, case No RG 1012/2009	Italy	Benin	08.09.2009	Persecution (acts of), Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/italy-trieste-court-first-instance-8-september-2009-rg-10122009
54	CNDA, 7 juillet 2009, n°634565, M.C.	France	Tunisia	07.07.2009	Membership of a particular social group, Persecution Grounds/Reasons	https://www.asylumlawdatabase.eu/en/case-law/france-cnda-7-july-2009-mr-c-n%20B0634565
55	CNDA, 6 avril 2009, n°616907, M.K.	France	Kosovo	06.04.2009	Actors of protection, Membership of a particular social group, Persecution Grounds/Reasons	https://www.asylumlawdatabase.eu/en/case-law/france-cnda-6-april-2009-mr-k-n%20B0616907
56	3 K 753/07.NW	Germany	Iran	08.09.2008	Assessment of facts and circumstances, Country of origin information, Credibility assessment, Personal circumstances of applicant, Standard of proof, Subsequent application, Membership of a particular social group, Persecution Grounds/Reasons	https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-neustadt-adw-8-september-2008-3-k-75307nw
57	Cour nationale du droit d'asile, 10 juin 2008, M.A., n°462102	France	Iraq	10.06.2008	Membership of a particular social group, Persecution Grounds/Reasons	https://www.asylumlawdatabase.eu/en/case-law/france-cnda-10-june-2008-mr-n%20B0462102
58	1 Sža/9/2007	Slovakia	China	16.10.2007	Credibility assessment, Membership of a particular social group	https://www.asylumlawdatabase.eu/en/case-law/slovakia-migration-office-16-october-2007-1l-v-ministry-interior-slovak-republic-1-s%20C5%Bea92007#content

no.	Case Name	Country of Decision	Country of Applicant	Date of Decision	Keywords	Link
59	2 Azs 66/2006-52	Czech Republic	Armenia	05.10.2006	Membership of a particular social group, Persecution (acts of), Persecution Grounds/Reasons, Sexual orientation	https://www.asylumlawdatabase.eu/en/case-law/czech-republic-supreme-administrative-court-5-october-2006-am-v-ministry-interior-2-azs

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Table 2

Consistency of UNHCR Guidelines on International Protection no. 9 with the EU Legal Framework.

The provisions are stated in the left column. The next column shows what the guidelines provide on it. The frameworks' provisions are stated in the next column. The right column indicates the consistency of the provision. The consistency column is either marked with a (+), meaning it is consistent, with a (-), meaning there is no consistency, or with a (o), meaning it is mostly consistent. A short argument and the relevant articles, paragraphs, and cases are provided for each provision.

Provision	UNHCR Guidelines on International Protection no. 9	EU Legal Framework	Consistency
Refugee definition	<p>“the term “refugee” shall apply to any person who [...] owing to a well-founded fear [...]”</p> <p>➤ Article 1 A (2) Geneva Convention</p>	<p>“a third-country national, who owing to a well-founded fear [...] or a stateless person [...]”</p> <p>➤ Article 2 (d) QD</p>	<p>(-)</p> <p>EU limits definition to third-country nationals and stateless persons, since it's a presumption that no EU national would be in need of asylum</p>
<i>Sur place</i> claims	<p>May arise because of activities or events after applicant left country; can occur because of change in SOGI</p> <p>➤ Para. 57</p>	<p>Fear of persecution may occur due to events or activities that happened after applicant left country, especially when it is due to continuing expression of beliefs and orientations</p> <p>➤ Article 5 QD</p>	<p>(+)</p> <p>Both acknowledge the existence of <i>sur place</i> claims</p>
Agents of persecution	<p>State and non-state actors; in case of non-state actors protection from state must be unavailable</p> <p>➤ Paras. 34-36</p>	<p>State, parties/organizations, and non-state actors; in case of non-state actors, protection from state/organizations must be unavailable</p> <p>➤ Article 6 QD</p>	<p>(+)</p> <p>Agree on agents of persecution. Also agree that protection must be unavailable if non-state actors persecute</p>
State protection	<p>Authorities should respond to requests and investigate those; offenders should be punished and prosecuted; anti-discrimination laws and existence of LGBTQ+ organizations do not necessarily evade well-founded fear</p> <p>➤ Para. 36-37</p>	<p>Having a legal system to expose persecution; measures to prevent persecution; punishment and prosecution of offenders</p> <p>➤ Article 7 (2) QD</p>	<p>(-)</p> <p>Mostly the same views, but guidelines also acknowledge that the mere existence of anti-discrimination laws and LGBTQ+ organizations does not evade well-founded fear</p>

Provision	UNHCR Guidelines on International Protection no. 9	EU Legal Framework	Consistency
Internal flight	<p>Relevance and reasonableness analysis to assess whether internal flight is an option; burden of proof on decisions-makers; a minimum of political, civil, and socio-economic rights has to be available to the applicant</p> <ul style="list-style-type: none"> ➤ Paras. 50-56 	<p>Base decision if internal flight is possible on COI and applicant's circumstances; burden of proof on decision-makers</p> <ul style="list-style-type: none"> ➤ Article 8 QD <p>Relevance analysis</p> <ul style="list-style-type: none"> ➤ Case 8.K.27.394/2016/4 <p>Relocation possible under 3 conditions: not being at risk for persecution, being able to enter the area, and reasonable to relocate there</p> <ul style="list-style-type: none"> ➤ Case 338530 	<p>(o)</p> <p>Both impose that internal flight must be relevant and reasonable for applicant; however, the rights laid down in the guidelines are not expressly mentioned in the legal framework</p>
Acts of persecution	<p>Serious human rights violations; violence, discrimination, infringement of family and socio-economic rights; cumulative impact of not as severe rights violations; intersecting factors like age, gender, and mental stability should be considered</p> <ul style="list-style-type: none"> ➤ Paras. 16, 17, 20-25 	<p>Serious human rights violations of rights that are non-derogable (Article 15 (2) ECHR); physical or mental violence, prosecution or punishment, acts of gender specific nature; cumulative impact of not as severe human rights violations</p> <ul style="list-style-type: none"> ➤ Article 9 QD <p>Infringing respect for private and family life and non-discrimination does not amount to persecution</p> <ul style="list-style-type: none"> ➤ Cases C-199/12, C-200/12, and C-201/12 	<p>(-)</p> <p>Have differentiating views on what acts of persecution are. Guidelines go beyond what framework imposes and even acknowledge intersecting factors</p>
Laws criminalizing SOGI	<p>Laws criminalizing SOGI even if not or rarely enforced amount to persecution; applicant's circumstances and COI must be considered</p> <ul style="list-style-type: none"> ➤ Paras. 26-28 	<p>Existence of laws criminalizing SOGI is not enough to amount to persecution, they must be enforced; situation has to be assessed</p> <ul style="list-style-type: none"> ➤ Cases C-199/12, C-200/12, and C-201/12 	<p>(-)</p> <p>Diverging views on whether criminalizing laws must be enforced to amount to persecution</p>
Causal link of	<p>There must be a link between the acts of persecution and one of the persecution grounds laid out in the refugee definition</p> <ul style="list-style-type: none"> ➤ Para. 38 	<p>There must be a link between the acts of persecution and one of the persecution grounds of the refugee definition</p> <ul style="list-style-type: none"> ➤ Article 9 (3) QD 	<p>(+)</p> <p>Both foresee the link between acts of persecution and one of the convention grounds as necessary</p>
Membership of a PSG	<p>Uses alternative approach to assess whether applicant falls under membership of a PSG</p> <ul style="list-style-type: none"> ➤ Para. 45 	<p>Uses cumulative approach to assess whether applicant falls under membership of a PSG</p> <ul style="list-style-type: none"> ➤ Article 10 (1) (d) QD ➤ Cases C-199/12, C-200/12, and C-201/12 ➤ Case 16014463 	<p>(-)</p> <p>Use different approaches to assess membership of a PSG</p>
Perceived SOGI	<p>Perceived SOGI can amount to a well-founded fear of persecution</p> <ul style="list-style-type: none"> ➤ Para. 41 	<p>Perceived SOGI also allows persons to claim asylum on the ground of membership of a PSG</p> <ul style="list-style-type: none"> ➤ Article 10 (2) QD ➤ Case A401/2019 	<p>(+)</p> <p>Both see perceived SOGI as amounting to a well-founded fear of persecution</p>

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Concealment	Rejecting an asylum application because applicant could return to country of origin and conceal their SOGI to avoid persecution is prohibited ➤ Paras. 31-32	SOGI applicants cannot be expected to conceal their SOGI to avoid persecution ➤ Cases C-199/12, C-200/12, and C-201/12 Concealment does not amount to well-founded fear when it is done because of societal pressures ➤ OO v The Secretary of State for the Home Department	(+) To expect an applicant to conceal SOGI to avoid persecution is prohibited
Burden of proof	-	Applicant must carry burden of proof; Member States assess the evidence together with applicant ➤ Article 4 (1) QD	(-) No provision laid out in guidelines
Evidence	Statement is prime and often only evidence ➤ Para. 64	Statement; documentation regarding former asylum requests, identity, nationality, etc. ➤ Article 4 (2) QD	(-) Framework provides for more evidence than the guidelines
Assessment	Must be done on an individual basis; personal circumstances of applicant must be considered ➤ Para. 16 Rely on COI, but consider that it might be lacking ➤ Para. 66 Rely on legal standards of refugee law	Must be done on an individual basis; COI, statements, documentation, and personal context, whether actions were based on establishing a ground to claim asylum, if actions would put them in danger if they would return to their home country, if asylum could be requested in country where applicant is a citizen should be taken into account ➤ Article 4 (3) QD Rely on legal standards of asylum and refugee law ➤ Article 10 (3) APD	(-) Agree on individual basis, personal circumstance, COI and relying on legal standards of asylum and refugee law; legal framework takes more aspects into account like the documentation, or whether the behavior of the applicant was based on establishing a ground for claiming asylum
Confirmation of statement	Statement should be seen as prime evidence and needs no further confirmation ➤ Para. 64	No confirmation needed if applicant showed legitimate exertion trying to prove claim, if lack of documents can be explained, if statement is coherent and logical, if application was made on time, if applicant is deemed credible ➤ Article 4 (5) QD	(-) Guidelines do not provide for any evidence apart from the statement, legal framework only sees statement enough under certain circumstances
Special training	Interviewers, Interpreters, and decision-makers should undergo specialized training ➤ Para. 60 (iv)	Personnel must be appropriately trained ➤ Article 4 APD	(+) Both see specialized training as necessary
Provisions for personal interview	Mention the interview where applicant can make their statement ➤ Paras. 58-63	Entitled to personal interview before decision ➤ Article 14 APD	(+) Personal interview is mentioned by both

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Requirements for personal interview	Open environment; matters handled confidentially; no stereotypes or inappropriate views of LGBTQ+ people, specialized training for interviewer and interpreter, no use of offensive language, requests regarding the gender of interviewer and interpreter can be made <ul style="list-style-type: none"> ➤ Para. 60 	Conducted without family members present; matters handled confidentially, interviewer should be knowledgeable of applicant's vulnerability, request can be made regarding the gender of interpreter and interviewer; interpreter should be competent, and language is chosen by applicant; interviewer should not wear a uniform <ul style="list-style-type: none"> ➤ Article 15 APD 	(o) Provide mostly for the same requirements with small deviations
Content of interview	Open-ended, non-judgmental questions; Areas of question include self-identification, childhood, self-realization, gender identity, non-conformity, family relationships, romantic and sexual relationships, community relationships, and religion <ul style="list-style-type: none"> ➤ Para. 63 	Applicant can present their case, explain why certain documentation is missing, and clarify any inconsistencies <ul style="list-style-type: none"> ➤ Article 16 APD Areas of question used during interview: Self-realization, self-acceptance, non-conformity, and romantic and sexual relationships <ul style="list-style-type: none"> ➤ Case No. 220 190 ➤ Case Denmark – Refugee Appeals Board's decision of 6 March 2018 ➤ Case NL 17.11921 	(+) Content of interview is consistent
Special procedural guarantees	Accelerated procedures and the safe third country principles are not suitable for SOGI claims; SOGI claimants are in need of special procedural guarantees <ul style="list-style-type: none"> ➤ Para. 59 Open and supportive environment, requests can be made regarding the gender of interviewer and interpreter, sensitivity training for the personnel, women should be interviewed without male family member present <ul style="list-style-type: none"> ➤ Paras. 58-60 	Accelerated procedures and the safe-third country principle shall not be used for applicants who had to endure violence <ul style="list-style-type: none"> ➤ Article 24 APD SOGI claimants are listed as being possibly in need of those guarantees <ul style="list-style-type: none"> ➤ Recital 29 APD 	(-) Both say that accelerated procedures and the safe-third country principle are not suitable, but the legal framework only imposes so for applicants who endured violence; they generally agree that SOGI applicants are in need of special guarantees, legal framework does, however, not provide specific guidance what that entails for SOGI applicants
Prohibited evidence	Medical tests, photos/videos of sexual practices, live demonstration of sexual practices, stereotyped questioning <ul style="list-style-type: none"> ➤ Paras. 49 & 64-65 	Questions about sexual practices or films and photos of sexual practices are prohibited <ul style="list-style-type: none"> ➤ Cases 148/13 to C-150/13 ➤ Case N°15006472 C+ Tests to prove SOGI of an applicant are only allowed if they adhere to the CFR and are recognized by the scientific community <ul style="list-style-type: none"> ➤ Case 473/16 ➤ Case 13.K.27.101/2016/7 	(-) Agree that photos/videos and the live demonstration of sexual practices are prohibited; Legal framework does, however, allow tests (if they adhere to CFR and are scientifically recognized) and do not prohibit stereotyped questioning

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Application not originally based on SOGI	Should not be denied because the applicant did not base his application originally on SOGI ➤ Para. 59	Should not be denied because it was not originally based on SOGI ➤ Cases 148/13 to C-150/3	(+) Agree on the matter
Trauma as an intersecting factor	Trauma and past experiences must be considered when assessing a claim since it can affect the ability of an applicant to effectively make their case ➤ Para. 59	Trauma can affect ability of applicant to be interviewed ➤ Article 14 APD PTSD, Trauma, etc., must be acknowledged for negatively affecting an applicant's ability to effectively make their case ➤ Case No. 15023/15	(+) Both acknowledge the intersecting factor that trauma can have on the ability to effectively make an asylum claim