

**“WE’RE HERE AND WE’RE QUEER” – A
CRITICAL APPRAISAL OF LGBT+ PROTECTION
WITHIN THE INTERNATIONAL REFUGEE
PARADIGM**

Shriya Kamat & Priyal Sanghvi***

Abstract

The oppression and marginalization of the LGBT+ community in various societal spheres have been long known, but ‘queer migration’ due to persecution based on their identity is a relatively recent phenomenon. LGBT+ applicants face a range of legal, social and procedural hurdles throughout their asylum application process. In general, the experiences of LGBT+ individuals are often homogenized, and the assessing authorities fail to take into account factors such as race, religion, and nationality, which play a vital role in the persecution faced by them. A disproportionate emphasis lies on proving their sexual/gender identity, as opposed to their past persecution, which points towards a need to pay close attention to issues of credibility. The Convention Relating to the Status of Refugees, 1951 provides a range of

*Shriya Kamat is a fifth-year student at West Bengal University of Juridical Sciences, Kolkata. The author may be reached at shriyakamat@nujs.edu.

**Priyal Sanghvi is a fifth-year student at West Bengal University of Juridical Sciences, Kolkata. The author may be reached at priyalsanghvi32@nujs.edu.

rights to refugees; however, the living reality of LGBT+ refugees in host countries is entirely different. They face discrimination while accessing housing, employment, medical assistance, etc. Due to their LGBT+ status as well as their refugee status, they are doubly marginalized, and hence the denial of their socio-economic rights amounts to a violation of their fundamental human rights. Such a denial defeats the primary purpose of refugee law, which is to offer surrogate protection to refugees. The authors have analyzed reports of LGBT+ refugees in different countries to emphasize the need for structural changes in their asylum regimes. Such refugees are fundamentally different from and more vulnerable than ordinary refugees, which warrants the need for distinctive measures in order to safeguard their interests.

I. INTRODUCTION

Targeted violence and discrimination against individuals based on their sexual orientation and gender identity (“**SOGI**”) is largely prevalent across the world. However, it has recently been recognized as a ground for seeking asylum in other countries under the Convention Relating to the Status of Refugees, 1951 (“**Convention**”).¹ More specifically, SOGI has been recognized as a

¹Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 1 A (2) (Refugee Convention).

characteristic constituting *membership of a particular social group*.² This recognition is based on the fact that it is an 'immutable characteristic' and a fundamental aspect of one's identity, which they should not be required to hide or change.³ Despite this, however, LGBT+ asylum seekers routinely face persecution in the form of severe human rights violations in their home countries, due to which they escape and seek asylum in relatively safer host countries.

Various issues underlie the broad theme of this paper; however, the authors intend to focus on the threshold for persecution under the Convention, the specific issues faced by LGBT+ persons during the process, and the different changes needed in the international refugee framework to make it more inclusive of and sensitive towards the LGBT+ community. Part II of this paper will analyze what kind of acts constitute persecution and explore whether and how an individual's SOGI can act as the underlying cause for persecution, as well as the standard applied by different courts in order to determine the same. Part III and IV will then examine issues of credibility of asylum applications and the manner in which Refugee Status Determination ("RSD") is conducted. Part V will focus on case studies of Turkey, Canada, and the European Union to unpack the obstacles faced by an LGBT+ asylum seeker at every stage of the process, and how they face discrimination even after being granted refugee status. The authors have chosen these particular countries primarily because they have established refugee law frameworks in place and are signatories to the Convention. These countries are also those where asylum is most frequently sought as they have anti-discrimination laws in place and are relatively safer in terms of other

²ibid.

³Benjamin Perryman, Deborah Morrish & Abbas Kassam, 'The Nebulous Nexus Between Sexual Orientation and Membership in a Particular Social Group', [2014] Human Rights Nexus Working Group Meeting, 10th World Conference of the International Association of Refugee Law Judges, Tunisia, 3.

persecutory activities. Thereafter, the paper will focus on the socio-economic discrimination faced by such asylum seekers both during and after RSD and analyze the changes that could be made to the overarching framework in order to ensure better protection of such refugees. Finally, Part VI will provide certain recommendations pertaining to structural changes that could be introduced in the system in order to make it more sensitive to the needs of this community.

II. SOGI AS A GROUND FOR PERSECUTION

Refugees and asylum seekers are entitled to basic non-derogable human rights in accordance with several international human rights instruments, both during and after the status determination process. Such rights include a range of civil, political and socio-economic rights, such as the right to physical security and bodily integrity, right against arbitrary detention, freedom of expression and association, amongst others. For the LGBT+ population, these rights are routinely violated in the form of arbitrary arrest and detention, rapes and torture, discrimination in access to public services, etc.⁴ The principle of non-discrimination is also firmly rooted in the Convention which implies that all the provisions and rights under the Convention must be implemented in a non-discriminatory manner.⁵ Principle 23 of the Yogyakarta Principles also emphasizes on how everyone has the right to seek asylum from persecution in another country, including when

⁴What amounts to 'a serious violation of international human rights law'? (Geneva Academy, 2014), <https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf> last accessed 27 December 2020.

⁵Preamble, Refugee Convention.

such persecution is on the basis of their SOGI,⁶ apart from other rights such as freedom from torture and exploitation,⁷ housing,⁸ education,⁹ health¹⁰ and other basic human rights.

The term 'particular social group' ("PSG") as mentioned in Art. 1(A)(2) of the Convention has been subject to a variety of interpretations in the past; however, the most significant one is the 'immutable characteristic' theory. Admittedly, some courts have also taken differing views to state that only a voluntary association of individuals can constitute a particular social group under the Convention.¹¹ The *Matter of Toboso Alfonso*¹² was the first case to recognize homosexuality as an immutable characteristic, where a gay asylum seeker was granted asylum for being persecuted on the basis of his identity. The Court in *Amanfi v. Ashcroft*,¹³ where the applicant faced persecution because of his imputed identity as a homosexual, upheld that persecution on the basis of SOGI can be perpetrated on the basis of imputed or perceived identity.

A fundamental criticism of this interpretation of PSG is that it assumes that an individual's sexuality or gender identity remains static throughout their life. It fails to recognize that such identities are often fluid and can change with time and experiences.¹⁴ It can also be

⁶International Commission of Jurists, 'Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity', (March 2007), principle 23 (A) (Yogyakarta Principles).

⁷Yogyakarta Principles, principle 10.

⁸Yogyakarta Principles, principle 15.

⁹Yogyakarta Principles, principle 16.

¹⁰Yogyakarta Principles, principle 17.

¹¹*Canada- Attorney General v. Ward* [1993] 2 S.C.R 689 (Can.).

¹²*Matter of Toboso Alfonso* [1990] BIA 20 I. & N. Dec. 819.

¹³*Amanfi v. Ashcroft* [2003] 3d Cir. 328 F.3d 719.

¹⁴Moira Dustin & Nina Held, 'In or out? A Queer intersectional approach to 'Particular Social Group' membership and credibility in SOGI asylum claims in Germany and the UK, 2018', *GenIUS – Rivista di studi giuridici sull'orientamento*

affected by external factors such as culture and general social and political surroundings. As a result, SOGI does not necessarily always have a visible external manifestation.¹⁵ That being said, visibility can still be an essential factor in determining whether the persecution occurred ‘on account of’ a Convention ground, i.e., the nexus between the persecution and the protected characteristic under the Convention.¹⁶ A significant number of LGBT+ asylum seekers do not have sexual relations or partners and are persecuted based on their identity alone. Therefore, the court in the case of *In Re Acosta*¹⁷ acknowledged that homosexuality is constituted by identity, and not by its performance or action. However, it is essential to consider that a lot of LGBT+ individuals conceal their identity out of fear.¹⁸ Hence, placing undue importance on visibility in LGBT+ asylum claims to establish membership of a PSG may go against the fundamental principles of refugee law i.e., to provide a regime of surrogate protection.

While there is no universally accepted definition of persecution, scholars have argued that major and recurring human rights violations broadly encompass it.¹⁹ This, by implication, suggests that not every human right violation will amount to persecution. Article 9(1)(a) of

sessuale e sull'identità di genere, No. 2, 74, 78 (2018); Alex Powell, ‘Interviews with Asylum Seekers Reveal Why the Home Office Rejects So Many LGBT Claims’, (*The Conversation*, 4 September 2019), <<https://theconversation.com/interviews-with-asylum-seekers-reveal-why-the-home-office-rejects-so-many-lgbt-claims-122905>> accessed 16 June 2020.

¹⁵Johannes Lucas Gartner, ‘(In) Credibly Queer: Sexuality Based Asylum in the European Union’ in Judith S. Goldstein & Anthony Chase (eds), *Transatlantic Perspectives on Diplomacy and Diversity* (2015).

¹⁶Fadi Hanna, ‘Punishing Masculinity in Gay Asylum Claims’ [2005] 114 Yale L. J. 913, 914.

¹⁷*In Re Acosta* [1985] BIA 19 I. & N. Dec. 211.

¹⁸*ibid.*

¹⁹John Tobin, ‘Assessing GLBTI Refugee Claims: Using Human Rights Law to Shift the Narrative of Persecution Within Refugee Law’ (2012) 44 International Law and Politics 448, 452; James Hathaway, ‘Fear of Persecution and the Law of Human Rights’ (2002) 91/1 Bulletin of Human Rights 99.

the European Qualification Directive states that the relevant acts must be 'sufficiently serious' by their nature or repetition to constitute a 'severe violation of basic human rights'. The United Nations High Commissioner for Refugees ("UNHCR") Guidelines encompass a variety of acts which qualify as persecution: violence, detention, torture, and other grave forms of human and socio-economic rights violations.²⁰

The threshold for persecution under the Convention is unclear and has been differently interpreted across the world.²¹ This lack of clarity can perhaps be explained by the inherent difference between international human rights law and refugee law, i.e., while the former seeks to protect all human rights irrespective of the degree of violation, the latter is more concerned with providing a regime for surrogate protection in light of a home country's breakdown of state protection. It also focuses more on the violation of human rights based on a Convention ground.²²

A 'well-founded fear' of persecution is a pre-requisite for making an asylum claim.²³ However, it is incredibly subjective and depends on the applicant's narrative. To determine well-founded fear, the applicant's subjective fear of persecution should be given primary importance. The UNHCR Guidelines specify that past persecution is not a pre-requisite for granting asylum.²⁴ The UNHCR acknowledges

²⁰UNHCR Guidelines, para 20-25.

²¹B.C Nirmal, 'Refugees and Human Rights' [2001] 6 Indian Society of International Law (ISIL) Yearbook of International Humanitarian and Refugee Law 1.

²²Tobin, (n 19) 451.

²³Refugee Convention, art 1(A) (2).

²⁴UNHCR, 'Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the context of Article 1 A(2) of the 1951 Convention and/or its Protocol relating to the Status of Refugees', (23 October 2012), HCR/GIP/12/01, para 18 (UNHCR Guidelines).

that a lot of such applicants might be fearful of ‘coming out’ and thus, tend to conceal their identity. Apart from this, a common aspect of such cases is that they are extremely fact-specific and depend on the circumstances and evidence produced.²⁵ This ambiguity, in turn, leaves a lot of discretionary powers with the authorities to determine claims in line with the host country's political, religious and xenophobic agendas.²⁶

The UNHCR also emphasizes on how a pattern of discrimination or targeted harassment could reach the threshold for persecution in some instances.²⁷ More importantly, each claim of persecution must be analyzed after taking into account the objective circumstances in the home country as well as prevalent homo/transphobia, and subjective lived experiences of the applicant. Aaron Sussman argues that there are certain indicative factors of a ‘pattern or practice of persecution’ on the basis of SOGI in a country, and that the presence of these factors create an atmosphere where LGBT+ persons are more likely to face persecution.²⁸ He bases this on the analysis drawn by the US Court of Appeals in the case of *Bromfield v. Mukasey*,²⁹ where the court analysed such factors present in Jamaica and drew an affirmative conclusion regarding the presence of persecution. Hence, these factors can be used as proof for creating a presumption of well-

²⁵Roger Haines QC, ‘Gender-Related Persecution’, in Erika Feller, Volker Türk & Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003); UNHCR, ‘Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’, (21 November, 2008) para 10 (UNHCR Guidance Note).

²⁶Swetha Sridharan, ‘The Difficulty of U.S. Asylum Claims Based on Sexual Orientation’, (*Migration Policy Institute*, 29 October 2008), <<https://www.migrationpolicy.org/article/difficulties-us-asylum-claims-based-sexual-orientation>> accessed 16 June 2020.

²⁷UNHCR Guidance Note, para 10.

²⁸Aaron Sussman, ‘Expanding Asylum Law’s Pattern or Practice of Persecution Framework to Better Protect LGBT Refugees’ [2013] 16 *University of Pennsylvania Journal of Law and Social Change* 111, 123.

²⁹*Bromfield v. Mukasey*, 543 F. 3d 1071 (9th Cir. 2008).

founded fear. They include laws that criminalise homosexuality, mob violence and state-sponsored violence, ingrained societal homophobia and homophobic culture, amongst others.³⁰ However, these factors are relatively loosely worded and might lead to an abuse of the RSD procedure by applicants. Creating such a strong presumption may have the impact of allowing applicants to use their SOGI to gain asylum when their reason for persecution was not on the basis of their SOGI. This possibility of abuse is why intersectionality of persecution and its contextualisation against a certain background must be a strong consideration in the determination of claims, instead of looking at the presence of one factor in isolation.

LGBT+ persons all over the world routinely face discrimination and harassment on the basis of their identity, although they are equally entitled to all human rights.³¹ The question that then arises is whether they can be reasonably expected to conceal this identity or not be as open about it as they would like, in order to avoid persecution or harassment? The UK Supreme Court in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*³² emphatically laid down that LGBT+ persons should not be expected to conceal their identity in order to escape or avoid persecution in their country. This position differs significantly from earlier jurisprudence which laid down the 'reasonable tolerance' test, according to which LGBT+ individuals could be expected to avoid persecution by hiding their identity. Scholars have also argued that being forced to hide one's identity can also be a form of self-oppression.³³ It is violative of the fundamental principles of equality, privacy, and non-discrimination as laid down in international human

³⁰Sussman, (n 28) 124-129.

³¹UNHCR Guidance Note, para 9.

³²*HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31.

³³Tobin, (n 19) 451.

rights instruments.³⁴ Therefore, such an act would amount to persecution, even though it does not result in an explicit harm to the individual. This view is also supported by the broader reading of the term persecution, i.e., any act which involves a human right violation. However, considering the tests discussed above, not every human right violation would amount to persecution and should be contextualized in each situation depending on the vulnerability and specific impact on the victim, the magnitude of violation of the right, the previous acts of the persecutor, whether such acts were state-sanctioned, etc.³⁵

The Yogyakarta Principles acknowledge that LGBT+ persons are entitled to human rights on an equal footing as the rest of the world and also recognize the obligation of states to grant asylum on the basis of persecution due to SOGI.³⁶ Although not binding, these principles are of persuasive value in the interpretation of human rights jurisprudence and a law criminalizing homosexuality would qualify as persecution not only as per human rights law³⁷, but also according to the UNHCR Guidelines, which emphasize on how anti-homosexuality laws are strongly indicative of persecution, irrespective of whether they are enforced or the kind of penalties they impose.³⁸ It is widely accepted that such laws are inherently discriminatory and violative of human rights jurisprudence in general.³⁹ Hence, although the existence of such laws creates a strong presumption of persecution, the burden is still on the applicant to show the existence of his/her well-founded fear of persecution. The Court of Justice of the

³⁴International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art. 27 (ICCPR).

³⁵Geneva Academy, (n 4) 34.

³⁶Yogyakarta Principles, principle 23 (A).

³⁷Senthoran Raj, 'Asylum, Sexual Orientation and,' (2015) The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies, 2.

³⁸UNHCR Guidelines, para 17.

³⁹*National Coalition for Gay and Lesbian Equality v. Minister of Justice & Ors* [1998] (12) BCLR 1517 (CC) (S. Afr).

European Union, in *X, Y & Z v. Minister voon Immigratie von Asiel*,⁴⁰ held that unless the actual implementation of such laws is persecutory, the existence of these laws in itself will not constitute persecution. There needs to be some element of individuated persecution. This interpretation is not in line with the broader human rights understanding of the term persecution and results in narrowing the scope of protection.

III. ANALYSING THE REFUGEE STATUS DETERMINATION PROCESS

The issues faced by LGBT+ refugees and asylum seekers during RSD are unique as compared to other refugees. Despite them being granted rights under the Convention, deep-seated social prejudices create hurdles in the interview and screening process of the asylum seekers. The general legal rule is that the burden of proof is on the applicant to prove his SOGI and substantiate his claim. The authorities investigate the facts with the evidence produced and adjudge the credibility of the claim. The authorities are duty-bound to actively co-operate with the applicant through the entire process.⁴¹ The RSD assesses the claims on two aspects; the applicant's credibility and the evidence produced. UNHCR provides extensive guidelines to assess the credibility of the applicant and offers a uniform evidentiary standard for countries to follow.

On the credibility aspect, the UNHCR Guidelines state that a sensitive and personalised system should be adopted to assess the applicant's

⁴⁰*X, Y & Z v. Minister voon Immigratie von Asiel* Joined cases C-199/12, C-200/12 & C-201/12, [2014] OJ C9/8.

⁴¹UNHCR 'UNHCR's Oral Submissions at the Court of Justice of the European Union: Hearing of the case of Minister voor Immigratie en Asiel v A, B and C' (25 February 2014) C-148/13, C-149/13 & C-150/1325 para 7.

claim.⁴² A conducive environment should be ensured during the screening process to enable applicants to present their claims fearlessly.⁴³ The focus should not be on the applicant's sexual practices but his experiences and feelings in order to ascertain his SOGI.⁴⁴ Although, there is no straightjacket formula to determine the credibility of the applicant's SOGI claim, the UNHCR Guidelines provide probable indicators; for instance, if the applicant identifies himself as an LGBT+ or has 'come out' to others, that ascertains his SOGI.⁴⁵ Whether the applicant has engaged in, or has the desire to engage in sexual or romantic relations is another strong indication.⁴⁶ Instances of feeling 'different' in their childhood about their SOGI can aid in determining the claim. Moreover, the applicant's non-disclosure of his identity to his family members, previous heteronormative marriage or children out of wedlock should not have an adverse effect on his claim.⁴⁷ Transgender applicants may or may not have undergone medical surgery or treatment to match their identity. The applicant may or may not know the LGBT+ community, its culture, or terminology. All these factors do not diminish the credibility of the applicant as it is shaped by his social, economic, and cultural background.⁴⁸ These indicators are not conclusive but only act as a helping hand in ascertaining the credibility of the claim.

On the evidentiary front, the UNHCR Guidelines clearly state that the applicant's testimony alone should be taken as primary evidence, as

⁴²UNHCR Guidelines, para 62.

⁴³UNHCR Guidelines, para 58.

⁴⁴UNHCR, IARLJ and ELENA 'Summary Report: Informal Meeting of Experts on Refugee Claims relating to Sexual Orientation and Gender Identity' (September 2011) para 9.

⁴⁵UNHCR Guidelines, para 63.

⁴⁶ibid.

⁴⁷Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 Intl J Hum Rts 1, 2.

⁴⁸ibid para 7.

they often face persecution from their community or family.⁴⁹ It is impermissible to demand documented proof of intimate acts from their private sphere; thus, there is no mandate to produce photographic or documentary evidence or oral statements from witnesses.⁵⁰ Additionally, no form of medical testing to determine the applicant's sexual orientation is permitted.⁵¹ Alternatively, forcing a physical demonstration of intimate acts is prohibited as it is a violation of their fundamental human rights.⁵² However, medical evidence in the form of sex-change surgeries, hormonal treatments, etc., may be used as corroborative evidence to strengthen the applicant's claim.⁵³ The UNHCR Guidelines acknowledge that, information on the treatment of LGBT+ persons in the specific home country is often absent; thus, that should not be the sole ground to deny the presence of persecution.⁵⁴

IV. ISSUES OF CREDIBILITY AND EVIDENCE

A significant number of asylum claims are rejected due to their apparent lack of credibility.⁵⁵ The problem here, however, lies in the

⁴⁹UNHCR Guidelines, para 64.

⁵⁰Satvinder Juss, 'Sexual Orientation, and the Sexualisation of Refugee Law' (2015) 22 (1) Intl J Minority & Group Rts 128, 152.

⁵¹UNHCR 'UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on persecution due to Sexual Orientation' (April 2011) para 3.1 (UNHCR Comments on Practice of Phallometry).

⁵²UNHCR Guidelines, para 64.

⁵³ibid para 65.

⁵⁴ibid.

⁵⁵Casper Latham, 'Credibility of Asylum Claims' (*Richmond Chambers*, 13 August 2019) <<https://immigrationbarrister.co.uk/credibility-in-asylum-claims/>> accessed 23 June 2020; Alex Powell, 'Interviews with Asylum Seekers Reveal Why the Home Office Rejects So Many LGBT Claims' (*The Conversation*, 4 September

disproportionate emphasis placed on proving one's SOGI as opposed to proving the persecution faced due to their SOGI.⁵⁶ This emphasis is demonstrative of a growing trend aimed at ensuring there is as less number of false claims as possible. While on the one hand, it is essential to determine the genuineness of an application, the method of determining the same is often insensitive and degrading.⁵⁷ Although UNHCR provides guidelines and a broad framework for the authorities to follow to ensure that LGBT+ applicant's claims are justly accepted, the reality is drastically different.

Firstly, the applicants flee their home country due to persecution from their community or government, leaving them traumatized and in a highly vulnerable position.⁵⁸ Majority of them are uncomfortable revealing intimate details about their personal life to the interviewing officials and reliving their trauma.⁵⁹ Owing to the sensitivity of the subject matter, the applicant's version of the event during the interview might not always be consistent, detailed, or complete. The psychological trauma, as well as inherent homophobia, affects the interview process, which makes the applicant hesitant or incapable of narrating the event with accuracy, leading to inconsistencies and misrepresentations in the information provided.⁶⁰ This hesitation is often used against the applicant as an instrument to strip his

2019) <<https://theconversation.com/interviews-with-asylum-seekers-reveal-why-the-home-office-rejects-so-many-lgbt-claims-122905>> accessed 23 June 2020.

⁵⁶Gartner (n 15) 45.

⁵⁷Janna Wessels, 'Sexual Orientation in Refugee Status Determination' (Working Paper Series No. 73, Refugee Studies Centre, Oxford Department of International Development April 2011), 13.

⁵⁸Veronica Carlino, 'Fairness Considerations: The Impact of Sexual Orientation on Asylum, Refugee Status, and Persecution' (2012) 18 *New Eng J Intl & Comp L* 477, 484.

⁵⁹Sheldon Magardie, "Is the Applicant Really Gay?" Legal Responses to Asylum Claims Based on Persecution Because of Sexual Orientation' (2003) 55 *Agenda: Empowering Women for Gender Equity* 81, 82.

⁶⁰Jenni Millibank and Laurie Berg, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 (2) *JRS* 195, 198.

credibility, not accounting for the psychological factor that affects the applicant while narrating his persecution.

Other applicants resist disclosing the real reason for fleeing their country, the event of persecution and their true identity as they fear social stigma or harassment in the host country or discrimination by interviewing officials.⁶¹ They fear being ostracised, harassed, or victimized by the other refugees and asylum seekers as well because the confidentiality of their claim is not always maintained. Interviews are often held in small crowded offices, adding to the asylum seeker's reluctance to freely communicate the details with the authorities which is often employed to question the credibility of the applicant.⁶²

Secondly, although the UNHCR Guidelines state that the applicant's testimony in itself is sufficient evidence to prove his SOGI, the authorities, in reality, do not adhere to this principle. There is a culture of disbelief when it comes to claims based on SOGI, primarily since it is easier to make bogus SOGI claims owing to its inherent limitations of refuting it.⁶³ This disbelief has resulted in a widespread practice amongst officers to demand corroborative evidence from the applicants in addition to their testimony, which the applicants are not always in the position to produce.⁶⁴ Applicants seldom have the liberty to gather documentary evidence before fleeing their country, much like other asylum seekers. This demand for corroborative evidence places legitimate applicants at a significant disadvantage by excessively increasing their burden of proof. Although, it can be argued that the mere testimony of an applicant is insufficient to form

⁶¹Amnesty International, 'Crimes of Hate, Conspiracy of Silence' (Amnesty International Publications 2001) 24.

⁶²Magardie (n 59) 83.

⁶³David A. B. Murray, 'Queer Forms: Producing Documentation in Sexual Orientation Refugee Cases' (2016) 89 (2) *Anthropological Q* 465, 479.

⁶⁴Jenni Millibank, 'The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 (1) *IJRL* 1, 21.

the entire basis for granting asylum and there needs to be some concrete evidence to prove one's LGBT+ status, the circumstances under which the claimants leave their country should also be considered. Obtaining such evidence can be challenging and therefore, expecting it as a pre-requisite for asylum can be unreasonable.⁶⁵

Thirdly, the RSD of the claim is eventually in the hands of the authorities, whose inherent prejudices and expectations come into play.⁶⁶ The interviewing officials often rely on the stereotypical idea of mannerisms and appearances to adjudge the SOGI of the applicant, such as a gay man must be flamboyant and feminine, and a lesbian should be butch in their dressing and demeanour.⁶⁷ As in many countries, homosexuality is looked at only as an externally visible characteristic. The case of *In Re Soto Vega* becomes relevant in this context as the applicant's claim therein was rejected because he did not display stereotypically homosexual external characteristics.⁶⁸ The authorities often engage in inappropriate and sexually explicit questioning.⁶⁹ They do not account for cultural and regional differences amongst the applicants; thereby, compelling them to frame their experiences in accordance with westernized concepts of SOGI, so as to fit into the definition laid down in their domestic refugee law and the Convention.⁷⁰ Further, there is a tendency to view the entire LGBT+ community as a monolith and comprising mainly of homosexuals. Since the homosexual asylum claims are more in number as compared to bisexual or transgender claims, the spotlight

⁶⁵ibid.

⁶⁶UNHCR Guidance note, para 36.

⁶⁷ibid.

⁶⁸*In Re Soto Vega* [2004] BIA A-95880786.

⁶⁹Marta D'epifanio, 'Credibility Issues of LGBTI Asylum-Seekers in the Refugee Status Determination' [2011] Istanbul Bilgi U. 48.

⁷⁰UNHCR 'Discussion Paper on the protection of lesbian, Gay, Bisexual, Transgender and Intersex Asylum Seekers and Refugees' (22 September 2010) para 31 (UNHCR Discussion Paper).

is primarily on homosexual asylum seekers, effectively sidelining the rest of the LGBT+ spectrum.⁷¹ Several transsexual applicants face specific problems such as gender mismatch with the one specified on their ID and difficulty in accessing public spaces.⁷² Bisexual claims are also not given importance and are assessed according to a rigid understanding of sexuality.⁷³

The interviewing officials and the interpreters often lack formal training in interviewing vulnerable groups. They have inadequate knowledge and little conceptual understanding of sexual identity, sexual orientation, gender identity, and LGBT+ terminology.⁷⁴ They are unaware of the complexities around gender identity and the issues faced by transgender and intersex individuals. Thus, they are often not equipped to hold interviews for the applicants and to adjudge upon their claims. Further, the applicants are from varied cultural and regional backgrounds. They lack an understanding about the correct vocabulary and terminology concerned with SOGI either due to illiteracy or unfamiliarity with the language in the host country, or absence of LGBT+ terminology in the home country. The interpreters must bridge the language and cultural gap; however, ill-informed or an insufficient number of interpreters affects the accurate assessment of claims.

⁷¹Sean Rehaag, 'Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia' (2009) 13 *The Intl J Hum Rts* 415, 418.

⁷²Rasha Younes, "'Don't Punish Me for Who I Am' Systemic Discrimination Against Transgender Women in Lebanon' (*Human Rights Watch*, 3 September 2019) 61 <<https://www.hrw.org/report/2019/09/03/dont-punish-me-who-i-am/systemic-discrimination-against-transgender-women-lebanon>> accessed 23 June 2020.

⁷³Dustin (n 14) 81.

⁷⁴United Kingdom Lesbian and Gay Immigration Group, 'Failing the Grade: Home Office Initial Decisions on Lesbian and Gay Claims for Asylum' (April 2010) 11 <<https://uklgig.org.uk/wp-content/uploads/2014/04/Failing-the-Grade.pdf>> accessed 23 June 2020.

Fourthly, although the UNHCR Guidelines explicitly prohibit any form of medical testing to ascertain the sexual orientation of the applicant,⁷⁵ certain countries use penile and vaginal plethysmography.⁷⁶ Authorities use visual stimuli to measure the degree of arousal without accounting for individual or cross-cultural experiences and psychological factors.⁷⁷ Such tests not only infringe human rights but also have no scientific backing.⁷⁸ Regardless, they are frequently used to ascertain the SOGI of the applicants,⁷⁹ making the interview process exceptionally arbitrary and unmerited. Additionally, in several cases, the authorities have rejected the application if the applicant was married to the opposite sex in the home country;⁸⁰ or had children out of wedlock;⁸¹ or had sexual relations with the opposite sex.⁸² The authorities ignore that the applicants in their home country are often forced to conform to societal norms induced by family pressure and even coerced into marriages. They might need to hide their real identity to prevent ostracization. There may be instances where the applicant might also discover his SOGI after several years. The authorities often fail to account for these possibilities while assessing credibility of claims.

Fifthly, in regressive countries, there is little to no accurate ‘country of origin’ information. The existence of LGBT+ people and the

⁷⁵UNHCR Guidelines, para 65.

⁷⁶European Union Agency for Fundamental Rights, ‘Current Migration Situation in the EU: Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum Seekers’ (March 2017) 6 (EU Asylum Seekers Report).

⁷⁷ibid.

⁷⁸UNHCR Comments on Practice of Phallometry, para 3.1.

⁷⁹UNHCR's Comments on the Practice of Phallometry in the Czech Republic (n 40); UNHCR Discussion Paper, para 33.

⁸⁰Jenni Millibank and Catherine Dauvergne, ‘Before the High Court: Applicants S396/2002 and S395/2002, a Gay Refugee Couple from Bangladesh’ [2003] 25 (1) *The Sidney L Rev* 97, 123.

⁸¹*Leke v Canada (Minister of Citizenship and Immigration)* [2007] FC 848.

⁸²UNHCR Guidelines, para 63.

discrimination and abuses that they are subjected to are often suppressed;⁸³ thus, making it extremely difficult for asylum seekers to corroborate their claims.

Lastly, the intersectionality of identity also plays a crucial role in the assessment of many LGBT+ claims. Often, an LGBT+ asylum seeker's religious, ethnic, or other identities play a role in their persecution. For example, Muslim asylum seekers faced Islamophobia in host countries in the post 9/11 scenario, which also intersected with their sexuality-based oppression.⁸⁴ The cause of persecution itself may be a combination of factors which culminate differently in each individual's life. Therefore, it can be challenging to ascertain the cause of persecution due to significant overlaps.⁸⁵ This lack of clarity can result in placing an even higher burden of proof on the applicants to establish their cause of persecution. However, as long as the applicants can establish that their persecution was even partly due to a protected Convention ground, they are eligible for protection.⁸⁶ This intersectional persecution or oppression can exacerbate their feelings of isolation and mental distress and place them in a position where they are unable to comprehend the reason for their persecution.⁸⁷ The UNHCR Guidelines, while acknowledging the subjectivity associated with every applicant's experience, emphasize on how the RSD process should be sensitive in this regard and should strive to create an overall safe environment for them to

⁸³UNHCR Discussion Paper, para 23.

⁸⁴'Muslim LGBTIQ+ Refugees More Likely to Gain Asylum in Germany if they Conform to Stereotypes' (*Taylor and Francis Group*, 25 July 2019) <https://www.eurekalert.org/pub_releases/2019-07/tfg-mlr072419.php> accessed 23 June 2020.

⁸⁵Dale Buscher, 'Unequal in Exile: Gender Equality, Sexual Identity, and Refugee Status' (2011) 3 *Amsterdam L Forum* 92, 96.

⁸⁶*Gafoor v INS*, [2002] 9th Cir. 231 F.3d 645, 652.

⁸⁷Buscher (n 85) 94.

make their claims.⁸⁸ That being said, the UNHCR Guidelines, Guidance Notes and other authorities merely serve as tools of interpretative guidance and are ultimately not binding on the states parties. Therefore, in reality, many countries employ their own RSD procedures which significantly differ from the UNHCR Guidelines, and thus, there is a need to bring them in conformity with the same. Several countries do not even collect data on the asylum claims of LGBT+ applicants, as a result of which there is no analysis as to how many such claims are successful.⁸⁹ The inherent drawback of refugee law can explain this inconsistency, i.e., a primary dependence on States' political will for its effective implementation.

An analysis of the RSD process exposes its bitter reality. The authorities in most countries ignore the UNHCR Guidelines, the domestic instruction manual⁹⁰ and domestic judgments⁹¹ while adjudicating LGBT+ claims. The applicant is imposed with an overwhelming burden of proof. On one hand, when applicants do not reveal their SOGI-based persecution due to fear of social discrimination and stigmatization, they get their claims rejected due to a lack of credibility. On the other hand, when the applicants reveal their SOGI, their application still gets rejected if their mannerism or appearance does not conform to preconceived notions of SOGI, or if they are unable to produce corroborative evidence of their SOGI. Therefore, attempts have been made by various countries to sensitize RSD procedures and implement training programs for their officials

⁸⁸UNHCR Guidelines, paras 58, 59.

⁸⁹European Commission, 'Ad Hoc Query on NL AHQ on National Asylum Policies Regarding LGBT asylum-Seekers' (*European Migration Network*, 2 May 2016) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/ad-hoc-queries-2016.1061_-_nl_ahq_on_national_asylum_policies_regarding_lgbt-asylum_seekers.pdf> accessed 23 June 2020.

⁹⁰U.S. Citizenship and Immigration Services, 'Guidance for Adjudicating LGBTI Refugee and Asylum Claims' (RAIO Combined Training Course 2011) (US – RAIO Training Course).

⁹¹UNHCR's Oral Submissions (n 41).

to help them better assess such claims.⁹² This effort is only a small measure in light of the pervasive discrimination against LGBT+ refugees, and there is a need to amend various aspects of the asylum process in order to make a significant impact.⁹³

V. POST STATUS DETERMINATION: AN ANALYSIS

The discrimination faced by LGBT+ asylum seekers owing to their identity goes beyond the RSD process. Even after attaining refugee status in the host country, they continue to be one of the most vulnerable groups in the society. They face significant hardships during the resettlement process as well. Factors such as ingrained homophobia and transphobia, issues in documentation and intersectional oppression create further barriers in offering them adequate protection and result in a denial of their socio-economic rights. The authors have examined the asylum regimes of Turkey, Canada and the European Union in order to study the treatment of LGBT+ refugees. These countries have varying degrees of tolerance towards the LGBT+ community and also differ in economic development and thus, can provide a broader understanding of the quality of life of LGBT+ refugees post the RSD process. In terms of international treaty obligations with respect to the protection of refugees, these countries are signatories to the Convention as well as the 1967 Protocol relating to the Status of Refugees which imposes on them certain binding obligations such as guaranteeing basic humanitarian treatment to refugees, amongst others.

⁹²EU Asylum Seekers Report 8; US – RAIO Training Course 29.

⁹³Sridharan (n 26).

A. *Case Study on the treatment of refugees in Turkey*

Turkey has ratified the Convention and the Protocol Relating to the Status of Refugees, 1967, and provides protection to refugees under the same. Turkey receives thousands of asylum seekers from Asia, Africa, Europe, and the Middle East; however, it provides protection only to individuals originating from Europe owing to its own limitations.⁹⁴ Non-European asylum seekers are allowed to stay temporarily during the pendency of the application for resettlement with UNHCR. The refugees are assigned to pre-designated ‘satellite cities’ by the Turkish government. However, they are seldom provided with any financial support by the government or the UNHCR. The burden of housing, food, and healthcare costs falls on the refugees themselves. This puts LGBT+ refugees and asylum seekers in a perilous position.⁹⁵

The LGBT+ refugees and asylum seekers in Turkey are highly vulnerable and live an extremely precarious life. Although the domestic law in Turkey does not criminalize homosexuality, there prevails an intolerant environment and animosity towards the sexual minorities in the society. The LGBT+ refugees and asylum seekers have often been victims of verbal and physical harassment, taunts, threats, beatings, and sexual assault by the local community.⁹⁶ Additionally, because they are non-citizens and cannot speak the local language, they are targeted more than the Turkish LGBT+ population. Moreover, the refugees have little faith in law enforcement as the

⁹⁴Helsinki Citizens’ Assembly-Turkey and Organization for Refuge, Asylum, and Migration, ‘Unsafe Haven: The Security Challenges Facing Lesbian, Gay, Bisexual and Transgender Asylum Seekers and Refugees in Turkey’ (June 2009) 2 (Unsafe Haven).

⁹⁵ibid 1.

⁹⁶“‘We Need a Law for Liberation’: Gender, Sexuality, and Human Rights in a Changing Turkey’ (*Human Rights Watch*, 22 May 2008) 25 <<https://www.hrw.org/report/2008/05/21/we-need-law-liberation/gender-sexuality-and-human-rights-changing-turkey>> accessed 23 June 2020 (Human Rights Watch).

local police are either unwilling or incapable of protecting them. Although, the refugees are entitled to the same rights as the citizens in terms of police protection and legal recourse,⁹⁷ the police rarely investigate cases filed by them.⁹⁸ Instead the police often engage in victim-blaming and reprimand the refugees for filing complaints.⁹⁹ As a result, they fear going outside and prefer staying at home. Scholars have argued that this results in double marginalization, which is a result of their intersecting oppression, i.e., that of their LGBT identity, as well as that of their race or nationality. It is not merely the effect of simultaneously belonging to both communities, but the multi-layered effect this has on their lives.¹⁰⁰

The refugees have to personally incur the cost of housing, which becomes burdensome for the LGBT+ refugees and asylum seekers as they seldom find a job, having fled their country with a minuscule amount of money. They are generally housed together, but their apartments are overcrowded and small. Landlords discriminate against them by refusing to lease them a place or evict them, in case their SOGI is discovered at a later stage.¹⁰¹ There have been instances of neighbours filing bogus complaints to the police or landlords in order to get such refugees evicted on account of their SOGI.¹⁰² Although, Turkish law does not explicitly prohibit housing discrimination based on SOGI, certain protections are given to legal tenants.¹⁰³ However, the majority of LGBT+ refugees do not sign

⁹⁷Constitution of the Republic of Turkey arts. 10, 12.

⁹⁸Unsafe Haven (n 94) para 3.3.

⁹⁹ibid.

¹⁰⁰Pamela Heller, 'Challenges Facing LGBT Asylum Seekers: The Role of Social Work in Correcting Oppressive Immigration Processes' (2009) 21 *J of Gay & Lesbian Social Services*, 295.

¹⁰¹Human Rights Watch (n 96) 42.

¹⁰²Unsafe Haven, (n 94) para 3.4.

¹⁰³Code of Obligations and Real Property Rentals Act No. 6570 (1955).

official housing contracts and thus, are unable to avail protection of the law. Additionally, although they have a legal right to file a case against the landlord, court charges and exorbitant legal fees make any legal recourse inaccessible.

Turkish refugee regulation recognizes all asylum seekers' right to seek employment.¹⁰⁴ However, in reality, the employment process is extremely strenuous, expensive, and complicated, and thus, very few can exercise this right. The refugees are mandated to submit identification proof, educational documentation, hold a six-month residence permit and obtain a sponsorship from the employer to apply for a job.¹⁰⁵ Obtaining all three is extremely difficult; therefore, only a small number of refugees can obtain employment legally. Besides, there exists an inherent bias in the local community that makes it more difficult for LGBT+ refugees to obtain employment.¹⁰⁶ Majority of the LGBT+ refugees fail to find a job despite several efforts, due to their external appearance. Some are even humiliated and targeted with sexual slurs by customers.¹⁰⁷ They face employment termination too, if their SOGI is revealed later. Such a situation inadvertently compels LGBT+ refugees to engage in illegal employment. These employers take advantage of their vulnerable position and subject them to inhumane working conditions and low pay. They face employment discrimination, sexual harassment, physical violence, and mistreatment both from employers and co-workers.¹⁰⁸ With the pressure of economic survival and lack of alternatives, they keep enduring the ill-treatment.

¹⁰⁴Ministry of Interior General Directorate of Security Circular No.57 (22 June 2006) art. 19.

¹⁰⁵Unsafe Haven, (n 94) 20.

¹⁰⁶'World Refugee Survey 2009: Turkey' (*United States Committee for Refugees and Immigrants*, 17 June 2009).

¹⁰⁷'Report on Turkey: Fourth Monitoring Cycle' (*European Commission against Racism and Intolerance*, 8 February 2011) para 138.

¹⁰⁸Unsafe Haven, (n 94) 21.

Some even resort to sex work for survival and are often forced to engage in unprotected sex by the clients, in addition to being subjected to continuous harassment and violence.¹⁰⁹ Thus, LGBT+ refugee sex workers face multi-layered marginalization - they are refugees, belong to the LGBT+ community, are employed in a socially- ostracized job, and have minimal access to healthcare. They are forced into this occupation, which opens them to health issues through sexually transmitted diseases and compromises their physical safety.

LGBT+ refugees, like other refugees, are required to pay for their medical costs. UNHCR provides minimal financial support only to the most vulnerable. Medical care is inaccessible to a majority of them due to their vocational and financial marginalization.¹¹⁰ They are unable to meet the expenses of treatments, surgeries, and medicines. Furthermore, owing to their marginalization and past trauma, they suffer from anxiety, depression, PTSD, suicidal thoughts, insomnia, etc. Mental health problems are apparent, but mental health support systems are inaccessible in the satellite cities to which they are assigned.

The LGBT+ refugees and asylum seekers in Turkey are incredibly marginalized, with virtually no employment, healthcare, housing, and financial assistance. They are socially ostracized and face frequent physical, mental, and sexual assault with no legal recourse.

*B. Case Study on the treatment of refugees in the European
Union*

¹⁰⁹Unsafe Haven, (n 94) 22.

¹¹⁰Tulin Gencoç & Murat Yuksel, 'Psychometric Properties of the Turkish Version of the Internalized Homophobia Scale' (2006) 35 Archives Sexual Behavior 597, 600.

All European Union Member States are signatories to the Convention, and they implement the guidelines laid down under the Convention through national legislation.¹¹¹ Additionally, the European Qualification Directive lays down a uniform standard for qualification of stateless persons and protection that should be extended by the EU member states.¹¹² It expressly mentions SOGI as a valid ground for persecution,¹¹³ which resonates with the principles of equality and non-discrimination enshrined in the EU Charter of Fundamental Rights.¹¹⁴ The qualification provides for a standard of assessment of credibility, evidence¹¹⁵ and protection such as a resident permit and accommodation,¹¹⁶ access to employment,¹¹⁷ healthcare¹¹⁸ and social welfare.¹¹⁹ The Asylum Procedures Directive is adopted to provide professional training to interviewing officers and interpreters on issues concerning LGBT+.¹²⁰

Although, on paper, the refugees are given complete protection; in practice, the reality is drastically different. At the stage of assessment, the Court of Justice of the European Union has laid down clear cut parameters for the applicants claiming refugee status based on SOGI.

¹¹¹Anita Orav, 'The EU and the UN Refugee Agency (UNHCR): At a glance' (*European Parliament Research Service*, May 2015).

¹¹²Council Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast) [2011] OJ L 337/9.

¹¹³Orav (n 111).

¹¹⁴Charter of Fundamental Rights of the European Union [26 October 2012] OJ C 326/02 arts. 20, 21 (EU Charter).

¹¹⁵EU Charter, art. 4.

¹¹⁶EU Charter, arts. 24, 32.

¹¹⁷EU Charter, art. 26.

¹¹⁸EU Charter, art. 30.

¹¹⁹EU Charter, art. 29.

¹²⁰Council Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and withdrawing International Protection (Recast) [2013] OJ L 180/60.

In *Minister voor Immigratie en Aiel v. A, B, and C*, the UNHCR reiterated that the applicant's testimony counts for primary evidence, tests for ascertaining SOGI are impermissible, and any previous heteronormative marriage or sexual relations or the existence of children by itself does not affect the credibility of the applicant.¹²¹ However, in Hungary, the authorities seek evidence beyond the applicant's testimony as proof that the applicant belongs to the LGBT+ community. Therefore, they assign psychiatrists to perform tests on the applicants to assess their sexual orientation.¹²² On the other hand, authorities in Finland often lack the academic capability and skill to assess claims made by LGBT+ applicants.¹²³ The training of reception staff is not done in a systematic format; no specific training or educational session takes place in France and Greece to ensure awareness about LGBT+ issues and terminology.¹²⁴ The interviewing officers, staff members, and police working with LGBT+ refugees rarely attend educational seminars on how to interact with vulnerable groups.

In Germany and Spain, LGBT+ citizens are frequent victims of homophobia, transphobia, harassment, and violence, which render LGBT+ refugees and asylum seekers vulnerable to it as well. Hate crimes are perpetrated by individuals, government, private organizations, and vigilante groups. The hate crimes against LGBT+ refugees are rarely officially recorded or reported; thus, the available data and numbers are inaccurate and misleading.¹²⁵ Civil society organizations and several unofficial sources in Denmark, Sweden, Finland, and the Netherlands regularly report instances of physical

¹²¹UNHCR's Oral Submissions (n 41) para 12.

¹²²EU Asylum Seekers Report, 6.

¹²³ibid.

¹²⁴ibid 8.

¹²⁵ibid 13.

and verbal assault, sexual harassment, threats, stigmatization, and discrimination.¹²⁶

Most EU member states do not provide private or LGBT+ specific accommodation for LGBT+ refugees. However, countries like Denmark, France, and Finland try to relocate them on a case-to-case basis.¹²⁷ In Sweden, refugees with special social needs are allotted special security accommodation, and LGBT+ refugees qualify for such special housing, especially if they have been victims of harassment in their previous housing.¹²⁸ However, the demand for these special housing units is higher than the supply; thus, not all eligible LGBT+ refugees can avail of this facility. Women are preferred over men, especially gay men, for transfer to more secure accommodation. Cisgender gay men are only moved when they face some sort of harassment or discrimination.

Majority of the EU member states provide necessary healthcare, including vital treatments and emergency care to all refugees, including the LGBT+ refugees. However, the problem arises in gaining access to hormonal treatment for transgender refugees. Hormonal treatment is of particular importance as interruption of such treatment has dire physical and psychological consequences on the refugee-patient.¹²⁹ There is an absence of universal guidelines or practices followed by all member states concerning the completion of already initiated hormonal treatment. On one hand, Sweden, France, and Denmark assess the urgency on a case-to-case basis and accord

¹²⁶ibid 14.

¹²⁷ibid 13.

¹²⁸'Accommodation with the Migration' (*Swedish Migration Agency*) <<https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/While-you-are-waiting-for-a-decision/Accommodation/Accommodation-with-the-Migration-Agency.html>> accessed 23 June 2020.

¹²⁹EU Asylum Seekers Report, 14.

treatment.¹³⁰ On the other, Finland and Netherlands automatically permit already initiated treatment to continue even at the stage of the asylum process.¹³¹ While countries like Greece, Hungary, and Poland do not extend hormonal treatment to refugees or asylum seekers at all.¹³²

On a detailed analysis of the policies, societal norms and behaviour, it is evident that the LGBT+ refugees are reduced to the margins of the society in the EU states. The EU states have been unable to protect the interests of the LGBT+ refugees. However, they have acknowledged the hardships faced by the LGBT+ refugees and have taken steps to improve the system. Majority of the EU states have established policies to handle LGBT+ claims, introduced LGBT+ sensitivity training, attempted to improve conditions in reception facilities, and collated statistics on LGBT+ asylum seekers. However, the EU member states still have a long way to go in terms of treating their LGBT+ refugees at par with their citizens.

C. Case Study on the treatment of refugees in Canada

LGBT+ applicants and refugees in Canada frequently face lack of access to necessary facilities such as medical care, housing, lawyers, etc. during the application process. This also has a bearing on the quality of their claim and the kind of evidence they can produce. Given how a large part of the decision hinges on the nature of the evidence, a lack of access to lawyers puts them at an unfair disadvantage.¹³³ The RSD procedures of most countries also do not cater to the specific needs of disabled, HIV positive, or racially

¹³⁰ibid 14.

¹³¹ibid 15.

¹³²ibid 15.

¹³³Angus Grant & Sean Rehaag, 'Unappealing: An Assessment of the Limits on Appeal Rights in Canada's New Refugee Determination System' (2015) Osgoode Legal Studies Research Paper Series, 3.

marginalized sections of LGBT+ asylum seekers.¹³⁴ Most of them are not allowed to work, and hence even basic sustenance is a challenge.

In Canada, there is a provision for ‘designated country of origin’ (“DCO”) which signifies those countries that are determined relatively safe to return to for asylum seekers. LGBT+ individuals from such countries are subjected to expedited asylum procedures. The criteria on the basis of which such countries are determined ‘safe’ fail to consider factors which impact the everyday life of an LGBT+ person.¹³⁵ For example, merely because homosexuality is not criminalized in a country does not mean it is safe in all respects for a homosexual or another member of the LGBT+ spectrum. A large number of corrective rapes, police brutality and generally anti-homosexual or transsexual culture are reported in countries such as Brazil and South Africa, both of which seem to be LGBT+ friendly countries on paper.¹³⁶

Recent changes in Canada’s immigration regime adversely affected a lot of marginalized asylum seekers. Those who come from DCOs are given shorter work permits and are not allowed to access basic or advanced healthcare through the integrated federal health program. Canada also has a system whereby refugees are given social insurance cards starting with the number 9, thus revealing their refugee status.¹³⁷ These measures, combined with generally prevalent homophobia and

¹³⁴Nick J. Mule & Erika Gates-Gasse, ‘Envisioning LGBT Refugee Rights in Canada: Exploring Asylum Issues’, 16, (*OCASI*, June 2012), <https://ocasi.org/downloads/Envisioning_Exploring_Asylum_Issues.pdf> accessed 23 June 2020 (Envisioning).

¹³⁵ibid 20.

¹³⁶Amnesty International, ‘Making Love a Crime: Criminalisation of Same Sex Conduct in Sub Saharan Africa’ [2013], <<https://www.refworld.org/pdfid/51d2a0144.pdf>> accessed 6 October 2020.

¹³⁷Canada Research Team of Envisioning Global LGBT Human Rights, ‘Envisioning LGBT Refugee Rights in Canada: Is Canada a Safe Haven?’, (*OCASI*, September 2015), 29, <https://ocasi.org/sites/default/files/lgbt-refugee-rights-canada-safe-haven_0.pdf> accessed 23 June 2020.

xenophobia, prevents them from accessing employment even during the asylum process. Racial discrimination is one of the most common forms of discrimination in Canada, and the intersection of this with a person's LGBT+ and refugee status can create multiple forms of oppression for these persons.¹³⁸ The asylum law regime also does not cater to the specific needs of differently-abled or HIV positive applicants.¹³⁹ Many of them face severe mental health issues due to the arduous asylum process as well as their past persecution, for which they are unable to access primary healthcare.¹⁴⁰ This also creates great barriers in their resettlement into the country after being granted asylum.

Therefore, there is a need to create LGBT+ friendly spaces even amongst seemingly LGBT+-friendly countries. The UNHCR should ideally step in to ensure a more sensitized and enhanced RSD procedure for LGBT+ claimants. For example, in Turkey, the UNHCR has stepped in to take palliative measures by making specific recommendations to promote inclusivity in their refugee regime. These include measures such as enacting specific anti-discrimination legislation with SOGI as a protected ground, laws to prevent violence and hate crimes, and specific amendments to their penal laws in order to prohibit discrimination against such refugees while trying to access housing, employment, and education.¹⁴¹ Decision-makers should also be trained to focus more on the persecution faced by the claimants as opposed to establishing their identity.¹⁴²

¹³⁸Envisioning, (n 135) 10.

¹³⁹Envisioning, (n 135) 26.

¹⁴⁰Sarah Hall & Rohan Sajjani, 'Mental Health Challenges for LGBT Asylum Seekers in Canada', (*OCASI*), <<https://www.amssa.org/wp-content/uploads/2015/06/Envisioning-Mental-Health-Information-Sheet1.pdf>> accessed 23 June 2020.

¹⁴¹Envisioning, (n 135) 9.

¹⁴²UNHCR Guidelines, para 60 (ii).

VI. RECOMMENDATIONS: QUEERING THE SYSTEM

LGBT+ refugees and asylum seekers experience persecution in a complex manner. They are most vulnerable to discrimination, violence and sexual abuse in the refugee system; however, they are given the least priority. Since LGBT+ refugees and asylum seeker's claims give rise to unique challenges, they require unique solutions to safeguard their interests. Therefore, the authors propose specific recommendations to make the refugee system more inclusive and sensitive to the issues and needs of LGBT+ refugees.

Firstly, all countries should be signatories to the Convention Relating to the Status of Refugees, 1951 in order to make them obligated to grant asylum to those asylum seekers and refugees who are forced to flee from their home country due to persecution. They should inculcate the provisions of the Convention into their domestic law to ensure the protection of LGBT+ refugees. Further, courts must also adopt a more liberal approach towards what constitutes persecution and give more importance to the subjective experience of the applicant. At the same time, courts must also objectively analyse the situation of home countries of asylum seekers. While determining whether a particular act or law qualifies as persecution, international human rights instruments should also be given importance.

Secondly, there is a need to re-examine the current refugee law policies and framework to formulate a custom-made approach for each member of the LGBT+ community. It is vital to recognize that each group of the LGBT+ community requires a tailored approach and detailed individual attention in future policies and frameworks made in the sphere of refugee law. While it may appear that the LGBT+ refugees and asylum seekers have gained much traction over the years, in reality, research and studies have been limited only to gay men, while lesbians, bisexuals, and transgender people are side-

lined.¹⁴³ Moreover, statistics prove that there exists a lacuna in research on lesbians; their issue is integrated with gender-based issues and ignored on the sexual orientation front.¹⁴⁴ Women's sexual orientation gains less traction as women's sexual activity has historically been less visible and less threatening to the society when compared to gay men's sexuality.¹⁴⁵ Lesbian refugees and asylum seekers face multi-layered marginalization: as a refugee, a lesbian, and as a woman. Furthermore, bisexual asylum seeker's claims are repeatedly rejected because of the notion that their freedom of 'choice' absolves them of any fear of persecution.¹⁴⁶ Bisexual applicants challenge the very core of asylum procedures that is based on binary sexual orientation. There is a need to re-analyse the principle of fear of persecution, specifically from the viewpoint of bisexuals, and emphasis should be given to flexible or fluid categories as well.¹⁴⁷ Thus, it is imperative to individually research on the invisibility of lesbians, bisexuals and transgender persons, their claims, and the unique problems faced by them during the asylum procedure and formulate and implement appropriate policies in the host countries.

Thirdly, every interviewing official and interpreter should go through a mandatory training programme that educates and familiarises them to concepts of sexual orientation, gender identity, and LGBT+

¹⁴³UNHCR, 'Protecting Persons with Diverse Sexual Orientations and Gender Identities' (December 2015) para 1.3.

¹⁴⁴Victoria Neilson, 'Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims' (2005) 16 *Stanford L & Poly Rev* 417, 440.

¹⁴⁵Fatma E. Marouf, 'The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender' (2008) 27 *Yale L & Poly Rev* 47, 84.

¹⁴⁶Millibank (n 60) 213.

¹⁴⁷Juss (n 50) 144.

UNHCR Guidelines, para 66.

terminologies and other related legal issues.¹⁴⁸ This training should specifically address unique issues that arise in LGBT+ claims and should aim to sensitize the officials to the difficulties that are specific to the applicants. They should be trained to neither ask needlessly invasive intimate questions nor ascertain credibility based on stereotypical mannerisms and looks.¹⁴⁹ They should be instructed to be attentive, to make use of appropriate terminology while addressing the applicant, and to adhere to absolute confidentiality and impartiality. The interviews must always be conducted in private rooms or offices to maintain privacy and confidentiality. The comprehensive UNHCR guidelines pertaining to credibility and evidentiary standard should be universally followed by the interviewing authorities.¹⁵⁰ Further, measures ought to be taken to develop and adopt interview techniques and tools which incorporate the perspectives of sexual minorities and vulnerable groups.¹⁵¹

Fourthly, authorities should recruit and maintain an adequate number of trained interpreters to communicate in the required language so as to bridge the gap between the applicant and the interviewing officials. Measures must be taken to avoid recruiting interpreters from the local asylum population in order to ensure a safe space for LGBT+ refugees to express their claims freely.¹⁵² Authorities should attempt to assign a female or a male interviewing official and interpreter based on the applicant's preference to ensure a comfortable setting during the interview.¹⁵³ A regular sensitization training should also be conducted for individuals from the health sector, education sector,

¹⁴⁸UNHCR Guidance note, para 37.

¹⁴⁹Amanda Gray & Alexandra McDowal, 'LGBT refugee protection in the UK: from discretion to belief?' (*Forced Migrants Review*, 2013) 24 <<https://www.fmreview.org/sogi/gray-mcdowal>> accessed 23 June 2020.

¹⁵⁰UNHCR Guidelines, paras 62- 66.

¹⁵¹UNHCR Discussion Paper, para 63.

¹⁵²Unsafe Haven, 13.

¹⁵³*ibid* 26.

social assistance, and police department who interact with the LGBT+ refugees and asylum seekers. Such measures will reduce the harassment and discrimination that the LGBT+ refugees and asylum seekers face.

Fifthly, the host countries need to make necessary modifications to provide real protection to the LGBT+ refugees and asylum seekers. The asylum process or resettlement process for the applicants should be expedited, and efforts should be made to create an environment that is conducive for the refugees during the pendency of the claim. Additionally, a conscious effort should be taken to allot the LGBT+ refugees to cities or zones with local LGBT+ communities or with communities that are tolerant towards them, in order to ensure integration in the society. Furthermore, they should be re-assigned immediately to a safer location if instances of harassment or discrimination occur.

Domestic anti-hate crime legislation should be passed and implemented with explicit provisions penalizing discrimination and violence on the basis of SOGI as well as discrimination in employment and housing due to an individual's SOGI. Further, the police personnel should respond adequately and instantaneously to complaints filed by the LGBT+ refugees. A specially designated police officer must be assigned to work on cases related to the LGBT+ community.

Sixthly, measures should be taken to reduce economic hardships on the LGBT+ refugees by easing the process for securing housing, employment, and healthcare. Housing permit fees that are imposed by several countries should be waived off for all impoverished refugees and asylum seekers. The government should consider waiving off cumbersome procedural mandates like documentation and fee requirements on a case-to-case basis to increase the accessibility to

jobs for refugees.¹⁵⁴ The government bodies should also take necessary measures to ensure free universal health care and access to medication akin to its citizens.

Lastly, steps should be taken to maintain accurate and updated information in the country-of-origin information reports on the treatment of all groups of LGBT+ individuals. Accurate country of origin information will drastically reduce the burden on the applicant to prove fear of persecution during the assessment procedure.

Through the adoption of these recommendations, the refugee law regime will get one step closer to ensuring a safe, equal and inclusive environment for LGBT+ refugees and asylum seekers to live in.

VII. CONCLUSION

LGBT+ refugees form one of the most vulnerable groups in the refugee system. They are in a constant battle with their family, community, government and themselves. They are victims of human rights violations in their home country, forcing them to flee in order to seek asylum at a safer place in the hope of having a better life. However, most of the host countries turn out to be an unsafe haven for them. There is a general perception of disbelief against the LGBT+ claimants in the RSD process. Even when the LGBT+ claimants gain refugee status, they face discrimination in healthcare, employment and housing in the host countries where the society is intolerant towards the LGBT+ community. Although, a wide range of countries like Canada, Turkey and EU member states have been analysed, the conclusion drawn is the same. LGBT+ refugees do not receive the treatment that they are entitled to; they continue to be a severely marginalized group in society.

¹⁵⁴Unsafe Haven, 26.

The host countries should ensure that their life and dignity is safeguarded. The host country is responsible for their protection not only during the screening and assessment process but also during their entire stay. Since the issues of LGBT+ refugees are unique, they require special attention. Thus, there is an urgent need to queer the entire system.