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AN EU-US COMPARATIVE LEGAL ANALYSIS OF TRANSGENDER ASYLUM ADJUDICATION

Based on the UNHCR Guidelines

Written by Mariza Avgeri, July 2023

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ABSTRACT

This report attempts a comparative review of the state of the art of asylum adjudication for transgender and gender nonconforming individuals in the US and the EU. The points of reference are the UNHCR Handbook and guidelines on particular social group, burden of proof and LGBTQI+ asylum claims. This report will review the pluralist human rights regime for transgender asylum claimants in the EU drawing on Court of Justice of the European Union jurisprudence as well as the Recast Qualification Directive of the Common European Asylum System, the Charter of Fundamental Rights of the EU and European Asylum Support Office guidelines. At the second part of the research, one will focus on particular social group and persecution practice of Asylum and Immigration Authorities in the US for transgender and gender nonconforming claims which will be juxtaposed with Board of Immigration Appeals and Supreme Court relevant case law. Lack of trans health care and legal gender recognition, as well as the inclusion of gender expression in the asylum grounds will be problematized in the recommendations for the EU/US, as well as the divergence of practice from UNHCR guidelines.

This report will be a tool for advocates and adjudicators, in order to navigate the complex US asylum system for transgender and gender nonconforming claimants with a perspective from the practice in the EU. It will identify divergence of US asylum adjudication for gender identity/expression claims from the UNHCR guidelines and good practices, as well as developing Human Rights norms and law on gender identity/expression, for example the Yogyakarta principles as well as other stakeholders and institutional tools. It aims to expand the view of transgender asylum by problematizing sex/gender diversity among asylum claimants, lack of trans health care and legal gender recognition at the country of origin as well as the lack of inclusion of gender expression in asylum adjudication. It aims to provide arguments based on legal research for advocates representing transgender and gender nonconforming claimants on the latter ones' inclusion to a particular social group for the purposes of asylum and identify circumstances where socio-economic discrimination rises to the level of persecution for transgender and gender nonconforming asylum claimants in the country of origin.

INTRODUCTION-METHODOLOGY OF THE REPORT

Drawing on literature review in Europe and the U.S. on transgender and gender nonconforming asylum adjudication, I will review current trends in EU and US refugee status determination for assessing transgender and gender nonconforming asylum claims. After I juxtapose the Common European Asylum System and the US asylum regime, I will delve into jurisprudence of the Court of Justice of the European Union and elaborate on the (Recast) Qualification Directive and its application in Member States. I will perform an analysis of transgender and asylum jurisprudence of the CJEU, which I will examine in comparison with the U.S. asylum regime, as it is revealed by exploratory interviews of U.S. asylum attorneys and NGO experts on transgender and gender nonconforming asylum claims. I will examine particularly the differences in establishing membership to a particular social group for transgender and gender nonconforming asylum claimants, the relationship with other asylum grounds, medicalization and binarism in gender identity/expression in EU and US asylum policies and the concept of persecution from state or non-state actors as well as cumulative harm which rises to the level of persecution even if it affects mainly

the deprivation of socioeconomic rights. Concluding, I will argue for good policies on transgender asylum claims based on the depathologization of transgender identity, privacy considerations, shared burden of proof and the inclusion of gender expression to the grounds qualifying for international protection through the concept of gender nonconformity as an inclusive concept for assessing gender diverse asylum claims.

1. SYNOPSIS OF UNHCR GUIDELINES

1.1. REFUGEE DEFINITION

A person is considered a refugee under the 1951 Convention if he meets the criteria outlined in the definition. This must occur before the official determination of his refugee status. Therefore, recognizing his refugee status does not make him a refugee, but rather declares him to be one. He is recognized not because he becomes a refugee, but because he already is one.¹

The determination of a person's refugee status is a two-step process. First, it is necessary to determine the pertinent case facts. Second, the definitions contained in the 1951 Convention and the 1967 Protocol must be applied to the newly discovered facts.²

According to Article 1 A (2) of the 1951 Convention, the term "refugee" applies to any person who: As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country.

The definition is summarized by the phrase "well-founded fear of being persecuted".³ In order to determine refugee status, it will be necessary to evaluate the applicant's statements and evaluate the circumstances in his country of origin.⁴

The qualification "well-founded" is added to the element of fear, which is a mental state and subjective condition. This suggests that a person's status as a refugee is determined not only by his state of mind, but also by the objective circumstances that support this state of mind. Therefore, the term "well-founded fear" contains both a subjective and an objective component, and both components must be considered when determining whether well-founded fear exists.⁵

1.2. PARTICULAR SOCIAL GROUP ACCORDING TO THE UNHCR GUIDELINES

One of the five grounds listed in Article 1A(2) of the 1951 Convention relating to the Status of Refugees ("1951 Convention") is "membership in a particular social group". It is the least defined ground and is not defined by the 1951 Convention itself. States have recognized women, families, tribes, occupational groups, and LGBTQ+ individuals as constituting a particular social group for the purposes of the 1951 Convention. It is increasingly invoked in refugee status determinations. This development has contributed

¹ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, para 28 <https://www.refworld.org/docid/4f33c8d92.html> [accessed 5 January 2023] accessed 8 January 2023.

² *Idem*.

³ *Idem*, para 34.

⁴ *Idem*.

⁵ *Idem*.

to a greater understanding of the refugee definition as a whole. UNHCR Guidelines provide legal interpretation guidance for evaluating claims in which a claimant asserts a well-founded fear of persecution due to his or her membership in a particular social group.⁶

While the ground requires delimitation—that is, it cannot be interpreted so as to render the other four Convention grounds redundant—its proper interpretation must be consistent with the object and purpose of the Convention. In accordance with the Convention's language, this category cannot be interpreted as a "catch-all" that applies to all individuals who fear persecution. In order to preserve the structure and integrity of the Convention's refugee definition, a social group cannot be defined solely by the fact that it is persecuted.⁷

There is no "closed list" of groups that may constitute a "particular social group" under Article 1A (2). There is no specific list of social groups in the Convention, nor is there any indication in the ratification history that such a list exists. Rather, the term membership in a particular social group should be interpreted in an evolutionary manner, taking into account the diverse and changing nature of groups in different societies and the development of international human rights standards.⁸

The grounds of the Convention are not mutually exclusive. A person may qualify for refugee status on the basis of more than one of the grounds listed in Article 1A (2) Refugee Convention. For instance, a claimant may assert that her refusal to wear traditional clothing puts her at risk of persecution. She may be able to establish a claim based on political opinion (if the State views her conduct as a political statement that it seeks to suppress), religion (if her conduct is based on a religious conviction opposed by the State), or membership in a particular social group, depending on the particular circumstances of the society.⁹

Judicial decisions, regulations, policies, and practices have varied in their interpretations of what constitutes a social group in the context of the 1951 Convention. In common law jurisdictions, two methods have dominated decision-making that according to the UNHCR must be applied alternatively, not cumulatively.¹⁰

The "protected characteristics" approach (sometimes referred to as an "immutability" approach) examines whether a group is united by an immutable trait or by a trait so fundamental to human dignity that a person should not be compelled to abandon it. An immutable quality may be innate (such as sex or race) or inalterable for other reasons (such as the historical fact of a past association, occupation or status). Human rights norms may assist in identifying characteristics deemed so fundamental to human dignity that changing them should not be required of anyone. A decision-maker adopting this approach would consider whether the asserted group is defined by: (1) an innate, unchangeable characteristic; (2) a past temporary or voluntary status that is unchangeable due to its historical permanence; or (3) a characteristic or association that is so fundamental to human dignity that group members should not be compelled to abandon it. Using this approach, courts and administrative bodies in a number of jurisdictions have concluded that, for example, women, LGBTQ+ individuals, and families can constitute a particular social group for purposes of Article 1A. (2).¹¹

The second approach examines whether a group shares a characteristic that makes them a recognizable group or distinguishes them from the rest of society. This approach has been referred to as "social

⁶ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02 <<https://www.refworld.org/docid/3d36f23f4.html>> accessed 5 January 2023.

⁷ *Idem*, para 2.

⁸ *Idem*, para 3.

⁹ *Idem*, para 4.

¹⁰ *Idem*, para 5.

¹¹ *Idem*, para 6.

perception" In accordance with this analysis, women, families, and LGBTQ+ individuals have been identified as distinct social groups, depending on the prevailing social conditions.¹² In jurisdictions governed by civil law, the particular social group ground is typically less developed. The majority of decision-makers place a greater emphasis on the risk of persecution than on the criteria for defining a particular social group. Despite this, both the protected characteristics and social perception approaches have been discussed.¹³

It is widely accepted in state practice that an applicant is not required to demonstrate that the members of a particular group know or associate with each other. That is, the group's "cohesion" is not required. The relevant inquiry is whether group members share a common characteristic. This is comparable to the analysis adopted for the other Convention grounds, where there is no requirement that members of a religion or political opinion group together or belong to a "cohesive" group. Thus, women may constitute a particular social group under certain conditions based on the shared trait of sex, regardless of whether they associate with one another on the basis of this trait.¹⁴ A claimant is not required to show that all members of a particular social group are at risk of persecution in order to establish the existence of that group.¹⁵

The size of the alleged social group is irrelevant for determining whether a particular social group exists within the meaning of Article 1A. (2). This is also true for cases involving other Convention grounds. States may, for instance, seek to suppress religious or political ideologies that are widely held by members of a particular society, perhaps even by a majority of the population; the fact that large numbers of people are at risk of persecution cannot be used as a reason to deny international protection when it is otherwise warranted.¹⁶

In a number of jurisdictions, "women" have been recognized as a distinct social group. This does not imply that every woman in society is eligible for refugee status. A claimant must also demonstrate a well-founded fear of being persecuted on account of her membership in the particular social group, must not fall under any of the exclusion grounds, and must meet all other pertinent criteria.¹⁷

However, there are still numerous obstacles to the successful recognition of gender-based PSG claims. First, one of the most pervasive challenges is the overwhelming reluctance of both advocates and decision-makers to frame the relevant PSG as simply "women"; however, according to leading case law, this is theoretically possible regardless of the adopted test.¹⁸ In the leading decision of the Australian High Court in *Khawar*, Gleeson CJ explained that the PSG in that case could be characterized simply as "women" because "[w]omen in any society are a distinct and recognizable group" and "their distinctive attributes and characteristics exist independently of how they are treated, either by males or by governments".¹⁹

Claims based on membership in a particular social group defined by sexuality or gender identity are an additional prominent source of PSG case law in a vast number of jurisdictions. In addition, as mentioned previously, in some jurisdictions sexual orientation has been explicitly included in domestic legislation either as an example of a PSG²⁰ or as an independent ground for refugee status,²¹ in some cases as a result of the transposition of Article 10(1)(d) of the Qualification Directive, which states that, "depending on the

¹² *Idem*, para 7.

¹³ *Idem*.

¹⁴ *Idem*, para 15.

¹⁵ *Idem*, para 17.

¹⁶ *Idem*, para 18.

¹⁷ *Idem*.

¹⁸ See *Liu v Secretary of State for the Home Department* [2005] All ER (D) 304 (Mar) (17 March 2005) [12]. His Honour also acknowledged that 'it is not essential that all members of it [the PSG] suffer persecution'.

¹⁹ (2002) 210 CLR 1, 14 [35] (Gleeson CJ).

²⁰ UN High Commissioner for Refugees (UNHCR), *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'*, August 2012, PPLA/2012/ 02, 21 <<https://www.refworld.org/docid/4f7d94722.html>> accessed 5 January 2023.

²¹ *Idem*, 21-22.

circumstances in the country of origin, a particular social group may include a group based on a common characteristic of sexual orientation".²²

In jurisdictions that have applied the protected characteristics approach in this context, there appears to be little difficulty in accepting that sexual orientation or gender identity meet this criterion, given that in the landmark *Ward* decision, the Canadian Supreme Court acknowledged that "the first category [innate or unchangeable characteristics] would encompass individuals fearing persecution on the basis of gender, linguistic background, and sexual orientation".²³

Much of the case law concerns claims by gay men, but it is clear that the PSG ground of sexual orientation or sexual identity applies to a wider range of contexts, including claims by lesbian,²⁴ bisexual,²⁵ and intersex applicants,²⁶ as well as transgender persons,²⁷ and "gay men with female sexual identities".²⁸ As noted by Lord Rodger of Earlsferry in *HJ and HT*, "the Convention offers protection to gay and lesbian people — and, I would add, to bisexuals and everyone else on a broad spectrum of sexual behavior" because they are entitled to the same freedom from fear of persecution as their straight counterparts.²⁹

Although there are difficulties in refugee claims based on sexual orientation and identity, including the pervasive question of when (if ever) "discretion" can be legitimately demanded of an applicant, these concerns do not pertain to the composition or delineation of the PSG.³⁰

In this context, the most significant remaining difficulty directly related to PSG claims relates to ongoing difficulties in the application of the social perception approach. In Australia, there is ample authority that sexual orientation or identity can constitute a PSG.³¹ In France, however, "homosexuals" are not recognized as a particular social group unless "the behavior of the claimant has been perceived by society as transgressing the social order".³² This has resulted in the rejection of claims where the applicant did not seek to "express openly her homosexuality through her behavior", such that "she does not belong to a sufficiently circumscribed and identifiable group of persons to constitute a social group",³³ whereas

²² See Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender identity in Europe*, September 2011; and Petter Hojem, *Fleeing for love: asylum seekers and sexual orientation in Scandinavia*, New Issues in Refugee Research Paper No. 181, December 2009.

²³ *Ward* [1993] 2 SCR 689, 739 (La Forest J).

²⁴ See *HJ and HT* in which the UK Supreme Court noted that "[t]here is no doubt that gay men and women may be considered to be a particular social group": [2010] 3 WLR 386, 393 [10]. For recent German cases, see Verwaltungsgericht (VG) Neustadt an der Weinstraße [Neustadt an der Weinstraße Administrative Court], 3 K 753/07.NW, 8 September 2008, accepting a claim by an Iranian woman on the basis that as a lesbian woman: 'The applicant has adduced evidence that she belongs to a group whose members share characteristics that are so fundamental to identity, that they should not be forced to renounce it, and that the group in Iran has a distinct identity, because it is perceived by the surrounding society as being different'.

²⁵ See Nicole LaViolette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender identity': a Critical Commentary (2010) 22(2) International Journal of Refugee Law 173, 190.

²⁶ *Idem*.

²⁷ See Canadian case *RPD File MA8-045150* (23 June 2011) in which the tribunal accepted that 'there is a serious possibility that the claimant would be a victim of persecution by reason of her membership in a particular social group, that of transgender persons, if she had to return to México': at [53]. For a French decision accepting a claim by an Algerian transsexual, see *M B*, Commission des Recours des Réfugiés (CRR) [French Refugees Appeal Board], 496775, 15 February 2005. See also UNHCR Guidance Note, note 296 above.

²⁸ *Hernandez Montiel v INS*, 225 F. 3d 1084, 1091 (9th Cir., 2000). The Court explained that, '[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them': at 1093. See also UNHCR, 'Guidelines on International protection: gender-related persecution', note 78 above, [16] where it is explained that '[r]efugee claims based on differing sexual orientation contain a gender element (...) the most common claims involve homosexuals, transsexuals or transvestites, who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination'.

²⁹ *HJ and HT* [2010] 3 WLR 386, 418 [76]. For further application of this principle in the context of lesbian women, see *MK (Lesbians) Albania CG* [2009] UKAIT 00036, [350].

³⁰ For other case law rejecting the 'discretion requirement, see *Norbert Okoli v Minister of Citizenship and Immigration* (2009) FC 332 (31 March 2009) [36]: 'The Federal Court has repeatedly found such findings perverse as they require an individual to repress an immutable characteristic' (citing *Sadeghi-Pari v Canada (M.C.I.)* 2004 FC 282, [29]). See also the emphatic rejection of the discretion requirement in *Karouni v Gonzales*, 399 F. 3d 1163, 1173 (9th Cir., 2005). See also *HJ and HT* as this was the crucial issue in that case.

³¹ In *Singh v Minister for Immigration and Multicultural Affairs* [2000] FCA 1704; 178 A.L.R. 742, Justice Mansfield of the Federal Court of Australia noted that the panel had 'accepted that the applicant's homosexuality meant that he was member of particular social group within the meaning of Article 1A(2) of the Convention', and that this 'has been accepted by the court on a number of occasions': at 744 [9]. See also Appellant *S395/2002 v MIMA* (2003) 216 CLR 473, 494 [55] (McHugh and Kirby JJ).

³² *Mme AGB*, 498570 (12 September 2005). This draws on the 1997 decision of the Conseil d'Etat in Decision No. 171858. This appears to require in most cases that the relevant law of the home country prohibit homosexual conduct.

³³ *Mlle F*, Cour Nationale du Droit d'Asile (CNDA) [French National Court of Asylum], 513547, 25 March 2005. See also *H*, Cour Nationale du Droit d'Asile (CNDA) [French National Court of Asylum], 605398, 7 May 2008 where the homosexual applicant from Kosovo was found not to be the target of rejection by

"persons who assert their homosexuality and manifest it through exterior behavior" are more likely to be accepted as falling within the PSG ground.³⁴ The French interpretation of "social perception" means that so long as a person conceals his or her sexual orientation or gender identity from others, no one can perceive it.³⁵

1.3. DISCRIMINATION VS PERSECUTION

There is no universally accepted definition of "persecution", and numerous attempts to develop one have met with limited success. It can be inferred from Article 33 of the 1951 Convention that any threat to life or freedom based on race, religion, nationality, political opinion, or membership in a particular social group is always persecution. Other grave violations of human rights would also constitute persecution for the same reasons.³⁶

The determination of whether other harmful actions or threats constitute persecution will depend on the specifics of each case, including the subjective element mentioned in the preceding paragraphs. The subjective nature of the fear of persecution necessitates an evaluation of the individual's thoughts and emotions.³⁷

Any actual or anticipated measures against him must also be viewed in the context of these opinions and sentiments. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.³⁸

In many societies, there are differences in the treatment of different groups to a greater or lesser extent. People who are treated less favorably due to such distinctions are not necessarily victims of persecution. Only under certain conditions does discrimination constitute persecution. This would be the case if measures of discrimination resulted in substantial disadvantages for the affected individual, such as severe restrictions on his right to earn a living, his right to practice his religion, or his access to normally available educational facilities.³⁹

1.4. BURDEN AND STANDARD OF PROOF

According to the general principles of the law of evidence, the burden of proof rests with the proponent of the claim. Thus, in refugee claims, the burden of establishing the veracity of the applicant's allegations and the accuracy of the facts upon which the claim is based falls on the applicant. The burden of proof is met when the applicant provides a truthful account of the pertinent facts so that a decision can be made based on those facts. In light of the particulars of a refugee's circumstance, the adjudicator shares the responsibility to ascertain and assess all pertinent facts. This is accomplished in large part by the adjudicator's familiarity with the objective situation in the country of origin in question, knowledge of

the Kosovar society, but only of his immediate circle of acquaintances; hence he 'cannot be regarded as belonging to a circumscribed group of people sufficiently identifiable to constitute a PSG'.

³⁴ *K*, Cour Nationale du Droit d'Asile (CNDA) [French National Court of Asylum], 571904, 1 July 2008. See also *G*, Cour Nationale du Droit d'Asile (CNDA) [French National Court of Asylum], 571886 (11 April 2008) in which the CNDA relied on the fact that the applicant displayed his homosexuality through his job (folk dancing) and his choice of clothes to establish he requisite 'external behaviour'.

³⁵ Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, September 2011, 36.

³⁶ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, 51: <https://www.refworld.org/docid/4f33c8d92.html>> accessed 5 January 2023.

³⁷ *Idem*, para 5.

³⁸ *Idem*, para 43.

³⁹ *Idem*, para 54.

relevant matters of common knowledge, guiding the applicant in providing the pertinent information, and adequately verifying alleged facts that can be proven.⁴⁰

In the context of the responsibility of the applicant to prove facts in support of his/her claim, "standard of proof" refers to the level of evidence required to convince the adjudicator of the veracity of the applicant's factual assertions. The facts that must be "proven" are those pertaining to the applicant's background and personal experiences that allegedly gave rise to a fear of persecution and a consequent unwillingness to seek the protection of the country of origin.⁴¹

In common law nations, the law of evidence governing criminal prosecutions stipulates that cases must be proven "beyond a reasonable doubt". In civil claims, the law does not require this level of proof; instead, the adjudicator must decide the case based on the "balance of probabilities". Similarly, in refugee claims, the adjudicator is not required to be fully convinced of the veracity of every factual assertion made by the applicant. Based on the evidence presented and the veracity of the applicant's statements, the adjudicator must determine whether it is likely that the applicant's claim is credible.⁴²

Clearly, the applicant has an obligation to tell the truth. In saying this, however, consideration should also be given to the fact that, due to the applicant's traumatic experiences, he/she may not speak freely; or that, due to the passage of time or the intensity of past events, the applicant may not be able to remember all factual details or recount them accurately or may confuse them; thus, he/she may be vague or inaccurate when providing detailed facts. Inability to recall or provide all dates or minor details, as well as minor inconsistencies, insubstantial vagueness, or incorrect statements that are not material, may be considered in the final credibility evaluation, but should not be decisive.⁴³

The term "benefit of the doubt" is used in the context of the burden of proof regarding the applicant's factual assertions. Given that there is no requirement in refugee claims for the applicant to prove all facts to such a degree that the adjudicator is fully convinced that all factual assertions are true, the adjudicator would typically have some doubts about the facts asserted by the applicant. When the adjudicator determines that the applicant's story is coherent and plausible on the whole, any element of doubt should not prejudice the applicant's claim; the applicant should be given the "benefit of the doubt".⁴⁴

In common law countries, a substantial body of case law has developed regarding the standard of proof to be applied in asylum claims to establish well-foundedness. This body of law largely supports the position that there is no need to prove well-foundedness beyond a reasonable doubt, or even that persecution is more likely than not. To establish "well-foundedness", it must be demonstrated that persecution is plausible.⁴⁵

⁴⁰ UN High Commissioner for Refugees (UNHCR), *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998 <https://www.refworld.org/docid/3ae6b3338.html>> accessed 5 January 2023.

⁴¹ *Idem*, para 7

⁴² *Idem*, para 8

⁴³ *Idem*, para 9

⁴⁴ *Idem*, para 12

⁴⁵ *Idem*, para 17.

2. HUMAN RIGHTS LAW ON GENDER DIVERSITY, DEPATHOLOGIZATION, AND THE YOGYAKARTA PRINCIPLES

2.1. HUMAN RIGHTS LAW ON TRANS LIVES

It is essential to establish from the outset the objectives of an expanded human rights framework. International conventions and customs have established a broad framework for analyzing human rights, but trans experiences are conspicuously absent. However, this framework has been replicated in national and regional systems. Charters, including the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the African Charter on Human and People's Rights (ACHPR), protect the same fundamental principles as international treaties. Each of these agreements (and their substantive rights) have been exhaustively interpreted by the courts and commissions that oversee their enforcement. These actors' case law reveals how broad rights protections apply to new and evolving areas of the law. In addition, a variety of soft law actors, such as the UN Human Rights Treaty Bodies (UN Treaty Bodies) and the Special Procedures of the UN Human Rights Council (UN Special Procedures), interpret and apply human rights standards. In recent years, they have been at the forefront, along with national and regional judges, of explaining and affirming the status of trans individuals under human rights law.⁴⁶ This has required applying fundamental rights standards (such as nondiscrimination and bodily integrity) to trans-specific experiences. In the absence of clearer guidance from treaty or customary law, these "subsidiary" sources provide valuable insight into the intersection of trans identities and human rights. In order to better comprehend the relationship between trans lives and human rights, in addition to judicial decisions, "soft law" sources are also very important.⁴⁷ While soft law is not expressly listed as a "subsidiary" source in Article 38(1), it has an "essential" status.⁴⁸

Soft law, like judicial decisions, has played a significant role in the incorporation of trans identities into international law. The UN Treaty Bodies, the Special Procedures, the UN Human Rights Council (HRC Council), and the UN High Commissioner for Human Rights (UN HCHR) have repeatedly incorporated trans experiences into their work in recent years.⁴⁹ Not only have these soft law organizations provided persuasive intellectual and legal arguments for why transgender people should be protected, but they have also documented how and why trans lives already enjoy important international protections. In particular, the UN High Commissioner for Human Rights monitors national requirements for gender recognition and has recommended that certain conditions, notably sterilisation, are incompatible with basic human rights. Regional actors, such as the Council of Europe, the Organisation of American States, and the African Commission on Human and People's Rights (ACmHPR), have taken steps (albeit to varying degrees) to enhance and promote transgender human rights. Although soft law sources, unlike judicial decisions, do not create binding norms, they can play an important role in the development of international human rights. Soft law is an effective method for "bringing an issue onto the international agenda".⁵⁰ In the absence of explicit treaty references, soft law such as Resolution 17/19 of the HRC Council⁵¹ promotes and

⁴⁶ UN Human Rights Committee, 'Concluding Observations on the Initial Report of Bangladesh' (27 April 2017) UN Doc No. CCPR/C/BGD/CO/1, [11(e) and 12(e)]

⁴⁷ Dinah Shelton, 'Compliance with International Human Rights Soft Law' (1997) 29 *Studies in Transnational Legal Policy* 119.

⁴⁸ Peter Dunne, *The Conditions for Obtaining Legal Gender Recognition: A Human Rights Evaluation* (Doctoral Thesis 2018).

⁴⁹ See also, United Nations Human Rights Council, '17/19 Human rights, sexual orientation and gender identity' (14 July 2011) UN Doc No. A/HRC/RES/17/19; United Nations Human Rights Council, '32/2. Protection against violence and discrimination based on sexual orientation and gender identity' (15 July 2016) UN Doc No. A/HRC/RES/32/.

⁵⁰ Christine Chinkin, 'Sources' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakuraman (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 93.

⁵¹ Resolution 17/19 is a landmark resolution adopted by the UN Human Rights Council. It recognised the discrimination and violence which LGBTI persons experience worldwide.

facilitates significant debates.⁵² Less than five years after the first-ever United Nations resolution on LGBTI rights, the HRC Council appointed a "Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity".⁵³ In the absence of unanimity and the will to establish hard law, soft law can also "express international standards and consensus on the need for particular action".⁵⁴ In some instances, soft law instruments are the only way to reach an international consensus on politically sensitive issues. According to Boyle, "it may be easier to reach an agreement" when states realize that "their legal obligation and the repercussions of noncompliance are more limited".⁵⁵ This is especially true in trans contexts, where governments may be reluctant to accept binding standards that fundamentally differ from their own national law. In fact, given the sensitivity and lack of protection for trans identities, it is not surprising that soft law has been the most influential international source of trans affirmation.⁵⁶

Article 8 ECHR protects "private life", which the European Court of Human Rights has interpreted to include "physical and moral integrity".⁵⁷ In the past, the Court has found a violation of article 8 when an applicant was subjected to a non-consensual gynecological examination⁵⁸ and when national criminal laws failed to protect a young victim of sexual abuse.⁵⁹ In *YY v. Turkey*,⁶⁰ the ECtHR affirmed that article 8 protects "the right of [trans] persons to personal development and physical and moral security".⁶¹ Article 8 is now the Council of Europe's primary instrument for defending transgender bodily integrity.⁶² It has been invoked to guarantee physical autonomy in medical and legal transition pathways.⁶³ However, article 8 of the European Convention on Human Rights is a qualified right and can be subject to proportionate restrictions, which must be lawful and necessary in a democratic society.⁶⁴

Equality and nondiscrimination, like bodily integrity, are fundamental human rights principles.⁶⁵

Human rights actors increasingly recognize the nondiscrimination rights of transgender individuals. According to the UN High Commissioner for Human Rights, "in their general comments, concluding observations, and views on communications, human rights treaty bodies have confirmed that States are required to protect all individuals from discrimination based on...gender identity".⁶⁶ Since the mid-1990s, United Nations actors have (not without controversy) affirmed the equality of gay, lesbian, and bisexual people.⁶⁷ In recent years, however, a concerted effort has been made to mainstream trans equality. The

⁵² Writing in the context of disability law, Sabatello and Sculze explain that, in the years preceding adoption of the UN Convention on the Rights of Persons with Disabilities (UN CRPD), "a number of so called 'soft law' instruments covering different aspects of human rights of persons with disabilities were adopted", Maya Sabatello and Marianne Schulze, 'Introduction' in Maya Sabatello and Marianne Schulze (eds) *Human Rights and Disability Advocacy* (University of Pennsylvania Press 2013) 3.

⁵³ United Nations Human Rights Council, '32/2. Protection against violence and discrimination based on sexual orientation and gender identity' (15 July 2016) UN Doc No. A/HRC/RES/32/2.

⁵⁴ Dinah Shelton, 'Compliance with International Human Rights Soft Law' (1997) 29 *Studies in Transnational Legal Policy* 119, 141.

⁵⁵ Alan Boyle, 'Soft Law in International Law-Making' in Malcolm Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 143-144.

⁵⁶ General Assembly of the United Nations, '67/168. Extrajudicial, summary or arbitrary executions' (15 March 2013) UN Doc No. A/RES/67/168, [6(b)]; United Nations Human Rights Council, '32/2. Protection against violence and discrimination based on sexual orientation and gender identity' (15 July 2016) UN Doc No. A/HRC/RES/32/2.

⁵⁷ *X and Y v Netherlands* [1986] 8 EHRR 235, [22].

⁵⁸ *YF v Turkey* App No. 24209/94 (ECtHR, 22 July 2003).

⁵⁹ *X and Y v Netherlands* [1986] 8 EHRR 235.

⁶⁰ App No. 14793/08 (ECtHR, 10 March 2015).

⁶¹ *Idem*, [58].

⁶² *AP, Garçon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017).

⁶³ *Schlumpf vs Switzerland* App no 29002/06 (ECHR, 9 January 2009); *YY v Turkey*, App no. 14793/08 (ECHR, 10 June 2015).

⁶⁴ ECHR, art. 8(2).

⁶⁵ Stephanie Farrior, *Equality and non-discrimination under international law* (Ashgate 2015); Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, materials and texts on national, supranational and international non-discrimination law* (Hart 2007); David Oppenheimer, Sheila Foster and Sora Han, *Comparative Equality and Anti-Discrimination Law: Cases, Codes, Constitutions and Commentary* (Foundation Press 2015).

⁶⁶ Ivona Truscan and Joanna Bourke-Martignoni, 'International Human Rights Law and Intersectional Discrimination' (2016) 16 *Equal Rights Review* 103, 105. According to Davies, intersectionality "goes beyond merely merging separate identities but considers the unique identity developed from an individual belonging to multiple categories simultaneously", Aisha Nicole Davies, 'Intersectionality and International Law: Recognizing Complex Identities on the Global Stage' (2015) 28 *Harvard Human Rights Journal* 205, 208.

⁶⁷ Aisha Nicole Davies, 'Intersectionality and International Law: Recognizing Complex Identities on the Global Stage' (2015) 28 *Harvard Human Rights Journal* 205 208.

United Nations Human Rights Council (UN HRC) and the United Nations Committee on Economic, Social, and Cultural Rights (UN CESCR) have confirmed publicly that a person's gender identity should not impede their enjoyment of human rights.⁶⁸ In *G v. Australia*, the UN Human Rights Committee stated unequivocally that "the prohibition against discrimination under article 26 [ICCPR] includes discrimination based on...gender identity, including transgender status".⁶⁹ Similarly, in their Concluding Observations on State Party Reports, numerous UN Treaty Bodies have critiqued discriminatory national regulations and practices against trans populations. In some instances, these committees have recommended corrective policies, such as the adoption or modification of laws, to promote trans equality.⁷⁰ This treaty law is strengthened by the work of the Special Procedures. In their investigations and thematic reports, the Special Procedures frequently promote nondiscrimination against transgender people and condemn transphobia.⁷¹ Regionally, judges and other actors advocate for trans equality.⁷² In its landmark decision, *Identoba and Others v. Georgia*, the European Court of Human Rights ruled that Article 14 of the Convention prohibits discrimination on the basis of gender identity.⁷³

There is no absolute right to equality and nondiscrimination. If the majority of human rights regimes prohibit differential treatment without objective and reasonable justification, then unequal treatment may be legitimate if sufficient reasons exist. In its General Comment No. 18, the UN HRC states, "[n]ot every differentiation of treatment will constitute discrimination if the criteria for such differentiation are reasonable and objective and if the purpose is to achieve a legitimate purpose under the Covenant".⁷⁴ In determining whether discrimination is legal, the ECtHR employs a two-stage analysis⁷⁵ that "has been adopted, explicitly or implicitly, by the vast majority of other human rights bodies".⁷⁶

2.2. THE YOGYAKARTA PRINCIPLES

The Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity were released on March 26, 2007 by a group of human rights experts. The Principles are intended to be a comprehensive and consistent statement of the obligation of states to respect, protect, and fulfil the human rights of all individuals, regardless of their sexual orientation or gender identity. Since their introduction, the Principles have garnered a great deal of attention from states, United Nations actors, and civil society. It is probable that they will play a substantial role in advocacy efforts and, whether directly or indirectly, in normative and judicial development. This article represents the first published critical analysis of the Principles. It seeks to situate them within the contexts of (a) the actual situation of individuals with diverse sexual orientations and gender identities and (b) the applicable international human rights law as it exists today. The Yogyakarta drafting process and the resulting text are examined in this context.⁷⁷

⁶⁸ Ivona Truscan and Joanna Bourke-Martignoni, 'International Human Rights Law and Intersectional Discrimination' (2016) 16 Equal Rights Review 103, 109.

⁶⁹ *Idem*, 120.

⁷⁰ Aisha Nicole Davies, 'Intersectionality and International Law: Recognizing Complex Identities on the Global Stage' (2015) 28 Harvard Human Rights Journal 205, 206.

⁷¹ 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' (19 April 2017) UN Doc No. A/HRC/35/361; 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (5 January 2016) UN Doc No. A/HRC/31/57, [34] – [36], [48] – [50]; United Nations Special Rapporteur on the Situation of Human Rights Defenders, 'Situation of human rights defenders' (30 July 2015) UN Doc No. A/70/217, [65] – [67], and [93(a)].

⁷² *P v S* (n 165); *PV v Spain* App No. 35159/09 (ECtHR, 30 November 2010)

⁷³ *Identoba and Others v Georgia* [2015] 39 BHRC 510, [96].

⁷⁴ United Nations Human Rights Committee, 'General Comment No 18 on Non-Discrimination' (1989), [13].

⁷⁵ *L and V v Austria* [2003] 34 EHRR 55, [44].

⁷⁶ Daniel Moeckli, 'Equality and Non-Discrimination' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakuraman (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 167.

⁷⁷ Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8 Human Rights Law Review, 207.

Those who violate gender norms are more likely to be the target of violence. The organisation "Transgender Day of Remembrance" estimates that one transgender person is killed every month in the US.⁷⁸ In Nepal, police have beaten metis (women who were assigned male at birth) with batons, gun butts, and sticks, burned them with cigarettes, and forced them to engage in oral sex.⁷⁹ Transgender people are "often subjected to violence... to punish them for transgressing gender barriers or for challenging dominant conceptions of gender roles",⁸⁰ and transgender youth are "among the most vulnerable and marginalized young people in society".⁸¹ According to a Canadian report, the idea that there are only two genders is one of the most fundamental concepts in our binary Western way of thinking. Transgender individuals challenge our fundamental worldview. And we force them to pay for our confusion with their suffering.⁸²

The Yogyakarta Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity (the Yogyakarta Principles) were conceived in the context of such diverse approaches, inconsistency, gaps, and opportunities. In 2005, a coalition of human rights NGOs proposed the creation of the Yogyakarta Principles, which was subsequently facilitated by the International Service for Human Rights and the International Commission of Jurists. It was proposed that the Principles serve a threefold purpose.⁸³ In the first place, they should constitute a "mapping" of the experiences of human rights violations endured by individuals with various sexual orientations and gender identities. This exercise should be as inclusive and comprehensive as possible, taking into account the unique ways in which human rights violations may be experienced in various regions of the world. Second, the application of international human rights law to such occurrences should be spelled out with as much clarity and precision as possible. Lastly, the Principles should elaborate on the nature of each state's obligation to effectively implement each of the human rights obligations.⁸⁴

There are 29 fundamentals. Each consists of a statement of international human rights law, its application to a particular situation, and an explanation of the nature of the State's obligation to implement the legal obligation. The Principles are organized in some way. The first three principles outline the universality of human rights and their application to all persons without discrimination, as well as the right of all people to be recognized before the law. The experts placed these elements at the beginning of the text to remind readers of the fundamental importance of the universality of human rights, the scale and scope of discrimination against individuals with diverse sexual orientations and gender identities, and the manner in which they are frequently rendered invisible within a society and the legal system.⁸⁵

Principles 22 and 23 underline the rights of persons to seek asylum from persecution based on sexual orientation or gender identity. Undoubtedly, as the Principles generate further commentary, additional omissions will be identified.⁸⁶

Notable is the fact that the Principles use exclusively gender-neutral language. The approach was adopted deliberately to ensure the application of all aspects of the Principles with regard to the life experiences of all people, regardless of their gender identity and with full respect for it, while avoiding binary gender

⁷⁸ Transgender Day of Remembrance, 'About the Day of Remembrance', available at: <http://www.gender.org/remember/day/what.html> [last accessed 15 February 2008].

⁷⁹ Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN General Assembly, 3 July 2001, A/56/156 at para. 17.

⁸⁰ Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN General Assembly, 3 July 2001, A/56/156 at para. 17.

⁸¹ Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Commission on Human Rights, 5 January 2004, E/CN.4/2004/9, para. 123.

⁸² Barbara Findlay, as cited in EGALE Canada Human Rights Trust, 'Outlaws & In-laws: Your Guide to LGBT Rights, Same-Sex Relationships and Canadian Law' (2003) at 46.

⁸³ Address of the Rapporteur at the launch event of the Principles, Geneva, March 2007.

⁸⁴ Michael O'Flaherty and John Fisher, Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8 Human Rights Law Review, 207.

⁸⁵ Idem.

⁸⁶ Idem.

constructions. This success came at the cost of erasing from the text any mention of the unique circumstances and concerns of women. It could be argued that this omission diminishes the document's capacity to forcefully address the problems facing lesbians in numerous countries.⁸⁷

The HRC, in individual communications subsequent to Toonen, while reaffirming the scope of Article 2.1 and 26 to include sexual orientation-related discrimination, has avoided specifying that this is through a reading of the term "sex", despite the fact that an individual concurring opinion of two HRC members in the case of *Joslin v New Zealand*, in 2002, states categorically that, "it is the Committee's established view that the prohibition against discrimination extends to sexual orientation."⁸⁸ European Court of Justice has criticized the apparent reliance on the "sex" category,⁸⁹ based on the fact that sexual orientation issues are substantively distinct from the binary men/women issues that the category "sex" is commonly perceived to address.

Nonetheless, in support of the HRC's strategy, it should be recalled⁹⁰ that the majority of discrimination based on sexual orientation or gender identity is directed at individuals who violate social or cultural gender norms. In light of the elevated status of sexual discrimination in the Covenant, which is also addressed in Article 3, the use of the "sex" category appears to elevate the suspect nature of sexual orientation-related discrimination above that of the other listed categories. Possibly due to considerations such as these, Jack Donnelly characterized the HRC's approach as "radical and provocative".⁹¹ The HRC's approach has the additional advantage of avoiding the use of the category "other status" in the absence of clearly established criteria for when an unspecified form of discrimination can be designated as such.⁹²

PART A: EU

3. COMMON EUROPEAN ASYLUM SYSTEM AND THE QUALIFICATION DIRECTIVES

Being an instrument established under EU primary law (Article 78(1) TFEU), the CJEU is primarily responsible for the correct interpretation of the QD (recast), and its judgments are binding on all Member States. In its case law, the CJEU has made it clear that the QD, and by extension the QD (recast), "must be interpreted in light of its general scheme and purpose, and in a manner consistent with the [Refugee Convention] and other relevant treaties referred to in Article 78(1) of the TFEU". Concerning the applicability of the Refugee Convention to the interpretation of the QD (recast), the CJEU held in the recent *Alo and Osso* judgment⁹³ that it is clear from recitals (4), (23) and (24) QD (recast) that the Refugee Convention is the foundation of the international legal regime for the protection of refugees. It emphasized

⁸⁷ *Idem*, 236.

⁸⁸ *Joslin v New Zealand* (902/1999), CCPR/C/75/D/902/1999 (2003); 10 IHRR 40 (2003).

⁸⁹ *Grant v SouthWest Trains Ltd* C-249/96 [1998] ECR I-621; (1998) 1 CMLR 993.

⁹⁰ Michael O'Flaherty and John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles* (2008) 8 Human Rights Law Review, 207, 217.

⁹¹ Jack Donnelly, 'Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime' in Peter Baehr, Cees Flinterman and Mignon Senders (eds), *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (Royal Netherlands Academy of Arts and Sciences 1999).

⁹² Michael O'Flaherty and John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles* (2008) 8 Human Rights Law Review, 207, 217.

⁹³ *Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover*, EU:C:2016:127, para. 29.

that the provisions of the Directive for determining who is eligible for refugee status and the nature of that status were adopted to guide the competent authorities of the Member States in the application of the Convention on the basis of common concepts and criteria.⁹⁴ Moreover, the CJEU determined that: In principle, [the considerations regarding the relevance of the Refugee Convention for the interpretation of the QD (recast) are] relevant only in relation to the conditions for determining who qualifies for refugee status and the content of that status, since the system laid down by the convention applies only to refugees and not to beneficiaries of subsidiary protection status, which is intended, as is apparent from recitals 6 and 7, to provide, as is apparent from recitals 6 and 7, to provide subsidiary protection. Nonetheless, recitals 8, 9 and 39 of Directive 2011/95 state that the EU legislature intended, in response to the Stockholm Programme, to establish a uniform status for all beneficiaries of international protection and that it chose to grant beneficiaries of subsidiary protection the same rights and benefits as refugees, with the exception of derogations that are objectively justified and necessary. Consequently, Chapter VII of Directive 2011/95, which relates to the substance of international protection, shall apply, in accordance with Article 20(2) of the directive, to both refugees and beneficiaries of subsidiary protection status, unless otherwise specified.⁹⁵

Consequently, the Refugee Convention can be cited for provisions on international protection applicable to both refugees and individuals eligible for subsidiary protection. This is also demonstrated by the CJEU's application of these considerations to the present cases involving the place-of-residence conditions attached to the residence permits of two Syrian nationals who were granted subsidiary protection status, as stated by the CJEU.⁹⁶

This is not the case for Article 33 of Directive 2011/95, despite the fact that certain articles in Chapter VII contain such a statement. Rather, this article makes it clear that the "freedom of movement" it establishes is guaranteed for "beneficiaries of international protection", meaning that refugees and beneficiaries of subsidiary protection status are subject to the same rules in this regard. Article 26 of the Geneva Convention, which guarantees refugees the right to freedom of movement, specifies that this freedom includes not only the right to move freely within the territory of the state that has granted refugee status, but also the right to choose a place of residence within that territory. There is no indication that the EU legislature decided to only include the first of these rights in Directive 2011/95, but not the second.⁹⁷

In interpreting the QD (recast), an "EU judge"⁹⁸ must consider EU primary law, such as the Charter of Fundamental Rights of the European Union (EU Charter),⁹⁹ and "other relevant treaties" referred to in Article 78(1) TFEU. The issue is discussed in greater detail in *An Introduction to the CEAS for Courts and Tribunals – Judicial Analysis*³², but according to the CJEU, the interpretation of the QD must be consistent with Article 17 of the EU Charter³³. In addition, Recital 16 emphasizes that the QD (recast) "respects the fundamental rights and observes the principles recognized in particular by the [EU Charter]".¹⁰⁰ The EU Charter, according to its preamble, "reaffirms [...] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the [ECHR], the Social Charters adopted by the [Union] and by the Council of Europe, and the case-law of the [CJEU] and of the European Court of Human Rights [ECtHR]".¹⁰¹

⁹⁴ *Idem*, para. 28.

⁹⁵ *Idem*, paras. 31-33.

⁹⁶ European Union: European Asylum Support Office (EASO), *Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis*, December 2016 <https://www.refworld.org/docid/5a65c4334.html> accessed 5 January 2023.

⁹⁷ *Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover*, EU:C:2016:127, paras. 34 and 35.

⁹⁸ When national courts or tribunals are required to interpret the provisions of EU law, the national judge is required to act as an 'EU judge', as explained in EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, 61.

⁹⁹ Charter of Fundamental Rights of the European Union of 18 December 2000, as adopted in 2007 [2012] OJ C 326/391 (entry into force: 1 December 2009).

¹⁰⁰ *Idem*, paras. 34 and 35.

¹⁰¹ *Idem*.

Article 78(1) of the TFEU does not define "other relevant treaties", and the CJEU has not yet clarified its components. It may include the treaties listed in Article 9 and recitals (17), (18), (31) and (34), as well as other treaties deemed relevant to the Refugee Convention's interpretation:¹⁰²

1. the Charter of the United Nations, 194535
2. the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 195036
3. the Convention relating to the Status of Stateless Persons, 195437
4. the International Covenant on Civil and Political Rights (ICCPR), 196638
5. the International Convention on the Elimination of All Forms of Racial Discrimination, 196639
6. the Convention on the Elimination of All Forms of Discrimination against Women, 197940
7. the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), 198441
8. the United Nations Convention on the Rights of the Child, 198942
9. the Rome Statute of the International Criminal Court, 199843
10. the Convention on the Rights of Persons with Disabilities, 200644

First, the CJEU has stated that the CEAS was conceived in a context that supports the assumption that all Member States observe fundamental rights, as evidenced by the CEAS's constituent texts.¹⁰³ This includes the rights outlined in the Refugee Convention and its Protocol, as well as Article 47 of the European Convention on Human Rights. Insofar as the EU Charter's fundamental rights are concerned, they are part of primary EU law. Article 52(3) of the EU Charter prohibits the institutions and bodies of the EU and the Member States from reducing the protection provided by the ECHR where the provisions of the EU Charter and the ECHR are equivalent, although this must not "prevent EU law from providing broader protection".

Regarding eligibility for and granting of refugee status, the provisions of the QD (recast) closely mirror those of the Refugee Convention. Regarding the Refugee Convention, the CJEU has repeatedly stated that "the [Refugee Convention] is the cornerstone of the international legal regime for the protection of refugees" and that the QD aims to guide the authorities of the Member States in applying the Refugee Convention "on the basis of common concepts and criteria".¹⁰⁴

Similarly, recitals (24) and (25) QD (recast) note that "common criteria" must be introduced for the recognition of asylum applicants as refugees under Article 1A(2) of the Refugee Convention.

This specifically refers to "protection needs arising on the ground, sources of harm and protection, internal protection and persecution, including the causes of persecution". In accordance with Article 1A(2) of the Refugee Convention,¹⁰⁵ Recital (22) indicates that the United Nations High Commissioner for Refugees (UNHCR) may "provide valuable guidance" regarding the determination of refugee status. The function of UNHCR is elaborated very important.¹⁰⁶

¹⁰² European Union: European Asylum Support Office (EASO), *Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis*, December 2016 <https://www.refworld.org/docid/5a65c4334.html> accessed 5 January 2023, 17.

¹⁰³ EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, Section 3, 61-89.

¹⁰⁴ Joined Cases C-199/12 to C-201/12, *X, Y and Z* [2013] ECLI:EU:C:2013:720, [39]; and CJEU, Joined Cases C-443/14 and C-444/14, *Alo and Osso* [2016] ECLI:EU:C:2016:127, [28]. See recital (23) QD (recast).

¹⁰⁵ See judgment in case C-528/11, *Zuheyr Freyeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerski savet*, [2013] EU:C:2013:342, [44] in which the CJEU has held with regard to UNHCR publications that "it should be recalled that documents from the UNHCR are among the instruments likely to enable the Member States to assess the functioning of the asylum system in the Member State indicated as responsible by the [Dublin II Regulation]" and that those documents "are particularly relevant in that assessment in the light of the role conferred on the UNHCR by the [Refugee Convention]".

¹⁰⁶ EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, Section 3, 62 and 63.

Article 2(d) QD (recast) defines the term "refugee" as follows:

[...] 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, and to whom Article 12 does not apply.

This definition largely corresponds to the definition of the term "refugee" in Article 1A(2) of the Refugee Convention.¹⁰⁷

The Refugee Convention does not define the term "being persecuted", but EU law provides one in Article 9(1) QD (recast), which states that:

1. To be considered an act of persecution within the meaning of Article 1(A) of the Geneva [Refugee] Convention, an act must: (a) be sufficiently grave by its nature or repetition to constitute a severe violation of fundamental human rights, in particular the rights from which no derogation may be made under Article 15(2) of the [ECHR]; or (b) be an accumulation of various measures, including violations of human rights, which is sufficiently severe to affect a person's life, liberty, or security (a).

Thus, the provision makes explicit reference to Article 1A of the Refugee Convention before outlining two conditions, both of which require an act to be sufficiently grave to constitute persecution and which must be alternatively met.¹⁰⁸

In fact, the QD is the first international instrument to elaborate on the meaning of "being persecuted" within the context of Article 1A of the Refugee Convention. Article 1A does not define persecutory acts. It has been stated that attempts to define persecution had failed due to the impossibility of enumerating in advance all forms of ill-treatment that could legitimately entitle individuals to the protection of a foreign state.¹⁰⁹ Consequently, the interpretation of this fundamental term was left up to the State Parties, resulting in divergent jurisprudence.¹¹⁰ The Directive aims to remedy this by guiding the competent authorities of the Member States in the application of the Refugee Convention based on common concepts and criteria.¹¹¹

The criteria of Article 9(1) QD (recast) largely reflect state practice and scholarly efforts to define the term "being persecuted" in Article 1A of the Refugee Convention. Whether human rights violations or other acts or accumulation of acts as defined in Article 9(1)QD (recast) constitute persecution must be assessed under Article 4(3) QD (recast) on an individual basis taking into account all relevant facts as they relate to the country of nationality or of former habitual residence at the time of taking a decision on the application, the relevant statements and documentation presented by the applicant, and the individual position of the applicant.¹¹²

¹⁰⁷ According to Art. 1A(2) of the Refugee Convention and its 1967 Protocol.

¹⁰⁸ European Union: European Asylum Support Office (EASO), *Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis*, December 2016, 27 <https://www.refworld.org/docid/5a65c4334.html> accessed 5 January 2023.

¹⁰⁹ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 1979, reissued December 2011.

¹¹⁰ See Guy S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, OUP 1996) 62; Hugo Storey, 'Persecution: Towards a Working Definition', in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 462-463.

¹¹¹ Joined Cases C-199/12 to C-201/12, *X, Y and Z* [2013] ECLI:EU:C:2013:720, [39] and [51].

¹¹² See case C-472/13, *Andre Lawrence Shepherd v Bundesrepublik Deutschland* [2015] EU:C:2015:117 [25].

The reference to Article 1A(2) of the Refugee Convention makes it clear that Article 9(1) QD (recast) attempts to define the meaning of persecution (or, more precisely, "being persecuted") within the meaning of Article 1A(2) (2). In this context, the provision specifies two alternative conditions under which an act constitutes persecution. The requirement that the act be sufficiently grave or severe to qualify as persecution is shared by these two alternatives. The threshold of sufficient seriousness may be exceeded either by the nature of a single act as a severe violation of fundamental human rights, or by the repetition of such acts that, if committed as a single act, might not yet qualify as severe violations. The distinction between the second alternative of Article 9(1)(a) (repeated acts) and Article 9(1)(b) (accumulation of various measures) is that the latter must be sufficiently severe violations of human rights to affect an individual in a comparable manner.¹¹³

In order to apply Article 9, it is not necessary to make a clear distinction between Article 9(1)(a) and Article 9(1)(b), especially if it is uncertain whether an interference with individual rights constitutes a violation of "fundamental" human rights.¹¹⁴

The determining factor of persecution is the severity of an act's impact on a person's rights, not the attribution of the violated rights to formal rankings.¹¹⁵ In accordance with this interpretation, the CJEU does not distinguish sharply between the various forms of persecutory acts described in Article 9(1)(a) and Article 9(1)(b) (b). The Court refers to the purpose of the Directive being to guide the competent authorities of Member States in the application of the Refugee Convention¹¹⁶ and interprets the provisions of Article 9 as a definition of the elements which support the finding that acts constitute persecution within the meaning of Article 1A of the Refugee Convention.¹¹⁷

According to Table 6 of Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis (EASO), the steps for determining whether an act constitutes persecution (Article 9(1)) are:¹¹⁸

1. Is the act by its nature or repetition, sufficiently serious as to constitute a severe violation of basic human rights (Article 9(1)(a))?

i) Does a basic human right risk being violated or has it already been violated?

ii) Is the right at issue an absolute right?

If the right is one of those listed in Article 15(2) ECHR as non-derogable, it is automatically considered a fundamental human right. Other nonderogable rights than those listed in the ECHR might also qualify as fundamental human rights.

iii) If the right is not non-derogable, is it fundamental and therefore comparable to non-derogable rights?

While no limitation can ever be legitimate for non-derogable rights (Article 15(2) ECHR), for derogable rights it must be determined whether the alleged violation would be legally justified as a derogation or a limitation. While a violation of non-derogable rights may be considered severe, a violation of derogable rights must be of equal severity to non-derogable rights violations.

¹¹³ European Union: European Asylum Support Office (EASO), *Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis*, December 2016, 27-28 <https://www.refworld.org/docid/5a65c4334.html> accessed 5 January 2023.

¹¹⁴ *Idem*.

¹¹⁵ See Cases C-71/11 and C-99/11, *Y and Z* [2012] ECLI:EU:C:2012:518 [66].

¹¹⁶ Joined Cases C-199/12 to C-201/12, *X, Y and Z* [2013] ECLI:EU:C:2013:720, [39].

¹¹⁷ In the judgment *X, Y and Z*, the Court stated: 'It is clear from those provisions that for a violation of fundamental rights to constitute persecution within the meaning of Article 1(A) of the Geneva [Refugee] Convention, it must be sufficiently serious' (*idem* [52]).

¹¹⁸ European Union: European Asylum Support Office (EASO), *Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis*, December 2016, 28 <https://www.refworld.org/docid/5a65c4334.html> accessed 5 January 2023.

vi) If the act is not grave enough by its nature to constitute a serious violation, is it grave enough by its repetition?¹¹⁹

If these two cumulative conditions are met, the act must be considered an act of persecution within the meaning of Article 9(1)(a) and Article 1A of the Refugee Convention. If the act does not satisfy these two cumulative conditions, it may still constitute persecution if it satisfies the conditions outlined in the second step (Article 9(1)(b)). Article 9(1)(b): accumulation of various measures, including violations of human rights, which are sufficiently severe to affect the individual similarly to Article 9(1)(a)? Article 4(3) requires that the combined effect of the measures be evaluated in light of the applicant's personal circumstances, taking into account all acts to which the applicant has been or risks being exposed. The term "measures" encompasses, in a broad sense, all measures that may affect a person in the same manner as a severe violation of fundamental human rights. The accumulation of multiple measures constitutes persecution only if it has the same effect on the applicant as a violation under Article 9(1). (a). The decisive factor is the gravity of an individual's rights violation.¹²⁰

Article 9(1)(a) QD (recast) calls for a violation of "fundamental" human rights. This language makes it clear that only the violation of a subset of human rights constitutes persecution. The QD (recast) does not define the term "fundamental" human rights, but its provisions shed light on the subject.

Article 9(1)(a) specifically references non-derogable rights under Article 15(2) ECHR. These include the right to life, freedom from torture, inhuman or degrading treatment or punishment, freedom from slavery and servitude, and freedom from retroactive criminal liability (Articles 2, 3, 4(1), and 7 of the European Convention on Human Rights). Consequently, a violation of a non-derogable right under Article 15(2) ECHR may be regarded as a grave violation of fundamental human rights¹¹⁵.¹²¹

As the provision is worded "in particular", however, the reference to Article 15(2) ECHR is not exhaustive. Consequently, rights other than non-derogable rights may qualify as "fundamental human rights" under Article 9(1)(a)¹¹⁶.¹²² In 30 and judicial measures that do not normally imply non-derogable rights by themselves. Therefore, paragraph 1(a) is not limited to the rights listed in Article 15(2) of the European Convention on Human Rights (ECHR)¹¹⁷.¹²³ The reference to non-derogable rights seems to imply that violations of those rights are always persecutive because they are sufficiently severe in and of themselves, but it does not limit "fundamental human rights" to non-derogable rights.¹²⁴ Nevertheless, any expanded content must pass a comparability test.

Article 9 QD (recast) does not provide criteria or a particular method by which a human right listed in a human rights instrument or recognised under customary international law can be determined as "basic" in the sense of Article 9(1)(a) for the purposes of establishing an application for international protection. Unless the human right at issue is referred to in Article 9(1)(a) as a non-derogable human right under Article 15(2) of the ECHR, a comparability assessment between the human right at issue and the non-derogable rights under Article 15(2) ECHR is required.¹²⁵

In its 2012 Y and Z decision, the CJEU determined that, despite being subject to derogations under the ECHR, freedom of religion is "one of the pillars of a democratic society and a fundamental human right".

¹¹⁹ *Idem.*

¹²⁰ *Idem.*

¹²¹ Anja Klug, 'Harmonization of Asylum in the European Union – Emergence of an EU Refugee System?', German Yearbook of International Law (2004) 594 and 602.

¹²² See Federal Administrative Court (Germany), judgment of 5 March 2009, BVerwG 10 C 51.07, BVerwG:2009:050309U10C51.07.0, in *Neue Zeitschrift für Verwaltungsrecht* 2009, 1167, 1168, available in English at www.bverwg.de.

¹²³ Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers, 2006), 234, para. 291.

¹²⁴ *Idem.*

¹²⁵ Reinhard. Marx, *Handbuch zum Flüchtlingschutz, Erläuterungen zur Qualifikationsrichtlinie* (2nd edn, Wolters/Kluwer Law International 2012), 30, para. 27.

For the Court, this means: [I]nterference with religious freedom may be so grave as to be treated similarly to the cases referred to in Article 15(2) of the ECHR, to which Article 9(1) of the Directive refers for guidance in determining which acts must in particular be regarded as persecution.¹²⁶

Not every unlawful or unfair treatment involving an enumerated right constitutes persecution.¹²⁷ The accumulation of measures must result in a deprivation of living conditions equivalent to a violation of such fundamental human rights from which there are no exceptions. In addition, in order to qualify as persecution, serious violations of economic and social rights must generally be attributable to an actor¹²⁸ (see actors of persecution or serious harm under Article 6 QD (recast)).

Article 9(2)(f) QD (recast) echoes the requirements of Article 4(3)(c), under which Member States are required to take into account: the individual position and personal circumstances of the applicant, including factors such as background, gender, and age, in order to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would constitute persecution or serious harm.

Gender-specific acts are persecutory acts that target a specific gender. To comprehend their nature, it is necessary to define and differentiate the terms "gender" and "sex". Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles, and responsibilities that are assigned to one sex or another, whereas sex is determined biologically. Gender is neither fixed nor innate; rather, it is socially and culturally constructed over time. This is evident from the language of recital (30) QD (recast), which states that "issues arising from an applicant's gender, including gender identity and sexual orientation, [...] may be associated with certain legal traditions and customs". Gender identity is a component of gender, whereas sexual orientation is intimately connected to gender.¹²⁹ These two concepts are defined as follows by the 2007 Yogyakarta Principles:¹³⁰

1) Sexual orientation is understood to refer to a person's capacity for intense emotional, affectionate, and sexual attraction to, and intimate and sexual relations with, individuals of a different gender, individuals of the same gender, or individuals of multiple genders.¹³¹

2) gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which, if freely chosen, may involve modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech, and mannerisms.¹³²

While shedding some light on the concept of gender, the above-quoted recital (30) QD (recast) is not concerned with gender-specific acts but rather with persecution based on membership in a social group defined on the basis of gender. The distinction between gender-specific acts and gender-based persecution must be made. In fact, although gender-specific acts of persecution may be perpetrated because of membership in a particular social group defined by gender, the two are not necessarily linked. Consequently, gender-specific acts can also constitute acts of persecution based on race, religion, nationality, political opinion, or membership in a particular social group defined on a basis other than

¹²⁶ European Union: European Asylum Support Office (EASO), *Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis*, December 2016, 30 <https://www.refworld.org/docid/5a65c4334.html> accessed 5 January 2023.

¹²⁷ James Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) 120.

¹²⁸ European Union: European Asylum Support Office (EASO), *Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis*, December 2016, 32 <https://www.refworld.org/docid/5a65c4334.html> accessed 5 January 2023.

¹²⁹ *Idem*, 41.

¹³⁰ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, 6.

¹³¹ *Idem*.

¹³² See for example Council for Alien Law Litigation (Belgium), decision of 17 October 2012, no 89.927 (see EDAL English summary); Migration Court of Appeal (Sweden), judgment of 12 October 2012, UM 1173-12 (see EDAL English summary).

gender. Conversely, gender-based persecution may be the result of acts not specific to a certain gender. This can be the case for a transgender woman who is discriminated against so severely in her social, economic,¹³³ or religious sphere that it becomes intolerable for her to remain in her country of origin.

The QD (recast), like the Refugee Convention on which it is based, provides refugee protection only to those who fear persecution "on account of their race, religion, nationality, political opinion, or membership in a particular social group" (Article 2(d) QD (recast)).¹³⁴ As stated in Recital (29) QD (recast), these causes of persecution must be related to the acts of persecution or the lack of protection against such acts in accordance with the Refugee Convention. One of the requirements for refugee status under Article 1(A) of the Geneva [Refugee] Convention is the existence of a causal link between the causes of persecution, namely race, religion, nationality, political opinion, or membership in a particular social group, and the acts of persecution or the absence of protection against such acts.

The connection clarifies that acts of persecution in and of themselves do not qualify a person as a refugee unless they were committed for one of the reasons for persecution. In order to establish the necessary causal link, it is not necessary for an act to be solely motivated by one of the five reasons. In addition to motives based on race, religion, nationality, membership in a particular social group, or political opinion, there may be additional reasons for a persecutor's actions.¹³⁵

How should the existence of a persecuting motive be determined? A claimant may be unable to demonstrate subjective persecutory intentions on the part of the persecutor, particularly when persecution occurs as part of a general policy of discrimination that clearly falls within the scope of Article 9(3). Either the subjective motivation of the persecutor or the objective impact of the measure in question¹³⁶ can demonstrate the causal link between an act or measures and their persecutory effects. As specified in Article 10(2) QD (recast), the focus must be on the persecutor's actions.

When determining whether an applicant has a well-founded fear of persecution, it is irrelevant whether the applicant actually possesses the racial, religious, national, social, or political characteristic that attracts the persecution,¹³⁷ so long as the actor of persecution attributes such a characteristic to the applicant.

The absence of state protection against persecution indicates that the State is unwilling and/or unable to provide effective, durable, and accessible protection to the applicant.¹³⁸

As is evident from the wording of Article 10(1)(d) QD (recast), a particular social group is defined by two elements: i) An innate shared characteristic or common background that cannot be changed, or a shared characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it; and ii) a distinct identity based on the perception of being different by the surrounding society.

Article 10(1)(d) uses the conjunctive "and" to indicate that both requirements are required under EU law. In 2006, the House of Lords of the United Kingdom expressed concern that requiring both requirements "proposes a more stringent test than is justified by international authority".¹³⁹ Nonetheless, the CJEU stated in 2013 that these two conditions must both be met, although there has not yet been a preliminary

¹³³ As entailed by the Asylum Court (Austria), judgment of 29 January 2013, E1 432053-1/2013 (see EDAL English translation).

¹³⁴ See also Art. 1A(2) of the Refugee Convention. The same wording is used in Art. 2(c) QD.

¹³⁵ European Union: European Asylum Support Office (EASO), *Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis*, December 2016, 44 <https://www.refworld.org/docid/5a65c4334.html> accessed 5 January 2023.

¹³⁶ Federal Constitutional Court (Germany), judgment of 10 July 1989, 2 BvR 502/86, Volume 80, 315, 335.

¹³⁷ *Idem*.

¹³⁸ European Union: European Asylum Support Office (EASO), *Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis*, December 2016, 45 <https://www.refworld.org/docid/5a65c4334.html> accessed 5 January 2023.

¹³⁹ House of Lords (UK), *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46 [16].

ruling that hinges on this point.¹⁴⁰ Although UNHCR's opinion is non-binding, UNHCR has long argued that the case-law of common law countries can be broken down into two approaches: "protected characteristics" and "social perception", and that it is necessary to reconcile the two in order to ensure that the Refugee Convention provides comprehensive and principled protection.¹⁴¹ UNHCR's proposed synthesis of the two is as follows: [A] particular social group is a group of people who share a characteristic other than their risk of being persecuted, or who are perceived by society as a group. Typically, the characteristic will be one that is innate, immutable, or fundamental to identity, conscience, or the exercise of human rights.¹⁴²

The "distinct identity" may be demonstrated by discrimination. According to the UK House of Lords, the concept of discrimination in matters affecting fundamental rights and freedoms is fundamental to comprehending the Convention. It is not concerned with all instances of persecution, even if they involve denials of human rights, but with discriminatory persecution. And in the context of a human rights instrument, discrimination refers to making distinctions that are incompatible with the right of every human being to equal treatment and respect, according to the principles of fundamental human rights. [...] In choosing to use the general term "particular social group" as opposed to an enumeration of specific social groups, the framers of the Convention were, in my opinion, intending to include all groups that may be viewed as falling within the anti-discrimination objectives of the Convention.¹⁴³

Unlike innate/shared characteristics or beliefs or a common background, the distinct identity of a social group refers to how the surrounding society perceives the group to be distinct. This is the case, for example, with victims of human trafficking, who, according to the French Conseil d'état (Council of State), "may be perceived by the surrounding society or institutions as belonging to a social group within the meaning of the [Refugee] Convention".¹⁴⁴

Nonetheless, as ruled by the CJEU, the existence of laws that stigmatize a particular class of individuals may indicate that they are recognized and targeted by a particular society: "[T]he existence of criminal laws [...] which specifically target homosexuals supports a finding that those persons form a separate group that is perceived by the surrounding society as different".¹⁴⁵

Regarding sexual orientation and gender identity, recital (30) QD (recast) exemplifies an aspect of the definition of a particular social group based on the following criteria: For the purposes of defining a particular social group, issues arising from a person's gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, such as those resulting in genital mutilation, forced sterilisation, or forced abortion, should be given due consideration insofar as they relate to the applicant's well-founded fear of persecution.¹⁴⁶

The revised QD expressly recognizes that sexual orientation may be a common trait.¹⁴⁷ The CJEU has accepted that a person's sexual orientation is so fundamental to his identity that he should not be required to renounce it [...] it is important to state that requiring members of a social group sharing the same sexual

¹⁴⁰ Joined Cases C-199/12 to C-201/12, *X, Y and Z* [2013] ECLI:EU:C:2013:720, [45].

¹⁴¹ UNHCR, *Guidelines on International Protection No. 2: 'Membership of a Particular Social Group' within the Context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 7 May 2002, UN Doc HCR/GIP/02/02. Another important report is Michelle Foster, 'The "Ground with the Least Clarity": A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group', UNHCR Legal and Protection Policy Research Series, 2 012.

¹⁴² UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, para. 11.

¹⁴³ House of Lords (UK), *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, ex parte Shah*, [1999] UKHL 20; [1999] Imm AR 283.

¹⁴⁴ Council of State (France), judgment of 25 July 2013, application no 350661,[5] (see EDAL for English summary).

¹⁴⁵ Joined Cases C-199/12 to C-201/12, *X, Y and Z* [2013] ECLI:EU:C:2013:720, [48] and [49].

¹⁴⁶ Art. 10 QD (recast) does include a group 'based on a common characteristic of sexual orientation'.

¹⁴⁷ Art. 10(1)(d) QD: 'Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation'.

orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it.¹⁴⁸

Individuals are not expected to accept any limitations on their conduct, with the exception of claims triggered by sexual conduct that would invite criminal sanction among Member States. The CJEU has stated that, just as Article 10(1)(b) protects the public and private spheres with regard to religion, "nothing in the wording of Article 10(1)(d) suggests that the European Union legislature intended to exclude from the scope of that provision certain other acts or expressions linked to sexual orientation".¹⁴⁹

The prohibition on refugee claims based on sexual orientation that would be deemed criminal in Member States has been strictly interpreted. However, as stated in *X, Y, and Z*, this provision should not be interpreted so as to exclude from the protection¹⁵⁰ other types of acts or expressions related to sexual orientation.

The phrase "well-founded fear" indicates that the applicant's fear of persecution must have a valid objective basis.¹⁵¹ This element of the refugee definition relates to the possibility or risk of persecution. The fear is considered well-founded if there is a "reasonable" possibility that it will occur in the future.¹⁵² In order to make this determination, it is necessary to evaluate the applicant's statements in light of all the relevant circumstances of the case (Article 4(3) QD (recast)) and to review the conditions prevailing in the applicant's country of origin and the behavior of persecutors.¹⁵³ Establishing a well-founded fear is therefore closely related to the task of evaluating evidence and credibility, which is primarily governed by Article 4 QD (recast). Evaluation of evidence, including evaluation of its credibility, is the first step. If the applicant's evidence is deemed credible, the next step for the decision-maker is to determine whether the accepted facts and circumstances constitute a well-founded fear. This two-step strategy was sanctioned by the CJEU:

In actuality, this "assessment" consists of two distinct phases. The first stage involves the establishment of factual circumstances that may serve as evidence in support of the application, while the second stage involves the legal evaluation of that evidence, which entails determining whether, in light of the specific facts of a given case, the substantive conditions outlined in Articles 9 and 10 or Article 15 of Directive 2004/83 for the grant of international protection have been met.¹⁵⁴

Similar to the Refugee Convention, the QD (recast) does not define the phrase "well-founded fear". Neither does it specify the applicable burden of proof. The definition of "refugee" in Article 2(d) QD (recast) closely follows the Refugee Convention definition¹⁵⁵ and refers, in particular, to a third-country national who is outside the country of his/her nationality "due to a well-founded fear of being persecuted" for reasons of race, religion, nationality, political opinion or membership in a particular social group and is unable or, "due to such fear", unwilling to avail their state's protection.

According to the CJEU, in order to meet the aforementioned definition, [the applicant must] have a well-founded fear that he will be persecuted for at least one of the five reasons listed in the [Qualification]

¹⁴⁸ Joined Cases C-199/12 to C-201/12, *X, Y and Z* [2013] ECLI:EU:C:2013:720, [46] and [70].

¹⁴⁹ *Idem*, [67]. See further Tribunal Supremo (Supreme Court, Spain), judgment of 21 September 2012, 65/2012, ECLI:ES:TS:2012:5907; and Supreme Court (Spain), judgment of 21 September 2012, 75/2012, ECLI:ES:TS:2012:5908.

¹⁵⁰ *Idem*, [66].

¹⁵¹ European Union: European Asylum Support Office (EASO), *Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis*, December 2016, 80 <https://www.refworld.org/docid/5a65c4334.html> accessed 5 January 2023.

¹⁵² See Cases C-71/11 and C-99/11, *Y and Z* [2012] ECLI:EU:C:2012:518 [51]; Joined Cases C-199/12 to C-201/12, *X, Y and Z* [2013] ECLI:EU:C:2013:720, [43]; See also C-179/08 *Abdulla and Others* [2010] ECLI:EU:C:2010:105.

¹⁵³ *Idem*.

¹⁵⁴ Case C-277/11, *MM v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, EU:C:2012:744, [64].

¹⁵⁵ See Art. 1A(2) of the Refugee Convention.

Directive and the [Refugee] Convention,¹⁵⁶ based on circumstances in his country of origin and the conduct of persecutors. Providing evidence of the aforementioned conditions "will demonstrate that the third country does not protect its nationals from acts of persecution"¹⁵⁷ and that these circumstances are the reason why it is impossible for the applicant, or he justifiably refuses, to avail himself of the "protection" of his country of origin within the meaning of [Article 2(d) Recast], that is, in terms of that country's ability to prevent or punish acts of persecution.¹⁵⁸

In addition to the definition of "refugee" specified in Article 2(d) of the QD (recast), two other provisions of the QD (recast) are crucial for understanding the concept of "well-founded fear": Recital (36) QD (recast) addresses the well-founded fear of a refugee's family members, while Article 4(4) QD (recast) clarifies the significance of past persecution. Article 4(4) QD (recast) relates to both refugee status and subsidiary protection, whereas Article 2(d) and Recital (36) QD (recast) only apply to applicants for refugee status. In particular in *Y and Z*,¹⁵⁹ *Abdulla*,¹⁶⁰ and *X, Y, and Z*,¹⁶¹ the CJEU provided additional guidance on the concept of well-founded fear.

The QD (recast) does not state whether "well-founded fear" includes both a subjective and an objective component. The CJEU has not addressed it explicitly either. However, the fact that the relevant CJEU judgments discussing the concept of "well-founded fear" do not mention the subjective element would seem to indicate that, according to the CJEU, the assessment of well-founded fear does not require an evaluation of the applicant's mental state, and that the objective test alone is sufficient.¹⁶² In other words, the CJEU does not appear to require the subjective element in addition to the objective element.

In assessing whether the applicant's acts in her country of origin "will give rise to a genuine risk that [he/she] will be persecuted",¹⁶³ application of the objective test requires careful consideration of matters that may be unique to the individual concerned, including his/her beliefs and commitments. In other words, the personal characteristics and circumstances of the applicant should be considered when determining the level of risk to which he or she will be exposed in the country of origin. In *Y and Z*, the CJEU ruled: "The subjective circumstance that the observance of a certain religious practice in public [...] is of particular importance to the person concerned in order to preserve his religious identity is a relevant factor to be taken into account in determining the level of risk to which the applicant will be exposed in his country of origin on the basis of his religion, even if the observance of such a religious practice does not constitute a core edict of the religion".¹⁶⁴

The QD (recast) does not specify the level of proof necessary for a fear to be deemed "well-founded". Nonetheless, the CJEU clarified in its *Y and Z* judgment that when determining whether an applicant has a well-founded fear of being persecuted, the competent authorities are required: in the system established by the [QD] [...] to determine whether or not the established circumstances constitute such a threat that the person concerned may reasonably fear, in light of his individual situation, that he will be subject to acts of persecution.¹⁶⁵

¹⁵⁶ See Cases C-71/11 and C-99/11, *Y and Z* [2012] ECLI:EU:C:2012:518 [51]; Joined Cases C-199/12 to C-201/12, *X, Y and Z* [2013] ECLI:EU:C:2013:720 [43]. See also the CJEU's earlier formulation in Joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Abdulla and Others* [2010] ECLI:EU:C:2010:105 [57].

¹⁵⁷ Joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Abdulla and Others* [2010] ECLI:EU:C:2010:105 [58].

¹⁵⁸ *Idem* [59]. See Cases C-71/11 and C-99/11, *Y and Z* [2012] ECLI:EU:C:2012:518 [66].

¹⁵⁹ See Cases C-71/11 and C-99/11, *Y and Z* [2012] ECLI:EU:C:2012:518.

¹⁶⁰ Joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Abdulla and Others* [2010] ECLI:EU:C:2010:105.

¹⁶¹ Joined Cases C-199/12 to C-201/12, *X, Y and Z* [2013] ECLI:EU:C:2013:720.

¹⁶² Cases C-71/11 and C-99/11, *Y and Z* [2012] ECLI:EU:C:2012:518 [69]; Joined Cases C-199/12 to C-201/12, *X, Y and Z* [2013] ECLI:EU:C:2013:720; Joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Abdulla and Others* [2010] ECLI:EU:C:2010:105 [58].

¹⁶³ See Cases C-71/11 and C-99/11, *Y and Z* [2012] ECLI:EU:C:2012:518 [69].

¹⁶⁴ *Idem*, [70].

¹⁶⁵ Cases C-71/11 and C-99/11, *Y and Z* [2012] ECLI:EU:C:2012:518, [76]; C-178/08 and C-179/08 *Abdulla and Others* [2010] ECLI:EU:C:2010:105 [72].

The "reasonable fear" test of the CJEU is consistent with the tests for evaluating well-founded fear developed by the national courts and tribunals of Member States. For the German Bundesverwaltungsgericht (Federal Administrative Court), the fear of persecution is well-founded if, in light of the third-country national's individual circumstances, he or she is in fact threatened, i.e. with a high probability or real risk, with persecution within the meaning of Article 2(d) due to the conditions in his or her country of origin.¹⁶⁶ It would appear that 83 is well-founded if there is a "real and substantial risk" or a "reasonable degree of likelihood" of persecution for a Convention reason.¹⁶⁷ Despite this language, the same Court makes clear that this standard is lower than one that requires more than 50 percent.

Importantly, all of these tests indicate that the dread is justified, despite the probability of persecution being less than fifty percent. Similarly, the European Court of Human Rights held in *Saadi v. Italy*, in the context of Article 3 ECHR, that the applicant is not required to "prove that ill-treatment is more likely than not".¹⁶⁸ The "reasonable fear" test therefore means that, while a mere chance or remote possibility of being persecuted is insufficient risk to establish a well-founded fear, the applicant is not required to demonstrate that there is a greater than 50 percent chance that he or she will be persecuted.¹⁶⁹

The term "fear" reflects the prospective nature of the Refugee Convention and the QD refugee definitions. The QD (recast) protects not only those who have been persecuted but also those who are at risk of "being persecuted".¹⁷⁰ In addition, it demonstrates an acceptance that the mere threat of persecution is sufficient to constitute persecution. Therefore, a person does not have to wait until they have been persecuted before applying for international protection; they may be "in fear of" future persecution instead.

In *Y and Z*, the CJEU emphasized the prospective nature of the well-founded fear, holding that: [W]hen assessing whether, in accordance with Article 2(c) thereof, an applicant has a well-founded fear of being persecuted, the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in light of his individual situation, that he will in fact be subject to act(s) of persecution.¹⁷¹

It also emphasized that the "assessment of the extent of the risk must, in all cases, be conducted with vigilance and care"¹⁷² and must be based solely on "a specific evaluation of the facts and circumstances, in accordance with the rules established in particular by Article 4".¹⁷³ In a similar vein, but without using the language of vigilance and care, the ECtHR states that the existence of a real risk of a violation of Article 3 of the ECHR must necessitate a rigorous approach.¹⁷⁴

The applicant's history of persecution is a key factor in assessing their current risk of persecution. The significance of past persecution is addressed in Article 4(4) QD (recast), which states: The fact that a person has been subject to persecution or serious harm, or to direct threats of such persecution or harm, is a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to believe that such persecution or harm will not be repeated.¹⁷⁵

¹⁶⁶ Federal Administrative Court (Germany), BVerwG 10 C 23.12, [19], available in English at www.bverwg.de.

¹⁶⁷ *RT (Zimbabwe) & Ors v Secretary of State for the Home Department* [2012] UKSC 38 [55].

¹⁶⁸ *Saadi v Italy* App no 37201/06 (ECHR, 28 February 2008) [140].

¹⁶⁹ See EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*, Publications Office, 2018, <https://data.europa.eu/doi/10.2847/64928> accessed 8 January 2023.

¹⁷⁰ See Cases C-71/11 and C-99/11, *Y and Z* [2012] ECLI:EU:C:2012:518, [74] and [75]; and]; Joined Cases C-199/12 to C-201/12, *X, Y and Z* [2013] ECLI:EU:C:2013:720, [63] and [64]. See also UNHCR Handbook, para. 45.

¹⁷¹ Cases C-71/11 and C-99/11, *Y and Z* [2012] ECLI:EU:C:2012:518 [76]. See also C-178/08 and C-179/08 *Abdulla and Others* [2010] ECLI:EU:C:2010:105 [89].; and]; Joined Cases C-199/12 to C-201/12, *X, Y and Z* [2013] ECLI:EU:C:2013:720 [72].

¹⁷² Cases C-71/11 and C-99/11, *Y and Z* [2012] ECLI:EU:C:2012:518 [77]. See also C-178/08 and C-179/08 *Abdulla and Others* [2010] ECLI:EU:C:2010:105 [73].

¹⁷³ Cases C-71/11 and C-99/11, *Y and Z* [2012] ECLI:EU:C:2012:518 [77].

¹⁷⁴ *Chahal v the United Kingdom* App no 22414/93 (ECHR, 15 November 1996) [96]; *Saadi v Italy* App no 37201/06 (ECHR, 28 February 2008) [129].

¹⁷⁵ Emphasis added.

Importantly, past persecution, as defined by Article 4(4) QD (recast), encompasses both acts and threats of persecution.¹⁷⁶ Therefore, both prior acts and threats of persecution constitute "evidence of the validity of [applicant's] fear that the persecution in question will recur if he returns to his country of origin".¹⁷⁷ In accordance with Article 4(4) QD, if the applicant has already been persecuted or directly threatened with persecution, this constitutes a "serious indication of well-founded fear".¹⁷⁸ This means that past persecution is not required, but evidence of past persecution is a strong indicator of the applicant's well-founded fear of persecution, unless there are compelling reasons to believe that such persecution will not be repeated.¹⁷⁹

As is logically implied by Article 5(1)QD (recast), which deals with international protection claims *sur place*, a claimant who was neither persecuted nor directly threatened with persecution prior to departure from his or her country of origin may establish by other evidence a well-founded fear of being persecuted in the foreseeable future. The acceptance of *sur place* claims clarifies that, in assessing the significance of past persecution, it is necessary to distinguish between applicants who fled persecution and still have a current well-founded fear of persecution and those who left their country of origin and only acquired a well-founded fear of persecution after leaving.¹⁸⁰ In addition, it must be considered that an applicant may have suffered harm in the past, which did not amount to persecution, but which is nonetheless relevant evidence when evaluating a well-grounded fear of future persecution.

The issue of discretion is not addressed in either the Refugee Convention or the QD (recast), but it has gained prominence as a result of applications for refugee status based on a fear of religious or sexual persecution. The term refers to the erroneous belief that applicants may be expected to conceal activities that could lead to their being persecuted, thereby justifying the denial of refugee status. In other words, it has been asserted, erroneously, that applicants' fears are no longer justified if they can avoid persecution by concealing their activities.¹⁸¹

In the *Y and Z* and *X, Y, and Z* judgments, the CJEU denied the existence of such an obligation to exercise discretion. In *Y and Z*, the CJEU was asked whether a person's fear of persecution is well-founded if he or she can "avoid exposure to persecution [...] by abstaining from certain religious practices" without being required to give up religious practice entirely.¹⁸² The CJEU was subsequently asked a similar question in the joined cases of *X, Y, and Z*, namely whether the applicant can be expected to avoid persecution by "concealing his homosexuality [from everyone in his home country] [...] or refraining from expressing it",¹⁸³ where it took a similar approach.

As stated by the CJEU, it is important to consider the significance of a particular practice to the applicant when determining the level of risk to which he or she would be exposed in the country of origin.¹⁸⁴

The subjective circumstance that the observance of a certain religious practice in public, which is subject to the restrictions at issue, is of particular importance to the person concerned in order to preserve his religious identity is a relevant factor to be considered in determining the level of risk to which the applicant

¹⁷⁶ See C-178/08 and C-179/08 *Abdulla and Others* [2010] ECLI:EU:C:2010:105, [94], [96] and [97].

¹⁷⁷ *Idem* [94]. See also Joined Cases C-199/12 to C-201/12, *X, Y and Z* [2013] ECLI:EU:C:2013:720 [64].

¹⁷⁸ Cases C-71/11 and C-99/11, *Y and Z* [2012] ECLI:EU:C:2012:518 [75].; and Joined Cases C-199/12 to C-201/12, *X, Y and Z* [2013] ECLI:EU:C:2013:720 [64].

¹⁷⁹ European Union: European Asylum Support Office (EASO), *Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis*, December 2016, 84 <https://www.refworld.org/docid/5a65c4334.html> accessed 5 January 2023.

¹⁸⁰ *Idem*, 86.

¹⁸¹ *Idem*, 85.

¹⁸² Joined Cases C-199/12 to C-201/12, *X, Y and Z* [2013] ECLI:EU:C:2013:720 [65].

¹⁸³ Cases C-71/11 and C-99/11, *Y and Z* [2012] ECLI:EU:C:2012:518 [78]-[80].

¹⁸⁴ *Idem*, [70].

will be exposed in his country of origin on account of his religion, even if the observance of such a religious practice does not constitute an act of discrimination.¹⁸⁵

In addition, when determining whether an applicant has a well-founded fear of being persecuted, "the competent authorities are required to determine whether or not the established circumstances constitute such a threat that the person concerned may reasonably fear, in light of his individual situation, that he will be subject to acts of persecution".¹⁸⁶

The German Federal Administrative Court (Bundesverwaltungsgericht) applied the CJEU judgment in Y and Z in domestic proceedings in accordance with the principle that no deference or discretion can be expected.¹⁸⁷ By analogy, the aforementioned conclusions from the Y and Z and X, Y, and Z judgments also apply to political opinion.

The ECtHR has also addressed the concept of *sur place* in the context of interpreting Article 3 of the European Convention on Human Rights. In *SF v Sweden*,¹⁸⁸ *AA v Switzerland*,¹⁸⁹ *HS and Others v Cyprus*,¹⁹⁰ and *FG v Sweden*,¹⁹¹ the ECtHR considered both "continuation" and "brand new" *sur place* activities in the context of Article 3 ECHR. In addition, it emphasized that:

Concerning *sur place* activities [...] it is generally difficult to determine if a person is genuinely interested in the activity in question, be it a political cause or a religion, or if he or she is only involved in it to create post-flight ground.¹⁹²

The abovementioned four ECtHR's judgments operate as persuasive arguments in interpreting the concepts of refugee *sur place*. However, the use of this Strasbourg case-law in the QD context should be approached with caution, since the ECtHR interprets neither the Refugee Convention nor the QD (recast), but is rather considering whether manufactured activities can expose an applicant to ill-treatment contrary to Article 3 ECHR.¹⁹³ In addition, due to the absolute character of Article 3 ECHR, the distinction between "good faith" and "bad faith" is never decisive for the ECtHR.¹⁹⁴ Further, the SF, AA and FG judgments deal with protection from refoulement, whereas Article 5(3) QD (recast) provides a ground for denial of refugee status (which are two different things).¹⁹⁵

According to recital (21) QD recast, the recognition of refugee status is a declaratory act. The declaratory nature of refugee status is also implied in Article 21(2) QD (recast) which suggests that protection from refoulement, in accordance with international obligations, applies whether a refugee has been formally recognised or not. As stated by UNHCR: A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This must occur before the official determination of his refugee status. Therefore, recognizing his refugee status does not make him a refugee, but rather declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.¹⁹⁶

¹⁸⁵ *Idem*.

¹⁸⁶ *Idem*, [76].

¹⁸⁷ Federal Administrative Court (Germany), BVerwG 10 C 23.12, op. cit., fn. 170, para. 27, available in English at www.bverwvg.de.

¹⁸⁸ *SF v Sweden* App no 52077/10 (ECtHR, 15 May 2012), [62]-[71].

¹⁸⁹ *AA v Switzerland* App no 58802/12 (ECtHR, 7 January 2014), [38]-[43].

¹⁹⁰ *HS and Others v Cyprus* App no 41753/10 and 13 other applications (ECtHR, 21 July 2015), [277].

¹⁹¹ *FG v Sweden* Application no 43611/11 (ECtHR, 29 March 2016), [123] and [144]-[158].

¹⁹² *Idem*, [123] (internal references omitted).

¹⁹³ Furthermore, it is not clear that the ECtHR attaches significance to the issue of whether the *sur place* activities are manufactured or not.

¹⁹⁴ See *FG v Sweden* Application no 43611/11 (ECtHR, 29 March 2016) [156].

¹⁹⁵ See also *idem*, [125]-[127].

¹⁹⁶ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, para. 28 states that: 'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee

As such, there are procedural guarantees of access to certain limited rights in advance of any formal recognition of status. The APD (recast) provides for a right to stay pending a decision by the determining authority in its Article 9 and recital (25). Article 46(5) APD (recast) stipulates that Member States shall allow applicants to remain in the territory until the outcome of the remedy.¹⁹⁷ Finally, the recast Reception Conditions Directive 2013/33/EU provides for social rights for applicants for international protection. One situation where recital (21) may have practical relevance is when refugee status or a residence permit is revoked.¹⁹⁸

The EU legal framework governing evidence and credibility assessment is limited. EU primary law contains certain general principles and rights that have an impact on evidence and credibility evaluation (21).¹⁹⁹ EU secondary law provides more specific standards for evaluating evidence and credibility (22).²⁰⁰ The CJEU has developed a few additional principles, but these are also relatively few in number.

In *FG v. Sweden*, although only concerned with the application of the ECHR, the ECtHR seeks to establish operational guidelines for national authorities and courts in this regard. The ECtHR suggests that if the contracting state is made aware of facts relating to a specific individual that could expose him or her to a real risk of ill-treatment, the authorities must independently assess that risk. According to the ECtHR, "[t]his applies in particular where the national authorities have been informed that the asylum seeker may plausibly be a member of a group systematically exposed to a practice of ill-treatment and there are serious reasons to believe in the existence of the practice in question and in his or her membership in the group concerned".²⁰¹

The obligation to substantiate the application does not require the applicant to provide documentary or other evidence in support of every relevant fact asserted. This is made clear not only by the qualification that the duty to substantiate extends only to "documentation at the applicant's disposal" (Article 4(2) QD (recast)), but most importantly by Article 4(5) QD (recast). Article 4.5) applies "where Member States apply the principle according to which it is the responsibility of the applicant to substantiate the application" and stipulates that "aspects of the applicant's statements, which are not supported by documentary or other evidence, shall not require confirmation" if certain conditions are met. Consequently, it provides exemptions from (or relaxations of) the requirement to present documentary or other evidence supporting the applicant's statements. This is in recognition of the fact that there may be little documentary or other evidence to support an applicant's statements, and that some asserted facts are difficult to support with documentary or other evidence. In addition, it acknowledges that, for instance, the applicant's or the country of origin's circumstances may make it impossible to obtain relevant documentary or other evidence. However, in accordance with Article 4.5) QD (recast), the applicant must provide a satisfactory explanation for the absence of relevant documentary or other evidence.²⁰²

Concerning the obligation to cooperate with the applicant, the CJEU stated in *MM* that, pursuant to Article 4(1), "although it is generally the applicant's responsibility to submit all elements necessary to substantiate the application, it remains the Member State's obligation to cooperate with the applicant at the stage of

status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee'.

¹⁹⁷ However, the right to suspensive effect is not absolute. See *C239/14, Abdoulaye Amadou Tall v Centre public d'action sociale de Huy* [2015] EU:C:2015:824.

¹⁹⁸ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96./

¹⁹⁹ See EASO, *An introduction to the Common European Asylum System for courts and tribunals – A judicial analysis*, August 2016, op. cit., fn. 3, Part 2.

²⁰⁰ The legal basis for the creation of secondary legislation is derived from Art. 78 Treaty on the Functioning of the European Union (TFEU); consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009): in [2012] OJ C 326/47).

²⁰¹ *FG v Sweden* Application no 43611/11 (ECtHR, 29 March 2016) [126]-[127] and [150]-[157]. See also, Request for a preliminary ruling from the Administrativen sad Sofia-grad (Bulgaria) lodged on 18 November 2016, *Serin Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, case C-585/16 (2017/C 046/17).

²⁰² EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*, Publications Office, 2018, 43 <https://data.europa.eu/doi/10.2847/64928> accessed 8 January 2023.

determining the relevant elements of that application".²⁰³ In A, B, and C, the CJEU reiterated that, despite the fact that the applicant is in the best position to provide evidence to establish his own sexual orientation, it remains the Member State's obligation to cooperate with the applicant at the stage of assessing the relevant elements of the application.²⁰⁴ As it cannot be assumed that the applicant knows what facts and documentary or other evidence may be relevant, in accordance with this obligation to cooperate, the Member State should provide the applicant with appropriate guidance and use appropriate questioning during the personal interview to elicit any relevant elements.²⁰⁵

In addition, the CJEU stated in MM: This obligation to cooperate implies, in practice, that if, for whatever reason, the elements provided by an applicant for international protection are not complete, up-to-date, or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements required to support the application can be assembled.²⁰⁶ In this regard, the CJEU noted in MM that "a Member State may also be in a better position than a requester to gain access to certain types of documents" (111). As stated by the Court:

[This] interpretation [...] finds support in Article 8(2)(b) [APD (now Article 10(3)(b) APD (recast))], pursuant to which Member States are to ensure that precise and up-to-date information is obtained on the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited.²⁰⁷

The fact that an applicant has told lies or even extensive lies does not indicate that they are material or determinative of the application's outcome without additional evidence that the applicant's claim is false. The obligation of the decision-maker is to respect the international obligations of the Member States towards people who actually qualify for refugee protection under the Refugee Convention, regardless of how much lying or acting in bad faith may have helped their case.²⁰⁸

In MA (Somalia),²⁰⁹ the Supreme Court of the United Kingdom considered the impact of false statements made in support of an application for international protection. It was stated that a lie may have a significant impact on the issue at hand, or the decision-maker may view it as "of little consequence", but "everything depends on the facts". Therefore, the significance of lies will vary from case to case, as ruled by the court. In some instances, the [decision-maker] may conclude that a lie has little impact. In other situations, if the [applicant] lies about a crucial aspect of the case, the [decision-maker] may conclude that the lies are of great importance. The appeal of MA was such a case. The central question was whether MA had close ties to influential actors in Mogadishu. The [decider] discovered that he had lied about his connections to Mogadishu. In such a situation, general evidence about the country may become especially crucial. The [decision-maker] must determine whether the overall evidence is sufficient to counteract what we have termed the "negative pull" of the [applicant's] lies.²¹⁰

In a case in which the determining authority had withdrawn international protection from a third-country national after establishing that he had lied about his identity and his reasons for applying for international protection, but his status was reinstated by the National Asylum Court on appeal, the French Conseil d'état

²⁰³ *MM v Minister for Justice, Equality and Law Reform, Ireland, Attorney General* [2012] ECLI:EU:C:2012:744 [65].

²⁰⁴ *Joined cases C-148/13 to C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie* [2014] ECLI:EU:C:2014:2406 [56].

²⁰⁵ EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*, Publications Office, 2018, 47 <https://data.europa.eu/doi/10.2847/64928> accessed 8 January 2023.

²⁰⁶ *MM v Minister for Justice, Equality and Law Reform, Ireland, Attorney General* [2012] ECLI:EU:C:2012:744 [66].

²⁰⁷ *Idem*.

²⁰⁸ *GM (Eritrea), YT (Eritrea) and MY (Eritrea) v Secretary of State for the Home Department* [2008] EWCA Civ 833, [29]-[31]. See also High Court (Ireland); *A v Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform* [2012] IEHC 480, [13]-[20].

²⁰⁹ *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49.

²¹⁰ *Idem*, [33].

(Council of State) ruled that once his identity was established, the National Asylum Court must consider all relevant points of fact and law and determine whether or not he is eligible for international protection.²¹¹

Article 4(5) QD (recast) specifies the conditions that must be met when Member States apply the principle that it is the responsibility of the applicant to substantiate the application for international protection and when certain aspects of the applicant's statements are not corroborated by documentary or other evidence. In such instances, "those aspects shall not require confirmation" if the conditions outlined in subparagraphs (a) through (e) are met.²¹²

In a number of Member States, questions concerning the confirmation of aspects of a candidate's statements are addressed by reference to the principle or rule of the benefit of the doubt.²¹³ In this regard, it should be noted that the Dutch language version of Article 4(5) QD (recast) actually reads "shall [...] be given the benefit of the doubt" rather than "those aspects shall not require confirmation". As established by the CJEU, the various language versions of EU legislation are all equally authoritative²¹⁴ and "must be given a uniform interpretation; accordingly, in the event of divergence between the versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it is a part".²¹⁵

Additionally, the ECtHR notes that it is frequently necessary to give applicants the benefit of the doubt.²¹⁶ For instance, in *JK and Others v. Sweden*, the Court ruled that:

Owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support thereof. Yet when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged inaccuracies in those submissions. [...] Even if the applicant's account of some details may appear somewhat implausible, the Court has considered that this does not necessarily detract from the overall general credibility of the applicant's claim [...].²¹⁷

The ECtHR's reference to the benefit of the doubt appears to be based on the view of the UNHCR set out in its Handbook that "if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt".²¹⁸ In fact, the European Court of Human Rights stated that both the UNHCR standards and Article 4(5) QD (recast) "recognize, explicitly or implicitly, that the benefit of the doubt should be accorded to an individual seeking international protection".²¹⁹

Internal consistency concerns findings regarding consistency, and any inconsistencies, discrepancies or omissions, in the statements and other evidence presented by applicants in their written communications and interviews, at all stages of processing their application and appeal until final disposal. The focus here is on how well a candidate's account or story flows together.²²⁰

²¹¹ *OPFRA c M B* App no 389733 B (Council of State (France), 28 November 2016).

²¹² EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*, Publications Office, 2018, 78 <https://data.europa.eu/doi/10.2847/64928> accessed 8 January 2023.

²¹³ See i.e., Supreme Administrative Court (Czech Republic), *SN v Ministry of Interior*, 5 Azs 66/2008-70.

²¹⁴ Case C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] EU:C:1982:335, [18].

²¹⁵ Case 30/77, *Regina v Pierre Bouchereau* [1977] EU:C1977:172, [14].

²¹⁶ *JK and Others v Sweden* App no 59166/12 (ECHR, 23 August 2016). See also, *RH v Sweden* App no 4601/14 (ECtHR, 10 September 2015) [58]; *N v Sweden* App no 23505/09 (ECtHR, 20 July 2010) [53]; *RC v Sweden* App no 41827/07 (ECtHR, 9 March 2010) [50].

²¹⁷ *JK and Others v Sweden* App no 59166/12 (ECHR, 23 August 2016) [93].

²¹⁸ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, para. 196. See also paras. 203 and 204.

²¹⁹ *JK and Others v Sweden* App no 59166/12 (ECHR, 23 August 2016) [97].

²²⁰ EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*, Publications Office, 2018, 85 <https://data.europa.eu/doi/10.2847/64928> accessed 8 January 2023.

Consistent with national case law, the ECtHR has stated that an applicant's basic story should be consistent throughout the proceedings, even if some details are uncertain or "somewhat remarkable", so long as they do not undermine the claim's overall credibility.²²¹ In assessing the general credibility of the statements, the Court has also stated that exact dates and times cannot be assumed.²²² A point may nevertheless be reached, even taking into account the need to give applicants the benefit of the doubt when assessing their evidence, that information presented gives strong reasons to question the veracity of the submissions. In such situations, the applicant must provide an acceptable explanation for the alleged discrepancies.²²³

External consistency refers to the consistency between the applicant's account (given during the personal interview and/or in other statements) and generally known information, other evidence such as evidence from family or other witnesses, medical and documentary evidence relating to issues relevant to the claim, COI, and any other relevant country evidence.²²⁴ The importance of considering the consistency of the applicant's statements with such evidence is explicit from the inclusion in Article 4(5)(c) QD (recast) of a requirement that "the applicant's statements [...] do not run counter to available specific and general information [...]".²²⁵

Consequently, the applicant's statements should not contradict external evidence such as COI, medical, or other documents. In general, it is reasonable to expect that a claim for international protection will be adequately presented and detailed, at least with regard to the most material facts of the claim. Insufficient detail may also constitute a lack of "relevant elements" as defined by Article 4(5)(b) QD (recast).²²⁶

If an applicant claims to have been arrested at a demonstration for the first time in his or her life, it would be surprising if no specific details can be provided regarding when, where, how, etc. However, this raises the question of how much detail can be reasonably expected. In each case, a balanced and objective evaluation is required to determine whether the applicant's account accurately reflects what can be expected from someone in the applicant's specific circumstances who is relating a genuine personal experience.²²⁷ This will involve considering the applicant's individual characteristics, such as education and background, which may or may not explain why he/she is unable to provide such detail.²²⁸

As previously mentioned, Article 4(5)(c) QD (recast) identifies plausibility as one of the conditions required to exempt a candidate from confirming his or her statements (see Section 4.3.7.3). In *Shepherd*, in the context of a claimant seeking refugee status under Article 9(2)(e) QD, the CJEU referred to the necessity of establishing the facts relied upon "with sufficient plausibility".²²⁹ Although the CJEU has not yet interpreted the term "plausible", it is evident that its scope is narrower than that of "credibility", since an account may be plausible but not credible. Its meaning appears to partially overlap with the phrase "not running counter to available specific and general information" in Article 4(5)(c) QD (recast). However, "plausible" cannot simply be a synonym, as it would have no specific application otherwise. According to UNHCR, "plausibility refers to what appears reasonable, likely, or probable" (emphasis added).²³⁰

In *HK v. Secretary of State*, the English and Welsh Court of Appeal (EWCA) stated:

²²¹ *Said v the Netherlands* App no 2345/02 (ECHR, 5 July 2005), [53], where the Court said that even if the account of his escape might appear somewhat remarkable, the Court considered that it did not reject the overall credibility of the applicant's claim that he was a deserter.

²²² See i.e., *idem*; *Bello v Sweden* App no 32213/04 (ECtHR, 17 January 2006).

²²³ *JK and Others v Sweden* App no 59166/12 (ECHR, 23 August 2016) [93]; and *RH v Sweden* App no 4601/14 (ECHR, 10 September 2015), [58].

²²⁴ See i.e., *Tekdemir v the Netherlands* App nos 46860/99 and 49823/99 (ECtHR, 1 October 2002); *M. T.*, no 15037987

(National Asylum Court (France), 25 January 2017).

²²⁵ EASO, Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis, Publications Office, 2018, 86 <https://data.europa.eu/doi/10.2847/64928> accessed 8 January 2023.

²²⁶ *Idem*, 87.

²²⁷ *Idem*, 87.

²²⁸ *Idem*, 87.

²²⁹ Case C-472/13 *Andre Lawrence Shepherd v Bundesrepublik Deutschland* [2015] ECLI:EU:C:2015:117, [43].

²³⁰ UN High Commissioner for Refugees (UNHCR), *Beyond Proof, Credibility Assessment in EU Asylum Systems*, May 2013, 60.

[...] in many asylum cases, some, even most, of the appellant's story may seem inherently unlikely but that does not mean that it is untrue. The ingredients of the story, and the story as a whole, have to be considered against the available country evidence and reliable expert evidence, and other familiar factors, such as consistency with what the appellant has said before, and with other factual evidence (where there is any).²³¹

Demeanor has been defined as "the aggregate of a witness's conduct, manner, behavior, delivery, and inflection [...]". In short, anything that characterizes his style of testimony but does not appear in a transcript of his actual words.²³² The use of demeanor as a basis for evaluating credibility in the context of international protection claims should be avoided in almost all instances.²³³ Considered a poor indicator of credibility is one's demeanor. If used as a negative factor, the judge must provide justifiable reasons as to why and how the applicant's demeanor and presentation affected the credibility evaluation, taking into account the applicant's relevant capacity, ethnicity, gender, and age. It should only be used (if at all) in the context of understanding the culture and background of the applicant.²³⁴ However, it is true that courts and tribunals frequently emphasize the significance of having had the opportunity to see and hear the witnesses. For instance, the European Court of Human Rights "accepts that, as a general rule, national authorities are best suited to assess not only the facts but, more importantly, the credibility of witnesses, since they have had the opportunity to observe, hear, and evaluate the demeanor of the individual in question".²³⁵ Consequently, comportment may have some influence during an oral hearing. The Irish High Court has issued the following guidelines for assessing conduct:

[T]he decision-maker must be careful not to misplace reliance upon demeanour and risk construing as a deliberate lack of candour a demeanour which may be the result of nervousness, of the stress of the occasion and even of the embarrassment of being an asylum seeker. An apparent hesitation and uncertainty may well be attributable to difficulties in language and comprehension.²³⁶

The second sentence of Article 4 (1) QD states that "it is the Member State's responsibility to assess the relevant elements of the application in cooperation with the applicant". The Court of Justice of the European Union (CJEU) has explained that while "it is generally the responsibility of the applicant to submit all elements necessary to substantiate the application", it remains the responsibility of the Member State to cooperate with the applicant in determining the relevant elements of the application.²³⁷

Cooperation implies that the applicant and determining authority collaborate to achieve a common objective.²³⁸ The common objective is to collect as much relevant evidence as possible in order to assess the veracity of the asserted facts and determine the need for international protection on a solid basis. The EAC states: "It is the responsibility of the asylum authority, in collaboration with the applicant, to evaluate the relevant elements of the application. This is sometimes referred to as both parties sharing the burden

²³¹ *HK v. Secretary of State for the Home Department* [2009] CSOH 35.

²³² Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (OUP 2000) 5.

²³³ International Association of Refugee and Migration Judges, *Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive - Judicial criteria and standards*, March 2013, 41. See also *MA (Nigeria) v Refugee Appeals Tribunal & Ors* [2016] IEHC 16, for an informative insight on Irish case-law on 'demeanour' in the context of credibility assessments.

²³⁴ International Association of Refugee and Migration Judges, *Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive - Judicial criteria and standards*, March 2013, 41.

²³⁵ See i.e., *RC v Sweden* App no 41827/07 (ECHR, 9 June 2010) [52]; *ME v Sweden* App no 71398/12 (ECtHR, 26 June 2014) [78].

²³⁶ *HR v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2011] IEHC 151, [7].

²³⁷ *Singh and others v. Belgium* App no 33210/11 (ECHR, 2 October 2012) [103].

²³⁸ *Case C-277/11 M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General (Opinion of Advocate General)*, ECLI:EU:C:2012:253 [88].

of proof. [...] This shared responsibility is intended to provide the decision maker with qualitatively and quantitatively sound information from which to make a decision".²³⁹

The CJEU has elaborated on what this means in practice: "This obligation to cooperate therefore means, in practice, that if, for whatever reason, the elements provided by an applicant for international protection are not complete, up-to-date, or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements required to substantiate the application can be obtained."²⁴⁰ The gathering of evidence for the application should be a collaborative effort that imposes extensive communication obligations on both the Member State and the applicant.²⁴¹

In principle, it is the responsibility of the applicant to submit evidence in support of a request for international protection, but "the examiner may use all the means at his disposal to produce the necessary evidence in support of the application".²⁴² Moreover, due to the unique and contextual circumstances of some applicants, the determining authority may be required to assume a greater level of responsibility for gathering evidence pertaining to the application.²⁴³

Further, UNHCR has stated, "[i]n light of the particulars of a refugee's situation, the adjudicator shares the responsibility to ascertain and evaluate all pertinent facts. This is accomplished in large part by the adjudicator's familiarity with the objective situation in the country of origin in question, knowledge of relevant matters of common knowledge, guiding the applicant in providing relevant information, and adequately verifying alleged facts that can be substantiated (emphasis added)".²⁴⁴

Moreover, due to the unique and contextual circumstances of some applicants, the determining authority may be required to assume a greater level of responsibility for gathering evidence pertaining to the application.²⁴⁵ As a result, it suffices to mention this fundamental principle of refugee law as stated by UNHCR: "Due to the particularities of a refugee's situation, the adjudicator shares the responsibility to ascertain and evaluate all the relevant evidence".²⁴⁶

²³⁹ *R v Secretary of State for the Home Department, Ex parte Sivakumar (FC)* [2003] UKHL 14, [16].

²⁴⁰ *A v Secretary of State for the Home Department* [2003] EWCA Civ 175, [20], Keene LJ stated: "As a matter of principle it would be difficult to achieve [anxious] scrutiny whilst closing one's eyes to relevant evidence".

²⁴¹ *Auad v. Bulgaria* App no. 46390/10 (ECHR, 11 October 2011) [103].

²⁴² UN High Commissioner for Refugees (UNHCR), *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, para. 6.

²⁴³ UN High Commissioner for Refugees (UNHCR), *Beyond Proof, Credibility Assessment in EU Asylum Systems : Full Report*, May 2013, 126 <https://www.refworld.org/docid/519b1fb54.html> accessed 6 January 2023.

²⁴⁴ UN High Commissioner for Refugees (UNHCR), *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, para. 6.

²⁴⁵ UN High Commissioner for Refugees (UNHCR), *Beyond Proof, Credibility Assessment in EU Asylum Systems : Full Report*, May 2013, 127 <https://www.refworld.org/docid/519b1fb54.html> accessed 6 January 2023.

²⁴⁶ *Idem*, 35.

4. COURT OF JUSTICE OF EUROPEAN UNION AND EUROPEAN COURT OF HUMAN RIGHTS RELATED JURISPRUDENCE ON ASYLUM AND TRANSGENDER RIGHTS

4.1. SEXUAL ORIENTATION AND ASYLUM

The CJEU has had three opportunities to hear sexual orientation asylum claims thus far. The first opportunity presented itself in the combined cases C-199/12 to C-201/12, X, Y, and Z v. Minister voor Immigratie en Asiel,²⁴⁷ in which the possibility of returning asylum seekers to their home countries based on their being discreet with regards to their sexual orientation has been examined. On the other hand, the Court determined that in order for a particular social group to qualify for asylum under the 1951 Refugee Convention,²⁴⁸ sexual orientation applicants must meet two criteria: membership in a group that is socially recognized in the country of origin (social recognition test) and recognition of sexual identity as a fundamental characteristic of a person (fundamental characteristic test). Additionally, the Court determined that criminalizing same-sex behaviour is not a form of persecution in and of itself. Both of these points reflect a strict reading of EU law that runs counter to UNHCR guidelines²⁴⁹ and commentators' opinions.²⁵⁰

In its 2013 X, Y, and Z decision, the CJEU determined that the right of persons to live according to their individual sexual orientation as an expression of the right to respect one's private and family life (Article 7 of the EU Charter, corresponding to Article 8 of the ECHR) is fundamental, but does not fall within the category of fundamental rights from which no derogation is possible. Although the Court has not explicitly interpreted Article 7 of the EU Charter, its reasoning demonstrates that the applicable criterion is whether violations of the right may be so grave as to meet the threshold of Article (9)(1). (a). The essential question is whether the violation is serious enough.²⁵¹ Not all violations of fundamental rights necessarily meet this criterion. Under these conditions, the Court concludes that the mere existence of legislation criminalizing homosexual acts "cannot be regarded as an act affecting the applicant in such a significant manner that it reaches the level of seriousness required for a finding that it constitutes persecution" under Article 9(1).²⁵² Nonetheless, a sentence of imprisonment that accompanies such a legislative provision and is actually applied in the country of origin may be disproportionate or discriminatory, and therefore constitute persecution.²⁵³ If laws mandating imprisonment are not actually enforced, the violation may not be deemed severe enough to constitute persecution. A violation of derogable human rights, such as those protected by Article 7 of the EU Charter/Article 8 ECHR, must meet a higher threshold of seriousness, whereas a violation of non-derogable rights may constitute persecution by its very nature.

In Y and Z, the CJEU then examined Article 4 QD in its entirety to determine whether it was reasonable to expect an applicant to abstain from religious practices that would expose him or her to the risk of persecution. It held: None of [the rules in Article 4 QD] states that, in assessing the extent of the risk of actual acts of persecution in a particular situation, it is necessary to take into account the possibility

²⁴⁷ Joined Cases C-199/12 to C-201/12 *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel* [2013] ECLI:EU:C:2013:720.

²⁴⁸ *Idem*.

²⁴⁹ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01.

²⁵⁰ International Commission of Jurists, *X, Y and Z: a glass half full for 'rainbow refugees'?*, 3 June 2014.

²⁵¹ Cases C-71/11 and C-99/11, *Y and Z* [2012] ECLI:EU:C:2012:518 [57]. In the same light, see the referring Federal Administrative Court (Germany), judgment of 10 December 2010, BVerwG 10 C 19.09, BVerwG:2010:091210B10C19.09.0, [20], available in English at www.bverwg.de.

²⁵² Joined Cases C-199/12 to C-201/12 *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel* [2013] ECLI:EU:C:2013:720 [55].

²⁵³ *Idem* [54]-[56].

available to the applicant of avoiding the risk of persecution by abstaining from the religious practice in question and, consequently, renouncing the protection that the Directive is intended to afford the applicant by conferring refugee status. Therefore, a person should be granted refugee status if it is determined that, upon his return to his country of origin, he will engage in a religious practice that will expose him to a real risk of persecution. In principle, it is irrelevant that he could avoid this risk by abstaining from certain religious practices. [...] Individually evaluating a request for refugee status, [the competent authorities] cannot reasonably expect the applicant to refrain from these religious practices.²⁵⁴

In *X, Y, and Z*, the CJEU took a similar approach and concluded that homosexual applicants could not be reasonably expected to refrain from expressing their sexual orientation in order to avoid the risk of being persecuted, with the exception of acts that are deemed criminal under the national law of EU Member States.²⁵⁵ Aside from that, for the purposes of determining the causes of persecution, there are no restrictions on "the attitude that members of a particular social group may adopt with regard to their identity or to behavior that may or may not fall within the definition of sexual orientation".²⁵⁶ It is "incompatible with the recognition of a characteristic so fundamental to a person's identity that they cannot be required to renounce it" to require members of a social group with the same sexual orientation to conceal that orientation.²⁵⁷ In addition, applicants cannot be expected to conceal their sexual orientation to avoid persecution.²⁵⁸ The fact that an applicant could avoid the risk by expressing his or her sexual orientation with greater restraint than a heterosexual is irrelevant in this regard.²⁵⁹

The Court addresses evidentiary standards more explicitly in the second sexual orientation asylum case heard by the CJEU: the CJEU stated in *Joined Cases C-148/13 to C-150/13, A, B, and C v Staatssecretaris van Veiligheid en Justitie*,²⁶⁰ that the sexual orientation declared by asylum applicant constitutes merely the starting point in the process of assessing the facts and circumstances, in light of the particular context in which asylum applications are made. While some European Union Member States skirt the issue by accepting asylum seekers regardless of their self-declared sexual orientation,²⁶¹ others, such as Hungary in the *F* case,²⁶² are eager to carefully examine applicants' self-declared sexual orientation, disbelieve it whenever possible, and thus find an easy way to deny the asylum claim. In *A, B, and C*, the Court correctly refused to use sexualized evidence or stereotyped assessments in sexual orientation asylum claims, effectively precluding medical tests such as phallographic testing and explanations of sexual practices on the grounds that such evidence violates the dignity and privacy of the claimants (Articles 1 and 7 of the EU Charter). However, no positive guidance²⁶³ regarding the types of questions that are appropriate in these circumstances was provided. Additionally, stereotype-based questions may be asked as part of a more balanced line of questioning, leaving a great deal of room for ambiguity and allowing for inappropriate interviewing and decision-making.

The *F* case reintroduced sexual orientation asylum claims to the European Union, allowing the Court to correct some of the flaws in its two previous decisions on the subject. It was unknown whether the Court would take advantage of this opportunity appropriately. Despite the fact that personality tests cannot

²⁵⁴ Cases C-71/11 and C-99/11, *Y and Z* [2012] ECLI:EU:C:2012:518 [70].

²⁵⁵ *Joined Cases C-199/12 to C-201/12 Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel* [2013] ECLI:EU:C:2013:720 [66]-[67].

²⁵⁶ *Ibid.*, paras. 67 and 68.

²⁵⁷ *Idem.* [70].

²⁵⁸ *Idem.* [71].

²⁵⁹ *Idem.* [75].

²⁶⁰ *Joined cases C-148/13 to C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie* [2014] ECLI:EU:C:2014:2406.

²⁶¹ Nuno Ferreira, 'Portuguese Refugee Law in the European Context: The Case of Sexuality-Based Claims', (2015) 27(3) *International Journal of Refugee Law* 411.

²⁶² Case C-473/16 *F v Bevándorlási és Állampolgársági Hivatal* [2018] ECLI:EU:C:2018:36.

²⁶³ Steve Peers, 'LGBTI asylum-seekers: the CJEU sends mixed messages' (*EU Law Analysis*, 2 December 2014) <<http://eulawanalysis.blogspot.com/2014/12/lgbti-asylum-seekers-cjeu-sends-mixed.html>> accessed 9 April 2022.

determine an applicant's sexual orientation, AG Wahl argued in this case that they should be permitted if consent is obtained and the tests are conducted in accordance with the applicant's right to dignity and respect for private and family life (Articles 1 and 7 of the EU Charter). AG Wahl effectively granted EU Member States an unnecessarily large margin of appreciation and an alarming amount of leeway to discredit asylum seekers' claims, which demanded our vehement condemnation.²⁶⁴

4.2. GENDER IDENTITY IN CJEU LAW

In *P v S* and *Cornwall County Council (P v S)*, the CJEU had to decide whether the principle of equal treatment in terms of working conditions, including dismissal – which was enshrined at the time in Article 5 (1) of Directive 76/207/EEC²⁶⁵ and is now included in the Recast Directive – precluded the dismissal of a transsexual person based on gender reassignment.²⁶⁶ Hereinafter in this subchapter, I will use the term "transsexual" as the CJEU has defined it. Using the term "transgender" instead, as a broad concept, according to Stryker, Valdes and Roen, is more inclusive and opposing binary distinctions.²⁶⁷ Transgender theorists regard the term "transgender" as inclusive of those identifying as transsexual, and that both can relate to queer identities.²⁶⁸ Additionally, I will use the term "gender reassignment" because it is the legal term used by the CJEU.

P, the applicant, was a manager at Cornwall County Council when he informed S, the Director of Studies, Chief Executive, and Financial Director, of his intention to undergo gender transition. P received notification of contract termination a few months later, following minor surgery.²⁶⁹

Contrary to the United Kingdom's and Commission's interpretations,²⁷⁰ the Court held that such dismissal was contrary to the directive's stated purpose.²⁷¹ It based its decision on the European Court of Human Rights' (ECtHR) case *Rees v United Kingdom*,²⁷² which defined transsexuals as "those who, whilst belonging physically to one sex, feel convinced that they belong to the other" often seeking to undergo "medical treatment and surgical operations to adapt their physical characteristics to their psychological nature".²⁷³ Additionally, it recalled prior case law that regarded equality as a fundamental right.²⁷⁴

However, problematic categorization and subsequent legal considerations can exacerbate social insecurity. As previously stated, the distinction between transsexuality and transgenderism raises some concerns about the inclusion (or exclusion) of specific individuals in one or the other. Additionally, these two categories coexist in fundamental tension, with transsexuality strengthening the binary system and transgenderism disrupting it. As a result, one might conclude that this Court's decision reflects that tension.²⁷⁵

²⁶⁴ Nuno Ferreira and Denise Venturi, 'Tell me what you see and I'll tell you if you're gay: Analysing the Advocate General's Opinion in Case C-473/16, F v Bevándorlási és Állampolgársági Hivatal' (Odysseus Blog – EU Immigration and Asylum Law and Policy, 24 November 2017).

²⁶⁵ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39.

²⁶⁶ Case C-13/94 *P v S and Cornwall County Council* [1996] ECLI:EU:C:1996:170 [13] (Hereinafter *P v S*).

²⁶⁷ Susan Stryker, *Transgender History* (Seal Press 2008) 19; Francisco Valdes, Afterword & Prologue: Queer Legal Theory (1995) 83 *California Law Review* 344; Katrina Roen 'Either/Or' and 'Both/Neither': Discursive Tensions in Transgender Politics – TEST' (2002) 27(2) *Signs* 501, 521.

²⁶⁸ *Idem*.

²⁶⁹ *P v S* [3]- [6].

²⁷⁰ *Idem* [14]-[15].

²⁷¹ *Idem* [24].

²⁷² *Rees v The United Kingdom* App No. 9532/81 (ECHR, 17 October 1986).

²⁷³ *P v S*:170 [16].

²⁷⁴ *Idem* [18]- [19].

²⁷⁵ STYCHIN, 'Troubling Genders: A Comment on P. v. S. and Cornwall County Council', p. 222.

In this case, the strong opinion of Advocate-General (AG) Tesouro²⁷⁶ is worth investigating, not only because it influenced the Court's conclusion,²⁷⁷ but also because it indicated an audacious move that the Court did not make.

It is true that Mr. Tesouro's vision was consistent with a medical discourse that pathologizes transsexuals, a discourse that the Court did not appear to follow.²⁷⁸ Mr. Tesouro was inspired by a definition proposed at the time by the Council of Europe Parliamentary Assembly (PACE), which defined transsexualism as a "dual personality syndrome, one physical, the other psychological".²⁷⁹ However, he furthered his rationale in the manner below.

The AG initially acknowledged a dynamic view of the legal system, stating that the law cannot "separate itself from society as it is", and thus must be "capable of regulating new situations revealed by social change".²⁸⁰ He continued by criticizing the Directive's undeniably embedded "traditional man/woman dichotomy" claiming that it overlooked "all unfavorable treatment related to sex",²⁸¹ as well as the "possible range of characteristics, behavior, and roles shared by men and women, so that sex itself ought to be thought of as a continuum".²⁸² Surprisingly, it also implied that a "third gender" individual should be excluded from the Directive.²⁸³

With numerous references to the "fundamental", "inalienable", "universal" principle of equality²⁸⁴ and a somewhat suggestive and lengthy argumentation – from the ironic reference to Adam and Eve²⁸⁵ to references to social justice and European integration²⁸⁶ – the Opinion concluded by urging the Court to make the "courageous", "bold but fair and legally correct"²⁸⁷ decision. The Court adopted a similar position.

5. WHERE EU FALLS SHORT ON GENDER IDENTITY/EXPRESSION ASYLUM JURISPRUDENCE

At this point, deficiencies in EU legislation relating to the preservation of gender variations can be identified. One might wonder if the lack of proper legal protections and the ambiguity around certain existing and developed notions were intentional or the product of irresponsible methods. Furthermore, one can wonder whether the Union is capable of acting at all, and if so, how far. Is the Union anticipated to act in any case?

To begin, keep in mind that the EU's (non-discrimination) legal framework has a very limited field of application and even a more limited scope of human rights protection. Despite its noble intentions, one could argue that the Union is technically and constitutionally incapable of acting in legal areas where intervention is required. What is the reason for this?

²⁷⁶ Opinion of Advocate General Tesouro, delivered on 14 September 1995, *P v S and Cornwall County Council*, Case C-13/94, ECR 1996 I-02143, ECLI:EU:C:1995:444.

²⁷⁷ BARNARD 'P v. S: Kite Flying or a New Constitutional Approach?', p.62. 141.

²⁷⁸ Carl F. Stychin, 'Troubling Genders: A comment on P. v. S. and Cornwall County Council' (1997) 2(3) *International Journal of Discrimination and the Law* 217, 222.

²⁷⁹ Recommendation 1117 on the Condition of Transsexuals Parliamentary Assembly of the CoE (29 September 1989) [1]; Opinion of Advocate General Tesouro, delivered on 14 September 1995, *Case C-13/94 P v S and Cornwall County Council* [1995] ECR I-02143, ECLI:EU:C:1995:444 [8].

²⁸⁰ Opinion of Advocate General Tesouro, delivered on 14 September 1995, *Case C-13/94 P v S and Cornwall County Council* [1995] ECR I-02143, ECLI:EU:C:1995:444 [9].

²⁸¹ *Idem* [16].

²⁸² *Idem* [17].

²⁸³ *Idem* [22].

²⁸⁴ *Idem* [19], [20], [22], [24].

²⁸⁵ *Idem* [17].

²⁸⁶ *Idem*, referring to words once articulated by the AG Trabbuchi.

²⁸⁷ *Ibid* [24].

To begin, Articles 3–6 and 352 of the TFEU²⁸⁸ outline the Union's powers, within which and only within which the Union is entitled to operate on the basis of the conferral principle. Furthermore, according to Article 19 of the TFEU,²⁸⁹ the Union is expected to combat discrimination "within the limits of the powers conferred by the Treaties", i.e., the principle of non-discrimination can only be applied if the subject comes within the scope of EU legislation.

The EU Charter's Article,²⁹⁰ which refers to the Charter's scope of application, contains a similar restriction. When implementing EU law and within the bounds of the Treaties' powers, paragraph (1) states that the Union and Member States must respect and promote the rights and principles enshrined therein, while paragraph (2) clarifies that the EU Charter cannot be used to expand the scope of EU law or to create or modify the Union's powers and tasks (as also stated in the second sentence of Article 6 (1) TEU).²⁹¹

In the absence of specific legal protection, sporadic attempts to fill the gap and the use of imprecise notions created an unsettled scenario. On the one hand, the CJEU incorporated protection for "gender reassignment" under the category of "sex" discrimination, reinforcing EU law's binary approach to sex and gender and establishing that there was no room for further argument. The Commission²⁹² and the European Parliament,²⁹³ on the other hand, were of the opinion that a broader definition of gender identity should be included. I argue that gender expression is a missing ground for protection as well.

Despite this, the legal structure of the European Union remained deafeningly mute. Even when the issue was being debated, the Council abstained from incorporating such an explicit reference in the Goods and Services Directive, and the CJEU earlier took that stance in *P v S*.²⁹⁴ The Court's recent decision in *MB* established that, rather than accommodating the Commission, its goal was to mature the comparative element and explain its (and the Union's) sphere of competence. Despite the fact that this would not be the first or second time the Court would rule in obiter dictum, the Court is not to blame because it was not convened to determine that subject.

As a result, determining whether such emptiness, confusion, and lack of concretization were intentional or unintended is challenging. There is no shortage of awareness or sensitivity; on the contrary, both are plentiful. However, it appears that the Union is waiting for new litigation, specifically claims brought by trans people who have not undergone gender confirmation surgery, other gender non-conforming individuals, or intersex people, to emerge through judicial interpretation, potentially leading to legislative changes, as happened after *P v S*.²⁹⁵

This avoids predicting problems and complexities, but it forces the legal system to operate in a reactive rather than proactive approach. The legislation, according to Attorney General Tesouro, must "keep pace with social changes".²⁹⁶ This, in my opinion, necessitates the legal system to evolve not merely to accept

²⁸⁸ Article 3 – exclusive competence; Article 4 – shared competences; Article 5 – coordinating competences; Article 6 – complementary competences; Article 352 – flexibility clause; See Robert Schütze, 'EU Competences – Existence and Exercise' in Anthony Anrull and Damian Chalmers (eds) *The Oxford handbook of European Union law* (Oxford University Press 2015) 84- 89; Paul Craig and Gráinne de Búrca, *EU Law, Text, Cases, and Materials* (6th edition, Oxford University Press 2015) 75- 94.

²⁸⁹ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326.

²⁹⁰ Paul Craig and Gráinne de Búrca, *EU Law, Text, Cases, and Materials* (6th edition, Oxford University Press 2015) 933.

²⁹¹ For a comment, see Angela Ward 'Article 51 Field of Application' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds), *The EU Charter of Fundamental Rights – A Commentary* (Hart Publishing 2014).

²⁹² European Commission, Report to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2015] COM/2015/0190.

²⁹³ Resolution of 15 September 2016 on application of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive') (European Parliament, 2015/2116(INI)).

²⁹⁴ See The Gender Directives and also Council of the European Union, Draft Minute of the 2606th meeting of the Council of the European Union (Employment, Social Policy, Health and Consumer Affairs) Document Number ST 13369 2004 INIT, held in Luxembourg on 4 October 2004, 7.

²⁹⁵ Inês Espinheiro Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019) 58.

²⁹⁶ Opinion of Advocate General Tesouro, delivered on 14 September 1995, Case C-13/94 *P v S and Cornwall County Council* [1995] ECR I-02143, ECLI:EU:C:1995:444 [9].

new societal notions and advancements, but also to be capable of influencing societal change by offering new perceptions. To put it another way, law must be capable of not only providing legal answers to discrimination claims brought by people who do not conform to binary and cis norms, but also of raising societal awareness of these people and their issues, thereby contributing to the debate and deconstruction of dichotomies.²⁹⁷ Indeed, Article 21 (1) of the EU Charter mandates that the Union actively promote basic rights.²⁹⁸ It is my view that EU law, is merely one tool among others at our disposal towards inclusion.²⁹⁹

It is debatable whether the lack of appropriate legal provisions and the ambiguity of some existing and manufactured notions were intentional or unintentional. Furthermore, one can wonder if the Union has the power to intervene at all, and if so, how far. The Union's legal framework establishes a reciprocal interaction with national legal systems, in addition to the osmotic relationship outlined above between law and society. The impact of EU law on national laws is evident, but the contrary is also true. The CJEU's so-called general principles of Community law is primary law and the European Convention of Human Rights and its elaboration by the European Court of Human rights are included therein. On the other hand, general principles of EU law were inspired not only by international human rights instruments, but also by national constitutions, before an express protection of human rights was established in the Treaties and the EU Charter came into force and became primary legislation.³⁰⁰

Similarly, in terms of the subject at hand, the EU Member States' national legal systems are evolving new and more progressive characteristics. The German Federal Court, for example, declared in October 2017³⁰¹ that the civil status law, which mandated gender registration but did not give a gender marker other than male or female, was unconstitutional. As a result, it asked that German legislators establish Basic Law-compliant provisions by December 31, 2018.³⁰²

Apart from the notable remarks on "binary gender patterns"³⁰³ and assumptions³⁰⁴, and thus the recognition of diverse identities beyond dichotomies, the recognition of "gender identity" as a protected ground against discrimination under "gender"³⁰⁵ – (de)constructions that may well inspire the CJEU – the point that is worth making here is that the inclusion of gender expression in the protected characteristics would open the door to more inclusive readings of transgender phenomena and violations of human rights that are linked to gender nonconforming phenomena that are not linked to binary medicalized identity claims and are embodied versions of (a)gendered self-narratives.

It's unclear how (or even if) the Victims' Directive³⁰⁶ that mentions gender expression would continue in the latter case, but how would Union law respond to claims brought by someone who was a survivor of a crime or in fear of their country of origin of persecution because of their gender nonconforming expression or non-binary gender? Could the person rely on gender nonconformity, apart from gender identity, in

²⁹⁷ Similarly, Carl F. Stychin, 'Troubling Genders: A comment on P. v. S. and Cornwall County Council' (1997) 2(3) *International Journal of Discrimination and the Law* 217, 218- 219. Skeptical in this regard is Morgan, 'Queer Law: Identity, Culture, Diversity, Law' (1995) 5 *Gay and Lesbian Law Journal* 1, 41. The relationship between law and social change is controversial for Martha Minow, 'Law and Social Change'(1993) 62 (1) *UMKC Law Review* 171.

²⁹⁸ Paul Craig and Gráinne de Búrca, *EU Law, Text, Cases, and Materials* (6th edition, Oxford University Press 2015) 397; Andrew Williams, 'Human Rights in the EU' in Anthony Arnull and Damian Chalmers (eds) *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 252.

²⁹⁹ Wayne Morgan, 'Queer Law: Identity, Culture, Diversity, Law'(1995) 5 *Gay and Lesbian Law Journal* 1, 41 and 44, arguing for the need for 'more direct strategies'. Along the same lines, Dean Spade, 'Trans Survival and the Limits of Law Reform' in Laura Erickson-Schroth (ed) *Trans bodies, Trans selves: A Resource for the Transgender Community* (Oxford Univ. Press 2014) 187, claiming the ineffectiveness of (US) anti-discrimination law and hate-crime legislation, and proposing new strategies.

³⁰⁰ FRA and CoE, *Handbook on European non-discrimination law* (Publications Office of the European Union, 2018) 20-21.

³⁰¹ Bundesverfassungsgericht (Germany), *Headnotes to the Order of the First Senate of 10 October 2017* (1 BvR 2019/16) [1]-[69]. For an English version, see <http://www.bverfg.de/e/rs20171010_1bvr201916en.html> accessed on 10 April 2022.

³⁰² *Idem*, 3.

³⁰³ Bundesverfassungsgericht (Germany), *Headnotes to the Order of the First Senate of 10 October 2017* (1 BvR 2019/16) for instance [59].

³⁰⁴ *Idem*, for instance [54].

³⁰⁵ *Idem* [56].

³⁰⁶ Council of the European Union, *Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, 14 November 2012, L 315/57.

asylum claims? How would the binary understanding of "sex" under Union laws be understood when confronted with a non-binary/medicalized view of sex and gender under national law?

Those questions, of course, are in addition to the Court's potential difficulties in dealing with claims brought by intersex and trans people, if their sex or gender is not legally recognized: is gender identity included in "sex", as "gender reassignment" is under the EU Law? Are "gender-related issues" included in the word "sex status"? As a result, it is apparent that the Union must be prepared to face inescapable future problems.³⁰⁷

PART B: US

6. THE US ASYLUM ADJUDICATION SYSTEM

The U.S. protection for those fleeing persecution is based on two international treaties enacted in response to the international community's failure to adequately protect Holocaust refugees. The 1951 U.N. Convention relating to the Status of Refugees, 189 U.N.T.S. 137, signed on July 28, 1951, and the 1967 U.N. Protocol relating to the Status of Refugees, 19 U.S.T. The Refugee Act of 1980, which amended the Immigration and Nationality Act (INA) to explicitly incorporate international obligations into U.S. domestic law, was passed by Congress in 1980. Applicants may qualify as "refugees" under INA 101(a)(42)(A); 8 U.S.C. 1101(a)(42)(A) if they are unable or unwilling to return to their home country "due to persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion". To apply for refugee status in the United States, a person must typically be outside of the country of persecution.³⁰⁸

The INA makes a distinction between individuals who seek relief while still living abroad and those who have already arrived on U.S. soil. Whether a person is designated a "refugee" or an "asylee" upon admission, both must meet the legal definition of a refugee. INA § 101(a)(42)(A); 8 U.S.C. § 1101(a) (42) (A). INA 207; 8 U.S.C. 1157 designates as "refugees" and admits to the United States foreign nationals who have been granted permission to enter the United States through its refugee resettlement program but are still located abroad. To qualify as a refugee, a person must meet the requirements of INA 101(a)(42)(A) and 8 U.S.C. 1101(a)(42) (A). Those who arrive at a U.S. border or are physically present in the U.S. but fear returning to their home countries apply for "asylum". If their applications for asylum are approved, they are labelled "asylees". Asylum benefits are determined pursuant to INA 208 and 8 U.S.C. 1158.³⁰⁹

Asylum seekers are individuals who have arrived in the United States in search of protection from persecution in their home countries. Asylum seekers who apply for asylum at a port of entry or after the DHS places them in removal proceedings are referred to as "defensive" asylum applicants. An immigration judge will typically hear these cases, unless the individual is a UAC, per Trafficking Victims Protection Reauthorization Act (TVPRA). In contrast, the cases of asylum seekers who file "affirmatively" — by voluntarily filing an application with USCIS and who are not in removal proceedings — are initially reviewed

³⁰⁷ As pointed out by Nora Markard, the German Court left that decision to the legislator, see Nora Markard, 'Structure and Participation: On the Significance of the 'Third Option' for the Equality Guarantee' in *The 'Third Option': Not Man, Not Woman, Not Nothing* held on 3 March 2018 <https://www.bundesverfassungsgericht.de/e/rs20171010_1bvr201916gen.html> accessed on 10 April 2022.

³⁰⁸ Lenni Benson, Stepehn Yale-Loehr, and Shoba Sivaprasad Wadhia, *Immigration and Nationality Law: Problems and Strategies* (2nd edition, Carolina Academic Press 2020), 114.

³⁰⁹ *Idem*, 115.

by a USCIS Asylum Officer. If the Asylum Officer decides not to grant asylum, only then is the case referred to an immigration judge (IJ). See Figure 1. If, however, the noncitizen asylum applicant is in valid nonimmigrant status when the Asylum Officer rejects his or her claim, the USCIS denies the asylum claim but does not refer the case to an immigration judge or initiate removal proceedings. The nonimmigrant simply continues in his or her current temporary status.³¹⁰ As opposed to the Refugee Admissions Program, there is no annual cap on the number of people who can be granted asylum. After a person is granted asylum, they are referred to as "asylees".³¹¹

Defensive asylum application is reserved for those that are placed in removal proceedings because they: Arrived at a U.S. Port of Entry and presented themselves to a U.S. official to express fear of return and to request asylum; or were apprehended in the United States or at a U.S. port of entry without proper legal documents or in violation of their immigration status; or Were apprehended by U.S. Customs and Border Protection (CBP) while attempting to enter the United States without proper documentation. As required, immigration judges hear defensive asylum claims in adversarial (court-like) proceedings. The judge will hear arguments from the two parties listed below:³¹² There are other ways people can end up in removal proceedings, such as after presenting themselves at a POE to lawfully request asylum (not attempting to enter without proper docs); Or, someone might have been placed in proceedings after an arrest internally (by ICE, usually) and then the issuance of an NTA.

Immigration judges are not independent members of the judiciary. Immigration judges and BIA members are not members of the judicial branch, despite their role in adjudicating complex and highly sensitive cases. They are neither confirmed by the Senate nor granted life tenure, the traditional means of ensuring judicial independence and preventing the politicization of the judicial process. These judges are instead employed by the Executive Office for Immigration Review (EOIR), a division of the Department of Justice. The Attorney General appointed them to their positions as attorneys.³¹³

Individuals who have suffered or fear persecution in their home countries on account of their race, religion, nationality, political opinion, or social group are permitted by federal law to apply for asylum in the United States. The 1951 United Nations Convention Relating to the Status of Refugees and the 1967 United Nations Protocol Relating to the Status of Refugees establish this right to seek protection. 1980 saw the enactment of the Refugee Act, which codified refugee and asylum protection.³¹⁴

The asylum regulations for applications before the asylum office and the immigration court are identical, but are located in different sections of the CFR. 8 C.F.R. 208 contains asylum regulations pertaining to applications before USCIS/the Asylum Office, while 8 C.F.R. 1208 contains asylum regulations pertaining to applications before the immigration court. In the interest of clarity, this manual will refer to 8 C.F.R. 208 of the Department of Homeland Security regulations.³¹⁵ Through U.S. Citizenship and Immigration Services (USCIS), the Department of Homeland Security (DHS) adjudicates affirmative requests for asylum. The Executive Office for Immigration Review (EOIR) of the Department of Justice has jurisdiction over pending asylum applications in removal proceedings.³¹⁶

³¹⁰ *Idem*, 821.

³¹¹ *Idem*, 821.

³¹² US Citizenship and Immigration Services 'Obtaining Asylum in the United States' <<https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states>> accessed 9 January 2023.

³¹³ Lenni Benson, Stephn Yale-Loehr, and Shoba Sivaprasad Wadhia, *Immigration and Nationality Law: Problems and Strategies* (2nd edition, Carolina Academic Press 2020), 723.

³¹⁴ National Immigrant Justice Center, 'Basic Procedural Manual for Asylum Representation Affirmatively and in Removal Proceedings', October 2017, 9 <<https://immigrantjustice.org/for-attorneys/legal-resources/file/nijc-procedural-manual-asylum-representation-pdf>> accessed 9 January 2023.

³¹⁵ *Idem*, para 1.

³¹⁶ *Idem*, 10.

The Immigration and Nationality Act (INA) outlines the legal eligibility requirements for asylum. If an applicant for asylum meets the definition of a refugee, the request may be granted. A refugee is a person who: Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.³¹⁷

To establish a "well-founded fear" of persecution, an asylum seeker need only demonstrate a reasonable likelihood that she will be persecuted. An applicant who demonstrates past persecution by the government (or an entity the government cannot or will not control) on the basis of one of the five protected grounds has satisfied this requirement and established a rebuttable presumption that she has a well-founded fear of future persecution.³¹⁸

An applicant may also establish eligibility for asylum by demonstrating an independent, well-founded fear of future persecution, i.e., a reasonable likelihood that she will be persecuted by the government (or an entity the government cannot or will not control) on the basis of one of the five protected grounds.³¹⁹

The Supreme Court has ruled that the following is sufficient to demonstrate a reasonable fear: "having a fear of an event that has less than a 50 percent chance of occurring", and "estimating a 10 percent chance of being shot, tortured, or otherwise persecuted".³²⁰

The INA and accompanying regulations lack a definition of persecution. Case law is therefore the primary source of guidance regarding persecution. *Stanojkova v. Holder*, 645 F.3d 943, contains the most recent and most generally useful definition of asylum in Seventh Circuit case law (7th Cir. 2011). In this decision, the Seventh Circuit distinguished three types of persecution:

The Attorney General remarked that "persecution" consists of the below components: (1) an "intent to target a belief or characteristic" (2) a "target", and (3) a "victim", (4) "the level of harm must be severe", and (5) "the harm or suffering must be inflicted by the government of a country or by individuals or organizations that the government was unable or unwilling to control".³²¹

Persecution has been defined as "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who are perceived to be offensively different".³²² As used in section 101(a)(42)(A) of the INA, "persecution" "clearly contemplates that harm or suffering must be inflicted upon an individual... for possessing a belief or characteristic a persecutor seeks to eradicate".³²³ It "does not include harm resulting from civil strife or anarchy", a definition Congress expressly rejected by omitting "displaced persons" from the Senate's version of the Refugee Act of 1980. The Court noted in *Stanojkova* that a credible threat to inflict grave physical harm would also constitute persecution under the second prong.³²⁴

A candidate for asylum must demonstrate that the persecution she suffered or fears was or will be carried out by either the government or a group that the government cannot or will not control.³²⁵ Thus, an

³¹⁷ INA §101(a)(42)(A).

³¹⁸ *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

³¹⁹ 8 C.F.R. § 208.13(b) (1).

³²⁰ *Cardoza-Fonseca*, 480 U.S. 421.

³²¹ *Matter of A-B-*, 27 I&N Dec. [337].

³²² *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), altered for other reasons, *Matter of Mogharrabi*, 19 I&N Dec. (BIA 1987).

³²³ *Idem*, [223] as amended by *Matter of Kasinga*, 21 I&N Dec. 357, [365] (BIA 1996); see *Matter of A-B-*, 27 I&N Dec. [335]. (citing *Matter of Kasinga*).

³²⁴ *Stanojkova*, 645 F.3d [948].

³²⁵ *Balogun v. Ashcroft* 374 F.3d 492 and 499 (7th Cir. 2004).

applicant can establish her eligibility for asylum by demonstrating that she was persecuted by a group – or even society as a whole – that the government refuses to control because it condones or tolerates the groups' activities (such as women who perform female genital mutilation, abusive spouses, or paramilitary groups) or by a group that the government cannot control because it is too powerful (such as gangs or guerilla groups). The Board of Immigration Appeals has determined that an applicant established asylum eligibility based on persecution by a non-government entity even though she did not request governmental protection because the evidence demonstrated that if she had requested help, the authorities would have been unable or unwilling to control her persecutor and requesting protection would have increased the applicant's risk of harm.³²⁶

A candidate must demonstrate a connection between the persecution and one of the protected grounds for asylum: race, religion, nationality, political opinion, or membership in a specific social group. Additionally, the applicant must demonstrate that the protected ground(s) "was or will be at least one central reason for the applicant's persecution".³²⁷ To satisfy the "one central reason" requirement, applicants must demonstrate a clear connection between the persecution and the protected ground, taking care to consider and highlight all direct and circumstantial evidence in the case that demonstrates a connection.³²⁸

The REAL ID Act (P.L. 109-13) shifted the burden of proof for asylum claims to "one central reason". Consequently, this obligation applies only to asylum applications submitted on or after May 11, 2005. Asylum officers are reminded that interviews must be conducted in a non-confrontational manner in order to elicit all relevant and useful information regarding the applicant's asylum eligibility.³²⁹ The question of whether an applicant holds a political opinion or is a member of a particular social group is distinct from the question of whether the applicant was persecuted due to her political opinion or social group membership, also for the purposes of credibility assessment.³³⁰ REAL ID Act allows asylum officers to assess credibility on both questions.

The concept of "particular social group" is expansive and dynamic. In general, it refers to a group of individuals who share or are defined by certain immutable characteristics, such as age, class, ethnicity, family ties, gender, and sexual orientation.³³¹ According to the Board of Immigration Appeals, members of a specific social group must share a "common immutable characteristic".³³² This trait should be one that the group cannot or should not be required to alter. The Acosta immutable characteristics test was the accepted definition of "membership in a particular social group" for more than two decades until the Board added "social visibility" and "particularity" in 2008.³³³ Several decisions issued by the U.S. Court of Appeals for the Seventh Circuit invalidated the social visibility requirement and broadened the definition of a particular social group.³³⁴

³²⁶ Regarding *S-A-*, 22 I&N Dec. 1328 and 1335 (BIA 2000).

³²⁷ INA § 208(b)(1)(B)(i); *Shaikh v. Holder*, 702 F.3d 897 (7th Cir. 2012).

³²⁸ *Martinez-Buendia v. Holder*, 616 F.3d 711, 715 (7th Cir. 2010).

³²⁹ See 8 C.F.R. § 208.9 (b).

³³⁰ National Immigrant Justice Center, 'Basic Procedural Manual for Asylum Representation Affirmatively and in Removal Proceedings', October 2017, 12 <<https://immigrantjustice.org/for-attorneys/legal-resources/file/nijc-procedural-manual-asylum-representation-pdf>> accessed 9 January 2023.

³³¹ *Idem*, 13.

³³² *Acosta v. United States*, 19 I&N Dec. 211, 222 (BIA 1985).

³³³ See National Immigrant Justice Center, 'Basic Procedural Manual for Asylum Representation Affirmatively and in Removal Proceedings', October 2017, 14 <<https://immigrantjustice.org/for-attorneys/legal-resources/file/nijc-procedural-manual-asylum-representation-pdf>> accessed 9 January 2023; *Matter of S-E-G*, 24 I&N Dec. 579; *Matter of E-A-G*, 24 I&N Dec. (BIA 2008).

³³⁴ *Holder*, 657 F.3d 537 (7th Cir. 2011); *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011); *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009); and *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009).

The Board issued two precedent decisions in February 2014 that clarified and reaffirmed the particularity and social visibility (renamed "social distinction") requirements.³³⁵ According to the Board, the particularity requirement stipulates that a group must be discrete and have definable boundaries; it cannot be comprised of numerous and diverse individuals.³³⁶ To meet the requirement for social distinction, a group need not be physically visible, but it must be recognized by society as a group.³³⁷

In *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), the seminal case regarding membership in a particular social group, the Board defined "particular social group" as a group whose members cannot change or should not be required to change a shared characteristic. In *Acosta*, the Board specifically cited gender as an example of an immutable trait that can serve as the foundation of a social group. Therefore, according to the *Acosta* test, gender alone should suffice to define a social group. Although the BIA now requires more than the *Acosta* test to establish membership in a particular social group (see *supra*).³³⁸

The applicant is presumed to have a well-founded fear of future persecution if she demonstrates past persecution on account of a protected ground by the government or an entity the government cannot or will not control.³³⁹ The burden then shifts to the government to demonstrate by a preponderance of evidence that conditions in the country of origin have changed to the extent that the applicant no longer has a well-founded fear of persecution or that it would be reasonable for the applicant to relocate to another part of the country to avoid persecution.³⁴⁰

If a candidate has not been persecuted in the past or if her future fear of persecution has been refuted, she must demonstrate an independent, well-founded fear of future persecution. In a claim based solely on future fear of persecution, the applicant must demonstrate the same elements as in a claim based on past persecution: persecution by the government or an entity that the government cannot or will not control due to a protected ground. The applicant must demonstrate both a subjective and objective fear of persecution, as the asylum claim is prospective only.³⁴¹ First, the applicant must demonstrate that there is a reasonable possibility – or at least a 10% chance – that she will be "singled out for persecution" by the government or an entity that the government cannot or will not control due to a protected ground.³⁴² Second, the applicant must demonstrate that "there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of the protected grounds", and that her "inclusion in and identification with such a group is such that her fear of persecution upon her return is reasonable".³⁴³

An asylum officer will conduct a credible fear interview when aliens who are inadmissible under INA 212(a)(6)(C) or 212(a)(7) indicate either an intention to apply for asylum under INA 208 or a fear of persecution or torture.³⁴⁴ Credible fear is "a significant possibility, taking into account the credibility of the alien's statements in support of the alien's claim and other known facts, that the alien could establish eligibility for asylum under section 208".³⁴⁵

³³⁵ *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. (BIA 2014).

³³⁶ *M-E-V-G-*, 26 I&N Dec. [239].

³³⁷ *Idem* [240].

³³⁸ 19 I&N Dec. 211 (BIA 1985).

³³⁹ 8 C.F.R. § 208.13(b)(1).

³⁴⁰ 8 C.F.R. § 208.13(b)(1)(i).

³⁴¹ *Cardoza-Fonseca*, 480 U.S. 421; *Ayele*, 564 F.3d [868].

³⁴² 8 C.F.R. § 208.13(b)(2)(iii); *Ayele*, 564 F.3d [868].

³⁴³ 8 C.F.R. § 208.13(b)(2)(iii); *Ayele*, 564 F.3d [868].

³⁴⁴ INA § 235(b)(1)(A)(ii).

³⁴⁵ *Idem* § 235(b)(1)(B)(v).

When an alien is subject to (1) a final administrative removal order under INA 238(b) or (2) a prior reinstated order of removal, exclusion, or deportation under INA 241(b)(5) and indicates a fear of persecution or torture, an asylum officer will conduct a reasonable fear interview. The "reasonable possibility" standard is identical to the "well-founded fear" standard required to establish asylum eligibility. In this context, the reasonable fear standard is not used to determine asylum eligibility, but rather as a screening mechanism to determine whether an individual may be able to establish entitlement in Immigration Court to INA 241(b)(3) withholding of removal, or withholding or deferred removal under the regulations implementing the U.S. obligations under Article 3 of the Convention against Torture.³⁴⁶

An asylum officer conducting a credible fear or reasonable fear interview must determine which laws apply to the applicant's claim. The asylum officer must apply all applicable Attorney General and BIA precedents,³⁴⁷ which are binding on all immigration judges and asylum officers in the United States. The asylum officer should also apply the case law of the relevant federal circuit court.

An officer must also take into account an applicant's overall credibility when adjudicating a reasonable fear or credible fear case at the borders, or a defensive asylum claim. There is no credibility presumption for such claims. Instead, the applicant must demonstrate his or her credibility. A negative determination of credibility is sufficient to deny a negative credible fear or reasonable fear determination and thus a negative asylum status adjudication.³⁴⁸

To determine whether an applicant or a witness is credible, the officer must evaluate the totality of the circumstances and all relevant factors, such as the applicant's demeanor, candor, or responsiveness; the plausibility of the applicant's account; the consistency between the applicant's written and oral statements; and any inaccuracies or falsehoods in such statements.³⁴⁹ It is not necessary for the inconsistencies or inaccuracies to be central to the applicant's claim to result in a negative credibility determination.³⁵⁰ Credibility is a question for the fact finder; therefore, the IJ or the Asylum Officer decides whether or not the petition is credible.³⁵¹

INA 208(b)(1) is amended by adding a new clause (B) titled "Burden of Proof" that requires asylum applicants to actively demonstrate that race, religion, nationality, membership in a particular social group, or political opinion was or will be "one central reason" for their persecution. Similar modifications are made to INA 241(b)(3), which governs the withholding of removal, and INA 240(c), which governs other requests for relief from removal.³⁵²

REAL ID amendments allow an immigration judge to determine a client's credibility based on any inconsistencies in their application or testimony. This includes conclusions based on indirect evidence, such as the applicant's demeanor, the plausibility of the applicant's account, the consistency of oral and written statements, and inaccuracies and outright lies in the statements.³⁵³ Under Real ID, an IJ or Asylum Officer

³⁴⁶ U.S. Citizenship and Immigration Services, 'Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*' (11 July 2018, PM-602-0162) Section V.

³⁴⁷ *Matter of E-L-H-*, 23 I&N Dec. 814, 819 (BIA 2005).

³⁴⁸ See INA §§ 208(b)(1)(B)(iii), 235(b)(1)(B)(v), 241(b)(3) (C).

³⁴⁹ INA section 208(b)(1)(B)(iii); also see *Matter of J-Y-C*, 24 I&N Dec. [262].

³⁵⁰ INA section 208(b)(1)(B)(iii); also see *Matter of J-Y-C*, 24 I&N Dec. [262].

³⁵¹ *Mendoza Manimbao v. Ashcroft*, 329 F.3d at 655; *Ashcroft v. Manimbao*, 329 F.3d at 661 (9th Cir. 2003).

³⁵² Public counsel Law Center, 'Asylum Manual for Public Counsel's volunteer attorneys', (Immigrants' Rights Project, January 2012) 29 <https://healtorture.org/sites/healtorture.org/files/PublicCounselAsylumManual.pdf> accessed 9 January 2023.

³⁵³ *Idem*.

may discredit an applicant for inconsistencies that are not material. (In prior Ninth Circuit case law, there was a materiality requirement).³⁵⁴

IJs may now require applicants to provide corroborating evidence for otherwise credible testimony "unless the applicant lacks the evidence and cannot obtain it in a reasonable manner".³⁵⁵ It is extremely difficult to reverse a judge's ruling that supporting evidence should have been presented. "No court shall reverse a fact-finder's determination regarding the availability of corroborating evidence unless the court finds that a reasonable fact-finder was compelled to conclude that such corroborating evidence is unavailable".³⁵⁶

The Ninth Circuit has determined that "the same standards governing credibility determinations by an administrative law judge also apply to documentary evidence".³⁵⁷ In other words, "when rejecting the validity of a document admitted as evidence, an IJ must provide a specific, convincing reason for doing so, and this reason must have a legitimate connection to the rejection".³⁵⁸

The IJ must evaluate the evidence contained in the asylum applicant's application. "Testimony is not necessary; a candidate may rely solely on her application if she swears at the hearing that its contents are true".³⁵⁹ In practice, it is exceedingly uncommon for a case to be granted without live testimony.³⁶⁰ An IJ may grant asylum based solely on the applicant's testimony under the REAL ID Act, but only if the applicant's testimony is "credible, persuasive, and refers to specific facts sufficient to demonstrate the applicant is a refugee".³⁶¹ An IJ may require additional evidence to corroborate testimony that is otherwise credible, "unless the applicant lacks the evidence and cannot reasonably obtain it".³⁶² Moreover, when determining whether the applicant has met his or her burden of proof, an IJ may consider the credibility of the witness alongside other evidence in the record.³⁶³

Finally, talking about the US asylum adjudication, one must note the effects of constitutional avoidance in determination of asylum claims by the courts. Constitutional avoidance is a legal doctrine in United States constitutional law that dictates federal courts should not rule on a constitutional issue if it is possible to resolve the case without involving the constitution. When a federal court has the option of ruling on a statutory, regulatory, or constitutional basis, the Supreme Court of the United States has instructed the lower court to decide the federal constitutional issue only as a last resort: "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of".³⁶⁴

In addition, as the case law cites the Board of Immigration Appeals and the Immigration Judges do not have the authority to rule on the constitutionality of the statutes they administer and, as a result, lack the jurisdiction to rule on a claim that the statute prohibiting relief for particularly serious crimes is unconstitutionally vague.³⁶⁵

³⁵⁴ *Idem*.

³⁵⁵ *Idem*, 30.

³⁵⁶ INA 242(b)(4)(B)(D), 8 United States Code 1252(b) (4).

³⁵⁷ *Matter of A-B*, [345] n.12.

³⁵⁸ *Zahedi v. INS*, 222 F.3d 1157, 1165 (9th Cir. 2000).

³⁵⁹ Citing *Grava v. INS*, 205 F.3d 1177 (9th Cir. 2000), *Ochave v. INS*, 254 F.3d 859, 865 (9th Cir. 2000).

³⁶⁰ Public Council Law Center, 'Asylum Manual for Public Counsel's volunteer attorneys', (Immigrants' Rights Project, January 2012) 29 <https://healtorture.org/sites/healtorture.org/files/PublicCounselAsylumManual.pdf> accessed 9 January 2023.

³⁶¹ INA §208(b)(1)(B)(ii), 8 USC §1158(b)(1)(B) (ii).

³⁶² *Idem*.

³⁶³ *Idem*.

³⁶⁴ *Tennessee Valley Authority*, 297 U.S. [288]; *Ashwander v. Tennessee Valley Authority*, 297 U.S. [347].

³⁶⁵ 26 I&N Dec. 88 (BIA 2013) Interim Decision #3776.

Quoting the BIA:

Insofar as the respondent contests the propriety of Matter of Y-L-, A-G- & R-S-R-, it is evident that the Immigration Judge and Board are bound by the Attorney General's decision. 8 C.F.R. § 1003.1(g) (2012). Similarly unconvincing is the respondent's claim that the statute prohibiting relief for those convicted of particularly serious crimes is "void for vagueness". We lack jurisdiction to address this claim because neither the Board nor the Immigration Judges have the authority to rule on the constitutionality of the statutes we administer.³⁶⁶

For many years, the Supreme Court has referred to deference to the BIA's interpretations as Chevron deference. Technically, Chevron involved interpretation of regulations promulgated after notice and comment. Two weeks after Chevron was decided, the Supreme Court interpreted the regulations concerning the standard of proof for asylum applications and refused to apply Chevron, instead, as it did in *Pereira*, applying a straightforward statutory interpretation.³⁶⁷ Over the past decade, there has been a growing call, primarily from those on the right of the political spectrum, to eliminate Chevron deference — the directive that federal courts defer to an agency's interpretation of a statute it administers if the statutory provision is ambiguous and the agency's interpretation is reasonable.³⁶⁸ During the March 2017 Senate Judiciary Committee hearing on then-Judge Neil Gorsuch's nomination to the Supreme Court, these calls took center stage. While serving on the Tenth Circuit, Gorsuch wrote a concurring opinion in which he questioned the constitutionality and wisdom of Chevron deference and suggested that "perhaps the time has come to confront the [Chevron] behemoth".³⁶⁹ Since administrative courts have been deferred to by Chevron for immigration decisions, but on the other hand cannot judge on the constitutionality of law, that creates a serious gap in the protection of asylum applicants that are assessed by the Home Office.

On the other hand, there is the issue of nonacquiescence that may be categorized as either intercircuit, in which an agency declines to follow the caselaw of a particular circuit except in cases arising within that circuit, or intracircuit, in which an agency refuses to follow the caselaw of a circuit even in cases arising within that circuit. Any discussion of nonacquiescence must distinguish between intercircuit and intracircuit nonacquiescence because the degree of acceptance among courts and commentators varies markedly between the two. Virtually all observers agree that intercircuit nonacquiescence is consistent with, and even complementary to, our system of judicial review.³⁷⁰ This appellate structure rejects intercircuit stare decisis in favor of a process of intercircuit dialogue.³⁷¹ Rather than establishing a nationwide rule whenever a single court of appeals decides an issue, the courts are free to pursue, and subsequently follow, a "law of the circuit" until the circuits reach a consensus or the Supreme Court makes a final decision.³⁷² This though is quite rare and leads to severe lack of intercircuit coherence in asylum adjudication. Complemented with Chevron deference and Executive Branch authority in immigration cases, it leads to a judicial system that provides no safety for asylum and refugee claimants.

³⁶⁶ See *Matter of Sanchez-Lopez*, 26 I&N Dec. 71, 74 n.3 (BIA 2012); *Matter of Valdovinos*, 18 I&N Dec. 343, 345-46 (BIA 1982).

³⁶⁷ Lenni Benson, Stephen Yale-Loehr, and Shoba Sivaprasad Wadhia, *Immigration and Nationality Law: Problems and Strategies* (2nd edition, Carolina Academic Press 2020)748-749.

³⁶⁸ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

³⁶⁹ Shoba Sivaprasad Wadhia & Christopher J. Walker, 'The Case Against Chevron Deference in Immigration Adjudication' (2021) 70 Duke L.J. (2021) 1197.

³⁷⁰ See i.e., *U.S. v. Mendoza*, 464 U.S. 154, 160-63 (1984).

³⁷¹ See i.e., SUP. CT. R. 17(a) (review and certiorari). Four benefits of intercircuit dialogue are identifiable: legal reasoning of the courts of appeals improves; empirical evidence increases as courts pursue different legal theories; the Supreme Court is signalled regarding when to grant certiorari; and the experiences of the courts of appeals aid the Supreme Court in deciding on the merits. See *Estreicher & Revesz*.

³⁷² Steve Y. Koh 'Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals' (1991) Yale Law & Policy Review 9 (2), 430, 440.

7. SUPREME COURT AND BIA PRECEDENTIAL CASE LAW ON ASYLUM AND TRANSGENDER RIGHTS

The U.S. Court of Appeals for the Ninth Circuit stayed the deportation of a transgender Mexican woman on September 3, 2015, because the Board of Immigration Appeals (BIA or Board) failed to take into account the "unique identities and vulnerabilities" of transgender women in Mexico.³⁷³ The BIA had instead considered the recent expansion of legal protections for gay, lesbian, and bisexual individuals in Mexico.³⁷⁴ Therefore, the BIA determined that the defendant, Edin Carey Avendano-Hernández,³⁷⁵ would not face sufficient danger upon her return to Mexico to warrant relief under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).³⁷⁶ The Ninth Circuit reversed in part and remanded the case for a grant of relief under the CAT because transgender individuals continue to face extreme danger in Mexico.³⁷⁷

There may be more to the BIA's apparent lack of understanding of the complexities of sexual orientation and gender identity than meets the eye. Courts, particularly the Ninth Circuit, have been conflating sexual orientation and gender identity for asylum seekers for over a decade. It is easier for a court to recognize an applicant as a member of an established group than to establish a new one.³⁷⁸

Prior to the 1990s, no court recognize LGB individuals as a distinct social group; anyone persecuted on the basis of their sexual orientation did not have legal precedent to support their eligibility for asylum.³⁷⁹ Before 1990, gay people and lesbians were not permitted to enter or immigrate to the United States.³⁸⁰ At the time, only the United States had an explicit policy of excluding noncitizens based on their sexual orientation.³⁸¹ In 1990, the landmark BIA decision *In re Toboso-Alfonso* recognized for the first time that LGB individuals could constitute a distinct social group.³⁸²

In this instance, the BIA granted a Cuban gay man withholding of deportation.³⁸³ The Immigration and Naturalization Service opposed such a grant because it "would be tantamount to awarding discretionary relief to those involved in behavior that is not only socially deviant in nature, but also in violation of the laws or regulations of the country", referring to the sodomy laws that were still in effect at the time.³⁸⁴ The BIA rejected this argument, explaining that *Toboso-Alfonso* was persecuted in Cuba due to his sexual orientation, not his homosexual behavior. Despite the fact that the BIA did not initially designate *In re Toboso-Alfonso* as a precedential opinion, the Attorney General issued an order several years later

³⁷³ *Avendano-Hernández v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015).

³⁷⁴ *Idem*, [1080].

³⁷⁵ *Avendano-Hernández*, 800 F.3d [1081].

³⁷⁶ *Idem*, [1075]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

³⁷⁷ *Avendano-Hernández*, 800 F.3d [1081]–[1082].

³⁷⁸ Adena L. Wayne, 'Unique Identities and Vulnerabilities: The Case for Transgender Identity as a Basis for Asylum' (2016) 102 *Cornell L. Rev.* 241, 244.

³⁷⁹ *Idem*, 246.

³⁸⁰ See 8 U.S.C. 1182(a)(4) and INA 212(a)(4) (1988) (repealed 1990).

³⁸¹ Shannon Minter, 'Sodomy and Public Morality Offenses Under U.S. Immigration Law: Punishing Lesbian and Gay Identities' (1993) 26 *Cornell International Law Journal* 771, 771.

³⁸² 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990).

³⁸³ *Idem*, 823. Withholding of deportation, now called "restriction on removal", is an alternative form of relief to asylum. 8 U.S.C. § 1231(b)(3)(A) (2012); INA § 241(b)(3)(A). However, the burden for restriction on removal is higher than that for asylum, and applicants must prove that, more likely than not, they will face persecution if they return to their country. See *INS v. Stevic*, 467 U.S.

407, 429–30 (1984). By contrast, asylum claims require only that the applicant have a well-founded fear of persecution, meaning that persecution need only be a reasonable possibility. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

³⁸⁴ *Toboso-Alfonso*, 20 I. & N. Dec. [822] (internal quotation marks omitted).

establishing it as precedent "in all proceedings involving the same issue or issues".³⁸⁵ In subsequent asylum cases, various circuit courts have acknowledged that homosexuals constitute a distinct social group.³⁸⁶

A decade after *In Hernandez-Montiel v. INS*, the Ninth Circuit reversed a BIA decision that denied asylum to a transgender woman in *re Toboso-Alfonso*.³⁸⁷ The court referred to Hernandez-Montiel as a "gay man with a female sexual identity" and consistently used male pronouns to refer to her.³⁸⁸ Thomas M. Davies Jr., an expert witness in the case regarding conditions for gay people in Mexico, explained that a gay man has a "female sexual identity" if he assumes the "stereotypical female, i.e., passive role in [gay] sexual relationships".³⁸⁹ In addition, he indicated that men with female sexual identities frequently dress and act as women. Davies added that men in Latin America may engage in homosexual activity without fear of persecution so long as they maintain the "male" role.³⁹⁰ Importantly, the Ninth Circuit acknowledged that persecution of Hernandez-Montiel as a person with a "female sexual identity" is distinct from the treatment others with homosexual sex may face.³⁹¹

Nonetheless, the court cited *In re Toboso-Alfonso* to demonstrate that sexual orientation could be the basis for a specific social group, and defined Hernandez-Montiel's social group as "gay men with female sexual identities in Mexico".³⁹² The Ninth Circuit, unlike the immigration judge (IJ) and the Board of Immigration Appeals (BIA), determined that Hernandez-Montiel was a member of a particular social group based on the immutability of her "sexual identity" rather than the mutability of her female dress.³⁹³

Even though only a small number of cases explicitly involve transgender asylum seekers, they largely adhere to the reasoning of Hernandez-Montiel, particularly in the Ninth Circuit. Several years later, the Ninth Circuit used the term "female sexual identity" once again in *Reyes-Reyes v. Ashcroft*, a case involving a transgender woman who fled El Salvador.³⁹⁴ Although she had not "undergone sex reassignment surgery", the court noted that she had used female names, possessed a "strong female identity", and exhibited "typically female appearance, mannerisms, and gestures".³⁹⁵ Additionally, the court noted in a footnote that she displayed "transsexual behavior".³⁹⁶ The court consistently referred to Reyes with male pronouns, referred to her as a "homosexual male", and discussed her "female sexual identity".³⁹⁷ Interestingly, the Ninth Circuit's decision did not explicitly address whether Reyes was a member of a particular social group; however, the court did mention in a footnote that sexual identity is "integral to a person's very identity".³⁹⁸ The court implicitly acknowledged that Reyes's female sexual identity made her a member of a specific social group.³⁹⁹

In *Ornelas-Chavez v. Gonzales*, a case involving another Mexican transgender woman, the Ninth Circuit utilized the same line of reasoning.⁴⁰⁰ As in Hernandez-Montiel and Reyes-Reyes, the court discussed both

³⁸⁵ Att'y Gen. Order No. 1895-94 (June 19, 1994).

³⁸⁶ See i.e. *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007) ("[H]omosexuals may be [members] of a 'particular social group'"); *Karouni v. Gonzales*, 399 F.3d 1163, 1171 (9th Cir. 2005).

³⁸⁷ 225 F.3d 1084, 1099 (9th Cir. 2000).

³⁸⁸ *Hernandez-Montiel*, 225 F.3d [1099].

³⁸⁹ *Idem*, [1089].

³⁹⁰ *Idem*.

³⁹¹ *Idem*.

³⁹² *Idem*, [1094].

³⁹³ *Idem*, [1094]–[1096].

³⁹⁴ 384 F.3d 782, 785 (9th Cir. 2004).

³⁹⁵ *Idem*.

³⁹⁶ *Idem*, [785] n.1.

³⁹⁷ *Idem*, [785].

³⁹⁸ *Idem*, [785] n.1 (citing *Hernandez-Montiel*, 225 F.3d [1093]).

³⁹⁹ See *idem*.

⁴⁰⁰ 458 F.3d 1052, 1054 (9th Cir. 2006).

Ornelas-Chavez's "homosexuality" and "female sexual identity" throughout the decision, again using male pronouns.⁴⁰¹ By the time this decision was rendered, the Ninth Circuit had conclusively determined that gay men with female sexual identities comprised a distinct social group. Citing Hernandez-Montiel, the court stated in a footnote that "whether Ornelas-Chavez belongs to a protected social group is not at issue in this appeal".⁴⁰² In another case, the court never had to determine whether the applicant, Morales, belonged to a particular social group due to the procedural posture.⁴⁰³ Instead, the court remanded the case for reconsideration on the asylum issue because the IJ's denial of Morales's asylum claim was based on improper evidence regarding her criminal convictions. Nonetheless, the Ninth Circuit decision noted the IJ's statement that "but for Morales' conviction, he would have found her eligible for asylum under Hernandez-Montiel v. INS".⁴⁰⁴ It appears that the IJ intended to group Morales with Hernandez-Montiel's gay men with female sexual identities, conflating sexual orientation and gender identity. In addition, the IJ denied Morales CAT relief because he did not believe it was more likely than not that she would be persecuted, based in part on evidence of a gay pride parade in Mexico City, further demonstrating that the IJ conflated sexual orientation and gender identity.⁴⁰⁵ While using Morales' correct pronouns and recognizing that she identifies as a woman indicate progress in the Ninth Circuit's understanding of transgender people, the court's failure to criticize the IJ's conflation of these distinct categories demonstrates that it continued to mischaracterize gender identity.⁴⁰⁶

Eight years later, in *Avendano-Hernández v. Lynch*, the Ninth Circuit received another case involving a transgender applicant from Mexico.⁴⁰⁷ This time, however, the court emphasized the distinct, if overlapping, characteristics of sexual orientation and gender identity.⁴⁰⁸ While the Ninth Circuit finally understood and acknowledged this significant distinction, it was unable to define an official social group in this opinion because *Avendano-Hernández* did not qualify for removal relief.⁴⁰⁹ The decision in *Avendano-Hernández* by the Ninth Circuit illuminated the significance of separating sexual orientation and gender identity in asylum law. Since the identities are distinct, transgender individuals may be treated differently in their home countries if they are transgender rather than gay. While gay men, lesbians, and bisexuals may be making significant progress in some countries, transgender people frequently face distinct, increased persecution.⁴¹⁰ Therefore, the BIA and federal circuit courts should acknowledge that transgender people are a distinct social group that faces unique challenges in many nations.

Moreover, experts consider one's transgender identity to be innate and therefore immutable,⁴¹¹ placing transgender identity squarely within Acosta's requirement that group members share a "common, immutable characteristic".⁴¹² Transgender people can change their appearance and choose to dress and behave in a manner consistent with the sex assigned to them at birth, which is a possible critique of the position that transgender identity is unchangeable. In *Hernandez-Montiel*, the Ninth Circuit addressed and

⁴⁰¹ *Idem*.

⁴⁰² *Idem*.

⁴⁰³ *Morales v. Gonzales*, 478 F.3d 972, 975 (9th Cir. 2007), [984]-[985].

⁴⁰⁴ *Idem*, [977].

⁴⁰⁵ To qualify for relief under CAT, applicants must show that, if they were to return to their country, the government would more likely than not torture them or acquiesce to their torture. *Idem*, [983].

⁴⁰⁶ Adena L. Wayne, 'Unique Identities and Vulnerabilities: The Case for Transgender Identity as a Basis for Asylum' (2016) 102 *Cornell L. Rev.* 241, 250.

⁴⁰⁷ 800 F.3d 1072, 1075 (9th Cir. 2015).

⁴⁰⁸ *Idem*, [1081] ("While the relationship between gender identity and sexual orientation is complex, and sometimes overlapping, the two identities are distinct").

⁴⁰⁹ *Idem*, [1078].

⁴¹⁰ See Katie McDonough, 'The Last Acceptable Bigotry?: How Cultural Ignorance Is Killing Trans Americans' (SALO, 29 August 2013) http://www.salon.com/2013/08/29/the_last_acceptable_bigotry_how_cultural_ignorance_is_killing_trans_americans/ accessed 9 January 2023.

⁴¹¹ Sue David Derald Wing Sue Diane M. Sue and Stanley Sue, *Understanding Abnormal Behavior* (11th ed Cengage Learning 2016) 449.

⁴¹² *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

rejected this line of reasoning, which the IJ and BIA had used to deny Hernandez-Montiel asylum.⁴¹³ Whether female sexual identity can refer only to trans identity, or include effeminate gender expression too, remains to be clarified for gender nonconforming applicants. While the court acknowledged that gay men with female sexual identities are able to alter the physical manifestations of their identity, it ruled that a person's identity, not the expression of that identity, is what defines that individual.⁴¹⁴

The same logic applies to individuals who identify as transgender. While their expression may change, especially for those who identify as gender fluid and may dress as a woman one day and a man the next, their identities as transgender individuals are unchanging. In the past, courts have required scientific or biological evidence that a trait is immutable; however, in Hernandez-Montiel, the Ninth Circuit "embraced non-biological forms of identity" by recognizing that an individual's sexual identity is innate and immutable.⁴¹⁵ The fact that other jurisdictions have recognized LGBTQ+ individuals as a distinct social group indicates that this lenient immutability standard is now widespread. Even if an applicant cannot provide scientific evidence of their transgender identity, they can still demonstrate that this identity-related trait is immutable.⁴¹⁶ Even if a court ruled that transgender identity is not immutable, transgender identity and expression should still qualify people for membership in a particular social group because it is so "fundamental to their individual identities" that they should not be required to change it.⁴¹⁷

Therefore, a transgender person's asylum claim is likely to take one of two forms regarding social distinction, each of which will place the applicant in a particular social group. One possibility is that the applicant's country of nationality recognizes a distinction between a person's sexual orientation and gender identity and persecutes individuals uniquely based on their gender identity, as described in *Avendano-Hernández*.⁴¹⁸

Even though some people used gay slurs against *Avendano-Hernández* in Mexico, clearly conflating her gender identity and sexual orientation, the court found that transgender women in Mexico faced a unique form of persecution, noting that "police brutality is a daily reality for transgender women in Mexico".⁴¹⁹

While persecution alone does not make a group socially distinct, it is also the form that persecution of transgender people takes, that demarcates how they are a distinct social group. When people in a particular society persecute transgender individuals in ways that are distinct from how they persecute other individuals, this indicates that the society views transgender individuals as distinct.⁴²⁰

In this scenario, transgender people are socially distinct not because a society persecutes them, but because people are able to recognize them as a distinct group.⁴²¹

Applicants from these societies would need proof of the fact that transgender people are persecuted in their countries. Obtaining such evidence may be challenging for some applicants, but if a society views transgender people as sufficiently distinct to persecute them uniquely, it is likely that there are additional

⁴¹³ *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1089 (9th Cir. 2000).

⁴¹⁴ *Idem*, [1096].

⁴¹⁵ Joseph Landau, "Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law' (2005) 32 *Fordham Urb. L.J.* 237, 249, 250. Joseph Landau has described the court's reasoning in *Hernandez-Montiel*, which asserts that one's sexual identity is innate and immutable, as a "soft immutability standard".

⁴¹⁶ Adena L. Wayne, 'Unique Identities and Vulnerabilities: The Case for Transgender Identity as a Basis for Asylum' (2016) 102 *Cornell L. Rev.* 241, 254.

⁴¹⁷ *Acosta*, 19 I. & N. Dec. [233].

⁴¹⁸ *Avendano- Hernández*, 800 F.3d [1081].

⁴¹⁹ *Idem*.

⁴²⁰ Adena L. Wayne, 'Unique Identities and Vulnerabilities: The Case for Transgender Identity as a Basis for Asylum' (2016) 102 *Cornell L. Rev.* 241, 257.

⁴²¹ *Idem*.

indicators of this distinction. "Country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like", states the BIA, "may establish that a group exists and is perceived as distinct".⁴²² In societies where transgender people are uniquely persecuted, it is likely that there are additional records of discrimination and hostility that support the applicant's claim that transgender people are distinct.⁴²³

Another theoretical possibility is that people in certain nations do not distinguish between sexual orientation and gender identity, persecuting both groups identically as LGB. In such a scenario, one could argue that transgender individuals are not socially distinct and are therefore not a social group. However, even if this were the case, transgender people may be able to establish membership in a particular social group based on their imputed gay identity, which means that their society perceives them to be gay.⁴²⁴

Attorney General Janet Reno stated in her order that the case applies to "a person who has been identified as a homosexual and persecuted by his or her government solely for that reason". This order protects applicants with imputed homosexual identities because it requires only that their societies have identified them as homosexuals, not that they identify as homosexuals or engage in homosexual behavior.⁴²⁵ Therefore, even if it could be established that people in a particular country did not differentiate between transgender and gay individuals and persecuted both groups similarly, a transgender applicant would likely qualify as a member of a particular social group due to their imputed homosexual identity.⁴²⁶

Importantly, it is irrelevant to the social distinction analysis whether or not members of a particular society can visually identify transgender individuals. Due to the BIA's recent clarification that social distinction does not refer to ocular visibility, the important question is not whether transgender people present as transgender, but rather whether their society acknowledges the existence of a group of transgender individuals.⁴²⁷ Even if some transgender individuals are able to pass as cisgender, either in accordance with their gender identity or the sex assigned to them at birth, this has no bearing on the social distinction inquiry. The irrelevance of ocular visibility is especially significant in the context of transgender individuals, as asylum law protects identity and, consequently, the society in question must perceive identity, not behavior.⁴²⁸

As discussed above, as a result of the REAL ID Act of 2005, there is no presumption of credibility before an Immigration Judge, so applicants for asylum must demonstrate their credibility. In *Safadi v. Gonzales*, an unreported Sixth Circuit case, the court determined that an asylum applicant claiming membership in a particular social group on the basis of his sexual orientation was not credible, in part because of a previous, fraudulent marriage to a woman. Indeed, the court noted that Safadi's inconsistent testimony "raises questions as to whether he is homosexual in reality".⁴²⁹ While Safadi asserted that the marriage was a sham and that he was exclusively attracted to men, the court appeared to be partially motivated by a suspicion raised by his previous relationship with a woman. The rigidity of the IJ, the BIA, and the Sixth Circuit's

⁴²² *In re M-E-V-G-*, 26 I. & N. Dec. 227, 244 (B.I.A. 2014).

⁴²³ Adena L. Wayne, 'Unique Identities and Vulnerabilities: The Case for Transgender Identity as a Basis for Asylum' (2016) 102 *Cornell L. Rev.* 241, 257.

⁴²⁴ *Idem*, 257-258.

⁴²⁵ Joseph Landau, "Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law' (2005) 32 *Fordham Urb. L.J.* 237, 249, 259.

⁴²⁶ *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1096 (9th Cir. 2000) (noting that the identities of gay men with female sexual identities must be immutable, not their behavior).

⁴²⁷ Adena L. Wayne, 'Unique Identities and Vulnerabilities: The Case for Transgender Identity as a Basis for Asylum' (2016) 102 *Cornell L. Rev.* 241, 259.

⁴²⁸ *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1096 (9th Cir. 2000) (noting that the identities of gay men with female sexual identities must be immutable, not their behavior).

⁴²⁹ 148 F. App'x. 372, 376 (6th Cir. 2005) ("We conclude that the various discrepancies, coupled with the pall cast on Safadi's credibility by his fraudulent marriage, are sufficient to support the adverse credibility finding by both the IJ and the BIA"), 377.

conception of sexual orientation is demonstrated by this presumption, which holds that if a man has the potential to be attracted to a woman, he cannot be attracted to men.⁴³⁰

Applicants who identify as transgender may face a similar credibility issue. Indeed, it could be a more pervasive issue, given that transgender identity awareness in the United States tends to be less prevalent than sexual orientation awareness.⁴³¹

While an IJ may comprehend the gender identity of a transgender woman, it is less likely that an IJ will comprehend the gender identity of a bigender individual. If an applicant did not present exclusively as male or exclusively as female, an IJ might question their credibility and whether they were actually transgender, just as IJs might do if an applicant did not present exclusively as male or exclusively as female.⁴³² In addition, the REAL ID Act favors corroboration through evidence, which could be an additional barrier for transgender individuals.⁴³³

Transgender individuals who have received medical care, such as counselling, hormones, or surgery, would be able to present their medical records to verify their identities.⁴³⁴ However, establishing credibility will be significantly more difficult for transgender individuals who lack transgender-related records because they have not received counselling and either have not yet taken medical or legal steps in their transition, or do not wish to do so. The REAL ID Act exempts applicants from providing corroborating evidence if "the applicant does not have the evidence and cannot obtain it in a reasonable manner".⁴³⁵ In practice, however, it is possible that an IJ would not be convinced that a person is transgender if they occasionally present consistent with the sex assigned to them at birth and they lack supporting medical documentation. How then can transgender individuals who do not strictly identify or present as male or female overcome a potential credibility barrier, nonbinary and gender nonconforming individuals?

8. WHERE THE US FALLS SHORT ON GENDER IDENTITY/EXPRESSION ASYLUM JURISPRUDENCE

Developments in transgender asylum can be interpreted through the lens of transnational feminist theory, recognizing the trans in both concepts as a site ripe for theorizing. As Enke notes, trans functions "as a prefix meaning "to cross",⁴³⁶ addressing what Stryker defines as the transgressive nature of trans as "the movement across a socially imposed boundary away from an unchosen starting point—rather than any specific destination or mode of transition".⁴³⁷ "Genders beyond the binary of male and female are neither

⁴³⁰ Adena L. Wayne, 'Unique Identities and Vulnerabilities: The Case for Transgender Identity as a Basis for Asylum' (2016) 102 Cornell L. Rev. 241, 261.

⁴³¹ See Katie McDonough, 'The Last Acceptable Bigotry?: How Cultural Ignorance Is Killing Trans Americans' (SALO, 29 August 2013) http://www.salon.com/2013/08/29/the_last_acceptable_bigotry_how_cultural_ignorance_is_killing_trans_americans/ accessed 9 January 2023.

⁴³² Mariza Avgeri, 'Assessing trans and gender nonconforming asylum claims: Towards a Transgender Studies Framework in Particular Social Group and Persecution, Refugees and Conflict' *Frontiers in Human Dynamics, Refugees and Conflict*, April 2021, <https://doi.org/10.3389/fhumd.2021.653583> accessed 9 January 2023.

⁴³³ See 8 U.S.C. § 1158(b)(1)(B)(ii) (2012).

⁴³⁴ See U.S. Citizenship and Immigration Services, 'Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI Refugee and Asylum Claims', (RAIO Combined Training Course, 20 December 2019) 55–46 <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf> accessed 9 January 2023.

⁴³⁵ 124 8 U.S.C. § 1158(b)(1)(B)(ii).

⁴³⁶ Finn Enke (Ed), *Transfeminist perspectives in and beyond transgender and gender studies* (Temple University Press 2012).

⁴³⁷ Susan Stryker, *Transgender history* (Seal Press 2008) 1.

fictitious nor futuristic; they are embodied and lived".⁴³⁸ Such boundary transgressive understandings of gender are compatible with transnational feminist theorizing that employs the trans to address "the transversal, the transactional, the translational, and the transgressive aspects of contemporary behavior" or what Shome refers to as "attention to the cracks and crevices, silences and sutures of the global".⁴³⁹ While some perceive trans and feminist perspectives to be in conflict, Salamon observes that combining trans and feminist theory has transformative potential. Specifically, combining trans and transnational feminist analyses entails paying attention to movement and the boundary transgressions that occur in that movement, while also maintaining a focus on the power dynamics at play in these movements and boundary transgressions.

Together, these analyses necessitate a focus on how boundary crossings and transgressions produce limits, exclusions, and prohibitions, a question that addresses the ripple effect and malleability of power structures. In this paper, I want to argue that while greater recognition for trans asylum seekers has necessitated an acknowledgment of the precariousness associated with shifting gender boundaries and necessitated the creation of refugee opportunities for certain trans applicants, it has done so at the expense of separating the concepts of gender and gender-based violence from the concepts of gender identity and expression.⁴⁴⁰ This latest iteration of US asylum law reproduces a dynamic in which gendered protections appear to be expanding, while presumably heterosexual, cisgender women of color continue to have limited ground for acquiring gendered protections. The incorporation of trans applicants facilitates the United States' global moral project of establishing itself as the authority on human rights issues, while mitigating the threat of expanding protections for women whose reproductive bodies are perceived as threatening. This analysis demonstrates how the protection of certain gender transgressions can also contribute to or produce limitations and foreclosures, violating the livability possibilities of others in the context of US transnational political aspirations and fears.⁴⁴¹

The US asylum system as it exists today began with the 1980 Refugee Act, which harmonized US law with international law and established a system for evaluating the claims of asylum seekers. By the mid-1990s, the courts had heard enough sexuality- and gender-related cases to realize that not only were there gaps in the protections offered through the application of the UN refugee definition, but that it was necessary to address those gaps, especially as the United States began organizing interventionist foreign policy projects in the name of protecting women and lesbian, gay, bisexual, trans, and queer (LGBTQ) individuals.⁴⁴² The 1994 Attorney General order did significant work to address the gaps for sexuality-related claimants (and because of the conflation of gender and sexuality, certain trans claimants as well), though there would be no equivalent recognition of gender and gender-based violence protections for cis women. Instead, acknowledgment of the gendered claims of cis women was incorporated through separate case precedent. Through these cases, gender became recognized almost exclusively as a characteristic of cis women, and gender-based asylum meant refuge for presumptively heterosexual cis women fleeing violence that could be understood as cultural, relational, or private.⁴⁴³

Hernandez-Montiel's case did not reach the courts for another five years, establishing a precedent for those who violated social and cultural norms through their gender identity and expression. Specifically, the courts

⁴³⁸ Gayle Salamon, 'Transfeminism and the future of gender' in Joan Wallach Scott (ed) *Women's studies on the edge* (Duke University Press 2008) 115.

⁴³⁹ Raka Shome, 'Transnational feminism and communication Studies' (2006) 9 *Communication Review* 255, 258.

⁴⁴⁰ Sara L. McKinnon, 'US gender- and sexuality-related asylum law: The politics of transgender asylum' (2016) 1(2) *Communication and the Public* 245, 246.

⁴⁴¹ *Idem*.

⁴⁴² Robin Riley, Chandra Talpade Mohanty and Minnie Bruce (eds) *Feminism and war: Confronting US imperialism* (Zed Books 2008).

⁴⁴³ Sara L. McKinnon, *Gendered asylum: Race and violence in US law and politics* (University of Illinois Press 2016).

recognized these claimants as "gay men with female sexuality identities", an eligible social group for asylum.⁴⁴⁴ This precedent created space for some trans applicants to be recognized as refugees, but it left many other trans applicants, including trans men, gender variant, and gender queer applicants, without legal standing to be recognized as refugees, and it did nothing for cis women making gender-based claims.⁴⁴⁵

Ten years from now, the Hernandez-Montiel precedent will continue to govern how trans applicants navigate the immigration system. Nonetheless, in accordance with the escalating US global "LGBT rights as human rights" platform, the pressure to harmonize US legal terminology with international doctrine regarding trans issues became of the utmost importance.⁴⁴⁶ President Obama took one of his first steps in this direction by signing the UN Resolution on "Human Rights, Sexual Orientation, and Gender Identity" alongside 66 other nations.⁴⁴⁷ The Obama administration explained in a press release that the United States is an outspoken defender of human rights and critic of human rights violations worldwide. As a result, we join the other supporters of this Statement and will continue to remind nations of the importance of respecting the human rights of all people in all appropriate international forums.⁴⁴⁸

This globally focused project is consistent with earlier iterations of the "women's rights as human rights" platform, which used language about protecting women and girls to justify U.S. international defence, diplomacy, and development projects.⁴⁴⁹ The current iteration of trans rights rhetoric consolidates US aspirations for political power and control.

Adopting legal language and protections for trans asylum seekers is a symbolically potent yet contained means of achieving this goal. As a manifestation of international law at the national level, asylum law has the symbolic power to represent a state's domestic and international stance on particular issues. In attempting to demonstrate the United States' defence of a person's right to transgress binarized gendered norms, the 2011 protocol and training began by offering a set of definitions to guide asylum officers' understanding of gender as it relates to other relevant concepts such as sex and sexual orientation.⁴⁵⁰

Gender is what society values in terms of male and female roles and identities. Sex is the determination of a person's masculinity or femininity based on anatomy and reproductive organs. Gender and sex are assigned to every individual at birth. Gender identity refers to a person's internal sense of being male, female, or other. Because gender identity is internal, one's gender identity is not always apparent to others.⁴⁵¹ Gender expression is how a person expresses one's gender identity to others, often through behavior, clothing, hairstyles, voice, or body characteristics. Transgender refers to individuals whose

⁴⁴⁴ *Hernandez-Montiel v. INS*, 225 F. 3d 1084 (9th Cir. 2000).

⁴⁴⁵ Victoria Neilson, 'Uncharted territory: Choosing an effective approach in transgender-based asylum claims' (2004) 32 *Fordham Urban Law Journal* 104.

⁴⁴⁶ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007.

⁴⁴⁷ United Nations High Commissioner for Human Rights, 'Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity' (A/HRC/19/41, Report 2011).

⁴⁴⁸ White House 'Statement by the President on the UN Human Rights Council Resolution on Human Rights, Sexual Orientation and Gender Identity' (Office of the Press Secretary, 17 June 2011) <https://obamawhitehouse.archives.gov/the-press-office/2011/06/17/statement-president-un-human-rights-council-resolution-human-rights-sexu> accessed 9 January 2023.

⁴⁴⁹ Inderpal Grewal, *Transnational America: Feminisms, diasporas, neoliberalisms*. (Duke University Press 2005) ; Wendy Hesford and Wendy Kozol (Eds) *Just advocacy?: Women's human rights, transnational feminisms, and the politics of representation* (Rutgers University Press 2005).

⁴⁵⁰ See U.S. Citizenship and Immigration Services, 'Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI Refugee and Asylum Claims)', (RAIO Combined Training Course, 20 December 2019) 55-46 <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf> accessed 9 January 2023.

⁴⁵¹ *Idem*, 12-13.

gender identity, expression, or behavior deviates from the norms associated with their assigned sex at birth.⁴⁵²

Some transgender people dress in clothes typical of a gender other than the one they were assigned at birth; others undergo medical treatment, which may include Hormone Replacement Therapy and/or gender confirmation surgeries. Transgender is not a sexual orientation but a gender identity. As with any other man or woman, a transgender individual may have a heterosexual, bisexual, or homosexual orientation.⁴⁵³

The offered definition of gender above allows cis women and men to be viewed as having a gender; however, by linking gender identity and expression directly to trans, the document eliminates the possibility that cis individuals could make legitimate claims based on their gender identity and expression. The manual contains one discussion of "gender-based mistreatment", but by focusing solely on the struggles of cis gay women in this section, it perpetuates the notion that only cis women have gender-based experiences.⁴⁵⁴

Unintentionally or not, the development of trans protections in US asylum participates in the severing of gender as a concept that might refer to a whole spectrum of identities, expressions, and experiences that variously fit or transgress social and cultural norms. Gender is instead determined ontologically, as opposed to being something that is performed and experienced in a variety of ways.⁴⁵⁵

Instead, the protocol perpetuates distinct categories for gender and gender-based persecution (concepts associated with cis women) and gender identity and gender-identity persecution (concepts assigned to trans and gender variant applicants). This framework solidifies the courts' earlier determination that gender is a characteristic reserved for cis women, while gender identity and expression become new legal categories reserved for trans applicants.⁴⁵⁶

According to some scholars, separating gender-based persecution from sexuality-based persecution normalized a one-sex, one-gender system in which male-assigned subjects are regarded as neutral subjects for whom all refugee categories (except gender) are available.⁴⁵⁷

By separating gender from gender identity and expression, these new trans-inclusive protections also function within the logic of this one-sex system, rendering male-assigned applicants more readily legible and, therefore, eligible for all asylum categories. This normalization arguably allows for greater political protections for trans applicants (though time will tell). Yet, by separating gender and gendered forms of persecution into categories, this process of normalization maintains the already steep uphill battle that cis women face in proving that the gendered transgressions for which they experience violence should qualify them for international and U.S. legal protection. For cis women whose reasons for claiming asylum are based on their gender, their options for claiming asylum remain, at best, limited and segregated.⁴⁵⁸

In addition to bolstering the United States' ability to demonstrate that it defends the rights of transgender individuals, this separation of gender from gender identity and expression can be viewed as a means of

⁴⁵² *Idem.*

⁴⁵³ *Idem.*

⁴⁵⁴ Sara L. McKinnon, 'US gender- and sexuality-related asylum law: The politics of transgender asylum' (2016) 1(2) *Communication and the Public* 245, 248.

⁴⁵⁵ Judith Butler, *Undoing gender* (Routledge 2004); Gayle Salamon, *Assuming a body: Transgender and rhetorics of materiality* (Columbia University Press 2010).

⁴⁵⁶ Sara L. McKinnon, 'US gender- and sexuality-related asylum law: The politics of transgender asylum' (2016) 1(2) *Communication and the Public* 245, 248.

⁴⁵⁷ Sara L. McKinnon, *Gendered asylum: Race and violence in US law and politics*, (University of Illinois Press 2016).

⁴⁵⁸ Sara L. McKinnon, 'US gender- and sexuality-related asylum law: The politics of transgender asylum' (2016) 1(2) *Communication and the Public* 245, 248.

delineating threats associated with gendered transgressions. This division specifically protects the state from the threat of non-White reproductive cis women's bodies. As McKinnon has demonstrated, one of the primary logics that determines who is an incorporable immigrant subject is national anxiety regarding the reproductive threat posed by non-White women's bodies and the perceived need to protect the White US nation from these bodies.⁴⁵⁹ Some migrant subjects are valued for their entrepreneurial potential when imagined as potential nation-state members, while others are racialized through "schemes that serve to blacken and stigmatize" their desirability.⁴⁶⁰ Luibhéid demonstrates that "pregnant on arrival" non-White immigrant women are a particularly fearful subject in contemporary Western national contexts. As she demonstrates, the actual or potential reproductivity of an immigrant woman is central to the discursive boundaries created between who is a desired immigrant subject and who is not, who is deemed "legal" and "illegal", who might be suitable for incorporation, and who must be excluded.⁴⁶¹

This also relates to sex work and the gendered implications it has for asylum claimants, particularly transgender or gender nonconforming applicants who are a crucial portion of sex workers.⁴⁶² On May 21, 2018, the Board of Immigration Appeals (BIA) issued a published decision in the Matter of Ding.⁴⁶³ The case dealt with the term "prostitution" as it appears in the aggravated felony provision found in section 101(a)(43)(K)(i) of the Immigration and Nationality Act (INA). Section 101(a)(43)(K)(i) defines as an aggravated felony "an offense that relates to the owning, controlling, managing, or supervising of a prostitution business". In Matter of Ding, the Board held that 101(a)(43)(K)(i) "is not limited to offenses involving sexual intercourse but is defined as engaging in, or agreeing or offering to engage in, sexual conduct for anything of value". Accordingly, Matter of Ding represents an important precedent going forward on the scope of the aggravated felony provision in section 101(a)(43)(K)(i).

Regarding the instant situation in Matter of Ding, the Board concluded, based on its reading of the aggravated felony provision, that "[t]he offense of keeping a place of prostitution in violation of section 944.34(1) of the Wisconsin Statutes is categorically an aggravated felony under section 101(a)(43)(K)(i) of the [INA]".

Prostitution is now explicitly addressed in several provisions of the INA. For example, section 212(a)(2)(D) renders aliens inadmissible for certain prostitution related offenses, including engaging in prostitution. Certain offenses relating to overseeing prostitution businesses and transportation for purpose of prostitution are deemed aggravated felonies under section 101(a)(43)(K). Engaging in acts of prostitution may also trigger a conditional bar to good moral character under section 101(f)(3) of the INA.⁴⁶⁴

In Matter of Ding, the Board divorced the definition of "prostitution" in the context of section 101(a)(43)(K)(i) from its definition in the context of section 212(a)(2)(D). In doing so, the Board adopted a significantly broader interpretation of section 101(a)(43)(K)(i) than both the Second and Ninth Circuits had in precedent and unpublished decisions, respectively. However, the Board's decision leaves open a number of questions, such as the scope of the term "sexual conduct", and renders transgender and gender non-

⁴⁵⁹ Sara L. McKinnon McKinnon, '(In)hospitable publics: Theorizing modalities of access to U.S. publics' in Daniel C. Brouwer, Robert Asen (Eds), *Public modalities: Rhetoric, culture, media, and the shape of public life* (2010 University of Alabama Press).

⁴⁶⁰ Aihwa Ong, *Buddha is hiding: Refugees, citizenship, the new America* (University of California Press 2003), 13.

⁴⁶¹ Eithne Luibhéid, *Pregnant on arrival: Making the illegal immigrant*. Minneapolis: University of Minnesota Press 2013).

⁴⁶² Lydia A. Sausa, JoAnne Keatley, Don Operari, 'Perceived Risks and Benefits of Sex Work among Transgender Women of Color in San Francisco' (2007) 36(6) Archives of Sexual Behavior 768.

⁴⁶³ 27 I&N Dec. 295 (BIA 2018).

⁴⁶⁴ My Attorney USA, 'Matter of Ding, 27 I&N Dec. 295 (BIA 2018): Defining Scope of "Prostitution" in INA 101(a)(43)(K)(i)' <http://myattorneyusa.com/matter-of-ding-27-iandn-dec-295-bia-2018-defining-scope-of-prostitution-in-ina-101a43ki> accessed 9 January 2023.

conforming sex workers or people who engage in "survival sex" and claim for asylum even in a more vulnerable and heavily discriminatory position.

CONCLUSIONS

9. THE EXCEPTIONALIST CONFIGURATION OF US ASYLUM ADJUDICATION SYSTEM FOR TRANSGENDER ASYLUM, THE RAO DIRECTORATE TRAINING MATERIAL AND THE UNHCR GUIDELINES ON GENDER IDENTITY CLAIMS

While the Supremacy Clause of the U.S. Constitution envisions a monist system in which treaty obligations automatically become part of the U.S. domestic legal order, structural constitutional impediments based on federalism and separation of powers present obstacles to automatic treaty supremacy. The Supreme Court's decision in *Medellin* further complicates these structural impediments to monism, putting the United States on a path toward a dualist model that could negatively impact U.S. international relations.⁴⁶⁵ The United States has been able to avoid any legal penalties resulting from its violation of international treaty obligations so far by leveraging its economic, diplomatic, and military strength. Consequently, its current practice more closely resembles a dualist system, in which the federal government makes international commitments that it cannot incorporate into the domestic legal order. There are two distinct legal orders, one pertaining to the United States in the conduct of its foreign affairs and the other pertaining to the United States in the conduct of its domestic affairs, as there are no readily identifiable legal penalties for the resulting violations.⁴⁶⁶ That is true for international refugee law as well, which has been incorporated in the US legal system through the INA.

9.1. THE UNHCR GUIDELINES ON SEXUAL ORIENTATION AND GENDER IDENTITY

In many regions of the world, individuals are subjected to grave violations of human rights and other forms of persecution because of their actual or perceived sexual orientation and/or gender identity. While persecution of Lesbian, Gay, Bisexual, Transgender, and Intersex individuals and those perceived to be LGBTI is not a new phenomenon,⁴⁶⁷ there is a growing awareness in many countries of asylum that people

⁴⁶⁵ *Medellin v. Texas*, 552 U.S. 491 (2008).

⁴⁶⁶ Jeremy Telman, 'A Monist Supremacy Clause and a Dualistic Supreme Court: The Status of Treaty Law as U.S. Law. Basic Concepts of Public International Law: Monism and Dualism (Marko Novakovic ed.), Valparaiso University Legal Studies Research Paper No. 13-6 (2013) 21 <http://ssrn.com/abstract=2265880> accessed 9 January 2023.

⁴⁶⁷ The 1951 Convention relating to the Status of Refugees was drafted not least as a response to the persecution during World War II, during which intolerance and violence cost the lives of thousands of people with a LGBTI background. See, UNHCR, 'Summary Conclusions: Asylum-Seekers and Refugees Seeking

fleeing persecution due to their sexual orientation and/or gender identity may qualify as refugees under Article 1A(2) of the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol (hereinafter "1951 Convention"). However, the application of the refugee definition in this area remains inconsistent. Killings, sexual and gender-based violence, physical attacks, torture, arbitrary detention, accusations of immoral or deviant behavior, denial of the rights to assembly, expression, and information, and discrimination in employment, health, and education are documented to occur against LGBTI individuals in all regions of the world.⁴⁶⁸

In a number of nations, engaging in consensual same-sex relationships is punishable by imprisonment, corporal punishment, or the death penalty. 5 In these and other nations, the authorities may be unwilling or unable to protect individuals from abuse and persecution at the hands of non-state actors, resulting in impunity for perpetrators and implicit, if not explicit, tolerance of such abuse and persecution.⁴⁶⁹

Sex, age, nationality, ethnicity/race, social or economic status, and HIV status are intersecting factors that may contribute to and compound the effects of violence and discrimination. As a result of these multiple layers of discrimination, LGBTI individuals are frequently marginalized in society and isolated from their communities and families. Additionally, it is not uncommon for some people to harbor feelings of shame and/or internalized homophobia. They may be inhibited from informing asylum adjudicators that their real fear of persecution is based on their sexual orientation and/or gender identity due to these and other factors.⁴⁷⁰

LGBTI+ individuals' experiences vary greatly and are heavily influenced by their cultural, economic, family, political, religious, and social environment. The applicant's background may influence how he or she expresses his or her sexual orientation and/or gender identity, or may explain why he or she does not openly live as LGBTI. It is crucial that decisions regarding LGBTI refugee claims not be based on superficial understandings of the experiences of LGBTI individuals or on incorrect, culturally insensitive, or stereotypical assumptions. These Guidelines provide substantive and procedural guidance on the determination of the refugee status of individuals based on their sexual orientation and/or gender identity, with the goal of ensuring a correct and unified interpretation of the refugee definition in the 1951 Convention.⁴⁷¹

Article 1 of the Universal Declaration of Human Rights states, "All human beings are born free and equal in dignity and rights". and Article 2 states, "Everyone is entitled to all the rights and freedoms enumerated in this Declaration".⁴⁷² On the basis of equality and nondiscrimination, all people, including LGBTI individuals, are entitled to the protection provided by international human rights law.⁴⁷³ Despite the fact that the major international human rights treaties do not explicitly recognize a right to equality based on sexual orientation and/or gender identity, international human rights law prohibits discrimination on these

Protection on Account of their Sexual Orientation and Gender Identity', November 2010, Expert Roundtable organized by UNHCR, Geneva, Switzerland, 30 September–1 October 2010, para 3 <http://www.unhcr.org/refworld/docid/4cff99a42.html> accessed 9 January 2023.

⁴⁶⁸ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01.

⁴⁶⁹ *Idem*, para 4.

⁴⁷⁰ *Idem*, para 3.

⁴⁷¹ These Guidelines supplement the UNHCR "Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees", 7 May 2002 <<http://www.unhcr.org/refworld/docid/3d36f1c64.html>> accessed 9 January 2023.

⁴⁷² United Nations. Universal Declaration of Human Rights 1948.

⁴⁷³ UN Office of the High Commissioner for Human Rights (OHCHR), *Born Free and Equal: Sexual Orientation and Gender identity in International Human Rights Law*, September 2012, HR/PUB/12/06.

grounds.⁴⁷⁴ For instance, the prohibited grounds of "sex" and "other status" contained in the non-discrimination clauses of the most important international human rights instruments have been interpreted to include sexual orientation and gender identity.⁴⁷⁵ Respect for fundamental rights and the principle of non-discrimination are pillars of the 1951 Convention and international refugee law.⁴⁷⁶ Therefore, the refugee definition must be interpreted and applied in accordance with these principles, including the prohibition on discrimination based on sexual orientation and gender identity.⁴⁷⁷

The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity were adopted in 2007 by a group of human rights experts and, although not binding, reflect well-established principles of international law.⁴⁷⁸ They establish the framework for the protection of human rights applicable to sexual orientation and/or gender identity. Principle 23 outlines the right to seek and enjoy asylum in the event of persecution based on sexual orientation and/or gender identity: "Everyone has the right to seek and receive asylum from persecutors in other countries, including those based on sexual orientation or gender identity. A state may not remove, expel, or extradite a person to a country where they have a reasonable fear of torture, persecution, or other cruel, inhuman, or degrading treatment or punishment due to their sexual orientation or gender identity".

Transgender refers to individuals whose gender identity and/or gender expression differs from the sex assigned to them at birth. Transgender is a gender identity, not a sexual orientation and a transgender individual may be heterosexual, gay, lesbian, bisexual, or any other sexual orientation. Transgender individuals frequently dress or behave differently than what is generally expected of them based on their assigned sex at birth. Also, they may not always appear or act in these ways. Individuals may, for instance, choose to express their gender only at specific times and in environments where they feel safe. Not fitting within accepted binary perceptions of being male and female, they may be perceived as threatening social norms and values. This non-conformity exposes them to risk of harm. Transgender people are frequently severely marginalized, and their claims may reveal severe physical, psychological, and/or sexual violence. Transgender people are particularly vulnerable when their self-identification and physical appearance do not match the legal sex on official documentation and identity documents.⁴⁷⁹ This definition includes gender expression to transgender identity, adopting the Yogyakarta principles. It also notes, that the transition to change one's birth sex is not a one-step process and may involve a number of personal, legal, and medical modifications. Not all transgender individuals opt for medical treatment or other measures to make their external appearance correspond with their internal identity. Therefore, it is essential for decision-makers to avoid placing too much emphasis on gender confirmation surgeries or other medical aspects of transition. Not all applicants will self-identify with the LGBTI terminology and concepts outlined above, and some applicants may be unaware of these labels. Some may be limited to using (derogatory) terms employed by the persecutor. Therefore, decision-makers must exercise caution when applying such

⁴⁷⁴ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, para 6.

⁴⁷⁵ *Idem*, para 10.

⁴⁷⁶ 1951 Convention, Preambular, para 1, Article 3.

⁴⁷⁷ *Idem*, para 11-12.

⁴⁷⁸ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007.

⁴⁷⁹ The European Court of Human Rights has established that authorities must legally recognize the altered gender. See, *Goodwin v. United Kingdom* App no. 28957/95 (ECHR, 11 July 2002) finding a violation of the applicant's right to privacy, noting that "the stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognize the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality", [77], and that "Under Article 8 of the Convention in particular, the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings" [90].

labels rigidly, as this could result in unfavorable credibility assessments or the failure to recognize a valid claim. Intersex individuals may not identify as LGBTI (they may not view their condition as part of their identity, for instance), and men who have sex with men may not always identify as gay. The distinction between sexual orientation and gender identity must also be made clear.⁴⁸⁰

A proper analysis of whether an LGBTI applicant is a refugee under the 1951 Convention must begin with the premise that applicants have the right to live openly in society and are not required to hide who they are.⁴⁸¹ Sexual orientation and/or gender identity are fundamental aspects of human identity that are either innate or immutable, or that a person should not be required to give up or conceal.⁴⁸² Sexual orientation and/or gender identity may be revealed by sexual conduct or a sexual act, by external appearance or dress, or by a variety of other factors, such as how the applicant lives in society or expresses (or wishes to express) his or her identity.⁴⁸³

An applicant's sexual orientation and/or gender identity may be relevant to a refugee claim if he or she fears persecutory harm due to his or her actual or perceived sexual orientation and/or gender identity, which does not conform to prevailing political, cultural, or social norms or is perceived not to conform to such norms. The intersection of gender, sexual orientation, and gender identity is integral to the evaluation of claims involving sexual orientation and/or gender identity. Harm resulting from not conforming to expected gender roles is frequently the focal point of these claims.⁴⁸⁴

The norms of society regarding who men and women are and how they should behave are frequently based on heteronormative standards. Both men and women may be subject to acts of violence intended to compel them to conform to society's gender roles or intimidate others by "setting an example". Such harm can be "sexualized" to further degrade, objectify, or punish the victim for his/her sexual orientation and/or gender identity, but it can also take other forms.⁴⁸⁵

Complex relationships exist between a person's orientation or identity and their behavior and activities. It may be expressed or revealed in a variety of subtle or obvious ways, through appearance, speech, conduct, attire, and mannerisms; or it may not be expressed or revealed at all. Despite the fact that certain actions expressing or disclosing a person's sexual orientation and/or gender identity may occasionally be viewed as trivial, the issue is the consequences that would follow such conduct. In other words, an activity associated with sexual orientation may only reveal or expose the stigmatized identity; it does not cause or justify the persecution. According to UNHCR, the distinction between forms of expression that relate to a "core area" of sexual orientation and those that do not is irrelevant for determining the existence of a well-grounded fear of persecution.⁴⁸⁶

⁴⁸⁰ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, 5.

⁴⁸¹ *Idem*, 12.

⁴⁸² *Idem*, 30.

⁴⁸³ *Idem*, 31-32.

⁴⁸⁴ *Idem*, 13.

⁴⁸⁵ UNHCR, 'Summary Conclusions: Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity', November 2010, Expert Roundtable organized by UNHCR, Geneva, Switzerland, 30 September–1 October 2010, para 6, 16 <http://www.unhcr.org/refworld/docid/4cff99a42.html> accessed 9 January 2023.

⁴⁸⁶ *Y and Z* [2012] ECLI:EU:C:2012:518 [62]; *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, UK Supreme Court, 25 July 2012 [75]–[76] (Lord Kerr); Case for the Intervener, *Secretary of State for the Home Department (Appellant) v. RT (Zimbabwe), SM (Zimbabwe) and AM (Zimbabwe) (Respondents) and the United Nations High Commissioner for Refugees (Intervener)*, 25 May 2012, Case No. 2011/0011 [12](9). <<http://www.unhcr.org/refworld/docid/4fc369022.html>> accessed 9 January 2023.

The perpetrators of violence against LGBTI individuals may justify their actions by claiming they intend to "correct", "cure", or "treat" the victim.⁴⁸⁷ Intention or motive of the persecutor may be a factor in establishing the "causal link", but it is not required.⁴⁸⁸ It is not necessary for the persecutor to have a punitive intent in order to establish a causal relationship.⁴⁸⁹ The focus is on the reasons for the applicant's feared situation and how he or she would experience the harm, rather than on the perpetrator's mindset. To establish the causal link, it is sufficient to demonstrate that the persecutor attributes or imputes a Convention ground to the applicant.⁴⁹⁰ In cases where the persecutor is a non-State actor, a causal link can be established if either the non-State actor is likely to harm the LGBTI person for a Convention reason or the State is unlikely to protect the LGBTI person for a Convention reason.⁴⁹¹

A sur place claim arises either because of the applicant's activities in the country of asylum or because of events that have occurred or are occurring in the applicant's country of origin since their departure.⁴⁹² Changes in the applicant's personal identity or gender expression after his or her arrival in the country of asylum may also give rise to sur place claims. It should be noted that some LGBTI asylum seekers may not have self-identified as LGBTI prior to entering the country of asylum, or may have chosen not to act on their sexual orientation or gender identity in their home country. Thus, their fear of persecution may arise or manifest itself while they are in the country of asylum, giving rise to a sur place refugee claim. When an LGBTI person engages in political activism or media work, or when their sexual orientation is revealed by a third party, such claims are common.⁴⁹³

9.2. THE RAO TRAINING 2019 ON LGBTI ASYLUM CLAIMS AND SEXUAL MINORITIES

On the other hand, according to the US guidelines, the "on account of" requirement emphasizes the persecutor's motivation. In the majority of LGBTI cases, the persecutor seeks to harm the individual due to the individual's perceived or actual sexual orientation, the persecutor's belief that the applicant transgresses traditional gender boundaries, or the persecutor's more general antipathy toward sexual minorities in general. In some instances, the persecutor may have attempted to "cure" the applicant of their sexual orientation or gender identity.⁴⁹⁴ The majority of persecutors may not have distinguished between gay, lesbian, bisexual, transgender, intersex, or HIV-positive individuals. They may have harmed the applicant based on their perception that he or she is homosexual or a sexual minority that is "outside the norm".

The applicant must provide direct or circumstantial evidence that the persecutor is acting against him or her because he or she possesses or is believed to possess one or more of the protected characteristics

⁴⁸⁷ Yogyakarta Principles, Principle 18.

⁴⁸⁸ UNHCR, Handbook, para. 66.

⁴⁸⁹ *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997), found that the requirement on the applicant to prove the punitive intent of the perpetrator was unwarranted.

⁴⁹⁰ UNHCR, "Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees", April 2001, para 9 <http://www.unhcr.org/refworld/docid/3b20a3914.html> accessed 9 January 2023.

⁴⁹¹ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, para 23.

⁴⁹² UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/IP/4/ENG/REV. 3, paras 94, 96.

⁴⁹³ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October, 2012, HCR/GIP/12/01.

⁴⁹⁴ *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

listed in the refugee definition.⁴⁹⁵ In an LGBTI claim, for instance, you would consider evidence that the persecutor harmed or attempted to change the applicant because the persecutor knows or suspects that the applicant is a member of a sexual minority.⁴⁹⁶ This is a crucial divergence from the UNHCR and EASO guidelines on persecution grounds.

When persecutors may have mixed motives, courts are faced with challenging cases. Currently, the applicant for asylum must demonstrate that he or she was persecuted "on account of" one of the five specified grounds. However, the Ninth Circuit ruled that one of the five grounds for persecution need only be a motive and not the sole motive.⁴⁹⁷ However, the applicant must still demonstrate a motive.⁴⁹⁸

In a nutshell, in order to clarify the burden of proof placed on the applicant, the REAL ID Act of 2005 amended INA 208(b)(1)(B) [8 U.S.C. 1158(b)(1)(B)] to read: "the applicant must establish that race, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant". Subsequently, the BIA determined that, under the revised version of INA 208, "the protected ground cannot play a minor role in the alien's past mistreatment or fears of future mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another cause of harm".

According to RAIO, being compelled to abandon or conceal one's sexual orientation or gender identity may cause significant psychological and other harms that may amount to persecution.⁴⁹⁹ This puts the weight on the applicant to prove the harm caused by suppression, instead of assuming a violation of a fundamental right when living openly as LGBTQ+ puts in risk of harm.⁵⁰⁰

To be eligible for asylum or refugee status, the applicant must establish that the persecution suffered or feared was or will be motivated "on account of" his or her actual or imputed possession of a protected characteristic (i.e., HIV). The U.S. Attorney General's 1994 decision in the *Toboso-Alfonso* case is cited by the Board of Immigration Appeals (BIA) as precedent in all proceedings involving LGBTI asylum and refugee claims. The BIA has not specifically issued a precedential decision on claims by other sexual minorities, but many courts have.⁵⁰¹

Applicants seeking to establish membership in a particular social group must also establish that the group is defined with sufficient particularity. The group must be discrete and have definable boundaries. It should not be defined so broadly as to make it difficult to distinguish group members from others in society.⁵⁰² The terminology involving LGBTI issues is still evolving. For purposes of the RAIO training, the term "sexual minorities" and the acronym "LGBTI" are used interchangeably as umbrella terms to refer to issues

⁴⁹⁵ See U.S. Citizenship and Immigration Services, 'Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI Refugee and Asylum Claims)', (RAIO Combined Training Course, 20 December 2019) <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf> accessed 9 January 2023.

⁴⁹⁶ *Idem*. See *Elias-Zacarias v. INS*, 502 U.S. 478 (1992).

⁴⁹⁷ See *Navas v. INS*, 217 F.3d 646 (9th Cir.2003).

⁴⁹⁸ *Quinonez-Colop v. INS*, 2003 WL 1900849 (9th Cir.2003).

⁴⁹⁹ See U.S. Citizenship and Immigration Services, 'Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI Refugee and Asylum Claims)', (RAIO Combined Training Course, 20 December 2019) <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf> accessed 9 January 2023.

⁵⁰⁰ For a critique of endogenous harm see: Maria Avgeri, 'Assessing trans and gender nonconforming asylum claims: Towards a Transgender Studies Framework in Particular Social Group and Persecution' *Refugees and Conflict in Frontiers in Human Dynamics, Refugees and Conflict*, April 2021, <http://doi.org/10.3389/fhumd.2021.653583> accessed 9 January 2023.

⁵⁰¹ See U.S. Citizenship and Immigration Services, 'Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI Refugee and Asylum Claims)', (RAIO Combined Training Course, 20 December 2019) 15 <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf> accessed 9 January 2023.

⁵⁰² *Idem*, 17.

involving sexual orientation, gender identity, and intersex conditions.⁵⁰³ The "sexual minorities in Country X" group may be appropriate where the persecutor perceives any sexual minority as "outside the norm" but does not necessarily distinguish between orientation, gender, and sex. This avoids the need to analyze past and future harm for two separate groups when both are based on applicant's sexual minority status and moves to the direction of accepting gender nonconformity as a unifying lens for LGBTQI+ asylum claims as Berg and Millbank suggest.⁵⁰⁴ The applicant must provide direct or circumstantial evidence that the persecutor is motivated to act against the applicant because he or she possesses or is believed to possess one or more of the protected characteristics in the refugee definition. The U.S. Supreme Court has made it clear that intimate sexual activity between consenting adults is constitutionally protected. If a law exists in another country that prohibits intimate sexual activity between consenting adults, enforcement of the law itself may constitute persecution.⁵⁰⁵

LGBTI-specific issues may arise in cases where the applicant has not experienced past persecution, but may nevertheless have a well-founded fear of persecution. An applicant may qualify for asylum or refugee status even if he or she was not persecuted in the past but has a well-founded fear of future persecution. The existence of certain objective elements in a particular claim will not necessarily undermine the applicant's subjective fear or credibility.⁵⁰⁶

A sur place claim for refugee status may arise as a consequence of events that have occurred in the applicant's country of origin. This may also occur where he or she has been "outed" to members of his or her family back home. These applicants may qualify for refugee or asylum if they can demonstrate a well-founded fear of future persecution. As with all claims based solely on a fear of future persecution, the claim must meet the four elements in the Mogharrabi test. Like most gender-based claims, LGBTI claims involve very private topics that are difficult for applicants to talk about openly.⁵⁰⁷

It is important to note that proof of gender confirmation surgery is not required and USCIS will not ask for records relating to any such surgery. According to the RAI0 training, the officer must conduct the interview in an open and nonjudgmental atmosphere designed to elicit the most information from the applicant.⁵⁰⁸ Some LGBTI applicants may be reluctant to talk about actual or perceived sexual orientation or to disclose experiences of sexual violence. While you must be sensitive as you interview an applicant regarding such delicate topics, you must not shy away from your duty to elicit sufficient testimony to make an informed adjudication. Interviewers are not required to inquire into the specific nature of the applicant's LGBTI status.⁵⁰⁹

Interviewees must first establish that the applicant is perceived to have a protected trait, such as belonging to a particular social group or coming from a particular race, religion, or nationality. Many LGBTI applicants may not know that their sexual orientation, gender identity, HIV-positive status, or intersex condition is

⁵⁰³ *Idem*, 11.

⁵⁰⁴ Laurie Berg and Jenni Millbank, 'Developing a Jurisprudence of Transgender Particular Social Group' in Thomas Spijkerboer (ed) *Fleeing Homophobia*, (Routledge 2013), UTS: Law Research Paper No. 2013/1 <<https://ssrn.com/abstract=02312887>> accessed 9 January 2023.

⁵⁰⁵ *Idem*, 17.

⁵⁰⁶ *Karouni v. Gonzales*, 399 F. 3d 1163 (9th Cir. 2005) [1173] (reasoning that to require the respondent to abstain from future homosexual acts if he wished to avoid persecution would effectively force him "to change a fundamental aspect of his human identity" and forsake the intimate contact and enduring personal bond that the Due Process Clause of the Fourteenth Amendment protects from impingement in this country and that 'ha[ve] been accepted as an integral part of human freedom in many other countries").

⁵⁰⁷ U.S. Citizenship and Immigration Services, 'Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI Refugee and Asylum Claims', (RAIO Combined Training Course, 20 December 2019) 28 <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf> accessed 9 January 2023.

⁵⁰⁸ *Idem*.

⁵⁰⁹ See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

the basis for a protection claim and may be reluctant to talk about these topics. Awareness of country conditions may also assist you in conducting the interview with cultural sensitivity. You must also ask about past harm and fear of future harm.⁵¹⁰

A transgender applicant may identify as straight, lesbian, gay, or bisexual, and that gender identity has to do with the person's inner feelings about his or her sexual identity. Some individuals do not subscribe to the male/female gender binary and may identify with neither gender or a combination of both genders. Interviewing an applicant who is transgender or has another claim based on gender identity should start with easy questions and gradually ease into the more sensitive ones, says USCIS officer in charge of the RAIO Combined Training Program (CATP) for refugees and asylum seekers.

- When did you first realize you were transgender? Or: When did you first realize that although you were born as a male (female) you felt more like a female (male)?
- How did you realize this?
- Did you know other transgender people in your country? Or: Did you know other people who felt like you in your country?
- If yes, how were they treated?
- Did you hear about other transgender people in your country?
- If yes, how were they treated?
- When did you begin to transition from a man to a woman or woman to a man?
- What steps have you taken to transition?
- Do you now live full-time as a man (or woman?) When did you begin to live full-time as a man (or woman)?
- Does your family know you're transgender?
- If yes, how did they react when they found out?⁵¹¹

All these questions presuppose a binary identity-based transgender claim and particular emotive journeys by the applicants, and they may encompass westernized notions of queerness which exclude many gender nonconforming applicants.⁵¹²

The burden of proof is on the applicant to establish eligibility, but equally important is your duty to elicit all relevant testimony. The applicant must establish past persecution or a well-founded fear of future

⁵¹⁰ In *re M-D-, Respondent*, 62 Fed. Reg. 10,312, 10,342 (1997) it is stated that ‘An asylum applicant bears the evidentiary burden of proof to establish his or her asylum claim. (to be codified at 8 C.F.R. § 208.13(a)) (interim, effective Apr. 1, 1997). To establish eligibility for a grant of asylum, an alien must demonstrate that he is a “refugee” within the meaning of section 101(a)(42)(A) of the Act 8 U.S.C. § 1101(a)(42)(A) (1994). See section 208 of the Act.

⁵¹¹ U.S. Citizenship and Immigration Services, ‘Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugee and Asylum Claims’, (RAIO Combined Training Course, 20 December 2019) 37 <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf> accessed 9 January 2023.

⁵¹² Mengia Tschalaer, ‘Between queer liberalisms and Muslim masculinities: LGBTQI+ Muslim asylum assessment in Germany’ (2020) 43 (7) *Ethnic and Racial Studies* 1265, 1270.

persecution based on actual or imputed (perceived) sexual orientation or gender identity,⁵¹³ contrary to UNHCR guidelines which state that burden of proof is shared in refugee status determination.

In some cases, you may ask the applicant to provide evidence that corroborates his or her sexual orientation, gender identity, or HIV-positive status. Pursuant to amendments to INA section 208 made by the REAL ID Act of 2005, an applicant for asylum must provide this evidence unless he or she does not have the evidence. The applicant should be able to describe his or her experience identifying as a transgender individual. In *Eke v. Mukasey*, the respondent argued that the Immigration Judge and the Board erred in requiring him to corroborate his claim of persecution based on his membership in a social group of homosexual men. A transgender applicant should be able to corroborate any treatment he or she has received from a medical professional.⁵¹⁴ Adjudicators may ask for such corroboration as a means of determining that the persecutor did or would perceive this trait in the applicant. Adjudicating LGBTI refugee and asylum claims presents certain unique challenges.⁵¹⁵

9.3. ANALYSIS OF US ASYLUM ADJUDICATION FOR SEXUAL MINORITIES

In assessing the credibility of all asylum claims, it is important to look beyond stereotypical preconceptions, but shifting societal norms make this a crucial issue in sexual and/or gender orientation asylum claims. Asylum applicants may obfuscate the reality of orientation on purpose. Applicants may have led concealed lives. Asylum applicants may have children. The applicants may have even been married or in heterosexual relationships. None of these factors exclude sexual and/or gender orientation as an "immutable characteristic".⁵¹⁶

It is difficult to define sexual orientation and/or gender identity due to the fluid nature of human sexuality. This fluidity can be problematic when addressing credibility issues. It is interesting to note that researchers have observed that American culture is "bound to a rigid binary sexuality system". Thus, if a man has a desire for another man, he cannot also have a desire for a woman, and vice versa. However, many self-identified LGBTI individuals may have lived with members of another sex for a variety of reasons, including fear of government persecution.⁵¹⁷

Even though LGBTI individuals have a path to asylum relief based on the immutable characteristic of their sexual orientation and/or gender identity, an individual applicant must provide a preponderance of credible probative evidence to establish membership in that particular social group, just as any other applicant would.⁵¹⁸ A claimant is not required to demonstrate deviation from traditional "masculine" or

⁵¹³ U.S. Citizenship and Immigration Services, 'Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI Refugee and Asylum Claims)', (RAIO Combined Training Course, 20 December 2019) 40 <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf> accessed 9 January 2023.

⁵¹⁴ See *Eke v. Mukasey*, 512 F.3d 372 (7th Cir. 2008) (holding that the BIA did not err in requiring alien to corroborate his claim of persecution based on membership in social group of homosexual men.) In *Eke v. Mukasey*, the respondent argued that the Immigration Judge and the Board erred "by requiring him to corroborate his claim of persecution based on his membership in the social group of homosexual men." *Idem* [383]. The court rejected this argument, reasoning that there "is nothing in the nature of [applicant's] claims that would compel us to find that corroborating evidence was unavailable to him".

⁵¹⁵ U.S. Citizenship and Immigration Services, 'Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI Refugee and Asylum Claims)', (RAIO Combined Training Course, 20 December 2019) 48 <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf> accessed 9 January 2023.

⁵¹⁶ Dorothy Harbeck, 'Asking and Telling: Identity and Persecution in Sexual Orientation Asylum Claims – Immutable Characteristics and Concepts of Persecution Under U.S. Asylum Law' (2010) 25 *Georgetown Immigration Law Journal* 117, 123.

⁵¹⁷ See Karen Moulding, 'Imposing U.S. Sexual Categories on Other Nationals' (2010) 1 *Sexual Orientation and the Law* § 8:16.

⁵¹⁸ Dorothy Harbeck, 'Asking and Telling: Identity and Persecution in Sexual Orientation Asylum Claims – Immutable Characteristics and Concepts of Persecution Under U.S. Asylum Law' (2010) 25 *Georgetown Immigration Law Journal* 117, 124.

"feminine" characteristics. The applicant is not required to demonstrate that he or she is sufficiently "gay"; rather, he or she must provide evidence to meet their burden of proof, which includes evidence of their membership in a particular social group. This is neither an exception nor an additional burden placed on these applicants. The applicant must present credible evidence of their eligibility.⁵¹⁹

The above perspectives must also be weighed against the established criteria for establishing an asylum claim for a specific social group.⁵²⁰ Determinations of credibility by Immigration Judges must be transparent. In *Martinez v. Holder*,⁵²¹ the Ninth Circuit recently ruled that Martinez's fear of persecution based on his sexual orientation and/or gender identity was not credible. Martinez filed his initial asylum application on September 21, 1992, based on detailed testimony of his fear of persecution due to his political beliefs. However, he later retracted his claim and filed a new claim of fear based on his sexual orientation and/or gender identity. The court noted that "the record reflected that the respondent twice misrepresented the basis of his fear while testifying under oath" and that the discrepancy between the two accounts was significant because it goes to the "heart of the respondent's asylum claim".⁵²²

The court also stated that "despite the defendant's explanation that the misrepresentation was motivated by his fear of additional persecution, his justification was not persuasive".⁵²³ The dissent argued that the respondent had a valid reason for concealing his sexual and/or gender orientation claim, as homosexuality was a basis for excluding any immigrant seeking entry into the United States in 1992. Martinez modified his claim on April 23, 1996, 19 days after sexual orientation and/or gender identity became a recognized social group.⁵²⁴

In *Moab v. Gonzalez*,⁵²⁵ decided in 2007, the Seventh Circuit reversed the BIA's dismissal of an appeal of an Immigration Judge's denial of asylum based on sexual orientation and/or gender identity. The court in *Moab* disagreed with the BIA's determination that the applicant was not credible due to the "increased egregiousness" of his claim (i.e., his account of his alleged harm became more egregious as he progressed from his airport interview to his credible fear interview to his filing of a defensive asylum application to his merits hearing testimony). The court stated, "We also find it reasonable that Mr. Moab would not have disclosed his sexual orientation and/or gender identity for fear that doing so would result in further persecution, as it did in his home country of Liberia".⁵²⁶ In addition, the *Moab* court determined that the applicant's fear was reasonable.⁵²⁷

In addition, when determining whether a respondent has established his or her LGBTQ identity, an adjudicator may request supporting evidence. In *Eke v. Mukasey*,⁵²⁸ the Nigerian respondent argued that the Immigration Judge and Board committed an error "by requiring him to corroborate his claim of persecution based on his membership in the social group of homosexual men".⁵²⁹ This argument was rejected by the court, which ruled, "there is nothing in the nature of [respondent's] claims that compels us to conclude that corroborating evidence was unavailable to him".⁵³⁰ The court then cited favorably from

⁵¹⁹ *Matter of Acosta*, 19 I. & N. Dec. 211, 215-16 (BIA 1985).

⁵²⁰ *Idem*.

⁵²¹ *Martinez v. Holder*, 557 F.3d 1059 (9th Cir. 2009) (Pregerson, J., dissenting).

⁵²² *Martinez v. Holder*, 557 F.3d 1059 (9th Cir. 2009) [1064].

⁵²³ *Idem*.

⁵²⁴ *Idem*, [1066].

⁵²⁵ *Moab v. Gonzalez*, 500 F.3d 656 (7th Cir. 2007).

⁵²⁶ *Idem* [661].

⁵²⁷ *Idem*.

⁵²⁸ *Eke v. Mukasey*, 512 F.3d 372 (7th Cir. 2008).

⁵²⁹ *Idem*, [381].

⁵³⁰ *Idem*.

the Board's decision in the case of the respondent: "[t]he applicant did not provide supporting witnesses. Additionally, he failed to either provide evidence of his sexual preferences or demonstrate that such evidence was not reasonably accessible to him. In fact, the applicant was unable to provide the name of the man with whom he allegedly engaged in sexual activity".⁵³¹

Even if a respondent has "covered" or "closeted" his or her sexual orientation in his or her native country and has not suffered past persecution, an applicant may still be able to demonstrate an independent, well-founded fear of future persecution based on the immutable characteristic of his or her sexual orientation and/or gender identity, such that a reasonable person in his or her situation would fear persecution.

It is crucial to examine how courts have interpreted and defined the term "persecution", especially in the context of a claim for gay asylum. In *Fatin v. INS*,⁵³² the Third Circuit acknowledged that "the concept of persecution is sufficiently broad to encompass government measures that compel an individual to engage in conduct that is not physically painful or harmful, but is repugnant to that individual's deepest beliefs".⁵³³

By analogy to "closeting" in other types of asylum claims, Circuit Courts of Appeals have determined that it is unreasonable to expect an asylum applicant to live in hiding in his or her home country in order to avoid prosecution.⁵³⁴ Hiding is not an acceptable method of internal relocation.⁵³⁵ If an applicant has spent a lifetime "covering" or "in the closet", even while residing in the United States, for one reason or another (such as residing in a community with strong ties to the applicant's country of origin), it will be significantly more challenging for him or her to present this evidence. Nonetheless, any specific evidence that demonstrates the connection between an applicant's personal situation and the general concept of harm-based persecution of a particular social group is incredibly helpful.⁵³⁶

Under the REAL ID Act, a credibility determination may be based on a totality of the circumstances standard. This standard logically encompasses the consideration of various societal repressions of LGBTI individuals, as well as the notion that they frequently "cover" or "closet" their sexual and/or gender orientation to survive.⁵³⁷ Clearly, external confirmation of specific experiences strengthens a claim. Witnesses who are aware of an applicant's sexual orientation and/or gender identity can certainly corroborate: 1. past experiences in the applicant's country of origin; and 2. the applicant's present sexual orientation and/or gender identity to support an independent, well-founded fear of future persecution.⁵³⁸

Finally, regarding socio-economic persecution as grounds for asylum in the US, the following must be noted: In *Kadri v. Mukasey*, the First Circuit reaffirmed that sexual and/or gender orientation can serve as the basis for a claim of persecution because it is the basis for membership in a particular group.⁵³⁹ The court then noted that, based on the evidence presented, the respondent may have a viable economic persecution claim.⁵⁴⁰ However, the court noted that the BIA and sister circuits have not articulated a consistent standard for economic persecution.⁵⁴¹ In fact, the court noted that the Second Circuit in

⁵³¹ *Idem*.

⁵³² *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

⁵³³ *Idem* [1242].

⁵³⁴ *Idem*, 125.

⁵³⁵ See *Mema v. Gonzales*, 474 F.3d 412, 419 (7th Cir. 2007); *Mece v. Gonzales*, 415 F.3d 562, 577 (6th Cir. 2005).

⁵³⁶ Dorothy Harbeck, 'Asking and Telling: Identity and Persecution in Sexual Orientation Asylum Claims – Immutable Characteristics and Concepts of Persecution Under U.S. Asylum Law' (2010) 25 *Georgetown Immigration Law Journal* 117, 126.

⁵³⁷ *Idem* 128.

⁵³⁸ *Idem*.

⁵³⁹ *Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008).

⁵⁴⁰ *Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008) [22].

⁵⁴¹ *Idem*, [22].

Mirzoyan v. Gonzales⁵⁴² remanded the case to the BIA for clarification of the applicable standard, noting that the BIA has applied at least three different standards for economic persecution over the years. In *Matter of T-Z*,⁵⁴³ the BIA articulated the following standard for economic persecution in response to this instruction: "[Nonphysical] harm or suffering... such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life" may constitute persecution.⁵⁴⁴ As a result, the court remanded the case to the BIA to instruct the IJ to evaluate Kadri's case in accordance with the *Matter of T-Z* standard, as it was unable to determine which standard the agency applied in rejecting Kadri's economic persecution claim.⁵⁴⁵ The ultimate outcome of this case following the remand is not reported. Discrimination against LGBTI individuals is not synonymous with persecution.

Courts have cautioned that persecution is an extreme concept that ordinarily does not encompass every type of treatment deemed offensive by society, such as discrimination on any of the five listed grounds.⁵⁴⁶ The BIA has determined that in exceptional circumstances, discrimination can be so severe and pervasive as to constitute "persecution" under the terms of the Act.⁵⁴⁷ In general, however, mere denigration, harassment, or threats do not constitute persecution under the INA, despite being considered "morally reprehensible" treatment. For example, harassment and discrimination based on race, such as when a respondent was inappropriately fondled, insulted with ethnic slurs, and threatened with the destruction of a family business if she continued to take Chinese lessons, do not constitute persecution.⁵⁴⁸ A respondent must demonstrate that the persecution he endured was so severe that it posed a threat to his life or freedom in order to meet his burden of proof.⁵⁴⁹

In *Amanfi*, the Third Circuit reversed a BIA ruling that the imputed identity doctrine was limited to political opinion and broadened the doctrine to include imputed sexual identity. *Amanfi* specifically held that imputed homosexuality falls squarely within the scope of the BIA's decision in *Matter of S-P*,⁵⁵⁰ which granted asylum to an applicant who faced persecution due to his imputed political beliefs. This encompasses the notion that in traditional conservative religious cultures, whether or not an applicant is homosexual, family, neighbors, or society could easily perceive him or her as such, leading to persecution.

According to track records, the distribution of asylum cases geographically across immigration courts is highly disparate. Only five immigration courts - in New York, Los Angeles, San Francisco, Houston, and Miami - decided the majority of these asylum cases.⁵⁵¹ Although slightly more than 60 percent of asylum applications were denied during this time period, only 49 percent of applications were denied in the top five courts. This is primarily due to the balancing effect of comparably low denial rates in New York (26%) and San Francisco (30%) compared to much higher denial rates in Houston (92%) and Miami (86%) and a

⁵⁴² *Mirzoyan v. Gonzales*, 457 F.3d 217, 222-23 (2d Cir. 2006) (per curiam).

⁵⁴³ 24 I. & N. Dec. 163, 171 (BIA 2007).

⁵⁴⁴ *Idem*.

⁵⁴⁵ *Kadri v. Mukasey*, 543 F.3d 16, 22 (1st Cir. 2008).

⁵⁴⁶ See *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (citing *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995)); See also *Fatin v. INS*, 12 F.3d 1233, 1243 (3d Cir. 1993).

⁵⁴⁷ See *Matter of Salama*, 11 I. & N. Dec. 536 (BIA 1966) (noting a government campaign causing departure of 37,000 Jews and urging boycott of Jewish doctors and dropping of Jewish professionals from professional societies constituted persecution).

⁵⁴⁸ *Wong v. Attorney Gen.*, 539 F.3d 225, 236 (3d Cir. 2008); see also *Zhu v. Gonzales*, 465 F.3d 316, 319 (7th Cir. 2006) (holding that a singular instance of physical beating did not constitute persecution).

⁵⁴⁹ *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993).

⁵⁵⁰ TRAC Reports, 'Asylum Decisions Vary Widely Across Judges and Courts - Latest Results' <https://trac.syr.edu/immigration/reports/590/> accessed 9 January 2023.

⁵⁵¹ *Idem*.

more moderate denial rate in Los Angeles (14%), which links in with the discussion of intercourt nonacquiescence.⁵⁵²

Immigration Courts with the most Asylum Cases⁵⁵³

Immigration Court	Completed Cases	Denial Rate	Number of Judges
New York	39,140	26.10%	46
Los Angeles	12,343	71.30%	44
San Francisco	12,110	29.50%	36
Houston	11,243	91.90%	15
Miami	11,001	86.10%	25
	85,837 (total)	49.4% (average)	166 (total)

Twelve immigration courts have cumulative denial rates exceeding 90%. This included Jena, a small court with two judges where 100% of Judge Crooks' 226 cases and 99.9% of 397 asylum applications were denied. It also included larger courts: Atlanta denied more than 97% of more than 2,000 asylum applications, Las Vegas denied 93% of its 2,000 applications, and Conroe denied 92% of more than 850 applications.⁵⁵⁴ In contrast, only seven immigration courts deny less than fifty percent of cases: Newark (49%), Phoenix (48%), Chicago (47%), Boston (42%), Honolulu (31%), San Francisco (30%), and New York (30%).⁵⁵⁵

In spite of contextual factors, meaningful comparisons can be made between judges serving on the same court if cases are assigned arbitrarily. Given that TRAC's reports require a minimum of 100 decisions per judge, random case assignment should ensure that judges serving on the same court have decided a comparable variety of cases. This implies that differences in judges' grant and denial rates within the same court cannot be attributed to disparities in the merit of their cases. Rather, one or more additional factors, such as the pre-existing preferences of the assigned judge, must explain these disparities in grant and denial rates.⁵⁵⁶

As far as the REAL ID goes, it contains provisions that are especially detrimental to transgender asylum seekers. REAL ID, for instance, increased the burden of proof requirements, requiring applicants to demonstrate "a clear connection between the persecution and a protected ground".⁵⁵⁷ It must be

⁵⁵² *Idem.*

⁵⁵³ *Idem.*

⁵⁵⁴ *Idem.*

⁵⁵⁵ *Idem.*

⁵⁵⁶ *Idem.*

⁵⁵⁷ Pooja Gehi, *Struggles from the margins: Anti-immigrant legislation and the impact on low-income transgender people of color* (2009) 30 *Women's Rights Law Reporter* 315.

demonstrated that the applicant's allegation of sexual orientation-based persecution is at least one of the primary motivations for the persecutor's actions against the applicant.⁵⁵⁸ In mixed-motive cases, in which the applicant was persecuted for other nonprotected reasons in addition to sexual orientation and/or gender identity, this becomes problematic, and immigration judges may question whether persecution was truly based on sexual orientation and/or gender identity. REAL ID also requires applicants to supplement their personal statements with documents that corroborate their claims of abuse, which can be extremely challenging for those fleeing family and authorities who wish to harm them due to their sexual orientation or gender identity.⁵⁵⁹

Under REAL ID, an asylum applicant is required to provide evidence of persecution based on a protected ground that a judge deems reasonably available. Applicants must provide corroborating evidence unless they do not have it and are unable to obtain it.⁵⁶⁰ However, failure to submit evidence may result in the applicant failing to carry the burden of proof.⁵⁶¹ REAL ID does not impose a reasonableness standard on judges when they determine whether corroboration is required or whether the evidence presented is sufficient.⁵⁶² As a result, immigration judges can require any form of corroboration — "unreasonable requests for evidence shift the burden to the applicants to demonstrate that their lack of evidence is reasonable".⁵⁶³

Under the current asylum system, it would be difficult to corroborate a credible fear of persecution for transgender women classified as gay men with female sexual identities, particularly if the persecutor is characterized as a private actor.⁵⁶⁴ Reporting a crime to state authorities is not required if the applicant can demonstrate that doing so would have been futile or would have subjected him to further abuse.⁵⁶⁵ In a recent decision by the United States Court of Appeals for the Ninth Circuit, an HIV-positive transgender woman was denied asylum for failing to adequately explain why reporting the sexual abuse to the authorities would have been futile or put her at risk of harm.⁵⁶⁶ The applicant chose not to report the sexual abuse to the authorities, despite laws prohibiting it, because he or she believed it would be futile to do so. In accordance with REAL ID, the Ninth Circuit ruled that "it was not unreasonable for the BIA to view [the applicant's] explanation for not contacting the authorities as less than convincing".⁵⁶⁷ In other cases, courts have justified the denial of asylum by describing persecution by state authorities as isolated, rogue acts.⁵⁶⁸

In a separate note, In Velez, the Eleventh Circuit ruled that a gay Colombian respondent "failed to provide material evidence of changed country conditions", and thus, the "BIA did not abuse its discretion in denying [the respondent's] motion to reopen" and petition for review.⁵⁶⁹ This type of negative corroboration finding

⁵⁵⁸ Marisa Silenzi Cianciarulo 'Terrorism and asylum seekers: Why the REAL ID Act is a false promise' (2006) 43 (1) Harvard Journal on Legislation 100; *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 107 S. Ct. 1207 (1987); *Voci v. Gonzales*, 409 F.3d 607 (3d Cir. 2005).

⁵⁵⁹ Michael Santos, 'In the Shadows: The Difficulties of Implementing Current Immigration Policies in Adjudicating Gender-Diverse Asylum Cases in Immigration Court' (LGBT Policy Journal, 14 November 2012) (<https://lgbtq.hkspublications.org/2012/11/14/in-the-shadows-the-difficulties-of-implementing-current-immigration-policies-in-adjudicating-gender-diverse-asylum-cases-in-immigration-courts/> accessed on 9 January 2023).

⁵⁶⁰ Melanie Conroy, 'Real bias: How REAL ID's credibility and corroboration requirements impair sexual minority asylum applicants' (2009) 24 (1) Berkeley Journal of Gender Law & Justice 1.

⁵⁶¹ *Matter of S-M-J*, 21 I&N Dec. 722, 726 (U.S. Board of Immigration Appeals 1997).

⁵⁶² Marisa Silenzi Cianciarulo 'Terrorism and asylum seekers: Why the REAL ID Act is a false promise' (2006) 43 (1) Harvard Journal on Legislation 100; *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 107 S. Ct. 1207 (1987); *Voci v. Gonzales*, 409 F.3d 607 (3d Cir. 2005).

⁵⁶³ CT Turney, 'Give me your tired, your poor, and your queer: The need and potential for advocacy for LGBTQ immigrant detainees' (2011) 58 UCLA Law Review 1343.

⁵⁶⁴ Dorothy Harbeck, 'Asking and Telling: Identity and Persecution in Sexual Orientation Asylum Claims – Immutable Characteristics and Concepts of Persecution Under U.S. Asylum Law' (2010) 25 Georgetown Immigration Law Journal 117.

⁵⁶⁵ *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006).

⁵⁶⁶ *Castro-Martinez v. Holder*, 641 F.3d 1103 (9th Cir. 2011), opinion amended and superseded on denial of hearing, 674 F.3d 1073 (9th Cir. 2011).

⁵⁶⁷ *Idem*.

⁵⁶⁸ *Joaquín-Porras v. Gonzales*, 435 F.3d 172 (2d Cir. 2006).

⁵⁶⁹ 360 Fed. App'x 103, 104, 2010.

is problematic in the context of transgender asylum because courts frequently conflate legal advancements with on-the-ground realities for LGBTQ individuals in a given country. The decriminalization of same-sex conduct, the legalization of same-sex marriage, the recognition of civil unions, and adoption rights for LGBT parents can be cited as factors in claims of altered country conditions.⁵⁷⁰ These advancements in the lives of lesbian, gay, and bisexual people have been used to undermine the asylum claims of transgender people who were incorrectly classified as gay men with female sexual identities. In *Castro-Martinez*,⁵⁷¹ the court upheld the denial of an asylum claim by a transgender woman and noted "the ongoing improvement of police treatment of homosexual men and efforts to prosecute homophobic crimes." Courts should also be cautious when addressing this confusion between improved country conditions for gay men and improved treatment of transgender individuals, as social gains for one group do not necessarily imply improved treatment for another group.⁵⁷²

There are instances where conditions affecting the LGB community should be applied to transgender asylum applications and there are instances where they must be distinguished. Courts should be familiar with the distinction when making this call. In *Velez*, the defendant submitted additional evidence in support of his motion to reopen his case. The court, for instance, should have found that the respondent met the burden of proof in proving persecution (despite the new evidence demonstrating violence in Colombia against transgender citizens) because the gay respondent is considered a sexual minority and was subjected to similar violence as transgender individuals.⁵⁷³ On the other hand, legal protections for same-sex couples and other factors demonstrating improved country conditions for gays and lesbians should be weighed lightly in a transgender asylum case because a transgender applicant will likely experience different or even greater violence than gays and lesbians. Unlike assigned male at birth gay men, transgender women who challenge stereotypical gender passing norms can have more social visibility and therefore be more susceptible to harm and violence.⁵⁷⁴

10. GENDER EXPRESSION, TRANS HEALTH CARE AND LEGAL GENDER RECOGNITION: RECOMMENDATIONS

10.1. THE INCLUSION OF GENDER EXPRESSION TO THE ASYLUM GROUNDS

One will now turn to Title VII cases in order to draw on those, in order to make inferences of how US Supreme Court understands sex/gender/gender identity and expression discrimination. *Price Waterhouse v. Hopkins*, which occurred on May 1, 1989, involved a plaintiff named Ann Hopkins who was denied a partnership at her firm because her employer believed she was insufficiently stereotypically feminine.⁵⁷⁵ To improve her chances of making partner, Ms. Hopkins was told to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewellery". She sued the

⁵⁷⁰ Dorothy Harbeck, 'Asking and Telling: Identity and Persecution in Sexual Orientation Asylum Claims – Immutable Characteristics and Concepts of Persecution Under U.S. Asylum Law' (2010) 25 *Georgetown Immigration Law Journal* 117.

⁵⁷¹ *Castro-Martinez v. Holder*, 641 F.3d 1103 (9th Cir. 2011), opinion amended and superseded on denial of hearing, 674 F.3d 1073 (9th Cir. 2011).

⁵⁷² Michael Santos, 'In the Shadows: The Difficulties of Implementing Current Immigration Policies in Adjudicating Gender-Diverse Asylum Cases in Immigration Court' (*LGBT Policy Journal*, 14 November 2012) (<https://lgbtq.hkspublications.org/2012/11/14/in-the-shadows-the-difficulties-of-implementing-current-immigration-policies-in-adjudicating-gender-diverse-asylum-cases-in-immigration-courts/> accessed on 9 January 2023).

⁵⁷³ 360 Fed. App'x 103, 104 (2010).

⁵⁷⁴ Ilona Turner, *Sex stereotyping per se: Transgender employees and Title VII* (2007) 95(20) *California Law Review* 561.

⁵⁷⁵ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

company and obtained a favorable ruling holding the company liable for sex-based discrimination under Title VII of the Civil Rights Act of 1964.⁵⁷⁶

In the decision, the Supreme Court clarified that Title VII bars not just discrimination because of one's sex assigned at birth, but also prohibits discrimination based on gender stereotyping. In other words, it is not permissible to treat employees differently based on their gender, nor is it permissible to treat employees differently because, according to the employer, they are not the right type of man, woman, or non-binary person. The Supreme Court clarified that "the days when an employer could evaluate employees based on the assumption or insistence that they fit the stereotype associated with their group are over".⁵⁷⁷

Price Waterhouse v. Hopkins has resulted in a significant number of lower court rulings in favor of LGBT plaintiffs who claimed that they, too, were discriminated against on the basis of gender stereotypes. In fact, five federal appeals courts and dozens of federal district courts and state courts have explicitly ruled that transgender people are protected against discrimination under federal laws prohibiting sex discrimination.⁵⁷⁸

It is sex discrimination when transgender people face discrimination because they do not conform to employers' expectations of how men and women should look, behave, and identify. For example, as a result of a challenge brought by Lambda Legal, an Eleventh Circuit Court clarified that discriminating against a transgender employee is sex discrimination because, "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes".⁵⁷⁹

The courts, administrative agencies, and academics are increasingly in agreement that these laws also protect lesbian, bisexual, and gay people from discrimination. When lesbian, gay, and bisexual individuals face discrimination based on their sex in relation to the sex of their intimate partners, this is also sex discrimination. Additionally, two federal appeals courts have explicitly ruled that LGB individuals are protected from discrimination plus SCOTUS, in *Bostock*.⁵⁸⁰

However, the precedent established in *Price Waterhouse* and the subsequent lower court decisions are now in jeopardy. On April 22, 2019, the U.S. Supreme Court granted review in three cases concerning Title VII and whether the prohibition on discrimination on the basis of sex is properly read to prohibit discrimination on the basis of sexual orientation or gender identity.⁵⁸¹

The *Price Waterhouse* case opens the door to gender non conformity protection as form of state protection. It has to do with discrimination towards gender nonconforming civilians but it can be a valuable reference, for the elevation of discrimination to persecution if the violations due to stereotyping are severe enough. It is my view that, one must consider gender expression when it is unrelated to identity-based claims in asylum applications. Applicants who do not conform to gender norms may identify as such due to their social position, but they may not make clear identity claims.⁵⁸² If gender expression discrimination

⁵⁷⁶ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e17 (as amended).

⁵⁷⁷ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), 490 U.S. [251].

⁵⁷⁸ Sasha Buchert, 'Price Waterhouse v. Hopkins at Thirty' (Alliance for Justice, 1 May 2019) <https://www.afj.org/article/price-waterhouse-v-hopkins-at-thirty/> accessed 9 January 2023.

⁵⁷⁹ *Idem*.

⁵⁸⁰ *Idem*.

⁵⁸¹ *Idem*.

⁵⁸² Mariza Avgeri, Assessing trans and gender nonconforming asylum claims: Towards a Transgender Studies Framework in Particular Social Group and Persecution, Refugees and Conflict in Frontiers in Human Dynamics, Refugees and Conflict, April 2021, <https://doi.org/10.3389/fhumd.2021.653583> accessed 9 January 2023.

arises to the level of persecution, due to the expectations of gender roles assigned at sex assumed at birth, then asylum applicants should be granted protection.

Applicants, regardless of whether they identify as transgender, gay, bisexual, or straight, may be persecuted if they appear too feminine or masculine based on gender norms that derive from their perceived sex characteristics⁵⁸³ even if they do not self-identify as LGBTQ+. One must investigate whether gender expression as the expression of one's conscience and personality is an exercise of fundamental human rights, whether these individuals have the right to look and express themselves as feminine or masculine as they choose, to what extent the requirement to renounce these characteristics constitutes inhuman and degrading treatment, and whether they constitute a priori fundamental rights of personhood. In addition, certain characteristics may be imputed and lead to persecution, such as a gender non-conforming applicant (such as a cis identifying "cross-dresser") being perceived as gay despite not identifying as such.⁵⁸⁴ One must decide if they are protected as a member of a group whose sexuality is imputed, a group whose gender is nonconforming, or both. There must be ways to protect these individuals from persecution even if they are not imputed a clear sexual orientation but are persecuted due to gender nonconformity (for example, the cross-dresser may not be perceived as clearly gay, but as a person who inexcusably defies gender norms). For this reason, the RSD framework on LGBT individuals is incomplete without the inclusion of gender expression.

In *Fatin*, the authorities affirmed that "feminism qualifies as a political opinion as defined by the applicable statutes".⁵⁸⁵ That could be true for people that defy gender norms as well, whether they identify as queer or not. The Asylum Officer Basic Training Course of the USCIS explains: "[F]eminism is a political opinion that can be expressed by refusing to comply with societal norms that subject women to severely restrictive conditions".⁵⁸⁶ "[O]pposition to institutionalized discrimination of women, expressions of independence from male social and cultural dominance in society, and refusal to comply with traditional expectations of behavior associated with gender (such as dress codes and the role of women in the family and society) may all be expressions of political opinion"⁵⁸⁷ according to USCIS, which can open the door for gender nonconforming and queer applicants too.

The Yogyakarta Principles are in no way flawless. Some states are "hesitant to adopt the Principles in their entirety due to the extensive obligations they impose".⁵⁸⁸ Some of the rights asserted by this article of the Principles "have never been addressed by authoritative interpreters of international law", and thus lack binding authority.⁵⁸⁹ At minimum, immigration courts, judges, and asylum officers should find the Principles persuasive. The United States has already adopted, to a limited extent, a number of the rights asserted by the Principles, including Principle 23, which states:

⁵⁸³CTDC (Centre for Transnational Development and Collaboration), *Conceptualising Sexualities in the MENA Region: Undoing LGBTQI Categories Implications for Rights Based Advocacy Approaches* (2017) 12 <https://ctdc.org/content/conceptualising-sexualities-mena-region-undoing-lgbtqi-categories/> accessed 9 January 2023.

⁵⁸⁴ Gail Mason, *The Spectacle of Violence* (Routledge 2002); Leslie Moran and Alex Sharpe 'Violence, identity and policing: the case of violence against transgender people' (2004) 4 *Crim. Justice Int. J. Policy Prac.* 395, 403.

⁵⁸⁵ *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993).

⁵⁸⁶ USCIS Asylum Officer Basic Training Course: Female Asylum Applicants and Gender-Related Claims (Mar. 12, 2009) cited at Tahiri Justice Center, 'Gender-Based Asylum Law Training: Quick Reference to the Law' <https://asistahelp.org/wp-content/uploads/2019/04/Asylum-Law-Handout-Fourth-Circuit.pdf> accessed 9 January 2023.

⁵⁸⁷ *Idem*.

⁵⁸⁸ David Brown, 'Making room for sexual orientation and gender identity in international human rights law: An introduction to the Yogyakarta (2010) 31 (4) *Principles*. *Michigan Journal of International Law* 821.

⁵⁸⁹ *Idem*.

Everyone has the right to seek and receive asylum from persecutors in other countries, including those based on sexual orientation or gender identity. A state may not remove, expel, or extradite a person to a country where they face a well-founded fear of torture, persecution, or other cruel, inhuman, or degrading treatment or punishment due to their sexual orientation or gender identity.⁵⁹⁰

Although the United States recognizes the right to seek asylum, other rights have not been implemented in all areas of U.S. immigration and refugee law, particularly since the implementation of REAL ID. One argument for the adoption of all the Principles despite the obligations to ensure effective protection from sexual orientation and gender identity discrimination relates to the evaluation of whether a transgender asylum applicant fears future persecution. A judge must consider whether any of the Principles would be violated should the applicant be returned to his or her country of origin when determining the likelihood of future persecution. If the objective is to change the law, then the United States should recognize and adopt some of the Principles, if not all of them. The Principles could be "voluntarily adopted by states for use as policy, or even law, through legislation or the courts".⁵⁹¹ The Principles may be utilized to challenge oppressive legal standards, develop new government policy, seek a responsive government, educate the public, or build a movement. The United States should at a minimum adopt the principles outlined in this section to protect LGBT asylum seekers.⁵⁹²

10.2. THE RIGHT TO LEGAL RECOGNITION

According to the Principles, "[e]veryone has the right to recognition everywhere as a person before the law".⁵⁹³ Asylum seekers who identify as transgender "shall have full legal capacity in all aspects of life. Each [applicant's] self-defined sexual orientation and gender identity is integral to their personality and one of the most fundamental aspects of self-determination, dignity, and freedom. No one shall be forced to conceal, suppress, or deny their sexual orientation or gender identity."⁵⁹⁴ In addition, one can argue that the lack of legal gender affirmation in the country of origin constitutes a serious violation of fundamental human rights, that can amount to persecution due to discrimination to this group of individuals.

The Hernandez-Montiel case demonstrates the inability of the current asylum system to recognize transgender applicants as members of a distinct social group. In *Hernandez-Montiel v. Immigration and Naturalization Service*,⁵⁹⁵ the court acknowledged that a person's sexual identity is "irreversible" and "so fundamental to one's identity that a person should not be required to abandon it". In doing so, it became an important development in asylum law "because it defines [membership in a] "particular social group" in a way that encompasses individuals who are actually persecuted — even if they do not qualify for asylum under the statute's other enumerated categories".⁵⁹⁶ Concurrently, it defined a transgender applicant as a homosexual man with a female sexual identity. While the court in *Hernandez-Montiel* defined

⁵⁹⁰ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007.

⁵⁹¹ David Brown, 'Making room for sexual orientation and gender identity in international human rights law: An introduction to the Yogyakarta (2010) 31 (4) Principles. *Michigan Journal of International Law* 821.

⁵⁹² Michael Santos, 'In the Shadows: The Difficulties of Implementing Current Immigration Policies in Adjudicating Gender-Diverse Asylum Cases in Immigration Court' (LGBT Policy Journal, 14 November 2012) (<https://lgbtq.hkspublications.org/2012/11/14/in-the-shadows-the-difficulties-of-implementing-current-immigration-policies-in-adjudicating-gender-diverse-asylum-cases-in-immigration-courts/> accessed on 9 January 2023).

⁵⁹³ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007.

⁵⁹⁴ *Idem*.

⁵⁹⁵ *Hernandez-Montiel v. Immigration and Naturalization Service*, 225 F.3d 1084, 1087 (9th Cir. 2000).

⁵⁹⁶ Leonard Birdsong, 'To admit or deny?': "Give me your gays, your lesbians, and your victims of gender violence, yearning to breathe free of sexual persecution . . .": The new grounds for grants of asylum'(2008) 32 (2) *Nova Law Review* 357.

transsexualism in a footnote, it concluded that it "need not consider whether transsexuals constitute a particular social group in this case".⁵⁹⁷ This decision reflects the confusion and reluctance of the court to deconstruct the homosexual-heterosexual binary in regards to transsexuals and transgender individuals. Although transgender asylum seekers have been successful in some cases, there are no published decisions that recognize them as members of a particular social group.⁵⁹⁸ In addition, Birdsong⁵⁹⁹ contends that the majority of published cases result in denials of asylum, resulting in a system in which it is nearly impossible to discern the clear standards required to establish a successful asylum claim. As Hernandez-Montiel demonstrates, "[e]ach asylum claim seeks to demonstrate the permanency of the protected group and the individual's membership therein".⁶⁰⁰ Expanding the category of a particular social group "has been least effective where characteristics appear to be matters of choice without profound personal and societal significance".⁶⁰¹ And adhering to the UNHCR alternative "protected characteristics" or "social perception" test, without using them cumulatively with the particularity requirement, would be closer to human rights standards in refugee law. Self-identification as transgender is "universally recognized as inherent, rather than chosen", and thus deserves recognition as a separate category for a specific social group.⁶⁰² The precedent set by Hernandez-Montiel is problematic because it established a standard that fails to meet the needs of those who do not neatly fit within a particular protected ground and the US asylum adjudication system expects them to meet all precedent criteria.

In order to provide transgender individuals and transsexuals with protection under asylum law, asylum officers and immigration judges should be willing "to receive and rely on additional sources of information".⁶⁰³ These sources include, but are not limited to, the Yogyakarta Principles, the United Nations High Commissioner for Refugees (UNHCR) Guidelines on Refugee Claims Relating to Sexual Orientation and Gender Identity (which incorporates the Yogyakarta Principles),⁶⁰⁴ and non-Department of State country condition reports. Adopting the Yogyakarta Principles is preferable to adopting the UNHCR's Guidelines because the Principles require states to comply with additional obligations in order to successfully implement the rights asserted in each Principle. In addition, the Principles hold accountable those who violate these rights. The right to recognition before the law as one's gender is fundamental, since the law sees acknowledges only gendered subjectivities, and sex/gender is an identifier of a physical person's legal status. In my view the argument can be made that inability or unwillingness by the state to legally recognize one's gender has severe implications for their gender dysphoria, and administrative, judicial and civil repercussions that they may suffer and it constitutes persecution on the grounds of particular social group.

⁵⁹⁷ *Hernandez-Montiel v. Immigration and Naturalization Service*, 225 F.3d 1084, 1087 (9th Cir. 2000).

⁵⁹⁸ Victoria Neilson, and Aaron Morris, 'The gay bar: The effect of the one-year filing deadline on lesbian, gay, bisexual, transgender, and HIV-positive foreign nationals seeking asylum or withholding of removal' (2005) 8 *New York City Law Review* 233.

⁵⁹⁹ Leonard Birdsong, 'To admit or deny?: "Give me your gays, your lesbians, and your victims of gender violence, yearning to breathe free of sexual persecution . . .": The new grounds for grants of asylum' (2008) 32 (2) *Nova Law Review* 357.

⁶⁰⁰ *Hernandez-Montiel v. Immigration and Naturalization Service*, 225 F.3d 1084, 1087 (9th Cir. 2000).

⁶⁰¹ Sarah Hinger, 'Finding the fundamental: Shaping identity in gender and sexual orientation based asylum claims' (2010) 19 (2) *Columbia Journal of Gender of Law* 367.

⁶⁰² *In re Heilig*, 816 A.2d 68, 78 (Md. 2003).

⁶⁰³ Sarah Hinger, 'Finding the fundamental: Shaping identity in gender and sexual orientation-based asylum claims' (2010) 19 (2) *Columbia Journal of Gender of Law* 367.

⁶⁰⁴ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01.

10.3. THE RIGHT TO PRIVACY AND BODILY INTEGRITY

In addition to the right to legal recognition, transgender applicants have the right to privacy and the ability to declare their perceived sexual identity. Principle 6 of the Yogyakarta Declaration states that "the right to privacy generally includes decisions and choices regarding one's own body and consensual sexual and other relations with others".⁶⁰⁵ Although there are no provisions in the U.S. Constitution regarding the right to privacy and bodily integrity, the U.S. Supreme Court has placed constitutional protection on the right to privacy on multiple occasions.⁶⁰⁶ In the same way that consenting adults have the freedom to engage in private sexual acts, transgender asylum seekers should have the right to assert their perceived gender identity. In the context of asylum, the constitutional right to privacy has not found a way to assert itself. As a result of the current asylum system's inability to recognize transgender applicants as a distinct social group, many judges refer to applicants based on their biological sex and attribute a homosexual identity to such individuals. In *Hernandez-Montiel*, for instance, the court consistently used the male pronoun to refer to the applicant, who was manifestly a transgender woman.⁶⁰⁷ By referring to the applicant by his or her birth sex, the courts are compelling the applicant to adopt an identity that conflicts with his or her gender expression and perceived gender identity, which are central to the applicant's asylum claim. Herald and Greenberg⁶⁰⁸ argue that this "undermines [the applicant's] right to personal dignity and autonomy" and could have a negative impact on the applicant's credibility, given that some transgender applicants have a genuine fear of authority due to past persecution. The transgender community is diverse; many transgender people do not identify as homosexual. To legally classify a transgender person as "same sex sexual orientation with opposite sex sexual identities", as *Hernandez-Montiel* did, is a violation of the individual's right to privacy and bodily integrity.⁶⁰⁹ There is a wide range of sexual orientations within the transgender community, and some transgender individuals identify as heterosexual. At least two subsequent cases in the Ninth Circuit repeated the erroneous classification of transgender women as members of the social group of homosexual men with female sexual identities.⁶¹⁰ In both instances, the court used pronouns based on the birth sex of the applicants. The right to moral integrity can also encompass the fundamental right to trans health care, the denial of which can elevate to the level of persecution if it is discriminatory, for gender incongruence and dysphoria as it is stated in sexual health section of ICD-11.⁶¹¹ Gender-affirmative health care can include any single or combination of social, psychological, behavioral, or medical (including hormonal treatment or surgery) interventions designed to support and affirm a person's gender identity and reduce dysphoria, and must be regarded as a fundamental human right.

⁶⁰⁵ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007.

⁶⁰⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Roe v. Wade*, 410 U.S. 113 (1973).

⁶⁰⁷ *Hernandez-Montiel v. Immigration and Naturalization Service*, 225 F.3d 1084, 1087 (9th Cir. 2000).

⁶⁰⁸ Marybeth Herald and Julie A. Greenberg 'You can't take it with you: Constitutional consequences of interstate gender-identity rulings' (2005) 80 (4) *Washington Law Review* 819.

⁶⁰⁹ Victoria Neilson, and Aaron Morris, 'The gay bar: The effect of the one-year filing deadline on lesbian, gay, bisexual, transgender, and HIV-positive foreign nationals seeking asylum or withholding of removal' (2005) 8 *New York City Law Review* 233.

⁶¹⁰ *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006). *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004).

⁶¹¹ World Health Organization, 'International Statistical Classification of Diseases and Related Health Problems' (11th ed, ICD-11, 2019) <https://icd.who.int/en> accessed 9 January 2023.

10.4. OTHER ISSUES

REAL ID permits biases and stereotypes to have a greater impact on the decision to grant or deny asylum to an applicant. It invites such prejudice and fails to prevent it.⁶¹² The current asylum system necessitates better-trained immigration judges and asylum officers in order to reduce the likelihood that decisions based on these biases will be upheld on appeal. Immigration authorities should continue to utilize external agencies that are in a better position to advocate for the rights of LGBT applicants for training and education purposes.⁶¹³ They must comprehend the diversity of the LGBT community and the place of LGBT individuals, particularly transgender asylum seekers, within the current asylum system. The REAL ID Act's increased burden of proof requirement is difficult for many transgender asylum applicants. For instance, "lack of employment opportunities forces many transgender individuals to engage in sex work", making these individuals more susceptible to being profiled and arrested by police officials in countries where prostitution is illegal or where sex work is heavily criminalized.⁶¹⁴ Persecution of transgender women in Mexico is well documented.⁶¹⁵ To conclude that country conditions have improved for transgender people because homosexuality is becoming more socially acceptable is to deny these people their self-identity and to permit prejudice to negatively impact their asylum claims. In *Kimumwe v. Gonzales*, the Eighth Circuit upheld the immigration judge's and BIA's conclusion that the gay applicant's problems with Zimbabwean authorities "were not solely based on his sexual orientation, but rather resulted from his engaging in prohibited sexual conduct".⁶¹⁶ Even though this case does not involve a transgender applicant, it presents "similar issues and challenges that a transgender applicant would face under a court's scrutiny and analysis".⁶¹⁷ Sexual minorities are subject to "harassment, detention, extortion, and bribery" as a result of the ambiguity of laws against disturbing public order.⁶¹⁸ Some sexual minorities are subjected to harassment under the guise of these laws against disruption of public order. Once detained (either in the U.S. or the country of origin), LGBT detainees are more susceptible to abuse.⁶¹⁹ The use of vague laws to persecute sexual minorities is problematic because it requires courts to differentiate between persecution based on the applicant's sexual orientation and/or gender identity and persecution based on the applicant's behavior.⁶²⁰

The courts are gradually recognizing that transgender people are a protected minority, but these individuals remain largely invisible. "If one is not recognized by the law as existing, one is not protected by the law".⁶²¹ REAL ID created "significant obstacles by inviting bias, improper inferences, illogical evidence

⁶¹² Melanie Conroy, 'Real bias: How REAL ID's credibility and corroboration requirements impair sexual minority asylum applicants' (2009) 24 (1) *Berkeley Journal of Gender Law & Justice* 1.

⁶¹³ Michael Santos, 'In the Shadows: The Difficulties of Implementing Current Immigration Policies in Adjudicating Gender-Diverse Asylum Cases in Immigration Court' (LGBT Policy Journal, 14 November 2012) (<https://lgbtq.hkspublications.org/2012/11/14/in-the-shadows-the-difficulties-of-implementing-current-immigration-policies-in-adjudicating-gender-diverse-asylum-cases-in-immigration-courts/> accessed on 9 January 2023).

⁶¹⁴ Felix Gardon, 'The Real ID Act's implications for transgender rights' (2009) 30 *Women's Rights Law Reporter* 352.

⁶¹⁵ Annick Prieur, *Mema's house, Mexico City: On transvestites, queens, and machos* (Chicago University Press 1998).

⁶¹⁶ *Kimumwe v. Gonzales*, 431 F.3d 319, 321 (8th Cir. 2005).

⁶¹⁷ Ellen Jenkins, 'Taking the square peg out of the round hole: Addressing the misclassification of transgendered asylum seekers' (2009) 40 (1) *Golden Gate University Law Review* 67.

⁶¹⁸ Annick Prieur, *Mema's house, Mexico City: On transvestites, queens, and machos* (Chicago University Press 1998).

⁶¹⁹ CT Turney, 'Give me your tired, your poor, and your queer: The need and potential for advocacy for LGBTQ immigrant detainees' (2011). 58 *UCLA Law Review* 1343.

⁶²⁰ Michael Santos, 'In the Shadows: The Difficulties of Implementing Current Immigration Policies in Adjudicating Gender-Diverse Asylum Cases in Immigration Court' (LGBT Policy Journal, 14 November 2012) (<https://lgbtq.hkspublications.org/2012/11/14/in-the-shadows-the-difficulties-of-implementing-current-immigration-policies-in-adjudicating-gender-diverse-asylum-cases-in-immigration-courts/> accessed on 9 January 2023).

⁶²¹ Dylan Wade, 'Expanding gender and expanding the law: Toward a social and legal conceptualization of gender that is more inclusive of transgender people' (2005) 11 (2) *Michigan Journal of Gender and Law* 253.

evaluations, and unrealistic expectations for corroboration".⁶²² REAL ID creates barriers for a population that is already vulnerable, while ignoring other likely immigration routes available to potential terrorists.⁶²³ Particularly in the areas of sexual orientation and gender identity, the current American asylum system does not accommodate expressions of variation. It does not recognize transgender people as a distinct social group, independent of their self-identified sexual orientation, and it fails to provide transgender asylum seekers with a fair trial.⁶²⁴ One of the ultimate challenges in implementing the Yogyakarta Principles in post-REAL ID asylum law is that "securing protection in an individual case sometimes creates precedents that make it harder to succeed in future asylum claims and that limit conceptions of gender and sexual orientation within the broader human rights movement".⁶²⁵ This is due to the fact that the majority of published cases involve asylum denials. Instead of establishing case precedents that only address what constitutes an improper asylum claim, the BIA should publish cases or other guidance that illustrate what a successful asylum claim would entail. The question of how an adjudicator would decide a transgender asylum case based solely on the individual's transgender identity remains unanswered due to a lack of precedent. Adopting the Yogyakarta Principles would expand protections under U.S. asylum law and permit cases to be decided in a fair and inclusive manner. To address this issue, the current asylum system should also compile statistical data regarding transgender asylum cases.⁶²⁶ Without the ability to disaggregate statistics, it would be difficult to know exactly how REAL ID has affected the outcomes of transgender asylum applications. In light of the growing presence and discussion of LGBT issues, the United States must recognize and address the numerous challenges posed by its current immigration policies in adjudicating gender-diverse asylum cases.⁶²⁷

FUTURE RECOMMENDATIONS

It would be a good direction that the executive and administrative branch adopt the above recommendations in immigration decisions and policies with specific regard to the Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, that refers to all persons in the jurisdiction including asylum claimants and *Boston v Clayton*, that informs also discrimination that amounts to persecution:

"Section 1. Policy. Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports. Adults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to sex-based stereotypes. People should be able to access healthcare and secure a roof over their heads without being subjected to sex

⁶²² Michael Santos, 'In the Shadows: The Difficulties of Implementing Current Immigration Policies in Adjudicating Gender-Diverse Asylum Cases in Immigration Court' (LGBT Policy Journal, 14 November 2012) (<https://lgbtq.hkspublications.org/2012/11/14/in-the-shadows-the-difficulties-of-implementing-current-immigration-policies-in-adjudicating-gender-diverse-asylum-cases-in-immigration-courts/> accessed on 9 January 2023).

⁶²³ Marisa Silenzi Cianciarulo 'Terrorism and asylum seekers: Why the REAL ID Act is a false promise' (2006) 43 (1) Harvard Journal on Legislation 100.

⁶²⁴ *Idem*.

⁶²⁵ Sarah Hinger, 'Finding the fundamental: Shaping identity in gender and sexual orientation based asylum claims' (2010) 19 (2) Columbia Journal of Gender of Law 367.

⁶²⁶ Deborah Morgan, 'Not gay enough for the government: Racial and sexual stereotypes in sexual orientation asylum cases' (2006) 15 Law and Sexuality 135.

⁶²⁷ Dylan Vade, 'Expanding gender and expanding the law: Toward a social and legal conceptualization of gender that is more inclusive of transgender people' (2005) 11 (2) Michigan Journal of Gender and Law 253.

discrimination. All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation".⁶²⁸

This is reflected in the Constitution, which guarantees equal protection under the law. These principles are also codified in our nation's anti-discrimination statutes, including Title VII of the Civil Rights Act of 1964, as amended.⁶²⁹ In *Bostock v. Clayton County*,⁶³⁰ 590 U.S. Title IX of the Education Amendments of 1972, as amended.⁶³¹ the Fair Housing Act, as amended,⁶³² and section 412 of the Immigration and Nationality Act, as amended,⁶³³ as well as their respective implementing regulations, prohibit discrimination on the basis of gender identity or sexual orientation, so long as they do not contain sufficient exceptions.⁶³⁴

"Sec. 2. Enforcing Prohibitions on Sex Discrimination on the Basis of Gender Identity or Sexual Orientation. (a) The head of each agency shall, as soon as practicable and in consultation with the Attorney General, as appropriate, review all existing orders, regulations, guidance documents, policies, programs, or other agency actions ("agency actions") that:⁶³⁵

(i) were promulgated or are administered by the agency under Title VII or any other statute or regulation that prohibits sex discrimination, including any that relate to the agency's own compliance with such statutes or regulations; and

(ii) are or may be inconsistent with the policy set forth in section 1 of this order".⁶³⁶

Finally, GLAD has filed a discrimination complaint with the Massachusetts Commission Against Discrimination and the Equal Employment Opportunity Commission on behalf of Alexander Pangborn, a hospice care nurse and Ascend employee who was denied coverage for medically necessary healthcare due to his transgender status under Title VII.⁶³⁷ The decision should also inform the severity of violation for denial of trans health care for all people, including people that are being denied affirming health care in their country of origin in a discriminatory manner.

⁶²⁸ White House, 'Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation' (Briefing Room, 20 January 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/> accessed 9 January 2023.

⁶²⁹ 42 U.S.C. 2000e et seq.

⁶³⁰ *Bostock v. Clayton County*, No. 17-1618, 590 US (2020).

⁶³¹ 20 U.S.C. 1681 et seq.

⁶³² 42 U.S.C. 3601 et seq.

⁶³³ 8 U.S.C. 1522.

⁶³⁴ White House, 'Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation' (Briefing Room, 20 January 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/> accessed 9 January 2023.

⁶³⁵ *Idem*.

⁶³⁶ *Idem*.

⁶³⁷ *Pangborn v. Ascend*, pending.