

In or out? A queer intersectional approach to ‘Particular Social Group’ membership and credibility in SOGI asylum claims in Germany and the UK¹

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Abstract

Individuals claiming asylum on the basis of sexual orientation or gender identity (SOGI) in Europe must prove to the authorities in question that they are ‘credible’ and meet the Refugee Convention criteria. In most cases, they do this by demonstrating that they belong to a Particular Social Group (PSG). However, for some time advocates and researchers have argued that SOGI claimants are treated both unfairly and inconsistently. In this article we use queer and intersectional theories to argue that one explanation for this is how PSG membership has come to be interpreted. Looking at recent experience in two EU countries – Germany and the UK – we argue that this is done in a way that is both prescriptive, in requiring claimants to conform to liminal understandings of sexual and gender identity, but also narrow and one-dimensional, in ignoring other aspects of the claimant’s identity and assuming that SOGI asylum seekers are only sexual or gendered beings.

1. Introduction

There are 72 countries in the world that criminalise same-sex sexual activities.² In addition, there are other countries that might not criminalise such activities, but where nevertheless LGBTQI+ people are persecuted (and prosecuted). When these individuals flee their country of origin and ask for asylum in Europe³, they must prove that they have a well-founded fear of being persecuted because of one of the five grounds of the Refugee Convention⁴, and in most cases the ground used in LGBTQI+ cases is membership of a Particular Social Group (PSG). However, advocates and researchers have shown that people claiming asylum in Europe on grounds of sexual orientation or gender identity (SOGI) face particular challenges when making their claims: often their claim to fear persecution is challenged by decision-makers, and it is suggested they internally relocate and live discreetly. At other times, claimants fail because their credibility – especially their membership of a PSG – is questioned.⁵

¹ This article has been produced within the context of the project ‘Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge –SOGICA’ (www.sogica.org). This project has received funding from the European Research Council (ERC) under the European Union’s Horizon 2020 research and innovation programme (grant agreement No 677693). Approval from the University of Sussex’ Ethics Committee has been obtained in the project’s first year (certificate of approval for Ethical Review ER/NH285/1).

² Carroll, A. and Ramón Mendos, L. (2017) *State-Sponsored Homophobia – A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*. 12th Edition. ILGA – the International Lesbian, Gay, Bisexual, Trans and Intersex Association.

³ We focus our analysis of SOGI claims on the EU, especially two of its member states as SOGICA explores the social and legal experiences of asylum seekers across Europe claiming international protection on the basis of their sexual orientation or gender identity.

⁴ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Art 1(A) (2).

⁵ ‘The credibility assessment involves a determination of whether and which of the applicants statements and other evidence can be accepted, and therefore may be taken into account in the analysis of well-founded fear of persecution and real risk of serious harm.’ UNHCR, ‘Beyond Proof. Credibility Assessment in EU Asylum Systems’ (2013) 13 <<http://www.unhcr.org/uk/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html#>> accessed 9 June 2018.

The crux here, as we will demonstrate, is that establishing credibility on the basis of PSG membership can be – and often is – unfairly difficult for SOGI claimants. Their legal and social experiences (including experiences of persecution) are not only shaped by sexual orientation and gender identity but also by their intersections with sex, ‘race’, social class, religion, and other social identifiers; however these intersections are often not considered by decision-makers.⁶

This affects the fulfilment of the PSG requirement in ways that impact on the individual’s credibility. The one-dimensional approach to SOGI asylum mitigates against a full understanding of LGBTQI+ asylum-seekers’ experiences and therefore against fair treatment of these claims. In the context of asylum, a fair claims process is one in which decisions are consistent, transparent and based on a thorough examination.⁷ However, if decision-makers do not hear and recognise the totality of an individual’s experience, they will be unable to make a thorough assessment of the circumstances of each case and give a reasoned decision in the case of refusal. As Millbank argues, credibility issues have a particular impact on SOGI claims:

Unlike disbelief of other aspects of a claimant's narrative (such as past persecution, where future fear of persecution may still be made out), disbelief regarding actual group membership will almost always doom the claim to failure.⁸

In addition, as we will show, there is an inherent tension between, on the one hand, refugee law and decision-making – which is about establishing facts and definitive accounts – and on the other hand, sexual and gender identities, which are fluid both over time and at any one moment.⁹

In response to these issues, in this article, we argue that an intersectional queer approach can help improve fairness in decision-making processes on SOGI claims. Whilst there is now a large body of published literature on intersectionality, only a few studies explicitly link intersectionality and asylum,¹⁰ and use the concept of intersectionality to understand the experiences of LGBTQI+ asylum seekers and refugees.¹¹ We contribute to this small, but

⁶ Nina Held, ‘What Does a “Genuine Lesbian” Look like? Intersections of Sexuality and “Race” in Manchester’s Gay Village and in the UK Asylum System’ in Francesca Stella and others (eds), *Sexuality, citizenship and belonging: trans-national and intersectional perspectives* (Routledge 2016) <<http://sro.sussex.ac.uk/63789/>> accessed 10 November 2016; Nina Held, ‘“They Look at You like an Insect That Wants to Be Squashed”: An Ethnographic Account of the Racialized Sexual Spaces of Manchester’s Gay Village’ (2017) 20 *Sexualities* 535.

⁷ Other elements include equal access to non-discriminatory procedures, access to legal advice, and the right to appeal (see UNHCR, ‘Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12’ 11–13.)

⁸ Jenni Millbank, ‘The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations’ (2009) 21 *International Journal of Refugee Law* 1, 4.

⁹ Berg, Laurie, and Jenni Millbank, ‘Developing a Jurisprudence of Transgender Particular Social Group’, 2013 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312887> accessed 2 February 2017, 122.

¹⁰ H Baillot, S Cowan and VE Munro, ‘“Hearing the Right Gaps”: Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process’ (2012) 21 *Social & Legal Studies* 269; G Firth and B Mauthe, ‘Refugee Law, Gender and the Concept of Personhood’ (2013) 25 *International Journal of Refugee Law* 470.

¹¹ Susan A Berger, ‘Production and Reproduction of Gender and Sexuality in Legal Discourses of Asylum in the United States’ (2009) 34 *Signs: Journal of Women in Culture and Society* 659; Steven Epstein and Héctor Carrillo, ‘Immigrant Sexual Citizenship: Intersectional Templates among Mexican Gay Immigrants to the United States’ (2014) 18 *Citizenship Studies* 259; Rachel A Lewis, ‘“Gay? Prove It”: The Politics of Queer Anti-Deportation Activism’ (2014) 17 *Sexualities* 958; Nora Markard, ‘Persecution for Reasons of Membership of a Particular Social Group: Intersectionality Avant La Lettre?’ [2016] *Sociologia del diritto* 45, 59; Deborah A

growing, literature by identifying the ways in which an intersectional and queer theoretical approach can help to interrogate law's evidentiary requirements for sexual orientation and gender identity for the purposes of PSG membership, in a contribution that shows the benefits of uniting refugee studies with queer theory and intersectionality.

We will demonstrate these benefits by applying the lenses of queer theory and intersectionality to recent SOGI asylum cases in Germany and the UK. By juxtaposing policy and law in two EU member states with some shared features as well as a number of differences, we suggest that, regardless of their specificities, in both countries LGBTQI+ asylum seekers are often required to conform to a flawed and outdated understanding of human sexuality and gender identity. Here, we focus on two particular subsets of cases: cases where claimants had children with opposite-sex partners and may identify or may be perceived as bisexual (or not), and cases where religion played a role in the decision-making on SOGI. We have chosen these cases as they demonstrate particularly well the effects of one-dimensional decision-making. As 'bisexual' cases reveal, sexual identity needs to be presented as something 'intrinsic' and 'fixed' for a claim to be accepted under the PSG requirement. In the case of Muslim gay men, for instance, as we will show, religion and sexuality are treated as separate entities, without recognition of how they interact to shape identity and the ways in which the person experiences persecution.

Before proceeding, we draw attention to the scope of this contribution and our choice of terminology. The acronym LGBTQI+ or variations of it are used in a broad and inclusive sense by self-identifying individuals and their advocates, but they can also be used to falsely homogenise people and experiences that are very different and disguise the lack of visibility of some groups of individuals within the larger group. This is certainly a phenomenon in the field of asylum. For instance, despite the broad use of acronyms such as SOGI and LGBTQI+ in Europe, there is little information about transgender people claiming asylum and their experiences in the UK and Germany – and none to be found about intersex-based claims or the experiences of intersex people claiming asylum.¹² Whilst we seek to address and destabilise the broader categorisation of asylum seekers claiming on the basis of sexual orientation *and* gender identity, in this article our focus is on people who identify – and are identified by the asylum system – as lesbian, gay and bisexual, hence we move between SOGI, LGB and LGBTQI+ terminology depending on the specificity or breadth of the particular cases or situation under discussion.

Morgan, 'Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases' (2006) 15 *Law & Sexuality: A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues* 135.

¹² The All Party Parliamentary Group (APPG) Global LGBT Rights report, for example, stated that '[w]hile many of the issues facing intersex people intersect with the concerns addressed in this inquiry, we felt that due to their distinctiveness they require an approach that is beyond the scope of the group. We however remain open to investigating the issues facing intersex people in the future.' All Party Parliamentary Group on Global LGBT Rights, 'The UK's Stance on International Breaches of LGBT Rights' (APPG on Global LGBT Rights, 2016) 13. The UK Lesbian and Gay Immigration Group (UKLGIG) has stated that they receive few requests for support from transgender claimants and suspect these individuals are unaware that gender identity can be the basis for an asylum claim, UK Lesbian and Gay Immigration Group (UKLGIG), *Missing the Mark. Decision Making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims* (UKLGIG, 2013), p7. The NGO Transgender Europe (TGEU) has stated that trans asylum claims are often mistakenly treated as sexual orientation-based claims because of lack of knowledge on the part of the interviewer or incredulity if the claimant has not had hormonal treatment or surgery, TGEU, *Trans Asylum Brochure* (TGEU, 2016) <http://tgeu.org/wp-content/uploads/2016/10/TGEU_TransAsylumBrochure_WEB.pdf > accessed 23 July 2017, 6.

Before outlining our theoretical framework and applying it to German and UK case law, we first provide an overview of our methodology.

2. Methodology and the case studies

This article draws on interviews and tribunal observations in the UK and Germany, carried out as part of the project *SOGICA* – ‘Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – (www.sogica.org). Focusing on Germany, the UK and Italy as case studies, the project explores the social and legal experiences of asylum seekers across Europe claiming international protection on the basis of their sexual orientation or gender identity (SOGI). The authors of this article are responsible for the German and the UK study respectively.

These two countries are similar and different in various respects concerning their legal system and how they treat SOGI claims. One of the major differences is that Germany’s legal system falls within the civil law model. In contrast to the UK’s common law and adversarial justice system, where the evidence gathering burden is shared between decision-maker and asylum-seeker but ultimately lies on the claimant, Germany adopts an inquisitorial system, i.e. the decision-maker takes the lead in gathering evidence. Because of the inquisitorial nature, judges are also actively involved in investigating the facts of the case (which can be highly intimidating for the claimant) rather than playing a role more like that of a referee during the hearing, as it is the case in adversarial systems. Thus, German courts are required to gain relevant evidence of their own initiative and are not bound by previous decisions.¹³ In contrast, in the UK, what are known as country guidance cases are particularly significant in influencing decisions in subsequent cases in a way that can be problematic. For example, the country guidance case *OO Algeria* in 2016 ruled that ‘Where a gay man has to flee his family home to avoid persecution from family members, in his place of relocation he will attract no real risk of persecution because, generally, he will not live openly as a gay man’, establishing a presumption that gay men in Algeria will not generally live openly that can be used in subsequent judgements.¹⁴

In terms of LGBTQI+ claims, both countries recognise claims on grounds of SOGI under the PSG requirement of the Refugee Convention. However, whilst in the UK this has been the case since 1999¹⁵, in Germany it has only been so since 2005, when Article 10 (paragraph 1) of the EU Qualification Directive 2004/83/EC¹⁶ was transposed into German law through the Residence Act,¹⁷ recognising claims of persecution on grounds of SOGI.

¹³ *SOGICA* aims to explore whether the nature of law systems as inquisitorial or adversarial makes a difference to SOGI claims. The differences between the legal system in Germany and the UK might also impact on the implementation of gender guidelines for instance. In the UK, the judiciary has more agency because of the precedent case system whilst in Germany the courts should only interpret the German codification system. This might make it more possible for ‘norm advocates’ to influence the judiciary in the UK than this is the case in Germany, see N. Markard, "Review. Reviewed Work(s): Internationale Normen und das Rechtssystem: Der Umgang mit geschlechtsspezifisch Verfolgten in Großbritannien und Deutschland by Heike Brabandt." In: *Kritische Justiz* 44/4, pp. 471-473, 2011.

¹⁴ *OO (Gay Men) Algeria CG* [2016] UKUT 00065 (IAC) para 5.

¹⁵ *Shah and Islam, Islam (A.P.) v. Secretary of State for the Home Department*; *R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*.

¹⁶ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004, p. 12–23. In the meantime replaced with the recast Directive 2011/95/EU of the European Parliament and of the Council of 13 December, 2011 on standards

When assessing membership of a PSG, both Germany¹⁸ and the UK¹⁹ follow the cumulative approach that has been suggested by the EU Qualification Directive.²⁰ This means that individuals need to demonstrate *both* that they share an innate or fundamental characteristic or common background, *and* that they are perceived as having a distinct identity as a group. This approach has been widely criticised²¹, and the UNHCR, for instance, suggests an alternative approach be used instead.²² As the International Commission of Jurists (ICJ) points out, the tangible impact for individual claimants of a cumulative two-limb test in that ‘while certain applicants’ claims satisfied the protected characteristics limb, they did not meet the social perception limb, either because the group of LGBTI persons are not visible within a given society or because the individuals themselves are not ‘out’ enough to be perceived as part of that group by society’.²³

Furthermore, we argue that the cumulative requirement to be LGB *and* be perceived as LGB corresponds with a reductive understanding of sexuality that focuses on fixed and distinct social identities emphasising innate and immutable characteristics. Furthermore, judgements based on the Convention’s PSG ground often focus on sexuality (or gender or gender identity) as the single identifier of an individual and leave out other Convention grounds, but

for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, p. 9–26.

¹⁷ http://www.gesetze-im-internet.de/englisch_aufenthg/index.html

¹⁸ § 3 (1) of the Asylum Act (Asylgesetz – AsylG) defines PSG according to the Qualification Directive; English version of the Asylum Act available at: https://www.gesetze-im-internet.de/englisch_asylvfg/index.html (access date 10 May 2018).

¹⁹ See for instance guidance for caseworkers Bangladesh, ‘Country policy and information note: sexual orientation and gender identity, Bangladesh’, November 2017, Home Office, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/660538/Bangladesh_-_SOGI_-_CPIN_-_v3.0_Nov_2017_.pdf accessed 17 March 2018.

²⁰ ‘a group shall be considered to form a particular social group where in particular:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.’

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

²¹ Including Lord Bingham in the House of Lords: ‘If, however, this article were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of subparagraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority. In its published Comments on this Directive (January 2005) the UNHCR adheres to its view that the criteria in sub-paragraphs (i) and (ii) should be treated as alternatives, providing for recognition of a particular social group where either criterion is met and not requiring that both be met.’ (Fornah v. Secretary of State for the Home Department (linked with Secretary of State for the Home Department v. K) [2006] UKHL 46, p.9, para 16.)

²² 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’, para 11.

²³ ICJ - International Commission of Jurists, ‘Refugee Status Claims Based on Sexual Orientation and Gender Identity: A Practitioners’ Guide (Practitioners’ Guide No. 11)’ (2016) 201 <<https://www.icj.org/wp-content/uploads/2016/10/Universal-PG-11-Asylum-Claims-SOGI-Publications-Practitioners-Guide-Series-2016-ENG.pdf>> accessed 6 April 2017.

this does not have to be the approach. As Markard argues, the PSG category could have the flexibility to accommodate intersectionality in a way other categories do not:

unlike the other Convention grounds – race, religion, nationality, political opinion – the particular social group category can be defined as widely or narrowly as necessary. This makes it uniquely suited to accommodating intersectional scenarios without running into the difficulties known from anti-discrimination law proper.²⁴

As we will show in the cases discussed below, there is little operationalisation of intersectionality on the basis that Markard advocates. Similarly, the potential contribution of queer theory to asylum decision-making has not been used, with success more likely for those claimants who conform and are able to conform to European asylum adjudicators' expectations of sexuality.

A note on our choice of cases: at the time of writing this article, *SOGICA* is its second year and we are conducting the fieldwork in three countries, in each of which we are holding 40 semi-structured interviews with LGBTQI+ refugees, with lawyers, politicians, activists, decision-makers and people working in NGOs; conducting four focus-groups with LGBTQI+ refugees, and observing 10 court hearings of SOGI cases. Two recent court observations made us aware that the need for an intersectional queer approach becomes particularly relevant in 'bisexual' cases and cases where claimants come from an Islamic country. Hence, after we conducted these two observations, we searched asylum databases²⁵ for similar cases that also contained the keyword 'particular social group', which we discuss in this article. In addition, we draw on some of the interviews already conducted. However, as we have not yet carried out our data analysis, these findings remain preliminary.

3. An intersectional queer theoretical approach to SOGI asylum

For almost 30 years, intersectionality has been used as a powerful tool in the Social Sciences and other disciplines to analyse the relationships between different forms of power and oppression. In legal studies, intersectionality has been used as a lens for dissecting anti-discrimination law²⁶ and human rights.²⁷ In fact, US legal scholar and civil rights activist Kimberlé Crenshaw, who coined the concept, developed it specifically with regard to anti-discrimination legislation. She demonstrated how discrimination against black women is not adequately covered in anti-discrimination law that separates gender discrimination and race discrimination. As she argued: 'Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.'²⁸ As Schiek demonstrates with recent European Court of Justice (ECJ) cases where intersectional discrimination was not recognised, this is generally the case in US and European courts.

²⁴ Markard (n 11) 51.

²⁵ Such as www.asyl.net for the German cases.

²⁶ Dagmar Schiek, 'On uses, mis-uses and non-uses of intersectionality before the European Court of Justice (ECJ): The ECJ rulings Parris (C-433/15), Achbita (C-157/15) and Bougnaoui (C-188/15) as a Bermuda Triangle?', *European (Legal) Studies on-line papers*, Volume 7 (2018) Issue 3, 1-25.

²⁷ Sheill, K. (2009): 'Losing out in the intersections: lesbians, human rights, law and activism', *Contemporary Politics*, Vol. 15 (1): 1 55–71.

²⁸ Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139, 140.

However, she argues that ‘current EU law can be interpreted as encompassing intersectionality’.²⁹ As we will show, intersectionality can also be applied to the ways in which the Refugee Convention is used. Judgments based on the Convention PSG ground often focus on *either* sexuality *or* gender and leave out other Convention grounds, or do not consider the intersections between them. This is problematic because it fails to fully recognise the identity and related experiences of the individual and therefore fails to give the claimant a full and fair opportunity to make their case.

While, in this article, we contribute to the increasingly diverse application of the concept of intersectionality by using it as a tool for analysing SOGI-based asylum case law, the widespread use and appropriation of the concept needs to be looked at critically. As Salem argues, the intersectionality’s critical roots have been erased by its journey from Black feminism into mainstream academia. In this article, we try to resist the co-option and depoliticisation of the concept by liberal feminism via the neoliberal academy. We do this by focusing on power relations when we look at the experiences of LGBTQI+ refugees rather than framing intersectionality around diversity.³⁰

Our second underpinning body of work, queer theory, emerged as a body of literature in diverse fields of studies in the early 1990s. Feminist theories, and lesbian and gay studies have been crucial in its development. Queer theory argues that sexuality is not inherent or natural, but is instead a product of social, cultural and historical processes. Furthermore, it is regulated, and discursively and performatively produced through the interrelation between knowledge and power.³¹ Sexuality is institutionalised: ‘in the everyday political terrain, contests over sexuality and its regulation are generally linked to views of social institutions and norms of the most basic sort.’³² This can be clearly seen in the asylum process, as we discuss below. Most importantly, all varieties of queer theoretical approaches share a common critique of fixed identity categories. They give us an understanding of sexual identity as fluid and liable to change during the course of a lifetime.³³ Offering unique analyses of the interconnections of gender and sexuality, Queer theorists have challenged the idea that both categories are based on a fixed binarism and are ‘naturally’ linked. Queer theory challenges the use of fixed identity categories and the idea that sexuality is based on the binarism of homosexuality/heterosexuality. They aim to destabilise this binary through the decoupling of the triad of sex, gender and sexual desire, and by conceptualising sexuality as always a work in process and constantly in the making.³⁴

At the heart of this diverse body of writing is the concept of performativity, most prominently developed by Judith Butler and at its simplest ‘understood not as a singular or deliberate “act,” but, rather, as the reiterative and citational practice by which discourse produces the

²⁹ Schiek (n29), 10.

³⁰ Sara Salem, ‘Intersectionality and its discontents: Intersectionality as traveling theory’, *European Journal of Women’s Studies*, first published April 22, 2016, available at: <https://doi.org/10.1177/1350506816643999>, access date 29/08/2018.

³¹ Judith Butler, *Gender Trouble* (Routledge 1990); Annamarie Jagose, *Queer Theory: An Introduction* (NEW YORK University Press 1996); Eve Kosofsky Sedgwick, *Epistemology of the Closet* (2Rev Ed edition, University of California Press 2008); Michael Warner, *Fear of a Queer Planet: Queer Politics and Social Theory* (U of Minnesota Press 1993).

³² Warner, 1993, (n33) p. xiii.

³³ Annamarie Jagose, *Queer Theory: An Introduction* (NEW YORK University Press 1996; Seidman, Steven (1993): “Identity and Politics in a “Postmodern” Gay Culture: some historical and conceptual notes”, in Warner (n33) 105-142.

³⁴ See for example Butler (n 33); Jagose (n 33); Sedgwick (n 33); Warner (n 33).

effects that it names'.³⁵ Butler argues that there is a link between gender and (hetero)sexuality in the ways in which 'under conditions of normative heterosexuality, policing gender is sometimes used as a way of securing heterosexuality.'³⁶ The 'natural order' of heterosexuality is maintained through a fixed binary system of sex and gender, and this binarism is necessary for compulsory heterosexuality. We see assumptions of a 'natural' heterosexual order in which LGB people claiming asylum must conform to the narrative of gayness as exotic and 'other' in some of the cases we identify below.

Focusing on gender and sexuality as the main categories of analysis, queer theoretical approaches have been criticised for not thoroughly taking multiple forms of oppression into account³⁷ and for often merely adding 'race' to analyses of sexuality, rather than fully exploring the 'raciality' of queerness.³⁸ In recent years, black and Asian queer theorists have challenged the white male and Western focus of queer theory.³⁹ In addition, scholars have pointed to the silencing of discussion about the intersections with other categories in queer theoretical approaches, such as class, disability and trans identities.⁴⁰ All of this is directly relevant to the experiences of LGB asylum seekers as we go on to explain.

Intersectional and queer theories and their analysis of the co-constitution of gender and sexuality could be productively used in SOGI asylum cases, informing decisions that are fairer because they speak to a more holistic understanding of the claimant's identity. As Markard argues with regard to application of the Refugee Convention, 'courts do not always make use of the full potential of an intersectional analysis'⁴¹ but as she further explains:

Gender doesn't simply differentiate between "men" and "women", to the exclusion of inter* bodies and certain trans* and inter* identities. It is also fundamentally heteronormative, predetermining the acceptable sexual preference and the specific way in which to "do gender". [...] An intersectional approach can make these dimensions visible in a more differentiated manner.⁴²

Judgements based on the PSG ground often focus on sexuality or gender, neglecting other Convention grounds, or the intersections with other grounds, as we show in our analysis of recent cases below. Moreover, the way that sexuality and gender are conceptualised in

³⁵ Judith Butler, *Bodies That Matter: On the Discursive Limits of Sex* (Routledge 2011), xii.

³⁶ Butler (n 33) xii.

³⁷ Erel, Umut/ Haritaworn, Jin/ Rodriguez, Encarnacion Gutierrez/ Klesse, Christian (2008): "On the Depoliticisation of Intersectionality Talk: Conceptualising Multiple Oppressions in Critical Sexuality Studies", in Kuntsman/ Miyake (eds.) *Out of Place: Interrogating Silences in Queerness/ Raciality*. York: Raw Nerve Books, 265-292, 265.

³⁸ Kuntsman, Adi/ Miyake, Esperanza (2008): "Introduction", in Kuntsman, Adi/ Miyake (eds.) (n39) 5-9.

³⁹ See, for instance, Eng, David L./ Halberstam, Judith/ Munoz, Jose Esteban (2005): "Introduction: What's Queer about Queer Studies now?", *Social Text* 84-85, 23 (3-4), 1-17; Ferguson, Roderick A. (2004): *Aberrations in Black: toward a queer of color critique*. Minneapolis/ London: University of Minnesota Press; Gopinath, Gayatri (2005): *Impossible Desires: Queer Diasporas and South Asian Public Cultures*. Durham and London: Duke University Press; Johnson, Patrick E./Henderson, Moe G. (eds.) (2005): *Black Queer Studies: A Critical Anthology*. Durham & London: Duke University Press; Puar, Jasbir K. (2007): *Terrorist Assemblages: homonationalism in queer times*. Durham and London: Duke University Press 2007; Sandeep Bakshi, Suhraiya Jivrai, Silvia Posocco (eds.). *Decolonializing Sexualities: Transnational Perspectives*, Critical Interventions. Oxford, 2016, Counterpress.

⁴⁰ Taylor, Y./ Hines, S./ Casey, M. (eds.) (2010): *Theorizing Intersectionality and Sexuality*. Palgrave Macmillan UK.

⁴¹ Markard (n 11) 59.

⁴² *ibid* 56.

classifying SOGI claimants as members of a PSG is problematic for at least two reasons: firstly, all too often the way SOGI claimants live out and experience their sexuality or gender identity is measured against white, Western notions of sexual identity;⁴³ secondly, other social categories that contribute to individual identity and experiences of persecution are not recognised to the degree that an LGB person claiming asylum is no more than the sum of their SOGI characteristics. As Morgan argues, such a racialised Western model of sexuality that is representing a stereotypical white male middle-class gay identity ‘presumes clarity of boundaries between heterosexual and homosexual identity and requires public expression of private and sexual behaviour’.⁴⁴ In order to successfully demonstrate membership to a PSG, claimants need to conform to these Western stereotypes and a particular ‘gay lifestyle’, which then forms part of the evidence that is expected for all SOGI claims (such as visiting gay bars, participating in lesbian and gay groups and at Gay Prides).⁴⁵

However, research suggests these Western stereotypes are too culturally specific to capture the ways in which individuals making SOGI asylum claims understand and express their sexual orientation and gender identity.⁴⁶ Rather, individuals might ‘negotiate their sexual and gender identities across cultural constructions of gender liminality and sexual identity that do not match the repertoires of western LGBTI identifications and lifestyles’;⁴⁷ as ‘their understandings and conceptualizations of sexual and gender identity shift and change over time and do not always align with western notions of a linear and essentialized trajectory.’⁴⁸ Decolonizing queer studies have pointed to the importance of bringing in transnational perspectives on the studies of sexuality to show how sexuality, race, gender and religion intersect transnationally.⁴⁹

As we will show with examples from Germany and the UK in the next section, sexual identity needs to be presented as something ‘intrinsic’, and not just a ‘mere inclination’ for a claim to be accepted. Decision-makers often use the binary framework of heterosexuality/homosexuality, where these are defined as opposites and the ‘real’ sexualities. Within this framework, asylum claims on grounds of bisexuality are difficult to establish as it is assumed that the person can choose between heterosexuality and homosexuality. As Rehaag shows in relation to Australian and North American case law, ‘... sexual minority refugee claims continue in practice to be measured against relatively rigid and immutable understandings of sexual orientations. Nowhere is this clearer than in the experience of bisexual refugee claimants’.⁵⁰ As we will demonstrate, this is also a European phenomenon: we show how, by subsuming bisexuality under homosexuality, decision-makers fail to recognise bisexuality as the basis of PSG membership, thereby contributing to the invisibility and erasure of individuals claiming on this basis.⁵¹

⁴³ Morgan (n 11).

⁴⁴ *ibid* 151–152.

⁴⁵ *ibid* 147; Claire Bennett and Felicity Thomas, ‘Seeking Asylum in the UK: Lesbian Perspectives’ [2013] *Forced Migration Review* 25, 26.

⁴⁶ Edward Ou Jin Lee and Shari Brotman, ‘Identity, Refugeeess, Belonging: Experiences of Sexual Minority Refugees in Canada’ (2011) 48 *Canadian Review of Sociology/Revue canadienne de sociologie* 241.

⁴⁷ Calogero Giametta, *The Sexual Politics of Asylum* (Routledge 2017) 587 <<https://www.routledge.com/The-Sexual-Politics-of-Asylum/Giametta/p/book/9781138674677>> accessed 18 May 2017.

⁴⁸ Lee and Brotman (n 48) 154.

⁴⁹ Bakshi et al. (n41).

⁵⁰ Rehaag, S. (2009) ‘Bisexuals need not apply: A comparative appraisal of refugee law and policy in Canada, the United States, and Australia’, *The International Journal of Human Rights*, 13(2–3), pp. 420.

⁵¹ Christian Klesse, ‘On the Government of Bisexual Bodies. Asylum Case Law and the Biopolitics of Bisexual Erasure’ in H Richter (ed.) *The Body of the Governed: Race and Gender in the Era of Biopolitical Governance*. (Rowman and Littlefield, 2018, forthcoming). Surya Monro, Sally Hines and Antony Osborne, ‘Is Bisexuality

4. Applying the lens of queer theory and intersectionality

As we have outlined above, both German and UK decision-makers draw on the cumulative approach when assessing membership of a PSG, deploying a reductive understanding of sexuality. By focusing on ‘bisexual’ claims and those where the claimant’s religion was a factor, we will show that the current understanding of sexual identity in both German and UK jurisprudence fails to draw on either queer theory or intersectionality.

4.1 Proving membership of a PSG in ‘bisexual’ claims

Our starting point is recognizing that the difficulty in meeting the requirements of both arms of the PSG criteria is greater for some applicants than others. In demonstrating that they have an innate or fundamental characteristic, and also that they are perceived as such, we see that claimants who identify as bisexual or who have, or have had sexual relationships with members of the opposite sex are particularly disadvantaged as they are often disbelieved, especially if they have children or have been married. It has been highlighted that having children (from previous relationships) can undermine the claims of lesbian women⁵², and this was one of the reasons given in a high profile UK High Court case:

The Claimant does not have membership of a particular social group whose sexual orientation is termed as lesbian She had heterosexual relationships, marriages to men, and two children. She had no same-sex relationships in the period 2004-2011. The fact that she may also have had same-sex relationships does not bring her within membership of the particular social group whose sexual orientation is lesbian....⁵³

The applicant was told by the Home Office barrister: ‘You can’t be a heterosexual one day and a lesbian the next day. Just as you can’t change your race’.⁵⁴ Whilst the judge hearing the case did not rule out the possibility of bisexuality falling under PSG, he argued that ‘the extent of such homosexual experience will weigh in a determination as to whether a person is genuinely a member of a particular social group.’⁵⁵

A further case in point is that of Orashia Edwards, a bisexual Jamaican man, who spent three and a half years battling attempts of the Home Office to deport him to Jamaica and was detained a number of times, after authorities claimed he was heterosexual and had just been ‘experimenting’ with men.⁵⁶

Invisible? A Review of Sexualities Scholarship 1970–2015’ [2017] *The Sociological Review* 0038026117695488.

⁵² Lewis (n 11).

⁵³ *R (on the application of Apata) v Secretary of State for the Home Department*, para 23 | *LexisWeb*.

⁵⁴ Emily Dugan, ‘Home Office says Nigerian asylum-seeker can’t be a lesbian as she’s got children’ (*Independent*, 3 March 2015) <<http://www.independent.co.uk/news/uk/home-news/home-office-says-nigerian-asylum-seeker-can-t-be-a-lesbian-as-she-s-got-children-10083385.html>> accessed 23 July 2017

⁵⁵ *R (on the application of Apata) v Secretary of State for the Home Department* | *LexisWeb* (n 76).

⁵⁶ Nick Duffy, ‘Bisexual Jamaican man wins right to stay in the UK after deportation battle’ (*Pink News* 18 January 2016) <<http://www.pinknews.co.uk/2016/01/18/bisexual-jamaican-man-wins-right-to-stay-in-the-uk-after-deportation-battle/>> accessed 23 July 2017.

Turning to Germany, a recent court observation in an Administrative Court made clear the difficulties for bisexual/gay men, who had had previous heterosexual relationships and children. Here, the claimant had made an earlier asylum claim five years previously, which had been refused by the very same judge. During the second hearing the judge said:

To claimant: 'You told me then, that you had lived with a woman, but you were not married.'

To court: 'He has four children with this woman.'

To claimant: 'And then you told me that you have a new girlfriend in Holland, with whom you also have a child. And with that in mind, you tell me now that you're gay.'

To court: 'This story is so deceitful. He has five children and tells me that he is gay as a post/ all the way ('stockschwul')! That is outrageous!'

The judge then said to the witness:

'Maybe I tell you first what I know. I know that the claimant has four children in England, and that he has a small child in Holland and that he therefore obviously cannot be gay. If you tell me now that he's gay no matter what, then I'll pass that on to the district court, and then you can receive a prison sentence to up to 12 months.'

This was a highly intimidating experience for the claimant and the witness (compounded by the German inquisitorial system where the judge asks all the questions). Despite the witness giving evidence that he had had sex with the claimant on several occasions, the judge expressed his strong belief that the claimant had fabricated his case and dismissed the case straight after the hearing.

In a decision of the Administrative Court of Ansbach⁵⁷ an Iranian man, who had made a second asylum claim on grounds of sexual orientation ten years after his first claim had been refused (he had lived in Holland in the intervening period), had his claim refused with the reason given that he did not belong to a PSG. He claimed that he was homosexual, which was questioned by the court:

When he was made aware of the fact that he obviously has also had sexual intercourse with a woman, which meant that his homosexuality was not clear and irreversible, the claimant said that this was true but that he was more attracted to men. Asked whether he currently practiced gay sex, the claimant said, not here, most recently in Holland. (p.3)

Here the 'obviously' refers to the fact that he had a child with a woman. The Court then asked him whether 'he could not confine himself to heterosexual contacts in the event of a return to Iran'.

In this decision the Court specified that as a consequence of the application of the Qualification Directive the case law of the Federal Administrative Court from 1988, in particular the requirement of 'inescapability'⁵⁸, 'may no longer be fully applicable'.

⁵⁷ AN 18 K 08.30201, 21 August 2008.

⁵⁸ The judgement used an understanding of 'homosexuality' as 'irreversible', 'inescapable' and even 'fateful' (BVerwGE, 15 March 1988, C 278.86, para 18). From a queer theoretical perspective we can see that the decision was based on an understanding of sexual identity as definitively fixed at a particular age in an individual's life: in this case, the Federal Administrative Court assumed that sexual identity is based on a

Nevertheless, in order to assign him to a PSG, the Court needed to identify homosexuality as fundamental to his identity:

According to the Chamber, the claimant lacks a fundamental identity in this sense [according to the definition of the Qualification Directive] because, according to his own submissions, his homosexuality was even after the end of adolescence [...] not more than a mere inclination beside heterosexuality which he also lived. (p.8)

The Court here drew on ‘the current state of science’, which showed that at the end of puberty, at the latest, a ‘fateful determination of homosexual behaviour’ exists that is not changeable (p.8). The court further stated that the claimant himself submitted that his homosexuality was not ‘clear and irreversible’ (p.8). The understanding of sexual identity used here is the same than the one that the Federal Administrative Court used in its 1988 decision. In order to demonstrate belonging to a PSG, the claimant needs to present a fixed and linear narrative of gay identity, according to a Western epistemic frame.⁵⁹

The Court decided that, as his homosexuality was a mere inclination, he was therefore not at risk of persecution (and also not at risk of his homosexuality being discovered). What is striking here is that bisexuality is subsumed by homosexuality to the extent that it is not even mentioned. In that sense, bisexual identities and the risk of persecution on grounds of bisexuality are erased.⁶⁰ Furthermore, and ignoring queer theoretical approaches, this conceptualisation of sexual identity is based on the binary framework of heterosexuality/homosexuality, with decision-makers assuming that if a person desires both men and women, they can choose a heterosexual identity, and therefore do not belong to a PSG.

This line of reasoning is also evident in a decision by the Administrative Court of Saarland where the judge argued:

Due to his predisposition, the claimant would be in a position to have a relationship with a woman in Algeria and to live out his sexuality. This assumption is supported by the fact that the claimant has already become the father of a child in Germany. In that respect, the present case differs from the cases decided by the CJEU, which dealt with the homosexual orientation of those affected. However, in case of homosexuality, the person would be, unlike the claimant in the present case, forced to completely deny their sexual orientation or to live in secret in order to escape the danger of punishment in Algeria.⁶¹

Even though the claimant had been in a two-year relationship with a man at the time this decision was made, the Court decided that the claimant could relocate within Algeria and carry on meeting men discreetly.

‘fateful’ sexual drive that is fully and forever established by the age of 18 (BVerwGE, 15 March 1988, C 278.86, para 24).

⁵⁹ Bakshi et al. (n 30).

⁶⁰ Rehaag sees the invisibility of bisexual refugee claimants as part of a larger social phenomenon: ‘That social phenomenon is that bisexuals tend to be invisible in – or actively erased from – both sexual minority and mainstream communities’ (Rehaag, 2009, 423-424). See also Klesse (n 26)

⁶¹ VG Saarland, 5 K 534/13; 18.02.2015, p.11-12.

Under a queer theoretical lens, these cases illustrate how decision-makers often draw on collective heteronormative knowledge and essentialise non-heteronormative ways of life. This includes ideas of a homogenous gay group identity, and the devaluation and non-acceptance of bisexuality and fluid forms of sexuality, as advocated by queer theory.⁶² That the courts apply a problematic understanding of sexual orientation and gender identity is also evidenced by the fact that the distinction made by queer theory between sex, gender and sexuality is often overlooked. For instance, in a recent case of a bi- and transsexual person from Russia, the Administrative Court of Potsdam accepted the claim for refugee protection on grounds of well-founded fear because of belonging to both, the social group of trans persons and the social group of bisexual persons.⁶³ While mentioning bisexuality, the decision subsequently refers only to sexual orientation and homosexuality. In addition to subsuming bisexuality within homosexuality, it also subsumed gender identity within sexual orientation. Not one single reference to gender identity was made so when the court referred to 'sexual orientation', it is not clear what aspect of the claimant's identity was referred to. Hence, the Court seems to be unable to treat gender identity and sexual orientation as two separate yet intersecting categories. In addition, the court appears unable to accept the fact that the claimant identifies as male, using only female pronouns to refer to him.

Because of the high threshold for bisexual claims, some claimants might therefore decide to claim on the grounds of homosexuality.⁶⁴ The requirement to 'be' fundamentally LGB and also to be perceived as such in the absence of any familiar stereotypes of how a bisexual person appears and behaves, increases this likelihood. Yet, as Berg and Millbank point out, this can be a risky strategy:

It may therefore be tempting for advocates [for bisexual claimants] to choose a term to categorize the applicant's sexuality which they feel will give the best chance of success: homosexual. Yet this may not be an accurate descriptor of the applicant's identity or of their behaviour and, importantly, any shift in category or terminology by the applicant during the process is likely to be taken as adverse to their credibility or as suggesting a lack of conviction in their identity.⁶⁵

However, the dearth of successful bisexual claims for refugee status suggests a need to investigate further whether some bisexual people claiming asylum in Germany and the UK do indeed opt for what appears to be the safer option of claiming to simply be gay or lesbian.

4.2 Intersections of sexuality and religion

As well as the need to conform to stereotypes, UK and German cases suggest the need for an intersectional approach to recognise that sexual orientation is rarely the sole factor in the

⁶² K. Hübner, Katharina, "Fluchtgrund sexuelle Orientierung und Geschlechtsidentität: Auswirkungen von heteronormativem Wissen auf die Asylverfahren LGBTI-Geflüchteter." In: *Feministische Studien* 34/2, pp. 242-260, 2016; Jagose (n 33).

⁶³ VG 6 K 338/17.A, 27. April 2017.

⁶⁴ Khan interviewed one Ugandan bisexual woman who had stated in her application that she was a lesbian. TY Khan, 'Investigating the British Asylum System for Lesbian, Gay and Bisexual Asylum-Seekers: Theoretical and Empirical Perspectives on Fairness' (PhD, University of Liverpool 2016) <http://livrepository.liverpool.ac.uk/3001777/>, 172.

⁶⁵ Berg, L. and Millbank, J. (2009) 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants', *Journal of Refugee Studies*, 22(2), 213.

success or failure of an asylum claim. Other characteristics, in particular religion, are deployed – and deployed by both the claimant and the decision-maker.

Giametta's (2014) research suggests that LGBTQI+ asylum claims may be more difficult to prove when the claimants 'confess' their religious beliefs, as this may then be regarded as evidence that they are holding on to 'backward' beliefs in conflict with Western narratives of temporal progression in LGBTQI+ identity development that embrace the freedom of 'the West'.

Religion is a recurring element in the decision-making process, particularly for Muslim applicants. In the UK, they can expect to be asked by the Home Office first, whether they are practicing Muslims and, if they answer yes, how they can reconcile their religion with their sexual identity given Islam's views on homosexuality. One recent tribunal included the following exchange:

Home Office presenting officer: Your father was very influential and religious?

Appellant: Yes.

HO: And he was very strict?

A: Yes.

HO: Why is it that he never discussed with you the teachings of the Koran on homosexuality?

A: These issues are not discussed there, it is not in the culture, these sensitive issues.

HO: But if it's such a shunned thing why were you not warned against it?⁶⁶

In this case, the claimant's barrister was successful in arguing against this line of questioning. As he pointed out in his summary, if faith were incompatible with a gay identity, there would be no gay Catholics or Jews, and we all know that is not the case. Still, it is a common line of argument by Home Office presenting officers and barristers. A solicitor we interviewed specialising in LGBTQI+ claims confirmed that it is common that clients are asked if they practice their religion. If their answer is positive, they are then asked how they reconcile their religion with their sexual identity.⁶⁷

In the case of a Malaysian transgender man, it was the appellant's lack of religion that initially appeared to count against him, because 'There was general discrimination in society, including occasional harassment, against LGBT people in Malaysia. The difficulties were typically greater for those from Muslim societies in Malaysia but this did not include the appellant.'⁶⁸ However, the decision stated that he had been arrested for dressing like a man and told by the police that 'the way he dressed was incorrect and that he was a woman and dressing as a man was not permitted in a Muslim country like Malaysia.'⁶⁹ His appeal was allowed on the implicit assumption that while there was no conflict between religion and gender identity for this particular individual, there was a conflict between the individual's gender identity and the religious values of the state and society from which he came.

⁶⁶ First tier tribunal PA00604/2018 Taylor House Tribunal Hearing Centre, London, 8 February 2018

⁶⁷ Interview on 6 November 2018 with Nath Gbikpi, solicitor with Wesley Gryk Solicitors, a firm with expertise in asylum claims made on the basis of sexual identity.

⁶⁸ Upper Tribunal (Immigration and Asylum Chamber) Appeal Number: PA/11792/2016, 10 AUGUST 2017, para 21.

⁶⁹ Upper Tribunal (Immigration and Asylum Chamber) Appeal Number: PA/11792/2016, 10 AUGUST 2017, para 27.

Here we see the interplay of religion and sexuality, and the assumption by decision-makers that a non-conformist sexual identity is incompatible with faith – or at least with Islam. Yet, there was no suggestion in either of these cases that the applicant had claimed on the Convention ground of religion. Rather, both claims were dependent on demonstrating that the individual was gay or transgender, and was visible as such with the religious dimension playing an unacknowledged part in that.

In a German case by the Administrative Court of Dresden,⁷⁰ the claimant asked for recognition of refugee status on grounds of his religion *and* homosexuality. It seems that his ‘main claim’ was based on the conversion from Islam to Christianity and an ‘added’ reason was his homosexuality, and this is how the court dealt with the case. The Court decided:

According to the substantive and legal situation (para. 77 (1) AsylG), prevailing at the time of the oral proceedings, the claimant is entitled to the granting of refugee status in accordance with para. 3 (1) AsylG because of his conversion to Christianity and his homosexuality.

In the decision, the Court dealt with these two grounds separately. It first dealt with the claimant’s religion and found that his Christian faith and religious activity belonged to his identity and that therefore his fear of persecution was well-founded.⁷¹ The Court then went on to argue:

Moreover, the court is of the conviction that the claimant has to be granted refugee status in accordance with para 3 (1) AsylG on grounds of his homosexuality. (p.12)

The Court further argued that there is a well-founded fear of persecution because the claimant belongs to a PSG. Hence, the Court separated his Christianity from his ‘homosexual’ identity and failed to recognise that his experience of persecution is because he is *both* a practising Christian and a gay man, refusing to acknowledge these intersecting forms of oppression. Whilst in this instance, this failure was not critical, as both the claimant’s religion and his sexual orientation alone were sufficient grounds for granting refugee status, not recognising intersecting or multiple fears of persecution may be problematic for other claimants.

In failing to apply an intersectional lens,⁷² decision-makers may decide that a claimant does not belong to a PSG and grant subsidiary protection rather than refugee protection, as pointed out by Markard:

A careful consideration of the particular social group category with respect to age, gender and ethnicity as defining factors could lead to a more principled analysis and to recognition of refugee status rather than subsidiary protection.⁷³

However, applying an intersectional lens in decision-making might not always favour the claimant. We see this where the risk of persecution and the possibility of relocation is

⁷⁰ 6 K 306/16.A, 19.04.2017.

⁷¹ From page 6 to 12 of the judgment.

⁷² For instance, the German database Asyl.net gives 166 results for the application of ‘Soziale Gruppe’ (social group) in court cases from 1998 to 2017; 41 of which are SOGI related. All but the one discussed here focus mainly on sexual orientation and/or gender identity without mentioning or including any other potential Convention grounds.

⁷³ Markard (n 11) 56.

assessed as higher for educated middle-class Indian lesbians, as was decided in one UK case.⁷⁴ Another case, *Y A* in 2015, demonstrates that recognition of multiple characteristics may support or undermine a claim based on sexual orientation.⁷⁵ In this case of a gay man from South Africa, the court heard that there was a greater risk to the appellant because of his Asian background,⁷⁶ however, relocation would potentially be a ‘reasonable option’ to him as a ‘well-educated man’ and he was also described as ‘from a wealthy background’.⁷⁷ At the same time, it was also recognised that he only had a small pension and no savings.⁷⁸ The fact that he was Muslim was mentioned with the suggestion that his father opposed his involvement in affairs of the mosque because of the appellant’s sexuality.⁷⁹ His age and health status – he was a 65-year-old man with an HIV infection – was recognised as increasing his vulnerability to violence.⁸⁰ The judge decided in favour of the appellant finding that he had ‘a well founded fear of persecution for reason of his social group as a gay man, and for the same reasons his removal would also be a breach of article 3 ECHR’.⁸¹

This case shows that while recognition of some factors might strengthen a claim for protection (sexual orientation, religion, age, health and income), recognition of other factors might weaken it (a high level of education and a wealthy background). However, we would argue that overall, a decision that recognises the totality of characteristics and attributes that contribute to any individual’s experiences of persecution is more likely to be a fair decision than one that takes a skewed and simplistic approach to human identity and experience.

5. Conclusion

In this article, we have explored the ways in which queer theory and intersectionality can be used to shed light on why some SOGI asylum claims may fail and others succeed. We argue that, while the recognition that sexual minorities may constitute a Particular Social Group is a welcome one in facilitating recognition of these claims, this in itself is inadequate. The cases we bring together above show the inherent tension between, on the one hand, refugee law and decision-making – which is about establishing facts and definitive linear accounts – and on the other hand, sexual and gender identities – which are fluid both over time and at any one moment.⁸²

As we have shown, the way that LGB asylum seekers are required to prove they meet the criteria for asylum by demonstrating membership of a PSG fails to recognise the reality of their experiences as sexual minorities but also their experiences as individuals with other characteristics that contribute to their experiences of persecution. It is when an individual’s story – and the identity that underpins it – is recognisable to decision-makers, that the basis of their claim can be fully understood. And for that to happen, the identity must be intelligible in

⁷⁴ AR and NH (lesbians) India CG [2016] UKUT 00066 (IAC), paras (1) and (6).

⁷⁵ SSHD (Appellant) and YA (Anonymity order made), Upper Tribunal (Immigration and Asylum Chamber) Appeal Number: AA/04871/2015.

⁷⁶ Ibid para 6

⁷⁷ Ibid paras 8 and 10

⁷⁸ Ibid para 25

⁷⁹ Ibid para 8

⁸⁰ Ibid para 25

⁸¹ Ibid para 26

⁸² Berg and Millbank (n68); Berg, Laurie, and Jenni Millbank, ‘Developing a Jurisprudence of Transgender Particular Social Group’, 2013 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312887> accessed 2 February 2017, 122.

terms of class, religion, age and a host of other factors, as well as sexuality and gender. We should recognise that what is ‘performed’ is not only sexuality and gender, but also race, class, age and other personal markers. If decision-makers do not hear and recognise the totality of an individual’s experience, they will be unable to make a thorough assessment of the circumstances of each case and give a reasoned decision in the case of a refusal, thus failing to meet the key elements of ‘fairness’ in decision-making we identified at the outset.

In conclusion, intersectionality and queer theory may sound abstract and irrelevant to the *realpolitik* of asylum but they inform what we argue should be some guiding principles in decision-making. First and foremost, claimants should only be required to demonstrate that they have *either* a fundamental characteristic *or* that they are perceived as being different in the assessment of belonging to a PSG, rejecting the restrictive nature of the cumulative approach currently deployed.⁸³ Secondly, we suggest that decision-makers need training to understand and apply the nuanced understandings of identity and sexuality that queer theory and intersectionality provide.⁸⁴ An understanding of the diversity *within* LGBTQI+ claims and of the intersectional nature of identity is critical to the development of an asylum system that is responsive to applicants’ experiences, rather than one that imposes a single model of sexual minority identity based on Western stereotypes. In this contribution, we have shown the urgent need to apply the knowledge and understanding of queer theory and intersectionality to asylum, and have started to map what is surely a larger piece of work needed to better understand SOGI asylum claims across Europe.

⁸³ Nuno Ferreira, Carmelo Danisi, Moira Dustin and Nina Held, *The reform of the Common European Asylum System: Fifteen recommendations from a Sexual Orientation and Gender Identity Perspective*, SOGICA / University of Sussex, May 2018, recommendation 11, available at <http://www.sogica.org/en/database/ferreira-danisi-dustin-and-held-the-reform-of-the-common-european-asylum-system-2018/> accessed 13 June 2018.

⁸⁴ As suggested by Nicole Laviolette for example (Laviolette, N. (2013) ‘Overcoming problems with sexual minority refugee claims: is LGBT cultural competency training the solution?’, in *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum*. Routledge, Chapter 9).