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COC NETHERLANDS

# PRIDE OR SHAME?

THE FOLLOW-UP

THE NEW WORK  
INSTRUCTIONS AND  
THE ASSESSMENT  
OF LGBTI ASYLUM  
APPLICATIONS IN  
THE NETHERLANDS



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THE NEW WORK INSTRUCTIONS  
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LGBTI ASYLUM APPLICATIONS  
IN THE NETHERLANDS

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**TROTS OF SCHAAMTE? HET VERVOLG**  
De nieuwe werkinstructies en de  
beoordeling van LHBTI asielaanvragen in  
Nederland

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# PREFACE

I would like to thank a number of people without whom this report would not have been produced.

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Thomas Spijkerboer, Professor of Migration Law,  
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Ashley Terlouw, Professor of Sociology of Law,  
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Sabine Jansen  
Amsterdam, February 2022

# 1. INTRODUCTION

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## 1.1 Reason for the research and research questions

In June 2018, COC Netherlands' (the Dutch LGBTI rights organisation) report: *Pride or Shame?* was published setting out the effects of the XYZ and ABC cases by the Court of Justice of the European Union regarding the application procedure for lesbian, gay, bisexual, transgender and intersex (LGBTI) asylum seekers in the Netherlands.<sup>1</sup> This research was predominantly based on the examination of asylum files conducted at the office of the Immigration and Naturalisation Service (IND).

The research revealed a shift had occurred in the assessment of LGBTI applications and that a vast majority of rejections was based on lack of credibility of the individual's sexual orientation.<sup>2</sup> The conclusion also being that the core of the Dutch LGBTI asylum policy was formed by the stereotypical expectation that in a LGBTI hostile country LGBTI people always had to go through a 'process of awareness' and a 'process of self-acceptance'.

The new Work Instruction 2018/9 (WI 2018/9), coming on the heels of COC's report came – in the opinion of the State Secretary – with an important improvement and amendment compared to its predecessor WI 2015/9, but – again in the opinion of the State Secretary – did not contain any new policy. In addition, the most important recommendations from *Pride or Shame?* seemed to have been adopted in this 'not-new-but-still-better-policy', even though asylum practice did not reflect this. In other words, plenty of reasons for a follow-up research.

Because WI 2018/9 is about assessing the credibility of sexual orientation, and this also played a large role in the *Pride or Shame?* report, it will also be the main subject in this current report which attempts to establish whether policy and practice regarding the assessment of the credibility of the sexual orientation of LGBs has in fact improved. The word 'improvement' is in this case understood as a form of assessment that is less reliant on stereotypes regarding sexual orientations and gender identities. At the request of the IND a definition of the term stereotype was provided in the *Pride or Shame?* report: 'a fixed idea, especially of a certain type of person or a certain population or group, which is often based on prejudices and clichés.' (onzetaal.nl), and a definition of prejudice being: 'an opinion based on insufficient knowledge.' (Van Dale). One could argue that these definitions shift the

1. *Pride or Shame? The assessment of LGBTI asylum applications in the Netherlands following the XYZ and ABC judgments*, COC Netherlands, June 2018. Hereafter this report will be referred to as the *Pride or Shame?* report.

2. See also Millbank 2009.

3. 'Gender identity' is in inverted commas here because it is primarily about sexual orientation. Until recently, it was extremely rare that a stated gender identity was not believed, but that seems to be changing, as will be discussed in chapter 4.

4. The request for this was made in March 2019.

5. 'Since the IND already intends to order a follow-up research in a broad sense regarding credibility assessments via the External Scientific Relations department of the WODC, cooperation in the file study proposed by COC will not be provided. Soon, in May or June, the WODC will publish a synthesis report requested by the IND on best practices in credibility assessments in LGBTI and conversion cases. In this report, the WODC indicates that with the recent changes in work instructions, the Netherlands seems to be at the forefront internationally when it comes to letting go of predetermined models or ideas about how the discovery of a sexual or religious identity proceeds. The WODC has not found better methods for this assessment in other EU Member States or other organisations, such as the police. The WODC report does, however, provide recommendations for a systematic evaluation of the decision practice in order to provide insight into any remaining bottlenecks in the current work instruction. In a logical follow-up to this, the IND intends to set out a follow-up study in the new round for submitting research topics at the beginning of June', according to an email from the acting Research & Analysis manager of the IND dated 15 April 2019.

6. Perhaps the objection of the 'excessive burden on the IND' is related to the fact that the IND initially refused to give permission for the publication of *Pride or Shame?* The IND objected to the use of anonymized quotations from files. After several discussions between the IND on the one hand and the researcher and members of the advisory committee on the other hand, after four and a half months and after various adjustments had been made to the text to meet a number of objections by the IND, did the IND finally agree to the publication of *Pride or Shame?*

7. Incidentally, the IND explicitly stated that they did indeed have confidence in the members of the advisory committee.

locus of the problem. The question then becomes if there are fixed ideas of LGBTI people at the IND, based on opinions that are based on insufficient knowledge.

## RESEARCH QUESTIONS

- Has there in fact been any improvement in the way in which the credibility of sexual orientation (and gender identity) has been assessed since WI 2018/9?<sup>3</sup> Is there currently less reliance on stereotypes?
- Has there been any other change in Dutch LGBTI asylum practice compared to practice at the time of the first *Pride or Shame?* research?
- What kind of recommendations could be offered for (further) improvement of the asylum procedure for people who have fled out of fear of persecution due to their sexual orientation or gender identity?
- How is the expression of sexual orientation and gender identity examined? Are people still being directly or indirectly pushed 'back into the closet'?
- Is there anything else worth noting for the assessment of LGBTI asylum requests?

## 1.2 IND refuses cooperation

To be able to make a good comparison, it was the initial intention to conduct a study that was as similar as possible to the original study: using the same researcher; the same advisory committee; and once again based on files consulted at the office of the IND, just as before. Unfortunately, the IND did not grant access to the researcher or to COC this time.<sup>4</sup> After a whole year of insistence by COC, the State Secretary was amenable to a follow-up of the file research but considered it more 'logical' to have this done by the Centre for Scientific Research of the Ministry of Justice (WODC) instead of COC.<sup>5</sup> In a conversation between COC and the IND, it was mentioned that another reason for the refusal was that the researcher and/or COC would not be 'independent' and that the researcher and/or COC would be an 'excessive' burden on the organisation of the IND'.<sup>6</sup> It was also mentioned that a follow-up study by the researcher and/or COC would probably have the same results as the original research.<sup>7</sup>

In a (introductory) meeting with COC, the then new State Secretary Broekers-Knol, suggested that the reason for refusing the researcher renewed access to the IND files was

that it was too early to evaluate the implementation of the policy of Work Instruction 2018/9. Apparently, however, it was not too early to ask the WODC to do exactly what COC had asked for: evaluate the policy and the implementation of Work Instruction 2018/9 and compare it to Work Instruction 2015/9 by means of (among other things) a file study.<sup>8</sup> It therefore appears that the real reason for the refusal of the IND and the State Secretary to cooperate in a follow-up research by COC was in fact a different one.

In any event, this refusal has led to the current study being hampered. Since no access was granted to the files of the IND and therefore to the internal considerations, it often remained guesswork as to the reasons why one case but not the other ended up with a positive decision. Moreover, comparison with the results of the previous study was hindered due to lack of access. An important conclusion from *Pride or Shame?* was of a quantitative nature: 63% of the files examined had a positive outcome, and in 85% of rejections, incredibility of sexual orientation was given as the reason. Unfortunately, this conclusion cannot be updated with any recent data, therefore it cannot be said whether anything has changed in this regard.

### 1.3 Methodology

After the final refusal of the IND to cooperate in a follow-up research, it was decided to allow the research to continue, but based on lawyers' case files. In order to obtain these files, a request for cooperation was distributed via the mailing list of the Association of Asylum Lawyers in the Netherlands, the VAJN. The request was also placed in the Newsletter of the Dutch Council for Refugees and in the magazine *Asiel- en Migrantenrecht* (Asylum and Migrants Law). Furthermore, lawyers were approached individually, in some cases in response to published case law that was of interest, in which they had acted as legal representative.

During the file selection, the aim was to spread across positive and negative outcomes, first and subsequent asylum applications, and representation of the various LGBTI subgroups. Compared to the previous study, it turned out to be more difficult to properly cover the different categories because the researcher was partly dependent on the files offered by the lawyers.

8. 'Question that was discussed during the introductory meeting: why does COC not get cooperation from the IND to do a new evaluation of the credibility assessment by the IND? At this stage, I think it is still too early to carry out a broader evaluation than on the various parts mentioned in the policy response to the House of Representatives on the WODC research. Following the results of the evaluation, it may be decided to carry out further research if necessary. However, I cannot make a commitment to this at this stage. However, in response to the above-mentioned motion by member Van der Graaf et al., I will request the WODC to also pay attention to file research in the context of the evaluation to be carried out by the WODC.' Letter from the State Secretary for Justice and Security to the Chairperson of the House of Representatives, following a conversation with COC, 24 March 2020, TK meeting year 2019-2020, 19637, no. 2593.

14 lawyers responded to the request and sent a total of 40 asylum files from 21 countries: Afghanistan, Algeria, Azerbaijan, Bangladesh, Cuba, Gambia, Guinea, Iran, Iraq, Jordan, Kazakhstan, Morocco, Nigeria, Pakistan, Russia, Senegal, Sierra Leone, Tanzania, Tunisia, Turkey and Uganda. A relatively large number of Ugandan files were involved in this study (10), on the one hand simply because lawyers offered many of these files, but on the other hand because it seemed useful to look at many of these files, given the current situation with regard to the processing of LGBTI asylum applications from Uganda.<sup>9</sup>

The files of 23 men and 17 women, including one bisexual and five trans women were analysed. There were no files of trans men or intersex persons.<sup>10</sup> 23 procedures ended positively; and of these, 15 were granted asylum immediately, meaning anywhere between a few days and a few months after the interview. 17 cases ended (for now) with rejection. At the conclusion of this research two of the cases had not yet reached completion. 28 files concerned a first asylum application and 12 a subsequent application. In seven cases, it concerned asylum seekers who were disclosing their sexual orientation or gender identity for the first time, and in five cases this had already been stated in the previous procedure.

Unfortunately, there were also disillusioned lawyers who noted that they had done many LGBTI cases in the past, but now refused to take on any such cases because they felt that since WI 2018/9 it had become even more difficult to convince the IND of the applicant's credibility. They feel that the IND will keep on searching until a ground for rejection is found. As one lawyer wrote: 'After that, a "he said/she said" game is created. The court then indiscriminately throws the term "vague" around, even if there is nothing vague at all. The term "superficial" is also common, terms such as shame/sadness are insufficient. These terms must be given substance, which is an impossible task. In my opinion, it is currently virtually impossible to obtain an asylum residence permit on grounds of sexual orientation and nothing is done with statements from third parties.'

Since it turned out to be complex and time-consuming for lawyers to request files from the archive, not only closed files were studied, as originally intended, but also ongoing files that were currently awaiting to be appealed. In four cases, asylum was eventually granted during this research.

9. See paragraph 3.10.

10. See, however, District Court Den Bosch 24 December 2021, NL21.11100, appeal allowed (Jordan).



In addition to the 40 files, a considerable amount of case law was examined and a small literature search was also carried out. The four people who were on the advisory committee in the previous study: Marcel van der Linde, Sadhia Rafi, Thomas Spijkerboer and Ashley Terlouw were all willing to participate in this follow-up research.

All asylum seekers are referred to by a fictitious name. To reduce the chance of recognition, no country of origin was mentioned in the five cases of transgender women as well as in a single case concerning an LGB person. Quotes from the files are given in green ink, printed in a smaller font and indented. Quotes from court judgments are printed in a smaller font and have been indented. All quotations are in principle literal, but in order to increase readability, the word 'person concerned' in the decisions is occasionally replaced by 'she' or 'he', and a few times a sentence from a statement has been paraphrased. Some linguistic errors in the decisions have also been corrected.

## 1.4 Reading guide

After the introduction of chapter 1, chapter 2 outlines the legal framework, the history and some background information. In chapter 3, the results of the research are presented, based on quotations from the files studied. This chapter is organised in themes. While the main topic of this report is the assessment of the credibility of sexual orientation, it also briefly addresses other specific aspects of the assessment of asylum applications from LGBTI asylum seekers, in particular the position of transgender asylum seekers in asylum policy (in Chapter 4) and the question of whether 'discretion' is still to be expected (in Chapter 5). The report reaches its ending in Chapter 6 where some conclusions, recommendations and directions for solutions are given.

## 2. LEGAL FRAMEWORK

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## 2.1 Introduction

This chapter outlines the history and a number of background topics that place the subject of ‘assessment of credibility of sexual orientation’ in a slightly broader context. Since this research is a follow-up to the *Pride or Shame?* report from 2018, paragraph 2.2 reflects upon some developments before and after the previous report’s publication. Paragraph 2.3 discusses the differences between the Work Instruction WI 2015/9 on the one hand; and WI 2018/9 and WI 2019/17 on the other hand. The latter were both published after *Pride or Shame?* Subsequently, paragraph 2.4, discusses three judgments of the Council of State which examine different aspects of the credibility assessment of the stated sexual orientation. Paragraph 2.5 briefly mentions the results of the research carried out on behalf of the WODC which has a similar research question as this current research. Partly in response to the State Secretary’s conclusions, paragraph 2.6 reflects on the working methods of the Netherlands in a European context. Lastly, paragraph 2.7 draws some conclusions.

## 2.2 About the *Pride or Shame?* report

In 2011, the *Fleeing Homophobia* report was published, a study on the position of LGBTI asylum seekers in Europe, carried out by COC Netherlands and VU University Amsterdam, together with experts from 25 different countries.<sup>11</sup> A few months later, the Council of State asked preliminary questions to the Court of Justice of the European Union. These questions led to the XYZ judgment, regarding whether asylum seekers who flee because they fear persecution on the basis of their sexual orientation are expected to hide their sexual orientation in their country of origin and whether they should be granted asylum right away if they come from countries where engaging in same-sex sexual acts is criminalised.<sup>12</sup> The Court answered both these questions in the negative. This judgment was followed a year later by the ABC judgment, also in response to questions from the Dutch Council of State, regarding the issue of what sort of obstacles exist while assessing whether the stated sexual orientation by an asylum seeker is considered credible.<sup>13</sup> Finally, the Court of Justice gave the judgment *F. v. Hungary*, which established that the use of ‘projective personality tests’<sup>14</sup> when assessing the credibility of an stated sexual orientation was forbidden, because it was a violation of the right to privacy.<sup>15</sup> As a result of these judgments, the State Secretary revised his

11. Jansen & Spijkerboer 2011.

12. CJEU 7 November 2013, *X, Y and Z v Minister voor Immigratie en Asiel*, C-199/12, C-200/12 and C-201/12, ECLI:EU:C:2013:720, JV 2014/31, and ABRvS (Council of State) 18 December 2013, ECLI:NL:RVS:2013:2423, (X.).

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

14. These were the *Draw-a-Person-in-the-Rain* (DAPR) test, the *Rorschach* test and the *Szondi* test.

15. CJEU 25 January 2018, *F. v. Bevéndorlási és Állampolgársági Hivatal*, C-473/16, ECLI:EU:C:2018:36, EHRC 2018/54 with comment Den Heijer. See also Ferreira & Venturi 2018. This was also the first time that the CJEU referred to the Yogyakarta Principles.

16. Aliens Circular Vc 2000, C2/ 3.2.

17. Motion Groothuizen (D66) et al., House of Representatives, meeting year 2017–2018, 34 775 VI, no. 67: 'The House, after hearing the deliberations, whereas it is of great importance that all asylum applications are handled with great care; whereas the assessment of the credibility of converted Christians and of the sexual orientation of asylum seekers who base their fear of persecution on this should be accompanied by adequate safeguards; calls on the government to investigate whether the assessment of the credibility of converts and the sexual orientation of asylum seekers can be improved and to come up with proposals to this effect.' These parliamentary questions were preceded by the campaign #Nietgaygenoeg (Notgayenough) of LGBT Asylum Support and the report 'Conversion to Christ, Points of attention for the asylum assessment of Christians with a background in another religion or belief', by Stichting Gave, June 2017.

18. COC: asielbeleid voor homo's nog altijd ondeugdelijk | NOS [COC: asylum policy for gays still unsound]; LHBTI-asielbeleid minder gebaseerd op stereotypen | gaykrant [LGBTI asylum policy less based on stereotypes]; IND gaat lhbt-asielzoekers anders beoordelen: wat gaat er veranderen? | De Volkskrant [IND will assess LGBTI asylum seekers differently: what will change?].

19. Letter from the State Secretary for Justice and Security to the Chairperson of the House of Representatives, meeting year 2017–2018, 19637, no. 2414.

policy. After the XYZ judgment, the policy in the Aliens Circular was amended,<sup>16</sup> and after the ABC judgment, Work Instruction 2015/9 was published. In the period 2016–2017, COC scrutinized the consequences of these judgments for asylum policy and practice in the Netherlands. On 30 November 2017, the House of Representatives accepted a motion in which the government was asked to 'investigate whether the assessment of the credibility of religious converts and the sexual orientation of asylum seekers can be improved and to come up with proposals to this end'.<sup>17</sup> The COC study was in the final phase at that time, so this worked out well.

In January 2018, COC's research was completed, but because the IND initially did not want to give permission for its publication, the research report *Pride or Shame?* was finally published, with considerable delay, on June 23, 2018 (Pink Saturday). When COC presented the report to State Secretary Harbers, two days later on 25 June 2018, it appeared that the State Secretary had already read a draft report and wholeheartedly agreed with its main recommendation: 'Do not use processes of awareness and self-acceptance as the focus of the policy, for these concepts are stereotypical.' The State Secretary further acknowledged that statements by third parties should play a larger role than previously. The State Secretary underlined this statement in his appearance in RTL News TV on 4 July 2018. In the new Work Instruction, which appeared a week later, the concepts of 'process of awareness' and 'process of self-acceptance' were no longer mentioned and proper attention was paid to the statements given by third parties.<sup>18</sup>

State Secretary Harbers wrote in a letter to the House of Representatives on 4 July 2018:

The discussions with interest groups and the expert sessions with IND employees have led to the IND making changes to the way in which the credibility assessment of LGBTI people and converts takes place. (...) Interest groups particularly criticized the emphasis that the IND places in the assessment on the awareness process and the self-acceptance of the LGBTI. This would lead to the IND relying too much on 'Western' concepts and on the premise that every LGBTI person can tell a good and psychologically substantiated story. I understand this criticism, and for that reason the instruction to the interviewing and decision-making staff will no longer focus on the awareness process and the process of self-acceptance.<sup>19</sup>

Subsequently, however, on the basis of case law, the impression arose that these changes were not implemented by the officials of the IND.<sup>20</sup> COC Netherlands wrote:

We find it incomprehensible and unacceptable that the IND pretends that nothing has changed, while you, partly in response to a request from the entire coalition and a large part of the opposition, explicitly state that the policy has in fact changed and you have deliberately adjusted the criteria. This situation gives the impression that the IND does not take the decision of the political leadership and the House of Representatives very seriously.<sup>21</sup>

While the State Secretary in his letter of 4 July 2018 spoke about ‘changes’, his letter of 13 November 2018 to COC stated that there was no question of any policy change:

The most important amendment in the work instruction for LGBTI people is that the terms ‘awareness process’ and ‘self-acceptance’ have been removed. These terms no longer form the main focus for the credibility assessment. This is an improvement in the method by which the IND assesses and motivates credibility. However, the adjustment of the working method used by the IND when assessing asylum applications from LGBTI people and converts does not imply a change in policy. The point is that there has been an improvement in the way asylum applications are currently assessed.<sup>22</sup>

This raises the question of what this improvement in the method of assessment entails and what exactly the differences are between Work Instruction WI 2015/9 and WI 2018/9.

## 2.3 Differences between WI 2015/9 and WI 2018/9

First of all, it may be noted that WI 2018/9 is about twice as long as its predecessor. WI 2018/9 offers a number of positive changes and additions, and a couple of new terms have been introduced. As mentioned before, the processes of ‘awareness’ and ‘self-acceptance’ have been removed. There is now a ‘(thinking) process’ and the ‘process of discovery’ that already emerged in WI 2015/9 has been maintained. The terms ‘authentic story’ and ‘frame of reference’ (5x) make their first appearance and it is cited no less than three times that it concerns an integral assessment.

Just as in WI 2015/9, WI 2018/9 states that the IND does not use as a starting point that an inner struggle must have

20. District Court Groningen 1 August 2018, NL18.12373 (Senegal); District Court The Hague 30 July 2018, NL17.2120 (Iran); District Court Amsterdam 17 July 2018, NL18.11803 (Mali); District Court The Hague 18 July 2018, NL.11680 (Nigeria); District Court Rotterdam 3 December 2018, NL18.5180 (Cameroon); District Court Utrecht 31 December 2018, NL18.22785 (Afghanistan); District Court Haarlem 18 December 2018, NL 18.22234 (Guinea). See also the letters from COC mentioned in the note below.

21. Letter from the director of COC Netherlands to the State Secretary for Justice and Security, 16 August 2018. See also the letters from COC of 10 September 2018 and 6 December 2018 to the spokespersons for asylum and LGBTI emancipation in the House of Representatives, and the letters of 9 June 2019 and 8 October 2019 to the State Secretary.

22. On the same day, a letter from the State Secretary to the House of Representatives was also published.

taken place before the asylum seeker has accepted his LGBTI orientation.<sup>23</sup> In which cases it is or isn't expected remains unclear.

The word 'religion' has been removed from the text in the work instruction. In WI 2015/9, par. 2.2.1 had the following headline: 'Private life (including family, friends, (previous) relationships) and religion' but in WI 2018/9 this headline was replaced by: 'Private life (including family, friends, (previous) relationships) and environment'. COC writes on 16 September 2018: 'we assume that this means that the fact that the asylum seeker adheres to a certain religion will no longer lead to disbelief of sexual orientation.' This turns out not to be the case, as will be shown in Chapter 3. However, the following mistrustful remark from WI 2015/9: 'The IND investigates whether the sexual orientation is credible, or whether the asylum seeker only pretends this motive for obtaining a residence permit' has now disappeared.<sup>24</sup>

### **No standard questions**

The instructions for the interviewers and decision-makers in WI 2018/9 have been greatly expanded compared to WI 2015/9:

There is no (standard) questionnaire in use. After the free narrative, mainly open questions are to be asked in response. If necessary, the answers given may lead to further questioning. The starting point is to encourage an open mind during the interview and to try to avoid (unconscious) reasoning from a personal, often Western, frame of reference. Care must be taken to specifically ask about the personal experiences of the asylum seeker and the personal significance that those events have had for the individual. When asking questions, the extent to which people can put their orientation into words should also be taken into account, as this will differ per person. Furthermore, not every alien is used to talking about their personal experiences and feelings. (...) Of course, it remains important to consider the personality and background of the alien during the questioning and assessment. After all, every asylum seeker has his own frame of reference based on education, cultural background, stage of life, etc.

### **Standard answers?**

In addition, the concept of 'standard answers' was introduced in WI 2018/9.

It is a regular occurrence that asylum seekers come up with standard answers regarding their LGBT status, while the IND are in fact looking for an authentic story from the asylum seeker in question. That is why

23. It is therefore a misunderstanding that this passage would be an addition, as is sometimes stated. See about the inner struggle more extensively *Pride or Shame?*, p. 27-29 and p. 56-67.

24. Cf. *Pride or Shame?*, p. 25.

it is important to ask further questions in the case of standard answers. (...) If the asylum seeker, despite being requested to substantiate his statements and make them more personal, does not do so and continues to come up with standard answers, there is no need to continue to question them indefinitely.

What exactly is meant by 'standard answers' is not explained. It is also not clear what is meant by 'questioning indefinitely' and what its relationship is with regular asking further questions, which incidentally is required.

When the author in August 2018 at the presentation of the *Pride of Shame?* report asked a room full of interviewers and decision-makers of the IND whether they had experience with 'standard answers' from LGBTI asylum seekers, there was simply no response to the question. In this research an application was (initially) twice rejected because the asylum seeker gave standard answers in the opinion of the State Secretary.<sup>25</sup>

Incidentally, in a letter of 13 November 2018 to COC, the State Secretary stated he believed this term does not evidence any mistrust towards asylum seekers:

This text has been included to emphasize the importance of uncovering the individual, personal and authentic story of the asylum seeker. This can also help, for example, the asylum seeker who is ashamed to go further into his personal story to substantiate his statements and make them more personal. In addition, in the case of asylum applications in general i.e. not specifically for asylum applications from LGBTI people, the IND is sometimes confronted with stories that have been pre-arranged for the asylum seeker by smugglers or travel agents. I therefore see no reason to remove this text from the work instruction.<sup>26</sup>

25. See chapter 3.

26. Letter from the State Secretary for Justice and Security to the Chairperson of the House of Representatives, 13 November 2018, House of Representatives, meeting year 2018–2019, 19 637, no. 2440. This letter was a response to a letter from COC of 10 September 2018, in which it was urged to delete the passage on standard answers.

27. Searching for 'standard answers' on the database of the Dutch Refugee Council also only yields references to cases of converts and LGBTI cases.

This answer does not clarify why there should be specific warning about standard answers from LGBTI people (and from converts, cf. WI 2018/10 and WI 2019/18) and it does not take away the impression that there is above-average suspicion.<sup>27</sup>

### **Photos and videos**

The IND does not ask for documentary evidence, such as photographs or videos to substantiate a sexual orientation. If the asylum seeker submits such evidence, it will be included in the assessment, unless it concerns (image) material that is explicitly of a sexual nature. This is then immediately returned



28. See also *Pride or Shame?*, p. 102-103 and 112, and recommendation 5. If criminal offences can be seen on visual material submitted by the alien, this will be passed on to the appropriate authorities. This remark is new and probably refers to child pornography. See, for example, District Court Arnhem 24 July 2017, ECLI:NL:RBGEL:2017:3891 (Iraq), appeal allowed for conflict with WI 2015/9, followed by ABRVS (Council of State) 16 October 2017, ECLI:NL:RVS:2017:2778, appeal allowed.

29. CJEU 2 December 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, C-148-13, C-149/13, C-150/13.

30. This is in line with WI 2014/10 (general credibility).

31. This occurred a few times in this study, in the form of letters of support from interest groups or others, in which certain details of the asylum narrative were described slightly differently than in the statement of the asylum seeker.

32. In the *Fleeing Homophobia* report (p. 9 and 52) an exception is made on this point for medical reports that have been drawn up because of psychological or physical trauma caused by homophobia, which also mention the sexual orientation of the person concerned.

to the person concerned. In WI 2015/9 it was still stated that photos which were brought along would not be included in the assessment. It is good that this was changed and explained.<sup>28</sup>

The Court of Justice prohibited evidence such as the demonstrative performance of homosexual acts, the undergoing of 'tests' to prove homosexuality or the submission of video recordings of such acts.<sup>29</sup> In WI 2015/9 this was incorporated as: 'The IND does not request documentary evidence in the form of, for example, photos or videos.' However, the *Pride or Shame?* study exposed that this text led to a far too broad interpretation of the Court's judgment because non-pornographic photos were also refused by the IND. The work instruction has now been further specified to read: 'The IND does not request documentary evidence in the form of explicit sexual images'.

### **Third-party statements**

There is an entirely new paragraph on third-party statements.<sup>30</sup> In support of their asylum application, asylum seekers sometimes rely on (written) statements from third parties (witnesses, partners, interest groups). According to Work Instruction 2018/9, the decision must always justify how third-party statements have or have not been taken into account. Merely stating that it is up to the asylum seeker to make it plausible by means of their statement that they are LGBT, is insufficient justification.

First of all, the asylum seeker's own statements are considered, but in doubtful cases, statements from third parties that add something to the file can prove decisive. It depends on the individual circumstances whether a third-party statement outweighs what the asylum seeker has stated. Information from third parties can also be disadvantageous to the asylum seeker if this information detracts from the statements of the asylum seeker.<sup>31</sup>

Factual information about specific behaviour of the asylum seeker outweighs a statement that the individual is LGBT. Supporting statements without factual information have no added value in themselves. Advice from psychologists, psychiatrists, doctors and sexologists who state that the person concerned is LGBT are not accepted.<sup>32</sup> Third party's own observations weigh more heavily than statements based on hearsay. Statements from someone who has no interest in a positive outcome also weigh more heavily. Less weight is



given to anonymous sources. 'In cases of doubt, for example if there is a partner, the IND could (in special cases) choose to hear the third party, as an exception.' This last sentence has no less than three stipulations (in doubtful cases, in special cases, as an exception) and in the researched files this exceptional exception did indeed not happen at all, even though lawyers asked a number of times to hear a partner or someone else. Not one single case was rewarded such a request.<sup>33</sup>

#### **WI 2019/17: LGBTI coordinators**

One of the recommendations of the *Pride of Shame?* research was to apply the four-eyes principle to LGBTI cases.<sup>34</sup> This recommendation was not adopted, but the idea that two know more than one was somewhat accommodated by the appointment of LGBTI and religious conversion coordinators.<sup>35</sup> Since the insertion of the motion by Van de Graaf et al. on 30 December 2019,<sup>36</sup> IND employees have been obliged to consult such a coordinator where appropriate. This was also included in WI 2019/17, which is almost identical to WI 2018/9. The only difference being that in WI 2019/17 'LGBT' has been replaced by 'LGBTI' and that the following passage has been added:

LGBTI coordinators are present at every location. In every case in which there is an LGBTI theme, an LGBTI coordinator must be consulted before a decision is taken. In addition, the coordinators can also be approached for questions about these matters.

The research commissioned by the WODC (see below) shows that the coordinators were selected on affinity with the subject of LGBTI and/or religious conversion and on the possession of coaching skills, but that they do not have specific expertise or prior education. Their role is advisory, which means that they do not make decisions, and do not have to see the decisions in advance.<sup>37</sup>

However, prior to any decision regarding an LGBTI asylum application, consultation must take place with an LGBTI coordinator. If this is not possible during the general asylum procedure, the case is referred to the extended asylum procedure. COC has been picking up signals that having to consult an LGBTI coordinator could lead to drawn-out procedures, as a result.

The decision-making officer of the IND carries the final responsibility for the decision and may therefore deviate from the advice of the coordinator if deemed necessary. This

33. Cf. District Court Den Bosch 20 December 2021, NL21.15162 (Senegal): 'The court is not aware of "cases" in which the respondent actually proceeded to hear a partner. At the sitting, when asked, the respondent also indicated that he had inquired about this and that he had also established that this almost never happens. Appeal allowed'.

34. Recommendation 10: 'Take the four-eyes principle seriously. If an asylum seeker's sexual orientation is not believed by an IND officer, the file should always be assessed by a second officer who is not informed of the outcome of the assessment conducted by their colleague.' See also ACVZ 2016, p. 4 and p. 62. And the letter from COC of 8 October 2019.

35. Letter from the State Secretary for Justice and Security to the Chairperson of the House of Representatives, 13 November 2018, House of Representatives, meeting year 2018-2019, 19 637, no. 2440.

36. Motion by Van de Graaf et al. of 21 November 2019, House of Representatives, meeting year 2019/20, 35 300 VI, no. 68.

37. Boekhoorn & Severijns 2021a, p. 63; see also Rafi 2020.

must be explained in the (non-public) internal IND report. It is unknown, however, whether this always happens. The researchers of the WODC have concluded that procedures for consulting the coordinator are not transparent. It cannot be determined whether every decision-maker always seeks advice, nor what influence this advice has on the actual decision.<sup>38</sup> It is also not clear to lawyers and interest groups what input the coordinators have in the decision-making process. However, the interviewed decision-makers are positive about the option of discussing their doubts with the coordinators.

Incidentally, the Swedish asylum authorities have worked with 'LGBTQ specialists' for several years but stopped doing so in 2020. It is unclear to what extent these specialists contributed to a more LGBTI sensitive decision-making practice. Allegedly, there were especially large differences between the various LGBTQ specialists in this regard.<sup>39</sup>

## 2.4 Three important judgments

After the publication of the new work instructions, the Council of State made a number of statements to highlight and clarify some aspects that must be taken into account when assessing a stated sexual orientation.

### 2.4.1 COUNCIL OF STATE 6 FEBRUARY 2020: CULTURAL BACKGROUND

The Council of State wanted to know whether when assessing the credibility of a stated sexual orientation, sufficient consideration is given to the cultural background of the applicant and submitted written questions to this effect to the State Secretary. On 6 February 2020, the Council of State ruled:

that the State Secretary has generally organised his interviewing and assessment process in such a way that sufficient account has been taken of cultural aspects. However, this does not mean that this is always the case in each individual case. (...) If an asylum seeker argues on the basis of country information, scientific articles or an expert report that the State Secretary has misunderstood or misinterpreted his statements due to a cultural difference, the State Secretary must respond to this and explain the reasons.<sup>40</sup>

This case was about an Iraqi and a Ugandan asylum seeker, whose homosexual orientation was brought into question. The Iraqi presented several scientific articles on cultural background

38. Boekhoorn & Severijns 2021a, p. 79.

39. Email exchange with Aino Gröndahl, asylum lawyer affiliated with the Swedish interest group for LGBTQ people, RFSL.

40. ABRvS (Council of State) 6 February 2020, ECLI:NL:RVS:2020:342, par. 7.

of the concept 'sexual identity'. With this he substantiated his argument that the reason he talked more about sex than about what his sexual orientation meant to him was because the concept of homosexuality has a different meaning in Iraq than it does in the West. However, according to the Council of State, those articles were expressly included in the decision-making process by the State Secretary. 'An asylum seeker who invokes his sexual orientation as the reason for asking asylum can be expected to be able to explain his own experiences, and it is of no consequence what interpretation he gives to the concept of homosexuality.' His appeal was therefore unfounded.<sup>41</sup>

With regard to the report by Buro Kleurkracht,<sup>42</sup> that the Ugandan man submitted, the Council of State ruled that the District Court had failed to recognise that the report also contained a specially dedicated part that focused on the statements of the asylum seeker and placed them in the cultural context of his country of origin. The State Secretary should not have ignored this without further justification and for that reason the appeal of the Ugandan was allowed.<sup>43</sup> Even so, the man received a negative decision again. He filed for appeal at the District Court and at the Council of State once more, but this time without success. Sadhia Rafi wonders with respect to this outcome what it would take to convince the State Secretary of the credibility of a person's sexual orientation, if the inclusion of an expert report to further substantiate cultural aspects is apparently insufficient.<sup>44</sup>

#### **2.4.2 COUNCIL OF STATE 12 AUGUST 2020: IS WI 2018/9 NEW POLICY?**

The Council of State proceeded to ask the State Secretary a second set of written questions about the credibility assessment of sexual orientation, in order to gain clarity regarding differences between the two work instructions.<sup>45</sup>

This case was about the credibility of the sexual orientation of a man from Iran and a man from Uganda. They argued that the assessment was noticeably different since WI 2018/9 because the focus was no longer on the awareness process and the process of self-acceptance.

In particular, the Council of State wanted to know:

- Have there been any changes because of WI 2018/9 compared to WI 2015/9?
- How has criticism of the policy been dealt with?
- Does the new work instruction contain new policies?
- To what extent do the processes of awareness and

41. ABRvS (Council of State) 6 February 2020, ECLI:NL:RVS:2020:342.

42. Buro Kleurkracht (Power of Colour Bureau) is a training and consultancy firm in the field of intercultural communication.

43. ABRvS (Council of State) 6 February 2020, ECLI:NL:RVS:2020:342.

44. Rafi 2021. This case is included in *Unheard. Injustice in migration law*, Wegelin et al. 2021.

45. Questions from the Council of State on (the application of) Work Instruction 2018/9, 28 February 2020, 201807042/1/V2; 201901408/1/V2.

- self-acceptance still play a role?
- In which cases can third-party statements be pivotal?

### **Has the policy changed?**

The State Secretary mentioned three points where WI 2018/9 would be an improvement compared to WI 2015/9:

1. There is no longer any emphasis on the awareness process and the manner of self-acceptance.
2. The importance of asking open-ended questions and questions about personal experiences and significance is emphasized in more detail in WI 2018/9.
3. WI 2018/9 states that the decision must include in what way any submitted third-party declarations have been taken into account.<sup>46</sup>

All this would amount to changes, but not to changes in policy. The Council of State, like the State Secretary, considered it an improvement that WI 2018/9 no longer uses the terms 'awareness process' and 'self-acceptance', but that WI 2018/9 is therefore 'not a substantive policy change that necessitates new assessment.'<sup>47</sup> Already in the judgment of 15 June 2016, the Council of State had ruled 'that Work Instruction 2015/9, in view of the documents on which it is based, has been carefully drawn up. Now that WI 2018/9 essentially builds on this, the Council of State sees no reason to judge otherwise regarding this work instruction.'<sup>48</sup>

### **Processes of awareness and self-acceptance**

Regarding the question about which elements of criticism from asylum support groups led to the improvements or changes the State Secretary offers no direct response, and the answer regarding the influence of the report *Pride or Shame?* in the improvements remains lacking.<sup>49</sup> In the explanatory memorandum to the questions to the State Secretary, the Council of State wrote: 'The criticism implies, among other things, that it seems that you have certain stereotypical expectations before you consider statements about awareness and self-acceptance credible. For example, one would expect a process of awareness or self-acceptance consisting of different phases.'<sup>50</sup>

The State Secretary replied that it is not true 'that a lot of value is attached to the statements about awareness and self-acceptance, at least in so far as it is interpreted in such a way that every asylum seeker will have gone through certain phases of awareness or will have had problems with their own

46. State Attorney Pels Rijcken, 8 April 2020.

47. ABRvS (Council of State) 12 August 2020, ECLI:NL:RVS:2020:1885, par. 6.4.2.

48. ABRvS (Council of State) 12 August 2020, ECLI:NL:RVS:2020:1885, par. 6.

49. This answer is: 'The State Secretary and the IND have taken note of the report *Pride of Shame*. The insights gained from this have been used in the creation of WI 2018/9.' State Attorney Pels Rijcken, 8 April 2020, 2.1.2.

50. Questions from the Council of State to the State Secretary, 28 February 2020.

sexual orientation.’ Even under WI 2015/9, that was never the intention, according to the State Secretary.<sup>51</sup> By removing the concepts of process of awareness and self-acceptance from the work instruction, the State Secretary wishes to make it clear that it is not assumed that the asylum seeker has gone through certain phases of awareness or has had problems with sexual orientation themselves and is able to adequately explain this.<sup>52</sup>

The Council of State adds that the State Secretary no longer uses this terminology, because asylum seekers do not always know what is meant by it, and to prevent giving the impression that there should always be some form of process of awareness or self-acceptance. By saying this, he tries to avoid misunderstandings about these terms thereby bringing the integral credibility assessment previously prescribed in WI 2015/9 more emphatically to the attention of his employees.<sup>53</sup>

### **Third-party statements**

The way in which the State Secretary deals with statements from third parties in WI 2018/9 does not, in the opinion of the Council of State, constitute a change in policy either. In WI 2018/9, the State Secretary does not give more weight to statements from third parties but he will now explain in greater detail how those statements are involved in the assessment. It is still primarily the responsibility of the asylum seeker to make their stated sexual orientation plausible based on their statements and any other evidence. Statements made by objective third parties, particularly about witnessing authentic behaviour, can serve as supporting evidence.<sup>54</sup>

### **Stereotypes**

The State Secretary denies having certain stereotypical expectations during the assessment of statements about awareness and self-acceptance and refers in this context to the answers of 10 September 2019 to the parliamentary questions of Members Voordewind and Groothuizen:<sup>55</sup>

It has been standard practice for some time for the IND to only use stereotypes if they support the statements of the asylum seeker. The Work Instruction LHBTI also clearly states that the assessment may not be based on prejudice. (...) I do not recognise the criticism in the letter from COC that the IND still uses stereotyping when assessing the credibility of sexual orientation.

The Council of State agreed with the State Secretary also on this point:

51. State Attorney Pels Rijcken, 8 April 2020, 2.3.6.

52. State Attorney Pels Rijcken, 8 April 2020, 2.3.5.

53. ABRvS (Council of State) 12 August 2020, ECLI:NL:RVS:2020:1885, par. 6.4.1.

54. ABRvS (Council of State) 12 August 2020, ECLI:NL:RVS:2020:1885, par.6.5.

55. Voordewind and Groothuizen asked these parliamentary questions on 14 June 2019 in response to a letter from COC dated 9 June 2019 and the report ‘Credibility of Conversion’ by Stichting Gave of 26 February 2019, in which questions were raised about the implementation of WI 2018/9 and WI 2018/10 respectively.

Moreover, the main criticism is that the State Secretary bases his assessment on stereotypes, especially the statements of asylum seekers about awareness and self-acceptance. As follows from the judgment of 15 June 2016, WI 2015/9 as such is not based on stereotypical principles. This also applies to the WI 2018/9 (...) Nor do the work instructions show that the State Secretary considers a stated sexual orientation credible only if an asylum seeker meets a certain image, such as having gone through a phased process of awareness or having gone through an inner struggle.<sup>56</sup>

### **Limited number of cases?**

Nevertheless, also according to the State Secretary, the policy has been incorrectly explained and applied in a limited number of cases when actually implemented. These cases were in violation of WI 2015/9, because there was too much emphasis on 'the awareness process' and 'self-acceptance' and these terms 'took on a life of their own'. In his letters, the State Secretary has intended to strongly state that this is absolutely not the intention and that this must stop.<sup>57</sup> However, the policy was only in some cases misinterpreted by the civil servants of the IND.

In order to do something about this, the State Secretary will not reassess all previous cases for the incorrect application of WI 2015/9, but he will assess with each subsequent application whether too much emphasis was placed during the previous procedure on the awareness process or self-acceptance. If that turns out to be the case, the asylum seeker will be interviewed again and/or the case will be reassessed.<sup>58</sup>

### **Stereotypical starting points in Iranian case**

The fact that, according to the Council of State, the agreed upon method in WI 2018/9 to investigate and assess a stated sexual orientation as such is not based on stereotypical starting points, 'of course does not exclude' – also according to the Council of State – 'that the State Secretary reasons in a specific case from a stereotypical starting point.'<sup>59</sup>

The Council of State subjects one of the present cases (that of the Iranian) to an extensive assessment and proceeds to conclude – surprisingly – that the State Secretary has not properly justified why the man has not made his sexual orientation plausible. This has created the impression that the State Secretary's assessment was based on stereotypical principles.<sup>60</sup> The man's statements about the discovery of his sexual orientation have not been properly assessed, his partner

56. ABRvS (Council of State) 12 August 2020, ECLI:NL:RVS:2020:1885, par. 6.1.

57. ABRvS (Council of State) 12 August 2020, ECLI:NL:RVS:2020:1885, par. 4.2.3.

58. ABRvS (Council of State) 12 August 2020, ECLI:NL:RVS:2020:1885, paragraph 4.2.4 and 6.4.5. See also the letter from State Secretary Harbers of 13 November 2018, which states that if the considerations were almost exclusively related to the process of awareness and self-acceptance, an additional interview or decision may be required.

59. ABRvS (Council of State) 12 August 2020, ECLI:NL:RVS:2020:1885, par. 6.1.

60. ABRvS (Council of State) 12 August 2020, ECLI:NL:RVS:2020:1885, par. 8.3.



has not been questioned, and the State Secretary ignores statements that the man himself considers important. His appeal was allowed and the decision of April 2017 was annulled. As with the judgment of 6 February 2020, the Council of State ruled in the judgment of 12 August 2020 that the policy is generally good and diligent, but that this may be different in an individual case: cultural aspects may not have been sufficiently taken into account or the decision may still have been taken on the basis of stereotypes. However, if the asylum seeker wants to invoke this, he must raise it himself.

#### **2.4.3 COUNCIL OF STATE 4 AUGUST 2021:**

##### **STATEMENTS FROM THIRD PARTIES**

On 4 August 2021, the Council of State issued an important judgment about the manner in which the State Secretary must deal with third-party statements and other supporting evidence. The Nigerian in this case had submitted a large amount of supporting documents: statements from (ex-) partners, photos, letters from COC and LGBT Asylum Support, and bank statements of visits to a gay sauna.<sup>61</sup>

The Council of State confirms once again that the starting point is that an asylum seeker can and must make their sexual orientation plausible mainly with their own statements. However, an inadequate statement may under certain circumstances be 'compensated' with other statements and submitted evidence. This mainly concerns information of a factual nature or statements by objective third parties about actual conduct. In the context of the integral credibility assessment, the State Secretary must make clear in the decision how he has considered each of the documents provided by the asylum seeker, according to the Council of State. The State Secretary cannot set aside the documents on the sole grounds that he does not consider them decisive, because he found the asylum seeker's own statement insufficient. Incidentally, this was already stated in the Work Instructions WI 2018/9 and WI 2019/17, but in practice often only the statement of the asylum seeker was looked at.

The Council of State ruled that the State Secretary did not properly justify how he weighed up the documents submitted by the Nigerian man either separately, collectively and in the light of other statements and objections; nor why the asylum seeker was unable to convince him of his stated sexual orientation by means of the documents in question. His appeal was allowed.

61. ABRvS (Council of State) 4 August 2021, ECLI:NL:RVS:2021:1754.

## 2.5 WODC research

In October 2021, the WODC's report 'Faith and love under the magnifying glass of the IND, Evaluation of the changes in the credibility assessment of asylum applications with a religious conversion or LGBTI motive' was published,<sup>62</sup> together with a policy response from the State Secretary.<sup>63</sup>

The WODC had already issued a Memorandum on the same subject in May 2019.<sup>64</sup> One of the recommendations was to register more data, both on the number of asylum applications with an LGBTI or religious conversion motive, as is already happening in Belgium, for example,<sup>65</sup> and on the reasons for the decision. This could contribute to a more transparent and consistent decision-making practice and to the learning capacity of the IND as an organisation.<sup>66</sup> However, the State Secretary saw no added value in such registration.<sup>67</sup> Due to the lack of quantitative data, no statements could be made in the recent evaluation of the WODC about possible effects of the new work instructions on the number of acceptances or rejections.<sup>68</sup>

Central to the WODC evaluation is the perspective of the interviewing and decision-making staff and the LGBTI and conversion coordinators of the IND. How do they experience working with the new instructions? The researchers conclude that on paper the work instructions offer tools to IND employees for avoiding stereotyping and using an open approach, but that in practice both stereotyping and a closed approach are still regular occurrences.<sup>69</sup> According to researchers, the changes are an improvement on paper, but the actual implementation could be improved. Incidentally, researchers note that a further systematic and extensive analysis of files could contribute to more information in this area.<sup>70</sup>

The State Secretary concluded from the WODC research that there are no indications for further improvements in the assessment of LGBTI cases, and that the IND uses the optimal method to assess the credibility of LGBTI people. However, it is not clear on what the State Secretary based this conclusion. In any event, this is not mentioned in the report.

62. Boekhoorn & Severijns 2021a.

63. Policy response WODC report 'Faith and love under the magnifying glass of the IND', State Secretary for Justice and Security to the Chairperson of the House of Representatives, 1 October 2021, Parliamentary Documents 19637, no. 2772.

64. Schans & Van Lierop 2019.

65. In Belgium, the office of the Commissioner General for Refugees and Stateless Persons (CGRS) processes the asylum motive in an automated file. The United Kingdom also published 'Experimental statistics' to find out how many cases are involved each year (Home Office, 2017).

66. Schans & Van Lierop 2019, p. 23.

67. Letter from the State Secretary for Justice and Security to the House of Representatives, 6 September 2019.

68. Boekhoorn & Severijns 2021a, p. 15.

69. Boekhoorn & Severijns 2021a, p. 76.

70. Boekhoorn & Severijns 2021a, p. 48.



## 2.6 Dutch working methods in an international context

In their previous study, the WODC also looked in other European countries for starting points for improving the credibility assessment in LGBTI and conversion cases. However, no leads were found.<sup>71</sup> The method in the Netherlands at the time of WI 2015/9 was comparable to that of other Western countries.<sup>72</sup> Because changes were proposed in 2018, such as the removal of awareness and self-acceptance, the researchers got the impression ‘that the Netherlands is at the forefront internationally when it comes to letting go of predetermined models or ideas about how the discovery of a sexual or religious identity develops.’<sup>73</sup> The State Secretary then concluded that the Netherlands was at the forefront internationally.<sup>74</sup> The reservations expressed by the researchers, namely that it had yet to be seen how the changes to WI 2018/9 would turn out in practice, were ignored. The State Secretary’s conclusion is therefore questionable.

For example, during recent international conferences, it appeared that the Netherlands is neither ahead nor behind in assessing the credibility of the sexual orientation of asylum seekers, but that the situation in other EU countries is very similar to the Netherlands.<sup>75</sup> Research shows that the stereotypes used in different countries are remarkably similar.<sup>76</sup> In that regard, there seems to be a link with the use of the so-called DSSH model.

The DSSH model was developed in 2011 by the British barrister S Chelvan, where DSSH stands for *Difference, Stigma, Shame* and *Harm*.<sup>77</sup> This model is intended to assist in establishing the credibility of a stated sexual orientation and was a response to the practice of asking highly explicit questions about sexual acts at the time, now prohibited by the European Court. As far as is known, the DSSH model as such is not used in Dutch practice, but it does seem to affect the credibility assessment of sexual orientation, as the model is part of EASO’s SOGI training module.<sup>78</sup> In connection with that module, interview trainers from the IND informed the WODC researchers that they were positive about the DSSH model.<sup>79</sup>

The DSSH model is based on the idea that LGBTI people have a few basic characteristics in common.<sup>80</sup> The problem is that this model assumes that the asylum seeker has gone through an ‘emotional journey’ (a process of awareness and

71. Schans & Van Lierop 2019, p. 19; see also EMN 2016: <https://bit.ly/3ohTab0>.

72. See in the same sense *Pride or Shame?*, p. 35 and p. 74.

73. Schans & Van Lierop 2019, p. 23.

74. See State Attorney Pels Rijcken 8 April 2020.

75. SOGICA Final Conference, University of Sussex, July 2020 (online); ‘WE - Connect Europe’, conference COC Netherlands, August 2020 (online); ILGA-Europe Gathering Online, October 2021.

76. Gröndahl 2021; Grønningsaeter 2017; UKLGIG 2018; Zisakou 2021. Sophia Zisakou distinguishes between first- and second-generation stereotypes. The first generation involves stereotypes about behaviour and appearance, knowledge of LGBTI organisations, topics and criminal laws in the country of origin, and avoiding risky behaviour, as described in the *Fleeing Homophobia* report. The second generation of stereotypes are about defining a sexual identity. It is expected that a process of self-realisation has been gone through, with negative feelings, and a detailed account of the moment that the orientation was discovered. In addition, deep feelings about the partner are expected.

77. See Gyulai et al. 2015, pp. 74-84; ICJ 2016, p. 48.

78. SOGI stands for sexual orientation and gender identity. The model is also mentioned in the UNHCR Guidelines 2012 no. 9.

79. Boekhoorn & Severijns 2021a, p. 70.

80. See Gyulai et al., p. 77.

self-acceptance), in which the LGBTI-phobia from the country of origin is internalised in the form of shame or other negative feelings.

Incidentally, the DSSH model is also mentioned in the *Fleeing Homophobia* report published in 2011.<sup>81</sup> At that time, attempts were still being made to find out the sexual orientation of asylum seekers by means of the now prohibited methods of ‘phallometry’<sup>82</sup> and the asking of sexually explicit questions. In this situation, it seemed a better idea to most of those involved to ask the asylum seeker about their experiences with discovering their own sexual identity. This idea is also included in the *Fleeing Homophobia* report, as well as in a great many other reports from that time.<sup>83 84</sup> It is now clear that this method of assessment has encountered new problems. Some critics of the DSSH model have suggested modifying the model,<sup>85</sup> but it might be better to use it no longer.

## 2.7 Conclusion

The most important conclusion of the *Pride or Shame?* report, based on a study of the decision-making practice of LGBTI asylum applications, was that the main focus or the core of the policy of WI 2015/9 – namely the expectation that in a country with an LGBTI hostile climate LGBTI people always go through a process of awareness and a process of self-acceptance – is based on a stereotype. State Secretary Harbers recognised this conclusion and deleted the terms in the new Work Instruction WI 2018/9. For a long time, it was not clear to what extent the processes of awareness and self-acceptance still played a role in the procedure.

Two years later, the Council of State wanted to know what was going on and whether the new policy text contained any new policy. On this point, the State Secretary and the Council of State agreed: WI 2018/9 does not entail a change in policy and the State Secretary does not have to carry out a complete reassessment of the asylum applications which were previously assessed based on WI 2015/9. In addition, the State Secretary denies that staff worked with stereotypes and on this point the Council of State also agrees. WI 2015/9 as such would not be based on stereotypical principles and this would also apply to the WI 2018/9 which was built on this.

81. Jansen & Spijkerboer 2011, p. 63 and 80.

82. Phallometry refers to the method in which the physical reaction of the asylum seeker was measured on the basis of pornographic images and which constituted a flagrant invasion of privacy and human dignity. See also ORAM 2010.

83. See, for example, FRA 2010, p. 60; UKLIG 2010; Miles 2010.

84. José Renkens rightly points out that it is very problematic from an intercultural point of view to ask how the asylum seeker discovered and experienced their sexual orientation. However, Renkens' conclusion that the *Fleeing Homophobia* report would have caused these problems is, in my opinion, not correct. See Renkens 2018.

85. Dawson & Gerber 2017; Gould 2018/2019.

The State Secretary also claimed that since WI 2018/9, the focus has not been on awareness and self-acceptance anymore. The latter would involve an incorrect application of the policy, and indeed, that is what occurred in a limited number of past cases where the emphasis was almost exclusively on 'the awareness process' and 'self-acceptance'. According to the State Secretary, by removing these terms, WI 2018/9 no longer placed too much emphasis on the processes of awareness and self-acceptance.

It is very difficult in all this to follow the claim that the application of the core point of the policy could be incorrect. In addition, the State Secretary does not in any way substantiate the argument that this only concerned a limited number of cases. Notwithstanding, this view is not consistent with the findings of the *Pride or Shame?* study, in which 85% of the rejections of LGBTI applications were based on implausibility of sexual orientation. In most cases, these were people who had not explained enough about the processes of awareness and self-acceptance that they were supposed to have gone through.

The State Secretary acknowledged that too much emphasis had been placed on these types of processes, in some cases almost exclusively. This incorrect application of the terms should stop, according to the State Secretary, but how would the State Secretary intend to do so? 'With the adjustments in WI 2018/9, and the deployment of coordinators in implementation practice, as laid down in WI 2019/17, it is intended to ensure that this does not happen again in the future.'<sup>86</sup> The question whether these measures offer a solution to the issues or show an improvement; or if they even can be characterised as the optimal method, is addressed later in this report and answered at the end of the report.

86. ABRvS (Council of State) 12 August 2020, ECLI:NL:RVS:2020:1885, par. 4.2.3.

## 3. CREDIBILITY SEXUAL ORIENTATION

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### 3.1 Introduction

Based on quotations from the files (and case law), this chapter discusses and examines whether anything has changed or improved with regard to the credibility assessment of sexual orientation when compared to the situation at the time of WI 2015/9, as described in the report *Pride or Shame?*.

This predominantly concerns credibility of the sexual orientation of people who come from countries where the performance of same-sex sexual acts is criminalised. This is still the case in 70 countries.<sup>87</sup> At least six of those 70 countries have the death penalty for homosexual acts.<sup>88</sup> One of the results of the *Pride or Shame?* survey was that in most cases, the sexual orientation of LGBTI people from countries where homosexual acts are not criminalised, is generally believed. This was also the case for the files studied this time around.<sup>89</sup> In the five files of transgender asylum seekers, as in the previous study, there was no doubt about their gender identity. Doubt about the credibility of a stated gender identity did occur in case law. This is discussed in Chapter 4.

### 3.2 General and procedural findings

#### The beginning of the interview

Usually, the interview starts with the interviewing officer explaining what is going to happen. In January 2020, the interview of Vincent from Gambia began with the following words:

*I will now talk to you about your sexual orientation. Because you indicate that you have fled because of your homosexuality, it is necessary that the IND investigates this. We do this by asking a variety of different questions. These are questions about how you found out you were gay and what role that has played in your life, and so on. These questions will be very personal and about your private life. Chances are that you have never been asked these kinds of questions before. However, it is necessary for me to ask you them. It is important that you give detailed answers, and your statements must reveal your personal story, the so-called authentic story. Based on your statements, it will be assessed whether or not your sexual orientation is credible.*

#### Frequent interviewing

Often asylum seekers who base their asylum claim on sexual orientation are interrogated very extensively.<sup>90</sup> In twelve of

87. Mendos et al. 2020.

88. These are Brunei, Iran, Mauritania, Nigeria (12 northern states), Saudi Arabia and Yemen. In addition, there are five other countries where sources say that the death penalty can be imposed for homosexual acts, but about which there is less legal certainty. These countries are Afghanistan, Pakistan, Qatar, Somalia (incl. Somaliland) and the United Arab Emirates. Mendos, et al. 2020, p. 31 and 38.

89. However, jurisprudence showed that applications from people from so-called 'non-criminalising' countries are sometimes rejected because their stated sexual orientation is not believed. See, for example, District Court Utrecht 21 December 2020, NL20.13378 (Armenia); District Court The Hague 1 June 2021, NL20.12401 (Kazakhstan); District Court Middelburg 10 August 2021, NL20.15077 (Georgia); District Court Amsterdam 20 April 2021, NL20.14803 (Ukraine).

90. The interviews based on gender identity that were examined for this study were shorter.

the files examined for this research, an additional interview was conducted.<sup>91</sup> It is not exceptional that an interview lasts several days, sometimes spread over a longer period of time. For example, Sophia was heard on four different days, spread out over three months, the report totalling 78 pages. James' interview also took three separate day-long sessions over the course of four months; and Nancy's interview took two days, executed over a period of four and a half months. This practice of interviews being spread out over a long period of time means that the corrections and additions to the report of the interview can only be drawn up after several months, so that errors in communication at the time of the interview can barely be amended. It would be much better if an interim report were provided for the asylum seeker and their lawyer. Moreover, research shows that several interviews lead to inconsistencies in the story.<sup>92</sup>

### Wrong advice

Henry from Iraq fled with his wife and three children to the Netherlands. After two failed asylum procedures, his wife discovered homoerotic photos on his phone, after which he admitted that he was gay. Subsequently, he received incorrect advice from various asylum lawyers to first divorce his wife before he could make an application based on his sexual orientation. Fortunately, he got in touch with a lawyer in time who was able to tell him that divorce was unnecessary. He and his wife made a new application together based on his sexual orientation. They were heard separately and two days later the applications were granted.<sup>93</sup>

### Civil servant's own experience

Sometimes the interviewing official offers their own experience with love and sex, as happened in the following example.

#### **Jane, Africa**

*When I was a child, before I was physically ready, I was already in love with girls from my school class. I didn't know what it all meant exactly but I noticed that I felt something towards girls. Do you have such experiences from your childhood but about girls? – Not really. It wasn't really something I remember. I felt something, but not so clearly.*<sup>94</sup>

Perhaps this interviewing official was trying to evoke a confidential atmosphere, but this runs a high risk of confusion of cultural norms. Incidentally, the 'but about girls' betrays the hetero perspective of the civil servant (presumably a white, heterosexual man), now that he himself was also talking about

91. Kok notes that in LGBT cases, additional interviews are more often held than in other asylum cases, Kok 2016, p. 41.

92. See Severijns 2019 and Doornbos 2006.

93. In April 2019, Henry received a permit on the basis of Article 29, first par. of the Aliens Act; his wife and children received a permit on the basis of Article 29, second par. of the Aliens Act.

94. Jane, Africa, additional interview, August 2018.

girls. The official who heard James also referred to his own experience.

**James, Uganda**

*At what point did you start to have feelings for D? – That was when we were at the soccer field, I went to hug him. I felt something for him then.*

*What exactly did you feel then? – My whole body felt very warm, and I got palpitations. (...)*

*I have been playing soccer myself, for over fifteen years. It is quite common for fellow players to hug each other, for example when cheering or after a victory, partly because of the euphoria after a victory. Why did you get feelings for D especially? – He had already told me that he was in love with me in his letter. It was at that moment I realised I felt something for him.<sup>95</sup>*

**Authentic?**

In connection with the origin of the term ‘authentic’, the WODC report states:

The adapted work instructions are in particular the response to comments provided by civil society (interest) organisations and the response to this from the political leadership of the ministry. By adapting the work instructions for LGBTI people and converts, the State Secretary wanted to respond to the criticism that was expressed by organisations about the use of ‘stereotyping’ in the assessment of asylum applications. Subsequently, a process of consideration was started within the ministry and the IND about the adjustment of the formulations in the work instructions, during which the term ‘an authentic story’ emerged. That term then became the starting point for both work instructions.<sup>96</sup>

A lawyer expresses their exasperation:

*In the decision, the respondent states that he is looking for an individual experience or an authentic story. My client wonders what the respondent means by this. Is a homosexual orientation only considered credible when the respondent finds the statements quite unique? Would the respondent also require this of heterosexuals? Is there an objective justification for this? No.<sup>97</sup>*

95. James, Uganda, interview, April 2019. James was not believed and his asylum application was rejected.

96. Boekhoorn & Severijns 2021a, p. 43.

97. Grounds for appeal, November 2020.

**LGBTI coordinators**

Based on this research, there is not much to say about the role of the LGBTI coordinators, whose consultation is mandatory since the introduction of WI 2019/17. Sometimes there is an



98. Matilda, Uganda, decision, September 2021.

99. District Court Utrecht 14 September 2021, NL21.11131 (Iran): 'Work instruction 2019/17 only states that the respondent should consult an LGBTI coordinator in his decision-making if an LGBTI motive is at issue. The WI 2019/17 does not require the respondent to disclose who this coordinator is, when the consultation of this coordinator took place and what the findings of the coordinator have been. The court considers it sufficient that the contested decision at least shows that the respondent has consulted the coordinator.'

100. District Court Den Bosch 2 March 2021, NL21.604 (Nigeria): 'In every case in which an LGBTI motive plays a role, an LGBTI coordinator must be consulted before the decision is taken. The court assumes that this passage in the work instruction is intended to promote the quality and uniformity of decision-making by the respondent. It does not appear from the respondent's decision-making that this has happened. The respondent thus acted contrary to his own work instruction. This constitutes a fault that, in the opinion of the court, can be amended in this case with the application of Article 6:22 of the General Administrative Law Act (Algemene Wet Bestuursrecht, Awb). The court has not found that the claimant was harmed in any way in his interests by this omission.'

101. See also chapter 2.

LGBTI coordinator mentioned in the files. For example, the decision on Matilda from Uganda states:

The claimant's position was not accepted. Moreover, the statements about her sexual orientation have been judged to be insufficiently credible, based on Work Instruction 2019/17 and in consultation with an LGBTI coordinator.<sup>98</sup>

There is, however, a considerable amount of case law about the scope of the obligation to consult an LGBTI coordinator. This shows that most courts do not consider it necessary to state in the decision that an LGBTI coordinator was consulted, let alone who the LGBTI coordinator was and what they advised. It is considered sufficient for the State Secretary to state that the file shows that a coordinator was consulted:

**District Court Haarlem 29 September 2021, NL20.12297 (Uganda)**

The court judges that it follows from WI 2019/17 only that the respondent must consult the coordinator before making a decision. Thus, the respondent is not obliged, on the basis of the instruction, to register in the decision that the coordinator was consulted, nor what was discussed or advised by the coordinator. Moreover, even in accordance with the principle of due care is the respondent under no obligation to officially register this fact.

There are also exceptions, however. For example, in a case concerning an Iranian, District Court Utrecht considered it necessary that the decision stated that the LGBTI coordinator had been consulted,<sup>99</sup> but District Court Den Bosch did not consider it much of an issue to find that this had not happened in a Nigerian case.<sup>100</sup> Sometimes it is considered sufficient that the interviewing officer is familiar with the subject.

**District Court Den Bosch 11 November 2021, NL21.12068 (Gambia)**

Since (...) the claimant's interview was conducted by an officer who specializes in interviewing LGBTI people, in the Court's judgment, the respondent rightly took the view that the claimant at his level could be expected to be able to give more depth to his statements.

**Standard answers**

According to WI 2018/9, it would occur regularly that asylum seekers 'come up with standard answers with regard to their being LGBT'.<sup>101</sup> This accusation was used in two of the files examined. Indeed, the first 'intention to reject' (i.e. the intention to reject the application, September 2018) already remarked that Victor 'tends to get stuck in generalisations', but only in



the fourth intention to reject quoted below, were his answers first branded as ‘standard answers’.

#### **Victor, Morocco**

During a later interview, the claimant largely stuck to using generalisations when he spoke about his personal experience regarding his stated homosexuality.<sup>102</sup> For example, he stated that he already felt different from other boys at a young age: *‘they talked about girls and did all kinds of things to attract their attention, whereas I had no interest in that. I was more attracted to men in the bathhouse, but at that time I didn’t have a relationship with anyone.’* The person involved also stated that he had an *‘inner struggle’*, a *‘phase of denial and acceptance’* and that he *‘thought it was something that would pass by itself, but that did not happen.’* While such feelings and thoughts will be familiar to many gay men, they are also standard answers that are often given to indicate how someone discovers being gay and dealt with those feelings. However, according to Work Instruction 2019/17 ‘Interviewing and deciding in cases in which LGBTI orientation has been invoked as an asylum motive’, the IND looks for an authentic story of the alien concerned and for his personal experience in this regard. It is therefore not sufficient for the asylum seeker to try to make his homosexuality plausible merely by means of generalisations and standard answers.<sup>103</sup>

One would think that thoughts and feelings that occur more often should not immediately be marked as standard answers. Incidentally, the court did not agree with the State Secretary that Victor was stuck in generalities or that the story was rehearsed. Kevin from Guinea was also accused of giving standard answers and in this case the judge also disagreed. Both Victor and Kevin have now been granted asylum.

#### **Kevin, Guinea**

It is relevant that the person concerned puts forward an authentic story with regard to his sexual orientation. He has not succeeded in doing so. His statements consist of standard answers. The person concerned cannot substantiate his statements further or make them more personal when requested.<sup>104</sup> He can also tell little to nothing about his personal experiences and his (thinking) process. He is not able to go beyond generalisations.<sup>105</sup>

The judge thinks otherwise:

The claimant has rightly pointed out that it has been argued several times that the claimant has not explained enough or has stuck to standard answers while he hasn’t been asked further questions on those points at any time. Appeal allowed.<sup>106</sup>

102. The referred to interview took place in April 2018, before the publication of WI 2018/9.

103. Victor, Morocco, fourth intention to reject, May 2020.

104. District Court The Hague 28 September 2020, NL20.13550, appeal allowed.

105. Kevin, Guinea, intention to reject, November 2020.

106. Kevin, Guinea, District Court Den Bosch 15 February 2021, NL20.19498.

### 3.3 Processes of awareness and self-acceptance

#### 3.3.1 INTRODUCTION

The main criticism of the decision-making practice, based on WI 2015/9, was that it was simply assumed that all LGBTI people have gone through processes of awareness and self-acceptance and that they are able to talk about it extensively. It was also anticipated that these asylum seekers struggled with accepting themselves; that they were ashamed; or that they experienced other negative feelings toward themselves. If they came from a country where homosexuality or committing homosexual acts was criminalised or where the atmosphere was generally LGBTI hostile, this was considered an additional argument for expecting a story full of psychological developments.

#### 3.3.2 AWARENESS AND SELF-ACCEPTANCE

Processes of awareness and self-acceptance (at the time of WI 2015/9 still the core of the policy) no longer appear as such in WI 2018/9 and WI 2019/17. The State Secretary deleted the terms and said they will be no longer used 'in order to prevent too much emphasis being laid on them in practice and to improve the way in which asylum applications from LGBTI people are assessed.'<sup>107</sup>

Nevertheless, in the files which were inspected, the concepts of 'awareness' and '(self)acceptance' are still used frequently. Sometimes the interviewing officer mentions it in a later interview, as with Nancy, Tim and Gary (self-acceptance). Occasionally, the term is only discussed in the intention to reject, as with Freddy (awareness). In other instances, the asylum seeker is the first to use the word 'awareness' or 'acceptance', or something similar, after which the IND employee in all cases (extensively) questions the matter further. Furthermore, sometimes the State Secretary replaces the words 'awareness' and 'self-acceptance' with synonyms.

107. Letter from State Secretary Harbers on 13 November 2018: 'The IND will not ask the alien to outline his awareness process or to make it plausible that there is self-acceptance. Incidentally, it is possible that these terms will still be used in the future, for example in a decision or court case. After all, an authentic story or an extensive personal story can mean that someone has convincingly talked about his awareness process or about the way in which he has accepted his sexual orientation.'

#### Nancy, Uganda

*Have you accepted it yourself? – Yes, I accepted it because it is natural. I was born that way and can't do anything about it.*

*Did you accept it right away or did it take you a while? – It has taken a while; it has gone in phases. (...)*

*In general, how did you find out what homosexuality is, what it is*

*exactly?* – You can't know exactly when you're lesbian or gay. It is a feeling that grows and grows.<sup>108</sup>

At several points in the later interview, the person concerned vaguely discussed her stated sexual orientation. For example, she stated that she could not really explain her sexual preference, 'After all, just like a heterosexual, you were born that way, you cannot explain to someone what this is like and what it is'.<sup>109</sup>

#### The State Secretary's response:

Regarding the acceptance process, the 'view' [lawyer's written response to the intention to reject the application] states that the intention to reject leans on stereotyping in judging the process of acceptance and that there should be an acceptance process as envisaged by the State Secretary. It is considered that the claimant is not expected to have gone through an acceptance process.<sup>110</sup>

The court judges that the respondent did not provide sufficient justification for claiming that the claimant was vague in explaining her feelings for women. (...) The appeal is allowed.<sup>111</sup>

The illiterate Tim was also asked about acceptance. He seems unfamiliar with the Western concept of 'acceptance of one's own sexual orientation' and the attempts to explain it during the interview are not very fruitful. In addition, Tim does not seem to make a distinction between being gay and acting gay.<sup>112</sup>

#### Tim, Afghanistan

*Have you accepted your homosexuality by now?* – Yes. (...)

*At what age did you accept these feelings?* – When I was 15/16 years old, I already liked it. I didn't like women and there was nothing I could do about it.

Interviewer's note: *I explain what I mean by the word acceptance and ask the question again.* – When I was about 25 years old, they wanted to arrange a bride for me. I didn't like women and it actually made me nauseous. I knew I couldn't live like that and I knew from that moment on that this was the way I was. (...)

*But how did you manage to accept such feelings?* – It was double. On the one hand I wondered why I was like this and before I came to the Netherlands, I didn't know you could talk about this. On the other hand, I knew I didn't like women and that I was just like that.

108. Nancy, Uganda, interview, April 2019.

109. Nancy, Uganda, intention to reject, February 2020.

110. Nancy, Uganda, decision, April 2020.

111. District Court Haarlem 30 July 2020, NL20.9201. After another additional interview, Nancy receives a status.

112. Cf. Hekma 2004: 'Before the nineteenth century there was no such thing as a homosexual identity and there were only 'unnatural acts' or sodomy. After the invention of homosexual identity, for a long time a distinction was made between "being like that" and "doing it". Nowadays, however, homosexual identity and homosexual acts are in line with each other: gays do what they are.'

*But how did you manage to let go of that double feeling and finally accept that you didn't like women and see yourself as you were? – I tried to contact women, but I couldn't. I asked myself why that didn't work out. Over there, boys marry when they are 15 or 16 years old. I wasn't able to because I couldn't do it.*

Interviewer's note: *I repeat the question and indicate that if the person does not understand the question, I can explain it better.* – Perhaps I cannot explain it clearly. I thought I was the only person with these feelings. I didn't see anyone around me who had the same thing. I tried to reach out to women, but I couldn't. The attraction towards boys was very strong. With women I felt nothing at all.<sup>113</sup>

#### The State Secretary's response:

The person concerned has not provided sufficient insight into how he has accepted his homosexual feelings. (...) About the way in which he has accepted these feelings, he continues to talk very vaguely and concisely. (...) It is reasonable to expect that he can tell what brought him to finally accepting these feelings. After all, he states that at the age of 25 he accepted these feelings, which implies that it took him 12 years. It is reasonable to expect that he can explain how he came to the 'acceptance' of these feelings.<sup>114</sup>

Also in Gary's interview the concept of 'acceptance' is introduced by the IND.

#### Gary, Morocco

*Was there a moment when you accepted that you are gay? – I didn't doubt my feelings, but I tried to feel and behave differently. But that didn't work because what I felt was natural. So, then I just accepted who I was. (...)*

*At what age did you accept that you were gay? – There have always been times when I have told myself to change my feelings and behaviour. That didn't last long. That lasted for only a short while and then I again thought that I am just the way I am; and this would have been from the age of 23.*

*Did some kind of process precede that? – From the beginning on I always accepted myself. It's something natural that you can't change. (...) The conditions were not always optimal, but in the end, nature wins over other factors such as religion, tradition or society.<sup>115</sup>*

#### The State Secretary's response:

The person concerned does not provide insight into the way in which he has accepted his sexual orientation. After all, the doubts he

113. Tim, Afghanistan, interview subsequent application, May 2019.

114. Tim, Afghanistan, intention to reject, July 2019.

115. Gary, Morocco, safe country of origin interview, February 2019.

describes are not his doubts, but he only tried to adapt because of his environment. This in no way shows how he himself has dealt with the realisation that he is homosexual.<sup>116</sup>

The court does not find this in accordance with the work instruction:

The court considers that by taking the position that the claimant does not provide insight into the way in which he has accepted his orientation, the respondent is not acting in accordance with the aforementioned work instruction, which states that the emphasis should no longer be on the manner of self-acceptance. Appeal allowed.<sup>117</sup>

During Freddy's interview, he was asked about his feelings and whether he had accepted it, but the term 'awareness' is only introduced in the intention to reject.

#### **Freddy, Iraq**

*Could you tell me more about how you felt when you realised you had these feelings? Your statements remain quite general, and I understand that it can be difficult to talk about it, but otherwise we cannot make a good decision if you keep giving such short general answers. – This boy A, I loved him. I wasn't concerned with why I'm like that. I just had to be with that guy. I also didn't think about the future and what would happen to me if I'm the way I am. After I was kidnapped and noticed that I was in danger, I came to realise that what I was doing was dangerous. (...)*

*What was it like for you to be young, to realise that you were gay and that this was penalised, and that your parents or family and tribe might disown you? – It was hard to stop. I loved that boy. I didn't want to stop.*

*What did this make you feel, wanting it but knowing that it is taboo with the risk of being ostracised? – I had no choice and I kept it a secret.*

*Did this affect your daily life? – Yes, it affected my mental state. I couldn't walk hand in hand on the street, and everything had to be done in secret.*

*Did you accept that you were gay? – Yes, as far as I'm concerned, yes. I loved it and accepted it with an open heart.*

*Did you just wake up one day and realised that you were gay, or did some time go by before that? – Only after I had been abducted did I realise how dangerous it was. (...)*

116. Gary, Morocco, intention to reject, December 2019.

117. District Court Zwolle 1 December 2020, NL20.1379. Gary is granted a status seven months later.

*Could you tell me a little bit more? I'm trying to map out a process and it is not working well this way. – When I had sexual intercourse with B it was purely to have sex without thinking. I also noticed that I was very eager every time. The feeling of wanting to keep this going with this guy. Until I met that boy at school, then I realised I wanted more, and I knew: this is how I am.*<sup>118</sup>

#### The State Secretary's response:

The person has been asked several times to tell what was going on in his mind. However, he persists in giving general and superficial answers without giving any insight into his thoughts and feelings.<sup>119</sup> In his statements about awareness, he also fails to give insight into his personal experiences and experiences regarding his stated homosexual orientation. (...) However, when asked what it did to him to realise that he was not interested in girls like other boys, he only states that he liked that feeling and wanted to retain it. This is also seen as general and vague. (...) His statement that he had to keep it a secret and he had no other choice is too superficial and general in nature. After all, this does not show how he dealt with the awareness of his stated homosexual orientation, and how he experienced this period.<sup>120</sup>

Sometimes it's the asylum seeker who is first to use the word 'awareness' or 'acceptance' (as with Sharon, Alan and Victor), or something similar (such as 'awareness' with Gary below), after which the IND employee in all cases (extensively) asks further questions on the subject.

#### Sharon, Uganda

*You mentioned that you didn't immediately accept yourself (the feelings you started having for women) what exactly do you mean by that? – I saw that all my friends were different. My girlfriends had boyfriends and I had different feelings. I wanted to do the same. Just be like other people. I did not succeed in doing so.*

*How did you feel about this not working out? – I was in pain. I cannot change. I couldn't develop feelings for those guys.*

*What kind of emotion was caused by the fact that you couldn't change? – I felt cursed. I felt guilty.*

*At what point did you finally accept yourself? – That was when I was eighteen years old. But I still haven't completely accepted it.*<sup>121</sup>

#### Alan, Jordan

*You had indicated that you realised around the age of 15 that you were attracted to boys. The question was what effect your knowing*

118. Freddy, Iraq, interview subsequent application, November 2019.

119. And the fact that it is noted in the corrections & additions that he found it difficult to talk about feelings does not help him either, because he should have said that in the interview.

120. Freddy, Iraq, intention to reject, December 2019. Nevertheless, Freddy is granted asylum, a few days after this intention to reject, and after statements from his partner and his parents have been submitted to the 'view'.

121. Sharon, Uganda, interview, April 2019. Sharon is not believed and therefore does not get asylum.

*that homosexuality is not accepted has on you when you realised you are gay? – Of course, I cried a lot and very often. On the one hand, I accepted it, but on the other hand, I didn't. I thought I might be the only one. I also thought it was a phase that would pass. (...)*

*You say on the one hand you accepted it, but on the other hand you did not. Can you explain that? – I couldn't accept it because my family wouldn't accept it. And at school I also had terrible problems. (...) In the last year of secondary school, all I really thought about was suicide. (...)*

*Have you accepted for yourself that you are gay? – Definitely, I see no other way.*

*Can you explain how you were able to accept yourself? How did that process go from actually wanting to commit suicide to accepting yourself? <sup>122</sup>*

#### **Victor, Morocco**

The person concerned has not sufficiently explained what his personal experience has been with regard to his sexual orientation. He has only stated that he experienced an inner struggle between the ages of 12 and 15. However, he cannot tell anything about this inner struggle or provide insights into this inner struggle. All he does is using generalisations. He cannot explain what he went through in the period between the ages of 12 and 15. It has been taken into consideration that it cannot be assumed by default that someone has gone through a process of self-acceptance, but in the case of the person concerned, he himself has stated that he has gone through such a process. He can therefore be expected to be able to talk about this. The person concerned has not sufficiently explained at what point enough was enough, how he arrived at acceptance, what he went through emotionally during his inner struggle and what the acceptance meant to him, especially since his family is vehemently against homosexuality.<sup>123</sup>

#### **Gary, Morocco**

*You have indicated that you are homosexual. Can you indicate when you found out you were attracted to men? – From an early age.*

*What age were you when you found out? – Since the time I became really self-aware. At about seven or eight years of age. Things that started around that time. I played with girls and I liked the girls' clothes. (...)*

*Can you tell me a little bit more about how you became aware that you*

122. Alan, Jordan, interview, September 2019. Two weeks later he was granted asylum.

123. Victor, Morocco, second intention to reject, January 2019. Later he is believed and granted asylum.

*were attracted to men? – Between twelve and fourteen years old I started to have feelings for boys. (...)*

*I would like to know a little more about the process of awareness of your homosexuality.<sup>124</sup>*

It seems quite apparent that when Gary said ‘Since the time I became really self-aware’, he is not talking about awareness of sexual orientation at all, but about a general self-awareness as a seven-year-old person. Nevertheless, the use of the word ‘awareness’ is used to ask about his awareness of his homosexuality.

### **Jurisprudence**

In some judgments, WI 2018/9 and WI 2019/17 are ignored.

#### **District Court Utrecht 11 March 2021, NL20.13838 (Iran)**

*Inner awareness process (...)*

The court judges that the respondent could within reason say that the claimant talked insufficiently and inconsistently about his inner awareness process. Claimant did state how he felt after he became aware of his homosexuality, namely that he was anxious, ashamed and started to withdraw. However, he has scarcely talked about the process of awareness and acceptance. (...) In addition, the respondent asked claimant several times about the ‘journey’ he took to the point he realised he was gay and how he felt he was different. Appeal rejected.

#### **District Court Roermond 3 June 2021, NL21.4164 (Morocco)**

In accordance with settled case law of the Administrative Jurisdiction Division of the Council of State, the claimant himself must make his homosexuality and his LGBTI orientation and the associated awareness process plausible. (...) Next, the respondent rightly states that the claimant’s statements have not made his process of awareness of his feelings adequately transparent and do not sufficiently go into depth with his statements. Mentioning a physical / sexual interest in men does not mean that the claimant has made it sufficiently clear how his interest in men arose, how he became aware of this and how these feelings have developed further. Claimant has been asked repeatedly to describe inner feelings but has not succeeded in doing so, except stating that he feels gratification with a man and not with a woman. Appeal rejected.

However, the District Court of Den Bosch points out that it is pointless to continue to expect statements about thoughts and feelings if actual action has taken place.

124. Gary, Morocco, safe country of origin interview, February 2019.



**District Court Den Bosch 29 July 2021, NL21.6808 (Uganda)**

The respondent seems to expect that the discovery of a homosexual orientation is always accompanied by some form of inner process of awareness. Whereas the claimant has instead made a statement about what the concrete consequences of discovering his sexual orientation were. It is not clear why the respondent does not have to take these consequences into account during the credibility assessment and it is not clear why the respondent expects every alien to think in detail about the consequences of their homosexuality. (...) The respondent is correct about all questions having been asked repeatedly. However, when it is already quite clear that the claimant did not so much think as much as take action, continuing to ask the same questions makes little sense. The fact that it is – probably – more difficult for the respondent to assess actual actions than statements about thoughts and feelings does not alter this. Appeal allowed.<sup>125</sup>

**District Court The Hague 6 July 2020, NL20.4230 (Ukraine)**

In summation, the respondent takes the view that the claimant has not made his homosexual orientation plausible, since he has not provided a deeper insight into the personal experience of his sexual orientation and has mentioned this only briefly and superficially, has never openly come out with his orientation, has not had any relationships with other men, (...) and has little knowledge about the situation for homosexuals in Ukraine. (...) The court considers that (...) the claimant stated that it was a shock to him when he first discovered that he was attracted to people of the same sex. (...) Claimant realised that he could not live up to his father's expectations and therefore decided that he should not permit himself feelings for other men, which resulted in a constant inner struggle that claimant has been waging with himself throughout his life. (...) In the opinion of the court, given his background, the claimant provided sufficient insight into the personal experience of his sexual orientation and his interpretation thereof and these statements cannot be regarded as brief and superficial. Appeal allowed.<sup>126</sup>

**3.3.3 SYNONYMS**

In various cases, the terms 'process of awareness' and 'process of self-acceptance' are no longer used. Synonyms are used instead.

**Sharon, Uganda**

During the interview, the person concerned was given the opportunity by the interviewing officer to give some insight into her feelings regarding her homosexuality, by inviting her to tell her own story. In this context, it has been taken into consideration that she has not been able to provide an insight into her feelings for women, or the road she has gone through from the discovery of her homosexual

125. After this, another negative decision was issued.

126. However, the legal consequences remained because he did not substantiate that there is no protection from the authorities in Ukraine.

orientation to embracing it. It is true that not every woman who has homosexual feelings has necessarily followed a certain road leading to acknowledgement of these feelings, as this is different for everyone. However, a person claiming that it has taken eight to nine years before she has been able to acknowledge her homosexual orientation can reasonably be expected to give more insight in the way in which she has followed this road to embracing her orientation and how she has experienced it, in relation to her own emotional life.<sup>127</sup>

The State Secretary adds in the decision:

In the 'view', the legal representative argues on behalf of the claimant that it does not follow from Work Instruction 2018/9 that there must be an embracing – or any other word carrying similar meaning – of the orientation. After all, in a country like Uganda, it is very difficult to embrace homosexual orientation. (...) With regard to the statements of the claimant about fully embracing her orientation, the lawyer points out that she has stated 'Now I have accepted it.' However, it is common knowledge from Work Instruction 2018/9 that the terms 'awareness process' and '(self)acceptance' have been abandoned. Therefore, the term '(self)acceptance' is no longer used for producing decisions, but – if necessary – synonyms or alternatives are used. In this case, the phrase 'to embrace' was chosen, as it is a synonym for 'acceptance'. The lawyer's claim that embracing is not the same as acceptance, therefore cannot be valid, which means that the intention to reject is still valid.<sup>128</sup>

After an allowed appeal,<sup>129</sup> a new intention to reject was issued, in which the text from the earlier one of August 2019 (see above) was repeated almost verbatim. Merely the words 'embrace' and 'acknowledge' were replaced by 'acceptance'<sup>130</sup> in this new intention to reject. Patricia met with the very same official who drew up the intention to reject and decision in Sharon's case: and the phrase 'to embrace' was also used for Patricia.

#### **Patricia, Uganda**

Furthermore, the claimant stated that she is still very sad because she no longer has a family due to her homosexual orientation and is no longer allowed to see her two eldest children. It seems premature to talk of her embracing her orientation.<sup>131</sup>

Her lawyer writes in the 'view':

She herself says that she has now accepted her sexual orientation. She literally says that she accepts her own sin. It is not to be expected that a further embracing will follow.<sup>132</sup>

127. Sharon, Uganda, intention to reject, August 2019.

128. Sharon, Uganda, decision, October 2019.

129. Sharon, Uganda, District Court Amsterdam 6 November 2019, NL 19.24177.

130. Sharon, Uganda, intention to reject, November 2019.

131. Patricia, Uganda, intention to reject, August 2019.

132. Patricia, Uganda, 'view', September 2019.

Patricia's decision of October 2019 contains the same text with regard to the use of the word 'embrace' as Sharon's (speaking of standard answers...), with the addition of a footnote with source reference: 'synoniemen.net'. Nancy's intention to reject, drawn up a few months later by another official, also refers to 'embracing'.

#### **Nancy, Uganda**

'From an early age, I found everything girls do and what women do interesting. Anything masculine, I didn't like. I found the relationship with my father very difficult. I wanted nothing to do with him. What my father did, burning my arm: that was an example of the difficult relationship between me and him.' With these statements, the person concerned does not give any insight into the discovery of her feelings and the road she has travelled to come to terms with these feelings. She can be held accountable for this.

It is taken into consideration that the person concerned gave only a brief and superficial statement about the way in which she discovered her feelings and embraced her homosexual orientation. Even more so since she comes from a country where homosexuality is taboo and even criminalised. To be able to, in spite of this, embrace the stated sexual orientation presupposes a rational and emotional road that the person concerned could have explained on a personal and authentic level. She has not succeeded in doing so.<sup>133</sup>

The judge ruled otherwise:

The court judges that the respondent has not provided sufficient reasoning that the claimant's statements about her feelings for women were vague. For example, the claimant stated that there was not necessarily a 'discovery' of her sexuality. She was born a homosexual. As a child, she noticed that she felt more comfortable in the company of women than with men. (...) The court concludes that the reasoning given by the respondent cannot be used to maintain that the claimant's sexual orientation is not credible. The appeal is allowed.<sup>134</sup>

It also happens regularly that the words 'process', 'awareness' and 'self-acceptance' are avoided and that other words are used, such as: 'What did it do to you when you realised you were LGBTI?' This was asked to Sophia, for example.

#### **Sophia, Uganda**

*I would like to talk with you some more about your bisexual orientation. During the previous part of this interview, I had already asked you how you experienced your bisexual orientation, both emotionally and in your thoughts, from the moment you realised that you were bisexual up*

133. Nancy, Uganda, intention to reject, February 2020.

134. Nancy, Uganda, District Court Haarlem 30 July 2020, NL20.9201. Nancy was granted asylum after an additional interview in November 2020.

*to the present day. Can you tell me more about that? – When I was in secondary school, I found out that I had feelings for boys and girls. (...) I then met my friend F. I was in a relationship with her. They caught us.*

*Yes, you already mentioned this last time. My question to you is whether you can offer more insight into what it did to you, when you realised you were bisexual. – I thought it would be normal in the Ugandan environment if I started a relationship with a boy, but a relationship with a girl is not allowed. That is taboo.*

*(...) I would like you to talk about what it did to you personally, how you dealt with it, what kind of feelings and thoughts you had when you realised you were bisexual. – I found it very difficult. I was very scared. I also felt guilty.<sup>135</sup>*

In Nigel's file, other phrasing was used.

#### **Nigel, Uganda**

During the interview and the additional interview, the claimant was given the opportunity by the interviewer to give an insight into his feelings regarding his homosexual orientation, by inviting him to tell his own story. In this context, it is considered he has not been able to give an insight into his feelings for men and the road he has travelled from the discovery of his homosexual feelings to acceptance of these feelings.<sup>136</sup>

In the new work instruction acceptance and awareness processes are explicitly omitted. It is about the entire thought process of the person concerned and not about just a part of it. The position in the 'view' that the acceptance process should not have carried weight in the assessment is not being followed, judging by the previously stated information. In addition, it is noted that the intention to reject does not mention the 'awareness and acceptance process'.<sup>137</sup>

His lawyer responds as follows:

'The road that [claimant] has travelled' is probably not meant in a literal sense, so it must be about some sort of process. The respondent is talking about a process from the discovering of their homosexual feelings to their acceptance, in other words: the awareness and acceptance process.<sup>138</sup>

The court sees no problem:

The court finds that, in accordance with WI 2019/17, the respondent included the claimant's personal account in his assessment. This involves when the claimant became aware he is homosexual, how he came to that realisation, when he came to accept his feelings

135. Sophia, Uganda, interview, August 2019.

136. Nigel, Uganda, intention to reject, January 2020.

137. Nigel, Uganda, decision, March 2020.

138. Nigel, Uganda, grounds for appeal, May 2020.

for men, whether he struggled with the fact that according to his religion homosexuality is a sin and what the disowning by his father, after he discovered his homosexuality (inwardly) meant to him. (...) All these considerations of the respondent refer to the claimant's own experiences and perceptions about the discovery or awareness or acceptance of his stated homosexual orientation. The appeal is unfounded.<sup>139</sup>

It seems that District Court Haarlem does not find it an issue that there is so much mention in this case of awareness and acceptance processes, even though those terms have been removed from the text of the work instruction in response to the criticism that these terms are stereotypical concepts.

### Jurisprudence

Case law also mentions the term 'embracing'.

#### **District Court Groningen 22 October 2021, NL21.13328 (Ghana)**

The court rules that the respondent did not wrongly conclude that the claimant was unable to give an insight into his feelings and the road from discovery to embracing his sexual orientation. The report of the interview shows that it has been asked several times how the claimant discovered his homosexual orientation and what this had meant to him. Claimant has responded to this with not very in-depth statements. His statements were largely about the sexual feelings he had and events that took place, but claimant has not given any insight into what was going on in his mind during these various events regarding his sexual orientation. Appeal unfounded.

### Comments

While the State Secretary has removed the concepts of awareness and self-acceptance from the policy text and promised not to use them anymore, they still show up regularly in the decisions of the State Secretary. Moreover, officials actively seek out synonyms and other phrases for awareness and acceptance processes, as evidenced by the previous quotes: embracing instead of accepting, discovering instead of becoming aware, a road rather than a process. What did it do to you and how did you experience it? In case law we also find: expecting an inner struggle and ability to offer insight into the realisation and development of homosexuality,<sup>140</sup> and undoubtedly more variants are used. It is not, of course, about the words, but about the stereotypical way of thinking that these words represent. Of course, replacing concepts with synonyms does not solve anything at all in that respect. Apparently, remains the way of thinking that every LGBTI

139. Nigel, Uganda, District Court Haarlem 29 October 2020, NL20.10063.

140. District Court Zwolle 15 April 2021, NL20.17663 (Guinea).

person must have gone through an awareness and acceptance process and can explain this insightfully and coherently. There is no sign of any improvement here.

### 3.3.4 NEGATIVE FEELINGS

One of the reasons that the State Secretary requested the removal of the terms ‘awareness’ and ‘self-acceptance’ was to make it clear that it is not assumed that the alien themselves has had problems with their sexual orientation. This was in accordance with one of the main conclusions of the *Pride or Shame?* study:

The idea that the person concerned has gone through a process of self-acceptance implies that it takes applicants huge effort to accept their orientation or identity. It is an unacceptable starting point to expect from LGBTIs, under threat of incredibility of the sexual orientation, that they have a negative opinion about themselves, that they are ashamed and feel guilty. What is more, this appears to be incorrect. (...) The problems lie rather with the others, with their environment. Unlike what is suggested in the policy text, most asylum seekers are perfectly able to make the distinction between themselves and their environment.<sup>141</sup>

The files show, however, that it is still an expectation that the awareness or discovery of one’s own sexual orientation is accompanied by negative feelings.<sup>142</sup> An example of someone who did not meet this expectation is Betty.

#### Betty, Uganda

*When did you first realise that you are attracted to women?* – I was ten years old.

*What was the first time you talked about your feelings for each other?* – During that night we talked about our feelings.

*What did you say to her?* – She told me how she felt. I told her that I felt the same. She asked, ‘is this normal?’. I said, ‘I don’t know either’. (...)

*Do I understand correctly that you did not know until that moment that how you felt about women meant that you were lesbian?* – I didn’t know at the time that I was lesbian. I was always happy and content when I was with a woman. (...)

*Did A know that your feelings for each other might mean that you were lesbian, or had she never heard of it either?* – No, neither of us knew anything about it, but we were happy when we were together.<sup>143</sup>

141. *Pride or Shame?*, p. 175.

142. Berg & Millbank already noted that many asylum authorities expect that discovering one’s own homosexual orientation in the country of origin is accompanied by negative emotions: ‘When applicants have stated that they were happy, content, or had no regrets about discovering their sexuality, decision-makers disbelieved them on the basis that the discovery could not be attended by such positive emotions in a persecutory environment.’ Berg & Millbank 2009, p. 21.

143. Betty, Uganda, interview, October 2019.

### The State Secretary's response:

First of all, it is considered that statements by the person concerned do not go beyond mere superficialities. For example, during the interview she was asked how it had affected her when she realised that she was different. She replied that it gave her a good feeling and that she felt joy. It is reasonable to expect the person concerned, who claims to have known since 1994 that she was attracted to girls, to be able to talk consistently, in detail and specifically about her own experiences in relation to her sexual orientation.<sup>144</sup>

#### Alexandra, Tunisia

In the context of the awareness process, the person concerned was asked what it was like for her when she realised that she is lesbian. She stated that she was not shocked and that she was very happy and that her only concern was that she had to control her own behaviour. It is considered doubtful that she only experienced feelings of joy regarding this moment in view of her other statements that homosexuality is taboo and not common in her country; and that moreover, she came from a strict religious family.<sup>145</sup>

Alexandra and Betty were not believed and their applications were rejected.<sup>146</sup> Angela from Guinea was granted asylum. She did not suffer from negative feelings, but she did have doubts.

#### Angela, Guinea

*How did it affect you, the realisation that you could feel attracted to women?* – I was happy, proud. I knew my orientation. I saw someone who made me happy and that made me proud. To be able to feel so much love for someone.

*Were there any opposing feelings?* – Yes.

*Can you elaborate on these a bit?* – It was new to me. For a man, I had never felt this before.

*It was purely positive for you?* – Yes.

*I was actually referring to the fact that you received confirmation that you were attracted to women. In a country and society like Guinea, this may not be only positive. Yet you indicate that there were only positive feelings in your case when confirming that you felt attracted to women.* – I found it positive but of course it was difficult for me to accept. It is not allowed in my country. In my head and heart, it was positive. (...)

I had huge doubts. I thought it was normal that I could be attracted to women, but I struggled with culture and religion and society. It is not

144. Betty, Uganda, intention to reject, October 2019.

145. Alexandra, Tunisia, intention to reject, first procedure, October 2017. This quote is part of a file in which a subsequent application was made on the basis of WI 2018/9.

146. Alexandra's subsequent application was also unsuccessful.



allowed or accepted. That's why I attempted to have a relationship with a man to see if I could become normal.<sup>147</sup>

In the case of Daniel from Afghanistan, shame played a role.

#### **Daniel, Afghanistan**

*Did you ever tell anyone that you had feelings for boys when you were twelve or thirteen years old? – No.*

*How did it affect you to not be able to talk to anyone about it? – I was ashamed of it. I was a lonely boy. (...)*

*You said that when you came to the Netherlands, you knew that you were gay in terms of sexual orientation, but that in the beginning you actually thought that you were born a sick person. What is the reason for this? – At school, swear words were used with the words father and mother in them. When I came here, the swear word was 'homosexual'. When I heard that, I thought: Am I sick? Am I a human being or am I an animal? <sup>148</sup>*

In the next case, a completely different twist was given to the term shame. It is about Tim, the illiterate man from the Afghan countryside, who talked about his sexual orientation for the first time during his subsequent application. It was noted by employees of LGBTI organisations that he was shy and introverted and came from a shame culture. The IND's response to this was to call this into question.

#### **Tim, Afghanistan**

After all, this so-called shame apparently did not prevent him from speaking about his homosexual experiences, while the sexual acts in question were criminalised in Afghanistan. The same can be said about the photographs submitted by the person concerned in which he (clothed) can be seen touching the tongue of another (also clothed) man with his own tongue and the photograph in which he can be seen, with his upper body partially bare, having his arm around a person of the male sex, also with partially bare upper body. It cannot therefore be maintained that shame/introversion has prevented him from being able to (properly) discuss his claimed homosexual orientation.<sup>149</sup>

This basically states that if he really were that shy, he would not have allowed himself to be photographed so blatantly, nor would he have talked about his homosexual experiences in Afghanistan.

The lawyer notes in the notice of appeal:

147. Angela, Guinea, interview, October 2019.

148. Daniel, Afghanistan, interview, January 2020. Daniel is later granted asylum.

149. Tim, Afghanistan, decision, February 2020.

The fact that the claimant takes pictures of himself and his friend in a private, secure and familiar situation does not detract from the claimant's introverted nature towards third parties. Moreover, the images are still very restrained. At the insistence of the legal representative, the photographs were selected from the claimant's telephone and submitted. He had not done this on his own initiative. That the respondent accuses claimant of talking about his homosexual experiences in Afghanistan during the interview, when under the respondent's policy he is expected to bring up everything and not be allowed to withhold anything, is astonishing.<sup>150</sup>

### **Struggle**

On 8 July 2015, the Council of State considered: 'In the assessment of the credibility of the sexual orientation, the IND does not use as a starting point that in all cases there must have been an internal struggle before the alien accepted his LGBT orientation.'<sup>151</sup> This was included in all work instructions on this subject: WI 2015/9, WI 2018/9 and WI 2019/17. In its judgment of 15 June 2016, the Council of State clarified the issue as follows: 'The respondent rightly does not expect that in all cases an alien has gone through an extensive process of awareness or an inner struggle, as such an expectation would be based too much on stereotypical opinions about a sexual orientation or a specific country.'<sup>152</sup> Yet, in many cases, an inner struggle is still expected. As was the case in the additional interview in Jane's first procedure.

#### **Jane, Africa**

*Was there an inner struggle when you found out you were a lesbian?*  
- No.

*If I understand you correctly, you thought right from the start: this is me?* - Yes, correct. It's a natural thing, it's in my blood. (...)

*I continue to find it difficult to understand that you accepted from the very beginning that you were lesbian and did not experience a so-called struggle. All the more so since you live in a country where this is unacceptable. Could you explain this to me again?* - I did not doubt my feelings. I have accepted it for myself and also the road I have followed. (...) In my country of origin, it is not only Islam that forbids this, but it is also forbidden by law.<sup>153</sup>

150. Tim, Afghanistan, notice of appeal, March 2020. Tim has exhausted all legal means.

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

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

153. Jane, Africa, interview, January 2016. This quote is part of a file in which a subsequent application was made on the basis of WI 2018/9. In the end, she was granted asylum.

Brian was also confronted for not having had an inner struggle. He discovered in the Netherlands that he was attracted to men. His application was rejected. He then had another interview and was rejected again.

### Brian, Iraq

Judging from the statements by the person concerned, his process of becoming aware seems to be based solely on the satisfaction of sexual needs and there does not seem to have been an inner and deliberate process, in which he would have struggled with his own identity and orientation.<sup>154</sup>

*How did it affect you to find out you were attracted to men? Was that difficult or easy?* – It was a nice feeling, I liked it, I still like it.

*So you've never had a hard time with it?* – No, I liked it right away.<sup>155</sup>

Apart from the fact that no new information has been provided that makes his process tangible, it is strange that he has experienced the change in his sexual orientation as pleasant and easy. He has not shown that there has been any inner struggle with his own identity and orientation. It is reasonable to expect him to be able to talk about an inner struggle. After all, he is from Iraq. Iraq is a country where the LGBTI community is quite clearly not accepted.<sup>156</sup>

Tim did struggle but cannot explain exactly how he dealt with it.

### Tim, Afghanistan

Furthermore, the person concerned did not provide sufficient insight into how he dealt with his homosexual feelings. For example, he states that he wondered why God had made him this way and that he hated himself. However, when asked, he could not clearly put into words how he dealt with these questions and thoughts. (...) In the corrections and additions, he again argues that there were periods when he was very depressed and would stay at home and on his own. (...) It would be reasonable to expect that he could further explain how he dealt with this inner struggle, especially since he states that it is impossible to speak of these feelings in Afghanistan.<sup>157</sup>

In the file of Patricia from Uganda, the word 'struggle' is not explicitly mentioned, but implicitly it is considered a 'positive credibility indicator'.

### Patricia, Uganda

She also stated that she is still very sad because she no longer has a family due to her homosexual orientation and is no longer allowed to see her two oldest children. There seems to be no question of embracing her orientation. Although this is a positive indicator of credibility, (...).<sup>158</sup>

154. Brian, Iraq, intention to reject April 2019.

155. Brian, Iraq, interview, July 2019.

156. Brian, Iraq, intention to reject, February 2020. Brian has exhausted all legal means.

157. Tim, Afghanistan, intention to reject, subsequent application, July 2019.

158. Patricia, Uganda, intention to reject, August 2019.

With regard to how the person concerned handled the discovery of her orientation, it has already been taken into consideration in the intention to reject that her statements in this respect are a positive credibility indicator. The remainder of her statements regarding her orientation, however, are vague, brief and superficial and her statements have been inconsistent. Therefore, this single positive indicator is insufficient to result in the credibility of the stated orientation.<sup>159</sup>

Apparently, the fact that Patricia did not simply ‘embrace’ her sexual orientation is a ‘positive credibility indicator’, and apparently this is consistent with a pattern of expectations in which there is a struggle present, or at least negative feelings. It is not clear what the decision-maker’s basis is for this line of reasoning. What is clear is that this is at odds with the work instructions, with the case law of the Council of State and with more recent statements made by the State Secretary that it is not expected that the asylum seeker has had inner conflicts.<sup>160</sup>

### Jurisprudence

#### **District Court Zwolle 15 April 2021, NL20.17663 (Guinea)**

The claimant further argued that the respondent improperly applied the policy by expecting the claimant to have gone through an inner struggle after all and to demand that he provides insight into the realisation and development of his homosexuality, terms that do not appear in WI 2019/17. Also, in contravention of WI 2019/17, the issue of whether there had been an awareness process and self-acceptance was again tested, despite the respondent not using these words. (...) The respondent stated at the sitting that the terminology in the decision may not always have been suitably chosen, but that the respondent did assess the claimant’s account in accordance with the work instruction. The court agrees. The appeal is unfounded.

#### **District Court Dordrecht 20 July 2020, NL20.7188 (Iraq)**

Since the claimant is from Iraq, where his sexual orientation is not accepted, the respondent is not wrong in expecting the claimant to be able to talk about an inner struggle.

### Comments

Although already years ago, at the instigation of the Council of State, it was included in the policy text that it is not expected that in all cases an inner struggle has taken place, because this is a stereotype, the State Secretary appears in many cases still to expect an inner struggle. Not being able to directly embrace sexual orientation is considered a ‘positive credibility indicator’. In addition, the State Secretary still supposes negative feelings

159. Patricia, Uganda, decision, October 2019.

160. State Attorney Pels Rijcken, 8 April 2020, 2.3.5.

from LGBTI people in general, while previously stating that this was not so. Jurisprudence on this is inconsistent.

### 3.3.5 BEING DIFFERENT

In assessing the credibility of sexual orientation, 'being different' plays an important role. WI 2018/9 and WI 2019/17 state:

#### 2.1.1 Private life (including family, friends, (previous) relationships) and environment

This context concerns the alien's own experiences regarding sexual orientation. The alien is asked to explain how he realised he was 'different' / LGBTI, how he personally experienced this, and how the environment reacted. (...)

However, it may be expected that an alien from a country where an LGBTI orientation is unacceptable and even criminalised, will have gone through a (thought) process in which the alien is confronted with the question of, among other things, what it means to be different from what society (and the law) expects/requires and in which way he wants to and can comply.

In the files, the emphasis is on personal experience and not on the reaction of the environment regarding 'being different'. The asylum seeker who has fled an LGBTI-phobic country is expected to have felt 'different' in that country and should be able to talk about it.<sup>161</sup> It is interesting to refer to the social sciences here, which use the concepts of belonging and othering. A definition of othering is the marginalisation of groups based on perceived group characteristics.<sup>162</sup> It may be a little far-fetched to say that the State Secretary is deliberately seeking to marginalise and exclude LGBTI asylum seekers, but the use of these specific words contributes to this, as is apparent from the following quotations.

#### Bernard, Asia

*You are attracted to men. You have said before that you never talked to anyone about it when you found out, because you thought it was normal. However, you grew up in an environment where it was common for men to marry women. When you found out you were attracted to men, did you never think that you were different or that what you did was wrong? – No. Why should I be any different? I'm normal. If someone likes a woman, he is going to marry her. I like a man, that's how I am. When I came in here, I was asked if I wanted to drink coffee, tea or water. I said water because I like water. Because I chose water, am I now different from others?*<sup>163</sup>

161. See also Hertoghs & Schinkel 2018.

162. 'While Othering processes marginalize people on the basis of perceived group differences, Belonging confers the privileges of membership in a community, including the care and concern of other members.' From 'Editor's Introduction', *Othering & Belonging*, Issue One, Summer 2016, Haas Institute, UC Berkeley.

163. Bernard, Asia, interview first procedure, January 2017. This quote is part of a file in which a subsequent application was made on the basis of WI 2018/9.

### The State Secretary's response:

The person concerned indicates that it was normal for him that a man could be with a man. He has in no way shown that the realisation that he was attracted to boys has affected him in any way. He has not been ashamed of this and has not considered that it is not allowed or not possible. (...) It is considered highly remarkable as well as peculiar that the person concerned, who claims to have known since 2005 that he is attracted to men, states that he has never spoken to anyone about this and that it has never raised any questions with him. It is hard to comprehend that if you grow up in a society where men only marry women, and at some point, you discover that you yourself as a man are attracted to men, you do not question yourself and that you would not share this discovery with others – in any sense whatsoever. (...) The fact that he also states that he did not talk to anyone about it because he thought that 'being attracted to men' was normal cannot be understood in any way and is rejected as completely incredible and divorced from reality.<sup>164</sup>

### Nancy, Uganda

*You call yourself a lesbian. Are you only attracted to women or also to men? How would you describe this yourself?* – I am only attracted to women.

*How did you find out? When did you discover this?* – If I wanted to answer that question, I would say that I was born that way. May I ask you something?

*Yes, of course.* – Are you a lesbian?

*No, I'm heterosexual.* – For me it's that I was born that way, just like a heterosexual.

*However, it is generally accepted to be heterosexual. If you are not, and especially in your country, then that is different and not accepted. What was that like for you?* – It is a feeling of insecurity and fear. You don't know who is going to accept you and who's going to do something about it, who's going to attack you, things like that.

*You are a few steps ahead of me now. You will have noticed at some point that you were different from other people and different from what was expected of you. How did this make you feel?* – You try to accept yourself but at the same time you're wary of what people think. On the other hand, it gives you a familiar feeling of being born that way.<sup>165</sup>

164. Bernard, Asia, intention to reject, January 2017. In his subsequent application, Bernard was believed and was granted asylum.

165. Nancy, Uganda, interview, April 2019.

The State Secretary's response:

In addition, the person concerned answered the question about how Ugandan society views homosexuality in a vague and general manner. 'My father thought I was some kind of beast because of who I was. If I extend this to ordinary people in society, this is the image they have about gays and lesbians. People think you're a bit crazy, or they think you're mentally impaired.' The fact that the person concerned is unable to provide insight into what her stated homosexuality has meant for her counts against her. After all, the person concerned who has stated that she was 'born that way' could be expected to have gone looking for information to make sense of her feelings in spite of 'being different' and 'being a bit strange' in the eyes of her father.<sup>166</sup>

Dave is also asked about how he felt about being Other, but Dave does not go along with that train of thought, in his answer the men who attacked him are the Others.

**Dave, Sierra Leone**

*How did you realise that you were supposedly 'different' from most other men in Sierra Leone?* – Other men have different feelings; they have feelings for women and I don't. I have been attacked by other men.

*What did it mean to you to be 'different' from what society and the law in Sierra Leone demanded?* – Again, it was painful. I wanted to be free, to have rights like everyone else. (...)

*You had sex with O again after 14 years, but you were immediately caught again. (...) What did it do to you, as a married man, to be caught again, by your wife no less?* – That was painful for me. I have been abused. I was ashamed.

*What were you ashamed of?* – My clothes were torn off. I was exposed.

*You weren't ashamed that you were caught with O?* – No.

*You were caught by your wife. – O was my partner.*<sup>167</sup>

Once again, Dave does not go along with the heterocentric way of thinking of the IND employee. He does not consider the woman he is married to to be his partner and he is not ashamed that he is gay and that his wife caught him having sex with his male partner. There is nothing shameful about this. The official apparently does not understand this.

166. Nancy, Uganda, intention to reject, February 2020.

167. Dave, Sierra Leone, additional interview, November 2018. Dave was later granted a status.



**Freddy, Iraq**

It is reasonable to expect that he is able to provide insight into what it was like for him to realise that he was different from others. However, when asked how it made him feel to realise that unlike other boys he was not interested in girls, he only states that he liked that feeling and wanted to hold onto it. This is also seen as superficial and vague. It is held that with this superficial and general statement he does not give proper insight into his own thoughts and feelings.<sup>168</sup>

**Comments**

Of course, LGBTI asylum seekers have had severe difficulties with the environment in their countries of origin in many cases. They have been extorted, raped, abused, tortured, and forcibly married off, and only because their sexual orientation or gender identity did not fit within the prevailing norm. That is why they fled. But that does not mean that it is necessary to remind them here in the Netherlands that they are 'different'. It would be better to stop asking about being different and how that made them feel and start asking about the reaction of the environment. For instance, Harry was asked: 'What other problems have you experienced in Russia due to being homosexual?'<sup>169</sup>

**3.3.6 INFLUENCE OF THE ENVIRONMENT**

The very fact that people who flee because of their sexual orientation or gender identity are from an LGBTI-phobic country (something that is actually always the case), is considered an additional argument to expect that they are able to talk in detail about what that is like to discover in such a country that you have a different identity than the usual heterosexual or cisgender identity. A few examples from the files.

**Ian, Guinea**

*You have told that your Guinean culture makes it difficult for you to talk about your homosexuality. In this respect, you follow what you have learned based on Guinean culture. You also mentioned that homosexuality is not accepted in Guinea. In this, however, you do not follow Guinean culture, because you personally accept your homosexuality. Could you explain this? – How can you refuse to accept something that you are? You are a woman. How can you refuse to be a woman if you can't do anything about it? That has nothing to do with culture. I didn't dare talk to people about it because it's forbidden in my culture, but it doesn't take away from the fact that I can accept myself.*

168. Freddy, Iraq, intention to reject, subsequent application, December 2019. Later, Freddy is granted asylum after all.

169. Harry, Russia, interview, March 2020. Harry was granted asylum.

*I am especially curious about how you experienced this. – I understand that. But in some things you don't have a choice, they're just clear. I was gay, I found out. I had no choice but to accept myself as gay. Even though I fear for my own life.*<sup>170</sup>

#### **Tim, Afghanistan**

The person concerned, who comes from a country where homosexuality is not accepted, can be expected to explain as extensively and detailed as possible his own experiences in relation to his sexual orientation in such an environment, his own acceptance of his feelings and his contacts with other LGBT people.<sup>171</sup>

#### **Victor, Morocco**

The person concerned has not sufficiently explained at what moment enough was enough for him, how he came to accept it himself, what he went through emotionally during his inner struggle and what this acceptance meant for him, especially considering that his family is vehemently against homosexuality.<sup>172</sup>

#### **Freddy, Iraq**

His statement that he had to keep it a secret and he had no other choice is too superficial and general in nature. After all, this does not show how he has dealt with the awareness of his stated homosexual orientation, and how he has experienced this period. Especially, because of the fact that the person concerned is from a country in which homosexuality is not accepted and is criminalised.<sup>173</sup>

#### **Gary, Morocco**

The respondent did not sufficiently justify why the claimant's sexual orientation would be not credible because he stated that he did not so much question it himself but tried to conform because of his environment. Given the claimant's cultural background, this type of attitude of the claimant is not inexplicable. The court considers it important that the respondent did take into account in the decision-making process that the claimant comes from an Islamic culture, but only to indicate that more can therefore be expected of the claimant. Appeal allowed.<sup>174</sup>

#### **Sharon, Uganda**

After all, the person concerned has had feelings for women for nine years and comes from a country where homosexuality is a major taboo and punishable by law. Therefore, it is to be expected that she could be more specific about the way she discovered her homosexual feelings and what made it clear to her that it was more than teenage sexual desires.<sup>175</sup>

170. Ian, Guinea, additional interview, September 2019.

171. Tim, Afghanistan, intention to reject, July 2019.

172. Victor, Morocco, second intention to reject, January 2019.

173. Freddy, Iraq, intention to reject, subsequent application, December 2019.

174. Gary, Morocco, District Court Zwolle 1 December 2020, NL20.1379. Gary received a status seven months later.

175. Sharon, Uganda, intention to reject, April 2019.

In Dave's file, the question arose whether the attitude of the environment had not made Dave doubt.

**Dave, Sierra Leone**

*You had already been caught twice with O. Weren't the people suspicious when they saw you with him?* – In the beginning, only our parents knew. But later the atmosphere changed.

*The atmosphere changed. Couldn't you walk alone through town with O anymore?* – After we were caught at school, everyone knew. Then I really couldn't walk with him through town anymore. From that moment on, I knew that what we were doing was not right, that people were against it.

*You say, 'from that moment on I knew it wasn't right what we were doing' What moment do you mean?* – When I was caught and they had taken me to my father.

*From that moment on, you knew that the people in your country did not agree with what you were doing. Did that start you thinking about whether you wanted to continue with it?* – No, not at that time because my condition was bad, I had been beaten.

*And later?* – I realised that people didn't approve of it. My father didn't agree with it either, he even said that I wasn't his child anymore.

*What did that do to you when you realised that?* – Nothing, because that's just the way I am, I can't change myself.<sup>176</sup> (...)

*How long did it take that you did not to know if what you were doing was right or wrong?* – Until 2003-2004. That's when I knew it was good, pleasurable. Then I also knew that it was not allowed in that country. (...)

*Did you not know at first that homosexuality is not allowed in your country?* – No, I was young. (...)

*What else can you tell me about your fears?* – That I would be mistreated.

*Didn't you think: I'd better stop with O?* – No. (...)

*Did you have any doubts in your mind whether what you were doing was right or was that actually not the case?* – No, I had no doubts.

*Why not?* – I liked what I did with O.

176. Dave, Sierra Leone, interview, August 2018.

*Despite the fact that people disapproved of it in your environment?*

- The environment did not know what I was doing. (...)

*But did you still have doubts about yourself?* - I did have doubts. I thought that if I was assaulted like that again, I would die from it.

*How did you deal with those doubts?* - I protected myself.

*So what did you do?* - I didn't go to O. I didn't see him anymore. (...)

*What made you no longer have any doubts, given that people in Sierra Leone disapprove of homosexuality?* - I do not understand your question.

*What made you no longer doubt whether you were gay? After all, most people in your country disapprove of it. But you were sure of yourself, you have just stated. What caused that?* - I am not the one who created me. I can't take this homosexuality away from myself. This is how I am.

*You were also attacked by neighbours. You have not returned home. At work, you were attacked by other guys who worked there. Did you not wonder at the time whether you were actually doing the right thing?* - I have already told you that I did not create myself. I am as I am. (...)

*Did you ever start having doubts about your sexuality in Sierra Leone? Whether you were doing the right thing?* - I don't care if it was right or not. I have no choice. I got scared, I didn't feel safe.<sup>177</sup>

The official keeps repeating the question 'whether it was right what he did', and whether he really had no doubts, while Dave himself had no problems with his homosexuality, it was his environment that did not like it and had a problem with it. It seems as if the interviewer himself does not like the fact that Dave is gay.<sup>178</sup>

### Jurisprudence

#### **District Court Middelburg 28 January 2021, NL20.13386 (Uganda)**

The respondent rightly pointed out that the claimant stated that she went through a struggle after discovering her sexual orientation, but that according to her statements, this was limited to the question of how her environment would react. The claimant's statements do not show any thought process about what it meant to her to be different from what society expected of her. The respondent rightly takes the view that this does not concur with the fact that homosexuality is not accepted in Uganda. The fact that the claimant had a steady girlfriend

177. Dave, Sierra Leone, additional interview, November 2018.

178. Nevertheless, Dave receives a status a month after the interview.

does not make a difference, because this does not affect the view of homosexuality in Ugandan society. Appeal unfounded.

**District Court Utrecht 11 March 2021, NL20.13838 (Iran)**

Given that homosexuality is considered unacceptable in Iran, the respondent was reasonable to expect the claimant to say more about his experience and emotions in recognising his homosexuality, as this can have far-reaching consequences for someone in Iran. (...) He has repeatedly stated that he noticed that he was different, without elaborating on why and how he felt different. Appeal unfounded.

The long quote below, from a judgment by the District Court Zwolle about a young man who only talks about his sexual orientation during his third application, clearly shows what goes wrong.

**District Court Zwolle 26 February 2021, NL20.10806 (Guinea)**

*'When did you finally become aware of your homosexual orientation?*

In 2014, I knew I really was gay. I knew then that if I saw a boy that I wanted to spend time with him.

*What did you think of that when you discovered it in yourself?* I liked it. *But it is not something that is seen as normal in Guinea.* That's right. It is not normal in Guinea. I knew that if I was caught, I could be set on fire, and they would kill me. That was how I felt.

*You said that you liked it when you discovered that you are gay, while you knew that such things could happen to you? I find that a bit strange.* That's right. I developed feelings for boys. That felt good. On the other hand, it is dangerous. Feeling is feeling. I cannot change that. *But if you have those feelings and you know that this is not accepted... Not by your family and not by your environment. How does that feel?* *What did that do to you?* I was in danger. They would kill me. I thought about that. (...)

*What did you think when you discovered that you have certain feelings that have not been accepted in society?* I had a lot of problems with that.

*Can you explain what kind of problem you had with that?* The problem was that I couldn't express my sexual orientation. For example, X and I couldn't express our relationship outside. Those were my problems.

*I actually mean if you had psychological problems with the circumstance that they did not accept you as a human being. Not because of sexual expressions.* The relationship between me and the rest of the people there, that was a problem for me. I knew I was seen as different. I didn't have a good relationship with those people there. *Because they didn't accept that you were gay?* That's right. (...)

*Then there must be a lot going on in your head if you discover that, especially if you live in a country where this is not accepted. How did*

*you deal with that psychologically? I've thought about that. At school I did see boys going with girls and I did not have that urge. I prayed to God that I would have. But it's in me. I can't change that. I've been trying for a while now to find out the feelings that you had when you realised that you were attracted to boys. It seems to me a very frightening idea that you realise that you have a certain orientation and that you are therefore not accepted by your environment. I understand that. The problem is that I felt trapped because I couldn't express my sexual orientation. If I wanted to express my feelings, I couldn't. That was very difficult for me.'* (...)

In the court's opinion, based on this, among other things, the respondent was able to take the position that the claimant's statements are vague, general and show little depth. They do not provide sufficient insight into his personal experience. Given the societal and state views on homosexuality in Guinea, more detailed and authentic statements could have been expected from him. The respondent was not required to consider the circumstances put forward by the claimant that the claimant remained very brief and is semi-literate and therefore cannot find the right words, as a sufficient explanation. In the court's opinion, by the way of asking questions, the respondent took sufficient account of the claimant's limited educational background and the respondent was reasonable to expect the claimant to provide more insight into his personal story. Appeal unfounded.

### **Comments**

This boy says that he found it a big problem that he could not express his sexual orientation, but he is not referring to psychological problems, despite strong insistence from the interviewer. It is very difficult to understand why his statements are considered vague and general or showing little depth. The homophobia of his environment has not been internalised and it is unreasonable that the State Secretary continues to expect this to happen. In addition, it is much more obvious to assume that someone from such an environment finds it difficult to talk about his sexual orientation, instead of demanding psychological treatises from him.<sup>179</sup> The District Court Den Bosch also ruled that it is not necessarily the case that people from LGBTI-phobic countries can talk especially well about this.

#### **District Court Den Bosch 29 July 2021, NL21.6808 (Uganda)**

The background that the claimant cannot openly express his orientation in Uganda, and that starting a homosexual relationship entails risks should this relationship become known, does not per se mean that the claimant should be able to describe deep emotions and feelings in detail. (...) Being able to make statements about a sexual identity and

179. See also *Pride or Shame?*, p. 68-74.

sensations is not self-evident for every alien. This is even more the case if the alien comes from a country where a non-heterosexual orientation cannot be expressed. The appeal is allowed.

### 3.3.7 RELATIONSHIPS

The assessment of the credibility of the sexual orientation is partly based on questions about relationships that the asylum seeker has had in the country of origin and/or in the Netherlands. This involves asking how lovers got to know each other, how they ended up in a relationship, what else they did and what is attractive about the lover. What is new is that questions about negative character traits of the partner are now also being asked.

#### Daniel, Afghanistan

*Have I understood correctly that you are still in a relationship with V at this time?* – Yes.

*What do you actually mean by a relationship?* – Having a relationship with someone with whom you get along well. You can share your feelings as well as your sexual orientation with that person.

*How do you substantiate your relationship with V?* – Can you ask in another way, please?

*You've mentioned that you're in a relationship with V. What are the things you sometimes do together? For example, do you meet up or do you do something else?* – He is also gay. You can vent to someone if they have also experienced something similar. He understands me. (...)

*What character trait do you find attractive in V?* – He loves me. When I'm with him, I really enjoy it. (...)

*What annoys you about V, for example a character trait?* – He talks and brags a lot.<sup>180</sup>

#### Nancy, Uganda

*Can you tell me what you find attractive about your partner?* – Her stature and her voice. She has a beautiful sexy voice. She is calm and makes jokes. I also like how she defends me. If one of her friends disrespects me, she immediately says that I am her girlfriend and that I should be respected and that makes me feel special.<sup>181</sup>

180. Daniel, Afghanistan, interview, January 2020. Daniel received a status a few months after this interview.

181. Nancy, Uganda, additional interview, September 2020.

There are apparently certain expectations in the State Secretary that a relationship must meet in order to be credible.



#### Alexandra, Tunisia

She stated that they supported each other emotionally, that they slept next to each other like friends and that she was happy with P. The above is not convincing, after all this is no different from a platonic friendship. (...) Again she was asked to provide insight into her internal process(s) through which she realised that she has feelings for P. On this she stated that she was very happy when she saw P, that she always wanted to be with her, that they were always together in class and that she missed her when she was not there. The above is not convincing, after all she has only painted a picture of a close friendship and with her statement has not yet shown a process of awareness that has developed to a point where she has realised that she has feelings for P. (...) She limits herself to physical descriptions. Such statements cannot reasonably serve to support an awareness process.<sup>182</sup>

Alexandra's statements are considered too mundane and they are also dismissed as too platonic and too physical. One may think that this problematic line of thought can be explained by the fact that this intention to reject dates from 2017, and that these stereotypical ideas no longer occur after WI 2018/9, but unfortunately that is not the case.

#### Ella, Uganda

She was also asked to provide more insight into the feelings she had specifically for T. It is held that she has not succeeded in doing so. After all, her statements only describe T's behaviour and give a brief account of her character. She only stated that she liked T because she was a sophisticated woman, understood her well and wanted the best for her, and that she was sometimes aggressive. When asked about how the person concerned and T substantiate their relationship, she replied that they travelled together, went on a picnic, went to friends' birthday parties together, shopped together and occasionally went to church together. With this description she has not been able to give an insight into her feelings of love for T. After all, this has not made it plausible that this relationship went further than any other relationship between friends.<sup>183</sup>

#### The State Secretary's response:

A stated sexual orientation cannot be considered plausible by merely describing physical or friendly feelings. After all, as the respondent has already indicated, the assessment of the statements concerns the claimant's reasoning. (...) In view of Work Instruction 2019/17, the interview officer rightly stopped the claimant when she wanted to elaborate on the physical aspects of their relationship. (...) The claimant has not been able to describe what the friendship relationship was like at first, how she noticed that they had transitioned into a love

182. Alexandra, Tunisia, intention to reject, October 2017, first procedure. This quote is part of a file in which a subsequent application was made based on WI 2018/9.

183. Ella, Uganda, intention to reject, November 2019. Ella was denied asylum.

relationship, what had changed substantially compared to the moment when they were only friends and what she had thought about it.<sup>184</sup>

In the case of Ella, the State Secretary states about her one partner that only physical feelings are not sufficient to make a love relationship plausible, and with regard to her other partner that only feelings of friendship are not sufficient. And if she wants to talk about sex, she is cut off. Patricia is also not believed to be lesbian, because, according to the State Secretary, it is too much about physical lust and not enough about love.

#### **Patricia, Uganda**

These statements as well have only shown the expression of physical lust based on sexual attraction. From this side, it cannot be seen how the person concerned and M had a relationship for several years, but only performed sexual acts with each other.<sup>185</sup>

#### **James, Uganda**

*What made D so special to you?* – Everything D did, I liked. He has helped me to accept myself. I am who I am now because of D.

*What things did D do that you liked?* – His way of walking and speaking, I also loved his character.

*This is very general; can you give me an example of a moment in your relationship when you realised you loved D?* – The first time I had intercourse with him, that was in the bathroom.

*What do you want to indicate with this?* – D first came to sit on my bed, he put his hand under my covers. (...) From that moment on we had intercourse with each other several times. I loved him very much.

*I would like an example from you in your relationship that made you realise that you loved D very much. Aside from the feelings of lust.*

– That's hard to explain. When he was acted distant, I missed him very much, I always wanted to be with him. (...)

*You must use your statements to make it plausible to the IND that you are homosexual. That is why I ask these questions, precisely to give you the opportunity to make it plausible that you are homosexual. Because many asylum seekers rely on their sexual orientation. You have also stated that D has played a crucial role in developing your sexuality. Do you understand this?* – I understand, but some things are very difficult to explain.<sup>186</sup>

184. Ella, Uganda, IND's written defence in appeal, March 2020.

185. Patricia, Uganda, intention to reject, August 2019. Patricia was denied asylum.

186. James, Uganda, interview, April 2019.

The State Secretary's response:

After the person concerned has been asked what attracted him so much to D he has remained vague. (...) Then he was asked at what moments he realised that he was really very happy with D and that he loved him. He has repeatedly replied evasively. He was therefore asked about D's character. It has been stated that he was kind, caring and smart and fed the person concerned when he had no food. As noted earlier, such traits are not unique for an emotional relationship. (...) He also mentioned that E gave him many gifts, clothes and food and he hardly had to buy anything himself. These statements do not show deeper feelings but rather material gain.<sup>187</sup>

**Betty, Uganda**

*What did A look like?* – She had a dark complexion. She was thin, taller than me. She had a happy face. She was always laughing. (...)

*What did the feelings you had for A entail?* – When I was with her, I felt safe. She understood me. I felt good. I haven't had that with other people.<sup>188</sup>

The State Secretary's response:

In principle, she was able to discuss her contact with A and how she met her. However, when she is subsequently asked questions that relate to her actual character traits, she uses general and superficial statements. For instance, she declares how A was sweet, kind and helpful. It should be noted that these vague and general statements can be a part of any friendly relationship. Furthermore, when discussing her relationship with A, the person concerned was very brief. She only stated that she felt safe and good. In addition, she claims to have spoken to A about her feelings. (...) 'I had told her that I liked her, that she had a beautiful smile. She was also going to tell me things that she liked about me.' Also with these statements, she does not provide insights into her sexual orientation and relationship with A.<sup>189</sup>

Ian wins his appeal because, unlike the State Secretary, the District Court Den Bosch does not find 'support, hope and future' to be vague generalisations at all:

The respondent held that the claimant's declaration that he has a male partner in the Netherlands with whom he lives together does not make his orientation plausible, because the claimant has persisted in using generalities with regard to his stated relationship. Thus, according to the respondent, he only substantiated his relationship in terms of a general nature such as support, hope and future. (...) Apart from the fact that the respondent did not justify why he refers to 'support, hope

187. James, Uganda, intention to reject, November 2019.

188. Betty, Uganda, interview, October 2019.

189. Betty, Uganda, intention to reject, October 2019.

and future' as generalities and why these aspects do not count as the core values of a relationship, the respondent did not take into account the duration and nature of the relationship that the claimant has talked about in the assessment of sexual orientation.<sup>190</sup>

After this, Ian is heard again:

*Tell me a little bit about your partner's character. – He has a good character. He's the best for me. (...) He wants to spend the rest of his life with me and vice versa.*<sup>191</sup>

The relationship of Alexandra from Tunisia is also not believed, because the State Secretary thinks that the description is better fitting for a platonic relationship. All in all, according to the State Secretary, a credible homosexual relationship seems to be about love, preferably expressed through statements that testify to deep feelings. Feelings that also occur in a friendly relationship are not considered a correct answer and physical or adolescent lusts are rejected for being superficial.

### Jurisprudence

#### **District Court The Hague 29 September 2021, NL21.11872 (Uganda)**

The State Secretary should have asked more questions about her current relationship with her girlfriend. This is all the more pressing since, in the contested decision, the respondent objected to the claimant that the statements about her current relationship were brief and general in nature and that, partly because of this, she did not make her orientation plausible. In view of the foregoing, the respondent did not adequately include the claimant's current relationship in assessing the credibility of the claimant's stated lesbian orientation. Appeal allowed.

#### **District Court The Hague 24 March 2021, NL21.2985 (Nigeria)**

The respondent does not wrongly take the view that the claimant's statements about his relationship with X lack depth and are illogical. In doing so, the respondent was able to take into account that the claimant was stuck in statements about the actions and qualities of his partner and not what he personally feels for this man. Nor has the claimant been able to state with sufficient depth about his relationship with Y. The argument that it is self-evident to the claimant that there is sexual attraction and that a deep emotional description of the relationship is not culturally obvious is not further substantiated. The fact that the claimant has an introverted personality does not mean, in the opinion of the court, that he cannot be expected to talk more about his relationships. Appeal unfounded.<sup>192</sup>

190. Ian, Guinea, District Court Den Bosch 18 March 2019, NL18.22309.

191. Ian, Guinea, interview, September 2019. After this interview, it is believed that Ian is gay. After another year of litigation, his asylum application is granted.

192. This judgment was overturned on appeal, ABRvS (Council of State) 4 August 2021, ECLI:NL:RVS:2021:1754.

**District Court Amsterdam 5 March 2021, NL20.22112; NL20.22113 (Russia)**

In connection with the appearance and character of his partner X, he explained at the sitting that he could not express his feelings with fine words and that he is not a poet. This is also in line with what the interview officer observed during the additional interview: *'[I] notice that you answer quite superficially when it comes to your feelings. You are able to explain fairly extensively when it comes to facts.'* In view of this, the court finds that the respondent did not provide sufficient reasons for the claimant's statements about X was vague and too concise. Appeal allowed.

**District Court Zwolle 30 June 2020, NL20.8738 (Nigeria)**

Not unjustifiably, the respondent objects to the claimant that there is a lack of interpretation of feelings and interpretation of the claimant's stated relationships. The claimant can be expected to testify about character traits or genuine feelings of love. The claimant – as the respondent rightly argues – is rather stuck discussing the sexual aspects of the relationships. The fact that, as was argued on behalf of the claimant at the sitting, the emphasis can also be on sexual aspects among heterosexuals does not alter the fact that the respondent may expect more from the claimant than he has stated. Appeal unfounded.

### 3.3.8 SEX AND DEEP FEELINGS

In the ABC judgment, the Court of Justice prohibited the asking of sexually explicit questions. This is also included in the various work instructions: 'The IND does not ask explicit questions about sexual acts or activities'.<sup>193</sup> In general, the IND also adheres to this, as evidenced by the following examples.

**Brian, Iraq**

*We do not require you to discuss the sexual details. What is important to me is that you tell me about how your first sexual encounter came about. You stated that you talked to him a lot first, is that correct?*  
– That's right.<sup>194</sup>

**Nancy, Uganda**

*Were there places after the school period where you could meet with her to be intimate with her, for example?* – Why would you ask me such a question, it is my private life. When you're in a relationship, you do things with each other, but I don't have to tell you what I do.

*I'm not talking about what it exactly is you did, I wouldn't ask you this, but I was wondering where you met with M.* – My sister was often travelling, so when she was away, we met at my sister's house.

193. WI 2015/9, WI 2018/9, WI 2019/17.

194. Brian, Iraq, interview subsequent application, March 2019.

*Interviewer's note: I would like to inform the lady that it is good that she asks me why I ask certain questions. I tell her that I do not want to offend her in any way, but only ask these questions to understand her story clearly.<sup>195</sup>*

Henry submits a large number of photos during his subsequent application, including photos of him and another man with bare torso, kissing and lying on top of each other.

#### **Henry, Iraq**

*The photos seem to be of an erotic nature so I ask the person concerned if the photos go any further than this, because in that case, I will not look at them further. This is not the case.<sup>196</sup>*

#### **Dave, Sierra Leone**

– He started playing with my genitals and then he said he wanted to have sex with me. I then had sex with him. (...)

*Did you immediately realise what he wanted with you?* – No, I had never done that before. I then got an erection. I then had sex.

*What do you mean by that? Did O enter you?* – No, I entered O.

*Did you know what to do?* – Yes.

*How? You had never had sex.* – O told me what to do.<sup>197</sup>

It does not seem necessary that these questions were asked Dave, and moreover, they are contrary to the policy and the ABC judgment. Nevertheless, it is advisable not to be too rigid with the ban on questions about sex, since in some situations it may be useful to ask such questions in order to better understand an actual situation.<sup>198</sup>

#### **Deep feelings preferred**

Sexual orientation is meant to be expressed through deep feelings. People whose feelings are considered vague or superficial by the State Secretary or who tell too much about sexual acts run a high risk that this will have a negative effect on their credibility.<sup>199</sup> This happened, for example, to Vincent from Gambia.

#### **Vincent, Gambia**

*The person concerned was asked, among other things, how he noticed that he was different from other boys around him. It was held that at this point he only and exclusively talked about sexual feelings and*

195. Nancy, Uganda, interview, April 2019.

196. Henry, Iraq, interview subsequent application, April 2019.

197. Dave, Sierra Leone, interview, November 2018.

198. See also *Pride or Shame?*, p. 48.

199. See also *Pride or Shame?*, p. 33-35.

activities. (...) He was also asked how it affected him when he knew he had feelings for boys at the age of twelve or thirteen. Also on this point, he continues using vague, superficial and varying statements and does not show any emotion or (deeper) feelings.<sup>200</sup>

This also initially went wrong with Freddy from Iraq. His statements about sexual acts were described as superficial, vague and general in nature. Later he did receive an asylum status after all.

#### **Freddy, Iraq**

*This may be a strange question, but what do you mean by being gay?* – That you have an attraction for boys and have same-sex sexual intercourse. (...)

*How long did the period of getting to know each other last until the first sexual acts?* – (...) I said I liked him and wanted to do it with him. He accepted this and asked where I wanted to do it.

*You say: he accepted it, but did he also tell you that he was gay?*  
– No, he did not say that. I approached him with my request. I said that I wanted to do that with him. He accepted that.<sup>201</sup>

#### **The State Secretary's response:**

It is held that his statements about his stated homosexual orientation are superficial, vague and general in nature. The person concerned therefore fails to provide insight into his personal experiences with regard to his stated homosexual orientation.<sup>202</sup>

#### **Steve, Africa**

It is taken into consideration that the person concerned has mainly declared about sexual acts with men with regard to his sexual orientation. For example, he has stated that he himself has found out that he is gay, because he had chosen to have sex with a man and because men have beautiful bodies. Despite the fact that during the interview he was asked direct questions about his feelings apart from sexual attraction to men, he continued to fall back on statements about sexual acts. However, he does not know how to give insight into (the development of) his feelings regarding his homosexual orientation. By only talking about sexual attraction and sexual contact, the person concerned has not been able to clarify how he discovered and experienced his homosexual orientation.<sup>203</sup>

#### **Brian, Iraq**

The person concerned has made general, unclear, varying, and unconvincing statements regarding his awareness process and reasons

200. Vincent, Gambia, intention to reject, January 2020.

201. Freddy, Iraq, interview subsequent application, November 2019.

202. Freddy, Iraq, intention to reject, December 2019.

203. Steve, Africa, intention to reject, December 2019. Steve is denied asylum.



for entering into homosexual contacts. For instance, he stated that he had sexual needs that were not being met.<sup>204</sup>

#### **Ella, Uganda**

She only declared about events in the context of how her first lesbian love affair went, with S, not about her feelings. She was then expressly asked to state her views in this regard. About the discovery of her feelings of love for a woman, she then stated that she was trying to suppress her feelings. She then stated that she had been confused about what she felt. When she was directly asked what was going on inside her, she continued using general remarks instead of discussing concrete feelings. For example, the person concerned only replied that she was confused because she saw that other girls were interested in boys. In addition, she stated that she had so much on her mind and wondered if it was possible that she had feelings for a woman. With these brief and superficial statements, the person concerned has not given sufficient insight into the discovery of her feelings of love for a woman.<sup>205</sup>

#### **Sophia, Uganda**

*I understood from you earlier that you are bisexual. Is that correct?*

– Yes, that's right.

*Do you like men and women equally or do you, in general, have a preference for either men or women?* – My preference is for women.

*Could you elaborate?* – (...) When I'm with a woman, I feel good. Then I also feel at ease. If I'm with a woman, I am able to orgasm. I love sex with the fingers.

*You don't have to be too explicit about your sexual preferences. I would like you to indicate what your preference for women stands for, for example emotionally, in your mind, in your experience, and how that preference arose and how you dealt with it.* – I love women and I have feelings for them and I am still attracted to women.<sup>206</sup>

#### **The State Secretary's response:**

With regard to her preference for women, the person concerned only stated that she feels more comfortable with a woman and that she prefers the sexual contact. When asked if she can clarify these feelings and talk about how she has dealt with this, she replies again that she just loves women and has feelings for them. She thus remains very general about her (developed) feelings for women, so that her sexual orientation cannot be considered plausible solely on the basis of these statements.<sup>207</sup>

204. Brian, Iraq, intention to reject, April 2019.

205. Ella, Uganda, intention to reject, November 2019. Ella's appeal is also unfounded.

206. Sophia, Uganda, interview, July 2019.

207. Sophia, Uganda, decision, December 2019.

### Betty, Uganda

*You have talked about your relationships with A and B. You have told me that you were in love with them because they are kind and cheerful. However, these are things that one can also feel in friendships. I would therefore like to give you another opportunity to clarify what made you fall in love with them and what was different about your feelings for A and B than the feelings you had for other women. – A was my neighbour. We did a lot of things together.*<sup>208</sup>

### The State Secretary's response:

Furthermore, in the context of her relationships, it is held that in her statements she often emphasises the sexual side of her orientation without going into detail about the emotional side. (...) When asked what the difference was between her feelings for A and B, she indicates that B knew all the sensitive physical spots. Even after it has been made clear to her that she must explain about the emotional side, she continues to explain about intimacy and physical contact. In conclusion, it is taken into consideration that she explains inconsistently and superficially, while she has been given sufficient opportunity to go deeper into feelings and thoughts.<sup>209</sup>

Falling in love with someone who is kind or cheerful is not considered 'deep feelings.' But emphasizing sex is certainly not intended either. As soon as there is a mention of sex, often very moralistic or normative reasoning follows, especially when it comes to women from Uganda. There is then talk of 'physical lusts' or 'adolescent feelings of lust' and it is clear that these qualifications are seen as inferior to feelings of love.<sup>210</sup>

### Patricia, Uganda

The person concerned has briefly and superficially declared about her feelings towards women and about the way in which she found out about these feelings. She interprets her feelings mainly in terms of physical attraction. Therefore, there does not seem to be any question of feelings of love. (...) Furthermore, it is pointed out that the development of feelings of attraction as a result of touching genitals and looking at/touching breasts indicates adolescent feelings of lust rather than feelings of affection-based love. However, someone who has had feelings for women for almost 30 years should have been able to explain in greater detail why such feelings were indeed expressions of love rather than solely adolescent lust. This is all the more true given the cultural and social view of homosexuality in Uganda.<sup>211</sup>

### Sharon, Uganda

It is recognised that homosexuality usually is expressed in sexual acts with the same sex. However, this does not exclude that to some extent

208. Betty, Uganda, interview, October 2019.

209. Betty, Uganda, intention to reject, October 2019.

210. Italian judges considered it credible that asylum seekers placed more emphasis on the physical aspects than on the emotional ones. See Danisi et al., 2021, p. 310: 'To avoid Western conceptions of sexuality and emotion dominating credibility assessment, appeal judges have found it credible that claimants would place more emphasis on the physical aspects of their sexuality than the emotional one, overturning decisions by territorial commissions denying international protection owing to lack of credibility. Appeal Tribunal of Brescia, judgment no. 1350, 18 July 2019'.

211. Patricia, Uganda, intention to reject, August 2019.

there must also be feelings of love, at least more intense feelings than mere attraction, which shows that interest in the same sex is not based solely on physical lusts. (...) The person concerned has remained stuck using general statements such as that she liked some girls at school and thought they talked nicely. Such statements do not show an attraction based on more than physical lusts.<sup>212</sup>

#### The judgment:

With regard to the claimant's statements about her feelings for women, the court judges that the link that the respondent makes between these feelings and the conclusion that the claimant's statements are insufficient to serve as a feeling of love is incorrect. (...) With regard to the respondent's assertion that there must be love in addition to physical lusts, did the claimant refer to the report *Pride or Shame*? It follows from this report that the physical attraction from which the performance of sexual acts may result is precisely what constitutes the distinction. As an example, the claimant's representative gives in the 'view': 'if I were to love the Queen very much and therefore cherish many feelings of love for her, that does not make me a lesbian.' At the sitting, the respondent indicated that he agreed with the claimant's criticism and dropped this point at the sitting. The appeal is allowed.<sup>213</sup>

Matilda's lawyer lists in the 'view' moments in which Matilda shows emotions that were noted by the interviewing officer during the interview, for example:

*My family didn't want to have any contact with me anymore. My father died without me being able to say goodbye to him.* Matilda starts crying. *What were the arguments with your husband about?* Matilda becomes emotional. *You got into a relationship with Q, how did that go exactly?* Matilda smiles. *What do you like less about her?* Matilda contemplates.<sup>214</sup>

#### The – incomprehensible – reaction of the State Secretary:

The use in argument of the emotions at the time of interview as a relevant element is not followed. After all, a relevant element is a fact or circumstance that touches on at least one subject or storyline related to refugee status or subsidiary protection status. An emotion has no common ground, therefore the person concerned is not followed in this. With regard to the assessment of emotions, it is held that emotions at the time of interview are included, but that there is no established causal link between the emotions and what she has stated.<sup>215</sup>

#### Jurisprudence

The Council of State pointed out in the judgment below that not every asylum seeker is used to speaking about their feelings.

212. Sharon, Uganda, decision, October 2019.

213. Sharon, Uganda, District Court Amsterdam 6 November 2019, NL 19.24177. After that, Sharon received another negative decision.

214. Matilda, Uganda, 'view', March 2021.

215. Matilda, Uganda, decision, September 2021.

**ABRvS (Council of State) 2 September 2021, 202100285/1/V2 (Armenia)**

The alien rightly argues that, if the State Secretary expected him to have given more insight into his feelings during the interview, the State Secretary should have asked more about this. (...) This is all the more important because the extent to which a person can put their orientation into words will vary from person to person and not every alien is used to talking about their personal experiences and feelings.

**District Court Middelburg 10 August 2021, NL20.15077 (Georgia)**

The respondent did not sufficiently justify why the claimant should explain more deeply about emotional aspects of feelings that he experienced as a fifteen-year-old. It is not possible to see why the feelings that the claimant experienced as an adolescent boy could not consist mainly of physical stimuli. The respondent wrongly did not take into account the perception of someone of that age. Appeal allowed.

**District Court Roermond 30 July 2020, NL20.8114 (Ghana)**

Respondent held: *'The person concerned started to smile during the interview after he talked about physical characteristics of X and later about his physical actions after watching men on the beach, which is separate from his feelings for X and other men.'* The court does not understand why, according to the respondent, the grinning expression is separate from claimant's feelings. Apparently, the grinning was so relevant to the interviewer that he has explicitly mentioned it twice. Both times it was about claimant's physiological response to other men. Appeal allowed.

**District Court Rotterdam 10 May 2021, NL21.380 (Uganda)**

The claimant has made brief statements about the feelings of love she felt when she found out that she was bisexual. (...) Her declaration that she was anxious and that she had repressed her feelings does not give a specific insight into her emotional life from the moment or period when she discovered that she had feelings for both sexes. The claimant could be expected to state more extensively about this, especially since it is reasonable that there was more to her than just fear, after she heard that bisexuality is a taboo and people are murdered for this reason. Appeal unfounded.

**District Court Rotterdam 3 March 2020, NL20.19904 (Uganda)**

The respondent rightly took the view that the claimant discussed only briefly and superficially the feelings she has for women and the way in which she found out about these feelings. (...) The point is that the claimant could be expected to go into greater detail with her statements. (...) The respondent did not wrongly take the view that the claimant interprets her feelings mainly in terms of adolescent physical attraction and that she did not make it plausible that there were also

feelings of love. (...) The respondent did not wrongly take the view that no acceptance process follows from the claimant's statements and that this could be expected of her, given the consequences it had in her country of origin. Appeal unfounded.

### 3.3.9 INTERMEDIATE CONCLUSION

From the quotes in the preceding paragraphs, it appears that very little has changed since the *Pride or Shame?* report. This means that the criticism from that report is still relevant. The sexual orientation of asylum seekers is still assessed based on stereotypical ideas, assuming that those involved went through processes of awareness and self-acceptance or discovery and inner struggles in their country of origin, before coming to terms with their sexual orientation. Deep feelings are expected, and it is best to talk about sex as little as possible. It is good that sexual acts are no longer so explicitly asked about, but that does not mean that sexual orientation is only about deep feelings and that sexual acts are not relevant. It is a sign of overcorrection to dismiss words that are often used for friendship when it comes to love. The State Secretary is implacably persistent in believing the idea that the greater the intensity of the LGBTI-phobia is in their country, the more hatred would be internalised by those involved. Shame and other negative feelings are still expected and people who are happy when they fall in love with someone of the same sex are mistrusted. As is the case with stereotypical ideas, of course all these things can happen, but it is unacceptable to expect such processes and negative feelings under penalty of implausibility.

In addition, answers to questions about awareness and other inner processes are often qualified as 'general', 'vague', 'superficial' and 'brief', while it is not clear what would be vague or superficial about the answers and the problem seems to be that the answers do not meet the expectations of the State Secretary.

## 3.4 Religion

If LGBTI asylum seekers are religious, the State Secretary expects them to have seriously studied the relationship between their orientation and their religion. Often LGBTI asylum seekers do not consider this of much consequence: if God or Allah really did not want this, why did he make me this way?<sup>216</sup> It is sometimes argued that the State Secretary is particularly targeting Muslims on this point,<sup>217</sup> but LGBTI

216. See also *Pride or Shame?*, p. 82-89.

217. See, for example, McNeal & French Brennan 2021.

Christians are just as much expected to have seriously studied the relationship between their religion and their sexual orientation. For example, James had not studied the Bible sufficiently.

#### James, Uganda

When asked, the person concerned stated that he loved E very much but thought that what they did was wrong. He referred to the fact that the priests said that homosexuality was a sin and that homosexuals would go to hell. However, he has stated that he still believes in God and even attends church again in the Netherlands. After being asked how he can reconcile this, he stated that he met a priest who says that everyone is welcome for God and that he therefore no longer believes that he is going to hell. However, when asked, he was not able to name scripture from the Bible or list parts of the Bible that discuss the subject of homosexuality. This is considered illogical since he has specifically listed his religion as a hinderance in accepting his stated orientation.<sup>218</sup>

#### Nigel, Uganda

*You have declared yourself to be a Protestant Christian. What does your faith say about homosexuality?* – It is a sin.

*How did this affect you?* – I see religion as something subjective. Everyone understands it in their own way.

*Did you do this already when you were a child?* – At home we were religious. (...) As you grow up, you start reading the Bible yourself and then you realise that being gay is a sign of love. In the Bible it is written that homosexuality is a sin and at the same time it also says that you must love everyone. (...)

*You stated that at first you thought there was something wrong with you and that you only later accepted your sexual orientation. Have you ever seen your sexual orientation as a sin?* – My religion thinks homosexuality is a sin.

*That is not my question. My question is, because of your religion, have you ever considered homosexuality a sin?* – When I read the Bible, God sent his son into the world to save everyone. In the New Testament, homosexuality is hardly considered a sin, as it is in the Old Testament. So, I consider the Old Testament to be less important, and I focus on what the New Testament says.<sup>219</sup>

The State Secretary's response:

(...) it has remained unclear whether the person concerned has at

218. James, Uganda, intention to reject, November 2019. James was not believed and his asylum application was rejected.

219. Nigel, Uganda, interview, December 2019.

any time struggled with the views of his faith – Protestantism – on homosexuality. After all, he has stated that on the one hand that he accepted his orientation 10 years after discovering it and on the other hand that he is Protestant and that his religion sees homosexuality as a sin. Although he is able to express his current opinion of the beliefs, he has not been able to explain whether he himself has ever seen his orientation as sinful. However, now that the person concerned has been asked about this seven times, he has been given sufficient opportunity to make a statement about this.<sup>220</sup>

The fact that seven is considered a sacred number lends the issue even something extra.<sup>221</sup>

#### **Vincent, Gambia**

*You consider yourself a Muslim but at the same time your religion does not accept homosexuality. Nevertheless, you participated in religious obligations. How did you deal with that?* – You have to understand that this was a secret. The only people who knew about it were the people I had sex with. I didn't show it either.

*My question is what did it do to you to have to participate in religious obligations when your religion does not accept you?* – I felt guilty about this. But I kept doing it. It is just what I wanted.<sup>222</sup>

#### **The State Secretary's response:**

The person concerned stated that at the age of 13 or 14 he heard in the mosque what homosexuality is and that homosexuality is considered a bad thing, which made him feel guilty. When asked about this guilt, he appears to be unable to give insight into the personal experience of his homosexual orientation in the context of his religion and the guilt he felt.<sup>223</sup>

#### **Sophia, Uganda**

The person concerned is Catholic and so are her parents. One of the central tenets of the Christian Catholic faith is that one may not live together before marriage and that children may not be born out of wedlock. (...) The entire course of events of what happened - having a relationship with F - living together - having a child - not marrying - is considered implausible, strange and contrary to information from a public source. The course of events does not correspond to the values of the Christian faith. In Uganda, religion plays a very important role and there is barely any separation between church and state.<sup>224</sup>

#### **Daniel, Afghanistan**

*What do you think is the difference between people who are gay and people who are not gay?* – The difference lies in the opinion of the

220. Nigel, Uganda, intention to reject, January 2020.

221. Seven - the meaning according to biblical Lexicon (ensie.nl). Nigel has exhausted all legal means. His application was rejected on the grounds of lack of credibility.

222. Vincent, Gambia, interview, January 2020.

223. Vincent, Gambia, intention to reject, January 2020. Vincent has exhausted all legal means.

224. Sophia, Uganda, additional intention to reject, May 2020. A footnote to this report reads: Catholics & Cultures, 'Introduction: Church plays large role in Ugandan religious life, social welfare', Thomas M. Landy, 2018.

people, what they think of it. They don't think I'm normal as a gay man. They think I'm an apostate. (...) According to my religion, that was not allowed. According to my religion, you are normal if you marry a woman as a man. That's why I thought to myself: if God created me, why doesn't he give me the right to live as I am? <sup>225</sup>

### Jurisprudence

#### **District Court Rotterdam 18 June 2021, NL21.5998 (Uganda)**

The claimant was extensively questioned about his Christian background and the role of his faith in the acceptance of his stated homosexual orientation, to which the claimant had replied and stated extensively. (...) the claimant was raised religiously, was a practicing Christian and was constantly told by those around him that homosexuality was bad. Claimant therefore struggled with his feelings and was ashamed. He says he prayed, fasted, met with girls, tried to 'chase out the demon,' and did everything to get the feelings out of his head. (...) Claimant had hoped that it would change. However, that did not happen, after which the claimant realised that he was 'just made so by God' and then decided to leave his faith behind and do what his heart told him to do and what made him happy. The court can follow the claimant where he states that this shows a personal and authentic story that the respondent is looking for in cases such as this. Appeal allowed.

### **3.5 Risky behaviour**

It often happens that LGBTI asylum seekers in the country of origin take risks when expressing their feelings and sometimes that takes a bad turn. The State Secretary expects more caution on this point, given the hostile environment. As a result, the perilous actions are often not believed and neither is the sexual orientation. This happened to Tim and James.

#### **Tim, Afghanistan**

*You have previously stated that you were afraid, particularly for the death penalty. Can you explain why you sought intimate contact in such situations? – When we were away from home and playing, I would try to contact a boy because I really liked it. I didn't dare share this with other people. If you say that, you can be killed.*

*Weren't you afraid that the boy – with whom you tried this – would tell others, which could get you into trouble? – I was afraid of that, but sometimes I couldn't control myself.<sup>226</sup>*

225. Daniel, Afghanistan, additional interview, November 2019.

226. Tim, Afghanistan, interview subsequent application, May 2019. Tim was not believed and his application was rejected.



**James, Uganda**

It is considered incongruous that the person concerned started kissing E at a party, in the public toilets, in view of all the risks associated with this. The fact that he had consumed alcohol is not considered excusable. After all, Uganda is a homophobic country, homosexuality is severely punished, and he was familiar with the negative attitude of others towards homosexual persons. It would therefore be reasonable to expect that he would be cautious in how he would behave towards other men.<sup>227</sup>

Sharon had also consumed alcohol at a party and afterwards she had sex with her friend P. The State Secretary finds it remarkable that they talked about their feelings the next day.

**Sharon, Uganda**

The following morning, she asked P how she felt. P replied that she was happy, after which she told P that she had had feelings for her for a long time but had not dared to tell. P replied that this also applied to her. (...) That she talked so easily with P and also indicated that she had feelings for her is, given the Ugandan culture regarding homosexuality, remarkable. After all, the person concerned could have been expected to proceed with more caution on the basis of the social views about homosexuality.<sup>228</sup>

**Betty, Uganda**

It is remarkable, to say the least, that she first states that she has always acted cautiously and secretly but has taken the risk of being intimate with a woman three times. (...) After all, she was aware of the consequences and she also knew that homosexuality was taboo.<sup>229</sup>

Her lawyer writes in the 'view':

She has taken a risk on many more occasion than these three times. She has met up with A to be intimate on many occasions. She has also often met with B. The reason, even after the warnings? The feelings were too strong and she could not resist them. However, they have always tried to be as careful as possible.<sup>230</sup>

**Dave, Sierra Leone**

*Your uncle told your mother. You were then beaten by your mother. How long did you not have sex? – I think a week and a few days.*

*You were beaten badly. How is it possible that after such a short time you took such a risk again? – I just like to have sex with guys. That's why I took that risk. (...)*

*In December 2016 you had sex with O again, namely in your own home.*

227. James, Uganda, intention to reject, November 2019. James was not believed and his application was rejected.

228. Sharon, Uganda, intention to reject, April 2019. Sharon was not believed and her application was rejected.

229. Betty, Uganda, intention to reject, October 2019.

230. Betty was not believed and her application was rejected.

*You said you closed the door but didn't lock it. Why didn't you lock the door? – I hadn't seen O for a long time. He then came to my house and I was really happy to see him again. Because of that feeling, because of the joy, I forgot to lock the door.<sup>231</sup>*

**Patricia, Uganda**

With regard to the risk she took by performing sexual acts with K in the infirmary, the intention to reject rightly held against her the fact that she took an unacceptable risk by performing acts that carry a life sentence with K in this publicly accessible place. (...) The fact that she risked receiving a life sentence only because of 'strong feelings' has therefore rightly been considered not credible.<sup>232</sup>

**Jurisprudence**

**District Court Den Bosch 2 March 2021, NL21.604 (Nigeria)**

In the opinion of the court, the respondent could not reasonably have objected to the claimant that it is implausible that the claimant drank alcohol and thus took the risk that he would become careless; (...) The respondent could have found it implausible that the claimant would not have closed the door and by not doing so, increasing the risk of being caught. Appeal unfounded.

There are a few judgments that recognise that minors cannot always be expected to exercise caution.

**District Court Middelburg 17 September 2020, NL20.9115 (Iraq)**

Furthermore, the court finds that in the contested decision the respondent held that the claimant could be expected to have done everything in his power not to be caught maintaining an affectionate relationship with X, even though he was young. The court rules that the respondent acted contrary to the work instruction in this respect. After all, the respondent did not explain why the claimant's frame of reference as a thirteen-year-old boy would not affect the fact that such a degree of insight and caution can be expected of the claimant. Appeal allowed.

**District Court Middelburg 3 November 2021, NL21.10906 (Uganda)**

In the court's opinion, the respondent could have held that the claimant took a great risk by performing sexual acts with X at a school party. (...) However, the fact that the claimant acted recklessly and took a risk of being caught cannot, without further justification, lead to the conclusion that this incident is not credible. In this regard, the claimant rightly pointed out his young age at the time of the incident. Appeal allowed.

231. Dave, Sierra Leone, interview, August 2018. Dave was granted asylum a few months later.

232. Patricia, Uganda, decision, October 2019. Patricia was not believed and her application was rejected.

### **Comments**

According to the judgment of 12 August 2020, the Council of State held that the State Secretary did not assume a stereotypical view in connection with being caught, because it was not about the asylum seeker having taken risks, but that the way in which he had taken those risks was strange.<sup>233</sup> It is questionable whether this distinction can always be clearly made, however. The objection, summarised as ‘What you would have done according to your story in that LGBTI-phobic country you are from, we find so risky that we do not believe your sexual orientation either’ will often come down to objecting that any risks have been taken. In any case, James and Sharon were told that they could have been expected to have been more careful.

Incidentally, according to WI 2019/17, the lack of credibility of events that prompted the asylum seeker to leave the country does not automatically lead to disbelieving sexual orientation. This means that the risky behaviour cannot be used indiscriminately as an argument against believing sexual orientation, but that it must be judged on credibility as an independent element.<sup>234</sup>

### **3.6 Knowledge of LGBTI topics**

A set part of the interview are the questions about knowledge regarding LGBTI organisations and LGBTI related subjects in the country of origin and in the Netherlands, ranging from criminal laws to gay parties. Not every LGBTI person will be familiar with LGBTI organisations in the country of origin: see for example, the cases of Greg and Clint below. Also, not everyone will be looking out for it. It can be dangerous, and people may be afraid of being outed that way, as Angela and Kate stated. Sometimes they do not feel a need for it, like Kate, or do not have time for it, like Bernard. Nevertheless, it is expected that they have done research into the situation in their country of origin and in the Netherlands, and that they therefore should have ‘in-depth knowledge’ about this area (see Sharon and Nigel). People fleeing for fear of persecution because of their sexual orientation or gender identity are also expected to be aware of the precise criminal provisions that the government of their country of origin has raised against them. If necessary, they can brush up on their knowledge on this point after arriving in the Netherlands.

233. ABRvS (Council of State) 12 August 2020, ECLI:NL:RVS:2020:1885, par. 8.8.

234. See also the comments by Lianne Hooijmans in the Refugee Council's UPdate 2021, no. 47 to the above judgment of the Middelburg District Court.

### 3.6.1 IN THE COUNTRY OF ORIGIN

#### Kate, Morocco

*Do you have knowledge of the LGBT organisations in Morocco?*

- No, I never looked for it.

*Why not?* - If you decide to visit such an LGBT organisation, you have to enter through the front door and everyone can see you. Then everyone can see who and what you are. And I was together with my girlfriend C. I didn't need such an organisation.<sup>235</sup>

#### Angela, Guinea

*Are you familiar with LGBTI organisations in Guinea?* - No.

*Do you know about the existence of gay meeting places in Guinea?*

- I don't know. I was scared. It could be that they are there, but I have never been to such a place. It's really not allowed.<sup>236</sup>

#### Bernard, Asia

A person who claims to fear to have to return to their country of origin because of their stated homosexuality can and may be expected to further investigate the situation for like-minded people in said country of origin.<sup>237</sup>

Bernard's lawyer writes:

In his country of origin, he worked day and night, 365 days a year. His relationships were the only bright spots. He therefore knows nothing about the LGBT community because he did not have time to investigate. His background has not been taken into account. (...) The fact that the interviewing officer does not believe that he had to work day and night mostly says something about the lack of empathy of the officer.<sup>238</sup>

#### Clint, Azerbaijan

*Do you know of any LGBT organisations in Azerbaijan?* - No. I have read that a representative of an LGBT organisation committed suicide by hanging himself. He had hung himself with the LGBT flag. It wasn't until I read this news that I knew that we had these kinds of organisations.

*Have you looked for other organisations that would exist in your country?* - No, because I was scared and suspicious. I don't know how to explain it to you, but you would see what it's like if you were to go to Azerbaijan.<sup>239</sup>

#### Sharon, Uganda

Finally, the lack of credibility of this relevant element is further confirmed by the poor statements of the claimant about her knowledge of the LGBTI groups in Uganda (...). These superficial

235. Kate, Morocco, interview, April 2019. Kate was granted asylum.

236. Angela, Guinea, interview, October 2019. Angela was granted asylum.

237. Bernard, Asia, intention to reject, January 2017. This quote is part of a document in which a subsequent application was made on the basis of WI 2018/9. In the end Bernard gets asylum.

238. 'View' and notice of appeal at the beginning of 2017.

239. Clint, Azerbaijan, interview, November 2018. Clint was granted asylum.

statements do not reveal any in-depth knowledge about these organisations.<sup>240</sup>

With regard to her knowledge of the position of LGBTI people in Uganda, it is pointed out that she could have been expected to have done some research into the parties that represent her interests. It is considered relevant that homosexuality is criminalised in Uganda and that it was therefore up to the claimant to investigate parties who could possibly help her to make her life more bearable.<sup>241</sup>

Accurate and detailed knowledge of criminal law is expected:

#### **Nigel, Uganda**

About the Kill the Gays Bill from 2014, the claimant stated in the additional interview that it is still valid. However, public information has shown that this law was declared unconstitutional by the Constitutional Court in August 2014. (...) On the basis of the above, the claimant has not shown any in-depth knowledge in the field of the position of LGBTI people in Uganda.<sup>242</sup>

#### **Sharon, Uganda**

In the additional interview, the claimant is again asked about the punishments for homosexuality in Uganda. She only replied that she knows that homosexuals can be arrested and that they can be attacked and killed by ordinary people. (...) She has also stated that the penalty for homosexuality in Uganda is life imprisonment and that they are currently discussing whether they can change this to the death penalty. It is held that the claimant only has superficial knowledge of the subject, and that she has not been able to recount the fact that the sentences in Uganda vary depending on the acts carried out. She also indicates that she has not done any further research into the laws in Uganda, while this could be expected of her, since these laws would relate to her homosexual orientation. The claimant can be expected to be aware of the relevant laws in Uganda, which relate to homosexuality now that she is applying for asylum for that reason. This is all the more so now that she has been living in the Netherlands for a long time, where she could freely conduct research on the subject.<sup>243</sup>

It is unclear why an LGBTI person should investigate the 'relevant laws' in Uganda, and especially after one has fled to the Netherlands. This is very similar to an exam that needs to be well prepared. And if Sharon had indeed gone to study Ugandan criminal laws, they would have probably responded that this information is publicly accessible, as happened to a man from Cameroon, when he managed to mention the names of two Dutch gay bars.<sup>244</sup>

240. Sharon, Uganda, intention to reject, April 2019.

241. Sharon, Uganda, decision, October 2019.

242. Nigel, Uganda, intention to reject, January 2020.

243. Sharon, Uganda, decision, May 2020.

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

### **Criminal laws**

Sometimes the question downplays the situation in the country of origin with regard to criminalisation and State persecution of LGBTI people. For example, the State Secretary uses the fact that most criminal laws in the countries of origin do not criminalise homosexuality per se, but rather the performance of homosexual acts.<sup>245</sup> This happened in the interviews of Victor and Angela, who were well informed and did not let themselves be fooled.

#### **Victor, Morocco**

*According to public sources, homosexuality is not punishable in Morocco. How do you know that you would not get protection if you turned to the police in case of problems? – Article 489 of the Criminal Code criminalises homosexuality. There is a prison sentence between 6 months and 3 years.<sup>246</sup>*

#### **Angela, Guinea**

*Do you know what is and is not forbidden in terms of LGBTI in Guinea? Legally or in society? – If you are recognised as homosexual by the population in Guinea, you can be lynched. But if you're lucky and arrested by the government, you risk a prison sentence from six months up to ten years plus a fine. If you are an adult, you get the death penalty. Society does not accept it.*

*According to my information, there is no government persecution of homosexuals. Criminal prosecution of homosexuals does not occur. It is known as taboo and is just tolerated. Homosexual acts are indeed punished. – That is not true. I have never seen a homosexual couple in Guinea.<sup>247</sup>*

245. See also the letter from COC of 21 May 2021, in which it was requested to refrain from the distinction between LGBTI orientation and acts from now on, after this distinction, made in the General Country Report Iran of the Dutch Ministry of Foreign Affairs of February 2021, was used as an argument for the proposition that there is no systematic persecution of LGBTI persons in that country.

246. Victor, Morocco, additional interview, November 2020. Eventually Victor was granted asylum.

247. Angela, Guinea, interview, October 2019. On the situation of homosexuals in Guinea, see also M.B. v. the Netherlands, ECtHR 21 December 2017, Appl. No. 63890/16. In general, homosexuals in Guinea are in the closet for fear of persecution.

248. Harry, Russia, interview, March 2020. Harry was granted asylum.

### **3.6.2 IN THE NETHERLANDS**

#### **Harry, Russia**

*What do you know about the rights of homosexuals in the Netherlands? – From what I have read and heard, I have understood that gays here have the same rights as straight people, and they are allowed to marry. They are not beaten up outside, in public and on the street. And they are protected here.<sup>248</sup>*

#### **Tim, Afghanistan**

*When asked what the claimant can tell us about the situation in the Netherlands, he limits himself to stating that homosexuals have equal rights and that there are no differences. This shows that he has little knowledge of the LGBT situation in the Netherlands, which does not show any interest and familiarity with the position of LGBT people in the Netherlands. In addition, he has not shown any knowledge about*

LGBT organisations in the Netherlands. (...) He also states that he has been to a party for homosexuals in Amsterdam two or three times. (...) Despite the fact that he is illiterate, it can be expected that he can at least mention the names of these parties or other places for homosexuals in the Netherlands.<sup>249</sup>

#### **Victor, Morocco**

From the statement of the claimant that he did not recognise the rainbow flag it is also deduced that he never explored his sexuality further. (...) He also stated that he has no contact in the Netherlands with LGBTI people or organisations aimed at LGBTI people. In view of the fact that there are fewer opportunities for this in Morocco than in the Netherlands, it can be expected of him to make use of these possibilities.<sup>250</sup>

In view of the fact that he specifically chose the Netherlands to flee to (...), it is to be expected that he could have talked extensively and in greater detail about the situation regarding LGBTI people in this country. For example, he could have stated that the Netherlands was the first country in the world to legalise same-sex marriage and that the capital Amsterdam has been known worldwide as the gay capital since the eighties.<sup>251</sup>

#### **Nigel, Uganda**

*You have been in the Netherlands since August 2018, have you also been going out to specifically gay places?* – I have only been to meetings and parties of COC. But not yet to any gay bars.

*Do you feel the need to go to gay bars?* – I really want to, but I don't know where any of the gay bars are. (...)

*What's stopping you from going there?* – I first want to know if I can just go to those kinds of bars, because I heard that for some places, I need a membership card to enter.<sup>252</sup>

From the intention to reject of a year later it appears that Nigel has now found his way to gay bars, but for the credibility of his sexual orientation it is no longer of any consequence. In-depth knowledge is expected:

The claimant is familiar with COC and has gone to parties and meetings of this organisation. He also visited Gay Pride and went to gay bars. However, these circumstances cannot lead to the credibility of the homosexual orientation he claims. (...) On that point, he merely stated that homosexuality is not criminalised in the Netherlands and that homosexuals are not discriminated against in the Netherlands. (...) A

249. Tim, Afghanistan, intention to reject subsequent application, July 2019.

250. Victor, Morocco, second intention to reject, January 2019.

251. Victor, Morocco, fourth intention to reject, May 2020. This was based on the interview that was carried out at the time he was here for three months.

252. Nigel, Uganda, first interview, March 2019.

more in-depth knowledge on this subject could have been expected from the claimant, especially now that he has been in the Netherlands for a year and a half and has applied for asylum here in the country based on his orientation.<sup>253</sup>

When asked about what she has learned about the situation of LGBTI people in the Netherlands, Ella mentioned: ‘freedom of LGBTI people, that homosexuals walk hand in hand on the street, can talk about their orientation and marry each other.’ This is not considered sufficient, especially since Ella ‘comes from a country where homosexuality is taboo and is even punishable by law.’

#### **Ella, Uganda**

It was reasonable to expect from her that she would have studied the situation of LGBTI people in the Netherlands more extensively, a country where the rights of LGBTI people are anchored in the law and where there is a lot to do and know in the field of LGBTI issues. It is not clear why once in the Netherlands, she did not delve further into this in order to be able to make use of freedoms and restrictions in the Netherlands in this area. Her statements fail to show, however, much research into any of this.<sup>254</sup>

#### **Patricia, Uganda**

Regarding the position of LGBTI people in the Netherlands, she stated that she knows that LGBTI people in the Netherlands have rights, are safe and are seen as equal to other people. However, these are superficial statements that do not show a more in-depth knowledge about the position of LGBTI people. However, since she had already been in the Netherlands for seven months at the time of interview, she could have been expected to have done more research into her position as LGBTI here in the country, even more so now that she sees the Netherlands as a safe country for homosexuals and has come here with the wish to settle here permanently.<sup>255</sup>

#### **Sophia, Uganda**

With regard to what the claimant knows about LGBTI organisations in the Netherlands and Uganda, it is held that she has sufficient knowledge as such. This is therefore not held against the claimant.<sup>256</sup>

#### **Sharon, Uganda**

With regard to her knowledge of the LGBTI community, the court rules that the respondent did not sufficiently justify why she should have been expected to conduct more research into the position of LGBTI people in the Netherlands than she did. The claimant stated that homosexuals are allowed to marry in the Netherlands and that they can

253. Nigel, Uganda, intention to reject, January 2020.

254. Ella, Uganda, intention to reject, November 2019. Cf. Sharon, Uganda, intention to reject, April 2019: ‘She also made superficial statements about the position of LGBTI people in the Netherlands. Thus, on this point, she has merely stated that homosexuals are equal to others and that they may marry and adopt. At this point, however, this has not shown any in-depth knowledge.’

255. Patricia, Uganda, intention to reject, August 2019.

256. Sophia, Uganda, intention to reject, October 2019.



adopt children. Furthermore, the claimant has made statements about a number of interest groups for LGBTI people in the Netherlands. (...) The respondent did not substantiate what else the claimant should have stated. Appeal allowed.<sup>257</sup>

### Jurisprudence

#### **ABRvS (Council of State) 2 September 2021, 202100285/1/V2 (Armenia)**

From his statements it appears that as a homosexual he did not come out of his shell and that he mainly searched the internet for information about places outside Armenia where he could live in safety with his partner. (...). It is also not clear why the State Secretary expects the asylum seeker to be aware of the existence of dating sites and social networks that specifically target the Armenian LGBTI community and to explain about interest groups that work for LGBTI rights in Armenia. The appeal is allowed.

#### **District Court The Hague 24 March 2021, NL21.2863 (Nigeria)**

The respondent did not wrongly take the position that it is incongruous that he did not read anything else about other LGBTI organisations in Nigeria, as this information is easy to find online. This circumstance does not support the credibility of the claimant's asylum account. Appeal unfounded.

#### **District Court Haarlem 3 June 2021, NL21.6111 (Indonesia)**

That he never looked for LGBTI interest groups in Indonesia is not incomprehensible. He has not been able to express his homosexuality in Indonesia and was not able to live openly as a homosexual. (...) In so far as the respondent claims that it is incomprehensible that he did not search for these organisations from the Netherlands, that assertion also is not tenable. The claimant counters that he has no intention of returning to Indonesia and living as a homosexual there. (...) The claimant has thus given a plausible explanation why he did not feel the need to investigate this. Appeal allowed.

#### **District Court Roermond 27 August 2021, NL21.7837; NL21.7838 (Iran)**

(...) from the Dutch General Country Report Iran 2019 it is apparent that homosexuality in itself is not criminalised, only the performance of homosexual acts. (...) The court rules that the claimant, who was 16 years old at the time of the interview, cannot be expected that she understands the difference between criminalisation of homosexuality and criminalisation of same-sex sexual acts. Appeal allowed.

#### **District Court Middelburg 10 August 2021, NL20.15077 (Georgia)**

The claimant has argued that the fact that he is not actively concerning

257. Sharon, Uganda, District Court Amsterdam 6 November 2019, NL19.24177. This was followed by another negative decision.

258. In this context, a rescue narrative is the stereotypical expectation that an LGBTI asylum seeker will be happy and relieved now that he is in the 'free west' and will therefore enthusiastically enter the gay scene. See also *Pride or Shame?*, p. 94-95.

259. Christian, registration interview, July 2018. He was later granted asylum.

260. See also District Court Amsterdam 21 May 2021, NL21.6356 (Nigeria): 'The claimant has stated that he was able to speak to a police officer in the Netherlands about his sexual orientation during Gay Pride (...). He stated that this also made him feel free to show his homosexuality to the outside world and that he no longer had to do it secretly. (...) The respondent has not made clear why this event and the claimant's feelings about it would be surprising for a Nigerian gay man who had not been in the Netherlands for long at that time.' Appeal allowed.

261. Letter from the State Secretary for Justice and Security to the Chairperson of the House of Representatives, 13 November 2018, meeting year 2018-2019, 19637, no. 2440.

himself with his sexual orientation in the Netherlands is related to the fact that he is still grieving the loss of his family and the fact that X abandoned him. According to the claimant, it is not clear why this would not be a good reason for the fact that the claimant has not yet started to 'develop' further in the Netherlands. Appeal allowed.

### 3.6.3 CONCLUSION

These quotes do not paint a pretty picture: having too little knowledge is held against you but having sufficient knowledge does not work in your favour either. Compared to the practice at the time of WI 2015/9 and *Pride or Shame?* it would appear that when it comes to knowledge of LGBTI organisations and topics, the bar seems to have been raised. Both with regard to the situation in the country of origin and that of the Netherlands, 'in-depth knowledge' is now expected; while the underpinning for this expectation does not go much deeper than: because you have fled your country of origin and because you apply for asylum here because of your orientation.

It is highly peculiar to say to someone who does not know the rainbow flag that he has 'not explored his sexuality'. In this way, the asylum procedure becomes an LGBTI exam, that you can fail. It is also strange to expect a Ugandan man to frequent gay bars after spending a few months in a Dutch reception centre. This makes it clear that the so-called 'rescue narrative' is still alive and kicking.<sup>258</sup> It certainly does happen that people are happily surprised when they come to the Netherlands, like the man who was abused and extorted by the police in Kazakhstan and who saw a boat with police officers of 'Pink in Blue' during the Canal Parade in Amsterdam,<sup>259</sup> but of course you cannot turn this into a general rule.<sup>260</sup>

## 3.7 Third-Party Statements

In WI 2018/9, a whole new paragraph was devoted to third-party statements. On 13 November 2018, the State Secretary wrote: 'I think it is important that statements from third parties can be submitted to the IND and that justification will be provided regarding why such a statement either is or is not taken into account in the assessment. With submission of declarations by third parties, I explicitly also mean partners or interest groups. Based on the new work instructions for LGBTI people and converts, the IND explains even more than before how the statements of third parties are taken into account in the decision on an asylum request.'<sup>261</sup> The State Secretary also

writes that statements by third parties have always been taken into account, and that the new text is therefore not a change in the assessment. Even so, WI 2018/9 contains a large passage detailing that justification must be provided concerning how such statements have been taken into account, in order to make it clear to an asylum seeker and to third parties exactly how their input is evaluated. Firstly, three examples of cases are listed below where statements from third parties may have contributed to a positive outcome, followed by several statements where this was not the case. These examples are all from before the judgment of the Council of State of 4 August 2021 (see paragraph 2.4.3).

#### **Nancy, Uganda**

Nancy lives with her partner whom she met in the reception centre. Her partner has a status. She came to the court sitting and also wrote a letter. It is quite possible that the relationship helped with the successful appeal and status for Nancy.

#### **Freddy, Iraq**

Freddy produced a statement from his Dutch friend: 'My name is Tim and I am in a relationship with Freddy. I am 22 years old and I live with my parents. We went to COC together. If you want to know more, you can email me back.' Further on, there are also statements from Tim's parents. His father writes: 'My son is in a relationship with Freddy, he has been to my house a number of times and he comes across as decent. It would be a shame if their relationship would have to end and I hope they get the chance to let this grow in to something beautiful. Personally, I believe that this is quite possible.' Tim's mother writes: 'My son Tim is in a relationship with Freddy. They've known each other for a year and a half now. Because of Freddy's frequent relocations, they have already gone through a lot. We have had good conversations with Freddy. We have spent several weekends together; he speaks Dutch fairly well and it is also improving. How nice it would be if they had a future together.' A few days later Freddy received a status.

#### **Jane, Africa**

Jane's story was not believed, despite her many physical and psychological scars.<sup>262</sup> It was only when an iMMO report confirmed her account of her scars that she was granted a positive decision after three years of litigation.<sup>263</sup> It is possible that the letter of support from COC employees and the new Work Instruction WI 2018/9 also played a role in this.<sup>264</sup>

262. Intention to reject, November 2015: 'For the sake of completeness, it is held that the person concerned has stated that she has various scars on her body. However, now that the person concerned has made veils and incongruous statements about the events that are supposed to have caused these scars, the position of the person concerned that these scars arose because of these events is not accepted.'

263. The doctors and psychologists of the Institute for Human Rights and Medical Research (iMMO) investigate torture and inhumane treatment in the context of the asylum procedure.

264. See also below, par. 3.9.2, on the internal IND report in this case.

Many third-party statements were also found in the files that did not have the desired effect. Often photographs are submitted, on which the asylum seeker can be seen together with their partner, at LGBTI parties, gay parades, etc. Usually, such photographs are disregarded with the remark: 'a person cannot make their stated homosexuality plausible with photos.'<sup>265</sup> Or using slightly more words: 'With regard to the argument that the photographs submitted by the claimant do have some probative value, it is held that the legal representative cannot be followed in this. After all, the representative does not in any way make clear how three photographs of the claimant in which he can be seen with another man could say something about the sexual orientation of the claimant.'<sup>266</sup> Sometimes LGBTI organisations write statements in support. Nigel and Tim had both submitted such statements.

#### **Nigel, Uganda**

This does not change the case, however. To this end, it is held that the submitted statements from third parties do show that the claimant has been in contact with two LGBTI organisations. However, it is important to note that these documents have not given insight into his homosexual orientation. After all, nothing follows from this about his inner beliefs, feelings or experiences with regard to his orientation.<sup>267</sup>

#### **Tim, Afghanistan**

Statements from third parties may serve as support for an stated sexual orientation, but this does not alter the fact that the alien himself must (also) make his sexual orientation plausible to the State Secretary on the basis of his statements. The claimant has not succeeded in doing so.<sup>268</sup>

The court ruled as follows:

The documents submitted by the claimant, such as the aforementioned statements of third parties, photos and screenshots, may serve as support for the stated sexual orientation, but this does not alter the fact that it follows from settled case law of the Council of State that the alien himself must make his orientation plausible to the respondent on the basis of his own statements. (...) Contrary to the claimant's assertion, the respondent did address the statements and other documents submitted by the claimant in his decision. Appeal unfounded.<sup>269</sup>

According to this judgment the State Secretary would have made reference to the documents in his decision, but that is not very substantive. The decision of February 2020 only

265. For example Nigel, Uganda, decision, March 2020.

266. Ian, Guinea, decision subsequent procedure, November 2018. A few procedures later, Ian is granted asylum.

267. Nigel, Uganda, decision, March 2020. Nigel submitted two letters from COC: one showing that he had attended LGBTI meetings, and the other about the intake conversations Cocktail had had with him. He also submitted a large amount of photos in which he can be seen at various LGBTI meetings. Nigel has now exhausted all legal means.

268. Tim, Afghanistan, decision, February 2020.

269. Tim, District Court The Hague 18 March 2020, NL20.4926.

states: 'With regard to the photographs, documents and written statements submitted by the claimant: these also cannot affect the conclusion that the statements of the claimant about his stated homosexual orientation are not credible.'

Sometimes an asylum seeker themselves writes a letter after the interview. Sharon from Uganda, for example, wrote a six-page letter in September 2019, in response to the intention to reject: 'This was my first time openly disclosing myself to anyone about my sexual background. I tried to express myself as best as I could but of course there was some nervousness and tension so maybe I did not meet your expectations.'

#### **Sharon, Uganda**

It is held that everyone is free to submit a handwritten letter before the interview or afterwards to explain the oral statements in more detail. (...) It is also taken into account that in the case of a handwritten letter as submitted by the claimant, it cannot be determined by whom, or under what circumstances, or on the basis of what information, the additional statements were recorded.<sup>270</sup>

#### **Greg, Asia**

In his third procedure in March 2018, Greg submitted a letter from COC showing that he attends the meetings of Cocktail, and a letter from two of his friends. They got to know him well through Cocktail and they became friends,<sup>271</sup> they make trips and talk about his experiences.

The State Secretary 's response:

The claimant will have to make his orientation plausible by means of his statements and he cannot rely solely on statements from third parties (...) The mere fact that he goes to meetings of LGBT asylum seekers and to meetings organised by COC is insufficient to assume his orientation in advance.<sup>272</sup>

In his fourth procedure (August 2018), he submitted even more letters. His friends go with him to gay movies and to evenings hosted by COC. Greg now knows many people from Cocktail and other parts of the LGBTI community. There are a large number of messages of support from friends and acquaintances. It does not help him, as evidenced by the State Secretary's response:

In accordance with Work Instruction 2018/9, statements from third parties do not ensure that the stated sexual orientation of the alien

270. Sharon, Uganda, intention to reject, November 2019. Sharon was not believed and was not granted asylum.

271. Cocktail is COC Netherlands' buddy project for LGBTI asylum seekers.

272. Greg, Asia, decision, March 2018.

must be regarded as credible without further ado. (...) It is also noted that in the statements submitted by various persons, in short, it is indicated that he is indeed homosexual. However, it is not indicated what this judgment is based on, other than by describing various events in his life.<sup>273</sup>

The appeal judge also offers no relief:

The report of his friends and the statements of others who endorse it were included by the respondent in the assessment. (...) The respondent may emphasise what the claimant himself can say about his orientation and need only consider what others state about it in light of that. (...) Furthermore, the respondent rightly pointed out at the sitting that statements to the same effect had also been submitted in previous procedures. Appeal unfounded.<sup>274</sup>

Sophia submits a letter of her own and an extensive letter from her girlfriend F who she met in the reception centre.

#### **Sophia, Uganda**

Since she was not able to explain sufficiently about F and their relationship during the interview, a statement about their relationship that was drawn up afterwards does not bear much significance. After all, she is expected to be able to explain about her partner in a spontaneous setting such as an interview. (...) In the letter, F describes her relationship with the claimant. In terms of content, the information contained in this letter cannot be regarded as factual information, because F cannot be regarded as a reliable source.<sup>275</sup>

Ella submits several supporting letters, photos of Pride Walk and Canal Pride, and a flyer from an LGBT café on which she can be seen.

#### **Ella, Uganda**

The submitted letter does not take away from the position already taken that the stated orientation is considered not credible on the basis of the declarations of the claimant. Even for this reason alone these submitted documents do not provide a reason to consider the stated orientation plausible.<sup>276</sup>

#### **The third party's gaydar**

Sometimes statements from third parties endorse the stated sexual orientation, but in principle, it does not help, because it must be factual information. Nevertheless, the State Secretary sometimes complains in response to statements of support that the interest groups have not investigated whether the claimant is gay, lesbian, or bisexual. James (Uganda) and

273. Greg, Asia, intention to reject, May 2019.

274. Greg, Asia, District Court Arnhem 1 July 2019, NL19.10972. Greg has exhausted all legal means.

275. Sophia, Uganda, additional intention to reject, May 2020.

276. Ella, Uganda, intention to reject, November 2019. Ella was not believed and her application was rejected.

Ella (Uganda) stated in the interview that they had attended meetings of COC and other LGBTI organisations. They are both confronted with the following text. Evidently, this is a standard passage:

These mere statements are insufficient to assume the stated sexual orientation of the claimant. After all, after some research, it is possible for any person to find the names of venues for LGBTI people. Moreover, such organisations do not conduct (in-depth) research into the actual sexual orientation of a person, so that this circumstance does not make a difference for the credibility of the stated sexual orientation.<sup>277</sup>

#### **Greg, Asia**

It is also noted that in the statements submitted by various people, in short, it is indicated that he is indeed homosexual. However, what this judgment is based on is not indicated other than by describing various events in his life.<sup>278</sup>

#### **The possibility to hear the partner**

'In doubtful cases, for example if there is a partner, the IND could (in special cases) choose to hear the third party as an exception', according to Work Instruction 2019/17, paragraph 3.2.2. This possibility was invoked a number of times in the examined files. For example, Ella proposes to hear a social worker friend who has written a statement and Alexandra brings up at the interview that the State Secretary should investigate whether there is a sentimental relationship by hearing her partner.<sup>279</sup> The author of Sophia's intention to reject does not appear to be aware of the text of the work instruction:

#### **Sophia, Uganda**

The claimant is of the opinion that hearing her partner about their relationship in accordance with WI 2019/17 would be appropriate. To this end, the following shall be held. An asylum application is assessed on an individual basis. The only circumstance when a partner is also interviewed is in the cases where partners have come to the Netherlands together and have applied for asylum at the same time. This is not the case for the claimant.<sup>280</sup>

277. Ella, Uganda, intention to reject, November 2019; James, Uganda, intention to reject, November 2019.

278. Greg, Asia, intention to reject, fourth procedure, May 2019.

279. Alexandra, Tunisia, District Court Utrecht 24 December 2018, NL18.22621, appeal unfounded.

280. Sophia, Uganda, additional intention to reject, May 2020.

#### **Jurisprudence**

##### **District Court Haarlem 3 June 2021, NL21.6111 (Indonesia)**

He has also submitted nearly 40 written statements, mostly from homosexual [persons] who know the claimant personally from the Gay [club], and who can vouch for his homosexuality. The respondent wrongly dismisses this evidence on the grounds that it does not



outweigh the claimant's inadequate personal statements about his orientation. Appeal allowed.

**District Court Amsterdam 21 May 2021, NL21.6356 (Nigeria)**

With regard to the statement of the claimant's stated partner X, the respondent considers that it does not relate to the claimant's homosexuality. Without further explanation from the respondent, the court cannot accept that a relationship with a man in the Netherlands would not relate to the homosexuality of the claimant and why this letter cannot contribute to the credibility of the claimant's homosexual orientation. (...) In addition, the respondent objects to the fact that the letters from COC and LGBT Asylum Support only show that the claimant participates in activities and that the letter writers do not judge the credibility of his homosexual orientation. However, WI 2019/17 states that the respondent only values statements of support from third parties that contain factual information, such as observations about the behaviour of the alien. The respondent will therefore have to justify how the factual information that claimant participates in activities of COC and LGBT Asylum Support is considered in the entire credibility assessment of claimant's orientation. Appeal allowed.

Indeed, LGBTI organisations in principle do not make statements about or (in-depth) research into someone's orientation. This is related to the fact that these organisations generally adhere to the principle that determining what sexual orientation or gender identity someone has can really only be done by the person in question, the so-called 'self-identification'. However, that of course does not mean that letters from interest groups or acquaintances about participation by the claimant in activities or other factual information can be dismissed as useless.

**District Court The Hague 29 September 2021, NL21.11872 (Uganda)**

The court judges that the respondent failed to sufficiently explain the claimant's inability to make her stated lesbian orientation plausible with her own statements together with the statements of the organisations. (...) The fact that it does not appear on what grounds the organisations base the lesbian orientation of the claimant does not mean that no value can be attached to the factual statements. Appeal allowed.

In the following case, the asylum seeker submits documents confirming that she is in a relationship with a woman.



**District Court Haarlem 27 February 2020, NL19.30996 (Uganda)**

The court rules that the respondent has insufficiently justified why he does not recognise the importance of the claimant's current relationship. (...) Furthermore, the court finds that this relationship is confirmed by a letter from her partner, this partner was present at the sitting to provide support, and the relationship was confirmed in a letter from a COC employee. He not only based the letter on the statements of the claimant and her partner, but also established the existence of the relationship during meetings. The respondent will therefore have to explain in more detail why the weighing of the statements led to the conclusion of lack of credibility. (...) This is all the more important now that homosexuality is criminalised in Uganda and the respondent, according to his policy, grants a permit to LGBTI people from that country, barring contraindications. The appeal is allowed.

The man in the next case brought in two witness statements from men with whom he had had a sexual relationship.

**District Court Arnhem 31 August 2020, NL19.7511 (Nigeria)**

The court finds that the (written) statements of the witnesses are not limited to an alternative credibility assessment but provide information about the claimant's actual conduct. The respondent has not given any reason to doubt the sincerity of their statements and the court sees no reason to doubt them. In addition, the court considers it important that it has not been shown that the witnesses have a (personal) interest in a positive outcome of the asylum application. After all, witness no. 1 has a residence permit in the Netherlands while witness no. 2 is a Dutch citizen. Appeal allowed.

The following judgment is about the objectivity of the partner and the possibility of them being heard, also considering the duty of cooperation.

**District Court Den Bosch 30 July 2021, NL21.1396 (Senegal)**

The court holds that the respondent has not explained what the self-interest of the claimed partner would be. And the argument that the claimed partner is not objective can also not be understood. After all, a partner is by definition subjective and from that perspective can put forward facts and circumstances that add something to the file and can also support the claimant's statements. (...) It seems to the court that the hearing of a stated partner leads to a more careful assessment of the credibility of the story. (...) It is precisely in a situation such as the present one, where it is held against the claimant that he would have spoken summarily and superficially, that the respondent should sympathetically examine and assess whether other statements can support the claimant's statements. Appeal allowed.

**District Court Den Bosch 29 July 2021, NL21.6808 (Uganda)**

The claimant has indicated with these productions that he is actively involved in LGBTI movements in the Netherlands. The respondent also acknowledges that this must be inferred from the photographs and statements of third parties, but says that this does not substantiate the stated orientation, because heterosexuals can also participate in activities for and by the LGBTI community. The court considers this assessment of the productions to be contrary to the work instruction. In this way, the claimant can never further substantiate his statements with activities that he currently carries out in the Netherlands or with statements from third parties that add facts to the file. Appeal allowed.<sup>281</sup>

In the examined files, the weight given to statements by third parties is disappointing but on 4 August 2021 the Council of State once again clearly underlined that the State Secretary cannot simply set aside statements from third parties. In addition to the asylum seeker's statement, the State Secretary must also include supporting evidence in the form of factual information in the assessment.<sup>282</sup> That judgment was followed by several positive judgments of district courts.<sup>283</sup>

**District Court Middelburg 17 August 2021, NL21.9822 (Iraq)**

Cocktail's letter contains information of a factual nature and statements about the claimant's conduct and therefore constitutes at least supporting evidence (...) and photographs relating to a Cocktail project. The respondent has not been able to provide insight into how he values and weighs the statements made and the documents submitted. There is therefore a lack of justification on this point. Appeal allowed.

**District Court Amsterdam 21 September 2021, NL21.10978 (Uganda)**

Although the respondent reacted to the letter from (...) and the claimant's activities for LGBTI organisations, he did not disclose the level of influence he gave to this. (...) In the opinion of the court, the respondent failed to explain why the statements of third parties submitted by the claimant and photos and lists of his participations in LGBTI meetings did not detract from the implausibility of the statements. Appeal allowed.

**District Court The Hague 2 September 2021, NL21.8916 (Cameroon)**

The respondent must include the documents submitted by the claimant on appeal in the (new) credibility assessment and thereby give a real and clear statement of the weight given to the content of the documents in the light of the other statements and documents regarding her bisexual orientation. Appeal allowed.

281. After this a negative decision was again issued.

282. ABRvS (Council of State) 4 August 2021, ECLI:NL:RVS:2021:1754. See also chapter 2.

283. See also District Court Roermond 27 August 2021, NL21.7837; NL21.7838 (Iran); District Court The Hague 29 September 2021, NL21.11872 (Uganda); District Court Middelburg 26 October 2021, NL20.13822 (Iraq).

But the appeals are not always allowed, see the following example:

**District Court Groningen 22 October 2021, NL21.13328 (Ghana)**

It is apparent from the contested decision that the respondent did take into account the statement submitted by his current partner in his decision-making, but did not attach any probative value to it, since the claimant failed to state convincingly about his relationship with his current partner. As regards the other documents submitted, the respondent considered in the contested decision that, as is already apparent from the intention to reject, the statements of third parties were indeed included in the assessment of the application. Appeal unfounded.

**Comments**

Previously, statements from third parties were scarcely taken into account. The decision usually concerned solely the statements (about awareness and self-acceptance) that the asylum seeker made in the interview.<sup>284</sup> Although it has always been the intention that third-party statements, which are ‘external credibility indicators’, should be taken seriously, and although this was clearly written down again in WI 2018/9, in practice, third-party statements were usually dismissed. With the judgment of 4 August 2021, the Council of State has now made it clear that this gap between theory and practice must come to an end.

### **3.8 Frame of reference, level of education**

During the *Pride or Shame?* study, it became evident that it is increasingly difficult or even impossible for people with little or no education to meet expectations regarding the extensive statement of deep emotions and psychological processes. That is why one of the recommendations was: ‘With respect to the credibility assessment, take the educational level and verbal ability of the asylum seeker into account.’ Whether nowadays account is taken of the fact that an asylum seeker has little, or no training cannot be said on the basis of the current research. The illiterate Jane and the poorly educated Bernard both eventually got asylum, but this does not apply to the poorly educated Vincent and Greg and the illiterate Tim. Tim’s lawyer wrote to the IND:

Your manner of questioning is too complicated for him. It is difficult for him to talk in a structured and chronological manner. (...) Client

284. See also *Pride or Shame?*, p. 101-112, and recommendation 5.

needs special procedural guarantees, not only because of his sexual orientation, but also because of his illiteracy. It does not appear from the content of the interview and from the intention to reject that appropriate support has been offered in accordance with WI 2015/8 and that appropriate adaptations were provided. Nor does it appear that a satisfactory.<sup>285</sup>

#### The State Secretary's response:

The State Secretary took sufficient procedural measures at the interview of the subsequent application. For example, the claimant was interviewed by an experienced and qualified official who had followed the mandatory module Interviewing Vulnerable Persons and a support worker from Vluchtelingenwerk Nederland (the Dutch Council for Refugees) was present during the interview.<sup>286</sup>

#### Vincent, Gambia

Speaking about his feelings and emotions is unusual and very difficult for him. Due to his culture and upbringing, he will never contradict an authority or superior. Nor will he indicate that he has difficulty answering a question. (...) Critical and direct questions have been asked about a subject on which there is silence in The Gambia. (...) The court does not accept the argument that insufficient account was taken of the claimant's (educational) level and cultural background. (...) The fact that the claimant is young, poorly educated and is not used to talking about feelings and a taboo subject, is not enough to be able to state that the respondent failed to sufficiently take his background into account in the assessment. (...) Insofar as the claimant disputes that he uttered only short and superficial statements, the court also disagrees. It is considered particularly important that the claimant, when asked, was unable to say anything about (the development of) feelings of love, guilt or fear (...). Appeal unfounded.<sup>287</sup>

While it remains unclear whether the asylum seeker's poor education was taken into account, it does seem that the level of education can operate to the disadvantage of the asylum seeker. More is expected of people with a higher level of education, as shown by the following examples.

#### Sophia, Uganda

The frame of reference of the person concerned reflects a certain pattern of expectations. She is highly educated, independent, comes from the city and has worked for eight years at a large NGO. Her education and job indicate that she must have a good ability to express herself and that she can therefore be expected to also demonstrate this ability during the interviews.<sup>288</sup>

285. Tim, Afghanistan, August 2016 and August 2019.

286. Tim, Afghanistan, decision, February 2020.

287. Vincent, Gambia, District Court Haarlem 6 March 2020, NL20.3210.

288. Sophia, Uganda, decision, July 2020.

**Nancy, Uganda**

From a public source it can be concluded that the (...) school where she attended the third and fourth grade (...), was a highly esteemed Catholic school, focused on their pupils acquiring academic skills.<sup>289</sup>

The court sees this differently:

The court also considers it important that the respondent wrongly objected that the claimant should be able to elaborate on her awareness process since she had had a Catholic education; and it is generally known that homosexuality is not seen as equal to heterosexuality within the Catholic Church. Apart from the fact that this is based on assumptions, the respondent did not ask the claimant any questions in this context during the interview.<sup>290</sup>

**Jurisprudence****District Court Amsterdam 19 November 2020, NL20.10818 (Nigeria)**

The claimant indicates that her relationship with X was her first relationship ever and she had very strong feelings for her, but does not elaborate on what that means. (...) When asked what was going on inside, the claimant says no more than that she felt 'a lot' for X and that X meant 'a lot' to her. The fact that the claimant has a limited level of education, speaks poor English and that possible cultural differences play a role does not alter this. Appeal unfounded.

**District Court Zwolle 30 June 2020, NL20.8738 (Nigeria)**

Nor do the claimants limited education and his frame of reference make it so that respondent should not expect the claimant to be able to declare personally and sincerely about his inner feelings. Appeal unfounded.

There is a number of judgments that show that judges do not always go along with the expectation that better education equals better abilities to relay psychological processes.

**District Court Rotterdam 18 June 2021, NL21.5998 (Uganda)**

The respondent's position that the claimant is university educated and can therefore be expected to explain and substantiate his stated sexual orientation better, cannot be accepted without further substantiation. It is hard to see why a university educated person should necessarily be better able to speak about his or her private life and feelings. Appeal allowed.

**District Court Den Bosch 29 July 2021, NL21.6808 (Uganda)**

It is hard to comprehend why highly educated aliens should be automatically considered capable of making more profound

289. Nancy, Uganda, intention to reject, February 2020.

290. Nancy, Uganda, District Court Haarlem 30 July 2020, NL20.9201. Nancy received a status four months later.

statements about their emotional life and more specifically their sexual development and relevant feelings and the relationships they have entered into. The respondent explained at the sitting that highly educated people have a larger vocabulary and should therefore be able to describe their emotions and feelings in more detail and on a deeper level. The court cannot accept this. The claimant has not been accused of the fact that his choice of words is insufficient, but that he has - apparently - experienced too few feelings with regard to his sexual development and has also been not properly aware of that development and the problems that he can experience in his country of origin as a result of his orientation. Appeal allowed.

**District Court Haarlem 27 October 2021, NL21.10797 (Nigeria)**

The court agrees with the claimant that the respondent cannot simply expect someone who is highly educated to be able to extensively discuss their feelings. The claimant has argued that he is a shy man who is not good with words and that he has stated as best he can about his homosexual orientation. Appeal allowed.

In the following case, the frame of reference was lost sight of completely. The judge asks for customization.

**District Court Den Bosch 30 July 2021, NL21.1396 (Senegal)**

The respondent has expected the claimant to be able to make statements about awareness, feelings and appreciating that homosexuality is not accepted in Senegal. (...) The claimant discovered his sexual orientation during a situation of coercion and abuse. The court can only conclude that from the moment the claimant indicated that his subsequent asylum application is based on his orientation, a standard working method was applied. The claimant was asked the same questions and his statements were assessed in the same manner as in the case of asylum applications stating that someone discovered his orientation spontaneously and as part of a sexual development and entered into a relationship of his own free will. The respondent claims to be looking for the authentic story of the alien. The respondent is then obliged to adapt his questioning and assessment to and to focus on this authentic story. There is no evidence of this whatsoever. Appeal allowed.

**Comments**

The work instruction states: 'When asking questions, the extent to which people can put their orientation into words must also be considered, because this will differ per person. Moreover, not every alien is used to talking about their personal experiences and feelings. Therefore, try to connect as much as possible with the alien's level and manner of speaking and his

frame of reference.<sup>291</sup> Unfortunately, this advice does not always appear to be taken to heart in practice.

### 3.9 Subsequent applications

Frequently, the credibility of sexual orientation in a second or later asylum application is being questioned. Two different situations can be distinguished. In the first place, those in which sexual orientation or gender identity is discussed for the first time only during a subsequent procedure. The asylum seeker could not speak about this earlier because of fear, shame, or ignorance. For this situation, an exception has been made to the nova-requirement. The asylum seeker should not be criticised for not having previously stated their sexual orientation and that therefore there are no new elements or findings.<sup>292</sup> The new asylum application is then assessed as a first asylum application. This does not mean that it is not allowed to ask why this was not reported in the previous procedure or that this should not be included in the assessment of the application. This is discussed in par. 3.9.1.

In the second place, there is the situation where the sexual orientation or gender identity had already been introduced in a previous procedure and was not believed at the time. It is in these cases often said that the incredibility of the sexual orientation is 'established in law'. In a subsequent procedure, 'new elements or findings' or 'new facts or circumstances' must then be submitted.<sup>293</sup> If there are none, the application for asylum may be declared inadmissible. This variant is discussed in par. 3.9.2.

A number of examples of these two variants is discussed below. Incidentally, this only concerns sexual orientation. There were no files in which gender identity played a role in a subsequent procedure.

#### 3.9.1 SEXUAL ORIENTATION NEW ELEMENT

The quotes below are from the files of Lilian from Nigeria, Freddy from Iraq, Henry from Iraq, and Daniel from Afghanistan. The examination mainly focuses on the reason for only coming out of the closet towards the IND during the follow-up procedure. All four people eventually received asylum.

291. WI 2018/9, 2.1 and WI 2019/17, 2.1.

292. Aliens' Circular (Vreemdelingen-circulaire) Vc C1/4.6: 'If an alien indicates during a subsequent application that he is LGBTI and this sexual orientation has not previously been stated and assessed during a previous procedure.' See also par. 4:6 Awb and WI 2019/17 under 4.

293. Article 30a, first par., point (d), Aliens Act. See also Article 40 Procedures Directive (2013/32/EU). See also Hooijmans 2019.

#### Lilian, Nigeria

*You have indicated in this procedure that you are a lesbian. Why did you indicate this now for the first time and not during your previous procedure?* – Because I was ashamed. Where I come from, it's taboo. (...)

*During your previous procedure, you already lived in a safe environment. But you didn't talk about your homosexual orientation. Now you do. What change has occurred in you that makes you able to talk about it now?* – When I came to live in the reception centre, I found out that people here are not discriminated against if they are homosexual. I figured out that I had to come out of the closet and live the life I wanted to live.<sup>294</sup>

#### Freddy, Iraq

*Why did you not mention anything about your homosexuality during your previous asylum application?* – I was 21 years old at the time and unfamiliar with the laws. I didn't know you could get a permit based on your sexual orientation.<sup>295</sup>

Henry from Iraq applied for asylum again, after his wife, whom he married under pressure from the family and had four children with, discovered here in the Netherlands that he was gay. They were heard separately, and his account was confirmed by his wife.<sup>296</sup>

Daniel from Afghanistan discovered some time after arriving in the Netherlands, when he was 12 to 13 years old and went to school here, that he was attracted to boys. He discusses it during the third procedure with the IND. This is called 'westernisation', but it also seems to be a typical *sur place* situation.<sup>297</sup>

#### Daniel, Afghanistan

*You indicate that you are westernised. Could you elaborate on this?* – Ever since I came to the Netherlands, my mentality has changed. (...) The biggest change is that I have become more open mentally. In my country of origin, I was made scared: if you do something wrong, you will go to hell. When I came here, I knew I was gay, but I also knew that a man should marry a woman. I wondered why a man can't marry a man.

*When was that?* – From the moment I realised I was gay, when I was about fifteen or sixteen years old. (...) When I turned sixteen, I told my Dutch foster mother. She said: 'You are a human being and the people in the Netherlands accept you.' (...)

294. Lilian, Nigeria, interview, October 2019.

295. Freddy, Iraq, interview to subsequent application, November 2019.

296. Henry, Iraq, April 2019, third proceedings.

297. A *réfugié sur place* is a person who only after departure from the country of origin has to fear persecution, either by events or developments in the country of origin, or by activities in the country of asylum.



*Do you expect problems due to your westernisation upon your return?*  
 – Yes, I do. I might be killed.<sup>298</sup>

Daniel is granted asylum two and a half months later. For Tim and Brian it doesn't end so well. Tim is illiterate and is from rural Afghanistan. In 2016, in the interview in his first procedure he said that he left his country because he was falsely accused of performing homosexual acts and the Mullah had pronounced a Fatwa that he could be stoned to death. This narrative was not believed. In 2019, he applied for asylum again:

**Tim, Afghanistan**

*What do you want to say about your follow-up application in the context of your homosexuality?* – I am a homosexual. When I came here, I didn't know I could talk about this freely. I thought it was the same here as in Afghanistan. Now that I know that I can apply for asylum on the basis of this, I have applied for asylum again.

*In your first procedure, you mentioned another reason for your departure. Why not this?* – When I arrived in the Netherlands, I thought there were the same rules and laws here. I didn't know I could speak freely about this matter, and I couldn't speak about it at the time. I later understood that this was in fact possible. (...)

*But are the reasons you mentioned true or not?* – They are true. I didn't know I could talk about this because I thought it was illegal.<sup>299</sup>

His lawyer writes in the appeal:

The respondent did not sufficiently justify why the claimant's statements about the development of his feelings for men are insufficient or contradictory. The respondent does not acknowledge that the claimant had feelings of anxiety and tried to suppress or avoid his feelings. It is still difficult for the claimant to speak about his feelings.<sup>300</sup>

The court ruled as follows:

The court sees no reason to believe that the respondent did not take sufficient consideration of the claimant's frame of reference (including his illiteracy and lack of education), acted carelessly or that the claimant's interests were harmed. (...) The court finds that the respondent used Work Instruction 2018/9 and Work Instruction 2019/17 in the present application, when assessing the credibility of an asylum application in connection with homosexuality. In both instructions, the personal story of the alien plays a decisive role, including the process of discovery of the orientation and the way in which the alien claims to have dealt with it. The respondent did not wrongly claim

298. Daniel, Afghanistan, additional interview, November 2019 and January 2020.

299. Tim, Afghanistan, interview subsequent application, May 2019.

300. Tim, Afghanistan, notice of appeal, March 2020.

that the claimant stated that his statement about this was too short, vague and inconsistent. (...) The respondent may expect the claimant to explain and clarify his feelings and, in the judgment of the court, the respondent has not wrongly stated that the claimant has not sufficiently done so. The court therefore does not accept the claimant in the assertion that the respondent has stereotypical expectations of his narrative and wrongly considers his sexual orientation to be not credible.<sup>301</sup>

#### **Brian, Iraq**

*What are the reasons why you have submitted a new asylum application?* – There is something new in my life. At the time, I left my country of origin because of problems. After spending a long time here, my life has changed. I have discovered something new in myself, namely that I am gay.<sup>302</sup>

#### **The State Secretary's response:**

Finally, it is considered remarkable that, in view of the fact that the claimant would have become aware of his homosexual orientation at the end of 2016, he has never mentioned this previously. (...) His statements that this was not his problem at the time, because he was still engaged in procedures, felt like a European and a free citizen and that as a refugee you can do whatever you want, is not considered an excusable explanation for not bringing such an important piece of information forward.<sup>303</sup>

#### **Comments**

The exception to the requirement to bring forward new facts has the desired result in most of the cases reviewed here. Lilian, Freddy, Henry and Daniel are all believed and granted asylum. Brian and Tim were not believed. It was held against Brian that he had not previously mentioned his sexual orientation. The issue was not that his sexual orientation was not considered a new element. His orientation was not believed mainly because there was too much talk about sex. The fact that Tim's homosexuality was not believed does not seem to have had much to do with his late coming out to the IND. The rejection seems to be mainly caused by the fact that, according to the State Secretary, he did not tell enough. In addition, (too) little attention seems to have been paid to the fact that he was illiterate and found it difficult to speak about his feelings. In the following judgment, a late coming out was used against the applicant.

301. Tim, Afghanistan, District Court The Hague 18 March 2020, NL20.4926.

302. Brian, Iraq, interview subsequent application, March 2019.

303. Brian, Iraq, intention to reject, April 2019.

## Jurisprudence

### **District Court Zwolle 26 February 2021, NL20.10806 (Guinea)**

According to the court, the respondent was able to take the view that introducing his sexual orientation no sooner than in this procedure undermines his credibility. The assertion in the additional grounds of appeal that, in view of his young age, the claimant was not yet ready to talk about his sexual orientation; that it was difficult for the claimant to come out of the closet; and that he therefore only dared to talk about his sexual orientation after having stayed here for some time makes no difference in the opinion of the court. This still does not provide sufficient explanation for the fact that the claimant only reported to the respondent for the first time in 2019, during his third asylum application, that he was homosexual. Appeal unfounded.

### **3.9.2 SEXUAL ORIENTATION REASSESSED**

As discussed in Chapter 2, the State Secretary acknowledged that in a number of cases too much emphasis had been placed on processes of awareness and self-acceptance, and therefore would examine every subsequent application to check whether this perhaps may have been the case during a previous procedure. Should this be so, the asylum seeker will be heard again and/or their case will be reassessed.<sup>304</sup> The following are some quotations from the files examined.

#### **Alexandra, Tunisia**

*Summary of the account: Firstly, you are lesbian and you cannot express your sexuality in Tunisia safely and freely. (...) You also fear that your family will marry you off. – Yes, but I'm also just afraid of the family. I have been abused a lot by them. I think they are also willing to kill me.*<sup>305</sup>

#### **The State Secretary's response:**

*The claimant has not succeeded in expressing clearly, precisely and unequivocally the course of the discovery of her sexual orientation. She keeps using general terms, although she has had ample opportunity to make her awareness process plausible. (...) She has been questioned several times about the process of self-acceptance. (...) In summary, it is held that there is no insight into any process of awareness. (...) Despite being given opportunity, it is odd that during the interviews she does not reach the core of her awareness process or her acceptance process, and many of her answers are trivial.*<sup>306</sup>

#### **Alexandra makes a new application and is interviewed again.**

*In your previous procedure, it was considered not credible that you were attracted to women. (...) Can you explain what's new now?*

304. See ABRvS (Council of State) 12 August 2020, ECLI:NL:RVS:2020:1885.

305. Alexandra, Tunisia, interview, March 2017, first procedure.

306. Alexandra, Tunisia, intention to reject, October 2017.

– Basically, the story is still the same. The only thing that is different now is that I have been able to find my way about more in the Netherlands, also to the LGBT organisations. (...)

*How has the new policy changed anything for you compared to the previous procedure?* – I don't know about that. The lawyer knows that better than I do. The lawyer said it to me. He is specialised and I am not.

*Has your lawyer not talked to you about it?* – It's hard for me to talk about it in detail. He said that the questions that will be asked will not be as searching as last time.<sup>307</sup>

This application was also rejected:

It has been held that although there is a new work instruction in the field of LGBT people, this work instruction is not substantially different from the previous one (...) The elements against which the stated orientation is tested are still the same. Since the narrative of the claimant remains unchanged and there is no new relevant information, it is held that she has still not been able to make her stated homosexuality plausible. (...) The mere declaration that she visited COC three times after the previous asylum procedure and received information does not make it plausible that she is homosexual.<sup>308</sup>

Although the emphasis is no longer placed on awareness and self-acceptance, it is still based on the statements of the alien that must form an authentic story, when assessed in an integral manner.<sup>309</sup>

The court considers that in the first procedures she made an extensive statement that was not found to be credible. (...) The fact that the respondent has a new work instruction is not in itself a reason to interview the claimant again. (...) The respondent rightly pointed out that in the previous procedure he looked not only at the process of awareness and self-acceptance, but also at other elements. Appeal unfounded.<sup>310</sup>

Alexandra was only briefly heard (30 minutes) about new facts and circumstances. She was basically told, 'You yourself have said that your story (which we do not believe) is still the same, so there is no need to interview you again.' The lawyer's appeal to the letter from the State Secretary of 13 November 2018, in which he said that an additional interview may be necessary, if in the previous procedure the decision was based almost exclusively on the basis of awareness or self-acceptance, was ignored in both the intention to reject and the decision. Apparently, this did receive some attention in the appeal phase.

307. Alexandra, Tunisia, interview subsequent application, November 2018, second procedure.

308. Alexandra, Tunisia, intention to reject, November 2018.

309. Alexandra, Tunisia, decision, November 2018.

310. Alexandra, Tunisia, District Court Utrecht 24 December 2018, NL18.22621. Alexandra has exhausted all legal means.

Scott states in the beginning of his subsequent interview that he is not doing well, that he has been discriminated against, that he has a partner and that he wonders why the IND does not believe that he is homosexual.

**Scott, Uganda**

*The report called 'Pride or Shame?', do you know what it says? – I'm not sure because I haven't read the report myself. My lawyer did everything for me.*

*According to the letter, you, or your lawyer, are of the opinion that in your case there was also use of stereotypes. Can you explain that to me? – I have told you everything I knew, and I have also given the evidence to you.*

*Can you explain how you feel stereotyping has been used in relation to you? – I am gay, and I need help here. It is not for nothing that I fled my country.<sup>311</sup>*

**The State Secretary's response:**

The statement that the claimant is homosexual cannot suddenly become credible as a result of the content of Work Instruction 2018/9. (...) The new work instruction does not concern a radical change in the assessment policy. (...) The narrative of the person concerned contains the following relevant elements: He has (again) declared himself to be homosexual and hereby invokes the new Work Instruction 2018/9 and a report by S. Jansen, entitled 'Pride or Shame?' (...) It is also considered that he does not in any way provide insight into how stereotypes would have been used against him, nor how the report would monitor his personal situation. When he is questioned about this in different ways during the interview subsequent application, he cannot further substantiate this in any way.<sup>312</sup>

Scott was also only briefly interviewed about new facts and circumstances. That he was expected to read the report *Pride or Shame?* is a lot to ask. Greg has previously applied for asylum in other European countries. After a Dublin procedure, he disappeared and resurfaces again in 2017. Greg is poorly educated.

**Greg, Asia**

The claimant has declared vaguely, briefly and evasively about his personal experiences, his acceptance of his sexual orientation and how he has experienced this orientation in a society in which LGBT is not accepted. He has been given the opportunity to talk about the awareness of his stated homosexual orientation. He merely states that

311. Scott, Uganda, interview subsequent application, January 2019.

312. Scott, Uganda, intention to reject, January 2019. Scott has exhausted all legal means.

he didn't get the same feelings for girls that he did for boys, and that he thought it was weird when someone talked about girls. When asked to clarify what he exactly thought was strange, he makes a comparison with being served food. (...) These statements of the claimant are vague and meaningless.<sup>313</sup>

#### Interview third procedure:

*In the previous procedure, it was ruled that you failed to make your homosexuality plausible. Do you want to add something that would make it more likely to be judged to be homosexual?* – I cannot prove with a certificate that I am gay. I can only tell you this. (...) I'm not such a fanatical gay that I want to start a relationship with anyone. I'm looking for real love. I'm tired of having to convince everyone. I still have a tiny bit of hope that I will be believed.<sup>314</sup>

#### Interview fourth procedure:

– I have been in the Netherlands for seven years now trying to prove who I am. I'm trying to prove what my identity is. (...) There's only one question in my head. I'm gay. But this is not my fault. I was born that way. Yet I have to prove again and again that I am gay. (...) I also brought a letter from my friends. My friends know my situation.

*Today you can clarify your fourth application. (...) The essence of today remains that you have to convince the IND that you are homosexual. (...) – Perhaps I have not been so open in the previous procedures. But now I've changed. Now I can talk about it openly. (...) I want to stay in the Netherlands with my friends, gays and non-gays. I am happy when I'm with them. I don't have to hide anymore. I want freedom and security. (...) For me, a new world has opened up. Here you can fall in love with a man. (...) Now I want to tell you about my history. I want to talk about the life I've had and the life I have now.*

*I don't think your entire history is that relevant now. I will also tell you why. You must convince the IND. You have already been able to talk about your life in your country of origin. You should focus on the new elements you want to bring in. – I am doing this, right? I am now giving special attention to my sexuality, so that I can convince the IND. I'm working on that.*<sup>315</sup>

#### The judge in the fourth procedure:

The current (fourth) application is again based on his sexual orientation. (...) While third-party statements may be relevant, the respondent is allowed to lay emphasis in his investigation on what the claimant himself can say about his orientation. (...) The claimant further argues that he has clearly stated the nature and depth of his current contacts with other gay men. (...) The court judges that the

313. Greg, Asia, intention to reject, August 2017, second procedure. In the interview of August 2017 it says: '– I did not get the feelings for girls that I did get for boys. I thought it was very strange when someone talked about girls. *What did you find strange, for example?* – For example, if someone was served food that he has never eaten before. That's the kind of feeling I got with girls.'

314. Greg, Asia, interview subsequent application, March 2018, third procedure.

315. Greg, Asia, interview subsequent application, May 2019, fourth procedure.

respondent did not have to consider this as new or relevant. (...) What is new is that the claimant now claims to have liked some boys and to have been in love. But the actual contact with them was limited to a short introduction or even just looking at a distance. That may be new, but the respondent does not have to attach decisive importance to it because of its limited relevance in the sense that the claimant can now make his homosexual orientation plausible. The appeal is unfounded.<sup>316</sup>

Bernard's application was initially also rejected.

#### **Bernard, Asia**

First of all, it is held that the claimant has not given insight into the awareness process of his sexual orientation. He is very vague and brief about his experiences and feelings. (...) He only stated that he enjoyed talking to boys, interacting with them and touching them. Nor does he show any acceptance process with regard to his sexual orientation. (...) All in all, no credence can be attributed to his statements about the stated homosexuality since he cannot give any experiential process information about his awareness of his sexual orientation and how his environment and relationships dealt with it and responded to it.<sup>317</sup>

He submits a new application and is interviewed again:

*In the previous procedure, it was judged that your statements about your process of awareness and self-acceptance of your orientation were not credible. Why should this be looked upon differently now?*  
– I am in a relationship. I am active in the LGBT community.

*In the previous procedure, your orientation and problems were not considered credible. What is different now that would lead to a different conclusion?* – I don't know what to say that will make you believe it. And what I'm not allowed to say that makes you not believe it. I have no idea. I know who I am. And how I live right now. That's what I can tell you.

*How do you envision the future of your relationship?* – I have a relationship with S. We want to be together all our lives. I want to grow old with him. I want to see S's face every morning. And we also have a plan to get married in the future. (...)

*Do you want to bring anything else forward, other than you have done before, about your own experiences regarding the discovery of your sexual orientation?* – I do not understand the question. (...) I have a relationship with S. (...) And I know who I am.<sup>318</sup>

Two days later he received a status. The application of Bernard, who only attended primary school, was at first rejected

316. Greg, Asia, District Court Arnhem 1 July 2019, NL19:10972.

317. Bernard, Asia, intention to reject, January 2017.

318. Bernard, Asia, interview subsequent application, November 2019.

because he had given too little ‘insight into his awareness and acceptance process’. In his subsequent procedure, he is nevertheless believed on the basis of statements made by himself, his partner and by others about his situation in the Netherlands. It is remarkable that nothing more was asked about the situation in his country of origin. Perhaps this is an example of someone who the State Secretary feels has been rejected solely on the basis of narratives about processes, but it could also well be that the State Secretary was also impressed by the story of Bernard and his partner.

#### Ian, Guinea

In his first procedure in 2016, there was a lot about processes of acceptance and awareness. Ian is not highly educated. He initiates a new application.

– I would ask you once again to ask me direct questions about what you want to know. I ask you this because I have difficulty explaining it myself. I’m someone who comes from a culture where these kinds of things aren’t discussed.

*What is difficult for you to explain?* – I find it difficult to talk about my sexuality. This is because I am simply not used to it because of my culture. That is why I want you to ask me questions about what you want to know about me. Perhaps I can give you a clear answer on that basis.<sup>319</sup>

#### The State Secretary’s response:

In the present procedure, the claimant has also not shown any emotional development or thought process with regard to the awareness and acceptance process of his sexual orientation.<sup>320</sup>

#### The District Court:

In the subsequent application’s interview, the following is included: (...) *‘Your first asylum application was rejected because the IND concluded that your reasons for seeking asylum on the basis of your homosexuality were not credible. Partly for this reason, the IND did not grant you international protection. How can you convince the IND today that your asylum motives - and specifically those that relate to your stated homosexuality - should be regarded as credible?’* The court finds that the respondent gave the claimant the opportunity to testify, but that this way of inviting the claimant to openly speak may create a threshold for considering what is expected of the claimant. The court further finds that the claimant has adequately answered every question that has subsequently been asked in the interview. (...) The court is also unable to see why the respondent interprets his statements as ‘limited

319. Ian, Guinea, interview subsequent application, November 2018.

320. Ian, Guinea, decision, November 2018.



to general terms'. (...) The respondent considered that the claimant's statement that he has a male partner in the Netherlands with whom he lives together does not make his orientation plausible, because the claimant has already mentioned this partner in the previous procedure and, incidentally, has only used generalisations with regard to his stated relationship. (...) The respondent should have considered the duration and nature of the relationship when assessing the subsequent application and not merely referred to the previous procedure. (...) The appeal is allowed.<sup>321</sup>

Ian is interviewed again:

*In your previous interview, you stated that your culture makes it difficult for you to talk about your homosexuality. Please clarify this.* – Yes. It's hard to express myself about that because it's simply not possible within my culture to broach these kinds of subjects with anyone, because it's taboo within my culture to be gay and it's dangerous for your safety to discuss it with people.

*Is there ever talk about feelings in general within your culture, or is that also something that is rare?* – No, not at all. (...)

*Would you say that you yourself have undergone a development in the way you deal with homosexuality because you stay in the Netherlands for some time?* – Yes. I have experienced here in the Netherlands that being gay is not a curse. It is also not forbidden. Everywhere I go I see people who are gay and who walk around freely without fear for their lives. That has made me feel safer. (...)

*You have previously indicated that you are in a relationship and that you are also living together. Are you currently still in a relationship with your partner?* – Yes. This morning we were together. He wished me luck and he gave me a kiss and he went to work.<sup>322</sup>

After three years of litigation, it is finally believed that Ian is gay. The fact that he had been living with his male partner for years could have played a role in this acceptance. What probably did not play a role in this was that in his first procedure, it was mainly about awareness and self-acceptance and that he had difficulty speaking about this. After all, his subsequent application was initially rejected. The fact that he was still interviewed almost a year later was the result of the successful appeal to the court. He then litigated for another year concerning whether the criminal provision is applied in Guinea and whether his fear of persecution in Guinea is serious, but in November 2020 he was granted a status.<sup>323</sup>

321. Ian, Guinea, District Court Den Bosch 18 March 2019, NL18.22309.

322. Ian, Guinea, interview, September 2019.

323. See District Court Den Bosch 14 September 2020, NL20.924, appeal allowed.

In the case of Jane, an illiterate woman from an African country, it is her first application which is involved in the research rather than a subsequent one. Nevertheless, this file is interesting for the comparison of the two work instructions since her procedure lasted from 2015 to 2019, with different interviews and a number of intentions to reject, both before and after WI 2018/9. Jane had a large amount of physical and psychological scars left over from the abuse and torture by her family and environment. Her account was initially not believed.

#### Jane, Africa

It is held that the claimant has not been convincing about the inner process that led to the discovery and acceptance of her sexual orientation. For example, she states that she knew she was lesbian after watching a pornographic movie, where she discovered that she was more interested in the sex that took place between two women than the sex between a man and woman. (...) She has been given the opportunity to explain her process of awareness twice and has also been pushed in that direction, but in her own words she has not gone through a process. (...) Furthermore, it has not been shown that she has undergone any emotional development in the following years with regard to her orientation. Especially after all the problems she claims to have undergone, it can still be expected that this would induce some change in her. (...) As explained above, no credence is given to her lesbian orientation.<sup>324</sup>

Jane is interviewed again.

*You indicated earlier on that you accepted yourself immediately with regard to your orientation. Can you tell a little bit more about that? What did it mean to you that your environment didn't feel the same way? What did it do to you that your God and religion disapproved? How could you accept yourself if your environment didn't? - I had a hard time with that. I saw everywhere around me that women were with men, but I didn't feel that way. I also thought that I was sick and that something was wrong with me.*<sup>325</sup>

According to the internal IND report of May 2019, this additional interview was held in response to the new work instruction and the fact that she had contact with COC. 'More weight could be given to her contacts here in the Netherlands and the letter of support from COC confirmed her story. The interview and the impression of the claimant during that interview were the determining factors.' Presumably, the iMMO report of May 2018 that confirmed her account regarding her scars also played an important role, even though this is denied in the internal IND report. Possibly the fact that she said in the

324. Jane, Africa, intention to reject first procedure, October 2016.

325. Jane, Africa, interview, August 2018.

additional interview that she had a hard time with it also helped with granting the positive decision. In the manner in which interviewer asks questions, there is no sign of any different approach towards awareness and self-acceptance. In any case, after three years of litigation, she finally received a positive decision.

### 3.9.3 CONCLUSION

In the six inspected files of people who only 'came out' for the first time to the IND during a later procedure, it does not seem to matter very much that they only talked about it at a later time. The exception to the requirement of new facts seems to work well in these cases.

In the five files in which sexual orientation was reassessed during the later procedure, in all cases in the earlier procedures a large amount of emphasis had been placed on the processes of awareness and self-acceptance. Therefore, one could say that these are examples of cases which, according to the State Secretary, should be interviewed again and/or reassessed, because – unintentionally – too much emphasis was placed on these types of processes. Greg and Bernard have indeed been interviewed again on the basis of WI 2018/9. Bernard was still believed and granted asylum. Greg was rejected again, on the grounds that the State Secretary accentuates the process of discovering his orientation and the way in which he claims to have dealt with that.

Alexandra, Scott and Ian were only interviewed (very) briefly about new elements. Their applications were consequently rejected again. In Alexandra's case, the court held: 'The respondent rightly pointed out that in the previous procedure not only the process of awareness and self-acceptance were looked at, but also other elements.' Indeed, it will not be a regular occurrence that a rejection is 100% based on processes of awareness and self-acceptance. Nevertheless, it would have been better if people whose sexual orientation credibility had previously been rejected under WI 2015/9 by reason of undue emphasis upon awareness and self-acceptance processes, would have been interviewed again with an open mind and without assuming that they would have had problems with awareness and self-acceptance. In that way, the mistakes of the past could have been corrected.

### 3.10 Different treatment of Ugandans

Already in the first phase of this study, it was noticeable that in files of Ugandan asylum seekers, the State Secretary seemed to be much stricter than in files of LGBTI asylum seekers from other countries. Furthermore, there was more use of coarser stereotypes. When it comes to Ugandan LGBTI people, the State Secretary seems to assume that their sexual identity is not credible.

The explanation for this differential treatment came sometime later, when reports appeared in the media about alleged fraud by Ugandan asylum seekers.<sup>326</sup> The reason was a six-page memo from the IND.<sup>327</sup> Supposedly, more Ugandan asylum seekers were coming into the Netherlands than before, they would more often apply for a visa, their asylum narratives would be very similar to each other and the IND had received anonymous 'tip letters' that they were fraudsters. The IND set up a working group to investigate this.

Between March 2019 and February 2020, this working group examined the anonymous tips and also screened 253 Ugandan status holders who applied for asylum with an LGBTI motive in the period 2014-2017. This gave the IND the suspicion that the narratives of Ugandan asylum seekers were made up instead of authentic. The IND also looked at possibilities to withdraw permits that had already been granted. In the event of withdrawal, the burden of proof shifts to the State Secretary, who must prove that the asylum seeker has provided incorrect information. According to the memo, one permit has been withdrawn. In her letter of 8 July 2021, the State Secretary stated that withdrawing a permit is so laborious that she wanted to shift the focus of the analysis to the 'beginning of the asylum procedure'.<sup>328</sup> Since 2018, Ugandan LGBTI cases have been handled as much as possible by experienced IND employees with a certain awareness when it comes to fraud cases, according to the memo.

The memo shows that the number of rejections among Ugandans has increased considerably compared to the period in which the *Pride or Shame?* research was conducted (2015- 2016). In 2015, the acceptance rate of Ugandan asylum applications in the Netherlands was still around 50%, compared to only 29% in 2018. The impression was created that Ugandans were applying for asylum en masse in the Netherlands on the basis of a (false) visa, while one of the outcomes of the memo

326. NRC: 'Ugandans are now equated with liars' | De Volkskrant: 'Hundreds of Ugandan asylum seekers are alleged to have lied about their sexual orientation: what are the facts?'

327. Report on the analysis of Ugandan LGBTI cases following reports of fraud. Annex to the letter from the State Secretary for Justice and Security to the Chairperson of the House of Representatives, 'Various topics LGBTI in migration policy', 4 November 2020, Parliamentary Documents 19637, no. 2670.

328. Letter of 8 July 2021 from the State Secretary for Justice and Security to the Chairperson of the House of Representatives, Parliamentary Documents 19637, no. 2759.

is that only 3% (in 2018) or 5% (in 2019) of the total number of Ugandans with a Schengen visa actually applied for asylum. COC wrote a letter in which the organisation expressed its concerns and urged extreme caution in drawing the conclusion that fraud has taken place and insisted on the careful and open-minded handling of asylum applications from Ugandan LGBTI persons.<sup>329</sup> COC also recently received signals from asylum lawyers and organisations working with refugees that Ugandan LGBTI persons were being examined more strictly and were wrongfully rejected. The conclusion seems justified that there is discrimination against Ugandan LGBTI people.

In the present study, ten files of Ugandans have been studied and only one of whom was granted a status.<sup>330</sup> It seems that, just to be on the safe side, the State Secretary considers all Ugandan LGBTI people to be fraudsters, which sound somewhat similar to the childcare allowance affair in which the Dutch government also distrusted a vulnerable group of people without good reason and treated them as fraudsters.<sup>331</sup> As long as it is dangerous for LGBTI people in Uganda, seeing as they are severely persecuted in that country, this is a very bad idea. Moreover, the fact that the withdrawal of a permit is not easy is a good thing, from the point of view of legal certainty.<sup>332</sup>

### 3.11 Conclusion credibility

The main conclusions of the *Pride or Shame?* study were that the processes of awareness and self-acceptance were based on stereotypes and that more attention should be paid to statements from third parties. Although it initially seemed that the State Secretary had adopted these conclusions in Work Instruction WI 2018/9, this is not at all reflected in the decision-making practice.

For example, the deleted terms ‘process of awareness’ and ‘process of self-acceptance’ are still used, either literally or in the form of synonyms. While the State Secretary acknowledged that the concepts have been deleted because wrong decisions have been taken on the basis of these concepts, and that this should stop, the fact that synonyms have been used makes it clear that the criticism has not been taken seriously at all. The files on subsequent applications based on the new work instruction also do not give the impression that correcting mistakes is high on the agenda of the State Secretary.

329. Letter COC Netherlands of 14 December 2020 to the State Secretary for Justice and Security, and the State Secretary’s reply of 27 January 2021.

330. This concerned Nancy, after an allowed appeal and when she had a new partner.

331. See also Wegelin et al. 2021 and Geertsema et al. 2021.

332. See, for example, on withdrawal District Court Zwolle 26 April 2021, NL20.13918, appeal allowed (Iraq).

The State Secretary still appears to expect LGBTI asylum seekers to talk about inner struggles and turmoil, or soul searching, as the British say. Relationships should not be about friendship or sex, but about love, and that should be accompanied by deep feelings. Joy seems to arouse suspicion. The idea is still that the awareness (or discovery) that the person in question has any other orientation or identity than heterosexual or cisgender is accompanied by shame and doubt and the expectation that there are negative feelings becomes stronger, in connection to how LGBTI-phobic the country of origin is. If, in the State Secretary's opinion, too many risks have been taken in dealing with people of the same sex in the country of origin, it damages the credibility. People who adhere to a religion must have seriously considered the relationship between this religion and their sexual orientation. With regard to the knowledge of LGBTI organisations and topics, expectations seem to have even increased in recent years: in-depth knowledge is now expected, ranging from criminal laws of their country of origin to all kinds of LGBTI topics in the Netherlands. Statements from third parties were of little consequence.

Often it seems that the real message is: if you do not explain in the manner we expect you to, we will find your statement 'vague' and 'general' and think that it shows little depth. This was the case, for example, in the file of Victor from Morocco, whose application was finally granted, but only after the judge had allowed his appeal four times. The files about Tim from Afghanistan or Greg from Asia are also not easy to follow. Of course, everything can be regarded as made up and fabricated, certainly if reasoned from a suspicious basic attitude, but their files did at least seem authentic to the researcher. The same applies to the files from Uganda, where it is difficult to understand why – for example – Sharon, Betty and James were not believed.

This study also included files in which the way in which the statements about sexual orientation were viewed did seem to be based on realistic expectations, and it is therefore certainly not excluded that individual officials have a less stereotypical approach. Nevertheless, the disappointing conclusion of this follow-up study is that it cannot be said that there has been an improvement, and that the assessment of the credibility of LGBTI asylum seekers is still based on stereotypes.



## 4. GENDER IDENTITY

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## 4.1 Introduction

The main subject of this report is the question of whether anything has improved with the introduction of WI 2018/9. Seeing as this work instruction is mainly about the credibility of sexual orientation, this research is also mostly about the way in which this credibility is assessed. However, in four of the forty files examined, the application was (initially) rejected not because of incredibility, but because the situation in the country of origin was not considered serious enough. The files were about Juliana (a trans woman), Stanley from Jordan, Ian from Guinea and Jason from Kazakhstan.<sup>333</sup> Ian's file was already discussed above, the files of Stanley and Jason are briefly discussed in the next chapter (on 'discretion'). In this chapter, some aspects of gender identity are discussed: misgendering, severity, and – again – credibility.

## 4.2 Misgendering

In response to parliamentary questions in connection to misgendering, the State Secretary stated: 'The IND's approach is to always address the asylum seeker according to the wishes of the asylum seeker, regardless of the information stated in the passport.'<sup>334</sup> Nevertheless, the trans woman Frances is referred to as 'he' in most of the file. Her lawyer writes in February 2021:

My client is transgender and she wants to be addressed as Mrs. And not with her male first name, as was the case in the waiting room, where everyone looked at her very strangely, seeing as she looks feminine. I explicitly stated this in advance and I do not understand how this could have gone wrong. Not until page 4 of the report does the officer ask how Mrs. wishes to be addressed. As a result, at the beginning of the report she was constantly addressed incorrectly as 'the gentleman'. This is very painful for her.<sup>335</sup>

Frances receives a positive decision, and in a footnote, it says:

The person concerned has indicated that they are transgender and this is considered credible. As the person concerned is actually still male, this is also stated as such in the subject of the decision. However, in the rest of the decision, the female form of address will be retained as much as possible, now that the person concerned has indicated that they see themselves as a woman.<sup>336</sup>

333. Ian from Guinea and Jason from Kazakhstan were given a status (years) after the last negative decision.

334. Parliamentary questions from Koekkoek (Vlt) and Simons (Bij1) and the answers of 26 October 2021 on the report 'Transcript from the margins' on the treatment of trans persons from Latin America and the Caribbean in Dutch asylum procedures, 23 November 2021. Most of the women interviewed for this report were addressed by the IND as 'he' or 'him'. The British instruction 'Gender Identity Issues in the Asylum Claim' (UKBA, 2011) states: 'As with anyone who lives by a name other than their birth name, a transgender applicant should be given respect and referred to by their chosen name and gender identity. If in any doubt, an applicant should be asked at interview which personal pronoun he or she would like used. (...) Correspondence should normally be prepared using the applicant's preferred salutation of the applicant.'

335. Frances, corrections and additions at first interview, February 2021.

336. Frances, decision, April 2021.

Unfortunately, the accompanying letter is written entirely using the male form of address, rendering the above-mentioned footnote rather meaningless. With Evelyn, for example, this went slightly better, although it is a pity that Evelyn is not referred to as a woman in the ‘reports and forms’.

#### Evelyn

*Do I understand correctly that you left your country of origin because you are transgender? – Yes.*

*How would you like to be approached and addressed by us? – As a woman.*

*Because you are currently officially registered as a man, this will also be maintained in the reports and on the forms. However, I will address and approach you as a woman.<sup>337</sup>*

The following quote shows that the distinction between man and woman does not have to be so sharp, it can also be less binary.<sup>338</sup>

#### Alice

*Can you tell me how you see your gender identity? – People call me transgender but I’m actually not. I want to live as both a woman and a man. I also try to accept my body as it is and I don’t have to change it. For example, if there are places where women go, I act like a woman. In male-oriented places, I act like a man.<sup>339</sup>*

Juliana is still addressed as a man in the first interview at the end of 2017. Her lawyer protests this in the corrections and additions, and in the interview of August 2018 she is addressed as a woman, although gender identity is referred to as ‘sexual orientation’.

#### Jurisprudence

The way in which the trans woman is addressed in the following judgment is not respectful and shows indifference.

#### **District Court Utrecht 9 December 2021, NL21.16096 (Egypt)**

The court designates [...] as the claimant [male form in Dutch] because this is his registered sex. No further significance should be attributed to this for the purpose of resolving the appeal. Claimant can also be read as a female claimant.

337. Evelyn, interview safe country of origin, October 2018.

338. On a non-binary gender identity as grounds for asylum, see also Upper Tribunal, [2020] UKUT 313 (IAC) (El Salvador), 22 October 2020.

339. Alice, interview safe country of origin, February 2020. Alice gets a status a month after this interview.

### Comments

Although the five files of trans women in this study have fared better than during the time of the *Pride or Shame?* study, misgendering still occurs regularly. UNHCR also makes the following recommendation to states in this regard:

'Recognize the right to legal gender recognition via self-determination for all refugees, asylum seekers and other forcibly displaced and stateless people on their territory.'<sup>340</sup>

### 4.3 Severity and country of origin information

Three of the five transgender women in this study were from a country where homosexual acts are criminalised. All three were granted asylum. The other two women, Helen and Juliana, came from a country without such criminal provisions.

Sometimes everything is believed except the causal link between what happened and the gender identity. The latter happened to Juliana: The State Secretary believed that she had been detained for almost a year and a half and also that she had been raped in prison, but not that these events were related to her gender identity. Therefore, her asylum application was rejected.<sup>341</sup> Another reason for cases of trans asylum seekers to flounder is the question of whether the situation in the country of origin is serious enough to qualify as persecution.

Helen had been raped by the police, she had been refused medical care and she lost her job. Moreover, in Helen's country of origin, the police are becoming increasingly aggressive towards trans people. Two quotes from her interview:

*We are not going to examine the transformation process today, because it has already been completed. We accept that you are a woman. Today I want to explore why you, as a woman, left your country of origin. (...)*

*Why have you not had any more work after 2013? – My birth certificate shows that I have undergone a gender reassignment. As soon as an employer sees this, the job application is immediately thrown in the trash.<sup>342</sup>*

Helen's situation was considered serious enough and a week after the interview she gets a status.

340. UNHCR 2021.

341. Juliana, decision, May 2019.

342. Helen, interview, September 2019.

343. LGBT people from Afghanistan, Libya, Nigeria and Russia are classified as 'risk groups', and LGBT people from Iraq, Chechnya and Uganda are in principle granted a refugee status.

344. WBV 2019/12, COC Netherlands strongly protested this policy change, which also reduced the protection of LGB people from Iran. There are already examples of Iranian asylum seekers whose sexual orientation is believed, but whose application was rejected anyway. See, for example, the letter from COC of 21 May 2021. The human rights organisations 6Rang and OutRight Action International also wrote letters to the Dutch government about this, see 6Rang (Iranian Lesbian and Transgender Network), 'Current situation of LGBT Rights in Iran: From Systematic Persecution to the Imposition of Death Penalty', Letter to the Dutch Ministry of Foreign Affairs and the Ministry of Justice and Security, February 11, 2020, [6Rang letter to Dutch government regarding its asylum policy for Iranian LGBTQI - 6Rang](#); OutRight Action International, 'The situation of LGBTI people in the Islamic republic of Iran', letter to the Ministries of Foreign Affairs and Justice & Security and the House of Representatives, 9 March 2020. See also ACVZ 2020, p. 23, note 29, and Hooijmans 2021.

345. WBV 2020/19. In Venezuela, transgender people cannot reconcile their documents with their appearance and may therefore be deprived of basic services.

346. Van Kempen & Ortiz 2021.

347. Appeal by District Court Haarlem 26 January 2018, District Court Haarlem 9 February 2018 and District Court Amsterdam 22 February 2018, ECLI: NL:RVS:2018:2168, ECLI:NL:RVS:2018:2169 and ECLI:NL:RVS:2018:2170.

348. See also Wijker 2018.

Country of origin policy often refers to 'LGBT' and usually makes no distinction between the different subgroups.<sup>343</sup> This recently changed when transgender people from Iran were no longer qualified as a 'risk group'.<sup>344</sup> Later on, transgender people from Venezuela did get classified as a risk group.<sup>345</sup>

The research report 'Transcript from the Margins' draws attention to the fact that in Dutch asylum practice the specific problems of transgender asylum seekers are not considered enough in coherence.<sup>346</sup> In many countries of origin, they are confronted with structural human rights violations and the State Secretary does not pay sufficient attention to the serious consequences that this has. Often it is not possible to obtain gender-affirming health care and legal recognition of gender identity in the country of origin. Because they do not conform to the gender that is expected of them, they are confronted with excessive violence, by fellow citizens and by authorities. In addition, for trans women, sex work is in many cases the only way to earn a living, which contributes significantly to their marginal position in the country of origin.

### Jurisprudence

#### **ABRvS (Council of State) 1 October 2019, 201900234/1 (Cuba)**

The asylum seeker is from Cuba and is transgender. In line with the decisions of the Council of State of 4 July 2018,<sup>347</sup> the court held that there is no group persecution of LGBTI people in Cuba and that they do not run the risk of treatment as referred to in Article 15 of the Qualification Directive as a group. The State Secretary has rightly taken the position that the problems she has experienced when seen in full context with regard to their quantity and intensity are not sufficiently serious. The State Secretary's appeal is allowed.<sup>348</sup>

It seems that in Cuban cases the State Secretary mainly looks at the indicators for an intolerable situation as a result of discrimination, such as whether or not they have access to education, housing and health care, and that less attention is paid to (cumulative) acts of persecution. Given the nature and level of severity of the experiences of Cuban trans people, this does not seem justified. Also, close attention should be paid to any experience of past persecution and whether protection by the authorities is available. This last issue is the subject of a number of judgments regarding trans women from Colombia.

**ABRvS (Council of State) 14 March 2019, 201805177/1/V2 (Colombia)**

She has based her asylum application on the fact that she is a trans woman and has therefore experienced problems in Colombia. (...) With the conclusion of the State Secretary that it is generally possible in Colombia to invoke protection from (higher) authorities, the State Secretary has not met the burden of proof resting on his shoulders. According to the district court, he should also have given a clear statement of the extent to which protection is provided in Colombia in general to the group of LGBTI people, in particular transgender people. The Council of State confirms the court's decision.<sup>349</sup>

**District Court Groningen 21 October 2021, NL21.12579 (Colombia)**

In the court's opinion, it can be deduced from the country of origin information submitted on behalf of the claimant that (...) there is a deteriorating situation in Colombia for, among others, transgender people and in particular for trans women. In addition, the court rules that, in view of the information that shows that security services and police officers are also partly responsible for the violence against LGBTI people, the respondent should investigate more carefully whether protection is actually provided in Colombia in general against violence against LGBTI people. Appeal allowed.

Incidentally, a day earlier, the District Court of Den Bosch came to a different conclusion in another case of a Colombian trans woman on the basis of the same country of origin information.<sup>350</sup>

## 4.4 Credibility gender identity

In Work Instruction 2019/17 it says:

By LGBTI is meant: lesbians, gays, bisexuals or transgenders. The acronym does incidentally not need to be interpreted as exhaustive and can be used in situations where the alien invokes a sexual orientation or gender identity in the context of an asylum application.

Two things stand out in this sentence. In the first place, not a word is said about the 'I' in the term LGBTI, which refers to intersex people.<sup>351</sup> This is probably because in WI 2018/9 there was still talk of 'LGBT', and only in WI 2019/17 in the entire text 'LGBT' was replaced by 'LGBTI' in the – apart from three sentences about coordinators – otherwise identical text. Secondly, it is specified that the instruction applies to people who flee because of their sexual orientation or their gender identity. The instruction is called 'interviewing and decision-making in cases in which LGBTI orientation has

349. Appeal by the State Secretary against District Court Roermond 25 May 2018, NL17.12618, manifestly unfounded. The woman has been granted a refugee status.

350. District Court Den Bosch 20 October 2021, NL21.10248, appeal unfounded (Colombia).

351. For more information on intersex, see Organisation Intersex International Europe: [Welcome to OII Europe! – OII Europe](#).

been put forward as an asylum motive', but although there is occasionally talk of 'being LGBTI', the instruction is otherwise only about sexual orientation and in particular about assessing the credibility of a stated sexual orientation. For example:

When an alien states that he is LGBTI, it is up to him to further substantiate the stated sexual orientation which is, as is usual during the interview, the starting point. The IND gives the alien ample opportunity to explain his stated sexual orientation and the situation of LGBTI people in the country of origin. The IND investigates whether the sexual orientation is credible.

Partly because the credibility of the gender identity was almost never questioned, the idea was that the instruction was not actually about trans people. However, trans asylum seekers are usually asked the same type of questions that are used to establish the credibility of a sexual orientation, complete with (moments of) awareness, self-acceptance and similar concepts. Evelyn was asked: 'You were born a man and now feel like a woman. Can you indicate when you became aware that you felt like a woman and what this did to you?'<sup>352</sup> The officer who interviewed Frances starts rather cautiously, but the questions seem to be simply copied from the usual questions about sexual orientation:

#### Frances

*I want to start by discussing your orientation. I want to indicate that I understand that someone's orientation is very personal and it's not easy for everyone to talk about it. I want to tell you that the questions I will ask are based on emotions and thoughts and that I will not ask about intimate topics. If you still have difficulty with a question for whatever reason during the question, please indicate this right away.*

*How do you see yourself? How would you define your sexual orientation yourself? (...) Please explain this as precisely as possible.*

- I am a woman who has had many setbacks and failures. She wants to get her rights and be able to be herself, just as she is. (...)

*How would you describe your sexual orientation?* - I was born in a boy's body, but my thoughts and my interests and also my feelings are all feminine.

*You have stated that you are transgender. Can you tell me what exactly you mean by the term 'transgender'?* - Female mind in a male body. (...)

352. Evelyn, interview, February 2019.

*How does it affect you that your body is becoming increasingly feminine? (...)*

*When did you become aware of the feeling that you are a woman in a man's body? (...)*

*Was there a specific moment when you made the decision and concluded that you were transgender?* – Yes, when I was fifteen. After the conversations with the psychologist, I knew for sure.

*Can you take me back to that moment, into your feelings?* – I can say that I was very happy that someone believed in me. I was glad someone wanted to help me. (...)

*Have you had any doubts about your gender or orientation?* – No.

*What was said in your youth by school and your immediate environment about transsexuality?* – Nothing.<sup>353</sup>

Frances's example shows that there is still a lot to learn for interviewing officers in the field of trans people. In the following quote, the official is taught by the asylum seeker.

#### **Frances**

*What is your partner's orientation?* – He's a heterosexual man.

*Did he know that you are an LGBTI?* – Yes, he knew from the beginning that I am transgender.

*It is not yet clear to me. You have stated that your partner is heterosexual. What is the reason he sent you a message?*

– (...) Men who are attracted to transgender women are called straight. They are not bisexual.<sup>354</sup>

The State Secretary believed that Frances is a trans woman and she was given a status. In the other four trans cases in this study, the gender identity was also believed without any problems. During the *Pride or Shame?* research, only one example was found of a judgment in which a stated gender identity was not believed. It was about someone from Belarus who claimed to be bisexual and transgender.<sup>355</sup> In the meantime, four more similar judgments have been found. In all four cases – as in the Belarusian case – it was about people who reported being both homosexual and trans, and neither of these were believed. It seems that in these cases insufficient distinction was made between homosexuality and trans gender identity.

353. Frances, interview, February 2021.

354. Frances, interview, February 2021. See also [www.transgendernetwerk.nl](http://www.transgendernetwerk.nl): 'Sexual orientation is about who and what gender someone is sexually attracted to, while gender identity is about the gender that someone has and with which one therefore identifies. Transgender persons can therefore be very different in their sexual orientations, just like cisgender persons.'

355. District Court Zwolle 28 March 2017, AWB 16/1743 (Belarus), *Pride or Shame?*, p. 46.



## Jurisprudence

### **District Court The Hague 14 February 2019, NL18.5419 (Kenya)**

The respondent did not find the claimant's homosexual orientation and transgender identity credible because of inconsistent and incongruous statements about his process of discovery and the way in which he dealt with it. He has also made inconsistent statements about the role of his non-voluntary breast formation. He has stated that he feels handicapped by this. Appeal unfounded.

### **District Court Roermond 3 June 2021, NL21.4164 (Morocco)**

The respondent does not wrongly take the position that claimant's statements that he wants to undergo gender reassignment surgery are incredible. The respondent does not wrongly take into account that his homosexual orientation is considered incredible, which detracts from the credibility about the gender reassignment operation. (...) It is not understood why the claimant did not bring this up earlier, especially now that he claims that he has already realised this from a young age and during his alleged relationship with X. (...) Claimant does not get past his statement that he wants to have breasts and long hair and wishes to undergo surgery for that, but he does not elaborate on this in any way. Appeal unfounded.

### **District Court Amsterdam 12 November 2021, NL21.16653 (Gambia)**

The claimant's statements about his wish to become a woman were also allowed to be regarded by the respondent as brief and superficial. (...) The claimant's assertion that the respondent wrongly did not consider his wish to become a woman as an independent element cannot lead to a different conclusion, if only because this assertion was only put forward at the sitting. Appeal unfounded.

### **District Court Utrecht 9 December 2021, NL21.16096 (Egypt)**

The interviewing officer has tried to find out the authentic story of the claimant. In this case, this includes asking about the realisation of being transsexual. It is a momentous thing to realise that you belong in another body and the respondent takes the position that he should have rightly included the feelings expressed by the claimant about this or the lack thereof in the assessment. This includes his process of self-acceptance. (...) The court accepts the respondent's position that he acted in accordance with the WI both in the interview and in the assessment of the application. (...) Also, it was not in conflict with the WI that there had been questioning about the process of self-acceptance and that the answers were taken into account during the assessment. (...) What the respondent has held against the claimant during his credibility assessment is that he does not mention any feelings in connection with his realisation and the way in



which he came to acceptance. (...) What the respondent holds against the claimant is that he does not provide insight into why it is not an issue for him and why he has accepted his transsexuality (apparently without inner struggle). (...) The respondent further takes the position that the claimant is not able to provide a clear description of himself. He lumps various concepts together and uses them randomly and interchangeably during the interview. According to the respondent, the claimant can be expected to be aware of the different nuances that exist when using the terms 'transgender' and 'transsexual' and certainly that these are not interchangeable terms with sexual orientation. Appeal unfounded.

This last judgment shows that this transgender person has been interviewed in a 'traditional' way, including 'psychologising', objecting to a lack of inner struggle and the use of the deleted terms 'awareness' and 'self-acceptance'. No distinction is made between sexual orientation and gender identity. In addition, it is striking that the State Secretary holds it against this asylum seeker that she does not use LGBTI terminology correctly, while the State Secretary herself also has something left to learn on this subject, as became clear, for example, at Frances's interview.

Judgments or files in which solely the trans gender identity was mentioned as the reason for fleeing and in which it was not believed, are not found. Also, no judgments were found in which the asylum seeker whose gender identity was not believed, won the appeal in court. The following judgment was not directly about credibility, but about whether the gender identity had been introduced in time to be included in the assessment. In this case, too, both sexual orientation and gender identity played a role.

**District Court Haarlem 8 November 2021, NL20.13596 (Venezuela)**

The State Secretary has considered the lesbian orientation of the alien credible, but rightly stated that she does not run a 3 ECHR risk as a result. In the additional grounds for appeal, the alien has argued that she is in gender transition. That she should have expressed this asylum motive earlier is not accepted. A teenager who is struggling with her identity and who is from a country where transition is a highly sensitive matter cannot be required to come out immediately to her lawyer or to the respondent. The State Secretary must include this asylum motive in the procedure. Appeal allowed.

## 4.5 Conclusion

There are several problems with the assessment of applications from transgender asylum seekers. Trans asylum seekers are still misgendered and treated with disrespect, and that can affect the quality of the interview. In addition, the expertise of IND employees in the field of transgender matters leaves a lot to be desired.

The severity needs to be assessed more carefully and, in this context, more extensive and better country of origin information regarding the situation of trans people needs to be collected, properly identifying the specific and cumulative problems in the country of origin.<sup>356</sup> At present, IND employees mainly use the General Country Reports drawn up by the Ministry of Foreign Affairs as a source of country of origin information, which have been designated by the Council of State as expert reports.<sup>357</sup> To get a better grasp of the situation of trans people in the countries of origin, it is important to also recognise and use other sources of country information.

From recent jurisprudence it has become apparent that the objection that an identity is not believed, which has long been thought to only play a role in sexual orientation within the LGBTI group, is now also becoming relevant for trans people. It is striking that the same stereotypes are used that were removed as criteria for the assessment of sexual orientation and that were an important reason for the present research.

A separate work instruction could be drawn up for transgender asylum seekers, similar to the one used in the United Kingdom.<sup>358</sup> It is important that no new stereotypes are introduced and that the pitfalls of WI 2019/17 are avoided.

356. Van Kempen & Ortiz 2021, p. 199-200 and 203-207. See also the answers of the State Secretary for Justice and Security to the written questions by Members Koekkoek (Vlt) and Simons (Bij1), November 23, 2021 and the answers by the State Secretary for Justice and Security to the written questions by Members Podt and Van Ginneken (D66) of December 7, 2021.

357. In the context of increasing impartiality within the Dutch asylum procedure, scientist and IND employee Pieter van Reenen recommends that country reports be drawn up by an independent institution from now on and that country reports should no longer be regarded as the primary source of country of origin information. Van Reenen 2021. See also EASO 2021.

358. United Kingdom Border Agency (UKBA), 'Gender Identity Issues in the Asylum Claim', 2011. See also Van Kempen & Ortiz 2021.



# 5. 'DISCRETION'

359. Actually, 'discretion' is not an adequate term, because it's a veiled term for the situation in which people have to hide their sexual orientation or gender identity – sometimes for life – but because the term is now established, it is nevertheless used in this report, albeit consistently in quotation marks.

360. Moreover, there has been some international progress on this point, now that the European Court of Human Rights, like the CJEU in XYZ seven years earlier, has finally recognised that 'discretion' cannot be required. This is also the first time that the Strasbourg Court has found a violation of Article 3 of the ECHR in a case of a homosexual asylum seeker. In this case, that violation was due to the fact that the Swiss authorities had not investigated whether the Gambian authorities would provide protection against persecution by fellow citizens. ECtHR 17 November 2020, *B&C v. Switzerland*, 889/19, 43987/16111.

361. Vc C2/3.2: 'Furthermore, when assessing the risk of persecution, the IND assumes that the alien's immediate environment is or could become aware of the sexual orientation.' On 'discretion' see also *Pride or Shame?*, p. 17-18 and p. 134-152; Jansen 2015; Weßels 2017; Spijkerboer 2017; Spijkerboer 2018.

362. Freddy, Iraq, interview subsequent application, November 2019.

363. Jason, Kazakhstan, interview, January 2020.

364. Jason, Kazakhstan, decision, April 2020. Just before the sitting, this decision was revoked and almost two years after the decision was issued, Jason was granted a status, presumably on the basis of country of origin information and because no restraint can be required.

The concept of 'discretion',<sup>359</sup> restraint, or to what extent the asylum seeker could hide their sexual orientation or gender identity in order to avoid persecution, has still not disappeared from Dutch asylum law.<sup>360</sup> It is still asked how the asylum seeker wants to express their orientation in the country of origin, after a (forced) return, while this is irrelevant, seeing that the discussion is about what would happen if their environment was to find out.<sup>361</sup>

#### **Freddy, Iraq**

*Would you like to express certain things that you would not be allowed to express?* – That I can walk hand in hand with my lover, I would like to live with him, but that is not possible.

*Would you have to do certain things you'd rather not do?* – Yes, a lot, for example, I can't say that I am in a relationship with him.

*Do you openly express in the Netherlands that you are attracted to men?* – Yes of course. I'm in a relationship and I kiss him regularly on the street.<sup>362</sup>

Jason lived together with his partner, but they kept their sexual orientation hidden from everyone else.

#### **Jason, Kazakhstan**

*You have had several relationships in Kazakhstan and you stated that you had to keep your orientation hidden. Can you tell me how you did that?* – I always kept my relationships a secret. When we went out, we would often take his cousin with us, and then we would pretend that I was dating her. (...)

*At what times could you be yourself, and could you take off your mask?* – When we were inside with the door locked. So only when there were no other people present.<sup>363</sup>

The State Secretary responded with the following standard consideration:

The fact that the person concerned cannot express his sexual orientation in his country of origin in the same way as in the Netherlands does not in itself constitute sufficient reason to provide him with an asylum residence permit. Not every violation of the right to express sexual orientation constitutes an act of persecution within the meaning of the Refugee Convention.<sup>364</sup>

Stanley from Jordan is interviewed additionally about the way in which he wants to express his sexual orientation or how he

will keep it hidden upon return. Subsequently, his application was rejected.

#### Stanley, Jordan

The person concerned has stated that he is a homosexual and that no one in Jordan knows this. He has stated that he has left Jordan because he is being forced to marry and he does not want to. Furthermore, he has indicated that his family and tribe are not aware of his homosexual orientation and that they will not accept his orientation when they find out. (...) Despite the fact that it will be difficult for the person concerned to be openly homosexual in Jordan because the social views on sexuality are conservative, in his case he has not made it plausible that he will be discriminated against to such an extent that this will amount to acts of persecution within the meaning of the convention. (...) The person concerned has never had any problems because of his orientation in his country of origin or with the authorities of Jordan. He has had relationships with men in Jordan without encountering any issues, (...) been able to maintain various relationships and he visited meeting places for homosexuals virtually without any problems.<sup>365</sup>

In the decision, his situation is compared to that of heterosexuals.

The fact that he, like every citizen of Jordan, cannot freely express his sexual orientation in public spaces, now that as earlier he has been held to have been able to give meaningful substance to this, is therefore considered to be insufficient restriction of his human right. There will have to be a certain intensity of the violation of the human right in question.<sup>366</sup>

His fear of forced marriage or honour killing by his brother is not considered well-founded and it is not examined what will happen when his sexual orientation comes to light. The court also apparently failed to see that Stanley was in fact being sent back into the closet.

The claimant has not made his alleged fear of return plausible. The respondent could take into account that it has not been established that the claimant in Jordan has ever experienced problems because of his sexual orientation. (...) The fact that he had to be careful in his relationships in order to avoid repercussions, and that he cannot express his sexual orientation in Jordan in the same open way as in the Netherlands, was not sufficient for the respondent to conclude that there is persecution in the sense of refugee law or that there is an inhuman situation as referred to in Article 3 of the ECHR.<sup>367</sup>

Stanley stated that his family was now aware of his sexual

365. Stanley, Jordan, intention to reject, December 2019.

366. Stanley, Jordan, decision, March 2020.

367. Stanley, Jordan, District Court Haarlem 23 September 2020, NL20.7854.

orientation, but that was not believed by the State Secretary and the judges. His appeal was unfounded, as was his appeal to the Council of State.<sup>368</sup> This is a factual form of 'discretion' and there is a notable similarity with the case of another homosexual man who led a double life in Jordan, discussed in the *Pride or Shame?* report.<sup>369</sup> 'Essentially, the applicant wants to display his sexual orientation more freely in social and public life in a way that is customary in the Netherlands, among other places,' states that judgment.<sup>370</sup> Although the judge in interlocutory procedures understood his wish, this in itself was not sufficient for the appeal to be allowed. However, the Council of State did agree with him, referring to the XYZ judgment.<sup>371</sup>

### Jurisprudence

Factual restraint also plays a role in other judgments. It cannot be required that someone has a homosexual relationship and must keep his or her sexual orientation hidden from everyone else. In most judgments, these errors made by the State Secretary are corrected by the courts.<sup>372</sup>

#### **Vzr. ABRvS (Provisional Judge Council of State) 20 February 2019, 201609659/1/V2; 201609659/4/V2 (Russia)**

Both aliens have stated that they have exercised restraint in their country of origin with regard to their orientation in order to avoid problems and explained how they did this. (...) The court did not recognise that the State Secretary did not take a position on the question of what he expects from the aliens in the event of a possible return to Russia. The provisional judge considers it important that the statements of the aliens about the homophobic climate in Russia and the problems which were considered credible that they have experienced in their country of origin despite their restraint, fit in with the picture that emerges from the country information about the position of homosexuals in Russia. The complaint is successful and the appeal is allowed.

#### **District Court Haarlem 1 February 2019, NL18.707 (Trinidad & Tobago)**

Although the claimant's statements show that he has had relationships with several people, he had to keep these relationships and his homosexual orientation secret outside of his LGBTI circle, to avoid problems. (...) In the opinion of the court, it can be concluded that the claimant exercised restraint in expressing his sexual orientation. In this, it is relevant that the respondent in his assessment, also according to his own policy, is not allowed to require an alien to exercise restraint in the expression of his sexual orientation. The starting point is that someone will express their orientation and start relationships in a way that is not substantially different from what is accepted from heterosexuals in the relevant country of origin. Claimant has argued that he has not been

368. Stanley, Jordan, ABRvS (Council of State) 24 November 2020, 202005645/2/V2.

369. *Pride or Shame?*, p. 144.

370. Provisional Judge District Court Amsterdam 29 May 2015, 15/9003, 15/9004, appeal unfounded (Jordan).

371. ABRvS (Council of State) 12 August 2015, 201504495/1/V2. See also *Pride or Shame?*, p. 144.

372. See also *Pride or Shame?*, p. 152.

able to do this in the past, even though he wanted to. The respondent did not take sufficient account of that statement in the decision-making process. Appeal allowed.

**District Court The Hague 26 May 2021, NL19.17529 (Venezuela)**

Claimant has stated that he has always lived reservedly and restrainedly. Only confidants knew about his sexuality, at the most. Also with his boyfriend he was restrained and inconspicuous. (...) The respondent did not explain on the basis of which sources of information it can be assumed that openly expressing the sexual orientation for LGBT people would not 'undoubtedly lead to serious problems'. (...) The court considers that the claimant can no longer be required to conceal his sexual orientation in order to prevent discrimination and abuse. Appeal allowed.

**District Court Den Bosch 20 December 2019, NL19.20147 (Venezuela)**

In assessing and explaining that the incidents are not serious enough to give rise to fear, the respondent must take into account that the claimant has always exercised restraint in entering into relationships and express his orientation. (...) Nor did the respondent justify whether entering into relationships and expressing relationships in a manner comparable to heterosexuals is part of the assessment of participation in society on a social and cultural level. In the court's opinion, this assessment goes beyond establishing that there is access to education, employment and health care. Appeal allowed.

However, a transgender woman who was expected to show 'discretion' regarding her gender identity was not supported by the court.

**District Court Den Bosch 20 October 2021, NL21.10248 (Colombia)**

Furthermore, the court holds that the respondent has rightly taken the position that it cannot be seen that the claimant (...) will necessarily get into prostitution in order to be able to provide for her livelihood. (...) Claimant has worked in trade, construction and at the international airport as a baggage carrier. Although the claimant stated that she had to dress up as a man to be able to do this work, it does not appear that she could not find work as a transgender. After all, it appears from her account that the claimant has often had problems based on her gender identity and has learned to defend herself. It can be deduced from this that the claimant was recognised as transgender regardless of her clothing. Appeal not allowed.

The reasoning that emerges from this quote is: 'You don't want to work in prostitution? Then you will just have to dress like a man, won't you? And if there is no protection by the police?



In that situation, it is very useful that you can properly defend yourself!' I suspect that the sentence: 'It can be deduced from this that the claimant was recognised as transgender regardless of her clothing.' means: 'They see that she is transgender anyway, no matter what clothes she wears.' The people in trade and construction also saw that and they gave her a job nevertheless, but one in which she had to wear men's clothes. By ignoring that this trans woman wants to dress as a woman, she is in fact being sent back into the closet. The question should be: is there a job for her where she can wear women's clothes, other than in prostitution?

#### **Comments**

'Discretion' or the notion that sexual orientation or gender identity can be hidden to a greater or lesser extent in the country of origin has still not disappeared from Dutch asylum practice. The outcome of the *Pride or Shame?* report was that in most cases where an application was rejected on the grounds of 'discretion', the State Secretary was corrected by the administrative judge.<sup>373</sup> It is clear from the examples above that both the Council of State in Stanley's case and the District Court of Den Bosch in the case of the Colombian transgender woman pass the 'discretion' requirement of the State Secretary. Eight years after the XYZ judgment, this should not be still occurring.

373. See *Pride or Shame?*, pp. 151-152.

## 6. GENERAL CONCLUSION

The most important question to which an answer was sought in this study was: Has the way in which the credibility of sexual orientation (and gender identity) is assessed indeed improved since Work Instruction WI 2018/9, as the State Secretary claimed? Are stereotypes now used less during the assessment? The question of whether more or fewer stereotypes occur in the decisions since WI 2018/9 cannot be answered in quantitative terms, at least not on the basis of this research. However, it is clear that decisions are still made on the basis of stereotypes.

Although the text of WI 2018/9 has been improved compared to WI 2015/9, it is still expected that the asylum seeker has gone through inner processes and can talk about this. The terms '(process of) awareness and self-acceptance' are still used, literally or in the form of synonyms. This shows that the State Secretary has not taken the criticism seriously at all.

Judges sometimes issue judgements that give the impression that they are now also starting to get fed up with the way in which the State Secretary examines the credibility of an stated sexual orientation. But in other court judgments, the terms 'awareness,' 'self-acceptance,' and 'inner struggle' still appear, as if no one has ever raised objections about this and as if no new work instruction ever appeared. Whenever the decision practice conflicts with WI 2018/9, it is certainly not always corrected by the court.

Initially, WI 2018/9 seemed to embody a new and less stereotypical policy, and the problem seemed to lie mainly in the implementation, but now the policy appears to be less new than originally hoped for. In any case, the new work instruction has not ensured that decision-making practice is less stereotypical. The disappointing outcome of this research is therefore that WI 2018/9 has not led to an improvement, as the State Secretary had promised and that the assessment of LGBTI asylum applications is still based on various stereotypes.

For example, LGBTI asylum seekers are still expected to have had an inner struggle, felt ashamed, or had to have dealt with other negative feelings about themselves, while the State Secretary vehemently insisted that LGBTI asylum seekers were no longer expected to have problems with themselves. The asylum seekers are also expected to be able to express how they personally experienced being 'different'. There is more emphasis on this than on the reaction of the environment.

In addition, there is the persistent, but no less stereotypical, expectation that, especially in an environment that is hostile to LGBTI people, they will internalise the hatred that arises from this and will be able to talk about it. Such stereotypes should be removed from the work instruction.

A recurring theme found in the files is the idea that homosexuality is not so much about sex or 'physical lusts', and also not about friendship, but about love and deep feelings. Presumably in response to the ABC judgment, policy and practice in an attempt to get a grip on the matter have gone too far towards an emphasis on the feelings and psyche of the asylum seeker. It is expected that LGBTI asylum seekers can talk about their feelings on a deeper level. In addition, it sometimes seems that especially the eloquence and poetic qualities of the asylum seeker are being tested.

On the positive side, since the clear judgment of the Council of State of 4 August 2021, statements from third parties and other supporting evidence finally seem to be dealt with seriously. While in WI 2018/9 many words were spent on this subject, in practice hardly anything came of it. Hopefully, this will now change.

Incidentally, the idea that asylum seekers can hide their sexual orientation or gender identity in the country of origin, the so-called 'discretion', has still not disappeared from Dutch asylum practice. Unlike before, the use of the argument that people could exercise restraint is not always corrected by judges.

**IN FACT, THE SITUATION HAS DETERIORATED ON A NUMBER OF POINTS:**

- The fact that cases have now also been found in which the gender identity of asylum seekers is not believed, and in which the assessment is based on self-acceptance and awareness, as if these concepts had not been removed from the work instruction for good reasons, shows clear deterioration. Hopefully this is of an incidental nature and is not the sign of a new trend.
- It is concerning that Ugandans who invoke their sexual orientation seem to be seen as frauds in advance and that their asylum applications are viewed more strictly and with the use of more, and more obvious, stereotypes.

- 'In-depth knowledge' is now expected on the subject of LGBTI organisations and issues in the country of origin as well as in the Netherlands, a requirement that did not occur in the previous study.
- The report *Pride or Shame?* showed that people who were poorly educated had even more difficulty with talking about their psychological processes, which led to the recommendation to have more consideration for the level of education of the LGBTI asylum seeker. This advice is followed in a negative sense: the State Secretary now expects more statements from people with a higher level of education.

The beginning of this report described which solutions the State Secretary had in mind to put an end to the incorrect application of the policy and the overemphasis that had been placed on the processes of awareness and self-acceptance. The State Secretary hoped that the adjustments in WI 2018/9, and the deployment of coordinators, would ensure that matters would improve in the future.

Whether the use of LGBTI coordinators has brought any improvement, cannot be said on the basis of this study. However, it can be concluded that their input has not noticeably led to the reduction of the use of stereotypes in interviewing and deciding. Unfortunately, this also applies to the adjustments in the work instruction. The conclusion is therefore that these measures have not led to an improvement, let alone to a solution of the problems.

## RECOMMENDATIONS AND SOLUTION DIRECTIONS

The conclusion of this research is that nothing has actually improved and that stereotypes are still being used. These stereotypes should disappear from policy and practice as much as possible. Below, some recommendations are made and solutions are proposed.

### **Put self-identification first**

The best way to find out another person's sexual orientation or gender identity is to ask the person concerned and to not directly question the given answer, the so-called 'self-identification'.<sup>374</sup>

UNHCR recently made a similar recommendation to States:

Assess credibility on the basis of an individual, balanced, intersectional and holistic evaluation of all the evidence submitted by the claimant (including their testimony and other corroborative evidence) and other available evidence (such as Country of Origin Information), placing due value on the claimant's self-identification, without expectations of 'emotional journeys' or reliance on culturally unsound and inappropriate stereotypes, and respecting the principle of the benefit of the doubt.<sup>375</sup>

### **Stop the stereotypes**

In 2019, the WODC stated in a Memorandum that the Netherlands seemed to be at the forefront when it comes to letting go of predetermined models or ideas about how the discovery of a sexual identity develops.<sup>376</sup> Unfortunately, very little of this has entered into practice. It is therefore time to truly let go of these ideas, to stop relying on universal characteristics of sexual orientation and gender identity and to recognise that in reality there is a great diversity of different people.<sup>377</sup> It would be a great improvement if the State Secretary were to no longer take decisions on the basis of stereotypes, as he himself has already instructed the officials of the IND<sup>378</sup> in the work instructions. In that regard, some hope can be drawn from the commitment of the new government coalition to implement the Rainbow Agreement.<sup>379</sup> It states,

374. Cf. Yogyakarta Principle 3: [Yogyakartaprinciples.org](http://Yogyakartaprinciples.org) - The Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity; UNHCR 2012, par. 63, i; ECtHR 12 June 2003, *Van Kück v. Germany*, 35968/97; SOGICA 2020, Final Recommendation No. 25; *Pride or Shame?*, p. 21-22.

375. UNHCR 2021.

376. Schans & Van Lierop 2019.

377. UNHCR also intends to 'urgently revise the UNHCR 2012 Guidelines for International Protection N° 9 and existing training materials in light of the latest academic, policy and research findings on SOGIESC matters and human rights law, so as to ensure asylum procedures are sensitive to the heterogeneity, rights and needs of SOGIESC asylum claimants, avoid adopting any model for the assessment of the credibility of the claimant's asserted SOGIESC, and are more solidly grounded in LGBTIQ+ refugees' real-life experiences.' UNHCR 2021. SOGIESC stands for Sexual Orientation, Gender Identity and Sex Characteristics.

378. WI 2018/9 and WI 2019/17, par. 4: 'the assessment must not be based on prejudices, but the decisive authority must start from the individual situation and personal circumstances of the asylum seeker concerned'.

379. Coalition Agreement 2021-2025, p. 26: 'We continue to work on the acceptance, safety and emancipation of the LGBTIQ+ community. The Rainbow Agreement is the basis for this. We are carefully implementing this agreement with (initiative) legislation and policy.'

inter alia: ‘There will be an end to the rejection of LGBTI asylum seekers on the basis of unsound stereotypes, such as the lack of ‘processes of awareness and self-acceptance’.<sup>380</sup>

### **New and better policies**

The Council of State has ruled that WI 2018/9 does not constitute a new policy. Now that this study shows that this not-new-policy does not offer any improvement, the conclusion is justified that new policy should indeed be written that will be an improvement. In this new policy, decisions should no longer be based on stereotypes and should no longer focus on the psyche and inner self of the asylum seeker.<sup>381</sup>

### **Separate work instruction for transgender asylum seekers**

It is also advisable to draw up a separate work instruction for transgender asylum seekers, to not suffer the same pitfalls as with WI 2018/9, and to involve Transgender Netwerk Nederland in drawing this up.

### **More training**

To counter stereotypes when interviewing and deciding in LGBTI cases, it is important that there is a well-developed level of empathy and an open mind. According to the State Secretary, the IND is committed to minimising stereotypes in asylum interviews: ‘This is done, among other things, by supporting employees in further developing their expertise with training courses and workshops, and by the presence of LGBTI and religious conversion coordinators at each location.’<sup>382</sup> Also, the new coalition promises that the IND will obtain more expertise for the assessment of LGBTI people.<sup>383</sup> The present study shows that the use of LGBTI coordinators has not noticeably led to a reduction in the number of stereotypes and that the knowledge of interviewers and decision-makers regarding LGBTI matters still leaves much to be desired. Training for interviewing and decision-making staff is therefore very much needed.

### **Alternatives to Gaydar**<sup>384</sup>

Finally, it would be a good idea to be a little less concerned with trying to find out whether the asylum seeker is a real LGBTI, as is happening now, and to pay more attention to the question what he or she fears upon return.<sup>385</sup> The most important question should not be, ‘What inner conflicts did you have with yourself in the LGBTI-phobic society you fled?’ but ‘Why did you flee?’

380. The Rainbow Agreement is an agreement between COC and the Dutch government, to enhance the situation of LGBTIQ+ people: [COC-Regenboog-Stem-busakkoord-2021.pdf](#).

381. See also the general conclusion of the report *Pride or Shame?*, p. 167-172.

382. Policy response WODC report, State Secretary for Justice and Security to the Chairperson of the House of Representatives, 1 October 2021, Parliamentary Documents 19637, no. 2772. See also Boekhoorn & Severijns 2021b, where the authors wonder whether interviewers and decision-makers always recognise their own stereotypical considerations.

383. Coalition Agreement 2021-2025, p. 41: ‘We strengthen the expertise of the IND with regard to the assessment of LGBTI people and converts in which external expertise will be involved.’

384. ‘Gaydar’, a combination of ‘gay’ and ‘radar’, indicates a supposed intuitive ability to recognise gays, lesbians and bisexuals. For an example, see the story of Inge Zuidhoek in LGBT Asylum Support 2018, p. 33-34.

385. See also Dustin & Ferreira 2021; Rehaag & Evans Cameron 2020; Middelkoop 2013; Jansen 2013.

## SUMMARY

In June 2018 the report *Trots of Schaamte?* (English translation, 2019: Pride or Shame? Assessing LGBTI asylum applications in the Netherlands following the XYZ and ABC judgments) was issued. The study found that, although the majority of LGBTI asylum claims resulted in a positive decision, 85% of rejections were based on the assessment that the sexual orientation was not credible and that these decisions were grounded in western stereotypes regarding the development of sexual identity formation. Dutch LGBTI asylum policy held on to the stereotypical idea that in countries with an LGBTI hostile climate, LGBTI people always go through a process of realisation followed by a process of self-acceptance. The main recommendations of the research were to prohibit these stereotypical concepts, and to pay more attention to the declarations by other parties.

Shortly after the release of the research report, and as a reaction to the criticism of COC and others, the Dutch authorities issued new guidelines (Working Instruction WI 2018/09) in which the processes of realisation and self-acceptance were omitted. An 'authentic story' is now being sought. However, terms like '(thinking)process' and 'process of discovery' are still being used. The new guidelines contain a whole new section on declarations by third parties, as means of proof of credibility of sexual orientation. In addition to this, LGBTI coordinators were involved from 2019 onwards, and an obligation to consult these people before a decision is taken in an LGBTI case was incorporated in Working Instruction WI 2019/17. The State Secretary claimed that the new guidelines are an improvement and an adjustment, but they are not new policy. The Council of State (the highest Dutch court in asylum cases) supports this view.

COC Netherlands decided to do a follow-up research in order to find out whether practice had actually improved. To make a proper comparison, this research would be conducted in a similar fashion to the previous one. However, this time the State Secretary refused to give COC Netherlands and/or the researcher access to the IND files, giving rather vague and in-



comprehensible reasons. Therefore, the current research ('Pride or Shame? The follow-up, the new Working Instructions and the assessment of LGBTI asylum applications in the Netherlands') was based on files obtained from asylum lawyers. The principal research question was: Has the way in which the credibility of sexual orientation (and gender identity) is currently being assessed actually improved since working instruction WI 2018/9? In this respect 'improved' is understood as 'with less reliance on stereotypes'. Just as before, 40 files have been studied in full: 23 regarding men, 17 regarding women (one bisexual woman, 12 cisgender women and five trans women). 23 of the cases resulted in a positive decision, 17 in a negative.

The outcome of the research is that the stereotypes have not disappeared. The concepts 'process of realisation and self-acceptance' are still being used, either literally or by means of synonyms. This clearly shows that the State Secretary did not take the criticism seriously. It is still expected that LGBTI asylum seekers have experienced some form of inner struggle, shame and other negative emotions towards themselves, even though the State Secretary assured not to expect this anymore. Asylum seekers are supposed to elaborate on their personal experience of feeling different. In general, more focus is put on their innermost thoughts and feelings, instead of the reaction of their environment. The perception that, especially in an LGBTI-phobic environment, these people will internalise the resulting hatred, is a stubborn and unfortunate prejudice.

The idea that a same-sex sexual orientation is not so much about sex or 'physical lust', nor about friendship, but rather about love and deep feelings is a recurring theme throughout the files. After the ABC-judgment, in which explicit questions on sexual acts were forbidden, policy and practice went too far in highlighting the emotions and the psyche of the applicants. Regarding the expectations of emotional depth, occasionally the impression arises that mainly the eloquence and the poetic qualities are being tested. Although WI 2018/9 states there is an obligation to motivate which weight is attached to declarations by third parties as supporting proof of the sexual orientation of the applicant, in practice these motivations are mostly confined to the statement that the declaration of the asylum seeker is more important. However, this might change, since in a judgment in 2021 the Council of State clarified and stressed this need for motivation. On some points the situation has deteriorated. Firstly, following allegations of fraud among Ugandan LGBTI asylum seekers, these people are met

with suspicion, and, disturbingly, their asylum applications seem to be examined from a stricter and more stereotypical viewpoint. Secondly, until recently asylum claimants' gender identity was always believed in Dutch asylum practice, but now jurisprudence shows examples of people whose claims were rejected, because their stated sexual orientation and their stated gender identity were disbelieved. The credibility of their gender identity was assessed by questioning them on their process of realisation and self-acceptance. It is to be hoped that these examples are not a prelude to a new trend in Dutch asylum practice. Thirdly, regarding LGBTI organisations and issues the expectations seemingly have been raised, as currently 'in-depth knowledge' is expected. Finally, instead of taking into account the circumstance that applicants may have a low level of education, the State Secretary now expects people with a high level of education to talk more about their inner processes. Moreover, the concept of 'discretion' is still present in Dutch asylum practice.

The disappointing conclusion of this follow-up research is that WI 2018/9 and WI 2019/17 did not lead to an improved practice, let alone to solving the problems. The assessment of LGBTI asylum applications in the Netherlands still relies on various stereotypes.

#### **RECOMMENDATIONS AND POSSIBLE SOLUTIONS**

- The recommendation from the previous research not to use stereotypical concepts, but rather to rely on self-identification instead, is still valid.
- It should be acknowledged that there are no universal characteristics or qualities that typify LGBTI individuals any more than heterosexuals, there is huge diversity.
- As the new guidelines are not considered a new policy, it is recommended to draft a new policy, without the stereotypes and the focus on the psyche of the applicants.
- In addition, it is recommended to draft guidelines specifically for trans asylum seekers, while avoiding the pitfalls that occurred in the drafting of WI 2018/9.
- This research shows that the people who process the hearings and the decisions still lack knowledge of LGBTI issues. In order to fight stereotypes and to adopt an open mind, it is crucial to better educate the employees of the IND.
- Finally, it is important to keep in mind, that the main question should not be: 'What problems did you experience with yourself in your LGBTI-phobic country of origin?', but rather: 'Why did you flee?'



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