

Chapter 5

An exercise in detachment: The Council of Europe and sexual minority asylum claims*

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1. Introduction

Both key regional organisations in Europe – the European Union (EU) and the Council of Europe (CoE) – have played an increasingly significant role in moulding current asylum law in Europe.¹ The EU now has a full-fledged, reasonably sophisticated asylum policy, constituted by a range of legal instruments and jurisprudence covering all key aspects of asylum claims (Peers 2016). This body of law and policy has a direct and explicit impact on sexual minority asylum claim (SMACs) (Ferreira 2018).² Although the activity of the CoE in the field of asylum is considerably scattered and patchy compared to the EU's, the CoE has nevertheless gradually produced an important body of law and policy that affects SMACs. This is mostly the case owing to the work of the European Court of Human Rights (the Strasbourg Court).

I will consider how the CoE has so far contributed to shaping the current European legal and policy framework relating to SMACs. Whilst there is already academic work comprehensively analysing this theme in the context of the EU and the Court of Justice of the EU (CJEU) (Ferreira 2018), that is not the case in relation to the CoE. My focus in this contribution will be, in particular, on how the jurisprudence of the Strasbourg Court has dealt with SMACs. Similar to the general situation in relation to the Strasbourg jurisprudence on sexual orientation (Johnson 2013), the CoE policy and the Strasbourg jurisprudence have a significant influence on how domestic authorities address SMACs, so it is critical to address this gap in academic literature and develop a thorough understanding of the framework developed in the context of the CoE on this matter. Enforcement issues will fall outside the scope of this contribution.

Through this work, I wish to contribute to a growing body of literature that adopts a queer perspective on the activity of the Strasbourg Court. Inspired by an extensive body of queer literature that explores the socio-cultural nature, diversity and fluidity of gender and sexuality (for example, Butler 1990; Sedgwick 2008) and uses ‘queer’ as a tool of critique in the field of migration (Fernandez 2017), I add my voice to those who offer a queer deconstructive reading of human rights discourse to challenge the lack of universality of sexuality rights and foster emancipation (see, for example, Gonzalez-Salzberg 2019; Langlois 2018). Whilst acknowledging that merely granting rights will not achieve sufficiently radical change for sexual minorities from a queer perspective, one cannot but *also* demand the recognition of rights as at least *part* of the solution (Langlois 2018). In addition to a queer perspective, it is important to also consider an intersectional perspective. Building on the work of intersectional scholars such as Crenshaw (1989) and Yuval-Davis (2006), which requires us to ponder on the range of individuals’ characteristics and their interactions in order to understand people’s social and political experiences, I will consider how the Strasbourg Court can offer a holistic analysis of SMAC applications in order to vindicate applicants’ rights and challenge injustice.

The key argument put forward in this contribution is that, despite some isolated positive developments, the CoE in general and the Strasbourg Court in particular are failing SMAC applicants. The jurisprudence of the Strasbourg Court reflects an astonishing degree of deference to Member States’ policies and decision-making in this field, thus effectively not upholding the European Convention on Human Rights (ECHR) and betraying the applicants’ rights. This deference creates a worrying detachment from the suffering and risks to which SMAC applicants are exposed when the Court denies their claims, something that has been argued in relation to the Strasbourg jurisprudence on migration in general as well (Dembour 2015). This argument will be substantiated throughout this contribution through an analysis of the relevant policy documents and numerous examples drawn from the jurisprudence in question. The significance of this analysis thus lies mainly in the identification of the shortcomings of the CoE’s policy and Strasbourg Court’s jurisprudence in this field, which will allow commentators, policy-makers and decision-makers to gain a systematic and critical understanding of this field and plan their response accordingly.

I will proceed by delineating in Section 2 the role of the CoE and the Strasbourg Court, in particular, in developing both asylum and sexual orientation law at a European level, albeit adopting lines of direction that are essentially divergent. Section 3 will explore the Strasbourg jurisprudence on SMACs, by offering an overview and a summary assessment of the relevant decisions. Section 4 will then explore three key themes that emerge in that jurisprudence, namely the threshold for violation of ECHR articles, the rules of evidence and credibility assessment and how the Court deals with intersecting characteristics and socio-cultural factors. Finally, Section 5 will offer some concluding remarks, summarising why the CoE and the Strasbourg Court, in particular, should deal more forcefully with these claims.

2. Asylum and sexual orientation in the Council of Europe: Resisting the meeting of the roads?

All CoE Member States are bound by the 1951 Refugee Convention³ but not all are bound by the 1967 Protocol,⁴ which extends the geographical scope of the 1951 Convention beyond Europe and removes its temporal restriction to pre-1951 events. Moreover, the CoE itself is not bound by the Refugee Convention or its Protocol and does not have a full-fledged policy on asylum matters. Nonetheless, the CoE has acquired a progressively significant role in the field of asylum. Despite the absence of an asylum policy as such, several of its bodies have taken a noteworthy role in this field. For example, in 2005 the CoE's Parliamentary Assembly warned domestic asylum authorities about the need to implement an efficient asylum system without jeopardising the standards in the Refugee Convention and its Protocol and the ECHR and its protocols.⁵ Furthermore, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) produces guidelines on the treatment of migrants and asylum claimants, which are a valuable tool to advocate for better conditions at a domestic level (Danisi 2009). The Committee has also urged CoE Member States to use detention only as a measure of last resort and to provide detainees with adequate conditions (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 2017), which is directly consequential for asylum claimants.

The Strasbourg Court, above all, along with the now extinct European Commission of Human Rights,⁶ has developed a strong line of jurisprudence that applies the ECHR to asylum claimants, despite the ECHR not

possessing any norm explicitly related to asylum. In short, although the Strasbourg Court does not take decisions that consider the final outcome of asylum claims as such, it does decide on the violation of ECHR articles that may protect asylum claimants. In doing so, the Court engages in a ‘balancing exercise between the effective protection of human rights, and the Contracting States’ autonomy to regulate migration and refugee flows’ (Buchinger and Steinkellner 2010, 421). The Strasbourg Court offers asylum claimants protection mostly on the basis of Articles 3 ECHR (prohibition of torture)⁷ and, to a lesser extent, 2 ECHR (right to life).⁸ In the Court’s own words:

its case-law has found responsibility attaching to Contracting States in respect of expelling persons who are at risk of treatment contrary to Articles 2 and 3 of the Convention. This is based on the fundamental importance of these provisions, whose guarantees it is imperative to render effective in practice (...). Such compelling considerations do not automatically apply under the other provisions of the Convention. On a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention.⁹

The Court may, nevertheless, also consider violations of Articles 4 (prohibition of slavery and forced labour),¹⁰ 5 (right to liberty and security),¹¹ 8 (right to respect for private and family life)¹² and 13 (right to an effective remedy)¹³ of the ECHR, if the asylum claimant has suffered or risks suffering a flagrant denial of these rights in the CoE host country. The Court will not, however, entertain claims based on Article 6 (right to a fair trial), because it only applies to civil and criminal matters, asylum (and migration) being neither. Most important, the Court not only limits itself for the most part to considering Articles 2 and 3 ECHR violations, which restricts immensely the scope of rights asylum claimants may claim (Dembour 2015), but it also adopts an excessively high threshold for finding a violation of these articles by requiring that they be ‘systematically’ violated (see Section 4.1). This is the cornerstone of the detachment Strasbourg denotes in relation to asylum claimants. Moreover, jurisprudence is also in tension with the intersectional approach adopted in this analysis, because asylum applicants whose particular combination of characteristics may expose them to greater levels of violence and persecution may not see their experiences fully acknowledged or their rights vindicated in

such broad-brush, excessive requirement of ‘systematic’ violation of Articles 2 or 3 ECHR. The greatest indictment in this respect comes from the fact applicants have come to find the United Nations’ bodies, namely the Commission Against Torture, more effective in staying removals of asylum claimants than the Strasbourg Court (CDDH and DH-SYSC 2019, 100), despite the widely-known shortcomings of the UN human rights system. Undoubtedly, the CoE needs to further refine its legal and policy framework on asylum and render it more responsive to the needs, interests and rights of the individuals affected. This will be illustrated by the analysis of SMAC jurisprudence in subsequent sections.

In parallel, the CoE has also developed a rich body of jurisprudence on sexual orientation but this has so far not influenced the SMAC jurisprudence of the Court. Despite some legitimate criticism (see, for example, Ammaturo 2017), the CoE has been active in facilitating what has been termed the ‘law of small change’ in relation to sexual orientation matters: slowly but steadily, there has been progress from decriminalisation of homosexual activity, to same-sex marriage and same-sex adoption (Waaldijk 2003). Indeed, the CoE has contributed considerably to such progress, including some positive changes at a domestic level. Yet, the legal framework of the CoE has been slow in tackling the violation of sexual orientation-related rights, which have been increasingly recognised at a domestic and an international level (Human Rights Council 2016; ‘The Yogyakarta Principles’ 2007), thus revealing an insufficiently queer reading of the ECHR.

Although the ECHR does not contain a stand-alone non-discrimination clause,¹⁴ the Strasbourg Court has developed a non-discrimination jurisprudence that also protects sexual minorities. This has included the use of Article 8 ECHR on the right to family and private life, often in combination with Article 14 ECHR, to prohibit the criminalisation of homosexuality,¹⁵ preclude bans on homosexuals in the armed forces,¹⁶ eliminate discrimination in relation to the age of sexual consent on grounds of sexual orientation,¹⁷ condemn discrimination against same-sex couples in relation to tenancy rights,¹⁸ protect parental rights of homosexual fathers,¹⁹ recognise that same-sex relationships are a form of ‘family life’²⁰ and safeguard family reunification rights of same-sex couples.²¹

The work of the Strasbourg Court has thus been increasingly supportive of sexual minorities' legal claims and this has been welcomed by activists and community groups. As van der Vleuten states, 'LGBTI [lesbian, gay, bisexual, trans and intersex] activists have been empowered vis-à-vis their governments by their access to the European courts when access to the national political arena was blocked, and that the ECJ [CJEU] and, to a lesser extent, the ECtHR [Strasbourg Court] have been empowered by LGBTI activism.' (van der Vleuten 2014, 119) It may be the case that the Strasbourg Court has not been sufficiently progressive in relation to all sexual minority matters and the case of SMACs may in fact be one such matter, as the jurisprudence analysis below will show. Nonetheless, the Strasbourg Court has been found to be more pro-active than the CJEU in relation to sexual minorities, to the extent that the CJEU tends only to offer protection to sexual minority claims when the Strasbourg Court has already initiated that legal direction (Wintemute 2015).²² In this regard, Ammaturo importantly points out that human rights frameworks inform a sense of European exceptionalism in relation to sex, sexuality and gender, which contributes to a 'European sexual and gendered citizenship' that has at its core the recognition of LGBTIQ+ (lesbian, gay, bisexual, trans, intersex, queer and other) rights in the European political community (Ammaturo 2017, 100). Consequently, Europe is no longer just a 'geopolitical area and becomes a prescriptive and normative idea, almost an aspiration' (Ammaturo 2017, 100). And yet, homonationalist agendas attempt to instrumentalise advancements on LGBTIQ+ rights for xenophobic and racist purposes (Bracke 2012; Mole 2017) and the Court's jurisprudence on sexual minorities has contributed to construct an '*essentialised, privatised, victimised and respectable* "homosexual"', simultaneously de-politicising, normativising and domesticating the 'homosexual subject' (Ammaturo 2018, 2).

There undoubtedly remains much work to be done in the context of the CoE to ensure that asylum claimants are able to vindicate their right to international protection and much can still be done to improve how sexual minorities are treated and recognised as fully-fledged members of society. From a queer theoretical perspective, the Court's jurisprudence is clearly still far from adequately acknowledging and respecting the human sexual and gender variety and fluidity. Moreover, asylum claimants are re-victimised by Strasbourg's detachment from their needs, interests and rights. The snap picture above suggests that Strasbourg has become an

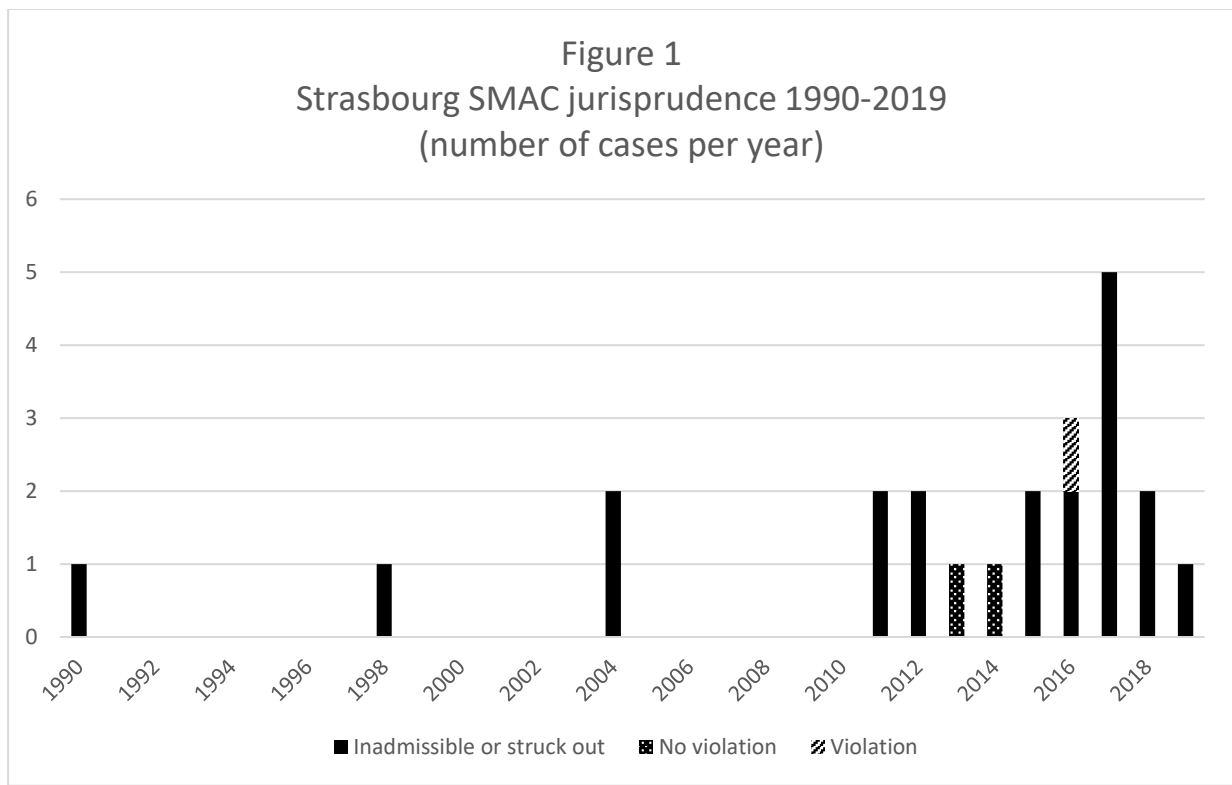
increasingly ‘pro-LGBT’ court but ‘anti-migrant’ as well. This might explain the hesitant and often inconsistent way the CoE, in general, and the Strasbourg Court, in particular, have dealt with SMACs so far, as will now be explored.

3. The sexual minority asylum jurisprudence of the Strasbourg Court

It has been clear for several years in the context of the CoE asylum law and policy that SMACs deserve legal protection. For example, the CoE Committee of Ministers has called on Member States to fulfil their international obligations in relation to SMACs:

asylum seekers should be protected from any discriminatory policies or practices on grounds of sexual orientation or gender identity; in particular, appropriate measures should be taken to prevent risks of physical violence, including sexual abuse, verbal aggression or other forms of harassment against asylum claimants deprived of their liberty, and to ensure their access to information relevant to their particular situation.²³

The European Commission of Human Rights (which until 1998 acted as scrutiniser of claims before they were allowed to reach the Court) and the Strasbourg Court have had a growing number of opportunities throughout the years to establish a position in relation to SMACs.²⁴ This jurisprudence can be quantitatively summarised as follows:²⁵



Amongst the 23 decisions that have been identified, the great majority – 20 (87%) – have been of inadmissibility (including applications found to be manifestly ill-founded) or striking out,²⁶ two (9%) have been of no violation of an ECHR article and only one (4%) has been of violation of an ECHR article. These figures alone suggest a reluctance by the Court to support sexual minority applicants claiming asylum. The figures also suggest a growing number of relevant decisions throughout time, with increasing figures since 2015, which tallies with the growing body of scholarly, NGO and media discussion on this theme.²⁷ A qualitative analysis of these decisions, however, tells us much more: it presents a severely lacking picture from a queer intersectional perspective.

3.1 A bird's-eye view

The first time the Strasbourg Court decided on a case involving a SMAC was in 1990, in *B. v. United Kingdom*, when a gay Cypriot man claimed his deportation to the Turkish Republic of Northern Cyprus (TRNC) would constitute a violation of Articles 8, 13 and 14 ECHR in the light of the criminalisation of same-sex acts in TRNC and the intimate relationship the applicant had developed with a British citizen in the meantime.²⁸ On this occasion, the Court found the application inadmissible for being manifestly ill-founded. Almost a decade

later, in 1998, the Commission again dealt with a SMAC in *Shahram Sobhani v. Sweden*, where an Iranian gay man who applied for asylum in Sweden on grounds of his homosexuality saw his claim denied.²⁹ Whilst his application to the Commission for violation of Articles 2, 3 and 8 ECHR was being considered, the Swedish Government quashed the expulsion order and granted the applicant a permanent residence permit, thus leading the claimant to withdraw his application and the application to be struck out by the Commission.

These two cases set a leitmotif: ever since, the Court has for the most part found applications related to SMACs inadmissible for being manifestly ill-founded or has struck them out. For example, *F. v. United Kingdom*³⁰ and *I.I.N. v. the Netherlands*,³¹ both involving Iranian gay men, were found manifestly ill-founded, as well as *A.N. v. France*, involving a Senegalese gay man,³² and *M.B. v. the Netherlands*, involving a Guinean gay man.³³ The Court has also found inadmissible the application in the interesting *H.A. and H.A. v. Norway* case, involving two Iranian brothers with asylum claims on multiple grounds (religion and sexual orientation). In this case, sexual orientation was a perceived characteristic of the applicant.³⁴ Although the Court also found the application manifestly ill-founded in *I.K. v. Switzerland*,³⁵ based on the domestic authorities' negative assessment of the applicant's credibility, this decision seems to signal a change in rhetoric: the Court acknowledged sexual orientation as a fundamental characteristic, talked about the need to be sensitive in the assessment of applicants' credibility and asserted the inappropriateness of 'concealment reasoning' in asylum claims (see Section 4 for further discussion). At any rate, the outcome remained negative, which suggests there is still a long way to go until the Court is ready to truly protect the rights of applicants in the case of SMACs.

Several applications have been struck out on the basis that national authorities had in the meantime taken measures that addressed the applicant's claim, such as suspending a return order in *K.N. and Others v. France*,³⁶ granting an asylum-based residence permit in *A.S.B. v. the Netherlands*,³⁷ conceding a continuous residence permit for work for one year, with a possibility to request a renewal, in *A.E. v. Finland*,³⁸ agreeing to re-examine the asylum claim in *M.B. v. Spain*,³⁹ accepting a fresh asylum claim in *A.T. v. Sweden*,⁴⁰ ordering that the claim be re-assessed in *E.S. v. Spain*,⁴¹ and granting a residence permit to the applicant in *A.R.B. v. the Netherlands*.⁴²

On a few occasions, the Court has also struck out the applications due to the applicants having lost contact with their legal representative, such as in *R.A. v. France*,⁴³ involving a Pakistani gay man, and *D.B.N. v. United Kingdom*,⁴⁴ involving the first lesbian asylum claimant filing a case with the Strasbourg Court. On other occasions, applications were struck out owing to the lack of reply from the applicant to the observations submitted by the respondent State and third parties, as in *M.T. v. France*, involving a gay Cameroonian man.⁴⁵ In a different context, the Court has also struck out the application in *Khudoberdi Turgunaliyevich Nurmatov (Ali Feruz) v. Russia*, which referred to an Uzbek gay man detained in Moscow.⁴⁶ What set this case apart from all other SMAC applications before Strasbourg is that the applicant was a publicly known journalist, who regularly contributed to a weekly newspaper with national coverage – *Novaya Gazeta* – and who had dealt with a wide array of issues, including LGBTIQ+ rights. After several months in detention in Russia, the applicant was allowed to travel to Germany, where authorities granted him asylum. On this account, the Court struck out the Article 3 claim as well as considered inadmissible the Article 5 claim.

The Court has only considered admissible three SMAC-related applications and two out of these led to a finding of no violation of an ECHR article. The first was the decision in *M.K.N. v. Sweden*, where the Court finally recognised that SMACs fall within the remit of the ECHR.⁴⁷ Although the Strasbourg Court agreed with the importance of affording the benefit of the doubt to asylum claimants, it sided with the Swedish authorities regarding the possibility of internal relocation and the negative credibility assessment. The Court thus held that returning the claimant to Iraq did not constitute a violation of Article 3 ECHR. The second one was the infamous decision in *M.E. v. Sweden*,⁴⁸ where the Court had to deal with the case of a Libyan asylum claimant in a same-sex relationship in Sweden, who had been required to return to Libya to obtain a family reunification visa. Although the applicant had been the target of death threats from his family for having married someone of the same sex, the Strasbourg Court found that requiring that the claimant be ‘discreet’ about his sexuality (effectively ‘concealing’ it) for a period of time in Libya was not a violation of Article 3 ECHR. This decision was severely criticised in a powerful dissenting opinion by Judge Power-Forde, who stated that the ‘majority’s conclusion in this case does not “fit” the current state of International and European

law on this important question of fundamental human rights’ and that the ‘reasoning is flawed and unconvincing’. Whilst this decision was being referred to the Court’s Grand Chamber, the Swedish Migration Board decided to grant the applicant a permanent residence permit due to the deterioration of conditions in Libya, leading the Court to strike out the case.⁴⁹

The only finding of a violation of an ECHR article in a SMAC-related application came with *O.M. v. Hungary*,⁵⁰ where the Strasbourg Court dealt with the case of an Iranian gay man who was detained for two months in Hungary and then granted refugee status. Here, the Court found that there had been a violation of Article 5 ECHR, especially due to the authorities disregarding the particular vulnerability of O.M. during his detention, and awarded the claimant compensation. The positive decision in *O.M. v. Hungary* had given hope for a Court more sensitive towards SMACs. Nonetheless, what has followed is a long string of SMAC applications either being held inadmissible or struck out, with no single finding of violation of an ECHR right ever since, quickly dashing any such hopes for a more supportive Court. Furthermore, *O.M. v. Hungary* did not relate to the asylum claim itself, so there is effectively no finding of a violation of an ECHR article in relation to a SMAC as such.

3.2 A summary assessment

Overall, the body of Strasbourg jurisprudence that has developed around SMACs indicates an insufficient willingness to protect these applicants from persecution. Even decisions significant for introducing positive developments, such as the recognition in *M.K.N. v. Sweden* that SMACs fall within the remit of Article 3 ECHR, reinforce the image of a Court unsympathetic towards SMACs. One might attribute this to the fact that the asylum claims found credible by domestic authorities are decided positively at domestic level and only the ones that are not found credible reach Strasbourg. Yet, that does not justify the substantive decisions across all the jurisprudence discussed above. Moreover, this image of an unsympathetic Court – or ‘static and unresponsive’, in the words of Falchetta and Johnson – becomes even more apparent when one contrasts this restrictive line of jurisprudence with the judgments the Court has produced in relation to cases involving

sexual orientation and migrants' residence issues (Falcetta and Johnson 2018, 215). All this reinforces the idea of a Court detached from the suffering of SMAC applicants, thus dehumanising them.

As Ammaturo points out, '[i]f there were a genuine interest in defending individuals—either citizens or non-citizens—from human rights abuses, stories of structural violence or harassment would be enough to grant protection, without the applicants having to demonstrate a threat of death or an extreme punishment' (Ammaturo 2017, 57). In none of the decisions discussed here is there any reference to the Yogyakarta Principles and only in one case – *I.K. v. Switzerland* – is there a reference to the UNHCR's guidelines on refugee claims based on sexual orientation and/or gender identity (UNHCR 2012). This practically inexistent consideration of international standard-setting documents in this field reinforces the lack of willingness from the Strasbourg Court to engage fully with the scope of rights of SMAC applicants, especially considering that the Court regularly refers to external sources in other types of claims.⁵¹ If the Court were receptive to genuinely considering such external sources, this would go some way to address the concerns raised by a queer intersectional perspective, by recognising and engaging with the variety of rights, characteristics and experiences of sexual minorities.

The increasingly frequent references by the parties and the Strasbourg Court to the jurisprudence of the CJEU could, in theory, translate into better outcomes for SMAC applicants. The CJEU has slowly developed a body of SMAC jurisprudence that, despite room for improvement, does possess many positive elements (Ferreira 2018). Moreover, although the relationship between the CJEU and Strasbourg Court has not always been clear or mutually supportive, there are plenty of examples of positive judicial dialogue (Rackow 2016). Yet, in practice, the CJEU jurisprudence has been used to either reinforce the argumentation in favour of a negative outcome or to dot negative argumentation with some positive references to the legal protection afforded to the applicants. As an example of the former, in *I.K. v. Switzerland* the CJEU's decision in *X, Y and Z* is only alluded to by the Swiss authorities to support the conclusion that the applicant's claim was unfounded.⁵² As an example of the latter, in *A.N. v. France* the Court acknowledges that the third parties intervening referred

to the decision in *X, Y and Z* to highlight the wrongness of the ‘discretion argument’ but the Court still concluded that the application was manifestly ill-founded on other grounds. Similarly, in *M.B. v. the Netherlands* the Court referred to the CJEU decisions in *X, Y and Z* and *A, B and C*, drawing its positive elements for the applicant but nevertheless again found the application to be manifestly ill-founded on other grounds.⁵³ Finally, the initial reference to *X, Y and Z* in the Court’s first decision in *M.E. v. Sweden* was ignored when the Court subsequently imposed an obligation on the applicant to conceal his sexuality upon return. The fact that the majority agreed on this point is stunning, as the CJEU’s decision in *X, Y and Z* could not have been clearer about there being no room for the ‘discretion argument’ in the asylum procedure. This deviation from a positive feature in *X, Y, and Z* indirectly weakened the strength of the asylum system in Europe, by undermining the CJEU’s authority and the persuasiveness of its decisions. This tension may be a mere reflection of the often fraught relationship between the CJEU and Strasbourg (including in the field of asylum) and heavily politicised debates affecting these Courts, such as the debate around the EU’s accession to the ECHR (Rackow 2016). When the consequences include potential danger to an applicant’s life, the Strasbourg Court should be able to rise to the situation and protect human rights above all.

Another noticeable and disappointing feature in this body of Strasbourg jurisprudence is the apparent strategy of the Member States to solve, delay or revisit the applicant’s claim for international protection in an obvious attempt to pre-empt negative decisions from the Court or simply lead the Court to strike out the applications. The long list of cases (partially or completely) struck out on account of the respondent States’ decision to somehow revisit their negative decision – 10 out of the 23 analysed – is clearly suggestive of that.⁵⁴ Specific examples can be found in *A.E. v. Finland*, for example: the Finnish authorities avoided a substantive decision by the Court by granting to the applicant a continuous residence permit for work for one year, with a possibility to request a renewal. This not only led to the Court striking out the application, but crucially also overlooks the fact that the applicant’s life remained in a limbo and the Finnish authorities could very well deny the subsequent renewal of the residence permit for work. Similarly, in *M.B. v. Spain*, the Spanish authorities decided to re-open the administrative procedure and re-examine the asylum claim in question whilst the Court was analysing the application, so the Court struck out the application. Although this decision is perfectly

legitimate in the light of the Court's rules and its jurisprudence on such circumstances, it has been lamented for missing the opportunity to provide greater clarity on the issues it raised (ILGA-Europe 2017). A third example can be seen in *A.T. v. Sweden*, where the Swedish authorities considered the expulsion order statute-barred and accepted a fresh asylum claim whilst the Court was analysing the claim, thus leading to the Court's decision to strike out the application. In a slightly different scenario, but with similar consequences, Russia escaped condemnation in *Nurmatov (Ali Feruz) v. Russia* by letting the applicant travel to Germany, where authorities granted him asylum. Whilst it is fortunate that the applicant is now in safety, it is lamentable that once again the Court was deprived (or deprived itself) of the possibility of analysing the substance of the claim. The most recent example of this strategy can be seen in *A.R.B. v. the Netherlands*, where the Netherlands granted a residence permit to the applicant, leading the Court to strike out the case.

One may believe that such State strategy is legitimate and that the Court should not be criticised for simply using the ECHR rules to manage its workload as effectively as possible. Yet, Article 37 ECHR also states that the Court 'shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires' and that it 'may decide to restore an application to its list of cases if it considers that the circumstances justify such a course'. These States' strategy not only affects migrants more generally but also seriously undermines applicants' human rights (Dembour 2015, 325). In the light of the vulnerable and precarious position in which these applicants are left by States in these circumstances, the Court would be not only entitled but also required not to strike out several of the applications mentioned above, for the sake of effectively protecting the rights of the applicants. In this process, the Court also disregards the particular characteristics of the applicants in these cases and how the Court's refusal to analyse the substance of the applications may leave them even more vulnerable. An intersectional approach to these cases is thus in order.

Overall, we are faced with a disappointing body of jurisprudence of the Strasbourg Court, which can be criticised on a range of grounds and is severely lacking from a queer intersectional perspective. In the next section,

three further key areas of criticism will be analysed, which will render more evident the flaws and scope for improvement of the decisions in question.

4. Exposing the skeletons in the Court's closet

The Strasbourg Court does not apply the Refugee Convention, so it is not directly concerned with ensuring the fulfilment of requirements such as 'persecution', membership of a 'particular social group', 'credibility' or lack of 'internal relocation alternative' (UNHCR 2019). Instead, the Court analyses such international protection claims from the prism of the ECHR. Such analysis – as carried out in the Strasbourg SMAC jurisprudence so far – entails many 'skeletons' that need to be exposed.

4.1 The threshold for violation of ECHR articles

Instead of determining whether there is a 'risk of persecution' under the Refugee Convention, the Court is concerned with determining whether there is a risk of violation of an ECHR right upon return of the applicant to their country of origin. As mentioned above, however, in this context the Court is generally only concerned with possible violations of Articles 2 and 3 ECHR and only more rarely with violations of other ECHR articles. To carry out this assessment, the Court often refers to the information submitted by the parties in relation to the situation in the applicant's country of origin. The analysis of the quality of such information will serve as springboard for this section. The analysis will then move to the restrictive use of the ECHR, the high threshold adopted by the Court to find a violation and the way the Court has dealt with the notion of 'discretion'.

To carry out their assessment of international protection claims, national authorities are expected to rely on precise and up-to-date country of origin information (COI) and information regarding countries through which the claimant may have transited. Despite the lack of relevant COI on sexual minorities, asylum claimants may well be victims of persecution warranting international protection, as the information gathered in relation to the country of origin, 'first country of asylum' and 'third countries' often omits elements regarding sexual minorities. Based on COI, national authorities often adopt lists of 'safe countries', which are seen as countries from where one would generally not expect to see a 'legitimate' asylum claim. This has been a notion widely

critiqued by both scholars and civil society for undermining the right to international protection (Costello 2016; ECRE 2016). Furthermore, the very notion of ‘safe country’ is in tension with an intersectional approach to asylum claims, which requires an individual consideration of each claimant’s circumstances and is not compatible with wholesale analyses of countries of origin. The Strasbourg jurisprudence has, positively, adopted a highly critical view of the mechanistic way in which asylum authorities use the notion of ‘safe country’ (be it country of origin or third country/country of passage). In *Ilias and Ahmed*, relating to Hungarian border procedures, the Court reiterated that the use of this notion needs to be carefully scrutinised against Article 3 ECHR.⁵⁵ To this purpose, public authorities cannot simply rely on a list of ‘safe countries’ and expect asylum claimants to rebut that legal presumption of ‘safety’: it is ‘unfair and excessive’ for the public authorities to lay the whole burden of proof on asylum claimants and not carry out any work of assessment of the risk of violation of Article 3 ECHR in case of refoulement. The Court thus ascertained that ‘it is incumbent on the domestic authorities to carry out an assessment of that risk of their own motion when information about such a risk is ascertainable from a wide number of sources’ (para. 118).

On a less positive note, however, the Court does not offer the full power of the ECHR and its jurisprudence to asylum claimants. For example, in *F. v. United Kingdom*, the Court oddly asserted that, despite all the evidence it had received about the treatment of gay men in Iran, it had not been proven that returning the applicant to Iran would entail treatment falling within the scope of Article 8 ECHR. The Court blatantly downplayed the risk of criminal punishment for homosexual conduct and asserted that returning the applicant to Iran would not engage Article 8 ECHR, let alone constitute a violation of that norm.⁵⁶ The Court adopted a similar approach in subsequent cases, such as *M.E. v. Sweden*. This is at odds with the Strasbourg jurisprudence on ‘sodomy laws’ that criminalised same-sex conduct in many countries across Europe and that were finally held to be a violation of human rights law since the 1980s by the Strasbourg Court in seminal cases such as *Dudgeon v UK*,⁵⁷ *Norris v Ireland*⁵⁸ and *Modinos v Cyprus*.⁵⁹ Whilst in these cases the mere existence of ‘sodomy laws’ in a Member State (even if not enforced) was considered a violation of Article 8 ECHR, in relation to SMAC applications the Court does not even believe Article 8 ECHR is engaged at all by ‘sodomy laws’ that may well be enforced. For this reason, Judge De Gaetano used his separate opinion in *M.E. v.*

Sweden to criticise the Court's reliance on *X, Y and Z* and tolerance of laws criminalising homosexual acts. More recently, in *I.I.K. v. Switzerland*, the applicant had also invoked a violation of Article 14 ECHR but the Court brushed that aside by asserting that the substance of the claim had already been analysed from the perspective of Article 3 ECHR, thus circumventing any analysis of Article 14 ECHR in the context of asylum. Foreign queer bodies are blatantly dehumanised, in a sort of legalised erasure of humanity, with the alleged blessing of established legal doctrinal principles.

What transpires evidently is that international protection claimants can only rely on a very limited scope of ECHR protection. Whilst nationals of CoE Member States can expect to benefit from the full scope of the ECHR whilst they remain within their jurisdiction (unless they are subject to extradition),⁶⁰ migrants in general should expect a more limited scope of protection (Dembour 2015). People seeking asylum, in particular, should generally not expect to benefit from more than the protection of Articles 2 and 3 when it comes to analysing the risks they may face upon return to their countries of origin. In the words of Spijkerboer, with this sort of decision the Court is effectively asserting that 'some fundamental rights are, actually, not fundamental because facilitating their violation by removal is not in violation of these rights' (Spijkerboer 2018, 228). Although one may say that Strasbourg is not responsible for the state of human rights across the globe, this application of double standards on the basis of one's citizenship status sits uneasily with the universality of human rights, has rightly been criticised by commentators (Jansen 2019, 133) and affects SMACs in particularly acute ways.

Even if one limits oneself to relying on Articles 2 and 3 ECHR, it is striking how the Strasbourg Court applies these articles to SMACs on the basis of an extremely high threshold, thus overlooking the absolute nature of these norms. For example, in both *F. v. United Kingdom* and *I.I.N. v. the Netherlands*, the Court ignored the possibility of prosecution for consensual and private homosexual relationships, the under-reporting of such instances, and the reported instances of criminal punishment of homosexual conduct. In *I.I.N. v. the Netherlands*, in particular, the Strasbourg Court considered a range of materials submitted as evidence, including a UNHCR position paper stating that:

[i]n view of the multiplicity of executions and lashings, it cannot be excluded the victims thereof include persons being punished – on grounds of homosexuality – by death or lashing as provided for on the Iranian Criminal Code. Against this background, it cannot be asserted with certainty that the criminal law provisions on homosexuality only have a theoretical significance.

Yet, similarly to *F. v. United Kingdom*, the Court found the application manifestly ill-founded. In both *F v. UK* and *I.I.N. v. the Netherlands*, gay Iranian asylum claimants conformed to the Western, popular notion of a ‘gay man’ and described the violence they had suffered in their home country. This ‘hypervisible Iranian queer’ (Shakhsari 2012) is someone who engages as much as one can expect with the asylum system and addresses all requirements one may be expected to fulfil in asylum claims. And yet, that was not enough, as the Strasbourg Court overlooked their humanity and dismissed their claims, denying the risk of cruel or inhuman punishment upon return to Iran.

The same approach was to be adopted in subsequent decisions. In *M.E. v. Sweden*, for example, although the applicant had been the target of death threats from his family for having married someone of the same sex in Sweden, the Court denied his application. This decision was widely criticised for disregarding that independently of whether the criminal penalties for homosexuality in Libya were enforced or not, ‘a hostile attitude towards anyone suspected of being homosexual permeated local culture’, instances of massive violence against gay men had been reported and all diplomatic representations in Libya had been closed down (Falcetta 2015). The decision itself referred to – but remained uninfluenced by – official reports by international organisations and domestic authorities confirming violence against civilians, active extremist groups, continued arbitrary detention of thousands of persons outside the state control and persecution of homosexuals. Again, a queer foreign body is victim of a violent process of dehumanisation, betraying an acutely detached Court.

More recently, in *A.N. v. France*, involving a Muslim gay Senegalese man, the Court determined that, although same-sex conduct is criminalised in Senegal with a prison sentence of up to five years and there are on average ten convictions each year on this basis, the enforcement of this norm was not ‘systematic’. The Court pursued

the same line of argumentation in *M.B. v. the Netherlands*, involving a gay man from Guinea, where – according to the Dutch authorities’ own official country guidance report – ‘there are deeply rooted social, religious and cultural taboos with respect to homosexuality’. Despite NGO and Dutch authorities’ own reports indicating the opposite, the Court found that the Guinean criminal offence of same-sex conduct was not ‘systematically applied’. ‘Systematically’ implies that the Court intends to cover all or practically all instances of violation of the law, which is unreasonable: it effectively means that no criminal norm in any system is enforced in a systematic way, as there are always instances where criminally punishable conducts are not prosecuted for the most various reasons. Furthermore, this line of argumentation overlooks the wide-spread societal, structural and institutional dangerous effects that the mere criminalisation of same-sex conduct, even when not actively enforced by public authorities, can have on the well-being and protection of sexual minorities, including facilitating blackmail, extortion, severe discrimination and other forms of serious harm (Phillips 2009; UNHCR 2012, para. 26).

The unreasonably high threshold of the Court in these cases is thus excruciatingly obvious and is in contradiction with the standards of the United Nations’ bodies, which have asserted that ‘inconsistencies and ambiguities’ in particular cases ‘are not of a nature as to undermine the reality of the feared risks’⁶¹ and that the fact that domestic authorities ‘are not actively persecuting homosexuals does not rule out that such prosecution can occur’.⁶² Moreover, such a high threshold is also arguably in contradiction with the Court’s own jurisprudence, to the extent that, in these cases, the Court should be considering whether there is a ‘real risk’ of even a *single* violation of Articles 2 or 3 ECHR, rather than whether there is a ‘systematic application’ of norms that violate ECHR rights. Crucially, this jurisprudence ignores the need to adopt an intersectional approach to SMACs and neglects how SMAC applicants’ particular range of characteristics and specific socio-economic context may affect potential violations of Articles 2 and 3.

The Court’s focus on the way such criminal offences are enforced can, furthermore, be denounced as hypocritical: whilst in relation to (heterosexual) women asylum claimants the Court is only concerned with whether there are laws in place to protect women from ill-treatment irrespective of the whether those norms are applied

in practice (Peroni 2018, 353), when it comes to SMACs the Court does the opposite and is only concerned with signs of lack of enforcement of laws criminalising same-sex conduct irrespective of whether those laws still cause harm or not even when not enforced. What is clear, then, is that the Court is not concerned with actual harm the applicants may risk suffering but rather with finding more or less formulaic methods to deny the applications. Crucially, there is a growing movement to consider the criminalisation of same-sex conduct between consenting adults to be a violation of Article 3 ECHR in itself, owing to the degrading and dehumanising nature of these criminal offences (Danisi 2015, 298–300; Johnson and Falcetta 2018).

The Strasbourg jurisprudence on SMACs has also touched on the idea that applicants may be returned to their countries of origin and be ‘discreet’ about their sexuality (effectively concealing it), so as to avoid any harm coming their way. In *M.K.N. v. Sweden*, the Strasbourg Court had already hinted at sympathising with this argument when it denied the applicant’s claim, perhaps influenced by the Swedish Government’s argument that, as the claimant intended to go on living with his wife, there was no risk of him demonstrating his sexual orientation upon return – and thus remaining ‘discreet’. Although such ‘discretion’ or ‘concealment’ argument or requirement was widely used across Europe for many years, in 2013 the CJEU condemned this idea beyond doubt in *X, Y and Z*. Yet, somewhat anachronistically, the Strasbourg Court’s decision in *M.E. v. Sweden* retained the ‘discretion requirement’ as appropriate, even if for a relatively short period of time, and thus found no violation of Article 3 ECHR under these circumstances. Although the Swedish authorities subsequently granted the applicant a permanent residence permit, the harm had been done: the Court had offered legitimacy to the ‘discretion requirement’ at a time when most European domestic jurisdictions had abandoned it and this was rightly criticised by commentators (Fraser 2014; Steendam 2014). In the light of the eradication of the ‘discretion requirement’ in most of its forms from most of the European domestic jurisdictions, one could legitimately expect a different position from the Strasbourg Court in subsequent, similar cases. That is what happened in *I.K. v. Switzerland*, where the Court acknowledged that there was no room for discretion in relation to such a fundamental aspect of one’s identity and conscience. And yet, the outcome was negative for the applicant. The Court again neglects SMAC applicants’ individual composite of characteristics and how

this may expose them to violence and persecution. Ultimately, this makes one wonder when rhetoric will translate into genuine queer rights vindication.

4.2 Rules of evidence and assessment of credibility

SMACs are notoriously difficult to prove in any jurisdiction (Jansen and Spijkerboer 2011). As with any other asylum claim, the success of SMACs is fundamentally dependent on the evidentiary standards adopted and the credibility assessment carried out by the decision-maker. As many scholars have already pointed out, a ‘culture of disbelief’ pervades some domestic asylum authorities, such as the Home Office in the UK (Millbank 2009; Souter 2011). Even more worryingly, the Strasbourg Court adopts a dangerously hands-off approach to the scrutiny of the credibility assessment carried out by domestic authorities, leaving applicants at the mercy of often hostile domestic authorities. Although the Court is admittedly constrained by its own statute and procedural rules, such as admissibility criteria (Article 35 ECHR) and striking out rules (Article 37 ECHR), there is scope to scrutinise more thoroughly Member States’ rules of evidence and assessment of credibility.

The Strasbourg jurisprudence’s leitmotif in this field is deference towards domestic authorities, something recognised by the Court’s judges themselves and justified on the basis of the Court’s subsidiary role and limited tools (Ravarani 2017, 3–4). This deference is blatant in the decisions subscribing to negative credibility assessments. Clear examples can be found in relation to the UK and French domestic authorities. In *F. v. United Kingdom*, the domestic authorities questioned F.’s credibility in relation to the length of time he spent in prison and his nationality. They also queried why he had not claimed asylum in Turkey. On appeal, the UK authorities reiterated the assessment of lack of credibility. The Court also chose to accept the assessment of lack of credibility of the domestic authorities, thus siding with the ‘culture of disbelief’ of the UK asylum authorities. In *A.N. v. France*, the Court also subscribed to the French authorities’ assessment of the facts, thus accepting the ‘verdict’ of lack of credibility. Although the Court acknowledged the difficulty in proving SMACs owing to the personal nature of the matters at hand, it sided with the French Government to reiterate

the insufficiency of the evidence submitted by the applicant. Deference – and detachment – once again prevailed.

Further examples of such deference to the negative assessments of credibility carried out by domestic authorities can be found in Strasbourg jurisprudence, such as in *M.E. v. Sweden*, *M.B. v. Spain*, *E.S. v. Spain*, and *I.K. v. Switzerland*. Even when the Court rhetorically highlights that the credibility assessment has to be carried out in an individual and delicate manner, as it asserted in *I.K. v. Switzerland*, deference prevails and the domestic authority's negative credibility assessment stands. A particularly crass example of such excessive deference can be seen in *M.B. v. the Netherlands*, where the Court deferred to the Dutch authorities' assessment of the applicant's credibility, although the Dutch authorities expected that the applicant could state the number of people involved in a mob attack and of police officers arriving afterwards. It is submitted that what would be 'incredible' would have been for the applicant to be able to point out the exact number of such attackers and police officers, as it would be highly unlikely for an individual to count the number of people beating up or detaining them. Moreover, the Court shows no sign of reflecting on the possible influence of individual mental health and trauma, or local cultural or social factors, on the accounts of applicants that may appear incredible to European decision-makers, although such impact has been analysed and evidenced at length (Bögner, Herlihy, and Brewin 2007). On the contrary, the Court is too easily convinced by the domestic authorities' preoccupation with apparent inconsistencies or oddities.⁶³

The principle of the benefit of the doubt – a principle whose importance in asylum adjudication is highlighted in the UNHCR guidance (UNHCR 2019) – is ultimately ignored by both domestic authorities and the Strasbourg Court, thus unlawfully depriving SMAC applicants of a key legal tool. A striking example can be seen in *M.K.N. v. Sweden*, where despite all the evidence submitted by the applicant, the Swedish Migration Board claimed that M.K.N.'s account was not credible. The Migration Court reiterated this assessment of lack of credibility owing to the late disclosure of his sexuality (see Section 4.3). Before the Strasbourg Court, M.K.N. claimed to have provided a reasonable explanation for the late disclosure and asked to be given the benefit of the doubt. The Strasbourg Court agreed with the importance of affording the benefit of the doubt to asylum

claimants but also agreed with the Swedish authorities regarding the possibility of internal relocation and the credibility assessment, in particular in relation to the claimant's homosexual relationship. At the end, the Court refused to give the claimant the benefit of the doubt, thus again deferring to the credibility assessment of the domestic authorities. The same approach by the Court can be seen in the first decision in *M.E. v. Sweden*.

The Court thus seems willing to accept Member States' choices as to what aspects of asylum claimants' testimonies matter or not and how they should matter, without offering domestic authorities any critical comments, positive guidance or admonition for the clearly inadequate application of rules on evidence and findings on credibility. Both Member States and the Strasbourg Court are accomplices in this violence caused to foreign queer bodies in search for international protection. It is thus apt to ask: Who's afraid of the benefit of the doubt?

4.3 Intersecting characteristics and socio-cultural factors

Besides analysing the risk of violation of an ECHR article upon return (Section 4.1) and the overall credibility of the applicant (Section 4.2), the Court is often also called upon to consider a range of other legal and social aspects relevant to asylum claims that are intertwined with a range of individual characteristics and socio-cultural factors. How the Court deals with this range of other aspects (including in the light of COI, discussed in Section 4.1) has an impact on how the Court analyses the risk of violation of an ECHR article upon return and the credibility of the applicant. It is thus crucial to consider those as well and bring to fruition an intersectional approach to the Court's SMAC jurisprudence.

One such aspect is the 'internal relocation alternative', i.e. an individual seeking asylum being able to return to the country of origin and relocate within it to escape the risk of persecution. In the light of how widespread discrimination and violence against sexual minorities can be in the countries of origin of most SMAC applicants, 'internal relocation' is rarely available to them (UNHCR 2012, paras 51–56). In *M.K.N. v. Sweden*, the Strasbourg Court uncritically endorsed the Swedish authorities' assertion that the Christian religious beliefs of the Iraqi claimant – who had had a homosexual relationship in Iraq and had been discovered – would allow

him to relocate to the Kurdistan region. Similarly, in *A.N. v. France*, the applicant – a Muslim man who had been victim of blackmail, physically assaulted by rioters and held captive and violently assaulted by relatives – submitted evidence that sexual minorities had to regularly move residence in Senegal to avoid being found out but the French Government insisted internal relocation was realistic and the Court simply referred back to the domestic assessment of the facts, without showing any interest in questioning the reasonability of internal relocation in Senegal.

Another aspect of SMAC applicants' experiences that can have a negative impact on the success of their claims is the 'late disclosure' of one's sexuality. The reality is that SMAC applicants often do not know that their sexual orientation can be of relevance for the purposes of obtaining international protection and, even if they do, many do not know how to structure their narratives and include all elements that may possess relevance to a European decision-maker. Most importantly, many SMAC applicants will not feel comfortable – or may even feel utterly mortified for religious, cultural or personal reasons – at the thought of discussing their sexual orientation with a complete stranger, in what is often a hostile environment. The Strasbourg Court's decision in *M.K.N. v. Sweden* is a good example of how asylum authorities fail to grasp the difficulties a sexual minority asylum claimant may have in disclosing their past experiences. In this case, the claimant's account of his past homosexual relationship was denied credibility for having been reported late, although the late disclosure could be justified by the fact that the claimant had an opposite-sex spouse, had children and had lived in a strongly conservative and unstable country affected by religious conflicts. M.K.N. himself attributed the late disclosure of this element of his account to not knowing that homosexuality was (socially and legally) accepted in Sweden. The Court, however, chose to disregard the difficulties involved in disclosing to authorities one's past homosexual relationships, even in such complex and adverse circumstances. Similarly, in *M.E. v. Sweden*, the Court chose to side with the Swedish authorities in their assessment of lack of credibility on account of the late disclosure of M.E.'s sexuality. More recently, however, the CJEU asserted in *A, B and C* that delays in disclosing one's sexuality should not automatically be held against asylum claimants to harm their credibility. One can only hope that this will prove valuable in guiding domestic authorities in not placing excessive importance on late disclosures.⁶⁴

More generally, the Court fails to grasp the complexity of applicants' lives and socio-cultural backgrounds and reduces them to 'siloes' identities that can fit neatly into domestic asylum systems and the ECHR system as envisaged by European mind-sets. In *I.I.N. v. the Netherlands*, for example, the gay Iranian asylum claimant had come into contact with the Iranian authorities not only due to his homosexuality but also due to his participation in protests. Yet, his political activism only deserves a quick mention amongst the facts reported and is ignored in the Court's analysis. Similarly, in *M.K.N. v. Sweden*, although the applicant had an opposite-sex spouse, had children and risked persecution on grounds of his sexuality, religious beliefs and economic (relatively good) condition, the Court paid no heed to the 'messiness' of the applicant's account and simply relied on the Swedish authorities' negative credibility assessment, focusing on only one of the applicant's characteristics – his sexuality. Generally, one can find passing references to some of the applicants' characteristics or circumstances: the applicant in *M.E. v. Sweden* fearing that the Libyan diaspora in Sweden would spread the news about his same-sex marriage to Libya; the applicant in *A.N. v. France* being gay, Muslim and afraid of discrimination by his diaspora community; or the gay male applicant in *M.B. v. the Netherlands* not knowing many details about his partner, perhaps owing to the clandestine nature of their relationship in a society oppressive towards sexual minorities.

Yet, disappointingly, the Court only mentions these aspects but never addresses or analyses them to any extent as the significant socio-cultural dynamics and identifiers that they are or allows them to have any positive bearing on the outcome of the case. It would have been particularly interesting in *M.B. v. Spain* – involving a lesbian woman of a particular ethnicity that was at the origin of her exposure to human rights violations – to see how the Court would deal with issues of criminalisation and credibility in a context where ethnicity, gender and sexuality intersect. Similarly, the decision in *H.A. and H.A.* – where one of the brothers feared persecution on the basis of both religion and sexual orientation – would have been an excellent opportunity to engage with the way in which religion and sexuality may potentiate persecution and human rights violations but the Court opted for worryingly dismissing that matter with a very terse analysis of the applicant's concerns, despite the

widely known severe treatment of gay (even if just perceived) men in Iran (ILGA, Carroll, and Ramón Mendos 2017).

Strasbourg's overall lacklustre approach to SMACs and the richness of these applicants' lives can ultimately dissuade them from pursuing their claims, with potentially terrible effects on their lives, further aggravated in cases where specific combinations of characteristics render claimants particularly vulnerable to gender and sexual oppression. Consciously pursuing a queer intersectional approach to these cases can support better decision-making in Strasbourg and we can legitimately expect more from the Court in terms of how it handles such complex lives and applications.

5. What way forward for the European sexual minority asylum framework

The CoE and, in particular, the Strasbourg Court have undoubtedly contributed to many positive developments for sexual minorities across Europe. Yet, in relation to SMACs, the current inadequacies are conspicuous. Although many of these inadequacies may seem a necessary by-product of the structure and functioning rules of the CoE and Court, it is realistic to expect a fairer treatment of SMACs. Both a quantitative and qualitative analysis of the Strasbourg jurisprudence on SMACs clearly reveals the unwillingness of the Court to genuinely and respectfully engage with these applicants' accounts and rights. Sporadic references to more positive CJEU decisions in this field have so far not led to any progress in Strasbourg. Worse, Member States have been successful in strategically prompting the Court to strike out applications by solving, delaying or revisiting applicants' claims. This leaves applicants in precarious situations and circumventing jurisprudential developments in this field. Whether the Court adopts this approach to avoid antagonising Member States, respect their margin of appreciation, manage its workload, avoid opening the 'flood gates' to this type of claims or any other reason, it needs to change its course to honour its mission and preserve the humanity of these claimants, even if that may well mean potentially 'exporting' the Convention's values and applying them to seven billion people (Ravarani 2017, 4). Foreign queer bodies have human rights as well.

To vindicate the rights of SMAC applicants and foster judgments better informed by a queer intersectional perspective, the Strasbourg Court needs to improve its jurisprudence on several levels. First, the Court needs to apply the full range of ECHR articles to these claims when analysing the risks the applicants will encounter if returned to their country of origin (in particular Articles 8 and 14). The Court also needs to lower the current threshold at which a risk becomes so severe as to be incompatible with the ECHR. States would still retain considerable agency to deport individuals with no human rights claims under a newly reduced threshold for deeming a risk ‘severe enough’ to be incompatible with the ECHR. In short, this would not mean ‘opening the floodgates’ to any challenge to deportation orders, because some leeway to deport individuals would remain.

Secondly, the Court needs to stop deferring to the ‘culture of disbelief’ engrained in many domestic authorities and start taking the principle of the benefit of the doubt seriously and hold domestic authorities against an appropriate standard of proof in these cases. If this means – as some may argue – that a small number of ‘fake claims’ succeed, then this is a reasonable price to pay for robust and fair international protection and human rights systems. Third, the Court needs to immerse itself in the applicants’ whole stories and seriously consider all the individual characteristics, identifiers and socio-cultural factors involved in each case. This means adopting an intersectional approach to deal in a more culturally and socially appropriate way with issues such as assessing whether there is any ‘internal relocation alternative’ and whether the ‘late disclosure’ of one’s sexuality should have any bearing on an applicant’s claim. Although this may at first seem to require further resources, it can in effect be pursued by making use of quality training materials and COI already in existence.

Essentially, it is submitted that the Court has so far failed to do justice to SMAC applicants by detaching itself from the violence to which they are submitted in their countries of origin and in Europe. The Court has repeatedly ignored the complexity and richness of applicants’ accounts and tended to operate within the limited parameters of narrow legal readings of the ECHR and the Court’s restrained relationships with the Member States. This does a disservice to the applicants’ claims and leads to unfair outcomes. If the Strasbourg Court

were to become more sensitive to a queer intersectional approach to SMAC applications, better justice would be done.

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Endnotes

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¹ Despite their different legal and technical meanings, the expressions ‘asylum’, ‘refugee’ and ‘international protection’ will be used somewhat inter-exchangeably throughout this text for ease of use.

² The expression ‘sexual minorities’ will be used in this contribution to refer to non-heterosexual persons. The expression ‘sexual orientation’ will also be used to refer to persons’ sexuality. I acknowledge that not everyone I wish to refer to may identify as a member of a ‘sexual minority’ or see the matters discussed as a matter of ‘sexual orientation’ but I will use these expressions for practical reasons. The words ‘homosexual’ and ‘homosexuality’ will also be used; despite being increasingly disfavoured and replaced with the word ‘gay’ in English-speaking contexts, they are still very much used in judicial decisions, policy documents and in other languages, so these words will be used here without any negative connotation. Much of the discussion in this contribution also relates to or affects gender identity asylum claims but owing to the fact that the Strasbourg Court has so far only dealt with SMACs, gender identity will fall outside the scope of this contribution. There is, however, currently pending a decision from the Strasbourg Court in a case relating to a transsexual individual already granted international protection: *Jafarizad Barenji Rana v. Hungary*, Application no. 40888/17, lodged on 29 May 2017 (Fourth section). The case regards a transsexual Iranian refugee in Hungary, who claims a violation of Article 8 ECHR for having been denied a change of legal status of name and gender.

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, 137.

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- ⁴ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.
- ⁵ Parliamentary Assembly of the Council of Europe, *Accelerated asylum procedures in Council of Europe member states*, text adopted by the Assembly on 7 October 2005 (32nd Sitting).
- ⁶ The European Commission of Human Rights was a body of the Council of Europe that assisted the Strasbourg Court until 1998 in determining whether applications were admissible, reaching friendly settlements and producing statements of facts and opinions on whether a violation had occurred. This Commission ceased to exist with the entry into force of Protocol No. 11 to the ECHR, which, amongst other things, introduced direct access by individuals to the Court: *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, Strasbourg, 11 May 1994, European Treaty Series - No. 155.
- ⁷ For example, *Chahal v. the United Kingdom*, Application no. 70/1995/576/662, 11 November 1996.
- ⁸ *Bahaddar v. the Netherlands*, Application no. 25894/94, 19 February 1998.
- ⁹ *F. v. United Kingdom*, Application no. 17341/03, 22 June 2004 (further discussed in Section 3.1).
- ¹⁰ *H.I. v. Switzerland*, Application no. 69720/16, 14 December 2017.
- ¹¹ For example, *Khlaifia and Others v. Italy*, Application no. 16483/12, 15 December 2016 (Judgment of the Grand Chamber); *O.M. v. Hungary*, Application no. 9912/15, 5 July 2016 (discussed in Section 3.1).
- ¹² *B.A.C. v. Greece*, Application no. 11981/15, 13 October 2016.
- ¹³ *G.R. v. the Netherlands*, Application no. 22251/07, 10 January 2012.
- ¹⁴ Article 14 ECHR refers exclusively to discrimination in relation to one of the rights in the ECHR. The 2000 Protocol No. 12 to the ECHR (ETS No. 177), which entered into force in 2005, does contain a self-standing non-discrimination provision but has so far only been ratified by 20 out of the 47 CoE Member States.
- ¹⁵ *Dudgeon v. UK*, Application no. 7525/76, 22 October 1981; *Norris v. Ireland*, Application no. 10581/83, 26 October 1988; *Modinos v. Cyprus*, Application no. 15070/89, 22 April 1993.
- ¹⁶ *Smith and Grady v. UK*, Applications nos. 33985/96 and 33986/96, 27 September 1999.
- ¹⁷ *L. and V. v. Austria*, Applications nos. 39392/98 and 39829/98, 9 January 2003.
- ¹⁸ *Karner v. Austria*, Application no. 40016/98, 24 July 2003.

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- ¹⁹ *Salgueiro da Silva Mouta v. Portugal*, Application no. 33290/96, 21 December 1999.
- ²⁰ *Schalk and Kopf, v. Austria*, Application no. 30141/04, 24 June 2010.
- ²¹ *Pajić v. Croatia*, Application no. 68453/13, 23 February 2016; *Taddeucci and Mccall v. Italy*, Application no. 51362/09, 30 June 2016.
- ²² Exceptions to this can be found in the CJEU's jurisprudence on, for example, access to marriage and discrimination, as can be seen in C-267/12, *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013, ECLI:EU:C:2013:823, and C-673/16, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, 5 June 2018, ECLI:EU:C:2018:385. For a discussion of this jurisprudence, see (Danisi, Dustin, and Ferreira 2019).
- ²³ Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010 at the 1081st meeting of the Ministers' Deputies.
- ²⁴ For a more extensive chronological narrative of this jurisprudence, see www.sogica.org/database/ferreira-sexual-minority-asylum-claimants-in-the-jurisprudence-of-the-strasbourg-court-2019/, last accessed 3 March 2020. For a quick overview, including information regarding the applicants, main legal bases and key outcomes, see table of European jurisprudence available online: www.sogica.org/database/ferreira-sogica-tables-of-european-sogi-asylum-jurisprudence-2019/, last accessed 3 March 2020.
- ²⁵ This jurisprudence has been identified through a search in the Court's database HUDOC (<http://hudoc.echr.coe.int/>, last accessed 3 March 2020), scholarly literature and NGO publications. Figures relate to date of decisions and were correct as of 21 May 2019. Only cases already decided have been included; applications lodged but not yet decided have not been included. *M.E. v. Sweden* has been included twice, as it has led to two decisions from the Court, although the first one did not become a final decision. The only selection criterion used was the case involving – even if not as its main feature – an asylum claim related to the applicant's sexual orientation. The decision in *Ayegh v. Sweden*, Application no. 4701/05, 7 November 2006, was thus excluded, as this case involves same-sex sexual acts (the applicant's son being raped and abused by his school headmaster in Iran) but not the sexual orientation of the applicant herself.

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- ²⁶ See Article 35 ECHR, which establishes the criteria for the Court to consider an application admissible and deal with it, and Article 37 ECHR, which determines the circumstances under which the Court may at any stage of the proceedings decide to strike an application out of its list of cases.
- ²⁷ See, for example, the database and social media available via www.sogica.org, last accessed 3 March 2020.
- ²⁸ *B. v. United Kingdom*, Application no. 16106/90, 10 February 1990.
- ²⁹ *Shahram Sobhani v. Sweden*, Application no. 32999/96, 10 July 1998.
- ³⁰ *F. v. United Kingdom*, Application no. 17341/03, 22 June 2004.
- ³¹ *I.I.N. v. the Netherlands*, Application no. 2035/04, 9 December 2004.
- ³² *A.N. v. France*, Application no. 12956/15, 19 April 2016.
- ³³ *M.B. v. the Netherlands*, Application no. 63890/16, 21 December 2017.
- ³⁴ *H.A. and H.A. v. Norway*, Application no 56167/16, 3 January 2017.
- ³⁵ *I.K. v. Switzerland*, Application no. 21417/17, 19 December 2017.
- ³⁶ *K.N. and Others v. France*, Application no 47129/09, 19 June 2012. This case stands out as the only ‘Dublin return’ case amongst the Strasbourg SMAC jurisprudence. See Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29.6.2013, p. 31–59.
- ³⁷ *A.S.B. v. the Netherlands*, Application no. 4854/12, 10 July 2012.
- ³⁸ *A.E. v. Finland*, Application no. 30953/11, 22 September 2015.
- ³⁹ *M.B. v. Spain*, Application 15109/15, 13 December 2016.
- ⁴⁰ *A.T. v. Sweden*, Application no. 78701/14, 25 of April 2017.
- ⁴¹ *E.S. v. Spain*, Application no 13273/16, 19 October 2017.
- ⁴² *A.R.B. v. the Netherlands*, Application no. 8108/18, 17 January 2019.
- ⁴³ *R.A. v. France*, Application no. 49718/09, 8 February 2011.
- ⁴⁴ *D.B.N. v. United Kingdom*, Application no. 26550/10, 31 May 2011.
- ⁴⁵ *M.T. v. France*, Application no. 61145/16, 27 March 2018.
- ⁴⁶ *Khudoberdi Turgunaliyevich Nurmatov (Ali Feruz) v. Russia*, Application no. 56368/17, 2 October 2018.

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- ⁴⁷ *M.K.N. v. Sweden*, Application no. 72413/10, 27 June 2013.
- ⁴⁸ *M.E. v. Sweden*, Application no. 71398/12, 26 June 2014.
- ⁴⁹ *M.E. v. Sweden*, Application no. 71398/12, 8 April 2015.
- ⁵⁰ *O.M. v. Hungary*, Application no. 9912/15, 5 July 2016.
- ⁵¹ For example, the Court has referred to World Health Organisation guidelines in *Makshakov v. Russia*, Application no. 52526/07, 24 May 2016, and *Petukhov v. Ukraine (No. 2)*, Application no. 41216/13, 12 March 2019.
- ⁵² Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*, 7 November 2013, ECLI:EU:C:2013:720.
- ⁵³ Joined Cases C-148/13 to C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, 2 December 2014, ECLI:EU:C:2014:2406.
- ⁵⁴ *K.N. and Others v. France, A.S.B. v. the Netherlands, M.E. v. Sweden* (Grand Chamber), *A.E. v. Finland, M.B. v. Spain, A.T. v. Sweden, E.S. v. Spain, M.T. v. France, Khudoberdi Turgunaliyevich Nurmatov (Ali Feruz) v. Russia*, and *A.R.B. v. the Netherland*.
- ⁵⁵ *Ilias and Ahmed v. Hungary*, Application no. 47287/15, 14 March 2017, para. 112-113, 118 and 124.
- ⁵⁶ Although the Strasbourg Court was not, in these cases, dealing with the notion of ‘persecution’ as such – as there is no right to asylum as such in the ECHR – it is interesting to note that the Strasbourg jurisprudence somehow mirrors the assertion of the CJEU in *X, Y and Z* that the criminalisation of same-sex conduct does not in itself constitute an act of persecution. This runs against the views of scholars and NGOs alike (ICJ - International Commission of Jurists 2014; Jansen and Spijkerboer 2011).
- ⁵⁷ *Dudgeon v. The United Kingdom*, Application no. 7525/76, 22 October 1981.
- ⁵⁸ *Norris v. Ireland*, Application no. 10581/83, 26 October 1988.
- ⁵⁹ *Modinos v. Cyprus*, Application no. 15070/89, 22 April 1993.
- ⁶⁰ See, for example, *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989.
- ⁶¹ *M.I. v. Sweden*, Communication No. 2149/2012, Human Rights Committee, views adopted by the Committee at its 108th session (8–26 July 2013), 25 July 2013, para. 7.5, in a case relating to a lesbian claimant from Bangladesh, where legislation criminalising same-sex conduct ‘in itself fosters the stigmatization of

LGTB individuals and constitutes an obstacle to the investigation and sanction of acts of persecution against these persons’.

⁶² *Mondal v. Sweden*, CAT/C/46/D/338/2008, UN Committee Against Torture (CAT), 7 July 2011, para. 7.3, regarding a homosexual Bangladeshi man.

⁶³ Rather astonishingly, the Court’s deference to domestic authorities even extends to the Court being more concerned with applying domestic law rather than the ECHR, as in *M.E. v. Sweden* (para. 85).

⁶⁴ See, for example, decision of the Italian Supreme Court: Corte di cassazione, ordinanza n. 4522/15.