

THE BISEXUALITY BLIND SPOT

AN EXPLORATION INTO ASYLUM CLAIMS ON THE BASIS
OF PERSECUTION DUE TO BISEXUAL ORIENTATION
IN THE NETHERLANDS



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due to bisexual orientation in the Netherlands

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Abstract

This research focuses on the question ‘What are the current challenges in the Netherlands to the granting of refugee status for asylum seekers who base their claim on persecution due to their bisexual orientation?’. It is an exploratory research, aimed at providing some preliminary insight into this under-researched topic. In the few publications that are available internationally on the topic of asylum claims on the basis of bisexual orientation, it is posited that the granting rates for bisexuals are significantly lower than those of, for example, lesbians or homosexuals. Several possible explanations have been offered for this, among which the argument that bisexuality does not fall within the binary view of sexuality that many decision makers in the asylum process hold, the idea that bisexuals may suffer more from any possible ‘discretion’ requirement used in the asylum process, and the point of general bisexual erasure in society. This study attempts to analyse the possible existence of this problem from an interdisciplinary perspective. Queer theory and theories of bisexual erasure are applied to the Dutch asylum context. On the basis of several interviews with asylum lawyers, bisexual asylum claimants and LGBTQI+ asylum claimants, as well as an analysis of twenty-two published court cases of bisexual asylum claimants, recurring themes are identified and further explained. It is concluded that several processes of bisexual erasure can be found in the Dutch asylum procedure, and that further research is needed. The limited number of interviews makes the data insufficient for drawing generalisable conclusions, but the research can be used as a first step in understanding the experience of bisexual asylum claimants in the Netherlands.

Keywords: asylum; bisexuality; LGBTQI+; Netherlands

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1. Introduction

“It is his reality and he just needs to be clear and honest about his reality. So, he has never thought about anything and has never considered any other things rather than the bisexuality to [claim asylum]”¹. This is the approach to bisexual asylum claims taken by one of the asylum claimants interviewed for this research. However, not everyone feels this way: bisexuals regularly decide to claim asylum as a lesbian or homosexual instead, and research in Canada and the United States showed that the granting rates for bisexual asylum claims there are low.² In the Netherlands, the group of bisexuals is not often discussed within the broader group of LGBTQI+ asylum claimants. This research will attempt to generate some insight into their position in the Netherlands.

With same-sex sexual activities being criminalised in 72 jurisdictions, in 12 of which it carries capital punishment, it is no wonder that LGBTQI+ people sometimes flee their country of origin in order to be able to fully be themselves.³ Therefore, having an LGBTQI+ identity has become a reason to apply for asylum. Within this group LGB and Q (lesbian, gay, bisexual and queer) people can be described as having a different sexual orientation than is considered the norm in some societies, whereas T and I (transgender and intersex) people have a different gender identity or different sex characteristics. As this research focuses on bisexual people, asylum on the basis of sexual orientation will be the more relevant category of the two. The term bisexual, in this research, is used to mean any sexual orientation or sexual behaviour directed at more than one gender.⁴

In several countries, the granting rates of asylum claims on the basis of persecution due to bisexuality have been found to be lower than those of, for example, lesbians or homosexuals.⁵ In the Netherlands, no research has been conducted that focuses specifically on bisexual asylum claimants. Therefore, this research will answer the question ‘What are the current challenges in the Netherlands to the granting of refugee status for asylum seekers who base their claim on persecution due to their bisexual orientation?’. In answering this question, a more general assessment of the challenges that LGBTQI+ asylum claimants face in their asylum procedures is also conducted, as these are part of

¹ Interview with [interviewee F], bisexual asylum claimant (Maastricht, the Netherlands, 15 June 2020).

² Sean Rehaag, ‘Bisexuals need not apply: a comparative appraisal of refugee law and policy in Canada’, the United States, and Australia’ (2009), 13(2) *The International Journal of Human Rights* 415, 417; Jaclyn Gross, ‘Neither Here Nor There: The Bisexual Struggle for American Asylum’ (2017), 69 *Hastings Law Journal* 985, 999.

³ ‘The Issue’ (*Human Dignity Trust*) <<https://www.humandignitytrust.org/>> accessed 5 July 2020.

⁴ Rehaag (n 2) 417.

⁵ Gross (n 2) 999.

bisexual claimants' experiences. It will be argued that several processes of bisexual erasure can be found in the Dutch asylum procedure, and that further research is needed.

Firstly, the methods used to conduct this research will be described. Secondly, a theoretical framework will provide insight into theories on sexual orientation and bisexuality that are important to understanding the position of bisexual asylum claimants. Thirdly, a legal framework will explain the legal context in which bisexual asylum claims in the Netherlands are processed. Fourthly, a context section will give an overview of the current available research on LGBTQI+ asylum and bisexual asylum, both internationally and in the Netherlands. These three background sections are then used to analyse the data that was gathered for this research, consisting of six interviews and twenty-two court cases on the topic of bisexual asylum claims. After describing the limitations, a conclusion will be drawn.

2. Methods

The question answered in this research will be ‘*What are the current challenges in the Netherlands to the granting of refugee status for asylum seekers who base their claim on persecution due to their bisexual orientation?*’. The assumptions and methodological stances taken to answer this question are the following.

2.1 Paradigm

This research adopts a social constructivist paradigm, specifically one that is based on Berger and Luckmann’s *The Social Construction of Reality* (1996).⁶ Social constructivism entails the idea that society and everything that it entails is constructed by people, and that it in turn shapes them.⁷ Three concepts are of importance in this process: externalisation, objectification, and internalisation. Externalisation points to the fact that people automatically create social order.⁸ In fact, Berger and Luckmann deem that the creation of social order is a necessity for human beings.⁹ Objectification is the way in which this constructed social order becomes viewed as an objective reality.¹⁰ For this to occur, actions must first be institutionalised. This takes place when people form patterns of behaviour regarding a certain thing or situation (habitualisation), and in that way create a specific understanding of that situation or thing (a typification).¹¹ When several actors share a typification, it can become an institution.¹² Such an institution is a consensus on the way in which a certain situation should be understood and acted upon, and it functions as a guideline for human behaviour.¹³ After this institution is created, it needs to be legitimised by norms and knowledge.¹⁴ This completes the process of objectification, and thus the construction of the institution as something external and real. The last step is internalisation, which is the acceptance, learning and adoption of these institutions and the norms relating to them by people.¹⁵ This is done through the process of socialisation.¹⁶

⁶ Peter Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (The Penguin Press 1997).

⁷ Ramón Flecha and Jesús Gómez and Lúdia Puigvert, ‘The Analysis of Socially Constructed Reality’ (2001) 250 *Counterpoints* 51, 51.

⁸ Flecha and Gómez and Puigvert (n 7) 51.

⁹ Berger and Luckmann (n 6) 70.

¹⁰ *ibid* 78.

¹¹ *ibid* 70-72.

¹² *ibid* 72

¹³ *ibid* 72

¹⁴ Flecha and Gómez and Puigvert (n 7) 52.

¹⁵ Berger and Luckmann (n 6) 78.

¹⁶ Berger and Luckmann (n 6) 78.

Because the social world is constructed by people through these processes, and people learn to see this social world and its institutions as an objective truth, social constructivism as a paradigm argues that the knowledge we have of society is also a construct, leading to the conclusion that there is no 'objective reality' to be found.¹⁷ Therefore, a social constructivist paradigm is paired with a qualitative research approach, focusing more on the research subjects and the meanings they attach to things, rather than an abstract perceivable reality 'out there'.¹⁸ The social constructivist point of view is relevant to take for this research as it provides specific insight into two aspects of this thesis: queer theory, and domestic and international law.

The basic tenet of queer theory is that gender and sexuality are constructed, in the sense that they are "produced by social, cultural and historical processes".¹⁹ This aligns perfectly with the social constructivist paradigm. The constructivist argument is of importance in the field of queer field as it supports the idea that the different classifications of sexual orientation (heterosexuality, homosexuality, etc.) are socially constructed categories, leading to the conclusion that the experience of sexual orientation may not be the same for everyone and that fluidity of sexual orientation is possible. The latter argument will be discussed more in detail in the theoretical framework.

Social constructivism is not usually used as a paradigm in a legal context, but recent efforts by legal scholars and sociologists have increasingly led to overlap in the field. A legal system can be seen as a social institution.²⁰ It is created by interactions between actors - in the case of international law: countries - who collectively agreed on this specific set of behaviours and rules.²¹ It is legitimised by legal scholarship and legal norms, and is viewed as an external reality that should be followed.²² This constructivist view on (international) law highlights the importance of norms and interaction in the international legal sphere, and facilitates the understanding of law as something that is made of and held up by consent and interpretation, making it somewhat flexible.

¹⁷ Flecha and Gómez and Puigvert (n 7) 52.

¹⁸ Uwe Flick and Ernst von Kardorff and Ines Steinke, *A Companion to Qualitative Research* (SAGE Publications Ltd) 3.

¹⁹ Moira Dustin and Nina Held, 'In or out? A queer intersectional approach to 'particular social group' membership and credibility in SOGI asylum claims in Germany and the UK' (2018) 2 *Genius* 74, 79.

²⁰ Jutta Brunnée and Stephen Toope, 'Constructivist Approaches to International Law' in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013), 130.

²¹ Jutta Brunnée and Stephen Toope, 'International law and constructivism: elements of an interactional theory of international law' (2000) 39 *Columbia Journal of Transnational Law* 19, 65.

²² Berger and Luckmann (n 6) 93.

2.2 Theoretical Perspective and Research Approach

This research adopts an interpretivist theoretical perspective. Interpretivism states that we interpret the world through mental classification processes.²³ This indicates that our approach to knowledge must take account of the fact that everyone has their own, subjective view on the world.²⁴ When conducting qualitative interviews, as will be done in this research, it is important to take into account the subjectivity of everyone's interpretation of information – including the researcher. The interpretivist theoretical perspective points this out.

The research is exploratory, meaning that it is aimed at understanding what is occurring and how it can be explained.²⁵ Additionally, it is inductive, meaning that it will only be attempted to construct a broader view of the topic after collecting information on specific aspects – theory construction after data collection.²⁶

2.3 Data Collection Methods

Two different methods are adopted for the data collection that underpins this research: an analysis of documents, and qualitative interviews. An alternative method that was considered was an analysis of individual case files (including for example asylum interview transcripts), but this idea was dismissed due to the fact that this data is not publicly accessible.

The analysis of documents is split up into two parts: a description and analysis of existing legislation, and an analysis of current case law in the Netherlands on the topic of bisexual asylum. The relevant existing legislation consists of both Dutch and international legal sources, as well as those documents published about them by the issuing institution (such as *travaux préparatoires*). The case law was obtained by searching 'rechtspraak.nl' for 'biseksueel asiel' (bisexual asylum) and selecting those cases for which the assessment of an asylum claim based on persecution due to bisexuality was indeed the main topic.²⁷ The total number of cases reviewed is 22, of which 7 were ruled in favour of

²³ David Grey, *Doing Research in the Real World* (3rd ed, Sage, 2014), 45.

²⁴ *ibid*

²⁵ *ibid* 62.

²⁶ *ibid* 43.

²⁷ Rb. Den Haag, 1 oktober 2011, ECLI:NL:RBSGR:2011:BU5314; Rb. Den Haag 26 maart 2015, ECLI:NL:RBDHA:2015:4399; Rb. Den Haag 5 november 2015, ECLI:NL:RBDHA:2015:12713; Rb. Den Haag 19 januari 2016, ECLI:NL:RBDHA:2016:565; Rb. Den Haag 18 november 2016, ECLI:NL:RBDHA:2016:14237; Rb. Den Haag 24 november 2016, ECLI:NL:RBDHA:2016:14363; Rb. Den Haag, 13 maart 2017, ECLI:NL:RBDHA:2017:2426; Rb. Den Haag, 19 mei 2017, ECLI:NL:RBDHA:2017:6679; Rb. Den Haag, 2 oktober 2017, ECLI:NL:RBDHA:2017:11260; ABRvS, 7 oktober 2017, ECLI:NL:RVS:2017:3054; Rb. Den Haag, 13 oktober 2017, ECLI:NL:RBDHA:2017:11708; Rb. Den Haag, 10 november 2017, ECLI:NL:RBDHA:2017:13078; Rb. Den Haag, 7 februari 2018, ECLI:NL:RBDHA:2018:1606; Rb. Den Haag, 3 april 2018, ECLI:NL:RBDHA:2018:3770; Rb. Den Haag, 3 april 2018, ECLI:NL:RBDHA:2018:9727; ABRvS, 23 mei 2018, ECLI:NL:RVS:2018:1721; Rb. Den Haag, 10 september 2018, ECLI:NL:RBDHA:2018:10861; Rb. Den Haag, 30 oktober 2018, ECLI:NL:RBDHA:2018:13026; Rb. Den Haag, 7 november 2019, ECLI:NL:RBDHA:2019:11958; Rb. Den Haag, 3

the asylum claimant. The appeal cases were processed between 2011 and 2019, with most cases taking place between 2017 and 2019.

The analysis of existing legislation serves to understand the intended application of the law and thus to determine whether the challenges faced by bisexuals in asylum claims are in coherence with the law. Additionally, Flick, von Kardoff and Steinke argue that official documents can generate insight into the institution that created them.²⁸ This means that the analysis of legislation can be used as data on the argumentation and stance of the issuing institutions. The analysis of case law, on the other hand, provides an insight into the actual application of the law, thus highlighting where common challenges might occur. The case law will be analysed making use of the same coding process used for the interviews, which will be described later in this section .

The second method applied for this research is the conduction of qualitative interviews. These interviews are semi-structured and focused on the topic of bisexual asylum claims (from different perspectives). A total number of six interviews were conducted, all of a length between 30 and 70 minutes. The group of interviewees consists of two bisexual asylum claimants, one homosexual asylum claimant, two lawyers with experience with LGBTQI+ cases and one official from a refugee rights organisation who is involved in LGBTQI+ asylum cases in that capacity. One of the bisexual asylum claimants recently received his status (on the basis of homosexuality), and the other two claimants were still waiting for their interview date. All three were male. The selection of interviewees was done by approaching personal contacts, placing announcements on social media platforms and contacting Dutch law firms, LGBTQI+ rights organisations and refugee rights organisations. The specificity of the topic and the difficulty of finding suitable interviewees that followed from that, as well as time constraints, put limitations on the number of interviews that could be conducted.

After being transcribed (verbatim), the interviews were coded manually in two 'cycles'. The first cycle consisted of the initial reading of the text, and the coding thereof through the 'structural coding technique'.²⁹ In this technique, the text is read with a specific research question in mind, and excerpts of text relating to that question are identified. These are then taken together and compared to each other, in order to create more detailed 'codes'. After this coding process is done – for which the interview transcripts are read in detail as many times as necessary, with a minimum of two times – a second cycle of is started, which has the goal of structuring the codes created before.³⁰ The second cycle consists of pattern coding, a process in which the codes from the first cycle are grouped into

december 2019, ECLI:NL:RBDHA:2019:12876; Rb. Den Haag, 27 september 2019, ECLI:NL:RBDHA:2019:13329; Rb. Den Haag, 10 december 2019, ECLI:NL:RBDHA:2019:13692.

²⁸ Flick and von Kardorff and Steinke (n 18) 284.

²⁹ Johnny Saldaña, *The Coding Manual for Qualitative Researchers* (2nd ed, Sage, 2013), 84; *ibid*, 163.

³⁰ *ibid* 207.

higher-level categories ('concepts' or 'themes') that identify their commonality.³¹ A coding table is used to keep track of the coding process, and the identified codes and themes form the basis of the discussion. During the entire coding process, analytical memos are written by the researcher (in an informal manner), as a way to reflect on the coding process and the discoveries made in it.³²

The document analysis and the qualitative interviews are two methods that may be perceived as being quite different. However, Coomans, Grünfeld and Kamminga indicate that there is a mismatch between legal scholarship, which tends to focus on the legal system, and social sciences scholarship, which analyses societies and social phenomena.³³ The mix of the more textual legal analysis methods with more interview-based sociological research conducted on those who interact with the legal system allows the researcher to bridge this gap, and give a proper insight in the law in both the way it is written and the way it functions in society. Additionally, the wider range of methods is used to achieve triangulation.

³¹ *ibid* 211.

³² *ibid* 41.

³³ Fons Coomans and Fred Grunfeld and Menno T Kamminga, 'Methods of Human Rights Research: A Primer' (2010) 32 *Human Rights Quarterly* 179, 181.

3. Theoretical Framework

The concepts of gender and sexual orientation are perceived as being central to our lives and have generated extensive academic attention. In analysing the treatment of asylum claims on the basis of bisexuality, it is important to gain an understanding of what bisexuality is and how bisexuals are generally perceived and treated. Therefore, this chapter gives an overview of several theories on sexual orientation, most notably queer theory, and on theories of bisexual erasure.

3.1 Approaches to sexual orientation

Sexual orientation can be defined in different ways, and the definition chosen can impact the category an individual is subsumed under.³⁴ Yoshino indicates the possibility of classification on the basis of conduct, desire, and self-identification.³⁵ Depending on the purposes of classification, a different definition may be chosen.³⁶ In asylum systems, as will be highlighted in the analysis, a desire-based definition is often used, but laws criminalising homosexuality are usually more focused on conduct.³⁷ Even within a desire-based approach, there are still differences in definition: the Dutch asylum system, for example, does not consider mere sexual attraction to someone to be enough to constitute an orientation, and requires a level of emotional attachment or love, whereas others may define desire in a way that focuses more on sexual attraction.³⁸

The way in which sexual orientation is formed has been theorised in many different ways. A well-known approach is Cass's 6-stage model, consisting of identity confusion (realising one's own non-heterosexual thoughts or actions), identity comparison (noticing the growing difference between themselves and heterosexuals), identity tolerance (tolerating their queer self-image), identity acceptance (starting to adopt a queer lifestyle), identity pride and identity synthesis (queerness becoming a part of their identity).³⁹ Linear models such as Cass's one have been criticised to be Western-based, non-universal, and rigid in the way that they assume the eventual fixedness of sexual

³⁴ Kenji Yoshino, 'The Epistemic Contract of Bisexual Erasure' (2000) 52 *Stanford Law Review* 353, 373.

³⁵ *ibid*

³⁶ *ibid* 372.

³⁷ 'Criminalising Homosexuality and the Rule of Law' (Human Dignity Trust 2015), 6.

³⁸ See section 6.3.1.1

³⁹ Vivienne Cass, 'Homosexual Identity Formation: Testing a Theoretical Model' (1984) 20(2) *Journal of Sex Research* 143, 147-153.

orientation.⁴⁰ An approach that is rather opposite of this, and that emphasises the flexibility of sexual orientation, is queer theory.

Queer theory is a field that focuses on the themes of sex, gender, and sexuality and the constructed nature thereof. Specifically, this research will use Judith Butler's theories as discussed in her book 'Gender Trouble'.⁴¹ Although there are many other queer scholars, Judith Butler's position at the center of the field of queer theory and her extensive engagement with other important queer scholars (such as Foucault) in her theories made 'Gender Trouble' a suitable basis for this research. Butler argues that gender is a constructed category that is made 'real' by performance: the acting out of the roles related to one's assigned gender help uphold that same gender category.⁴² The concept of sex is often cited as a biological category linked to gender: the argument here is that sex entails male or female anatomy, and that this leads to one's gender – the way someone enacts the behaviour expected from someone with that sex.⁴³ Butler, however, argues that there is no such biological background to gender. Rather, she argues that sex itself, too, is a constructed category, and that gender is used as a way to reinforce its binarism (male versus female) and stability.⁴⁴ In this cycle of construction and upholding of constructed categories, there is a third aspect: sexuality.⁴⁵

Sexuality, then, is used as a way to reinforce sex and gender through sexual desire and practice.⁴⁶ Butler argues that the assumed desire in our current society is heterosexual, and that this is heterosexuality is made 'compulsory' in society in order to keep the binary systems of gender and sex in place.⁴⁷ This compulsory heterosexuality is reproduced in institutions such as the asylum procedure, and can be linked to specific power hierarchies between groups of diverse sexual orientations.⁴⁸ This regulation of identity leads to the marginalisation of those identities in which these three concepts of sex, gender and sexuality do not cohere.⁴⁹ The goal of queer theory, then, is to break

⁴⁰ Jasmine Dawson and Paula Gerber, 'Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation' (2017) 29(2) International Journal of Refugee Law 292, 309.

⁴¹ Judith Butler, *Gender Trouble* (Routledge, 1990), 6.

⁴² *ibid*

⁴³ *ibid* 7.

⁴⁴ *ibid* 7.

⁴⁵ *ibid* 22.

⁴⁶ *ibid* 17.

⁴⁷ *ibid* 22.

⁴⁸ Sean Rehaag, 'Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada' (2008) 53 McGill Law Journal 59, 80.

⁴⁹ April S Callis, 'Playing with Butler and Foucault: Bisexuality and Queer Theory' (2009) 9 Journal of Bisexuality 213, 227.

out of these constructed regulatory regimes and allow the experience of sex, gender and sexuality in their broadest sense.⁵⁰

3.2 Bisexuality and bisexual erasure

Although queer theory has the general goal of theorising the possibilities of breaking the heterosexist paradigm, many queer theorists have been criticised for not engaging with the topic of bisexuality enough.⁵¹ This is despite the fact that bisexuality could arguably be a strong contribution to queer theory due to its ability to highlight the flaws of the idea of a coherent group of sex, gender and sexuality.⁵² The tendency to overlook bisexuals as a group is not limited to queer theory only: in real world situations, bisexuality is often ignored or forgotten, leaving a monosexual (heterosexual or homosexual – nothing in between) structure in place.⁵³ Bisexuals are perceived as different from the traditional images of ‘homosexuality’ (which display mainly gay and lesbian identities), and have relatively little visibility in the LGBTQI+ community compared to lesbians and homosexuals.⁵⁴ Additionally, bisexuality is often not taken seriously as a sexual orientation, as many view it as a ‘phase’ before one eventually accepts that they are homosexual or heterosexual.⁵⁵ These views are present both in heterosexual and sexual minority communities. This concept of the exclusion or downplaying of bisexuality can be seen as monosexism: discrimination against those who do not have an exclusively heterosexual or homosexual orientation.⁵⁶

3.2.1 Reasons for bisexual erasure

Kenji Yoshino has theorised this issue, for which he coins the term ‘bisexual erasure’, and has constructed a reason why bisexual erasure might be so prevalent and long-lasting: the epistemic contract of bisexual erasure.⁵⁷ The epistemic contract of bisexual erasure entails the argument that because homosexual and heterosexual groups have an interest in bisexuality being ignored, they both work to keep it hidden. The investments of the two groups set out by Yoshino fall into three categories: an interest in the stabilisation of sexuality/sexual orientation, an interest in the stabilisation of the primacy of sex and an interest in the stabilisation of monogamy.⁵⁸ These interests are based in a view

⁵⁰ Butler (n 41) 147.

⁵¹ Callis (n 49) 217.

⁵² *ibid* 229.

⁵³ Yoshino (n 34) 369.

⁵⁴ Rehaag (n 2) 424.

⁵⁵ *ibid* 428.

⁵⁶ Rehaag (n 48) 89.

⁵⁷ *ibid* 388.

⁵⁸ *ibid* 391.

of sexuality as fixed and binary.⁵⁹ This entails that sexual orientation is seen as something that cannot change throughout someone's life, and something that is split up into the two categories of homosexuality and heterosexuality, with nothing existing in between.

Concerning the interest of straight and queer communities in the stabilisation of monogamy, Yoshino argues that homosexual and heterosexual restrictions to one gender in their choice of romantic partners leads to a sexual jealousy towards those who have broader options, leading to a view of bisexuals as having an 'excess' in their sexual behaviour.⁶⁰

The interest of straight and queer communities in the stabilisation of sexual orientation mentioned by Yoshino entail that it is important for both groups to be able to claim that they have a single monosexual sexual orientation.⁶¹ For heterosexual communities this is of importance as their privilege stems from them having the sexual orientation identity that is seen as being 'at the top of the hierarchy': heterosexuality is seen as the 'normal' sexual orientation, leading to a situation where heterosexuals do not need to even justify their orientation, whereas people of other sexual orientations are often discriminated against or not awarded the same rights because of it.⁶² If heterosexuals can no longer claim their membership of the heterosexual group, or indicate the differences between their group and the other 'deviant' types of sexuality, their position of power would crumble.⁶³ For homosexuals or lesbians the maintenance of their stable sexual orientation can be of importance too. Even though it sounds slightly counterintuitive, considering that they occupy a marginalised place in the hierarchy of sexualities, pertaining to a clearly defined group can bring a sense of comfort and community.⁶⁴ In addition to this, the ability to claim one stable sexual orientation is essential to the gay community as it allows them to continue using the 'immutability defence'. The immutability defence is an argument that has often been used in the fight for mainly lesbian and gay (LG) rights.⁶⁵ It entails the idea that because someone's sexual orientation is unchangeable, it would be unjust to treat them differently and more negatively on the basis of it.⁶⁶ This argument uses an element of 'it is not their fault' in coming to this conclusion, which is why it has been strongly criticised by several scholars.⁶⁷ However, as it is the basis of many LGBTQI+ rights advancements, it is

⁵⁹ Yoshino (n 34) 395 and 405.

⁶⁰ *ibid* 420-421.

⁶¹ *ibid* 400.

⁶² *ibid* 402.

⁶³ *ibid* 401.

⁶⁴ *ibid* 401.

⁶⁵ Rehaag (n 48) 91.

⁶⁶ *ibid* 92.

⁶⁷ *ibid* 92.

understandable why the groups benefiting from it would choose to erase anything that threatens this view on sexual orientation.⁶⁸

The stability of sexual orientation described above is threatened by bisexuality in several ways. Yoshino argues that the existence of bisexuality leads to an impossibility for members of either the heterosexual or the homosexual communities to prove their monosexual identity.⁶⁹ It is impossible to prove a negative, and therefore the conceptual possibility of desire for more than one gender makes it impossible for heterosexuals and homosexuals to prove the absence of same-sex and cross-sex desire respectively in their lives.⁷⁰ This destabilises the identities that their privileges or rights claims are built upon, and is thus seen as a threat. More than destabilising these monosexual identities, bisexuality could be seen as voiding the binary distinction between categories of sexuality from any meaning.⁷¹ Namely, the existence of something in between indicates that there is more than just the 'outer categories' of homosexuality and heterosexuality that the current system is based upon.⁷² Bisexuality's position in between the sexuality binary and its perceived threat to the stability of prevalent sexual categories thus creates grounds for its erasure.

A last point made by Yoshino is that bisexuality can threaten the primacy of sex as a category to identify or distinguish people by.⁷³ This primacy is important to both heterosexual and LG groups as sex is currently constructed to be such a central element of a person that questioning its importance would destabilise human identity as we know it.⁷⁴ Additionally, for both groups, a sex-based distinction in the selection of their romantic partners is what defines their sexual orientation identity.⁷⁵ Furthermore, for straight cisgender people, the heterosexual way in which sex is currently understood (thinking back to Butler: female sex cohering with female gender and sexual desire for males) places them in a position of power in which heterosexual norms are seen as the standard.⁷⁶ For LG people, on the other hand, a destabilisation of sex as an identifying category inhibits their possibilities for 'sex separatism', the organisation of their communities in entirely same-sex groups.⁷⁷ Although this might

⁶⁸ Surya Monro, *Bisexuality: Identities, Politics and Theories* (Palgrave Macmillan 2015) 26; Yoshino (n 32), 405.

⁶⁹ *ibid* 400.

⁷⁰ *ibid* 400.

⁷¹ Ruth Colker, *Hybrid: Bisexuals, Multiracials, and Other Misfits Under American Law* (NYU Press 1996) 29; Naomi Mezey, 'Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts' (1995) 10 *Berkeley Women's Law Journal* 98, 103.

⁷² Mezey (n 71) 103.

⁷³ Yoshino (n 34) 411.

⁷⁴ *ibid* 412.

⁷⁵ *ibid* 410.

⁷⁶ *ibid* 416.

⁷⁷ *ibid* 417.

not be a threat to all, it is definitely a change from the sex-based stratification prevalent in social organisation before.

How bisexuality threatens the use of sex as a category to distinguish people can be understood by thinking back to Judith Butler.⁷⁸ Where heterosexuality upholds the constructed categories of sex and gender by stressing the distinction between male and female, and homosexuality still selects potential partners on the basis of sex or gender, bisexuality does not do either: all sexes and genders are possible.⁷⁹ Although some bisexuals experience different types or levels of attraction to people of different sexes, others argue that they do not care about the sex or gender identity of the person at all.⁸⁰ This deconstruction of the importance of sex in distinguishing between people, in this case in terms of desire, threatens the abovementioned interests of straight and LG communities in keeping this distinction in place.⁸¹

The reasons for the erasure of bisexuality discussed above relate to the entire society and is mirrored in many different fields. For this research, the field of law is of specific interest. Greenesmith argues that the adherence to the binary and immutable view of sexuality that erases bisexuality is even stronger in the legal field than in general society.⁸² This is because many legal arguments have been built upon a binary and stable view of sexuality. The fact that bisexuality does not fit into those categories means that bisexuality needs to be overlooked in order not to complicate arguments or cause incoherence with legal concepts.⁸³

3.2.2 Practices of bisexual erasure

The erasure of bisexuals described above is mainly done in three ways: class erasure, individual erasure, and delegitimisation.⁸⁴ Class erasure entails the implicit or explicit argument that bisexuality does not exist at all, or if it does, that it is not a relevant sexual orientation.⁸⁵ Examples of this could be the omission of the category of bisexuals when discussing LGBTQI+ issues (for example calling same-sex marriage 'homosexual marriage' instead), or stating that bisexuality does not exist as people are either homosexual or heterosexual. The latter argument is often mirrored in individual erasure,

⁷⁸ Butler (n 41).

⁷⁹ *ibid* 22; Yoshino (n 34) 410; Laura Erickson-Schroth and Jennifer Mitchell, 'Queering Queer Theory, or Why Bisexuality Matters' (2009) 9 *Journal of Bisexuality* 297, 297.

⁸⁰ *ibid*

⁸¹ *ibid* 410.

⁸² Heron Greenesmith, 'Drawing Bisexuality Back into the Picture: How Bisexuality Fits into LGBT Legal Strategy Ten Years after Bisexual Erasure' (2010) 17 *Cardozo Journal of Law & Gender* 65, 66.

⁸³ *ibid*

⁸⁴ Yoshino (n 34) 395.

⁸⁵ *ibid*

where the category of bisexuals is presumed to be true but someone's own identity as a bisexual is questioned.⁸⁶ An argument often used in this is that the person in question is merely going through a phase, and that they will eventually end up being straight or gay.⁸⁷ Even if bisexuality is accepted as a category or a personal identity, it can still be erased through delegitimation. This is the process in which negative attributes are associated with bisexuality, such as promiscuity, lack of courage to come out as 'fully gay', or hypocrisy in trying to benefit from heterosexual privilege while also enjoying the possibility of same-sex desire.⁸⁸ This research will attempt to analyse to what extent these practices of bisexual erasure are embedded in the Dutch asylum procedure.

3.3 Conclusion

As described above, there are several ways of defining and theorising sexual orientation. Where the original staged models are often rigid, the queer theory approach allows for more flexibility and a less binary conception. The fact that bisexuality falls outside of the heterosexual-homosexual binary, and the interests of both queer and straight communities maintaining the status quo, leads to the erasure of bisexuality from both general life and the law. The next chapter will describe the Dutch legal situation, and the way in which it affects bisexual asylum claims.

⁸⁶ *ibid* 396.

⁸⁷ *ibid* 398.

⁸⁸ *Ibid* 399.

4. Legal Framework

4.1 Introduction

This section will give an overview of the legal framework that is at play in the consideration of asylum claims based on persecution due to bisexual orientation in the Netherlands. It introduces the relevant legal sources, their content, and an analysis of the intended meaning of the law.

The Netherlands are a monist country; following Article 93 and 94 of the Dutch Constitution, treaties or resolutions by international institutions that bind all can override Dutch law. This chapter will be structured according to the Dutch asylum legislation, but international legal documents will be referred to when relevant.

4.2 The Dutch Asylum Process

The Dutch asylum process consists of several steps. After arriving in the Netherlands, the asylum claimant officially applies for asylum.⁸⁹ The next step is the registration interview, in which the immigration service (*Immigratie- en Naturalisatiedienst*, IND) tries to establish the identity of the claimant.⁹⁰ This interview does not yet include questions about the reason for their application.⁹¹ After this, the claimant is provided with rest, shelter, and legal advice.⁹² Afterwards, they wait for their interview period to start. In this process, which includes several interview days and review of the interviews by the claimant's lawyer, the IND comes to a decision on the asylum claim: asylum is granted, the person is referred to an extended asylum procedure, or their claim is rejected.⁹³ In case of a rejection, the claimant is still given the opportunity to file an administrative appeal against this decision. If the IND then still decides to reject their claim, the claimant is given the opportunity to appeal this decision in court.⁹⁴

⁸⁹ Vreemdelingen-circulaire (C) 2000, p. 2.

⁹⁰ *ibid* 4.

⁹¹ *ibid* 5.

⁹² *ibid* 6-10.

⁹³ *ibid* 27-30.

⁹⁴ Vreemdelingenwet 2000, artikel 69.

4.3 Requirements for Refugee Status

The central legal document on refugees in the Netherlands is the Dutch Alien Act 2000.⁹⁵ It was written with the intention of regulating and constraining the influx of migrants into the Netherlands as much as possible, while respecting the existing international legal order.⁹⁶ The Act describes several types of residence permits – this research will be focused on the asylum residence permit, since it is the central theme of this research. When an asylum claimant first applies for an asylum residence permit, it is for a residence permit for a fixed period of time, which is issued for a maximum of five consecutive years.⁹⁷

Article 29 of the Alien Act defines who can apply for an asylum residence permit for a fixed period of time. The subsection of this article that is relevant to this research is Article 29(1)(a): an alien who is a refugee under the terms of the Convention (being the Convention Relating to the Status of Refugees). This direct referral to the Convention indicates the importance of the Convention for the Netherlands. Although other types of refugees are specified in Article 29, LGBTQI+ refugees fall under the category of refugees under the terms of the Convention.

4.3.1 The 1951 Convention

The ‘Convention’ referred to in the Dutch Alien Act is the 1951 Convention Relating to the Status of Refugees (from now onwards: the Convention). With its 146 state parties and 19 signatories, it is the central document to the international refugee regime, and it was ratified by the Netherlands in 1956.⁹⁸

Article 1(A)(2) of the Convention defines a refugee as follows:

“any person who (...) owing to *well-founded fear* of being *persecuted* for reasons of *race, religion, nationality, membership of a particular social group or political opinion*, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.⁹⁹ [emphasis added]

⁹⁵ Vreemdelingenwet 2000.

⁹⁶ *Kamerstukken II 1998-1999*, 26732, p. 1.

⁹⁷ Vreemdelingenwet 2000, artikel 28.; *Kamerstukken II 1998-1999*, 26732, p. 26;

⁹⁸ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

⁹⁹ *Ibid* Article 1(A)(2).

In this definition, the aspect of ‘well-founded fear of persecution’ is the most important.¹⁰⁰ What constitutes a ‘well-founded fear’ is not defined in the Convention and is thus up to member states to interpret. It is usually interpreted to mean ‘reasonable likelihood’.¹⁰¹ Persecution is another term that receives no clear definition in the Convention, nor in the preparatory material. The judicial view that persecution consists only of harmful or oppressive actions can be seen as narrow, and efforts have been made to broaden the definition and with it, the scope of protection.¹⁰² In the Netherlands, persecution in terms of the Convention is defined as acts so severe or recurrent that they constitute a severe violation of human rights, especially the human rights which according to Article 15(2) of the European Convention of Human Rights can under no circumstances be infringed upon, or as a combination of acts, including human rights violations, that is severe enough to affect a person in such a way.¹⁰³ For bisexual asylum claims, the definition of ‘persecution’ is important as they are often perceived as having the possibility to avoid persecution by posing as heterosexuals.¹⁰⁴

The ‘well-founded fear of persecution’ in the Convention needs to be linked to one of the grounds of asylum: race, religion, nationality, membership of a particular social group or political opinion.¹⁰⁵ The ground of belonging to a ‘particular social group’ is used most often for LGBTQI+ asylum claims.¹⁰⁶

4.3.2 Defining a Particular Social Group

Where for some grounds of persecution, such as race or nationality, the link to the claimant is usually clear, in the case of ‘membership of a particular social group’ the presumed link requires extensive argumentation.¹⁰⁷

The definition of a ‘particular social group’ used in the Netherlands can be found in the 2011 EU ‘Qualification Directive’, which prescribes several standards relevant to the qualification of a person as a refugee.¹⁰⁸ Of particular importance is Article 10 of the Directive, describing the reasons for persecution. In Article 10 (d) of the Directive a ‘particular social group’ is defined as follows:

¹⁰⁰ Paul Weis, *The Refugee Convention 1951: the travaux preparatoires analysed, with a commentary* (Cambridge University Press, 1995), 7.

¹⁰¹ *ibid* 8.

¹⁰² *ibid* 8.

¹⁰³ Voorschrift Vreemdelingen 2000, artikel 3.36(1).

¹⁰⁴ Sabine Jansen, ‘Pride or Shame? Assessing LGBTI Asylum Applications In The Netherlands Following The XYZ and ABC Judgments’ (COC, 2018), 17.

¹⁰⁵ Voorschrift Vreemdelingen 2000, artikel 3.36(3).

¹⁰⁶ Gross (n 2) 994.

¹⁰⁷ *ibid*

¹⁰⁸ Council Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] *OJ L* 337/9.

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

- members of that group share an *innate characteristic*, or a *common background* that cannot be changed, or share a *characteristic or belief* that is so *fundamental to identity or conscience that a person should not be forced to renounce it*,

and

- that group has a *distinct identity* in the relevant country, because it is perceived as being different by the surrounding society.”¹⁰⁹ [emphasis added]

This definition is a cumulative approach, meaning that both the aspect of an ‘innate or fundamental characteristic or common background’ and a ‘distinct identity of the group in the country’ must be adhered to. For the first aspect, LGBTQI+ asylum claims are usually based on the argument that an LGBTQI+ identity is ‘innate’ (to the extent that it is seen as something that does not change easily or at all), or ‘so fundamental that a person should not be forced to renounce it’, as sexual orientation or gender identity can be viewed as something that is extremely central to a person. The Dutch definition of what constitutes a particular social group is in coherence with that of the EU Qualification Directive, and explicitly refers to the possibility of people with a certain common sexual orientation constituting a social group.¹¹⁰

4.4 Assessing Asylum Claims

Article 30 of the Asylum Act lists procedural reasons for which an asylum claim can be rejected, whereas Article 31(1) of the Asylum Act specifies that it shall be rejected if the alien has not made a plausible case that their claim is based on circumstances which, either on their own or in connection with other facts, constitute a legal ground for issuing the permit.¹¹¹ This Article emphasises that the burden of proof in this process lies with the claimant – an important premise in refugee law worldwide.¹¹² The applicant can supply proof in the form of any documentation that can prove their identity and any persecution they may have already faced, or statements.¹¹³ In the assessment of the asylum claim, this is supplemented by country of origin information.¹¹⁴

The plausibility addressed in Article 31(1) of the Asylum Act consists of two aspects: *credibility* (are the facts stated by the claimant credible?) and *severity* (are the facts grave enough to constitute

¹⁰⁹ *ibid* Article 10 sub d.

¹¹⁰ Voorschrift Vreemdelingen 2000, artikel 37(d).

¹¹¹ Vreemdelingenwet 2000, artikelen 30 and 31(1).

¹¹² *Kamerstukken II* 1998-1999, 26732, p. 40.

¹¹³ Jansen (n 104) 15.

¹¹⁴ *ibid*

grounds for asylum?).¹¹⁵ If either one is not adhered to, the claim can be rejected. The way in which the aspects of credibility and severity are determined is described in the Aliens Act Implementation Guidelines 2000 and the internal Immigration Service Policy 2019/17.

In cases of bisexual individuals who wish to make an asylum claim based on their sexual orientation, a credibility assessment is performed on two aspects of the case: the sexual orientation of the claimant, and the events that led them to leave the country.¹¹⁶ The credibility assessment of the events is mainly used as an add-on to that of the sexual orientation.

To determine the credibility of someone's LGBTQI+ asylum identity, the immigration service asks the claimant questions about their sexual orientation/gender identity. These questions relate to several set themes, although it is determined on a case-by-case basis which themes should be stressed more.¹¹⁷ The themes are: (1) private life and environment, (2) current and previous relationships and contacts in or knowledge of the LGBTQI+ community in the country of origin, (3) contacts in and knowledge of the LGBTQI+ community in the Netherlands, and (4) experiences of discrimination, repression and persecution in the country of origin.¹¹⁸ It is important that these questions are not based on stereotypical views on LGBTQI+ people, as determined by the Court of Justice of the European Union (CJEU) in its 'ABC' judgment.¹¹⁹ This judgment also outlawed the use of intrusive questioning, such as questioning about sexual acts, and the admission of physical evidence of a sexual nature.¹²⁰ The main focus of the credibility assessment is on the claimant's statements regarding their experience of their sexual orientation in personal terms and in the context of their country of origin, and how these experiences relate to the general available information on this topic.¹²¹ The asylum office is not allowed to assume that the claimant went through an internal struggle to accept their sexual orientation. However, questions can be asked on the process by which they became aware of their orientation, and how they dealt with being 'different' in a society that does not accept them.¹²² In this process of questioning, personal characteristics of the claimant such as educational background, cultural background and personality should be taken into account.¹²³

¹¹⁵ Willem J van Bennekom and Jaap H van der Winden, *Asielrecht* (Boom Juridische Uitgevers 2011) 294.

¹¹⁶ Immigratie- en Naturalisatiedienst, *Werkinstructie 2019/17 Horen en beslissen in zaken waarin lhbt-gerichtheid als asielmotief is aangevoerd*, December 2019, 5.

¹¹⁷ Immigratie- en Naturalisatiedienst, *Werkinstructie 2019/17 Horen en beslissen in zaken waarin lhbt-gerichtheid als asielmotief is aangevoerd*, December 2019, 4.

¹¹⁸ *ibid* 3.

¹¹⁹ *ibid* 4.

¹²⁰ Jansen (n 104) 22.

¹²¹ Immigratie- en Naturalisatiedienst, *Werkinstructie 2019/17 Horen en beslissen in zaken waarin lhbt-gerichtheid als asielmotief is aangevoerd*, December 2019, 5.

¹²² *ibid*

¹²³ *ibid*

After the credibility of the claimant's statements – both on their sexual orientation and on the events that led them to leave the country – has been established, the severity is assessed. The severity of the claim is based on the perceived risks that would be attached to returning the claimant to their country of origin, based on the aspects of their story that were found credible.¹²⁴ For these risks to be high enough to grant asylum status, they need to fall under the scope of persecution as explained in paragraph 4.3.1.1, or constitute a violation of article 3 of the European Convention of Human Rights (the prohibition of torture).¹²⁵ In the determination of severity, it is important to take into account that, following the CJEU's 'XYZ' judgment, the idea that someone could avoid persecution by downplaying their sexual orientation or 'acting straight' – the so-called 'discretion argument' - does not negate the severity of the risk. In other words, a person cannot be 'sent back into the closet'.¹²⁶ This judgment is important for bisexual asylum claimants, the 'discretion argument' was used regularly on bisexuals, as it was perceived as a less invasive change for them than for example for a homosexual.¹²⁷

4.5 Appealing a rejection

In case the immigration service is planning on rejecting the asylum claim, the claimant will be notified of this and be given the opportunity to express their viewpoint on this in a written reply.¹²⁸ If, after this reply, the Minister decides to still reject the claim, the claimant can appeal the decision in court.¹²⁹ These cases will be dealt with by the administrative court in The Hague.¹³⁰ In case the court rules the appeal was unfounded, it is possible to appeal again, this time to the Administrative Jurisdiction Division of the Council of State.¹³¹

The capability of the court to review the immigration service's decision is limited. Concerning most aspects of a decision, the court is allowed to assess whether the immigration service's point of view is justified.¹³² However, concerning the credibility assessment of a claim by an asylum claimant that is not supported by evidence, the court can only assess whether the immigration service did not unjustly conclude that the claim was not credible.¹³³ This assessment thus requires a certain level of

¹²⁴ *ibid* 13.

¹²⁵ *ibid* 13.

¹²⁶ Jansen (n 104) 17.

¹²⁷ Ray Sin, 'Does sexual fluidity challenge sexual binaries? The case of bisexual immigrants from 1967-2012' (2015) 18(4) *Sexualities* 413, 430.

¹²⁸ Vreemdelingenwet 2000, artikel 42.

¹²⁹ *ibid* artikel 45.

¹³⁰ *ibid* artikel 71 sub 1.

¹³¹ *ibid* artikel 85.

¹³² ABRvS 13 april 2016, 201507952; ECLI:NL:RVS:2016:890, par. 9.

¹³³ *ibid*

restraint.¹³⁴ Importantly, this decision by the immigration office needs to be accompanied with proper motivation, which can then be assessed by the court.¹³⁵

Even if a residence permit for a fixed period is granted, it can still be cancelled, or the request to extend it to an indefinite period can be rejected. The rule on this of most interest to the topic of bisexual asylum seekers is Article 32(1)(c) of the Alien Act, specifying that it can be cancelled if the grounds of issuing the permit, as defined in Article 29, is no longer present. This could be a problem for bisexuals if they decide to claim asylum on the basis of homosexuality or lesbianism instead, but then start a relationship with an opposite sex partner – theoretically, this could ‘invalidate’ their stated sexual orientation, and thus their refugee status in the Netherlands.

4.6 Conclusion

This overview of the Dutch legal framework shows the regulation at play in the assessment of bisexual asylum claims in the Netherlands, and the specific aspects thereof that may pose a challenge to bisexual asylum claimants. In the next section, an overview is given of the available literature on LGBTQI+ asylum and bisexual asylum, both worldwide and in the Netherlands.

¹³⁴ *ibid*

¹³⁵ *ibid*

5. Context

5.1 Introduction

This research focuses on a specific aspect of the broader theme of LGBTQI+ asylum claims. Many of the obstacles that bisexual asylum claimants in the Netherlands may face are related to the fact that they are part of the wider group of LGBTQI+ refugees and will thus coincide with the problems LGBTQI+ refugees face in asylum processes worldwide. This section will provide context for this research by giving a broad overview of the previously conducted research on the topics of LGBTQI+ asylum claims worldwide, LGBTQI+ asylum claims in the Netherlands and asylum claims on the basis of bisexuality. This background will later be used to analyse the experiences of bisexual asylum claimants in the Netherlands.

5.2 LGBTQI+ asylum

5.2.1 Worldwide

In previous research on LGBTQI+ asylum claims, many issues have been pointed out that may inhibit an LGBTQI+ asylum seeker's claim from being granted. These issues are broadly related to the general adversarial and critical setup of asylum procedures, the difficulties that asylum claimants may face in proving that they belong to the LGBTQI+ community, the parameters immigration services implement (consciously or unconsciously) for believing that someone is LGBTQI+, the question of what level of queerness is 'enough' for asylum to be granted, and some procedural issues.

5.2.1.1 Asylum procedures

Most asylum systems are set up in a way that the burden of proof lies on the claimant.¹³⁶ In LGBTQI+ cases it is hard to substantiate the claims with objective evidence; how does one conclusively prove their queerness? This, in combination with an often-sceptical view of immigration services on the truthfulness of statements made by claimants, leads to strict credibility assessments that often result in the rejection of such asylum claims.¹³⁷

¹³⁶ *Kamerstukken II 1998-1999*, 26732, p. 40.

¹³⁷ Gross (n 2) 994.

5.2.1.2 Substantiating the Self

In providing proof for their LGBTQI+ identity, asylum claimants may face several obstacles. It is difficult to provide tangible, objective evidence of one's LGBTQI+ identity.¹³⁸ Until 2014, it was possible to introduce videos or pictures of a sexual nature as evidence of one's sexual orientation.¹³⁹ However, in a 2014 judgment, the Court of Justice of the European Union (CJEU) decided that the utilisation of such evidence was contrary to human dignity, and thus banned its use in Europe.¹⁴⁰ This same judgment also banned the use of 'tests' to demonstrate one's homosexuality. Although this is a positive development that avoids LGBTQI+ asylum claimants being pushed to reveal intimate sexual information or being assessed on the basis of questionable tests, it also means that the focus in the assessment of claims lies on other types of evidence. In the case of LGBTQI+ asylum claims, the evidence provided usually consist of the claimant's own statements on their identity and potentially additional proof that they are part of the LGBTQI+ community, such as proof of membership of LGBTQI+ organisations (in the country of origin or in the receiving country) or statements by partners or witnesses.¹⁴¹ In the assessment of the credibility of the claimant's LGBTQI+ identity, a lot of weight is given to the asylum claimant's own statements on their identity and the way they have experienced it.¹⁴² The claimants are expected to give elaborate answers to the questions asked in the interview which, even though questions of a sexual nature have been banned in the same CJEU judgment that banned pornographic materials, are still very intimate and personal. It is important to consider that for many LGBTQI+ asylum claimants, this may be the first time they are openly discussing their identity.¹⁴³ The fact that this takes place in front of a stranger, with often an interpreter from their own country of origin (and thus from an area in which LGBTQI+ identities are not accepted) can exacerbate any nervousness or restraint that the claimant may already feel.¹⁴⁴ A factor that might further complicate the issue is that the educational and cultural background of certain claimants may obstruct their understanding of or ability to answer the immigration service's questions.¹⁴⁵ Questions may be too abstract, or the claimant may not be familiar with some of the vocabulary used. If this is

¹³⁸ Neva Wagner, 'B Is for Bisexual: The Forgotten Letter in U.K. Sexual Orientation Asylum Reform' (2016) 26 *Transnational Law & Contemporary Problems* 205, 221.

¹³⁹ Joined Cases C-148/13 to C-150/13, *A, B, and C v. Staatssecretaris van Veiligheid en Justitie* (2 December 2014); Jansen (n 104) 112.

¹⁴⁰ Jansen (n 104) 22.

¹⁴¹ 'Current Migration Situation in the EU: Lesbian, Gay, Bisexual, Transgender and Intersex Asylum Seekers' (European Agency for Fundamental Rights 2017), 6.

¹⁴² Gábor Gyulai, 'Credibility Assessment in Asylum Procedures: A Multidisciplinary Training Manual' (second volume, Hungarian Helsinki Committee, 2015), 77.

¹⁴³ Sabine Jansen, 'Herken de Homo: Over het beoordelen van de geloofwaardigheid van seksuele gerichtheid in asielzaken' (2013) 5 *Justitiële Verkenningen* 44, 48.

¹⁴⁴ *ibid* 47.

¹⁴⁵ Jansen (n 104) 20.

not taken into account, it can have negative consequences for the outcome of the claim. These issues show that the discrepancy between the high expectations of the immigration services and the difficulties asylum claimants face in making their statements can obstruct their ability to get a positive assessment.

5.2.1.3 Concluding credibility

In addition to the problems on the side of the asylum seeker in providing a convincing story relating to their LGBTQI+ identity, there are several issues in the way in which immigration services assess this story that can lead to the rejection of a possibly legitimate claim. One often-observed problem is that decision makers sometimes base their assessment of the credibility of someone's LGBTQI+ identity on stereotypes of LGBTQI+ people – which is usually a breach of the official rules of the immigration service, and is also forbidden on the basis of the 2014 CJEU judgement.¹⁴⁶ These stereotypes can manifest in very clear ways, such as the idea that homosexuals are always effeminate and lesbians masculine, and that this should be visible in their clothing and manners for their claim to be believable.¹⁴⁷ However, the assumptions can also be more covert, such as the expectation that every LGBTQI+ person goes through a specific process of becoming aware of their identity, struggling to come to terms with it, and eventually accepting it.¹⁴⁸ The Hungarian Helsinki Committee advises on the formation this type of assessment, in the specific form of a 'DSSH model'. This is a model that posits that LGBTQI+ asylum claimants experienced a moment when they realised they were different (D), perceived stigma on the basis thereof (S), internalised this stigma in the feeling of shame (S), and fear harm (H) on the basis of this.¹⁴⁹ Although this may not seem like a stereotypical assumption at first sight, several academics have argued that these processes are not the same for everyone and can be very context-dependent.¹⁵⁰ The models of sexual identity development that the DSSH model is based upon, such as the Cass model explained in section 3.1, are strongly rooted in Western experiences of sexual identity, more specifically the experience of white homosexual middle-class men in Western societies.¹⁵¹ If a claimant has a different gender identity or cultural background than this (the latter of which is per definition the case in LGBTQI+ asylum claims), their experience might be

¹⁴⁶ Sabine Jansen and Thomas Spijkerboer, 'Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe' (COC and Vrije Universiteit Amsterdam, 2011), 7; Wagner (n 138) 219; Gyulai (n 142) 71.

¹⁴⁷ Jansen (n 104) 49.

¹⁴⁸ Wagner (n 138) 220.

¹⁴⁹ Gyulai (142) 74-85.

¹⁵⁰ Lauri Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22(2) *Journal of Refugee Studies* 195, 208; Wagner (n 138), 220; Dawson and Gerber (n 40) 304.

¹⁵¹ Berg and Millbank (n 150) 207.

significantly different.¹⁵² This results in increased difficulty for many LGBTQI+ asylum claimants to obtain a positive credibility assessment.¹⁵³ The use of stereotypes in credibility assessments puts LGBTQI+ asylum claimants that do not conform to stereotypes in a difficult position where they have to choose to either give their own authentic story, with the risk of it being ‘not credible’ because the decision maker does not recognise it enough, or change their story to be more stereotypical, with the risk of being told that their statements were too general and stereotypical to be seen as authentic.¹⁵⁴

Another often-recurring issue in the assessment of LGBTQI+ identities by immigration services is the way in which relationships are defined and perceived. Many LGBTQI+ people from countries in which homosexuality is criminalised may have engaged in opposite-sex relationships or even marriages in their country of origin. These ‘heterosexual’ experiences may be interpreted as evidence against someone’s queer orientation.¹⁵⁵ Problems may also appear in the credibility assessment of queer relationships. Wagner points out queer asylum seekers are in a continuous limbo of being perceived as having had relationships that were ‘too risky to be credible’, where the immigration service does not believe that someone would take actions of that nature when the consequences could be so dire, or being rejected on the basis that they have not had enough or deep enough same-sex romantic experiences.¹⁵⁶

5.2.1.4 Seeing Severity

After the sexual orientation of a claimant has been established, and the actual persecution of LGBTQI+ people in the country of origin is proven, the assessment turns to whether or not the claimant runs the risk of being persecuted if they were to be sent back. In this, the use of the ‘discretion argument’ is sometimes observed. Although the CJEU ‘XYZ’ judgment banned the use of this requirement in Europe, more subtle versions of the discretion argument can sometimes still be discerned.¹⁵⁷

5.2.1.5 Reasons why

Several reasons have been proposed that might underlie the problems in LGBTQI+ claims described above. A first explanation is that many asylum systems are designed to limit the amount of granted

¹⁵² *ibid* 207 and 211; Deborah A Morgan, 'Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases' (2006) 15 *Law & Sexuality: Review of Lesbian, Gay, Bisexual & Transgender Legal Issues* 135, 136.

¹⁵³ Senthorun Raj, 'A/Effective Adjudications: Queer Refugees and the Law' (2017) 38(4) *Journal of Intercultural Studies* 453, 453.

¹⁵⁴ Wagner (n 138) 220.

¹⁵⁵ *ibid* 221.

¹⁵⁶ *ibid* 220.

¹⁵⁷ See section 5.2.2.3; Jansen (n 104) 152.

claims.¹⁵⁸ Naturally, this depends on the political climate of a country, but the general rhetoric towards migrants in many (western) countries of destination gives a negative indication thereof. A second explanation is that many decision-makers do not have a deep enough understanding of LGBTQI+ issues and the many factors that play into people's identities.¹⁵⁹ The way in which the claimant identifies (L/G/B/T/Q/I and/or something else), their gender, their cultural background, their educational background, their socio-economic background and possible other relevant factors all intersect to form claimants' experiences of their identity and the oppression they may face in their country of origin. A lack of regard for this interplay of factors causes the type of standardised Western-based assessments of LGBTQI+ asylum claims that lead to unjust rejections. Related to this is the fact that decision-makers, as many other people, have preconceived notions and personal biases related to LGBTQI+ people.¹⁶⁰ Because these are often unconscious processes, it is difficult to assess or eliminate their impact on asylum claims, especially with a lack of in-depth training.¹⁶¹ These explanations are helpful as they point towards things that could be improved in order to more fairly assess LGBTQI+ asylum claims.

5.2.2 The Netherlands

In the Netherlands, the most recent integral assessment of LGBTQI+ asylum claims is the one conducted by Sabine Jansen in 2018. This research found several problematic issues in the Dutch asylum system, most of which are in coherence with the challenges found worldwide.

5.2.2.1 *Substantiating the Self*

In obtaining evidence to prove their queer identity, LGBTQI+ asylum claimants in the Netherlands face similar problems as those described in section 5.2.1.2. In fact, the case that triggered the CJEU judgment banning photographic or video material of a sexual nature was a prejudicial question from the Dutch Council of State. Jansen argues that, even though this was not the intention of the judgment, in the Netherlands the 'XYZ' case has also led to a lack of admissibility of or regard for photographic material of a non-sexual nature.¹⁶² She argues that this should change. Additionally, she believes that other types of evidence, such as statements of partners, LGBTQI+ organisations or other witnesses should be allowed and considered more seriously.¹⁶³ At present, those statements are only considered

¹⁵⁸ *Kamerstukken II 1998-1999*, 26732, p. 1.

¹⁵⁹ *Dustin and Held* (n 19) 87.

¹⁶⁰ *Gross* (n 2), 994.

¹⁶¹ *Jansen* (n 104) 171.

¹⁶² *Jansen* (n 104) 112.

¹⁶³ *ibid* 174.

to the extent that they add factual information to the claim – meaning that a mere statement by a third party that the claimant is LGBTQI+ is not considered important.¹⁶⁴ The possible interests of third parties in the claimant obtaining asylum are also taken into account.¹⁶⁵ In addition, in the assessment of relationships, it can sometimes be a problem that the immigration service has a different understanding of what a ‘relationship’ means and of what constitutes homosexuality than the asylum seeker has.¹⁶⁶ Purely physical acts are not regarded as sufficient for either one: an aspect of love and deep feelings is needed.¹⁶⁷

5.2.2.2 Concluding credibility

In the credibility assessment, too, several issues were found. A main finding of Jansen’s report, that contextualises the importance of looking into the credibility assessments of LGBTQI+ asylum claims in the Netherlands, is the fact that a lack of credibility is the most common reason for rejection of LGBTQI+ asylum claims in the Netherlands (about 85 percent of the rejections).¹⁶⁸ In the credibility assessment of a claimant’s identity, the stereotypes discussed in section 5.2.1.3 have also been perceived to play a role in the Netherlands.¹⁶⁹ Although the more flagrant stereotype-based assessments are often overturned by the court in the appeals phase, a dependency on a stereotypical model of sexual identity formation can still be seen.¹⁷⁰ For a long time, the assessment was largely based on the claimant’s statements on their process of becoming aware of their sexual orientation, from shame and stigma to eventual self-acceptance, in a similar way as the DSSH model prescribes.¹⁷¹ In this, it was often also assumed that a claimant could pinpoint an exact moment at which they became aware of being ‘different’. After academic and NGO criticism, the policy has been changed and the latest internal instructions of the immigration service posit that it should not be assumed that everyone had an internal struggle before accepting their LGBTQI+ identity.¹⁷² However, it is still expected that the claimant had a thought process related to being perceived as ‘different’, meaning that, to a large extent, the reliance on a stereotypical process of ‘becoming aware of and accepting one’s identity’ is still present.¹⁷³

¹⁶⁴ Immigratie- en Naturalisatiedienst, *Werkinstructie 2019/17 Horen en beslissen in zaken waarin lhbt-gerichtheid als asielmotief is aangevoerd*, December 2019, 6.

¹⁶⁵ *ibid*

¹⁶⁶ Jansen (n 104) 100.

¹⁶⁷ *ibid* 74.

¹⁶⁸ Jansen (n 143) 46; Jansen (n 104) 41.

¹⁶⁹ Jansen (n 104) 124.

¹⁷⁰ *ibid*

¹⁷¹ *ibid*

¹⁷² Immigratie- en Naturalisatiedienst, *Werkinstructie 2019/17 Horen en beslissen in zaken waarin lhbt-gerichtheid als asielmotief is aangevoerd*, December 2019, 5.

¹⁷³ *ibid*

5.2.2.3 Seeing Severity

In relation to the ‘level of queerness’ needed to gain asylum, Jansen found that the discretion argument explained in section 4.4 (‘downplay your queerness to avoid persecution’) can still be recognised in the Dutch asylum process in certain forms. Although the policy states that a person’s lack of intention to express their orientation upon return will not lead to a rejection of the claim, it is still perceived as acceptable to take it into account in the assessment of severity.¹⁷⁴ This points towards a partial implementation of a ‘factual discretion’ argument, which consists of the idea that if someone was or is already closeted, it is okay to expect them to remain that way.¹⁷⁵

In the procedural aspects of asylum claims, late disclosure of one’s sexual orientation could have a negative impact in the Dutch asylum process.¹⁷⁶ At present, the fact that it was disclosed later can be taken into account in the credibility assessment, but cannot be the main basis of a rejection.¹⁷⁷ Another important procedural point is the fact that in the Netherlands, the courts have only limited possibility to review the immigration service’s decisions in terms of credibility: the only judgment the court can make is whether, considering the immigration service’s motivation of the negative credibility assessment, the negative decision was understandable.¹⁷⁸ This restrained review of asylum decisions makes it difficult to correct some of the possible mistakes that have been outlined in this section.

5.3 Bisexual asylum

Although the research on LGBTQI+ asylum claims worldwide is very extensive, only a handful of publications can be found on the topic of asylum claims on the basis of bisexuality. Overall, most of the challenges bisexual asylum claimants face are a variant of the challenges of other LGBTQI+ claimants, mixed with the factor of bisexual erasure that exacerbates their effects. In general, bisexual asylum claims are much less frequent than those of lesbians or homosexuals.¹⁷⁹ Additionally, the granting rates for such claims have been found to be lower than those for other sexual orientation-based claims.¹⁸⁰ It is argued that both these trends are due to more general processes of bisexual erasure that are reflected in asylum procedures.¹⁸¹

¹⁷⁴ Jansen (n 104) 18.

¹⁷⁵ *ibid* 134.

¹⁷⁶ *ibid* 36.

¹⁷⁷ *ibid* 36.

¹⁷⁸ ABRvS 13 april 2016, 201507952; ECLI:NL:RVS:2016:890, paragraph 9.

¹⁷⁹ Rehaag (n 2) 421-422.

¹⁸⁰ Gross (n 2) 999.

¹⁸¹ *ibid* 985.

5.3.1 Asylum procedures

The fact that asylum systems require a claimant to support their own credibility poses a challenge for bisexuals: namely, bisexuality is often perceived as an ‘easy’ ground for heterosexual people to base a faulty asylum claim on, as it allows for future opposite sex relationships.¹⁸² Gross argues that this, although possible, is an unjust assumption considering that the possibility to lie is present in all types of non-physical grounds for asylum, and that it would be illogical to base a feigned asylum claim on a category with such a low chance of success.¹⁸³

5.3.2 Substantiating the Self

In the process of trying to prove their sexual orientation, bisexuals face similar struggles as other LGBTQI+ claimants in gathering appropriate evidence. However, some categories of evidence that are available for other LGBTQI+ claimants may not be as easy to obtain for bisexuals: a possible history of opposite-sex relationships and a subsequent societal perception of the person as (temporarily) ‘heterosexual’ may have kept the claimant from joining an LGBTQI+ organisation, and may cause there to be less evidence available of their partial same-sex orientation.¹⁸⁴ Additionally, any opposite-sex relationships they may have had can be misinterpreted as evidence that the applicant is heterosexual.¹⁸⁵

This kind of misinterpretation is only possible because of a lack of knowledge of and possible biases against bisexuality in the immigration service.¹⁸⁶ Many of the biases against bisexuals that are present in general society, such as the idea that bisexuality is ‘just a phase’ or the idea that bisexuals can simply choose between heterosexuality and homosexuality, are also held by some decision makers in the asylum process.¹⁸⁷ This leads to bisexual asylum claimants not only having to convince the immigration service of the credibility of their sexual orientation, but also of the validity thereof.¹⁸⁸ Insofar as judgments of LGBTQI+ asylum claims are made on the basis of stereotypes, bisexuals experience the problem that there are no clear stereotypes for them to conform to: due to bisexual invisibility, there is no clear public image of what a bisexual looks like or how they behave.¹⁸⁹ This

¹⁸² *ibid* 1002.

¹⁸³ *ibid* 1002.

¹⁸⁴ Wagner (n 138) 222.

¹⁸⁵ *ibid* 221; Gross (n 2) 997.

¹⁸⁶ Rehaag (n 2) 425; Gross (n 2) 999.

¹⁸⁷ Wagner (n 138) 206-207 and 215.

¹⁸⁸ *ibid* 217.

¹⁸⁹ Rehaag (n 48) 87; Wagner (n 138) 215.

means that bisexual asylum claimants do not have the option to possibly boost their credibility by conforming to a somewhat stereotypical narrative.¹⁹⁰

5.3.3 Seeing Severity

In the determination whether bisexuals are ‘queer enough’ to obtain asylum, the definition of a particular social group is of importance. For this, the claimant has to show that they share a common characteristic that is innate or so fundamental that they should not be asked to change it, or an unchangeable common background, and that they are perceived as having a distinct identity in their country of origin.¹⁹¹ This is often interpreted as meaning that the characteristic needs to be something fixed and intrinsic, not just a “mere inclination”.¹⁹² Because immigration services often use the monosexual viewpoint that a homosexuality and heterosexuality are the only two ‘real’ sexual orientations, bisexuals are perceived as having the possibility to choose between the two.¹⁹³ This level of perceived ‘flexibility’ leads to the conviction that a bisexual orientation is not fixed or intrinsic, and thus that bisexuals do not fall under the particular social group ground.¹⁹⁴ A further challenge is that bisexuals are sometimes perceived as lacking persecution, because they have access to heterosexual privilege.¹⁹⁵ In reality, however, their status as bisexuals rarely excludes them from discrimination by people who are homophobic, and sometimes even limits their access to the safe spaces available to the rest of the community.¹⁹⁶ A lack of specific information on bisexuals in country of origin information makes it difficult to point out these issues and prove the real risk of persecution they face.¹⁹⁷ Even if a bisexual’s particular social group membership and a real risk of persecution are believed, they may still face the argument that they could simply opt for only having opposite sex relationships in order to avoid persecution.¹⁹⁸ This discretion argument is sometimes used more easily towards bisexuals, as for them it would not mean having to forgo any type of sexual or romantic contact, but could limit themselves to opposite-sex connections.

Underlying these problems is the general process of bisexual erasure as explained in the theoretical framework. An additional explanation of why the monosexual and fixed views of sexuality

¹⁹⁰ Rehaag (n 48) 87; Wagner (n 138) 220-221.

¹⁹¹ European Asylum Support Office, *EASO Guidance on Membership of a Particular Social Group* (Publication Office of the European Union, 2020), 11.

¹⁹² Dustin and Held (n 19) 81.

¹⁹³ *ibid*; Rehaag (n 48) 28.

¹⁹⁴ *Ibid* 83.

¹⁹⁵ Rehaag (n 48) 88.

¹⁹⁶ *ibid*

¹⁹⁷ *Ibid*, 90; Wagner (n 138) 223.

¹⁹⁸ Rehaag (n 48) 93.

that are central in bisexual erasure are so present in asylum systems is the fact that these institutions are built to give a 'yes or no' answer.¹⁹⁹ This binary and rigid setup clashes with the fluidity and binary-breaking characteristics of bisexuals, leading to their erasure from asylum claims.

5.4 Conclusion

As shown above, LGBTQI+ asylum claimants face many different problems in their asylum procedure. The special position of bisexuals in between the sexuality binary, in combination with the societal reaction to that, lead to additional challenges for bisexuals, that result in comparatively low granting rates. The next chapter will use the issues found in this chapter, as well as the theory from chapter 3 and the legal framework from chapter 4, as a background for analysing interviews and court cases on bisexual asylum.

¹⁹⁹ Gross (n 2) 1000.

6. Discussion

6.1 Introduction

To analyse the current situation of bisexual asylum claimants in the Netherlands, an analysis of several types of data was conducted. This data consists of six interviews (indicated as A to F, for privacy purposes) conducted for the purposes of this research, and of twenty-two Dutch court cases. Interviewee A was an asylum lawyer with experience with LGBTQI+ claimants, B a bisexual refugee who eventually obtained asylum on the basis of a claim of prosecuted homosexuality (even though he personally still identifies as bisexual), C a NGO worker at a refugee rights organisation, D another asylum lawyer with experience with LGBTQI+ claimants, E a homosexual asylum claimant at the start of his procedure and F a bisexual asylum claimant at the start of his procedure.

The legal framework of Chapter 4 gives a background from which to understand the rules at play in bisexual asylum claims, the context of Chapter 5 gives an indication of the challenges that might be found, and the theoretical framework of Chapter 3 is used to explain and further analyse the themes and codes found. Both the interviews and the court cases were coded, focusing on the question: *'What are the current challenges in the Netherlands to the granting of refugee status for asylum seekers who base their claim on persecution due to their bisexual orientation?'*. Additionally, the question *'What elements mentioned in the literature on LGBTQI+ asylum claims can be recognised?'* was included, in order to make it a more complete assessment of the status of LGBTQI+ asylum claims in the Netherlands. The findings will be introduced sorted by theme (in coherence with the headings of Chapter 5), and the similarities and differences between the findings from the interviews and the court cases will be pointed out.

The general themes and codes found in the interviews were:

Asylum procedures	Reasons to reject Opaque decision-making Perceived position of power Discrepancy between policy and reality
Substantiating the Self (evidence & content)	High standards Difficulty in answering questions Communication problems Similar cultural background
Substantiating the Self: Bisexuality	'Go Gay' Specificity vs broadness
Concluding Credibility (credibility assessment)	Lack of knowledge on LGBTQI+ identities Judgments based on stereotypes Problems with opposite-sex relationships Lack of quality IND decision makers
Concluding Credibility: Bisexuality	General adversity Lack of knowledge on bisexuality Lack of visibility Binary view of sexuality Fixed view of sexuality Grouping bisexual people under homosexual
Seeing Severity (assessment of severity)	Discretion argument
Seeing Severity: Bisexuality	Stronger discretion argument Perceived lack of persecution

The general themes and codes found in the court cases were:

Asylum procedures	Opaque decision-making
Substantiating the Self	High standards
Concluding Credibility	Awareness and acceptance Moment of awareness and acceptance 'Too risky to be credible' Knowledge of the Netherlands
Concluding Credibility: Bisexuality	Fixed view of sexuality

6.2 Findings

6.2.1 Asylum procedures

Both in the interviews and in the court cases, several issues were raised that related to asylum claims in general.

6.2.1.1 Reasons to Reject

Several interviewees perceived the IND to be looking for reasons to reject a claim while still following the rules, rather than conducting a fair assessment of its credibility. One way in which this was done was trying to find small inconsistencies in the statements and putting a lot of emphasis on those. Examples of this in the interviews were asking a claimant how much money he had in his pocket when fleeing their country – five years after the fact, and arguing that another claimant was making ‘conflicting’ statements because in one interview she declared the number plates of a car to have been blue, and in the other one green. Interestingly, the two interviewed asylum claimants who were still at the start of their process (waiting for their interview) had the impression or at least hope that the IND is just doing its job. All other interviewees were more critical, with one person calling the IND “the rejection organisation of the Netherlands”.²⁰⁰ It was not possible to infer this topic from the court cases.

6.2.1.2 Opaque decision-making

The decision-making processes of the immigration service was found to be opaque. One aspect thereof was that the IND did not explain sufficiently how certain issues pointed out by lawyers (such as the educational level of the claimant) were taken into account in the decision. A: *“They [the immigration service] just say ‘we took it into account’, but you don’t see at all in the decision how it was taken into account”*.²⁰¹ Additionally, it was often perceived that the arguments provided by the immigration service to justify a negative decision were not extensive enough. One of the bisexual asylum claimants perceived this lack of argumentation to be especially detrimental in his situation, when the IND rejected his claim after he had gone to court and won the case, and again after he had gone to the high court and won the case. B: *“When the court made a positive decision, who are you [the IND] then that you give me negative again after the decision of the court? Even after the high*

²⁰⁰ Interview with [interviewee D], LGBTQI+ asylum lawyer (Maastricht, the Netherlands, 6 May 2020), 33.

²⁰¹ Interview with [interviewee A], LGBTQI+ asylum lawyer (Maastricht, the Netherlands, 17 April 2020), 4.

court, you refuse. It's not normal".²⁰² This lack of argumentation was also perceived in the court cases, where judges repeatedly critiqued the IND on this.

Using late disclosure as a negative point in the assessment, even though it is not officially allowed to use it as a basis for rejection, further contributed to the opacity of the decision-making process (3). On this, interviewee A stated: *"You can feel on the basis of how the decision is worded, that they do want to take it into account in the definitive decision. They will never say it that way on paper, but you can feel that it's happening"*.²⁰³ This tendency was also found in the court cases, where in one case it was rectified by the court.

6.2.1.3 Perceived position of power

The immigration service and the people working at the immigration service were perceived to be in a position of somewhat unchecked power. This perception was mainly held by interviewee B. He perceived this position of power in misbehaviour of immigration service decision-makers in his interview and decision-making process, and stated that *"the IND has full power in this country"*.²⁰⁴

An example of this was the fact that the IND worker conducting his interview laughed at a certain point during the interview, and when the claimant told him he could not laugh at him, he was given the answer that he could just file a complaint. The perception of position of power of the IND could be exacerbated by a lack of ability of courts to fully review the IND's decisions. As interviewee C said, *"it [a court case] is not a completely new chance or anything like that."*²⁰⁵

6.2.1.4 Discrepancy between policy and reality

Several interviewees perceived differences between the official policies of the IND and the way the procedure went in real life, arguing that the guidelines were not always adhered to.

²⁰² Interview with [interviewee B], bisexual asylum claimant who received asylum on the basis of homosexuality (Maastricht, the Netherlands, 20 April 2020), 16.

²⁰³ Interview with [interviewee A], LGBTQI+ asylum lawyer (Maastricht, the Netherlands, 17 April 2020), 6.

²⁰⁴ Interview with [interviewee B], bisexual asylum claimant who received asylum on the basis of homosexuality (Maastricht, the Netherlands, 20 April 2020), 16.

²⁰⁵ Interview with [interviewee C], NGO worker at Dutch refugee rights organisation (Maastricht, the Netherlands, 1 May 2020), 25.

6.2.2 Substantiating the Self

In providing evidence for and adhering to the content requirements for their sexual orientation assessment, both LGBTQI+ claimants in general and bisexual claimants can face several challenges.

6.2.2.1 General

6.2.2.1.1 High standards

The standards for the immigration service to believe a claimant's identity were perceived to be very high. This was especially noticeable in the standards for defining what a sexual orientation entails and what a relationship should look like. For the definition of a sexual orientation, it was clear in both the interviews and the court cases that the IND does not believe that a sexual orientation can be based merely on sexual attraction: deeper affection or genuine love are required. However, in one court case, the court criticised the IND for this decision and reversed it, arguing that this argument did not hold and was not in coherence with the policy.²⁰⁶ The expectations towards relationships were often perceived as high, in the sense that a lot of depth was expected. As interviewee B said, *"There are usually very high expectations when it comes to the statements of partners, and even courts often deem it to be 'not enough', even though (...) the majority of (...) people, they're also just watching some Netflix on television, and talking about very little, and watching a soccer game? (...) Not that I'm that much of an intellectual, (...) but at least sometimes I really talk about something. But a lot of people don't, I'm convinced of that. But they do expect that. (...) The depth of the relationship."*²⁰⁷

Furthermore, it was perceived third party statements (either from partners or from other witnesses) were quickly overlooked, usually because the general story of the claimant had not been convincing enough. Interviewee A found this strange, as (in the case of a partner statement) *"it is actually a substantiation of the argument that (...) [the client] has a relationship with this person"*.²⁰⁸ The court cases supported all three of the findings mentioned in this section.

6.2.2.1.2 Difficulty in answering the questions

In the interviews, several points of difficulty in answering the questions were mentioned, and it was pointed out that the immigration service often did not take these difficulties into account enough. The main difficulties mentioned were the fact that it is the first time people are talking about their sexual

²⁰⁶ Rb. Den Haag, 19 mei 2017, ECLI:NL:RBDHA:2017:6679, par. 7.3.

²⁰⁷ Interview with [interviewee B], bisexual asylum claimant who received asylum on the basis of homosexuality (Maastricht, the Netherlands, 20 April 2020), 34.

²⁰⁸ Interview with [interviewee A], LGBTQI+ asylum lawyer (Maastricht, the Netherlands, 17 April 2020), 9.

orientation, and the claimant's cultural and educational background that may impede them from answering as extensively as expected by the IND. Interviewee D gave an example: *"[I had a client and] he had an IQ of 32. (...) And with him they were constantly stressing that 'from the claimant we can expect that he gives us more insight into the processes he experienced'. Way too short-sighted."*²⁰⁹

6.2.2.1.3 Communication problems

In the interviews, it was mentioned that several communication problems can appear in the asylum determination interviews. These consisted of language-based misunderstandings and misinterpretations and a lack of directness from the IND towards the claimant. Interviewee A explained: *"Sometimes they ask questions and they expect a certain answer, and they only say that for the first time in the 'voornemen' [decision], even though they did not ask the actual question that they want an answer to. So, they expect the client to just bring up a lot of stuff themselves."*²¹⁰

6.2.2.1.4 Similar cultural background

Several interviewees noted that it could be an inhibiting factor for the claimant if someone present at their interview (either the interpreter or the IND decision-maker) was from their own cultural background, as this person may share the beliefs of the society that persecuted the client before. As stated by interviewee B: *"A Muslim person who works at the IND should not interview a person who is a Muslim LGBT."*²¹¹.

6.2.2.2 Bisexuality

6.2.2.2.1 'Go Gay'

In the interviews it was often mentioned that bisexuals are advised, either by their lawyer or by other asylum claimants who have gone through the process already, to claim asylum as lesbian or homosexual instead. Although sometimes they do not take this advice, if they do it can be detrimental to their claim because, as interviewee C explained, *"if they don't tell the whole story then you get the situation that the IND notices 'someone's a bit more closed, or is leaving out parts of the story'. And*

²⁰⁹ Interview with [interviewee D], LGBTQI+ asylum lawyer (Maastricht, the Netherlands, 6 May 2020), 25.

²¹⁰ Interview with [interviewee A], LGBTQI+ asylum lawyer (Maastricht, the Netherlands, 17 April 2020), 5.

²¹¹ Interview with [interviewee B], bisexual asylum claimant who received asylum on the basis of homosexuality (Maastricht, the Netherlands, 20 April 2020), 19.

that can come across as deceitful, even though it was not meant that way".²¹² In one case, a bisexual friend of the interviewee E had told him that *"I don't have any girlfriend anymore, we broke up, and I'm seeking asylum as gay"*.²¹³ This indicates how changing their asylum status can interfere with the possibility for opposite-sex relationships of bisexuals. Interviewee F, who decided to claim asylum as bisexual in spite of the stories he heard, stated [through his interpreter]: *"he has no doubt about going on with the bisexuality because he thinks that it's his reality and he just needs to be clear and honest about his reality"*.

6.2.2.2.2 Specificity vs Broadness

One interviewee indicated that the broadness of bisexuality (the fact that bisexuals can have both same-sex and opposite-sex partners) was at odds with the specificity of the questions asked by the IND. He stated *"What the IND often does is saying 'how is that for you exactly?'. You're really pushed into a corner that way, when you're being interviewed. (...) That 'exactly'. (...) And the broader the area you need to discuss, the harder it becomes for you. [So the broadness of bisexuality] (...) could be a problem."*²¹⁴

6.2.3 Concluding Credibility

In the credibility assessment of their sexual orientation, both LGBTQI+ and bisexual claimants may face issues, mainly related to knowledge and training of IND decision-makers and the visibility of the category itself.

6.2.3.1 General

6.2.3.1.1 Lack of knowledge on LGBTQI+ identities

Almost all interviewees indicated that decision-makers from the IND sometimes had a lack of knowledge on LGBTQI+ identities. Interviewee D noted that the IND as an organisation does have some knowledge, as they sometimes conduct researches on these topics, but he's *"not quite sure*

²¹² Interview with [interviewee C], NGO worker at Dutch refugee rights organisation (Maastricht, the Netherlands, 1 May 2020), 22.

²¹³ Interview with [interviewee E], homosexual asylum claimant (Maastricht, the Netherlands, 13 May 2020), 36.

²¹⁴ Interview with [interviewee D], LGBTQI+ asylum lawyer (Maastricht, the Netherlands, 6 May 2020), 34.

where that knowledge is".²¹⁵ Interestingly, the two interviewees who were still at the start of their asylum procedure expected the IND to have this knowledge.

6.2.3.1.2 Judgments based on stereotypes

One interviewee perceived the IND to expect him to 'act gay' in the way he moved his body. He expressed not trying to adhere to that because it was not the way he is. *"But they were really expecting this from me as well, that I will do something like this. And I told them 'everything is in my heart, in my blood. And I cannot change this, What I am, I am.' So they were really thinking that I was a straight person and that I was lying to them. Because I don't move my hands, and I don't move my body"*.²¹⁶ This type of judgment based on stereotypes was not found in the court cases.

6.2.3.1.3 Awareness and acceptance

In the court cases, the claimant's declarations on their 'process of self-awareness and -acceptance' were often seen as not being extensive or deep enough. A lack of internal struggle quickly led to a negative credibility assessment.²¹⁷ This was especially the case if the claimant was religious.²¹⁸ Even after the introduction of internal policy 2018-9, in which it is stated that it can no longer be expected that the claimant had an internal struggle to accept their identity, this argument could still be perceived.²¹⁹ In some cases, this was rectified by the court.²²⁰

6.2.3.1.4 Moment of awareness and acceptance

A related expectation that could be found in the court cases was the idea that there is one specific moment in which a claimant becomes aware of their sexual orientation, and a specific moment in which they accept it, and that those moments can be pinpointed. If the claimant mentioned several moments or indicated fluctuations in their acceptance, it was regarded as contradictory and therefore

²¹⁵ Interview with [interviewee D], LGBTQI+ asylum lawyer (Maastricht, the Netherlands, 6 May 2020), 32.

²¹⁶ Interview with [interviewee B], bisexual asylum claimant who received asylum on the basis of homosexuality (Maastricht, the Netherlands, 20 April 2020), 15.

²¹⁷ Rb. Den Haag 18 november 2016, ECLI:NL:RBDHA:2016:14237, par. 13; Rb. Den Haag, 10 november 2017, ECLI:NL:RBDHA:2017:13078, par. 6; Rb. Den Haag, 3 april 2018, ECLI:NL:RBDHA:2018:3770, par. 5.2; Rb. Den Haag, 3 april 2018, ECLI:NL:RBDHA:2018:9727, par. 8.2.

²¹⁸ Rb. Den Haag, 7 februari 2018, ECLI:NL:RBDHA:2018:1606, par. 5; Rb. Den Haag, 10 september 2018, ECLI:NL:RBDHA:2018:10861, par. 4.

²¹⁹ Rb. Den Haag, 27 september 2019, ECLI:NL:RBDHA:2019:13329, par. 6.3; Rb. Den Haag, 7 november 2019, ECLI:NL:RBDHA:2019:11958, par. 5.2.

²²⁰ Rb. Den Haag, 3 december 2019, ECLI:NL:RBDHA:2019:12876, par. 4.3

not credible. This is evidence of the use of a linear and staged model of sexual identity formation, which has been criticised by queer scholars.

6.2.3.1.5 'Too risky to be credible'

In several court cases, the stories of the claimant on the way they expressed their sexual orientation in their country of origin (through attendance to certain events, or through sexual contacts) was found to be too risky to be true, considering the severe punishments for homosexuality in their countries of origin.²²¹ However, this puts asylum claimants at something of a catch-22, where they are either confronted with their sexual behaviours being too risky, or their sexual behaviours being too infrequent.

6.2.3.1.6 Knowledge of the Netherlands

A last point that stood out in the court cases was the fact that in several cases, it was found strange that the claimant had limited knowledge about the position of LGBTQI+ people in the Netherlands, and this was used as a negative argument in their credibility assessment. This point was not brought up in the interviews.

6.2.3.1.7 Problems with opposite-sex relationships

One interviewee indicated that past opposite-sex relationships could be a problem for people claiming asylum on the basis of homosexuality. This indicates a fixed view of sexual orientation, as will be discussed in section 6.2.3.2.5.

6.2.3.1.8 Lack of quality IND decision-makers

Some interviewees had the perception that IND decision-makers were sometimes not fit to make the judgments they were making. The main complaints were that IND decision-makers could have a lack of knowledge about the country of origin of the claimant, and that they may lack general open-mindedness and a certain level of education. Interviewee D told a story about an IND-decision maker who saw someone eat tuna in the canteen and stated that she would never eat that, because it was

²²¹ Rb. Den Haag, 19 mei 2017, ECLI:NL:RBDHA:2017:6679, par. 10.3; Rb. Den Haag, 7 februari 2018, ECLI:NL:RBDHA:2018:1606, par. 17; Rb. Den Haag, 3 april 2018, ECLI:NL:RBDHA:2018:3770, par. 5.2.

way too weird. “Can someone really analyse the person in front of them [an LGBTQI+ asylum claimant] well if they already think tuna in a can is very strange and special?”²²²

6.2.3.2 Bisexuality

6.2.3.2.1 General adversity

The IND was perceived by several interviewees to be inherently biased against bisexual asylum claims. This was said to manifest in a reluctance to grant asylum on the basis of bisexuality, and a general attitude of disbelief towards bisexuals. For one interviewee, this was proven by the fact that his claim as a bisexual got rejected several times (even after he won a court case and an appeal), and then immediately got granted when he eventually changed his claim to homosexual in an additional interview after the second court case. “This was the important point, they just wanted to change this [changing the bisexuality to homosexuality]. They didn’t tell me, but they just wanted to change, they wanted to hear this change from me.”²²³ This could be seen as a practice of bisexual erasure, specifically individual erasure as explained in section 3.2.1.2: the identity of a bisexual being questioned more harshly than that of for example a lesbian or gay person.

6.2.3.2.2 Lack of knowledge on bisexuality

One interviewee perceived that the IND decision-makers he interacted with had a lack of knowledge on bisexuality. This lack of knowledge was by through the fact that when he expressed having dated women, the IND wrote down in the interview report that “this is also a negative part of him, that he also dated women”.²²⁴

6.2.3.2.3 Lack of visibility

The scarce occurrence of bisexual asylum claims was perceived by several interviewees to be an inhibiting factor in itself, as it meant that less court judgments were available to use as possible precedent. The court cases found and analysed by the researcher naturally show that there is at least

²²² Interview with [interviewee D], LGBTQI+ asylum lawyer (Maastricht, the Netherlands, 6 May 2020), 32.

²²³ Interview with [interviewee B], bisexual asylum claimant who received asylum on the basis of homosexuality (Maastricht, the Netherlands, 20 April 2020), 13.

²²⁴ Interview with [interviewee B], bisexual asylum claimant who received asylum on the basis of homosexuality (Maastricht, the Netherlands, 20 April 2020), 14.

some material available, although indeed significantly less than that on some other types of LGBTQI+ asylum cases.

6.2.3.2.4 Binary view of sexuality

One claimant strongly experienced that IND operates with a binary notion of sexuality. B: *“They only understand when you say you are straight or you are homosexual”*. This was not corroborated by any of the other interviewees, nor found in the court cases.

6.2.3.2.5 Fixed view of sexuality

A fixed view of sexuality was perceived in several ways, both in the interviews and in the court cases. Firstly, it was seen in the question how much percent a bisexual claimant liked men, and how much women: a consistent answer was expected in these cases. Additionally, if the IND perceived there to be an element of choice or fluidity in the sexual orientation, that posed a problem or was seen as ‘contradictory’, leading to a ‘not credible’ claim. Noting the fact that bisexuals were perceived as having a choice, as explained by an interviewee, this was an obstacle for bisexual asylum claims. However, taking into account perspectives from queer theory, it can be argued that sexual orientation is not stable at all, and that levels of attraction or desire towards different genders may fluctuate. A more flexible view of sexuality is thus needed.

6.2.3.2.6 Grouping bisexual people under homosexual

One interviewee experienced being classified as a homosexual (the IND noted him down as homosexual in the interview report), even though he stated that he was bisexual. This was corrected when he pointed out the problem. This practice, however, can be seen as an instance of class erasure, where bisexuality is entirely subsumed under another category. This class erasure was also perceived in the selection of court cases, as in several court cases the claimant was described as ‘homosexual or bisexual’, omitting an important distinction.

6.2.4 Seeing Severity

A few issues were found in the severity assessment of LGBTQI+ and bisexual asylum cases, mainly relating to the discretion argument.

6.2.4.1 General

One interviewee indicated that the discretion argument, in a way, is still present in decision-making, stating that *“in reality the rule is that someone who says ‘I’m homosexual’ should be able to live like a heterosexual person in the country of origin. But that is interpreted in a much more narrow way. (...) it is often noted in a negative way that ‘you don’t have any plans to make your homosexuality seen in your country of origin, to stand in the gap, to start an organisation, to make a political point of it, or to start a court case about it’”*.²²⁵ No examples of the discretion argument were found in the court cases.

6.2.4.2 Bisexuality

6.2.4.2.1 Stronger discretion argument

Several interviewees indicated the thought or the fear that the discretion argument would be used more easily on bisexuals. As interviewee C noted, *“I think that few people call themselves that [bisexual] because in the asylum claim they might be afraid that IND will just say ‘well can’t you just solve that by only starting relationships with people of the opposite sex if that’s okay with you anyways’. I think that people find it very complicated to say that”*.²²⁶ However, none of the interviewees actually experienced the use of this argument themselves. In the court cases, it was not found either.

6.2.4.2.2 Perceived lack of persecution

It was indicated by several interviewees that the IND may perceive a lack of persecution of bisexuals in the country of origin, even though in reality (as explained by the interviewees) the level of persecution is the same. Interviewee B stated that *“when I came here, the problem was: in our country, if you’re bisexual or homosexual, the people view it as the same. There’s no ‘discount’ for bisexuals.*

²²⁵ Interview with [interviewee D], LGBTQI+ asylum lawyer (Maastricht, the Netherlands, 6 May 2020), 30.

²²⁶ Interview with [interviewee C], NGO worker at Dutch refugee rights organisation (Maastricht, the Netherlands, 1 May 2020), 20.

*But here they think it is normal, a lot of people are bisexual here”.*²²⁷ The court cases did not indicate this argument.

6.3 Analysis

The findings from the interviews and court cases largely confirm the issues described in the context and provide evidence for their presence in the Netherlands. Several findings stood out, or indicated new issues that had not been explored before.

A large part of the findings that applied to asylum procedures in general were new and somewhat worrying: the indication that the IND focuses on finding reasons to reject a claimant, often does not sufficiently explain its decisions, is seen as an institution that has unlimited power towards claimants, and does not always follow its own policies points towards a stressful and vulnerable position of asylum claimants in the Netherlands.

In the assessment of evidence and content of LGBTQI+ asylum claims, it was surprising how much emphasis was put on the idea that sexual orientation needs to include genuine feelings, not mere sexual attraction. In light of the fact that the laws that criminalise homosexuality often target conduct, it might be important to rethink the goal of the category of LGBTQI+ asylum: is it to shelter people who are prosecuted on the basis of the things they do, or to exclusively protect people who want to love someone they cannot love in their country of origin? This is a quite philosophical question, the answer of which does not fall within the scope of this research, but finding a clear answer to this could be beneficial to the openness and clarity of the Dutch asylum system. The question how much content and depth are required for something to be classified as a relationship, too, could benefit from more explicit clarification. Here, interviewee D’s statement indicates that it is important to evaluate what is fair to ask from such a relationship, in comparison with how people in a relationship may generally interact with each other.

In the credibility assessment of LGBTQI+ asylum claims, an important point is the extent to which expectations of a process and moment of awareness and acceptance are still in place. As argued in section 5.2.1.3, such a storyline is based on a rigid view of sexual orientation that is not in line with queer theory. Considering the existing criticisms of such an approach, and the fact that the IND accepted those criticisms to a certain extent by officially putting less focus on the process of awareness and acceptance in their policy, it may be good if this point of assessment is taken out entirely. Another

²²⁷ Interview with [interviewee B], bisexual asylum claimant who received asylum on the basis of homosexuality (Maastricht, the Netherlands, 20 April 2020), 10.

aspect that stood out in the credibility assessment was the interviewee's perception that IND decision-makers lacked knowledge or open-mindedness. In LGBTQI+ asylum claims, a certain level of openness is needed to be able to conduct a proper assessment. Therefore, stricter selection criteria or extra personal bias trainings could be helpful to alleviate this situation.

For bisexuals, some of the tendencies described in the literature were found, some were not observable, and some new ones were added. In the provision of evidence, it was clear that the advice to 'go gay' is still very much in use for bisexuals, both from lawyers and from friends. Its possible implications were also illustrated, with a claimant's friend having to break up an opposite-sex relationship because he was claiming asylum as homosexual. The 'go gay' advice puts bisexuals in a difficult position, where they either lie and run the risk of their story being perceived as 'not authentic', or they stay true to their bisexual orientation but may face difficulties in their claims because of a perceived aspect of choice and a perceived lack of persecution. The comment by one of the interviewees on the broadness of bisexuality, in opposition to the specificity of IND questions and expected answers, can be added to the ways in which the setup of the legal system may reinforce bisexual erasure.

In the credibility assessment, the general adversity towards granting asylum on the basis of bisexuality that was observed by some of the claimants is worrying. Bisexuals being held to a higher standard can in itself be seen as an act of individual erasure. Although a binary view of sexuality could not be concluded on the basis of the data, a fixed view was definitely perceived, most clearly demonstrated by questions on 'how much percent' a bisexual likes a certain gender. Such expected specificity and continuity feeds into the opposition between the freeness of bisexuality and the rigidity of the legal system that is at the basis of bisexual asylum claimant's challenges. The class erasure that took place in the grouping of bisexuals under 'homosexuality', both in one IND interview and in several court cases, is another indication of bisexual erasure in the Dutch asylum system.

For the determination of severity in bisexual asylum claims, it was interesting to see that the factors that most generally scare bisexual asylum claimants into claiming asylum under another basis instead – the strengthened version of the discretion argument and the idea that they would lack persecution – were not found in the court cases at all. On the basis of the data it is not possible to conclude that these arguments are not used at all, but it would be interesting to further explore where these beliefs among bisexual claimants come from.

6.4 Limitations

There are several ways in which the outcomes of this research may have been distorted or influenced. Firstly, there is a possibility of researcher bias. As a bisexual-identified woman, and a human rights student, the researcher has a clear opinion that LGBTQI+ and bisexual asylum claims should be treated carefully, which may have caused a more critical view of the immigration service. Secondly, the way in which the interviews were set up and conducted could have skewed the research results. The small number of interviewees and personal, unsystematic way of selecting them results in a selection bias – although this was difficult to avoid, considering the specificity of the research and the limited time available. The fact that two of the selected refugees were still at the start of their procedure (something that was not known by the researcher until the interviews) led to short interviews with little usable data, leading to a partial reliance on one interview to describe the experiences of bisexual asylum claimants. However, the simultaneous analysis of court cases helped to corroborate certain findings. Additionally, the way in which interview questions were asked and the way in which the researcher spoke in the interviews may have influenced the interviewee's answers. Lastly, problems with language and translation (one claimant did not speak English very well, another claimant had to communicate through an interpreter, and the quotes from three interviews had to be translated from Dutch to English) may have led to some misinterpretations or loss of meaning.

7. Conclusion

This research has explored the topic of asylum claims on the basis of persecution due to bisexual orientation in the Netherlands. In the theoretical framework, different approaches to defining and understanding sexual orientation were introduced. Importantly, it was noted that queer theory allows for a more flexible and fluid understanding of sexual orientation. Additionally, Yoshino's theory of bisexual erasure was explained, providing insight into the ways in which bisexuality is erased – class erasure, individual erasure, and delegitimisation – as well as the reasons why both straight and queer communities might strive towards that erasure. The legal framework and context chapters provided additional background to the topic of bisexual asylum by showing the rules at play and the difficulties faced by both LGBTQI+ and bisexual asylum claimants.

In the analysis of the data, many of the challenges for LGBTQI+ asylum claimants described in the context were found to exist in the Netherlands too. An important aspect in this was the expectation that the claimant went through some type of internal struggle or awareness process in the recognition and acceptance of their sexual orientation – an approach that is criticised by those with a queer theory perspective. New findings were the perception that the IND focuses on trying to reject claimants, does not provide sufficient insight into its decision-making process, does not always follow its own policies and is in a strong position of power. The fact that some of these processes were not noticed by the interviewees who were at the start of their procedure, but were stressed by lawyers and the claimant that completed his asylum procedure, indicates that it may be interesting to conduct a future research on the perceptions of (LGBTQI+) asylum claimants on the IND and the way those perceptions change as they move further in the procedure.

For bisexual asylum claimants, the prevalence of the advice to claim asylum as lesbian or homosexual stood out. When looking at the actual problems bisexual claimants may face in their procedures, several challenges were found. The fixed view of sexuality that leads to the exclusion of bisexuals was found to be used by the IND. This feeds into the broader argument that the rigidity of categories used in legal systems and the binarism that is inherent in a procedure that is meant to give a 'yes or no answer' can lead to erasure of bisexuals. The perceived reluctance of the IND to grant asylum on the basis of bisexuality adds to this argument. In addition to this, the interviewees indicated that the IND may see bisexuals as being persecuted to a lesser extent in their country of origin, even if that is not their lived reality. The interviewees also indicated the possible use of a stronger discretion argument. Both the IND's assumption of a lack of persecution and the IND's use of a stronger discretion argument, however, could not be found in the court cases. It would thus be interesting to ask the question where these beliefs from the people who engage with the asylum process on the

claimant's side come from. Namely, the perception that the IND will treat bisexual asylum claimants harshly in this way contributes to the idea that bisexuals are better advised to claim asylum as a homosexual or a lesbian, which seems to be consistently perpetuated among bisexual asylum claimants and their lawyers. It is thus recommended that a larger future research be conducted on the topic of bisexual asylum claims that includes a larger number of interviews, as well as an in-depth analysis of case files of bisexual asylum claimants, in order to uncover in a more conclusive way the challenges that bisexual asylum claimants in the Netherlands face. This future research could also attempt to analyse why the processes of bisexual erasure that were perceived in the asylum procedure are in place, looking at the interests of queer and straight communities in this process of bisexual erasure as described in the current research. This is something that, due to the nature of the data, could not be achieved in the current research.

Looking at the outcomes of this research, it is important for research on the topic of asylum claims on the basis of persecution due to bisexuality in the Netherlands to continue. Because bisexual asylum claimants, as much as other LGBTQI+ asylum claimants, deserve to be honest about their reality.

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Appendix I. Coding Tables

I. Coding Tables Court Cases

Theme	Code	Description	Quotes
Asylum procedures	Opaque decision-making	The opacity of decision-making described in the interviews was also noticeable in the court cases. In several judgments, the court critiqued the IND for a lack of motivation of their decisions, or a lack of motivation on how certain important characteristics of the claimant were taken into account (1). Using late disclosure as a negative argument towards someone's asylum claim was also found in the court cases (2), where in one case it was overturned by the court and in another it was found just.	<p>1 Uit het bestreden besluit volgt niet op welke wijze verweerder zijn onderzoek naar een gestelde seksuele gerichtheid verricht. Verweerder heeft dan ook onvoldoende inzichtelijk gemaakt dat sprake is van een vastgelegde, op de aard van het asielrelaas toegespitste onderzoekssystematiek zoals bedoeld in voormelde uitspraak van de Afdeling van 8 juli 2015. (Rb. Den Haag 5 november 2015, ECLI:NL:RBDHA:2015:12713, par. 5.3.)</p> <p>Verweerder heeft hiermee [de beschrijving van thema's die gebruikt worden voor het vaststellen van de geloofwaardigheid van seksuele gerichtheid] nog immer onvoldoende de gehanteerde onderzoekssystematiek inzichtelijk gemaakt. De door verweerder genoemde thema's zijn algemeen geformuleerd en zijn niet nader toegelicht of uitgewerkt, al dan niet door het vaststellen van vragenlijsten. Verweerder heeft in dit verband ter zitting desgevraagd verklaard dat voor het onderzoek naar een gestelde seksuele gerichtheid geen specifiek op die asielzoekers toegespitste vragenlijst is ontwikkeld. Dit brengt onder meer het risico met zich dat een asielzoeker tijdens gehoren in strijd met eerdergenoemd arrest van het Hof van 2 december 2014 gedetailleerd worden ondervraagd over de wijze waarop hij praktisch invulling geeft aan zijn seksuele gerichtheid, hetgeen – zoals volgt uit het rapport nader gehoor en zoals verweerder zelf ter zitting heeft erkend – in onderhavige zaak is gebeurd. De enkele verwijzing van verweerder naar eerdergenoemde artikelen ter onderbouwing van de thema's acht de rechtbank bij gebrek aan een nadere toelichting onvoldoende. Het artikel van Prof. Dr. Laviolette dateert bovendien uit 2004 en is daarmee niet recent. Verder is niet gebleken dat de werkstructuur en de daarin opgenomen thema's in samenspraak met belangengroeporganisaties, zoals de Nederlandse Vereniging tot Integratie van Homoseksualiteit (COC), tot stand zijn gekomen. (Rb. Den Haag 5 november 2015, ECLI:NL:RBDHA:2015:12713, par. 6.2)</p> <p>Verweerder heeft dan ook ten onrechte het asielrelaas zonder nadere motivering van de invloed van de psychische problematiek van eiser op zijn verklaringen als ongeloofwaardig beoordeeld. (Rb. Den Haag, 10 september 2018, ECLI:NL:RBDHA:2018:10861, par. 6.1.)</p>

			<p>[De] rechtbank [is] van oordeel dat verweerder in het bestreden besluit de verklaringen van eiser zoals die zijn afgelegd in gehoor opvolgende aanvraag onvoldoende kenbaar heeft betrokken en tevens onvoldoende heeft gemotiveerd dat eiser zijn gestelde geartheid niet aannemelijk heeft gemaakt. Hierdoor is er sprake van een motiveringsgebrek.</p> <p>(Rb. Den Haag, 3 december 2019, ECLI:NL:RBDHA:2019:12876, par. 5.)</p> <p>2</p> <p>[Verweerder heeft aan de afwijzing van de aanvraag] terecht ten grondslag gelegd dat het feit dat eiser zijn gestelde gerichtheid pas in 2013 voor het eerst naar voren heeft gebracht, terwijl hij al sinds 2009 in Nederland verblijft, afbreuk doet aan de geloofwaardigheid daarvan.</p> <p>(Rb. Den Haag 24 november 2016, ECLI:NL:RBDHA:2016:14363, par. 13.)</p>
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Substantiating the Self	High standards	High standards from the IND towards the stories and evidence of the claimants were found in the court cases. Notably, there was a lot of stress on the difference between sexual conduct and sexual orientation (1), and the argument that statements on sexual attraction were not enough to constitute a sexual orientation: an aspect of love was required. The court sometimes upheld this argument, but also corrected it in one case, stating that the IND did not support the argument that merely sexual contacts does not constitute an sexual orientation extensively enough. Additionally, in some cases a high expectation of the depth of relationships could be perceived (2). A tendency found in the court cases that exacerbated the effect of the high standards was the rejection of certain types of evidence, most importantly third party	
		<p>1</p> <p>Verder heeft verweerder ten overvloede overwogen dat, zelfs wanneer geloof zou worden gehecht aan zijn verklaringen dat hij af en toe snelle en eenmalige seksuele contacten met mannen zou hebben, eiser nog altijd niet heeft overtuigd dat hij biseksueel is. Hierbij heeft verweerder betrokken dat uit eisers verklaringen blijkt dat hij steeds relaties heeft met vrouwen en dat hij in het geheim er enkele en eenmalige seksuele contacten met mannen op na houdt. Hieruit blijkt dat eiser, zowel in Spanje als in Senegal, gevoels voor, noch relaties met iemand van hetzelfde geslacht heeft gehad. Zelfs al zou eiser in Spanje wellicht enkele keren kortstondig seksueel contact hebben gehad met iemand van hetzelfde geslacht, maakt dit nog niet dat moet worden aangenomen dat deze gestelde seksuele contacten ook voortkomen uit een intrinsiek gevoelde biseksuele gerichtheid met een oprecht gevoelde liefde voor een (aantal) mensen van het mannelijke geslacht. De gestelde biseksuele geaardheid van eiser wordt niet geloofwaardig geacht.</p> <p>(Rb. Den Haag, 19 mei 2017, ECLI:NL:RBDHA:2017:6679, par. 2)</p> <p>Eisers schetst dan het beeld dat hij graag seksueel contact heeft met mannen, maar hierruit blijkt niet dat ook daadwerkelijk sprake is van een biseksuele geaardheid. Dit is niet in negatieve zin bij de beoordeling betrokken, maar draagt ook niet bij in positieve zin.</p> <p>(Rb. Den Haag, 19 mei 2017, ECLI:NL:RBDHA:2017:6679, par. 8.2)</p> <p>De rechtbank is van oordeel dat verweerder niet heeft gemotiveerd dat en waarom het enkel hebben van seksuele contacten, niet zou kunnen duiden op een “intrinsiek” gevoelde geaardheid. Verweerder heeft deze aanname niet, onder verwijzing naar bronnen waarop de aanname gestoeld is, voorzien van een deugdelijke motivering, zodat niet inzichtelijk is gemaakt dat het enkel hebben van seksuele contacten niets of onvoldoende zegt over de geaardheid van de betrokken persoon. Voor zover verweerder met de hiervoor weergegeven overweging heeft beoogd te stellen dat van een bepaalde geaardheid eerst kan worden uitgegaan indien sprake is van een duurzame “intrinsieke” affectie of wens tot samenleven met iemand van hetzelfde geslacht en dat hiervan in dit geval niet is gebleken, omdat uit het relaas van eiser niet volgt dat hij ook daadwerkelijk een (al dan niet) duurzame relatie is aangegaan of wenst aan te gaan met iemand van hetzelfde geslacht, is de rechtbank van oordeel dat verweerder hiernee geen juiste toepassing heeft gegeven aan het beoordelingskader zoals weergegeven in WI 2015/9. Dat verweerder, zoals ter zitting is gesteld, dit niet in negatieve zin zou hebben betrokken bij de beoordeling van het relaas, maakt dit niet anders, nu verweerder zelf heeft aangegeven dat het ook niet in positieve zin bijdraagt aan de beoordeling van de geloofwaardigheid en het hier blijkens het voornemen wel degelijk een dragende overweging betreft. De beroepsgrond slaagt.</p> <p>(Rb. Den Haag, 19 mei 2017, ECLI:NL:RBDHA:2017:6679, par. 8.3)</p>	

		<p>statements and partner statements (3). For these types of evidence, it was repeatedly stressed that not much weight could be given to them as the credibility of the claimant should be based on the claimant's statements. The court usually upheld the decision of the IND to exclude those.</p>	<p>Voorts heeft verweerder niet ten onrechte aan eiser tegengeworpen dat hij slechts summier heeft kunnen verklaren over de vraag hoe zijn relatie met [persoon 3] is ontstaan, nu hij enkel heeft verklaard waarom hij [persoon 3] fysiek aantrekkelijk vond. (Rb. Den Haag, 3 april 2018, ECLI:NL:RBDHA:2018:3770, par. 5.2)</p> <p>Het proces van bewustwording van zijn biseksuele geartheid niet inzichtelijk heeft gemaakt. Eiser koppelt zijn gevoelens voor mannen volledig aan de gebeurtenis waarbij twee van zijn vrienden in zijn aanwezigheid seks met elkaar hadden. Om die reden is er geen sprake van een bewustwordingsproces, wat wel verwacht mag worden nu eiser afkomstig is uit een omgeving waarin homoseksualiteit wordt afgewezen. (Rb. Den Haag, 3 april 2018, ECLI:NL:RBDHA:2018:9727, par. 8.2)</p> <p>Ook meent verweerder dat de verklaringen van eiser niet getuigen van een diepgewortelde biseksualiteit, maar eerder van gemakzucht ten aanzien van het bevredigen van seksuele verlangens. (Rb. Den Haag, 10 september 2018, ECLI:NL:RBDHA:2018:10861, par. 4)</p> <p>Eiser [heeft] met zijn verklaringen onvoldoende inzicht heeft verschaft door hierover enkel te verklaren dat hij ineens seksuele gevoelens had voor jongens en daarover verder geen gedachten had. (Rb. Den Haag, 7 november 2019, ECLI:NL:RBDHA:2019:11958, par. 5.2)</p> <p>Verweerder stelt tevens dat eiser met betrekking tot zijn relaties en contacten enkel over seksuele aantrekkings en seksueel contact heeft verklaard en niet over dieperliggende gevoelens en hiermee geen inzicht heeft gegeven in de ontdekking en beleving van zijn geartheid. Ook dit standpunt volgt de rechtbank niet. Uit het gehoor opvolgende aanvraag blijkt namelijk dat eiser niet enkel over seksuele ervaringen heeft verklaard. Eiser verklaart desgevraagd dat hij zich echt veilig voelde bij [B] omdat de relatie niet alleen gebaseerd was op seks, maar ook op andere dingen zoals liefde voor elkaar, vertrouwen, het waarderen en respecteren van elkaar (pagina 22). Als verweerder hierop doorvraagt verklaart eiser dat hij veel heeft geleerd van [B], zoals vriendschap, elkaar vertrouwen, respect hebben voor elkaar en over je gevoelens kunnen praten (pagina 22). Over zijn relatie met [A] verklaart eiser dat hij behalve seks ook een vriendschap met haar had en dat zij hem plaatsen liet zien en hem informatie gaf over de cultuur en de taal (pagina 22). Hoewel eiser ook verklaart het moeilijk te vinden om zijn gevoelens te omschrijven, is de rechtbank van oordeel dat verweerder eiser niet heeft kunnen tegenwerpen dat hij enkel heeft verklaard over het seksuele aspect. (Rb. Den Haag, 3 december 2019, ECLI:NL:RBDHA:2019:12876, 4.5)</p>
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		<p>2</p> <p>Voorts is het opmerkelijk dat eiseres zegt niet zeker te zijn wat de achternaam is van [Kapster], die niet alleen haar kapster was, maar waarmee zij ook thuis alcohol dronk en waarmee zij langere tijd een seksuele verhouding onderhield.</p> <p>(Rb. Den Haag 19 januari 2016, ECLI:NL:RBDHA:2016:565, par. 3.5)</p> <p>Daarbij heeft verweerder mogen betrekken dat eiser bij zijn beschrijving over de aantrekkingskracht tot [A] zijn gevoelens niet verder kan beschrijven dan 'een verzameling van gevoelens'.</p> <p>(Rb. Den Haag, 27 september 2019, ECLI:NL:RBDHA:2019:13329, par. 6.3)</p> <p>3</p> <p>De in beroep overgelegde getuigenverklaringen kunnen niet tot een ander oordeel leiden, nu eiser door middel van zijn eigen verklaringen zijn seksuele gerichtheid aannemelijk dient te maken.</p> <p>Rb. Den Haag 24 november 2016, ECLI:NL:RBDHA:2016:14363, par. 13)</p> <p>Ook de verklaringen die de getuige ter zitting heeft afgelegd, kunnen niet tot een ander oordeel met betrekking tot de geloofwaardigheid van de gestelde seksuele gerichtheid leiden. Dat de getuige op grond van haar lesbische gerichtheid door verweerder in het bezit is gesteld van een asielvergunning en heeft verklaard een relatie te hebben met eiseres, kan niet van doorslaggevend belang zijn in de zaak van eiseres, nu daarmee de geconstateerde tegenstrijdigheden en ongerijmdheden in haar relaas niet kunnen worden weggenomen.</p> <p>(Rb. Den Haag, 13 maart 2017, ECLI:NL:RBDHA:2017:2426, par. 9)</p> <p>Verklaringen over en/of van een partner of derden onverlet laten dat de eiser (ook) tegenover verweerder overtuigende verklaringen af moet kunnen leggen over zijn seksuele geaardheid en zijn persoonlijke bewustwordings- en acceptatieproces.</p> <p>(Rb. Den Haag, 10 november 2017, ECLI:NL:RBDHA:2017:13078, par. 6)</p> <p>De rechtbank overweegt dat de verklaringen over en/of van een partner of derden onverlet laten dat de eiser (ook) tegenover verweerder overtuigende verklaringen af moet kunnen leggen over zijn seksuele geaardheid en zijn persoonlijke bewustwordings- en acceptatieproces. Het is aldus allereerst aan eiser om zijn bisexuele geaardheid aannemelijk te maken. Hierin is eiser niet geslaagd. Aan de door eiser overgelegde stukken wordt daarom niet de waarde gehecht die eiser eraan hecht.</p> <p>(Rb. Den Haag, 10 november 2017, ECLI:NL:RBDHA:2017:13078, par. 6)</p>
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			<p>Dat [persoon B – partner van eiser] een verblijfsvergunning heeft gekregen op basis van zijn geaardheid, maakt op zichzelf nog niet dat de gestelde geaardheid van eiser ook geloofwaardig is. (Rb. Den Haag, 10 november 2017, ECLI:NL:RBDHA:2017:13078, par. 6)</p>
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Concluding Credibility	Awareness and acceptance	In the credibility assessment, the claimant's declarations on their 'process of self-awareness and -acceptance' were often seen as not being extensive or deep enough, or as being contradictory in some way (1). A lack of internal struggle quickly led to a negative decision. This was especially the case if the claimant was religious (2). Even after the introduction of internal policy 2018-9, where it is stated that it can no longer be expected that the claimant had an internal struggle to accept their identity, this argument could still be perceived (3). In some cases, this was rectified by the court.
		<p>1</p> <p>Derrechtbank overweegt dat verweerder eiser ten aanzien van het eerste thema van de werkinstructie, het thema 'privéleven', heeft tegengeworpen dat hij vage verklaringen heeft afgelegd, met name wat betreft het proces van bewustwording en zelfacceptatie. Op grond van het rapport van gehoor opvolgende aanvraag stelt de rechtbank vast dat eiser weliswaar heeft verklaard gedurende twee jaren een dergelijk proces te hebben doorgemaakt, dat hij in dit kader onder meer begrippen als schaamte en tweestijd heeft genoemd en dat hij onder meer heeft gerefererd aan opmerkingen die zijn vader zou hebben gemaakt, maar dat hij niet of nauwelijks heeft gesproken over twijfels, over wat hij precies doormaakte of hoe hij anderszins kwam tot het accepteren van zijn geaardheid. Nu eiser in het bijzonder zijn verklaringen over het proces van bewustwording en zelfacceptatie niet verder heeft uitgediept en niet gebleken is dat dit niet van hem verwacht had mogen worden, heeft verweerder zich niet ten onrechte op het standpunt gesteld dat eiser met de beantwoording van de vragen over het thema privéleven de gestelde biseksuele gerichtheid niet geloofwaardig heeft gemaakt. (Rb. Den Haag 18 november 2016, ECLI:NL:RBDHA:2016:14237, par. 13)</p> <p>Voorts heeft verweerder terecht geconcludeerd dat er uit eisers verklaringen geen proces van bewustwording of zelfacceptatie blijkt. Hoewel er meerdere malen en op verschillende manieren naar gevraagd is, heeft eiser hierover vage verklaringen afgelegd. Hij stelt slechts dat het voor hem niet makkelijk was, maar dat hij zijn gerichtheid wel heeft geaccepteerd. In dit verband is van belang dat eiser afkomstig is uit een land waar zijn gestelde seksuele gerichtheid niet geaccepteerd wordt en hij ook zelf heeft verklaard dat hij het beschouwt als een ziekte. (Rb. Den Haag 24 november 2016, ECLI:NL:RBDHA:2016:14363, par. 13)</p> <p>Eiser [heeft] over het proces van bewustwording en zelfacceptatie in Nigeria vaag, summier en tegenstrijdig verklaard. Enerzijds verklaart eiser dat hij zich er van bewust was dat homoseksualiteit door de omgeving, zijn familie en in Nigeria in het algemeen absoluut niet geaccepteerd werd en dat hij zijn geaardheid en relatie verborgen moest houden, anderzijds verklaart hij dat hij het voor zichzelf wel accepteerde. Zeker nu eiser heeft verklaard dat hij zich al ongeveer negen jaar geleden bewust is geworden van zijn seksuele gevoelens voor mannen en een relatie is aangegaan met een man, had van hem verwacht mogen worden dat hij over dit proces meer zou kunnen verklaren. (Rb. Den Haag, 10 november 2017, ECLI:NL:RBDHA:2017:13078, par. 6)</p> <p>Uit de verklaringen van eiser blijkt dat hij enerzijds blij was met de ontdekking van zijn seksuele gerichtheid, maar dat hij anderzijds bang was omdat hij wist dat deze gerichtheid door de maatschappij niet wordt aanvaard. Zoals</p>

			<p>verweerder niet ten onrechte aan eiser heeft toegeworpen, heeft eiser in het licht van voormelde discrepantie niet voldoende inzicht gegeven in hoe hij dit heeft ervaren. (Rb. Den Haag, 3 april 2018, ECLI:NL:RBDHA:2018:3770, par. 5.2)</p> <p>Bij eiser is ook niet gebleken van enig proces van zelfacceptatie. Zo is er geen sprake geweest van een persoonlijke worsteling of twijfel bij eiser. Dat eiser zijn gevoelens meteen en volledig accepteerde, heeft verweerder – gelet op het sentiment in de maatschappij – ongerijmd kunnen vinden. (Rb. Den Haag, 3 april 2018, ECLI:NL:RBDHA:2018:9727, par. 8.2)</p> <p>2</p> <p>Ter motivering daarvan stelt verweerder zich op het standpunt dat eiser tegenstrijdig, vaag en summier heeft verklaard over zijn proces van bewustwording en zelfacceptatie. Eiser heeft geen inzicht geboden in hoe zijn zoektocht naar de islam heeft geleid tot acceptatie van zijn gestelde seksuele gerichtheid. Uit de verklaring van eiser blijkt niet dat hij zich daadwerkelijk heeft afgekeerd van de islam. Ook los van religie heeft eiser summier en tegenstrijdig verklaard over zijn bewustwordingsproces en zelfacceptatie. (Rb. Den Haag, 7 februari 2018, ECLI:NL:RBDHA:2018:1606, par. 5)</p> <p>Naar het oordeel van de rechtbank heeft verweerder terecht vastgesteld dat eiser vaag heeft verklaard over zijn seksuele gerichtheid tegen de achtergrond van zijn religie. Eiser heeft niet inzichtelijk gemaakt hoe hij binnen zijn religie probeerde te genezen van zijn homoseksualiteit en hoe hij zijn geaardheid heeft aanvaard onder loslating van zijn religie, toen hij daarbinnen geen verklaring vond, aldus verweerder. De rechtbank volgt verweerder in dit standpunt. Verweerder heeft hierbij terecht gewezen op eisers verklaring tijdens het aanvullend gehoor dat hij zeer religieus is, maar dat hij er desondanks en ondanks zijn hevige innerlijke strijd en het lezen van geschiedenisboeken ter verdieping van zijn kennis, niet in is geslaagd een antwoord te vinden op de vraag hoe de islam hem zou kunnen helpen bij de aanvaarding van zijn seksuele gerichtheid. Eiser heeft slechts in zijn algemeenheid verklaard dat de religie tegen logica en wetenschap is en dat hij tegenstrijdigheden binnen de religie aantrof zonder daarbij te beschrijven hoe de islam omgaat met homoseksualiteit, behalve dan de conclusie van eiser dat de islam deze geaardheid slecht acht. (Rb. Den Haag, 7 februari 2018, ECLI:NL:RBDHA:2018:1606, par. 14)</p> <p>Verder meent verweerder dat geen sprake is geweest van een zelfacceptatieproces, nu eiser zou hebben verklaard dat zijn bisexualiteit is ontstaan aan het begin van de middelbare school en hij het voor zichzelf makkelijk heeft weten te accepteren nu het geloof in die periode voor hem minder op de voorgrond stond.</p>
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			<p>(Rb. Den Haag, 10 september 2018, ECLI:NL:RBDHA:2018:10861, par. 4)</p> <p>3</p> <p>Verweerder [heeft] niet ten onrechte gesteld dat eiser, door niet consistent, summier en vaag te verklaren over zijn gevoelens en gedachten ten aanzien van zijn bewustwording zijn gestelde bisexuele geaardheid niet geloofwaardig heeft gemaakt. Aangezien eiser tijdens het gehoor heeft verklaard dat hij zich bewust was dat zijn geaardheid in zijn land van herkomst niet wordt geaccepteerd en dat seksuele handelingen tussen mensen van hetzelfde geslacht strafbaar zijn en kunnen worden bestraft met de dood, mag in redelijkheid van hem worden verwacht dat hij het proces van bewustwording en de acceptatie van zijn seksuele gevoelens inzichtelijk kan maken. Hierin is eiser niet geslaagd.</p> <p>(Rb. Den Haag, 7 november 2019, ECLI:NL:RBDHA:2019:11958, par. 5.2)</p> <p>Verweerder stelt dat eiser niet inzichtelijk heeft gemaakt hoe hij – mede gegeven dat eiser afkomstig is uit een land waar een afwijkende seksuele gerichtheid problemen kan opleveren – zijn bisexuele gerichtheid heeft ontdekt en beleefd omdat hij hierover zeer summiere en zelfs wisselende verklaringen zou hebben afgelegd. Zo zou eiser wisselend hebben verklaard over of hij zijn geaardheid als “normaal” heeft ervaren of als “niet normaal”. De rechtbank overweegt dat uit het gehoor opvolgende aanvraag blijkt dat eiser de gevoelens voor zichzelf normaal vond, maar dat de gevoelens ook gepaard gingen met angst omdat hij wist dat de maatschappij, de cultuur en zijn familie het verkeerd vonden. “Als je het doet, ben je aan het genieten en weet je niet wat je doet, maar als je helder bent, krijg je spijt, omdat de reactie van anderen slecht kan zijn. Dit zijn dingen die dubbel zitten bij iemand die de gevoelens heeft”, aldus eiser (pagina 7). Daarna verklaart hij nogmaals dat zijn gevoelens vanwege de maatschappij en religie een taboe waren en verboden waren, maar omdat hij de gevoelens voor zichzelf hield het normaal was (pagina 8). Eiser verklaart dat hij de gevoelens voor zichzelf normaal acht, maar dat hij door de beperkingen in de cultuur en religie geen vrijheid had om zich te uiten (pagina 8). Naar het oordeel van de rechtbank zijn deze verklaringen niet aan te merken als wisselend. Bovendien heeft verweerder ten onrechte geconcludeerd dat eiser geen inzicht heeft gegeven in de beleving van zijn seksuele geaardheid gegeven eisers achtergrond. Eiser heeft immers herhaalde aangegeven een onderscheid te maken tussen enerzijds de interne beleving van zijn geaardheid en anderzijds de onmogelijkheid om deze beleving te uiten vanwege het taboe dat op het onderwerp rust in Marokko. Dat sprake is van (te) summiere verklaringen op dit punt, is de rechtbank niet gebreken.</p> <p>(Rb. Den Haag, 3 december 2019, ECLI:NL:RBDHA:2019:12876, par. 4.3)</p>
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		<p>De rechtbank volgt verweerder in zijn standpunt dat eiser summier, oppervlakkig en niet inzichtelijk heeft verklaard over zijn eigen ervaringen en persoonlijke beleving ten aanzien van zijn bisexuele gerichtheid. Verweerder heeft naar het oordeel van de rechtbank niet ten onrechte overwogen dat eiser ten aanzien van zijn bewustwording en gevoelens blijft steken in oppervlakkige verklaringen en algemeenheden. Nu eiser sinds enkele jaren weet zou hebben van zijn geaardheid mag van hem verwacht worden dat hij hier meer inzicht in weet te verschaffen, te meer nu dit één van de hoofdredenen voor hem is om asiel aan te vragen. (...) Verder heeft verweerder kunnen betrekken dat eiser niet is ingegaan op de concrete gevoelens en emoties die hij heeft gehad met betrekking tot de (verdere) ontdekking van zijn gestelde seksuele gerichtheid. Verweerder mag dit wel van eiser verwachten, zeker nu eiser zelf heeft verklaard dat bisexualiteit niet wordt geaccepteerd in Marokko en door zijn familie. Voorts heeft verweerder niet ten onrechte het standpunt ingenomen dat eiser desgevraagd niet (voldoende) kan concretiseren hoe en waarom hij zijn gevoelens uiteindelijk wel heeft geaccepteerd. Eiser volstaat met de mededeling dat hij het aangetrokken voelen tot beide seksen niet accepteert, maar dit later heeft losgelaten omdat dit in 'zijn natuur' zit. Verweerder heeft zich terecht op het standpunt gesteld dat eiser zeer oppervlakkig en onvoldoende concreet heeft verklaard over zijn innerlijke strijd. Dit doet verder afbreuk aan de geloofwaardigheid van eisers verklaringen over zijn seksuele gerichtheid.</p> <p>(Rb. Den Haag, 27 september 2019, ECLI:NL:RBDHA:2019:13329, par. 6.3)</p>
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Moment of awareness and acceptance	<p>A related expectation was the idea that there is one specific moment in which a claimant becomes aware of their sexual orientation, and a specific moment in which they accept it, and that those moments can be pinpointed. If the claimant mentioned several moments or indicated fluctuations in their acceptance, it was regarded as contradictory and therefore not credible.</p>	<p>Eiser [heeft] wisselend verklaard over het moment waarop hij zich bewust is geworden van zijn biseksuele gerichtheid. Tijdens het aanvullend gehoor op 7 januari 2016 heeft eiser verklaard dat hij zich in Libië nog niet bewust was van zijn gerichtheid. In de zienswijze van 4 juni 2013, waarin eiser voor het eerst melding maakt van zijn gestelde biseksuele gerichtheid, stelde hij echter dat deze gerichtheid zich hier in Nederland nader heeft geopenbaard. Ook uit de correcties en aanvullingen van 20 januari 2016 blijkt dat eiser in Libië al biseksuele gevoelens had.</p> <p>(Rb. Den Haag 24 november 2016, ECLI:NL:RBDHA:2016:14363, par. 13)</p> <p>De staatssecretaris heeft zich niet ten onrechte op het standpunt gesteld dat de door de vreemdeling gestelde seksuele gerichtheid ongelooftwaardig is. Hij heeft hierbij terecht betrokken dat de vreemdeling tegenstrijdig heeft verklaard over het moment waarop of de periode waarin hij zijn gevoelens voor mannen heeft ontdekt en ook over het moment waarop of de periode waarin hij die gevoelens heeft geaccepteerd en een relatie heeft gekregen.</p> <p>(ABRvS, 7 oktober 2017, ECLI:NL:RVS:2017:3054, par. 4.2)</p>
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<p>'Too risky to be credible'</p>	<p>In several cases, the stories of the claimant on the way they expressed their sexual orientation (through attendance to certain events, or through sexual contacts) in their country of origin was found to be too risky to be true, considering the severe punishments for homosexuality in their countries of origin.</p>	<p>De rechtbank is van oordeel dat verweerder niet ten onrechte heeft overwogen dat eisers verklaring, dat hij maar één keer een seksueel contact heeft gehad met een man in Senegal, inconsistent is met zijn verklaringen over het op pad gaan met zijn - kennelijk als zodanig herkenbare - homoseksuele vriend en het regelmatige bezoek aan een club. Hiertoe is allereerst van belang dat eiser zelf heeft verklaard dat van deze club in Senegal bekend is dat er veel homoseksuelen komen en dat iedereen die de club bezocht homo was. Dat er, zoals eiser in de zienswijze en in de gronden van beroep aanvoert, ook heteroseksuelen in die club komen, doe daar niet aan af. Het door eiser genoemde en ter zitting getoonde filmpje van deze club, leidt evenmin tot een andere conclusie. Eiser heeft niet duidelijk gemaakt dat hij, terwijl hij volgens zij verklaringen altijd bang was dat zijn geaardheid in Senegal naar buiten zou komen, desondanks het risico nam om regelmatig een club te bezoeken waarvan volgens eiser zelf bekend is dat daar veel homoseksuele mannen komen en waarvan mensen volgens hem ook zeiden dat iedereen die de club bezoekt, homo is. Verweerder heeft dit niet ten onrechte ongerijmd geacht. De beroepsgrond slaagt niet. (Rb. Den Haag, 19 mei 2017, ECLI:NL:RBDHA:2017:6679, par. 10.3)</p> <p>Verweerder heeft toereikend gemotiveerd dat eiser aanmerkelijke risico's heeft genomen voor ontdekking van deze relatie en dat zijn verklaringen, die als strekking hebben dat niemand daarvan mocht weten, niet stroken met zijn handelingen. Verweerder heeft daarbij ook terecht gewezen op het afspreken met [naam vriend 2] in het huis van diens ouders, hoewel deze ouders de omgang tussen beiden hadden verboden. Voorts heeft verweerder terecht gesteld dat eiser dit verbod zeer kort met [naam vriend 2] heeft besproken. Ook sprak eiser af met [naam vriend 2] op openbaar terrein, terwijl eiser heeft verklaard dat hun seksuele geaardheid wel een beetje zichtbaar was voor wat betreft uiterlijk en gedrag. (Rb. Den Haag, 7 februari 2018, ECLI:NL:RBDHA:2018:1606, par. 17)</p> <p>Ook heeft verweerder niet ten onrechte aan eiser tegengeworpen dat bevreemdend is dat hij, in het licht van de gevaren die hij vreemde indien zijn gerichtheid bekend zou worden, grote risico's heeft genomen door clubs te bezoeken waar veel homoseksuelen komen, en door af te spreken met iemand die hij nauwelijks kende. (Rb. Den Haag, 3 april 2018, ECLI:NL:RBDHA:2018:3770, par. 5.2)</p>
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		<p>Niet valt in te zien dat eiser en [persoon X] een dergelijk groot risico zouden nemen om betraapt te worden door in het huis van [persoon X] af te spreken en seksueel contact te hebben. Het hebben van een relatie en seks buiten het huwelijk wordt in Irak immers niet geaccepteerd en kan tot verstoting of de dood leiden. Dat [persoon X] zeker wist dat er niemand thuis zou komen en dat eiser vanwege zijn leeftijd en het zoeken naar genot niet over de gevolgen nadacht, maakt dit niet anders.</p> <p>(Rb. Den Haag, 3 april 2018, ECLI:NL:RBDHA:2018:9727, par. 7.1)</p> <p>Gezien de positie van eisers vader in de gemeenschap ligt het voorts niet voor de hand dat betrokkene juist in het huis van zijn vader afspreekt om gemeenschap te hebben met [persoon X] en er evenwel geen blijfs gegeven van gedegen voorzorgsmaatregelen om betrapting tegen te gaan, aldus verweerder.</p> <p>(Rb. Den Haag, 10 september 2018, ECLI:NL:RBDHA:2018:10861, par. 4)</p>
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	<p>Knowledge of the Netherlands</p>	<p>In several cases, the fact that the claimant had limited knowledge about the position of LGBTQ+ people in the Netherlands was perceived as strange, and used as a negative argument in their assessment.</p>	<p>Verweerder acht het verder bevreemdend dat eiser zich in Nederland niet heeft verdiept in de positie van homo- of biseksuelen nu hij vreest te worden vervolgd vanwege zijn seksuele gerichtheid. De relatie met een jongen in Nederland acht verweerder niet geloofwaardig. (Rb. Den Haag, 7 februari 2018, ECLI:NL:RBDHA:2018:1606, par. 8)</p> <p>Eiser [heeft] summier (...) verklaard over zijn kennis van de positie van LHBT's in Nederland. De verklaring van eiser hiervoor dat zijn verblijf in Nederland niet zeker is, heeft verweerder niet hoeven te volgen. Terecht heeft verweerder zich op het standpunt gesteld dat niet valt in te zien dat iemand die in Nederland bescherming vraagt uit vrees te worden vervolgd voor zijn seksuele gerichtheid zich niet verdiept in de positie van LHBT's in Nederland. (Rb. Den Haag, 7 februari 2018, ECLI:NL:RBDHA:2018:1606, par. 20)</p> <p>Bij het voorgaande heeft verweerder het feit dat eiser niet veel kennis heeft van de situatie van LHBT'ers in Benin en in Nederland terecht meegewogen. Eiser heeft immers Nederland uitgekozen om hem bescherming vanwege zijn (gestelde) geartheid te verlenen. Van hem mag dan worden verwacht dat hij hierover meer had kunnen verklaren. (Rb. Den Haag, 10 december 2019, ECLI:NL:RBDHA:2019:13692, par. 9)</p>
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Concluding Credibility: Bisexuality	Fixed view of sexuality	In the judgments, a fixed view of sexuality could sometimes be perceived. One way in which this became clear was the fact that bisexuals were often asked whether they like men or women more, and expected to give a consistent answer to that (1). A second notable point was that indications of flexibility or fluidity of a claimant's sexual orientation were interpreted as contradictory (2), thus making their statements 'not credible'.	<p>1</p> <p>Voorts overweegt de rechtbank dat verweerder kan worden nagegeven dat eiser wisselend heeft verklaard over de vraag of hij meer gevoelens heeft voor mannen of voor vrouwen. Evenwel is de rechtbank van oordeel dat eisers stelling dat als rode lijn door het gehoor opvolgende aanvraag loopt dat eiser – hoewel hij verklaart op zowel mannen als vrouwen te vallen – de voorkeur geeft aan mannen, kan worden gevolgd. Zo heeft eiser herhaaldelijk verklaard dat het hem qua gedrag en omgang niet uitmaakt of hij met een man of een vrouw is, maar dat hij van seks met mannen meer geniet (pagina 21 en 22). Ook uit hetgeen eiser heeft verklaard over zijn tijd in Marokko en zijn gedachten bij en omgang met mannen en vrouwen (pagina's 10 tot 13) valt naar het oordeel van de rechtbank af te leiden dat eisers voorkeur uitging naar mannen.</p> <p>(Rb. Den Haag, 3 december 2019, ECLI:NL:RBDHA:2019:12876, par. 4.6)</p> <p>2</p> <p>Zo heeft eiser gesteld dat hij biseksueel is. Verweerder heeft terecht vastgesteld dat uit eisers verklaringen tijdens het aanvullend gehoor juist volgt dat hij zich meer aangetrokken voelde tot de eigen sekse en dat hij de omgang met meisjes flauw en weezinwekkend vond en dat hij die keuze reeds had gemaakt op zijn veertiende of vijftiende jaar. Verweerder heeft dit terecht tegenstrijdig geacht. Daarbij heeft verweerder er terecht op gewezen dat eiser tijdens het nader gehoor heeft verklaard dat hij op zestienjarige leeftijd een relatie met een meisje wilde uitproberen. Deze verklaring heeft verweerder terecht tegenstrijdig geacht met de verklaring van eiser dat hij op veertien- of vijftienjarige leeftijd de keuze voor de eigen sekse al had gemaakt.</p> <p>(Rb. Den Haag, 7 februari 2018, ECLI:NL:RBDHA:2018:1606, par. 13)</p>
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Appendix II. Interview Questions

II.1 Interview questions for LGBTQI+ asylum lawyers / NGO workers (Dutch)

LHBTI asielaanvragen algemeen

1. Aan hoeveel LHBTI asielaanvragen heeft u (ongeveer) meegewerkt, en in welke tijdsperiode?
2. Aannemend dat de meeste LHBTI asielaanvragen gebaseerd zullen zijn op Art. 29(a) Vw 'verdragsvluchteling', op welke grond beroepen de meeste LHBTI asielaanvragen waar u aan meegewerkt heeft zich? (bijvoorbeeld sociale groep, religie, politieke overtuiging etc.)
 - a. Indien dit sociale groep is:
Hoe wordt het concept 'sociale groep' volgens u in praktijk gedefinieerd in asielzaken?
 - Cumulatief? (zowel '*innate characteristic*' of '*fundamental characteristic*' en '*distinct identity in the country of origin*')
 - Nadruk op *innate characteristic* of *characteristic fundamental to identity*?
Allebei mogelijk?
3. Wat zijn, volgens u, de moeilijkste aspecten van het onderbouwen van LHBTI asielaanvragen?
 - a. Op wat voor manier verschillen LHBTI asielaanvragen hierin van andere asielaanvragen?
En op wat voor manier komen ze hierin met andere aanvragen overeen?
4. Wat zijn, rekening houdend met Art. 30 en 31 Vw en het Vreemdelingscirculaire 2000, de meest voorkomende redenen voor het afwijzen van LHBTI asielaanvragen? Waardoor denkt u dat dit zou kunnen komen?
5. Indien u sinds 30-12-2019 LHBTI asielaanvragen heeft behandeld, ziet u een verschil in de manier waarop LHBTI asielaanvragen worden behandeld sinds het invoeren van de *Werkinstructie IND WI/2019/17 Horen en beslissen in zaken waarin lhbt-gerichtheid als asielmotief is aangevoerd*?

Asielaanvragen op basis van vervolging door biseksuele orientatie

1. Aan hoeveel asielaanvragen op basis van vervolging door biseksuele orientatie heeft u (ongeveer) meegewerkt, en in welke tijdsperiode?
2. Op welke grond beroepen deze aanvragen zich in uw ervaring meestal?
 - a. Indien dit sociale groep is:
Op welk aspect van de definitie van sociale groep worden deze aanvragen normaliter gebaseerd? *Innate characteristic* of *characteristic fundamental to identity*? Zijn deze volgens u allebei mogelijk in dit geval?
3. Wat zijn volgens u de grootste verschillen tussen biseksuele aanvragen en LHBTI aanvragen algemeen?
4. Wat zijn, volgens u, de moeilijkste aspecten van het onderbouwen van biseksuele asielaanvragen?
 - a. Heeft u ooit meegemaakt dat een opvatting van seksualiteit als (1) onveranderlijk en (2) binair (homosexueel of heterosexueel) bij de beslissende instantie biseksuele aanvragen in de weg heeft gestaan?
 - b. Heeft u het gevoel dat er bij de beslissende instanties genoeg begrip voor en kennis van biseksualiteit is?
 - c. Heeft u het gevoel het gehad hebben van of momenteel hebben van een relatie met iemand van het andere geslacht de asielaanvragen van biseksuelen kan vermoeilijken? Zo ja, in welk opzicht?
 - d. Heeft u ooit meegemaakt dat iemand een aanvraag deed op basis van lesbisch of homoseksueel zijn terwijl ze zich identificeerden als biseksueel?

- i. Zo ja, heeft dit problemen opgeleverd in het verloop van het proces of in de uitdrukking van seksuele oriëntatie van die persoon in het verdere verblijf in Nederland?
Zou dit volgens u risico bieden tot het niet verlengen van of intrekken van verblijfsvergunning asiel op basis van Art. 32 Vw (specifiek 32(1)(c): ‘de basis van de asielaanvraag is niet meer van toepassing’) of Art. 35 Vw (specifiek 35(1)(a): ‘het indienen van onjuiste informatie of achterhouden van informatie die tot het afwijzen van de aanvraag had kunnen leiden’)?
- 5. Hoe denkt u dat eventueel door u genoemde moeilijkheden vermeden zouden kunnen worden?

Toekomst

1. Denkt u dat het nodig is om verdere veranderingen te maken in het beleid/de wetgeving rondom LHBTI asielaanvragen om eventuele genoemde problemen/moeilijkheden in deze aanvragen te verlichten?
Zo ja, welke veranderingen?
2. Denkt u dat er aan de kant van de asielzoeker acties ondergaan kunnen worden om eventuele genoemde problemen/moeilijkheden te vermijden?

II.2 Interview questions LGBTQI+ asylum claimants (English)

Personal information

1 Name, age, nationality

What is the situation of LGBTQI+ people in your country of origin

2 What do you identify as? Bisexual, homosexual?

Asylum process

3 Could you tell me something about your asylum *process*?

How long was it?

What stages were there?

4 On what basis did you originally claim asylum?

5 How did they try to establish whether you were telling the truth or not (credibility)?

Critical questions

Bisexuality

6 Do you think the fact that you had relationships with women as well in the past was a negative point in your case / something that the immigration service held against you?

Did they ask about your opposite-sex relationships as well in establishing your credibility?

Did they interpret you having opposite-sex relationships as meaning you were straight and thus not eligible to asylum?

7 Do you think the immigration service had a proper understanding of bisexuality?

8 Do you think the immigration service maybe overlooked/didn't believe/didn't understand bisexuality because they saw sexuality as

- Something fixed?
- Something that is binary (either homosexual or straight)?

9 In establishing your bisexuality and membership of a particular social group, was there any focus on either (1) sexuality as something immutable, or (2) sexuality as something so fundamental to your identity that you should not be required to change it?

LGBTQI+

10 Did the immigration service ever indicate that you could be sent back because you could live a 'straight' life there?

11 Did you ever notice that the immigration service asked questions based on a stereotypical image of LGBTQI+ identities, and that they wanted/expected you to adhere to that?

Did they take into account possible cultural differences with your country and how homosexuality is seen there?

12 Did they ask you questions about how you came aware of your identity, and if so, were those hard for you to answer?

General asylum process

14 Do you believe the asylum process in the Netherlands was based on the assumption that you were lying?

15 Do you believe that the asylum process in the Netherlands was based on trying to find a reason to reject your application, instead of finding out the truth?

16 Were the questions asked by the immigration service understandable, or overly complicated? Did you have an interpreter?

Future

17 What do you think the problems in the asylum process for bisexuals are? Or what were they for you?

18 How do you think they could be solved?

