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EDITORIAL

Queering Asylum... or Human Rights in Europe?

Carmelo Danisi

University of Bologna

&

Nuno Ferreira

University of Sussex

After 70 years since the conclusion of the Convention relating to the status of refugees, the process of ‘queering’ asylum law is beyond doubt, as we have explored in [The Oxford Handbook of International Refugee Law](#) (Chapter 4). This process of ‘queering’ asylum law has certainly reached its highest peak in Europe, where the needs of people claiming asylum on grounds of sexual orientation and gender identity (SOGI) are increasingly taken into account in law and practice. Yet, a [four-year research project](#) carried out across the EU has found that [a range of issues remain problematic](#), or even unaddressed, in this field. These include: the lack of information on SOGI as grounds to claim international protection at arrival to Europe; the lack of specific procedural arrangements, including the choice of the interviewer and of the interpreter, and of appropriate reception conditions; a persistent culture of disbelief and the use of stereotypical views on sexual and gender minorities during the adjudication process of asylum claims; and the misuse and low quality of Country of Origin Information. Some of these problems could be [addressed in the context of the current reform of EU asylum law](#), given the need to improve the Common European Asylum System in this respect. However, such a reform might not be enough, especially if we consider the evolution of European human rights law in relation to SOGI asylum.

Indeed, we have recently witnessed controversial decisions by the European Court of Human Rights (ECtHR) that raise a fundamental question: to effectively protect SOGI minorities claiming asylum in Europe, along with the ‘queering’ process of asylum law, is

there a need to also 'queer' human rights? To answer this question, here we wish to bring attention to two decisions issued, respectively, by the ECtHR in [B and C v. Switzerland](#), and the Committee on the Rights of the Child in [A.B. v. Finland](#). By building on different assumptions, these human rights bodies seem to set different principles in the field of SOGI asylum. Let us first briefly recall the facts and outcomes in these cases.

On the one side, in [B and C v. Switzerland](#) the European Court of Human Rights issued one of its [very few decisions on the merits](#) of an application related to SOGI asylum. In short, Mr B claimed that, if returned to The Gambia, he could be exposed to persecution and, therefore, to ill-treatment on grounds of his sexual orientation. In fact, Swiss asylum authorities rejected his asylum applications in the belief that Mr B's sexual orientation would presumably not come to the attention of the Gambian authorities or population, so he could be safely returned. The ECtHR certainly made important statements in its decision in this case. In line with the position adopted by the Court of Justice of the EU (CJEU) in [X, Y and Z](#), it has reiterated that no one should be obliged to conceal their sexual orientation in order to avoid persecution. The ECtHR also found that it is irrelevant whether or not the Gambian authorities or population are aware of Mr B's sexual orientation because this may be discovered very easily after his removal. Even more importantly, according to the ECtHR, given that the risk of persecution may come from non-State actors, States parties' authorities need to evaluate whether the Gambian authorities would be able and willing to provide the necessary protection to Mr B against ill-treatment based on his sexual orientation emanating from such non-State actors. Yet, the ECtHR adopted a controversial position in relation to the criminalisation of homosexuality or same-sex sexual acts: 'the mere existence of laws criminalising homosexual acts in the country of destination does not render an individual's removal to that country contrary to Article 3 of the Convention' (para. 59). In fact, and in line with the judgment of the CJEU in [X, Y and Z](#), what is decisive for the ECtHR is whether there is a real risk that these laws are applied in practice. In other words, the effects that the mere existence of such laws have on sexual and gender minorities and on their protection by the State have been disregarded by the ECtHR, although their implications for the protection of human rights are [widely known](#).

On the other side, in its first-ever decision involving SOGI asylum, the Committee on the Rights of the Child has adopted a much firmer approach questioning the possibility of returning a family to a country where legislation discriminates against sexual and gender minorities. In short, a Russian child was discriminated against on the grounds of his mother's sexual orientation and same-sex relationship. To cite just one example, he was bullied in kindergarten, where even the staff considered his family to be 'abnormal'. The child's mothers decided to flee Russia and moved to Finland, where they submitted an asylum application on sexual orientation grounds. Although the asylum authorities recognised the general increasing violence against sexual and gender minorities in Russia, especially after the introduction of the so-called '[gay propaganda law](#)' that promotes the

impunity of perpetrators of discrimination and harassment, and accepted that the family experienced discrimination in Russia, the asylum application was rejected because the threshold of persecution was not met. The rights violation was not so severe as to fulfil the requirements of the notion of refugee. The family was therefore forced to go back to Russia, where the child has to lie about his family to avoid ill-treatment, which entails serious mental health implications and the constant need to move to other parts of the country. Against the arguments of the State party in question, the Committee found that the Finnish authorities had failed to carry out a proper asylum assessment. In fact, the existence of a risk of serious violations of the Convention on the Rights of the Child in Russia was not evaluated in light of the child's best interests to live safely and receive appropriate care in a way that would effectively ensure his holistic development. Despite being based on the principle of the best interests of the child, the Committee on the Rights of the Child accepted that, even without criminalisation of same-sex sexual acts or relationships, the impact of violence and harassment in a homophobic society in the country of origin is an essential factor in the evaluation of the risk of *refoulement*. It may indeed lead to finding a real risk of irreparable harm (directly and indirectly) on SOGI grounds.

Leaving aside other considerations based on their different nature and role, the gap between the approaches adopted by the ECtHR and the Committee on the Rights of the Child sheds light on what a 'queer reading' of human rights really entails. Whereas the Committee looked at the individual and contextualised his specific needs in order to evaluate the risk of return, the ECtHR failed to afford sufficient weight to the societal and cultural environment in which the risk of ill-treatment materialises. In doing so, the Court employs heteronormative understandings of human rights, far from more advanced interpretations of asylum and human rights law supported [at international level](#), as well as adopted [domestically](#).

So, the answer to our question is necessarily 'yes': European human rights law *also* needs to be 'queered', because despite all the improvements made so far, 'queering' asylum law is not enough to protect SOGI minorities claiming asylum in Europe if human rights law supports contrasting views. The decision of the Committee on the Rights of the Child in [A.B. v. Finland](#) is particularly welcome because it may set the path for a better understanding of the complex and harsh conditions that sexual and gender minorities experience in their countries of origin before fleeing to safer places. Hopefully, it may lead to better-informed asylum and human rights decisions in Europe.

SUGGESTED READING

DANISI, C, DUSTIN, M, FERREIRA, N AND HELD, N (2021) [Queering asylum in Europe: legal and social experiences of seeking international protection on grounds of sexual orientation and gender identity](#). IMISCOE Research Series. Springer, Cham.

FERREIRA, N AND DANISI, C (2021) *Queering international refugee law*. In: COSTELLO, C, FOSTER, M AND MCADAM, J (eds.) [*The Oxford Handbook of International Refugee Law*](#). Oxford University Press, Oxford, Chapter 4.

SOGICA Project (2020) [*32 recommendations to the European Commission on the new EU LGBTI+ Equality Strategy*](#). University of Sussex, Brighton.

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