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Judging Homosexuality, Granting Asylum

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Asylum applications on the grounds of sexual orientation, although uncommon, raise questions that are relevant to any asylum claim: according to what criteria and what level of persecution are "genuine" refugees distinguished from "bogus" ones? And what is meant by this policy of proof?

"To be honest, he didn't look gay at all," commented a rapporteur of the National Court of Asylum (*Cour nationale du droit d'asile*), standing in front of the coffee machine during a break between two hearings. Minutes earlier he had been listening to a young man from Pakistan – whose file he had reviewed beforehand – who was seeking refugee status on the grounds of his persecution as a homosexual in his country of origin. Assisted by an interpreter and advised by a lawyer, this asylum seeker had first heard the reporter recommend that his claim be rejected before answering questions from the three judges of the bench. Clearly, he had failed to convince them, and they suspected him –as one of the judges later confirmed –of not being a "true" homosexual.

Since the 1980s and the development of increasingly restrictive immigration policies, asylum seekers have systematically been suspected of misusing the asylum procedure for purposes of "economic migration", a far cry from the criteria contained in the definition of the term "refugee" as established in the Geneva Convention. So there are said to be "genuine" refugees, legally entitled to seek asylum in France, and "bogus" claimants who must be tracked down. This dichotomy has been at the centre of the everyday judgment practices that have become established in the National Court of Asylum – the administrative court responsible for assessing appeals made against the decisions of the French Office for the Protection of Refugees and Stateless People (*Office français de protection des réfugiés et apatrides* – OFPRA) by asylum seekers whose initial claim has been dismissed.

The particularity of asylum claims based on sexual orientation lies in the fact that the judges focus less on any actual persecution or fears of persecution than on the veracity of a claimant's homosexuality. Once this has been established, persecution no longer has to be proven. It is therefore the ascertainment of homosexuality[1] that opens the doors to

[1] This article is based on an ethnography of the decisions made at the National Court of Asylum between 2009 and 2011 and supplemented by the study of a body of case law related to sexual orientation. Most of the cases observed involved homosexual men, which led me to examine only applications made by men. The analyses presented here could, however, be used to consider applications made by lesbians and transgender individuals. Nevertheless, further studies should be carried out in order to refine our understanding and take account of any specific features of their claims.

asylum. And yet, what are the elements that enable sexual orientation to be determined? When a person's sexuality comes under scrutiny, the judgment methods used are often called into question. Although these cases are infrequent, they lead to a broader reflection on the procedures for administering evidence in asylum claims.

The National Court of Asylum and the appeals process

The ordinary formation of the National Court of Asylum, formerly the Refugee Appeals Board (*Commission des recours des réfugiés* – CRR), is composed of a three-member bench: (1) an appointed president, chosen either by the vice-president of the Council of State (*Conseil d'Etat*) from among the members of either the Council of State or the administrative tribunals or administrative appeals courts, whether active or honorary; by the First President of the Court of Audit (*Cour des comptes*) from among the magistrates of the Court of Audit and the regional chambers of accounts, whether active or honorary; or else by the Minister of Justice from among the active magistrates on the bench and the honorary magistrates of the judiciary; (2) a qualified person of French nationality appointed by the United Nations High Commissioner for Refugees (UNHCR) acting on the advice of the vice-president of the Council of State; (3) a qualified person appointed by the vice-president of the Council of State on the recommendation of one of the ministers represented in the OFPRA administrative board. Extraordinary plenary sessions are also held, with nine members reviewing cases that are referred by the president of the Court or a bench because new legislation needs to be introduced.

After the appeal has been registered by the courts administration service and the case file requested from OFPRA, the Court first assesses its admissibility. The president has the option of dismissing some cases by order due to debarment (i.e. when the appeal is lodged after the deadline). Since the end of 2004, the president may also dismiss appeals by "new order", in other words after an initial assessment of the merits of the application (i.e. when requests for a review do not present any new facts). This procedure enables a number of cases to be dismissed quickly. After this initial sorting, each case is allocated to a rapporteur – an employee of the Court, either salaried or on a temporary contract – responsible for examining all the documents in a file (the applicant's story, the exchange with OFPRA, witness accounts and supporting documents, etc.) in order to draw up a report recommending the dismissal of the appeal or the overturning of OFPRA's decision and, in that event, the granting of the protection sought. The rapporteur may reserve their opinion, either because it has not been possible to establish an opinion on the case or because they prefer not to provide an opinion to the bench. The applicant is then summoned to a public hearing where a sworn interpreter assists in the language of the applicant's choice and a lawyer advises the applicant. During the hearing, the rapporteur provides a summary of the facts presented by the claimant and OFPRA's decision, presents the attachments and recommends a solution. The bench then listens to the lawyer and questions the applicant. Decisions are reached in camera after the hearing and posted three weeks later in the lobby of the Court building: either

OFPRA's decision is overturned and protection is granted; or the decision is upheld and the claim is dismissed, in which case the applicant is asked to leave the territory within 30 days. The individual can request that the case be re-examined by the prefecture. To do so, the applicant must produce new elements to support their fear of persecution if returned to their country of origin. OFPRA issues a certificate of re-examination, the prefecture extends the applicant's residency permit and the case returns to OFPRA. If the review is unsuccessful, the application is rejected permanently and the applicant has 30 days in which to leave the territory, after which the prefecture issues an obligation to leave French territory; after this period, the individual can be expelled automatically and the administration is not required to issue a new ruling. It is also possible to appeal against the Court's decisions to the Council of State; in order for an appeal to be admitted, it must be presented by a lawyer within two months of the notification of the decision. This appeal is non-suspensive. As such, during the case review the applicant is not issued with a residency permit and an expulsion ruling may be enforced. In the event that the ruling is overturned, the appeal is sent back to the Court to be re-examined.

Homosexuals as a "social group"

In the aftermath of the Second World War, those who drafted the convention on the status of refugees made no reference to sexuality among the reasons for persecution or fear of persecution justifying the protection of a host country. Five criteria were used to define a refugee as a 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."[2]

The profound shift in people's perception of sexuality that came about with gay rights movements, first in the United States then in Western Europe, the development of feminist theories and the fight against AIDS all helped to bring persecution on the grounds of sexual orientation or gender identity onto the list of legitimate reasons for seeking asylum. In 1993, the first plenary session of the appeal court was held to adjudicate on the asylum claim of a transsexual in France.[3] It ended in a dismissal of the case on the grounds that the applicant "could not be considered as belonging to a social group". An appeal against the ruling was lodged with the Council of State and the CRR's decision was overturned on the grounds that the judges had not assessed whether or not "the elements that were submitted to it regarding the situation of transsexuals in Algeria enabled those individuals to be considered to constitute a social group whose members were, due to the shared characteristics that define them in the eyes of the Algerian authorities and Algerian society, at risk of being persecuted".[4] The case was therefore

[2] Convention on the Status of Refugees, Chapter 1, Article 1, A(2). (http://www.unhcr.org/3b66c2aa10)
[3] Plenary session, Refugee Appeals Board, Koloskov, 17/12/93.
[4] Council of State, Ourbih, 23/06/97.

referred back to the CRR and the individual was finally granted asylum in 1998.[5]

One year later, in May 1999, it was ruled that the notion of "social group" could be applied to homosexuals.[6] Sexual orientation and gender identity were then included among the five criteria laid down in the 1951 Convention, and homosexuals, lesbians and transsexuals from a particular country were considered as members of a "social group"[7]. The 1999 ruling specified the two conditions that must be met in order for an applicant to make an asylum claim on these grounds: first, they must "claim" their homosexuality and, second, they must "manifest it in their outward behaviour". The model of refugees persecuted in their country for their political opinion was used to develop the case law.

Claiming homosexuality became the key element in granting asylum. The applicant must have been publicly seen and acknowledged as homosexual in their own country – frequenting homosexual meeting places, taking part in gay rights movements, etc. The majority of the rejected applications that I consulted were the result of a failure to make public manifestations of this sort. This was mirrored by the fact that refugee status was granted to applicants who had manifested and claimed their sexual orientation. There were also decisions to grant refugee status that did not reflect related case law. In 2000, a CRR decision granted asylum to an Iranian man who had never publicly stated he was homosexual on the grounds that in his country "mere suspicion" of homosexuality was enough to cause persecution. As occurs with imputed political opinion, homosexuality can be "discovered" or "suspected" by local authorities, resulting in persecution. In all the Court rulings that granted refugee status despite the lack of any external manifestation, the applicants were from countries where homosexuality is punishable by law.

Moreover, during hearings and conversations with various actors of the Court it became apparent that there is a kind of benevolence towards applications that deal with sexual intimacy. This a priori positive position – which shows the force of Western values regarding the individual and control over one's own body – does not, however, necessarily lead to a systematic granting of refugee status. Nowadays, decisions on "gay asylum" lie somewhere between suspicion and benevolence.

Indications of homosexuality

For judges at the National Court of Asylum, establishing the validity of an asylum claim consists in scrutinising the case documents and assessing the applicant's sincerity during the hearing. For cases based on sexual orientation, this means determining the truth of the sexuality claimed by the applicant. The judges therefore seek to question the claimant on what they consider to be evidence of their sexuality. What follows is an excerpt from a

[5] Plenary session, Refugee Appeals Board, Ourbih, 15/05/98.
[6] Plenary session, Refugee Appeals Board, Djellal, 12/05/99.
[7] The three decisions of the Refugee Appeals Board that I consulted in reference to asylum claims on the grounds of transexuality analysed the applications of a social group under the terms defined by the Geneva Convention. One of them referred to transexuality as a sexual orientation, thus establishing an association that many Court staff seemed to make during our conversations.

hearing in which a female president of the bench questioned a Kosovan applicant seeking asylum on the grounds that he had been assaulted several times in his country on account of his homosexuality:

> Judge – Were you faithful [to his boyfriend, whom he claimed to have been seeing in secret]?
> The applicant listens to the translation and answers. Interpreter – Yes.
> Judge – But did you have any relationships that you have not mentioned in your written account?
> The applicant listens to the translation and answers. Interpreter – I only ever had flirtations.
> (…) Judge – Was your American friend [who was living in Pristina and gave the claimant accommodation and took care of him for ten days after the assault took place] just a flirtation or something more?
> The interpreter translates, the applicant answers and the interpreter says – He was just a friend.
> Judge – But he was homosexual…
> Applicant – Yes [in French before continuing in his own language]. Interpreter – There was nothing going on between us.
> Judge – Do you have a friend in France?
> Interpreter, after hearing the applicant's answer – Yes.
> Judge – Did you come here because you knew him?
> The applicant listens to the translation and answers. Interpreter – No, I met him here.
> [The judge asks one final question before handing over to her colleagues, who ask one question each, and to the lawyer]
> Judge – Do you go to gay bars here? Can you tell us the name of any?
>
> (field notes, National Court of Asylum hearing, 2010)

In order to test "gay knowledge", to use the expression of one rapporteur, the judge questioned the applicant on gay meeting places in France. These questions reveal the way in which the legal definition of "social group" has shifted towards what is considered homosexual sociability, with sexual orientation implying socialising with and belonging to a particular group. The judge also questioned the claimant on his relationships and fidelity. Other judges question asylum seekers on brands of lubricant they have used. Others are prepared to ask specific questions on sexual activity. These questions illustrate an act-based definition of what homosexuality means for these judges. For them, activity – specifically sexual activity – is what determines sexual orientation. It would seem that these judges consider all homosexuals to be sexually active.

At the same time, some magistrates believe it is possible to "see" an applicant's homosexuality during the hearing, based on their appearance and attitude. Others are more modest about their ability to "recognise" homosexuals: "It is true that sometimes their behaviour cannot be differentiated," one of them confided. "Differentiating" and "looking" are both terms that presume there to be obvious homosexual attributes. The young Pakistani applicant who "to be honest, […] didn't look gay at all" was clearly not

effeminate enough. Being able to "see" femininity in a man – and probably also masculinity in a woman – is an indication of this perceptible homosexuality. In such cases, sexuality has shifted towards gender.
The studies that have been made in several Anglo-Saxon countries[8] have observed the same method of dealing with asylum requests based on sexual orientation. Based on an analysis of claims by asylum seekers whom the judges consider "not feminine whatsoever," these studies have shown that decisions are made according to sexual stereotypes that are racialised and socially, temporally and spatially situated. Applicants who therefore do not conform to the image of the affluent, urban, white homosexual are systematically seen as "bogus" homosexuals and, as such, as "bogus" refugees. Claimants who are aware of these stereotypes beforehand can play on their appearance and perform to Western expectations of homosexuality during their hearing.

The lack of proof

Not all Court judges share these stereotypical views, however, just as the methods and specific aims of their questioning of applicants also vary. Many judges ask a large number of detailed questions while others ask no questions at all. Some take into account applicants' level of French whereas others give it little thought. Some magistrates highlight the existence of medical certificates while others focus on the "coherence" of the story being presented. These differences can be partly explained by the professional career paths of the members of the bench: there are administrative and judicial magistrates, assessors with a legal background, former educational civil servants, etc. The emotions aroused and the values used in decision-making also differ according to the personal background, sexual identity and gender of the judges. These differences can be observed in the variety of decisions reached by the Court, where similar cases can sometimes result in opposite rulings.[9]

Despite their differences, all the judges with whom I have discussed asylum claims made on the grounds of sexual orientation have spoken of their unease with regard to these "very awkward", "problematic", "difficult" and even "nightmarish" cases. Their unease stems not so much from the embarrassment they feel asking people intimate questions but from the fact that it is impossible to establish clear proof of a person's homosexuality. The judges believe they can only trust their impressions during the hearing when determining the applicant's sexuality, which, they admit, cannot be proven by any document. As one magistrate exclaimed, "We can't ask them to bring in a video of themselves making love!"

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[8] Laurie Berg, Jenni Millbank, "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants", *Journal of Refugee Studies*, vol. 22, n° 2, 2009, p.195-223; Fadi Hanna, "Punishing Masculinity in Gay Asylum Claims", *Yale Law Journal*, vol. 114, n° 4, 2005, p. 913-920; Deborah Morgan, "Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases", *Law and Sexuality,* vol. 15, 2006, p. 135-161. See also Jane Herlihy, Kate Gleeson, Stuart Turner, "What Assumptions About Human Behavior Underlie Asylum Judgments?", *International Journal of Refugee Law,* vol. 22, n°3, 2010, p. 351-366.

[9] Furthermore, the lack of a uniform body of case law was cited by the institution as one of the reasons it recruited permanent presidents who took on most of the appeals being examined.

In asylum procedures, as Gérard Noiriel wrote in the early 1990s, the official's task is based on the principle that the individual is an *applicant*, that it is their job to prove their identity and legitimate right to asylum, but that the public authorities must establish the nature and quantity of proof needed.[10] A policy of proof is thus established, in which the asylum seeker must provide an autobiographical account of their experience in the country of origin and of what caused them to flee, accompanied by all kinds of documents corroborating their story: a membership card of a political party, newspaper articles, photographs, medical certificates, proof of legal actions, etc.

It has become vital to provide a body of evidence in support of an account, but it is rarely sufficient because in most cases the documents provided are inconclusive or contested and the asylum application is rejected. Claims made on the grounds of sexual orientation implicitly demonstrate the lack of proof that ultimately lies in all asylum claims. They also illustrate the shift that has occurred in the test of truth, from examining the truthfulness of an account towards assessing an applicant's sincerity during the hearing. As such, it is no longer facts but people that are subject to judgment, with applicants expected to correspond to the stereotype of a homosexual or the archetype of a refugee.[11] In order to be granted asylum, it is necessary to correspond to this ideal construct.

Published in *Books&Ideas,* 3 October 2016. Translated from the French by Susannah Dale, with the support of the Florence Gould Foundation.

First published in laviedesidees.fr, 17 December 2015

[10] Gérard Noiriel, *La tyrannie du national. Le droit d'asile en Europe 1793–1993*, Paris, Calmann-Lévy, 1991.

[11] See Karen Akoka's studies on the construction of the refugee at OFPRA, including Karen Akoka, "L'archétype rêvé du réfugié", *Plein droit*, vol. 90, 2011. (http://www.gisti.org/spip.php?article2441).