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Of Prejudice and Protection: Assessing Spanish Judicial Compliance vis-à-vis Key EU Asylum Law Standards in SOGIESC-Based Claims

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Abstract

Asylum claims based on sexual orientation, gender identity or expression, and sex characteristics (SOGIESC) have become an increasingly prominent part of European asylum practice. Although these claims are governed by the Common European Asylum System (CEAS) -which seeks to ensure common standards of protection-, the examination and application of such standards remain primarily the responsibility of Member States. In this context, the Court of Justice of the European Union (CJEU) has developed key interpretative benchmarks aimed at guiding national decision-makers and strengthening protection for SOGIESC applicants. However, the effectiveness of these benchmarks ultimately depends on how they are interpreted, and applied by domestic courts, where divergences and protection gaps may arise.

Thus, this thesis examines the extent to which Spanish judicial practice complies with three core EU asylum law benchmarks identified in the CJEU's case-law: the prohibition of discretion, the criminalisation of SOGIESCs in countries of origin, and the standards governing credibility assessments. Adopting a doctrinal case-study approach, the research combines an analysis of relevant CJEU case-law with a systematic examination of all judgments issued by the Spanish Appeal Court and the Spanish Supreme Court between 2015 and 2025. The national case-law is assessed through a three-tiered compliance framework distinguishing full, partial, and non-compliance with the three EU benchmarks that have been previously identified.

The findings reveal an uneven pattern of compliance. While Spanish courts consistently adhere to the CJEU's benchmark on criminalisation, they display only partial and inconsistent compliance with the prohibition of discretion and with credibility assessment standards. In particular, discretion is frequently reintroduced implicitly, and credibility assessments continue to rely on stereotyped and Eurocentric assumptions. The thesis concludes that significant protection gaps persist in practice, underscoring the need for more robust, rights-sensitive judicial interpretation to ensure effective protection for SOGIESC asylum seekers within the CEAS.

List of abbreviations

AG	Advocate General
Art.	Article
CEAS	Common European Asylum System
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union (also referred in the text as "the Court")
COI	Country of Origin Information
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
IPA	Internal Protection Alternative
LGBTIQ+	Lesbian, gay, bisexual, transgender, intersexual, queer, and other sexual and gender minorities not reflected in the acronym
NGO	Non-Governmental Organization
Refugee Convention	The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol
SOGIESC	Sexual orientation, gender identity or expression, and sex characteristics
UNHCR	United Nations High Commissioner for Refugees

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1 Introduction

1.1 General context and problem statement

Over the last years, applications for international protection based on sexual orientation, gender identity or expression, and sex characteristics ('SOGIESC') have visibly increased across Europe.¹ These claims underscore a persistent reality: in many parts of the world, LGBTIQ+ persons continue to face threats to their safety, dignity, and freedom.² Within the EU, such claims are examined under a layered legal framework that combines international refugee law -with the Refugee Convention at its core- and the rules of the Common European Asylum System ('CEAS').³ This system, composed of a number of directives, regulations and other legal acts, ensures that asylum procedures remain the responsibility of Member States while being guided by EU-wide minimum common standards. In this context, judicial interpretation by the CJEU has played an important role in refining the framework and clarifying how these standards should apply in practice.

Yet the balance struck between EU guidance and national responsibility leaves room for divergencies at the national level.⁴ Because national authorities and courts are the ones applying international and European norms in individual cases, their role becomes pivotal in shaping the practical contours of protection in this field. In this sense, the effectiveness of the Luxembourg jurisprudence ultimately depends on how it is received and applied by national adjudicators, making their compliance decisive both for the uniformity of EU law and for the protection of asylum seekers in practice.

Against this backdrop, Spain illustrates these dynamics particularly well. As one of the EU's principal countries of destination for asylum seekers, it receives a consistent number of SOGIESC-based claims from diverse backgrounds, which has given rise to a substantial body of jurisprudence.⁵ This provides an ideal setting for analysing how

¹ EUAA, 'Jurisprudence on LGBTIQ applicants in international protection' in Fact Sheet No. 21 from September 2023. Available at: https://euaa.europa.eu/sites/default/files/publications/2023-09/AR2023_factsheet21_case_law_LGBTIQ_applicants_EN_0.pdf

² EUAA, '5.5. LGBTI applicants in the asylum procedure' in EASO Asylum Report 2021, January 2022. <https://euaa.europa.eu/easo-asylum-report-2021>

³ European Commission, 'Evolution of EU legislation on asylum'. Available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/asylum-eu_en

⁴ M. Wagner, P. Baumgartner and M. Mouzourakis, 'Harmonising asylum systems in Europe – a means or an end per se?' (CEASEVAL Working Paper No 25, CIDOB, April 2019), p. 38. Available at: <https://www.cidob.org/publicaciones/harmonising-asylum-systems-europe-means-or-end-se>, accessed 27 June 2025.

⁵ For instance, in Spain, 11.4% of refugees in 2025 were granted protection due to sexual orientation, a rise from 8.9% in 2022. Source: Government of Spain, 'The number of refugees in Spain on the basis of sexual orientation grows by 2.5% since 2022' (La Moncloa, 27 June 2025) <https://www.lamoncloa.gob.es/lang/en/gobierno/news/Paginas/2025/20250627-sexual-orientation-refugees.aspx>, accessed 27 June 2025.

adjudicators engage with key CEAS standards and for assessing the degree to which Spanish case-law aligns with this framework.

1.2 Research question and scope of the study

In this context, this thesis aims to explore and answer the following question: to what extent is Spain ensuring an assessment of SOGIESC asylum applications that is in compliance with key EU asylum law standards?

The choice to focus the scope of the study on SOGIESC-based asylum claims is grounded in their growing visibility and importance within European asylum systems; applications and status determinations based on SOGIESC have increased across Europe in recent years, reflecting both a heightened awareness of protection needs and persistent patterns of exclusion. Spain has been selected as the country of the study because it is among the EU's principal destination countries for asylum seekers, while its case-law on SOGIESC claims remains highly understudied. Rounding off the scope of the study are the three selected benchmarks: the expectation of discretion or concealment, the criminalisation of sexual orientations or gender identities, and the assessments of credibility, which were systematically and inductively identified through the review of the CJEU case-law. This review revealed that these are the most salient and influential standards set by the Court, having a significant impact on the assessment of SOGIESC applications. Their frequent recurrence in asylum cases as well as the contentious debate in the literature reflects both their importance and a degree of legal uncertainty regarding their proper interpretation and application, leading to their selection.

1.3 Methodology and limitations

To address the research question, this thesis adopts a doctrinal approach, focusing on the case study of Spain. This methodology combines a review of the EU case-law with a systematic examination of Spanish judicial practice concerning SOGIESC-based asylum claims across two chapters.

Chapter I analyses the three key benchmarks on discretion, criminalisation and credibility. For this purpose, the review of the EU case-law was conducted using the Newsletter on European Asylum Issues ('NEAIS') from the Centre for Migration Law of the Radboud University, which concisely covers CJEU decided and pending cases concerning asylum.⁶ All cases reported in the newsletter and every quarterly update from January 2012 until June 2025 were examined, focusing on those falling under the theme "Qualification for protection". The selected timeframe was chosen in order to

⁶ The NEAIS can be found at: <https://cmr.jur.ru.nl/neais/>.

identify standards reflecting contemporary developments, while also allowing national authorities sufficient time to internalise and apply them in their decision-making. From this corpus, only those judgments in which the Court explicitly interpreted provisions of EU asylum law with respect to SOGIESC applicants were retained.

In Chapter II, the thesis evaluates the Spanish judicial practice in light of the three selected benchmarks. For the evaluation of the Spanish judicial practice it is important to notice that, since the decisions issued at first instance of the asylum procedure in Spain are administrative⁷ and not open to the public,⁸ access to case information is only possible once a negative decision has been issued.⁹ At that point, the applicant may appeal to the judiciary, namely to '*Audiencia Nacional*' (the Spanish Appeal Court), whose decisions are publicly accessible, together with the ones of the Spanish Supreme Court.

To this end, a systematic review of all judgements that were publicly available and issued by the *Audiencia Nacional* and the Spanish Supreme Court between January 2015 to June 2025, dealing with international protection applications based on SOGIESC claims was conducted. This timeframe was chosen in order to capture contemporary developments while allowing sufficient distance from earlier CJEU case-law so that its reception and implementation at the national level could be meaningfully assessed. The judgments were retrieved through CENDOJ, the official Spanish database for judicial decisions. To identify them, the database's built-in search filters using the following terms was applied: "*Asylum AND LGTB OR LGTBI OR homosexuality OR homosexual OR bisexuality OR bisexual OR transsexuality OR transgender OR transexual*". And the following search fields: jurisdiction "administrative", type of decision "judgement", body "*Audiencia Nacional* and *Tribunal Supremo*" and year "From 01/01/2015 to 30/06/2025". The search yielded a sample of 1416 judgments. From this corpus, all of them were systematically reviewed, but only those that raised significant questions in relation to the three benchmarks were selected to be scrutinised. This was a human selection of cases where it was manually revised that at least one of the three benchmarks was substantially involved by representing the core problem and not just mentioned or dismissed for procedural issues. The result was a pool of 57 cases.¹⁰

⁷ According to Arts. 23 and 24 of the Spanish Law 12/2009 on the right to asylum and subsidiary protection.

⁸ According to Art. 45 of the Spanish Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations.

⁹ The competent authority to issue the decisions at first instance in Spain is the Inter-Ministerial Commission on Asylum and Refugees ("*CIAR*", for its Spanish acronym), which belongs to the Ministry of Home Affairs.

¹⁰ See list of cases in the Annex provided.

This thesis is also subject to several limitations. Firstly, the selection of the benchmarks relies on the cases covered by the NEAIS newsletter. While this source is systematic and reliable, it is still intermediary and shaped by editorial choices. Secondly, the Spanish analysis focuses exclusively on judicial decisions issued by *Audiencia Nacional* and the Spanish Supreme Court. As the first stage of the asylum process in Spain are not publicly accessible, this study cannot evaluate first-instance decisions, potentially omitting a substantial part of the analysis. Thirdly, the research is limited by its temporal scope. While the timeframe allows for a contemporary analysis and gives national courts sufficient opportunity to process and implement standards introduced shortly before 2015, it necessarily excludes earlier or very recent developments (from July 2025 onwards). Fourthly, it must be noted that, although the review of the national cases was open to all marginalised SOGIESCs, by far most cases deal only with sexual orientation. Lastly, it is important to acknowledge a limitation related to the Spanish judicial decisions database, since it has been noticed that it occasionally yields irrelevant cases, for instance by offering judgments that do not include the search terms entered into its filters. Thus, it is reasonable to think that the opposite may have occurred as well: relevant decisions might not have been retrieved and were therefore excluded from the analysis due to the database's shortcomings.¹¹

In order to answer the research question and evaluate Spain's alignment with the EU benchmarks, this thesis adopts a three-tiered framework to measure compliance with each of them. The categories are as follows: (1) Full compliance is identified when national courts follow and correctly apply the relevant EU standard, without introducing contrary reasoning or overlooking critical elements. (2) Partial compliance is noted when Spanish case law acknowledges the EU benchmark but either misapplies it, adds contradictory reasoning, or demonstrates inconsistencies. (3) Non-compliance is determined when the EU benchmark is ignored, contradicted, or replaced with reasoning incompatible with EU law and case-law. In analysing each judgement and the tier they will fall under, compliance is assessed through an examination of the legal reasoning, argumentative consistency, interpretative choices, deviations, and implications of the outcome for the applicants.

Finally, an Annex providing a clear overview of all Spanish judicial decisions analysed for this thesis has been elaborated, regardless of whether they are explicitly mentioned in the text or not. It is organised according to the three selected benchmarks following the sequence in which they are discussed in the thesis, and within each benchmark, the

¹¹ For this reason, the list of cases offered in the Annex does not ensure absolute exhaustiveness: it has been compiled with the authors' best efforts and with the technical means and sources that are public and available.

cases are arranged chronologically from the earliest to the most recent. Following individual examination, each judgment was marked into one of the three tiers of compliance. The purpose of the annex is twofold: first, to ensure transparency and seriousness in the case selection and coding process; and second, to provide a clear empirical basis for evaluating compliance and divergences. By condensing the data in this way, the annex directly supports the answer to the research question, as it makes very visible the extent to which Spanish courts align with or depart from CJEU standards.

1.4 Aim and relevance

This study is timely and necessary. On the one hand, due to the fact that Europe has been experiencing increasing polarisation, racism, xenophobia, and homophobia over the last years, asylum seekers have been placed in an especially vulnerable position. Ensuring that judicial practice upholds the EU's commitments is therefore of pressing importance. On the other hand, courts play a decisive role in shaping how these commitments are applied in practice, and their reasoning directly influences whether protection on paper is translated into effective lived realities through the courtroom. Against this backdrop, the aim of the thesis is to provide an overall picture of how such claims are assessed in Spain.

The relevance of this study lies in its focus on the intersection between supranational norms and national adjudication. While the EU framework on asylum is relatively well studied, far less attention has been devoted to how national courts apply these standards, particularly in Spain. By examining Spanish judicial decisions, this thesis contributes to filling that gap.¹² Additionally, the findings could be relevant not only for understanding Spain's compliance, but also for broader debates on consistency, legal certainty, and the effective protection of vulnerable groups within the CEAS. But, most importantly, the relevance of this study also lies in its specific focus on SOGIESC claims. LGBTIQ+ applicants often face compounded vulnerabilities within the asylum procedure: not only are they subject to its structural disadvantages, but they also confront entrenched social prejudices linked to their SOGIESC. This dual exposure frequently results in heightened barriers to recognition, such as limited or inadequate COI, the invisibility of certain identities in legal and social discourse, and the lack of decision-makers adequately trained to assess the particularities of these claims.¹³ Since many claimants navigate overlapping and intersectional forms of marginalisation in addition to their SOGIESC, acknowledging this dimension and dedicating some space to explore

¹² A. Rada, 'Situación de los refugiados LGBTI en Europa: trayectoria y retos del derecho de asilo en la UE' (2016) 120 *Tiempo de Paz*, p. 81-87.

¹³ See, for instance, on the issue of lack of training: N. LaViolette, 'Overcoming Problems with Sexual Minority Refugee Claims: Is LGBT Cultural Competency Training the Solution?' (2012) in Thomas Spijkerboer (ed.), *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum*, p. 8.

some of the challenges they face is important to ensure that adjudication processes are sensitive to such realities and that legal systems do not reproduce the very exclusions they are meant to redress.

1.5 Structure

This thesis is structured into four main parts.

The first part, the Introduction, establishes the general context of the research by situating SOGIESC asylum claims within the broader European framework and outlines the key issues that justify and inform this thesis. It presents the research question and the scope; the methodology and its limitations; the aim and relevance of the study; and its structure, providing the necessary foundation for the analysis that follows.

Chapter I identifies and examines the three selected benchmarks established at the EU level for assessing SOGIESC claims, namely by exploring on the interpretation given by the CJEU and the main criticism they have faced.

Chapter II applies this framework to 57 Spanish judicial decisions, assessing the country's level of compliance vis-à-vis the EU standards outlined in Chapter I. This is done through the three-tiered system. The assessment will enable to identify whether protection gaps or systemic patterns persist at the national level.

Finally, the Conclusion synthesizes the main findings of the study and evaluates Spain's compliance in order to answer the research question. On this basis, it formulates recommendations directed at remedying the shortcomings identified and fostering the conditions necessary for a higher level of compliance.

2 Setting the scene: key EU asylum benchmarks under scrutiny

2.1 The discretion or concealment requirement

2.1.1 Prohibiting forced discretion: the breakthrough of X, Y, and Z

In 2013, the CJEU issued in *X, Y, and Z* one of the most important judgements for SOGIESC-based claims.¹⁴ The case dealt with asylum applications lodged in the Netherlands by three men who claimed to be persecuted in their countries of origin by reason of their sexual orientation, which was referred to the CJEU for a preliminary ruling.¹⁵ The Court was asked to clarify three issues.¹⁶ First, whether people with a homosexual orientation should be considered a “particular social group” under the Qualification Directive. Second, whether applicants could be required to conceal their sexual orientation or show restraint in expressing it, and whether any distinction could be made between a “core” and a “non-core” area of sexual orientation. And third, whether the criminalisation of same-sex conduct and the threat of imprisonment amounted to persecution within the meaning of EU law.

With regard to requiring a person to conceal their SOGIESC the Court held that it is incompatible with EU law to expect asylum seekers to be ‘discreet’ about their sexual orientation in order to avoid persecution.¹⁷ It further clarified that even if the asylum seeker could theoretically be more “discreet”, such a possibility should be irrelevant for the purpose of their claim’s assessment.¹⁸ Therefore, authorities may not consider whether an applicant could safely and effectively avoid harm by concealing their sexual orientation, the same way that political activists, for instance, are not expected to hide their opinions.

The Court substantiated these conclusions with three arguments: first, it relied on a literal interpretation of Art. 10(1)(d) of the Qualification Directive, noting that nothing in its wording suggests that certain acts or expressions linked to sexual orientation should be excluded from its scope. On that basis, the Court rejected the idea that applicants could be required to adopt particular attitudes or restrict how they express their identity;¹⁹ second, the Court referred by analogy to Art. 10(1)(b), which explicitly provides that religion covers both private and public practices;²⁰ finally, the Court invoked a principle-based argument grounded in human dignity, understanding that

¹⁴ Joined Cases C-199/12, C-200/12, and C-201/12 *X, Y, and Z v Minister voor Immigratie en Asiel* [2013] ECLI:EU:C:2013:720 (Fourth Chamber, 7 November 2013).

¹⁵ *Ibid* (n. 14) para. 23-36.

¹⁶ *Ibid* (n. 14) para. 37.

¹⁷ *Ibid* (n. 14) para. 76.

¹⁸ *Ibid* (n. 14) para. 75.

¹⁹ *Ibid* (n. 14) para. 67-68.

²⁰ *Ibid* (n. 14) para. 69.

because sexual orientation constitutes a characteristic so fundamental to personal identity, individuals cannot be required to conceal it.²¹

2.1.2 Tracing the roots of discretion: legal, doctrinal, and normative influences

While the *X, Y, and Z* judgement was certainly ground-breaking, it aligned with other previous developments to ensure a fair asylum procedure for LGBTIQ+ persons. Looking at the CJEU's own case-law, expert opinions, UNCHR Guidelines, and national case-law, helps to explain the inspiration behind the prohibition of forced or expected concealment of sexual orientation.

As for its own case-law, the Luxembourg Court had previously addressed persecution on the basis of religion in case *Y and Z*, where it similarly found that "the fact that [an applicant] could avoid [a real risk of persecution] by abstaining from certain religious practices is, in principle, irrelevant".²² This is so -the CJEU argued- because there is nothing in the text of the Qualification Directive that could make the Court think that the EU legislature had the intent to require applicants to avert persecution by concealing.²³ In *X, Y, and Z*, the Court extended this reasoning by analogy to sexual orientation, suggesting that the discretion requirement lacks a legal basis. The Court concluded that sexual orientation cannot be confined to the private sphere alone.²⁴

AG Sharpston in her Opinion on *X, Y, and Z* had previously formulated: "To say that all will be well if the applicant behaves discreetly on his return home is to ignore reality. Discretion is not a sure protection against discovery and consequent blackmail or persecution."²⁵ Here, the AG recognises the permanent possibility of being caught or involuntarily exposed that many people with marginalised SOGI face, which can often be outside of a person's control.²⁶ In addition, the AG acknowledges that circumstances of applicants may change over time and secrecy may not be an option for the entirety of their lifetime, something that was previously highlighted by the High Commissioner.²⁷ Other authors have gone beyond, emphasizing that the accompanying state of

²¹ Ibid (n. 14) para. 70.

²² Joined Cases C-71/11 and C-99/11 *Y and Z v Bundesrepublik Deutschland* [2012] ECLI:EU:C:2012:318 (Grand Chamber, 5 September 2012), para. 79.

²³ Ibid (n. 22) para. 78.

²⁴ Ibid (n. 14) para. 69.

²⁵ Advocate General Sharpston, Opinion in Joined Cases C-199/12 to C-201/12, *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* [2013] ECLI:EU:C:2013:474 (AG opinion, delivered 11 July 2013), para. 69.

²⁶ T. Spijkerboer, 'Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe' (COC Nederland/Vrije Universiteit Amsterdam 2011). Available at: <https://www.refworld.org/reference/themreport/vuu/2011/en/83496> accessed 13 January 2025, p. 38.

²⁷ UNHCR, 'Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (23 October 2012). Available at: <https://www.refworld.org/policy/legalguidance/unhcr/2012/en/89548>, accessed 28 June 2025, para. 32.

permanent fear of the 'risk of discovery' can, in itself, be seen as inhuman and degrading.²⁸ Thus, rejecting an asylum claim merely because the applicant could conceal their identity is seen by experts as ignoring the reality that this is neither a reliable nor a permanent safeguard, and may amount to inhuman and degrading treatment.

The UNHCR's authoritative Guidelines on SOGIESC claims were released a year before the ruling. In them, the High Commissioner clearly states that LGBTIQ+ persons are entitled to the same rights of expression and association as anyone else, setting the ground work for any further legal interpretation: the possibility for an applicant to avoid persecution by concealing does not constitute a valid reason to deny refugee status.²⁹ Any different understanding would entail allowing individuals with marginalised SOGIESCs to be required to hide, alter, or abandon fundamental aspects of who they are, standing in direct contradiction with the purpose of the Convention.³⁰

The prohibition of discretion had previously also been established by the UK Supreme Court in its 2010 *HJ and HT* judgement.³¹ This ruling played a formative role in shaping the understanding discretion. According to the British judges, requiring an applicant to hide their sexual orientation undermines their fundamental right to live freely and openly.³² In order to provide some guidance as to how to deal with asylum applications in the future, the UK Supreme Court proposed the several-step "if-and-why test":³³ if individuals who are open about their sexuality would face persecution in their country of origin, the initial question is whether the applicant would live openly.³⁴ If the answer is yes, then they qualify for refugee status, even if they could avoid harm by concealing. However, if the applicant would live discreetly, the next step is to determine the motivation for that. If the reason for concealment is fear of persecution, then the individual should be recognised as a refugee. Conversely, if discretion is a matter of personal preference or family or social convention, then refugee status would not

²⁸ Ibid (n. 26) 8.

²⁹ Ibid (n. 27) para. 31.

³⁰ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

³¹ Other courts include, for instance, the High Court of Australia in case *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 29, 26 May 2005, S70/2004.

³² *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, United Kingdom Supreme Court 31, [2010], 7 Jul. 2010, para. 78.

³³ A. Edwards, 'X, Y and Z: The "A, B, C" of Claims based on Sexual Orientation and/or Gender Identity?' (Expert Roundtable on asylum claims based on sexual orientation or gender identity or expression)', International Commission of Jurists, Brussels, 27 June 2014) <https://www.refworld.org/policy/statements/unhcr/2014/en/100304>, accessed 8 July 2025, p. 6.

³⁴ Ibid.

apply.³⁵ The British Court thus found an apparent distinction between “discretion out of necessity” and “voluntary” discretion that remains debated in the literature.

2.1.3 The contested notion of ‘voluntary discretion’

This latter distinction of ‘voluntary discretion’ has drawn the most criticism among scholars. Firstly, as sexual orientation concerns a deeply personal and sometimes shameful part of a person’s identity, it seems impossible for an outsider to decide when a person is truly “choosing” to live discreetly.³⁶ This holds especially true as the reason for disguising one’s SOGIESC can be a mix of cumulative factors: fear of being rejected by relatives, social marginalization, job-related consequences, or internal religious or moral conflicts with one’s own identity. In fact, one could even go as far as arguing that ‘voluntary discretion’ does not exist. For many LGBTIQ+ individuals, discretion is not genuinely free but shaped by subconscious fear, anguish, stigma, or internalised pressure.³⁷ As a result, even when someone “chooses” to live discreetly, that decision may still be driven by coercive or protective factors rooted in forced reasons. Finally, it has been argued that “by submitting an LGBTIQ+ based application, individuals are [already] expressing their desire to live openly and without fear of persecution”.³⁸ Therefore, in case of concealment, the motive should be irrelevant altogether,³⁹ including an apparently “voluntary” choice by the applicant.⁴⁰

2.1.4 The CJEU’s approach to discretion and criticism

While the main conclusions of *X, Y, and Z* in regard to discretion were considered by the literature as a fair and necessary step-forward in the assessment of SOGIESC-based applications,⁴¹ some authors argued that the Court’s ruling fell short, not because of what it stated, but because of what it did not.⁴² While the Court clearly put a blanket ban on all forms of expected or “involuntary” concealment,⁴³ it remained silent on the issue of voluntary discretion of one’s sexuality. Although it did state that the “restraint

³⁵ M. den Heijer, ‘Persecution for Reason of Sexual Orientation: *X, Y and Z*’ (2014) 51(4) *Common Market Law Review* 1217-1234, p. 1227-1228.

³⁶ J.M. Wessels, ‘HJ (Iran) and HT (Cameroon) – Reflections on a new test for sexuality-based asylum claims in Britain’ (2013) *International Journal of Refugee Law*, 815-839, p. 837.

³⁷ *Ibid* (n. 26) 8.

³⁸ *Ibid* (n. 26) 38.

³⁹ Some authors like Hathaway or Pobjoy have even suggested that the approach taken by the UK Supreme Court represents an allowance of the concealment requirement through the back door. In this regard, see: James C. Hathaway and Jason Pobjoy, ‘Queer Cases Make Bad Law’ (2012) 44 *New York University Journal of International Law and Politics* 315, p. 329.

⁴⁰ J. Millbank and C. Dauvergne have noted that “even an individual who wishes to hide, who desperately wishes – and takes all possible steps – to remain closeted does in fact become increasingly ‘visible’ with the passage of time”, see C. Dauvergne and J. Millbank, ‘Before the High Court: Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh’ (2003) *Sydney Law Review* 97, Vol 25, 122.

⁴¹ See, for instance: *Ibid* (n. 36).

⁴² P. Sussner, ‘Addressing Heteronormativity: The Not-So-Lost Requirement of Discretion in (Austrian) Asylum Law’ (2022) 34(1) *International Journal of Refugee Law* 31-53, p. 35.

⁴³ *Ibid* (n. 14) para. 71.

that a person should exercise” with regards to the assessment of their actual fear of persecution lies in the discretion of the deciding authority,⁴⁴ it did not consider the degree to which openness about one’s sexuality matters (if it does at all), nor did the Court refer to cases where a person appears to voluntarily suppress this part of their identity, and how this would impact on their qualification for protection.

Furthermore, some scholars have also argued that the Court could have given a more detailed roadmap on how SOGIESC claims should be assessed post-*X, Y, and Z*, in order to avoid that discretion continues to *de facto* apply in these claims.⁴⁵ Concretely, it has been criticized that the Court did not provide further guidance for decision-makers on how to treat SOGIESC claims in the future, leaving a void for decisions to be made based on heteronormative or even stereotyped ideas of what people with diverse sexual orientations “should” behave like.⁴⁶ This lack of guidance may explain why national courts of Member States like Austria have continued to ask for discretion in IPA cases,⁴⁷ assuming that if nobody is aware of the applicant’s identity in the new location, no risk of persecution exists.⁴⁸ However, this clearly presumes that the individual will conceal their identity, which the CJEU has prohibited.⁴⁹

In summary, the Luxembourg Court clarified that persons with marginalised sexual orientation cannot be expected to restrict the expression of their identity beyond that expected of a heterosexual person. However, as heteronormative ideas and expectations remain present in European asylum systems, a potential for gaps and inconsistent decision-making provides a strong justification for examining national case-law more closely.

2.2 The criminalisation of sexual orientations or gender identities

2.2.1 The CJEU’s approach on criminalisation

The landmark *X, Y, and Z* judgement further dealt with another important aspect of SOGIESC claims: criminalisation. This can be understood as the prohibition by law of sexual acts between same-sex adults in private or other acts that deviate from cis and

⁴⁴ Ibid (n. 14) para. 72.

⁴⁵ See, for instance: Ibid (n. 42), p. 31.

⁴⁶ Ibid (n. 42).

⁴⁷ See some of the cases analysed in Ibid (n. 42), p. 48-50.

⁴⁸ Ibid (n. 42) 49.

⁴⁹ Issues like this one in relation to the IPA may become more common now that its consideration will be mandatory under the new Migration Pact (as opposed to the current ‘may’ clause). Art. 8 of the Qualification Directive reads as follows of today: “1. As part of the assessment of the application for international protection, Member States **may** determine that an applicant is not in need of international protection if in a part of the country of origin [...]”. However, with the Qualification Regulation 2024/1347, applicable as of July 2026, Art. 8 will be modified as follows: “1. Where the State or agents of the State are not the actors of persecution or serious harm, the determining authority **shall** examine, as part of the assessment of the application for international protection [...]”.

heteronormativity.⁵⁰ Punishment may range from economic fines and imprisonment to corporal punishment or death.⁵¹ Problems during the asylum procedure arise where marginalised SOGIESC are criminalised in theory, but the laws are not consequently enforced. In this regard, the CJEU found also in *X, Y, and Z* that the mere existence of legislation criminalising homosexual acts does not *per se* amount to persecution.⁵² However, “a term of imprisonment which sanctions homosexual acts, and which is actually applied [...] must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution”.⁵³

2.2.2 A lost opportunity for stronger protection?: reasoning by different actors?

The Court followed the suggestions of UNHCR, who intervened in the case as a third party,⁵⁴ emphasising that laws criminalising same-sex conduct are inherently discriminatory and contrary to human rights standards.⁵⁵ While the High Commissioner recognised that criminalisation of same-sex relations, even if rarely enforced, can amount to persecution,⁵⁶ he maintained that criminalisation must be enforced in practice to justify refugee status.⁵⁷ UNCHR argued that if there is no enforcement, then there is not a real risk of persecution and, therefore, the elements of the refugee definition are not fulfilled. All in all, UNCHR considered the ruling to be in line with international refugee standards.⁵⁸

AG Sharpston, for her part, acknowledged that within the EU laws criminalising same-sex relations are considered to infringe fundamental rights.⁵⁹ Even if laws are dormant, their existence is already incompatible with the standards of dignity and equality. As such, an argument *a sensu contrario* could be made: if the mere enactment of such laws in a Member State would constitute a violation of fundamental rights, irrespective of their enforcement, it is unclear why the same situation in a non-EU state

⁵⁰ ILGA World, ‘Criminalisation of consensual same-sex sexual acts’ (ILGA World Database, online) <https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts>, accessed 22 July 2025.

⁵¹ Ibid (n. 26) 21.

⁵² Ibid (n. 14) para. 55-56.

⁵³ Ibid (n. 14) para. 61.

⁵⁴ Ibid (n. 33).

⁵⁵ Although it is true that it was never clearly expressed by UNCHR that the mere existence of such laws could constitute persecution within the meaning of the 1951 Geneva Convention, it seemed that, with the Guidance Note on Refugee Claims relating to sexual orientation and gender identity, the High Commissioner was of a different opinion. However, over the years, the UNCHR adopted a much more attenuated position, which is the one expressed in this text. However, it is worth reading the views expressed in this note on “Laws criminalising homosexual conduct”, back in 2008. See: UNHCR, ‘Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’ (2008), para. 17-22. Available at: <https://www.refworld.org/policy/legalguidance/unhcr/2008/en/63725>, accessed on 14 July 2025.

⁵⁶ Ibid (n. 27) para. 26-27.

⁵⁷ Ibid (n. 33).

⁵⁸ Ibid (n. 33).

⁵⁹ Ibid (n. 25) para. 41.

should be treated differently. However, in the end the AG found that “the Qualification Directive does not aim to grant protection whenever an individual cannot fully and effectively exercise the freedoms guaranteed by the Charter or the ECHR in their country of origin. The aim is not to export those EU standards globally”.⁶⁰ Such an export could be seen, otherwise, as a form of human rights or cultural imperialism,⁶¹ and she concluded that criminalisation does not automatically qualify as persecution under EU law.⁶² Nevertheless, the AG highlights a more nuanced understanding of what amounts to persecution, which also includes an “accumulation of various measures, including violations of human rights which is sufficiently severe”,⁶³ echoing Art. 9(1)(b) of the Qualification Directive. This coincides with longstanding case-law of the ECtHR, which, while not going as far as considering criminalisation that is not enforced an automatic violation of Art. 3, does see it as a violation of Art. 8 of the right to private and family life.⁶⁴

In this regard, the Strasbourg Court highlighted already in 1981 in *Dudgeon v. UK*, that the mere existence of criminalisation is in itself damaging and a source of “fear, suffering and psychological distress” that is liable to violate Art. 8.⁶⁵ Similarly, in *Norris v. Ireland* it held that: “A law which remains on the statute book, even though it is not enforced [...], may be applied again in such cases at any time.”⁶⁶ Criminalisation is, thus, clearly regarded as a violation of human rights that, if cumulative factors are given, may amount to asylum-relevant persecution. Nevertheless, more recently in *B and C v. Switzerland*, the Strasbourg Court focused on a potential violation of Art. 3 with regards to criminalisation and stated that “the mere existence of laws criminalising homosexual acts does not render an individual’s removal to that country contrary to Art. 3”, while asking the competent authorities, just like the CJEU did, to verify the actual application of the criminalising laws as a decisive factor to establish persecution.⁶⁷

⁶⁰ Ibid (n. 25).

⁶¹ Ibid (n. 25); footnote 33.

⁶² Ibid (n. 25) para. 50.

⁶³ Ibid (n. 25) para. 50.

⁶⁴ See some cases where a violation of Art. 8 ECHR was found: *Dudgeon v. the UK*; *Norris v. Ireland*; or *Modinos v. Cyprus*.

⁶⁵ *Dudgeon v. United Kingdom* Series A no 7525/76 (ECtHR, 22 October 1981), para. 37.

⁶⁶ *Norris v Ireland* Series A no. 142 (ECtHR, 26 October 1988), para. 33: “This conclusion is further supported by the High Court’s judgment of 10 October 1980, in which Mr Justice McWilliam, on the witnesses’ evidence, found, inter alia, that ‘One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease.’”

⁶⁷ *B and C v Switzerland* App no. 43987/16 and 889/19 (ECtHR, 17 November 2020), para. 59.

2.2.3 2.2.3. What the CJEU missed: criminalisation alone amounts to persecution

Organisations like the International Commission of Jurists or Amnesty International have argued that criminalisation constitutes persecution in itself.⁶⁸ This is so because, even if unenforced, such laws inherently stigmatise, marginalise individuals, and foster homophobia.⁶⁹ Additionally, criminal laws serve both as a standard for behaviour and as a tool for punishment.⁷⁰ They shape societal norms by signalling what is considered permissible and what is not. In doing so, they create legal and social pressure and empower society to react with stigma, bias, and exclusion toward those who do not conform. These provisions violate the right to human dignity⁷¹ and are inconsistent with international human rights principles, which affirm that dignity, equality, and fundamental freedoms are universal and inalienable.⁷² Finally, it has been argued that it is unreasonable to expect an LGBTIQ+ person to seek protection from state authorities while criminalising laws persist and that such laws may be seen a sign that State protection of LGBTIQ+ individuals is not available.⁷³

To summarise, the CJEU has taken the view that the mere existence of laws criminalising same-sex conduct does not in itself amount to persecution. According to the Court, such laws constitute persecution only where they are actually enforced. Nevertheless, international guidance recognises that even unforced criminal provisions are a core element of the persecutory environment underpinning a well-founded fear.⁷⁴ The effect of these laws should not be underestimated “just” because they are not effectively applied, as they often compel LGBTIQ+ individuals to suppress their identities, retreat into secrecy, or curtail relationships.⁷⁵

⁶⁸ International Commission of Jurists, ‘X, Y and Z: A Glass Half Full for “Rainbow Refugees”?’ The ICJ’s Observations on the Judgment of the Court of Justice of the European Union in X, Y and Z v Minister voor Immigratie en Asiel’, (3 June 2014) <https://www.icj.org/wp-content/uploads/2014/06/CommentaryXYZ-Advocacy-2014.pdf>, accessed 15 July 2025.

⁶⁹ Amnesty International and International Commission of Jurists, ‘Observations on the Preliminary Ruling Reference to the CJEU in the Joined Cases of X, Y and Z v Minister voor Immigratie en Asiel’ (2 October 2013) <https://www.icj.org/wp-content/uploads/2013/10/Observations-by-AI-and-ICJ-on-X-Y-and-Z-CJEU-ref-2-OCT-2013-FINAL-with-index-number-and-logos.pdf>, accessed 15 July 2025, p. 6.

⁷⁰ Ibid.

⁷¹ Enshrined, for instance, in Art. 1 of the Charter.

⁷² Ibid (n. 69) 5.

⁷³ Ibid (n. 67) 62.

⁷⁴ Ibid (n. 27) 8, para. 26.

⁷⁵ Ibid (n. 33).

2.3 The credibility assessment

2.3.1 When doubt replaces discretion: the role of credibility reshaped by the Court

After *X*, *Y*, and *Z* set aside the requirement of discretion, the focus of asylum rejections in many European countries began to shift.⁷⁶ Whereas before the judgement many SOGIESC cases were decided based on whether a person could disguise their identity upon return, afterwards the decision-making factors changed⁷⁷ and authorities increasingly questioned whether the applicant genuinely identified as LGBTIQ+.⁷⁸ Since proving a SOGIESC can be *per se* challenging as it concerns a deeply personal and often hidden part of one's identity, particularly for persons from a country where it is criminalised or stigmatised, lack of internal credibility was often the reason to reject these claims. This, together with the fact that in these situations there is usually a lack of 'hard evidence', meant credibility assessments took a much more central role in decision-making.

Despite being such an integral part of the decision-making process, there was little guidance on how credibility assessments should be carried out, particularly in SOGIESC claims.⁷⁹ The credibility assessment focuses on whether the applicant can present and internally and externally credible narrative. Lack of credibility means that a person's identity or story is not believed to be true and may directly lead to the rejection of their application. For instance, UNHCR states that internal "credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is capable of being believed".⁸⁰ Internal credibility is thus not an objective truth but a negotiated construct formed through a sort of pact between the applicant and the decision-maker.⁸¹ According to UNHCR's guidance, it largely depends on the narrative being logically structured and free from contradictions,

⁷⁶ See for instance: J. Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009), *Int. J. Hum. Rights* 13 (2-3), 391-414.

⁷⁷ S. Zisakou, 'Credibility Assessment in Asylum Claims Based on Sexual Orientation by the Greek Asylum Service: A Deep-Rooted Culture of Disbelief' (July 2021), *Frontiers in Human Dynamics*, 3, p. 4.

⁷⁸ ILGA-Europe, 'Good Practices Related to LGBTI Asylum Applicants in Europe' (ILGA-Europe, May 2014) <https://www.ilga-europe.org/report/good-practices-related-to-lgbti-asylum-applicants-in-europe/>, accessed 16 July 2025.

⁷⁹ Nowadays, there is more guidance on this issue. See, for instance: EUAA, 'Practical Guide on Applicants with Diverse Sexual Orientations, Gender Identities, Gender Expressions and Sex Characteristics – Examination Procedure' (EUAA, November 2024). Available at: <https://euaa.europa.eu/publications/practical-guide-SOGIESC-examination-procedure/>, accessed 30 July 2025.

⁸⁰ UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims' (16 December 1998), p. 3. Available at: <https://www.refworld.org/policy/legalguidance/unhcr/1998/en/23696>, accessed on 30 July 2025.

⁸¹ B. Gutiérrez Hernández, L. Carrillo Palacios and B. Alboreca Fernández, 'La situación de las personas solicitantes de protección internacional y refugiadas LGTB' (*Spanish Catholic Migration Commission Association*, 'ACCEM', 2018). Available at: <https://www.accem.es/archivos/libro/files/downloads/Estudio-LGTBi.pdf>, accessed on 30 July 2025.

suggesting that internal coherence increases the likelihood of being believed.⁸² Nonetheless, a lack of clear judicial standards meant internal credibility tests could vary greatly.⁸³

The Dutch Council of State recognised this problem and in 2013 asked for guidance from the CJEU in *A, B, and C*. This case sought to clarify how authorities should evaluate credibility in sexual orientation cases.⁸⁴ The Court held that national authorities cannot base their decisions on stereotypes, nor can they ask intrusive or degrading questions about sexual practices.⁸⁵ It also prohibited the use of evidence like showing sexual acts or explicit videos to prove someone's sexual orientation for violating the applicant's dignity and fundamental rights, as well as their right to private life.⁸⁶ This interpretation was supported by UNCHR.⁸⁷

2.3.2 Assessing feelings: the unresolved challenge of proving SOGIESC claims

At this point, it is essential to acknowledge some challenges of "proving" a marginalised SOGIESC within the asylum procedure. One difficulty lies in the conceptual ambiguity of terms such as 'sexual orientation', which remains contested among scholars even today. There is no universally accepted definition and interpretations vary considerably across academic disciplines.⁸⁸ Equally problematic is the wide cultural diversity in how sexuality and gender are experienced and expressed across the world.⁸⁹ Attempting to evaluate these identities through a Western European lens risks imposing normative assumptions that may not be applicable to individuals from different socio-cultural backgrounds and leads to unfair expectations from applicants who may be unfamiliar with Western concepts.

For instance, a person assigned male at birth in Uganda who internally experiences a sense of being a "woman" may misidentify as homosexual or may not recognise themselves as transgender simply because the concept, language, or social recognition of transgender identities may not even exist in their context. To put it into simple words: how can a person know that they are transgender if they do not even know such a concept and what it means in the Europe? In these cases, applicants may present

⁸² Ibid (n. 81).

⁸³ David A. Morgan, 'Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases' (2006) 15 *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 135.

⁸⁴ Joined Cases C-148/13, 149/13, and 150/13 *A, B and C v Staatssecretaris van Veiligheid en Justitie* [2014] ECLI:EU:C:2014:2406 (Grand Chamber, 2 December 2014).

⁸⁵ Ibid (n. 84) para. 72.

⁸⁶ Ibid.

⁸⁷ Ibid (n. 27) para. 60 and 62-64.

⁸⁸ S. Rehaag and H. Evans-Cameron, 'Experimenting with Credibility in Refugee Adjudication: Gaydar', *Canadian Journal of Human Rights* 9(1) (2020).

⁸⁹ Ibid (n. 26) 47.

accounts that appear inconsistent, confusing or contradicting, not due to deception, but due to genuine limitations and barriers shaped by their background, which may not “match” the preconceived assumptions held by decision-makers. This often leads such narratives to be dismissed for lacking credibility, despite being a direct consequence of structural and cultural disparities.

Additionally, in many heteronormative societies, sexual minorities have historically been denied the right to define their own identities, which has caused long-lasting psychology-related harm.⁹⁰ Many LGBTIQ+ individuals grow up facing narratives that portray their sexuality or gender identity as deviant or pathological: something to be corrected or treated.⁹¹ Within this context, it can be recognised that demanding proof of an applicant’s identity risks reproducing the pain and violence from which they are seeking protection. This may again lead to inconsistencies, not due to the absence of a marginalized SOGIESC, but because of the trauma asylum seekers have experienced.

Yet, for SOGIESC experts the most respectful and reliable approach to assess someone’s identity is to accept their self-declared one (also when their conception is different from “ours”).⁹² Self-identification, as one of the aspects of the right to private and family life, is part of the European human rights framework.⁹³ For instance, the ECtHR has stated in its case-law that: “Elements such as gender identification, name, sexual orientation and sexual life fall within the personal sphere protected by Art. 8”.⁹⁴ Nevertheless, neither the CJEU nor the UNHCR treat self-identification alone as sufficient proof of credibility, requiring applicants to go beyond their own declarations to establish the legitimacy of their SOGIESC.⁹⁵

2.3.3 Further reshaping: the F judgement

In 2018, the Court further elaborated on the credibility assessment of SOGIESC cases in the *F* judgment. The case arose in Hungary after a Nigerian man claiming persecution due to his sexual orientation was subjected to psychological testing.⁹⁶ The

⁹⁰ Ibid (n. 77) 4.

⁹¹ Ibid.

⁹² See, for instance: Ibid (n. 26); S. Jansen and COC Netherlands, ‘Pride or Shame: Assessing LGBTI Asylum Applications in the Netherlands Following the XYZ and ABC Judgments’ (*COC Netherlands*, June 2018). Available at: <https://www.refworld.org/docid/5c6eb3344.html>, accessed 25 July 2025; A. Gustafsson Grønningsæter, ‘Establishing a sexual identity: The Norwegian immigration authorities practice in sexuality-based asylum cases’, *Out&Proud? LGBTI Asylum in Europe Conference*, COC Netherlands, Amsterdam, 5-6 October 2017.

⁹³ *Van Kück v Germany* [2003] (Application No 35968/97, ECtHR, Chamber, 12 June 2003), para. 69.

⁹⁴ Ibid.

⁹⁵ Ibid (n. 77) 4: “For UNHCR self-identification is an *indication* of someone’s SO and for the CJEU it is the *starting point* of the procedure”.

⁹⁶ F. Ferri, ‘Assessing Credibility of Asylum Seekers’ Statements on Sexual Orientation: Lights and Shadows of the F Judgment, *European Forum*, *European Papers* 3(2) (17 July 2018), p. 875-884 Available at: <https://www.europeanpapers.eu/europeanforum/assessing-credibility-of-asylum-seekers-statements-on-sexual-orientation>, accessed 22 July 2025.

results were compiled in a report by an expert who found him not credible. F challenged the decision arguing that the tests violated his fundamental rights. The Hungarian court referred the case to the CJEU, seeking clarity on the limits of national authorities' methods when verifying whether an applicant is -or is perceived to be- LGBTIQ+. ⁹⁷ The Court ruled that, while expert reports may be used under Art. 4 of the Qualification Directive, they must fulfil three conditions: ensure full respect to the rights enshrined in the Charter, particularly dignity and private life; ⁹⁸ not be the sole basis for the decision; and must not be treated as binding. ⁹⁹ Equally important, the Court also held that projective personality tests constituted a disproportionate and unjustifiable interference with the applicant's intimate sphere, even if consented, thus being contrary to EU law. ¹⁰⁰

This ruling marked a significant step forward towards the establishment of limits to the practices carried out during credibility assessments in the national systems. The case added an extra layer of protection by acknowledging the need for safeguards even when expert evidence is introduced and by reinforcing the primacy of fundamental rights. Furthermore, it also reaffirmed that asylum procedures must not replicate the very stigmas and harms from which claimants seek protection. However, the Court - again- refrained from positively defining what a fair credibility assessment should look like. ¹⁰¹ Likely, the CJEU will face more opportunities to provide further guidance in this regard.

In summary, the CJEU has banned practices that harm the dignity of SOGIESC applicants as well as reliance on stereotypes. Overall, credibility assessments have thus shifted from the assessment of practices to the assessment of feelings. ¹⁰² This shift presents significant challenges for the applicants, which have, however, not been recognised further by the Court. Given their deeply subjective nature, feelings are inherently difficult to prove and asylum seekers often face the problem of not having evidence other than their own testimony. ¹⁰³ But LGBTIQ+ asylum seekers usually face additional barriers, particularly when their narratives do not align with the expectations

⁹⁷ Ibid.

⁹⁸ Enshrined in Art. 1 and Art. 7, respectively.

⁹⁹ Ibid (n. 96) para. 46.

¹⁰⁰ Ibid (n. 96) para. 71.

¹⁰¹ Some authors have identified some flaws in the reasoning of the Court in *F*. For instance, F. Ferri identifies that the legal reasoning on why the personality tests conducted on the case at stake are not useful to shed light on the sexual orientation of the person are not fully explained. S. Zisakou also points out that issues such as the type of assessments that could help an expert determine someone's SOGIESC (other than the three conditions stated in order to allow expert reports), remained unaddressed as well. In this regard, see: Ibid (n. 97); and Ibid (n. 77) 4-5.

¹⁰² Ibid (n. 77) 4.

¹⁰³ F.A. Peña Díaz, 'Credibilidad de los solicitantes de asilo y estereotipos heterosexistas: en busca del "refugiado LGTBI por antonomasia' (2019) 39 *Cuadernos Electrónicos de Filosofía del Derecho* 271-291.

and identity-based assumptions of the authorities.¹⁰⁴ This mismatch can lead to disbelief, since claims are more likely to be credible when they reflect what reviewers expect or understand about LGBTIQ+ identities.¹⁰⁵ This reliance on familiar narratives makes it particularly difficult for asylum seekers whose experiences deviate from Western or mainstream conceptions.¹⁰⁶

2.4 Interim conclusion

The CJEU has clarified that applicants cannot be required to conceal their SOGIESC, that criminalisation alone constitutes persecution only when laws are effectively enforced, and that credibility assessments must avoid degrading, stereotypical, or overly intrusive methods. In the absence of further judgments refining or expanding these findings, these benchmarks represent the settled standards against which Spanish judicial practice will be assessed. Yet, from a critical perspective, not all problematic practices have been fully eliminated, and positive guidance seems to remain missing.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid (n. 81).

¹⁰⁶ See, for instance: R.A. Lewis, "'Gay? Prove It': The Politics of Queer Anti-Deportation Activism' (2014) 17 *Sexualities* 958. Available at: <https://doi.org/10.1177/1363460714552253>, accessed on 30 July 2025; or O. Jubany, 'Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within' (2011) 26 *International Sociology* 74. Available at: <https://journals.sagepub.com/doi/10.1177/0268580910380978>, accessed on 30 July 2025.

3 Spanish compliance vis-à-vis the EU benchmarks

In order to evaluate the extent to which Spanish judicial practice aligns with EU standards, this chapter will analyse Spanish case-law vis-à-vis the three European benchmarks identified in Chapter I. The analysis is structured around the three benchmarks in the order presented in the previous chapter to allow for both thematic clarity and comparative insight. For each benchmark, the chapter will discuss Spanish case-law that has been considered relevant for the aim of this thesis, assess the level of compliance and draw interim conclusions.

3.1 The discretion or concealment requirement

3.1.1 Preliminary remarks

As shown in the Annex, out of the 18 rulings analysed, only 5 demonstrate full compliance with the CJEU's prohibition of discretion, 1 reflects partial compliance, and 12 amount to outright non-compliance. Instances of correct application are frequently interwoven with departures from the standard with no consistent pattern emerging. For example, rulings issued in 2020 reached both compliant and non-compliant outcomes. Particularly concerning is the fact that, despite the considerable time elapsed since the CJEU established its case-law, more recent judgments continue to expect discretion in practice. Against this backdrop, several illustrative cases will be examined in detail below.

3.1.2 Analysis of the judgements

In 2016, the *Audiencia Nacional* made a controversial assessment on how a gay man should rationally act in a country where homosexuality is punishable (*SAN 178/2016*). In this case, the applicant -a Nigerian national- claimed to have left his country for being discovered while engaging in sexual activities with his boyfriend.¹⁰⁷ The court found, however, that "in a homophobic social environment such as Nigeria, which requires the gay community to adopt absolutely prudent lifestyles" such an incident would be unlikely to happen, ultimately denying his claim.¹⁰⁸ This reasoning rests on a problematic presumption: it imposes an expectation that individuals with non-heteronormative identities should necessarily behave discreetly in repressive contexts.¹⁰⁹ While decision-makers themselves do not require the applicant to conceal in this case, they assume what another person in this situation "would have done". This is in opposition to the Court's view that the expression of sexuality as a fundamental

¹⁰⁷ Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 8, Sentencia 178/2016, 25 January 2016, Rec. 679/2014, p. 3.

¹⁰⁸ *Ibid.*

¹⁰⁹ This controversial statement also engages with another standard analysed in this thesis: the assessment of the credibility of the applicant and his story.

part of one's identity should not only be relegated to the private sphere alone and is irrelevant to the procedure.

In a different case dealing with the criminalisation of homosexuality in Morocco (*SAN 3731/2016*), the Spanish court referred to specific incidents brought by the applicant as "sporadic in number, of random nature and reflecting bad luck", and found no evidence of widespread or systematic persecution targeting the homosexual population.¹¹⁰ One of the incidents involved an attack against two men kissing in a car, which the court argued would have elicited a similar reaction had it involved a heterosexual couple, in an attempt to prove that the restraint asked of homosexuals is the same than the one heterosexuals would be expected to exercise, as the CJEU established.¹¹¹ However, this conclusion by the Spanish court is based on mere speculation rather than on any supporting evidence, such as human rights reports, empirical data, or documented situations involving heterosexual couples in comparable circumstances. The judgment further concluded that Moroccan society demonstrates a "permissiveness *de facto*" towards homosexuality: through a practice of social denial, whereby homosexuality is tolerated (not accepted) as long as it remains private.¹¹² This shows how applicants are still expected to disguise.

In the same line, another ruling from 2019 accepts that "Moroccan persecution is not carried out through systematic persecution by the State."¹¹³ The cases of conviction arise from 'reckless actions'; as a general rule, sexual orientation that is practised 'discreetly' is not prosecuted".¹¹⁴ This reasoning once again clearly reinforces an expectation of discretion, suggesting that sexual orientation's concealment is an acceptable means of avoiding persecution.

Moreover, in cases like these ones where enforcement is found to be "rare", Spanish courts combine the issues of not-enforced criminal laws with an expectation to live discretely, an interplay that had not been analysed before. Where criminalising laws are considered 'seldomly applied', Spanish judges often argue that individuals could then live safely if they keep their marginalised SOGIESC private. In doing so, judges reintroduce expectations of living discretely or privately to minimize any form of persecution. This interpretation shifts responsibility away from the receiving state's

¹¹⁰ Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 2, Sentencia 3731/2016, 30 September 2016, Rec. 694/2015, p. 4-5. See also how Spanish courts refer to this argument in other cases, for instance: Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 2, Sentencia 2770/2021, 28 May 2021, Rec. 341/2019, p. 3.

¹¹¹ Ibid (n. 111 "Sentencia 3731/2016") 4-5.

¹¹² Ibid (n. 111 "Sentencia 3731/2016") 5.

¹¹³ Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 2, Sentencia 2778/2019, 27 June 2019, Rec. 494/2018, p. 10.

¹¹⁴ Ibid (n. 114) 11.

obligation to protect individuals from persecution, redirecting it toward the applicant's expected capacity to "navigate" their home environment without drawing attention. As a result, the substance of the discretion requirement remains present in the adjudicatory logic, reinforcing the assumptions that *X, Y and Z* sought to dismantle.

In a rare judgement concerning a lesbian trans woman from Panamá, the court concluded that there was no risk of persecution due to the absence of Panamá in major human rights reports as a country of "concern" and due to a 2009 ILGA report¹¹⁵ indicating that Panamá was among the countries where consensual same-sex relations were legally permitted in private.¹¹⁶ The court interpreted these two factors as sufficient to dismiss the claim, while ignoring her transgender identity. However, it is important to notice that the court's emphasis on the legality of same-sex relations in private as a justification for rejecting the asylum claim implicitly reintroduces discretion. This reasoning effectively presumes that protection is unwarranted so long as individuals refrain from publicly expressing their SOGIESC. In doing so, Spanish courts keep perpetuating a logic of discretion in the public sphere, something that has been rejected by the CJEU. Incidentally but worth noticing, the ILGA report cited by the Spanish court dates to 2009 (seven years prior to the issuance of the judgment), which may also raise concerns about the updating of the information relied upon. This issue has been identified as a recurrent problem in several other judgements.¹¹⁷

Finally, one of the most straightforward cases is *SAN 37/2022*. In this ruling, the Court stated that:

"Homosexuals can lead a relatively quiet life in Algeria if they live their status discreetly. They must act with restraint and caution towards imams, family members and certain public sectors of society, but they can enjoy a certain freedom in specific places in the country where homosexuals gather."¹¹⁸

¹¹⁵ D. Ottosson, 'State-Sponsored Homophobia: A World Survey of Laws Prohibiting Same Sex Activity Between Consenting Adults' (ILGA, May 2009). In this report, reference is made to the Panamanian *Decree No. 332, Official Gazette of 31 July 2008*. Access to the text of the Panamanian legislation: <https://www.gacetaoficial.gob.pa/pdfTemp/26095/12345.pdf>.

¹¹⁶ Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 8, Sentencia 1662/2016, 25 April 2016, Rec. 169/2015, p. 3-4.

¹¹⁷ See, for example: Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 2, Sentencia 1199/2020, 13 March 2020, Rec. 216/2018, p. 15; or Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 3, Sentencia 2542/2025, 5 June 2025, Rec. 1162/2023, p. 3, 7 and 8.

¹¹⁸ Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 5, Sentencia 37/2022, 12 January 2022, Rec 85/2021, p. 6.

This directly expects people with marginalised SOGIESC to live discreetly in their country of origin. Moreover, this expectation of discretion is clearly greater than what would be expected for heterosexual couples.

3.1.3 Level of compliance

The analysis reveals that Spanish case-law on discretion is at odds with the CJEU's standard. While some judgments issued show formal compliance with the standard set out by the CJEU, the majority of them continue to deviate from it. This shows that, although Spanish courts are aware of the prohibition of discretion, they have failed to apply it consistently.

First, Spanish courts sometimes develop reasonings where there is an expectation towards the applicant to live more discreetly in their countries of origin. This sometimes is done in combination with the existence of criminalising laws that are considered to be rarely enforced, where the courts argue that by concealing, the person will not suffer from any persecution due to such laws. Second, Spanish rulings often reduce same-sex relationships to the private sphere. Applicants are told that they can live safely as long as they confine the expression of their sexuality to private spaces. This approach conflicts directly with the CJEU's position that the expression of sexuality, as a fundamental aspect of identity, cannot be limited to the private sphere and must be protected in the public domain to the same extent as for heterosexuals. Finally, some rulings rely on outdated or decontextualised COI to argue that no risk of persecution exists in the applicants' home countries. While this is not the primary issue, it compounds the problem by providing a weak evidentiary basis for decisions that already fall back on discretion.

In conclusion, while Spanish judiciary has incorporated the prohibition of discretion sometimes, the majority of the judgments reflect interpretative tendencies and practices that deviate, pointing to persisting patterns. This shows a national practice falling under partial compliance.

3.2 The criminalisation of sexual orientations or gender identities

3.2.1 Preliminary remarks

The existence of laws punishing homosexuality or other forms of sexual orientation or gender identity in a country of origin seems to be one of the most recurrent factors for individuals to flee their countries and request international protection in Spain. As the Annex shows, 30 of the 57 cases analysed address this issue: all of them reflect total compliance with the criminalisation benchmark. This suggests that criminalisation is the standard with which Spanish courts have engaged most consistently. Nonetheless,

as has been identified above, the CJEU standard itself falls short of the protection needs of LGBTIQ+ applicants, according to international organisations and experts. This leads to certain harmful patterns or limitations identified also in the Spanish case-law.

3.2.2 Analysis of the judgements

When examining the impact of laws criminalising marginalised SOGIESCs, Spanish authorities rely on “objective” and “subjective” evidence to ascertain whether these laws may in fact cause a well-founded fear of persecution. While subjective evidence relies on the applicant’s own account, including factors such as the coherence and plausibility of the testimony; objective evidence refers to COI reports published by various third parties, most notably international organisations.¹¹⁹ In principle both subjective and objective evidence should be considered, as underscored by UNHCR,¹²⁰ which considers, however, that the applicant’s own testimony should be the primary source of evidence, especially “where persecution is at the hands of family members or the community”.¹²¹

However, this analysis has identified that Spanish courts tend to grant overriding evidentiary authority to “objective” evidence in criminalisation cases. This often creates an imbalance that disadvantages the applicant even when their account is coherent and plausible. For instance, in some rulings, the court has acknowledged that the applicant offered a consistent and contradiction-free narrative but ultimately rejected the application for protection because no objective evidence supported a conclusion of persecution.¹²² Spanish courts thus interpret the absence of explicit references to acts of persecution as evidence that no real risk exists. This directly contravenes UNHCR guidance, which stresses that the absence of specific COI on the situation of LGBTIQ+ persons is common and should not automatically lead to the conclusion that no persecution exists.¹²³ Spanish judges often overlook common reasons for the lack of documentation, such as limited monitoring, state censorship, or underreporting.

Nevertheless, in cases where both subjective and objective evidence pointed at a clear criminalisation in law and in fact, Spanish courts have duly recognised persecution. A positive example of this can be found in the applications submitted by asylum seekers from Cameroon, where being homosexual (or bisexual) is criminalised with prison

¹¹⁹ Mostly, Amnesty International, ILGA, Human Rights Watch and all sources of the UNHCR (notes, reports, briefings). Sometimes national organisations (if any) or other bodies from states with historical ties to the country in question are also taken into account, such as embassies.

¹²⁰ UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol’ (1 February 2019), para. 37-38.

¹²¹ Ibid (n. 27) para. 64.

¹²² See, for instance: Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 3, Sentencia 4102/2018, 25 October 2018, Rec. 319/2018; or Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 8, Sentencia 5816/2023, 10 November 2023, Rec. 987/2021.

¹²³ Ibid (n. 27) para. 66.

sentences.¹²⁴ For instance, in *AN 2388/2016*, the *Audiencia Nacional* gave refugee status to a Cameroonian bisexual man against whom an arrest warrant had been issued for having been involved in homosexual conducts. In another case, the Spanish Supreme Court established that the effective application of criminal punishment to homosexuals, as was proven for Cameroon, constitutes persecution.¹²⁵ These decisions were in line with the standard set out by the CJEU.

In cases involving applicants from Morocco and Algeria, the Court has consistently shown reluctance to recognise persecution. In *SAN 3735/2016*, a Moroccan national sought asylum after experiencing discrimination and physical violence from family and neighbours due to his sexual orientation, including a knife attack by his brother that caused head injuries.¹²⁶ He feared reporting the incident to the police, as homosexuality is criminalised in Morocco.¹²⁷ The *Audiencia Nacional* dismissed the claim, deeming homosexuality “*de facto* tolerated” and citing the absence of direct state persecution.¹²⁸ While acknowledging that Moroccan law prescribes prison sentences for same-sex acts and that such penalties have been enforced on occasion, the court concluded that the lack of active state-led persecution precluded refugee status. This approach reveals the assumption that persecution must only originate from state actors. In reality, however, many LGBTIQ+ individuals face threats from family, community, or other groups, while state authorities usually turn a blind eye.¹²⁹ Yet, Spanish courts frequently give decisive weight to the absence of direct state prosecution, failing to assess whether the state is unwilling or unable to provide effective protection against non-state persecution.¹³⁰

This is linked to the court’s failure to contextualize the applicant’s fear of approaching the police due to the criminalisation of homosexuality within the broader climate of legal and social hostility, which reflects a flawed understanding of protection. It seems then reasonable that when the persecution comes from third parties (like in the case at stake, where the applicant had suffered violence from his relatives) and the

¹²⁴ Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 2, Sentencia 2388/2016, 26 May 2016, Rec. 269/2015.

¹²⁵ Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección 3, Sentencia 3571/2016, 18 July 2016, Rec. 3847/2015, p. 7.

¹²⁶ Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 2, Sentencia 3735/2016, 7 October 2016, Rec. 118/2016, p. 2.

¹²⁷ Ibid.

¹²⁸ Ibid (n. 127) 3.

¹²⁹ CEAR, *Boletín Jurídico: Segundo semestre 2016*, p. 31. Available at: <https://www.cear.es/wp-content/uploads/2017/05/BOLETIN-JURIDICO-CEAR-SEGUNDO-SEMESTRE-2016.pdf>, accessed 30 July 2025.

¹³⁰ See other cases where Spanish courts focus almost exclusively on criminalisation as the most obvious form of direct state persecution while neglecting other actors of persecution: Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 8, Sentencia 1487/2017, 5 April 2017, Rec. 572/2015; Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 4, Sentencia 3712/2019, 2 October 2019, Rec. 529/2018; or Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 8, Sentencia 3834/2022, 1 July 2022, Rec. 750/2020.

reason for that persecution is itself criminalised, the persecuted person does not turn to the authorities for protection, as has been pointed out by the ECtHR.¹³¹

Although this does not, in itself, amount to a departure from the CJEU's standard on criminalisation, this recurring pattern in Spanish case-law nonetheless raises concerns about the protection of applicants with marginalised SOGIESCs. Many judgments rely on formulaic reasoning, particularly when addressing the enforcement of criminalising laws and conditions in the country of origin, often reproducing identical wording that suggests an automatic and uncritical application of precedent. In particular, courts often dismiss claims by citing that laws criminalising same-sex conduct in countries like Morocco are "generally rarely enforced", reaching rejection without assessing the applicant's specific situation and current country conditions, which represents a duty for the Member States under Art. 4 of the Qualification Directive. But even if that is not the case, by continuing to copy and paste these reasonings, Spanish courts give the impression of assuming that conditions in the country of origin remain unchanged over the time, and that they fail to conduct a thorough assessment of the current situation at the time the asylum claim is evaluated, as well as the specific circumstances of the individual. This holds true especially as the enforcement of criminalisation is found to be "rarely" not never enforced and thus highlights the possibility of occasional enforcement and the importance of personal testimony.

3.2.3 Level of compliance

Spanish case-law on criminalisation demonstrates a high degree of compliance with the CJEU's interpretation in *X, Y and Z*, but important limitations remain. Courts generally respect the benchmark set by the Court. They tend to grant protection where both subjective testimony and objective COI point towards an effective enforcement of such laws but refrain when this is not the case. However, a recurrent tendency is the disproportionate reliance on objective COI over applicants' own testimony when assessing whether criminalising laws are actually enforced. While this does not formally contradict the CJEU's interpretation, it raises doubts as to whether Spanish courts fully adhere to the protective spirit of the Refugee Convention, which requires that, when examining the well-founded fear of being persecuted, both subjective and objective elements are given consideration, especially the subjective one.¹³²

Moreover, Spanish courts tend to focus almost exclusively on criminalisation as the clearest form of direct state persecution, while giving insufficient attention to other persecutory actors such as family members, local communities, or religious groups, as

¹³¹ Ibid (n. 67) 62-63.

¹³² Ibid (n. 121) para. 37-38; and Ibid (n. 27) para. 64.

well as the inability of individuals to obtain state protection where the reason that they might be harmed for is formally criminalised. This approach suggests that, in the absence of further case-law beyond *X, Y and Z*, national courts have confined themselves to the specific scenarios addressed in Luxembourg, thereby overlooking other forms of persecution that remain equally relevant.

Taken together, Spanish case law reflects a full level of compliance with the CJEU standard that nevertheless reflects the very shortcomings of the Luxembourg's judgment.

3.3 The credibility assessment

3.3.1 Preliminary remarks

As visible in the Annex, a total of 14 Spanish judgments substantively addressing credibility have been identified. Of these, only 4 demonstrate full compliance with the Court's standards, 2 reflect outright non-compliance, and the remainder show partial compliance. The persistence of such deviations -particularly in more recent rulings from 2022 and 2023- is troubling, not least because the only compliant decisions date back to 2017. This suggests that while Spanish courts initially incorporated the CJEU's interpretation on credibility assessments, they have since moved away from that interpretation. On a positive note, no cases have been found to resort to practices such as requiring psychological testing or overly invasive or degrading questioning about personal experiences. In this context, several illustrative judgments will be analysed in detail below.

3.3.2 Analysis of the judgements

In *SAN 37/2022*, a case concerning a gay applicant from Algeria, the Spanish court rejected his application arguing that "there is no development or "construction" of his sexual orientation, therefore the applicant's narrative does not suggest he left his country due to persecution."¹³³ In essence, the court argues that the applicant did not have the typical "coming out" story that they would expect from a gay person. This reasoning rests on the cliché that sexual identity follows a fixed trajectory and that credibility depends on whether applicants follow a stereotypical path with their sexuality in the eyes of the judges. The judgment further states that "the account does not appear to reflect the experience of someone who, in his country of origin, was prevented from expressing his sexual orientation."¹³⁴ Here too, credibility is assessed through a bias: the court assumes that an applicant must have lived in repression or inhibition in order to be credible. This ignores the complex realities of LGBTIQ+ persons in repressive

¹³³ Ibid (n. 119) 2.

¹³⁴ Ibid.

contexts, where individuals may sometimes express themselves openly in limited spaces or relationships, while still facing criminalisation, societal hostility, or the risk of targeted violence (similarly to a political activist, for instance). Someone may appear to live “freely” at certain points, yet be forced to flee once conditions shift, after an incident of exposure, or when protection by authorities proves unavailable. By relying solely on such stereotypes and failing to acknowledge this complexity, the court reduces sexual orientation to a fixed narrative of continuous repression, ignoring the more nuanced and precarious ways in which applicants often navigate hostile environments, disregarding the CJEU’s standard.

Other judgements also show that there is often an implicit expectation that sexuality remains fixed over time.¹³⁵ This reflects a view that reduces sexual identity to a static and unchanging trait, disregarding its fluid and evolving nature.¹³⁶ For instance, in *SAV 178/2016*, the court questioned the credibility of the applicant’s account of discovering his sexual orientation after being abandoned by his girlfriend, characterising the narrative as unnatural and contrived.¹³⁷ This reasoning effectively erases the legitimacy of bisexuality or any non-linear experience of sexuality by imposing a rigid framework in which only fixed, lifelong identification is seen as credible.

In HIV cases, historical evidence points to a longstanding link between stigma and homophobia.¹³⁸ In fact, it has been recognized that individuals with HIV often face heightened levels of homophobia,¹³⁹ yet statements by the Court like: “Certainly, the treatment received by the appellant in the Spain is significantly superior to the treatment he receives in Perú. The appellant has emigrated in search of European standards of social protection, as opposed to those of his country, which are lower than ours”,¹⁴⁰ reproduce an idea of Eurocentrism and implicit sense of supremacy over so-called “third-world countries”,¹⁴¹ leading to the reproduction of stigmas like the

¹³⁵ Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 8, Sentencia 2759/2022, 12 May 2022, Rec. 493/2020; or Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 2, Sentencia 2406/2019, 7 June 2019, Rec 826/2017.

¹³⁶ S.A. Berger, ‘Production and Reproduction of Gender and Sexuality in Legal Discourses of Asylum in the United States’ (2009) 34 *Signs: Journal of Women in Culture and Society* 659. Available at: <https://www.journals.uchicago.edu/doi/10.1086/593380>, accessed on 30 July 2025.

¹³⁷ *Ibid* (n. 108) 3.

¹³⁸ E.A. Arnold, ‘“Triply Cursed”: Racism, Homophobia and HIV-Related Stigma Are Barriers to Regular HIV Testing, Treatment Adherence and Disclosure among Young Black Gay Men’ (2014) 16 *Culture, Health & Sexuality* 710. Available at: <https://www.tandfonline.com.mu.idm.oclc.org/doi/full/10.1080/13691058.2014.905706>, accessed on 30 July 2025.

¹³⁹ See, for instance: Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 2, Sentencia 5190/2017, 1 December 2017, Rec. 228/2017, p. 5.

¹⁴⁰ Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 2, Sentencia 1056/2022, 14 March 2022, Rec. 1668/2020.

¹⁴¹ *Ibid* (n. 107, R.A. Lewis).

'opportunistic' migrant, where the person is seen as someone who 'takes advantage' of the European welfare system, reinforcing xenophobic narratives.

As for transgender persons, the single important case deals with "the negotiation of the identity through medicalisation".¹⁴² In case *SAN 1593/2022*, the court gave refugee status to the applicant based on the fact that the applicant had self-hormoned and wished to undergo sexual reassignment surgery.¹⁴³ The Spanish judges signalled the expectation that, in order to get refugee status as a trans person, the applicant is expected to undergo medical treatment in order to acquire the "corporeality" of a "man" or a "woman", according to the European conceptions of these notions. This is similarly problematic as it allows only for one idea of how to live one's trans identity and denies individuals their own expression of gender and the diverse and individual experiences of persecution they may face as a result.

In another ruling, Spanish judges have even stated outright that: "The promiscuity of homosexuals is a well-known fact", clearly relying on stereotyped conceptions.¹⁴⁴ All these observations suggest reliance on preconceived ideas about credible identity development and narrative authenticity that risk undermining fair assessments.¹⁴⁵

3.3.3 Level of compliance

Spanish jurisprudence on credibility assessments reveals a mixed picture. Spanish courts generally avoid the most intrusive practices condemned in *A, B and C* and *F*, such as degrading questions or psychological testing. Yet, many rulings still rely on stereotypes, something that was explicitly banned by the CJEU: applicants are expected to present a "constructed" and linear identity, or to conform to fixed and Eurocentric notions of sexuality and gender. Such reasonings interpret non-normative narratives as signs of dishonesty, reproducing stigma rather than assessing credibility fairly.

¹⁴² L. Berg and J. Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 *Journal of Refugee Studies* 195. Available at: <https://academic.oup.com/jrs/article-abstract/22/2/195/1560647?redirectedFrom=fulltext&login=false>, accessed on 30 July 2025.

¹⁴³ Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 7, Sentencia 1593/2022, 11 April 2022, Rec 1135/2020.

¹⁴⁴ Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 2, Sentencia 1199/2020, 13 March 2020, Rec. 216/2018, p. 10.

¹⁴⁵ These ideas are also present in the reasonings of the courts when the applicant reports to have had same-sex relations, but claims not to be homosexual and refers to them as "just a fling", like in Audiencia Nacional (Sala de lo Contencioso-Administrativo, Sección 3ª), Sentencia 1871/2022, 9 May 2022, Rec. 393/2020, p. 2; when applicants themselves refer to homosexuality in a pejorative way, like in Audiencia Nacional (Sala de lo Contencioso-Administrativo, Sección 4ª), Sentencia 5002/2022, 5 October 2022, Rec. 292/2020, p. 2; or when persecution only happens years after the "discovery" of their sexual orientation, like in Audiencia Nacional (Sala de lo Contencioso-Administrativo, Sección 8ª), Sentencia 1573/2015, 23 April 2015, Rec. 334/2013), p. 2.

Therefore, while Spanish courts have generally internalised the prohibition of certain harmful practices, the persistence of embedded stereotypes and stigmas justify a classification of partial compliance with the EU standard.

4 Conclusion

To answer the research question: “*To what extent is Spain ensuring an assessment of SOGIESC asylum applications that is in compliance with key EU asylum law standards?*”, it can be stated that Spain’s judicial practice reflects full compliance regarding the criminalisation standard and partial compliance regarding the discretion and credibility standards, at times deviating from the CJEU interpretation and leaving certain protection gaps for SOGIESC applicants. This answer is also visibly reflected in the Annex.

Regarding the discretion benchmark, some examined rulings formally echo *X, Y and Z*’s prohibition on requiring concealment. Yet, many decisions, including some very recent ones, continue to reintroduce discretion through the back door. Spanish courts often assume that applicants can live safely if they restrict the expression of their SOGIESC to the private sphere or if they adopt “prudent” behaviour in public. In other instances, they combine the presence of rarely enforced criminal laws with an expectation of discretion, effectively shifting responsibility onto the applicant to avoid persecution. Some judgments even explicitly advise applicants to live discreetly, which stands in open contradiction to the CJEU’s case-law. These patterns show that while awareness of the prohibition exists, application is inconsistent.

Regarding the criminalisation benchmark, all examined rulings follow the criminalisation interpretation by the CJEU. They correctly recognise that actively enforced criminal laws against same-sex acts constitute and have granted protection where enforcement was credibly shown. Nevertheless, certain practices display protection-eroding tendencies: an over-reliance on COI over the applicant’s testimony that treats the absence of documentation as proof of safety; a reluctance to recognise persecution by non-state actors in settings where the state is unwilling or unable to protect; and a reproduction of formulaic reasonings which seem to replace the required individualized, up-to-date assessment. These tendencies do not formally contradict the Luxembourg jurisprudence but reflect interpretative habits that risk narrowing protection in practice. Criminalisation thus emerges as the benchmark with the highest level of compliance, although marked by some shortcomings.

Regarding the credibility benchmark, most Spanish judgments generally avoid the most intrusive practices condemned in *A, B and C* and *F*, such as degrading questioning or psychological testing. Yet, many rulings still rely on stereotypes, which has been ruled out by the CJEU, such as a linear “development” of their identity, sexual fixity that erases the fluidity of SOGIESCs, or medical validation of trans identities. These reasonings risk converting cultural assumptions and prejudices into legal criteria to measure credibility.

The picture thus is mixed: while adhering to the most outright prohibitions, stereotypes remain an issue for a fair credibility assessment.

In sum, Spain has internalised the three EU benchmarks but applies them unevenly in practice. To close the protection gap, adjudicators should (1) exclude the expectation of discretion in any guise; (2) recognise criminalisation's inherent effects on persons' abilities to live a dignified life and the existence of criminalising laws alone as sufficient to establish persecution (in cumulation); (3) balance COI with applicants' testimony and ground country analysis in updated, individualized COI; (4) recognise non-state persecution and the availability of state protection; and (5) operationalise culturally sensitive, stereotype-free credibility assessments with self-identification at its core. Without such course-corrections, full compliance overall will remain unattained.

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8 Annex: List of cases analysed for this thesis

Case number	Benchmark	Full compliance	Partial compliance	Non-compliance
SAN 1662/2016	Discretion			X
SAN 178/2016	Discretion		X	
SAN 3731/2016	Discretion			X
SAN 2819/2018	Discretion	X		
SAN 2406/2019*	Discretion			X
SAN 2778/2019	Discretion			X
SAN 1390/2020*	Discretion			X
SAN 393/2020*	Discretion			X
SAN 474/2020	Discretion			X
SAN 853/2020	Discretion	X		
SAN 2211/2020	Discretion	X		
SAN 1686/2021	Discretion			X
SAN 1932/2021	Discretion			X
SAN 597/2021	Discretion			X
SAN 1090/2022	Discretion	X		
SAN 37/2022*	Discretion			X
SAN 6775/2023*	Discretion	X		
SAN 2552/2025	Discretion			X
STS 4492/2015	Criminalisation	X		
SAN 2388/2016	Criminalisation	X		
STS 296/2016	Criminalisation	X		
STS 3571/2016	Criminalisation	X		
SAN 3735/2016	Criminalisation	X		
SAN 583/2016	Criminalisation	X		
SAN 1487/2017	Criminalisation	X		
SAN 510/2017	Criminalisation	X		
SAN 5190/2017	Criminalisation	X		
SAN 3410/2018	Criminalisation	X		
SAN 4102/2018	Criminalisation	X		
SAN 4259/2018	Criminalisation	X		
SAN 4902/2018	Criminalisation	X		
SAN 3712/2019	Criminalisation	X		
SAN 1390/2020*	Criminalisation	X		
SAN 393/2020*	Criminalisation	X		
SAN 1983/2021	Criminalisation	X		
SAN 2770/2021	Criminalisation	X		
SAN 3834/2022	Criminalisation	X		
SAN 484/2022	Criminalisation	X		
SAN 6185/2022	Criminalisation	X		
SAN 6282/2022	Criminalisation	X		
SAN 1891/2023	Criminalisation	X		
STS 2128/2023	Criminalisation	X		
SAN 5816/2023	Criminalisation	X		
SAN 6775/2023*	Criminalisation	X		
SAN 4470/2024	Criminalisation	X		
SAN 1127/2025	Criminalisation	X		
SAN 2353/2025	Criminalisation	X		
SAN 2542/2025	Criminalisation	X		

SAN 1573/2015	Credibility		X	
SAN 1773/2017	Credibility	X		
SAN 5167/2017	Credibility	X		
SAN 2406/2019*	Credibility		X	
SAN 1199/2020	Credibility			X
SAN 1056/2022	Credibility			X
SAN 1593/2022	Credibility		X	
SAN 1871/2022	Credibility		X	
SAN 2759/2022	Credibility		X	
SAN 37/2022*	Credibility		X	
SAN 5002/2022	Credibility		X	
SAN 1512/2023	Credibility	X		
SAN 6020/2023	Credibility	X		
SAN 6714/2023	Credibility		X	
Total: 57				

*Cases that deal with more than one benchmark and therefore are repeated on the table:

- SAN 2406/2019: discretion and credibility
- SAN 393/2020: discretion and criminalisation
- SAN 37/2022: discretion and credibility
- SAN 6775/2023: discretion and criminalisation