Normative Understandings: Sexual identity, Stereotypes, and Asylum Seeking

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The decision in *HJ and HT* was a landmark moment in the treatment of sexual minority asylum seekers by the UK.[1] In ringing the death knell of the much-maligned 'discretion test', the judgement has been heralded as a 'key factor in the improvement of first decisions'.[2] However, implementation of the decision has not been without issues. As Millbank[3] and Chelvan[4] predicted, the decision has placed greater emphasis on asylum seekers to prove their sexual identity.[5] This is borne out in the fact that 86% of rejections in 2013 were based, at least in part, on adverse credibility findings.[6]

This chapter employs a queer theoretical framework applying it to existing academic literature and judgements of the Court of Appeal and Upper Tribunal to interrogate the methods through which the 'legal truth' of asylum seekers' sexual identities is produced. [7] Building on Raj's observations[8] regarding the anxiety those administrating the asylum apparatus[9] feel towards the potential for false claims, I undertake a deconstructive analysis of

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[1] *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596.
[2] UK Lesbian and Gay Immigration Group, 'Missing the Mark' (Unison 2013) <https://uklgig.org.uk/wp-content/uploads/2014/02/Missing-the-Mark.pdf> accessed 12th December 2017.
[3] Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 The International Journal of Human Rights 391, 391-414.
[4] S Chelvan, 'Put Your Hands Up (If you Feel Love)' (2011) 25 Immigration, Asylum and Nationality Law 56, 57.
[5] See: Orientation, Behaviour, Identity section for an explanation of why I have adopted the concept of sexual identity.
[6] UK Lesbian and Gay Immigration Group, *'Missing the Mark'* (Unison 2013) <https://uklgig.org.uk/wp-content/uploads/2014/02/Missing-the-Mark.pdf> accessed 12th December 2017.
[7] For a discussion of the term legal truth see generally: See: Leslie Moran, '*The Homosexual(ity) of Law'* (Routledge 1996) 11.
[8] See Generally: Senthorun Raj, 'Affective Displacements: Understanding Emotions and Sexualities in Refugee Law' (2011) 36 Alternative Law Journal 177; Senthorun Raj, 'Queering Fears: Pro-LGBTI Refugee Cases' in Chris Ashford, Alan Reed and Nicola Wake '*Legal Perspectives on State Power: Consent and Control'* (Cambridge Scholars Publishing 2016) 126; 147-148; Senthoran Raj, 'A/Effective Adjudications: Queer Refugees and the Law' (2017) 38:4 Journal of Intercultural Studies 453.
[9] For a discussion of the term apparatus see Giorgio Agamben, '*What is apparatus? And Other Essays'* (Stanford University Press 2009) 2-3.

the methods through which law authenticates 'credible' identity performances. By doing this, I locate the discursive formations on which decision-makers' understandings of sexual identity rest. Thus, enabling me to illuminate the flawed reasoning of credibility determinations within sexual identity based claims.

The core themes underlying these determinations are then grouped together under the headings 'born-this-way' relating to the need for claimants' orientations and behaviours to have formed into coherent identities; 'I'm coming out (I want the world to know)' relating to the requirement on asylum seekers to visibly manifest their sexual identity; and 'I kissed a girl and I liked it' relating to the need for asylum seekers sexual behaviours' to correlate to their proclaimed identity.

Unpacking Queer

The term 'queer' is applied in numerous contexts, with different meanings intended by its user depending on their political orientation. For example, in the title of Hathaway and Pobjoy's *'Queer cases make bad law',*[10] queer calls attention to the unusual composition of the judgement in *HT and HJ.*[11] With Hathaway and Pojboy seeking to pinpoint the 'strange' nature of a decision which—in their view—disrupts the coherence of international refugee law.[12] Although my usage of the term is very much divorced from theirs, there is a common thread in the idea of *disrupting disciplinary coherence.* My understanding of queer draws on the work of Halberstam who argues that:

> A queer methodology, in a way, is a scavenger methodology that uses different methods to collect and produce information on subjects who have been deliberately or

[10] James Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 International Law and Politics 315.
[11] *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596.
[12] James Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 International Law and Politics 315, 331;335.

> accidentally excluded from traditional studies of human behaviour. The queer methodology…refuses the academic compulsion toward disciplinary coherence.[13]

Unpacking Halberstam, we can see that central to a queer approach is creating space to allow for those previously ignored to be accounted for and, through doing this, the disruption of the assumptions underlying a discourse.[14]

Orientation, Behaviour, Identity

One of the assumptions which must be disrupted in order to understand the specific issues facing sexual minority asylum seekers is the assumed coherence of sexuality. Savin-Williams argues that the term sexuality conflates sexual identity, sexual orientation and sexual behaviour.[15] He draws on a series of examples such as that of a girl, who publicly declares herself a lesbian; has a bi-sexual orientation, because she is attracted to males and females; and has presently had sex with only one person, a boy.[16] As this example demonstrates, there are times where there is no coincidence between identity, orientation, and behaviour at all. This issue plays out in the lived experiences of many sexual minorities. For example, some men may consider themselves gay as they are emotionally attracted to individuals of the same sex, while lacking any sexual attraction at all.[17]

Considering the structure of the credibility determination process, it appears that law is concerned with protecting sexual identity.[18] Therefore, the term sexual identity has been deployed in this paper when discussing the basis for sexual minority claims. This contrasts

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[13] Jack Halberstam, '*Female Masculinity'* (Duke University Press 1998) 13.
[14] Following Foucault, the term discourse is here used to mean any act of communication, whether written, spoken, or performed; this includes the structure of legal entities. See: Michel Foucault, *'Discipline and Punish'* (Vintage Books 1995) 233-239.
[15] Rich Savin-Williams, '*The New Gay Teenager'* (Harvard University Press 2005) 27-48.
[16] *Ibid* 35.
[17] See: Kirstin Scherrer, 'Coming to an Asexual Identity: Negotiating Identity, Negotiating Desire' (2008) 11 Sexualities 621.
[18] As we will explore later in the chapter.

with other scholars who deploy the terms sexuality and sexual orientation to refer to sexual minority asylum seekers.[19]

As will be explored below, credibility determinations attempt to assess the legal truth of individuals' claims to be of a certain sexual identity partially in reference to their sexual behaviour. Therefore, it is important to recognise a distinction between the protected characteristic (sexual identity) and one of the forms of evidence that can support the applicants claim to this identity (sexual behaviour).

Further, the distinction between orientation, behaviour and identity exposes one of the norms to be investigated. Asylum seekers are required to have formed their sexual orientation and any sexual behaviour into a coherent identity intelligible to a western audience. This requirement is exposed through one tribunal judge's claim that the claimant displayed 'a total absence of any understanding of what it means to be gay.'[20] As this underlies, there is an expectation that desire for members of the same sex will formulate into a coherent identity with a distinctive meaning. This requirement is further underlined by the various expectations that asylum seekers will have interacted with LGB community groups during their time in the UK,[21] and will be informed on LGB activist organisations within their country of nationality.[22] Going forward, this chapter lays out the refugee determination process before

[19] See For Example: Jenni Millbank, 'Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation' (2003) 18 Georgetown Journal of Immigration Law 71; Sheldon Magardie, '"Is The Applicant Really Gay" Legal Responses to Asylum Claims Based on Persecution Because of Sexual Orientation' (2003) 55 Agenda: Empowering Women for Gender Equality 81; Jenni Millbank, '"The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 International Journal of Refugee Law 1, 1-34; Jasmine Dawson and Paula Greber, 'Assessing the Refugee Claims of LGBTI people: Is the DSSH model useful for determining Claims by Women for Asylum Based on Sexual Orientation' (2017) 29 International Journal of Refugee Law 292.

[20] *Mr Syed Kazim Hussain Shah v Secretary of State for the Home Department* (UKUT IAC, 19 March 2018) [16].

[21] See For example: *Mr Get v Secretary of State for the Home Department* (UKUT IAC, 13 October 2017); *JBN v Secretary of State for the Home Department* (UKUT IAC, 13 September 2017) [17].

[22] See for example: Jenn Millbank, '"The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 International Journal of Refugee Law 1, 19.

turning to look specifically at how sexual minority identities are validated within the UK asylum apparatus.

Achieving Refugee Status

Refugee status is governed by the criteria set down in Article 1 A (2) of the Refugee Convention[23] as amended by the Protocol on Refugee status.[24] Article 1 A (2) states that a Refugee is:

> A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[25]

At the time of writing, the proposition that sexual identity can form the basis of an asylum claim is uncontroversial, with both the EU[26] and UNHCR[27] highlighting the fit of sexual orientation[28] within the 'Particular Social Group' (hereafter: PSG) head of the Refugee Convention.[29] However, it wasn't until the 1999 case of *Shah and Islam* that the UK accepted the premise that sexual identity could form the basis of a PSG.[30]

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[23]Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.
[24]Protocol Relating to the Status of Refugees, 31 January 1967,606 UNTS 267.
[25]Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137, Article 1 (A) 2.
[26]Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L337/26.
[27]UN High Commissioner for Refugees, 'Guidelines on Gender-Related Persecution Within the Context of Article 1A (2) of the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees 30', U.N. Doc HC/GIP/02/01 (2002).
[28]This is the term employed by the bodies themselves.
[29] Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.
[30]*Islam v Secretary of State for the Home Department and R v IAT ex p Shah* [1999] UKHL 20, [1999] 2 A.C.629.

Even after accepting that sexual identity based asylum seekers could for a PSG head, issues lingered. A useful overview of the key developments in this area is offered by Chelvan.[31] While *Shah and Islam*,[32] and later in the same year, *Jain*[33] clearly laid out that sexual identity—again labelled by the courts as sexual orientation or homosexuality—could form the basis for an asylum claim under PSG, the court in *Jain* went to extreme lengths to distinguish conduct from identity. Millbank draws attention to this practice, and its resonance with the gay rights struggle in the UK.[34] Chelvan has further claimed that 'The effect of Jain was that the court's understanding of the lives of gay men resulted in a purely "conduct driven approach" reducing their lives to the engagement of the sexual act…in the so-called 'privacy' of the bedroom'[35] In practice, the distinction between conduct and identity enabled claims to be denied on the basis that the claimants could avoid persecution through acting discreetly.[36]

This came to be known as the mandatory discretion criterion; which was founded on the idea that those seeking asylum on the basis of sexual identity could avoid persecution by keeping their sexual identity secret, not visibly manifesting their sexual orientation, and conducting their sexual behaviour in private. For example, mandatory discretion was described bluntly in an Australian decision as a 'reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection'[37] by acting with 'self-

[31] S Chelvan, 'Put Your Hands Up (If you Feel Love)' (2011) 25 Immigration, Asylum and Nationality Law 56, 56-66.
[32] *Islam v Secretary of State for the Home Department and R v IAT ex p Shah* [1999] UKHL 20, [1999] 2 A.C.629.
[33] J*ain v Secretary of State for the Home Department* [1999] EWCA Civ 3009, [2000] IMM AR 76.
[34] Jenni Millbank, 'A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation 1989-2003' (2005) 14 Social and Legal Studies 115.
[35] S Chelvan, 'Put Your Hands Up (If you Feel Love)' (2011) 25 Immigration, Asylum and Nationality Law 56, 57.
[36] See generally: Jenni Millbank, 'A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation, 1989-2003' (2005) 14 Social and Legal Studies 115.
[37] V95/03527 [1996] RRTA 246, 247.

restraint',[38]avoiding behaviour that might identify them as gay,[39] and never disclosing their sexual identity to others.[40] Often this line of reasoning was based on a mistaken and unchallenged premise that gay people will, or ought to, be inherently discreet.[41]

Following *HJ and HT,*[42] mandatory discretion is no longer available to decision-makers. Indeed, *HJ and HT* provided a new test to be applied to claims based on real or perceived sexual identity. [43] The test lays out that a decision maker should 'first ask itself whether it is satisfied on the evidence that he is gay'.[44] Then 'ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality'[45]. Thirdly, they should consider 'what the individual applicant would do if he were returned to that country.'[46]

Following this test, if the applicant either would live openly, or would live discreetly due to a fear of persecution, they qualify as a Refugee and are entitled to the protections promised under the Convention. Crucially, this means that decision makers are no longer permitted to compel a claimant to be discreet, rather they may only decide that they would do so as a matter of fact. However, under the new test, the first task confronting a decision maker is to ascertain whether the applicant's sexual identity is credible.

In sexual identity claims, as in all other asylum claims, the burden of proving their eligibility for Convention protection lies with the claimant. Decision-makers have claimed

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[38] *R. v. Secretary of State for the Home Department ex p Binbasi* [1989] Imm AR 595 (QB) [5].
[39] J*ain v Secretary of State for the Home Department* [1999] EWCA Civ 3009, [2000] IMM AR 76 [9].
[40] *R. v. Secretary of State for the Home Department ex p Binbasi* [1989] Imm AR 595 (QB).
[41] Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 International Journal of Human Rights 391, 392.
[42] *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC *596.*
[43] *Ibid* [82-83]
[44] *Ibid* [82].
[45] *Ibid* [82].
[46] *Ibid* [82].

that sexual identity asylum claims are 'easy to make and impossible to disprove'.[47] However, Millbank has highlighted the peculiar evidentiary position sexual minority asylum seekers are placed in. She argues that the lack of objective evidence available to prove an individual's sexual identity means such claims end up being largely narrative based.[48] This means that the success of a claim is often dependent on the ability of the claimant to articulate their narrative in terms comprehensible to the decision maker.

The Credibility Determination Process

Due to the narrative driven nature of such claims, the key to the success of a claim often lies in the credibility findings made by the decision maker. This is recognised by UNHCR who state that credibility assessments are a 'core element of the adjudication of asylum applications.'[49]

Millbank identifies two distinct types of consistency operating within the credibility determination process, internal and external.[50] Internal consistency, assesses the asylum seeker's narrative for coherence, with credible narratives being those which have narrative consistency.[51] While this can be problematic, particularly considering the impact of trauma on memory,[52] this chapter focuses exclusively on external consistency. External consistency relates to how the narrative corresponds to external criteria. Millbank is critical of the

[47] *Krasniqi v Secretary of State for the Home Department* [2001] UKIAT 01TH02140 [2].
[48] See Generally: Jenni Millbank, '"The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 International Journal of Refugee Law 1; Laurie Berg & Jenni Millbank, 'Constructing the Personal narratives of Lesbian, Gay and Bisexual Asylum Claimants [2009] Journal of Refugee Studies 195.
[49] UN High Commissioner for Refugees (UNHCR), *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, available at: http://www.refworld.org/docid/519b1fb54.html [accessed 18 May 2018], 13.
[50] Jenni Millbank, '"The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 International Journal of Refugee Law 1, 11.
[51] *Ibid* 11.
[52] Jane Herlihy, Peter Scragg and Stuart Turner, 'Discrepancies in Autobiographical Memories – Implications for the Assessment of Asylum Seekers: Repeated Interview Studies' (2002) 324 British Medical Journal 324.

tendency of external consistency assessments to blur into plausibility assessments.[53] Indeed, following *Y v SSHD,* decision-makers are entitled to regard a claimants account as lacking in credibility based on their own 'common sense'.[54]

The problem posed by external consistency based credibility assessments for sexual identity claims is well put by Lord Hope in *HT and HJ,* where he observes that

> Behaviour which reveals one's sexual orientation, whether one is gay or straight, varies from individual to individual. It occupies a wide spectrum, from people who are naturally reticent and have no particular desire to establish a sexual relationship… to those who wish… to proclaim in public their sexual identity.[55]

As Lord Hope's statement exposes, there are no objective criteria against which an individual's sexual identity can be judged. This means that sexual and social behaviour are often deployed as a means of assessing the credibility of a claim. As Raj identifies, 'Emotion, desire and feeling are obscured by largely ethnocentric administrative methods of verification… which produces a caricatured, stereotyped and overdetermined legal trope of the gay or lesbian asylum seeker.'[56]

Governing the production of these 'legal tropes' are normative ideas about the nature, performance, and status of sexual identity. Both Bruce-Jones and Millbank identify the requirement for asylum seekers to present their identities in a manner consistent with the

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[53] Jenni Millbank, '"The Ring of Truth": Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 International Journal of Refugee Law 1, 11-16.
[54] Y v Secretary of State for the Home Department [2006] EWHC 122, [2006] All ER 395.
[55] *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596 [22] (Lord Hope)
[56] Senthorun Raj, 'Affective Displacements: Understanding Emotions and Sexualities in Refugee Law' (2011) 36 Alternative Law Journal 177, 177.

judge's understandings of sexual identity.[57] Fassin furthers this, arguing that 'the refugee question has been tightly circumscribed in recent years by normative ideas of 'truth'.[58]

Normative Standards

The use of external markers to identify 'credible' sexual identity claims effectively means that individual's identity performances are assessed by reference to normative truth criteria. It is only when the identity is performed with a sufficient familial resemblance to western and heteronormative understandings of sexual identity that the asylum seeker will be understood as credible.

Of course, in the search for external criteria against which to judge the credibility of an individual's performance of sexual identity, law has few answers. This is because, 'What counts as legal knowledge, or knowledge for law, is something that changes over time. And this mainly happens outside the courtroom'.[59] In order to identify the norms with which performances must conform, we need to look outside of law, and specifically we must look to discourse. As Hardy recognises,

> The refugee subject is a product of processes of determination that lead to his or her classification as well as the broader discourses that impinge on and overlap with refugee discourse… There is, then, no autonomous subject: a refugee only exists in so far as he or she is recognized by others.[60]

This means that the metrics through which credibility is assessed have themselves been produced. This production occurs both in the asylum apparatus, which has the ability to shift

[57] Eddie Bruce-Jones, 'Death Zones, Comfort Zones: Queering the Refugee Question' (2015) 22 International Journal on Minority and Group Rights 101, 114; Jenni Millbank, '"The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 International Journal of Refugee Law 1.
[58] Didier Fassin, 'The Precarious Truth of Asylum' (2013) 25 Public Culture 39, 41.
[59] David Nelken, 'Getting at Law's Boundaries' (2006) 15 Social and Legal Studies 598, 602.
[60] Cynthia Hardy, 'Refugee Determination: Power and Resistance in Systems of Foucauldian Power' (2003) 35 Administration & Society 462, 467-468.

the meaning and nature of sexual identity, and within society more broadly. In recognising this, it is pertinent to bear in mind Nelkin's reflection that courts often draw on different forms of knowledge depending on the verdict they wish to reach.[61] Therefore, it should be borne in mind that certain constructions of sexual identity may reflect the ideologies of individual decision makers—or the impact of certain political sympathies—as well as the apparatus more broadly.

Raj has identified that 'The interrogation of credibility- in relation to the veracity of an asylum seeker's sexual orientation- has reproduced ethnocentric ideas of both (homo)sexual identity and intimacy'.[62] However, he does not account for the exact norms through which credibility is determined. This chapter attempts to plug that gap by investigating the discourses through which credibility is determined, charting them overt the next three sections under the headings 'born-this-way', 'I'm coming out: I want the world to know', and 'I kissed a girl and I liked it.'

Born-This-Way

Born-this-way has become synonymous with western gay rights struggles. Johnston defines the born-this-way phenomenon as the 'political and quasi-scientific claims that sexual orientation and gender identity are immutable and intrinsic facts.'[63] Born-this-way was originally deployed as a stance in debates around whether sexual identity was biologically or socially constructed, providing an innate status to which rights claims could be tethered. Even within the context of Refugee Law, the born-this-way narrative has been productive, providing sexual identity claims with the underlying innate status necessary to found them as

[61] David Nelken, 'Getting at Law's Boundaries' (2006) 15 Social and Legal Studies 598, 601.
[62] Senthorun Raj, 'Queering Fears: Pro-LGBTI Refugee Cases' in Chris Ashford, Alan Reed and Nicola Wake '*Legal Perspectives on State Power: Consent and Control'* (Cambridge Scholars Publishing 2016) 132, 142.
[63] Tim Johnston, 'Beyond "Born This Way"' (2015) 5 PhiloSPOHIA 140, 140.

a characteristic protected under the Refugee Convention.[64] This is because, as Hathaway identifies 'Whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change or should not be required to change.'[65]

However, in many individual asylum cases the idea that sexual identity is an innate characteristic—which manifests itself in a fixed manner—has proved to be an obstacle to those attempting to provide a credible narrative of their sexual identity. Indeed, it is possible to conceptualise the born-this-way narrative as a myth in the terms of Nancy, who argues that 'myth arises only from a community and for it: they engender one another, infinitely and immediately'.[66] To draw this out a little, the born-this-way narrative, regardless of its factual basis, has now become a foundational myth of modern LGB identities—meaning that only those conforming to the myth now possess normative intelligibility. Or, in the language of asylum, present a credible narrative.

The born-this-way narrative links to a number of expectations which expose themselves during Upper Tribunal (Immigration and Asylum Chamber) hearings relating to sexual identity. Firstly, the narrative's impact can be seen in the incredulity towards applicants who have had previous sexual partners of the opposite sex,[67] or those who have had children.[68] This links to the expectation that the individual has always been, and been aware of, the sexual identity they claim. Thus, negative credibility inferences are drawn from anything that contradicts this expectation – such as a sexual history with members of the opposite sex.

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[64] Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.
[65] James Hathaway, '*The Law of Refugee Status'* (Butterworths 1991) 160.
[66] Jean-Luc Nancy, *'The Inoperative Community'* (University of Minnesota Press 1991) 57.
[67] See for Example: Submission of a Senior Presenting Officer in a case involving a Mongolian Lesbian, 2002. Cited in: Barry O'Leary, '"We Cannot Claim Any Particular Knowledge of The Ways of Homosexuals, Still Less of Iranian Homosexuals…" The Particular Problems Facing Those Who Seek Asylum on The Basis of Their Sexual Identity' (2008) 16 Feminist Legal Studies 87, 89.
[68] *Ibid.*

The born-this-way narrative also troubles those whose claims hinge on culturally relative experiences of sexual minority status. This is because implicit in the premise that we are 'born-this-way'—with a fully-formed, pre-social sexual identity—Is the idea that sexual identity is universal. Crucially, if sexual identity is understood in universal terms then it is understood as being expressed in the same way regardless of the cultural or social background that an individual comes from. This can pose serious issues for those whose claims are not articulated in terms known to western audiences. For example, 'Syrian refugees may refer to themselves as Lutti. This is a common word that translates as "faggot" and is sometimes used by Syrian refugees from rural areas to describe their own sexuality.'[69] When deploying these terms, asylum claimants may be considered to be either lacking in credibility for using homophobic language or suffering from internalised homophobia.[70] Which, even if it does not undermine their claim to asylum, functions to erase their identity and supplant it with a western one.

The science is still out on whether it is biology or society that is responsible for differing sexual identities. until we have a definitive answer to the question of exactly what it is that results in sexual identities—and can account for every possible manifestation these may take—it is anathema to justice to speculate about whether or not someone's identity is credible by referring to criteria wrapped up in the born-this-way narrative.

Without venturing more than is necessary into the terrain of the essentialist-constructionist binary, it is worth noting that even moderate essentialists, who believe that the orientation aspect of minority sexual identities is biological, do not deny the potential for social factors to produce different performances of sexual identity. For example, Wilkerson's

[69] Nof Nassier-Edin, Nour Abu-Assab, Aydan Greatrick, 'Reconceptualising and Contextualising Sexual Rights in the MENA Region: Beyond LGBTQI Categories' (2018) 26 Gender and Development 173,184.
[70] *Ibid*, 184.

emerging fusion thesis postulates that while it is desire that leads individuals to choose to adopt a sexual identity, no individual knows of their desire prior to socialisation and therefore, the ability to discern where biology ends, and socialisation begins, is lost to us.[71] Given this, and the aims of the Refugee Convention,[72] more scope must be provided for the recognition of cultural difference in the performance of sexual identities.

I'm Coming Out: I want the world to know

One of the core areas where cultural differences arise is in ability to and attitudes towards 'coming out'. As already explored, prior to *HJ and HT* asylum seekers faced pressure from the UK to hide their identities to avoid persecution.[73] Since the discretion test was ruled to be unlawful, this pressure has reversed, with only those who publicly articulate their identity deemed credible when it comes to applying for refugee status.

The need to be 'out' and visible is manifested through two routes. Firstly, if a claimant is naturally discreet and would not wish to publicly proclaim their identity then *HJ and HT* has left the door open to finding that as a matter of fact the claimant would avoid having a well-founded fear of persecution by being discreet.[74] In essence, this provision targets those that Lord Hope termed 'naturally reticent',[75] giving a limited power for decision-makers to determine that individuals would be discreet, without the ability to compel them to do so. Secondly, those who do not visibly manifest their sexual identity will struggle to dispense with the evidentiary burden required to prove their identity.

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[71] William Wilkerson, *'Ambiguity and Sexuality: A Theory of Sexual Identity'* (Palgrave Macmillan 2007) 106.
[72] Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.
[73] *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596.
[74] *Ibid,* [82].
[75] *Ibid*, [22].

These two pressures, as other scholars have pinpointed, result in a need for asylum seekers to visibly manifest their identity.[76] In effect, this produces a need for asylum seekers to 'come out' if they are to succeed in their asylum claim. This can present great difficulties for those who come from cultures in which sexual identity is manifested in a different manner to its UK iteration. Problems can also arise for those whose country of origin has alternative ideas of the public/private divide. Indeed, the need for visibility can often result in denial for those who were not out in their countries of origin.[77]

One way in which asylum seekers can demonstrate their visibility is through attending LGB venues and organisations.[78] Indeed, claimants were met with incredulity when they were unable to demonstrate a sufficient series of links to gay social spaces, charities and support groups.[79] Despite the fact that, as Millbank identifies, some of us are just 'home-bodies' who do not have any particular desire to go out and socialise in such venues.[80] Vogler has rightly called out the expectation for potentially traumatised subjects to attend such venues as an act which punishes asylum seekers for displaying a symptom of fear and persecution.[81]

Alongside the need to attend particular venues, the recognition of an individual as credible in their identity also relies on the possession of certain knowledges about queer communities and entities commonly assumed to be a part of queer culture. Morris provides a framework through which issues of assumed knowledge, such as those arising in the context

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[76] See For Example: Fadi Hanna, 'Punishing Masculinity In Gay Asylum Claims' (2005) 114 The Yale Law Journal 913, 913-920.
[77] Thomas Spijkerboer, '*Sexual Identity, Normativity and Asylum'* in T Spijkerboer, '*Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum'* (Routledge, 2013) 221.
[78] See for example: *Mr G E T v Secretary of State for the Home Department* (UKUT IAC, 6 October 2017) ; JBN v Secretary of State for the Home Department (UKUT IAC, 12th September 2017) [17].
[79] See for example: *Mr FR v The Secretary of State for the Home Department* [2017] UKSIAC PA/04550/2016, [12], [48].
[80] Jenni Millbank, '"The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 International Journal of Refugee Law 1, 19.
[81] Stefan Vogler, 'Legally Queer: The construction of Sexuality in LGBQ Asylum claims' (2016) 50 Law and society review 856, 863.

of credibility determinations, can be theorised. His framework of *Gay Capital* argues that certain gay (middle-class) men have access to particular forms of symbolic, social, and cultural capital which can enhance their ability to achieve social recognition.[82] For example, he highlights how having knowledge of gay popular culture such as RuPaul's Drag Race helped some of his participants to form stronger friendship networks.[83] In a similar register, it is possible to understand the focus on claimants' knowledge of gay culture, gay venues, and gay organisations—and in one particularly egregious Canadian example, Oscar Wilde[84]— as a requirement for sexual identity asylum seekers to possess a certain amount of gay capital in order to present as credible.

Morris's framework built on the work of Bourdieu,[85] Giametta has pinpointed the appropriateness of a Bourdieusian analysis as a way of understanding the impact of different forms of capital on the experiences of LGB asylum seekers.[86] In effect, a Bourdieusian analysis demonstrates that the construction of truth in regard to sexual identity based claims is dependent on the possession of particular forms of knowledge—or capital—which enable the perspective asylum seeker to render themselves visibly queer—or more commonly visibly homonormative.[87] Being able to make one's self visibly 'out' is, even in the post discretion landscape, key to being recognised as a refugee.

'I kissed a girl: and I liked it'

[82] Max Morris, '"Gay Capital" In Gay Student Friendship Networks: An Intersectional Analysis of Class, Masculinity and decreased Homophobia' (2018) 35 Journal of Social and Personal Relationships 1183.
[83] *Ibid*, 1195.
[84] *WAAG v. Minister for Immigration and Multicultural and Indigenous Affairs* [2004] HCATrans 475 [6].
[85] Pierre Bourdieu, *'Distinction: A Social Critique of the Judgement of Taste'* (Routledge 1984).
[86] Calogero Giametta, *The Sexual Politics of Asylum: Sexual Orientation and Gender Identity in the UK Asylum System'* (Routledge 2017) 56.
[87] See: Lisa Duggan, '*The New Homonormativity: The Sexual Politics of Neoliberalism'* in Russ Castronovo & Dana D Nelson (eds) *'Materialising Democracy: Toward a Revitalized Cultural Politics'* (Duke University Press 2002) 175-194.

The final prism this chapter will explore are the expectations governing what kinds of sexual behaviour form the basis of a credible sexual identity. Here, expectation exists both in terms of sexual activity which undermines one's claim to a particular sexual identity (such as a sexual history with members of the opposite sex or having had children) and sexual activity which is required to provide evidence for one's claimed sexual identity. Consideration also needs to be given to the circumscribing of asylum seeker's emotional responses to intimacy.

As already outlined in the section on Orientation, Behaviour and Identity, it is by no means a given that sexual identity, sexual orientation and behaviour will correspond perfectly—or in fact, at all—within any individuals life. Therefore, the expectation that they will align within the lives of individuals whose country of nationality strictly policies sexual freedom is particularly onerous.

Nonetheless, there appears to be an expectation that individuals will be able to evidence their sexual identity with reference to sexual behaviour. For example, in one hearing the judge noted that the claimant 'did not current have a long-term partner'[88] as something which undermined his credibility. Another judge noted that the claimant had lived in the UK for approximately 13 years and had produced no evidence of any romantic or sexual relationship with a man during this time.[89] As these cases demonstrate, decision-makers attempt to utilise sexual behaviour as evidence for asylum seekers sexual identities.

References to sexual behaviour appear with alarming frequency throughout Upper Tribunal cases. In one judgement the judge even went so far as to state that,

> Any potential persecutor is on a simple basis likely to consider men who have sex with men as gay, and men who do not have sex with other men as not being gay.

[88] *AT v Secretary of State for the Home Department* (UKUT IAC, 5th April 2018) [5].
[89] *SH (Bangladesh) v Secretary of State for the Home Department* (UKUT IAC, 9th February 2018) [8].

> Therefore, there is a real question mark as to whether or not the appellant would be perceived by any potential persecutor as gay.[90]

What this view elides are the multitude of other ways in which an individual's sexual identity can be revealed or imputed. For example, one claimant argued that if he were returned to his country of origin he would be forced to marry.[91] This situation also captures others who remain in their countries of origin, facing social pressures to marry, to have children, and to perform a heterosexual narrative. Chelvan draws attention to this requirement, pointing out that non-normative sexual identities tend to become increasingly visible over time. This, he argues, is because the requirements of normative behaviour become more onerous with age.[92] Giametta stresses that, in his study, one of the primary 'strategies of survival' adopted by those seeking to hide their sexual identity in their country of origin was heterosexual marriage.[93]Therefore, far from being about who an individual has sex with, what a persecutor considers to make someone different enough to constitute a legitimate target for persecution is a complex question enmeshed in a web of social relations.

Upper Tribunal cases and existing academic literature highlight the requirement for claimants to manifest their sexual desires in a consistent and fixed way. Despite the fact that a natural part of being 'discreet' about one's sexual identity will be performing the 'false' sexual identity in a manner believable to the society within one's country of origin. O'Leary even documents a senior Home Office Presenting Officer stating that 'The Appellant cannot be a lesbian, as she has had a relationship with a man and had a child with him.'[94] As this

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[90] *FJI v Secretary of State for the Home Department* (UKUT IAC. 28th February 2018) [19].
[91] *SH (Bangladesh) v Secretary of State for the Home Department* (UKUT IAC, 9th Feburary 2018) [18].
[92] S Chelvan, 'Put Your Hands Up (If you Feel Love)' (2011) 25 Immigration, Asylum and Nationality Law 56, 60.
[93] Calogero Giametta, '*The Sexual Politics of Asylum: Sexual Orientation and Gender Identity in the UK Asylum System'* (Routledge 2017) 45.
[94] Submission of a Senior Presenting Officer in a case involving a Mongolian Lesbian, 2002. Quoted in: Barry O'Leary, "We Cannot Claim Any Particular Knowledge of The Ways of Homosexuals, Still Less of Iranian Homosexuals…" The Particular Problems Facing Those Who Seek Asylum on The Basis of Their Sexual Identity (2008) 16 Feminist Legal Studies 87, 89.

shows, the current expectation of the asylum apparatus is that sexual identity is dependent on a fixed and unchanging sexual orientation which manifests in monosexual behaviour. This is expected despite the fact that the claimant is applying from a context in which openly expressing their sexual desires (or failing to express normative desires with sufficient intensity) could bring about severe consequences.

The focus on presenting a fixed and consistent sexual narrative also leads to issues for those with bisexual or otherwise non-monosexual identities. This is manifested in the fact that bisexual claimants have a reduced chance of success when compared to their monosexual counterparts.[95] There is a need for further research into the additional issues bisexual asylum seekers face. However, that is beyond the scope of this chapter.[96]

The framing of rejected sexual identity claims based on bisexuality is potentially telling, with decision-makers making a great deal of the idea that claimants could choose to only indulge the heterosexual component of their attractions.[97] Similarly, the language of judges making decisions which applied the now disavowed discretion criterion framed the ability of both gay men, lesbians, and bisexual people to be open about their identity as 'flaunting'[98] or 'indulging'.[99]

Putting aside the direct issues with the focus on sexual behaviour, tribunal decisions also reveal strong expectations in relation to the emotional experiences of sexual minorities to their sexual encounters. For example, one Upper Tribunal judge stated that

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[95] Laurie Berg & Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum claimants' (2009) 22 journal of Refugee Studies 195, 213.
[96] Some interesting work addressing the experiences of bisexual asylum seekers already exists. See Thomas Spijkerboer, 'Sexual Identity, Normativity and Asylum' in Thomas Spijkerboer, '*Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum'* (Routledge, 2013) 221. See also: Stefan Vogler, 'Legally Queer: The construction of Sexuality in LGBQ Asylum Claims' (2016) 50 Law & Society Review 868.
[97] See: Neva Wagner, 'B is for Bisexual: The Forgotten Letter in U.K. Sexual Orientation Asylum Reform' (2016) 26 Transnational Law & Contemporary Problems 205, 216.
[98] *Amare v. Secretary of State for the Home Department* [2005] EWCA Civ 1600 [36].
[99] *AJ v Secretary of State for the Home Department* [2009] UKAIT 00001 [6].

> the Appellant lacked all credibility because he was asked on three occasions during his asylum interview "to describe his emotional reaction to his first experience with Claire, his first with a transgender woman and the Appellant was unable to do so because his responses were "entirely focused on his physical, sexual acts"[100]

As this passage shows, the normative demands on asylum seekers exist not just in respect of the content of their narratives, but also in respect of their emotional responses to the things that have happened to them. As Raj identifies, 'the extent to which queer refugees have been granted protection has been contingent on whether they subscribe to (hetero)normative ideas of intimacy, identity and injury.'[101]

Sexual Identity as Performativity

One route out of the issues raised by this chapter could be to adopt a more performative understanding of sexual identity. As O'Leary argues, 'of all the problems identified, the lack of understanding of sexual identity and its reduction to sexual conduct is the hardest to overcome.'[102] However, this reduction is not simply something which takes place within tribunals and Home Office interviews. Rather, it is something prevalent throughout the current public discourse on sexual identity. It may be that, in fact, the best way to improve the situations encountering sexual identity asylum seekers is to alter public perceptions of sexual identity itself. While this would not be a panacea, it is argued that such a switch could dramatically improve outcomes for sexual minority asylum seekers.

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[100] *Mr Syed Kazim Hussain Shah v Secretary of State for the Home Department* (UKUT IAC, 19 March 2018) [5].
[101] Senthorun Raj, 'Queering Fears: Pro-LGBTI Refugee Cases' in Chris Ashford, Alan Reed and Nicola Wake '*Legal Perspectives on State Power: Consent and Control'* (Cambridge Scholars Publishing 2016) 124.
[102] Barry O'Leary, 'We Cannot Claim Any Particular Knowledge Of The Ways of Homosexuals, Still Less of Iranian Homosexuals… The Particular Problems Facing Those Who Seek Asylum On The Basis of Their Sexual Identity' (2008) 16 Feminist Legal Studies 87, 94.

Raj strikingly identifies that, in reinforcing the need to assess the credibility of asylum seeker's sexual identities 'The demand for authenticity was reproduced rather than repudiated and the court was able to pull away from facing the fact that all sexualities were performative.'[103] Despite this, little of the research currently addressing sexual identity asylum claims has considered the potential of a wider shift in our framing of sexual identity towards a recognition of its performative nature.

Butler has explicated the idea of performativity in respect of gender.[104] Her argument centres on the idea that that identity categories are socially constructed through the repeated performance of social scripts.[105] Crucial to Butler's argument is a recognition that the constant reiteration of these scripts results in an erasure of their constructed status—meaning they come to be held up as pre-existing entities with ontological status.[106] To put this in another way, they are seen as free-standing categories which fit people, rather than as shared affectations which are produced in and through their performance.

Recognising this demonstrates the problematic nature of external consistency within asylum credibility determinations. The continued repetition of scripted performance, as a means to be recognised as credible in your own claim, itself entrenches the requirements for those who follow you in the process. This is why it is important, that, as Bruce-Jones's account stresses, the power of asylum hearings to rearticulate the boundaries of different categories is recognised.[107] By this I mean, if a certain behaviour is repeatedly expressed by a social group, that behaviour will itself be added to the recognised representation of that group; it will become an expected part of a credible performance. This is performativity at its

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[103] Senthorun Raj, 'Queering Fears: Pro-LGBTI Refugee Cases' in Chris Ashford, Alan Reed and Nicola Wake '*Legal Perspectives on State Power: Consent and Control'* (Cambridge Scholars Publishing, 2016) 132, 151.
[104] Judith Butler, '*Gender Trouble'* (Routledge 1999); Judith Butler, '*undoing Gender'* (Routledge 2004).
[105] Judith Butler, '*Gender Trouble'* (Routledge 1999) 31-38.
[106] Stephen White, 'The World Turns: Ontology and politics in Judith Butler' (1999) 32 polity 155, 158
[107] Eddie Bruce-Jones, 'Death Zones, Comfort Zones: Queering the Refugee Question' (2015) 22 International Journal on Minority and Group Rights 114.

most simple, the performance itself creates the thing which is to be performed. Therefore, how individuals present their identities within asylum claims itself shapes how those identities are perceived, understood, and constructed.

In effect, the current essentialist framing of sexual identity, means that as Spijkerboer articulates,

> Sexualities which deviate from the dominant norm are only comprehensible if they take a particular form. This is most easily visible in credibility assessment[s]…LGBT people are assigned to a specific and quite narrow space where we can be LGBT—but only one category at a time, preferably for life, and only to the extent they identify with one of those exact categories.[108]

In order to create space for queer asylum, and to render it possible for those who have non-normative or non-western sexual identities to benefit from the protections promised in the Refugee Convention[109], I argue that there is a need to recognise the potential for certain aspects of sexual identity to be socially constructed and therefore culturally relative.

Conclusion

Deploying a queer analytical framework, this chapter has presented an analysis of the discourses informing the production of legal truth when tribunals are asked to assess the credibility of an individual's claim to be of a certain sexual identity. In undertaking this analysis, I have sought to disrupt the idea that the deployment of western phenomena is a just and objective means of producing that truth. In doing this, I have devoted specific attention to deployments of essentialism, visibility and identity/conduct conflation.

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[108] Thomas Spijkerboer, '*Sexual Identity, Normativity and Asylum'* in Thomas Spijkerboer (ed), '*Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum'* (Routledge, 2013) 224-225.
[109] Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

The chapter argued that adopting a performative understanding of sexual identity can enable decision-makers to make space for queer modalities within the asylum apparatus. Crucially, I have highlighted how the existing methods of truth production are incompatible with queer realities—failing to account for the fluidity of sexual identity, and the impact of social expectations on individual narratives. In response to these issues I have proposed the adoption of a more performative understanding of sexual identity at the societal level. While I do not think this would address the various issues confronting those claiming asylum on the basis of their sexual identity, I do think that it would aid their claims in being recognised and understood as credible and would therefore be a step along the long path we still have to travel.