Freedom To Be:
Assessing the Claims of LGBTQ Asylum Seekers

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Abstract: In refugee status assessment, the process of proving the 'truth' of one's sexual orientation (and proving that one will be persecuted on account of this) is often infected by the cultural biases of individual decision-makers. Assessors may, for example, expect self-identifying homosexual or bisexual asylum seekers to act in a particular manner (conforming to Western assumptions about sexual behaviour or identity), or expect an unreasonable degree of detail and consistency with regard to asylum seekers' experiences in their countries of origin. Alternately, assessors may conflate various forms of sexual identity (such as homosexuality and transgender status, or different forms of sexual expression from other cultures) under the blanket label of 'LGBT' or 'LGBTQ' (and assess risks accordingly).

This paper assesses contemporary dilemmas in the assessment of asylum claims based upon sexual identity, including international legal challenges to previously-prevailing notions that lesbian, gay, bisexual, transgender and queer ("LGBTQ") asylum seekers may escape persecution through 'discretion'; difficulties faced in credibility assessment; and the need for greater receptivity to diversity of lived sexual identities across cultural barriers. It draws upon the author's own experiences as researcher for an Australian law firm specialising in refugee law and advocacy.

1. Introduction

The *Convention Relating to the Status of Refugees* ("*Refugees Convention"*) of 1951,[1] as amended by the 1967 *Protocol Relating to the Status of Refugees ("Refugees Protocol")*[2], defines a 'refugee' as any 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',* cannot return to their country of nationality.[3] How this definition applies to the circumstances of lesbian, gay, bisexual, transgender and queer persons ("LGBTQ") has been a source for continuing controversy – both in terms of whether LGBTQ individuals can, in fact, constitute a '*particular social group'* and, if so, how the truthfulness of asylum seekers' claims to belong to such groups can be determined.

LGBTQ individuals were first judicially recognised as potentially belonging to 'particular social groups' on the basis of their sexual identities (and hence, in certain circumstances, as refugees under the *Refugees Convention)* in the Netherlands in 1981.[4] Various Western nations,[5] as well as the European Union,[6] have since followed suit. (The process by which this has occurred is covered in section 2 below.) In recognizing that sexual orientation is a protected characteristic under the *Refugees Convention* (as part of one's membership of a particular social group), courts and policy-makers in these jurisdictions have also dispensed with the prior orthodoxy that

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[1] *Convention relating to the Status of Refugees,* 28 July 1951, 189 UNTS 137.

[2] *Protocol relating to the Status of Refugees,* 4 October 1967, 606 UNTS 267.

[3] *Convention relating to the Status of Refugees,* 28 July 1951, 189 UNTS 137, article 1A(2).

[4] See Sabine Jansen, *Introduction: fleeing homophobia, asylum claims related to sexual orientation and gender identity in Europe*, *in* FLEEING HOMOPHOBIA: SEXUAL ORIENTATION, GENDER IDENTITY AND ASYLUM 1, 16 (Thomas Spijkerboer ed., 2013).

[5] See e.g. *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs,* 216 CLR 473 (Austl., 2013); *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department,* UKSC 31 [UK, 2010]; *Refugee Appeal no 75665/03* (NZ Refugee Status Appeals Authority, 2004).

[6] *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Party Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted,* 19 April 2004, 2004/83/EC.

sexual identity may be concealed, suppressed, or indeed discarded in order to escape detection or persecution. In such jurisdictions, refugee status assessors can no longer hold that asylum seekers are not refugees due to their ability to remain 'discreet' if removed to their countries of citizenship. However, the recognition that fears of harm based upon sexuality identity may, in theory, give rise to protection under the *Convention* has not necessarily entailed greater rates of acceptance of LGBTQ asylum seekers. Instead, as Millbank notes, new hurdles have been raised; an end to findings based upon discretion has brought with it *'a significant increase in decisions where the applicant's claim to actually being gay, lesbian or bisexual is outright rejected'.*[7]

Rejections of asylum seekers' claims to belong to sexual minorities are based upon various premises. Asylum seekers' claims may be rejected because their accounts of their experiences fail to comport with decision-makers' expectations as to how LGBTQ people in their own jurisdiction may identify or behave. Alternately, asylum seekers may present as unacceptably vague or inconsistent in their accounts of their experiences of harm (or the nature of their fears as to what will occur upon their return); such 'inconsistencies' may include failure to raise fears of persecution on the basis of sexual identity until well after the applicant for protection has arrived in the jurisdiction in which they will eventually seek asylum, or even until after they have initially applied for a protection visa on other grounds. Furthermore, the 'demeanour' of an asylum seeker (including how they present themselves, relate their experiences, and respond to questioning) may be found by decision-makers to be inconsistent with their claimed sexual identity or their claimed experiences.

Credibility assessment is a necessary part of any conceivable model for determining whether individuals are 'refugees' under the *Refugees Convention.* Even though the extent of inquiry will vary,[8] it is still necessary for decision-makers to determine whether asylum seekers have, in fact, fled their home countries for the reasons that they have claimed. This process is particularly important in circumstances where

[7] Jenni Millbank, *From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom*, 13 INT'L J. OF HUM. RTS. 391, 392 (2009).
[8] Middelkoop, for example, proposes *'a shift in focus from assessing whether it is credible that the asylum seeker is gay to whether elements in the narrative indicate that the actors of persecution perceive him to be gay':* Louis Middelkoop, *Normativity and credibility of sexual orientation in asylum decision making, in* FLEEING HOMOPHOBIA: SEXUAL ORIENTATION, GENDER IDENTITY AND ASYLUM 154, 169 (Thomas Spijkerboer ed, 2013).

applicants for protection lack documentary proof that their claimed experiences have in fact occurred.[9]

The methods that have been customarily employed in determining whether asylum seekers who claim to fear persecution on the basis of their sexual identity are, however, uniquely prone to error. They may rely upon culturally-specific notions of sexual identity and expression, impose unrealistic expectations as to memory, emotional responses and understanding of domestic immigration systems, and fail to account for diverse human experiences. In exercising discretion as to credibility – a form of fact-finding notoriously open to '*personal judgment that is inconsistent from one adjudicator to the next'*[10] – there is a stark need for an acute understanding of the limits of a decision-maker's own perceptions and of the available information, and for reasonable and culturally-appropriate standards of assessment.

This essay, following a brief exploration of the legal context of asylum claims based upon sexual identity, discusses the potential shortcomings of credibility tests commonly employed by refugee status assessors internationally. It is based upon both academic research and the author's own experiences as a researcher involved in advocacy on behalf of individual applicants for refugee status in Australia,[11] including on behalf of applicants fearing harm in their countries of origin on the basis of their LGBTQ identity.

2. Gay, Lesbian, Bisexual and Transgender People as Asylum Seekers: A Brief Overview

In assessing the contemporary challenges faced by LGBTQ asylum seekers in proving their claims for protection, it is necessary to first establish how such claims came to be regarded as legitimate grounds for seeking asylum (in some jurisdictions). Many of

[9] See UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* HCR/IP/4/Eng/REV.1, para 196 (1979), *revised edition* (1992) (hereinafter *Handbook*).
[10] Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L. J. 367, 367 (2002-2003).
[11] In Australia, 'protection visas' may be granted under section 36 of the *Migration Act* (1958) (Aus.) to (*inter alia)* non-citizens '*in respect of whom the Minister [for Immigration and Border Protection] is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'.*

the challenges faced by LGBTQ applicants for protection in earlier years (in establishing that they did, in fact, belong to legitimate 'particular social groups' based upon sexuality, and in proving that the forms of harm to which they were subject could constitute persecution) remain relevant even after these early struggles have been ostensibly won – in that the strains of thought which once denied the legitimacy of LGBTQ claims for asylum entirely exhibit many of the same false assumptions made by decision-makers in the present day.

The history of claims based upon sexuality in Australia prior to 2003 is representative in this respect. Traditionally, Australia's Refugee Review Tribunal[12] and Federal Court[13] had found that '*the capacity of an applicant to avoid persecutory harm'* was relevant to whether an applicant could be said to face a '*real chance'*[14] of harm.[15] Applying this line of reasoning, LGBTQ applicants were found not to face a real chance in circumstances where they could remain '*discreet'* as to their sexuality, whether by relocating within their country of origin (to a new locale where their previous profile would not be discovered)[16] or by living '*quietly without flaunting their homosexuality'*.[17]

[12] The Refugee Review Tribunal, established under section 457 of the *Migration Act* (1958) (Aus.), has power to review decisions (at first instance) of the Minister for Immigration and Border Protection as to whether asylum seekers are eligible for protection visas under section 36 of the *Migration Act.* It is a 'merits review' body.

[13] The Federal Court, established by section 5 of the *Federal Court of Australia Act* (1976) (Aus.), enjoys jurisdiction over, *inter alia,* migration law. At present, it hears appeals from the Federal Circuit Court of Australia; decisions of single judges of the Federal Court are appealable to the Full Bench of the Federal Court (constituted by a bench of three or five judges).

[14] In Australia, whether a person has a '*well-founded fear'* of persecution requires that they face a '*real chance'* of harm. See *Chan v. MIEA,* 169 CLR 379, 389 (Austl., 1989) (Mason CJ). A '*real chance'* may exist even where '*there is less than a fifty per cent chance of persecution occurring'* (*Id.*), or even where '*there is only a 10 per cent chance that [an applicant refugee status] will be… persecuted'* (*Id.* at 429 (McHugh J)).

[15] In *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs,* 216 CLR 473, 492n17 (Austl., 2003) (McHugh and Kirby JJ), the following decisions of the Federal Court in which this proposition was upheld are cited: *Khalili Vahed v. Minister for Immigration and Multicultural Affairs,* FCA 1404 [Fed. Ct. Aust., 2001]; *SAAF v. Minister for Immigration and Multicultural Affairs,* FCA 343 [Fed. Ct. Austl., 2002]; *Nezhadian v. Minister for Immigration and Multicultural Affairs,* FCA 1415 [Fed. Ct. Austl., 2001]; *WABR v. Minister for Immigration and Multicultural Affairs,* 121 FCR 196 (Fed. Ct. Austl., 2002).

[16] Jenni Millbank, *Sexual orientation and refugee status determination over the past 20 years: unsteady progress through standard sequences, in* FLEEING HOMOPHOBIA: SEXUAL ORIENTATION, GENDER IDENTITY AND ASYLUM 33, 37 (Thomas Spijkerboer ed., 2013).

[17] *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs,* 216 CLR 473, 511 (2003) (Austl., Callinan and Heydon JJ, dissenting).

The flaws in this argument are both moral and practical. On a practical level, this line of reasoning denies that LGBTQ people '*are entitled to enjoy the full range of fundamental human rights and freedoms',* instead assuming that they may legitimately be called upon to suppress an essential aspect of their identity in order to placate their persecutors.[18] As New Zealand's Refugee Status Appeals Authority has noted, decisions requiring that applicants for refugee status '*abandon'* (in practice) their sexual identity are effectively requiring '*the same submissive and compliant behaviour, the same denial of a fundamental human right'* of asylum seekers that '*the agent of persecution in the country of origin seeks to achieve by persecutory conduct'.*[19] To identify one's sexual conduct as distinguishable from one's identity – and hence as unprotected by the Convention – falls within the same fallacy identified by Kennedy J in *Lawrence v Texas:*[20] the assumption that that '*overt expression'* of one's sexuality '*in intimate conduct with another person'* is distinguishable from the nature of one's relationships with other persons, a field in which humans may make free choices outside the appropriate scope of State or Court interference.[21] One's sexual conduct may legitimately form part of one's ability to '*define one's own concept of existence, of meaning, of the universe, and of the mystery of human life'.*[22]

Even beyond these moral qualms, the plausibility of requiring an asylum seeker to hide their sexual identity or behaviour from society or the authorities – or even to abstain from meaningful sexual activity altogether – is hardly self-evident. In his decision in *HJ and HT*, Lord Rodger harshly criticises the implicit logic of this approach: *'[n]o-one would proceed on the basis that a straight man or woman could find it reasonably tolerable to conceal his or her sexual identity indefinitely to avoid suffering persecution',* nor would it be reasonably tolerable for a man or woman '*to conceal his or her race indefinitely to avoid suffering persecution'.* To extend such assumptions to gay men and lesbian women is, in Lord Rodger's analysis, '*equally unacceptable'.*[23]

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[18] Millbank, *supra* note 16, at 33.
[19] *Refugee Appeal no 75665/03*, para 114 (New Zealand Refugee Status Appeals Authority, 2004).
[20] *Lawrence v. Texas*, 539 US 558 (2003).
[21] *Id.* at 563 (Kennedy J).
[22] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 US 833, 851 (1992), cited in *Lawrence v. Texas*, 539 US 558, 570 (2003).
[23] *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department,* UKSC 31, para 76 [UK, 2010].

In its decision in *S395/2002,*[24] a majority of the High Court of Australia[25] overturned prior decisions of the Federal Court in finding that 'discretion' is no defence where persecution is feared on the basis of sexuality. McHugh and Kirby JJ, for the majority, found that the Refugee Review Tribunal (in finding that the appellants, gay men from Bangladesh, had not previously suffered harm because they had '*acted discreetly'*) had asked itself the wrong questions: it had not considered *why* the appellants had done so, or what may occur to them if they chose to '*liv[e] openly in the same way as heterosexual people in Bangladesh live'.*[26] In doing so, McHugh and Kirby JJ issued a ringing call for tolerance (rare amongst the usually-legalistic and restrained judgments of the High Court): that '*[s]ubject to the law, each person is free to associate with any other person and to act as he or she pleases, however much other individuals or groups may disapprove of that person's associations or particular mode of life'.*[27] (The 'laws' in question are only those which serve '*a legitimate object of that country'.*[28])

The High Court's decision in *S395/2002* was '*the first decision of an ultimate appellate court anywhere in the world to deal with a claim for refugee status based on sexual orientation'.*[29] It has subsequently been followed by the UK Supreme Court's decision in *HJ (Iran) and HT (Cameroon)* [2010].[30] Despite the apparently seismic consequences of the recognition of sexual orientation as a protected characteristic under the *Refugees Convention*, however, the decision in *S395* was not followed by a significant rise in the success rate for claims by sexual minority applicants – instead, strikingly, reasons for rejecting such claims shifted from findings that LGBTQ

[24] *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs,* 216 CLR 473 (Austl., 2003).
[25] The High Court of Australia is Australia's final court of appeal, as well as exercising original jurisdiction in constitutional cases. Its establishment was foreshadowed by section 71 of the *Commonwealth of Australia Constitution Act* 1900 (UK), which states that '*[t]he judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia'.*
[26] *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs,* 216 CLR 473, 493 (2003) (Austl., McHugh and Kirby JJ).
[27] *Id*. at 491 (McHugh and Kirby JJ).
[28] *Id.*
[29] Millbank, *supra* note n 7, at 391.
[30] *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department,* UKSC 31 [UK, 2010].

applicants could remain '*discreet'* to '*arguments based on not believing that the applicant is an LGBTI person.'*[31]

The fate of the appellants in *S395/2002* is emblematic in this respect. As Jenni Millbank notes, the appellants, upon being remitted to the Refugee Review Tribunal, were found to have fabricated their claims to fear persecution on the basis of their sexual identity, and indeed not to be gay at all.[32] The credibility of their claims had not been questioned at any earlier stage during the assessment process.

3. Stereotypes and False Assumptions

In assessing asylum seekers' credibility, assessors (in various jurisdictions) have frequently engaged in questionable assumptions about how LGBTQ people in other countries view themselves or express their sexuality. The cultural biases of decision-makers are significant in this respect. Expectations of how LGBTQ asylum seekers 'should' behave are indelibly influenced by decision-makers' own experiences and their legal, social and cultural contexts.

As Middelkoop notes, decision-makers frequently err in assuming that '*western conceptions of sexuality'* are universally applicable to sexual minorities from other countries.[33] To this end, Middelkoop, drawing upon his research upon Immigration and Naturalisation Service (IND) procedures and decision-making in the Netherlands), records that applicants were regularly questioned upon their knowledge of '*gay culture',* with applicants '*regularly expected to be able to tell about (inter)national gay rights organizations, local places where gay people meet, gay nightlife, famous gay persons, and movies and books that centre on homosexuality'.*[34] In the Australian context, Millbank quotes a notorious decision of the Refugee Review Tribunal, cited in *WAAG* [2002]:

> '*[T]he Tribunal attempted to gain insights into the Applicant's outlook as a homosexual and the experiences and other phenomena that contributed to it. The Tribunal asked the Applicant which, if any, art, literature, song lyrics or*

[31] Jansen, *supra* note 4, at 16.
[32] Millbank, *supra* note 7, at 393-394.
[33] Middelkoop, *supra* note 8, at 161-162.
[34] *Id.* at 164.

> *popular culture icons spoke to him in isolation from the rest of society. The Applicant provided not one example. He said he did not understand the question. The Tribunal asked him if his ears pricked, say, when he heard of any famous, perhaps foreign artist, performer or author being banned in Iran for reasons of immorality. In reply, he said he did not understand the question. The Tribunal was not demanding that the Applicant be a leading Gide scholar or even a Marilyn Monroe fan, but it did seem odd that the sexuality he was forced to suppress in Iran did not find expression in any phenomena at all, whether in high culture or low, also considering that he claimed elsewhere to have been alert to what was happening in countries like Australia.'*[35]

To judge the credibility of LGBTQ applicants based upon their experiences in this respect risks silencing or marginalising the vast diversity of human sexual experience. Some asylum seekers, for instance, may have engaged in same-sex sexual conduct (as, for example, men who have sex with men ["MSM"]) in their countries of origin without identifying as LGBTQ. It is not reasonable to expect these individuals to be familiar with cultural or political figures significant within a movement and a subculture with which they do not identify. Furthermore, questions focusing on gay nightlife or local sexual practices not only prioritise the claims of refugee claimants from certain regions within their country of origin (for example, individuals who have been raised in urban or relatively tolerant environments, where LGBTQ communities and subcultures may be able to develop to some degree, over claimants from rural areas excluded from significant involvement with other LGBTQ individuals) but are uniquely prone to elicit inconsistent or vague answers simply by virtue of the embarrassment and shame that many asylum seekers (who have experienced stigma and harassment on account of their sexuality throughout their life) may experience in recounting their knowledge of such practices. (Further information is provided in this respect below in section 5).

Furthermore, the assumption that asylum seekers from nations which do possess LGBTQ communities and activists will be aware of the struggles of other individuals who share their sexual identities may fail to appreciate the effects of widespread (and

[35] *WAAG v. Minister for Immigration,* FMCA 191, para 10 [Fed. Ct. Austl., 2002].

internalised) homophobia. (As Middelkoop notes, applicants who suffer from internalised homophobia face particular difficulties in articulating their claims for protection, particularly given the tendency of such applicants to disclose their sexual orientation only at a late stage in the refugee assessment process.[36]) Information on how to access support services or meet other LGBTQ people is by no means as widely available to asylum seekers (when in their countries of origin) as it may be to researchers and decision-makers in the countries to which these asylum seekers have fled. Even where this information is available, LGBTQ people who seek to suppress or deny their sexual identities may have no desire to seek out this further information.

4. Identifying Categories: Failure to Distinguish Different Forms of Sexuality

Through this paper to this point, the general term 'LGBTQ' has been used to refer to individuals whose sexual identities and practices differ from heteronormative assumptions. While convenient as shorthand, however, the term 'LGBTQ' is potentially apt to mislead in the refugee assessment process. In this respect, culture is again relevant: decision-makers, prone to thinking of sexual minorities as uniformly marginalised (or, alternately, as subject to uniformly positive treatment in some jurisdictions), may conflate various forms of sexual identity and thereby incorrectly assume that asylum-seekers will be subject to better treatment upon their return to their countries of origin than is, in fact, the case. This fallacy is particularly common in the interpretation of 'independent country information' about particular jurisdictions.

In particular, transsexual or transgender applicants' claims have been conflated with those of other forms of sexual minorities, despite potentially stark differences in how they are treated in their countries of origin. In the principal US authority on the application of the Refugees Convention to transgender applicants, *Hernandez-Montiel* (2000),[37] the particular social group of 'gay men with female sexual identities' was adopted (rather than an independent particular social group of 'transgender women'). Berg and Millbank note that this failure to acknowledge '*trans claimants* as *trans'*

[36] Middelkoop, *supra* note 8, at 163.
[37] *Hernandez-Montiel v. Immigration and Naturalisation Service,* no 98-70582 (9th Cir, 2000).

contributes to '*the erasure of trans identity in legal texts and lawmaking'.*[38] Additionally, Berg and Millbank observe that transgender practices have been frequently (and problematically) characterised as a mere manifestation of other forms of sexual identity (such as same-sex attraction), rather than as a form of identity in its own right.[39]

In Australia, although claims based upon transgender status have been considered in the past,[40] an analysis of Refugee Review Tribunal authorities reflects continuing problematic rhetoric. Reflecting my own experiences (in advocacy on behalf of transgender asylum seekers), the Tribunal has used male pronouns for persons identifying as female. In its decision in *0902671* [2009],[41] for example, the Tribunal acknowledges its failure to refer to an applicant by their preferred title of 'Miss', stating that '*[f]or the purposes of this decision the Tribunal has referred to the applicant as a male as that is the gender stated on the applicant's passport'.*[42] In observing the constraints of strict legalism, the Tribunal has (unintentionally) trivialised the applicant's claim and the source of her fear of persecution, imposing upon her the same gender identity that she has rejected. In using male pronouns, the Tribunal gives preference to the bureaucratic practices of the jurisdiction in question (from which the applicant sought protection) over the rights of the applicant to live, and to identify, in accordance with her own aspirations.

5. Inconsistencies, Vagueness and Demeanour

All asylum seekers are open to challenge by assessors in the jurisdiction in which they have sought asylum for the manner in which they choose to present their stories of persecution. Findings that asylum seekers have exaggerated or fabricated their claims for protection may arise for many reasons. Assessors may, for example, find that asylum seekers have provided inconsistent accounts (from interviewer to interviewer) of what has happened to them – whether in terms of the details of their claim (how

[38] Laurie Berg and Jenni Millbank, *Developing a jurisprudence of transgender particular social group, in* FLEEING HOMOPHOBIA: SEXUAL ORIENTATION, GENDER IDENTITY AND ASYLUM 128, 133 (Thomas Spijkerboer ed, 2013).
[39] *Id*.
[40] See *SZOBR v. Minister for Immigration and anor*, FMCA 333 [Fed. Mag. Ct. Austl., 2010].
[41] *0902671*, RRTA 1053 [Ref. Rev. Trib., 2009].
[42] *Id.*

many times they were attacked, how many attackers there were, dates and places) or in terms of the claim itself (with failure to raise a particular reason to fear harm at the earliest possible stage in the process taken as proof that it has been concocted as a show of desperation). Similarly, assessors may find that asylum seekers have been impermissibly vague in recounting particular incidents of trauma – for example, providing only very general descriptions of how events occurred and not providing further details upon prompting. Furthermore, an asylum seeker's self-presentation and ability to answer questions may invite comment and criticism on multiple fronts. An asylum seeker who appears to 'avoid the question' or to provide rambling, irrelevant answers may be as easily suspected as an asylum seeker whose answers appear rehearsed and lacking in spontaneity, or who shows little emotion in recounting traumatic events.

Making findings of credibility on these grounds are problematic for all asylum seekers, in that they ignore the inevitable role played by memory lapses (particularly in recounting events of trauma and torture), difficulties in translation (both linguistic and cultural) and unfamiliarity with the interview process (and what information asylum seekers are expected to provide) in shaping how answers are formulated. As Rosemary Byrne has noted, decision-makers have consistently afforded probative weight to '*consistent recall from serial interviews'* despite scientific and medical skepticism as to the existence of any link between '*credibility and accurate recall of traumatic experiences'*.[43]

These aspects of 'credibility assessment' are, however, particularly devastating for LGBTQ asylum seekers. As Berg and Millbank note, claims for asylum based upon sexual orientation are distinguishable from other claims based upon experiences of torture and trauma by the fact that '*extremely private experiences infuse all aspects of the claim'*.[44] Asylum seekers who have been raised in an environment where their sexuality is a source of shame or stigma, and where revelation of their sexual identities or experiences to decision-makers would expose them to harm, may deliberately conceal uniquely traumatic or embarrassing aspects of their experiences.

[43] Rosemary Byrne, *Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals*, 19 INT'L J. REFUGEE L. 609, 623 (2007).
[44] Laurie Berg and Jenni Millbank, *Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants*, 22 J. REFUGEE STUD. 195, 196 (2009).

In light of this, it is of particular concern that Middelkoop notes that refugee status assessors have been observed to ask '*very intrusive questions into sexual contacts',* with asylum seekers '*apparently expected to share [their] most intimate experiences during the interview'.*[45] Although the sources discussed below are often of general application, it must hence be borne in mind that the unique circumstances of LGBTQ asylum seekers render them of particular relevance to these claimants for protection.

The UN High Commissioner for Refugees (UNHCR)'s guidelines on the assessment of asylum seekers' claims ("the *Handbook*") emphasise that decision-makers should assess applicants (in terms of their demeanour, the amount of detail they provide and the consistency of their claims) with due regard to the circumstances from which they have emerged. As the *Handbook* notes, applicants who have emerged from fearing the authorities in their own country '*may… be afraid to speak freely and give a full and accurate account of [their] case'.*[46] In Australia, the Refugee Review Tribunal has stressed that these experiences of trauma may influence the recall and presentation of even applicants who fear non-state actors: '*[a] person may have had traumatic experiences or be suffering from a disorder or illness which may affect his or her ability to give evidence, his or her memory or ability to observe and recall specific details or events',* which may also contribute to '*mistrust in speaking freely to persons in positions of authority'.*[47]

Inconsistencies are a problematic indicator of whether asylum seekers' accounts of their experiences are truthful, simply because the nature of such experiences (almost by definition, incidents of trauma and hardship) do not allow for consistent and accurate recall. Survivors of torture may suffer from memory blocks, disassociation and difficulty in concentrating, all of which compromise their ability to present a convincing narrative of their experiences (particularly within the often-traumatic format of an interview with a refugee status assessor).[48] As Steel, Frommer and Silove write, '*[t]raumatized asylum seekers often are unable to present a coherent trauma*

[45] Middelkoop, *supra* note 8, 160.
[46] *Handbook*, *supra* note 9, para 198.
[47] Refugee Review Tribunal of Australia, GUIDANCE ON THE ASSESSMENT OF CREDIBILITY, para 4.3 (2012).
[48] Cecile Rousseau, Francois Crepeau, Patricia Foxen and France Houle, *The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board*, 15 JOURNAL OF REFUGEE STUDIES 43, 49 (2002).

narrative to the decision-maker'[49] simply by virtue of the long-term consequences of their experiences. For example, torture survivors' elevated rates of '*depression, anxiety, sleep disturbance, nightmares, impaired concentration and memory [and] PTSD'*[50] present significant barriers to the consistent and coherent recounting of experiences of hardship. Significantly, traumatic experiences impact both upon applicants' *willingness* to provide detailed accounts of their experiences (with varying openness to interviewers from instance to instance inevitably influencing the degree of detail provided) and their *ability* to do so. As Steel, Frommer and Silove note:

> '*Because traumatic memories are encoded while an individual is experiencing extreme anxiety, the normal processing and integration of these experiences is disrupted… Instead of being encoded into memory in an organized, coherent and integrated manner, traumatic experiences are often encoded in a disorganized and fragmented manner…'*[51]

Beyond issues encountered in the encoding of memories, the nature of asylum seekers' recall is similarly context-specific. Herlily, Scragg and Turner note that '*depressed patients are biased towards recalling negative personal memories in favour of positive ones',* and may suffer from '*difficulties in retrieving specific autobiographical memories'.*[52] As an example, they note that an asylum seeker's description of his treatment varied from '*we were slapped around'* to (when recounting the incident in question on another occasion) '*we were badly beaten'*.[53] Whereas a discrepancy of this kind may be mistaken by a decision-maker for an asylum seeker exaggerating their experiences (or even recounting a concocted experience, and failing to remain consistent about imaginary details), Herlily, Scragg and Turner suggest that instead the asylum seeker '*may simply have been in a different mood state in each interview, thus giving different evaluations of his experience'.*[54]

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[49] Zachary Steel, Naomi Frommer and Derrick Silove, *Part I – The mental health impacts of migration: the law and its effects: Failing to understand: refugee determination and the traumatized applicant*, 27 INT'L J.L. & PSYCHIATRY 511, 517 (2004).
[50] *Id*. at 515.
[51] *Id.* at 517.
[52] Jane Herlily, Peter Scragg and Stuart Turner, *Discrepancies in autobiographical memories – implications for the assessment of asylum seekers: repeated interviews study*, 324 BRITISH MEDICAL JOURNAL 324, 325 (2002).
[53] *Id.* at 326-327.
[54] *Id.*

In its report *Beyond Proof: Credibility Assessment in EU Asylum Systems,* the UNHCR have similarly emphasized the need for decision-makers '*to have realistic expectations of what an applicant should know and remember'* in light of the natural limitations of human memory, particularly in cases of trauma. The report notes that '*[i]nconsistency, loss of detail and gaps in recall are a natural phenomenon of the way a person records, stores and retrieves memories'.*[55] The degree of detail provided by asylum seekers – both in total and between varying occasions – will depend upon a wide array of factors, and cannot be attributed to a desire to mislead or fabricate claims without further evidence to this effect. For example, memories which have been repeatedly recalled may exhibit greater details, whereas separate incidents may become fused as *'[b]lended or generic memories'.*[56] (Juliet Cohen has similarly testified that *'[p]articularly with repeated experiences, information specific to one episode tends to drop out while information common to other similar episodes is incorporated into the general schema and retained',* forming '*a kind of blended memory'.*[57]*)* The UNHCR further caution that '*[a] person's recall of dates, frequency and duration is nearly always reconstructed from inference, estimation and guesswork'.*[58]

In light of the above, it must be consistently borne in mind in assessing LGBTQ asylum seekers that inconsistent, late or vague claims are not necessarily untrue, and should not be judged to be false simply because they are inconsistent, late or vague. Given the extremely serious consequences that may transpire from a negative finding (including the potential exposure of an unsuccessful applicant to detention, torture or death), a finding that any asylum seeker, but particularly an LGBTQ asylum seeker, is lying about an aspect of their claims must never be made lightly: it should only be reached where a far broader range of indicia point to this conclusion, and where other explanations for discrepancies are not satisfactory. Middleton J's observation in *SZLVZ* [2008] that refugee status assessors '*must be sensitive to the difficulties often faced by applicants and should give the benefit of the doubt to those who are*

[55] UN High Commissioner for Refugees, BEYOND PROOF: CREDIBILITY ASSESSMENT IN EU ASYLUM SYSTEMS: FULL REPORT 57 (2013).
[56] *Id*, at 58.
[57] Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 INT'L J. REFUGEE L. 293, 295 (2001).
[58] UN High Commissioner for Refugees, *supra* note 55, at 154.

generally credible, but are unable to substantiate all of their claims'[59] arguably retains its relevance beyond circumstances where there is a lack of corroborating evidence. Middleton J's call for '*the benefit of the doubt'* should similarly inform the amount of weight decision-makers afford to inconsistencies and 'vagueness'.

An applicant's demeanour is similarly an inexact guide to the truth of their claims to fear persecution on the basis of LGBTQ conduct or identity. This is true both with regard to their general affect and how they recount traumatic experiences. As noted above, LGBTQ individuals cannot be expected to act in a manner reminiscent of Western stereotypes. Even in positive decisions, such as that in *0805932* [2008], the Refugee Review Tribunal has commented that applicants possess '*physical characteristics that would identify [them] as homosexual and effeminate'.*[60] An asylum seeker who identifies as LGBTQ (or who has engaged in same-sex sexual conduct) in a context where such behaviour and identities are stigmatised and repressed cannot be expected to present in a manner that readily conforms to contemporary Western assumptions.

More broadly – and in common with asylum seekers applying for protection on other grounds – the failure by LGBTQ asylum seekers to exhibit particular emotional responses when recounting their experiences (such as overt grief or hesitation) cannot necessarily be regarded as evidence that these experiences are fabricated. As Joanna Ruppel writes, '*[t]he manner in which individuals respond to questions may… be influenced by culture'.*[61] What would be perceived in a Western context as an evasive or unduly taciturn response may be eminently justified by the cultural norms of the asylum seeker, particularly one who has learned in their country of origin to '*volunteer nothing to people in uniforms'* (or to otherwise distrust figures of authority, choosing not to show weakness or to 'give too much away').[62] Given that individual experiences of trauma differ, a flat affect or seeming detachment from the events related may owe as much to experiences of disassociation, or even excessive rehearsal

[59] *SZLVZ v. MIAC*, FCA 1816, para 25 [Fed. Ct. Austl., 2008].
[60] *0805932*, RRTA 442 [Ref. Rev. Trib., 2008].
[61] Joanna Ruppel, *The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applications*, 23 COL. HUM. RTS. L. REV. 1, 13-14 (1991-1992).
[62] *Id*.

prior to presenting one's account of one's experiences (in light of the dire consequences of failure), as to any attempt to mislead refugee status assessors.

6. Conclusion and Recommendations

As was bluntly asserted by Lord Rodger in *HJ and HT*, LGBTQ people are protected under the *Convention*, properly interpreted, because '*they are entitled to have the same freedom from fear of persecution as their straight counterparts'*.[63] This ringing declaration can only be observed in practice, however, if LGBTQ asylum seekers' claims to belong to sexual minorities, and to fear harm as a result, are believed by the people responsible for deciding the fate of their claims. In light of this, it is of concern that decision-makers have frequently approached this unique subset of claims without regard to differences of cultures and distinct forms of sexual identity, and without giving sufficient weight to the fallibility of human memory (particularly when relating circumstances of trauma, and especially in the unusual, artificial format of a refugee assessment interview).

As noted in section 1, it is essential to conduct some form of credibility assessment in determining the outcome of asylum seekers' claims – whether with regard to their sexuality or (as Middelkoop would prefer) as to what has transpired in their countries of origin. The degree of weight to be afforded to matters that go to applicants' credibility in individual circumstances is difficult to mandate through statutes, precedents or policies; it will depend to a great extent upon the circumstances of individual cases. Despite this, the need for sensitivity and understanding – for the challenges faced by asylum seekers in telling their stories, for the unique plight of LGBTQ asylum seekers (particularly those who have seldom or never before spoken of their sexuality and their experiences) and in the interpretation of information about their countries of origin – in determining asylum seekers' claims under the *Refugees Convention* must always be paramount.

[63] *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department,* UKSC 31, para 76 [UK, 2010] (Lord Rodger).

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