YOU ARE NOT WHAT YOU OUGHT TO BE:

Credibility Assessment in Sexuality-Based Asylum Cases

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Abstract

Australia, Canada and the United Kingdom have exhibited similar approaches in the adjudication of refugee claims based on sexual orientation. On the positive side, they all have included LGBT people in the scope of the 1951 Refugee Convention predominantly as members of a "particular social group." Moreover, they all have discredited the so-called discretion requirement that used to have a deleterious effect on the interpretation of "persecution" in LGBT cases. Nonetheless, the progress achieved by these developments is at the risk of being undermined by the increasing trend of disbelief in the claimant's sexual orientation in all three jurisdictions. This thesis argues that the substantial room that these countries allow for personal biases and convictions to play a determinative role during credibility assessment in the refugee status determination procedure easily disadvantages LGBT claimants. The reason for this is adjudicators' lack of knowledge of the particular situation of LGBT people, their lack of empathy for their problems as well as certain claimants' inability to live up to Western expectations of a global gay identity. Relying on UNHCR and UKBA guidance materials, this thesis demonstrates what it considers as the most outstanding (substantive and procedural) problems during the credibility assessment process through administrative-level decisions and practices. The paper arrives at the conclusion that stereotypical views can often prevent genuine LGBT claimants to be granted refugee status. This situation, however, can and should be remedied by providing decision-makers with both written guidelines and regular training sessions that specifically address issues that are likely to arise in sexuality-based claims.

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INTRODUCTION

> *"It is violation of human rights when people are beaten or killed because of their sexual orientation, or because they do not conform to cultural norms about how men and women should look or behave. It is a violation of human rights when governments declare it illegal to be gay, or allow those who harm gay people to go unpunished […] or when people are murdered after public calls for violence toward gays, or* when they are forced to flee their nations and seek asylum in other lands to save their lives."[1] [emphasis added]

At the end of 2011 when U.S. Secretary of State, Hillary Rodham Clinton, delivered her historic speech at the UN in recognition of the human rights violations that permeate sexual minorities' lives worldwide, 76 countries had laws on their books that criminalized consensual same-sex sexual activity either explicitly or in the way they were applied.[2] In seven of these primarily African and Asian countries same-sex sexual conduct is still punishable, and is being punished, by death even today.[3] These laws, however, demonstrate only the tip of the iceberg when compared to the innumerable,[4] yet oftentimes unreported,[5] manifestations of discrimination and persecution that infiltrate sexual minorities' everyday existence. It should come as no surprise then that when pursuing a peaceful and safe life becomes untenable, and existence is reduced to a mere quest for survival, thousands of LGBT people set out to seek a safe haven outside their country of origin on a yearly

[1] Rodham Clinton, Hillary. "Remarks in Recognition of International Human Rights Day." United Nations General Assembly. Palais des Nations, Geneva, Switzerland. 6 December 2011. Remarks: http://www.state.gov/secretary/rm/2011/12/178368.htm [accessed 10 January 2012]
[2] Jansen, Sabine and Thomas Spijkerboer. "Fleeing Homophobia – Asylum Claims Related to Sexual Orientation and Gender Identity in Europe." COC Nederland: Vrije Universiteit Amsterdam (2011), p. 21.
[3] Bruce-Jones, Eddie, and Lucas Paoli Itaborahy. "State-sponsored Homophobia: A world survey of laws criminalising same-sex sexual acts between consenting adults." Report. ILGA: 2011: http://ilga.org/ilga/en/article/1161 [accessed 6 December 2011], p. 10.
[4] O'Flaherty, M, and J. Fischer. "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles." Human Rights Law Review 8(2) (2008), pp. 208-209.
[5] Millbank, Jenni. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." 21(1) International Journal of Refugee Law (2009), p. 447.

basis.[6]Challenges thatthese newly become refugees and asylum-seekers face due to their sexual orientation do not stop at the border of their own country of origin, however, and can manifest during the refugee status determination procedureas well.[7]

It is the assertion of this thesis that despite the fact that higher courts have resolved two major contentious issues related to sexuality-based claims, namely the inclusion of LGBT claimants in the scope of the Convention and the interpretation of persecution on the basis of sexual orientation, genuine LGBT refugees may still see their applications rejected.I will argue that the reason for this is thatdecision-makers'personal biases and convictions can lead them to disbelieve the claimants' sexual orientation during credibility assessment,[8] which forms the central part of the refugee determination procedure.[9]

LGBT claimants in genuine need of protection have a chance to face disbelief by adjudicators for the following main reasons. Firstly, the framing of sexual orientation by high courts in Australia, Canada and the United Kingdom, the three jurisdictions observed in this paper, reflects an understanding of identity based on sexual orientation that may disadvantage non-Western claimants.[10]Secondly, the credibility assessment procedure allows substantial room for unfounded, and often anti-LGBT, biases and expectations to play a determinative role in the process, which has the potential to negatively impact LGBT

[6] Jansen, Sabine and Thomas Spijkerboer. "Fleeing Homophobia – Asylum Claims Related to Sexual Orientation and Gender Identity in Europe." COC Nederland: Vrije Universiteit Amsterdam (2011), p. 16.; Cowen, Tim, et al. "Sanctuary, Safety and Solidarity - Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland." Report. Equality Network, BEMIS and GRAMNet: 2011: http://www.gla.ac.uk/media/media_195792_en.pdf [accessed 12 January 2012], p. 37.
[7] Helsinki Citizens' Assembly – Turkey Refugee Advocacy and Support Program, and ORAM – Organization for Refuge, Asylum & Migration. "Unsafe Haven: The Security Challenges Facing Lesbian, Gay, Bisexual and Transgender Asylum Seekers and Refugees in Turkey." Report. 2009: http://www.oraminternational.org/images/stories/PDFs/oram-unsafe-haven-2011.pdf [accessed 6 February 2012], p. 7.
[8] Millbank, Jenni. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." 21(1) International Journal of Refugee Law (2009), p. 35. The definition of credibility assessment is elucidated in the second chapter of this thesis.
[9] Coffey, G. "The Credibility of Credibility Evidence at the Refugee Review Tribunal." International Journal of Refugee Law 15 (2003), p. 414.The definition of the refugee status determination procedure is elucidated in the first chapter of this thesis.
[10] Katyal, Sonia. "Exporting Identity." 14 Yale Journal of Law & Feminism 97 (2002), p. 100.

claimants. Thirdly, these sentiments are present in Australian, British and Canadian cases.These preconceptions, coupled with the frequent lack of evidence in sexual orientation claims,can easily pose an insurmountable hurdle to genuine LGBT claims' success, unless these applicants fit Western preconceptions. Finally, certain seemingly neutral procedural practices during credibility assessment can lead to an adverse ruling on LGBT claimants' credibility if decision-makers overlook the specificities of these applicants' circumstances.

The thesis will illustrate through the analysis of various, mainly administrative-level decisions, practices and related reportshowthe presence of biases on the part of decision-makersduring the credibility assessment procedure in Australia, Canada and the United Kingdom has failed and is bound to fail LGBT applicants. It will address the question how (remediable) deficiencies manifest themselves during credibility assessment of LGBT refugees and asylum-seekers. The paper will draw heavily on guiding materials, like the 2008 "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity"[11] or the 2010 UK Border Agency's guidelines "Sexual Orientation and Gender Identity in the Asylum Claim,"[12] which have already identified recurring problems in LGBT refugee status determination procedures. Assuming that they address the most contentious issues, the sections providing guidance on credibility assessment in the abovementioned documents will provide assistance in the detection of biases and procedural flaws at the administrative level of decision-making in Australia, Canada and the United Kingdom.

[11] UN High Commissioner for Refugees, UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 21 November 2008: http://www.unhcr.org/refworld/docid/48abd5660.html [accessed 25 February 2012]
[12] United Kingdom: Home Office, Sexual Orientation Issues in the Asylum Claim, 6 October 2011: http://www.unhcr.org/refworld/docid/4eb8f0982.html [accessed 25 February 2012]

These three common-law countrieslend themselves as ideal candidates for a comparative analysis for the following reasons. Firstly, the Convention and its Protocol have been incorporated into the respective domestic systems of these three countries in a highly similar manner.[13] Secondly, they have set up comparable procedures for the adjudication of asylum and refugee claims.[14] Thirdly, these three state parties are also among the first jurisdictions to have received and accepted claims based on sexual orientation.[15] As a result, they have accumulated substantial jurisprudence in this arena. Moreover, they have also followed parallel trajectories in the adjudication of sexuality-based refugee claims. Fourthly, all three of these countries share a common, Western/Anglo-Saxon understanding of what sexual identity is and how the concept is interpreted as a protected ground in domestic anti-discrimination legislation.[16] Finally, while all three states guarantee comparably high-level anti-discrimination protections to their own LGBT citizens, they all have demonstrable shortcomings in the adjudication of LGBT claims duringcredibility assessment.

It is important to emphasize the limitations of this master's level thesis. This paper only aims to engage in a qualitative, as opposed to a quantitative, assessment of LGBT cases and related practicesin order to establish the occurrence of deficiencies in the assessment credibility procedure during the adjudication of these cases. So that it does not identify problems in an arbitrary manner, the paper will rely heavily on the abovementioned two

[13] Fullerton, Maryellen. "A Comparative Look at refugee Status Based on Persecution Due to Membership in a Particular Social Group." 26 Cornell International Law Journal 505 (1993), p.511.; Laviolette, Nicolette. "The Immutable Refugees: Sexual Orientation in Canada (A.G.) v. Ward." 55 University of Toronto Faculty of Law Review 1 (1997), p. 4.; Macklin, Audrey. "Canada (Attorney-General) v. Ward: A Review Essay." 6 International Journal of Refugee Law 362 (1994), p. 363.; Walker, Kristen I. "Sexuality and Refugee Status in Australia." International Journal of Refugee Law 12(175) (2000), pp. 2, 4.
[14]Dauvergne, Catherine, and Jenni Millbank. "Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers." 300 Federal Law Review (2003), p. 302.
[15]Ibid., p. 302.
[16] Seidman. Steven. *The Social Construction of Sexuality.* W. W. Norton and Company, 2nd ed. (2010), p. 82.; Katyal, Sonia. "Exporting Identity." 14 Yale Journal of Law & Feminism 97 (2002), p. 100.

guiding materials as well as other relevant literature. Furthermore, it should also be noted that this thesisdoes not endeavor to imply that claimants bringing their cases on other Convention grounds do not face procedural hurdles. However, it is intended to specifically highlight the obstacles that gay and lesbian claimants are likely to encounter during credibility assessment and shed light on the causes of these barriers. The thesis onlyintends to provide an assessment of deficient practices during the credibility evaluationvis-à-vis the sexual orientation of claimants in sexuality-based cases in Australia, Canada and the United Kingdom. Therefore, the use of country of origin information will also be excluded from this paper, as it is usually utilized to prove or disprove the existence of persecution in the sending country, but can hardly be relied on to corroborate the applicant's sexual orientation.[17]

With regard to its terminology, this paper is in accordance with the language of the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity (the Yogyakarta Principles).[18] These Principles provide"a coherent and comprehensive identification of the obligation of States to *respect*, *protect* and *fulfill* the human rights of all persons regardless of their sexual orientation or gender identity"[19] [emphasis added].Pursuant to the Principles, sexual orientation is "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one

[17] LaViolette, Nicolette. "Independent human rights documentation and sexual minorities: an ongoing challenge for Canadian refugee determination process." 13 The International Journal of Human Rights, 2-3 (2009), p. 438.
[18] International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007: http://www.unhcr.org/refworld/docid/48244e602.html [accessed 25 February 2012]
[19] O'Flaherty, M, and J. Fischer. "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles." Human Rights Law Review 8(2) (2008), p. 207.

gender."[20] In light of this definition, sexual minorities will be groups of persons who have the"capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of […] the same gender."[21] These groups might include, but are not restricted to, lesbian, gay, bisexual or transsexual, or as commonly referred to "LGBT,"[22] persons. This paper is going to use the terms "sexual minorities" and "LGBT (people)" interchangeably. At the same time, the paper will refrain from using the term "homosexual" due to its medical connotations, unless it forms part of a direct quotation. The terms "homosexuality" and "bisexuality" will refer to people's "capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of […] the same gender"[23] and"more than one gender"[24] respectively.

The first chapter of this paper will demonstrate howpast problems related to LGBT claimants' inclusion in the personal scope of the Conventionand the requirement of discretion in case of persecution on the basis of sexual orientationhave been resolved by judicial precedence. It will also shed light on how these decisions reflect a preference for the"substitutive model"[25] of sexual orientation in the three jurisdictions. The second chapter will argue that credibility assessment, which has emergedas the most recent area of major contestin LGBT asylum

[20] International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, p. 6: http://www.unhcr.org/refworld/docid/48244e602.html [accessed 25 February 2012]
[21] Ibid.
[22] O'Flaherty, M. "Jurisprudential Annotations to the Yogyakarta Principles." (2007), p. 49.: http://www.yogyakartaprinciples.org/yogyakarta-principles-jurisprudential-annotations.pdf [accessed 20 February 2012]
[23] International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, p. 6.: http://www.unhcr.org/refworld/docid/48244e602.html [accessed 25 February 2012]
[24] Ibid.
[25] Katyal, Sonia. "Exporting Identity." 14 Yale Journal of Law & Feminism 97 (2002), p. 100.

claims after the former two disputed arguments were delegitimized,[26] is a procedure that is highly perilous for LGBT applicants due to the prevalence of negative perceptions on homosexuality. The third chapter will prove that stereotypical expectations on the part of adjudicators regarding LGBT applicants can play a negative role in these claimants' credibility assessment. The concluding chapter will argue that written guidelines specific to sexual orientation claims supplemented with trainings for administrative-level decision-makers are crucial to enhance knowledge and empathy, and thus, to minimize the role personal biases play in the credibility assessment of LGBT people.

[26] Jansen, Sabine and Thomas Spijkerboer. "Fleeing Homophobia – Asylum Claims Related to Sexual Orientation and Gender Identity in Europe." (2011), p. 47. (UK); Millbank, Jenni. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." 21(1) International Journal of Refugee Law (2009), p. 4. (AUS, CAN)

1. BACKGROUND AND PAST PROBLEMS: MEMBERSHIP WITH "DISCRETION"

"[A] hidden right is not a right."[27]

This chapter will provide a concise analysis of the relevant principles of the landmark high court decisions that resolved past issues during the refugee status determination procedure. These issues related to LGBT applicants' inclusion in the personal scope of 1951 Convention Relating to the Status of Refugees[28] and the reliance on the so-called discretion requirement regarding the interpretation of persecution in sexuality-based claims. These questions are important to highlight as they used to constitute the two most significant obstacles for LGBT refugees during the refugee status determination procedure.[29] This paper shows that even though these issues have largely been resolved, the emergence of disbelief in the claimants' sexuality as the most recent major problem during the refugee status determination procedure undermines the progress achieved by the resolution of the two aforementioned issues. It is also the aim of this chapter's analysis is to provide a contextual framework for the rest of the paper as well as to shed light on the way sexual orientation is conceptualized in the three jurisdictions.

[27] Decision *VA5-02751* (Private Proceeding), *VA5-02751*, Immigration and Refugee Board of Canada, 16 February 2007: http://www.unhcr.org/refworld/docid/48245a5f2.html [accessed 26 February 2012]
[28] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.: http://www.unhcr.org/refworld/docid/3be01b964.html [accessed 25 February 2012]
[29]Millbank, Jenni. "A Preoccupation with Perversion: the British Response to Refugee Claims on the Basis of Sexual Orientation 1989-2003." 14 Social and Legal Studies (2005), p. 116.; Millbank, Jenni. "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom." 13 (2/3) International Journal of Human Rights (2009), p. 391.

1.1.Refugee Status Determination in LGBT Cases

Providing a "surrogatefor protection" to those who flee their country of origin is the purported aim[30] of the Refugee Convention and the 1967 Protocol to the Convention.[31] It is these instruments that comprise the cornerstone of international refugee law at the global level and provide the pillars of domestic protection mechanisms for refugees and asylum-seekers, including those persecuted on the basis of their sexual orientation. Nonetheless, when the Convention and its Protocol were drafted the plight and protection of sexual minorities was not an issue of explicit consideration.[32] "Sexual orientation" is therefore not listed in these treaties as a discrete ground on which refugee claims may be based. In this respect sexual orientation is comparable to other categories, such as gender or age,[33] which while textually omitted, in the course of the last few decades have come to be interpreted as protected grounds for the purposes of refugee protection in several jurisdictions.[34]

Refugee status is granted or rejected through the refugee status determination (RSD) procedure. This is a process through which decision-makers examine whether a claimant fulfills the requirements of the refugee definition and to which every claimant has a right of

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[30]Millbank, Jenni. "The Role of Rights in Asylum Claims Based on Sexual Orientation." 4 Human Rights Law Review 2 (2004), p. 215.
[31] UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.: http://www.unhcr.org/refworld/docid/3ae6b3ae4.html [accessed 25 February 2012]
[32] Conroy, Melanie A. "Real Bias: How Real ID's Credibility and Corroboration Requirement Impair Sexual Minority Asylum Applicants." 24 Berkeley Journal of Gender Law and Justice 1 (2009), p. 3.
[33] Türk, Volker and Frances Nicholson. "Refugee protection in international law: an overall perspective" in Feller, Erika, Volker Türk and Nicholson Frances (eds.): Refugee Protection in International Law – UNHCR's Global Consultations on International Protection. Cambridge: Cambridge University Press, 2003, p. 19.; Edwards, Alice. "Age and gender dimensions in international refugee law" in Feller, Erika, Volker Türk and Nicholson Frances (eds.): Refugee Protection in International Law – UNHCR's Global Consultations on International Protection. Cambridge: Cambridge University Press, 2003, pp. 53, 57.; Binder, Andrea. "Gender and the 'Membership in a Particular Social Group' Category of the 1951 Refugee Convention." 10 Columbia Journal of Gender and Law 167 (2001), pp. 1-2.; Godfrey, Peter C. "Defining the Social Group in Asylum Proceedings: The expansion of the Social Group to Include a Broader Class of Refugees." 3 Journal of Law & Policy 257 (1994), p. 258.
[34]*Canada (Attorney General) v. Ward*, [1993] 2 SCR 689.: http://scc.lexum.org/en/1993/1993scr2-689/1993scr2-689.html [accessed 20 November 2011], *A and Another v Minister for Immigration and Ethnic Affairs and Another*, Australia: High Court, 24 February 1997: http://www.unhcr.org/refworld/docid/3ae6b7180.html [accessed 20 November 2011], *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999: http://www.unhcr.org/refworld/docid/3dec8abe4.html [accessed 20 November 2011]

access.[35]In the center of this process is the credibility assessment. Credibility in this paper "refers only to whether the applicant's own testimony [particularly his or her claim on being an LGBT person] will be accepted in status determination."[36]While the exact implementation of the refugee status determination procedure is within the discretionary power of the state parties,[37] the refugee definition, contained in Article 1A(2) of the Refugee Convention, has been incorporated into the national legislation of all the three abovementioned countries almost identically.[38]The definition stipulates that a refugee is a person who is

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[39]

In light of this, the test the refugee definition establishes for refugee status determination is three-pronged: (1) the claimant needs to prove that he or she would likely face persecution if refouled, (2) he or she needs to establish a nexus between the persecution feared and one of the five protected Convention grounds that apply to him or her, and he or she (3) needs to

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[35] Durkee, Melissa J. "Beyond the Guantanamo Bind: Pragmatic Multilateralism in Refugee Resettlement." 42 Colum. Hum. Rights Law Review 697 (2011), p. 722.
[36] Kagan, Michael. "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination." 17 Georgetown Immigration Law Journal 367 (2003), p. 730.
[37] Coffey, G. "The Credibility of Credibility Evidence at the Refugee Review Tribunal." International Journal of Refugee Law 15 (2003), p. 380.; Ramanathan, Erik D. "Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence." Georgetown Immigration Law Journal (1996), p. 4.
[38] Incorporated into the national legal system through: 1. the Migration Act 1958 (Cth) in Australia: Kassisieh, G. "From Lives of Fear, to Lives of Freedom" A review of Australian refugee decisions on the basis of sexual orientation." Gay and Lesbian Rights Lobby, Glebe (2008), p. 5.; 2. The Immigration and Refugee Protection Act, SC 2001, c. 27. in Canada: LaViolette, Nicolette. "Independent human rights documentation and sexual minorities: an ongoing challenge for Canadian refugee determination process." 13 The International Journal of Human Rights, 2-3 (2009), p. 465.; 3. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted in the United Kingdom: Jansen, Sabine and Thomas Spijkerboer. "Fleeing Homophobia – Asylum Claims Related to Sexual Orientation and Gender Identity in Europe." (2011), p. 18.
[39] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Article 1A(2): http://www.unhcr.org/refworld/docid/3be01b964.html [accessed 25 February 2012]

show the lack of effective and available state protection.[40] Once the adjudicator is satisfied (on the basis of, *inter alia*, the claimant's testimony and available evidence) that the claimant meets these criteria, refugee status is granted.

As mentioned above, there used to be two highly contested areas in the jurisprudence of LGBT refugee claims in Australia, Canada and the United Kingdom: the interpretation of "membership of a particular social group"[41] and the concept of "persecution."[42] Falling inside the personal scope of the Convention as well as the existence of persecution due to a protected Convention ground are essential conditions for the establishment of refugee status. While LGBT refugee claimants have managed to bring successful claims under the protected Convention grounds of "religion"[43] and "political opinion,"[44] "membership of a particular social group" has been the most heavily relied upon basis for such claims.[45] Nevertheless, reliance on this Convention ground was not always unproblematic for LGBT refugees, particularly in Canada and the United Kingdom.[46] The same applies to the contested interpretation of persecution by decision-makers, whose utilization of the so-called discretion requirement used to be ubiquitous in Australia and the United Kingdom, resulting in the

[40] Choi, Venice. "Living Discreetly: A Catch 22 in Refugee Status Determinations on the Basis of Sexual Orientation." 36 Brooklyn Journal of International Law 241 (2010), p. 245.; Walker, Kristen I. "Sexuality and Refugee Status in Australia." International Journal of Refugee Law 12(175) (2000), p. 2.
[41] Millbank, Jenni. "A Preoccupation with Perversion: the British Response to Refugee Claims on the Basis of Sexual Orientation 1989-2003." 14 Social and Legal Studies (2005), p. 116.
[42] Millbank, Jenni. "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom." 13 (2/3) International Journal of Human Rights (2009), p. 391.
[43] Swink, Arwen. "Queer Refugee: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities." 29 Hastings International Comparative Law Review 251 (2006), p. 254.
[44] Ramanathan, Erik D. "Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence." Georgetown Immigration Law Journal (1996), p. 6.
[45] Walker, Kristen I. "Sexuality and Refugee Status in Australia." International Journal of Refugee Law 12(175) (2000), p. 4.
[46] McGhee, Derek. "Persecution and Social Group Status: Homosexual Refugees in the 1990s." 14 Journal of Refugee Studies 1 (2001), p. 24.; Laviolette, Nicole. "The Immutable Refugees: Sexual Orientation in Canada (A.G.) v. Ward. University of Toronto Faculty of Law Review 55(1) (1997), p. 9.

frequent rebuttal of the existence of persecution in LGBT cases.[47] These contentious issues have largely been settled by judicial precedence in the respective jurisdictions they surfaced as a problem.

1.2. "Membership of a Particular Social Group"

As indicated above, it is the "membership of a particular social group" ground that claims brought on the basis of sexual orientation most frequently rely on. Out of the five Convention categories a refugee may utilize to establish refugee status, it is also this group that leaves the most substantial room for interpretation.[48] In the elucidation of the meaning of this category, two different approaches have evolved in common law jurisdictions: the so-called protected characteristics and social perception formulations. While these two approaches might arrive at different conclusions regarding whom they view included in the scope of a "particular social group,"[49] there is sometimes convergence between their results.[50] It is a welcome development that LGBT claimants have been recognized as belonging to a "particular social group" under both of these approaches.

[47] Millbank, Jenni. "Gender, Visibility and Public Space in Refugee Claims on the Basis of Sexual Orientation." 1 Seattle Journal for Social Justice 725 (2003), p. 731.; Millbank, Jenni. "A Preoccupation with Perversion: the British Response to Refugee Claims on the Basis of Sexual Orientation 1989-2003." 14 Social and Legal Studies (2005), p. 119.

[48] Goodwin-Gill, Guy S and Jane McAdam. The Refugee in International Law (Third Edition). Oxford: Oxford University Press, 2007: pp. 74-75. Türk, Volker and Frances Nicholson. "Refugee protection in international law: an overall perspective" in Feller, Erika, Volker Türk and Nicholson Frances (eds.): *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press, 2003: pp. 16-17. Edwards, Alice. "Age and gender dimensions in international refugee law" in Feller, Erika, Volker Türk and Nicholson Frances (eds.): *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press, 2003: p. 70.

[49] Türk, Volker and Frances Nicholson. "Refugee protection in international law: an overall perspective" in Feller, Erika, Volker Türk and Nicholson Frances (eds.): Refugee Protection in International Law – UNHCR's Global Consultations on International Protection. Cambridge: Cambridge University Press, 2003: p. 17.

[50] Bresnahan, Kristin A. "The Board of Immigration Appeals's New 'Social Visibility' Test for Determining 'Membership of a Particular Social Group' in Asylum Claims and Its Legal and Policy Implications." 29 Berkeley Journal of International Law 649 (2011), p. 655.; Türk, Volker and Frances Nicholson. "Refugee protection in international law: an overall perspective" in Feller, Erika, Volker Türk and Nicholson Frances (eds.): Refugee Protection in International Law – UNHCR's Global Consultations on International Protection. Cambridge: Cambridge University Press, 2003: p. 17.

1.2.1. The "Protected Characteristic" Approach

The four Convention grounds, enumerated in addition to "membership of a particular social group" in the Convention's refugee definition, seem to be a reflection of general human rights principles, in the sense that they prohibit persecution on the basis of grounds usually protected against discrimination in human rights law.[51] Consequently, some argue that the interpretation of "particular social group" should also be informed by human rights principles.[52] The so-called protected characteristic approach is premised on this assumption. It asserts that the characteristic of a group is protected if it is immutable, that is either innate or otherwise unalterable, or if it is so fundamental to human dignity that members of the group cannot be made to change it.[53] In both Canada and the United Kingdom LGBT applicants have come to fall inside the personal scope of the Convention, because their sexual orientation has been regarded as a protected characteristic by the courts.

The Canadian *Ward* and the British *Islam and Shah* decisions, respectively handed down by the Supreme Court of Canada in 1993 and the UK House of Lords in 1999, both adopted the "protected characteristic" approach. *Canada (Attorney General) v. Ward*,[54] in which the Court dissected whether a former member of the Irish National Liberation Army fleeing the wrath of the paramilitary group fell in the scope of the Convention, is the seminal Canadian

[51] Aleinkoff, T. Alexander. "Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group'" in Feller, Erika, Volker Türk and Nicholson Frances (eds.): *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press, 2003: p. 294.
[52] Ibid.
[53] Türk, Volker and Frances Nicholson. "Refugee protection in international law: an overall perspective" in Feller, Erika, Volker Türk and Nicholson Frances (eds.): Refugee Protection in International Law – UNHCR's Global Consultations on International Protection. Cambridge: Cambridge University Press, 2003: p. 17.; Aleinkoff, T. Alexander. "Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group'" in Feller, Erika, Volker Türk and Nicholson Frances (eds.): *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press, 2003: p. 294.
[54] *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689: http://scc.lexum.org/en/1993/1993scr2-689/1993scr2-689.html [accessed 20 November 2011]

case on the interpretation of "particular social group." *Ward* established a limiting test that elucidated the types of refugee groups that merit protection under that Convention ground.[55] The line of argument along which this so-called *Ward* test was established resonates with how unlisted grounds in Section 15 of the Canadian Charter of Rights and Freedoms,[56] the Charter's equality section, became constitutionally protected as "analogous grounds" under the Charter in Canada. Namely, the establishment of protected groups both under Section 15 of the Charter and the "particular social group" of the Convention's refugee definition is informed by "the general underlying themes of the defence of human rights and anti-discrimination."[57] An obiter in*Ward*specificallyasserted that sexual orientation is "an innate and unchangeable characteristic," and on this basis, included sexual minorities in the ambit of the "particular social group."[58] It is noteworthy that this exact same logic was utilized in the *Egan v. Canada* decision of the Supreme Court of Canada two years later in 1995. *Egan*'s plurality opinion established that sexual orientation, although not listed specifically, is "analogous to the enumerated grounds" in Section 15 of the Charter.[59]

The *Ward* decision helped harmonize the jurisprudence of the Immigration and Refugee Board of Canada vis-à-vis claims brought on the basis of sexual orientation, which had been inconsistent prior to the ruling. The British *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*[60]ruling

[55]Ibid.
[56] Canadian Charter of Rights and Freedoms, assented to 29 March 1982: http://laws.justice.gc.ca/eng/charter/ [accessed 15 December 2011]
[57]*Canada (Attorney General) v. Ward*, [1993] 2 SCR 689: http://scc.lexum.org/en/1993/1993scr2-689/1993scr2-689.html [accessed 20 November 2011]
[58]Ibid.
[59]*Egan v. Canada*, [1995] 2 S.C.R. 513 at 567
[60]*Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999: http://www.unhcr.org/refworld/docid/3dec8abe4.html [accessed 20 November 2011]

had a similar impact on jurisprudence of sexual orientation-based refugee claims in the United Kingdom. This milestone case revolved around two Pakistani women trying to escape domestic violence and its holding helped clarify the meaning of "particular social group" in the British jurisprudence. Similarly to the *Ward* decision, in *Islam and Shah* the Lords established that the principle of anti-discrimination informs the Convention.[61] As to the question of "homosexuals" being included in the ambit of "particular social group," the decision confirmed that gays and lesbians' "common immutable characteristic" could serve as the legitimate basis of their refugee claims.[62] In light of the above, claims brought on the basis of persecution due to sexual orientation cannot be rejected on the grounds that sexual orientation is not afforded protection under the 1951 Convention neither in Canada nor in the United Kingdom, since the courts have pronounced sexual orientation immutable.

1.2.2. The "Social Perception" Approach

Nowhere in the text of the Convention is it asserted, however, that the interpretation of the refugee definition or the "particular social group" category should be premised on the principle of anti-discrimination. It is therefore not surprising that the "protected characteristic" approach has not been adopted unanimously across all jurisdictions. Another school of thought, the so-called social perception approach, has emerged as an alternative, which utilizes a different understanding of "particular social group." This approach shifts the emphasis from the group-forming common characteristic's immutability to its impact on how

[61] Marouf, Fatma E. "The Emerging Importance of 'Social Visibility' in Defining a 'Particular Social Group' and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender." 27 Yale Law and Policy Review (2008), p. 56.

[62] *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999, p. 9.: http://www.unhcr.org/refworld/docid/3dec8abe4.html [accessed 20 November 2011]; Chelvan, S. Refugee Claims on the Basis of Sexual Orientation/Identity and Gender Identity. London: No5Chambers (2011), p. 19. In ECRE/ELENA Advanced ELENE course: Vulnerable Groups in the Asylum Procedure, 15-17 April 2011. Leuven, Belgium. Course material. (On file with author)

the group is perceived by others in society.[63] It is pursuant to this understanding of "particular social group" that LGBT refugees and asylum-seekers have come inside the ambit of the Convention in Australia.

In the landmark Australian decision, *Applicant A v. Minister for Immigration and Ethnic Affairs*,[64] the High Court of Australia took up the question whether Chinese couples, who have a child and object to coerced sterilization under the country's "one child policy," could form a "particular social group" under the Convention. The Court claimed that "a group must share a common, uniting characteristic that sets its members apart in the society"[65] in order for to be regarded as a "particular social group" under the Convention. Nonetheless, the decision also established that persecution cannot be the only factor that unites the group.[66] Furthermore, the Court ruled that the group does not have to be socially visible *per se* and that even imputed characteristics could serve as the basis for "membership in a particular social group."[67]

Applying these criteria to LGBT applicants, the Court specifically included LGBT applicants in the scope of "particular social group." Pursuant to the decision, "[i]f the homosexual members of a particular society are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole, they will

[63] Marouf, Fatma E. "The Emerging Importance of 'Social Visibility' in Defining a 'Particular Social Group' and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender." 27 Yale Law and Policy Review (2008), p. 58.; Aleinkoff, T. Alexander. "Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group'" in Feller, Erika, Volker Türk and Nicholson Frances (eds.): *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press, 2003: p. 271.
[64] *A and Another v Minister for Immigration and Ethnic Affairs and Another*, Australia: High Court, 24 February 1997: http://www.unhcr.org/refworld/docid/3ae6b7180.html [accessed 20 November 2011]
[65] Ibid.
[66] Ibid.
[67] Ibid.

qualify for refugee status,"[68] supposing, they fear persecution back home. By taking this approach, as opposed to the Canadian and British courts, the High Court of Australia did not have to analyze whether sexual orientation is a protected characteristic, and if so, on what basis.

1.3. "Well-Founded Fear of Persecution"

Pursuant to Article 1A(2) of the 1951 Convention, a refugee claimanthas to establish that they have a "well-founded fear of being persecuted."[69] Persecution, however, is a concept not specified in international law.[70]The resultant discretion on the part of adjudicators in defining persecution in sexuality-based claims, however, is not the greatest hurdle that LGBT refugees faced in establishing persecution on the basis of their sexual orientation. The widespread reliance on the so-called discretion requirement by Australian and British decision-makers[71] more often than not led to the rejection of the existence or circumvention of persecution.[72] The utilization of the "discretion requirement" meant that LGBT refugee claimants who managed to establish both their sexual minority status and the existence of persecution in their home country could still be returned with the warning that they should avoid persecution by simply acting discreetly.

[68]Ibid.
[69] The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, Article 1A(2)
[70]UN High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3, para. 51.: http://www.unhcr.org/refworld/docid/4f33c8d92.html [accessed 26 February 2012]; Edwards, Alice. "Age and gender dimensions in international refugee law" in Feller, Erika, Volker Türk and Nicholson Frances (eds.): *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press, 2003: p. 50.
[71] Millbank, Jenni. "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom." 13 (2/3) International Journal of Human Rights (2009), p. 391.
[72]Ibid., p. 393.

The "discretion requirement" in LGBT cases is defective at many levels and it absolutely subverts the purpose of the Convention, which is to provide a safe haven in the receiving state for those who had to flee their country of origin due to persecution. First of all, it blames the victim for being persecuted and shifts the onus from the persecutor to the persecuted.[73] Secondly, it maintains and legitimates the oppression the claimant faces at home on the basis of one of the Convention grounds, as it fails to address the question whether the need to act discreetly to evade persecution amounts to persecution in itself.[74] Thirdly, it restricts sexual orientation to sexual acts.[75] At the same time, it denies the freedom of expression of one's identity and sexuality and bars same-sex affection from public view, thus engaging in social policing at the same time.[76] Fourthly, the use of the discretion requirement in LGBT cases sheds light on the existence of double standard, as acting discreetly was never required of political or religious refugees in Australia and the United Kingdom as ubiquitously as of LGBT applicants.[77]

Requiring discretion was rejected in Canada not too long after the first sexuality-based refugee claim was brought in the country,[78] and therefore, never gained traction there. This

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[73]*Sabaratnam, Thavakaran v. M.E.I.* (FCA, no. A-536-90), October 2, 1992, as quoted in Kendall, Christopher N. "Lesbian and Gay Refugees in Australia: Now that 'Acting Discreetly' is no Longer an Option, will Equality be Forthcoming?" 15 International Journal of Refugee Law 4 (2003), p. 739.
[74]Millbank, Jenni. "The Role of Rights in Asylum Claims Based on Sexual Orientation." 4 Human Rights Law Review 2 (2004), p. 214.
[75]*Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia: High Court, 9 December 2003, at para. 81: http://www.unhcr.org/refworld/docid/3fd9eca84.html [accessed 27 November 2011]; role p. 207
[76] Millbank, Jenni. "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom." 13 (2/3) International Journal of Human Rights (2009), p. 393.
[77]*Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia: High Court, 9 December 2003, at para. 80: http://www.unhcr.org/refworld/docid/3fd9eca84.html [accessed 27 November 2011]; Millbank, Jenni. "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom." 13 (2/3) International Journal of Human Rights (2009), p. 393.
[78] Millbank, Jenni. "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom." 13 (2/3) International Journal of Human Rights (2009), p. 391.;Dauvergne, Catherine, and Jenni Millbank. "Before the High Court: Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh." 25 The Sidney Law Review 97 (2003), p. 115.

stands in sharp contrast to Australia and the United Kingdom, where it became an insurmountable obstacle for numerous LGBT applicants. Fortunately, this widespread practice has been put an end to by the judiciary in both jurisdictions. The Australian *Appellants S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs*[79] revolved around the appeal of two Bangladeshi gay men. The two men brought refugee claims on the basis of persecution due to sexual orientation and saw their applications rejected by the Refugee Review Tribunal that required discretion of them on their return.[80] The High Court of Australia refuted the legitimacy of the discretion requirement[81] and scolded the Tribunal for failing to consider the applicants' fate in Bangladesh if their closeted identity is revealed[82] and whether the necessity of discretion was already persecutory.[83] The High Court also condemned the confinement of sexual identity to mere sexual conduct.[84] A similar conclusion was reached by the recent *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*[85] decision of the UK Supreme Court, which concerned two gay men from Iran and Cameroon. In this decision the Court discredited the "discretion

[79]*Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia: High Court, 9 December 2003: http://www.unhcr.org/refworld/docid/3fd9eca84.html [accessed 27 November 2011];
[80]*Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia: High Court, 9 December 2003, at para. 69: http://www.unhcr.org/refworld/docid/3fd9eca84.html [accessed 27 November 2011]; Kendall, Christopher N. "Lesbian and Gay Refugees in Australia: Now that 'Acting Discreetly' is no Longer an Option, will Equality be Forthcoming?" 15 International Journal of Refugee Law 4 (2003), p. 717.
[81]*Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia: High Court, 9 December 2003, at para. 82: http://www.unhcr.org/refworld/docid/3fd9eca84.html [accessed 27 November 2011]
[82]Ibid., at para. 56.
[83]Ibid., at para. 88.
[84]Ibid., at para. 81.
[85]*HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010: http://www.unhcr.org/refworld/docid/4c3456752.html [accessed 27 November 2011]

requirement"[86] and recognized the right to freedom of expression of one's sexual identity for sexual minorities as well.[87]

1.4. Western Legal Discourse on Sexual Orientation

The Canadian *Ward* decision has had a significant impact on the framing of sexual orientation in the legal discourse in all three jurisdictions.[88] Irrespective of whether LGBT applicants were included in the personal scope of the Refugee Convention due to the alleged immutability of sexual orientation or society's perception of sexual minorities, all of the abovementioned decisions rest on an identity-based approach to sexual orientation. They all provide a great manifestation of the supposition, widely held in Western legal thought, which equates sexual conduct, sexual identity and sexual orientation.[89] Even in Australia, where the *Appellant A* judgment did not rule on the immutability of homosexuality as a reason for the inclusion of LGBT applicants in the scope of the Convention, the *S395/2002 and S396/2002* decision talks about *(homo)sexual identity*[90] [emphasis added].

This idea also provides the foundation of domestic anti-discrimination legislation vis-à-vis LGBT people in these countries.[91] However, this particular framing of identity as based on sexual orientation can lead to generalizations. As Nitya Iyer argues, "[o]nce a characteristic is created as intrinsic to a group, and becomes its identifier, it is regarded as wholly

[86]Ibid., para. 82.
[87]Ibid., para. 78.
[88] The decision was heavily referenced by both Australian and British courts as well. See, for example: *A and Another v Minister for Immigration and Ethnic Affairs and Another*, Australia: High Court, 24 February 1997: http://www.unhcr.org/refworld/docid/3ae6b7180.html [accessed 20 November 2011] or *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999: http://www.unhcr.org/refworld/docid/3dec8abe4.html [accessed 20 November 2011]
[89] Katyal, Sonia. "Exporting Identity." 14 Yale Journal of Law & Feminism 97 (2002), p. 100.
[90]*Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia: High Court, 9 December 2003, at para. 81: http://www.unhcr.org/refworld/docid/3fd9eca84.html [accessed 27 November 2011]
[91] See for exampleEgan v. Canada, [1995] 2 S.C.R. 513 at 567.

constitutive of that group's social identity."[92] Problems are likely to arise in cross-cultural settings, like a refugee tribunal hearing, where decision-makers' expectations based on the Western legal framing of sexual identity might be contrasted by a different conceptualization of sexual orientation that "challenge the notion of a global gay identity."[93] The following chapters shed light on these problems.

[92] Iyer, Nitya, "Categorical Denials: Equality Rights and the Shaping of Social Identity." In Dyzenhaus, David, Sophia Reibetanz Moreau, Arthur Ripstein (eds.). Law and Morality: Readings in Legal Philosophy. Toronto: University of Toronto Press, 2008: p. 486.
[93] Morgan, Deborah A. "Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases." 15 Law and Sexuality 135 (2006), p. 150.

2. THE PRESENT PROBLEM: CREDIBILITY IN LGBT REFUGEE CLAIMS

"We cannot claim any particular knowledge of the ways of homosexuals, still less of Iranian homosexuals…"[94]

This chapter is devoted to a brief analysis of the role credibility assessment plays in refugee status determination and the main reasons discretion on the part of adjudicators during credibility assessment can seriously disadvantage LGBT claimants. Now that exclusion in the personal scope of the Convention and the discretion requirement have judicially been discredited, "discrediting" itself has recently assumed a new relevance in the adjudication of sexuality-based asylum claims as well to the detriment of LBGT applicants. Research has indicated that decision-makers have increasingly been relying on adverse credibility findings to reject sexuality-based claims in all three jurisdictions monitored in this paper.[95]

2.1. Subjectivity in The Credibility Assessment Process

This section endeavors to shed light on the extent of subjectivity afforded to decision-makers during the credibility assessment process. Positive credibility assessment is critical to the success of any application irrespective of the ground they are brought on, as negative credibility rulings are "both difficult to rebut and an infrequent ground for successful judicial

[94] By a UK Immigration Judge in a 2005 case, as quoted in O'Leary, Barry. "'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." 16 Feminist Legal Studies (2008), p. 94.

[95] Jansen, Sabine and Thomas Spijkerboer. "Fleeing Homophobia – Asylum Claims Related to Sexual Orientation and Gender Identity in Europe." (2011), p. 47. (UK); Millbank, Jenni. "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom." 13 (2/3) International Journal of Human Rights (2009), p. 392. (AUS); Millbank, Jenni. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." 21(1) International Journal of Refugee Law (2009), p. 2. (CAN)

review."[96] During credibility assessment adjudicators determine whether the applicants' testimony recounting the reasons for his or her claim will be accepted in the refugee status determination process, based on the claimant's testimony and corroborative evidence presented.[97] Given the fact that refugees will frequently not be able to present any evidence corroborating his or her claim, the testimony presented to the decision-maker will be the only basis the claimant can build his application on.[98] As a result, the applicant's testimony will be of utmost importance in the refugee status determination process.[99] What assumes even greater significance, however, is the way the testimony is received and adjudicated by the decision-maker.

When judging the claimant's narrative without any corroborative evidence, adjudicators often rely on their "gut feelings," that is impressions based on personal judgment and preconceptions, which end up being determinative during the credibility assessment.[100] Consequently, decisions on credibility are rendered subjective, and therefore, are often inconsistent.[101] To reduce the subjectivity of these decision-making procedures and assist in the approach to the claimant's testimony, guidance has been provided to adjudicators by the UNHCR and in several jurisdictions, including Australia, Canada and the United Kingdom. The recently reissued UNHCR "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status" require that the claimant's testimony be "coherent and

[96] Coffey, G. "The Credibility of Credibility Evidence at the Refugee Review Tribunal." International Journal of Refugee Law 15 (2003), p. 377.
[97] Kagan, Michael. "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination." 17 Georgetown Immigration Law Journal 367 (2003), pp. 369-370.
[98] UN High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3, p. 38: http://www.unhcr.org/refworld/docid/4f33c8d92.html [accessed 26 February 2012]
[99] Kagan, Michael. "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination." 17 Georgetown Immigration Law Journal 367 (2003), p. 368.
[100] Ibid., p. 367.
[101] Ibid., pp. 374, 377.

plausible."[102] In Australia, the government's "Guidance on the Assessment of Credibility" suggests that "the Tribunal should consider the overall consistency and coherence" of the testimony, with the caveat that the applicant's demeanor should be considered with particular care.[103] As far as the claimant's testimony is concerned in Canada, consistency as well as "the claimant's demeanour" may be weighed.[104] With regard to the British asylum instructions,[105] they emphasize a need for the testimony to be "coherent, consistent and plausible"[106] and call for sensitivity when judging the claimant's demeanor.[107] These materials are, however, prepared for decision-makers to provide guidance, but are not binding on them during the decision-making procedure.[108]Moreover, highlighting a general need for sensitivity is hardly helpful in elucidating particular instances where adjudicators should take particular care during the procedure.

In practice, all three of the abovementioned factors – consistency, plausibility and demeanor – seem to be given considerable weight by adjudicators, no matter how unreliable these factors are claimed to be.[109] The way they are observed and processed by the decision-maker, the method through which these elements of the narrative and the act of telling are used as the foundation of a credibility decision, are highly subject to the personal propensities of the

[102]Ibid., p. 374.
[103] Refugee Review Tribunal. "Guidance on the Assessment of Credibility." August 2008, pp. 3-4.: www.mrt-rrt.gov.au/.../118/CredibilityGuidanceAug08.pdf.aspx [accessed 20 January 2012]
[104] Immigration and Refugee Board of Canada. "Assessment of Credibility in Claims for Refugee Protection." Guidelines. 31 January 2004, p. 3.: http://www.irb.gc.ca/eng/brdcom/references/legjur/rpdspr/cred/Pages/index.aspx [accessed 20 January 2012]
[105] UK Border Agency. "Considering Asylum Claims and Assessing Credibility." Guidelines, p. 14.: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/asylum-assessing.credibility.pdf?view=Binary, [accessed 20 December 2011]
[106]Ibid., p. 12.
[107]Ibid., p. 15.
[108]Millbank, Jenni. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." 21(1) International Journal of Refugee Law (2009), p. 27.
[109] Macklin, Audrey. "Truth and Consequences: Credibility Determination in the Refugee Context." Conference Paper for Association Internationale des Juges aux Affaires des Refugies - Conference (1998), p. 139.: http://www.en.refugeelawreader.org/index.php?option=com_docman&task=cat_view&gid=36&Itemid= [as accessed 20 January 2012]

adjudicator.[110] Decision-makers often hear and see what they are able to and want to perceive.[111]Consequently, a basic level of understanding of and empathy for the claimants' problems, as well as an ability to overcome barriers of cross-cultural communication, are essential for the adjudicator to prove fully receptive to the applicant's narrative. The lack of knowledge about and empathy for the claimant's situation in the home country, coupled with the misleading effects of the failure to consider cultural relativism in framing certain issues, could prove fatal for any refugee claim, especially in the absence of any evidence to the contrary.

2.2. Homosexuality in the Credibility Assessment Process

This section provides some insight into why LGBT claimants are likely to face particular problems when they encounter decision-makers in the refugee status determination procedure. While cultural differences may present a problem in themselves between any claimant and his or her adjudicator, the issue of homosexuality is likely to be the source of further misunderstandings during the credibility assessment process. This is because of decision-makers' potential lack of knowledge and empathy as well as the absence of a global gay identity. Referencing feminist, gender and queer theory, this section will argue that the closet LGBT people are often forced into and the ensuing invisibility of homosexuality, the disgust and confusion heterosexual people often exhibit over it, and the lack of a globalized homosexual identity are likely to negatively influence decision-makers when they decide on the credibility of applicants bringing sexuality-based claims.

[110]Ibid., p. 140.
[111]Millbank, Jenni. "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia." 26 Melbourne University Law Review 144 (2002), p.145.

2.2.1. The Closet and the Lack of Recognition: Their Implications to Adjudicators' Knowledge

What sets homosexuality apart from other grounds of discrimination and persecution, like race or gender, is the fact that it frequently is a non-observable, invisible trait.[112] Due to homosexuality's invisibility, claims on this ground are often alleged to be "easy to make but hard to disprove."[113]At a different level, moreover, homosexuality is set apart even from other non-apparent traits, like religion or political belief, because of its social invisibility. (This is the reason why the recent introduction of the "social visibility test" by the US Board of Immigration Appeals is seen as highly troubling with regard to the success of LGBT claims by a barrage of legal scholars.[114]) Religious and political dissenters usually give expression to their beliefs as part of a community experience. As a result, the exercise of religion and political beliefs enables members of religious and political minorities to socialize and form a "community of peers."[115] Homosexuality, on the other hand, is usually confined to secrecy in oppressive regimes, oftentimes finding its expression merely through sexual acts. The "closet" that Eve Kosofsky Sedgwick views "as the defining structure for gay oppression,"[116] often prevents LGBT people from forming an identity based on their

[112]Brower, Todd. "Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts." 27 Pace Law Review 141 (2007), p. 144.
[113] Berg, Laurie, and Jenni Millbank. "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants." 22 Journal of Refugee Studies 195 (2009), p. 196.
[114]Bresnahan, Kristin A. "The Board of Immigration Appeals's New 'Social Visibility' Test for Determining 'Membership of a Particular Social Group' in Asylum Claims and Its Legal and Policy Implications." 29 Berkeley Journal of International Law 649 (2011), p. 671.; Marouf, Fatma E. "The Emerging Importance of 'Social Visibility' in Defining a 'Particular Social Group' and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender." 27 Yale Law and Policy Review (2008), p. 79.; Pimentel, Melissa J. Hernandez. "The Invisible Refugee: examining the Board of Immigration Appeals' 'Social Visibility' Doctrine." 76 Missouri Law Review 575 (2011), p. 593.
[115] National Center for Lesbian Rights. "The Challenges to Successful Lesbian Asylum Claims." Report: p. 4.:http://www.nclrights.org/site/DocServer/challenges_lesbian_asylum_cases.pdf?docID=1142 [accessed 20 January 2012]
[116] Sedgwick, Eve Kosofsky. Epistemology of the Closet. Berkeley: University of California Press, c1990: p. 71.

sexuality, and thus, giving expression to their sexual orientation in the public sphere and from sharing their experiences at a community level.[117]

The closet can be utilized to evade unwanted attention[118] as well as to serve as a "zone of shame and exclusion."[119] In highly oppressive regimes, the closet most probably serves both purposes for most LGBT people. Facing enormous stigmatization, LGBT people often engage in so-called covering, "by displaying only gender-typical traits to allow others to ignore their sexual orientation."[120] Moreover, a closeted life prevents LGBT people from influencing the way homosexuality gets conceptualized by the majority. Therefore, the perception of LGBT people isfounded on negative stereotypes, which, in turn, are often internalized by sexual minorities.[121] In addition to this, the closet and the ensuing invisibility also lead to serious evidentiary problems.[122]

The reason for homosexuality's invisibility is manifold. First of all, LGBT people's sexual orientation is often viewed as and reduced to sexual behavior.[123]Sexual conduct is usually a private experience that lacks a public element and firmly belongs in the private sphere in most cultures around the world. Consequently, homosexuality, when conceptualized as aform

[117]Seidman. Steven. The Social Construction of Sexuality. W. W. Norton and Company, 2nd ed. (2010), p. 81.
[118] Thomas, Kendall. "Shower/Closet." Assemblage, No. 20, Violence, Space (Apr., 1993), p. 80.
[119]Rasmussen, Mary Lou. "The Problem of Coming Out." 43 Theory into Practice 2, Sexual Identities and Schooling (Spring, 2004), p. 144.
[120]Hanna, Fadi. "Punishing Masculinity in Gay Asylum Claims." 114 Yale Law Journal 913 (2005), p. 915.
[121]Chan, Phi C. W. "The Lack of Sexual Orientation Anti-Discrimination Legislation in Hong Kong: Breach of International and Domestic Legal Obligations." 9 International Journal of Human Rights 1 (2005), p. 76.; Berg, Laurie, and Jenni Millbank. "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants." 22 Journal of Refugee Studies 195 (2009), p. 199.
[122] National Center for Lesbian Rights. "The Challenges to Successful Lesbian Asylum Claims." Report: p. 4.:http://www.nclrights.org/site/DocServer/challenges_lesbian_asylum_cases.pdf?docID=1142 [accessed 20 January 2012]
[123]Massad, Joseph A. "Re-Orienting Desire: The Gay International and the Arab World." 14 Public Culture 2 (2002), pp. 373-374.; Millbank, Jenni. "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom." 13 (2/3) International Journal of Human Rights (2009), p. 393.; UN High Commissioner for Refugees. "The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees." 22 September 2010, p. 7.: http://www.unhcr.org/refworld/docid/4cff9a8f2.html [accessed 9 February 2012]

of sexual conduct, is veiled by the cloak of secrecy, labeled as a taboo topic.[124] As Judith Butler points out, "[o]ne of the central tasks of lesbian and gay international right is to assert in clear and public terms the reality of homosexuality, not as an inner truth, not as a sexual practice, but as one of the defining features of the social world in its very intelligibility."[125] The invisibility of sexual minorities is most easily pierced when homosexuality is not regarded as a mere sexual practice. Hence the emphasis on identity in Western LGBT rights movements.

Secondly, sexual minorities often lack recognition by society and are not subjects in social discourse. In order for LGBT people to become "socially viable beings,"[126] they have to receive social recognition. This is because, as Butler maintains, "the discursive condition of social recognition precedes and conditions the formation of the subject: recognition is not conferred on the subject, but forms that subject."[127] When the notion of homosexuality is not recognized in a society, an individual cannot identify as LGBT in that society.[128] Therefore, when the Iranian President Mahmoud Ahmadinejad asserts that in his country they "don't have homosexuals,"[129] what he claims is that "LGBT" *identity* does not exist in Iran.

Until sexual minorities are not recognized as "full partners in social interaction,"[130] "the deadly elasticity of heterosexist presumption"[131] will prevent their "participatory parity" in

[124] Yoshino, Kenji. "The Epistemic Contract of Bisexual Erasure." 52 Stanford Law Review 2 (2000), p. 364.
[125] Butler, Judith. Undoing Gender. New York: Routledge, 2004: p. 29.
[126] Ibid.: p. 2.
[127] Butler, Judith. 1 "Critically Queer." GLQ, pp. 17-32 (1993), p. 18.
[128] Sullivan, Nikki. A Critical Introduction to Queer Theory. Melbourne: Circa Books (2003), p. 146.
[129] Fathi, Nazila. "Despite Denials, Gays Insist They Exist, if Quietly, in Iran." The New York Times, September 30, 2007; as accessed: http://www.nytimes.com/2007/09/30/world/middleeast/30gays.html
[130] Fraser, Nancy. "Social Justice in the Age of Identity Politics: Redistribution, Recognition, Participation." Discussion Paper: 1998: p. 3.
[131] Sedgwick, Eve Kosofsky. Epistemology of the Closet. Berkeley: University of California Press, c1990: p. 68.

social discourse.[132] Nancy Fraser argues that this kind of misrecognition is "morally wrong" for "it denies some individuals and groups the possibility of participating on a par with others in social interaction" as a result of "institutionalized patterns of cultural value in whose construction they have not equally participated and which disparage their distinctive characteristics or characteristics assigned to them."[133] Heteronormativity and homophobia, or sexual prejudice, [134] operate on these very principles, as they allow for imputing characteristics to LGBT people that devalue and disempower them at the same time, stripping them of an opportunity to debunk those stereotypes.[135] The fact that the subjection of LGBT people to human rights violations due to their sexual orientation is a worldwide phenomenon is the best evidence for this.[136]

Due to LGBT people's lack of full recognition in society, their experience in the eye of the majority becomes the majority's reflection on that experience, as in the lack of participatory parity the majority's "knowledge" will not be based on minority's actual experience. Therefore, an adjudicator might not be able to relate to the recount of certain events or understand the reaction of the LGBT applicant to certain questions, as on the basis of his or her prior knowledge on LGBT experience he or she might have expected a different narrative or some other reaction. This inevitably impacts what catches the decision-maker's eye in the story and its telling and what might evade his or her attention.

[132] Fraser, Nancy. "Social Justice in the Age of Identity Politics: Redistribution, Recognition, Participation." Discussion Paper: 1998: p. 3.
[133] Fraser, Nancy. "Social Justice in the Age of Identity Politics: Redistribution, Recognition, Participation." Discussion Paper: 1998: p. 3.
[134] Current Directions in Psychological Science, Vol. 9, No. 1 (Feb., 2000), p. 19.
[135] Wilets, James D. "Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective." 60 Albany Law Review 989 (1997), p. 1006.
[136] O'Flaherty, M, and J. Fischer. "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles." Human Rights Law Review 8(2) (2008), p.208.

2.2.2.Disgust: Its Implications to Adjudicators' Empathy

Lack of genuine knowledge of LGBT experience is not the only obstacle that may prevent an adjudicator from making fair assessment of a claimant's credibility. Decision-makers are human beings who base their decision not only on cognitive but also on emotional capacities.[137] Martha C. Nussbaum argues "the politics of disgust […] for gays and lesbians" is still influential in how LGBT people are perceived.[138] The manifestation of this might be less tangible, and thus, harder to detect in the adjudication of asylum claims than in the motivation behind hate crimes,[139] yet its relevance should not be forgotten. Nussbaum asserts that in almost every society there is a group of people who are stigmatized for their sexual practices and that disgust has commonly been associated with gay men in the eye of heterosexual men.[140] Gay male sex is often found disgusting, which assumes even more significance in light of the fact that homosexuality is frequently restrained to sexual conduct.[141]

Moreover, when confronted with disgust elicited by homosexuality, society is likely to rely on certain defense mechanisms. "[P]unishing those who violate conventional moral norms"[142] is a common way to do so and it could be expressed in legal terms (e.g. decriminalization of same-sex conduct, other forms of discrimination under the law) as well

[137] Kagan, Michael. "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination." 17 Georgetown Immigration Law Journal 367 (2003), p. 367.
[138] Nussbaum, Martha C. "The Politics of Disgust: Practice, Theory, History." In From Disgust to Humanity: Sexual Orientation and Constitutional Law. Oxford University Press: 2010, p. 2.
[139] Abrams, Kathryn. "'Fighting Fire with Fire': Rethinking the Role of Disgust in Hate Crimes." 90 California Law Review 5 (Oct., 2002), pp. 1437
[140] Nussbaum, Martha C. "The Politics of Disgust: Practice, Theory, History." In From Disgust to Humanity: Sexual Orientation and Constitutional Law. Oxford University Press: 2010, pp. 13, 17, 18.
[141] Millbank, Jenni. "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom." 13 (2/3) International Journal of Human Rights (2009), p. 393.
[142] Nussbaum, Martha C. "The Politics of Disgust: Practice, Theory, History." In From Disgust to Humanity: Sexual Orientation and Constitutional Law. Oxford University Press: 2010: p. 10.

as in the form of social condemnation (e.g. persecution). It isarguable that disgust is detectable in the so-called discretion requirement as well. While the presence of disgust may not be as obvious in this requirement as in the case of an "anti-sodomy" law, the discretion requirement effectively condones persecution and blames the victim for it.When the claimant is deemed unworthy of Convention protection, because he or she is not discreet enough, he or she is being punished for the violation of "conventional moral norms" – the same idea that underlies the decriminalization of same-sex sexual conduct.[143] In the same way, disgust is likely to operate in the background when decision-makers reject perceiving serious forms of prosecution of LGBT people as persecution[144] or when in the past they denied protection for LGBT claimants on moral grounds.[145]

Furthermore, sexual minorities, including gay men, who suffer persecution on account of their sexual orientation are often victims of sexual assault.[146] However, in contrast to eliciting empathy, sexual assault committed against gay men might in fact result in arousing disgust in the decision-maker, as the thought of the male body as "anally penetrable" is one of the main sources of disgust, especially in heterosexual men.[147] The importance of disgust in the adjudication of LGBT claims cannot, therefore, be ignored as playing an important role in the decision-making procedure.

[143] Nussbaum, Martha C. "The Politics of Disgust: Practice, Theory, History." In From Disgust to Humanity: Sexual Orientation and Constitutional Law. Oxford University Press: 2010, p. 10.
[144]Millbank, Jenni. "The Role of Rights in Asylum Claims Based on Sexual Orientation." 4 Human Rights Law Review 2 (2004), pp. 208, 222.
[145] Ramanathan, Erik D. "Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence." Georgetown Immigration Law Journal (1996), p. 36.
[146]LaViolette, Nicolette. "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines." 19 International Journal of Refugee Law 169 (2007), p. 187.
[147]Nussbaum, Martha C. "The Politics of Disgust: Practice, Theory, History." In From Disgust to Humanity: Sexual Orientation and Constitutional Law. Oxford University Press: 2010, p. 18.

2.2.3. Misconceived (as) Identity: The Impact of a Lack of Global Sexual Identity on Decision-Making

As illustrated above, due to their invisibility and misrecognition, LGBT people are usually unable to influence how the majority comes to perceive them, and this perception is often highly influenced by disgust. While these two tendencies affect sexual minorities at the global level, there is another phenomenon that is more Western-specific: the framing of one's identity on the basis of sexuality.[148] Sexual identity is a social construction, and as Steven Seidman contends, "a culture of sexual identities seems to have taken shape primarily in the United Kingdom and her former colonies: the United States, Canada, and Australia."[149]

At the same time, the notion itself might altogether be missing in other societies.[150] This could be explained by the lack of LGBT communities in these latter countries, which is probably due to widespread persecution, or by the fact that the idea of basing one's identity on one's sexuality is "simply foreign" to that particular culture.[151] Therefore, there might easily be a significant discrepancy between how identity is framed in the receiving country, especially in Anglo-Saxon countries like the ones observed in this paper, and how identity is conceived of in the sending state. This, in turn, might considerably limit Australian, British and Canadian adjudicators' cross-cultural understanding of identity formation. "The presumed equation between sexual conduct, sexual orientation, and sexual identity, so prevalent in Western legal thought,"[152] or as Sonia Katyal calls it, "the substitutive model of

[148]Seidman. Steven. The Social Construction of Sexuality. W. W. Norton and Company, 2nd ed. (2010), p. 81.
[149]Ibid., p. 82.
[150]Ibid., p. 80.
[151]Ibid., p. 80.
[152]Katyal, Sonia. "Exporting Identity." 14 Yale Journal of Law & Feminism 97 (2002), p. 100.

gay sexuality," [153] if accepted by decision-makers, might lead to adverse credibility assessment of those who do not construct their identity on the basis of their sexuality.

2.3. Credibility as Ignorance

While credibility *per se* is not a requirement under the Convention's refugee definition, a claimant's credibility significantly impacts the assessment of his or her claim.[154] Research has shown the increasing significance of credibility assessment in sexuality-based applications, [155] where an adverse credibility finding on one's sexual minority status automatically results in denial. It is also widely accepted that subjective factors play a determinative role in the outcome of a claimant's credibility assessment[156] and this chapter argued how this has a potential to negatively impact LGBT refugee claimants. Lack of well-informed knowledge of LGBT people's lives, disgust for them, as well as culturally specific, and thus, differing constructions of identity could all wreck genuine LGBT refugees' claims. Indeed, as once famously stated, "[c]redibility is a way by which the interviewer is able to express his ignorance of the world. What he finds incredible is what surprises him."[157] The next chapter will provide specific examples for Australian, British and Canadian practices where this has been observed.

[153]Ibid., p. 110.
[154] Kagan, Michael. "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination." 17 Georgetown Immigration Law Journal 367 (2003), p. 368.
[155] Jansen, Sabine and Thomas Spijkerboer. "Fleeing Homophobia – Asylum Claims Related to Sexual Orientation and Gender Identity in Europe." (2011), p. 47. (UK); Millbank, Jenni. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." 21(1) International Journal of Refugee Law (2009), p. 4. (AUS, CAN)
[156] Kagan, Michael. "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination." 17 Georgetown Immigration Law Journal 367 (2003), p. 367.
[157]Millbank, Jenni. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." 21(1) International Journal of Refugee Law (2009), p. 23.

3. LGBT CLAIMANTS IN THE EYE OF THE ADJUDICATOR

"[J]ust as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates."[158]

This chapter is devoted to an illustration of the specific set of problems that LGBT asylum-seekers face during the credibility assessment process in the receiving countries. Recently increasing attention has been paid to these issues in several jurisdictions. In November 2008 the UNHCR issued the "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity,"[159] which is a landmark document in the history of adjudication of sexuality-based claims. In the countries observed in this paper, only the United Kingdom has had a similar document, "Sexual Orientation Issues in the Asylum Claim,"[160] issued by the UK Border Agency, since June 2011. Comprehensive reports on the particular problems of LGBT asylum-seekers have recently been conducted both in Australia[161] and in European Union Member States,[162] including the United Kingdom, and these are supplemented by other reports and academic studies in all the three jurisdictions.[163] Despite the fact that awareness-raising and sensitization trainings have been held for asylum

[158] *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010, para. 78: http://www.unhcr.org/refworld/docid/4c3456752.html [accessed 27 November 2011]
[159] UN High Commissioner for Refugees. "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity." 21 November 2008: http://www.unhcr.org/refworld/docid/48abd5660.html [accessed 26 February 2012]
[160] UK Border Agency. "Sexual Orientation Issues in the Asylum Claim." 2011: http://www.unhcr.org/refworld/pdfid/4eb8f0982.pdf [accessed 20 February 2012]
[161] Kassisieh, G. "From Lives of Fear, to Lives of Freedom" A review of Australian refugee decisions on the basis of sexual orientation." Gay and Lesbian Rights Lobby, Glebe (2008)
[162] Jansen, Sabine and Thomas Spijkerboer. "Fleeing Homophobia – Asylum Claims Related to Sexual Orientation and Gender Identity in Europe." (2011)
[163] Prolific authors in this area include Nicole LaViolette, Jenni Millbank, Sean Rehaag, Kristen Walker.

authorities in all three jurisdictions,[164]Australian and Canadian authorities have so far failed to publish written guidelines specifically devoted to LGBT asylum claims.

Written guidelines are important, because even though they are not binding, they provide valuable instructions to adjudicators who realize they are not well-versed or skilled enough to deal with sexuality-based claims. This chapter uses all the abovementioned sources to argue that a lack of knowledge of homosexuality (and indeed sexuality in general), a lack of empathy for LGBT claimants and misconceptions on a global sexual identity have contributed to the subjective determination of credibility on the part of the decision-maker becoming a hurdle for LGBT claimants in the recent past.[165]This section analyzes problems and deficient procedural practices that have been specifically identified as occurring during the credibility assessment procedure by both the aforementioned UNHCR document and the UK Border Agency's guidelines. The reason for this is the assumption that the centrality of these issues in the above documents indicates that they present the most ubiquitous problems LGBT claimants face during credibility assessment.

3.1. Presumptions of Sexuality as Fixed

The presumption of sexuality as fixed is likely to have its roots in the reliance on the "substitutive model" of sexual orientation in the Anglo-Saxon world. Both the British guidelines and the UNHCR Guidance Note regarding sexuality-based claims emphasize that

[164] Cowen, Tim, et al. "Sanctuary, Safety and Solidarity - Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland." Report. Equality Network, BEMIS and GRAMNet: 2011, p. 47.: http://www.gla.ac.uk/media/media_195792_en.pdf [accessed 12 January 2012] (UK); LaViolette, Nicolette. "Independent human rights documentation and sexual minorities: an ongoing challenge for Canadian refugee determination process." 13 The International Journal of Human Rights, 2-3 (2009), p. 470. (CAN); Millbank, Jenni. "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom." 13 (2/3) International Journal of Human Rights (2009), p. 403. (AUS)

[165] Due to the novelty of the British guidelines, their impact is yet to be assessed. As a result, this paper concerns itself with the period preceding the Guidelines.

heterosexual relationships, marriage(s) or parenthood should not negatively influence the claimant's credibility or categorize him or her as heterosexual.[166] The British instructions assert that it is the applicant's "current identity" that should be considered.[167] Moreover, the UNHCR Guidance Note also points out that LGBT people may "be forced into arranged marriages or experience extreme pressure to marry."[168] However, as criticized by Nicole LaViolette in her commentary of the Guidance Note, this caveat is discussed in the section that elucidates persecution vis-à-vis LGBT people, despite this issue's relevance during credibility assessment.[169] Adjudicators should consider all these factors when making decision on applicants that base their claims on persecution due to their sexual orientation. Nonetheless, in practice, these factors are sometimes ignored by decision-makers.

3.1.1. Immutability: "A Homosexual Only Has Same-Sex Sex"

Some decision-makers in all three jurisdictions seem fixated on the assumption that sexuality is fixed and cannot be changed.[170] This essentialist view of sexuality,[171] as an innate and unchangeable trait, may be traced back to domestic jurisprudence framing sexuality as an integral part of one's identity and the sexuality-based identity politics of LGBT people in all three jurisdictions.[172] Nonetheless, sometimes life might contradict the expectations of adjudicators and this could lead to negative decisions on one's plausibility, the observance of

[166] UK Border Agency. "Sexual Orientation Issues in the Asylum Claim." 2011, p. 11.: http://www.unhcr.org/refworld/pdfid/4eb8f0982.pdf [accessed 20 February 2012]; UN High Commissioner for Refugees. "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity." 21 November 2008, p. 16.: http://www.unhcr.org/refworld/docid/48abd5660.html [accessed 26 February 2012]

[167] UK Border Agency. "Sexual Orientation Issues in the Asylum Claim." 2011, p. 11.; pursuant to *NR (Jamaica) v. SSHD* [2009] EWCA Civ 856, as referred to in the Guidelines.

[168] UN High Commissioner for Refugees. "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity." 21 November 2008: http://www.unhcr.org/refworld/docid/48abd5660.html [accessed 26 February 2012], p. 13.

[169] LaViolette, Nicole. "'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity': A Critical Commentary. International Journal of Refugee Law (2010), p. 195.

[170] Walker, Kristen I. "Sexuality and Refugee Status in Australia." International Journal of Refugee Law 12(175) (2000), p. 6.

[171] Rehaag, Sean. "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada." 53 McGill Law Review 59 (2008), p. 61.

[172] Yoshino, Kenji. "The Epistemic Contract of Bisexual Erasure." 52 Stanford Law Review 2 (2000), p. 405.

which is considered to be a reliable tool in the assessment of credibility by many decision-makers.

Canadian decision-makers sometimes consider opposite-sex relations as an indication of heterosexuality.[173] In a 2005 Canadian case,[174] for example, the Immigration and Refugee Board (IRB) reversed a previous decision granting refugee status to a man on the basis of his homosexuality. The vacation of the former judgment was based on the fact that the man pursued opposite-sex relationships after the hearing.[175] A similar ruling was reported from a year later when the IRB voided its prior decision, because a woman, who had been accepted into Canada as a lesbian refugee, ended up marrying a man.[176]

Those with past opposite-sex relationships or marriages may fare no better. In the United Kingdom, decision-makers continue to question the claimant's credibility if proof of past opposite-sex relationships or procreation comes to the surface.[177] For example, a Mongolian woman was not believed to be a lesbian by an immigration judge, since "she had a relationship with a man and had a child with him."[178] In another British case, a woman from Sierra Leone claimed that after her sexual orientation became known in her community, she became the victim of a forced marriage and rape by her husband, before she could flee her

[173] Reference in *Leke* 2007 FC 848, *Eringo*, 2006 FC 1488, *Santana* 2007 FC 519 (Harrington J.), as cited in Michael Battista's analysis (on file wit author). Michael Battista is a Toronto-based immigration lawyer specializing in sexuality-based issues.
[174] Re *L.E.W.* [2005] R.P.D.D. No. 19 (QL), as quoted inRehaag, Sean. "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada." 53 McGill Law Review 59 (2008), p. 75.
[175]Ibid.
[176]*MA6-02300* [2006] CanLII 61623 (IRB), as cited in Millbank, Jenni. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." 21(1) International Journal of Refugee Law (2009), p. 17.
[177] Fundamental Rights Agency. "Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity - 2010 Update - Comparative legal analysis." Report. 2010, p. 59.: http://fra.europa.eu/fraWebsite/attachments/FRA-2011-Homophobia-Update-Report_EN.pdf [accessed 11 February 2012]
[178]O'Leary, Barry. "'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." 16 Feminist Legal Studies (2008), p. 89.

country.[179] She was pregnant on arrival in the United Kingdom and this weighed heavily against her during credibility assessment, when the immigration judge could not believe that she could be pregnant as a lesbian.[180]

Similarly, a Nigerian man's sexual minority status, who had been married in Africa with two children, was disbelieved in Canada on the basis of his opposite-sex marriage and parenthood, and therefore, he was denied asylum.[181] Another Nigerian man in Australia, who had been in an opposite-sex relationship in his home country and had a child there, sought asylum for reasons of persecution on the basis of his homosexuality.[182] However, in Australia he pursued "an exclusively heterosexual lifestyle."[183] The Refugee Review Tribunal gave voice to the assumed lack of plausibility of such scenario but eventually accepted the claimant as a bisexual who is perceived as a homosexual in Nigeria.[184]

3.1.2. The Homosexual/Heterosexual Divide: "Sexuality Is Binary"

Bisexuality presents a unique problem, as it provides a contrast to the idea of binary sexuality.[185] While in the last example cited above, adjudicators were open to the idea of the Nigerian man being bisexual, it is important to note that claimants seeking asylum on the basis of their bisexuality face a particular challenge as a result of decision-makers' "homo–

[179]O'Leary, Barry. "'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." 16 Feminist Legal Studies (2008), p. 89.
[180]Ibid.
[181]Millbank, Jenni. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." 21(1) International Journal of Refugee Law (2009), p. 17.
[182]*RRT Reference V02/14641*, as quoted in Kassisieh, G. "From Lives of Fear, to Lives of Freedom" A review of Australian refugee decisions on the basis of sexual orientation." Gay and Lesbian Rights Lobby, Glebe (2008), p. 28.
[183]Ibid.
[184]Ibid.
[185] Rehaag, Sean. "Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia." 13:2 International Journal of Human Rights (2009), p. 424.

hetero binary approach to innate sexual identities."[186] As sexuality is often understood by Anglo-Saxon decision-makers as something immutable, an applicant's ability to have partners of both sexes could seem irreconcilable. If they viewed sexuality as "something an individual should not be required to change," bisexual claimants would not face such an up-hill battle.[187]

Kenji Yoshino argues that "bisexualityis less sociallyvisiblethan homosexuality"[188] and "[s]elf-describedbisexualityis […] seennot as a stableindividual identity buta place fromwhicha stable monosexual identity acknowledged and or chosen." Against this backdrop, adjudicators may exhibit an inability to think outside the heterosexual/homosexual binary[189] and cannot deal with bisexuality on a par with homosexuality.[190] This is demonstrated by the fact as well that bisexual asylum-seekers are rejected at a significantly higher rate than gay and lesbian claimants in Australia[191] as well as in Canada.[192] Similarly, a recent British report also indicates that the UK Board Agency "struggle to understand the concept of someone being bisexual, and […] do not readily accept someone self-identifying as bisexual."[193] It is not surprising therefore, that assertions of bisexuality in asylum claims are easily neglected in

[186]Rehaag, Sean. "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada." 53 McGill Law Review 59 (2008), p. 62.
[187]Walker, Kristen I. "Sexuality and Refugee Status in Australia." International Journal of Refugee Law 12(175) (2000), p. 7.
[188]Yoshino, Kenji. "The Epistemic Contract of Bisexual Erasure." 52 Stanford Law Review 2 (2000), p. 368.
[189]Hinger, Sarah. "Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims." 19 Columbia Journal of Gender and Law 367 (2010), p. 404.
[190] McLachlan, Gary. "The practical difference in the persecution between the UK and Canada – LGB refugees in the Refugee Convention and Protocol and subsidiary protections." Research Paper, p. 5.: http://garymclachlan.files.wordpress.com/2009/11/research-analysis.pdf [accessed 11 January 2012]
[191]Rehaag, Sean. "Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia." 13:2 International Journal of Human Rights (2009), p.422.
[192]Ibid., p. 421.
[193]Cowen, Tim, et al. "Sanctuary, Safety and Solidarity - Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland." Report. Equality Network, BEMIS and GRAMNet: 2011, p. 105: http://www.gla.ac.uk/media/media_195792_en.pdf [accessed 12 January 2012]

cases where the claimant has had opposite sex relations,[194] as an outcome of the circumstances in the detention of same-sex individuals or simply "sexual experimentation"[195] or a "phase."[196]

The above practices clearly demonstrate the need for the clear articulation of the fact that opposite-sex relationships do not disqualify a claimant who seeks asylum on the basis of his or her homosexuality. Adjudicators at the administrative level of decision-making need to desert an essentialist view of homosexual/heterosexual binary[197] and the "substitutive model" of gay sexuality.[198]If the claimants' circumstances are duly considered, opposite-sex relations may be revealed as the outcome of societal pressure, the inability of facing one's sexual attractions that might very well be ferociously condemned by society or any other reasons that make same-sex relationships impossible for the asylum-seeker at home.[199] As far as bisexuality is concerned, a more specific focus on it is completely missing from the UKBA guidelines on sexuality-based asylum claims, while Australia and Canada do not even have such guidelines. The problem lies in the fact that unreasonable expectations of sexuality on the part of decision-makers can easily lead to negative assessment of plausibility, and therefore, an adverse decision on the applicant's credibility as an LGBT person.

[194]Rehaag, Sean. "Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia." 13:2 International Journal of Human Rights (2009), p. 427.
[195] Overturned by Court of Appeal (England and Wales), August 2009, *NR (Jamaica) v SSHD* [2010] INLR 169., as cited in Jansen, Sabine and Thomas Spijkerboer. "Fleeing Homophobia – Asylum Claims Related to Sexual Orientation and Gender Identity in Europe." (2011), p. 221.
[196]Rehaag, Sean. "Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia." 13:2 International Journal of Human Rights (2009), p. 428.
[197]Ibid., p.428.
[198]Katyal, Sonia. "Exporting Identity." 14 Yale Journal of Law & Feminism 97 (2002), p. 110.
[199]LaViolette, Nicolette. "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines." 19 International Journal of Refugee Law 169 (2007), p. 198.

3.2. Sexual Orientation as Sexual Conduct

The "sexualization"[200] of sexuality-based claims, that is, the disproportionately great focus on sexual conduct alone with a diminished attention on sexual identity, presents another serious problem to LGBT asylum-seekers in all the three countries observed. Both the British and the UNHCR guidance issues warning as to judging a person's sexuality by the lack of same-sex sexual relations: "The fact that an applicant has not had any same-sex relationship(s) in the country of origin or in the country of asylum does not necessarily mean that s/he is not lesbian, gay or bisexual."[201] The myopic assumption that sexual identity can be reduced merely to sexual conduct could easily vindicate the renounced discretion requirement in the past.[202]As far as that requirement is concerned, it was founded on the supposition that if the (sexual) act was hidden, the LGBT person was shielded from the eyes of any potential persecutor too. In contrast to this, today it is assumed that if (a consistent) same-sex sexual conduct is revealed, sexual orientation is verified. Therefore, adjudicators might disbelieve those refugees who either cannot prove having engaged in same-sex sexual relations before or have yet to act upon their sexual attractions.

Moreover, some rulings reveal an expectation on the part of adjudicators that LGBT refugees should conduct sexual relations with members of the same sex, if not sooner, then after their arrival in the more liberated receiving state. One case from the United Kingdom, in which the

[200] Berg, Laurie, and Jenni Millbank. "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants." 22 Journal of Refugee Studies 195 (2009), p. 203.
[201] UK Border Agency. "Sexual Orientation Issues in the Asylum Claim." 2011, p. 11.: http://www.unhcr.org/refworld/pdfid/4eb8f0982.pdf [accessed 20 February 2012]; text almost identical in UN High Commissioner for Refugees. "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity." 21 November 2008, p. 17.: http://www.unhcr.org/refworld/docid/48abd5660.html [accessed 26 February 2012]
[202]O'Leary, Barry. "'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." 16 Feminist Legal Studies (2008), p. 91.

decision-maker included the following passage in the refusal letter to an African woman, demonstrates this convincingly: "It is believed that if you were attracted to other women then with all the freedom to choose a sexual partner of your choice in this country you would have a relationship with another woman."[203] Several UK Border Agency personnel have disclosed that when confronted with a sexuality-based claim, they usually rely on the existence of same-sex relationships and conduct in the asylum-seeker's life, especially in the post-arrival period in the United Kingdom.[204]

While expectations on the existence of same-sex sexual conduct are certainly not unreasonable, the absence of such activities can be explained by many factors. It is unfounded to believe that once asylum-seekers arrive in a "liberated" Western state, they are suddenly broken free from all their former chains. LGBT asylum-seekers have reported "harassment and marginalization by other asylum-seekers and refugees" in refugee camps as well as on the hands of the local population.[205] It is, therefore, hardly surprising if asylum-seekers struggle with the stigma of their homosexuality even in the receiving state. Moreover, meeting local LGBT people in bars or on the Internet may simply be inaccessible for asylum-seekers whose funds are usually severely limited.[206] Homophobic harassment and socio-economic status are only a couple of several other factors that may prevent LGBT asylum-

[203] Secretary of State for the Home Department in refusal letter to an African female, 2004; as cited in O'Leary, Barry. "'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." 16 Feminist Legal Studies (2008), p. 90.
[204]Miles, Nathanael. "No Going Back: Lesbian and Gay People and the Asylum System." Report. Stonewall: 2009, p. 16.: http://www.stonewall.org.uk/media/current_releases/3927.asp [accessed 29 January 2011]
[205]Helsinki Citizens' Assembly – Turkey Refugee Advocacy and Support Program, and ORAM – Organization for Refuge, Asylum & Migration. "Unsafe Haven: The Security Challenges Facing Lesbian, Gay, Bisexual and Transgender Asylum Seekers and Refugees in Turkey." Report. 2009: p. 19.: http://www.oraminternational.org/images/stories/PDFs/oram-unsafe-haven-2011.pdf [accessed 6 February 2012]
[206]O'Leary, Barry. "'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." 16 Feminist Legal Studies (2008), p. 90.

seekers from having emotional or sexual relations in the receiving state. The lack of thereof, therefore, should not automatically mean disbelief in the claimant's sexual orientation.

3.3. Western Stereotypes of LGBT People

Unreliable as it may be, demeanor is one of the factors that decision-makers observe during credibility assessment.[207] That is why it is noteworthy that both the UNHCR Guidance Note and the British guidelines warn against the utilization of "stereotypical images of LGBT persons"[208] or "stereotypical ideas of people."[209] Widespread reliance on Westernized, stereotypical notions of what an LGBT person looks like, does or knows, nevertheless, has been proved to influence adjudicators in their assessment of a claimant's credibility.[210] Australian,[211] British[212] and Canadian[213] decision-makers are, unfortunately, no exception to this practice either.

3.3.1. LGBT People's Exterior: "Gay men are effeminate, lesbian women are masculine"

Decision-makers are not immune to Western stereotypes of the feminine gay men and the masculine lesbian.[214] In one case the Canadian IRB found a claimant did not look lesbian, as she was "an articulate, professional, well-groomed, and attractive young

[207]Millbank, Jenni. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." 21(1) International Journal of Refugee Law (2009), p. 7.
[208] UN High Commissioner for Refugees. "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity." 21 November 2008, p. 16.: http://www.unhcr.org/refworld/docid/48abd5660.html [accessed 26 February 2012]
[209] UK Border Agency. "Sexual Orientation Issues in the Asylum Claim." 2011, p. 10.: http://www.unhcr.org/refworld/pdfid/4eb8f0982.pdf [accessed 20 February 2012]
[210]Morgan, Deborah A. "Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases." 15 Law and Sexuality 135 (2006), p. 137.
[211] Millbank, Jenni. "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom." 13 (2/3) International Journal of Human Rights (2009), p. 400.
[212] Miles, Nathanael. "No Going Back: Lesbian and Gay People and the Asylum System." Report. Stonewall, 2009, p. 27.: http://www.stonewall.org.uk/media/current_releases/3927.asp [accessed 29 January 2011]
[213] LaViolette, Nicole. "'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity': A Critical Commentary. International Journal of Refugee Law (2010), p. 194.
[214]Cowen, Tim, et al. "Sanctuary, Safety and Solidarity - Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland." Report. Equality Network, BEMIS and GRAMNet: 2011, p. 65.: http://www.gla.ac.uk/media/media_195792_en.pdf [accessed 12 January 2012]

woman."[215]Similarly, in cases concerning gay men, decision-makers found that they lacked "effeminacy"[216] and looked "very masculine"[217] or "athletic,"[218] and therefore, did not appear gay. In an Australian decision, the RRT found the allegedly gay applicant did not look "effeminate" based on a photograph.[219] Moreover, disbelief in the claimant's identity is used as a ground for denial in the United Kingdom as well.[220] A UK Border Agency presenting officer recently asserted that "[s]omeone in a tight white t-shirt with effeminate body language would have a better chance [of being believed to be gay] than another young guy who looks just like every other young Iranian you'd meet."[221]

Reliance on appearance is often misleading, especially in light of the fact that in many countries where they are faced with severe persecution, LGBT people have to engage in "homosexual covering."[222] This is conducted "by, for example, displaying only gender-typical traits" so that they will not be identified as members of a sexual minority in the eyes of potential persecutors.[223] As a result, those who come from a country where oppression is the most debilitating might be the least able to live up to adjudicators' "unsubstantiated

[215]*Re P.W.Z.*, [2000] C.R.D.D. No. 47 at para 6 (QL), as quoted in LaViolette, Nicolette. "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines." 19 International Journal of Refugee Law 169 (2007), p. 192.
[216] Reference in *Herrera* 2005 FC 1233 (Teitelbaum J.), as cited in Michael Battista's analysis (on file wit author). Michael Battista is a Toronto-based immigration lawyer specializing in sexuality-based issues.
[217] Re *W.R.O.*, [2000], C.R.D.D. No. 284 at para. 5 (QL), as quoted inRehaag, Sean. "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada." 53 McGill Law Review 59 (2008), p. 72.
[218]*Valdes v. Canada* (Minister of Citizenship and Immigration), [2004] R.P.D.D. No. 140 at para 29 (QL), as quoted inRehaag, Sean. "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada." 53 McGill Law Review 59 (2008), p. 72.
[219] As described by the appeal judge in *SZFDJ v MI* [2005] FMCA 733 at para. 15, as cited in Kassisieh, G. "From Lives of Fear, to Lives of Freedom" A review of Australian refugee decisions on the basis of sexual orientation." Gay and Lesbian Rights Lobby, Glebe (2008), p. 22.
[220]Cowen, Tim, et al. "Sanctuary, Safety and Solidarity - Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland." Report. Equality Network, BEMIS and GRAMNet: 2011, p. 68.: http://www.gla.ac.uk/media/media_195792_en.pdf [accessed 12 January 2012]
[221]Miles, Nathanael. "No Going Back: Lesbian and Gay People and the Asylum System." Report. Stonewall, 2009, p. 27.: http://www.stonewall.org.uk/media/current_releases/3927.asp [accessed 29 January 2011]
[222]Hanna, Fadi. "Punishing Masculinity in Gay Asylum Claims." 114 Yale Law Journal 913 (2005), p. 915.
[223]Ibid., p. 915.

stereotypes"[224] on appearance. This is problematic, as those who are the most heavily oppressed may end up being denied protection under the Convention.

3.3.2. LGBT People's Cognition and "Lifestyle:" "Gay Men Like Madonna"

In an attempt to verify the applicant's homosexuality, some adjudicators resort to testing the claimant's knowledge with lines of questioning that reveal Westernized, stereotypical expectations of what LGBT people should be aware of on the part of decision-makers. Expectations therefore do not only pertain to supposed external but also to internal characteristics. In certain cases applicants bringing sexuality-based claims received inquiries on their knowledge of whereabouts of gay venues both in the receiving and sending countries, [225] the political and legal landscape of LGBT people in their home countries,[226] LGBT organizations in the country of origin[227] or cultural icons or pieces generally held popular among Western LGBT people (like Madonna or Oscar Wilde).[228] In a recent Canadian case, the Immigration and Refugee Board disbelieved the applicant because he did not disassociate himself from the Catholic church as a gay man, which seemed implausible for the adjudicator.[229]

[224]Hinger, Sarah. "Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims." 19 Columbia Journal of Gender and Law 367 (2010), p. 389.
[225] In numerous Australian and Canadian cases cited in Millbank, Jenni. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." 21(1) International Journal of Refugee Law (2009), p. 20.
[226]*Laszlo v Canada* [2004] RPDD 334 at para 6, as cited in Millbank, Jenni. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." 21(1) International Journal of Refugee Law (2009), p. 21.
[227]*SZHFP v MI* [2007] FMCA 224 at para 4, as cited in Kassisieh, G. "From Lives of Fear, to Lives of Freedom" A review of Australian refugee decisions on the basis of sexual orientation." Gay and Lesbian Rights Lobby, Glebe (2008), p. 23.
[228] Miles, Nathanael. "No Going Back: Lesbian and Gay People and the Asylum System." Report. Stonewall, 2009, p. 16.:http://www.stonewall.org.uk/media/current_releases/3927.asp [accessed 29 January 2011]; *WAAG v MI* [2002] FMCA 191, as cited in Kassisieh, G. "From Lives of Fear, to Lives of Freedom" A review of Australian refugee decisions on the basis of sexual orientation." Gay and Lesbian Rights Lobby, Glebe (2008), p. 10.
[229] Reference in *Trembliuk*, 2003 FC 1264 (Gibson J.), as cited in Michael Battista's analysis (on file wit author). Michael Battista is a Toronto-based immigration lawyer specializing in sexuality-based issues.

The above list of criteria is certainly not exhaustive but sufficient to give a good sense of how deeply embedded Australian, British and Canadian adjudicators' expectations of what constitutes an LGBT identity are in Western culture. Assumptions like these mistakenly suppose the existence of a "uniform way in which lesbians and gay men recognize and act on their sexual orientation."[230] Moreover, presumptions like these completely ignore obstacles that may arise on the basis of the applicant's other characteristics like "gender, age or socio-economic status," restricting LGBT refugees in their ability to pursue what is perceived to be a "gay lifestyle,"[231] even if they had the intention to.

3.4. The Experience of the Other

The abovementioned cases and practices powerfully indicate how reliance on the demeanor, consistency and plausibility of LGBT refugees can be absolutely unreliable. When listening to the usually uncorroborated narrative of the LGBT asylum-seeker, Australian, British and Canadian adjudicators are confronted with the task of listening to the account of a "'foreign' experience."[232] The experience is foreign not only due to its cross-cultural dimensions but also because it consists of listening to the account of a person whose life experience might be too "foreign" for decision-makers to construe. This isoften due to their lack of knowledge and empathy,[233] which have roots in the subordinated, misrecognized status of LGBT people in society and the disgust heterosexual people so prevalently feel about them. Kim Lane Scheppele argues that "[t]he resolution of any individual case in the law relies heavily on a

[230]LaViolette, Nicole. "Coming Out to Canada: The Immigration of Same-Sex Couples under the Immigration and Refugee Protection Act." 49 McGill Law Journal (2004),p.996.
[231]Kassisieh, G. "From Lives of Fear, to Lives of Freedom" A review of Australian refugee decisions on the basis of sexual orientation." Gay and Lesbian Rights Lobby, Glebe (2008),p. 25.
[232]Millbank, Jenni. "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia." 26 Melbourne University Law Review 144 (2002), p.150.
[233]Ibid.

court's adoption of a particular story, one that makes sense, is true to what the listeners know about the world, and hangs together."[234] As a result, the claimant's narrative is not necessarily about the asylum-seeker's knowledge, experience or emotions: the truth might be more in the eye of the beholder,[235] particularly given the decision-maker's position of power in the refugee status determination. His or her point of view is determinative and highlydependent on what he or she can be receptive of.[236] As illustrated above, decision-makers can easily "exclude outsiders' stories" if those are in tension with their in-built preconceptions and biases about LGBT people.

[234]Scheppele, Kim Lane. "Foreword: Telling Stories." 87 Michigan Law Review 2073 (1989), p. 2080.
[235] Kagan, Michael. "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination." 17 Georgetown Immigration Law Journal 367 (2003), p. 397.
[236]Scheppele, Kim Lane. "Foreword: Telling Stories." 87 Michigan Law Review 2073 (1989), p. 2090.

4. LGBT CLAIMANTS IN THE WEB OF THE PROCEDURE

"[THE TRIBUNAL]: Now you may not want to answer this question *but when you do have sex do you use a lubricant?*

[NAOX]: I don't want to.

[THE TRIBUNAL]: Don't want to answer..."[237] [emphasis added]

This chapter argues that certain seemingly neutral practices in the refugee status determination process that bear relevance to the applicant's credibility are, in fact, detrimental to LGBT claimants. This problem is realized by the UNHCR and the UKBA instructions as well that call particular attention to some aspects of the procedure, in addition to providing guidance as to how the content of an LGBT claimant's narrative should be approached and processed. Both of these documents explicitly flag the presence of "shame," "stigma" or "taboo," the feeling of which are prevalent among LGBT people,[238] and are particularly augmented in people who come from an environment where homosexuality is ubiquitously despised. The two guidance materials caution that, as a consequence of these emotions, confiding in the interviewer might be especially difficult for the LGBT asylum-seeker, in particular regarding matters of such intimate character.[239] Feeling of shame and related emotions has a potential to impact the demeanor, consistency and plausibility of a claimant's testimony. Adjudicators, therefore, need to be prepared to recognize the presence of shame and its impact on the applicant's credibility.

[237] Excerpt from *NAOX*, Refugee Review Tribunal, as quoted in Budd, Michael Carl. "Mistakes in Identity: Sexual Orientation and Credibility in the Asylum." Thesis. The American University in Cairo.December 2009, p. 41.
[238] LaViolette, Nicole. "'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity': A Critical Commentary. International Journal of Refugee Law (2010), p. 195.
[239] UN High Commissioner for Refugees. "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity." 21 November 2008, p. 17.: http://www.unhcr.org/refworld/docid/48abd5660.html [accessed 26 February 2012]; UK Border Agency. "Sexual Orientation Issues in the Asylum Claim." 2011, p. 10.: http://www.unhcr.org/refworld/pdfid/4eb8f0982.pdf [accessed 20 February 2012]

4.1. Late Disclosure

One of the potential outcomes of reluctance to make a full disclosure of one's sexuality is delayed submission of claim on the basis of sexual orientation. Late submissions have been observed in all three of the jurisdictions,[240] and sometimes they resulted in adverse credibility findings as well. Based on interviews with adjudicators and lawyers' accounts, UK decision-makers seem to expect that LGBT asylum-seekers come out of the closet soon after they cross the border to the country and fail to understand and empathize with those who do not do so.[241] Even when late submission in itself does not lead to an adverse credibility assessment, it certainly does not help a claimant's case in the United Kingdom that has become renowned for its so-called culture of disbelief that is prevalent in the credibility assessment procedure.[242] However, in certain cases delay in disclosure has direct relevance to the applicant's credibility assessment. In a recent Australian case, a male claimant from Egypt disclosed his homosexuality with delay, and at the first occasion the Tribunal rejected his claim to be gay.[243] His appeal was accepted and the man later started a long-term same-sex relationship.[244]

[240]Millbank, Jenni. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." 21(1) International Journal of Refugee Law (2009), p. 15.
[241]Miles, Nathanael. "No Going Back: Lesbian and Gay People and the Asylum System." Report. Stonewall, 2009, p. 11.: http://www.stonewall.org.uk/media/current_releases/3927.asp [accessed 29 January 2011]; O'Leary, Barry. "'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." 16 Feminist Legal Studies (2008), pp. 92-3.
[242] Cowen, Tim, et al. "Sanctuary, Safety and Solidarity - Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland." Report. Equality Network, BEMIS and GRAMNet: 2011, p. 79.: http://www.gla.ac.uk/media/media_195792_en.pdf [accessed 12 January 2012]; UN High Commissioner for Refugees. "The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees." 22 September 2010, p. 10.: http://www.unhcr.org/refworld/docid/4cff9a8f2.html [accessed 9 February 2012]
[243]*SZEOP v MIC* [2007] FCA 807 at [25], as cited in Kassisieh, G. "From Lives of Fear, to Lives of Freedom" A review of Australian refugee decisions on the basis of sexual orientation." Gay and Lesbian Rights Lobby, Glebe (2008), p. 20.
[244]Kassisieh, G. "From Lives of Fear, to Lives of Freedom" A review of Australian refugee decisions on the basis of sexual orientation." Gay and Lesbian Rights Lobby, Glebe (2008),p. 21.

"If they've come to the UK because they felt it was a safe country to claim asylum, then […] [i]t's very difficult to see why they would choose not to give the reasons, particularly in relation to being gay."[245] When a UK Border Agency senior caseworker's sentences reveal such ignorance, it has to be acknowledged that it is both lack of knowledge and lack of empathy that may hinder adjudicators' understanding of why LGBT asylum-seekers are unable to trust authorities and show reluctance in coming out in an official setting. Highlighting this issue and articulating its causes in the LGBT context, therefore, is certainly a welcome development by the UNHCR and the UK Border Agency.

4.2. Sensitivity

Fortunately, both of the UNHCR and British guidance materials specifically emphasize the need for "sensitive" or "appropriate enquiries and interview techniques,"[246] due to the delicacy of issues discussed during the hearing. The British instructions go even further when they claim that questions by the decision-maker should enable claimants to elaborate on "the development of their identity."[247] This is important, since LGBT people, as "gender outlaws,"[248] are often targets of sexual assault, which they receive as a form of punishment for transgressing the strictly drawn gender boundaries.[249]

[245]Miles, Nathanael. "No Going Back: Lesbian and Gay People and the Asylum System." Report. Stonewall, 2009, p. 11.: http://www.stonewall.org.uk/media/current_releases/3927.asp [accessed 29 January 2011]
[246] UN High Commissioner for Refugees. "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity."21 November 2008, p. 17.: http://www.unhcr.org/refworld/docid/48abd5660.html [accessed 26 February 2012]; UK Border Agency. "Sexual Orientation Issues in the Asylum Claim." 2011, p. 10.: http://www.unhcr.org/refworld/pdfid/4eb8f0982.pdf [accessed 20 February 2012]
[247] UK Border Agency. "Sexual Orientation Issues in the Asylum Claim." 2011, p. 10.: http://www.unhcr.org/refworld/pdfid/4eb8f0982.pdf [accessed 20 February 2012]
[248]Wilets, James D. "Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective." 60 Albany Law Review 989 (1997), p. 1006.
[249] UN High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3, pp. 82-83.: http://www.unhcr.org/refworld/docid/4f33c8d92.html [accessed 26 February 2012]

Nicole LaViolette rightly asserts, that as a result of the above, LGBT claimants should be observed "with the same sensitivity as […] sexual assault victims more generally."[250] A receptive and safe environment at the interview is obviously more conducive to a more open storytelling, but creating a trustworthy environment requires much empathy as well as understanding on the part of decision-maker. On the contrary, when the interview becomes a further source of frustration for the claimant, it is likely to adversely impact the assessment of his or her credibility.

Potentially frustrated by the lack of skills on how to best approach sexuality-based claims or simply to embarrass claimants they cannot relate to, adjudicators readily resort to the sexualization of the claim by bombarding the applicant with sexually explicit questions.[251] This means that decision-makers place the emphasis on intrusive inquiries on sexual acts rather than questions on identity development.[252] The discussion of sexuality in itself is a taboo topic in many of the overly oppressive countries LGBT asylum-seekers are attempting to flee.[253]

When the requirement to talk about sex intersects with the challenging task of giving an account of one's sexual practices that are fiercely stigmatized in many societies, claimants might become unresponsive or lose their composure. In an Australian Tribunal case, the applicant's incapacity to answer questions about his same-sex sexual practices, which included inquiries about the use of lubricant as well, led the decision-maker to declare the

[250]LaViolette, Nicole. "'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity': A Critical Commentary. International Journal of Refugee Law (2010), p. 195.
[251]Berg, Laurie, and Jenni Millbank. "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants." 22 Journal of Refugee Studies 195 (2009), p. 203.
[252]Ibid.
[253]Dialmy, Abdessamad. "Sexuality in Contemporary Arab Society." 49 Social Analysis 1 (Summer 2005), p. 29.

claimant incredible.[254] This case is demonstrative of the insensitivity and inappropriateness (likely generated by lack of knowledge and empathy) that might characterize interviewers in LGBT claims. Similarly, in several Australian, British and Canadian cases, the claimant's inability to engage in the description of same-sex sexual acts with sufficient detail and cogency eventuated in adverse credibility rulings.[255] Adjudicators are clearly not aware of, or simply choose to ignore, how deeply engrained cultural norms related to silence on certain issues can preclude people from oppressive regimes to talk about their sexual life. When this discussion is likely to involve unorthodox sexual practices, the wall of silence, built on the pillars of the lack of trust and shame, is even higher.

4.3. Further Considerations

In addition to the sexualization of claims, there are further procedural obstacles that have a potential to hinder the claimant's ability to disclose essential facts about his or her identity. The gender of the interviewer and the interpreter[256] as well as the interpreter's membership in the applicant's community or culture[257] pose great difficulties to an LGBT asylum-seeker in certain cases, who might not feel safe enough to confide in a person he or she does not find supportive or identifies as a potential source of risk. The UNHCR Guidance Note recognizes that the presence of the interpreter could be a factor in how the dynamics of the hearing are

[254] *NAOX,* Refugee Review Tribunal, as quoted in Budd, Michael Carl. "Mistakes in Identity: Sexual Orientation and Credibility in the Asylum." Thesis.The American University in Cairo. December 2009, p. 41.
[255] Millbank, Jenni. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." 21(1) International Journal of Refugee Law (2009), p. 9.
[256] Ibid.
[257] Berg, Laurie, and Jenni Millbank. "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants." 22 Journal of Refugee Studies 195 (2009), p. 199.; O'Leary, Barry. "'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." 16 Feminist Legal Studies (2008), p. 94.

shaped.[258] That is the reason it calls for "trained" officials and interpreters.[259] The British guidelines advise that the applicant's request on the interviewer or interpreter's gender should be honored.[260] It is also a welcome development that in 2008 the Australian credibility guidelines were changed so that the claimant's sexual orientation became a basis for consideration of the gender of the interpreter.[261] However, this is still one step short of providing advice on the appropriateness of the interviewer's gender in the same situation. Nevertheless, being cognizant about the impact of the person of the interviewer and the interpreter might have during LGBT applicants' hearings is beyond doubt a necessity in these cases which frequently revolve around sensitive, oftentimes, traumatic issues and memories.

[258]UN High Commissioner for Refugees. "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity." 21 November 2008, p. 17.: http://www.unhcr.org/refworld/docid/48abd5660.html [accessed 26 February 2012]
[259]Ibid.
[260] UK Border Agency. "Sexual Orientation Issues in the Asylum Claim." 2011, p. 10.: http://www.unhcr.org/refworld/pdfid/4eb8f0982.pdf [accessed 20 February 2012]
[261]Refugee Review Tribunal. "Guidance on the Assessment of Credibility." August 2008, p. 3.: www.mrt-rrt.gov.au/.../118/CredibilityGuidanceAug08.pdf.aspx [accessed 20 January 2012];Millbank, Jenni. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." 21(1) International Journal of Refugee Law (2009), p. 9.

CONCLUSION

"Claims about sexual orientation may be easy to assert, but difficult for applicants to substantiate and for decision-makers to evaluate."[262]

We have to acknowledge the fact that adjudication of sexuality-based claims is an extremely delicate issue. When adjudicators exhibit negative attitudes or rely on negative stereotypes, they do not necessarily do so intentionally. They may not even realize that preconceived ideas and emotions influence their decision-making. Furthermore, it also has to be recognized that sexuality-based claims leave substantial room for abuse.Therefore, it is not surprising that decision-makers often conclude that sexuality-based claims are easy to make and difficult to rebut.[263]Caution, thus, does need to be exercised; nonetheless, it is important that it does not turn into outward hostility, especially towards genuine LGBT claimants.

This thesis argued that claims on the basis of sexual orientation are also often extremely difficult to make and seemingly too easy on the part of adjudicators to disbelieve. And disbelieve adjudicators do. Accepting the premise that disbelief in the applicant's claimed sexual orientation has emerged as the most recent major gatekeeping function in sexuality-based claims in Australia, Canada and the UK, this thesis asserted that the substantial room adjudicators' personal biases and convictions are afforded in the credibility assessment is not only likely to, but actually does, have a negative impact on LGBT claimants in certain cases.

[262]*SZIGI v. Minister for Immigration and Multicultural Affairs* [2006] FMCA 1800 (20 Nov. 2006), at para. 25.: http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FMCA/2006/1800.html?stem=0&synonyms=0&query=title(szigi%20) [accessed 20 January 2012]

[263]Millbank, Jenni. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." 21(1) International Journal of Refugee Law (2009), p. 4.

The first two major obstacles LGBT asylum-seekers faced in Australia and the United Kingdom, and to a varying degree in Canada, were the inclusion of sexual minorities under the personal scope of the Refugee Convention and the extensive use of the "discretion requirement." These two questions struck at the core of the refugee definition of Article 1A(2) of the Convention, which requires that the refugee suffer persecution in his or her country of origin and that this persecution be on an enumerated Convention ground. The lack of explicit mention of sexual orientation as a protected ground in the Convention and the widespread reliance of the "discretion requirement" that undermine the interpretation of persecution in sexual orientation claims could easily lead to rejection at the administrative level until they were judicially resolved.The legal approach taken by the respective courts in the decisions that resolved these issues is imbued with the acceptance of the "substitutive model" of sexual orientation and is informed by an anti-discrimination discourse. This Western legal framing of sexual orientation has a potential to disadvantage applicants who come from cultures where a sexuality-based identity is not an existing concept.

Moreover, the subjective nature of the credibility assessment process, through which one's claim of sexual minority status is verified, is another source of significant problems for LGBT claimants in all three jurisdictions. Stereotypical views on and disgust for LGBT people on the part of adjudicators could emerge from the lack of full recognition of sexual minorities in society and their pursuant disempowerment that prevents them from shaping the perception the majority has on them. These stereotypes, in turn, may unfairly lead to adverse credibility findings. As this thesis asserted, Westernized expectations on LGBT people's sexuality and sexual conduct, their exterior and cognition, and their lifestyle are frequently

manifestly ill-founded and place an overwhelming, culturally specific burden on refugees that is hard to overcome in the eye of the decision-maker in all three jurisdictions.

This problem is augmented by the fact that the same kind of ignorance and lack of empathy that filter through decisions on sexuality-based claims at the administrative level also prevent adjudicators from recognizing that certain seemingly neutral procedural requirements may disproportionately disadvantage LGBT claimants. Asylum-seekers' reasons for delay in coming out to the authorities and their concerns related to the gender and origin of the adjudicator and the interpreter are often unjustly disregarded when an adverse credibility decision on the applicant's sexuality is made. These problems all boil down to decision-makers' lack of understanding of and empathy for LGBT applicants.

If lack of understanding and empathy is the problem, they should be remedied. As demonstrated, the credibility assessment guidelines in all three jurisdictions leave room for subjectivity. Both the credibility and gender guidelines fail to explicitly elucidate problems that are likely to occur with regard to sexuality-based claims in Australia, Canada and the United Kingdom. Even though claims based on sexual orientation do have a gender element, gender guidelines often deal with problems specific to female claimants.[264] Therefore, gender guidelines are not of great assistance vis-à-vis sexuality-based claims, as these cases require more focused attention and training.

[264] LaViolette, Nicolette. "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines." 19 International Journal of Refugee Law 169 (2007), p. 187.

It is important that both the UK Border Agency and the UNHCR Guidance Note and Summary Conclusions,[265] in accordance with several other reports,[266] highlight the necessity for trained officials. Training is not only a remedy for adjudicators and interpreters' lack of knowledge but it could also influence their potential feeling of disgust towards LGBT applicants. This is because "disgust has a cognitive element"[267] as well, since despite the fact that certain aversions have "an evolutionary basis," "they still have to be confirmed by learning."[268] Consequently, if homophobia can strengthen someone's disgust for LGBT people, education that debunks the foundations of negative attitude towards these groups can also weaken disgust.

Canada is a forerunner in the field of trainings that specifically dealt with sexual orientation issues in the asylum procedure.[269] As early as 1995 the Immigration and Refugee Board of Canada held a training vis-à-vis sexual minorities for its adjudicators.[270] Similar trainings took place at the Refugee Review Tribunal in Australia in 2008[271] and in the United Kingdom Border Agency at the end of 2010[272] for the first time. The fact that stereotyping

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[265]UN High Commissioner for Refugees."Summary Conclusions: Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity." November 2010, p. 4.: http://www.unhcr.org/refworld/docid/4cff99a42.html [accessed 29 January 2012]

[266]Cowen, Tim, et al. "Sanctuary, Safety and Solidarity - Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland." Report. Equality Network, BEMIS and GRAMNet: 2011, p. 13.: http://www.gla.ac.uk/media/media_195792_en.pdf [accessed 12 January 2012]; UK Lesbian & Gay Immigration Group. "Failing the Grade – Home Office initial decisions on lesbian and gay claims for asylum." Report. April 2010, p. 8.: http://www.asylumlaw.org/docs/sexualminorities/Failing%20the%20Grade%20UKLGIG%20April%202010.pdf [accessed 27 January 2012];McLachlan, Gary. "LGB Refugees in the UK asylum system: Problems with the UK application of the 1951 Refugee Convention and 1967 Protocol in UK asylum law." Research Paper. 2009, p. 3.: http://garymclachlan.files.wordpress.com/2009/11/report-recommendations.pdf [accessed 10 January 2012]

[267] Nussbaum, Martha C. "The Politics of Disgust: Practice, Theory, History." In From Disgust to Humanity: Sexual Orientation and Constitutional Law. Oxford University Press: 2010, p. 14.

[268]Ibid.

[269]LaViolette. Nicolette. "Independent human rights documentation and sexual minorities: an ongoing challenge for Canadian refugee determination process." 13 The International Journal of Human Rights, 2-3 (2009), p. 438.

[270]Ibid., p. 445.

[271]Millbank, Jenni. "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom." 13 (2/3) International Journal of Human Rights (2009), p. 403.

[272]Cowen, Tim, et al. "Sanctuary, Safety and Solidarity - Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland." Report. Equality Network, BEMIS and GRAMNet: 2011, p. 47.: http://www.gla.ac.uk/media/media_195792_en.pdf [accessed 12 January 2012]

has not become a foreign experience for Canadian decision-makers in spite of the ongoing training session they have received for the last almost two decades[273] proves the relevance of written guidelines on sexual orientation claims. Currently the United Kingdom is the only country out of the three observed, where written guidance exists and training has been provided for adjudicators. Nonetheless, as both the training and the written guidelines are recent developments in this jurisdiction, their impact is yet to be assessed, and thus, should be subject of further research.

I argue that both written guidelines and awareness-raising sessions should be provided for decision-makers in all three jurisdictions, like it already has been achieved in the United Kingdom, as personal biases are frequently difficult to overcome, or even, to be realized. To give LGBT refugees voice in a process in which they (in all their humanity) should be in the focus instead of adjudicators' personal biases against and perceptions of LGBT people, training sessions could provide former LGBT applicants already granted asylum in the respective jurisdictions an opportunity to reflect on their experience on the credibility assessment procedure. This would benefit both LGBT refugees and adjudicators, as sexuality-based claims may truly become easy to make, and at the same time, easy to verify in a fair manner as well.

[273]LaViolette. Nicolette. "Independent human rights documentation and sexual minorities: an ongoing challenge for Canadian refugee determination process." 13 The International Journal of Human Rights, 2-3 (2009), p. 470.

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