



THE UNIVERSITY *of* EDINBURGH

This thesis has been submitted in fulfilment of the requirements for a postgraduate degree (e.g. PhD, MPhil, DClinPsychol) at the University of Edinburgh. Please note the following terms and conditions of use:

This work is protected by copyright and other intellectual property rights, which are retained by the thesis author, unless otherwise stated.

A copy can be downloaded for personal non-commercial research or study, without prior permission or charge.

This thesis cannot be reproduced or quoted extensively from without first obtaining permission in writing from the author.

The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the author.

When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given.

The inclusive guise of “gay” asylum: A socio-legal analysis of sexual minority asylum recognition in the UK

P. Trent Olsen

Abstract

The United Kingdom's acceptance of lesbian, gay, bisexual, and transgender (LGBT) refugees has been heralded as a progressive shift in asylum law. Indeed, the scope for the protection of sexual minorities under the Refugee Convention has expanded. The interpretation of the Convention definition of refugee in Article 1A(2) has been continuously adapted, especially the "particular social group" (PSG) category as well as the recognised scope of "well-founded fear of being persecuted." This thesis interrogates *how* "gay" refugees have been accepted under the Convention.

The analysis considers the ways judicial decision-making has constructed the PSG and persecution of sexual minority asylum seekers. The sample consists of 22 appeals from 1999-2011 which were identified as major legal developments, beginning with the first significant recognition of "homosexual" refugees. Several additional tribunal determinations and key international cases are also considered. A socio-legal approach is taken to study the tensions between fluid sociological images of gender and sexuality and the fixed notions of identity found in the law (whether arising from individual cases, formal practice, or state imperatives). Through an examination of the legal discourse in the texts examined, the research deconstructs the jurisprudential debates in order to assess their impact on sexual minorities seeking asylum. This contextual, rather than doctrinal, approach reveals how the jurisprudence often obscures sociologically problematic assumptions made by adjudicators.

This analysis offers an original contribution, concluding that UK protection is grounded on the assumption that sexual and gender identity are "immutable." Far from opening the UK to persecuted sexual minorities, the prevalence of this assumption significantly narrows the apparently "inclusive" construct of the refugee. Building on the findings, the thesis proposes that adjudication should focus on the persecutory intent to suppress non-conforming acts and identities (or *norm deviance*) in order to identify sexual minority refugees rather than the categories of LGBT. Additionally, framing determination in the terms of *relational autonomy* develops a better understanding of the conditions necessary to realise a non-conforming sexual and gendered life free of persecution. The concept of norm deviance decentres the assumption of a knowable truth of identity, and relational autonomy asserts that the

deprivation of self-determination and rights to relate may constitute a well-founded fear of persecution.

Contents

Volume I

Declaration.....	i
Acknowledgements.....	ii
Introduction – The “gay” refugee.....	1
1 The global and national context: The struggle for sexual minority human rights and refugee status	5
2 Overview of the thesis.....	9
3 Argument and contribution	12
Part I – Background	14
Chapter One – A transnationally recognisable “gay” identity?	15
1 Historically contingent	16
1.1 <i>Defining “homosexuality”</i>	16
1.2 <i>Capitalism and sexual identities</i>	19
1.3 <i>Institutionalised identities</i>	21
2 Culturally relative	25
2.1 <i>Gay history</i>	26
2.2 <i>Global diversity</i>	28
3 Sexuality and globalisation	30
3.1 <i>Colonialism</i>	31
3.2 <i>The possibility of transnational identities</i>	33
3.3 <i>Sexual and gender identity: Terms, acronyms, and categories</i>	36
4 Conclusion	41
Chapter Two – Refugee law: Establishment, concepts, and practice.....	43
1 The establishment of international human rights and refugee law	44
1.1 <i>A short history of the “refugee” and human rights</i>	44
1.2 <i>The Convention and Protocol relating to the Status of Refugees</i>	51
1.2.1 <i>Perceived importance of consensus between states</i>	53
1.2.2 <i>Particular social group</i>	55

1.2.3 <i>Persecution</i>	57
1.3 <i>The construct of the refugee</i>	58
2 International law (and norms) in practice	60
2.1 <i>The international framework of supporting treaties</i>	60
2.2 <i>Inter- and supra-national institutions, guidance, and law</i>	62
2.3 <i>UK implementation of refugee law</i>	67
3 Conclusion	71
Chapter Three – Socio-legal discourse analysis: Research design, methodology, and theoretical framework	73
1 Theoretical approach and research questions.....	73
2 Research design and methodology.....	77
3 Case selection and primary data.....	81
4 Interpreting and analysing the data	84
5 The decision-making process.....	88
6 Conclusion	94
Part II – Case law analytical chapters	95
Introduction	95
Chapter Four – The inclusive guise of “gay” asylum	99
1 Reading in sexual orientation and gender identity as a particular social group	100
1.1 <i>Analysis of “particular social group”</i>	100
1.2 <i>“Reasonable” concealment: More than sex?</i>	104
1.2.1 <i>Discrete, discreet conduct: Narrowly classified and concealable categories</i>	105
1.2.2 <i>Nascent discretion reasoning</i>	108
1.2.3 <i>Conduct in the closet</i>	113
1.2.4 <i>Principle of internal relocation</i>	119
1.3 <i>HJ and HT: Gay rights are human rights?</i>	122
2 “Genuine” sexual minority refugees	125
2.1 <i>Bodies of evidence</i>	126

2.2 <i>Visually arresting: Perceiving “genuine” sexual and gender identities ...</i>	130
2.3 <i>Dichotomy of (dis)belief: Situational and fluid sexualities</i>	136
3 Conclusion	138
Chapter Five – When persecution is persecution worthy of protection.....	139
1 Developments in the assessment of persecution	140
1.1 <i>Discretion and persecution before HJ and HT</i>	141
1.1.1 <i>Discriminatory persecution</i>	141
1.1.2 <i>Conduct driven approach: Conduct, privacy, and persecution</i>	143
1.1.3 <i>Not all rights violations are persecutory</i>	147
1.1.4 <i>Reasonable tolerability</i>	152
1.2 <i>Discriminatory persecution post-HJ and HT: Discretion is persecution... ..</i>	156
2 Constraining what amounts to persecution	159
2.1 <i>Glass closets, discovery and persecution: There was no “misunderstanding”</i>	160
2.2 <i>“Tradition,” generalised violence, and international consensus</i>	163
2.2.1 <i>Local context: Normalised violence and the perceived need to “respect” local cultural norms</i>	164
2.2.2 <i>An invisible hand: Restricting the meaning of persecution</i>	167
2.3 <i>Critical reflections: Politics, immigration control, and international consensus</i>	170
3 Conclusion	176

Volume II

Part III – Theoretical contributions	178
Introduction	178
Chapter Six – Norm deviance and the social group.....	180
1 Re-reading the PSG as norm deviance	180
1.1 <i>The problems of identity in transnational decision-making.....</i>	182
1.2 <i>Social perception of the PSG: Moving beyond immutability</i>	185

1.2.1 <i>Interpreting PSG: Immutability and social perception</i>	186
1.2.2 <i>Social perception and persecutory intent</i>	188
1.3 <i>A theory of norm deviance</i>	190
1.3.1 <i>Closetedness: Norm deviance, visibility, and harm</i>	191
1.3.2 <i>Transgressing norms and uncertain risks of being persecuted</i>	193
2 <i>The knowability of norm deviance</i>	195
2.1 <i>Immutability and double binds</i>	195
2.2 <i>Norm deviance in context</i>	198
2.2.1 <i>Reading in omissions: Asexuality, celibacy, and situational sexuality</i>	198
2.2.2 <i>Gender and other expressions of identity</i>	200
2.2.3 <i>Individual subjectivity and the implications for RSD</i>	202
3 <i>Conclusion</i>	206
Chapter Seven – Relational autonomy, embodied rights, and the judgment of persecution	208
1 <i>Applying relational autonomy to refugee status</i>	208
1.1 <i>The social perception approach and persecution</i>	209
1.2 <i>Seeking reconciliation between perspectives on autonomy</i>	212
1.3 <i>Embodied, relational rights</i>	215
1.4 <i>Self-determination and choosing norm deviance</i>	217
1.5 <i>Community, concealment, and material belonging</i>	219
2 <i>Reconceptualising judgment</i>	223
2.1 <i>Compassionate creativity</i>	224
2.2 <i>Judgment and relational autonomy</i>	226
2.2.1 <i>Relational autonomy and equal moral worth</i>	227
2.2.2 <i>The “corrupt homosexual:” Relational autonomy is political</i>	229
2.2.3 <i>Relational autonomy and hard cases</i>	232
3 <i>Conclusion</i>	236

Conclusion.....	238
Appendix I – List of abbreviations and acronyms	242
Appendix II – Glossary	244
Appendix III – International instruments and preparatory works	254
Appendix IV – Select table of cases	257
Domestic cases	257
International cases	259
Appendix V – Case summaries	261
Bibliography	286

Table of Figures

Figure 1 Structure of the appeals process.....	70
Figure 2 Interpretation of facts and law.....	89
Figure 3 Relational autonomy and persecution.....	222

Declaration

This thesis is entirely the candidate's work, except where otherwise indicated, and no part has been submitted for any other degree or qualification.

P. Trent Olsen, 10 May 2017

.....

Acknowledgements

If not for space limitations, I would thank each and (almost) every teacher I have had. But Samantha Nelson Ray and Susan Thomson truly are gems, and the knowledge and inspiration they imparted still resound with me today. At Arizona State University, Ruth Jones and Michael Mitchel picked me out of the crowd and helped me develop as a writer and researcher.

Colleagues and friends, Kathy Dodworth, Inês Correia, Heather Hill, Victoria Loughlan, Laura S. Martin, Sissela Matzner, David Martí, Mor Sobol, Kathleen Ward, Grit Wesser, and Dr X (pseud.) have all contributed immensely. If not for their constructive feedback and friendship the completion of this thesis would not have been possible. Special thanks to Darcy Leigh for timely advice and thought-provoking discussions; to Nonna Gorilovskaya, editor and dear friend, whose kindness and generosity are immeasurable; and to Holly Davis, who sacrificed hours of her time to give me essential comments on drafts and priceless encouragement.

All the participants in the 2014 Migration and Citizenship Writing Workshop need mention, if especially Nicki Dunne, Mike Slaven, and Joanna Wiseman. Alistair Hunter and Ewen McIntosh both extended helping hands over the past years. All of the students I have had the privilege of working with in the College of Humanities and Social Science have challenged my thinking on broader yet important issues, but thanks particularly to the Edinburgh Law School students on the course “Asylum and Refugee Law and Policy” in 2014 and 2015 for their insightful participation in my seminar on sexual orientation-based claims. Thank you also to the audience who attended my seminar in the Centre for Law and Society, Edinburgh Law School; especially Luís Duarte d’Almeida for his critique, as well as Liz Campbell, Lynne Copson, Antony Duff, Anne Griffiths, Chloë Kennedy, Lesley McAra, and Claudio Michelon for their insights and an invigorating discussion as I neared the completion of this thesis.

In the School of Social and Political Science, faculty members Elizabeth Bomberg, Barbara Bompani, Xavier Guillaume, Juliet Kaarbo, Pontus Odmalm, and Fiona Mackay offered indispensable outside advice as well as opportunities for my personal development. My supervisors Christina Boswell and Sharon Cowan each gave this thesis something special, as well as endless patience and assistance, for

which I am deeply indebted. Both allotted more time to critiquing and editing this project than I could ever have wished for from supervisors. Many thanks to both for their guidance, encouragement and opportunities for my development in teaching and research.

From professional to (strictly) personal life, without Carlo Pia the legal perspective of the project would be sorely under-developed, and he helped immensely with all issues of clarity of my thoughts and their presentation. Carlo's encouragement and love were truly indispensable. Thanks also to the Pia family for their support, if especially Mafalda for the revelation: "Trent, honey, you're always confused." Finally, I must thank my family, including my siblings Boomer, who I named when I was five, and Micah, who with his wife, Michelle, declined to let me name their three wonderful children. My parents Kim and Fred were unwavering in their support for my education. This thesis is dedicated to my parents; without whom it would not have been possible.

Introduction – The “gay” refugee

“A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...”¹

This thesis concerns how the definition of refugee in Article 1A(2) of the 1951 Convention Relating to the Status of Refugees, as applied by the 1967 Protocol, has been interpreted in relation to asylum claims in the United Kingdom (UK) that are based on sexual orientation and gender identity.² Hathaway (2005, 63–64) suggests that the “interpretive challenge” in refugee law is that states are obliged to interpret the historical legal context of refugee rights so that these protections can be guaranteed in light of contemporary challenges and the needs of people seeking asylum today. Seen through a different lens, Tuitt (1996, 14) has described the on-going task of refugee law as constructing the identity of “refugee.” Building on these perspectives, this research explores the ways in which the recognition of sexual minority refugee status has expanded over time, and how “gay” refugees have been recognised as being persecuted, and have had their identities constructed in judicial decision-making. This introduction will outline the study but for the sake of clarity and by way of background, first offers illustrative examples of the treatment of “gay” refugees, discusses what is meant by the fear of being persecuted, and foregrounds some recent developments pertaining to sexual minorities seeking asylum in the UK.

In 2008 and 2009, the asylum claim of John “Bosco” Nyombi was well publicised in the UK leading up to his deportation, as members of his church and campaigners sought to prevent his removal (see e.g. Bolton 2008; Davies 2008),³ and when it was found that his removal from the UK was “manifestly unlawful” (*N* [2009], para 11; see also Dugan 2009; Verkaik 2009).⁴ When Bosco arrived in the UK in 2001, he claimed asylum and was detained for four months. When he initially presented to the Home Office he was asked: “why did you leave your country?” and why he could not “change” or be “discreet” if he knew he could be persecuted for

¹ Article 1A(2) of the Convention Relating to the Status of Refugees, 189 UNTS 137.

² Appendix I lists acronyms and abbreviations, e.g. UK, LGBT, and so on.

³ Local television stations also aired the story.

⁴ Full case citations and abbreviations can be found in Appendix IV.

being gay in Uganda (Thiam 2012). UK adjudicators acknowledged that Bosco was a homosexual, and this fact remained uncontested throughout his appeals (*N* [2009], para 2).

Bosco lived and worked in Portsmouth and Southampton from 2002 to 2008 while his claim was being appealed until he eventually exhausted the asylum appeals process. Advocates emphasised his upstanding character to the press, that he had been in continual employment, paid his taxes, and always checked in with police as per the requirement of his temporary leave to remain (*Portsmouth News* 2008a; 2008b). However, the public attention proved to be dangerous to him when a leading Ugandan newspaper featured a story entitled “Gay refuses to return to Uganda” on its front page prior to his deportation, coverage which closely mirrored UK media reporting (*New Vision* 2008). In Uganda homosexuality was already a criminal offence before recent efforts to introduce harsher restrictions and sentencing (Lazaro 2012), and Bosco’s family had disowned him because of his sexuality (*Portsmouth News* 2008b; Alcock 2011).

At one of Bosco’s usual check-ins at a local police station he was arrested and turned over to the Home Office.⁵ Bosco was told he was going for an interview when in fact he was being secretly detained and deported. Bosco’s phone was confiscated so he would be unable to contact supporters. Campaigners called, but they were told Bosco was not in the detention facility. Denied access to his lawyer and the immigration officer, the UK authorities forcibly boarded Bosco on to a flight to Uganda (*N* [2009], para 13-14, 17; see also Dugan 2009).

“Four of them overcame me, one knelt on my chest and punched me in the groin. This took the strength out of my legs and they put leg splints on... I was then carried onto the plane. Still with the leg splints and handcuffs, I was seated between two Officers. I was still in tears but I wanted to hide myself from the other passengers” (Fair [unpublished], 22).

Upon landing, the “overseas escorts” left Bosco at passport control with money to bribe the agent. “We know all about you and we have read everything,” threatened

⁵ I have somewhat simplified the events of his return and time in Uganda with the help of personal correspondence with John Bosco, Fair [unpublished], and Thiam (2012). I am grateful to John Bosco Nyombi for our discussion, and Alan Fair for his assistance and permission to cite the unpublished biography.

the border officer (Fair [unpublished], 23). The officer asked Bosco why he had adopted “the European culture” and asserted, “they do not have gay people in Uganda” (Fair [unpublished], 23; see also Museveni 2014). But the officer also denied Bosco’s Ugandan citizenship as he did not have official papers as a result of the hasty deportation, though eventually he was able to get through with a bribe. In hiding for months, Bosco was apprehended and imprisoned twice (see *N* [2009], para 29-31). On one occasion he was beaten by prison officers who reiterated the adage “they don’t have gay men in Uganda, [he] was not [a Ugandan]” (Fair [unpublished], 26). Later released again on a bribe, he was told to report to the police to answer the charges relating to the *New Vision* article regarding his sexual orientation.

The High Court later ruled Bosco’s removal was “manifestly unlawful,” and that he be brought back (*N* [2009], para 11, 28, 34-35). It was argued on behalf of the Secretary of State for the Home Department (SSHD) that a fresh claim would lack merit and be rejected too, that the *New Vision* article had been “manufactured” to bolster his claim, even that his treatment by Ugandan authorities was the result of his lacking official documentation and not his homosexuality (*N* [2009], para 32-33). The judge disagreed and ordered the SSHD “to secure the return of the claimant to the United Kingdom” (*N* [2009], para 35). In the fresh claim the Immigration Judge (IJ) granted Bosco refugee status until 2014 (Fair [unpublished], 37), and he was granted indefinite leave to remain that year, thirteen years after first claiming asylum in the UK.⁶ However, Bosco’s harrowing story is unfortunately indicative of the challenges facing sexual minority asylum seekers, and the potential consequences of a state’s failure to recognise the refugee status of at-risk persons.

“The last year has been torture. I’ve never done anything wrong and what the Home Office did was illegal. All the things I went through are because of them” (Bosco in Dugan 2009).

The traumas of Bosco’s case show the very real risk of being persecuted upon return to a country of origin, faced by many asylum seekers who await determination or

⁶ Prossy Kakooza, Twitter correspondence, 12 September 2014, available at: <https://twitter.com/Pkakooza/status/510460788130480128> [Last accessed 11 November 2015].

have been refused asylum (see e.g. Shidlo and Ahola 2013).⁷ The risks to asylum seekers upon being forcibly repatriated could be shame, hiding, rejection by their family, and discrimination in employment and wider society – the effects of which cumulatively can amount to persecution. And asylum seekers may be forced to live a life defined by a persistent anxiety and fear of harm, whether in the form of targeted, random, or systemic acts of violence because of their actual or imputed gender or sexual identity. As noted by Lord Justice (LJ) Dyson (para 30) in *Sivakumar* [2001], all “asylum cases call for consideration with ‘the most anxious scrutiny,’” because “at stake...is fundamental human rights, including the right to life itself.”

Refugee status determination (RSD), in this context, the determination of sexual minorities’ claims, precariously balances stated human rights and protection aims with the perceived needs of immigration control (see in particular chapter five). A major study of RSD in the United States memorably describes seeking asylum as “refugee roulette” as the researchers found that determination varies considerably between adjudicators around the country at all levels (Ramji-Nogales et al. 2009). Similar observations have been made of the UK (Persson 2013; Yeo 2013), and I would argue that the practical impossibility of a perfectly fair and consistent determination regime must be acknowledged (see in particular chapter three; Gray and McDowall 2013, 25). As Sedley LJ (para 4) puts it in *AK* [2008], “two conscientious fact finders can reach opposite conclusions on the same evidence.”

This thesis does not directly examine the legal process of claiming asylum. The analysis considers the possibilities of proof, practices of adjudication, and the assumptions of the case law in the construction of a “genuine” sexual minority refugee from the perspective of social research and theory. But behind these more abstract legal discussions are real people, whose human rights and lives are at stake. Inherent problems of proof, credibility, and judicial subjectivity aside, the arguments in chapters six and seven propose a framework for a more appropriate determination of refugee – one that accounts for the lived experience, struggle, and pain of asylum seekers like John Bosco.

⁷ It should be noted, however, that in strictly legal terms the emotional state of an asylum seeker is not central to the determination – the Convention’s “use of ‘fear’ was intended to emphasize the forward-looking nature of the test,” and not the “claimant’s state of mind” (Hathaway 1991, 69).

1 The global and national context: The struggle for sexual minority human rights and refugee status

Before bringing into focus the purpose of this study and outlining the thesis, it is helpful to set out the broader context of why sexual minorities are seeking asylum, and the political landscape and challenges of gaining refugee status in the UK. More than seventy states have anti-homosexual laws with sentences ranging from imprisonment to the death sentence (Stewart 2015). In these states and others without explicit prohibitions, sexual minorities may face discrimination and violence in their everyday lives (UNHCR 2011a; OHCHR 2012a). “You faggot. We should stone you just like the Bible says,” said one of three men who randomly attacked a young Kenyan, because they perceived him to be gay (Kaleidoscope 2015, 20). Explanations for the phenomenon may vary across states but there has been an apparent increase in trans- and homo-phobic rhetoric globally, which includes calls to enforce existing prohibitive laws and pass new measures. At minimum, it would seem the visibility of lesbian, gay, bisexual, and transgender (LGBT) rights issues has increased and been followed by less welcome attention. For example, Christian fundamentalists in several African countries have advocated for anti-homosexual laws which have been embraced by (ironically) anti-colonial discourses such as the case with recent Ugandan bills (Alcock 2011; Mugisha 2011; 2014; Lennox and Waites 2013; Akullo 2014), and there is a similarly toxic mix in the post-Soviet revival of the Orthodox Church and Russian nationalism (Khazan 2013; Parkinson 2014; Persson 2014; *VICE* 2014; Wilkinson 2014). Islamists and other religious fundamentalists have also incited violence against perceived homosexuals, and imposed horrific punishments (see e.g. Ravichandran 2009; Canning 2010; Ali 2013; Khan 2015; Zaccour 2015).

World leaders both for and against sexual minority human rights have intensified the substantive and rhetorical debate (see e.g. Swiebel 2009; Clinton 2010; Roberts 2013a; Obama 2014; Reid 2014). In 2010, then-US Secretary of State Hillary Clinton evoked her iconic speech on women’s rights in 1995 and proclaimed that “human rights are gay rights and gay rights are human rights” (Clinton 2010). At the Commonwealth Heads of Government Meeting in 2011, UK Prime Minister David Cameron floated a proposal that development aid should be linked to

countries’ human rights records which provoked “fierce resistance” from states with anti-homosexual laws as well as some sexual minority activists who feared repercussions (Kaleidoscope 2015, 11).

Sexual minorities’ global struggle for acceptance and social inclusion has generated a significant amount of international interest and action (see e.g. Cox 2010; Nassar 2011; Onziema 2014; Quesada et al. 2014). The United Nations has also been increasingly vocal on lesbian, gay, bisexual, transgender, and intersex (LGBTI) human rights and refugee issues (see e.g. Wilkes 2010; Kirchick 2012; OHCHR 2012b; Knight 2013; see also Sen 2015). The increasing global visibility of LGBTI issues seems to have strengthened the political imperative to support human rights abroad (Lazaro 2012), and increased public awareness of sexual minorities seeking asylum in the UK. This is only a brief consideration of global developments, but a key aspect of the construction of “refugee” is transnational, as will be further discussed (see in particular chapters four and five). International and domestic dialogue is critical to the advancement of sexual minority human rights but the rhetorical affirmation should not “pinkwash” failures to act in tangible ways, for example, to protect refugees.

HJ and HT [2010] was a landmark ruling of the UK Supreme Court (UKSC) for the recognition of “gay” refugees. The decision affirmed rights to expression and association, and clarified that refugee status could not be refused on grounds that a sexual minority could be “discreet” to avoid being persecuted. Prior to the UKSC’s ruling in *HJ and HT*, the Government’s Coalition Programme stated that the UK would “stop the deportation of asylum seekers who have had to leave particular countries because their sexual orientation or gender identification puts them at proven risk of imprisonment, torture or execution” (Coalition 2010, 18; see also Lanchin 2010; Gray and McDowall 2013, 23). Commenting on *HJ and HT*, Home Secretary Theresa May noted that the Government had already promised improvements and added, “I do not believe it is acceptable to send people home and expect them to hide their sexuality [i.e. be discreet] to avoid persecution” (Meikle 2010; see also *BBC* 2010; *Telegraph* 2010). In the 2015 general election, the Conservatives’ platform did not contain a pledge comparable to the 2010 Coalition Programme but instead touted the Marriage (Same Sex Couples) Act 2013 and

promised measures to restrict migration (Conservative Party 2015, 28–31, 46). In the same election, Labour issued a supplementary LGBT manifesto in which it was noted that there had “been too many cases of discriminatory and offensive treatment of LGBT people claiming asylum,” and the party pledged to “review the procedures to ensure the rules are upheld fairly and humanely” if it was elected (Labour Party 2015, 10; see also Robins 2015).

It seems that refugee and asylum issues are politicised and command public interest, but it is helpful to focus in on some critical points within current political discourses. For better or worse, sexual minority claimants have also received a generous amount of media coverage. Provocatively titled stories in *The Sun*, “Say you are gay if you want to stay in UK,” and *The Daily Mail*, “Posters tell migrants they can lie about their sexuality to claim asylum,” recently claimed that migration activists had been coaching migrants at Calais on how to get into the UK (Wilkinson 2014; Smith 2015; see also Jimenez 2004).⁸ Similarly in 2012 the *Daily Times of Nigeria* published “How to get asylum,” offering sardonic instructions like gender identity is easy to fake “if you are an effeminate man,” and if there are any pride events “attend and be in the line of fire of the cameramen” to bolster your claim to be gay (Stewart 2012).⁹ Another short-lived scandal involved a Ugandan man who had been convicted of raping a woman in the UK, who then claimed asylum as a gay man in order to “exploit the situation” in Uganda in an attempt to remain in the UK (*PinkNews* 2011; McGivern 2012). In spite of more sensationalist press, a preponderance of media has sought to humanise the struggles of sexual minority refugees as well as revealed Home Office malpractice (see e.g. Bayer 2011; *BBC* 2011; 2012; Burns 2011; McVeigh 2011a; Kirby 2015).

While generally outside the scope of this thesis, other developments should be briefly highlighted for context of the obstacles facing sexual minority asylum seekers. The most pressing concerns include that asylum seekers have been subjected to homophobic verbal abuse and sexual harassment in detention centres, in addition

⁸ Other countries clearly share similar anxieties about the migration “floodgate” and gay asylum seekers, e.g. Jimenez (2004) in the *Globe and Mail* has since been edited on the website but the title, “Gay refugee claimants seeking haven in Canada” was originally followed by the subtitle, “Bogus applications partly account for surging number, refugee experts say” (Morgan 2006, 142).

⁹ The paper has since removed the piece so I was happy to rediscover excerpts on Stewart’s (2012) blog and indispensable resource, *Erasing 76 Crimes*, available at: <http://76crimes.com/>.

to the already traumatic effects of the asylum process as well as harsh treatment at the hands of border officers and contracted employees (Bryant 2014; Morgan 2014; Strudwick 2015; UKLGIG 2015; see also Tabak and Levitan 2013; Faiola 2015). The detained fast-track (DFT) procedure has been more widely criticised, and there are specific concerns relating to sexual minority claimants. Among other hurdles there can be difficulties in disclosing gender and sexuality (Shidlo and Ahola 2013), discussing culturally relative and sensitive topics, and establishing credibility under the pressurised timescale of DFT (McVeigh 2011b; Raj 2014; Vine 2014; Batchelor 2015). These examples seem to turn the concept of a “safe” country for sexual minority asylum seekers on its head, and highlight claimants’ needs and vulnerabilities (see chapter seven).

The public revelations that asylum seekers had been submitting sexually explicit media when faced with mounting pressure to “prove” their sexual orientation, and had been subjected to shockingly intrusive questioning, briefly captivated the media’s attention (see e.g. Elgot 2013; Stanbridge 2013; Taylor 2013; Taylor and Townsend 2014; Townsend and Taylor 2014; Yeo 2014). Other EU Member States have faced similar scrutiny of their recognition and handling of sexual minority asylum seekers (see e.g. Chompsky 2013; Day 2013; Eigenraam 2013; Badcock 2015). In decisions affecting UK practice, the European Court of Justice (ECJ), now called the Court of Justice of the European Union (CJEU), has also weighed in on anti-sodomy laws and the testing of credibility (Amnesty International 2013; *BBC* 2013; Smith 2014; API 2015, 6, 8, 10, 21).¹⁰

Finally, sustained pressure on the Home Office to release statistics of how many LGBT asylum claims were made has failed to force compliance with previous commitments to do so (McVeigh 2011b; Bowcott 2013; Roberts 2014). A crude estimate placed the number of LGBT asylum seekers in 2008 between 1,200-1,800 (Bell and Hansen 2009, 64). In 2013, Chief Inspector Vine (2014, 8–9, 40) reported 283 or 1.4% of asylum claims had been flagged for sexual orientation grounds, but noted that the figure is likely to have been higher due to inconsistent reporting. To date, no complete official statistics are available; however, even in the event they were, their veracity can be doubted given Vine’s concerns about flagging claims

¹⁰ X, Y, and Z [2013] on prohibition and persecution; A, B, and C [2014] on credibility.

The inclusive guise of “gay” asylum made on sexual identity grounds until UK Visas and Immigration (UKVI) demonstrates consistency in its reporting. Stakeholders and other researchers may find such statistics useful in setting out successful and refused claims (e.g. Gray and McDowall 2013, 124), and I discuss the controversy here for general context and to indicate a direction taken in domestic legal advocacy.

However, knowing the particular numbers of claimants is not as important in the present research, which concerns itself with the “who” and “what” questions of identity and persecution in the construction of a genuine “gay” refugee. The primary research question to be addressed asks: **(1) How do UK legal institutions construct “legitimate” or “genuine” sexual minority asylum seekers in judicial decision-making?** Bringing aspects of that question into focus, the sub-questions first consider the two necessary conditions in the Convention definition of refugee: (a) the fact that one is seeking refuge “for reasons of” an Article 1A(2) category, in particular here “membership of a particular social group;” and (b) having a “well-founded fear of being persecuted.” These questions ask: **(a) How does law identify sexual and gender identity in the transnational context of asylum? (b) How is the persecution of sexual minorities understood in legal and political discourse?** A third sub-question (c) is posed to address the challenges raised by identity in the transnational context of seeking asylum: **(c) What are the implications of this research for theories of sexual and gender identity and, in particular, for sexual autonomy?** The next section situates these questions in the structure of the thesis.

2 Overview of the thesis

This thesis is divided into three parts. The three background chapters in Part I consider gender and sexuality, refugee law, and the research questions and design. In Part II the case law analytical chapters, four and five, present an analysis of the concepts “particular social group” and “persecution” as they relate to sexual minority asylum seekers in the case law. Finally, I offer a critical appraisal of the findings in Part III, and set out a normative argument for an alternative way forward, based on using the concepts of *norm deviance* and *relational autonomy*.

In LGBT asylum cases, the adjudicator’s first problem to consider is “whether there is such a thing as a transnationally recognizable gay identity” (Miller 2005, 165; see also Miller 1999). Chapter one establishes that a range of empirical

evidence indicates that gender, same-sex behaviour and identities are historically contingent and culturally relative. I conclude that presupposing universal meaning and values should be avoided, and that the current reification of identities in advocacy and law is a pressing problem in transnational decision-making. Of course asylum seekers may identify as L, G, B or T, but adjudicating a sexual minority asylum claim requires sensitivity to context so as not to impose our own categorical stereotypes. As opposed to a more finite “LGBT” category, I often use “sexual minority” to evoke indeterminacy in describing the broader range of behaviour- and identity-based categories of gender and sexuality, which in a transnational context should not be conflated but are also not always mutually exclusive (see Walker 2003; Rehaag 2009). I also use the term “SOGI” for sexual orientation and gender identity (e.g. Yogyakarta 2007; Kollman and Waites 2009, 5).

Chapter two explores the historical background of human rights and refugee law as is relevant to international instruments and institutions, and the UK’s asylum system. The scope for the protection of sexual minorities and their human rights under the Refugee Convention has expanded. Here, the most relevant part of the 1951 Convention definition of refugee set out in Article 1A(2) is “[a] person who owing to a well-founded fear of being persecuted for reasons of...membership of a *particular social group* [emphasis added].” Since sexual and gender identity are not specified grounds for protection, SOGI-based claims have been “read-in” under the “particular social group” (PSG) category. The legal discourse however suggests that UK protection is qualified by the assumption that sexual and gender identity is “immutable,” something “innate” and “unchangeable.” The case law analytical chapters will show that, far from opening the UK to persecuted sexual minorities, the prevalence of this assumption narrows contemporary asylum law.

Part I concludes with the research design and methodology. Chapter three explains the socio-legal approach to the study, theory of constructivism, the choice of the perspective of discourse analysis, and the purposive sampling of the case law considered. This chapter also sets out the research questions in further detail, having first contextualised their significance in chapters one and two.

In Part II, the case law analytical chapters, chapter four considers identity and chapter five addresses persecution. Many other “Western” or “liberal” states (for lack

of better terms) recognised sexual orientation or identity as a PSG in the late 1980s and 1990s, as did the UNHCR in 1995 (Walker 2000; Millbank 2002, 149; 2005; Johnson 2007, 105). The UK House of Lords (now Supreme Court) initially accepted sexual minorities, or “homosexuals,” under the Convention category PSG in the case of *Islam and Shah* [1999]. But in practice a decade of case law shows that adjudicators systematically undermined asylum claims made for reasons of sexual orientation (see in particular chapter four). By expecting asylum seekers to be “discreet” or to “conceal” their sexual identity upon return, adjudicators often found it was unlikely that the feared persecution would occur in countries of origin (Weßels 2013, 55). In other words, discretion undermined the necessary “well-founded fear” in the definition of refugee (see in particular chapter five).

In *HJ and HT* [2010] the Supreme Court rejected the discretion approach to determination, and ruled that claimants should not have to conceal their sexuality to avoid persecution. However, in the analysis of this case in chapters four and five I draw on historic cases as well as more current examples to illustrate how the construction of identity has been exclusive, or narrowed the application of *who* might be considered a sexual minority at risk of persecution. In doing so, I want to identify some of the problematic assumptions about immutability made by adjudicators, as well as the determination of persecution against sexual minorities.

Finally, in Part III, chapter six articulates that PSG could be more appropriately framed by emphasis on the claimant’s *norm deviance* – deviance from sex, gender, and sexuality norms, the transgression of social conventions, such as defined sex/gender roles or legal rules, or simply by being identified by wider society as “perverse” or “deviant.” In particular, what concerns us here is the asylum seeker whose particular figuration(s) of sex, gender, and/or sexuality may place them at risk of discriminatory persecution; not who is “truly” LGB or T. I do not argue that identity is irrelevant (in the sense of people claiming to be LGB or T), but that it should be understood differently and defined in part by the behaviour of the persecutors, or *persecutory intent*, to suppress non-conforming sex/gender and sexuality. In a sense, this is a new concept, but it is grounded in social theory and is in some ways complementary to existing interpretations of refugee law.

Chapter seven then argues that individual autonomy is necessary for sexual minorities to be free of persecution, but it is also insufficient, because it is *relational autonomy* that ensures the conditions of human flourishing which make autonomy related to gender and sexuality possible. Having the capacity to realise one’s own “identity” is dependent on relations with others, and sexual minorities thus require equal treatment of their rights, including both privacy and access to the public sphere to achieve meaningful autonomy. Relational autonomy challenges us to think about rights differently. RSD should focus on how rights can be emptied of meaning and significance through the denial of relationships. That is to say, the loss of relational autonomy would constitute a well-founded fear of persecution.

3 Argument and contribution

D’Emilio (1998a, 244–245) observes that by claiming an innate identity, homosexuality rhetorically becomes a “poor second choice,” so “[w]e must not slip into the opportunistic defence that only homosexuals become homosexuals.” Applying this to refugee status I wonder if rights to self-determine same sex-relationships, gender non-conformity, and whether to be private and access the public on our own terms, are not valid life choices to exercise free of persecution without laying claim to an essential LGBT personhood? A truly inclusive construction of refugee would not have to rely on the exclusive determination of categories.

Chief Inspector Vine’s (2014) report into the Home Office’s handling of sexual orientation-based claims recommends that adjudicators should focus on open questions that “[enable] the applicant to provide a narrative about realisation of their sexuality” (Vine 2014, 19), and quotes an Immigration Judge who said that questions regarding sexual orientation “should focus on an *‘individual’s inner life’*” (Vine 2014, 20). However, adjudicators *cannot* really know a claimant’s “true” inner identity, whether it is immutable or not; what asylum law *can* affirm is a right to choose, which in practice is not too dissimilar from “choosing” religion or political opinion. An asylum seeker’s human capacities to choose to identify with and practice different ways of being sexual, gendered, doing family, or being in love, as well as whether to be in or out of particular communities (Nedelsky 1996a, 79; Lacey 1998, 119), should be a focal point of the “social group” of sexual minorities and how this results in persecution.

This thesis aims to set out that – in spite of the flaws of any subjective judicial process and because of the imperatives of protection – we can and should accomplish the protection of sexual minority refugees with a more appropriate framework. This thesis will conclude by arguing that refugee protection should not rely on the prescriptive framework of “immutability” or “protected characteristics” that creates legally unnecessary categories into which asylum seekers must “fit,” but should instead focus on individual difference and the essential need to relate if one is to live without the fear of being persecuted.

Part I – Background

Chapter One – A transnationally recognisable “gay” identity?

Establishing the “nature” of sexuality is a principle issue in understanding the grounds on which sexual and gender identity-based asylum claims are included within “particular social group” (PSG). In determining asylum claims, the UK government and decision-makers are endowed with “the epistemological authority to know and to designate what (and who) a homosexual is” (Halley 1993, 88). This chapter will explore how “knowing” a homosexual may be complicated by global sexual diversity. In the determination of lesbian, gay, bisexual, and transgender (LGBT) asylum claims, the adjudicator’s first problem to consider is “whether there is such a thing as a transnationally recognizable gay identity” (Miller 2005, 165; see also Miller 1999). Authors such as Millbank (2009a), McGhee (2000), Walker (1996) and others have shown it is often necessary to look or act gay, or to fit the adjudicator’s stereotype of the identity claim in asylum proceedings. “Institutionalised” LGBT identities may be at odds with sexual diversity in asylum proceedings where adjudicators may expect claimants to validate certain (Western) traits in an identity claim, or otherwise impose conduct-based approaches relating to sexual acts. This chapter suggests the global heterogeneity of ways in which sexual behaviours and identities manifest problematises the Western cultural lens that adjudicators may deploy to determine the “legitimacy” or “genuineness” of a sexual minority asylum claim.

Part one of this chapter considers the historical contingency of sexuality, the “creation” of the homosexual “species” in the West, and briefly touches upon how political identities sprung from organised gay rights movements. These culturally relative categories, i.e. the “gay identities” developed in Europe and North America, are potentially at odds with alternative paradigms of sexuality in transnational contexts.¹¹ Part two considers the possibility of “gay history,” and multicultural examples of sexual behaviour and identity. Finally, part three explores sexuality and globalisation, and the possibility of a transnationally recognisable “gay” identity.

¹¹ I will be using “transnational” to describe the processes of migration, the relevance of the nation-state, as a synonym for “diasporic,” the possibility of a particular form of postcolonialism, and the importance of social movements (Grewal and Kaplan 2001, 664–65). In later chapters (especially four and five), I consider how refugee status determination (RSD) is *itself* a transnational process.

1 Historically contingent

The first task of this chapter is to deal with the historical contingencies of sexual and gender identity. Here, this section will expose “modern,” or “institutionalised” gay identities as historically situated products of European and North American origin that have inscribed particular meanings to sexuality in medical and legal practice. A review of the literature demonstrates that gay, lesbian, and bisexual identities are (socially) constructed categories, and their creation and proliferation is related to modernisation and contemporary social movements.

1.1 Defining “homosexuality”

The Homosexuals, a mainstream television documentary first broadcast in the United States in 1967, investigates the “homosexual menace” (Rubin 1993, 5), and claims that the “condition” is medically diagnosable and morally contrary to social decency.¹² The documentary provides an unflattering depiction of the “homosexual lifestyle,” and a barometer of the world before gay liberation movements, when increasing calls for rights met with bewildered heterosexual bigotry. Notable journalist Mike Wallace concludes the programme with a summary of the (perceived) reality of homosexuals:

“The dilemma of the homosexual: told by the medical profession he is sick; by the law that he’s a criminal; shunned by employers; rejected by heterosexual society; incapable of a fulfilling relationship with a woman, or for that matter with a man. At the center of his life he remains anonymous. A displaced person. An outsider” (Wallace, 1967).¹³

Here, I seek to trace the history of this dialogue, as well as the movements spawned from the corrosive atmosphere of homophobia as typified by Wallace’s statement. These social stigmas, scientific classifications, and legal prosecutions were formative influences on current “gay identities,” which were particular to the socio-political and economic realities of advanced industrial states.

¹²The contemporary docudrama *A Very British Sex Scandal* (Reams 2007) covers roughly the same time period in Britain; there are significant thematic similarities and *The Homosexuals* interestingly references England’s impending decriminalization homosexual activity as if it may be something to “learn” from. See also Christian (1961), D’Emilio (1998b), and Weeks (1990, 156–182).

¹³ See also Uganda’s President Museveni’s (2014) reasons for signing legislation for tough restrictions on homosexuality.

A number of authors have traced the development of ideas on homosexuality through history, and a general consensus is that “new conceptualisations” or, rather, specifications of certain sexual acts and identities appeared in the late nineteenth- and early-twentieth century (Weeks 1981, 102). Plummer (1992, 5) proposes that “homosexual” was coined in 1869 by a Hungarian doctor, K. M. Kertbeny,¹⁴ and Halperin (1990, 15) describes how the word came into English through translations of medical work on sexual deviance. Before the term homosexuality came into usage, “sexual inversion” applied to a range of gender-nonconformity including, but not specifically denoting, same-sex desire (Escoffier 1985, 135). Halperin (1990, 15) credits Charles Gilbert Chaddock with introducing “homo-sexuality” into the *Oxford English Dictionary* in 1892. Instead of being “essential” or “natural” categories, the homosexual/heterosexual distinction “represents a peculiar turn in conceptualizing, experiencing, and institutionalizing human nature” (Halperin 1990, 25). The categorisation of “homosexuals” accompanied modern scientific and regulatory discourses, and was particular to Europe and North America. The classification of sexuality in medical practice, criminal surveillance, and the subsequent influence over popular conscience prompted social change, “both in the ways a hostile society labelled homosexuality, and in the way those stigmatized saw themselves” (Weeks 1990, 3; see also Jamieson 2002, 511–512). In this way, modern society labelled deviant sexualities, and gay, lesbian, and transvestite (generally transgender today) identities came to be used in subcultures and nascent social movements.

Leaving aside a detailed discussion of the religious prescriptions against sodomy and criminal sanctions inflicted on sexual deviants, I move to consider how medical science ascribed labels to “abnormal” sexual practices and the supposed consequences. Through medical definitions of sexual deviance, the “homosexual” came into being through specifications of the meanings of homosexual behaviour and, particularly, “sexual object choice” (Halperin 1990, 15). In other words, sodomy had been a criminal offence rooted in (biblical) sin, but medical definitions created a “homosexual” in classifying same-sex desire as an intrinsic, individual, and deviant condition. These processes, especially through the turn of the nineteenth century, contributed to the rise of a “class” of people that had previously only committed act-

¹⁴ cf. Weeks (1990, 3), who claims that the term was “coined by a Hungarian, Karoly Maria Benkert,” and that “inversion” was not common until the same period as “homosexual.”

based indiscretions of moral turpitude. The persistent relevance of Foucault’s *History of Sexuality* should be addressed here, not least for the seminal importance of his work in subsequent scholarship on topics of sexuality, but also his astute descriptions of these discourses and their effects. To quote at length perhaps the most oft-cited passage:

“As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology with an indiscreet anatomy and possibly a mysterious physiology... Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphroditism of the soul. *The sodomite had been a temporary aberration; the homosexual was now a species* [emphasis added]” (Foucault 1990, 42).

Although others had made similar observations, Weeks (1981, 6, 10) describes the most significant artefact of Foucault’s work is the “recognition of the constant struggles within the definitions of sexuality.” Foucault detached sexuality from biology, interpreting it instead as a cultural production and peculiar deployment of social (power) relations (Halperin 1990, 7).

Foucault’s works also overturned the dominant “repression hypothesis,” instead positing that sexual behaviours were governed by “the powers of ‘incitement,’ definition and regulation” (Weeks 1981, 5). One of his many insights that has generated academic research and discussion is that specifications of sexual identities, such as “homosexual,” are not inherently liberating but may also act as mechanisms of social control (Weeks 1981, 5). Although I am not intending to endorse Foucault’s conclusions or adopt these positions uncritically, he asks important questions, draws fundamental, if controversial, conclusions, and his methods have been applied to a range of later works (e.g. as in feminist and queer theory). Definition, regulation, as well as resistance will be implicitly revisited in part three of this chapter regarding homophobia and the growth of LGBT communities.

Although it is apparent that a taxonomy of sexuality can (and often *has*) function(ed) as a mechanism of control, these identities were seized in counter-

discourses and used to organise around a common banner in gay rights movements.¹⁵ Weeks (1981, 102) argues that just as medical, psychological, and legal categorisation defined “a new subject of social observation and speculation,” this historical juncture also created new possibilities in self- and community-articulation. Certainly, the production of sexual “conditions” was repressive in that medicine was “acting as the moral policemen of the mind and body” (Weeks 1990, 31), but in the latter half of the twentieth century this position was challenged in multiple arenas, such that it became more and more untenable. Crucially, the so-called “medical model” has been influential in the “individualisation of homosexuality” (Weeks 1981, 105; see also 1990, 23–32). However, I suggest that economic factors were equally if not more important in the creation of modern sexual identities – capitalism fostered the conditions for independence from traditional family structures and other crucial social changes. Building on the implications of medical discourses of sexuality and the ascription of same-sex acts onto “homosexuals,” I will now consider the importance of sexual political economy in the birth of gay identities.

1.2 Capitalism and sexual identities

Gay liberation began in the late 1960s without knowledge of a “gay history” with which to “fashion [its] goals and strategy,” so gay men and lesbians “invented a mythology” (D’Emilio 1998a, 239). Rejecting the myth of the “eternal homosexual” that gays and lesbians are everywhere, have, and always will be, D’Emilio asserts in an influential essay, “Capitalism and Gay Identity” (first published in 1983), that gay identities in the West are a “product of history,” and more specifically, wage labour capitalism:

“Their emergence is associated with the relations of capitalism; it has been the historical development of capitalism... that has allowed large numbers of men and women in the late twentieth century to call themselves gay, to see themselves as part of a community of similar

¹⁵ I am aware this usage of “counter-discourse” can be problematic. Foucault’s usage of this term acknowledged counter-discourses “exist but apparently as little more than demonstrations by subjects of their successful internalisation of knowledge/power and their ability to police themselves” (Evans 1993, 13). I use counter-discourse here in the sense that sexual minorities have seized labels in order to make claims. That is, if labels can be controlling, it is also possible that through counter- or reverse-discourse “homosexuality can begin to speak in its own behalf, to demand that its legitimacy or ‘naturalness’ be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified” (de Vos 2000, 199–200).

men and women, and to organize politically on the basis of identity” (D’Emilio 1998a, 240).

A number of authors have linked the emergence of gay identities to the socioeconomic conditions of the industrial (or post-industrial) liberal democratic states including, but not limited to, McIntosh (1992), Weeks (1990), D’Emilio (1983; 1998a), Escoffier (1985), Evans (1993), Altman (2001), Cantú (2009), and to a certain extent, regarding urbanization, Rubin (1993). Evans (1993, 35) persuasively argues that “the sexualisation of modern societies,” and in this instance the creation of gay identities, is rooted in the “material dynamics of late capitalism” and its effects on social and political life. However, that is not to say a materialist approach alone explains these social changes. Although it is important to flag the significance of socioeconomic forces, I want to avoid unwittingly creating an “undeveloped” versus “developed” narrative of sending and receiving countries in asylum law. Cantú (2009) makes an important contribution to the literature on “sexual political economy,” by bringing in characteristically “queer” concerns. In addition to being “dependent upon social location for interpretation,” gay identities have been shaped by the social shifts associated with “capitalist development and the intersecting influences of race, class, and gender” (Cantú 2009, 166). Cantú (2009, 29) terms his approach the “queer materialist paradigm,” which is helpful in understanding the distinction between the emergence of Western sexual identities from the industrial experience on the one hand, and global sexual diversity on the other. Identities may be shaped by economic imperatives but in conjunction with culturally specific interpretations of race, class, gender, religion, and other social signifiers (see further Cantú 2009, especially 55–73). The production (and acknowledgement) of sexual and gender identities is particular to the state and social context.

In short, I would suggest that economic change proved crucial in the formulation of modern gay *identities* from homosexual *behaviours*. Organised gay and lesbian movements and the associated “institutionalised” identities emerged when these groups gained the economic resources and political traction necessary to compete in the public arena (Escoffier 1985, 119–120). Weeks (1990, 173) claims “puritan moral codes began to crumble” in the 1960s during the “climax...of economic expansion and affluence,” and Evans (1993, 68) elaborates the “permissive

moment” of sexual liberation occurred in “a period of unprecedented judicial reform, affluence, and leisure and lifestyle consumerism which challenged fundamental norms of monogamous marital heterosexual love and rational fidelity.”¹⁶ From the beginning of industrialisation, to urbanisation, and beyond: “Capitalism has created the material condition for homosexual desire to express itself as a central component of some individuals’ lives” (D’Emilio 1998a, 244). Altman (1996, para 6) argues similar connections are evident between the growth of consumerism and the visibility of gay and lesbian identities internationally (discussed below in part three of this chapter). Out of the stigmatising labels of law, psychology and medicine, in the favourable economic conditions of (post-)industrial liberal democracies, gay liberation and refracted movements that followed created the ideological conditions for people to “come out of the closet,” and enabled choices in the articulation of identities and alternative lifestyles.

1.3 Institutionalised identities

Recalling *The Homosexuals* above, which describes an anonymous, displaced person, this section will consider how “coming out” created public identities and challenged polities to tolerate and accept sexual minorities. Of course, I am not claiming the absolute equality of sexual minorities in the UK; rather, an excavation of this question reveals a non-linear, slow, and on-going process.¹⁷ Here, I will explore the role social movements played in rights claims, and how the not-too-distant repression of sexual minorities in the West spawned political resistance and aided the consolidation of “gay” identities.¹⁸

Social acceptance of homosexuality involved “coming out” on a personal level for thousands of gay people but, on another level, coming out also involved “a

¹⁶ Although Weeks is specifically referring to the UK and Evans focuses mainly on the UK, I interpret these assertions also apply to, or have relevance in, other (post-)industrial economies.

¹⁷ It should be noted, however, that the notion of “progress” is contested. If the “advancement” of LGBT rights has been built upon homonormativity and sameness, it is not “progress” in the queer sense of affirming diversity; for instance, the recognition of same-sex marriage as akin to the “traditional,” heteronormative model of a family cannot be said to be “progress” in this second, queer sense of the word that would highlight “alternative” constructs of family.

¹⁸ In this section, I have not fully accounted for gay liberation movements in great detail; especially regarding the role of transvestite/transgender activists who were first on the frontlines, and then excluded by “mainstream” gay pride such as Sylvia Rivera. Instead, my concern is to acknowledge that identity-based movements have helped to consolidate Western “gay” identities.

historical process, [and] the gradual emergence and articulation of a homosexual identity and public presence” (Weeks 1990, vii). Even though the homosexual community was fragmented, organisations had taken root before 1969, especially in urban areas. World War II had dislocated millions from the traditional model of family structure and economic changes spurred growth of homosexual subcultures (D’Emilio 1983; 1998a; Escoffier 1985; Weeks 1990, 5–6, 156–158). Developments in gay subcultures created a shared social identity through cultural mediums and commercial activities, as well as political mobilisations that pressured governments on the validity of gay rights (Escoffier 1985, 142). In this period, homosexuals began to define themselves by their sexual deviance, including the notion that sexuality was an essential “condition.” MacIntosh aptly observes in “The Homosexual Role,” first published in 1968:

“It is interesting to notice that homosexuals themselves welcome and suppose the notion that homosexuality is a condition. For just as the rigid categorization deters people from drifting into deviancy, so it appears to justify the deviant behavior of the homosexual as being appropriate for him as a member of the homosexual category” (MacIntosh 1992, 28).

The homosexuals’ shared deviancy prompted subcultural cohesion allowing “outsiders” to formulate their own norms and reject that this identity was a choice or social pathology. In 1969, the growing gay and lesbian communities of the Postwar Era reached a watershed moment in the United States. In New York City, the Stonewall Riots politically mobilised a large number of young men and women under a shared homosexual identity to challenge their second-class status (D’Emilio 2000, 35).¹⁹ After Stonewall,²⁰ protests and Pride Marches ushered in overtly public

¹⁹ Stonewall was a critical juncture in the history of the gay movement, both symbolically and in instigating the latent movement, but I would like to note the perspective that sexual liberation movements from the late 1960s to early 1970s “in much of the Western world, had no single source origin” (Weeks 1981, 283; see also 1990). I have taken this somewhat out of context for brevity. For example, elsewhere D’Emilio (1998a, 243) suggests that the “massive, grass-roots liberation movement could form almost overnight...because communities of lesbians and gay men [already] existed” and had grown and stabilised in the Postwar Era.

²⁰ Notably, while it is uncertain who instigated violent resistance at Stonewall, some say it was a gay man named Jackie Hormona and other accounts stress that it began spontaneously, it is also possible that “the first one to throw a stone at a policeman” was Marsha P. Johnson (Carter 2010, 298); at minimum, she was one of the first (Kasino 2012). Johnson was a black drag queen, femme gay, transvestite (see Carter 2010, 65–66; Kasino 2012) or, possibly, trans woman in today’s terms. Regardless, drag queens and transvestites were key players in the resistance at Stonewall (Carter 2010,

gay rights movements. Mobilised against prejudices such as a psychological homosexual illness and perceived criminality (e.g. paedophilia), gay liberation movements drew upon the strategies of the anti-war and counterculture movements of the 1950s and 1960s (Escoffier 1985, 186). Altman (1993, 121) writes in *Homosexual: Oppression and Liberation*, first published in 1971, that, “Gay liberation is a phenomenon that exists only in modern Western industrialized countries, and like the contemporary women’s movement is born of the technological and social conditions of such countries.” Belgium, France, Germany, Italy, the Netherlands, the UK, Canada, Australia, and New Zealand soon had similar movements based on “inspiration and rhetoric” of the US, but local activists adapted the strategies of gay liberation to address the specific socio-political challenges of their own states (Weeks 1990, 189).

Modern sexual identities coalesced around this newfound visibility, and class consciousness spawned a renaissance of gay social and political organisations (see e.g. Rimmerman 2000). Altman (1996) argues that the influence of the media is evident in the transmission of particular lifestyles and trends, as indicated by both the various shifts from gay male “camp” to “macho” in the 1970s and the creation of “lipstick lesbian” in the 1990s. These examples show a certain fluidity or malleable potential of sexual identities over time, which are not necessarily “immutable” or predetermined by the mere fact of same-sex desire (see further chapter six). Especially since 1969, commercial activity and socio-political activism has solidified more coherent “modern” identities and alliances between lesbians, gay men, bisexuals, and transgendered persons.²¹ The economic and social developments shaped community building, and led to the “institutionalisation” of social action and commercialisation of gay news and venues (Weeks 1990, 207–230). “Coming out” of the closet, LGBT persons fashion(ed) a tangible minority community challenging the social and legal discriminations of their common experiences, but often at the

162–163), and trans people played an important but often unacknowledged role from the very beginning of “gay” liberation.

²¹ Here, I am not claiming a singular “modern” model of “gay” identities and recognise that this is simplified to make the point that the “Western” (and within the West there are substantial national, community, and individual differences) LGB and T identities are generalised, contemporary, constructed categories. As I move to consider gender and sexuality transnationally, like Walker (2000, 61), “I am suggesting that there is a socially dominant model of gay identity, one that is intrinsically bound up with commercial markets, that is being exported to non-western countries,” or the possibility thereof.

cost of reifying these identities, sanctioning the “essentialist” myth of the eternal homosexual (D’Emilio 1998a, 240).

Before shifting to a discussion of global diversity, it is interesting to note a general absence of women in histories of sexuality, especially regarding criminalisation of same-sex acts. This is also, to a certain extent, evident in asylum law. This is not to suggest there are no “lesbian” refugees, but other authors have noted the scarcity of lesbian claims for various reasons, as will be discussed in the case law analytical chapters (four and five). Weeks (1981; 1990) writes of the historical “invisibility” of lesbians in Europe. Not only did early theorising of homosexuality focus on male same-sex desire, but lesbianism was also ignored in criminalisation (Weeks 1981, 105). In many states, anti-homosexual laws continue to apply incongruently to male and female same-sex acts (Walker 1996, 585; HDT 2016). Weeks (1990, 89) offers a summary of the European experience that seems especially relevant in consideration of continuing gender inequalities, especially globally. He writes that attitudes toward lesbianism must be understood within the matrix of “the role that society assigns to women; the ideology that attempts to control this; the prevailing definitions of female sexuality; and the actual expression by women of their sexual nature” (Weeks 1990, 89). Evans (1993, 265) indicates a crucial turn towards the sexual revolution occurred in the separation of reproduction and sexual pleasure in the 1950s and 1960s that heralded the arrival of, or the potential for, radical feminism. Avoiding for the moment the intricacies of a rich bed of feminist theory and lesbian history, I believe it should suffice, at least for the present purposes, to point back to materialism.

Consider, for example, that if indeed capitalism influenced the development of gay identities, the economic opportunities which existed for men to live independently of the traditional family structure did not equally apply to women who may also have desired same-sex relationships (D’Emilio 1998a, 442). Regarding the gendered expectations of female sexuality, “[i]t is an oversimplification to suggest that all cultures organize sexuality around the enhancement of male pleasure above female, but it is rare to find cultures where the reverse is true” (Altman 2001, 5). I would argue at minimum that what is clear is that disparities between the sexes in capitalist states can be attributed to men having greater social, economic, and

political power. Thus, “it is inevitable that specific terms of sexual citizenship have developed, as did general citizenship before, more dramatically amongst men than women” (Evans 1993, 88). These social and material considerations and corresponding inequalities between men and women are historically reflected in the development of gay male identities (and parallel commercial projects), but also in the effects of criminalisation. To summarise the contemporary position of women in post-industrial states: women have gained economic freedoms and a corresponding capacity to construct their own lifestyles, norms, and sexual freedoms (Evans 1993, 41). But just as the historical experience of Western lesbians and gay men should, where possible, not be conflated, I propose that an awareness of the historical formation of “modern” lesbian identities sensitises the project in locating the lesbian “other” in transnational, refugee contexts of the specific limitations that may burden women in expressing same-sex desire. As Walker (2000, 61) has noted, “the spread of a western lesbian identity seems to be far less pronounced than the spread of a gay (male) identity,” and this may “in part [be] because of the social and economic constraints under which women find themselves in both western and non-western countries” (see also Walker 1996).

The historical and contemporary invisibility of female sexual minority asylum seekers has particular significance in RSD (Miller 2005, 141). Country of origin information (COI) often has “little or no information” on women with same-sex desire or gender non-conforming people, and this has been taken by adjudicators to indicate an “absence of threat” to these asylum seekers (Bach 2013, 35). Whether it can be said that there is a “transnationally recognisable lesbian” may then be especially problematic, and this inquiry should treat the legal discourse on the cases of refugee women with heightened sensitivity.

2 Culturally relative

“We cannot claim any particular knowledge of the ways of homosexuals, still less of Iranian homosexuals...”²²

In discussing the medical model, political economy of sexuality, and gay rights movements, I have shed some light on how, as Weeks (1990, 35) puts it,

²² A UK Immigration Judge, quoted in O’Leary (2008, 87).

“homosexuality” has been “institutionalised.” The following discussion of global sexual diversity demonstrates that, in addition to being historically contingent, sexuality is culturally relative. The literature on sexual diversity suggests that culturally relative categories of sexual orientation and gender identity complicate transnational asylum claims if the law assumes “essential” or “immutable” sexual minority categories. I use studies of “gay history” to understand what can be known about gender and sexuality cross-culturally. The following section will highlight empirical examples from the literature to convey the fluidity of sexual and gender identity that challenges judicial decision-making in the asylum process.

2.1 *Gay history*

In order to envisage “global gays,” it is helpful to contextualise sexual diversity within the debate between “universalists” and “neo-evolutionists” (Plummer 1992, 15–18).²³ A neo-evolutionist suggests that although sex “is a natural fact, sexuality is a cultural production: it represents the *appropriation* of the human body and of its erogenous zones by an ideological discourse” (Halperin 1990, 25). In this sense, gender and sexuality are socially constructed rather than an innate or essential property. A universalist approach, by contrast, asserts that certain sexual behaviours are more fundamental or essential but manifest differently across cultures (see e.g. J. Boswell 1992). The notion that sexual and gender identity are culturally constructed has long been asserted, and it has been through empirical social research, especially in history and anthropology, that this view can generally be said to be the established consensus in spite of debates on whether these categories are to some degree innate or biologically rooted. Whether we can “know” gay people in history sheds light on a contemporary question about the “knowability” of a gay refugee. Instead of becoming entangled in more esoteric questions of a “gay history,” I will interrogate the general, established consensus that homosexuality is a constructed category, and the dynamic between sexual behaviours and identities in a multicultural setting.²⁴

²³ Elsewhere, I have used the terms “essentialist” and “constructivist.” Here, I find that Plummer’s (1992) “universalist” and “neo-evolutionist” terminology better captures the local and global dynamics between institutionalised gay identities (often presumed to be universal or immutable) versus cultural construction of sexuality.

²⁴ The consensus I allude to refers mainly to social science, but does not reject that certain aspects of same-sex desire or gender identity may be based on biological factors (see e.g. Halley 1994). However, especially in psychology and neuroscience, many scholars *emphasise* biology and continue

I would support the position on “gay history” as argued by Halperin (1990), because the empirical evidence indicates that same-sex behaviour is culturally relative. Sexuality is mediated through regulations of gender and sexual relations such as social customs and legal rules. Although sexual acts or behaviours may be similar, the meanings ascribed to sexual activity can be profoundly different (Weeks 1981, 97). Therefore, “[t]here is no abstract and universal category of ‘the erotic’ or ‘the sexual’ applicable without change to all societies” (Padgug 1992, 54). In various cultures, sex has been appropriated for religious and pedagogic functions, and there exists a range of other configurations that defy “traditional” Western sexualities, including reproductive and class-based models of sexual activity (Weeks 1981, 11).

In opposition to law’s tendency toward rigid and even essential categories, the dominant position on sexuality in social science rejects the idea of a “natural” homosexual category. Institutionalised, Western gay identities presuppose a range of social relations and attitudes, and are historically situated products of contemporary society. “To ‘commit’ a homosexual act is one thing; to *be* a homosexual is entirely different” (Padgug 1992, 58). For instance, the assumption that homosexual behaviour in itself defines a homosexual would wrongly label New Guineans where sexual man-boy relationships were once common in parts of the country (Whitehead 1993, 500). Whitehead (1993) compares this temporary arrangement to ancient Greek pederasty, and bringing to manhood younger males through an explicitly erotic relationship. Both physical and cultural, this institutionalised homosexual behaviour performs the function of transmitting manhood between generations (Whitehead 1993, 500). Neither the erotic relationships of the ancient Greeks (see generally Halperin 1990) or New Guineans (Whitehead 1993) are burdened by the same Westernised concept of a “homosexual” and corresponding identity, stigma or, for that matter, implicit suggestion of exclusive same-sex desire. Rather, these forms of pederasty must be understood in their particular contexts. These examples, among others considered below, highlight a central problem of considering sexuality in a

to search for a “gay gene” (see e.g. LeVay 2011). But these “facts” and similar conclusions are contested. For example, while science has often asserted that *essential* gender differences extend beyond sexual characteristics into the structure of the brain (e.g. op cit. LeVay), recent research has suggested the sex/gender, male/female brain features which govern various behaviours are rarely binary but are in fact “mosaics” of the purported neurological spectrum in most individuals (Joel et al. 2015).

global context, as is done in the adjudication of asylum claims. “While it is clear that acts that look homosexual to a contemporary western gaze are by and large universal, the emergence of a homosexual social identity—‘gayness’—as we know it needs to be carefully historically and geographically bracketed” (Hoad 2000, 151).

While at first these arguments may seem overly historical, deconstructing the monolithic “gay” category has continuing relevance. Even in the most violently homophobic states today, a person who engages in same-sex acts is not necessarily labelled a homosexual. The difference between homosexual behaviour and the homosexual identity can create a “messy” picture of the likelihood of sexual minorities being persecuted. Purported tolerance or non-prosecution of certain homosexual acts can percolate through the evidence and into decision-making. For example, despite harsh laws against homosexuality, experts have informed adjudicators that in Iran “differing levels of homosexual activity” may be tolerated; in “rural areas” men having sex with men (MSM) “can be considered socially to be compensatory sexual behaviour for heterosexual intercourse and the practitioners are held not to be homosexuals” (*RM and BB* [2005], para 19). In another case experts went so far as to define the identity as distinct from the behaviour in the context of Iran where “homosexuals” are “willing passive partners,” and claimed that lesbianism is lesser known and in practice is “relatively unimportant” (*HS* [2005], para 86). The following examples will show how this issue complicates “knowing” homosexuality as a transnational, stable category.

2.2 Global diversity

Although I will explore some of the cultural possibilities of sexuality, I do not purport to have presented a complete account of global sexual diversity. Borrowing the cautious tone of Aldrich (2003, 8) regarding his investigation of European imperialism and homosexuality, he clarifies that his project is not about the “colonised ‘other’” and he does not “claim to see into the ‘native’ mind.” Similarly, this project is primarily concerned with the UK’s conceptions of sexual minorities and recognition of asylum for persecution on these grounds. The purpose here is to sensitise the inquiry into the construction of “legitimate” or “genuine” sexual minority refugees to a broader spectrum of sexual behaviours and identities than are (typically) known by an UK adjudicator, raising potential challenges in asylum law.

Although not all societies, “traditional” or “modern,” have articulated a “role” for what from a Western perspective may be considered a “transgender” identity, a common feature of sexuality between many societies is a diverse range of sex/gender configurations. In the “West” transgender and gender identity are often used as umbrella terms to describe non-conformity to gender as assigned at birth, and lesbian, gay, and bisexual or sexual orientation are used to describe sexual desire and identity.²⁵ In other parts of the world this binary between gender and sexuality is not as distinct. Some examples include “Indonesian *waria*, Thai *kathoe*, Moroccan *hassas*, Turkish *kocek*, Filipino *bayot*, [and] Luban *kitesha* in parts of Congo” that are “characterized by both transvestite and homosexual behavior” (Altman 2001, 90). Historically, *berdache* gender-crossers were common throughout the indigenous cultures of North America (Whitehead 1993, 502; see also Nibley 2009). The *berdache* form of “institutionalised homosexuality” is that of a biological male adopting a female identity and social role (Whitehead 1993, 502).²⁶ These diverse “traditional” models seem *loosely* related to the “sexual inversion” models that preceded the category of homosexuality in the West. Through medical classification the “homo-sexual” emerged as science increasingly began to distinguish homosexual desire (or sexual perversion in nineteenth-century terms) from gender-nonconformity (or inversion).

Hijras in Pakistan and India also occupy a particular gender role. Nanda (1993, 544) writes of Indian hijras that they begin life as “incomplete men,” and many self-identify as neither man nor woman despite adopting a woman’s appearance. Unlike North American *berdache* who historically moved between genders without necessarily disrupting the male/female binary, Pakistani hijras, for instance, often occupy a more transgressive niche by performing (dancing and/or singing), begging, or prostituting themselves (Obaid-Chinoy 2011). Similar to the spiritual validity of *berdache* Native Americans, hijra sexualities are not inherently antithetical to religion. Although hijra origins are rooted in Hinduism, Islam “provides a powerful positive model of an alternative gender” (Nanda 1993, 550).

²⁵ See Appendix II on “gender identity” and “sexual orientation.”

²⁶ Although I have presented this as a historical category, the contemporary documentary *Two Spirits* (Nibley 2009) explores modern engagement with the *berdache* identity and a particular case of violent conflict between “traditional” and “modern” identities through the murder of sixteen-year-old Fred Martinez.

Pakistan and India have made significant, if somewhat incremental advances toward the contemporary social inclusion of their hijra communities (Feder 2014; Kaleidoscope 2015, 53; see also chapter six).

Non-conforming gender identities have been implicated in global migration. In an ethnographic study of “gay” men in the Filipino diaspora, Manalansan (2003, 25) describes the complexity of *bakla*, which “conflates the categories of effeminacy, transvestism, and homosexuality and can mean one or all of these in different contexts, the main focus of the term is that of effeminate mannerism, feminine physical characteristics...and cross-dressing.” Bakla and the other identities examined here do not neatly “fit” into Western categories, complicating transnational refugee claims. “Modern” homosexual identities may incite persecution in refugees’ countries of origin, but “they also threaten the position of ‘traditional’ forms of homosexuality, those which are centered around gender nonconformity and transvestism” (Altman 2001, 88). Thus, this cursory glance at sexual diversity incites questions as to how the case law and institutions of asylum can account for the variety of ways sexual and gender identity exists in cultures around the world and the persecutions that may affect “genuine” sexual minority refugees.

3 Sexuality and globalisation

This section explores what can be known empirically about the possibility of a transnationally recognisable gay identity. First, I consider colonialism and criminal regulation of sexuality, as well as anti-colonial homophobia and the “white man’s disease.” The second section discusses the globalisation of gay identities. I conclude that indigenous gay movements may appeal to universal rights, and implicitly Western gay identities, in order to challenge homophobic rhetoric and laws. However, I argue that the globalisation of identity categories should not erase local histories and cultural experiences. The problems of articulating a valid universal framework of gay rights in these cases parallels the challenges of “knowing” a global gay identity in RSD. Finally, I conclude with a discussion of terms and categories, and how this thesis incorporates an analysis of gender and sexuality in light of the discussions in this chapter.

3.1 *Colonialism*

Sexuality and colonialism strikes an interesting chord in contemporary, homophobic political discourse that homosexuality is a “European phenomenon,” or disease that has effectively been introduced to former colonies, including states that produce sexual minority refugees. As discussed above, there is an unsettling grain of truth to this claim in relation to how modern LGBT identities have been “institutionalised” in the West. To some degree, it is also apparent that these identities have been exported through globalisation. Historical research suggests the globalisation of sexualities is not an exclusively modern phenomenon, because “colonial law brought with it a discourse of morality which was very significant in the construction of individual subjects (in possession of a ‘sexuality’)” (Phillips 2000, 19). For example, explorers in the early colonisation of Australia were horrified to discover men in marriage-like relationships with boys and other pederastic practices (Aldrich 2003, 218). In an attempt to regulate homosexual behaviour overseas, British laws were extended to Australia and other colonial possessions (Aldrich 2003, 408), and many former colonies retain these laws, which perpetuates a continual justification for homophobia and persecution (Altman 2008, 153; Kaleidoscope 2015). This discussion of tensions over gay identities is somewhat simplified for clarity, but is in reality more nuanced, and particular to socio-political contexts. Other anti-homosexual rhetoric may be more or less concerned with prohibiting “gay” identity than its propagation and perverted “practices” – or as Wilkinson (2014, 368–370) articulates in the case of Russian anti-homosexual propaganda laws, “prohibiting sins, not sinners.”

A number of researchers have acknowledged the postcolonial implications of gay identities, such as Altman (2001), Hoad (1999; 2000), and Spruill (2000). Studies on the globalisation of sexualities indicate that gay identities may in fact carry neo-colonial baggage, “but given that many anti/postcolonial movements and governments deny existing [indigenous] homosexual traditions it becomes difficult to know exactly whose values are being imposed on whom” (Altman 2001, 95). A recurrent example of gay identities and anti-colonialism in the literature is President of Zimbabwe Robert Mugabe’s 1995 assertion that homosexuality is a white man’s disease (see e.g. Phillips 1997; 2000; Spruill 2000; Altman 2004, 67).

Phillips (1997; 2000) claims that while the President’s public homophobia considerably increased the number of people identifying as “gay,” there was not a “flood” of gay men and lesbians coming out of the closet following Zimbabwe’s crackdown.²⁷ However, it is apparent that Mugabe unwittingly became a publicist for gay identities and indigenous rights groups (Phillips 2000, 31). Instead of ostracizing a fringe group, Mugabe introduced their platform of minority rights into the public discourse – where the homosexual-heterosexual binary had previously been unknown or unacknowledged. Mugabe’s condemnation of homosexuality inadvertently reproduced the sexual identity he labelled as a Western import, giving credence to an identity “that is individualized, sexualized and, in this form, historically marginalized” (Phillips 2000, 31). Recalling Weeks (1990, 3), Mugabe’s anti-colonial homophobia defined a class of people, and his rhetoric had the effect of changing “the way those stigmatized saw themselves.” From a group defined by indigenous social markers, the introduction of entrenched Western identity categories “[allowed] for an appeal to specific late-twentieth-century notions of rights” (Phillips 2000, 31). This example demonstrates an interesting dynamic between Western gay identities, postcolonial discourse, and how specific rights claims (and possibly persecution) may arise. As Altman (2001, 50) observes, “[t]he clash between universal concepts of human rights and essentialist views of African tradition captures some of the basic contradictions of globalization.” The irony of Mugabe’s claims also implicates the colonial introduction of Christianity and legal regulation, not just the “white man’s disease” in isolation. Any assertion of “colonial contamination” must also consider that sexual regulation was an instrument of colonialism (Altman 2001, 52).

Spruill (2000) gives a broad account of the dynamics between colonial laws criminalising homosexuality, and how identities have been deployed in different contexts both for and against gay rights in colonial and post-colonial South Africa. Reminiscent of D’Emilio’s (1998a) eternal homosexual myth, Spruill (2000, 12)

²⁷ Regarding the prosecution of homosexual offences in Iran, the state has gone to great lengths to ensure, for various reasons, that the frequency is underreported. Consider, for example, *RM and BB* [2005]: evidence presented to the Tribunal suggested that “Islamic clerics insisted that [anti-homosexuality] cases remain private to try and protect the Islamic society from being corrupted, and that publicity might cause other people to commit these sinful activities” (para 46, see also 81, 83). See also Kouri (2012).

writes that “[b]lack lesbian and gay South Africans insist that same-sex sexual conduct has always existed.” Spruill argues that in this community there is a romanticised image – in the sense that the examples may be obscured by political imperatives – of same-sex sex occurring on “hunting trips,” lesbian relationships “among co-wives of polygamous marriages,” and an occurrence of relationships between rural women when their husbands were away at the mines (Spruill 2000, 12–13). Spruill (2000, 13) concludes that the “desire to find a pre-colonial gay self may be read as specifying a historical identity by conflating conduct and identity.” Possibilities of pre-colonial homosexual behaviours and identities aside, African “gay” identities/behaviours, as in the experiences of South Africa and Zimbabwe, are marred by competing discourses in which rights claims are made and “colonial contamination” has significant postcolonial connotations.

It should be acknowledged that anti-homosexual rhetoric and laws also seem to have been motivated by a reaction to a sort of figurative colonialism and globalisation, in addition to the literal colonial legacy of, for example, Zimbabwe. As in the case of Russia, states may assert a sort of “moral sovereignty” through anti-homosexuality, challenging the relationship between human rights and morality (Wilkinson 2014; see also Khazan 2013; Persson 2014). In other words, the globalisation of gay identity presents an opportunity to “challenge contemporary international human rights norms, buoyed up by longstanding discontent over the West’s perceived domination of the international system and imposition of culturally alien norms on sovereign states” (Wilkinson 2014, 373). But at root and relevant to the asylum cases considered in chapters four and five, “traditional” practices of sexuality and gender are, as in the former colonies of Africa, the Caribbean, and Pacific, complicated by the historical interaction of colonial authorities and pre-colonial culture, as well as the result of mass migrations during European colonialism (Altman 2001, 43). Sexual behaviours and identities vary widely and are dictated by multiple “local” and “global,” or in this case, colonial, discourses. Therefore, in most cases sexuality possesses not one source of origin, but many. This historical trajectory has continued and accelerated in contemporary globalisation.

3.2 The possibility of transnational identities

It seems apparent that refugee protection would be under-inclusive if determinations

were based on a restricted, Eurocentric reading of sexual and gender identity. I would conjecture, as Plummer (1992, 17) writes that “each national and local culture brings its own richness, its own political strategies, its own uniqueness.” However, many domestic rights claims appeal directly to international human rights discourses that are premised on Western LGBT categories, such as the slogan that “gay rights are human rights” (Clinton 2010). Local appeals to universal gay identities and rights, transnational social movements and activism, and the dissemination of Western “ways to be gay” through media have all raised the possibility of a “transnationally recognisable gay identity.”

The HIV/AIDS epidemic has had the affect of proliferating global discourses on sexuality, which draw heavily on Western knowledge and, inevitably, ideas of what it means to be gay (Altman 1996, para 17). Altman (1996; 2001; 2008) uses his extensive experience in activism and research to elucidate examples of how Western sexual categories have globalised through HIV/AIDS discourse. HIV/AIDS education makes use of categories such as “sex worker,” “gay,” and “bisexual,” and thus plays a significant role in magnifying the influence of Western sexualities (Altman 2001, 74). International non-governmental organisations and local prevention campaigns help to construct “gay” identity transnationally through the distribution of liberal Western sex-education material (Altman 1996, para 18). Altman’s (2001, 75) research leads to the conclusion that “while recognizing the diversity of sexualities, and the fact that for most people behavior does not necessarily match neat categories, there is a gradual shift toward conceptualizing sexuality as a central basis for identity in most parts of the world.”

The spread of Western ideas of being “gay” also appears to have been accelerated by economic globalisation. Empirical histories and ethnographies have demonstrated global sexual diversity, but modernity and globalisation have injected local cultures with (Western) gay identities. Grassroots, indigenous gay rights movements have rhetorically adopted Western gay identities in order to make universal appeals to international conventions, but often at the expense of appearing to reject local traditions (Phillips 2000, 34). However, in South Africa for example, many self-identifying gay men and lesbians refuse the notion that their claims contradict tradition, especially given that globalisation and modernisation of their

contemporary societies make the pre-colonial model untenable (Spruill 2000, 15). Perhaps globalisation, including connectivity and economic growth, is the most significant factor of a “transnational gay identity,” as it has increased the proliferation of Western ideas of “gayness” globally.

Recalling the sexual or queer political economy in developing economies, discussed above, there appears to be an important distinction between people with same-sex desires, and their ability to realise their sexuality relative to their poverty or affluence (Murray 1992, 32). Regarding the elaboration of gay identities, Murray (1992, 36) substantiates the claim that “economic opportunity and security” contributed to the emergence of modern gay identities in the “developed” world, but also that dependence on traditional family structures in places like Thailand and Mexico do not afford similar opportunities to sexual minorities in the “developing” world. Therefore, it may be that the spread of these particular gay identities is linked to the English-speaking middle-classes in locales as diverse as Mexico City, Istanbul, and Mumbai where individuals identify as part of a “gay community,” in a Western sense (Altman 2001, 93).

To reiterate, I am not claiming that “modern” homosexuality takes a singular form, or that “undeveloped” societies are necessarily “backwards.” Such an opinion would have the effect of contributing to a binary formulation in which the “West” is figured as economically developed and therefore politically progressive, whereas the “Rest” are presumed traditional, backward, and sexually repressive (Grewal and Kaplan 2001, 669). Rather, I mean to highlight that “modern” gay identities are, in various ways, linked to socioeconomic realities and the difficulties this may introduce into the discourse of asylum law. In the construction of a “genuine” sexual minority, possibly in relation to someone who is “out” or in possession of a particular and cognisable identity, asylum recognition may replicate a “developed” versus “undeveloped” narrative of sending and receiving countries if it is not attentive to the nuances of sexuality and constraints placed on refugees in countries of origin. Global gay rights movements have (and will) develop alternative paradigms of activism and ways of living differently sexual and gendered lives (Altman 1996, para 16). For this inquiry, these global claims to gay rights and the spread of Western identities are important, as they may obscure sexual difference in positing universal goods, such as

rights. Furthermore, the difficulty in articulating universal rights in activism based on relative identities parallels the judicial quandary of locating a “transnationally recognisable ‘gay’ identity” in an asylum claim.

3.3 Sexual and gender identity: Terms, acronyms, and categories

I have argued in this chapter that categories of gender and sexuality are social constructs, and this constructivist perspective will be extended to other social groups, legal concepts and processes in this thesis. Notably, as I will set out in chapter three, the perspective of constructivism in this research asserts that “people have one self but many identities” (Jamieson 2002, 507). This section will briefly address individual subjectivity and its relation to multiple identities and social groups, because categories of gender and sexuality, however fragmented or incomplete, are necessary to define the scope of this project and its analysis. Yet, any term or acronym is going to be inadequate to describe gender and sexuality, global diversity and individual subjectivity. Both in the “real” world, such as activism and the expression of solidarity, and in the study of that social world, which involves categorisation on some level, terms and acronyms are indefinite and contested including the ubiquitous “LGBT.” A category can be *under*-inclusive if it excludes or invisibilises people who experience similar oppressions or, rather paradoxically, if one employs an umbrella or catchall category it may be *over*-inclusive and erase the personal histories and struggles of the minority within the minority. Therefore, it is necessary to clarify why and how I consider both sexual orientation *and* gender identity in this thesis. This is primarily because I do not find these constructs to be *necessarily* mutually exclusive, but there are also practical reasons that sexual orientation and gender identity or “SOGI” and “sexual minority” have particular appeal in the transnational context of seeking asylum.

First, however, it should be noted that others have found that for the purposes of refugee law sexual orientation and gender identity are discrete and should be considered separately. Some legal scholars writing on sexual minority asylum have chosen to exclude transgender and intersex asylum seekers from their analyses, observing that gender identity claims are or should be adjudicated differently (e.g. Schutzer 2012; Bach 2013). Others have considered the jurisprudence of gender

identity or transgender to be a separate body of case law (e.g. Jenkins 2010; Berg and Millbank 2013). Gender identity has been more extensively considered in other jurisdictions (e.g. Mohyuddin 2001; Neilson 2004; Landau 2005; Benson 2009), but less has been written on this ground for seeking asylum in the UK (e.g. Bach 2013; Berg and Millbank 2013). The UKBA’s Asylum Policy Instructions formerly outlined both sexual orientation and gender identity in a single guidance note until 2011, when separate instructions were created (API 2010; 2011a; 2011b). As we will see, in the UK gender identity has been recognised as grounds for asylum through the interpretation of jurisprudence on the “particular social group” recognition of gender and sexual orientation rather than transgender being articulated by the courts as its own distinct category. On one level, I can see that if I have not adequately dealt with gender identity issues I may actually be contributing to the erasure of gender non-conformity by subsuming these categories into an analysis of sexuality. On the contrary, I argue that by not engaging gender identity this thesis would be foregoing a critical opportunity to engage the persecution and protection of gender non-conforming persons, even if that consideration is empirically limited by the availability of case law (i.e. there are few reported gender identity cases; see further chapter four). For these reasons, gender identity is considered alongside sexual orientation, but due attention will be given not to conflate them where that is possible and relevant to the analysis.

Regarding the choice of terms, “SOGI” has been used in international activism to address the discrimination faced by people self-identified as or perceived to be sexually and/or gender non-conforming (notably, Yogyakarta 2007). “Sexual minority” has been used in transnational and local activism. A few real-world examples of its use includes Sexual Minorities Uganda or “SMUG,” a local organisation that has attracted international attention (e.g. Zouhali-Worrall and Wright 2012); the term has also been used by the International Lesbian, Gay, Bisexual, Trans and Intersex Association or “ILGA,” seemingly without distinction between sexual and gender identity (Itaborahy and Zhu 2013); finally, the Global Commission on HIV and the Law uses “sexual minorities” in a report as inclusive of gender identity in-text but acknowledges “gender minorities” separately in a footnote (UNDP 2012, 52, 129). The Global Commission’s definitions are helpful in

explaining the utility of this terminology in spite of the fact that in practice its report, like this thesis, collapses both into “sexual minority.” “‘Sexual minorities’ refers to people who identify themselves *largely* [emphasis added],” that is, not exclusively, “around their preferred sexual acts and the communities of those who seek out similar pleasures,” so it is *one of* their identities; and “[g]ender minorities’ are people who are more comfortable living social roles or appearances that do not conform with those conventionally assigned to their biological bodies; they may not in fact identify as either men or women” (UNDP 2012, 129). These are broad, fluid definitions that leave open the possibility for overlaps between the two, and the second specifically rejects that gender solely refers to a binary man/woman distinction. In short, “the term ‘sexual minorities’ includes all individuals who have traditionally been distinguished by societies because of their sexual orientation, inclination, behavior, or nonconformity with gender roles or identity” (Wilets 1997, 990).

This chapter has considered “gay history” and global diversity, which suggested that the relationship between sexual and gender identity is deeply intertwined in many local cultural contexts. “Gay” history and gender identities are not discrete. It has been shown that societies throughout history and gendered diversity in the contemporary world evidence that there are many different ways of conceiving both gender and sexuality, and that these categories are often co-constructed. Even “homo-sexuality” was at one stage medically described as “inversion” in the West (Ecoffier 1985, 135). Gender non-conforming people undoubtedly have different social and material needs, and political goals that exist independently of non-conforming sexualities and *vice versa*, but one cannot be understood without the other.

As discussed above, some theorists may argue that gender identity and sexual orientation are mutually exclusive, but I will now attempt to further problematise this view, especially as applied in a transnational context, by way of a few illustrative examples. As we have seen in this chapter many local cultural contexts have “traditional” models of gender non-conformity such as hijra. However, in contemporary societies it has been questioned whether in some circumstances these actually facilitate *sexual* non-conformity, as in the case of Iran’s *de jure* acceptance

of transgender while that state continues to persecute homosexuals (Eshaghian 2008; McFarland 2014; see further chapters four and six). Of course, not all transgender people seek medical intervention, but consider, for instance, the account of one trans-woman who chose not to have vaginoplasty specifically because she was a sex worker. The Turkish woman cited her clientele, who she claimed were mostly closet homosexuals (Dooley 2016). How is it that her sexuality, even if that is also entangled in work, is not intimately tied to her gender identity?

Further to an individual’s subjectivity (one’s self), we must consider how they are perceived by and interact with others (their identities). This is one way in which sexual orientation and gender identity may be mutually constitutive. For example, someone assigned male at birth may be attracted to women, but once they have transitioned to a female gender identity they may then be sexually attracted to men. So while many would argue that sexual and gender identity are separate, mutually exclusive categories, and while that may be “true” in certain contexts and individually subjectively authentic, the lived experience of others may well tell a different story. Therefore, what matters in avoiding presupposing universal categories, is individual subjectivity, and highlighting that, if gender and sexuality can be independent, they may also be co-dependent.

This seems to be especially complicated by social interaction. One’s sexual orientation may be (or become) deeply intertwined with gender identity, discursively, even if one feels one’s gender and sexuality are discrete. Gender non-conforming individuals may feel the need to justify themselves, or one aspect of their identities, and their bodies, to others in order to gain the desired recognition as, for example, “gay” or “straight” in addition to their gender identity. A gay-identified trans-man might be asked, “Doesn’t that just make you straight?” Or a straight-identified trans-woman might be asked, “Doesn’t that just make you gay?” Of course, these are culturally specific and (somewhat) inconsequential questions, but the broader implication is that one’s gender *and* sexual identity can be challenged everyday by a spectrum of interactions ranging from the benign to more malicious and threatening exchanges. The concept of gender identity cannot be wholly understood without the dimension of sexuality, or defined solely by one’s subjectivity and a desire to embody one’s gender(s). Even if gender is experienced by an individual as distinct

from their sexuality, these identities are also constructed by how one is perceived, rightly or wrongly, in social interaction.

Likewise, sexual orientation or identity cannot be wholly understood without the dimension of gender non-conformity. The oppression, discrimination, and persecution faced by both sexually non-conforming and gender non-conforming people “is, to a great extent, gender oppression” (Wilets 1997, 991). Making certain analytical claims on the assumption that sexual and gender identity are wholly exclusive categories can become untenable if the apparently self-evident distinction is closely scrutinised.

Sexual minorities are seeking asylum in the UK from many different countries of origin, so particularly in this context I do not find rigid classifications of gender and sexuality useful. In this context *both* sexually and gender non-conforming asylum seekers may be persecuted based on the (mis)perception of their gender identity or, conversely, sexual orientation.

In short, I claim that the legal construction of sexuality also directly engages the construction of gender. One cannot be understood without the other. In later chapters of this thesis I will explore examples of the ways in which the two interact in the asylum context. For example, where adjudicators considered whether an effeminate man (e.g. *JM* [2008]), or woman who rejects her subordinate position in society (e.g. *Amare* [2005]), could be “discreet” about their sexualities, these “gay” cases are also necessarily about gender. Similarly, gender identity in the asylum context can involve sexuality where, for example, a transgender claimant could fear persecution because their society may perceive them to be gay (e.g. *AK* [2008]).

Finally, I should add mention of the alleged “inclusive guise of ‘gay’ asylum” which I will argue is precisely that – an approach to asylum that seems inclusive but that invisibilises other sexual minorities. As we will see in chapters four and five the reported case law primarily concerns gay male claims. Transgender, lesbian, bisexual, and other sexually and gender non-conforming people are sidelined in the judicial discourse. As such, “gay” is used repeatedly throughout the thesis as the default, somewhat ironically, and specifically with reference to the argument that will be made in later chapters that the archetypal and most readily recognised sexual minority refugee is a gay male political activist fleeing state persecution.

4 Conclusion

This chapter raised questions about the construction of legitimacy in asylum, and underlined how the recognition of “gay” refugees may be under-inclusive if it does not account for global diversity. Parts one and two demonstrated that certain universal appeals that appear inclusive may in fact generate rigid constructions and expectations that disadvantage asylum seekers, especially in light of cultural differences. I have highlighted concerns between accepted “gay identities” against transnational “others,” and that the possibility that sexual minorities threatened with persecution on account of their actual and/or assumed behaviours or identities may not be comparable to Western “gay identities.” As stated in the thesis introduction, LGB and T are political identities with a source, history, and cultural baggage. Morgan (2006, 154) quotes a Canadian lawyer who observes that adjudicators’ questions inevitably descend into “Gay 101” about pride and clubs, and research into UK practice suggests a similar tendency (see e.g. Bennett and Thomas 2013; Vine 2014; Bennett 2015). In many receiving states, proving that you are a gay refugee has “focus[ed] more on knowledge of gay trivia than on actual experiences and culturally relevant identity markers” (Morgan 2006, 154–155; see also LaViolette 2007; Millbank 2009b; Murray 2014).

Despite the (general) consensus among many scholars that gender and sexuality are, at least, to some degree socially constructed and contingent, in the legal arena it is often (apparently) necessary to make certain essentialist claims; for example, as has been done in past asylum claims to meet the nexus requirement between the fear of being persecuted and the PSG under the Refugee Convention (see further chapter four).²⁸ Queer theorists have argued against reifying sexuality, positing the problematic that “[t]he very insistence of the epistemological frame of reference in theories of homosexuality may suggest that we *cannot* know – surely or definitively” what (and who) is gay (Fuss 1991, 6). If we apply Western sexual minority categories (e.g. LGBT) in transnational refugee and asylum issues, we should be aware that they are narrow, arbitrary classifications, but may be, as Weeks terms (1995, 99), “necessary fictions.” But if there is no transnationally recognisable

²⁸ The nexus requirement is that a claim falls within one or more of the five protected groups, defining a refugee as a person who has “a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.” See Appendix II.

“gay” identity, and no “immutable” universals, how does asylum law recognise and protect the rights of sexual minorities? The next chapter will consider the ways in which sexual minority claims have been constructed in the “PSG” category, and through the concept of persecution under the Convention in refugee law.

Chapter Two – Refugee law: Establishment, concepts, and practice

Chapter one explored how particularistic Western conceptions of “gay identities” may complicate legal understandings in the transnational context of refugee law. Before analysing the domestic case law that recognises sexual minority refugees in the United Kingdom (UK), we must first look to the broader, international framework and origins of refugee law as well as how it has been implemented in the UK. This chapter will explore the international regime of refugee law and the 1951 Geneva Convention relating to the Status of Refugees (hereafter the Convention) at the core of the international refugee regime, define relevant concepts in human rights and refugee law, and frame the discussion historically. In doing so I will set out the relationship between key international texts, including conventions, declarations, treaties, and guidance notes, to establish the context for this study.

Past research has elaborated the formative importance of international law to state-based asylum recognition, and its historic and continuing significance in establishing international norms. However, many have argued that it appears that the human rights treaty system privileges fixed identity categories (Miller 1999, 297) of the kind that were problematised in chapter one. That is not to say that refugee law is necessarily static. This chapter will place the investigation of UK recognition of sexual orientation- and gender identity-based refugees in the broader context of international refugee law, providing the necessary background for the case law analytical chapters by highlighting the interrelations between domestic and international instruments and processes of granting protection. In sum, the international refugee framework may help us to understand how the persecution and protection of sexual minorities have been “read into” domestic refugee law.

Part one first considers the history and establishment of relevant international institutions and law. The history of the Convention is considered to establish the “original” extent of refugee protections, including the foundational importance of consensus amongst states to share the “burden” of refugees, and the meanings of “social group” and “persecution.” An analysis of the definition of “refugee” concludes this section. Part two then considers international law in practice. The importance of international treaties, the United Nations High Commissioner for

Refugees (UNHCR), and the European Union (EU) are discussed in relation to the application of refugee law. Finally, I turn to the UK system of implementing international refugee law, and then summarise how the establishment, theory, and practice of refugee law have created *spaces for change* in application of its principles.

1 The establishment of international human rights and refugee law

Part one will consider the history of human rights and refugee law, the international instruments, and institutions for the protection of refugees. The 1951 Convention and its *travaux préparatoires* (“preparatory works”) will be considered to interpret, if possible, the “original” meanings of the document, including the purported limits to the definition of “refugee” which is challenged by the ambiguity of the “social group” category and “well-founded fear of persecution.” First, the historical evolution of the refugee concept must be established, as well as the Universal Declaration of Human Rights that preceded the Convention.

1.1 A short history of the “refugee” and human rights

Different commentators have emphasised various socioeconomic and political conditions following the Second World War that spurred international cooperation on refugee issues, culminating with the 1951 Convention. Here I will outline some key facts of the interwar precursor to the current refugee regime, and events that prompted the establishment and terms of the 1951 Convention (see generally Hathaway 1991, 1–13). The two World Wars resulted in conflict and genocide which killed millions, and the destruction in war-torn states caused millions more to be displaced across Europe and other regions around the world (Marrus 1988, 23–25). On the one hand, accounts have been given that emphasise the postwar establishment of conventions and institutions as the international community’s attempt to standardise states’ recognition of refugee rights to guarantee minimum protections (Hamilton 2006). On the other hand, historical accounts problematise over-idealistic explanations of a causal relationship between genocide and refugee protection. Instead, a number of scholars have argued that the development of refugee law may have had more to do with state interests in resettlement, and political and economic

stability, with parallel rather than core humanitarian aims. Drawing from the literature reviewed, I will argue that the interwar refugee framework, initial postwar institutions and Cold War objectives, and the Convention’s *travaux préparatoires* expose deeper state anxieties and interests in the standardisation of refugee recognition. This suggests the “original” construct of “refugee” was not based in human rights, but that consideration for rights was secondary to states’ geopolitical concerns. While the UNHCR mandate and the Convention established minimum rights to protection for refugees, they also “reflected the hesitancy of nation states to extend their efforts on behalf of refugees” (Gallagher 1989, 580). In sum, the interwar framework sheds light on the history of certain concepts of refugee law, such as the meaning of “refugee” itself, that remain relevant today.²⁹

Historical analyses suggest that there was “no single moment at which the identity of ‘refugee’ and ‘migrant’ were...separated into separate groups by international policy-makers” (Long 2013, 21) to create the construct of refugee. The actions of states and the international community during the interwar years (1919-1938) and immediate post-Second World War period to manage displaced and stateless persons shaped the contemporary social and legal meaning of “refugee.” Briefly tracing this history will recount two distinct shifts leading up to our present refugee regime. First, the interwar League of Nations treaties primarily facilitated population exchanges and transfers in response to shifting national boundaries. This system laid the groundwork for later instruments, but the responsibilities of repatriation and resettlement were left almost exclusively to governments that categorised migrants on the basis of political and economic interests. The second juncture occurred after the Second World War as the UN and Convention Signatories specified categories of individuals in possession of “rights” under the Convention definition of a refugee; however, the right to seek asylum does not supersede the sovereignty of states. The construct of refugee and international regime evolved from successive developments in administration, regulation, and definitions of classes of people in need of protection (Malkki 1995). Rather than seeing the “refugee” as

²⁹ e.g. Article 1A(1) of the Convention first states that “refugee” applies to persons who have “been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 12 September 1939 or the Constitution of the International Refugee Organization.”

originating in a concern for human rights, I am persuaded by accounts of history that suggest that states were motivated by a desire to control and limit migration, and to privilege categories of people in order to limit state obligations.

The mass influx of displaced and stateless persons in Europe became a significant international crisis partially as a result of governments around the world introducing new immigration restrictions (Zolberg et al. 1989, 18–19; Hathaway 1991, 1–2; Long 2013, 11).³⁰ The conclusion of First World War “ushered in the age of the passport and of greater control of movement across borders” (Schuster 2003, 86). In the 1920s, many countries began to impose stricter immigration controls, including the UK (Good 2007, 6), spurring cooperation between states to deal with people stuck in “grey areas,” displaced and/or without nationalities (see Hathaway 1991, 3). The interwar League of Nations created the High Commissioner for Refugees (HCR) in reaction to mass displacement caused by nationalistic wars, especially in Eastern Europe, and that raised humanitarian concerns and required an international response (Holborn 1956, 2–6; Schuster 2003, 86–89). The HCR facilitated mass population transfers of ethnic groups (Marrus 1985), and “[r]efugees tended to be viewed as an inevitable by-product of the consolidation of new states, rather than individual victims of persecution” (Boswell 2000, 546; see also Hathaway 1991, 2–3). The Nansen passport system was developed to assist in providing stateless persons with travel documents, which was done *en masse*, and this in an “entirely political” manner (Skran 2011, 10; see also Long 2013, 8–11). It increasingly became apparent through the 1920s that the Nansen system was inadequate, and an idealistic and pragmatic movement “emerged to give the system a conventional foundation in treaty law” (Skran 2011, 14).

The 1933 Convention was the “first comprehensive refugee convention,” was formal, binding, and “expanded the rights of refugees” (Skran 2011, 14). Refugee status continued to be focused on the resettlement of displaced ethnic and national “groups” rather than on an individual basis (Goodwin-Gill and McAdam 2007, 16; Skran 2011, 18). The League of Nations treaties generally termed a refugee as someone “outside their country of origin and...without the protection of the government of that State” (Goodwin-Gill and McAdam 2007, 16). A further League

³⁰ Zolberg et al. (1989, 18) claim the restrictions placed on immigration “amounted to the imposition of a new international regime,” where refugees had no place to go.

of Nations Convention was adopted in 1938 in reaction to the thousands of Jewish refugees fleeing Germany, and the reluctance of governments to grant them protection. The 1938 Convention added another key criteria to the definition of “refugee,” which identified a separate category of migrants needing protection against migrants leaving Germany for “personal convenience” (Skran 2011, 26–35; see also Hathaway 1991, 4, 99).³¹ The interwar refugee framework developed these concepts and others that were expanded in the postwar era, including the issuing of travel documents, *non-refoulement*,³² and various provisions for socioeconomic rights. As Zolberg et al. (1989, 20) write, the “interwar developments were significant in that they distilled the concept of refugee from the European historical experience to date and made it concrete by establishing a specialized set of agencies.”

The specification and individualisation of the refugee category progressed dramatically in the postwar instruments (Hathaway 1991, 5–6). The “refugee” in our full, modern usage came into being after the Second World War “as a specific social category and legal problem of global dimensions” that in many ways did not exist before (Malkki 1995, 497–498). States created international institutions and law to “share the burdens” of the “refugee problem,” and means to identify those in continued need of protection and assistance.³³ The formalisation of an international legal and administrative category of “refugee” was not to facilitate “unlimited migration” of people in need, but instead complicated by “growing numbers, restrictive immigration policies, and limited availability of aid” that required criteria for the determination of particular persons deserving of asylum and assistance (Zolberg et al. 1989, 3).

After the Second World War, a succession of international organisations was created to aid and settle those not repatriated by military forces, including the United Nations Relief and Rehabilitation Administration (UNRRA), the International Refugee Organization (IRO), and finally the UN established a permanent High

³¹ This concept is revisited in chapters four and five in cases where adjudicators distinguish between sexual minorities that might find the UK more open to their “lifestyle” as a matter of convenience, as opposed to those that might actually be deemed to fear persecution in their country of origin.

³² Article 33 of the 1951 Convention prohibits the expulsion or return (“*refoulement*”) of a refugee “to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

³³ See further Hathaway (1991, 8–9) and chapter five of this thesis on “burden sharing.”

Commissioner for Refugees (UNHCR). The UNRRA focused on “relief, rehabilitation and repatriation,” whereas the IRO primarily focused on resettlement (Gallagher 1989, 579). Under the IRO, “people were not necessarily designated refugees, but rather as people whom governments had recognized a special interest to assist with their relocation,” including growing East-West tensions and the economic recovery of Europe (Gallagher 1989, 579; see also Loescher 1989, 16; Hathaway 1991, 66–67). The High Commissioner’s Office for Refugees was created in 1949 to discharge the IRO’s functions due to the on-going refugee crisis (Lauterpacht and Bethlehem 2003, 93–94). The United Nations General Assembly (UNGA) adopted the Statute of the Office of the United Nations High Commissioner for Refugees in 1950 to establish a permanent specialised agency for these duties, creating the UNHCR as subsidiary organ of the UNGA (Lauterpacht and Bethlehem 2003, 93–94). Under the UNHCR the “refugee problem” became an institution of social and humanitarian orientation (Malkki 1995, 496). The UNHCR signified a shift in international cooperation on refugee issues, one that was humanitarian, more explicitly oriented towards the recognition of human rights, and the organisation was eventually charged with supervision of the 1951 Convention and its 1967 Protocol.

Considering key events prior to the 1951 Convention, I turn finally in this section to the Universal Declaration of Human Rights (UDHR).³⁴ The UDHR of 1948 has proved widely influential, because “it floats above all local and regional contingencies and is a statement of more or less abstract moral rights and principles” (Morsink 1999, xi). This transcendent quality has allowed the Declaration to aid the consolidation and evolution of rights in later instruments such as the 1951 Convention. The occurrence of human rights discourse in refugee law may in part be attributed to its being understood and deployed as “universal, indivisible, interdependent, and interrelated” (Haines 2003, 329; see also Eide and Alfredsson 1992, 6). In order to understand how international refugee law defines refugee status, we must take into account the treaties and practices international institutions use to

³⁴ Mazower (2004) presents a compelling account of the origins of the UDHR, and the convergence of interests among Jews, Poles, the Allied Powers, and others away from minority and national rights (characteristic of the interwar period) towards individual human rights. Perhaps not coincidentally there was a parallel shift toward recognising the individual refugee, which also serves to lower the cost to States through distinguishing between “targeted” versus “indiscriminate” persecution victims (Tuitt 1996, 15).

define the categories of and circumstances for being considered a refugee (Goodwin-Gill and McAdam 2007, 16). Due consideration of the UDHR is necessary because, at least *prima facie*, the Convention is a human rights instrument (Kjærø 1992, 218–219). This is especially evident in the Preamble of the 1951 Convention, referencing a core purpose of the Charter of the UN and the UDHR that “human beings shall enjoy fundamental rights and freedoms without discrimination,” and that the Convention has sought to secure refugees the “widest possible exercise of these rights” (Preamble, see also Article 2; Hathaway 1991, 106–107; Lauterpacht and Bethlehem 2003, 106–107).

Among the fundamental rights and freedoms enumerated by the UDHR are the “freedom of movement” rights in Articles 13 (movement and residence within a state; to leave and return) and 14 (right to seek asylum). Article 14 proved to be controversial, and prompted an intense debate during drafting over a proposed “right” to asylum (see generally Morsink 1999). The UK Delegation offered an amendment to the proposed right to instead read the “right to seek and enjoy asylum,” which gained the backing of the United States and others; this amendment later passed when supporters of a “substantial” right to asylum conceded to save what was left of the principle. The opposing delegations saw that this “gutted the real force of the article,” and suggested that the UK Delegation had conflated immigration with the right of asylum (Morsink 1999, 79). A Pakistani Delegate levelled the criticism that “the right to be granted asylum was implicit in the right to freedom of thought and expression” (Morsink 1999, 79). Born out of a fear of mass immigration,³⁵ the record appears to suggest the language of the Declaration was diluted to calm the political anxiety over a “right” refugees could claim against states, that would have to be granted.

With the passage of the UK amendment, Article 14 of the UDHR reads “to seek and to enjoy in other countries asylum from persecution.” Morsink (1999, 332) observes the adoption of Articles 13 and 14 can “be traced directly to the experience of the Holocaust,” where to the victims of Nazi persecution the right to seek and

³⁵ Many states objected to the wording “right to asylum” which would violate state sovereignty, and the UK Delegate expressed that a “right” may actually encourage persecution in some states against an undesirable minority when it could invite them to claim asylum elsewhere (Goodwin-Gill and McAdam 2007, 359). In fact, some historians claim Hitler encouraged Jewish emigration, and that genocide began when the emigration policy failed (Hilberg 1985; see also Zolberg et al. 1989, 16).

enjoy asylum “was a matter of life or death and therefore a question of their human rights.” While an extensive consideration of the UDHR is not possible here, the rights it declares will be revisited in later chapters of this thesis, especially regarding discussions of discrimination, persecution, and general principles of international law. It was the unanimous opinion of the delegations that the UDHR exercises only “moral force.” On the one hand, it could be argued that although the UDHR is legally non-binding, the symbolic power of the Declaration’s philosophical grounding seems to have allowed it to “become a moral beacon in the affairs of individuals as well as of states,” and the inherent rights it proclaims to “be used as standards against which history and circumstance are to be judged” (Morsink 1999, 295–296). On the other hand, it could be said that the UDHR *is* binding in international law, “either because [human rights] are part of customary international law, or because they constitute general principles of law” (de Schutter 2010, 50).

At minimum, the Declaration’s achievement has been to establish a broad scope of enumerated rights with relatively specific minimum protections, which form avowedly universal moral bonds and political obligations (Parekh 2006, 17). The process of drafting the UDHR “involved an arduous effort to harmonize different cultures of law” (Mazower 2004, 396). The pliability of human rights discourse, as opposed to finite constitutional rights, allows its principles “[to be expanded and adopted] to changing circumstances by either adding new rights or suitably reinterpreting and broadening the scope of the existing ones” (Parekh 2006, 18).³⁶ Although the UDHR does not grant a “right of asylum,” its authoritative moral language can be evoked to support an asylum claim through mandate status of the UNHCR or Convention refugee status as recognised by states. In spite of the utility of human rights, Benhabib (2006, 52) argues it should be recognised that there are inherent contradictions between “universal” human rights and state sovereignty. Likewise, the 1951 Convention and its 1967 Protocol can be limited by Signatories too, in how these instruments are interpreted and applied (see also Beyani 2006). Therefore, I do not wish to overstate the authority of human rights, but rather delineate their potential utility in advocating for and understanding inclusive refugee law and policy (see generally Hathaway 1991, 109–112). At least it might be said

³⁶ Moravcsik (2000) deploys a theory of republican liberalism and concludes states contract to higher ideals in order to confirm domestic legitimacy.

that the UDHR is universal in aspiration if not in practice via enforcement mechanisms; a similar theme is explored in the next section in relation to the 1951 Convention.

1.2 The Convention and Protocol relating to the Status of Refugees

The 1951 Convention relating to the Status of Refugees (Convention) and its 1967 Protocol (Protocol) are the key instruments of refugee law. The Convention was the first human rights treaty adopted by the UN and forms the “second pillar” of the refugee regime, preceded by the Statute of the Office of the UNHCR (Einarsen 2011, 40). The Convention and its Protocol have “legal, political, and ethical significance” that extend beyond the specific scope of their texts (Türk and Nicholson 2003, 6); their legal and political importance in domestic law, primarily the definition of refugee in Article 1A(2), will be considered throughout this thesis. The purpose of this section is to outline the key provisions of the Convention and its Protocol and their development in order to lay the groundwork for discussion in later chapters.

The Convention and its Protocol are the cornerstones of international refugee law, but interpretation and the determination of refugee status is reliant on Contracting States such as the UK (Türk and Nicholson 2003, 6). Therefore, the recognition of refugees, policy and practice has varied from state to state and over time (Beyani 2006, 271).³⁷ In order to define “refugee” and other concepts, we must consider traditional sources of refugee law such as treaties, as well as UNHCR guidance on practice and procedures, before looking at UK implementation specifically (Goodwin-Gill and McAdam 2007, 16). This section covers the Convention definition of refugee and the analysis will draw upon the *travaux préparatoires* to explore what the drafters and Signatory States may have understood to be the meaning and intention of the text.³⁸

³⁷ Neither the 1951 Convention nor its 1967 Protocol prescribe procedures for determining refugee status.

³⁸ The *travaux préparatoires*, or “preparatory works,” of the Convention consist of official records of the Ad Hoc Committee on Statelessness and Related Problems and Conference of Plenipotentiaries on the Status of Refugees. The Vienna Convention on the Law of Treaties (1969) states that *travaux préparatoires* may be used as “supplementary means of interpretation” in Article 32 to confirm the meaning of Article 31, that a treaty be “interpreted in good faith.” The preparatory works are frequently used by adjudicators and commentators in refugee law (Lauterpacht and Bethlehem 2003, 106; Goodwin-Gill and McAdam 2007, 9). See also McAdam (2011, 99–103) on the “secondary

The Convention’s definition of refugee applied to persons affected “[a]s a result of events occurring before 1 January 1951” (Article 1A(2)), *either* “in Europe” *or* “events occurring in Europe or elsewhere” before the specified date depending on which limitation a Signatory State declared to apply (Article 1B). Its 1967 Protocol removed the geographic and time limits of the Convention in states which acceded to it (see Hathaway 2005, 97, 110–111). States may be party to the Convention, its Protocol, or both.³⁹ In Article 1A(2), both the Convention (with geographic and time limitations) and its Protocol define “refugee” as applying to any person who

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

The drafting and implementation of the Convention “reflected as liberal a synthesis of policies as nation states could agree to” – there was a consensus among signatories on the “right to seek asylum,” but territorial sovereignty was often prioritised (Gallagher 1989, 580). The Convention was drafted with the view that it was an instrument for sharing the burden of refugees, and although it may be outwardly humanitarian “the true motives and intentions behind [it] have been subject to debate and still influence its interpretation in theory and practice” (Einarsen 2011, 41–42). From a critical perspective, the refugee regime was created primarily by the Western powers and is sustainable only so long as their interests are reconcilable with human rights and humanitarian norms (Loescher 1989, 9; Hathaway 1991, 6–10; Tuitt 1996, 7). For example, Hathaway (1991, 6) argues that the definition, Article 1A(2), had a “strategic dimension” that stems from the “successful efforts of Western states to give priority in protection matters to persons whose flight was motivated by pro-Western values,” which had particular salience in the Cold War. The remainder of

means for interpretation” and utility of “all documents that had a formative effect on a treaty’s drafting,” which for the 1951 Convention includes the records and documents of the Ad Hoc Committee and Conference, such as drafts, written interventions, and summary minutes.

³⁹ Three states are party to the 1967 alone, while the UK is one of 133 states party to both the Convention and its Protocol (Lauterpacht and Bethlehem 2003, 102–103).

this section is organised around the themes of international consensus, the development of the particular social group category, and the meaning of persecution.

1.2.1 *Perceived importance of consensus between states*

The Convention may have been prompted by, and seen as a solution to, the effects of displacement, as well as violations of human rights, but more critically it was a means to define categories of people who should receive international protection (Gallagher 1989, 594). To support the claim that the Convention was as liberal as Contracting States could agree to (Gallagher 1989, 580), the summary records of the Ad Hoc Committee on Statelessness and Related Problems (hereafter the Ad Hoc Committee) and Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (hereafter the Conference) are examined briefly here to illustrate the difficulties of negotiating the terms of the Convention that set out clear limitations to state obligations (see Hathaway 1991, 6 on the drafting process).

The Ad Hoc Committee postponed negotiating a solution for all refugees beyond the dateline or events which caused them to become refugees (“events occurring before 1 January 1951” in the final agreement), because it was recognised states would not accede to a Convention offering a “blank cheque” for obligations to an indefinite and uncertain number of future refugees (A/CONF.2/SR.21).⁴⁰ A particular debate in which Mr Hoare (United Kingdom) and Mr Rochefort (France) are the main protagonists is a helpful illustration. Over several meetings, stark differences of opinion came to light over the geographic limitations of the Convention; here, the UK was apparently “universalist” or “generous” and France “Europeanist” or “egoist” (A/CONF.2/SR.19; A/CONF.2/SR.35). This debate is particularly apt as it centred on the widest possible definition of refugees that Contracting States could agree to (A/CONF.2/SR.19).⁴¹

The French Government’s position was that the Convention definition of “refugee” should be limited to events in Europe, based on historical facts, and could not be universal without making it “Open Sesame” (A/CONF.2/SR.22; see Hathaway 1991, 7). Mr Rochefort (France) contrasted the international obligations and moral

⁴⁰ These citations denote separate documents retrieved from *RefWorld*, a UNHCR database; full references for these are listed in Appendix III.

⁴¹ Although I have cited the Nineteenth Meeting generously (A/CONF.2/SR.19), the debate continues at other points of the convention too (e.g. A/CONF.2/SR.33; A/CONF.2/SR.34).

commitments to refugees against the practical limits of states, especially those on the European mainland that refugees could easily reach (A/CONF.2/SR.19). Mr Hoare represented that the UK “had always advocated the widest possible definition,” not due to the geographic advantage as an island for the control of migration, but “on the grounds that the status of refugee should be granted to any person fleeing from persecution” (A/CONF.2/SR.19). The UK Government’s stated position was that if the purpose of the Convention was to grant certain minimum protections that “those guarantees ought not to be limited to refugees from a particular area” (A/CONF.2/SR.19). The UK delegation had originally favoured a definition that was without the limitations of geography (in Europe) and time (as a result of events occurring before 1 January 1951), but eventually accepted these “in a spirit of compromise” (A/CONF.2/SR.34). The rest of the Conference was equally divided on the issue.

The UNHCR had expressed concern for the Convention to cover the greatest number of refugees whilst remaining acceptable to as many Contracting States as possible (A/CONF.2/SR.21). A solution which suited both sides of the debate was eventually found and the compromise is evident in Article 1B(2), discussed above, regarding “in Europe” or “in Europe or elsewhere” (see A/CONF.2/80; A/CONF.2/SR.21; A/CONF.2/SR.23). The UK Government submitted for inclusion in the Conference’s recommendations in the Final Act a paragraph expressing hope the Convention would “have value as an example exceeding its contractual scope,” and that states would grant refugee status to those not covered by Article 1A where possible (Recommendation E of the Final Act; A/CONF.2/107; see Hathaway 1991, 11).⁴² The drafting process reveals the competing interests between state sovereignty and the control of migration, and the recognition of refugee rights, but the former was consistently prioritised in negotiation and often in practice (Tuitt 1996, 38). One speaker from the voluntary agencies observed that at the Conference the discussions and “decisions had at times given the impression that it was a conference for the protection of helpless sovereign states against the wicked refugee” (A/CONF.2/19). These themes of a “blank cheque” to refugees or migrant “floodgate,” sovereignty

⁴² Many states applied this recommendation in refugee crises until the 1967 Protocol removed the temporal and geographic limitations of the Convention (Goodwin-Gill and McAdam 2007, 36).

The inclusive guise of “gay” asylum and immigration control, and international consensus are explored in later chapters – especially six.

1.2.2 *Particular social group*

Of the five Convention categories that persecution must be based on – race, religion, nationality, membership of a particular social group (PSG) or political opinion – SOGI-based asylum claims typically rely on PSG. Despite the significance of PSG for this project, it is important to note that commentators and UNHCR Guidance suggest that Convention “reasons” or grounds for persecution, may be overlapping. Thus sexual minority refugees might also fall within the Convention definition for persecution based on, for example, political opinion (UNHCR 2008, 14–15). Tuitt (1996, 38–42) observes that states have been reluctant to recognise political opinion as a grounds to include additional categories of refugees, such as homosexuals; instead many have opted to employ *ejusdem generis* to interpret the PSG category independently of other grounds, but as within the Convention’s scope (see Hathaway 1991, 160–161).⁴³ Here I will briefly overview the way in which particular social group became included in Article 1A(2).

The *travaux préparatoires* record that the Swedish Delegate put forward the amendment (A/CONF.2/9) because “experience has shown” refugees had been persecuted on account of membership of a particular social group (A/CONF.2/SR.19). Mr Petren’s (Sweden) recorded comments on the introduction of “particular social group” were brief. Regarding the Swedish amendment (A/CONF.2/9),⁴⁴ Mr Petren “suggested the inclusion in sub-paragraph 2 of paragraph A of a reference to persons who might be persecuted owing to their membership of a particular social group. Such cases existed, and it would be as well to mention them explicitly” (A/CONF.2/SR.19).

However, throughout the Ad Hoc Committee and most of the Conference, the draft under consideration did not include PSG, as the amendment was added late in the Conference and so was subject of little debate. Therefore, the *travaux préparatoires* and other evidence do not suggest much in the way of an “original

⁴³ See Appendix II on *ejusdem generis*.

⁴⁴ The Swedish amendment (A/CONF.2/9) was adopted by the Conference 14 votes to none, with 8 abstentions (A/CONF.2/SR.23).

intent” of the category, but it has been suggested the drafters presumed it referred to former capitalists from the Communist bloc (Hathaway 1991, 7; Aleinikoff 2003, 265–266; Good 2007, 74–75). As Good (2007, 74) has noted on plausible meanings of PSG, it is likely that it was included without objection or discussion in relation to concerns for refugees from communist states.⁴⁵ This seems to be a likely explanation considering that the Convention was being drafted at a time when the Cold War hostilities were heightening. Indeed, several commentators have argued that the recognition of refugees has been used as a foreign policy tool in order to condemn the country of origin (Loescher 1989, 12–15; Tuitt 1996, 15–17).⁴⁶ Another interpretation is that PSG was a category intentionally left open to state and judicial discretion. I would argue it is unlikely PSG was intended as a remedial clause or “safety net” for persons outside the stated categories in Article 1A(2), even if perhaps that is how it has been interpreted (see further Hathaway 1991, 157–159. If it was the intent, as Harvey (2000, 328) observes, why would “the drafters include a list of grounds at all?”

My interpretation of the records is that a broad application of PSG was not intended. In the same statement regarding the introduction of the Swedish amendment (A/CONF.2/9), Mr Petren also discusses for “reasons other than personal convenience,” a concept introduced by the interwar 1938 Convention discussed above. The concept referred to explicitly “[attempts] to exclude the possibility of a refugee’s availing himself of asylum for the sake of financial gain,” which Mr Petren submitted could be difficult to “gauge,” and the Swedish Government would not “accept a text that was not sufficiently limited and precise” (A/CONF.2/SR.19). However liberal the Swedish Government may have been in its asylum policy, these comments seem to suggest that it too had a preoccupation with limiting the

⁴⁵ Other observers are critical of this conclusion, such as Einarsen (2011, 63), writing that a “specific Cold War motivation cannot be documented, and thus must be based on mere speculation.”

⁴⁶ Tuitt (1996, 18) observes that the collapse of the USSR has diminished the extent to which refugees are deployed in an “ambassadorial role.” However, there may be a corollary political aim or unwitting judicial effect of conferring refugee status on sexual minorities in “pinkwashing,” indicating a similar ambassadorial usage today. Here I use pinkwashing as synonymous to what Bhabha (2002, 161) terms “gatekeeping” that “keeps migration exclusion morally defensible,” or as Luibhéid (2008, 179–80) claims the select few that receive asylum “lend credence to claims of first-world humanitarianism and democratic freedom.” This is consistent with a range of literature which posits the determination of refugee status is necessarily political, constituting an appraisal of the conditions in the country of origin (see e.g. Zolberg et al. 1989, 272–275; Miller 2005, 143, 166).

Convention.⁴⁷ Surveying the minutes of the Conference, it seems reasonable to conclude that, like the Convention as a whole, “particular social group” was meant, in the words of Mr Petren, to be *sufficiently limited and precise*.⁴⁸

1.2.3 Persecution

The “well-founded fear of being persecuted” is central to the Convention definition and recognition of refugee status. Zolberg et al. (1989, 25) claim that “the selection of ‘persecution’ as the key operational criterion was in keeping with the desire of the international community to make the status of refugee exceptional,” precluding mass influx of refugees fleeing generalised violence. A complementary explanation is that, as Hathaway (1991, 7) argues, “[i]t was understood that the concept of ‘fear of persecution’ was sufficiently open-ended to allow the West to continue to admit ideological dissidents [from the Soviet bloc] to international protection.” However, in Article 1A(2) “owing to well-founded fear of being persecuted” is ambiguous and not clarified elsewhere in the Convention. Neither the 1951 Convention nor its *travaux préparatoires* substantially address the definition of persecution (Goodwin-Gill and McAdam 2007, 98).

Therefore, this issue is more adequately addressed in examination of the domestic law analysed in the case law analytical chapters (see in particular chapter five), because like many terms of the Convention, “well-founded fear of persecution” cannot be interpreted and applied independently of other instruments. Rather, it must be understood within a broader range of treaties and domestic jurisprudence. A number of approaches have been taken to define “persecution.” For example, some authorities on refugee law have suggested persecution should be recognised in cases of violation of fundamental human rights (Tuitt 1996, 43). Other legal commentators have suggested “persecution” has come to be understood as “the severe violation of human rights accompanied by the failure of the State to protect the individual” (Zimmermann and Mahler 2011, 345). Aside from briefly addressing the minimum

⁴⁷ However, it should be acknowledged Mr Petren claims Sweden had and hoped to continue a liberal asylum policy (A/CONF.2/SR.19).

⁴⁸ Because the *travaux préparatoires* are unhelpful in interpreting PSG due to limited discussion (Aleinikoff 2003, 265), I have supplemented the discussion with related opinions; however, the limited preparatory work around PSG and therefore lack of evidence for its “original intent” has left interpretation open and adds interest in the category as a “space for change” in international refugee law.

EU standard of persecution later in this chapter, for now I leave these issues to be revisited in the context of the case law analysis in chapters four and five, where it is possible to situate interpretations of persecution within the contemporary recognition of sexual minority refugees.

1.3 *The construct of the refugee*

In summary, part one of this chapter has overviewed key conceptual developments in refugee law, the importance of human rights, and the 1951 Convention and its 1967 Protocol, especially meaning of Article 1A(2). The evolution of human rights concepts may in part explain both the expanded scope of the definition of Convention refugee (Good 2007, 6),⁴⁹ and the changes to international legal norms in refugee law and UNHCR Guidance and policies considered further in chapters four and five. Goodwin-Gill and McAdam (2007, 70–90) claim that the five recognised Convention “reasons for persecution” have “progressively developed” corresponding to non-discrimination jurisprudence, including the rights of association (see also Hathaway 1991, 136). As this research will demonstrate, the category of PSG has expanded protection to a number of groups, including sexual minorities, and “[pushed] the boundaries of refugee law” (Aleinikoff 2003, 264).

Before moving on, it is useful to reflect on the implications of defining “refugee” in law in the context of this research.⁵⁰ Studying, categorising, and defining the “refugee experience” is problematic in that “it posits a single, essential, transhistorical refugee condition” (Malkki 1995, 511; see also Tuitt 1996). I would suggest, similarly to Malkki (1995, 511), that the social complications of defining a refugee, as with SOGI (see chapter one), is that to propose a definition or criteria for being a refugee in law reifies, to some extent, an essential and transhistorical category. The term refugee does not just describe an individual seeking state

⁴⁹ Zimmerman and Mahler (2011, 299) argue that Article 1A(2) “constitutes, just like similar clauses in treaties generally and in human rights instruments in particular, part of a ‘living instrument.’” See also Bayefsky (ed., 2006).

⁵⁰ The consequences of defining “refugee” and the resulting exclusions are apparent in legal terminology. For example, alternative classifications have been developed for asylum seekers to avoid their being labeled “refugees” which are protected by international law and entitled certain obligations by states; therefore, states have instead labeled many asylum seekers as “‘displaced persons,’ ‘illegal immigrants,’ ‘economic migrants,’ ‘quasi-refugees,’ ‘aliens,’ ‘departees,’ ‘boat-people,’ or ‘stowaways’” to “assert...greater freedom of action” in granting refugee status (Goodwin-Gill and McAdam 2007, 50).

protection but, in fact, often ends up specifying a “kind” of person (Malkki 1995, 513). Similar to my rejection of specific “gay” categories in favour of the term “sexual minority,” the use of “refugee” and its criteria should be clarified, where possible, to avoid reducing the person to a “kind” or “type” in the case law analysis of this thesis (see generally Luibhéid 2005a, xi on “migrant;” Long 2013). Instead, the limits of the term “refugee” should be delineated, noting that it is only analytically useful “as a broad legal or descriptive rubric that includes within it a world of different socioeconomic statuses, personal histories, and psychological or spiritual situations” (Malkki 1995, 496). Where social-scientific, non-legal conceptions of “refugeehood” can be broad in scope, the premise of a legal definition necessarily reduces this to an artificial identity of those deserving of official recognition and creates an “entrenched identity” that is “relatively narrow and inflexible” (Tuitt 1996, 14). Part one has attempted to outline the origins of refugee law and the centrality of Article 1A(2); moving forward, we will see that the on-going task of refugee law has been to construct the identity of refugee (Tuitt 1996, 14).

A historical inquiry into the category of “refugee,” its administration, regulation, and codification in law reveals the 1951 Convention is grounded in the European political experience (Hathway 1991, 1), for European refugees, only being formally extended to all refugees in 1967. If the Convention’s principles and, perhaps, human rights originate in Europe and were adopted in order to address European problems, I would suggest analyses remain attentive to the limits of the construct “refugee.” As Zolberg et al. (1989, 270) observe, the specification of “‘exact definitions’ were necessary to prevent the number of refugees from multiplying *ad infinitum*,” and this has become more self-evident over time, because the grant of refugee status “represents a privileged form of migration” which “can only be given to a limited number of people.” This (perceived) reality or understanding of the refugee requires “discriminating interpretations.” To paraphrase Halley (1993, 88) on homosexuality and the construction of heterosexuality, law also possesses the authority to designate what and who a “refugee” is – and in doing so imposes a notion of refugeehood that, as Malkki (1995) tells us, may not account for the whole person. The question to consider here, then, may be to explore the

The inclusive guise of “gay” asylum consequences of defining the “refugee,” creating a “kind” of person, and to what extent the law simplifies the social world and becomes inflexible. The case law analytical chapters will examine the tension between universal conceptions of refugee law, sexual and gender identity and their particularistic roots in Western ideas and institutions. But first we must consider the institutions of the international framework that affect UK law and practice.

2 International law (and norms) in practice

Part two of this chapter carries forward the discussion of the 1951 Convention within the context of international legal norms and highlights the role of international institutions. After briefly considering supporting treaties, the first section considers the operation of international refugee law, and the second will outline the relationship between the UNHCR and states party to the Convention and its Protocol. This discussion will conclude with some of the key features of European asylum law that are relevant to this research. Finally, I consider the UK implementation of refugee law and its asylum system.

2.1 The international framework of supporting treaties

Since the Convention does not specify procedures for the determination of “refugee” outwith the definition provided in Article 1A(2), it is important to consider the interrelations between human rights and refugee law, and the relationship between international and domestic law. The Vienna Convention on the Law of Treaties (VCLT) stipulates that States Parties to the 1951 Convention must apply it in good faith (Einarsen 2011, 40). Nonetheless, in practice states retain considerable leeway in the recognition of international refugee law because it is not enforceable by an international body, and so the regime provides an ineffective system of accountability. Moreover, it is debateable whether the human rights treaties are binding on a state unless that state has ratified the specific instruments (Hamilton 2006, 237–238). This section briefly outlines relevant treaties of international law, and how international law (or norms) may affect domestic refugee law.

In addition to the 1948 UDHR, “the twin International Covenants of 1966” outline crucial rights in international law and further clarify the importance of “non-discrimination” (Hamilton 2006, 237). These are the International Covenant on Civil

and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). As noted above, non-discrimination has contributed to the progressive development of PSG (Goodwin-Gill and McAdam 2007, 70–90). Non-discrimination has become a central issue in the application of many international human rights and refugee law instruments. As Morsink (1999, 331) notes, Articles 2 and 7 of the UDHR are the “textual anchors” of a “non-discrimination theme that runs throughout” that Declaration, and subsequent instruments such as the ICCPR and ICESCR further developed the concept, reiterating the importance of non-discrimination.

In international law generally, non-discrimination cuts through multiple instruments and forms a cornerstone of human rights protection. Bodies of human rights “law reinforce the non-discriminatory basis of international law...which impacts on international refugee law in particular” (Edwards 2003, 47). A select list of instruments that espouse non-discrimination include the UDHR, ICCPR, ICESCR, the 1965 Convention on the Elimination of All Forms of Racial Discrimination, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, and the 1989 Convention on the Rights of the Child (Haines 2003, 327–28). The 1951 Convention and its 1967 Protocol are, therefore, part of a broader international agreement on the validity of non-discrimination in the enjoyment of human rights. Though states retain sovereignty in the application of the codified standards of international law, the VCLT affirms that there are common rules necessary to protect the international order (Hamilton 2006, 238). As international treaties are not “self-applying” and their terms are generally not “self-evident,” the meaning of non-discrimination, persecution, and *non-refoulement* among others must instead be understood holistically within international human rights and refugee law (Goodwin-Gill and McAdam 2007, 7).

Some commentators have expressed concern over how the 1951 Convention has been applied at the state level, according to “national subjective considerations, overly political concerns, and prejudices that are at odds with the Convention itself” (Beyani 2006, 271). This critical theme will be considered in the case law analytical chapters regarding sexual minorities seeking asylum in the UK. But it should be highlighted here that there is dispute among decision-makers and commentators as to

whether asylum is actually codified in international law (Goodwin-Gill and McAdam 2007). Instead, it might be more accurate to say that international law posits common standards which are in fact persuasive norms lacking coercive force (Kratochwil 1989, 179; Steiner 1999, 351). That is, the “international norms” of refugee protection more aptly summarise the process of “expansion” or “clarification” of existing concepts and definitions, because the Convention and its Protocol lack coercive means to ensure state compliance with international obligations.

As with Morsink’s (1999) assertion that the success of the UDHR has partially been credited to the aspirational potential of human rights, I consider the “norm” of sexual minority recognition under the 1951 Convention today may be attributed to the Convention’s ambiguous definitions of PSG and persecution. I will further unpack this idea in the case law analytical chapters as it applies in the UK. Using this conceptualisation of international law as normative, I turn now to the institutions of the refugee regime.

2.2 Inter- and supra-national institutions, guidance, and law

This section considers the role of the UNHCR as the key international institution of the refugee regime before moving on to the European response to the “asylum crisis,” and the relevant EU law and policy in the UK’s application of refugee law. The UN General Assembly (UNGA) established the High Commissioner’s Office for Refugees in 1949, and the Statute of the Office of the United Nations High Commissioner for Refugees (hereafter the Statute) was adopted in 1950 (UNHCR 2010). The Statute called upon states to cooperate with the UNHCR in performance of the Office’s functions, to become parties to subsequent conventions, undertake their implementation, and enter into other “special agreements with the High Commissioner for the execution of measures calculated to improve the situation of refugees and to reduce the number requiring protection” (UNGA Resolution 428(V) 2(a)). Chapter 1(2) of the Statute declares that the work of the High Commissioner should be “entirely non-political” in character, humanitarian and relate to “groups and categories of refugees.” The Executive Committee (composed of 79 states including the UK) approves the material assistance programmes of the UNHCR and advises on the High Commissioner’s role as defined by the Statute (UNHCR 2010).

The UNHCR mandate and 1951 Convention contain similar definitions of “refugee,” but it is within the competence of the UNHCR to determine refugee status under its mandate and for Contracting States to determine refugee status under the 1951 Convention and/or 1967 Protocol (Goodwin-Gill and McAdam 2007, 51–52). Thus, a claimant may be recognised both by the UNHCR as a mandate refugee and by the state as a Convention refugee, or as one category exclusively (Goodwin-Gill and McAdam 2007, 51–52). Therefore, despite similarities, the UNHCR and states may derive different meanings from the respective texts (see further Hathaway 1991, 11–13). The UNHCR also “has the statutory function of supervising the application of international conventions for the protection of refugees, and States parties to the Convention and Protocol formally undertake to facilitate this duty” (Goodwin-Gill and McAdam 2007, 51–52). This is the primary relevance the UNHCR has in this research as an international institution – the guidance it issues, especially the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (2011b, past editions 1992, 1979), will be referenced in subsequent chapters of this thesis.

The role of the UNHCR in supervising the 1951 Convention is established in Articles 35 and 36. Under Article 35, Contracting States are directed to “undertake to co-operate” with the UNHCR “in the exercise of its functions, and in particular facilitate its duty of supervising the application of the provisions of [the] Convention” (see generally Anker 2005). Contracting States are to provide the UNHCR “information and statistical data” concerning “the condition of refugees,” “implementation of [the] Convention,” and “laws, regulations and decrees which are...in force relating to refugees.” As a result, the UNHCR in its capacity to offer states guidance on instruments can become an important component of progressive readings of refugee law (see e.g. Buxton 2012, 402–403 on *HJ and HT* [2010]). For the first time, in 1996 the UNHCR provided that a claim to refugee status could be made on grounds of sexual identity (Walker 2003, 253).

“It is the policy of the UNHCR that persons facing attack, inhumane treatment, or serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognized as refugees” (UNHCR 1996, 12).

The UNHCR has since issued specific guidance on claims to refugee status based on sexual orientation and gender identity (see e.g. UNHCR 2011a; UNHCR 2011b). Although the determination of refugee status is a state prerogative, and the UNHCR lacks the authority to enforce compliance, the UNHCR “can call attention to the legal obligations undertaken” by states to implement the Convention and its Protocol (Loescher 1989, 19). In a similar way to international law, UNHCR guidance relies on persuasive norms to influence state practice (Anker 2005, 108; Goodwin-Gill and McAdam 2007, 217).

The UK is obliged, however, to implement the law of the European Union (EU) in relation to refugee status. While the UK maintains an option to participate in EU asylum policy, the Labour Government chose to opt-in to measures adopted between 1999 and 2004 (Costello and Hancox 2014, 2, 4). Importantly here, the previous Conservative-led and current Conservative Government have not opted-in to recent policy, such as the 2011 Qualification Directive (recast),⁵¹ and have expressed a desire to withdraw from previous instruments (Costello and Hancox 2014, 4). At the time of writing, however, the 2004 Qualification Directive that is discussed below still has effect in the UK (see e.g. API 2015, 6–7).

Here, I begin by discussing the reasons for European cooperation in asylum, before shifting to relevant treaties, and conclude with measures that directly affect UK law and policy that are relevant to this thesis. Cooperation in this area was initially triggered by an “asylum crisis” in Europe in the 1980s and 1990s. The “crisis” was characterised by an influx of asylum seekers and populist anti-immigrant politics, which, it is argued, led to multinational cooperation through the EU (Freeman 1995, 889–893). Many European states adopted restrictive immigration policies in response to economic recession in the mid-1970s, and many perceived themselves to be “overwhelmed” with asylum claims by the 1980s (Zolberg et al. 1989, 278; Boswell 2000, 541). European states confronted the increasingly difficult task of determining large numbers of asylum claims, and began to “streamline” procedures to deal with case backlogs (Boswell 2000, 541–542). For example, the UK instituted “fast processing of ‘manifestly unfounded’ asylum claims” which lead to an increased refusal rate “from 16 per cent in 1993 to 75 per cent in 1994” (Joppke

⁵¹ Council Directive 2011/95/EU of December 13, 2011.

1999, 134). The fact that a vast majority of asylum seekers in Western Europe were refused led many to conclude they were in fact economic migrants (Hollifield 2004, 899).

The first meaningful steps to harmonize asylum policy at the EU level occurred in the early 1990s with the Maastricht Treaty (Boswell 2000, 542). Early measures were not legally binding on Member States. At the 1999 Tampere summit, Member States expressed commitment to develop a comprehensive asylum policy (Guiraudon 2003). Effective in 1999, the Amsterdam Treaty expressed a commitment to adopt legislation on particular areas of asylum policy. The Directives subsequently set out minimum standards for recognising refugee status, but these initiatives have been criticised by commentators for encouraging a “lowest common denominator” approach (Boswell 2000, 543).⁵² EU asylum policy has focused on accelerated determination procedures, an EU-wide definition of refugee, and “safe third country” provisions. The 1990 Dublin Convention sets out which contracting state is responsible for an asylum claim (Guiraudon 2003, 266–267). The crux of Dublin is that it stipulates refugees must “apply for asylum in the first ‘safe country’ where they arrive,” meaning they can be returned to this first state without violating the principle of *non-refoulement* (Hollifield 2004, 898; see also Costello and Hancox 2014, 4–5).

The Treaty on the Functioning of the European Union (TFEU) came into force in 2009.⁵³ TFEU Article 78(1) stipulates that “the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status” to those in need of protection and in observance of the principle of *non-refoulement*. Moreover, the common asylum policy must be in accordance with the 1951 Convention and other relevant treaties. Article 78 also provides that the European Parliament and the Council will adopt measures for the standardisation of asylum that will be valid throughout the EU. Following from TFEU, Article 18 of the Charter of Fundamental Rights of the European Union (CFREU) grants the right of asylum with “due respect for the rules” of the 1951

⁵² e.g. Joppke (1999, 85) observes European integration allowed Germany to regain sovereignty over refugee policy which had previously been restricted under its Basic Law.

⁵³ *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01.

Convention and its Protocol.⁵⁴ The position of asylum in the CFREU gives it the status of a fundamental right for claimants in the EU.

Finally, the key EU standards and common criteria of asylum in this research can be found in the EU Council Directive 2004/83/EC (see generally Lambert 2006). The 2004 Directive instructs Member States, including the UK, to consider through their own legislative means *minimum* standards of refugee protection in defining PSG and persecution.⁵⁵ The European Court of Justice (ECJ), now called the Court of Justice of the European Union (CJEU), oversees the application of the 2004 Directive and has clarified its meaning in decisions that affected UK practice.⁵⁶ The Directive considers a PSG to “share an innate characteristic, or common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it.”⁵⁷ Moreover, a PSG has a “distinct identity...perceived as being different by the surrounding society,” and this common characteristic can be sexual orientation, with the limitation that it “cannot be understood to include acts considered to be criminal in accordance with national law of the Member States.”⁵⁸ Thus, the 2004 Directive sets out a “two limb” or “cumulative” test for PSG as possessing both an “innate characteristic” and that it is “perceived as being different” in the country of origin. The CJEU affirmed this approach in *X, Y, and Z* [2013], but the standard has been criticised by the UNHCR and commentators for how it applies in practice, and the burden imposed on sexual minority claimants (Chelvan 2013, 3–4; Ferreira 2015, 425–426; cf. Lambert 2006, 169–170). However, the UK House of Lords (UKHL, now Supreme Court) observed in *K and Fornah* [2006] that “[t]he Directive expressly permits member states to apply standards more favourable to the applicant than the minimum laid down;” therefore, the UKHL followed the UNHCR’s Guidelines that an innate characteristic and social perception “should be treated as alternatives,” and recognised PSG as applying “where either criterion is met,” but not

⁵⁴ *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02.

⁵⁵ Translated to UK law by Regulation 5 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525).

⁵⁶ e.g. *X, Y, and Z* [2013] regarding persecution and the enforcement of anti-homosexual laws; *A, B, and C* [2014] regarding evidence and proof in sexual identity claims.

⁵⁷ Council Directive 2004/83/EC of April 29, 2004. Article 10(1)(d).

⁵⁸ *Ibid.* In other words, the Directive incorporates two approaches to interpreting PSG, the “protected characteristics” or “immutability” approach and the “social perception” approach (see Appendix II); these will be considered in chapters six and seven.

The inclusive guise of “gay” asylum requiring both (Lord Bingham, para 16). The 2004 Directive sets out that persecution must be committed in respect of an Article 1A(2) ground, and is defined as:

“(a) sufficiently serious by its nature or repetition as to constitute a severe violation of a basic human right, in particular a right from which derogation cannot be made under Article 15 of the [ECHR]; or

(b) an accumulation of various measures, including a violation of a human right which is sufficiently severe as to affect an individual in a similar manner as specified in (a).”⁵⁹

These are *minimum* EU standards the UK must apply in determining asylum claims; again, Member States may apply more generous standards. The relationship between EU law and its application in the UK is considered in several cases considered in this thesis, especially the 2004 Directive.

2.3 UK implementation of refugee law

Thus far the chapter has set out the relevant background necessary to consider how the UK recognises refugees in practice. The cases studied in this thesis cover the period 1999 to 2012, and over that time a series of legislative changes reorganised the UK asylum system and how claims progressed through the appeals process. This section overviews the most relevant statutory changes, the roles and titles of specific “adjudicators” – a term I use broadly to describe decision-makers of asylum claims at all levels of appeal – as well as the general structure of appeals in the relevant period. In conclusion, I revisit the question of the relevance of human rights in the form of the 1998 Human Rights Act (HRA).

Although a signatory to both, the UK has not “expressly” incorporated the 1951 Convention and its Protocol into domestic law. Instead, “successive legislative references and the content of rules adopted” in relation to refugee law has led UK “courts to conclude that, to all intents and purposes, [the Convention and its Protocol] are indeed part of domestic law” (Goodwin-Gill and McAdam 2007, 44). For the purposes of this study, a rough outline of the judicial and administrative structures of refugee status determination (RSD) will provide sufficient background for examining the construction of identity and persecution in the case law. The body of statutory law set out below concerning immigration and asylum has transformed

⁵⁹ *Ibid.* Article 9.

the appeals process over time. Following an initial decision from the Secretary of State for the Home Department (SSHD),⁶⁰ if the asylum claim was refused, the tribunals to which the appellant first appealed were, in order of creation: Immigration Appellate Authority (1971-2005), Asylum and Immigration Tribunal (2005-2010), and the First Tier Tribunal (since 2010). Onward challenges from tribunals are submitted to the High Court or the Court of Appeal depending on procedure and disputed legal questions.⁶¹ A final appeal may have been heard previously by the UK House of Lords (UKHL) and currently the Supreme Court (UKSC) in difficult cases.⁶²

The first system of immigration appeals was introduced by the Immigration Appeals Act 1969 which established a two-tier system (Harvey 2000, 155–156; Kotzeva et al. 2008, 210–211). Following this, the Immigration Act of 1971 replicated many provisions from the previous Act and the two-tier appellant structure of Adjudicators and the Immigration Appeal Tribunal (IAT) under the Immigration Appellate Authority (IAA) (Harvey 2000, 156). The rules of the 1971 Act provided that the UK’s obligations under the 1951 Convention should be considered for someone seeking asylum (Kotzeva et al. 2008, 210–211). Under the IAA, following from an initial decision of the SSHD, a refused asylum claim could be appealed to an Adjudicator and then the IAT. Further, the Nationality, Immigration and Asylum Act 2002 (NIAA 2002) provided for the dismissal of unfounded claims, added a list of “safe countries” to the statutory law (e.g. EU Member States), and limited the scope of the Tribunal’s power to review. Regarding the power to review, the Tribunal’s remit had previously extended to error of fact (e.g. likelihood of persecution) or point of law (e.g. definition of persecution) in hearing appeals, but the NIAA 2002 limited grounds of appeal to the IAT to an error of law (Kotzeva et al. 2008, 211; Goodwin-Gill and McAdam 2007, 536). The IAA tribunal system remained largely intact until its dissolution in 2005, at which point it was superseded by the AIT scheme.

⁶⁰ Under the SSHD, formerly the UK Border Agency (UKBA) and currently UK Visas and Immigration (UKVI) staff make initial decisions – I simplify this initial stage and identify the SSHD, rather than UKBA Case Owners, Presenting Officers (see e.g. Baillot et al. 2012, 271–272), and others under earlier legislation, considering that the sample of case law concerns the appeals process.

⁶¹ The Court of Session is relevant to appeals in Scotland but does not concern the sample of cases here.

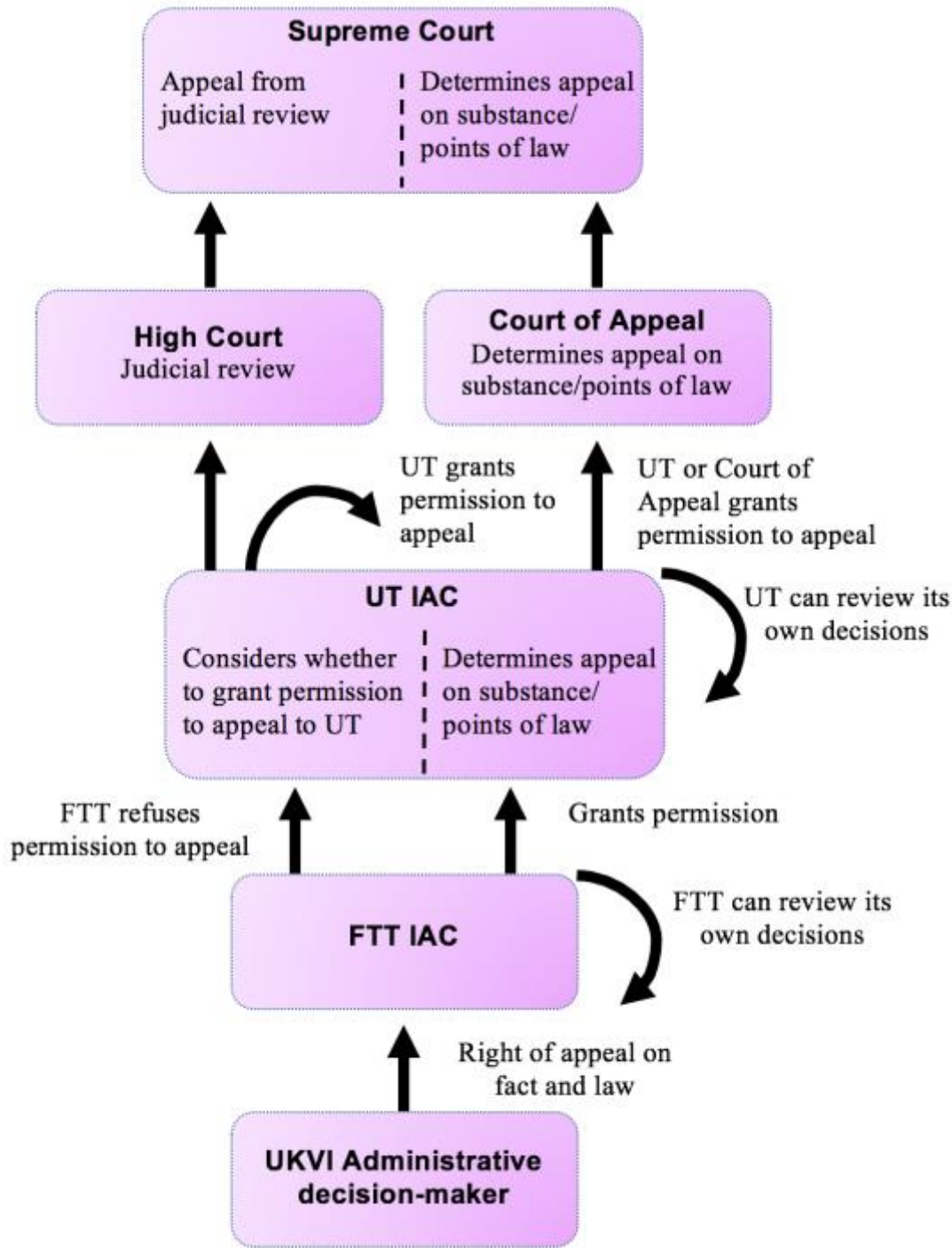
⁶² The UKSC was created by the Constitutional Reform Act of 2005 and began hearing cases in 2009 as the highest appellate court in the UK for civil cases. Formerly, Lords of Appeal in the Ordinary (“Law Lords”) were professional judges appointed to the UKHL to perform its judicial functions.

The Asylum and Immigration Tribunal (AIT) was created under the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (AIA 2004) and began hearing cases in 2005. The AIA 2004 abolished the two-tier system of Adjudicator and IAT under the IAA and replaced this with a single-tier appellate system (Thomas 2008, 502; Kotzeva et al. 2008, 211–212). In short, asylum seekers first submitted a claim with the SSHD and appeals against a negative decision were heard by the AIT (Sweeney 2007, 20). Under the AIA 2004, Adjudicators became Immigration Judges (IJ) (Sweeney 2007, 20). With the introduction of the single tier, appeals were heard by a single IJ or panel of AIT members depending on the circumstances of a particular case (Kotzeva et al. 2008, 211–212). The single-tier meant applications for reconsideration and review would then go to the High Court or the Court of Appeal (see generally Thomas 2008, 495–497).

The current appeal system is structured according to the Tribunals, Courts and Enforcement Act 2007 (TCEA). This reformed the appeals system and introduced the Immigration and Asylum Chamber (IAC) First Tier Tribunal (FTT) and Upper Tribunal (UT). Importantly, under the TCEA the UT was vested with greater authority to shape FTT practice.⁶³ In chronological order, a refused asylum claim on appeal as of 2010 (TCEA in force) proceeds from the SSHD (or UKVI decision-maker), to the FTT, UT, High Court or the Court of Appeal, and finally the most contentious cases may come before the UKSC. Figure 1, below, roughly outlines the current appeals process.

⁶³ Although tribunals “do not have a common law based jurisdiction,” and therefore lack power to set precedent, higher courts such as the Court of Appeal have “explicitly encouraged the immigration tribunal to give detailed guidance on country conditions to ensure consistency of approach” in asylum cases (Elliott and Thomas 2012, 319).

FIG 1 Structure of the appeals process⁶⁴



There are two general points to be distilled from this discussion. Firstly, the UKSC, formerly the UKHL, and the Court of Appeal, consider errors of law and establish precedents to be followed by the tribunals. Secondly, under the IAA, AIT, and FTT

⁶⁴ Unlike Figures 2 and 3, I have largely based Figure 1 on another source, an outline by Elliot and Thomas (2012, 307).

The inclusive guise of “gay” asylum and UT today, the specialist adjudicators can generally be said (with variation over time and tribunal tier) to deal with both fact and law.

One final piece of UK legislation requires consideration which links back to the previous discussion of human rights. Adjudicators must consider whether the UK’s obligations under the European Convention of Human Rights (ECHR) are engaged in RSD (Sweeney 2007, 21; Johnson 2011, 72–73). The 1950 ECHR was given further effect in domestic UK law by the HRA 1998; for example, section 6(1) of that act states “[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right.” Section 6(3) of the HRA defines a “public authority” as including (a) “a court or tribunal,” and (b) “any person certain of whose functions are functions of a public nature.” HRA Section 2(1) provides that courts and tribunals must also take into account any “judgement, decision, declaration or advisory opinion of the European Court of Human Rights” (ECtHR) in “determining a question which has arisen in connection with a Convention Right.” The ECtHR has developed jurisprudence in relation to torture,⁶⁵ private life,⁶⁶ as well as other relevant grounds that affect asylum law in the UK. Therefore, the “European dimension” intersects UK asylum law through EU Directives and Regulations and the rulings of the CJEU, as well as the rights proscribed by the ECHR and interpreted by the ECtHR.

3 Conclusion

The contribution of this chapter to the broader project has been to establish the key instruments and concepts of international refugee law, and how the UK relates to this framework of refugee protection. In addition to outlining what the instruments and institutions are and, generally, how refugee law operates, this chapter has considered how the international framework may help us to understand how the persecution of sexual minorities and their need for protection have been “read-in” under Article 1A(2). In the interpretation of the 1951 Convention, “particular social group” can be understood as an example of an organic element in law. Whether in clarification or redefinition of the category, the development of PSG is illustrative of the general

⁶⁵ e.g. *Ireland v United Kingdom* (1978) 2 EHRR.

⁶⁶ e.g. *Dudgeon v United Kingdom* (1982) 4 EHRR 149; *Bensaid v United Kingdom* (2001) 33 EHRR 10.

principles of refugee law, and the extension of recognition to unforeseen groups in immediate need of protection. As argued by Türk and Nicholson (2003, 42), “international refugee law is less an exact science than a regime that needs to be responsive to individual circumstances.” Elsewhere, the 1951 Convention has been termed a “living instrument” (Zimmerman and Mahler 2011, 299).

Throughout, I have attempted to structure this chapter and my analysis to allude to where there have been and are *spaces for change*, or pliability in refugee law to accommodate sexual minority asylum seekers. To do so in this context I outlined the fundamentals of international and domestic refugee protection. Reading the *travaux préparatoires*, PSG was apparently not intended to be an indefinite “catch all” category. As we will see in the case law considered in subsequent chapters, states have sought to constrain PSG in order to preserve the “integrity” of Article 1(A) of the Convention. However, in application, spaces for change in domestic law have been created by the continuous interpretation (or as some would claim, clarification) of PSG, *prima facie* allowing the broadest possible application of the Convention, while attempting to preserve the integrity of that Convention and international principles of universal human rights. In the case law analytical chapters, I will consider the evolution of the jurisprudential definition of “particular social group,” and how the persecution of sexual minorities has been recognised, part and parcel of identifying spaces for change present in legal discourse for the progressive adaptation of the definition of “refugee.”

Chapter Three – Socio-legal discourse analysis: Research design, methodology, and theoretical framework

Chapter one established that sexual and gender identity are culturally relative and are, like the construct of refugee discussed in chapter two, historically contingent. These background chapters also suggested that a discursive approach is best suited to study how the recognition of “refugee” and “persecution” have been progressively transformed over time, and how the jurisprudence may obscure sociologically problematic assumptions made by adjudicators. Therefore, this chapter proposes an approach that is contextual and exploratory. Using socio-legal discourse analysis will allow the research to attend to the “performative aspects of [the] texts,” including the case law and other documentary evidence, “as sites of definitional creation, violence, and rupture in relation to [the] particular institutional circumstances” (Sedgwick 1991, 3) of refugee status determination (RSD). The approach will be contrasted to “traditional” legal analysis and “positivist” social research. In other words, this work will be critical in its theoretical approach, and not a “doctrinal” legal analysis. Instead, this socio-legal study will utilise a small sample of cases to consider how “legitimate” or “genuine” sexual minority refugees have been read-in through the case law.

After setting out the theoretical approach and research questions, this chapter outlines the research design and methodology for the analysis undertaken in the case law analytical chapters. The subsequent section explains the importance of the United Kingdom as a case study and the process of selecting legal cases for analysis. The last two sections of this chapter will consider my conceptual framework for interpreting the case law as well as the decision-making process. This conceptualisation is necessary to link “text to context” as a foundation for the case law analysis in chapters four and five, but it will also inform the theoretical critiques and further analysis of the research findings in chapters six and seven.

1 Theoretical approach and research questions

I am guided by social constructivist and critical theory perspectives on social research. This section outlines each in turn and then the research questions. Although

there are different traditions of constructivism, constructivist theories in general attempt to explain how social processes and interaction constitute shared meanings or a knowledge of reality. Constructivism has been applied on a macro level, at which an “institution” may be defined as “a relatively stable set or ‘structure’ of identities and interests” (Wendt 1992, 399). As such, Wendt attempts to explain conflict through the social construction of reality, because “[w]ithout ideas, there are no interests, without interests there are no meaningful material conditions, without material conditions there is no reality at all” (Wendt 1999, 139). The last two sections of this chapter will first consider the roles of “institutions” and actors in constructing the refugee, and then how legal decision-making is in effect constructivism in practice.

Constructivism is the most appropriate theoretical approach here because the focus is on legal engagements with identity, an essential concept in these theories. A constructivist perspective of identity is that it “is a phenomenon that emerges from a dialectic between the individual and society” (Berger and Luckmann 1967, 195), and these theories emphasise that “a sense of self as a human individual cannot develop without social processes” (Jamieson 2002, 509; see also 2012, 4.8). In other words, “identities are not something people ‘have’ or ‘are’ but resources that people ‘use’ something they ‘do’” (Jamieson 2002, 508). An identity such as “gay” does not “pre-exist,” but is a construction of, on some level, social interaction. While identity is constructed in “fluid” social processes and is therefore not “reified,” it must also be acknowledged that identity categories can become notionally fixed rather than being experienced as contingent, which allows people to develop a stable sense of self and belonging (see further Jamieson 2002).

The critical perspective in this thesis does not deny that people have stable identities and these are significant to living as, for example, LGB or T. However, I am concerned that the legal discourse may in fact impose certain forms of identity that do not correspond to an individual’s subjectivity, or that adjudicators may fail to acknowledge that identity can be a malleable concept. Universal categories of gender and sexuality were problematised in chapter one by the accounts of historical contingency and global diversity. Adapting Halley’s (1993, 88) insights on the construction of heterosexuality, I would similarly observe that in the context of

refugee law, adjudicators have the “epistemological authority to know and to designate what (and who) a homosexual is” (see also Bourdieu 1987, 838; Harrington and Yngvesson 1990, 140–141; Lacey 1998, 125). Therefore, this research should remain attentive to how RSD may be *ethically violent* (Hoad 2000) or *homonormative* (Wilkinson 2014); that is, if discourses of human rights and refugee law are based on the assumption of a universal homosexual subject that may impose arbitrary and exclusive categories in transnational contexts (Hoad 2000, 153). The queer critique of “homonormativity” in this context adds that relying on the categories of “LGBT” can be problematic in universal human rights discourse if one presupposes who the holder of rights is, and what those rights should be on Western, “homonormative” ways to be gay (Wilkinson 2014).

Drawing upon the critical, queer, postmodern and, to some extent, feminist works cited, I will argue that refugee law can and should avoid essential or immutable categories (Fuss 1991, 6–7; Duggan 1995, 177; Hart and Bauman 1996, 1–8), and affirm sexual and gendered differences in opposition to what may be called the “logic of identity” (Lacey 1998, 154; see Appendix II and chapter six). This perspective is especially drawn from queer thought, but that deconstructive effort parallels many socio-legal analyses (see e.g. Bower 1994; Mertz 1994; Merry 1995). Finally, I have used “critical theory” broadly to describe that I view this research and its findings as a “relative” account, in addition to the politically-minded critiques that are developed in Part III. Just as Young (1990, 13) explains in her analysis, the present study was undertaken from a particular vantage point: “a specific location in a specific society, [and] I can claim in this writing to be neither impartial nor comprehensive.” This work does not (or cannot) “separate social facts from social values,” or “[claim] to be value-neutral” in its analysis (Young 1990, 5; see also Hart and Bauman 1996, 4; Fairclough 1999, 207–208; Blaikie 2009, 17).

There remain a number of unanswered questions in the transnational context of migration regarding gender and sexuality, and particularly how states become involved in the construction of identities in the asylum process (see e.g. Grewal and Kaplan 2001, 670). This project is not necessarily about the actual sexual or gender identities and experiences of refugees from an ethnographic standpoint. Rather, this thesis explores how the UK, as a refugee-receiving state, has identified sexual

minorities, constructed identity, and recognised the attendant persecutions asylum seekers flee. The research interrogates *how* gay refugees have been recognised as eligible or “legitimate” under the Refugee Convention through UK adjudicators’ interpretation of law.

(1) **How do UK legal institutions construct “legitimate” or “genuine” sexual minority asylum seekers in judicial decision-making?**⁶⁷ This research question aims to discover what exclusions are produced in asylum law or how the construct “refugee” is kept sufficiently narrow. Although the UK may recognise refugee status on the grounds of sexual and gender identity, questions remain as to whether (or how) institutional actors impose cultural norms in definitions of asylum categories (e.g. LGBT), especially in relation to recent developments. Based on concerns raised in the existing literature, this question intends to focus on how refugee law may privilege certain groups and individuals such as “LGBT” asylum seekers whose identities and behaviours are perceived to be congruent to Western labels, potentially undermining individual difference and global diversity that were explored in chapter one.

(a) **How does law identify sexual and gender identity in the transnational context of asylum?** Given that sexual and gender identities and behaviours are culturally relative, asylum claims on these grounds are highly challenging in transnational judicial decision-making. LGBT categories need to be geographically and temporally bracketed as culturally relative and historically contingent. Yet, Mertz (1994, 1256) concludes that the nature of legal categorisation necessarily leads to “some degree of reification,” and she highlights that the question is not *if* law views particular characteristics of individuals and groups rigidly, “but how, and to what degree, and with what consequences.” The implications for sexual minorities claiming asylum may be that non-Western, non-conforming identities and behaviours are not cognisable to adjudicators, or that particular “forms” of identity are imposed

⁶⁷ I use “legitimate” and “genuine” somewhat interchangeably but intend a different connotation in the use of each term. “Legitimate” pertains to the accepted claim to refugee status; “genuine” is slightly broader and means to imply the asylum seeker’s sexual or gender identity is cognisable and “true,” not an “unsettled” desire or fantasy, but deeply felt and constitutive of human dignity (purportedly “immutable”). Regarding persecution, “legitimate” refers to the objective and established well-founded fear of persecution but, again, “genuine” may be broader and refer to both the objective *and* subjective well-founded fear in the assessment of credibility. In other words, an asylum seeker may have a genuine, *subjective* fear of persecution, but an adjudicator may find that is not an *objective* fear sufficient to make a legitimate claim to refugee status.

on or expected of asylum seekers in legal decision-making.

(b) **How is the persecution of sexual minorities understood in legal and political discourse?** Establishing persecution is essential in an asylum claim, thus attention to this as a separate sub-question is warranted. Understanding the construction of legitimate asylum seekers also involves the problematic issue of delineating “when discrimination shades into persecution,” which is particularly difficult in cases “where [minority groups] are systematically treated less favourably than others” (Goodwin-Gill and McAdam 2007, 86). Prior studies have examined practical consequences of how persecution is recognised, for example, the expectation that asylum seekers can return to the country of origin on the basis they will exercise “discretion” to avoid persecution (e.g. Millbank 2009a). But additional work into how the persecution of sexual minorities is constituted in the legal and political discourse of UK asylum recognition contributes to the literature in this field, and enhances extant explanations of what constitutes a “legitimate” sexual minority asylum claim.

(c) **What are the implications of this research for theories of sexual and gender identity and, in particular, for sexual autonomy?** Adapting a problem posed by Plummer (1992, 18) to the context of sexual minority asylum, we might ask: Is it possible to agree on what we can really “know” about sexual and gender identity in order to accommodate (global) diversity, and deploy Western “gay” identities in rights claims while still remaining sensitive to (local) difference? Drawing on conclusions from this research, this thesis proposes a *relational* autonomy framework for understanding, adjudicating, and advocating transnational sexual minority asylum claims.

2 Research design and methodology

To answer the research questions, the methodological approach adopted consisted in a qualitative, exploratory inquiry attuned to the broader context of refugee law. The study followed multiple units of analysis, such as emergent identity categories, and recognised forms of persecution (Yin 2009, 18, 53–54). For example, the research actively resisted pre-defining a sexual minority refugee, but certain categories were identified in the case law early in the research (e.g. “open” versus “discreet” homosexuals). Utilising archival sources, this case study research design allowed for

an in-depth investigation into the socio-legal construction of sexual minorities and recognised persecution.

As a small-n research design without a testable hypothesis or a predefined data set, the research strategy compensated with rich description of empirical and publicly available data to persuasively argue the validity of the findings (Bryman 2004, 273; Yin 2009, 40–45, 102). The case selection, which will be discussed in the next section, is especially pertinent because this project faces many of the limitations of other qualitative projects, especially relating to generalisability (see e.g. Jaworski and Coupland 1999, 36–38; Gomm et al. 2000, 17–98). Generalisability in the present context refers to a matter of “fit” between the chosen case – the UK – and other jurisdictions to which it may be possible to apply this study’s concepts and conclusions (Scholfield 1993, 200). The hope is that the thick descriptions of the socio-political context of legal decisions and the construction of legitimate or genuine asylum claims allow the research conclusions to be judged to “fit” or inform studies of other refugee receiving states (Scholfield 1993, 200; Bechhofer and Paterson 2000, 42).

Framing the study as socio-legal is especially apposite considering that the research questions focus on law’s construction of identities, and the relationship between law and the social world (Lacey 1998, 221–223; Banakar and Travers 2005b, 135–136). A socio-legal approach is ideal in this study of tensions between fluid sociological images of gender and sexuality, and the more rigid, and, therefore, conflicting perspective that law derives from individual cases, formal practice, and state imperatives (Banakar and Travers 2005a, 12–13; 2005b, 133). The socio-legal approach applied in this thesis can be distinguished from a doctrinal study of the law, because the former takes the latter as the object of study. In doing so the aim is to free the study of legal discourse from the jurisprudential debate on law between “formalism” that conceptually separates law from the “social world,” and the competing notion of “instrumentalism” that sees “law as a reflection” of power or “tool in the service of dominant groups” (Bourdieu 1987, 814). The socio-legal approach here seeks to look at asylum law from the outside, rather than on its own terms, to deconstruct the discourses of its operation, in order to assess the impact of the jurisprudential debate on sexual minority asylum seekers (Lacey 1998, 222–223).

Lacey (1998, 230–231) argues that socio-legal studies should be concerned with the source and understanding of values, and recognise the exclusions in legal practices. Further, this means not only “generating insights...about the deep meaning of legal practices but also about how such practices might be reconstructed” (Lacey 1998, 231).

A flexible socio-legal research framework supports a transdisciplinary approach open to multiple methods and sources of data. Framing the study as transdisciplinary allows the thesis to strategically draw upon the fields of sociology, political and legal studies. It is *trans*-disciplinary or across disciplines because legal studies does not have an independent methodology relevant to answering the research questions. Instead, law “borrows” knowledge from other fields such as social research (Good 2007), instrumentally to accomplish its purposes; for example, how evidence is deployed in legal discourse to determine the truth of a sexual minority asylum claim (see Cotterrell 1998, 174). Therefore, this research cannot, strictly speaking, be *inter*-disciplinary in the sense of combining different approaches to address the problem (Cotterrell 1995; 1998).

Within a socio-legal framework, I employed discourse analysis to research how asylum law understands “genuine” identity and constructs the “legitimate” claims of sexual minority refugees (see Appendix II on “legitimate”). In this sense, socio-legal discourse analysis “aims at discovering how social identities...(power) relations and systems of knowledge are signified, constituted, and constructed” (Banakar and Travers 2005b, 136). Drawing on a broad range of texts, discourse analysis was used to explore how sexual minority identities are constituted in legal discourse, and how the asylum system(s) govern the recognition of genuine sexual minority refugees (Jaworski and Coupland 1999b, 135–136; Banakar and Travers 2005b, 136). Applying discourse analysis in legal contexts can be used to understand how “judgments about intention” are created by participants (Wood and Kroger 2000, 14–15), to “reveal” the way the texts represent concepts of gender, sexuality, and persecution and, more generally, the “ideological functions of language in producing, reproducing or changing social structures, relations, identities” (Mayr 2003, 5 cited in Benwell and Stokoe 2006, 105; see also Fairclough 1999, 202). The analysis seeks to uncover the constructs of identity and persecution, especially in

finding how “cultural meaning,” for example, is infused into the legal discourse. Through “interrogating the cultural meanings” of the case law and legal frameworks of RSD, we may “uncover the unconscious bias inherent in...judicial decisions” on sexual minority refugee status (Morgan 2006, 147).

Applying discourse-analytic methods, broadly, to interpret “texts,” including archived written, visual and audio data, allowed for a wide array of evidence to be drawn on for the case study (Jupp and Norris 1993, 46–49; Wood and Kroger 2000). But the principle sources of data in the case law analytical chapters are decisions of UK courts. The analysis identifies *intertextuality* between UK decisions and other countries’ case law (or “international refugee law”) in the creation of LGBT asylum precedents in order to answer the research questions (Bakhtin 1999, 130–131; Fairclough 1999, 184–185).⁶⁸ The analysis in chapters four and five links the discussion of UK cases to other authorities in the “transnational” or “transjudicial” conversation where possible (discussed in the next section), such as where this lends legitimacy to a particular UK interpretation of the Convention. Similarly, the analysis attempts to show the dense interconnections of UK case law at various levels – conceptualising judges as institutional authors – noting how adjudicators cite other determinations, and the purpose and intention of intertextuality, for example, implicitly or explicitly invoking a case such as *Amare* [2005] that developed a consequentialist line of reasoning that prioritised immigration control and a narrow vision of human rights. The work also attempts to draw in other institutional texts where relevant, such as UK Asylum Policy Instructions (APIs) and other policy guidelines like UNHCR Guidance, as these texts may influence judicial decision-making and *vice versa*.

More specifically, the discursive approach of this thesis is most akin to critical discourse analysis, “notably [in] its questioning of objectivity and its interest in the practices which produce apparent objectivity, normality and factuality” (Jaworski and Coupland 1999a, 33, see also 1999b, 497). Discourse analysis may be

⁶⁸ The “intertextual perspective [sees] discourse as the recontextualising of already existing forms and meanings, one text echoing and partially replaying the forms, meanings and values of another” (Jaworski and Coupland 1999b, 53, see also 139). Therefore, the intertextual approach sets out “to track how various forms of discourses, and their associated values and assumptions, are incorporated into a particular text, why, and with what effects” (Jaworski and Coupland 1999a, 9). By intertextuality I mean how the case is cited and deployed, e.g. by other judgments, government policies, and in decision-making (see Barnes et al. 1996, 57–59; Benwell and Stokoe 2006, 107).

resisted as a research “method” (i.e. used theoretically) and may always be on some level “critical” (see e.g. Jaworski and Coupland 1999a). It seems to me that discourse analysis can only be done from an interpretive, subjective perspective, and the findings will have critical or politically reconstructive implications whether or not this is made explicit in the research (Finch 1986, 3). Parts II, the case law analytical chapters, and III, the theoretical contribution, of this thesis contrast the case law against social research and theory, and critique the apparent political imperatives behind supposedly objective legal decision-making (Lacey 1998, 145–146). For example, the case law analytical chapters highlight how case law often constructs “genuine” identities as immutable, innate or unchangeable (see in particular chapter four). Politically, this study also critiques adjudicators’ invocations of the UK’s so-called “legitimate aim of firm but fair immigration control” (*Amare* [2005], para 4) and the impact this perception has had on sexual minority refugee recognition (see in particular chapter five). In sum, the discourse analysis involves a variety of “texts” to elaborate the practical and symbolic importance of these events in answering the research questions.

3 Case selection and primary data

The UK case is a good example of a country where sexual and gender identity-based asylum claims have been increasingly recognised. As such it provides an interesting site for elucidating the considerations underpinning legal decisions on sexual minorities seeking asylum. This section explores why the UK is an important case study in more depth, and argues that the research findings may be generalisable or widely applicable to refugee law and other Signatory States, before considering the method(s) of selection of the legal cases for analysis.

The UK House of Lords, now the Supreme Court, and Court of Appeal are authoritative in the “transnational judicial conversation” of refugee law (Hathaway and Pobjoy 2012, 338), or what Slaughter (1994) calls “transjudicial communication.” Transjudicial communication is “communication among courts – whether national or supranational – across borders” (Slaughter 1994, 101). This conceptualisation is particularly apt to explain how refugee law could be described as quasi-international and is applied by Signatory States, such as the UK where there is apparently “a reliance on persuasive authority” and “a sense of common judicial

identity and enterprise” (Slaughter 1994, 102; see also Kratochwil 1989; Tobin 2012, especially 454 on “interpretive communities”). Chapter four will consider the importance of persuasive, transnational case law in the evolution of PSG; chapter five considers the constraint of so-called “international consensus” on the interpretation of persecution in particular.

UK law is internationally significant to the construction of the notion of refugee. In addition to the influence it enjoys in the “transjudicial conversations” between common law countries, UK judgments are also important in Europe. For example, following the key case of *HJ and HT* [2010], Sweden adopted the Supreme Court’s approach to determination of sexual identity-based asylum claims (Jansen 2013, 4), and courts in Norway and Finland have also endorsed the decision (Chelvan 2013, 8). If the argument that the UK’s stature in the “transnational judicial conversation” of refugee law fails, at minimum we can establish that *HJ and HT* [2010] is in itself significant and worthy of additional academic attention. Decided by “one of the world’s most influential courts” (Tobin 2012, 482), *HJ and HT* is one of “the two highest-level judicial determinations in the world to address gay refugee claims to date” (Millbank 2012, 500).⁶⁹ Therefore, it is important to understand the relevant history, social and theoretical contexts of identity, and the case law which was integral to the Supreme Court’s decision. This thesis will elaborate how the UK came to occupy one of the most facially “progressive” stances on sexual minority asylum claims and human rights (i.e. at least in terms of case law).

As an exploratory case study this research did not begin with a particular set of legal cases for analyses. Instead, it employed “theoretical sampling,” a sub-type of purposive sampling, to collect data from judicial decisions, guidance, as well as legislation to contextualise the cases (Glaser and Strauss 1968, 45–77; Layder 1998, 47). Data generation was guided by the emerging concepts, identifying legitimate identities and fears of persecution recognised by legal institutions (Corbin and Strauss 2008, 195; Blaikie 2009, 143–144, 178, 179). Through “purposive sampling” a substantial roster of key cases were collated. Cases were selected for this work

⁶⁹ The other national-level decision being *S395* [2003] of the High Court of Australia, which is considered extensively in the UK case law and discussed where relevant in this thesis; two judgments of the CJEU, *X, Y, and Z* [2013] and *A, B, and C* [2014], clarified aspects of EU standards in relation to sexual orientation and might also be highly classed, but these necessarily considered the interpretation of the Directives and not the Refugee Convention *per se*.

drawing first from key House of Lords/Supreme Court and Court of Appeal judgments relating to sexual identity-based asylum claims (see Appendices IV “Select table of cases” and V “Case summaries”). The first decision to recognise homosexuals as a PSG, *Islam and Shah* [1999], and *K and Fornah* [2006], which further clarified the parameters of PSG, are the key House of Lords decisions prior to the creation of the Supreme Court and its judgment in *HJ and HT* [2010]. I then turned to legal database tools such as Westlaw UK, which allow the searcher to find key cases that have cited or relied on, for example, *Islam and Shah* [1999], and a number of cases were marked as relevant from mining the academic literature. Ultimately, a sample of thirteen Court of Appeal cases from 1999 to 2010 was generated, including appeals cited in *HJ and HT* [2010].

House of Lords and Supreme Court judgments are binding on the Court of Appeal, and the decisions of all of these courts are binding on Tribunals and Adjudicators. Emphasis on these key cases in this thesis is justified because they are authoritative and therefore crucial to the UK recognition of sexual minority refugees. However, the sample also includes several Tribunal-level determinations and second-hand accounts of these decisions in order to contextualise the jurisprudence in practice, and to further elaborate the development of particular lines of judicial thought. One notable IAT determination, *RM and BB* [2005], flagged as a Country Guidance (CG) case, is cited throughout this thesis, because of the reliance subsequent precedent-setting judgments placed on the Tribunal’s factual findings on Iran (see Thomas 2008, especially 494 on CG). Two AIT determinations are also in the main sample given they were appealed in other cases cited. Finally, two UT (IAC) determinations are considered to illustrate how *HJ and HT* [2010] has been applied. In total, the main sample consists of 22 cases, including: 3 House of Lords and Supreme Court, 13 Court of Appeal, 2 Upper Tribunal (Immigration and Asylum Chamber), 3 Immigration Appeal Tribunal and Asylum and Immigration Tribunal, and 1 High Court decisions. These are summarised in Appendix V, which also contains some additional context and explanation as to why these cases are crucial to answering the research questions. A range of other domestic and international legal cases particular to refugee law, and also human rights, are considered, where they are relevant to understanding the development of cases in the main sample.

4 Interpreting and analysing the data

Having set out the research strategy, it is now necessary to conceptualise a theoretical framework, or approach to the data, and analysis (Crotty 1998, 7–9; Punch 2006, 48–49; Blaikie 2009, 128). As set out in the methodology section, discourse analysis will be used to explore how sexual minority identities are constituted in the legal discourse, and how the asylum system governs the recognition of legitimate sexual minority refugees (Banakar and Travers 2005b, 136). The analysis of legal discourse includes the available evidence in treaties, statutes, cases, and guidance notes. In addition to the establishment of precedent, the research is concerned with the ways in which adjudicators represent, construct, and reify identity and persecution, because the question may not be *if* law does this, but *how* and the possible consequences (Mertz 1994, 1256; see also Lacey 1998, 144–145). To make sense of the legal texts, a theoretical bridge is required between the methodology described above and the analysis of the process of RSD (see e.g. Blaikie 2009, 20–21, 124–129), or “linking text to contexts,” because “[h]ow texts are produced and interpreted...depends on the nature of the social context” (Fairclough 1999, 206).

It is first necessary to state that the research analysis will cite and discuss the written determinations of Adjudicators, Immigration Judges, Lords Justice, Lords and Baroness Hale⁷⁰ as *authors*. These authors are writing in particular circumstances (or contexts) with a specific purpose and audience to be addressed. In moving beyond a “doctrinal” approach to the law, the documents are where possible acknowledged to be works of “authors” that construct meaning, creating or interpreting law in relation to the social world (see Bourdieu 1987; Lacey 1998, 232–233; Fairclough 1999, 204).⁷¹ For example, these authors define the scope of particular legal concepts such as persecution and “find” facts in asylum claims which

⁷⁰ The only woman appointed as a Law Lord; no other woman has been appointed to the Supreme Court (as of 2015). To my knowledge, no Lady Justice on the Court of Appeal heard an appeal in the sample here.

⁷¹ In a sense, this approach to asylum law recognises that it is a “quintessential form of symbolic power of naming that creates things named, and creates social groups in particular” (Bourdieu 1986, 838). Symbolic power “is a power of consecration or revelation, the power to consecrate or reveal things that are already there” (Bourdieu 1989, 23). This perspective is taken in tandem with that presented in chapter one, that adjudicators possess the epistemological authority to know what and who homosexuals are (Halley 1993, 88), and by extension here whether or not they have a well-founded fear of persecution (see also Mehan 1999).

together may or may not constitute persecution. The analysis of the case law should be attuned to the role of adjudicators in construction of legal facts (Sweeney 2007). Jurists are authors that draw upon a diverse range of narratives to reach conclusions in a process that reshapes refugee status in the case law. In citing all adjudicators as authors, it is also acknowledged that decisions should be attributed to the tribunals and courts on which they sit as well, in order to assess the “collective judgements” (Barnes et al. 1996, 56), and the standing of particular decisions in the jurisprudence and recognition of LGBT-based claims in the UK.

Labelling adjudicators as “authors” could also be extended to other “jurists” who write and practice in this field such as legal practitioners and scholars who have contributed to the process of reading-in sexual minority refugees under Article 1A(2) of the Refugee Convention (see Lacey 1998, 141–143 on “legal community”).⁷² Adjudicators, practitioners, and academics are “gatekeepers” in refugee law (Bhabha 2002). In addition to decision-makers, solicitors, barristers, and academics possess authority as practitioners, experts in the field, writers on law, and so participate in the interpretation of texts and, therefore, the construction of refugee (Bourdieu 1999, 505). Bhabha (2002) suggests that human rights and refugee advocates actively participate in the sorting of genuine and non-genuine claims, facilitating “gatekeeping” and legitimating state practice (see also Lacey 1998, 142–143 on “non-legal...communities”). Zimmerman and Mahler (2011, 420) observe that academic research has contributed to the acceptance and progressive recognition of LGBT claims (see also Anker 2005, 107, 119).⁷³ Non-governmental institutional authors have contributed to the on-going process of interpretation through reports on sexual minority asylum (e.g. UKLGIG, Stonewall, and ORAM) and general country guidance reports often used as supplements to official state reports (e.g. ILGA, Human Rights Watch, and Amnesty International) – often identified as “corporate partners” – though I also use “stakeholders” interchangeably.

Even if non-juridical actors have a less explicit role in constructing the legitimate or genuine refugee, many are implicated in gatekeeping and crucial to

⁷² The ordinary meaning of “jurists” includes judges but also solicitors, barristers, legal researchers, and students of law.

⁷³ For example, consider frequent references to Hathaway (1991) in many cases discussed in chapters four and five of this thesis; other examples include Dauvergne and Millbank (2003) in *SW* [2011], para 76, as well as Millbank (2009a) in *HJ and HT* [2010], para 92-93, 112.

RSD. From a Foucauldian perspective of discourse analysis, “expert status” is significant in the production of discourse. Discourse “relies on the idea that there will be limitations on who will be considered to speak authoritatively,” and “whether statements will be judged as ‘true’ rather than ‘false’” (Lange 2005, 178). Experts provide adjudicators with indispensable “objective” evidence and “facts” about an asylum seeker, including medical doctors who may verify previous physical trauma, psychiatric professionals who diagnose conditions such as PTSD, and country experts such as anthropologists who have studied that society (see e.g. Thomas 2008, 505, 527–528). Other “gay” refugees from the country can be implicated too. John Bosco, whose claim was discussed in the introduction, has testified before adjudicators on the claims of other asylum seekers, and been asked questions which included: whether he knew his friends’ boyfriends, how many relationships the asylum seeker had, if he believed the asylum seeker or if he was misleading John and pretending to be gay, and even if John had sex with him (Thiam 2012).

However, most importantly, the analysis will consider UK policy and how adjudicators act in the process of granting refugee protection, and the interpretation of refugee and human rights law. Other “jurists” and “authors” will not be disregarded in the analysis because they are critical to the process of forming, interpreting, and implementing law. But the opinions submitted by extrajudicial jurists are more often evidentiary in proceedings, such as NGO human rights reports, or supplementary to interpretation of the law, such as the widely cited work of Hathaway (especially 1991). Despite the importance of commentary from other jurists, to state the obvious, these authors do not write on behalf of Signatory States in an official capacity. On the other hand, adjudicators acting on behalf of the UK hold a monopoly on symbolic violence, and physical constraints on life, liberty, and property (Bourdieu 1987, 837–838; Lacey 1998, 125–127, 157–158; Mehan 1999, 572–573). In the case of RSD, the rejection of a genuine claim may result in serious harm and/or deprivation of individual liberty. The written positions of judges “transcend” individual perspectives to represent the view of the state on sexual minorities’ claims to refugee status (see Bourdieu 1987, 837–838). However, the process of exercising this authority is not linear but patchwork.

Adjudicators often tend to prefer one of the approaches to the law and evidence put forward by the appellant or respondent that in turn draw upon a range of texts from the broader juridical field and expert evidence from, for example, social researchers or medical practitioners (see Cotterrell 1998, 174).⁷⁴ The position here contends that adjudicators do not find legal “facts” in RSD, but that the “meaning and significance” of facts are “actively constructed *by* [adjudicators] from the competing narratives presented *to* them” (Sweeney 2007, 31).⁷⁵ The arguments proposed by appellants and respondents in briefs and hearings draw from a variety of texts to establish facts (e.g. from expert witnesses, state or NGO Reports) and to offer persuasive reasoning (e.g. domestic jurisprudence, international precedent, or academic works) for consideration in RSD. That is to say that the case before adjudicators proposes a means of interpreting and applying the law that is drawn from a variety of other texts such as case law and research to support or argue the dismissal of a claim to refugee status. Borrowing from Sweeney (2007), I argue that the determination of “legal facts,” especially in claims on sexual and gender identity which are shown to be indeterminate in chapter one of this thesis, should be understood as “constructivism in practice.” The adjudicators draw from the evidence and arguments submitted, and bring the case together under one systematic summary or “narrative,” and often issue a decision derived from the approaches proposed by the appellant and respondent.

Given the complexity of these processes, I do not seek to fully detail RSD, to construct a generalisable framework or, for that matter, to profile jurists as individual authors. The immediate limitation of the approach presented in this chapter is that “RSD is a multistage process in which identities are experienced, framed and translated,” so it may not be possible to achieve a complete understanding of this in the written decisions (Berg and Millbank 2013, 121; see also 2009). However,

⁷⁴ See e.g. Kotzeva et al. (2008, 36–39) for suggested types of evaluation (e.g. questioning) and evidence (e.g. NGO and state COI reports) advocates or practitioners should use in their own assessments of claims and the presentation of the asylum seeker’s narrative. This note considers topics of assessing a claimant’s credibility, accounting of events, and evidence.

⁷⁵ While this is evident in many of the cases to be discussed, perhaps the most obvious and relevant example is *HJ* [2008]. In that case Hodge J (para 1-2, 26-27) sets out the appellant’s lengthy appeal history spanning six years at that time and, therefore, that the Tribunal had at its disposal a range of narrative evidence from the appellant. The AIT explicitly chose to ignore HJ’s most recent testimony in favour of a previous statement which purportedly showed his life in Iran was safely discreet, and that he had not suffered unreasonably as a result (Hodge J, para 41).

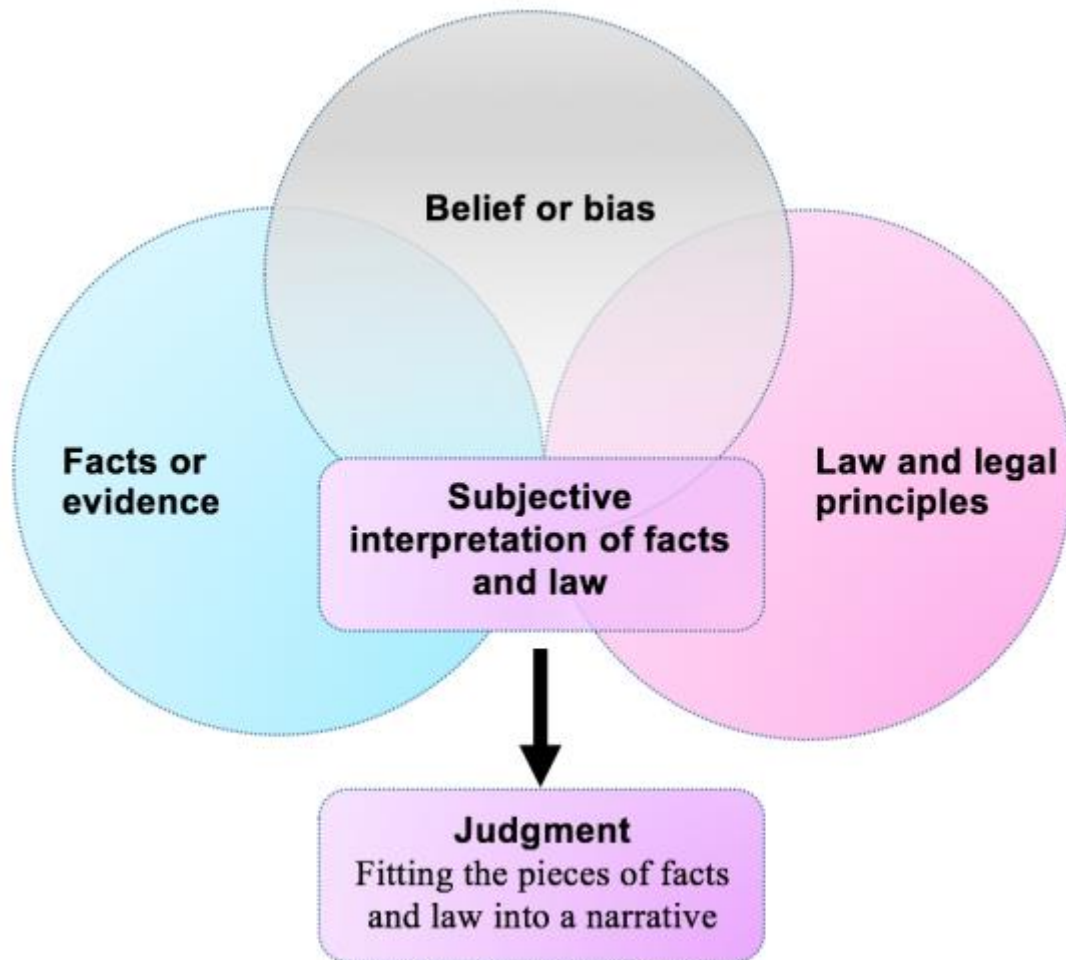
acknowledging the context of adjudicators’ positions in the field and the complexity of RSD is important to understanding the construction of sexual and gender identity, and recognition of persecution in the legal discourse. In sum, adjudicators hold power over the acceptance or dismissal of “facts” (e.g. objective risk of persecution), the scope of the law (e.g. obligations under the 1951 Convention or the ECHR), and whether they believe the claim (e.g. subjective fear of harm, credibility, and so on). This perspective acknowledges the “position” of adjudicators not only as the authors of case law, facts and credibility of claims, but also their status as agents of the state and shaping of social reality – namely, in shaping “genuine” refugee identities and well-founded fears of persecution.

5 The decision-making process

Even though it may offer an incomplete picture, examination of the case law in this research sheds light on how identity is constructed by the authors in order to answer the research questions. Sexual and gender identity must be framed in the terms of the Refugee Convention and within the adjudicators’ own understandings of identity, behaviour, and persecutory harm (see Berg and Millbank 2009; 2013, 121).

By taking case law as the primary source of data, I turn now to explain the way in which I will conceptualise the process by which adjudicators (and other jurists) reach decisions on refugee status.⁷⁶ Again, this is intended as a general conceptual outline, and the concepts will not, for example, be measured as variables or used to draw conclusions in the analysis. However, these assumptions are important to understanding the data and its creation, which is therefore significant background to the analysis, because “there often remains a considerable role for the decision maker’s own personal judgment” (Thomas 2008, 491; see also 2006, 84–85). I created Figure 2, below, in order to help us visualise my conceptualisation of the process of judicial interpretation of facts and law in the RSD.

⁷⁶ This section theorizes decision-making of the actors; the UK’s asylum system was outlined in chapter two. For a more practical overview, see e.g. Kotzeva et al. (2008, 279, 311–312) on the constitution of the Tribunal and procedures in the UK.

FIG 2 Interpretation of Facts and Law

Needless to say, the process of factual and legal interpretation has been simplified for representation here, whereas more systematic research on decision-making may outline a complex, iterative, multistage process. The centrepieces of RSD are the facts or evidence and the law and legal principles. This simplified model of the interpretation of facts and law is, arguably, not exclusive to RSD, but a general observation of the legal decision-making process (see generally Holland and Webb 2010, 125–133). However, the particular significance here is the fluidity and intangibility of the “facts.” Any test applied by adjudicator to determine an asylum seeker’s identity is potentially deficient, because there is no concrete, knowable “truth” or, therefore, possible systematic approach to the determination of gender or sexuality and whether they are, for example, intrinsic, immutable, or genuine (see further chapter six). But ultimately adjudicators focus intently on finding “facts” to

the detriment of jurisprudential issues in many determinations (see e.g. Thomas 2006, 79; Sweeney 2007, 19). Put simply, the task of adjudicators is to interpret the law of refugee status in light of the evidence and to accept or deny the claim before them. However, there is often an intense focus on the facts and their credibility (Thomas 2008, 491–492), leading to common-sense thinking rather than reasoned decision-making based on the jurisprudence (Sweeney 2007, 19) and decisions based on pre-understandings of sexual and gender identity (Berg and Millbank 2009).

In an asylum claim, the facts may be drawn from country of origin information (COI), and include dates of arrival, age, occupation, and so on (see e.g. Thomas 2006; 2008; see further case law analytical chapters). Supporting evidence could include accounts of past persecution, prosecution, or other well-founded fear of future harm if returned, such as a court summons (see e.g. Miles 2009; Vine 2014). Generally, the claimant holds the “burden of proof” and submits facts and evidence of the case, but in many asylum claims the Secretary of State or even the adjudicator contests this evidence, such as the credibility of identity or the well-foundedness of the fear of persecution (see e.g. Sweeney 2007; Millbank 2009b). Sweeney (2007, 30) observes that “the power games” between adjudicators and solicitors in labelling evidence as “not credible” versus legal “findings of fact” contributes to the myth of a privileged access to “truth.” RSD may tend toward adversarial or, perhaps, “fact-fighting” (Bazelon 2015), rather than inquisitorial procedures but, like the legal principles, how the asylum process *should* be conducted seems to be rarely addressed in the case law (see Thomas 2008, 509–510).⁷⁷ However, in *AK* [2008] Sedley LJ (para 24) clarified, *obiter*, that proceedings should be “a collaborative endeavour to get at the truth by the best available means.”

Alongside “facts,” the law stands as a lens through which jurists see the case and its merits (see Figure 2). Taking the view of Sweeney (2007, 21), however, suggests that “[t]he reality of the RSD process is that these legal definitional questions” in translating “abstract (legal) norms to actual practice” are hardly

⁷⁷ Of course, the UK is an “adversarial appellate jurisdiction” where “the appellant bears the burden of proof; it is for the parties to present the evidence that they wish to rely upon;” and the independent tribunal “should refrain from descending into the arena” (Thomas 2008, 509). This is a brief, critical reflection on the process of asylum adjudication, drawing upon the literature, to consider how legal facts are constructed in the asylum context, as opposed to a comparison between adversarial and inquisitorial legal systems.

addressed. As we will see in some of the determinations analysed in the case law analytical chapters, adjudicators, especially in Tribunals, focus almost exclusively on findings of fact – e.g. credibility of sexual identity, COI, and objective risk of persecution – whereas the application of law in asylum cases is often downplayed (Sweeney 2007). Though determinations often appear to rely on common-sense approaches, the claimant and respondent generally set out for the adjudicator opposing views of the legal principles or differing precedent that should be applied. The contested space could include the meaning of the Convention and its scope, the meaning and application of previous precedents in the case law, or the persuasive reasoning of international jurisprudence. The facts and law are seen as independent, and treated as mutually exclusive, whereas the beliefs, biases, or pre-understandings of the adjudicator are formed independently, are independent of a particular case at play, but influence perceptions of fact and law.⁷⁸

While this project does not attempt to discover personal beliefs of individual jurists, the apparent importance of judicial subjectivity must be acknowledged.⁷⁹ The assumption in the analysis is that adjudicators (and all actors in the field) have sets of beliefs, biases, or pre-understandings that impact decision-making (see e.g. Jubany 2011; Souter 2011). Belief and bias are difficult or impossible to attribute, and may in fact be unnecessary to account for in a strict analysis of the case law. A major study of the US asylum system, *Refugee Roulette* (Ramji-Nogales et al. 2007; 2009), *Failing the Grade* (UKLGIG 2010) in the UK, and other statistical studies have suggested that RSD is often subjective, and to some extent dependent on the adjudicator and the claim submitted.⁸⁰ It would be an oversimplification to claim that adjudicators are not aware of their own subjectivity; for example, in *AK* [2008] Sedley LJ (para 4) explained that the two previous determinations, which accepted and refused the same asylum claim, “illustrate how two conscientious fact finders

⁷⁸ Here I must thank Mor Sobol for drawing my attention to the independent versus dependent factors and outcomes at play in outlining the process.

⁷⁹ This is loosely derived from Bourdieu’s concept of *habitus*, that are dispositions which incline agents to act and react in certain ways (Bourdieu 1991; Thompson 1991). This also applies to “field” (or social context) that is assumed to be both real and metaphorical; “agents” or “actors,” importantly, must believe in the game they are playing.

⁸⁰ Ramji-Nogales et al. (2007; 2009) suggest there are marked disparities in the rates of refusal of different categories of refugee claims across the US and connections between adjudicators’ personal profiles and the acceptance of certain asylum claims. The UKLGIG (2010) report claims that in the UK lesbians and gay men were refused 98-99% at the initial stage compared to 73% of other claims submitted. See generally Thomas (2008; 2009).

can reach opposite conclusions on the same evidence.” However, while the findings of jurists and the language they use to express them are often made to seem obvious and objective, determinations are often made in a “common-sense” way, influenced by the subjective views of the adjudicator (Sweeney 2007, 26).

Successful asylum claims are likely to have set out a persuasive story. Arguably, public and legal advocates make strategic decisions using prevailing norms to frame arguments for asylum which often play on the presumed stereotypes of adjudicators. Skeleton arguments⁸¹ provide a narrative that will “resonate” with an adjudicator’s “values, beliefs, and assumptions of” the gay refugee and persecution, and effective asylum claims often “draw upon prevailing norms and beliefs, no matter how problematic they may be” (Ahmad 2002, 122; see also Miller 2005, 164–166; Morgan 2006, 147). Other examples can be found in the literature and case law on sexual and gender identity-based asylum claims that suggest rigid, Western notions of identity and behaviour may influence decision-making (see e.g. Berg and Millbank 2009; Bennett and Thomas 2013; further chapter four).

The interpretation of facts and law is a contested space (whether or not formal proceedings are adversarial or inquisitorial) in the process of reaching a particular outcome in the adjudicator’s decision.⁸² While the facts and law are to some extent independent from each other, as are the particular beliefs of an adjudicator, the outcome (or decision) is dependent on all of the above. The adjudicator might be predisposed to act on a case in a certain way, forced by judicial constraints or other factors, but the merits of the decision are previously indeterminate.⁸³ The facts and law may be mutually exclusive, and determined separately, but in the narrative of a legal decision these concepts are often fitted together like the pieces of a jigsaw puzzle (see Thomas 2008, 520; Holland and Webb 2010, 129–130). The case law presents a template from which to determine refugee status. Like a puzzle, where the box may provide a reference, legal concepts such as persecution must resemble the template provided by the jurisprudence. An adjudicator may start with the case law

⁸¹ See Appendix II on “skeleton.”

⁸² Even if RSD is inquisitorial, the position articulated here suggests that the adjudicator is still in the position of constructing or finding the facts of the case and understanding the law; e.g. knowing what, and who, a homosexual is and the risk of future persecution in the country of origin.

⁸³ An exception here could be made to an appellate court, where adjudicators and judges in lower courts determine facts, but the contention here is that the general argument still applies if in a modified sense.

(template) and find the factual elements (pieces of the puzzle) that lead to a particular result – or even begin with the result based on findings of fact and justify the conclusion in retrospect (see Mehan 1999, 563 on “unconscious bias,” 573 on “oracular reasoning”; Souter 2011, 53, 55–56 on denial). The analysis in the case law analytical chapters suggests this facts/law dichotomy may be somewhat artificial, because “their dependence works *both ways*” (Holland and Webb 2010, 129). In refugee law, persecution is a concept which illustrates the difficulty of this distinction, because there is no agreed upon legal test or standard. Instead, jurists draw on a range of sources, often broad definitions, that are dependent upon the subjective interpretation of the actor and the presentation of facts in a particular case to create meaning of, especially, a well-founded fear of persecution (see chapter five). The jigsaw exercise fits together the pieces of fact and law into a cohesive narrative with a justified and legal outcome on the claimant’s refugee status.

As Bourdieu (1987, 826) has noted, the “rules” outlined in the case law, generally, “can never be purely and simply applied to a new case” (see also Barnes et al. 1996, ix, 54–73 on finitism). This may be especially difficult to negotiate under PSG in Article 1A(2), where “legal opinion *sometimes implies* that the phrase’s very indeterminacy is its most desirable feature, allowing courts to cope with the almost limitless range of situations that may arise [emphasis added]” (Good 2007, 74). In seeking to answer the research questions, the analysis of the case law must consider the subjective elements of RSD, such as the credibility of sexual identity. The standing and outcome of particular asylum claims is difficult to predict because the legal norms in precedent are used as tools to justify the determination, but “the same precedent [can be] understood in different ways, [and] can be called upon to justify quite different results” (Bourdieu 1987, 832–833). The established precedent cannot be viewed entirely as a rational framework that guarantees “consistency and predictability as well as the objectivity of the legal decisions” acting to limit arbitrary and subjective decision-making (Bourdieu 1987, 832–833). The interpretation and application of precedents illustrates textual elasticity where the social world, such as the nature of identity, can be perceived and expressed in different ways and are indeterminate (see Bourdieu 1989, 20).

6 Conclusion

The constructivist perspective detailed in this chapter drew upon critical theory. The theoretical approach to the research acknowledged that its findings are relative, and it was conducted with a political concern for individual difference – in opposition to homonormativity – and ethical violence in RSD. I argued for a flexible and exploratory research design, and that the UK is a good case for study in light of recent developments and the international significance of the country’s case law. The case law examined has been purposefully sampled, and the discursive analysis of the texts will give a broad, contextual account that problematises the judicial constructs of a “gay” refugee.

This research design could be said to reflect the tension between an “inherently probabilistic” social research perspective compared to legal reasoning, which is “nonprobabilistic” and “associated with a large tolerance for low-accuracy results” (Driessen 1983, 479 cited in Good 2007, 32) given the imperative in RSD to grant or reject a claim for protection (Thomas 2006, 86). The approach outlined for the interpretation and analysis of the data and the conceptualisation of decision-making highlights the role of adjudicators as authors of the social world. I have drawn attention to the quasi-independent capacity of adjudicators to shape social reality in their written decisions, and their power to impose form in the determination of legitimate categories and concepts in refugee law (Bourdieu 1987, 839; Jamieson 2002, 511–512). Using the theoretical and methodological framework in this chapter, Part II of this thesis will detail the historical development of the UK’s recognition of sexual minority refugees, but also challenge the assumptions made in legal discourse by drawing on sociological understandings of identity.

Part II – Case law analytical chapters

Introduction

Part I reviewed the literatures on sexual orientation and gender identity, international refugee law, and the relevant background of the United Kingdom’s asylum system, which are essential to the analysis of the case law in Part II. Chapters four and five examine the interpretation of particular social group (PSG) and persecution respectively, and assess how the UK has “read-in” sexual minority refugees in its case law and policy. This preface briefly overviews the evolution of UK jurisprudence to provide context for the following case law analytical chapters.

The UK Supreme Court decision *HJ and HT* [2010]⁸⁴ was couched in strong language affirming LGBT asylum seekers’ right to live openly and to qualify for refugee status if they had a well-founded fear of persecution in their country of origin. However, the UK was comparatively late among liberal democracies to recognise LGBT asylum, and its law and practice in the area had long been criticised (see e.g. Millbank 2005; Johnson 2007, 105). Well-founded fear on the basis of sexual orientation was recognised as a PSG by many Western states in the late 1980s, 1990s, and by the UNHCR in 1995 and 1996 (Millbank 2002, 149; Walker 2003, 253). The Court of Appeal first considered whether sexual orientation was a PSG in *Binbasi* in 1989, and rejected the contention that anti-sodomy laws were persecutory (McGhee 2001b; Millbank 2004, 208; 2005, 6–7). *Binbasi* [1989] suggested that asylum seekers should “refrain” from homosexual acts, because anti-sodomy laws targeted “practising” homosexuals, even if the discrimination suffered amounted to persecution (Tuitt 1996, 91).

A decade later, the UK House of Lords challenged the traditionally narrow, *status quo* understanding of PSG in *Islam and Shah* [1999], and unanimously agreed that “homosexuals” could constitute a PSG under the Convention (McGhee 2001a; Millbank 2005). *Islam and Shah* arguably shifted the focus onto the discriminatory basis of persecution, creating opportunities for the recognition of other non-

⁸⁴ The key cases discussed are summarised in Appendix V; abbreviations for cases cited regularly can be found in IV; and acronyms are listed in I.

traditional Convention refugees (see Anker 2005). The Court of Appeal subsequently implemented the new PSG category of homosexuals in *Jain* [1999], where they developed a “conduct driven approach” for RSD that focused on the nexus between homosexuals and sexual acts, and neglected the expression of identity (Chelvan 2011, 57). The decision emphasised that the mere existence of anti-sodomy laws did not amount to persecution, but that an asylum seeker from a state prohibiting *and* enforcing criminal law against the engagement in private activity may be able to qualify under the Convention (Schiemann LJ, 77). However, the majority of cases following *Jain* held that incarceration of periods from forty days to ten years did not amount to persecution under the Convention or breach the ECHR (Millbank 2004, 222).⁸⁵

After the passing of the HRA 1998, which gave the ECHR further effect in UK law, asylum claims began to be argued both on grounds under the 1951 Convention and grounds under the ECHR.⁸⁶ Cases such as the conjoined appeals of *Z and M and A* [2002] considered Article 3 (prohibition of torture) and 8 (right to private and family life). While the 1951 Convention was not at the forefront of this case, many commentators have argued that the broader human rights framework has become central to the protection of sexual minorities in refugee law (e.g. Hathaway 1991; Anker 2002; Millbank 2004). Nonetheless, early claims under the ECHR did not “translate into any real consideration of...the rights of lesbians and gay men in the vast majority of cases,” and determinations on human rights were more “formulaic” and often “superficial” (Millbank 2004, 209). UK adjudicators consistently rejected framing RSD in the language and reasoning of the human rights-based arguments put to them.⁸⁷

Following the High Court of Australia’s (HCA) decision in *S395* [2003], a second Court of Appeal case considered *Z*’s claim to refugee status in the UK.⁸⁸ International jurisprudence is persuasive and not binding, but UK courts repeatedly cited this particular Australian determination, and it has also received a significant

⁸⁵ See e.g. *Z and M and A* [2002], para 36.

⁸⁶ For example, the House of Lords held in *Ullah* [2004] that *non-refoulement* applied where there were denials or violations of rights under the ECHR.

⁸⁷ See e.g. *Z* [2004]; *Amare* [2005].

⁸⁸ *Z* [2004]. On the remitted case prior to the 2004 appeal, the Tribunal had concluded that *Z* did not demonstrate a serious risk of harm under the Refugee Convention or ECHR Article 3 (prohibition of torture) for the same reasons.

amount of academic attention (e.g. Goodman 2012; Hathaway and Pobjoy 2012; Schutzer 2012). In *S395* the HCA rejected the “discretion approach,” holding that asylum seekers could not be expected to take steps to hide or modify their belief or identity to avoid persecutory harm if they were returned (see Millbank 2004, 215; 2009a). Z’s primary contention in the appeal, elucidated by *S395*, was that “persecution” is a “discriminatory denial...of a core human right,” in this case the right to a private life, and that the appellant was unable to live openly with his “(homosexual) partner” in the country of origin (Buxton LJ, para 10). The Court of Appeal rejected this, holding that the core of the HCA decision was already a part of UK law; that the Convention did not protect all interferences with human rights; and that the threat of serious harm was necessary to constitute persecution.⁸⁹

From 1999 to 2010, UK adjudicators repeatedly rejected the notion that anti-sodomy laws were persecutory (Millbank 2005; Miles 2009), and expected claimants’ discretion – i.e. the self-repression and concealment of identity and behaviour in order to avoid persecution (Millbank 2005; 2009a; Schutzer 2012, 685–693).⁹⁰ Dismissing a right to live openly, the courts instead fabricated the concept of “reasonable” discretion, which in some ways facilitated the invisibility of sexual minorities, in expecting them to “pass” as heterosexuals (see McGhee 2000; 2001b).⁹¹ While the extent of the change prompted by *HJ and HT* [2010] is debatable (i.e. whether too far or not far enough – cf. Hathaway and Pobjoy 2012; Weßels 2013), the decision was profound in that it comprehensively dismissed the logic of discretion, and referred to the right of association and the immutability of identity. The Supreme Court asserted that if an asylum seeker were to live openly and had a well-founded fear of persecution on that basis if returned, they would qualify for refugee status, even if that harm might otherwise be avoided by concealment.⁹²

Chapter five considers the juridical construction of sexual minority refugee status, including what is “reasonably tolerable” to conceal, and the shift towards protection of expression and association. Chapter six elaborates on the assessment of

⁸⁹ The Court of Appeal had granted permission to appeal with the express emphasis that this was to consider the impact, if any, of *S395* upon English law based on the appellant’s claim that case shed new light on his appeal (Buxton LJ, para 8).

⁹⁰ See e.g. *Z* [2004]; *Amare* [2005]; *RG* [2006]; *HJ and HT* [2009].

⁹¹ See e.g. *J* [2006]; *HJ* [2008]; *XY* [2008].

⁹² See also *RT and KM* [2012], applying *HJ and HT* to political opinion.

persecution and the evolving “threshold” of serious harm, well-founded likelihood of its occurrence, and eventual recognition that it is not the burden of refugees to protect themselves. Both of these chapters consider the judicial development of the concept of discretion, because even if discretion can no longer be “required,” these determinations are historically significant and may help us to understand where the legal discourse “went wrong.” Yet, as we will see, there may still be scope for discretion reasoning in decision-making if an asylum seeker is understood to be “naturally discreet” about their identity. Finally, the case law that came before *HJ and HT* [2010] is still instructive for understanding the judicial construction of sexual and gender identity, as well as what it means to be persecuted on these grounds, and for explaining the context of the recognition of “gay” refugees today.

Chapter Four – The inclusive guise of “gay” asylum

Between 1999-2010, UK House of Lords/Supreme Court and Court of Appeal decisions incrementally recognised a wider scope of private behaviour, public identities, and types of persecution suffered by LGBT claimants as qualifying for refugee status. However, consideration of the jurisprudence on how sexual orientation has been “read-in” as a “particular social group” (PSG) also demonstrates the limitations of that inclusion. The analysis in this chapter suggests that the courts repeatedly sought to prevent what, in their view, would have been an opening of the floodgates – whilst in the same breath suggesting that the UK was a place of refuge for persecuted sexual minorities. The protracted process of establishing LGBT persons as a PSG reveals a judicial reluctance to accept a right to privacy against the threat or imposition of anti-sodomy laws. The courts further expected “discretion” or “concealment” of identity, rejecting a right to live openly without fear of persecution, in many asylum cases until 2010.

This chapter outlines the progressive recognition of sexual minority refugees, but also critiques how explicit and implicit exclusions are constructed in the judicial discourse. The analysis of PSG undertaken in part one primarily considers the implications of adjudicators’ constructions of gender and sexuality as potentially “legitimate” PSG-based asylum claims. Part two critically considers a select group of cases in depth on the construction of “genuine” claims by sexual minorities as it is conceived in the case law.⁹³ Distinct themes emerged from the determinations, such as defining private and public spheres and what may be “reasonably” concealed. The analysis considers some of the emergent concepts thematically, and offers some insights on the process of the construction of sexual orientation and gender identities in refugee status determination (RSD). The conclusion drawn is that if “disbelief” is a barrier to sexual minority refugee status, the challenge is to reconcile the requirement for credibility with the possibility that an adjudicator cannot know surely or definitely who is “gay.”

⁹³ See Appendix II and chapter three on my uses of “legitimate” and “genuine.”

1 Reading in sexual orientation and gender identity as a particular social group

Part one outlines the development of the jurisprudence of the House of Lords/Supreme Court and the Court of Appeal, as well as some applications at the Tribunal level, which (re)defined PSG. It should be noted that, particularly in part one, the definition of what constitutes “persecution” is closely entangled within the definition of PSG/identity and *vice versa* (see chapter five), because the concepts are not mutually exclusive.⁹⁴

1.1 Analysis of “particular social group”

It is first necessary to contextualise the judicial interpretation of PSG in order to address the construction of “legitimate” or “genuine” sexual minority asylum seekers in judicial decision-making. Here I will provide an overview of how sexual minorities were accepted under the Convention category, PSG, in UK jurisprudence. Importantly, the UK drew substantially on evolving international case law on PSG assessment to expand the application of Article 1A(2).

Islam and Shah [1999] detailed how broad categories of women subject to discriminatory persecution could qualify for refugee status. For the first time the House of Lord’s interpretation also “compelled the Home Office to recognise the possibility” of a sexual orientation-based PSG (Good 2007, 95). UK law and practice had previously required some cohesive attribute and group interdependence as criteria for PSG.⁹⁵ The House of Lords (UKHL) relied strongly on the 1985 US Board of Immigration Appeals (BIA) *In re Acosta*’s construction of PSG.⁹⁶ *In re Acosta* held that persecution in relation to the five Convention refugee categories must be aimed at a common, “immutable characteristic” that cannot be changed or is one which an asylum seeker should not be required to change, because the characteristic is fundamental to an individual’s identity or conscience.⁹⁷

⁹⁴ See e.g. McHugh and Kirby JJ in *S395* [2003], para 43, who explain this problematic dichotomy with particular clarity; Weßels (2013, 55) on the discretion requirement.

⁹⁵ Lord Steyn writes in *Islam and Shah* that the Court of Appeal had previously held that the claimants did not qualify as a PSG, because the term “implies a collection of people closely affiliated with each other” citing *Sanchez-Trujillo, et al., v Immigration and Naturalization Service*, 801 F.2d 1571, United States Court of Appeals for the Ninth Circuit, 15 October 1986.

⁹⁶ According to Lord Bingham in *K and Fornah* [2006], para 14. See *In re Acosta* [1985].

⁹⁷ The *In re Acosta* approach was also endorsed in *Matter of Toboso-Alfonso*, US BIA, 12 March 1990, regarding a gay man.

Lord Steyn (*Islam and Shah*, 154) observed that “homosexuals are, of course, not a cohesive group.” Citing Hathaway (1991, 159), Lord Steyn suggested the drafters had contemplated a limited meaning to PSG, and that it was not intended to be a remedial clause or “catchall.” While acknowledging certain limitations to the Convention definition of a refugee, the UKHL rejected that it was necessary to further restrict the PSG category with requirements of homogeneity, cohesiveness, interdependence, or co-operative organisation. Drawing upon international jurisprudence,⁹⁸ the UKHL concluded that “depending on the evidence homosexuals may in some countries qualify as members of a [PSG]” (Lord Steyn, 155). Crucially, if an individual is able to evade the persecution feared, perhaps because of a privileged status or circumstances, that “does not mean the social group of homosexuals cannot exist” (Lord Steyn, 155). Lord Millet dissented on the appellants’ appeals, but he agreed with the majority that the PSG category should not be confined to its “original meaning,” and invoked the non-discrimination clause in the UDHR to support this interpretation. Lord Millet asserted a PSG of domestic violence victims could not exist because of the “circular constitution” principle, but accepted that homosexuals were a social group *independent* of persecution.⁹⁹

“In a society which subjected practising homosexuals but not non-practising homosexuals to persecution the relevant social group would still consist of homosexuals, not a subset of practising homosexuals. A non-practising homosexual would have no difficulty in establishing that he was a member of a persecuted social group. His only difficulty would be in establishing that his fear of persecution was well founded... This would be a matter of evidence, but given the hostility encountered by all homosexuals in such a society and the obvious problems the applicant would have in satisfying his tormenters of his own sexual abstinence, I doubt that the difficulty would be a real one.”¹⁰⁰

⁹⁸ Particular attention was paid to the New Zealand case, *Re GJ* [1995], which drew upon case law and practice from Denmark, Germany, the Netherlands, Sweden, Australia, Canada, and the US to conclude that homosexuals can constitute a PSG within the meaning of Article 1A(2). Millbank (2004, 197–199) traces the New Zealand decision to *Ward* [1993]; furthermore, considering cases that drew upon *Ward*, Millbank argues Australia, New Zealand, and the US purportedly took a “less categorical” or immutable approach, whereas the UK did not as convincingly reject this position on sexual orientation.

⁹⁹ See Appendix II on “circular constitution.”

¹⁰⁰ Lord Millet, 173.

The early creation of a legal distinction between “practising” and “non-practising” was succeeded by the distinctions between “open” and “discreet” homosexuals or, as Weßels (2013) proposes, the shift in assessment to “is” versus “does” after *HJ and HT* was decided by the UK Supreme Court (UKSC) in 2010. Lord Millet’s dissent in *Islam and Shah* is an insightful prelude to later debates over whether “practising” homosexual conduct in the private sphere has anything to do with a public identity, and how to assess the likelihood of persecution if “private” sexual practices were to become known to the public in RSD.

Within a year of *Islam and Shah* the Court of Appeal would carry the distinction of sexual “practice” forward in *Jain*. In *Jain* [1999], the conduct based approach carefully outlined the types of “permissible sex” that might bring a claimant under the Convention.¹⁰¹ Schiemann LJ (77) set out that there are “permissible grounds” upon which states may interfere with persons’ sexual behaviours, including the expression of sexual desires, paedophilia, and exhibitionism. Evans LJ (79) agreed with Schiemann LJ’s opinion, but was “anxious to emphasise” that the appellant sought “an adult male partner whose homosexual practices would be conducted in private and with that partner.” This strongly parallels Millbank’s (2002, 164) observation that public sex has often been used to isolate gay men as promiscuous and predatory, citing Backer (1996, 531) in suggesting that challenging anti-sodomy statutes in the UK resulted in gay men being inscribed as “mythological figures of disgust” in judicial discourse (see also Bersani 1987, 531). The court’s acceptance here of the possibility of a homosexual refugee is made conditional upon the refugee’s perceived “normality,” and is underlined with a sense of disgust, and conflation of homosexuality with criminality.¹⁰² Evans LJ (79) further clarified that if there were “any suggestion” that the Indian Penal Code “discriminates...against homosexual men who engage in homosexual practices with

¹⁰¹ The SSHD accepted that the appellant was a member of a PSG of “practising homosexuals,” according to *Islam and Shah*; Schiemann LJ (73) speculates that this may not be the proper categorisation, but that it could “be regarded ‘those perceived to be homosexuals,’ or some other grouping.” But the issue of categorisation was deferred to future cases because the material issue in *Jain* was whether he had a well-founded fear of persecution.

¹⁰² “Homosexuality, as with many other forms of *sexual misconduct*, is a criminal offence in Pakistan [emphasis added]” – *R v Special Immigration Adjudicator, ex parte T*, High Court, 11 May 2000 (Unreported), para 2, cited in Millbank (2004, 218–219). UK adjudicators were reluctant to accept prosecution could be persecutory and, instead, viewed it as a proper enforcement of social mores. “Permissible persecution” and cultural difference is discussed further in chapter five.

minors or in public” (i.e. the predatory or promiscuous) it would raise “entirely different considerations” that would “militate strongly against the applicant.”¹⁰³ In outlining the conduct-based approach in *Jain*, the court was careful to accept private homosexual “practices.” *Obiter dicta*,¹⁰⁴ “permissible” sex was contrasted to other sexual behaviours the judges deemed perverse, and which a state might justifiably disapprove of, prohibit, and sanction (see Backer 1996, 530–538, 554–590). Homosexuals could bring themselves within the Convention definition of PSG, but the UK would only accept “good gays” as refugees and not “bad queers” (see Miller 2005, 146–147; Wilkinson 2014). The phrase “good gays” is also used more broadly in this analysis to include being “discreet” upon return, having a demonstrably fixed sexuality (e.g. never married with an opposite sex partner), among other ideals that have been expected of “genuine” sexual minority asylum seekers.

The specification of, put bluntly, “no perverts” evident in *Jain* is perhaps more muted yet still present in other adjudications considered in this thesis. For example, in *HC* [2005] it had been found credible that HC, who had owned a video shop, had been “falsely” accused of having “adult pornographic videos” (Keene LJ, para 9). Although clarifying that HC’s conduct was not provocative or criminal, the court went beyond a mere statement of fact. Covertly, the court seemed to suggest that the possession and distribution of videos which offended social mores, such as same-sex pornography and, especially, child pornography would likely have “militated strongly” against HC. “Obscene” materials may have provoked adjudicators’ own anxieties of the perverted, promiscuous, and predatory asylum seeker so clearly expressed by the Lords Justice in *Jain*. In Hathaway and Pobjoy’s (2012) critique of *HJ and HT*, they argue there is a duty on the courts to exclude “trivial” behaviours or, as Goodman (2012, 425–426) writes in response, to “curb some forms of provocative conduct.” Further analysis will suggest what an asylum seeker “is” or “does” is still a contested issue.

¹⁰³ This is, of course, a critique of the judicial discourse and why the judges found it was necessary to juxtapose another state’s regulation of homosexuality with, for example, the protection of children from homosexual paedophiles, and does not mean to suggest that being the latter should entitle one to refugee protection. However, it is curious that later cases, such as *RM and BB* [2005], would use evidence of cruising areas to indicate a tolerance for homosexuality rather than potential evidence of intolerance and oppression, where cruising in public places may be the only outlet for a prohibited sexual desire.

¹⁰⁴ See Appendix II on *obiter dicta*.

However, the legal issue of whether homosexuals could constitute a PSG under the Convention (generally) faded over time in UK case law following *Islam and Shah* [1999]. Adjudicators stepped back from questioning the necessary “form” of a PSG, such as questions of organisation, and continued by accepting that appellants were, in fact, homosexual and therefore members of a PSG for the purposes of the Convention. The 2004 EU Qualification Directive (Council Directive 2004/83/EC) provided that sexual orientation could constitute a common characteristic of a PSG, but gender identity was only added to Article 10 of the EU Qualification Directive in 2011 (Jansen 2013; Tsourdi 2013).¹⁰⁵ Generally, the contested space shifted from the meaning of PSG *per se* towards the possibility of discretion or concealment, the perceived reasonableness of an asylum seeker’s behaviour, and the availability and credibility of the evidence such as whether an asylum seeker sought to access “gay spaces” or experienced persecution.

The UK established that sexual minorities could constitute a PSG in 1999, but I would argue the debate did not end there, with the inclusion of homosexuals under PSG. Before *HJ and HT* [2010], adjudicators developed a tendency toward outright disbelief of evidence of the likelihood of persecution, and then following the landmark 2010 decision were increasingly suspicious of the authenticity of the identities claimed, for example, with respect to *who* is subjected to the kind of harm that maintains a “nexus” to the Convention category (and their credibility),¹⁰⁶ or *what acts* can form the basis of the “high threshold” of persecution (or its likelihood). Arguably, the turn towards a discursive examination of credibility and subjective assessment of persecution refocused the debate over the PSG upon issues that had previously been peripheral, and suggests that the interpretation of PSG is ongoing and thus remains relevant in RSD.

1.2 “Reasonable” concealment: More than sex?

UK case law evidences that its adjudicators were for some time keen to demarcate the “limits” of sexual minority inclusion under the Convention, primarily built upon the discretion requirement. This section details how judgments based on strictly

¹⁰⁵ The UK has not opted-in to the 2011 EU Qualification Directive (Council Directive 2011/95/EU; see also Costello and Hancox 2014, 4), but does issue Asylum Policy Instructions on gender identity (API 2011b).

¹⁰⁶ See chapter two and Appendix II on the nexus requirement.

private conceptions of identity and concealment were rationalised. By the mid-2000s, Canada, Australia, New Zealand, and the US had all acknowledged that “requiring behaviour modification as a means to avoid persecution constitutes an unacceptable limit on the expression of an individual’s identity” (Johnson 2007, 105). In a particularly vivid illustration, a German decision-maker first compared discretion to changing the colour of one’s skin to avoid persecution in 1983 (Weßels 2013, 55). Until the UKSC decision in 2010, adjudicators imposed the discretion requirement in spite of the fact that other Signatory States had recognised that it “[placed] an unfair demand on lesbian and gay applicants that [did] not exist for other cognate groups” (Goodman 2012, 427–428). By focusing RSD on discretion, privacy, or a “norm of invisibility,” the UK “[employed] the violence of the law to force applicants back into their...closets” (Millbank 2005, 120).

But the operation of discretion reasoning was ambiguous. For example, Buxton LJ (*RG* [2006], para 19) wrote that the courts in *Z* [2004] and *Amare* [2005] recognised that a “forced change of sexuality” would perhaps breach the ECHR, that is, if it amounted to being “forced” on consideration of the evidence. The Secretary of State (SSHD) also accepted that an “illicit requirement” for an asylum seeker to conceal their identity to avoid persecution, as the Tribunal had posited in *Amare*’s appeal, was an error of law (Laws LJ in *Amare* [2005], para 10). However, UK adjudicators consistently found that discretion as to sexual orientation or gender identity did not in itself amount to persecution within the meaning of the Refugee Convention or otherwise place asylum seekers in a situation of persecution. The subsections below consider some of the many rationalisations that sustained the discretion approach, including the avoidance of identity altogether with a focus on conduct, ignoring the obvious connections between past discretion and the fear of persecution, and the possibility of internal relocation in the country of origin.

1.2.1 Discrete, discreet conduct: Narrowly classified and concealable categories

In *Jain* [1999], the Court of Appeal’s conduct-driven approach affirmed the distinction between “practising” and “non-practising” homosexuals, and built a

closet out of privacy.¹⁰⁷ The conduct based approach centred on the practising/non-practising homosexual and a similar open/discreet distinction soon emerged in the case law (Millbank 2012, 505–506). These distinctions proved to be major evidential hurdles and sources of adjudicator speculation of, for example, *why* homosexuals had acted discreetly, which was used in turn as justification for suggesting asylum seekers could continue to do so as a grounds for rejecting claims to refugee status. In other words, evidence of a past concealment of identity legitimised the requirement of future discretion in RSD. The implicit rationale of discretion was that the sexual identities of asylum seekers were constituted by nothing more than deviant sex and that transgression of norms needed to be concealed.

The conduct driven approach in *Jain* invited adjudicators to forensically examine asylum seekers’ “private” sexual practices as well as the moral acceptability of their desires (i.e. privacy to do *what*). Adjudicators were essentially given permission to seek and form perspectives on the claimants’ sexual lives. The spectacle of their being sexual and the practice thereof, such as where it took place, who did what and to whom, became the way of defining a legitimate gay refugee (see e.g. Miles 2009). The UK’s broader depiction of the “good gay” refugee was one who was private, silent, discreet, and for a decade determinations did not properly engage the public implications of the ways in which sexual identity is linked to sexual practice (see Johnson 2007, 109).¹⁰⁸ Focusing assessment on sexual conduct often forgoes examination of the psychological implications of the persistent anxiety of hiding, and fear of spill over from the asylum seeker’s “private” sexual life into the public sphere (see e.g. *B* [2007], para 18 on a doctor’s testimony).

¹⁰⁷ I discuss *Jain* at length in this chapter, and chapter five to some extent, because of the formative importance Schiemann LJ’s conduct driven approach had for later case law; e.g. *Amare* [2005], para 22, where Laws LJ cited *Jain* at length in addressing the relation between human rights and refugee status; Hodge J also relied heavily on *Jain* in *HJ* [2008], para 15, and quoted a substantial excerpt which evidences the precedent’s continued importance at least until *HJ and HT* [2010]; see also King JJ in *JM* [2008], para 152.

¹⁰⁸ For example, see *Dawkins* [2003], para 35, citing the Adjudicator’s determination:

“Insofar as there may be some interference, by virtue of the imposition of criminal sanctions causing the appellant to be secretive in the conduct of his homosexual relationships in Jamaica, I have had regard to the background evidence as to the lack of societal discrimination against homosexuals and the specific evidence of the appellant regarding his own [discreet] homosexual activity...”

Limiting the scope of identity to privacy and sexual conduct, it was found that Dawkins could go clubbing and be sexually promiscuous, discreetly. On the other hand, *Binbasi* [1989] had suggested that the gay claimant might exercise “self restraint,” which Millbank (2004, 214) presumes could be construed to mean “complete and life-long sexual abstinence” to avoid persecution.

Finally, the conduct-focused framework for adjudication apparently prioritised “practicising” homosexuals with the added emphasis on “being out” in the country of origin in order to claim refugee status (Johnson 2007, 106–107).¹⁰⁹

Regarding the precedent in *Jain* for the protection of (legitimate) private conduct, the obvious exclusions to refugee status are identities and expressive practices which are public and could have otherwise been accommodated by their “reasonable” concealment. According to Millbank (2004, 209) the reasoning in *Binbasi* [1989] was that “abstinence would protect the applicant from prosecution as it was gay sex, rather than being gay, which was the subject of criminal sanctions.” *Jain* edged forward, slightly, in stating homosexual asylum seekers may be able to bring themselves within the Convention definition, but through persecution based on homosexual sex and not being gay, *per se*. Ironically, this reflects the 2013 decision of the Supreme Court of India to uphold the law which contributed in part to Jain’s feared persecution: “Section 377...does not criminalize a particular...identity or orientation. It merely identifies certain acts which if committed would constitute an offence.”¹¹⁰ Claiming rights to privacy can be a successful legal strategy in domestic contexts to challenge anti-sodomy laws.¹¹¹ However, privacy is not a comprehensive solution, especially where anti-sodomy laws do not explicitly discriminate between hetero- and homo-sexual acts.¹¹² Privacy was further limited in the asylum context where it was interpreted to exclude the protection of public identities. A broader rights-based approach was repeatedly rejected by adjudicators.¹¹³

Essentially, determination relied on distinguishing what were unacceptable

¹⁰⁹ See e.g. *Amare* [2005], para 4, citing the Adjudicator’s determination, para 19; *HJ* [2008], para 42–44, regarding past concealment not adversely impacting the claimant, how HJ’s life in the UK did not involve “highly extroverted forms of homosexual activity,” and so return was reasonable; see also *B* [2007], para 23, and how the SSHD construed the claimant’s increasingly public homosexuality as an attempt to further the asylum claim.

¹¹⁰ *Suresh Kumar Koushal and another v NAZ Foundation and others*, Civil Appeal No. 10972 of 2013, para 38. Nevertheless, some UK adjudicators did acknowledge that anti-sodomy laws were patently discriminatory, e.g. *HS* [2005], para 147, 150.

¹¹¹ See e.g. *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, Case CCT 11/98.

¹¹² cf. the Supreme Court of India decision, *National Legal Services Authority v Union of India and others*, Writ Petition (Civil) No. 400 of 2012, para 21–22, 47, 63, and 66 which potentially put this decision at odds with the court’s view in the S377 case. The present decision was a major victory for trans/hijra activists who sought equal rights and protections, as well as a legal “third gender” option (see chapter one regarding hijra). The court strongly framed self-determination/personal autonomy in terms of dignity (para 74) and equality as the “basic essentials designed to flower the citizen’s personality to its fullest” (para 98).

¹¹³ e.g. *Z* [2004]; *Amare* [2005]; *JM* [2008].

violations of privacy from acceptable discrimination or “permissible persecution” of non-conforming practices of sex and expression (Johnson 2007). Adjudicators’ subjective assessments of the boundaries of privacy and what was acceptable sexual conduct within that limited space allowed concealment to be deemed “reasonable.” By imposing discretion the UK was “indirectly colluding with the persecutory state” in the subsequent limits placed on failed asylum seekers’ lives in their countries of origin (Tuitt 1996, 93; see also Johnson 2007, 109; 2011, 58, 61; Jansen 2013, 6).¹¹⁴ Specifically in sexual orientation-based claims, the pretence of discretion contributes to the “production of ‘invisible’ homosexuality [and] perpetuates the continued social eradication of the expression, public visibility, and even the practice of homosexuality in the countries concerned” (McGhee 2001b, 25; see also Dauvergne and Millbank 2003; Millbank 2004, 214; Johnson 2007, 108).

Post-*Jain* the UK adapted its position on the concealment of sexual behaviour and identity. As is the nature of case law, principled legal rules require interpretation and adaptation in application, but RSD was often skewed toward exclusion rather than protection. The narrowly classified and concealable categories of potential refugees were sieved through often contradictory discourses of discretion, silence, and conformity versus openness, political activism, and flaunting to be rejected and returned to a surrogate closet.

1.2.2 Nascent discretion reasoning

Conduct-based adjudication, discretion and concealment took hold after *Jain* and remained the status quo for a decade. Adjudicators carefully avoided affirming any rights to sexual identity and expression in RSD. This sub-section analyses early discretion reasoning and Z [2004], in particular, because the discussion in that appeal revolves around the landmark Australian decision, S395 [2003].

First, it is beneficial to foreground some sociological implications of the assumptions of the discretion requirement for the construction of sexuality. Millbank (2004, 217) provides an example of the effects of discretion requirements, citing at length an appeal of a gay Pakistani before the High Court in 2001. The appeal concerned the claimant’s fear of persecution if he were to be returned and live

¹¹⁴ See also Haines QC (para 114) in *Refugee Appeal No. 74665* [2004] on the potential complicity with persecutors in RSD.

openly, as he had been living in the UK. The facts of his homosexuality and the lack of a gay community in Pakistan had been accepted. However, the Adjudicator concluded that the appellant had not demonstrated a well-founded fear of persecution so long as he were to be discreet about his lifestyle as he had in the past. To “attract” persecution “he would have to flaunt his homosexuality.”¹¹⁵ Millbank (2004, 216, 217) argues that the adjudicators trivialised the public expression of homosexuality as a “right to go clubbing,” and demonstrated “a dogged determination not to conceptualise the life experience...of a gay man in terms of human rights concepts such as self-expression or freedom of association.”¹¹⁶ The observation of this kind of early discretion reasoning remained relevant until at least 2010.

For example, in the AIT hearing that would eventually wind its way to the Supreme Court as *HJ and HT* [2010], HJ’s claim that discretion would not be reasonably tolerable was dismissed. Hodge J (*HJ* [2008], para 43) trivialised rights to association in public when recounting HJ’s testimony that he had enjoyed going “to pubs, clubs, parks and friends’ homes,” and being “able to hold hands and put his arms around gay friends.” Hodge J (para 45) acknowledged that “[i]n Iran, he could not go to gay clubs,” because “[h]omosexuals may wish to, but cannot, live openly in Iran.” The Tribunal found that because he could convene discreetly with a few confidants in Iran, HJ could “express his sexuality albeit in a more limited way than he could do elsewhere” (Hodge J, para 45). The discretion requirement was repeatedly challenged in appeals for refugee status. But the Home Office and adjudicators were adept at framing the reasoning in adjudications so as to maintain appearances that the refusal of refugee status based on the possibility of the claimant’s discretion could not adequately be described as a “requirement,” which would contravene domestic and international jurisprudence.¹¹⁷ The first decision to employ this cynical tactic in the main sample analysed here was handed down in 2004.

¹¹⁵ Quoted by the High Court (para 10) in *R v Special Immigration Adjudicator ex parte T* [2001] Imm. A.R. 187. The Tribunal declined to overturn the Adjudicator’s decision, as did the Court of Appeal (Millbank 2004, 217).

¹¹⁶ See e.g. *Dawkins* [2003], where the Adjudicator’s findings of fact, para 27, are set out by Wall J: the asylum seeker, Dawkins, had frequented gay nightclubs in Jamaica (Wall J, para 13-14), purportedly evidence that he was not a risk of ill-treatment, and Dawkins was able to maintain sexual relations “by meeting his various partners either at a hotel or a guest house” (Wall J, para 13).

¹¹⁷ Notably, in domestic law, *Ahmed* [1999].

Following the publication of the HCA decision in *S395* [2003], Appellant Z complained in the application for permission to appeal that the SSHD and IAT had failed to consider “*why* the appellant had conducted his personal relations discreetly” (cited in Buxton LJ in *Z* [2004], para 20).¹¹⁸ The Court of Appeal supported the Tribunal’s decision and concluded that the appellant had not substantiated his own question in the appeal with evidence demonstrating why he had been discreet about his sexuality in Zimbabwe. In fact, reflecting on his judgment in *Z* [2004], former Lord Justice Buxton (2012, 397) writes that “[i]n terms of its evidence and argument, *Z* was a very unsatisfactory case.” However, the decision the court reached leads to a paradoxical conclusion or suggestion of what may lead to a successful claim: a premium is placed on “being out” in the country of origin and, yet, that expression of sexuality may actually provoke the persecution feared. Below, I have included an excerpt from *Z* [2004] for discussion of three conceptual themes that emerged during this period (see Fairclough 1999, 196 on method). Crucially, adjudicators had reasoned that self-repression was the asylum seeker’s own preference, and so constructed a legal artifice in which discretion was not, in the court’s view, required.

“[1] He said that they did not visit gay places...He said they conducted their relationship ‘secretly, so it was not known.’ This history is relevant because it demonstrates in our view that [2] the appellant’s chosen form of homosexual conduct did not involve overt expression or the frequenting of gay bars or other collective homosexual settings, [3] activities which may well increase the risk an appellant would run of hostile reaction from the police or public [numbering my own].”¹¹⁹

At the centre of the discursive legal construction or, perhaps, omission of identity is a distinction between “open” and “discreet” homosexuals, which produced a seemingly impossible double bind for achieving refugee status. The case law has both suggested that asylum seekers demonstrate having taken the risk of being out, open, perhaps even politically active,¹²⁰ or experienced persecution in the past,¹²¹ and

¹¹⁸ *Z* [2004]. See also *S395* [2003]: McHugh and Kirby JJ, para 18, decided that the tribunal had erred in dividing homosexuals into “discreet” and “non-discreet” categories, especially where there may have been a “need to act discreetly” to avoid persecution, and noted the tribunal failed to consider what would happen if the appellants were discovered by the community to be homosexuals.

¹¹⁹ IAT cited in Buxton LJ, para 6.

¹²⁰ e.g. *Amare* [2005], especially para 6; *B* [2007], para 12.

¹²¹ e.g. the case of “E” in *RM and BB* [2005]; *RG* [2006]; *HJ* [2008].

coupled these with the expectation that claimants be “good gays” in their discretion, conscious of the social mores in their country of origin.¹²² Any combination of these contradictory constraints may leave no clear path to refugee status for persecuted sexual minorities.

I would argue the excerpt is indicative that [1] evidence that a claimant had been closeted in the country of origin, regardless of reasons for this concealment, allowed adjudicators to infer that sexuality had not previously put the asylum seeker at risk, and would not do so in the future. This “expectation of silence and conformity” leads the adjudicator to “privilege an imagined (discreet)” lifestyle, even over and above past experience of persecution as well as present and future conduct such as living openly, which may expose them to persecution (Millbank 2004, 214–215). On the second point [2], adjudicators often went so far as to conclude appellants really *wanted* to live a private life, regardless, and therefore discretion was not “imposed” in the rejection of the claim and their prospective removal.¹²³ In relation to Z’s claim, the IAT found that “in reality the appellant and his partner had been able to conduct their gay relationship without serious difficulties” (Buxton LJ, para 6). By interpreting previous concealment to infer “choice” of lifestyle, adjudicators used evidence to suggest homosexual conduct would remain private without having to seriously consider the reasonable likelihood or implications of the associated identity becoming public. That is to say, UK adjudicators did not address how a claimant’s sexual life, conduct or, by extension, identity could potentially become public and the possibility of persecution in those circumstances (see Weßels 2013, 66). At [3], the adjudicators acknowledged the danger the claimant might be put in upon return if he acted “openly,” but the court decided that expecting Z to conduct his relationship discreetly was not unreasonable – after all, that was *his choice* (see also Millbank 2004, 214, 216; *HJ and HT* [2010], para 97). Even if the finding that Z’s “chosen form of homosexual conduct” was inherently discreet is taken at face value, as correct, adjudicators either failed to grapple with or

¹²² e.g. *JM* [2008], especially para 149; *HJ and HT* [2009], para 34-36.

¹²³ Similar reasoning is also applied in *Amare* [2005], discussed below, and in *RG* [2006], para 11. See also Millbank (2004, 214), citing an Australian case where the court referred to the applicant’s “‘preferred lifestyle of discreet homosexuality’ in Iran.”

intentionally neglected how the “choice” can be constrained by the imperative to avoid persecution as well as the tenuous safety a closet has to offer.¹²⁴

The conclusion reached by the court in *Z* [2004] is especially problematic given that permission to appeal had been granted in order to consider the relevance of the HCA decision, *S395* [2003]. The UKSC later found the application of *S395* in UK Court of Appeal decisions to be based on a “misunderstanding” of the Australian case (*HJ and HT* [2010], para 25-29, 47-51, 102-103, 124-127). *S395* would have implied an entirely different legal outcome for *Z* if it had been applied correctly. In *S395*, a gay couple had been determined to exercise discretion because they feared serious harm if they were to live openly. McHugh and Kirby JJ (para 34-35), in the majority in that case, submitted that the Minister (respondent) was correct, that the appellants would indeed exercise discretion if returned to Bangladesh as they had in the past. However, the Tribunal did consider the possibility that the choice to be discreet was influenced by the fear of persecution if they were not to be so (see McHugh and Kirby JJ, para 40, 44, 53, 55, 56; Gummow and Hayne JJ, para 80, 82). Contrary to the court’s conclusion in *Z* [2004], “the judgment [in *S395*] conceives of sexuality as fully rounded identity and in doing so implicitly posits self expression as a protected aspect of that identity” (Millbank 2004, 207). While the SSHD, Tribunal, and Court of Appeal may have been right to decide that there was “no specific evidence” for why *Z* had concealed his relationship in Zimbabwe, the decision seems to evade, or even contort, the reasoning of the majority in *S395*.

If the UK court had properly considered and applied the HCA’s decision, the Lords Justice would have granted *Z*’s appeal. The court would have directed the Tribunal upon remitting the case to consider whether the evidence showed *Z* had to be discreet or if he could live openly upon return, and scrutinised the real question of whether *Z* had a well-founded fear of persecution in either scenario. Finally, the decision would have emphasised the importance of not relegating sexual minority

¹²⁴ Others have referred to this as “reasonable tolerability,” suggesting that choice discourses have surfaced in the wake of *HJ and HT*. Weßels (2013, 64), for example, argues “the emphasis seems to have moved from ‘reasonably tolerable discretion’ to a presumption of ‘discretion by choice’...because the [*HJ and HT*] test continues to focus on the applicant’s behaviour and separates this from the protected identity.” Based on the cases considered in this thesis, I would observe this is a continuation, if evolution, of the legal discourse in the new paradigm. Perhaps this is also merely a conflict of terms, and the recent legal reasoning has moved past referring to the “choice” as “reasonable,” per *HJ and HT*.

The inclusive guise of “gay” asylum seekers to a “false dichotomy” of “discreet” and “non-discreet” groups (McHugh and Kirby, para 38-39; Gummow and Hayne JJ, para 88).

Asylum seekers’ professed sexual orientations were generally accepted as fact until *HJ and HT* [2010].¹²⁵ In retrospect the credibility assessment of the sexual identities of Z and others seems to be inconsistent with current practice, which raises a speculative and yet troubling question of whether this change has allowed adjudicators additional *discretion* to refuse claims in light of *HJ and HT* (see further chapters six and seven). Currently the Asylum Policy Instructions suggests adjudicators infer a claim is unfounded where the asylum seeker’s evidence presented an irrational degree of risk-taking, because it would be unbelievable that she had placed herself in a position of possible harm (Vine 2014; API 2015). Perhaps in the case of Z, not being discreet would be incredible.

It is reasonable to find that Z’s “discreet” lifestyle in the country of origin may have been adopted to avoid harm or could result in harm in spite of a desire for a quiet life, which the court so whimsically dismissed as voluntary concealment.¹²⁶ As presented in the written decision, Z’s contention that previous discretion evidenced the possibility of persecution seems sensible, grounded in international refugee and human rights discourses and, if anything, adds to the appellant’s credible well-founded fear and the identity claimed.

1.2.3 Conduct in the closet

This sub-section considers more thoroughly the operation of the discretion requirement upon private sexual conduct, based on an “understanding that closeting of sexuality is a permissible limit on the expression of identity” (Johnson 2007, 108). Over time discretion reasoning evolved with case precedent, but the basic concept that it relied on, in various forms, was always the closet.

According to Buxton LJ (para 11) in *RG* [2006], Z [2004] proposed two questions: first, “is he being required...to modify his behaviour” and, secondly, “will that modification of behaviour put him in a situation of persecution.” Like *Jain*, the revised framework centred on private homosexual conduct, and required a very high

¹²⁵ Based on the sample of cases in this study; see e.g. *Amare* [2005], *HJ* [2008], *Apata* [2015], and the literature, e.g. Millbank (2009a), Lewis (2014).

¹²⁶ See *HJ and HT* [2010], Lord Rodger, para 65 on previous discretion as “an indication that there is indeed a threat of persecution;” Sir John Dyson, para 123 on “no real choice.”

likelihood of persecution, such as the enforcement of anti-sodomy laws in the country of origin.¹²⁷ Given that anti-sodomy laws often only target men who have sex with men (MSM), a literal reading of then-UK precedent might have reached a misinformed conclusion that other gender and sexually non-conforming persons would not also be at risk from authorities, non-state agents, and the broad discriminatory effects of the very existence of such prohibitions (Jansen 2013, 7–8).¹²⁸

In *Amare* [2005] the claimant was a lesbian from Ethiopia which, unlike many states that criminalise sodomy, also criminalises female same-sex acts (Itaborahy and Zhu 2013, 48). Lesbian claims to asylum may be impacted by the double discrimination of gender and sexual orientation as argued in *Amare* (Laws LJ, para 23, 26; see UNHCR 2002, para 16–17). The UNHCR Guidelines (2011b, 80–83), for example, provide that even where gender is not a central ground of a claim, gender-related aspects are important to understanding the context and evidence in RSD. General issues of the social control of women, restricted access to public spaces, and lower social and geographic mobility have apparently contributed to fewer lesbian claimants and their invisibility in refugee law (McGhee 2001b, 25–26; Miller 2005, 141; Jordan 2009, 171; Cragolini 2013, 101). *Amare* submitted as evidence that Ethiopian society placed a premium on marriage to the extent that where a single woman did not live with her family, she was, in effect, considered a prostitute (see Laws LJ, para 11). Problematically, women’s rights have also been viewed through a lens of cultural difference in asylum claims, which obscured the fear of persecution (see chapter five).¹²⁹ The court applied discretion in *Amare* but, additionally, failed to appreciate the ways in which women are too often deprived of the social and material resources to, at minimum, have their own discreet “closet,” let alone the additional barriers they may face in trying to access the public sphere.

In the sample of cases, the first recognition of the right to expression and association was tenuously made in *J* [2006], but with the explicit limitation that the

¹²⁷ See e.g. *OO and JM* [2009], para 9, 13, 22; Johnson (2011, 61); Tobin (2012, 453–454).

¹²⁸ Consider, for example, *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, Case CCT 11/98, para 108–109; in this decision the Constitutional Court of South Africa struck down the country’s anti-sodomy law.

¹²⁹ See e.g. *Islam and Shah* [1999], especially 163 on the majority of women conforming to subordination; *K and Fornah* [2006], para 28, 109.

repression of aspects of sexual identity was acceptable. To a certain extent, Kay LJ cited and applied *S395* [2003] in the spirit of the law, both of the HCA decision and the growing international consensus which it represented – sexual identity was about more than private sex. In remitting the case to the Tribunal, the Court of Appeal instructed the Tribunal to consider if “discretion” is something reasonably tolerable for J in Iran, “not only in the context of random sexual activity but in relation to ‘matters following from, and relevant to, sexual identity’ in the wider sense recognised by the [HCA]” (Kay LJ, para 16; citing Gummow and Hayne, para 83). Buxton LJ (para 20) agreed with the judgment of Kay LJ, but qualified that inquiry into what may be reasonably tolerable with more obviously limited terms. Buxton LJ (para 20) wrote that J “may have to abandon part of his sexual identity” where not being discreet could lead to “extreme danger.” This approach is generally consistent with the pre-2010 cases in this study, with the possible exception of Collins J’s critique in *B* [2007].¹³⁰

In *B* the respondent relied on the absence of prosecutions in Algeria to argue that the claimant was not at risk of persecution. The Adjudicator agreed in finding that homosexuality was tolerated to some extent in Algeria so long as it was not “expressed very explicitly in public,” which B had argued would provoke social hostility, police harassment, or possibly even death threats from Muslim fundamentalists (Collins J, para 11). At the High Court, Collins J (para 24, 31) noted the repeated references to “discreetly” in previous determinations, and that the whole basis for refusing B’s claim was that he *would* act discreetly if returned. Collins J (para 15) further questioned what the Tribunal meant by “expressing very explicitly in public through behaviour or clothes” and, therefore, whether the risk of persecution was “limited to those who flaunt their homosexuality,” or perhaps LGBT rights activism (see further part two, below).

In *HJ* [2008], the AIT considered the questions set out by Kay and Buxton LJ in *J* [2006], principally with a remit to determine why HJ had been discreet in the past, would be so if returned to Iran, and whether the need for discretion would itself constitute persecution (Hodge J, para 5-6, 9, 39; see also Appendix V). Rather than a “subjective” test, which is described as how it is thought HJ “*should* behave” or,

¹³⁰ See further Appendix V; discretion was important in this decision, but not the error of law.

perhaps, should be able to be a homosexual, the Tribunal interpreted their assigned task as an objective test on the “facts” of how HJ “*will* behave” (Hodge J, para 39). According to the Tribunal, these facts were to be deduced from how and why he had conducted himself before: “we have to examine whether that will entail for him having to live a life which he cannot reasonably be expected to tolerate” and if it required him to suppress “many aspects of his sexual identity” (Hodge J, para 39).

HJ’s counsel forwarded that the fear of being discovered, convicted, sentenced, and punished for homosexuality in Iran was the causative factor of discretion, and that HJ could not reasonably be expected to tolerate this discretion. The SSHD simply concluded that, because HJ had lived discreetly to avoid authorities, he reasonably tolerated life in Iran (Hodge J, para 10-11). The Tribunal reviewed the CG case,¹³¹ *RM and BB* [2005], and considered up-to-date evidence (see Thomas 2008 on CG). Iranian punishments for homosexuality were acknowledged to amount to persecution, and it was noted that there had been an increase in surveillance since 2005 (Hodge J, para 20-24). But the evidence of increased surveillance was insufficient, because Iran defines homosexual offences under a broad category as a moral crime. Thus, there was no evidence homosexuals were a particular target of authorities (Hodge J, para 25). Like *RM and BB* [2005], the Tribunal in *HJ* found the likelihood of discovery and persecution for private conduct was slim. Noting that the situation of Iranian homosexuals was relatively unchanged, Hodge J (para 25) included an excerpt of *RM and BB* that observed “it can be expected that they would be likely to conduct themselves discreetly for the obvious repercussions that will follow” (Allen VP, para 124).

The Tribunal found that, because HJ had been discreet in the past (“objectively”), he could reasonably tolerate a closeted life in Iran without significant detriment to his private life or, purportedly, significant risk of harm:

“On the evidence he was able to conduct his homosexual activities in Iran without serious detriment to his private life and without that causing him to suppress many aspects of his sexual identity. Whilst he has conducted his homosexual activities in the UK less discreetly, we are not persuaded that his adaptation back to life in Iran would be

¹³¹ See Appendices II, on country assessments and CG cases, and V, on *RM and BB* [2005].

something he could not reasonably be expected to tolerate.”¹³²

Hodge J (para 45) continued, HJ “may well live in fear on return to Iran now he is aware of the penalties which might be arbitrarily imposed were he to be discovered.” Nevertheless, the dismissal of the appeal was not overturned on the basis of the Tribunal’s finding that, in spite of the level of seriousness, the actual probability of discovery was insufficient for international protection.

The requirement to suppress sexual identity to avoid persecution was particularly apparent in *XY* [2008]. The Court of Appeal here decided that it was not unreasonable that the Iranian appellant and his “friend,” A, with whom he had a “seven-year relationship” had been restricted to sex in bathhouses and A’s home when his family were away (Stanley Burnton LJ, para 2).¹³³ XY’s homosexuality and relationship with A were accepted as facts by adjudicators. However, what authorities knew, whether A had been arrested, and if XY had been summoned were not accepted by adjudicators as having been established (Stanley Burnton LJ, para 3). XY’s counsel argued the Immigration Judge (IJ) had failed to consider *J* [2006], and whether XY could reasonably be expected to tolerate having to “conduct his sexual life clandestinely” (Stanley Burnton LJ, para 5). Counsel also stressed XY’s circumstances of living in a family home and having to go to public baths (Stanley Burnton LJ, para 14). The court accepted that the consequences of living openly in Iran amounted to persecution according to the CG case, *RM and BB* [2005] (para 123-124). But Stanley Burnton LJ (para 7) in *XY* stated that if homosexual claimants are discreet “there is no real risk of their being apprehended and punished” unless “they have previously been arrested or are wanted...on account of their homosexual activities.”

Like the Tribunal in the remitted case of *J* [2006], i.e. *HJ* [2008], in *XY* [2008] Stanley Burnton LJ (para 9) found it opportune to underline Buxton LJ’s (*J*, para 20) emphasis on HJ possibly having to “abandon part of his sexual identity,”

¹³² Hodge J, para 44.

¹³³ A is referred to once as “friend” and once as “partner.” Similar to gender and pronouns in *AK* [2008], a case discussed below, we cannot know how XY identified A from the decision. However, the use of “friend” is highlighted because, depending on how XY actually identified A, it is a peculiar, possibly culturally rooted description for a long-term partner, and/or could be a homophobic characterisation of that relationship by the court akin to a racist reference to a black man as “boy.” The court in *HJ and HT* [2009] also refers to XY’s “7 year homosexual relationship with a friend” (Pill LJ, para 24).

which helped to justify the decisions in *HJ* [2008] and *XY* [2008]. Yet, these determinations appear at odds with Kay LJ’s (para 16) affirmation in *J* [2006] of a protected identity “not only in the context of random sexual activity,” say, sex in a bathhouse shower cubicle, but also in “matters following from, and relevant to, sexual identity” (and here Kay LJ was drawing upon Gummow and Hayne JJ in *S395*, para 83). In *XY*, Stanley Burnton LJ (para 10-13) excerpted *HJ* [2008] at length: this included the rationale that HJ could clearly tolerate living in Iran as a gay man because he had done so previously, that there was no evidence the appellant was of interest to authorities, and that while the UK might be preferable to him, he would act discreetly in Iran without serious detriment to his private life (Hodge J, para 41-42, 44-45, 61-62). “It was for [XY] to establish that he could not reasonably be expected to tolerate his condition if he were returned,” which, according to the court, he did not, and the appeal was dismissed (Stanley Burnton LJ, para 14). What, in the court’s view, may have been unreasonable and intolerable remained undefined.

While continuing to examine Iranian asylum appeals in the UK, the next case considered gender identity and the fear of being perceived to be gay and persecuted in that state. Berg and Millbank (2013, 135) argue that gender identity should be conceived and developed in jurisprudence as a PSG distinct from sexual orientation, and by that measure *AK* [2008] failed to properly identify and articulate that PSG. It should be noted, however, that the decision suggested adjudicators found that *AK* belonged to a PSG and that credibility was not disputed but whether there was a well-founded fear of persecution was not clear (Sedley LJ, para 2, 19, 28). Instead, the concern is that a failure to develop the PSG could impact future gender identity claims that would have less case law from which to draw support.

Berg and Millbank (2013, 123–124) found only 37 publicly available decisions concerning trans asylum seekers in their study of 5 states and 17 years of case law, including 3 UK decisions. *AK* [2008] is included in this sample as it elaborates, if briefly, some key trans asylum issues. Importantly, this illustrates how little developed UK case law is on trans claimants and that, despite recent innovations to the Asylum Policy Instructions (API 2011b; Berg and Millbank 2013, 122–123, 132, 143–144), gender identity has effectively only been implied with the inclusion of gender and sexual orientation.

Problematically, AK is identified as “he” and described as “a transsexual in need of gender reassignment” (Sedley LJ, para 1). While AK was male to female (MTF), it is not clear in the decision whether AK had “actually presented their chosen sex or preferred mode of address,” so we cannot infer whether the construction of trans in the case is a reflection of the adjudicators’ or appellant’s view (Berg and Millbank 2013, 126, 144–145). With that cautionary note, I also use male pronouns in reference to AK.

Sedley LJ (para 1) expressed that, “[s]urprisingly – at least to the outside world – gender reassignment is not only accepted but widely practised in Iran.”¹³⁴ But AK feared “he will be perceived and persecuted” as a homosexual (Sedley LJ, para 1). While AK’s appeal was granted by Atkinson IJ, the SSHD’s application for reconsideration succeeded before Mather IJ (see Appendix IV). Mather IJ found the previous decision had wrongly “equated the risks to the appellant as a transsexual, with those of a homosexual,” but the Court of Appeal disagreed with this analysis (Sedley LJ, para 2, 4). Sedley LJ (para 4) asserted that Atkinson IJ’s opinion had distinguished the two groups, but he also accepted AK’s argument that “there was a real risk that others in Iran would not do so.” Sedley LJ (para 6) agreed, only briefly adding that it was an “evidential fact” that the risk of persecution facing “a pre-operative transsexual living in Iran” could not simply be equated “to that faced by overt homosexuals.” Like pronoun preference, the decision does not offer substantial details of AK’s personal circumstances. For example, if in Iran a “post-operative transsexual” would not face persecution, I wonder if perhaps AK did not wish for (certain) medical intervention(s) to affirm their gender identity (see Sedley LJ, para 28). The majority of the decision concerned the appeal’s process, so I consign the analytical consideration of gender identity to these few short paragraphs which is a fitting reflection of the jurisprudence.

1.2.4 Principle of internal relocation

The discretion requirement has also been coupled with assumptions that asylum seekers could be refused because of an internal relocation alternative.¹³⁵ Internal

¹³⁴ See also *HS* [2005], para 49, 86; Jansen (2013, 13); Eshaghian (2008).

¹³⁵ The UNHCR Guidelines (2011b, 105–113) refer to “internal relocation alternative” or “internal flight alternative” but adjudicators do not necessarily refer to the principle of relocation as an option

relocation is a fundamental consideration in RSD, that an asylum seeker could be removed and relocated in the country of nationality (see generally Hathaway 1991, 133–134). For example, in *Atkinson* [2003], part of the claimant’s grounds was of his *perceived* homosexuality in his community due to his association with his gay boss (Supperstone QC, para 7). Supperstone QC (sitting as Deputy Judge) found that if Atkinson were to relocate to a new area, “there [was] no reason why he should be perceived as being homosexual” (Supperstone QC, para 27).

A common inquiry is whether a sexual minority can instead seek refuge in a cosmopolitan city (Jansen 2013, 13–14). Evidence of cruising areas in Tehran was cited from *CG RM and BB* [2005] several times in the sample. In *B* [2007] the findings of the Adjudicator set out “in the cities,” “big cities, especially in Algiers,” there are various meeting places for homosexuals, as long as their behaviour is not overt (cited in Collins J, para 11).¹³⁶ So, in reality, internal relocation has the potential to be deployed as “discretion plus” – displacement and relocation of identity within the individual, plus relocation of the individual within the country.¹³⁷

In *HC* [2005], the Court of Appeal agreed with points of law in favour of HC, but the appellate history details a problematic application of an internal relocation alternative. The Adjudicator and the Tribunal failed to consider the cumulative effect of being both a Palestinian and gay in suggesting internal relocation (Keene LJ, para 21). According to the Adjudicator, HC was not safe in his refugee camp due to criminal actions, but he was safe in other areas of Lebanon, such as Beirut (Keene LJ, para 18-19). The Tribunal agreed and articulated that while living openly is not tolerated and homosexual acts are punishable, the evidence did not show a “reasonable likelihood” of persecution from state or non-state actors “if he were to conduct himself with discretion” (cited in Keene LJ, para 23). Supported by a range of documents and expert evidence, HC had testified that “[a]s a Palestinian I could not live in a Christian area and as a gay I could not live in a Muslim area” (Keene LJ, para 11, 21). Keene LJ was persuaded by the appellant’s argument, and concluded

for an asylum seeker other than international protection as internal relocation or flight. See also UKLGIG (2010, 5-6).

¹³⁶ See also *LZ* [2011], para 66-74 on the disputed “gay scene” in Zimbabwe.

¹³⁷ See also Millbank (2012, 505) on “re-concealment;” Zaccour (2015) on Lebanon; *HJ and HT* [2010], para 19-21, 84.

that the evidence had been misconstrued and did not consider *de facto* discrimination (Keene LJ, para 28-31).

Of the approach taken by the Court of Appeal generally, three principles are more widely applicable. First, the possibility of internal relocation was questionable in HC’s circumstances, because of the *accumulation of factors* impeding the “tolerability” of return. The accumulation of factors of discrimination and possible ill-treatment were the result of the various intersections of his being gay (PSG), Muslim (religion), and Palestinian (race/nationality) which made the prospect of his relocation and inclusion in any community and opportunity for a normal life extremely difficult, perhaps unreasonable (Keene LJ, para 29).¹³⁸ This brings us to the second problem with the internal relocation alternative, *liveability*. While the Adjudicator had found he “could reasonably (and safely) relocate” to Beirut, where “he had lived without difficulty,” the Court of Appeal found this did not consider the long-term viability of “his prospects of living safely in Beirut on a long-term basis,” including owning property and employment (Keene LJ, para 30). Finally, as with the discretion requirement and the implications of conforming to a society’s norms by acquiescing to marriage, masquerading as heterosexual, or living a celibate life, an issue within internal relocation alternatives is the forcible production of an “outsider” who is regarded with *suspicion*. The Adjudicator’s finding that Palestinians were granted free movement between camps “ignored the [expert evidence] about the difficulties a young gay man would have in doing so and the suspicion which would attach to him if he sought to do so” (Keene LJ, para 31). Discretion itself is suspicious, often because it affirms an inescapable expression of one’s sexuality through discourses of silence and non-conformity to social mores.

In *JM* [2008], the appellant was not out to his family, but this would “inevitably be revealed on the issue of marriage” (King IJ, para 17). In Uganda this would also be an issue for relocating within the country. Local counsellors would need to give permission to resettle in a new area, and “[a]s a 32 year old man who is

¹³⁸ Keene LJ does not, as I have, highlight that the various factors are in fact, possibly, parallel Convention grounds under Article 1A(2). I highlight them here as I seek to develop a narrative that the categories are distinct but not mutually exclusive (see e.g. *MM* [2009], especially para 35; further chapter seven). Moreover, relevant factors may not in themselves be standalone Convention grounds but include, for example, gender (e.g. LaViolette 2007), or other status or stigma such as HIV (e.g. Johnson 2007).

The inclusive guise of “gay” asylum not married, it would not take many questions to elicit the fact of his homosexuality” (King II, para 17, 20). Unfortunately, the case of *HC* [2005] somewhat stands out in the jurisprudence in that it recognises that an internal relocation alternative is not always as straightforward as it may at first seem. Relocation must be scrutinised for whether it actually provides sufficient protection if, as I have argued, it is closely linked to, or a subset of, discretion reasoning.¹³⁹

1.3 *HJ and HT: Gay rights are human rights?*

The Supreme Court’s judgment in *HJ and HT* [2010] affirmed that LGB(T)¹⁴⁰ asylum seekers should be able live openly without the fear of persecution or the requirement for discretion. As gay men, the appellants, HJ and HT “are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of persecution” (Lord Rodger, para 78). The UKSC dismissed the reasoning of discretion, and quite firmly grounded its decision in the *immutability* of sexual identity.¹⁴¹

Importantly, homosexuals “are as much entitled to freedom of association [and] self-expression in matters that affect their sexuality, as people who are straight” (Lord Hope, para 14). While the slight differences in the opinions of Lords Rodger and Hope can be reconciled,¹⁴² their contrasting frames of the scope of a relevant “gay life” seem to strike a discordant note. Lord Hope (para 35; see also 14-15) seemed pointedly more reserved than Lord Rodger in terms of the construct of refugee: “it would be wrong to approach the issue [of persecution] on the basis that the purpose of the Convention is to guarantee...that he can live as freely and as openly as a gay person as he would be able to do if he were not returned” (cf. Buxton 2012, 405–406). Or, at least, Lord Rodger did not offer a similar qualification. On

¹³⁹ i.e. *HC* does not seem to have had a significant impact in the development of jurisprudence relating to gay refugees. See also *Hysi v SSHD* [2005] EWCA Civ 711 on internal relocation, concealment, and mixed ethnicity, cited in *HJ and HT* [2009] and [2010].

¹⁴⁰ The UKSC did not, strictly speaking, engage gender identity or trans issues in seeking asylum. But there was a hidden reference, perhaps inadvertently, in an anecdotal account of persecution of a couple who had been “married,” and one of the parties was actually gender non-conforming (Lord Hope, para 2; Gevisser 2014). Moreover, it is arguably inconceivable the principles of the case would not equally apply to gender identity; e.g. consider the application of *HJ and HT* [2010] in *MT* [2011] regarding religion and *RT and KM* [2012] regarding political opinion; see also API (2011b).

¹⁴¹ Recall “natural to them;” see also Lord Hope, para 11; Lord Rodger, para 76; Hathaway and Pobjoy (2012, 386).

¹⁴² See e.g. *LZ* [2011], para 99-100; *SW* [2011], para 10-11. It should be noted, however, that Lord Hope’s judgment was not adopted by other members of the Supreme Court (Buxton 2012, 406).

the contrary, beginning from a position of immutability Lord Rodger (para 76) wrote that Convention protection extends to gays and lesbians, but also “bisexuals and everyone else on a broad spectrum of sexual behaviour,” and they “are entitled to have the same freedom from fear of persecution as their straight counterparts.”

With the exception of “naturally discreet” persons, the UKSC outlined that if an asylum seeker were to live openly and had a well-founded fear of persecution on that basis if returned, they would qualify for refugee status even if that harm might otherwise be avoided by concealment. Previous discretion reasoning undermined the very purpose of the Convention; as Lord Rodger (para 82) explained, to refuse an asylum seeker because “he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution.” Lord Rodger (para 82) set out a new test to be followed by adjudicators (see also Lord Hope, para 35). The Tribunal in *SW* [2011] interprets this task and helpfully summarises the questions which need to be answered in light of *HJ and HT*:

“(a) whether [the Tribunal] was satisfied on the evidence that the claimant was gay, or that he or she would be treated as gay by potential persecutors in the country of nationality; and if so

(b) whether it was satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant’s country of nationality; and if so

(c) what the individual claimant would do if he or she were returned to that country.”¹⁴³

Lord Rodger’s (para 82) judgment was that if an asylum seeker “would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g. not wanting to distress his parents or embarrass his friends, then his application should be rejected” – i.e. “naturally discreet” (cf. Lord Hope, para 22). However, if the asylum seeker would live discreetly because of a fear of persecution, they should be granted refugee status.

So *HJ and HT* still left ample *discretion* for adjudicators to reject an asylum claim. Firstly, as the excerpt from *SW* [2011] above indicates, adjudicators must be

¹⁴³ *SW* [2011] para 10-11, see also 119; Lord Rodger’s test is also summarised in Appendix V.

satisfied the asylum seeker is gay. This is often a matter of credibility. Secondly, discretion is still applicable in cases of “social pressures,” which seems to be quite a subjective test for showing how “well-founded” a fear of being persecuted is; the application of *HJ and HT* in *SW* [2011] followed that “naturally discreet” sexual minorities are not refugees (Gleeson IJ, para 85, 106). Counsel for *SW*, Chelvan urged the Tribunal to “go further than the Supreme Court” and find that “naturally discreet” lesbian and bisexual women in Jamaica were refugees because they did not live a “heterosexual narrative” (Gleeson IJ, para 85). Chelvan argued that the implication of not conforming to the heterosexual narrative, such as not marrying or having children by a certain age, was that even if an asylum seeker was naturally discreet and did not “go shouting about [their sexuality, they] are going to be identified” (Roberts 2013b). Although *SW*’s appeal succeeded, the Tribunal rejected “that all lesbians” were at risk, because that would be “very close to finding a generic risk to all single women throughout the country” including “naturally discreet” lesbians who lived a heterosexual narrative (Gleeson IJ, para 106).

Finally, there is a more speculative issue of what exactly falls under the UKSC umbrella of behaviour that is “natural to them as gay men” in the construct of refugee (see further chapter six). A critique of *HJ and HT* is that refugee status should not be awarded for “trivial” behaviours which are deemed not to be fundamental to the “immutable” gay identity (e.g. Buxton 2012; Hathaway and Pobjoy 2012; cf. Goodman 2012, 425–426). For instance, Lord Rodger (para 78) uses illustrative, “trivial stereotypical examples from British society” to say:

“[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.”

Hathaway and Pobjoy (2012, 335) argue that the UKSC failed to “grapple with the scope of activities properly understood to be inherent in, and an integral part of” the status of being a gay refugee. In other words, to exclude from refugee status what is “trivial” to sexual minority identities or, as Goodman (2012, 425–426) summarises their argument in his response, to “curb some forms of provocative conduct” (see also Millbank 2012; Weßels 2013). Tobin (2012, 457) is critical of Hathaway and

Pobjoy’s approach, but agrees that “[i]f persecution is to be considered a serious human rights violation...then there was a need for the members of the Supreme Court to ground their finding of persecution in an internationally recognised human right.” Chelvan (2013, 9) identifies that the Court of Justice of the European Union (CJEU) rejected reasoning that attempted, like Hathaway and Pobjoy, to draw a distinction between so-called “core” and “peripheral” conduct. The CJEU found in *X, Y, and Z* [2013] that the fact a homosexual “could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account” (para 75); moreover, “it is unnecessary to distinguish acts that interfere with core areas of the expression of sexual orientation, even assuming it were possible to identify them, from acts which do not affect those purported core areas” (para 78).

The obvious impact of *HJ and HT* was to clarify that it was not “reasonable” to expect discretion to avoid persecution. The decision also appears to have moved the UK, at least in law, to the forefront of efforts to secure sexual minorities’ human rights, even if those were not clearly specified, in RSD. In spite of the UKSC’s landmark ruling on the recognition of sexual minorities’ routes to refugee status, the contentious problem of establishing “facts” such as of a “genuine” identity remains as a potentially irresolvable conflict in RSD, as we shall now explore.

2 “Genuine” sexual minority refugees

Part two interrogates the judicial construction of sexual orientation and gender identity and possible methods for the identification of asylum seekers’ identities in RSD. Building on part one, the analysis here critiques the assessment of sexual and gender identity in the determination of “genuine” as well as “unfounded” claims to refugee status. In particular, medical, psychological, and country information discourses have affected the constitution of a “genuine” sexual minority refugee. The issues considered have emerged from the case law, not always chronologically, and are significant to RSD pre- and post-*HJ and HT*. Though credibility issues pervade all aspects of all asylum claims and may be a particular barrier to SOGI-based claims, this analysis is not concerned with the assessment of credibility *per se*. Instead, this is a discussion of the possibility that an adjudicator cannot know surely or definitely someone’s gender or sexuality. The analysis is organised thematically

into sections on the body, the perception of gender and sexuality, and finally the dichotomy of (dis)belief in credibility assessment.

2.1 *Bodies of evidence*

Generally, forensic medical evidence left by sexual practices on the bodies of asylum seekers never really seemed legitimate in the UK as a means to establish the “truth” of identity. But the possible utility of types of corporeal evidence were occasionally entertained in asylum proceedings to establish the credibility of sexuality before being exceeded again by psychological, personal narrative, and country assessments.¹⁴⁴ This section explores the possibility of testing arousal to “prove” the sexuality claimed, submitting to medical examination for signs left on the body by sexual acts, and the filming or photographing of sexual acts to overcome adjudicators’ “culture of disbelief” (O’Leary 2008; Souter 2011).

International authorities have denounced the use of tests designed to measure erotic response in RSD.¹⁴⁵ Pallometry or penile plethysmography (PPG) and, the rough equivalent but less common, vaginal photoplethysmography (VPG) are instrumental forms for measuring blood flow to genitals. PPG and VPG tests usually expose the subject to different levels and types of sexually explicit material to measure response, and purport to indicate the presence of sexual arousal and object preference (see ORAM 2011). The reliability of both tests is questionable and courts have found PPG results inadmissible in criminal cases, but the test is still widely used as a “therapeutic” tool and indicator of the likelihood of reoffending in certain states (Wilcox 2000, 139–140; Odesho 2004). The Czech Republic used VPG and PPG to assess asylum seekers until 2009, which provoked international condemnation and, though the practice was stopped, PPG was used as late as 2012 in a Slovakian case (Jansen and Spijkerboer 2011, 52; Śledzińska-Simon and Śmiszek 2013, 17; Jansen 2014, 23–24;). While I found no documented case of the UK using PPG or VPG, I discuss them in the broader international and European context to

¹⁴⁴ See Appendix II on “psychological assessments,” “personal narrative,” and “country assessments” or COI.

¹⁴⁵ See *Toomey v United Kingdom*, App. No. 37231/97 (1999) regarding PPG monitoring. See also Jansen and Spijkerboer (2011, 49–50) applying *Toomey* in the asylum context.

underscore the problem sexual identity poses to definitive testing.¹⁴⁶ Moreover, there is an obvious attraction for UK adjudicators to locate a defensible measure of sexual identity in RSD (Sweeney 2007; O’Leary 2008, 89),¹⁴⁷ as seen in the next technique for corroborating one’s sexuality with bodily evidence.

The possible use of forensic medicine to assess homosexuality in RSD was explored by the UK in 1995. Ioan Vraciu failed to produce convincing proof of his homosexuality through other evidence and a consistent personal narrative. The solicitor for the Home Office requested that doctors medically examine Vraciu’s anus for scar tissue which was accepted by the IAT until the appellant’s solicitor successfully argued homosexuality is properly understood to be psychological in its manifestation (McGhee 2000, 39–42).¹⁴⁸ Of course, if medical examination of an alleged homosexual’s anus was applied broadly, it would falsely assume that all MSM engage in anal sex and as “passive” participants too (Schutzer 2012, 695), and it is doubtful such a test could produce conclusive results (Long 2004, 136–137).

Perhaps “rectal examination reports” have failed to gain traction in the UK because of the obvious limitations. However, in an unreported 2007 case, the representative for the SSHD questioned why there was no medical evidence to support the gay claimant’s self-professed “passive” sexual role, and the IJ accepted the argument was admissible (Miles 2009, 24; Chelvan 2010, 60–61). Even as outliers, the consideration of scant medical evidence of an asylum seeker having been anally penetrated brings into stark contrast the construction of male homosexuality in RSD. There are also significant issues of medical and legal ethics involved in such an approach, including dignity, bodily integrity, and ECHR Article 3 ill-treatment standards. An examination may require consent, but the catch-22 could be that not to consent would shed doubt on credibility. Based on the evidence presented in this case study, the more unsettling problem is that it is a symptom of something more systemic – the precariously thin line tread by UK techniques of

¹⁴⁶ Given the small-n design of this study, I wonder if UK adjudicators really never *tried* to push PPG or VPG into RSD, if I have missed an instance in the literature and, more speculatively, why adjudicators passed over this method of testing the veracity of claims given the documented references to “rectal examination reports.”

¹⁴⁷ e.g. in 2006 an IJ asked counsel: “What medical evidence is there that your client is gay?” (O’Leary 2008, 89).

¹⁴⁸ *R v SSHD ex parte Vraciu* 1995, Special Adjudicator’s report, Appeal no. HX/70517/94, 28 April 1995.

discovering the “truth” of sexual identity running parallel to those of the persecutory states refugees are fleeing. Consider, for example, the forced examinations of suspect homosexuals in Egypt, Lebanon, and Kenya (Long 2004; Agutu 2015; Zaccour 2015).¹⁴⁹

In the CG case on Iran, *RM and BB* [2005], an expert gave the example of the case of a student in a dormitory, whose suspicious liaisons with another man were reported to the authorities. After being placed under surveillance, they were arrested and prosecuted, and the body of the passive partner became a key piece of evidence.

“The [Iranian] student had been sentenced to death because he had confessed. They had found sperm in his body. There was no way for him but to confess... He did not, however, confess until the [medical expert’s] report arrived, and even if he had not confessed, the crime would be proved by the personal knowledge of the judge...”¹⁵⁰

RM and BB [2005] underscores the transnational dynamic of “knowing” a sexual minority in RSD. UK adjudicators are predicting the likelihood of what the persecutory state could “know,” and what it would do about the knowledge, real or perceived, of the claimant’s gender or sexuality. So the inherent difficulties in gender and sexuality not only limit what UK adjudicators can know for themselves, but is additionally compounded by the persecutors’ power to know in their own judgment, which may restrict the rights of, or otherwise harm, sexual minorities.

In *RM and BB* [2005], the IAT delved significantly into the “reasonable likelihood” a “practising homosexual” would come to the attention of Iranian authorities. The IAT found a death sentence on conviction of sodomy was unlikely given that the burden of proof theoretically included, for example, “the witness of four just men” (Allen VP, para 15, see also 18, 21, especially 117 on its infrequent use). But it was also suggested that the most important element of the Iranian legal framework is the “knowledge of the judge,” which means that, in practice, the prosecution of homosexuality could be secretive and censored, with judges exercising great discretion over the severity of punishment (Allen VP, para 30-33,

¹⁴⁹ Millbank (2004, 214) makes a similar argument in relating persecution to the discretion requirement as “decisions [which] come perilously close to the same ideology as discriminatory criminal laws.” Here, however, I build upon this to suggest that transnational decision-making can come “perilously close to the same ideology” of *knowing* a sexual minority, or who is not (see also McGhee 2001b, 25; Tuitt 1996, 93).

¹⁵⁰ Allen VP, para 54.

46).¹⁵¹ Official Iranian statistics later released recorded 2,148 arrests for the crime of sodomy in just nine months of 2006 (*HJ* [2008], para 19). But for a decade, UK adjudicators continued to speculate whether homosexuals were likely to come to the attention of authorities on reports from family, state-sponsored neighbourhood surveillance, raids on known cruising areas, and even entrapment via internet chatrooms (see *HJ* [2008], para 17-25). Adjudicators remained unconvinced that Iranian sexual minorities may be subjected to imprisonment, lashings, even an exceptional death sentence, which would purportedly only then qualify as a well-founded fear of being persecuted.¹⁵²

As discussed above, *HJ and HT* [2010] ushered in stronger protections for LGBT refugees in the UK, who no longer had to show discretion was intolerable, and so the point of contestation moved to proving the identity claimed (see Millbank 2009a; Lewis 2014). Numerous reports have documented gay, lesbian, and bisexual asylum seekers submitting sexually explicit pictures and videos to prove the identity claimed (e.g. *BBC* 2014; Dugan 2014; 2015; Duffy 2015). Public scrutiny triggered a review of Home Office practice. The new Asylum Policy Instructions do not permit explicit lines of questioning and allegedly avoid soliciting graphic responses, and acceptance of the media has also been discredited by the CJEU (Chelvan 2014; Smith 2014; API 2015).¹⁵³ The scrutiny of refugee bodies, from the forensic traces of sex acts to measuring erotic responses, has failed to prove immutable identity, “but God knows we keep trying” (Sant 2009).

Psychological assessment is often used as evidence in asylum applications, but does not seem particularly reliable. Psychological assessments of conditions such as PTSD can often produce competing results that are open to interpretation rather than provide definitive “proof.”¹⁵⁴ Moreover, while RSD demands a consistent personal narrative, “a person’s survival of persecution sometimes necessitates amnesia and denial of the impact and severity of traumatic events” (Shidlo and Ahola 2013, 9). Successful asylum claims generally demonstrate a “chronologically

¹⁵¹ See also *Refugee Appeal No. 74665* [2004], para 24; *Re GJ* [1995].

¹⁵² e.g. *RM and BB* [2005]; *J* [2006]; *HJ* [2008]; and *HJ and HT* [2009], especially para 13-21, 31.

¹⁵³ See further *A, B, and C* [2014].

¹⁵⁴ e.g. *RG* [2006], para 17-20; *Apata* [2015], para 47-56; see also *B* [2007], para 21 on depression and para 18-19 regarding the mental health assessment which suggested B would be unable to conceal his homosexual identity without experience of the necessary “life skills” to “mask” his “distinctly feminine” characteristics.

accurate, ‘factual’ and realistic linear narrative of persecutory behaviour,” but the chances of success are increased the more this “evidence can be endorsed by the scars of torture and...medical reports” (Johnson 2011, 69; see also Millbank 2009b, 5–6, 11–16). The conclusion I draw from scientific measures of the body, especially relating to sexual and gender identity, is that even “hard” evidence can only be *made true* by the belief or knowledge of the judge. The key to transnational decision-making is fundamentally discursive or constructivist in practice (Sweeney 2007, 31), and so the problem of establishing “proof” of gender or sexual orientation is likely irresolvable. Instead RSD has often relied on finding the “truth” through such things as stereotypes, societal prejudices, narrative consistency, and other shaky measures of a “genuine” gay.

2.2 Visually arresting: Perceiving “genuine” sexual and gender identities

The mere fact of being effeminate or butch can militate against an asylum claim in perplexing ways. “Flamboyance” is a particularly problematic expression in the legal discourse which has been used to trivialise sexual minority identities when they could otherwise be concealed to “pass” as “normal.” On the other hand, if asylum seekers were not “flaunting” their gender or sexuality, that could be cited for the claim’s dismissal and justified discretion as reasonable. This section discusses how visibility is an issue before an adjudicator, as well as what could be done by the asylum seeker to remain invisible to avoid persecution.

To paraphrase an iconic judicial confession,¹⁵⁵ “knowing a gay when you see one” is perhaps the most tempting consideration in adjudicating something, such as identity, which cannot be precisely defined or evidenced (see Gewirtz 1995). Observing that the presentation and perception of gender and sexuality has influenced RSD can be deduced from the case law and is supported by the literature (Hanna 2005; LaViolette 2007, 191–192, 196–197; Bennett and Thomas 2013; Lewis 2014). Research has suggested that where an adjudicator considers that it is

¹⁵⁵ *Jacobellis v Ohio*, 378 US 184 (1964) was a US Supreme Court decision on obscenity and pornography. After stating that he would not venture to offer further definitions of types of obscenity, and perhaps the impossibility of ever “intelligibly doing so,” Justice Stewart concludes his concurring opinion: “But *I know it when I see it*, and the motion picture involved in this case is not that [emphasis added]” (Stewart J, 197).

possible to know a “genuine” gay asylum seeker, this has often been applied through a lens of a stereotype, and therefore has influenced outcomes (e.g. Miles 2009, 27; Bennett and Thomas 2013, 26; UKLGIG 2013, 16–21).¹⁵⁶ Judging the sexuality of the asylum seeker by their visual presentation and similar evidence on gut instinct resorts to limiting stereotypes that are culturally relative (Bilefsky 2011; Gray and McDowall 2013, 22–23; see also chapters one and six). In sexual minority claims, many adjudicators have relied on the “when I see it” mantra to judge whether an asylum seeker “looks” like the identity or not, in addition to assessing whether their narrative “rings” true or false (e.g. Millbank 2009b; Schutzer 2012; Mathysse 2013, 29; Murray 2014). The visual perception of identity strongly parallels the recurrent dichotomy of discretion or “passing” versus open expression or “visibility” in the case law. Instead of seeing multiple routes to intelligibility in how identity may become known, the baseline assumption in RSD is an “inadequate dichotomy of visibility and invisibility” (Robinson 1994, 716). Within that dichotomy, assessing the truth of identity has often relied on “the false promise of the visible as an epistemological guarantee” (Robinson 1994, 716, see also 716–719), such as demeanour confirming “gayness” or finding one’s stereotypical mannerisms could be made invisible through discretion. For example, consider an Adjudicator’s assessment of appearance or mannerisms as indicative of the identity claimed:

“The appellant’s demeanour in court supported his claim to be a homosexual desirous of living openly as a homosexual but only in the gay community... His fear is of persecution should he return to Pakistan and behave there as an open and outed homosexual and in a promiscuous manner.”¹⁵⁷

While the sample of this thesis only includes one determination on grounds of gender identity, *AK* [2008], a large scale study of EU LGBTI asylum recognition only reported a single instance in which an asylum seeker’s gender identity was not believed (Jansen and Spijkerboer 2011, 51; see also Jansen 2013, 15–16). At least in the binary man/woman distinction, perhaps gender identity is a visible

¹⁵⁶ This could be legally problematic per *R. (on the application of European Roma Rights Centre) v Immigration Officer, Prague Airport* [2004] UKHL 55 which established that stereotyping qualifies as direct discrimination, e.g. if some sexual minority asylum seekers are treated less favourably than others.

¹⁵⁷ Quoted by the High Court (para 9) in *R v Special Immigration Adjudicator ex parte T* [2001] Imm. A.R. 187.

epistemological guarantee (Berg and Millbank 2013, 127–129; see also Morgan 2006, 156). But there has been an agonising inconsistency in adjudicators’ assessments of “visible” credibility between the “genuine” gay presentation and demeanour being made true and, on the other hand, effeminacy and flamboyance adding credence to the dismissal of unfounded claims.

In *B* [2007] a major question before adjudicators was whether *B* *could* act discreetly given his “innate characteristics” (Collins J, para 32). Given *B*’s “distinctly feminine behaviour” and lack of experience concealing those characteristics, a psychologist had determined *B* did not have the “life skills” to survive as a homosexual in a repressive society (Collins J, para 18). The Adjudicator had found that *B* had lived discreetly in the UK and could do so in Algeria (Collins J, para 14). *B*’s fresh claim (see Appendix V) was supported by a range of evidence that he had “not acted in what could be described as a discreet fashion” in the UK, including photographs of his participation in pride as well as his involvement in a number of gay organisations (Collins J, para 16). Collins J (para 23) excerpts the following from the Home Office refusal letter:

“It is considered that your client has gone out of his way to express his homosexuality in public in an attempt to further his asylum and human rights claim in light of the adjudicator’s findings and your client’s activities are purely intended to frustrate his removal from the [UK].”

Similarly, in a 2015 appeal of a lesbian asylum seeker, the FTT concluded that her “change of image is entirely due to a false claim of lesbian sexuality,” and because she is not a lesbian, on return to her country of origin “she will not be motivated [to] act in such a manner as to be perceived to be a lesbian.”¹⁵⁸

The theme of perception in UK jurisprudence, however, more often focused on how visibility affected the well-founded fear. In *Amare* [2005], the IAT and Court of Appeal cited the Adjudicator as stating that there was no evidence to indicate that it was “essential to her identity as a homosexual woman that she adopt an overt style

¹⁵⁸ Cited in *Apata* [2015], para 13 (see further chapter six). While the appellant in *MM* [2009] had apparently not “exaggerated” his identity publicly to “bolster” his claim, it is interesting to draw comparison here to *Rix LJ* (*MM*, para 21), quoting the Tribunal: “We have come to the decision that the Appellant’s religion, like his homosexual leanings have been exaggerated to enhance his asylum claim. *We consider that his religious conversion was tactical*” (see further Appendix V).

The inclusive guise of “gay” asylum of homosexual behaviour in public” in a way that could result in state or non-state persecution (Laws LJ, para 4). Laws LJ (para 6) quotes the IAT (para 36):

“The appellant is not a political activist nor feels compelled to make outspoken criticism of societal discrimination against homosexuals... Such relationships are no more “flamboyant” than most heterosexual relationships... If such a relationship can be classified as “being discreet,” it does not seem to us to be very different from the conventional married lives of many other couples who neither flaunt their sexuality nor adopt an overtly heterosexual lifestyle.”¹⁵⁹

Of the cases considered in this thesis, the excerpt above is perhaps the clearest example of a judicial failure to empathise, a complete lack of understanding of the differences that define the lived experiences of sexual minorities – people whose lives have been violently shaped by the banal assumption that everyone is or should be heterosexual and, at minimum, visibly indistinguishable. In *XY* [2008], Stanley Burton LJ (para 13) excerpts the IJ’s determination (para 61-62) in which it is noted *XY* did not come to the attention of Iranian authorities on account of political or religious dissidence, and evidence he would be of interest to the state was disbelieved. The IJ rejected the claim that *XY* would have to abandon part of his sexuality:

“The Appellant does not simply abandon his sexual identity if he is required to carry on his sexual activities with a same-sex partner with some care or discretion. All persons, of whatever sex, involved in intimate relationships conduct themselves with such care and discretion.”¹⁶⁰

At least in *Amare* [2005] the Tribunal directly acknowledged that it was “clear that the nature of [*Amare*’s past] relationship was secretive in a way that would not have

¹⁵⁹ See also *B* [2007], where the Adjudicator found that social hostility and police harassment in Algeria for explicit homosexual behaviour was not too different from the situation in the UK (Collins J, para 11), and also drew comparison to a French case where the gay Algerian had been granted asylum; unlike *B*, that individual was a “political activist,” organising AIDS and human rights work, and “had a particularly high profile” (cited in Collins J, para 12). Likewise, in the *dissenting* opinion of Callinan and Heydon JJ (*S395* [2003], para 107-108), the Justices suggest the appellants’ sexual identity required no public or overt expression, as they had not engaged in “sexual politics.”

¹⁶⁰ IJ’s determination, para 61, cited in *XY* [2008], para 13; see also *HJ and HT* [2009], para 24, 35.

occurred had the relationship been heterosexual” (para 34, cited in Laws LJ, para 6).¹⁶¹

Simply put, the evidence in Amare’s claim did not indicate that she “flaunted” her sexuality any more than heterosexuals. The dangerous and contradictory implication is that evidence of “being out” in the country of origin, while inviting persecution, may have been beneficial to Amare’s claim. Instead, she had previously been able to “pass off” as friends” with a former partner in Ethiopia to avoid the persecution from which she was seeking asylum (Laws LJ, para 6). Forced marriage, marital rape, and severe criminal penalties were presented as evidence of systematic discrimination against women in Ethiopia and the possible persecution Amare could face if returned, but the discrimination the court accepted she was likely to suffer was held not to amount to persecution (see Laws LJ, para 6). The fact Amare had been able to avoid persecution on account of discretion was not, as the adjudicators had made it, incidental but based wholly on her ability to remain invisible.

Consider another case, *RG* [2006], regarding how mannerisms may identify an asylum seeker. Part of RG’s claim was that since living in the UK he had become more overt in the expression of his sexuality. It was argued that it would be psychologically traumatic for RG to be returned to Colombia and have to conceal his mannerisms. While other circumstances militated against RG’s asylum claim, notably his serostatus, the Adjudicator addressed the aspect of expression with reassurances that RG “would regulate his behaviour accordingly so as not to draw unwelcome attention to himself no matter where he is if by failure to to [sic] so he would place himself in danger” (cited in Buxton LJ, para 6). This view of refugee status disregarded the expression of sexuality, and asserted that the fact that the UK is more accepting of sexual minorities is insufficient where modifications and concealment would, purportedly, prevent persecution (see e.g. Buxton LJ in *RG* [2006], para 19).

¹⁶¹ The Court of Appeal upheld the Adjudicator’s determination, but although the SSHD accepted the IAT had made an error of law, Laws LJ (para 5) considered their determination “very well reasoned, balanced, and sensitive.”

Flamboyant character was alternatively used to demonstrate that the asylum seekers’ “innate characteristics” would surely have provoked persecution in the past if there was indeed a well-founded fear. In *JM* [2008], King IJ (para 13) noted:

“The appellant in his written statements described himself as ‘feminine and softly spoken.’ From our observations of him this would be an accurate description. Recognising as we do the dangers inherent in subjective approaches to demeanour, it is right that we acknowledge that there will be a perception in certain quarters that the appellant is effeminate in manner and speech.”

Absent the context, one could assume the qualification of dangers in subjective approaches to demeanour would be judicious, but in fact the Tribunal authenticated his sexual identity by using his demeanour in order to justify the refusal of JM’s claim. King IJ (para 20, 23) was clearly vexed that JM’s demeanour and stereotypically gay profession as a hairdresser would not have already raised suspicions of his sexuality and, therefore, did not believe that he would be persecuted on return (see Hanna 2005). The Tribunal went on to “find that any limited restraint or discretion exercised by the appellant so as not to give rise to offence in public” which required JM to conceal his sexuality and mannerisms did not compromise “his integrity or sexual identity” (King IJ, para 159; see also Millbank 2012, 519–520).

These appellants could “pass” without being visually arrested by the persecutors and so did not require refugee status. “When I see it” then is not only a reference to immediate visibility of demeanour, mannerisms, or flamboyance in asylum proceedings.¹⁶² The assessment of discretion/openness or passing/visibility is based on an assemblage of personal narrative and country assessments that make the asylum seeker likely to be perceived as a sexual minority if removed from the UK, in addition to how the adjudicator perceives the genuineness of the person seeking asylum. It is this “knowledge of the judge” which makes the visibility of an asylum seeker a transnational affair, neither situated wholly in the perceptions of asylum proceedings nor in the country of nationality.

¹⁶² See e.g. *SW* [2011]: “The appellant is educated, sophisticated and articulate” (para 27), and “we were able to see that her style of dress was feminine rather than ‘manly,’ and her skin is fairly dark” (para 28).

2.3 Dichotomy of (dis)belief: Situational and fluid sexualities

The legal discourse has consistently undermined the very *possibility* of bisexuality, as well as situational sexuality where, for example, a sexual minority may be or feel obliged to marry and live a “heterosexual” lifestyle. In RSD an asylum seeker is either believed to be gay or dismissed as unfounded, with little grey area or benefit of the doubt. Although I do not purport to test the veracity of claims or legal strategies for claiming asylum, in the framing of claims to asylum it is little wonder that asylum seekers often posit an absolute “immutable” identity, even if in reality SOGI can be more nuanced. This section considers how RSD tends toward a hetero/homo distinction which omits the possibility of fluid sexuality, and how it may be in some circumstances situational.

The evidence of the appellant, M, in *Z and M and A* [2002] was discredited by the Home Office, and ultimately the Court of Appeal dismissed the appellant’s case. Schiemann LJ (para 46, 47) excerpted the Adjudicator’s determination at length which details that the applicant’s case is weakened by the fact that M did not claim asylum immediately on arrival, first claimed asylum on the basis of political opinion, and only later added persecution on the basis of homosexuality. But the Adjudicator also expressed that in “view of the fact that the appellant is married and has two children, it seems strange that he now claims to be a homosexual” (cited in Schiemann LJ para 46). Of course, I am not arguing that the Adjudicator should be discouraged from inquiring as to the inconsistencies in the narrative and development of a claim, *per se*, such as testing issues of M’s credibility. However, the view that M’s family status somehow excludes him from the broader category of homosexuals is problematic if, as argued in chapter one, sexuality is understood to be fluid and mutable.

In *Dawkins* [2003] Wall J (para 10-12, 15, 18) clearly expressed his scepticism that the claimant was a gay man. According to Wall J, the Adjudicator’s determination was not impacted by the fact that Dawkins had a relationship with a woman, Maxine. “It was argued on Dawkin’s behalf that homosexuality was capable of falling within the definition of a ‘social group’ and that the applicant, *despite his relationship with Maxine*, was gay [emphasis added]” (Wall J, para 18). Dawkins alleged to have fabricated the relationship with the woman after he was outed to his

brother by a third party, and he felt obliged to demonstrate to his brother that he was not gay (Wall J, para 10).

The Court of Appeal allowed the appeal in *NR* [2009], and the claim was remitted back to the Tribunal for a new determination. However, the Tribunal’s reasons for finding she was not a lesbian are especially troublesome. Goldring LJ (para 1) summarised that the AIT found NR’s “past lesbianism was in the nature of teenage experimentation rather than a settled sexual orientation,” and current same-sex “relationship was motivated by a desire to strengthen her claim for asylum.” NR had “experimented with different types of sexual identity” while “imprisoned in all-female institutions,” because “there was no alternative except celibacy” (AIT cited in Goldring LJ, para 22). The SSHD told the court that the AIT’s conclusions about NR’s sexual identity seemed to be based on “its rejection that she was raped and consequently that could not explain her becoming a lesbian,” among other findings (Goldring LJ, para 23). It does not appear to me in the context of the decision that NR had argued she was a lesbian because she had been raped, but that the Tribunal had made that connection in order to undermine the credibility of her claim.

If NR’s sexual history was “experimentation and not settled,” it was, in other words, not “immutable.” Citing *NR* [2009], the current Asylum Policy Instructions (API 2015, 16) provide that “what is relevant is ‘current’ identity” but, of course, adds that self-identification “should not however be accepted as an established fact on the basis solely of the declarations of the claimant.” Instead, self-identification of a current identity is just the starting point for an assessment of the asylum claim.

A recent case is particularly relevant to issues of evidence and the gay/straight dichotomy. An asylum seeker from Jamaica who claimed to be bisexual and was in a same-sex relationship in the UK was disbelieved by the Home Office, discredited on the grounds that the Tribunal had rejected the credibility of a past relationship with a man on details such as the partner’s date of birth, and that the claimant had been married, and had a child. Explicit photographs were also dismissed as evidence, because they were not also of the man he was in a relationship with (Mattocks 2014a; 2014b; Duffy 2015; Fenton 2015). These examples underline not only how the current framework of adjudication moves to invisibilise bisexuality, but also how it forces other sexual minority asylum seekers

into pigeonholes. The inconsistency makes claimants question what, if anything, could “prove” their sexuality: letters from friends and family, media including of an explicit variety, past marital status and other evidence is easily bent in favour or against an asylum claim dependent on the subjective belief of adjudicators. Perhaps all *HJ and HT* [2010] accomplished was moving the goalposts, as Millbank (2009a) has coined, from “discretion to disbelief.”

3 Conclusion

UK case law produced exclusions to refugee status through requiring discretion, anxiously sought to define acceptable sexual behaviour against criminality and perversion, and finally accepted the right to live openly. While the UK no longer formally requires the concealment of identity and behaviour to avoid persecution, the new frontier in RSD appears to be a continuing negotiation of where discrimination shades to persecution under *HJ and HT* [2010]. The “new” challenges also involve the interrogation of the “truth” of identity. *HJ and HT* has raised new epistemological questions of how to know a homosexual after an apparent shift towards disbelief, as well as additional questions of what behaviours should be protected from persecution in refugee law.

Chapter Five – When persecution is persecution worthy of protection

A common thread running through RSD is the second hurdle an asylum seeker must overcome after “proving” they are member of a sexual minority – what would amount to persecution, and how to persuade the adjudicator of the likelihood of their being persecuted. In considering the various principles of persecution, the most important element is that the “subjective” fear of the claimant must also be shown to be “objective” or “well-founded” to engage the Refugee Convention. Until *HJ and HT* [2010], adjudicators often found that an asylum seeker’s fear was not well founded if it was possible for them to avoid being persecuted by being discreet in their country of origin. In other words, it was “reasonable” to expect a claimant to be discreet about their private life and identity, even if discretion was the result of a threat of harm; Johnson (2007) aptly terms this “permissible persecution.”

This chapter considers the definition of persecution, and how the difficulties of “well-foundedness” and the threshold of persecution have been navigated in the case law in relation to sexual minorities. The legal separation of what constitutes a PSG and, then, what amounts to a well-founded fear of persecution is central to refugee law (Türk and Nicholson 2003, 18).¹⁶³ This is reflected in the separation of the case law analytical chapters, but I would emphasise that the distinction in the legal discourse is somewhat contrived. Sexual minorities’ identities and behaviours may be directly shaped and defined by discrimination, and the threat of persecution (see Eribon 2004; Good 2007, 71–84).¹⁶⁴ Where possible the chapter considers the case law chronologically to allow the analysis to emerge from the data, but this is at times impractical because the concept of persecution as it applies to sexual minorities was not articulated here as linearly as PSG. So, instead, this chapter contains a more thematic analysis of the cases.

Part one first considers how discretion was applied by courts as a means of defeating the claim to an objective fear of persecution. Secondly, the chapter sets out how *HJ and HT* [2010] recognised that, in a sense, discretion *is* persecution. Several issues have been central to the judicial construction of the “threshold” of persecution,

¹⁶³ See e.g. Haines QC in *Refugee Appeal No. 74665* [2004], para 48.

¹⁶⁴ See Appendix II on “circular constitution,” chapter four in relation to PSG.

and the separation of well-founded fear from acceptable discrimination. These include the likelihood of prohibitions being enforced in the country of origin, whether discretion was a “requirement,” and the reasonableness of restrictions on expression and association. However, I will argue that following *HJ and HT* [2010], the focus of persecution in the legal discourse moves from what may be “reasonably tolerable” persecution to debates on the “reasonable likelihood” of harm. Part two critically reflects on the instrument of discretion, the closet. The final sections of this chapter analyse the role of culture in the assessment of persecution, and the extent to which the politics of immigration control and international consensus have influenced what the UK has recognised as the persecution of sexual minorities.

1 Developments in the assessment of persecution

“There is no single decision...which answers this straightforward question does it amount to persecution according to these broad tests if the clandestine character of the homosexual activity which there has been in the past and will be on return in the future is itself the product of fear engendered by discriminatory legislation or policing which itself violates the individual’s human rights?”¹⁶⁵

Some authors suggest “persecution” was intentionally undefined in the 1951 Convention (e.g. Hathaway 1991, 102). Central to the problematic is that understanding well-founded fear, and creating a threshold of “when discrimination shades into persecution” is particularly difficult because sexual minorities “are systematically treated less favourably than others” around the world (Goodwin-Gill and McAdam 2007, 86). In the excerpt, above, Sedley LJ (*J* [2006], para 1) confronted these dilemmas: what amounts to the persecution of sexual minorities, how to separate persecution from commonplace discrimination on grounds of gender and sexuality, and whether discretion is an appropriate consideration in RSD. The first section below considers developments in UK approaches to assessing the persecution of sexual minorities between 1999 and 2010, and the second considers *HJ and HT* [2010] and the effects of that decision.

¹⁶⁵ Sedley LJ granting J permission to appeal, cited in *J* [2006], para 1.

1.1 *Discretion and persecution before HJ and HT*

In considering the selected case law in this study, five shifts are identifiable in UK adjudicators’ approaches or tests to assess the persecution of sexual minorities, the first four of which occurred prior to *HJ and HT* [2010]. Firstly, in defining persecution, *Islam and Shah* [1999] crucially demonstrated that the Convention is not concerned with *all* cases of persecution, but with those cases arising from discrimination or, in other words, discriminatory persecution. Secondly, the Court of Appeal’s quick intervention in *Jain* [1999] set out a conduct driven approach that applied to the persecution of sexual minorities as well as the PSG. Thirdly, the cases of *Z* [2004] and *Amare* [2005] carefully dismissed human rights-based approaches (HRBA) which supported the expression of identity, and refined the conduct approach with affirmations that not all rights violations are persecutory (e.g. forced repression of sexuality is not necessarily persecutory). Fourthly, *J* [2006] explicitly constructed a “reasonable tolerability” test for considering when discretion was appropriate, and instructed adjudicators to consider whether the modification of behaviour on return would place an individual at risk of persecution. Finally, *HJ and HT* [2010] concluded that asylum seekers should not be expected to conceal their identity to avoid persecution, and outlined that adjudicators must consider whether previous discretion was actually caused by a well-founded fear. The sub-sections below set out the first four developments in judicial assessments of persecution before *HJ and HT*.

1.1.1 *Discriminatory persecution*

The UKHL decision, *Islam and Shah* [1999] is a cornerstone case which set out the relationship between discrimination and persecution. Lord Hoffman (161) wrote in his judgment that discrimination is key to interpreting the Convention, because it is not concerned with all cases of persecution but with “persecution which is based on discrimination” (i.e. discriminatory persecution). Lord Hoffman (158-159) explained in the context of those appeals that domestic violence is “regrettably by no means unknown” in the UK; however, that does not amount to being persecuted or constitute a PSG for the purposes of refugee law, “because the victims of violence would be entitled to state protection” (see also Anker 2005, 116–118). The concept of discriminatory persecution thus helped to define the scope of the PSG category,

The inclusive guise of “gay” asylum demonstrating how closely interconnected these two aspects of RSD are.¹⁶⁶

Although persecution is not defined in the Convention, Lord Hoffman (*Islam and Shah*, 164) cited a formulaic definition of persecution, that “Persecution = Serious Harm + The Failure of State Protection” (Refugee Women’s Legal Group 1988, 5; see also Anker 2005, 107). “Being persecuted,” according to Haines QC (*Refugee Appeal No. 74665* [2004], para 53), “is the construct of [these] two separate but essential elements” that are necessary to engage what Hathaway (1991, 135) identifies as the “surrogate or substitute protection” of refugee status. Until 2010, the decisions in this study suggest that, in relation to sexual minorities, the UK approach could be summarised as “Prior Discretion + Continuity of Discretion on Return = No Well-Founded Fear of Persecution.” While crude, I would submit this description highlights that the UK systematically undermined the purpose of the Convention by shifting the burden onto asylum seekers to protect themselves by being discreet about their sexuality. For example, while the Court of Appeal in *J* [2006] went on to allow *J*’s appeal, Kay LJ (para 8) summarised the AIT’s finding on the appellant’s well-founded fear of persecution as follows:

“The finding...that this appellant does not have such a fear is constructed on the fact that he was not persecuted during his earlier homosexual relationships in Iran prior to his departure because they were ‘conducted discreetly’ and that it is not reasonably likely that he will be the subject of adverse attention from the authorities following return to Iran, by implication because any future homosexual relationship there would also be ‘conducted discreetly.’”¹⁶⁷

In rejected claims, adjudicators have often discussed or implied what was permissible treatment that did *not* amount to persecution. For example, when the Court of Appeal revisited *J*’s case in *HJ and HT* [2009], Pill LJ (para 34-36) discussed how the Tribunal would have to decide whether social standards that limited private sexual practices violated an asylum seeker’s human rights, or were permissible violations for the purpose of refugee status. Regardless of how serious or *discriminatory* the threat of harm was in a state that did not offer protection, sexual

¹⁶⁶ See further chapter four; Appendix II on “circular constitution” for related aspects of this discussion.

¹⁶⁷ See also *B* [2007], para 14.

The inclusive guise of “gay” asylum minority asylum seekers could, supposedly, act discreetly to evade persecution.¹⁶⁸ This chapter demonstrates that not all cases of discriminatory persecution have been found to be cases of persecution, even when asylum seekers were recognised as members of a PSG, and had well-founded fears of “being persecuted” if “being discreet” had not been considered as a reasonable alternative to refugee status.

1.1.2 Conduct driven approach: Conduct, privacy, and persecution

As discussed in the previous chapter, in *Jain* [1999] the Court of Appeal instructed that homosexuals could qualify as refugees for being persecuted on grounds of private sexual practices, but not because they were openly gay. Schiemann LJ (77-78) also detailed a continuum where at one end a state enforces anti-sodomy laws against private homosexual conduct and at the other a state does not prohibit homosexuality and sexual minorities are free of “social disapprobation.” He (78) stated that the occasional interference with privacy was not in itself persecution, and “[t]he problem which increasingly faces decision-makers is when to ascribe the word ‘persecution’ to those pressures on the continuum” (see also *JM* [2008], para 152). I will argue that the challenge of “when to ascribe” persecution is still a contentious factor in RSD.

The Tribunal had found in the case of *Jain* that on the evidence, the criminalisation of sodomy (or “carnal intercourse,” Section 377 of the Indian Penal Code)¹⁶⁹ was not in itself persecutory on several counts. Firstly, although the maximum prison sentence was 10 years, there were no known “recent charges” for sodomy. Secondly, the law does not criminalise homosexual identity *per se* even if society views it as “deviant.” Thirdly, Indian society’s attitudes are progressively changing. Fourthly, there is no evidence the appellant would be forced into an arranged marriage. Finally, even though a known homosexual may not receive “sympathetic treatment” from Indian authorities, in that the police have a reputation for brutality, and the conditions in detention or jails are “at best most

¹⁶⁸ Consider for instance the discussion in chapter four of how likely Iranian asylum seekers were to come to the attention of authorities (e.g. *HJ* [2008], para 17-25). Perhaps the death penalty was unlikely in Iran but, if exposed, an offender of sexual morals might be subject to a significant prison sentence and/or lashings (persecution and ECHR Article 3 violations). And, yet, these were entertained on grounds of “likelihood” despite adjudicators’ acceptance of the asylum seekers’ sexual orientation. See e.g. *RM and BB* [2005], *J* [2006], *HJ* [2008], *XY* [2008], and *HJ and HT* [2009].

¹⁶⁹ This law had been struck down by the High Court of Delhi in 2009, but was reinstated by the Supreme Court of India in Civil Appeal No. 10972 of 2013.

uncomfortable,” Jain was said to be unlikely to be subjected to this treatment (IAT, page 24, cited in Schiemann LJ, 75). Of course, it is questionable to suggest that the prison conditions are not persecutory or a violation of ECHR Article 3 ill-treatment standards.¹⁷⁰

However, the Lords Justice in *Jain* accepted the Tribunal’s assessment of the possibility of future harm. It was “not reasonably likely” that the appellant would experience discrimination or even harassment, which is to say the fear of persecution was not well-founded. As the approach only acknowledged the legitimacy of private sexual practices, laws that criminalised the public expression of gay and lesbian identities which were vaguely defined and arbitrarily enforced were not accepted as amounting to persecution (Millbank 2004, 215–216).¹⁷¹ Schiemann LJ (76) wrote that if it were shown that there was a reasonable likelihood the appellant would “be imprisoned or treated brutally by police, with the State being indifferent, for *indulging in homosexual acts in private* [emphasis added],” it should be accepted as constituting a well-founded fear of being persecuted. Moreover, the test was explicitly linked to the assumption of discretion. “If [Jain] does not openly show himself to be a homosexual the risks of anything occurring outside his family must be down to a chance encounter,” and that again, therefore, the fear of persecution was not well-founded (IAT, page 24, cited in Schiemann LJ, 75).

Schiemann LJ claimed to appreciate that the existence of legal prohibition can affect a person’s private life. He (78) stated that “in some not greatly dissimilar circumstances” from Jain’s appeal, a claimant might show “facts” that allow an adjudicator to “infer” that they have a “justified fear of persecution.” Evans LJ (79) also rejected the appellant’s approach to defining persecution, which cited Hathaway’s (1991, 108–112) four protected categories of human rights or “core entitlements” (see iii, below). Rather, the “relevant form of persecution” was said to centre on “the individual [enjoying] the right not to be persecuted for his private legitimate behaviour” (Evans LJ, 79). The focus on conduct subsequently obscured the effects of the very existence of anti-sodomy laws, and how other discriminatory prohibitions affect sexual minorities (Gray and McDowall 2013, 22). Unenforced anti-sodomy laws may, for example, discourage sexual minorities from associating

¹⁷⁰ See e.g. *Soering* [1989]; *Ullah* [2004].

¹⁷¹ *R v SSHD ex parte Lepeov*, High Court, 15 February 2000 (Unreported).

and developing relationships, regardless of the nature of one’s “private” sexual conduct or the “likelihood” sanctions would be enforced. Discriminatory persecution may result either from insufficient state protection by non-state actors even in the absence of criminalisation, or where formal protections and equality provisions are not applied in practice (Millbank 2004, 210–211). As we will see, future determinations interpreted *Jain* in ways that applied a nearly impossible threshold of the likelihood of prosecution and therefore persecution, especially because of the discretion requirement.

In spite of *Jain*, the UK practice of RSD stubbornly resisted the idea that prosecution was persecution, and even contemplated that sentences of ten years imprisonment did not amount to persecution (Millbank 2004, 222). For example, in *Z and M and A* [2002], the Court of Appeal and Schiemann LJ reconsidered when the threat of prosecution might be persecutory. On the evidence, the Adjudicator accepted that Z was a homosexual and had been in a same-sex relationship in Zimbabwe, but determined that the fear of persecution was not well-founded because the country’s anti-sodomy law was not actively enforced (Schiemann LJ, para 25). Considering Z’s appeal, the Tribunal applied the ECtHR decision in *Modinos* [1993], and determined that anti-sodomy laws amount to a breach of the right to a private life (Schiemann LJ, para 25). The Court of Appeal remitted the case of Z. According to the court, an unenforced law was not persecutory, and the Tribunal was instructed to assess the *actual* risk of prosecution.¹⁷²

Moreover, Appellant A’s appeal presents a conspicuous example of decision-making based on the idea that a homosexual should be discreet in order to avoid being prosecuted, which, according to the court, may under certain circumstances amount to persecution. A was in a relationship in Zimbabwe and was identified as a homosexual after a domestic dispute. The incident was reported to the police, “who arrived to investigate it as a case of common assault,” but it was because the appellant and his partner “volunteered the carnal nature of their relationship that the police came to treat it as sodomy” (IAT, para 2, cited in Schiemann LJ, para 36). A and his partner were sentenced to imprisonment but this was suspended, and they

¹⁷² See also Laws LJ in *Amare* [2005], para 6, citing that the IAT, para 36, found that Amare was able to develop covert “homosexual relationships in Ethiopia without the serious possibility of being prosecuted or convicted of offences arising from her homosexuality.”

were issued with a fine. The fine was treated as diminutive (and downplayed by the IAT, para 2, cited in Schiemann LJ, para 36), but so too was the prospect of a harsher sentence:

“Even if there were such a risk, there has been no suggestion that the conditions of imprisonment there carry any risk of ill treatment over and above the fact of incarceration. Though this point was not argued for us, we should not regard 40 days’ imprisonment as itself amounting to Refugee Convention persecution or Art. 3 ill treatment.”¹⁷³

The Court of Appeal did not clarify in its judgment whether the Tribunal’s view on 40 days’ imprisonment was persecutory, apparently leaving this to adjudicators to determine on the circumstances of an individual claim. But after A’s arrest, he had also been attacked by a group of men who recognised him from a newspaper report. By focusing on sexual conduct and prosecution, the UK approach obviously failed to examine how “criminal sanctions [established] a climate where further human rights breaches are allowed to flourish unchecked” (Millbank 2004, 223; see also Ferreira 2015, 425).

Instead, in its assessment of the risk of A being persecuted upon return, the IAT relied on the evidence that A had been discreet – only engaging in “consensual sodomy in private,” had “not claimed to have indulged in any other kind,” and would thus remain an “undetected” homosexual (para 5, cited in Schiemann LJ, para 36). If *Jain* [1999] established the threat of actual imprisonment could constitute persecution, the IAT remarks cited by Schiemann LJ (para 36) in *Z and M and A* [2002] seem to tell a different story of the construct of the gay refugee. The “good gay” would have lived discreetly but also never admitted, under any circumstances, the carnal sin of their homosexuality to the state. The Tribunal stressed in A’s circumstances the “harm was self inflicted” (Millbank 2004, 223), and the appeal illustrates how discretion reasoning can be “a particularly invidious form of victim blaming because it affirms the perspective, if not the conduct, of the persecutor” (Millbank 2012, 504; 2013, 37). The expectation of discretion minimised the risk of persecution, and hence such a fear would not be well-founded. Because A had wittingly broken the rule of silence, the implication of the adjudicators’ conclusion

¹⁷³ IAT, para 5, cited in Schiemann LJ, para 36.

was that the country of origin was entitled to jail or threaten punishment upon the homosexual, with impunity, in order to maintain adherence to the social mores of the country – and this was just not persecutory. In other words, the persecution was permissible and there was no legitimate claim to refugee status.

On the international stage, in 2002 the UNHCR Guidelines noted the criminal prohibition of homosexual conduct could amount to persecution.¹⁷⁴ Yet, the judicial construction of the threshold of persecution established in *Jain* (i.e. whether or not anti-sodomy laws were enforced) remained contentious in two ways: firstly, whether punishments were persecutory or “mere” discrimination; and, secondly, how to objectively assess the likelihood of the enforcement of prohibitions.

1.1.3 Not all rights violations are persecutory

It has been argued that imposing a limit on the expression of gender or sexual identity, including “elementary” modifications, actually achieves the ends of persecutors – the maintenance of the political community’s norms of gender and sexuality. In other words, “[m]anaging that violence through repression of one’s identity perpetuates persecution, and jurisprudential affirmation of such a finding validates the persecution” (Johnson 2007, 107; see also chapter six). The sample of decisions discussed here openly affirmed broad circumstances under which persecution and deprivation of human rights were permissible.

Revisiting Z’s case, Z [2004], in light of S395 [2003], the Court of Appeal addressed several aspects of UK jurisprudence on the right to privacy, the ability to live openly in the country of origin and whether the need to be discreet was persecutory. Z’s counsel argued that in light of S395, persecution was understood to be the discriminatory denial of a core human right such as private life, and that persecution expressed through the inability to live openly was protected by the Refugee Convention and ECHR Article 8 (Buxton LJ, para 10). Z’s counsel drew upon the definition of persecution set out by the UKHL in *Ullah* [2004], where Lord Steyn (para 32) quotes Hathaway (1991, 112): “persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of

¹⁷⁴ UNHCR (2002, para 17); Millbank (2004, 224) criticises the UK’s failed application of this standard; see also Türk and Nicholson (2003, 21).

the *core entitlements* which has been recognized by the international community [emphasis added].”¹⁷⁵

According to Buxton LJ (Z [2004], para 11-12), however, Lord Steyn was actually setting out conduct which *might* be persecutory in *Ullah*, and did not establish conduct which *definitely* breaches the threshold of persecution. Instead, Buxton LJ referred to Lord Bingham in *Sepet* [2003], where he defined persecution as a strong word suggesting death, torture, or other severe penalty. Lord Bingham’s (*Sepet*, para 7) construction of persecution has become “the standard definition” (Johnson 2011, 61), and has been widely cited as guidance in many determinations:¹⁷⁶

“[Persecution] is a strong word. Its dictionary definitions...accord with popular usage: ‘the infliction of death, torture, or penalties for adherence to a religious belief or opinion as such, with a view to the repression or extirpation of it;’ ‘A particular course or period of systemic infliction of punishment directed against the professors of a...belief.’”

Following this definition Buxton LJ (para 12, see also 14-19) asserted in Z [2004] that not all interferences with “core human rights” are protected under the Refugee Convention (see further Buxton 2012, 394).

On the other hand, appellant Z relied on McHugh and Kirby JJ (para 43) in *S395*, which set out that “[i]t is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct.”¹⁷⁷ Z’s permission to appeal was granted in order to assess the implications of *S395* but, according to the UK Court of Appeal, the HCA had relied on a principle already established in UK law by *Ahmed* [1999].¹⁷⁸ In *Ahmed*, Simon Brown LJ (8) posited that the single, critical question was whether the asylum seeker would behave as she says she will, however

¹⁷⁵ Hathaway’s (1991, 108–112) classified four tiers of human rights as “core entitlements,” see further Appendix II. The “core entitlements” approach was advanced in, for example, Z [2004], para 11, *Amare* [2005], para 17. The efficacy of the definition was challenged by Evans LJ in *Jain* [1999] and Laws LJ in *Amare* [2005].

¹⁷⁶ For example, *Sepet* was referenced in Z [2004], para 12; *RG* [2006], para 14; *J* [2006], para 11 which was then applied in *HJ* [2008], para 8 as well as *XY* [2008], para 8, 10; *HJ and HT* [2010], para 12.

¹⁷⁷ Asylum seekers continued to refer back to *S395* until *HJ and HT* [2010]; e.g. *HJ* particularly relied on McHugh and Kirby JJ (para 43) to argue for a HRBA to assessing persecution (Hodge J in *HJ* [2008], para 14).

¹⁷⁸ Buxton LJ in Z [2004], para 16, referring to McHugh and Kirby JJ in *S395*, para 41.

“unreasonable,” and risk persecution in the country of nationality; if so, she is entitled to asylum. Abridged, Simon Brown LJ’s judgment in *Ahmed* [1999] stated:

“[I]n all asylum cases there is ultimately but a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason? If there is, then he is entitled to asylum. It matters not whether the risk arises from his own conduct in this country, however unreasonable... [T]he critical question: if returned, would the asylum seeker in fact act in the way he says he would and thereby suffer persecution? If he would, then, however unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, in my judgment he would be entitled to asylum.”¹⁷⁹

If the IAT had refused Z’s application by requiring him to avoid persecution, they would have failed to respect the jurisprudence in *Ahmed*; but, according the Court of Appeal, they did not make the error of *requiring* behaviour modification (Buxton LJ, para 16-17). Instead the Tribunal had proposed the closet as *voluntary* discretion or concealment based on its finding of how Z had previously acted and would act in the future to avoid persecution (Buxton LJ, para 17).

In the remitted case of Z, the Tribunal had admitted a report by an expert witness, Dr Oliver Phillips, to give evidence on attitudes to homosexuality in Zimbabwe (Buxton LJ, para 5). In the Court of Appeal, Buxton LJ (para 22) claimed that neither the COI nor Dr Philips’ report indicated that there was widespread social hostility towards homosexuals, and therefore it was not possible to form a view of what might happen if Z and his partner were to live together “but otherwise not [emphasise] their homosexuality.” Without having access to the specific evidence provided to support the appeal, Phillips (1997) had previously written on the vilification of gays and lesbians in Zimbabwe, but also that the vitriolic discourse of President Mugabe and others did not appear to have prompted an increase in arrests or prosecutions for sodomy.¹⁸⁰

¹⁷⁹ Simon Brown LJ *Ahmed* [1999], 8. This influential statement has been cited widely in domestic and international jurisprudence, including many cases discussed here, such as: *S395* [2003], para 41; *Z* [2004], para 16; *RG* [2006], para 10; *HJ and HT* [2010], para 18; see also *Amare* [2005], para 10; *J* [2006], para 10.

¹⁸⁰ See also Phillips (2000) and his evidence in *LZ* [2011], which is considered throughout the determination.

Requiring an explicit discretion requirement would be an error of law; therefore UK adjudicators created loopholes. If an adjudicator decided on evidence that an asylum seeker had been discreet in the past, whatever the reasons, the UK was not in fact enforcing concealment in the eyes of the law. Ultimately, *Z* [2004] did not answer the question of what adjudicators should see as appropriate evidence, either for concluding that discretion had been employed to avoid persecution, or for the gravity or likelihood of the harm feared to require international protection. Buxton LJ (para 24) concluded that the “appeal comes down to the issues of fact,” and there was not “sufficient evidence” of *why* Z had been discreet. Or, as Buxton LJ (para 14) would later apply in *RG* [2006], “it was not established that he behaved in the way that he did only to avoid persecution or that his conduct denying his sexuality was so serious in its effect upon him as to put him in a situation of persecution.”

With reference to *Z* [2004] and *Ahmed* [1999], the SSHD and Court of Appeal accepted in *Amare* [2005] that the IAT had erred in law in stating “[a] person can properly be expected to take *some* steps to ensure the risk he faces is reduced” (Laws LJ, para 11, 10). But like Buxton LJ (para 16-17) in *Z* [2004], Laws LJ (para 11) in *Amare* found that the relevant determination of the present appeal, the Adjudicator’s, did not find “that the appellant *should* act secretly or discreetly...so as to avoid persecution, but that as a matter of fact that is how she *would* conduct herself, having done so previously.”

However, the judgment in *Amare* [2005] went further, and minimised arguments for a connection between human rights and persecution in RSD. Amare’s counsel advanced a HRBA with two relevant points to the development of jurisprudence (see Laws LJ, para 17). First, persecution is the sustained or systemic violation of internationally recognised human rights and the core values of privacy, dignity, and equality with a failure of state protection (Hathaway 1991, 104–105). Second, discrimination based on gender is a source of persecution that is “structural,” “endemic,” or “institutionalised” in societies such as Ethiopia; combined gender and homosexual grounds are especially pernicious. The judgment of Laws LJ (para 17-33) considered the appellant’s proposed HRBA at length. The wisdom of Haines QC’s purported reliance on Hathaway (1991) in the New Zealand decision, *Refugee*

Appeal No. 74665 [2004] was criticised by Laws LJ (para 20, 30-31). Particular attention was paid to Haines QC’s (para 66, 82) discussion in favour of a HRBA, and explanation of why discretion is contrary to fundamental rights. Laws LJ (para 27) recalled two Convention principles as though Haines QC and Hathaway were at odds with the 1951 definition: the nexus clause in Article 1A(2),¹⁸¹ and that persecution must be of a “substantial level of seriousness.” Haines QC was alleged to have underplayed the importance of a nexus to the Convention as well as the seriousness of harm in deference to the deprivation of a human right. Laws LJ (para 31) suggested, on the other hand, that Hathaway’s (1991, 112) definition should “be treated with a degree of caution.” Curiously, Hathaway’s definition had been cited by a number of international authorities, including the UKHL (e.g. *Ullah* [2004], para 32). Yet, Laws LJ (para 31) insisted the definition “[gives] no very clear place to the requirement of gravity or seriousness,” and “[contains] no recognition of the condition that protection is only to be afforded” in cases of violations arising from 1951 Convention grounds.

Amare’s counsel argued that criminalisation was an affront to human rights, and cited the UK case of *Dudgeon* and the landmark South African constitutional case which denounced anti-sodomy laws as contrary to private life.¹⁸² But Laws LJ (para 19-20, 30) dismissed the appellant’s referral to non-asylum cases as unhelpful to interpreting the 1951 Convention (see also Laws LJ, para 22, 28, 32 on international consensus).

The second pillar of Amare’s argument was that discrimination was cumulative and endemic (see Laws LJ, para 23, 26-27). The persecution of sexual minority women in particular often appears structural and rooted in the accumulation of discrimination on grounds of sexuality *and* gender, as outlined by the appellant’s counsel in *Amare*.¹⁸³ The HRBA advanced by the appellant sought to clarify the “grey area” between discrimination and persecution. For example, the lack of reported prosecutions in a particular country of origin does not mean that state protection is sufficient where in fact sustained, systemic discrimination may subject

¹⁸¹ See Appendix II on the “nexus clause.”

¹⁸² *Dudgeon v United Kingdom* (1982) 4 EHRR 149; *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, Case CCT 11/98.

¹⁸³ Set out by Laws LJ, para 23-24, 26; see also Baroness Hale in *Hoxha* [2005], para 35-36.

sexual minorities to treatment amounting to persecution. In *Hoxha* [2005], Baroness Hale cited UNHCR Guidance that discrimination in itself is not persecutory.¹⁸⁴ Yet, “a pattern of discrimination or less favourable treatment could, on cumulative grounds, amount to persecution” warranting refugee status (Baroness Hale, para 35).¹⁸⁵ But just as Laws LJ (para 21) had narrowly applied *S395* [2003] to focus on the question of substantial levels of harm (see McHugh and Kirby JJ, para 40, 43), he (para 27) similarly relied on Baroness Hale’s (para 36) statement in *Hoxha* that “the treatment feared has to be sufficiently severe” to justify the restricted application of human rights to assess persecution in *Amare*.¹⁸⁶

According to Buxton LJ (para 16) in *RG* [2006], the consensus of UK jurisprudence and international authorities was that a “high level of distress...must be reached before a denial of freedom can be said to be persecutory.” Of course, *whose* freedoms or exercise of core human rights or *what*, on the facts of a case, “counts” as persecution is unresolved in such constructions. What Buxton LJ (para 19) *does* make clear, however, is that the “teaching” of Laws LJ in *Amare* [2005] and his own decision in *Z* [2004] “is that a breach of Convention rights,” such as the “forced change of sexuality,” “cannot in itself amount to persecution” (see also Johnson 2011, 73). Problematically, proving that the “level of distress” experienced from having to repress identity is sufficient to reach Buxton LJ’s threshold rested on highly subjective factors.¹⁸⁷

1.1.4 Reasonable tolerability

In *J* [2006], Kay and Buxton LJ set out a “reasonable tolerability” test for adjudicating sexual minority asylum claims. The Court of Appeal found discretion was not appropriate *if* the concealment of sexuality was sufficiently significant in itself to place an individual at risk of persecution, defined by serious harm, intensity and duration (Kay LJ, para 8, 10-11; Buxton LJ, para 20). Kay LJ (para 11) suggested that reasonable tolerability was set out in previous UK decisions.¹⁸⁸ However, reasonable tolerability does not appear to have been the *explicit* test or

¹⁸⁴ See further *OO and JM* [2009], para 11-14, 17-21; UNHCR (2002, para 14).

¹⁸⁵ See also Keene LJ in *HC* [2005], para 29-31; chapter four of this thesis.

¹⁸⁶ See also Buxton LJ’s interpretation of *S395* [2003] in *Z* [2004], para 15, on “the level of interference.”

¹⁸⁷ See Sir John Dyson in *HJ and HT* [2010], para 122.

¹⁸⁸ Specifically *Z* [2004], para 12, *Amare* [2005], para 27, and *RG* [2006], para 16.

principle until *J* [2006]. The version of reasonable tolerability in *J* was less of an iteration of the case law than it seems to have been retrospective sense-making for jurisprudential clarity and/or legitimacy.¹⁸⁹ Instead, the preceding case law appears to have been more concerned with the “high threshold” of persecution, especially regarding repeated emphasis upon part of the opinion of McHugh and Kirby JJ (para 40) in *S395* [2003], which mitigated the broader implications of that international authority.¹⁹⁰ But perhaps *J* [2006] was emphasising the underlying “reasonable tolerability” requirement in earlier UK jurisprudence.

In part, *J* [2006] seemed to recognise discretion was an unfair burden to impose on an asylum seeker. However, the court also constructed the reasonable tolerability test in its decision, and Buxton LJ’s short intervention significantly shaped the test to the detriment of sexual identity in refugee status. Kay LJ (para 3) cited the finding in *RM and BB* [2005] (para 123) that the death penalty for sodomy in Iran was rare, but that the Tribunal was satisfied that if homosexuals did come to the attention of authorities there was a real risk of “significant prison sentences and/or lashing.” Kay LJ (para 4) continued, the CG case “paints a much grimmer picture” than countries with mere societal discrimination and that, “[p]lainly, there are particular problems for practising homosexuals in Iran.” He (para 8) continued that the Tribunal’s determination that J would not be persecuted was based “on the fact that he was not persecuted previously,” “because [his relationships] were ‘conducted discreetly,’” nor would J come to the attention of authorities on return because his conduct “would also be ‘conducted discreetly.’”¹⁹¹ Kay LJ (para 8) scrutinised this point from the perspective of *S395* [2003]. The HCA suggested the intensity and duration of harm was relevant such that “the person persecuted cannot reasonably be expected to tolerate” it; but the majority decision *also* emphasised that the Convention would give no protection under religion or political opinion if the claimant must “take steps – reasonable or otherwise – to avoid offending the wishes

¹⁸⁹ In 2012, then-former LJ Buxton wrote a response to the UKSC judgment in *HJ and HT* [2010]. In order to defend his previous commitment to discretion reasoning, which he still found tenable, Buxton (2012, 397–398) added yet more terms to the debate in order to lend credibility to his view, including: “limited range of persecution” regarding tolerating a threat, and “behavioural avoidance” instead of discretion; he further argues that the Court of Appeal had previously drawn upon Hathaway and Pobjoy’s (2012) distinction between “endogenous” and “exogenous” harm “without realising that it [and he] was doing so” in *J* [2006] and *Z* [2004].

¹⁹⁰ See *HJ and HT* [2010], para 25-29, 66-69.

¹⁹¹ See also *Z* [2004], para 16-17; *Amare* [2005], para 11 on voluntary, not tolerable discretion.

of the persecutors” (McHugh and Kirby JJ, para 40; see also Goodman 2012, 427–428). The HCA continued: “The notion that it is reasonable for a person to take action that will avoid persecutory harm” fails to properly consider if the claimant’s discretion was influenced by the fear of persecution (McHugh and Kirby JJ, para 43).

Considering J’s appeal in *HJ and HT* [2010], the UKSC would later conclude that the Court of Appeal had interpreted the observations in *S395* [2003] to imply a reasonable tolerability test in spite of the fact the HCA “was plainly” referring to “the context of what amounts to persecution and not [avoiding persecution]” (Lord Collins, para 103; see also 81, 125). As such, the Court of Appeal wrongly constructed a reasonable tolerability test in *J* [2006] based on a “misunderstanding” of *Ahmed* [1999] and *S395*. The Court of Appeal, through their reasonable tolerability test, instructed the Tribunal to consider whether discretion could be expected of asylum seekers to avoid being persecuted if the modification of their behaviour was not “sufficiently significant in itself to place [them] in a situation of persecution” (Kay LJ, para 10-11). Persecution is thus, according to Kay LJ (para 11), a synthesis of a “strong word” according to *Sepet* [2003] and of a significant “intensity or duration” that a claimant “cannot reasonably be expected to tolerate” per *S395*.¹⁹²

Further, Buxton LJ (para 20) added to the judgment’s test of what may be reasonably tolerable by instructing that the Tribunal should take account that J may have to “abandon part of his sexual identity...in circumstances where the failure to do so exposes him to the extreme danger that is set out in [*RM and BB* [2005]].” Refuting that asylum seekers had been required to be discreet, former Lord Justice Buxton (2012, 398) writes that – if it was not reasonable to expect any “adjustment of behaviour” – “the alternative seemed to be to grant asylum automatically in any case where any adjustment of behaviour would be required in order to avoid...persecution.” I turn now to consider the remitted case of J, *HJ* [2008], together with *XY* [2008], because they raise similar issues of applying reasonable tolerability that benefit from comparison.¹⁹³

¹⁹² Also applied in *Z* [2004], para 12, *Amare* [2005], para 27, *RG* [2006], para 16, and *JM* [2008], para 154, 156 via *J* [2006].

¹⁹³ See also *JM* [2008], para 153-155.

Following the approach in *J* [2006], Hodge J (*HJ* [2008], para 9) summarised that since living openly could expose J/HJ (hereafter HJ) to extreme danger, the Tribunal needed to determine whether the need to be discreet “would itself constitute persecution” under the Convention. What is supposedly unreasonable and intolerable discretion was vaguely defined. Arguably, Stanley Burnton LJ (para 8) in *XY* [2008] somewhat clarified the test: “[a] persecutory situation is capable of existing by reason of the fear and stress engendered by [the] risk” of having “to carry out...sexual activities clandestinely” (i.e. discreetly). Hodge J (*HJ*, para 7) cited the text of the 2006 Protection Regulations – ¹⁹⁴ which emphasised that the harm feared must be sufficiently serious – which is remarkable given that adjudicators had accepted the fact that if Iranian homosexuals were not discreet or were discovered, that would expose them to *extreme danger* (see also Stanley Burnton LJ, para 6). New evidence was even presented to the AIT in *HJ* that included official Iranian arrest statistics, and further corroborated the prospective punishments for sodomy (Hodge J, para 19-20). The SSHD argued that in the case of HJ, with which the Tribunal in effect agreed in its determination, “[w]here a person does in fact live discreetly to avoid coming to the attention of the authorities he is reasonably tolerating that position” (Hodge J, para 10, 45; see Millbank 2012, 520 on how this creates a catch-22). The Tribunal concluded that the “[e]nforcement of the law against homosexuality is arbitrary but the evidence does not show a real risk of discovery of...homosexuals in Iran who conduct their homosexual activities discreetly” (Hodge J, para 46; see further part two, below). The Court of Appeal essentially came to the same conclusion in *XY*, and it was suggested the appellant may have to abandon part of his sexual identity, but there is nothing to say he could not continue his sexual life discreetly (Stanley Burnton LJ, para 13-14).

In *HJ and HT* [2009] the Court of Appeal found that the application of S395 [2003] in *J* [2006] constructed an “appropriate and workable test” that complied with the standards of refugee law, which the Tribunal in *HJ* [2008] “plainly understood” (Pill LJ, para 31; see also para 24-25 on *XY*). Additionally, Pill LJ (para 31) added that adjudicators should determine what was reasonably tolerable for an asylum seeker with reference to the religious “beliefs” and societal “views about

¹⁹⁴ Refugee or Person in Need of International Protection Regulations 2006 [SI 2006 No. 2170], implementing EU Council Directive 2004/83/EC, Article 9; see also *B* [2007], para 29.

The inclusive guise of “gay” asylum homosexuality and its practice” in the country of origin: “A judgement as to what is reasonably tolerable is made in the context of the particular society” (Pill LJ, para 31, see also 36; see further part two, below). These discussions are a far cry from the notion of gay men “drinking exotically coloured cocktails” and being “as free as their straight equivalents in the society concerned,” which Lord Rodger (para 78) would affirm when *HJ and HT* reached the UKSC in 2010.

1.2 Discriminatory persecution post-HJ and HT: Discretion is persecution

As we have seen, “discretion” was a central theme throughout the case law from 1999-2010. In 2010 the UKSC clearly set out in *HJ and HT* (para 102-103, 124-127) that the Court of Appeal constructed the reasonable tolerability test for persecution based on a “misunderstanding” of the HCA judgment, *S395*, which the Lords Justice had taken out of context.¹⁹⁵

Firstly, Lord Rodger (para 58) commented on whether discretion was required; for years, adjudicators did not claim to *require* discretion but “[purported] to decide the case *on the assumption* the applicant would do so.” But “this distinction,” in Lord Rodger’s words (para 59), “is pretty unrealistic,” because “when faced with a real threat of persecution, the applicant would have no real choice: he would be compelled to act discreetly.” In fact, it was an “obvious point” that the effect of discretion reasoning was “to establish a form of secondary persecution brought on by his own actions in response to the primary persecution” – i.e. discretion *is* persecution (Lord Rodger, para 75; see also Lord Collins, para 106-107; cf. Buxton 2012, 402).

Secondly, aside from the need to be discreet being persecutory, the UKSC did not fully engage what amounts to “being persecuted.” On the one hand, Lord Hope (para 35) stated in no uncertain terms: “There will be little difficulty in holding that in countries such as Iran and Cameroon gays or persons who are believed to be gay are persecuted and that persecution is something that may be reasonably feared.” But, on the other hand, the UKSC did not set out a specific test for persecution as it had for determining whether the claimant was a refugee based on being or being

¹⁹⁵ Former LJ Buxton (2012) argues, on the other hand, that the UKSC disregarded the basic principles of refugee law and, in fact, inverted the established means of interpreting Article 1A(2).

The inclusive guise of “gay” asylum perceived as gay, if they could be openly gay and what they would do if returned.¹⁹⁶ In an abstract sense, Lord Walker (para 89-91) discussed the “threshold of concern” (Hathaway 1991, 75–80) in RSD, which is a reasonable degree of likelihood of a subjective and, critically, objective fear or, his preferred term incorporating both elements, “risk” of the asylum seeker being persecuted. He (para 91) adds:

“I suppose that it may be debateable whether a gay man would be at real risk of persecution (in the Convention sense) if, on returning to his own country, he would face a one in ten risk of being persecuted and made to pay a fine, or sent to prison for a month. But if he would face a one in ten risk of being prosecuted and sentenced to death by public hanging from a crane there should be only one answer.”

This is important for context of what may be persecutory post-*HJ and HT*. Other engagements in the decision with the concept of persecution seem to have been built on the assumption that there is an established (objective) measure of what amounts to persecution. For instance, reference was made to Hathaway’s (1991, 108) definition, “sustained or systemic failure of state protection” in relation to international “core entitlements,” as adopted by several key authorities (see *HJ and HT*, para 13, 101, 113-115). In fact, former Lord Justice Buxton (2012, 393–394) argues that the UKSC incorrectly used Hathaway’s definition of persecution as a complete one, and should have considered *Sepet* [2003] on whether the treatment was sufficiently severe.

In the two initial applications of *HJ and HT* considered in the sample of this thesis, the SSHD argued before the Tribunals that the evidence of each country did not show treatment amounting to “being persecuted.” Regardless of how “natural” they found being openly gay or discreet, an asylum seeker must show that being so would result in persecution. In the case of *SW* [2011], the SSHD argued on evidence that there were no lesbians living openly in Jamaica; the only risk of discreet lesbians being persecuted was from “isolated and infrequent incidents which fall short of the threshold for persecution,” which required “a ‘consistent pattern’ of ill-treatment” (Gleeson II, para 70).¹⁹⁷ Applying *HJ and HT*, *SW*’s counsel argued this fact was

¹⁹⁶ See *HJ and HT*, para 35, 82.

¹⁹⁷ The SSHD declined to make further submissions in light of the new test, *HJ and HT* [2010], which negated much the respondent’s argument put to the Tribunal in *SW* [2011], see e.g. para 50-51, 54-55, 116.

The inclusive guise of “gay” asylum irrelevant “since the need to return to discretion for safety’s sake was itself persecutory” (Gleeson IJ, para 81). SW’s appeal was successful.

In the other case, *LZ* [2011], the SSHD contented that there was “societal disapproval” of homosexuality in Zimbabwe but not persecution (Macleman and Holmes IJJ, para 6, 24). LZ’s appeal succeeded because of the particular risk-factor that her family had connections to members of the elite, but the Tribunal found no “general risk” to homosexuals in the country (Macleman and Holmes IJJ, para 113-116). Notably, in *LZ*, the Tribunal directly addressed the perennial question of whether anti-sodomy laws are persecutory, and Macleman and Holmes IJJ (para 27) observe that it is “legally uncontentious” that the existence of anti-sodomy laws is not persecutory unless they are “routinely enforced, and penalties imposed.”

To summarise the findings in part one of this chapter, persecution *can be* targeted, physical violence and acted out by the state or with its complicity. Often in the absence of sufficient state protection, persecution *also* consists of subtler forms of oppressive power in which a whole range of actors, institutions, and social norms contribute to discrimination and collude to deprive sexual minorities of rights. If persecution is to be understood, as authorities such as *Ward* [1993], *Horvath* [2001], *Ullah* [2004], *Refugee Appeal No. 74665* [2004], and *HJ and HT* [2010] have recited, as the “sustained or systemic failure of state protection” of rights (Hathaway 1991, 112), I would argue that oppression (or “dispossession”) is integral to the assessment of refugee status, not as a substitute for but as the facilitator of persecution and the circumstances of well-founded fear (see further chapter six). A principled definition or approach to (discriminatory) persecution accounts for the common scenario of oppression which leads, in the case of sexual minority claims, to discretion or the closet: “*But for*” the asylum seekers’ modification of behaviour, might they have suffered more? Per *HJ and HT* (para 75, 106-107), threats of harm that necessitate discretion and a closeted existence *can* amount to persecution. To persecute sexual minorities is to oppress with the view of making them invisible and eliminate the perceived threat to society and the state; this is not always (or only) achieved by the persistent and ominous threat of torture or death, but also the threat or deprivation of the rights a full member of the political community would enjoy (Hathaway 1991, 108–112).

Arguably, reasonable concealment has not been entirely eliminated as a result of *HJ and HT* (see Weßels 2013) and, as discussed in chapter four, some commentators have argued for the exclusion of so-called “trivial” behaviours which are not integral to the status of being gay (Anker and Ardalan 2012; Hathaway and Pobjoy 2012). Moreover, while *HJ and HT* makes a strong emotive case for sexual minorities to be as free as heterosexuals, and has established that the need to be discreet can be persecutory, it is still the case that the treatment or harm feared on grounds of sexual or gender identity must both be reasonably likely to occur and sufficiently severe to amount to persecution.

2 Constraining what amounts to persecution

International consensus on human rights and refugee law has been used selectively in the UK, often to justify immigration restriction. Early international law on sexual orientation challenged anti-sodomy laws on grounds of human rights claims to private life.¹⁹⁸ However, the existence and enforcement of such laws was slow to develop as grounds of persecution within refugee law.¹⁹⁹ In theory, the UK recognised homosexual refugees who were persecuted for “legitimate” private acts, but in practice discretion was applied in a way that undermined the necessary well-founded aspect of persecution.²⁰⁰ Discretion reached its nadir in the so-called reasonable tolerability test, which was based on a “misunderstanding” of international case law, and continued to limit the recognition of gay refugees.²⁰¹ Today, the need to be discreet is seen as potentially persecutory.²⁰²

The first section here critically reflects on why discretion is problematic in the assessment of persecution. I start by arguing that adjudicators did not “misunderstand” the international case law and that discretion was contrary to the Convention – the question is why did they ignore axiomatics of the closet (Sedgwick 2007, 3–4)? If discretion is now seen to be contrary to the Convention, there must be other hurdles that explain why the processes of securing contested rights for sexual minority refugees were so lengthy. The remainder of the chapter offers an analysis

¹⁹⁸ e.g. *Dudgeon v United Kingdom* (1982) 4 EHRR 149; *Toonen v Australia*, UN Doc CCPR/C/50/D/488/1992 (4 Apr 1994); see also Millbank (2004, 218).

¹⁹⁹ e.g. *Jain* [1999]; *Z and M and A* [2002].

²⁰⁰ e.g. *Z* [2004]; *Amare* [2005]; *RG* [2006].

²⁰¹ *J* [2006]; see also *XY* [2008]; *HJ and HT* [2009].

²⁰² *HJ and HT* [2010]; see also *SW* [2011]; *LZ* [2011].

and some explanations for the narrow recognition of the “gay” refugee. I firstly assess how aspects of the local context in countries of origin, including their cultural norms and evidence of systemic violence, has influenced the assessment of persecution. Giving too much weight to culturally specific norms or explanations for what appears to be persecution, or undermining the discriminatory effects of persecution as generalised violence prevents an adjudicator from properly assessing whether there *is* a well-founded fear of being persecuted. Finally, I will summarise the impact of immigration control and international consensus, and how these could affect *spaces for change* going forward.

2.1 Glass closets, discovery and persecution: There was no “misunderstanding”

Basing protection from persecution on the discretion of a claimant undermined the very purpose of refugee status. Regarding state prohibitions, the UK failed to recognise that even unenforced anti-sodomy laws can foster widespread homophobia, fear of reporting abuse to authorities, and extortion at the hands of law enforcement. Likewise formal equalities do not always translate to freedom from persecution (Millbank 2004, 210–211, 215–216, 226; Johnson 2007, 103). This section considers the courts’ application of discretion, and suggests there was no “misunderstanding” of international law in discretion reasoning. Rather, discretion is used as a way of denying or avoiding responsibilities under the Convention.

UK adjudicators had in many cases a range of evidence that would suggest that regardless of whether an asylum seeker *wanted* to be discreet, or *would* modify their behaviour as a matter of self-preservation, where their sexual indiscretions came to the knowledge of society or the state they could be persecuted. Yet, this knowledge was often downplayed. For example, a Tribunal found that it was “far too speculative to suppose that those around [Amare would] identify her as a lesbian and demonstrate their disapproval of her activities by acts of sexual or other violence upon her” (IAT, para 36, cited by Laws in *Amare* [2005], para 6). Even on the limited evidence and accepted facts which featured in the Court of Appeal’s decision in *Amare* [2005], it is plain to see that a single woman in Ethiopia would be living in an incredibly transparent closet.

I use the terms “glass” or “transparent” closet similarly to what has been called the “heteronormative panopticon,” including the “constant fear of being “disclosed,” of being victim of violence, to self-violence accompanied by internalised homophobia” (Kuhar and Švab 2008, 268).²⁰³ Johnson (2007, 103) suggests that the terminology used by the judges in *RG* [2006] “evidences a failure on their part to understand the threats of violence and blackmail” that were presented in *RG*’s case. Even where there was “some level of formal protection,” the COI and human rights organisations had suggested that there was a real risk the persecutors may be non-state actors and that local authorities and communities in Colombia may be complicit (Johnson 2007, 103).

Similarly, in *HC* [2005] the formal legal position contrasted with the actual threat of persecution in Lebanon for the claimant, a gay Palestinian. There was a range of background information presented in the appeal, including COI which stated prosecution was unlikely but open homosexuality was not tolerated, that Lebanese police do not interfere in Palestinian camps, as well as two reports which discussed the legal and factual position of sexual minority rights in Lebanon, respectively (Keene LJ, para 12, 14-15, 21, 28-30). The previous decisions had emphasised the legal position, but the Court of Appeal stressed the broader evidence. An expert attested that “while [it was] not literally impossible for a gay man to live in a Muslim area of Lebanon, it would be extremely difficult for him to do so,” and nor would he be safe in Beirut (Keene LJ, para 13). An acquaintance who had visited *HC* in Lebanon provided a witness statement that noted the “risks of blackmail and arrest if gay men spent the night together or met openly” (Keene LJ, para 14). The assumption of discretion held by many adjudicators failed to consider the many ways societies can identify sexual minorities, and what they could do about it (see further chapter four).

A further example of this is the *CG* case, *RM and BB* [2005], because it was accepted by UK adjudicators that if homosexuality was discovered by the Iranian authorities, they would investigate and prosecute, and the punishment would at

²⁰³ Švab and Kuhar (2014, 19) use “transparent closet” differently, specific to the family and a refusal to acknowledge coming out, but I mean it as something specific to the fact of being discovered by family, society, state and the risks more like the panopticon. See also Kuhar (2012, 151–152, 162) applying “transparent closet” to the public/private dichotomy, Tebble (2011), and chapter six.

minimum violate ECHR Article 3 and likely amount to persecution.²⁰⁴ This CG was used in several other appeals considered,²⁰⁵ and discretion in Iran was accepted as a matter of survival, where there was no public gay community (see Allen VP in *RM and BB* [2005], para 28).²⁰⁶ Expert evidence suggested that homosexuality may be discovered in large part because of private complaints which can be made in the Iranian legal system, though their source is often questionable (Allen VP, para 65). Private complaints are “a large source of insecurity for a practicing homosexual,” as they can “be laid against him by a neighbour, servant, a spouse or any other person in his orbit, either out of a sense of moral rectitude or for revenge” (Allen VP, para 117). Allen VP (para 124) curiously suggested that allegations that a complaint had been or could be made by a asylum seeker’s family should be viewed with “scepticism,” but in the context of a conservative society where homosexuality brings incredible shame to the family too, I find this is misguided (see e.g. Morgan 2006, 144–145; McFarland 2014; Ferreira 2015, 423–424).²⁰⁷ In fact, Haines QC (para 26-27) *emphasised* that Iranian “homosexuals are repressed by their family and relatives” in *Refugee Appeal No. 74665* [2004].

While there were known cruising grounds, evidence suggested that there were “raids on homosexuals in parks in Tehran” (Allen VP, para 43). In *HJ* [2008] it is noted that Iranian authorities sought to entrap homosexuals in Internet chatrooms in 2004-2005 (Hodge J, para 21). For discretion to really guarantee safety in Iran, the evidence seems to suggest the only certainty would be non-disclosure plus celibacy.²⁰⁸ The Tribunal was also told that two men living together would “arouse neighbourhood suspicions as being very unusual” (Allen VP in *RM and BB*, para 43), and since 2004 “a sort of state-run neighbourhood watch” has policed all manner of moral crimes (Hodge J in *HJ* [2008], para 22).

While Iran is a state at the more extreme end of the spectrum, these points trouble the logic of discretion generally (see Millbank 2012, especially 506). As

²⁰⁴ See also *HJ* [2008], para 20; *XY* [2008], para 6-7; cf. *HS* [2005].

²⁰⁵ Including *HS* [2005], *J* [2006], *HJ* [2008], *XY* [2008], *HJ and HT* [2009], *MM* [2009], and *HJ and HT* [2010].

²⁰⁶ See also *Refugee Appeal No. 74665* [2004], in which Haines QC (para 28) found that the evidence suggests “that to avoid harm, homosexuals in Iran must live ‘in the closet.’”

²⁰⁷ Other appellants have raised concerns their families could report them to authorities, e.g. B from Algeria who had been “disowned” (*B* [2007], para 16).

²⁰⁸ See Lord Rodger in *HJ and HT* [2010], para 63.

discussed in the last chapter, the appellant in *JM* [2008] relied heavily on the argument that questions asked of his marital status would inevitably reveal his true sexual identity regardless of modification to behaviour (King J, para 17, 20, 81, 143). And in *Amare* [2005], adjudicators speculated on what could happen if she were to live with a partner in a “conventional” but not “flamboyant” relationship (Laws LJ, para 6). Decision-makers failed to acknowledge an axiomatic truth – peculiarity alone raises suspicions, heightens surveillance, pierces the closet and increases the risk of persecution.

The UKSC (*HJ and HT* [2010], para 102-103, 124-127) would later explain that many decisions on discretion were based on a “misunderstanding” of *S395* (especially *McHugh and Kirby JJ*, para 40). As Lord Hope (*HJ and HT*, para 20) explained his use of concealment over discretion, I would prefer not to call this a misunderstanding because “this euphemistic expression does not tell the whole truth.” Whatever the reasons, the Court of Appeal had all of the tools at its disposal to correctly apply *S395* or, at minimum, might not have engaged with persuasive and non-binding international case law. I have tried to expose some of the many false assumptions that discretion prevented persecution and negated a well-founded fear, but these *wilful* oversights were especially pernicious.

2.2 “Tradition,” generalised violence, and international consensus

Normalising violent social contexts in decision-making gets in the way of an evaluation of persecution. In the first subsection, I suggest that whether a state may enforce “traditional” values, even if its laws or social mores may result in persecution as defined by international refugee law, is a contested issue. Relatedly, culturally specific notions of harm and justice may conflict with international human rights norms and be persecutory. Finally, this section will consider COI that indicated the persecution feared was systemic and not discriminatory, and, therefore, the asylum seeker is determined not to be a Convention refugee. The second subsection further considers the role of cultural divergence in the context of restricted interpretations of persecution, as well as “international consensus” and keeping the “floodgate” sufficiently closed.

2.2.1 Local context: Normalised violence and the perceived need to “respect” local cultural norms

The perceived need to balance international human rights standards and local cultural norms has troubled adjudicators (see e.g. Anker 2005, 113–116). For example, adjudicators have struggled over how to classify the systemic, subordinate position of women in Pakistani society measured against “universal” rights and UK liberalism. *Islam and Shah* [1999] illustrated an underlying anxiety of some adjudicators to assure “respect” for the local laws and customs in countries of origin. On the other hand, it has been observed that awarding refugee status is an implicit criticism and political reprimand of the country of origin (see e.g. Hathaway 1991, 82–83, 100–101; Tuitt 1996, 93; Anker 2002, 152; 2005, 120; Millbank 2004, 203). Assessing persecution whilst attempting to respect a society’s cultural norms can adversely impact asylum claims. As the IAT had determined in the case of *Islam*: “We do not think the purpose of the Convention is to award refugee status because of a disapproval of social mores or conventions in non-western societies” (cited in Lord Hoffman, 165).

The UKHL rejected that respect for local cultural norms was a determinative factor in RSD.²⁰⁹ In any case, the right to be free from discrimination is not only a Western value but also shared, at least in law, with Pakistan’s constitution and the human rights instruments it too ratified.²¹⁰ But *Islam and Shah* suffered discriminatory persecution as a result of the failure of the state in practice to protect them from ill-treatment because of their subordination in that society (Lord Hoffman, 165-166). Instead, Lord Hoffman (165-166) employed universal rights over the Tribunal’s culturally centred approach.

Court of Appeal and Tribunal decisions have since found it necessary to continue engaging cultural difference in the assessment of persecution. Adjudicators have found that it is necessary to separate the question of discriminatory persecution from whether there are local cultural norms that may be legitimately enforced.²¹¹

²⁰⁹ *Islam and Shah* [1999], 165-166.

²¹⁰ See also *Refugee Appeal No. 74665* [2004] where Haines QC (para 38) rejected domestic human rights standards in favour of international measures, because the former “allows too easily the intrusion of ideology and also the implication of censure of the state of origin,” and he (para 112) further rejected the domestic laws of the country of origin as overriding considerations of international human rights norms in RSD.

²¹¹ See e.g. *HJ and HT* [2009], para 32, discussed below.

This includes whether a state can legitimately regulate social mores, by customary norms or domestic law, and determining when these can be persecutory. To decide these questions, adjudicators have had to weigh competing values of international human rights and “traditional values” (Wilkinson 2014).

In *HJ* [2008] the Tribunal emphasised that in Iran homosexual acts are classified as “crimes against the public virtue,” including adultery and other crimes in a “wide sense” (Hodge J, para 19). “But there is no evidence that [the authorities have] focused particularly on homosexual conduct” (Hodge J, para 25). So accordingly it was merely incidental that “homosexuality is one of the moral crimes which is subject to increased surveillance,” and that failed to show HJ would be discovered and persecuted for private homosexual conduct (Hodge J, para 25). Pill LJ (para 32) gave additional weight to social morality in assessing persecution in the conjoined appeal of *HJ and HT* [2009]:

“The need to protect fundamental human rights transcends national boundaries but, in assessing whether there has been a breach of such rights, a degree of respect for social norms and religious beliefs in other states is...appropriate. Both in Muslim Iran and Roman Catholic Cameroon, strong views are genuinely held about homosexual practices... Analysis of in-country evidence is necessary in deciding what an applicant can [reasonably tolerate] on return...”

Pill LJ (para 36) concluded that Tribunals must determine “[w]hether a requirement to respect social standards has the effect of violating a fundamental human right.”²¹² In effect, adjudicators not only endorsed the enforcement of traditional values in Iran, Cameroon, and other states, but also the regulation of public morality with the threat of persecution.

In the majority of appeals considered in this thesis, asylum claims were rejected on grounds that prosecution and therefore persecution was unlikely. However, several examples in the literature and case law suggest that refugee status had been refused not only because states may regulate public morality by threatening persecution, but also that the persecution was not really persecution in the context of that society. In one case, an Adjudicator had reasoned that an asylum seeker “would

²¹² In *HJ and HT* [2010], para 128-130, Sir John Dyson rejects this approach with reference to “objective human rights standards, and not by reference to the social mores of the home country.” See also *MK* [2009], para 290, 384 citing and applying Pill LJ’s observations in the case of an Albanian lesbian seeking asylum.

not face persecution if he were returned to the Yemen...only prosecution and any punishment [100 lashes or 1 year in prison], within the context of the Yemeni culture would not be harsh and unconscionable.”²¹³ Another Adjudicator accepted that an asylum seeker had suffered ill-treatment and six months imprisonment, but in the context of Iran “[h]is sentence of six months for homosexuality and sodomy was not disproportionate and relatively lenient.”²¹⁴ These cases illustrate the notion of “permissible persecution,” which can be broadened, especially since discretion is now properly recognised as persecutory. Asylum claims rejected on grounds of discretion show that adjudicators appreciated that the closet was, in the context of those cultures, “not disproportionate and relatively lenient.”²¹⁵

Finally, the formulation of “discriminatory” persecution that merits refugee protection as distinct from “systemic” persecution that does not, though neat in theory, can become messy in RSD. Widespread, generalised violence in countries of origin has led to the rejection of asylum claims despite the addition of evidence that suggested the likelihood that sexual minorities may be harmed was higher. In an unreported appeal to the IAT in 2001, the Brazilian claimant’s evidence noted that more than 1,600 gay, lesbian, and trans people had been murdered from 1980-1999. The homicide rate was determined to indicate a systemic rather than discriminatory threat of persecution. The IAT found that the figure must be viewed in the context of Brazil and its “unbelievable record of violence,” 6,000 murders in Rio de Janeiro in 1999 alone, and given domestic activists claim there are 15 million homosexuals in the country, “it is difficult to see” the community “is a particular target of violence.”²¹⁶ A similar finding of systemic violence was made in *Dawkins* [2003], which undermined the asylum claim. The Adjudicator determined:

“Against the context of the background and high levels of violence in Jamaica, whilst noting that he was attacked outside a gay night club...

²¹³ *Saeed v SSHD* [2002] UKIAT 01465; the Adjudicator’s determination was overturned on appeal to the IAT; cited in Millbank (2004, 218–221).

²¹⁴ *Musavi v SSHD* [2002] UKIAT 04050, cited in Millbank (2004, 222).

²¹⁵ *Ibid.*

²¹⁶ *Barbalaga v SSHD*, IAT Appeal No 01TH00068 HX-73150-96, 28 February 2001 (Unreported), para 5, cited in Millbank (2004, 219).

I do not regard it as established to a reasonable degree of likelihood that he was attacked on account of his homosexuality.”²¹⁷

In *JM* [2008], King IJ (para 105) discredited the claimant’s evidence of mob violence in Uganda on the basis it was systemic too. The Tribunal found there was a culture of violence and vigilantism in the country. The violence feared by JM was found not to be discriminatory, because the report submitted had “very little to say” about homosexuality as a provocation (King IJ, para 105). Therefore, according to the Tribunal, JM was unlikely to be at risk of the persecution feared any more than the next Ugandan, so he was not a Convention refugee.

If adjudicators allow a broad cultural view to influence the assessment of the state, society, and persecution feared, they may fail to engage the question of whether the circumstances are in fact persecutory. While the circumstances of generalised violence may, strictly speaking, be a separate consideration from cultural difference, what they share in common is the local context of countries of origin. And both have obscured whether there is a particular risk to a gay asylum seeker. “Gay” asylum seekers can easily be determined to be aberrations to “traditional” culture and “statistics,” that may be underreported, rather than as refugees threatened by local cultural norms and as vulnerable targets in circumstances of generalised violence.

2.2.2 An invisible hand: Restricting the meaning of persecution

“The appellant’s sexuality comes at a price but it is not so high as to require the international community to provide surrogate protection.”²¹⁸

The case law considered suggests that political imaginings of the perceived effects of asylum decisions were a primary driver of legal reasoning, rather than a principled jurisprudential application of human rights and refugee law. *Jain* [1999] justified a limited interpretation and application of the concept of persecution, allegedly grounded in an “international consensus” which attempts to be observant of cultural

²¹⁷ Adjudicator’s determination cited in *Dawkins* [2003], para 31; see also SSHD’s argument in *SW* [2011], para 60, 67.

²¹⁸ IAT, para 37, cited in *Laws LJ*, para 6, *Amare* [2005]. The quoted text specifically referred to the ECHR Article 8 grounds, but is representative of their decision on the other human rights and asylum grounds of *Amare*’s appeal.

difference. Schiemann LJ (74) at the appeal quoted the Tribunal (page 22) on the divergence of standards in the international community:

“...to deny a country its right to adhere to mores, to cultural attitudes and to laws different from one’s own and which make up its inherent being cannot be acceptable if the Convention is to have any truly international acceptability... [W]e can see that the punishment for behaviour which is unacceptable can be judged by one standard, for example international norms, whilst in the same case the cultural attitude or mores is judged by another, for example that of the country to which the asylum seeker may be returned.”

Underlying the evolution of the “threshold” of persecution is a preoccupation with maintaining an international consensus (see also chapter two), which continues to be deployed to justify a narrow construct of the refugee. Of course, it could be argued that adjudicators had a benign intention to recognise difference, and avoid false universals. But *Jain* and successive cases apparently engaged cultural difference and international consensus on the definition and assessment of persecution as a means to justify immigration restriction.

Another excerpt from *Jain* [1999] is coded below (see Fairclough 1999, 196 on method). This reasoning has appeared varying in the jurisprudence, including [1] finding international consensus, [2] fear of opening the floodgates, and [3] the move to cloak restrictionist intentions with positive humanitarian objectives.

“[1] It is clearly desirable that the international community moves with a degree of consensus in relation to what it regards as persecution, [2] for otherwise burdens will be imposed upon those States who are most liberal in their interpretations and whose social conditions are most attractive. [3] If intolerable burdens are imposed there is a risk that such States will resile from their observance of the Convention standards, which would be a disaster [numbering my own].”²¹⁹

The excerpts above, especially at [1], illustrate an on-going preoccupation with limiting the Convention by clearly demarcating those eligible for refugee status with a focus on “burden sharing” between Signatory States.²²⁰ At [2], the Court of Appeal

²¹⁹ Schiemann LJ, 77.

²²⁰ I argued similar perspectives on the Convention are evident in its *travaux préparatoires* (see chapter two).

apparently sought to move the UK towards the lowest common denominator, with added emphasis at [3] on the importance of states distributing the costs of refugees.

Jain declared there was an international consensus that states should not interfere in private homosexual conduct. However, an unenforced penal code that maintains the “privacy of the closet” was said not to be persecutory (see Millbank 2004, 215 on *Jain*). The restriction placed on expression and association limited the number of prospective refugees even before there was a consideration of whether the fear of prosecution was well-founded, and what punishments would breach the court’s threshold of persecution. At [2], above, by referring to the “social conditions” that may be desirable to masses of the world’s homosexuals, perhaps the Lords Justice were assuming the UK is less homophobic than other Signatory States, or maybe that it has a more generous welfare state which was relevant in, for example, the rejected asylum claim of HIV-positive RG in 2006 (Johnson 2007, 109).²²¹ Other researchers have observed the “floodgates argument,” as it is termed by Millbank (2004, 222), who quotes Walls J (para 49) in *Dawkins* [2003]:²²²

“It simply cannot be the law, in my judgement, that merely because the law of Jamaica has a criminal statute which criminalises homosexual behaviour, that mere fact cannot, of itself, be sufficient to require this country to grant immigration status to all practising homosexuals in Jamaica. *On that basis, anybody who was a homosexual could come to this country and claim asylum* [emphasis added].”

In *HJ* [2008], Hodge J (para 12) suggested that the appellant’s counsel offered submissions in a skeleton argument that came “very close to a claim that, given the discrimination against homosexuals in Iran, on a proper application of the law any homosexual person from Iran is entitled to international protection.”²²³ The appellants’ appeals in *SW* [2011] and *LZ* [2011], which applied *HJ* and *HT* [2010], were allowed *explicitly* in the particular circumstances of those asylum seekers. The floodgate was clearly a key concern in both determinations as the Tribunals stressed upfront in their introductions that it did not follow that granting refugee status to one claimant meant that all nationals of the same sexual or gender identity had a

²²¹ *RG* [2006], para 2-5, 15.

²²² See also *Atkinson* [2003], para 19-22, especially 21 referring to *Dawkins*.

²²³ cf. *XY* [2008], para 7; the appellant’s counsel accepted “that not every active Iranian homosexual is entitled to asylum.”

legitimate claim to UK protection. On the other hand, if the adjudicator’s role is to apply legal principles and if, hypothetically, applying those rules granted every homosexual of a particular nationality refugee status, it is questionable why the, arguably political, “floodgate” is the primary judicial concern. Or as Grahl-Madsen (1966, 163) argues: “Once a person is subjected to a measure of such gravity that we consider it ‘persecution,’ that person is ‘persecuted’ in the sense of the Convention, irrespective of how many others are subjected to the same or similar measures” (cited in Hathaway 1991, 85).

2.3 Critical reflections: Politics, immigration control, and international consensus

“The answer in each case is so blindingly obvious that it must be a mystery to some why either of them had to reach this House.”²²⁴

The remainder of this chapter will revisit and summarise the argument that the judicial discourse evidences a political preoccupation with limiting immigration, and that UK adjudicators had repeatedly rejected broader recognition of sexual minority asylum seekers on these grounds. This study has observed that “consensus” was often used in the determination of sexual minority claims when adjudicators were in effect hiding behind international norms instead of rising to meet the UK’s obligations of protection.

On the one hand, international consensus can be beneficial in creating *spaces for change*, exploiting the open texture of refugee law for the purposes of expanding the scope of Convention protection. However, it may also be that application of the Convention relies on interpreting human rights, not universally, but to the point that humanitarian and political interests are reconcilable (see Zolberg et al. 1989, 272; Loescher 1993, 51; Einarsen 2011, 46; see also chapter two). So-called “international consensus” has been used in arguments for the restriction as well as the expansion of Convention protection, and “winning” arguments on either side are tenuous at best and are open to reinterpretation in subsequent applications of the law (see Bourdieu 1987, 832–833; Goodman 2012, 441–442).²²⁵

²²⁴ Baroness Hale in *K and Fornah* [2006], para 83.

²²⁵ Of course, this is a statement of how case law functions generally in practice. But I mean to emphasise that a so-called “international consensus” on LGBT human rights and refugee status simply

Consider, for instance, *K and Fornah* [2006] and their Lordships’ apparent dismay that adjudicators had refused the appellants refugee status on the grounds that women did not constitute a PSG and a reluctance to acknowledge that FGM was persecutory. Lord Brown (para 121) wrote, “It would be most unfortunate if the jurisprudence of the United Kingdom (out of step with that of most enlightened countries) were available to support a narrow view of the Convention’s protective reach.” The House of Lords emphasised the UK as an outlier in an imagined league of exceptional countries to expand the scope of the Convention in terms of “international” acceptability (see Anker 2005). Their Lordships framed the scope of protection in problematic terms of “enlightened” and “civilised” countries, which construct UK (and Western) exceptionalism against “backward” states (see Puar 2006, 68–69, 85–86; Mepschen et al. 2010; see also Waites 2013, 145, 147–149 on colonial guilt). In the words of Baroness Hale (para 108), “The United Kingdom is apparently alone in the civilised world in rejecting such a claim.”

While the decision in *K and Fornah* seems to suggest a common-sense solution, the concept of persecution has evaded definition and proved an effective barrier to refugee status. Dawson J (160) of the HCA recalled in *Appellant A* [1997]: “By including in its operative provisions the requirement that a refugee fear persecution, the Convention limits its humanitarian scope and does not afford universal protection to asylum seekers.” It may be that this fact of persecution is so obvious as to be banal. But I would argue that the uses of persecution to limit or restrict the construct of refugee are often covert and ambiguous. Persecution has occasionally created spaces for change and widened the scope of refugee protection, for example, in the assessment of threats, likelihood, or types of harm that may be recognised. However, interpreting what amounts to persecution has usually forestalled the recognition of otherwise genuine claims to refugee status.

Sexual minorities have been excluded from refugee status for lack of adjudicators’ “empathy and imagination” in understanding persecution (Millbank

did not guarantee a winning formula in the UK. Bourdieu (1987) discusses how in the “pure” theory of the law, it is conceived as a coherent and predictable institution, but that view disguises the operation of power in the field. Goodman (2012, 441) expresses caution against the over-reliance on international law in RSD, because adjudicators “retain considerable leeway.” Adjudicators have the power of naming, to confer identity under PSG and acknowledge persecution in RSD (see Bourdieu 1987, 838), and so the “consensus” on principled legal rules is a myth that is better recognised as the application of international *norms* by those adjudicators (see Kratochwil 1989; Steiner 1999).

2002), but also by the perceived need in their political imaginations to balance refugee protection with immigration control and international consensus, imperatives which appear to transcend case-by-case decision-making (see further Ivarsflaten 2005). For example, in *Z and M and A* [2002] the SSHD argued that appellant A’s current relationship in the UK was outwith the scope of ECHR Article 8, and that any interference with his private life resulting from deportation was in the public interest for “the maintenance in itself of immigration control” (Schiemann LJ, para 38).²²⁶ For whatever reasons, adjudicators are apparently preoccupied with limiting the scope of Convention protection. Consider Lord Hope (para 9) agreeing with Lord Brown (para 85) in *Hoxha* [2005]:²²⁷

“[I]t is generally to be assumed that the parties included the terms that they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were unable to agree... It is not open to a court...to expand the limits which the language of the treaty itself has set for it.”

I would argue the view of historical permanency is problematic when juxtaposed to the competing jurisprudential narrative that the Convention is a “living instrument.” The literature and cases studied in this thesis would suggest that expanding on the language of the Convention is *exactly* what courts have done. Whether through lenses of human rights, supplementary interpretation or because of the necessities of changing socio-political realities, reading-in new categories of identity and persecution pushed at the limits of the Convention text. It seems to be a source of judicial anxiety that the principles of interpreting the Convention rely on terms that are not fixed or clearly demarcated. UK legal decisions have been apparently influenced by the political imperative of keeping the categories of refugees and persecution narrow for fear of opening the floodgates (Berg and Millbank 2013, 131). Interpretations based on the lowest common denominator were justified by claims that not to do so would undermine the Convention, especially because not to

²²⁶ The Court of Appeal specifically asked the AIT to consider whether this was proportional upon remittal; *Z and M and A* [2002], para 39.

²²⁷ *Hoxha* primarily dealt with the cessation clause, Article 1C(5).

do so would burden states with more generous or liberal interpretations, as well as those with attractive social conditions.²²⁸

Despite the pace of change in international law relating to sexual minority refugee status, UK adjudicators continued to be reticent in recognising that the discretion requirement was incompatible with the Convention. The true watermark of an “international consensus” began submerging UK case law and practice even as its courts continued to hark back to the threat of “being out front” if the UK were to be too liberal in its interpretation versus other Signatory States.²²⁹ In other words, it was clear that the “consensus” of many authorities had moved beyond requiring discretion, but the UK continued to hide behind the imputed international norm (i.e. the old standard). In *Z* [2004], two foreign cases took centre stage: *S395* from the HCA and Refugee Status Appeals Authority of New Zealand (hereafter “Authority”) in *Refugee Appeal No. 74665* [2004]. Buxton LJ (para 13) did “not presume to determine what is the law of New Zealand in light of the Authority’s decision, but [he had] no hesitation in saying that the decision gives no support to [the appellant’s argument].” Buxton LJ (para 13) quoted the Authority’s decision (para 114) in order to highlight that “serious harm is threatened,” and concluded that the deprivation of rights alone does not constitute persecution “in its international meaning.”

While Buxton LJ disclaimed knowledge and authority over New Zealand’s law, the judge and Court of Appeal explicitly purported to exercise authority over the “international meaning” of persecution and other Convention definitions. Buxton LJ (para 13) highlighted that “serious harm is threatened” (literally and figuratively), but he did not discuss the last part of his own excerpt of the Authority’s decision. Haines QC (para 114) of the Authority stated that if the asylum seeker would be deprived of a core human right “and serious harm is threatened,” that “it would be contrary to the...purpose of the Refugee Convention to require the refugee to forfeit or forgo that right and to be denied refugee status on that basis that he or she could engage in self-denial or discretion...”²³⁰ On the other hand, Buxton LJ concluded his discussion of the excerpt from the Authority’s decision by finding that the

²²⁸ See e.g. *Jain* [1999], 77; *Amare* [2005], para 22, 31; *RG* [2006], para 6; *OO and JM* [2009], para 24. See also Hathaway and Pobjoy (2012, 335).

²²⁹ See especially Laws LJ in *Amare* [2005], para 32.

²³⁰ See further Tobin (2012, 479–480) for a discussion and critique of the Authority’s distinction between “core” and “marginal” rights.

requirement of serious harm was consistent with the UK case law, namely *Sepet* [2003]. Similarly, on the decision in *S395* that discretion itself may be persecutory (McHugh and Kirby JJ, para 43), the Court of Appeal found that this too relies on a substantial level of interference, threat and menace, to qualify for refugee status (Buxton LJ, para 15).

In *Z* [2004], as in other cases, adjudicators drew from international jurisprudence when it suited their argument, imposed meaning with their interpretations, but otherwise claimed to have bounded limitations in their authority, for example, where it would have opened the “floodgate.” The contradictory readings of international jurisprudence involved disclaiming authority over another jurisdiction, while at the same time appropriating, interpreting, and representing it in the context of the domestic case to legitimise the domestic limitations to refugee status. The reasoning is similar to UK adjudicators’ expressed desire to maintain parity in the international system of refugee law, where courts claim they cannot go beyond what the Signatory States had contractually bound themselves to recognise. The duplicitous justification is humanitarian, that the Convention is a living instrument and humanitarian text of enormous value that requires consensus to ensure its integrity and continued application – this was especially apparent in *Amare* [2005].²³¹

In that case the Court of Appeal decided that the interference with the claimant’s private life in returning her to Ethiopia “would not be disproportionate given the legitimate aim of firm but fair immigration control” (Laws LJ, para 4).²³² In *Amare*, Laws LJ (para 22) cited Schiemann LJ (77) in *Jain* [1999], most notably that the evolution of refugee law must be based on an international consensus, “otherwise burdens will be imposed upon States who are most liberal in their interpretations and whose social conditions are most attractive.” While the Convention may be a “living instrument,” Laws LJ (para 28) expressed that “this is no license for the courts, in the cause of protecting or enlarging human rights, in effect to impose on the State obligations which in truth they have not undertaken.”²³³

²³¹ *Amare* [2005], especially para 32; see also *Jain* [1999], 77.

²³² See also *B* [2007], para 35; *JM* [2008], para 168.

²³³ cf. *Hoxha* [2005], para 9, 85.

As discussed in part one, the court in *Amare* was highly critical of a HRBA in RSD. Part of the effect of downplaying rights was the conclusion that homosexuals cannot migrate to the UK under the Convention as a matter of “personal convenience” where they might find and develop relations more freely than in their countries of origin: “The Convention is not there to safeguard or protect potentially affected persons from having to live in regimes where pluralist liberal values are less respected, even much less respected, than they are here” (Laws LJ, para 31).²³⁴ The court emphasised that “refugee” is a limited category with a narrower scope of protection than Amare had argued from a human rights perspective – purportedly for the preservation of the Convention, because states would no longer adhere to the Convention under the “burden” of too liberal an approach.

A recurring theme in the sample of cases is that the asylum seeker cannot be assumed to want to be “more free” in the UK; and that merely because they may be less free in their country of origin, that is not persecutory. For instance, in 2006 the SSHD sent B a refusal letter which specifically cited this excerpt from the claimant’s evidence: “I am not a discreet gay Muslim man. In summer, I enjoy sunbathing topless in Soho Square...and [the] relaxed gay pavement lifestyle that exists in London.”²³⁵ Similarly, an adjudicator in the appeal of a gay Pakistani noted: “It is of course not a Convention reason that an asylum seeker returning to his own country is unable to enjoy there the peripheral benefits of westernised and so called liberalised behaviour.”²³⁶ *Perhaps*, according to the UKSC in *HJ and HT* (e.g. para 11, 78), the Convention does in effect guarantee asylum seekers more freedom if their so-called “liberalised behaviour” would result in a well-founded fear of being persecuted.

As discussed in chapter two, the drafting and implementation of the Convention “reflected as liberal a synthesis of policies as nation states could agree to” (Gallagher 1989, 580). It has been argued that states viewed specifications of particular individuals and groups deserving of international protection as preventing the number of refugees from multiplying *ad infinitum* (Zolberg et al. 1989, 270). The Convention was, as mentioned repeatedly in the preparatory works, an instrument for

²³⁴ Cited in *HJ* [2008], para 16.

²³⁵ Cited in *B* [2007], para 23; see also *HJ* [2008], para 36-37, 43.

²³⁶ Quoted by the High Court (para 10) in *R v Special Immigration Adjudicator ex parte T* [2001] Imm AR 187.

“burden sharing” with the explicit goal of securing the widest possible definition of “refugee” that Contracting States could agree to.²³⁷ Or as Laws LJ (para 28) imagines politically in *Amare*, the “courts must keep a weather eye on the fact that they are dealing with the product of negotiation between contracting states.” Without an international consensus the burden of refugees would be imposed upon states with the most liberal interpretations and most attractive social conditions; “to apply the Convention without marked respect for the edge or reach of what the contracting States agreed,” in Laws LJ’s assessment, “would carry great risks” (Laws LJ, para 32).

HJ and HT [2010] “fundamentally undermines Laws LJ’s rejection” of a progressive human rights and international consensus approach.²³⁸ However, this chapter has demonstrated that the perceived consensus of the Convention deployed by UK adjudicators was restrictionist. This complicated the received wisdom of the utility of international human rights and refugee law in domestic practice to further broader protection. Advocates and researchers had proposed the “international consensus” was tilted towards greater recognition of sexual minority refugees prior to *HJ and HT*,²³⁹ and possibly a human rights-based understanding of persecution, as demonstrated by Canada in *Ward* [1993], Australia in *S395* [2003], and New Zealand in *Refugee Appeal No. 74665* [2004]. If spaces for change are seen in the Convention as a “living instrument,” this analysis suggests that diligence should be paid to “international consensus” as subject to an interpretive process which could just as easily swing away from broader protection of refugees and their human rights.

3 Conclusion

The minimum accepted persecution in the jurisprudence and policy guidance for the purposes of refugee status has changed over time, mirroring the extent to which rights to engage in private sexual acts and the public expression of sexual orientation and gender identity have been incrementally acknowledged in UK jurisprudence. UK adjudicators have repeatedly rejected rights to expression and association in RSD. Regardless of the discrimination, ill-treatment, and persecution faced by sexual

²³⁷ See A/CONF.2/SR.19; A/CONF.2/SR.21; A/CONF.2/SR.23; chapter two of this thesis.

²³⁸ S Chelvan, Twitter correspondence, 29 May 2013, available at: https://twitter.com/S_Chelvan/status/339839817753956353 [Last accessed 14 April 2015].

²³⁹ See e.g. *OO and JM* [2009], para 15-16, 24.

minorities, if the conditions of their concealment were found to be “reasonably tolerable” the asylum claim could be rejected. As I have set out, the forced repression of gender or sexual identity resulting from the persistent threat of discriminatory ill-treatment or harm posed by discovery or visibility can be in itself a well-founded fear of persecution.

UK legal discourse on refugee status and sexual minorities has included broad and often sweeping statements of the international meaning and significance of the Convention. Relative interpretations of “consensus” have been used to justify immigration control and the restrictionist tendencies of adjudicators. The case law suggests courts often treated possibilities of persecution lightly, as well as any subsequent limits on sexual minorities’ rights. *HJ and HT* [2010] has opened new doors in determining that sexual identity should not have to be concealed, even based on previous discretion, because of a well-founded fear of persecution. While proving sexual and gender identity presents new challenges, especially if there has been an increase in the instances of adjudicators disbelieving the identities claimed, the concept of persecution remains even less clear. If the social group has been recognised in the case law and the identity claimed can be proven, refugee status hinges on subjective and perhaps even more imprecise tests than those used for proving identity to judge what would amount to persecution, and, furthermore, the likelihood of being persecuted. Regardless of how broad or narrow the test for persecution may be, it is the adjudicator’s discretion in the assessment of well-founded fear that plays the most significant role in the outcome of an asylum claim. In Part III, I will propose a different way to assess persecution based on the concept of relational autonomy.

Part III – Theoretical contributions

Introduction

The conclusions drawn in Part II suggested, firstly, as to whether if “disbelief” that an asylum seeker is in fact “gay” is increasingly an obstacle to refugee status, the challenge may be to reconcile issues of proving the identity claimed with the possibility that an adjudicator *cannot* know surely or definitely who is “gay.” Furthermore, *HJ and HT* [2010] framed sexual identity as “immutable,” but did not make clear what behaviours should be protected from persecution. Finally, *HJ and HT* set out that discretion can no longer be required to avoid persecution, and affirmed sexual minorities’ rights of expression and association when seeking asylum. The decision paved the way for greater recognition of sexual minority refugees, yet there are still gaps in protection in the legal discourse and practice of RSD. Part III will address these deficiencies by offering an alternative to the determination of “immutable” identity, and clarifying the role of rights in the assessment of persecution.

Part III contributes an alternative approach to the protection of sexual minorities which is grounded on the case law analysis and critique in Part II. The approach is based on three original contributions: norm deviance, relational autonomy, and compassionate creativity. Chapter six argues that in order to decide on sexual minority claims to refugee status, determination should focus on the *persecutory intent* to suppress non-conforming acts and identities (or *norm deviance*). Norm deviance does not focus on determining what “protected characteristics” are “immutable,” but instead on what distinguishes the asylum seeker from society and puts them at risk of being persecuted, such as gender non-conformity.

Chapter seven offers an alternative approach to the assessment of a well-founded fear of being persecuted in relation to sexual minorities by applying existing theories of autonomy in the context of refugee law. I argue that a framework of *relational autonomy* develops a better understanding of the conditions necessary to realise a life free of persecution; the loss of relational autonomy, including relationships and equal rights, could constitute a well-founded fear of persecution.

Part III will conclude by exploring how the original concepts developed build upon the existing case law, and offer an analysis of how the interpretive standpoint of *creative compassion* uses these concepts in the determination of refugee status.

Chapter Six – Norm deviance and the social group

Drawing upon the analytical conclusions of the case law in the previous two chapters, this chapter proposes a conception of *norm deviance* for determining the refugee status of sexual minorities. As I have previously argued, gender identity and sexual orientation have been established as culturally relative and historically contingent categories, therefore compounding the difficulties of knowing the “truth” of an asylum claim. Even in the most detailed medico-psychological evaluations, sexual and gender identity are inaccessible and subjects of speculation. Evidence presented to substantiate the claimed identity and fear of being persecuted is always reliant on subjective belief of its credibility and reliability. I develop the concept of norm deviance as a means to identify sexual minority claims, and argue that the *persecutory intent* to suppress non-conforming acts and identities can found a “genuine” well-founded fear of persecution. This new approach to the PSG category overcomes several epistemological difficulties posed by gender and sexuality in transnational decision-making. Most importantly, the norm deviance approach avoids essentialised categories.

Part one of this chapter considers alternative ways of interpreting PSG, including the approaches of immutability or protected characteristics and social perception, and it explores how the epistemological problems of sexual and gender identity may be better accounted for in RSD. Part two reconsiders the findings of this research, and explains why norm deviance is better suited as an alternative conceptual framework. I conclude that RSD can avoid essential categories while remaining consistent with Convention principles, and norm deviance is a workable and less prescriptive way of defining and identifying the social group(s) of sexual minority refugees.

1 Re-reading the PSG as norm deviance

While *norm deviance* broadly may be attributed to a number of groups, here I am concerned with norm deviance on the grounds of sex, gender, and sexuality. Although I draw upon common sociological definitions of “norm” and “deviance,” and there are notional similarities in their usage here, I have not used the terms with

reference to the theories of other disciplines such as criminology (see e.g. Abercrombie et al. 2006, 106–107, 272). Instead, I use these terms as empirical descriptors. *Norms* are standards and “rules that govern social behaviour and are enforced by positive or negative sanctions” (Bruce 2006, 216, 69). “Norms” will be used broadly to refer to informal, social expectations, or *de facto* rules as well as formal, legally codified, or *de jure* rules. *Deviance* “is the breaking of social rules” and is, therefore, different from the norm and may be sanctioned (Bruce 2006, 216, 69). Importantly, this definition of “norms” captures a broad spectrum of social power relations, thus determining whether the sanction for deviance amounts to persecution must also consider the grey area between *de jure* and *de facto* norms, such as with some applications of Sharia law, where the “source” of a persecutory sanction, whether state or non-state, may be obscure:

“[A]n act or characteristic is only deviant because the social group has created the rules which define what is acceptable and what is deviant... [W]hat makes homosexuality ‘abnormal’ is a set of norms that accept only heterosexuality. Another society could decide otherwise; in that sense deviance was always situational” (Bruce 2006, 69).

Deviance from the norms of heterosexuality or *compulsory heterosexuality* is situational and may be relevant in a number of societies.²⁴⁰ With respect to the PSG, assessing norm deviance involves examining the negative sanction applied to the asylum seeker whose particular figuration of sex, gender, and/or sexuality may place that person at risk of discriminatory persecution in the country of origin. The asylum seeker’s norm deviance may transgress a number of social conventions, even simultaneously, such as defined sex/gender roles, socio-legal rules, or being attributed an identity viewed by wider society as perverse. And while the idea of persecutory intent may be relevant to other refugee categories,²⁴¹ what is important

²⁴⁰ Others have referred to “compulsory heterosexuality,” coined by Rich (1980; see also Butler 1991; Sedgwick 1991, 81), generally as “institutionalized heterosexuality” (e.g. Weeks 2007, 12) and “heteronormativity” (e.g. Warner 1993; McGhee 2001a, 3; Luibhéid 2005b, 74) among other terms. I have chosen compulsory, in a more literal sense, because I mean to argue and emphasise that it is the absence of a meaningful choice, or indeed outright prohibition, which can be persecutory. See also Young (1990, 58–61) on cultural imperialism and oppression.

²⁴¹ See also Aleinikoff (2003, 267–268) on a UNHCR brief regarding “values and standards at odds with...social mores,” and UNHCR guidance referring to “harsh or inhuman treatment due to their having transgressed...social mores.” In *Hoxha* [2005], para 32, Baroness Hale discussed sexual violence against women as a means of political oppression that can result in “pain, hardship and [the]

here is the intent to suppress and eliminate the “deviant” sex, gender, and/or sexuality.²⁴²

According to this conceptualisation of norm deviance, a genuine refugee is one who is persecuted by the country of origin or society because of who or what that person is, or has chosen to be. A sexual minority asylum seeker is often unable to fully develop and express identity, lacking the means to actualise normatively deviant desires because of the dispossession, ostracism, or fear of persecution in the country of origin. Rather than defaulting to the immutable, essential, or categorical frameworks in PSG claims, which reify identity and produce future exclusions, I will argue that the primary inquiry of RSD should be norm deviance. Deviance from compulsory heterosexuality places an individual at risk of discriminatory persecution.

First, part one reconsiders identity in the transnational arena of asylum seeking to assert the relevance of norm deviance. The second section considers how the social perception approach to determining PSG-based claims is better suited to accommodating identity in transnational contexts, and with greater inclusivity. Strategic essentialism may be a feasible alternative to the anti-essentialist rejection of fixed identity categories, but I argue that the recognition of subjectivity and identity is better accommodated by a constructive assessment of the persecutory intent to suppress deviance.

1.1 *The problems of identity in transnational decision-making*

In chapter one, I argued that the use of LGBT identities in non-Western states may be liberating in some contexts, for example as categories with global visibility and utility in claiming rights attached to them (Katyal 2002, 119–123). However, in some states “LGBT” labels can lead to accusations of the adoption of non-traditional, imported practices, and can result in persecution (Katyal 2002, 122, 125–132). It should also be noted that the use of “LGBT” locally does not necessarily involve the

indignity of rejection and ostracism,” and noted: “The UNHCR Guidelines recognise that punishment for transgression of unacceptable social norms imposed upon women is capable of amounting to persecution” (see UNHCR 2002, 3, 12, 23, 31).

²⁴² *Persecutory intent* should not be seen to imply that an adjudicator must establish what was in the mind of the persecutor. I will suggest in this chapter and chapter seven that “intent” can be interpreted by external factors in the available COI evidence, such as a hostile regime or the prevalence of religious extremism. This is because, unlike, for example, criminal law, RSD requires a lower standard of proof – that of “reasonable likelihood.”

adoption of the Western culture associated with these categories (see e.g. Philips 2000, 34; Spruill 2000, 14). Non-Western sexual minority communities have developed and inevitably will continue to develop new articulations of identity by drawing on local cultures and traditions, but continue to lay claim to the protection of international norms and the rights associated with “normalised” LGBT identities (see e.g. Altman 1996; Philips 2000, 34; Walker 2000, 61–62; Weeks 2007, 216–223). Therefore, the need to avoid presupposing meaning and values and reification of identities is a pressing issue in the transnational decision-making arena. An additional layer of complexity is introduced when individual fluidity within cultures or social groups is considered. So, here we return to the question of whether it is possible to agree on what we can really “know” about sexual and gender identity in order to accommodate (global) diversity, and deploy Western “gay” identities in rights claims while still remaining sensitive to (local) difference (Plummer 1992, 18; see also Miller 1999, 290–291).

Developing a legal framework for that purpose here requires consideration of the roles of *gatekeepers* in shaping the construct of refugee, including adjudicators, advocates, academics, and activists (Bhabha 2002; see also Miller 1999, 291).²⁴³ The background literature and case law analytical chapters of this thesis suggested that claiming refugee status as a sexual minority has resulted in the reification of types of people or categories of asylum seekers who are deemed worthy of protection. Similarly, Sheill (2009, 56) observes that human rights discourse “requires stable categories,” eschews “special rights,” and stresses the “normality” of LGBT people.²⁴⁴ Though case law and policy guidance have taken note of cultural diversity (e.g. API 2015), gatekeepers persistently default to assumptions of stable, immutable identities. The case law analytical chapters have shown that adjudicators in particular have been unable to see beyond kinds or types of people that may form a PSG in the literal sense. Reliance on a “gay” category may lead to the protection of certain

²⁴³ The concept of gatekeeping and gatekeepers is drawn from Bhabha (2002), to set out that all actors in the field are implicated in the inclusion and exclusion of refugees. Gatekeeping in practice is, in short, the subjective process of determining of who is a genuine refugee (see further Appendix II). See also McGhee (2001b, 38) on “specific intellectuals” and the “suspension of the system” in the inclusion of sexual minorities as a PSG.

²⁴⁴ See also D’Emilio’s (1998, 244–245) critique that homosexuality rhetorically becomes a “poor second choice” when identity is essentialised, and “[w]e must not slip into the opportunistic defence that only homosexuals become homosexuals.”

claimants, rightly, but the ends do not justify the means, especially in the sense of creating a new “kind” or “type” into which new claimants must “fit” (see Walker 2000, 68; Morgan 2006). The assumption of a stable category also contributes to the myth of a knowable “truth” in a claim, forsaking the empathy and imagination for understanding the very unknowability of gender and sexuality.

If the narrative of an exemplary well-founded fear of persecution is that of an “out,” gay male political activist fleeing the oppression of a state and its anti-sodomy laws, many sexual minority asylum seekers could be excluded from refugee status (see Lewis 2014, 967). The case law suggests many adjudicators know no conception of identity besides the “possession” of one and, in fact, seem possessed by identity as an object. Adjudicators’ imaginations fail to understand the ways in which refugees have been *dispossessed* of their identities and freedoms,²⁴⁵ that is, dispossessed of the ability to realise a different sexual or gendered life for fear of persecution. The essentialist perspectives held by adjudicators further contribute to the reification of categories and exclusion of other sexual minorities from seeking asylum. Identity, as I argue in this chapter, is not an object that can be possessed, and casting identity as immutable can be oppressive even in a case where the immediate result is refugee status. The newsworthy case of Aderonke Apata aptly illustrates these intrinsic troubles of identity.²⁴⁶

Aderonke Apata is not a lesbian, at least according to the UK authorities. Viewed through an immutable lens that imagines permanence of identity, several points of Apata’s claim trouble rigid legal classifications. From Nigeria, Apata first claimed asylum in 2004 on the grounds of religion, which failed. Raised Christian, she married a Muslim man. Since having been discovered working illegally in 2012, she has claimed the marriage was a cover for a long-term lesbian relationship (Dugan

²⁴⁵ Butler (2004, 19) observes on identity that “when we speak about *my* sexuality or *my* gender, as we do (and as we must) we mean something complicated by it. Neither of these is precisely a possession, but both are to be understood as *modes of being dispossessed*, ways of being for another or, indeed, by virtue of another.”

²⁴⁶ I have chosen this case in particular for the fact it is, literally, newsworthy. Several mainstream outlets, LGBT news sites, and activist groups have taken up the banner of Apata’s cause (see e.g. Blair 2015; Filar 2015). So the facts of the case are not only topical, the “public outrage” shows another aspect of gatekeeping and the assumptions of identity rooted in political discourses. In fact, I was first made aware of Apata’s case by an email requesting support for her petition to the government (various online petitions garnered tens of thousands of signatures), and later happened upon various social media posts by her supporters, e.g. the Asylum for Aderonke Facebook page (since removed).

2014). When her husband’s family suspected the affair, Apata was taken to a sharia court where she was sentenced to death. She managed to escape, though her brother and three-year-old child “were killed in related vigilante incidents” (Dugan 2014). Her ex-girlfriend was also killed some years later, but the 2012 claim was refused as was her 2015 appeal. Moreover, Apata tells *The Independent* that she submitted personal pictures and videos as a last resort to “prove” her sexual orientation (Dugan 2014; 2015). As discussed in chapter five, reports of asylum seekers going so far as to submit sexually explicit evidence in desperation to prove their sexuality contributed to a review of Home Office procedures relating to LGB-based claims (BBC 2014; Chelvan 2014; Vine 2014); this is no longer permitted (A, B and C [2014]; API 2015).

I revisit Apata’s case later in this chapter. Neither you nor I know if she is a lesbian. In fact not even her friends, family, or sexual partners can know her “true” sexual orientation. Put simply, an adjudicator might be persuaded to see “truth” in either argument (see Sedgwick 2007, xv on “perspectivism”). In spite of the fact that she might not be a lesbian, the conclusion I draw below is that she is deserving of refugee status on the grounds of norm deviance.

1.2 Social perception of the PSG: Moving beyond immutability

It appears that the coherence of “LGBT” at a national level within the UK is tenuous and fictitious, let alone the notion of a global homogeneity of LGBT people.²⁴⁷ Thinking “strategically,” though, about what we can know about sexual minorities globally and what makes “sexual minorities” a distinguishable PSG, the most important commonalities are deviance from heterosexual or cisgender hegemonic norms and the resulting discrimination or persecution.²⁴⁸ While sexual and gender-

²⁴⁷ Discussing the fluidity of identity can be as elucidating as it is obscuring; the purpose of this thesis is not to attempt a comprehensive mapping of the noted contingencies. However, the existence of a “messy” world of subjective, personal, and interpersonal identities at multiple levels of analysis must be acknowledged. Importantly, though, I am not intending to conflate culturally relative categories with individual subjectivity, or fluid identities, within particular cultures.

²⁴⁸ Cisgender (also cissexual and gender normals) is a term connoting one’s gender aligning to the sex one was assigned at birth (Schilt and Westbrook 2009). NB people with alternative sexualities (e.g. LGB people) can be non-cisgender where applicable (i.e. a trans person could also be LGB). The addition of this term intends to highlight the divergent experiences of norm deviance in gender and sexuality. I have argued in chapter one that gender identity and sexual orientation are not discrete, but also cannot be conflated; the concepts are intricately connected (see e.g. Katyal 2002, 133–136).

variant acts and identity are relative, what is shared in common amongst sexual minorities is subjection to various levels of discrimination and persecution. What can be “known” is the violence against a minority; not only violence against someone self-identified as a sexual minority, but also against those who are “perceived” to be a sexual minority, or are “unknowable” and discreet in everyday life. To consider norm deviance as a more appropriate construct of refugee, I first situate the concept in existing debates on interpreting PSG and the problems with the dominant, immutable approach to the category, before going on to unpack persecutory intent or what is intended by (the threat of) persecution.

1.2.1 Interpreting PSG: Immutability and social perception

There is an international consensus in refugee law that prohibits the “circular constitution” of a PSG (see chapter four; Appendix II; Aleinikoff 2003, 292–294; Türk and Nicholson 2003, 17). This means that Signatories and the UNHCR have insisted that “a social group must exist independently of the persecution imposed on members of the group” as a limiting principle (Aleinikoff 2003, 286). However it has also been widely acknowledged that “while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society” (*Appellant A* [1997], 173) – i.e. it is still the perception created of an attribute and not being persecuted that identifies the PSG (Aleinikoff 2003, 288; UNHCR 2011b, 94). The social group must not be defined by the persecution, because that could “render the other four Convention grounds superfluous” (UNHCR 2011b, 92).

Generally, approaches to the interpretation of PSG have taken two forms: the “protected characteristics” or “immutable” approach and the “social perception” approach. The “protected characteristics” approach considers whether a group shares an immutable characteristic which is so fundamental to their human dignity that they cannot change or should not be required to change it (Türk and Nicholson 2003, 17). The “social perception” approach considers whether the group shares a common characteristic that sets it apart from society as different and makes those individuals vulnerable to persecution (Türk and Nicholson 2003, 17). As observed by Baroness Hale (para 99) in *K and Fornah* [2006], “homosexuals can qualify as [a PSG] under either approach; but the social perception approach might identify ‘set apart’ groups

based on a common characteristic which is neither immutable nor fundamental.” The key distinction between social perception and immutability is that social perception also protects those asylum seekers who associate for so-called “non-fundamental” reasons.

In 2003 Aleinikoff (2003, 274) suggested the UKHL offered a mix of both the immutability and social perception tests, but more often relied on immutability. The UKHL further attempted to reconcile these approaches in *K and Fornah* [2006].²⁴⁹ However, as I have argued, *HJ and HT* [2010] tends toward the immutability approach in its language, but also in how it has been applied (see chapter four; Hathaway and Pobjoy 2012, 386). I would argue this approach contributes to the maintenance of an apparent hierarchy of what (or who) should be protected as definitive sets of “protected characteristics.” The analysis in chapters four and five suggested UK adjudicators have a tendency to fit claims neatly in the Western concepts of the “normal” LGBT rights holder (Weber 2015), which, perhaps, maintains a “Charmed Circle” of good refugees to the exclusion of perceived sexual and gendered chaos (see Rubin 1993; Wilkinson 2014, 365, 373–374). Immutability also seems to privilege an overly historical construct of the Convention refugee that claimants must fit: the archetypal and still most generally accepted “genuine” sexual minority refugee is the gay male activist fleeing political oppression (see McGhee 2001b; Lewis 2014, 967).

However, regardless of identity’s evident contingency, identity claims are made in our everyday lives, political struggles, and in legal claims for rights. Categories can be liberating as they are debilitating (Young 1990, 47–48; Seidman 1993, 136). Bearing in mind this disconnect between theories of gender and sexuality and the requirements of proof in RSD, one alternative may be “strategic essentialism” (Spivak 1988, 205; see also Duggan 1995, 185–186).²⁵⁰ Identity is fluid, and yet legal categories entail some degree of reification (Mertz 1994, 1256); this incompatibility might be partially rectified by the observation that “[a] strategy suits a situation; a strategy is not a theory” (Spivak 1994, 154). That is to say, what is

²⁴⁹ See discussion in *K and Fornah* [2006], para 11-16, 57-58, 97-101, 113, 118.

²⁵⁰ Spivak (1994) criticises non-reflexive uses of strategic essentialism, and I do not intend for it to go unchecked here. On the contrary, I hope my preference for an anti-essentialist stance (where possible) and suggestion of difference or norm deviance in adjudication ideally avoids the ascription of categories altogether.

true of the social “theory” of identity may not be wholly transferrable to a “strategy” for advocacy and decision-making in RSD.

Still, relying on essentialism as a legal strategy *is* incompatible with constructivist theories of identity, and the analytical findings of this thesis suggest it is both detrimental for the individual seeking asylum and that it reifies identity in the case law. It is both possible and necessary to avoid essentialism in the construct of refugee (Fuss 1991, 6–7; Duggan 1995, 177). In acknowledging that identity claims exist (in the sense of people claiming to “have” identities), it is important to avoid adopting the terminology and reasoning that assumes immutability. Norm deviance moves the assessment away from immutability and towards a social perception approach.

In the particular context of refugee law, I argue for a social perception approach to interpret PSG-based asylum claims. This is crucial, for example, in circumstances such as those of many sexual minority asylum seekers from Iran. It may be particularly difficult to prove these claimants constitute an “immutable” PSG, because sexual minorities are so marginalised and made invisible by the threat of persecution in Iranian society that even their very existence has been officially denied (Reeves 2009, 219–220). I would argue that the social perception approach acknowledges the fact that a social group is often, per Lord Millet’s (174) dissenting opinion in *Islam and Shah* [1999], “an artificial construct called into being to meet the exigencies of the case” – even if PSG cannot be a “catch all” (UNHCR 2011b, 92). The social perception approach is also discussed further in the next chapter in relation to persecution and relational autonomy.

1.2.2 Social perception and persecutory intent

I turn now to explain how persecutory intent is a key concept of the social perception approach being outlined, and argue that the animus of the persecutor should be a central focus in the determination of social groups and refugee status. Building on Aleinikoff’s (2003) “social perception” approach, the concept of norm deviance suggests that gatekeepers need to more thoroughly consider the persecutory intent or conduct in RSD. As early as 1966, Grahl-Madsen (1966, 175) argued for persecutory conduct to be the benchmark for refugee status, writing, “it is the behaviour of the persecutors that determines what persons shall be considered refugees in the legal

sense” (cited in McGhee 2001b, 27; see also 26–28). As we will see, emphasising the persecutory intent against the PSG unsettles the paradigm case of the “gay” asylum seeker. Alternatively, norm deviance allows us to “know” sexual minorities seeking asylum, while avoiding the ascription of hierarchical “protected characteristics” in RSD.

Adjudication of the persecutory intent to suppress norm deviance is practically achievable within RSD. It allows gatekeepers to affirm diversity of gender and sexuality in transnational decision-making on what constitutes a PSG, as well as to positively assert the social conditions that would contraindicate persecution (see further chapter seven). Persecutory intent and norm deviance must be actively assessed through constructive decision-making by those who are determining refugee status. And as with all rights claims, we must begin with the acknowledgement that RSD requires “social negotiations” that are “situational, provisional, or temporary and involve *ad hoc* discursive strategies” (Seidman 1997, 41–42).²⁵¹

The fundamental problem of a purely identity-based claim to refugee status can be likened to Butler’s oft-quoted observation that “[s]ocial categories signify subordination and existence at once. In other words, within subjection the price of existence is subordination” (Butler 1997, 20; see also Golder 2013, 13–14 on rights and subjection). Butler (2004, 31–32) argues that “norms of recognition function to produce and deproduce the notion of the human,” and applies this to transnational identity and persecution:

“This is made true in a specific way when we consider how international norms work in the context of lesbian and gay human rights, especially as they insist that certain kinds of violences are impermissible, [and] that certain lives are vulnerable and worthy of protection...” (Butler 2004, 31–32; see also 2009, 41–42).

The very existence of categories of sexual minorities is dependent on international, national, and interpersonal norms of recognition at multiple intersections. We must

²⁵¹ I believe Miller (1999) is rightly critical of *ad hoc* claims, and suggests that identity-based groupings focused on discrimination and privacy are dangerous; however, here I mean to recognise that claims in the end must often be framed pragmatically, and in the language of the UK in an asylum claim. Possibly, for example, positing that claimants like Apata are lesbians. Nevertheless, I hope that the conception of norm deviance, where possible, avoids identity as the basis for inclusion in Article 1A(2).

“first be imagined from somewhere else” before we can consider to imagine ourselves or, rather, “I cannot be who I am without drawing upon the sociality of norms that precede and exceed me” (Butler 2004, 32; see also Weeks 1995, 102–108; Eribon 2004, 56–59; Downie and Llewellyn 2011, 4–6).

I am not arguing that identity is entirely irrelevant to RSD, but that it should be understood differently and defined at least in part by the behaviour of the persecutors – the persecutory intent and conduct.²⁵² Generally, though not exclusively, what is intended by the persecution of sexual minorities is to sanction the deviant norm, because it is perceived as a threat to the normative bounds of compulsory heterosexuality in the state or society (see Wilkinson 2014, especially 365 on “moral sovereignty”). The current gap in protection is that genuine refugees may fail to evidence they do indeed “possess” a cognisable identity, and that the violence of their dispossession warrants international protection.

It would be ill-advised to engage in reductivism that makes asylum seekers’ identities and rights as individuals the sole focus, because self-definition of identities and freedoms is in large part collective (Miller 1999, 291). Yet, at the other extreme, to stake a claim to community entails some degree of reification (Sedgwick 1991, 85 on “incoherence”; Weeks 1995, 104). The challenge is to find a middle way for the purposes of RSD (see Aleinikoff 2003, especially 287). This requires locating what can be known of the dispossessed in their countries of origin, including the deprivation of full personhood and discriminatory rejection from the polity (e.g. exclusion from social, political, or economic life) on the grounds of their norm deviance.

1.3 A theory of norm deviance

The previous section set out the use of norm deviance as a strategy in the context of refugee law; here I will outline a theory of the concept and how asylum seekers’ lives may have been shaped by discrimination and persecution. This provisional theorising of sexual and gender identities and behaviours in persecutory contexts is necessary to

²⁵² Two commenters posed related questions on this point. Briefly, why not simply focus on unacceptable practices of persecution rather than social norms at all. A focus on social norms may leave out instances of persecution. I agree. Unfortunately, as discussed above, refugee law insists the PSG cannot be defined by the persecution. So like the attribute of being left-handed in the example in *Appellant A* [1997], deviance from the norm may be necessary to maintain a nexus under the Convention. Thank you to Antony Duff and Luís Duarte d’Almeida for these comments (Olsen 2015).

operationalise the legal approach of norm deviance. “Difference,” “stigma,” and “taboo” all may be used interchangeably in different contexts to refer descriptively to what I mean by “norm deviance” and “norm deviants” in RSD. Difference seems to denote the quality of being “other,” stigma often refers to the social status of an individual and its effects, and taboo has been used to describe the political dimension of social non-conformity. But I also mean something conceptual by norm deviance: norm deviance attempts to bridge the gap between sociological and legal understandings of sexual minority refugees, so we might better understand an asylum claim without impressing LGBT assumptions upon the claimant.²⁵³ First, I revisit the closet, before considering stigma, and visibility, and conclude that what can be known is persecution for the transgression of norms of heterosexuality.

1.3.1 Closetedness: Norm deviance, visibility, and harm

For sexual minorities, to “come out of the closet,” to make sexual preferences and gender identifications public is necessarily a *political* act (Weeks 1990; Altman 1993). I would argue that the term “closet” does not solely apply to sexuality and gender identity (e.g. Arendt 1967, 66–67). We all have closets, regardless of gender identity or sexual orientation, social status, or geography; “all a closet is, is a hard conversation” (Beckham 2013; see also Sedgwick 1991, 68; Katyal 2002, 129–130). Stated more analytically: the closet is not gay, but also affects those assumed to be members of a sexual minority by their appearance, lifestyle, or other stigma that might wrongfully identify them. Sedgwick (1991) and Foucault (1990) affirm that there are many silences; closetedness itself is not binary, but is instead a “speech act of...silence” which occurs in “fits and starts, in relation to the discourse that surrounds and differently constitutes it” (Sedgwick 1991, 3).

For a sexual minority, the consequences of disclosure or their previously unacknowledged status becoming public, can vary significantly depending on various intersections of sex (as assigned), age, race, class among other statuses and, particular for our purpose here, country of origin. Of course the consequences of “coming out” can also lead to harm. The link between the “closet” or “discretion” and persecution is described by the HCA (para 43) in *S395* as “the threat of serious

²⁵³ See generally Davies and Harré (1990, 51) on typification; Duggan (1995, 192–193) on dissent; Eribon (2004, 15–17) on insult.

harm with its menacing implications that constitutes the persecutory conduct” (see also Sedgwick 1991, 68; Gray and McDowall 2013, 22). Here, I examine the discriminatory effects on the everyday lives of sexual minorities to contextually develop the theory of norm deviance.

Goffman (1968) famously analysed *stigma*, and some of this work might provide some initial groundwork from a symbolic interaction standpoint for conceptualising norm deviance. Charting the etymology of stigma, Goffman (1968, 11) tells us the term originated in reference “to bodily signs to expose something unusual and bad about the moral status of the signifier.” It was designed to expose people in public as slaves, criminals, and traitors; medicine later used the term to describe physical disorders; and today stigma “is applied more to the disgrace itself than to the bodily evidence of it” (Goffman 1968, 11; see also Sedgwick 1991, 75; Urla and Terry 1995, 1–3). Importantly, the definition of stigma suggests society considers that the individual “with a stigma is not quite human” (Goffman 1968, 15; see also Cowan 2009, 114 on gender and personhood; Sheill 2009, 55). Stigma describes the status of a person that might provoke persecutory intent, but further consideration is needed of how an asylum seeker’s life is complicated by it and results in their being persecuted.

Tebble (2011) elaborates how the “ethic of unacknowledgeability” complicates and transcends public and private distinctions around sexuality (see also Sedgwick 1991, 69–71 on judicial formulations of “public” and “private”). The “closet,” specifically, in Tebble’s theory is understood to be a notion within unacknowledgeability that is a “more general operation of norms of physical disappearance and discursive silence which together constitute homosexuality’s governing taboo ethic” (Tebble 2011, 922). Tebble’s definition of taboo, like stigma, contributes to an understanding of norm deviance in the present context: “taboo [is] the status of social practices that are considered not only to be unacceptable, forbidden, and hidden from view, but also...undiscussable in the vast majority of circumstances” (Tebble 2011, 921; see also Millbank 2005, 120; 2009a). These taboos are brought to the fore in the asylum process (e.g. Johnson 2011, 70–71). Research has shown particular difficulties in disclosing sexual orientation in the first instance of claiming asylum, and later in discussing personal histories. It is suggested

that all of these difficulties are compounded by cultural and linguistic barriers (see e.g. Johnson 2011 on silence; Baillot et al. 2012 on sexual violence, especially 281–288; Bennett and Thomas 2013, 26; Ferreira 2015, 419). I turn now to apply these insights to a theory of norm deviance.

1.3.2 *Transgressing norms and uncertain risks of being persecuted*

In countries that are anxious of non-conformity and where sexual minorities are persecuted, the taboo can itself make norm deviance invisible or even inhibit its very possibility. The effect is that the threat of persecution can actually limit the available evidence of a well-founded fear of being persecuted. Consider *RM and BB* [2005] where expert evidence was given that “[h]omosexuality is a taboo subject in Iran and the family and friends of persons convicted of homosexual offences are extremely unlikely to campaign or publicise a conviction owing to the social stigma” (para 36). Moreover, although the country of origin information (COI) in that appeal suggests that it is reasonably likely Appellant E would have been at risk, adjudicators became preoccupied with whether E had committed an offence by participating in an explicit sex education video. But the real question of persecution here, as elsewhere, has less to do with the letter of the law than the indeterminate scope of harm and arbitrary violence that may be inflicted by state and non-state persecutors – the menacing risk of harm which silences – closets – the norm deviance.

As a result of a taboo, the dominant position of “normals” may be expressed through quiet disapproval, verbal and physical harassment and violence as means to ensure conformity to expectations of behaviour and appearance in the (symbolic and literal) policing of public spaces (Eribon 2004, 16, 46–47; Tebble 2011, 926; O’Neill and Bliss 2014).²⁵⁴ The norm deviance of sexual minorities is engendered by public stigma and private shame in everyday life that teaches moderation, that is, when to be unknowable in situations of unacknowledgeability (Tebble 2011, 931). Both cisgender heterosexuals and norm deviants often cooperate to keep “the Love that

²⁵⁴ This “normal” person is a simplification: it may be in certain circumstances, for instance, that widely shared norms in a society are not in fact persecutory but that a sexual minority is subjected to persecution by a minority, perhaps to which the asylum seeker also belongs, for breaking the social norms of that community. But regardless of whether the persecutory intent to suppress deviance is widely shared in that society, the relevant question still concerns the insufficiency or failure of state protection in relation to the asylum seeker being persecuted for their behaviour or identity, i.e. norm deviance. Thanks to Luís Duarte d’Almeida for his insight in a discussion of the draft (Olsen 2015).

dare not speak its name” (Douglas 1894/1984) hidden from view (Sedgwick 1991, 67–69). While it is often already an open secret, accepting the existence of the stigma or taboo is dependent on the context, in addition to the great range of consequences that could result from the norm deviance being acknowledged (see Goffman 1968, 155; Sedgwick 1991, 77–78 on unknowing; Eribon 2004, 53–55).

Sexual and gender identities are in some ways shaped by the insults, trans- and homo-phobia confronted in the process of self-making (see Sedgwick 1991, 80, 89–90; Eribon 2004, xviii). The ethics of taboo, difference, stigma, or norm deviance may be found in common with both domestic and foreign groups of sexual minorities. The deviance from social norms may result in everyday “low level” discrimination to discriminatory persecution at the other extreme (see Butler 2004, 34).²⁵⁵ However, in states such as the UK there are meaningful opportunities available *not* to be discreet about one’s non-conforming gender or sexuality, and the state is willing and able to protect sexual minorities from discrimination and violence.

Persecutory states perpetrate or are complicit in, through lack of criminal prosecution and legal protections, the discriminatory persecution of sexual minority refugees. Persecution of sexual minorities is directly linked to their transgression of social norms, and usually those norms that relate to gender and the prescribed lifestyle of a given culture (see Katyal 2002, 142–145; LaViolette 2007; Millbank 2009b, 25–26 on UNHCR Guidance). Deviance, transgressing those gender norms, invites violence ranging from casual insults to harassment and death. So the psychology of the persecutor – persecutory intent – is necessarily implicated in the well-founded fear of an asylum seeker *and* the PSG (see Aleinikoff 2003, 272, 279–280, 293–294; see also Sedgwick 1991, 18–21 on “homosexual panic;” Eribon 2004, 15 on “insult”). Sexual minority refugees are disciplined by state or non-state actors, “[preceding] from the anxious and rigid belief that a sense of the world and a sense of the self will be radically undermined” by the norm deviance (Butler 2004, 34; see also 2006, 208; Arendt 1967, 300–301; Terry 1995, 159; Wilets 1997, 1006, 1049).

²⁵⁵ However, I do not mean to suggest this could be assessed along a continuum, but is linked to complex circumstances of a particular case.

2 The knowability of norm deviance

Having defined norm deviance and situated the concept in refugee law, I turn now to consider how the concept decentres the assumption of a knowable identity. One’s “immutable” identity or “inner truth” cannot be known, but necessarily manifests itself in behaviour – both of the persecutor and persecuted – that *can* be observed. Norm deviance shows that what is knowable is that sexual and gender identity is linked to behaviour, and that refugees are persecuted by an inability to be themselves and/or because they have been (made) visible. In both instances the threat of being persecuted deprives sexual minorities of the ability to actualise non-conforming gender or sexuality.

An approach that focuses on understanding the persecutory intent to suppress the norm deviance of the asylum seeker is more appropriate and sensitive to the challenges faced by sexual minorities claiming asylum. The evidence of a well-founded fear, including social ostracism, vigilante justice, and criminal prohibitions (e.g. laws proscribing acts, identities, expression, and association) substantiates a claim to refugee status. The question should not be “is an individual ‘gay enough?’” but, rather, “is a sexual minority at risk of persecutory treatment?” Determination should consider how deviance from social norms, namely compulsory heterosexuality, may result in discriminatory persecution rather than focus on the protection of particular identities. The final part of this chapter, then, considers contradictory constraints in the definition of PSG, examples of how norm deviance is more appropriate, and concludes with thoughts on the way forward.

2.1 *Immutability and double binds*

An analysis of previous applications of case law has shown that even subtle assumptions of essential, immutable, or inborn identity-based categories are damaging (see chapter four). Before considering a series of double binds that have led to the refusal of sexual minority claims, we must first consider the dominant approach to RSD – immutability – in this context, because I argue it has led to these exclusions. As proponents of protected characteristics, Hathaway and Pobjoy (2012) argue that the protection of gay refugees should be limited to behaviour that is supposedly integral to their “immutable” identity. Responding to Aleinikoff’s paper

that identifies the immutability and social perception approaches, and favours the latter, Hathaway had previously proposed a hypothetical “social group” of persecuted roller-bladers, and argued that it would be more “reasonable” for them to “take off their skates” than to be granted refugee status for “non-fundamental” behaviour (see Aleinikoff 2003, 299). Aleinikoff refuted Hathaway’s immutability critique from a social perception standpoint: is the asylum seeker at risk of persecution, however “unreasonable” the asylum seeker’s actions? These approaches will be further considered in the next chapter in relation to persecution, and I will argue the social perception standpoint is the correct one. The relevance of the distinction between the two approaches here is that by adopting Hathaway’s approach to defining the scope of conduct relevant to an *identity* arbitrarily limits Convention protection. The notion of “immutable” identities and basing refugee protection on fixed sets of so-called “reasonable” characteristics and behaviours has excluded sexual minorities. In refugee law, the immutability approach inevitably “codifies an excruciating system of double binds, systematically oppressing gay people, identities, and acts by undermining through contradictory constraints on discourse the grounds of their very being” (Sedgwick 1991, 70; see also Johnson 2011, 62–63).

A number of double binds have constrained sexual minority asylum claims from 1999 to the present. It was necessary at one time to be “out” in the country of origin to form a successful claim, which was often coupled with the discretion requirement and/or an internal relocation alternative to avoid persecution.²⁵⁶ Further to being “out,” a claimant might have been expected to express a desire to live a political life versus a quiet private life and to show a willingness to transgress the taboo regardless of the possible consequences (see chapters four and five). Yet, other claimants that had not been discreet but “out” or taken “risks” were found not to be credible (see Millbank 2009b, 20–21; UKLGIG 2010, 9). Chief Inspector Vine’s (2014, 21–22) review of Home Office practice includes a case study and partial excerpt from a transcript in which the applicant’s evidence was “tested” and disbelieved on the basis of the context of past sexual activity. According to the report it remains “important to test the credibility of the applicant’s evidence of what appeared to have been behaviour that risked discovery, knowing the impact in his

²⁵⁶ See further chapters four and five.

country of being discovered” (Vine 2014, 22; see also Schutzer 2012, 696 on how this creates a catch-22). In other words, the current credibility test asserts that a credible asylum seeker would have avoided any risk of discovery, and been invariably discreet to avoid the persecution from which they are seeking asylum.

Adjudicators have favoured claimants from countries that enforce anti-sodomy laws to establish an “objective” well-founded fear, which has compounded the invisibility of women who are not subjected to as many formal legal prohibitions globally (see further HDT 2016). Yet, at the same time asylum seekers may have been pressed in questioning as to why they were gay if it was illegal in the country of origin (see Bennett and Thomas 2013, 26). Asylum seekers have been required to support their self-identification with tangible evidence like pictures or love letters that, when available, could be disbelieved as implausible and fabricated (Millbank 2009b, 17). Finally, there is a contradiction in the most recent controversy of asylum seekers feeling compelled, like Apata, to submit evidence containing graphic, intimate, *private* materials to “prove” their claimed *public* identities (Chelvan 2014; Dugan 2014); as we have seen, one does not necessarily follow from the other. These double binds, the systemic lag between law and social theory of gender/sexuality, and the failure of practice to constructively adapt to the changing realities of refugee protection call for a more radical, de-essentialised framework.

UK practice is evolving, most recently with Chief Inspector Vine’s (2014) report and subsequent updates to UKVI Asylum Policy Instructions (2015), both produced in cooperation with stakeholders (see also Gray and McDowall 2013, 23–24). For example, Chelvan (2014) has advocated for a framework of difference, stigma, shame, and harm (DSSH), rather than identity as such, to assess LGBTI asylum claims, and Vine (2014) cites this formulation. There are parallels between what I have outlined and Chelvan’s framework, and DSSH is undoubtedly a valuable tool for gatekeepers, and a strong critique of the failings of UK adjudication (see also LaViolette 2007). However, neither DSSH nor the updated UKVI Asylum Policy Instructions (2015) depart radically enough from the assumptions of universal “gay” identities or casts a broad enough net for the protection of potentially vulnerable

The inclusive guise of “gay” asylum persons.²⁵⁷ Stressing the immutability of identity claims to *any* degree may incur future limits to the PSG.

2.2 Norm deviance in context

This section uses several “real world” examples to explore the application of norm deviance, and illustrate how it can help identify a knowable yet still fluid social group, thus allowing for the reality of many people’s experiences to be recognised within RSD. The first example, asexuality, attempts to expose the conflict between individual and community-focused notions of sexual orientation, and how we are dispossessed of our “own” identities. The expression of gender is the second example that problematises definitive, set limits to an asylum seeker’s conduct when considering whether they should be protected by PSG. Finally, I argue that RSD must accommodate how acts and identities are imagined and practiced.

2.2.1 Reading in omissions: Asexuality, celibacy, and situational sexuality

Not unlike other sexual minorities, asexuals and celibates subvert compulsory heterosexuality, and so deviance from heterosexual norms may result in persecution in an asexual case too. Discretion or concealment on return has often been coupled with an assumption that celibacy would *prevent* persecution, from *Binbasi* in 1989 until *HJ and HT* (para 63, 92) in 2010 (Tuitt 1996, 37; Millbank 2012, 503–504).²⁵⁸ However, if a cisgender person with a norm-deviant sexual orientation (or non-orientation) was to return and practice life-long abstinence (willingly or unwillingly), the difficulties in conforming to norms of marriage and spousal cohabitation may result in discriminatory persecution. It is highly problematic if RSD dismisses as

²⁵⁷ My criticism here is more directed at a general legal perspective that apparently requires consequentialist reasoning, whereas I have situated this research outside this system and can thus be more critical. However, for example, when Chelvan (2014) speaks as a gay barrister of wanting a more feminine birthday cake when he was a child, and Millbank (2012) writes that behaviour reveals an identity, it seems to me these positions play into the hand of current judicial thinking on “finding” something that is and has always been there, or at least they do not seem to question the myth of essentialism (see further chapter seven). That is, those arguments seem to parallel Vine’s (2014, 19–20) analysis of RSD, finding an “inner truth” and how that has been “realised,” as opposed to my own argument for the process of *becoming* a sexual minority, and the factors that affect the choice to so become.

²⁵⁸ While asexuality is distinct from celibacy, for the “functional” purposes of refugee law this comparison still seems advantageous as part of a “pragmatic discursive strategy.” The blurring of the distinction seems useful to draw attention to often invisible, but very real, asexual people who are likely suffering in silence.

relevant the absence of a choice to deviate from the norms of compulsory heterosexuality without fear of persecution, or for that matter, if it assumes that the burdens of acquiescing to those norms in order to avoid persecution are merely an inconvenience.

The observation that “[i]t takes two women, not one, to make a lesbian” (de Lauretis 1991, 232 cited in Weeks 1995, 103) also extends to asexuality as an identity that cannot be constituted individually. Butler (2004, 33) observes that “we are outside ourselves as sexual beings, given over from the start, crafted in primary relations of dependency and attachment” which are “coextensive with our existence” (see also Sedgwick 1991, 81; Eribon 2004, xvii). Identities are mutable, situational, and characterised by discourses of relations that define or constitute their very existence. One’s identity can be influenced by the context such as the particular time and place, knowledge or unknowing of the identity, and subjection to power such as in the fear of violence (see McGhee 2001b, 21 on “discourse”). The absence of sexual desire must also be valid as part of the normative aspiration for full sexual minority inclusion within the PSG category. To be asexual requires socially defining oneself against others with sexual orientations, and possibly learning from other asexuals in self-definition.²⁵⁹ Even as a hypothetical, the circumstances and implications of asexuality are relevant to RSD.²⁶⁰

In particular, here the notion of choice allows us to contrast the desire to be asexual with being forced by one’s circumstances into a celibate or heterosexual life. In the case of Aderonke Apata, evidence of a previous marriage as well as the existence of her child, were used to discredit the claim that she was a lesbian. On appeal to the High Court, the barrister for the Home Office explained Apata had “indulged in same-sex activity,” but “[y]ou can’t be a heterosexual one day and a lesbian the next day” (Dugan 2015). Even post-*HJ and HT*, RSD has failed to

²⁵⁹ Social media and communication technologies underline the organic nature of many sexual minority “communities.” A prominent example of the asexual community is the organisation and web resource AVEN <www.asexuality.org> (Tucker 2011; Carrigan and Falconer 2015). Anecdotally it seems that many asylum seekers are looking for a freedom to love – to be given over to others fully, romantically. However, that observation is not meant to assert an ideal (see also Miller 1999, 295–296 on “good sexuality”).

²⁶⁰ i.e. I am not aware of a reported or unreported case regarding the asylum claim of a self-identified asexual. Chelvan (2014) briefly defends his position from an asexuality critique, and Vine’s (2014, 26) report mentions asexuality in passing and notes the case of a Jamaican woman who was “not straight enough,” but the case itself does not directly address asexuality. See also SW [2011].

grapple with *situational heterosexuality*, whereas the spectacle of *situational homosexuality*, for example in prisons and pornography, has been given ample consideration in academic and popular discourses (see Halley 1988, 941–946; McIntosh 1992; Duggan 1995, 156). While the latter can be said to exist, the former has been made into a serious issue of credibility in RSD. Moreover, the invisibility of bisexuality is compounded by the entrenchment of the hetero/homo binary as an issue of credibility (Rehaag 2009; Duffy 2015; chapter four of this thesis).

As discussed in chapter one, in particular, sexual identities cannot be inferred exclusively from an instance or instances of stereotypically associated sexual acts (Halperin 1990; Padgug 1992, 58; Whitehead 1993; Naqvi 2014). Situational sexuality sheds doubt on what exactly sexual images and other explicit evidence – the presentation of which constitutes a gross violation of human dignity – can prove.²⁶¹ Failing to fully consider the implications of compulsory and situational heterosexuality can be particularly damaging to women because of their dependent status in certain countries (see also Sheill 2009, 62–65 on women and privacy; UKLGIG 2010, especially 6; HDT 2016).

2.2.2 Gender and other expressions of identity

There are many more figurations of sex, gender, and sexuality than can be condensed into the male/female and gay/straight binaries. That includes variations within heterosexuality and homosexuality that are manifested in the *expression* of what we feel about our bodies, sexualities, and how we relate to one another. A majority of people are cisgender and still many others identify within the established sex/gender binary, but a more ethical and comprehensive approach is possible in order to account for others that claim not to have or seek to challenge gender norms.²⁶² The predominant binary notions of male/female as either/or in gender identity needs to accommodate the both/neither lived realities of many gender-variant individuals (Cowan 2009, 100–104). Everyone should have a right to self-determination of gender; this means an opportunity to resist binary categories, even if it is not possible

²⁶¹ See e.g. *A, B, and C* [2014].

²⁶² Consider “freedom *not* to hold and *not* to have to express opinions” (Lord Dyson in *RT and KM* [2012], para 32) as a principle of freedom of thought, opinion, and expression enumerated in the UDHR (Articles 18 and 19), ICCPR (Article 18), and ECHR (Articles 9-10). See also *RT and KM*, para 32-36, and Aleinikoff (2003, 269–271) on thought and association. See further chapter seven.

to escape them (Butler 2006; 2014; Cowan 2009, 111–112), and the choice to identify as non-binary or genderqueer among others, such as the increasingly recognised third gender options as equally valid to assigned or self-identified “man” or “woman” labels (Halley 1993, 99; Katyal 2002, 136–142). The urgency of reading gender diversity into PSG determinations is evidenced in a global trend toward gender-inclusion; for example, the Supreme Court of India decided the “third gender” option was a human rights issue (Feder 2014),²⁶³ and there have also been legislative changes such as Germany’s controversial “indeterminate” birth certificate option (Agius 2013; Vilorio 2013).

Like sexuality, gender expression may result in persecution through the intent to eliminate the norm deviance. Such norms are constituted at least in part through compulsory heterosexuality and the “complementary” binaries discussed above. For example, what if a transgender individual in Iran did not wish for medical intervention against their body? Iran represents a somewhat peculiar, and uniquely violent, form of compulsory heterosexuality for someone to fit the cisgender, morphological ideal of the state and, purportedly, Islam, in that it requires trans people and other sexual minorities to undergo surgery or face prosecution for homosexuality; that is, to refuse the state’s demand that trans people undergo surgery is to deviate from the prescribed masculine and feminine norms, possibly resulting in persecution or even death. Needless to say, this has resulted in the coercion of some individuals into sex reassignment rather than what we might call gender confirmation surgery (Eshaghian 2008; Bach 2013, 35–36; Jansen 2013, 19; McFarland 2014).²⁶⁴

In this example we can see that self-determination of one’s gender or sexuality can be enabled or constrained by the state and society, and so it may not have been possible for an asylum seeker to reject a norm in the country of origin (see further chapter seven). There are critical “historical, social, political, and economic conditions under which particular actions and identities become available, thinkable,

²⁶³ See *National Legal Services Authority (NALSA) v Union of India and others* [Writ Petition (Civil) No. 400 of 2012], para 62: “[A]ll citizens shall have the right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behaviour or any other form. No restriction can be placed on one’s personal appearance or choice of dressing.”

²⁶⁴ Sex reassignment is used here to denote the violation of an individual’s bodily autonomy or integrity against their felt gender or without their consent such as, for example, the case of intersex children before they are able to consent. Gender confirmation, on the other hand, refers to a medical process of configuring the body with gender identity (i.e. an affirmative term, unlike the former).

liveable, and desirable – and, conversely, unthinkable, unliveable, and undesirable” (Luibhéid 2005b, 70). In other words, the possibility of being and existing as a sexual minority is in some ways dependent on the absence of a fear of persecution, and the persecutor’s intention to eliminate deviance in that society or make it invisible (see Shidlo and Ahola 2013, 10).

Control over one’s body must include presentation as much as morphology and sexual pleasure. Dress and other presentations in the physical spaces people share are critical to an individual’s internal, psychic existence (Bach 2013, 35). Our appearances are not only “private” matters of choice. Public expression of gender and sexuality is equally important to rights of privacy in the attainment of full citizenship (Stychin 1995; 1998; Katyal 2002, 145–148), to count as human without fear of discriminatory persecution. For example, clothing can be crucial to expressions of individuality, community, gender, sexuality, religion, and other social symbolisms (see e.g. Millbank 2012, 513–514). More than an expression of one’s self, clothes are speech, “can be a political statement, and can evoke a political response” (Weeks 1995, 150). Clothes “are a form of self-expression” which can bring us into conflict with others (Hall 1928/2008, 76) because they “change our view of the world and the world’s view of us” (Woolf 1928/2008, 120).²⁶⁵ Restrictions on the public expression of identity are always political and may constitute a well-founded fear of persecution.

2.2.3 Individual subjectivity and the implications for RSD

RSD must be flexible and attentive to the axiom that “[p]eople are different from each other” (Sedgwick 2007, 22). Except in keeping with the requirement of Article 1A(2) that the risk of persecution must be on the grounds of a Convention category such as PSG, approaching determination from the perspective of norm deviance does not impose forms of identity to the legal construct of a “gay” refugee and thus better accounts for individual subjectivity. By subjectivity I mean an individual’s “particular perspective, feelings, beliefs, and desires” (Solomon 2005) pertaining to their gender or sexuality (see also Jamieson and Simpson 2013, 12–15). Challenging the boundaries of who should be protected by refugee law, what is cognisable to adjudicators, indeed, what it is possible to know, requires the de-essentialisation of

²⁶⁵ See e.g. *B* [2007], para 11 on behaviour and clothes.

categories to imagine and empathise with the multifaceted, legitimate desires of asylum seekers whose deviance from established sets of norms may result in persecution (Miller 1999, 299). It should be insufficient to say “this asylum seeker is a lesbian” if that category does not reflect the person’s own needs, thoughts, feelings, and fear of persecution. Instead, a decision-making framework must account for the infinite possibilities of gender, sexuality, and asylum seekers’ subjectivity.

A problematic assumption of adjudicators is that sexual categorisation can determine fixed, empirical facts about a person’s identity based on a natural given. Alternatively, I argue that RSD must account for figments of gender and sexuality that are (or can become) acts and identities with a diverse array of meanings (and legitimacy) in an asylum seeker’s “immutable” life (see Sedgwick 2007, xvi).²⁶⁶ The process of determination can be conceptualised differently to account for this by acknowledging fantasy, the imaginary domain, and recognising that subjectivity is inaccessible to avoid the present fixation upon an LGBT PSG.

An individual’s subjectivity, identity and behaviour, is bound to fantasy – “fantasy is part of the articulation of the possible; it moves us beyond what is merely actual and present into a realm of possibility, the not yet actualized or the not actualisable” (Butler 2004, 28). Cornell’s (1995; 2003) “imaginary domain” stipulates that people require access to imagine themselves as whole persons as an aspect of human integrity (bodily, sexual, and so on). Lacey (1998, 120) argues that the imaginary domain is impossible to achieve fully in practice, yet crucial to the “on-going project of personhood.” As Lacey (1998, 120) writes, “[t]here is an asymmetry in the imaginary domain: it cannot be captured or realized by institutions, but it can be killed or closed off by them.” In this case, the persecutory intent to impose compulsory heterosexuality inhibits one’s ability to deviate from the prescribed norms, to imagine and embody a life as a sexual minority; and the determination of “protected characteristics” can kill or close off the refugee’s subjectivity too.

²⁶⁶ As argued in the next chapter, “figments” of gender and sexuality, beliefs about one’s self, behaviour, and the PSG, whether real or imaginary, may gain legitimacy from a juxtaposition with “immutable” religious beliefs and practice protections in international, European, and UK refugee law (see Miller 1999, 301).

Predetermined “protected characteristics” are not only difficult (or impossible) to prove as “immutable,” but are also out of touch with the epistemology of identity (see Aleinikoff 2003, 297–298 on “external factors;” Goodwin-Gill and McAdam 2007, 80). To conceptualise which protected characteristics are “fundamental,” the adjudicator must impose a particular form or stereotypical ideal in order to define who is deserving of protection, which is ethically problematic; and this approach does not address how one is to determine the distinction between the protected “identity” and the relevant “conduct.” Take for example a sexual sub-culture. Are individuals that identify with dom, sub, SM, BDSM or other “kink labels” among others not deserving of protection from persecution? (see Walker 2000, 65–66). Should these norm deviants be required to change their behaviour even if they find it integral to their full sexual and life fulfilment? This particular “kink” in sexual behaviour and communities of norm deviants also blurs the heterosexual-homosexual binary that predominates activist and legal discourse (see Miller 1999, 290 on heterosexual nonconformity).

An immutable approach constructs hierarchies of sexual identity and behaviour, presupposing that one act or orientation is more important than others deemed “trivial” (see Sedgwick 1991, 8–9 on “gender of object choice”). I would, perhaps too idealistically, hope that such a hierarchy of (consensual) desires is untenable even in the legal context of refugee status.²⁶⁷ Yet, in practice, a legal strategy may require some “consensus on what constitutes acceptable behaviour” (Weeks 1995, 64). So, if sexual minorities are to be as free as heterosexuals (Lord Rodger in *HJ and HT*, para 78), and if some asylum claims may require taking “national legislation as a yardstick” (UNHCR 2011b, 14), the consensus may be that only kinks or sexualised behaviours that do not result in bodily harm are permissible, which is consistent with UK case law.²⁶⁸ However, the distinctions between harm and eroticism in UK jurisprudence are problematic and ambiguous (Cowan 2010). UK refugee law seems equally ambiguous on this issue between so-called “core” and

²⁶⁷ See e.g. Millbank (2012, especially 515) on integral/marginal conduct; Hathaway (in Aleinikoff 2003, 299) on “roller-bladers;” Rubin (1993) on the “Charmed Circle.”

²⁶⁸ This approach appears to be consistent with the 2004 Qualification Directive according to the CJEU: “only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope” (*X, Y, and Z* [2013], para 76). See further the UKHL decision in *R v Brown* [1994] 1 AC 212 on consent and bodily harm.

“marginal” breaches of human rights. This ambiguity likely stems from the contradiction highlighted by Tobin (2012, 472), that drawing upon human rights law can be problematic in that its discourse “makes no distinction between serious and non-serious human rights violations.” On the other hand, the consensus in refugee law is that not all rights violations are persecutory. However, if we reframe persecution as regards to its intent, to suppress or eliminate norm deviance, perhaps there is scope for inclusion.²⁶⁹

Discriminatory persecution must be “sustained and systemic” according to widely accepted standards, and a useful illustration of the effect is that “the ‘normal’ relationship between state and citizen” is “ruptured” (Anker 2005, 118). That breakdown leaves the refugee “fundamentally marginalized, unable to enjoy basic rights, or vindicate them through change or restructuring from within her society” (Anker 2005, 118; see also Hathaway 1991, 135–136). It is in this sense that fantasy and the ideal of the imaginary domain have implications for good judgment, in allowing decision makers to understand the relationships between the asylum seeker’s self, identities, or norm deviance and the resulting persecution; in short, how ruptures may result in their dispossession (see Nedelsky 2001a, 114; 2001b, 241). Similarly to Young’s (1990, 40) definition of the oppressed, the dispossessed “suffer some inhibition of their ability to develop and exercise their capacities and express their needs, thoughts, and feelings.” To adjudicate asylum claims of the dispossessed is to understand that the *process* of becoming one’s self is intangible and indefinite, but is one that profoundly affects the embodiment of autonomy, belonging, dignity, and integrity. In line with this body of social theory, I conclude that gender and sexuality are psychic, inaccessible, and conditional “truths,” only knowable through self-determination and yet reliant on the affirmation of others. The challenge is to “[map] out different values” of “autonomy, relationships, of belonging, of difference and diversity” in a process, such as RSD, so that “change can happen” (Weeks 1995, 100). I revisit this in the next chapter.

²⁶⁹ See Lord Dyson in *RT and KM* [2012], para 51; see also para 47-52, especially 49 on “sado-masochistic acts.”

3 Conclusion

In conclusion, norm deviance that results in persecution should be protected by refugee status, and a PSG for the purposes of refugee status could be constituted from well-founded fear of persecution as a result of norm deviance. The importance of advocating the choice and mutability of norm deviance is not an esoteric consideration, but a pressing concern for the protection of genuine refugees. An adequate framework cannot rely on the “born this way” liberal mantra, using “gay-positive” biology which implicitly links sexual orientation and gender identity to a determinative feature of the body or psyche (Terry 1995, 160–161). A successful claim on immutable grounds requires having to justify the permanence of the asylum seeker’s identity (Millbank 2009b, 15–16),²⁷⁰ entertain the coherence of the social group (see Davies and Harré 1990, 58–59),²⁷¹ and/or pretend to the ideals of the nearest-dominant subject position (e.g. L, G, B or T) relative to their norm deviance to form a successful claim (see Davies and Harré 1990, 46).²⁷² Finally, I would stress again the grey area between norm deviance and the persecution where they may be mutually constitutive, and that one informs the other (Young 1990, 47; Eribon 2004, 18–19).

What is “true” of Aderonke Apata’s claim is not that she is a lesbian – though she may be. Like all identities, the meaning of lesbianism is fluid, contingent, and subject to the personal experience of the claimant, including discourses that define and differently constitute the identity such as the persecutory intent to enforce conformity. Apata is a norm deviant who has avowed non-normative same-sex relationships and, at least situationally, has evidenced same-sex relations that would

²⁷⁰ Such as in the case of Apata, whose life is riddled with so-determined evidence of heterosexuality and, therefore, her present self-identification was disbelieved (Dugan 2015). Apata could not be a *real* lesbian.

²⁷¹ In spite of the apparently settled fact that the coherence of the social group is no longer an explicit pre-requisite to a PSG-based claim (see *Islam and Shah*), I would note that the implicit reasoning of coherence arises in the justification that “I” am one of “them” (see Sedgwick 1991, 79). How do you know you are a lesbian? What gay bars have you frequented? The questioning of evidence necessarily invokes coherence, even if to a lesser extent than more traditional interpretations of PSG.

²⁷² Again, while I acknowledge that the imperative of gatekeepers to ensure the acceptance of a genuine claim may require strategic essentialism, and that such an outcome is just, I mean here to critique the framing of the issue to find a more constructive way forward through norm deviance. But gatekeepers should consider the “epistemological authority to know what (and who)” (Halley 1993, 88) as “constructivism in practice” (Sweeney 2007), viewing strategic essentialism with a focus on *how* a person, not what (or who), is a genuine refugee. In other words, establishing identity and persecution should focus on how the evidence or facts are *made true* by gatekeepers, rather than what is simply true or false.

place her at risk of persecution in Nigeria. Apata was dispossessed in Nigeria, unable to actualise needs, thoughts, feelings, and desires without transgressing compulsory heterosexuality and risking persecution. Who or what asylum seekers are or do that sets them apart as a PSG is a necessary nexus to the Convention. However, the inquiry must also consider how they have been deprived of the very opportunities to deviate from compulsory heterosexuality due to the threat of persecution. The next chapter considers how relational autonomy enables us to imagine ourselves otherwise – to identify and practice different ways of being sexual and performing gender – which should be protected from persecution.

Chapter Seven – Relational autonomy, embodied rights, and the judgment of persecution

While the previous chapter considered norm deviance as a way of identifying sexual minority refugee claims under “PSG,” this chapter develops a framework for defining the conditions to realise a life free of persecution. It does so by developing the theory of *relational autonomy* in the context of RSD: a relational autonomy approach requires consideration of the positive conditions for human flourishing, and the assessment of persecution resulting from norm deviance and dispossession. The infringement of relational autonomy constitutes a threat to life and liberty, and is persecutory. In this chapter, I argue that it is the persecutory intent to deprive a person of *rights to relate* which may constitute a well-founded fear of persecution. I offer both a conceptual explanation of relational autonomy and consider how it may be applied in the judgment of persecution.

Part one considers how relational autonomy is necessary for the concept of norm deviance to be meaningfully operationalised. To illustrate the theory in practice, this chapter argues that assessing the autonomy of a claimant – whether there is a well-founded fear of persecution – requires consideration of both the legal status of sexual minorities and the relational, social conditions in the country of origin that would contraindicate persecution. In addition, a “social perception” approach requires gatekeepers to focus on the persecutory intent. Part two then argues that RSD requires imagination, empathy, and giving claimants the “benefit of the doubt” where there may be no immediate or formal “facts” in the active assessment of how truth, such as credibility, is constructed. I conclude by suggesting that assessing the deprivation of relational autonomy, including equal rights and social inclusion, is a sociologically and legally grounded approach to judging persecution that is attuned to sexual and gendered difference.

1 Applying relational autonomy to refugee status

It is relational autonomy that ensures the conditions of human flourishing, which make autonomous expression of gender and sexuality possible. The word “autonomy” comes from Greek and is derived from the roots “self” and “law” to

mean – having one’s own laws (see Lindley 1986, 5; Hepburn 2005). In an important sense, deviating from prescribed norms involves giving oneself new rules and definitions, both sexual and gendered. Yet, just as the concept of norm deviance cannot exist independently of normativity, neither can autonomy exist outside of society. Having one’s own laws or norms is dependent on relations with others. Part one of this chapter now considers how relational autonomy enables sexual minorities to thrive, and how the deprivation of rights that empower relational autonomy are persecutory. Sexual minorities require equal treatment of their rights, including privacy, as well as access to the public sphere, to achieve autonomy.

The first section below situates relational autonomy in refugee law as a “social perception” approach, before considering opposing theories of autonomy and how they may be reconciled. Relational autonomy requires reconceptualising rights, and focusing on how they foster individual agency. I use “rights to relate,” “relational rights,” and “embodied rights” somewhat interchangeably to show the conceptual problem from different angles. The phrase “rights to relate” builds on Waaldjik’s (2013) term “right to relate,” which aptly summarises the international legal struggle for sexual minorities more broadly in the recognition of relationships. “Relational rights” asserts that rights *are* relationships (see e.g. Young 1990; Nedelsky 1990; 1996b), and the phrase “embodied rights” emphasises how rights are or should be enacted in practice, through embodiment, to be meaningful. Part one concludes with sections on how relational autonomy applies to individual self-determination and, finally, the essential value of community.

1.1 *The social perception approach and persecution*

The concept of norm deviance moves the determination of PSG towards a social perception approach of how the asylum seeker is discriminated against, threatened, and dispossessed by the persecutory intent. As mentioned in the previous three chapters, one critique of *HJ and HT* [2010] is that the court’s judgment failed to acknowledge that refugee status should not be awarded for “trivial” behaviours, which are deemed not to be fundamental to the “immutable” gay identity (e.g. Hathaway and Pobjoy 2012; cf. Goodman 2012, 425–426).²⁷³ A “social perception”

²⁷³ See also Hathaway’s analogy of the persecution of roller-bladers and argument that it would be more reasonable for them “to take off their skates,” and Aleinikoff’s response discussed in chapter six

analysis, on the other hand, focuses not on determining what “protected characteristics” are immutable, or what characteristics an individual should or should not be required to change,²⁷⁴ but asks: is the asylum seeker at risk because they are or will be perceived as deviant and persecuted, however “unreasonable” (or “trivial”) their actions may be?

In chapter six, I showed how using a framework of norm deviance means that a plethora of acts and behaviour are not, and should not be construed as trivial (e.g. BDSM, genderqueer). In contrast, Hathaway and Pobjoy (2012, 335) argue the Supreme Court failed to “grapple with the scope of activities properly understood to be inherent in, and an integral part of” the status of being a gay refugee of in *HJ and HT*, implying that there is a duty to adjudicate and exclude from refugee status what is “trivial” to sexual minority identities (cf. Goodman 2012; Millbank 2012; Weßels 2013). To fail to exclude the “trivial” could open the proverbial floodgates and undermine the “consensus” on which the Convention is built (cf. Aleinikoff 2003; Hathaway and Pobjoy 2012). However, chapter five suggested that “consensus” is a problematic aim in refugee law, and can undermine the purpose of refugee protection. In order to apply a more appropriate interpretation of the Convention, these arguments for “consensus,” which restrict the recognition of refugees by delineating characteristics and conduct that are protected (in contrast to those that are “trivial”), must be refuted.

Anker and Ardalan (2012, 533–534, see also 538–539) suggest that instead of clarifying the scope of protected grounds in sexual identity claims, we should look at “the context of persecutory harm;” it would be “analytically clearer to re-frame what activities should be protected under the Convention in terms of violations of core rights.” While I do not support Anker and Ardalan’s apparent desire for specified limits to the construct of refugee, their human-rights based approach seems pointedly less discriminating than, as Hathaway and Pobjoy (2012) have advocated, denoting a scope of (immutable) activities integral to the status of being gay.²⁷⁵ Alternatively,

(Aleinikoff 2003, 299). This chapter argues for a position similar to Aleinikoff’s analysis: is the asylum seeker at risk of persecution, however “unreasonable” the asylum seeker’s actions?

²⁷⁴ See e.g. *K and Fornah* [2006], para 11-16, 57-58, 97-101, 113, 118 on immutability or protected characteristics and the social perception approach.

²⁷⁵ For example, Hathaway and Pobjoy (2012) would exclude a right to go to Kylie concerts; while perhaps Lord Rodger’s (*HJ and HT*, para 78) “trivial stereotypical examples” are problematically

Millbank (2012, 510–512) refutes the protected/trivial distinction because the *activity* does not cause the persecution or form the basis of protection, but in fact reveals the *identity* protected by refugee status (see also Weßels 2013, 56). Still, this approach seems too wedded to the assumption of an immutable identity. Instead, the social perception approach shows that “to adopt a ‘non-triviality’ requirement [for refugee status] would be to give the persecutor *carte blanche* for groups that associate for ‘non-fundamental’ reasons, that is, to permit the persecutor to accomplish precisely what he or she wants” (Aleinikoff 2003, 300), namely the suppression of norm deviance (see Inlender 2009, 359).²⁷⁶

Relational autonomy, as set out in this chapter shows that in establishing the “truth” in an asylum claim, RSD should be focused on the persecutory intent, rather than the identity of the asylum claimant. RSD has inappropriately focused on establishing identity through the sexual acts of the claimants, probing evidence for credibility through “confessions of the flesh” and incitement to discourse of their sexuality (Foucault 1980, 215–216; 1990; Salter 2007, 58–60; Golder 2013, 12–14). I have argued that focusing on “essential” identities may result in the distortion of credibility, reinforcing assumptions of monolithic narratives of sexual and gender identity. Problematic assumptions of identity and credibility are especially evident in Chief Inspector Vine’s (2014, e.g. 21) report.²⁷⁷ Vine’s (2014) report into the Home Office’s handling of sexual orientation-based claims recommends that adjudicators should focus on open questions which “[enable] the applicant to provide a narrative about realisation of their sexuality” (Vine 2014, 19), and quotes a First Tier Tribunal

culturally relative, he was actually referring to *expression* and *association* not to particular activities, and those are certainly not “trivial” rights. See also Tobin (2012, 473–474); Millbank (2012, 514–515).

²⁷⁶ See also Haines QC in *Refugee Appeal No. 74665* [2004], para 114: “By requiring the refugee applicant to abandon a core right the refugee decision-maker is requiring of the refugee claimant the same submissive and compliant behaviour, the same denial of a fundamental human right, which the agent of persecution in the country of origin seeks to achieve by persecutory conduct;” however, see also para 120–121, 124 on the Authority’s view of “core” rights and avoiding “absurd results.”

²⁷⁷ One particular *Observer* article, “Home Office wouldn’t believe I was gay: how do you prove it?” (Townsend and Taylor 2014), quoted sexually explicit lines of questioning by adjudicators (see also Taylor and Townsend 2014). This prompted changes in the handling of the claims and commissioning of Vine’s report (see also API 2015). The reason for including a number of actors in the definition of “gatekeepers” is illustrated by the apparent, immediate impact the article had according to senior managers who acknowledge the spotlight “applied extra pressure...to improve [Home Office] handling of sexual orientation cases” (Vine 2014, 41). The media, as in this example, activist groups or “stakeholders,” and a myriad of others are implicated in the determination of “genuine” refugees (see Lacey 1998, 9; Nedelsky 2001a, 114–115; 2001b, 242–243). The report is notably silent on issues of well-founded fear of persecution, focusing instead on the assessment of sexual orientation.

judge who has stated that questioning sexual orientation “should focus on an *‘individual’s inner life’*” (Vine 2014, 20). However, one cannot know a claimant’s “true” inner identity, whether it is immutable or not.

The self-identification of an asylum seeker as, for instance, gay may need to remain a centrepiece of PSG-based claims as a strategic imperative. But the observable social circumstances such as those documented in country of origin information (COI), which suggest persecutory intent against that claimant’s norm deviance, are a clearer indicator of a genuine asylum claim than merely establishing the status of the claimant as “gay.” For example, the Adjudicator accepted the facts that RG was a homosexual and HIV positive. In Colombia, these were at-risk groups targeted by paramilitaries, and “prostitutes, drug users, vagrants and people with mental disabilities [were also] often murdered by extremist elements in what is described as a *social cleansing* [emphasis added]” (cited in *RG* [2006], para 3).²⁷⁸ That RG was or would be perceived to be gay in this circumstance may be important to his being identified as part of the PSG, but which of his “activities” should be protected is not relevant to the consideration of the level of risk that is indicated by the broader evidence of the persecutory intent, in this instance, for “social cleansing.”

By refocusing the assessment of persecution upon whether or not the asylum seeker was able to exercise relational autonomy, refugee protection can affirm sexual and gender non-conformity, and diversity, by determining if the COI and other evidence indicates a persecutory intent to suppress or eliminate the deviance. Having defined the terms of relational autonomy and having put it in the context of refugee law, I turn now to consider theories of autonomy in greater detail.

1.2 Seeking reconciliation between perspectives on autonomy

Debates between the proponents and critics of liberal rights on issues of autonomy, individualism and the collective, have covered many of the issues I discuss here. First, this section argues that the notion of sexual autonomy is helpful – with the qualification that sexual autonomy must be achieved *relationally* if it is to provide

²⁷⁸ See also *B* [2007], para 12, where the Adjudicator referred to a “pledge...to kill a variety of people who they consider offend Islamic principles,” including immodest women, substance users, and the unfaithful; *HJ* [2008], para 19, on “crimes against the public virtue” in Iran; *HS* [2005], para 77, 86 for discussion of crimes punishable by death for “spreading corruption on earth.”

the necessary conditions for people to thrive. Before proceeding, I flag several cautions against advocating for autonomy. Some of these critiques are general and some are specific to refugee status; foregrounding these concerns will allow me to build an argument in support of relational autonomy.

Sexual autonomy is “the freedom to determine one’s own sexual experiences, to choose how and with whom one expresses oneself sexually” (Lacey 1998, 104). Sexual autonomy has been conceptualised as a facet of a larger trend in what has been called the democratization of intimacy (Giddens 1992; cf. Jamieson 1999, 477–482; 2005, 5–6, 10; 2012, 1.5), resulting from increasing individualisation and emphasis on self-determination since the 1960s (Weeks 2007, 72–85; see also Sheill 2009, 67; Frank 2012). Autonomy (or self-determination) is a legally useful concept, but one also grounded in sociological changes (see further Jamieson and Simpson 2013, 15–20). Weeks (2007, 84) writes that gay liberation was concerned with “freeing individuals from the burdens of history,” including “tradition, patriarchy, homophobia or heteronormativity,” and at the “heart is the assumption of individual autonomy.” Socio-economic changes also propelled the shift toward individual autonomy (D’Emilio 1998; Walker 2000). Crucially for refugee law, “the protection of individual autonomy and corporal non-interference” (or bodily integrity) is at “the philosophical core of human rights” (Anker 2005, 115; see also Tobin 2012, 460). Further, Katyal (2002, 173) proposes a sexual autonomy framework for transnational legal advocacy to work within and protect sexual diversity, stressing that autonomy “equalizes one’s sexual and identity preferences by focusing on the *act of choosing*, rather than *the gender or identity chosen*, as a focal point of protection” (see also Morgan 2006, 150–153; Wilkinson 2014, 373–374).

In contrast, Nedelsky (e.g. 2011) and other relational autonomy theorists (e.g. Mackenzie and Stoljar 2000) have developed a body of social and legal theory that focuses not only on the protection of individual rights, but also examines how relationships foster autonomy. The key conceptual point of departure from traditional theories of autonomy is the observation “that autonomy is not a matter of *independence*, but of interdependent relationships that foster it” (Nedelsky 1996a, 83). Relational autonomy is applicable in a number of fields (e.g. Mackenzie and Stoljar 2000, especially 213–299; Beiner and Nedelsky 2001; Nedelsky 2011). I

apply relational autonomy to questions of judgment and diversity in RSD, finding it highly relevant when considering the threats of persecution faced by those who wish to live “deviant” genders and sexualities in their countries of origin.

A number of researchers have criticised any use of autonomy (even attempts to make it relational) in disciplines related to and relevant for this project. In law and politics, Lacey (1998) argues that autonomy is too individualistic, forgoes consideration of “the conditions under which choices can be meaningful” (Lacey 1998, 117), and reinforces the public/private dichotomy of liberalism (Lacey 1998, 72–86; see also Sherwin 2011, 13–14; Jamieson and Simpson 2013, 19). In human rights and refugee law in particular, critiques of sexual autonomy have included that it is Eurocentric, abstract, patriarchal, and ultimately fails to critique oppressive institutions – thus not accounting for intersectionality (Sheill 2009, 66–67; see also Oswin 2001, 349; Hayden 2006, 480–483). Walker (2000, 71) emphasises self-determination “to avoid the liberal notion of the fully autonomous individual and to convey instead some notion of partial autonomy or agency.” Miller (1999, 298) cautions that although autonomy (and self-determination) has strong appeal, “[i]t is too impoverished an idea” to support sexual diversity.²⁷⁹

Moreover, according to Butler (2004) a relational view of autonomy is inadequate. To argue “a relational view of the self over an autonomous one, or trying to redescribe autonomy in terms of relationality,” does nothing but “[suture] the rupture in the relation we seek to describe, a rupture that is constitutive of identity itself” (Butler 2004, 19; see also 1991, 14). From a social theory perspective, individual autonomy superficially aided by a relational conception is insufficient for describing how people live through one another, shaping their own identity (see Jamieson 2002, 508–509, 515; 2012, 1.4). Instead, Butler offers a conceptualisation of *modes of being dispossessed* (2004, 19; see also chapter six of this thesis).

In one way or another, none of these authors necessarily rule out claims based on autonomy. For example, Butler (2004, 20) discusses how recourse to autonomy must be sought as a means to frame arguments for rights, such as protection from persecution in refugee status. While rejecting on theoretical grounds the notion that

²⁷⁹ Miller (1999, 288) details that in addition to self-determination, other advocates have focused on autonomy, non-discrimination, bodily integrity, tolerance and diversity, and sexual liberation. It seems to me that these concepts are interrelated and cannot be realised without conjunction with the others.

“autonomy” can helpfully be supplemented by “relationality,” Butler (2004, 20) observes the “political predicament” where rights are conferred on individuals, groups, and classes of people which assumes “bounded beings, distinct, recognizeable, delineated, subjects before the law.” Broadly, lesbians, gays and bisexuals argue for sexual freedoms, trans people for self-determination, and intersex people to be free from non-consensual medical interventions that would make them “fit” the normative morphologies.²⁸⁰ The articulation of these freedoms cannot be made “without recourse to autonomy,” and these claims must be made even though “[b]odily autonomy,” in reality, “is a lively paradox” (Butler 2004, 21). In a sense, one *must* make these claims to autonomy and frame them in the language of rights. Relational autonomy merely draws upon the strengths of sexual autonomy claims. The next section considers how reconceptualising rights as relational allows for an appropriately adaptable framework for RSD.

1.3 Embodied, relational rights

Although the role of rights in refugee law may be contested, I argue that the violation of relational autonomy is an appropriate ethical and practical standard for determining whether there has been persecution on the basis of norm deviance. Like identity, rights are not things that people “have” but relationships crucially embedded in social practice. “Rights are not fruitfully conceived as possessions” (Young 1990, 25; see also Bentham 1987, 50), and can only be meaningfully realised, like acts and identities, with and through others (see Nedelsky 1996a, 71; Butler 2004, 19). Therefore, context is essential for the realisation of rights, which should be understood as “ideals [that] are relational and socially inclusive” (Somers and Roberts 2008, 412). International norms of human rights are “[n]onsense upon stilts” (Bentham 1987, 200) unless they are embodied “in a complex configuration of relationships and institutional arrangements” (Somers and Roberts 2008, 413; see also Nedelsky 1996a, 74–75). While there may be utility in deploying rights as boundaries for protecting the individual autonomy of asylum seekers, in reality

²⁸⁰ Consider e.g. *K and Fornah* [2006], especially Baroness Hale, para 96, where the practice of FGM was accepted to amount to persecution. In a similar way, forced alteration of an intersex person’s body or Tehran’s policy of encouraging sex reassignment surgeries upon sexual minorities violates bodily autonomy and warrants international protection.

autonomy cannot be achieved without conceiving “rights as structuring relationships” (Nedelsky 1996a, 77). As Young asserts:

“Rights are relationships, not things; they are institutionally defined rules specifying what people can do in relation to one another. Rights refer to doing more than having, to social relationships that enable or constrain action” (Young 1990, 25; see also Nedelsky 1996a, 76).

Without a social body to enable rights, including kinship, community, and a state willing and able to enforce them, rights are meaningless and not protective factors for a minority against the conflicting values of the majority. This is especially evident where asylum seekers have been persecuted, dispossessed of the capacities to develop their gender or sexuality relationally. That is to say, the loss of relational autonomy should constitute a well-founded fear of persecution. RSD should focus on how rights can be emptied of meaning and significance through the denial of relationships.

The categories enshrined in Article 1A(2) and the notion of well-founded fear have evolved through time. I am arguing that they must further evolve to recognise relational autonomy, and the concept of norm deviance. When rights are viewed as relations existing in social practice, refugee rights to protection begin to transcend minimal liberal conceptions of harm such as state violence, privacy, legal prohibitions, and the denial of free speech and association (see Weeks 2007, 222; Golder 2013 on Foucault). The liberal conception of rights is useful for establishing “autonomy” in a traditional sense, such as the security of an individual and their right to life (see Oswin 2001, 360; Golder 2013, 9), but fails to ensure their rights to positively flourish. As Oswin (2001, 359) has argued, “[t]he reification of rights as boundaries draws attention away from the ongoing process of determining them.” I would add that to approach rights as boundaries appears to contribute to the specification of “normal” rights holders whose activities adjudicators find acceptable (Hathaway and Pobjoy 2012, 355), which excludes the “perverse,” “bad queer,” or uncategorisable other (see Rubin 1993; Johnson 2007, especially 109; Weber 2015; chapter four of this thesis).

The relational autonomy of norm deviant asylum seekers requires assessment of the conditions under which one can be fully human, and would see them not

necessarily as an “additional” category of proprietary rights holders, but as open, fluid, and equal members of a heterogeneous society (Young 1990, 119–120; considered further below). The foundational “bare” or “boundary” rights, which specify an individual’s “ownership” of their body, thought, and privacy, are necessary for protection from state violence, but insufficient (see Ferreira 2016, 13 on a “floor of rights”).²⁸¹ When rights are seen as relational they empower choices that are required for norm deviance, such as those to openly live alternative configurations of relationships (e.g. polyamory), to control one’s own sexed body (e.g. trans, intersex), and to challenge and redefine what counts as consensual sex and harm (e.g. BDSM).

Refugee law should embrace a wider programme of rights in the adjudication of persecution (Sheill 2009). As was shown in chapters four and five, persecution by a state needs to be defined by more than definite acts of torture, detention, and state-sponsored discrimination, and should also include restrictions on freedom of expression, association, and family life in order to benefit sexual minorities (Miller 1999, 294; Anker 2005). RSD that considers relational autonomy is an opportunity for asylum seekers to be repossessed of the conditions of human flourishing denied to them by their country of origin. Protecting relational autonomy allows people to be autonomous in the sense of having control of one’s body, acts, identity, but also the right to live openly without fear – to have and be had by a community.

1.4 Self-determination and choosing norm deviance

People are not born capitalists, communists, separatists, nationalists, Christians, Muslims, Jews, Sikhs, Hindus, or even, perhaps, into a particular race or ethnicity. They become religious, partisan, or members of other particular social groups; gender and sexuality should equally be “about choice rather than destiny” (Weeks 1995, 5), in order to assert that individual fluidity is legitimate, genuine, and indeed *credible* in RSD (see Figure 3, below). Whether or not people’s identities are immutable, they should be able to choose their life scripts – accepting, rejecting, or recreating the narratives of gender and sexuality as means to live their lives, to

²⁸¹ Recall, for instance, Jain [1999], considering homosexuals may be refugees if they were persecuted for their *private*, legitimate conduct.

understand themselves and to be understood by others (Cornell 1995; 2003, 144).²⁸² Protecting the choices made by sexual minorities and acknowledging how these deviances may result in persecution avoids any debate over degrees of immutability in Convention categories and precludes an implicit hierarchy of who or what is more legitimate or genuine and deserving of protection. Relational autonomy seeks to assert that the judicial authority over identity, the asylum seeker’s “inner truth,” should be restricted. It is the deprivation of embodied rights to choose and practice gender and sexuality that is persecutory.

Therefore, people’s capacities for choice to identify with and practice different ways of being sexual, gendered, doing family, or being in love, as well as whether to be in or out of particular communities (Nedelsky 1996a, 79; Lacey 1998, 119), should be a focal point of the PSG for sexual minorities and how this results in persecution.²⁸³ While the choices of gender and sexuality may be limited, configured by social relationships and constraints of social context (Jamieson 1999, 482; Katyal 2002, 169–170; Jamieson and Simpson 2013, 7), the focus of RSD should shift from identity categories to protection of self-determination of gender and sexual expression (D’Emilio 1998; Walker 2000, 70). Regarding international norms, Walker (2000, 71–72) argues that it is through self-determination that sexual minorities can express themselves and develop relationships. Along the same lines, Katyal (2002, 168–169) argues for a framework of sexual autonomy that is deliberative in negotiating personal subjectivity and external expression, includes

²⁸² Several commenters have voiced concern about drafts of this thesis over the suggestion sexual orientation is a choice; one going so far as to caution that the result is to make a mockery of homosexuality, when the same scrutiny is not (in reality) placed on heterosexuality. A visceral reaction to the idea can be immediately linked to an all-too-common coming out story, when parents, friends, or others outcast the individual for that person’s “choice,” and dismiss a community for “unnatural” perversion. Social conservatives have admittedly used framing sexual orientation as a choice to justify discrimination, persecution, and even destruction. Nazi physicians, for instance, argued that the research showing homosexuality was heritable only served the interests of “those who wished to believe that homosexuality was not a matter of choice,” whilst the state was moving toward the destruction of the “pathology” threatening public health (Proctor 1995, 186–188). In fact, “a degree of choice” in coming out and association was used to exclude gay asylum seekers in the UK in the 1990s (McGhee 2001b, 23). I empathise with sensitivity to “choice,” but argue that it is, at minimum, a necessary evil in this context. While I believe the following revision neuters part of the argument, an alternative might be: “People should be free to choose to realise their sexual orientation and gender identity” (suggesting it “is” already within them).

²⁸³ See Miller’s (1999, 301) description of the similarities between Article 18 of the ICCPR and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: the right to have or not have a belief or identity, recognition of the relationship between an individual and the community, and the connectedness of private and public practices (see also Aleinikoff 2003, 269–271; Hathaway and Pobjoy 2012, 358; Waaldijk 2013, 165–166).

conduct with or without attachment to particular identity categories; expressive in protecting public identifications; and is, therefore, more appropriate for incorporating gender and sexuality into domestic and international contexts (see also Schulhofer 1998, 108). In sum, standards of protection should endorse the autonomy of individuals through assessment of the disembodiment of relational rights.

1.5 Community, concealment, and material belonging

The paradox of autonomy is that society “is the source of autonomy as well as a threat to it” (Nedelsky 1996a, 71). For rights to be embodied and meaningful, the open participation and inclusion of sexual minorities in the civic life and economy of any country should not be the exception but a basic expectation, stemming from, but not substituted by, judicial and political equality (see Stychin 1995; 1998). As argued above, rights are, quite pointedly, meaningless unless they are grounded in practice through “inclusion in a political community” (Somers and Roberts 2008, 395; see also Arendt 1967, 267–302; Nedelsky 1996a, 72). Waaldijk (2013) has recently articulated the concept of “the right to relate” as underlying the global struggle for sexual minority rights; “the right to establish and develop relationships” *openly* has been increasingly “recognized as one aspect of the human right to respect for one’s private life” (Waaldijk 2013, 168). Likewise, “[i]nstead of defining the private as what the public excludes,” relational autonomy in RSD should consider private life as that which “any person has the right to exclude others from” (Young 1990, 119; see also Persson 2014, 260–261).

Private life is only achievable through a constructive relationship with the public sphere. In human rights law “privacy has been said to constitute a right to individual self-determination,” and the notion of autonomy underlies the right in relation to interference in both public and private spheres (Tobin 2012, 459). In striking down South Africa’s anti-sodomy laws, its Constitutional Court affirmed that the right to privacy is based on the notion of a necessary space to have one’s own identity, and being protected from the conflicting values of the community.²⁸⁴ But the notion of privacy cannot “presuppose that a holder of rights is an isolated,

²⁸⁴ *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, Case CCT 11/98. In using this case as an affirmative example, I should highlight it would seem that Sachs J did express a more socially conservative view than this thesis of when the state can and, perhaps, should interfere in private life, which he wrote is not without limits.

lonely and abstract figure possessing a disembodied and socially disconnected self” (Sachs J, para 117). Sachs J observed that even with regards to the right to privacy, society must “promote conditions in which personal self-realisation can take place” (para 116), because “people live in their bodies, their communities, their cultures, their places and their times” (para 117).²⁸⁵

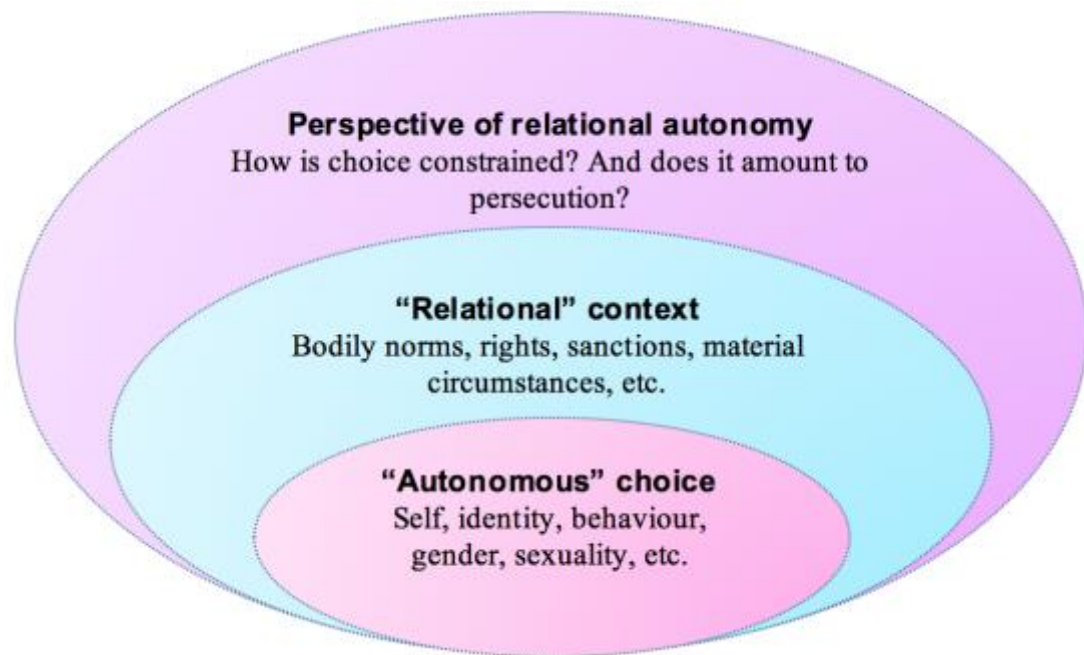
Young (1990, 220) suggests the aspiration for a “heterogenous public” relies on two principles: “(a) no persons, actions, or aspects of a person’s life should be forced into privacy; and (b) no social institutions or practices should be excluded a priori from being a proper subject for public discussion and expression.” Applied to refugee status, persecutory states have often excluded sexual minorities from the public by asserting “moral sovereignty,” where “human rights are contingent on the observation, especially in public spaces, of local traditional values, which are seen to represent the values of the majority” (Wilkinson 2014, 365). When an individual’s autonomy is at odds with the conflicting values of the community, “refugee law is concerned with an individual who wishes to dissociate herself from that consensus” (Anker 2005, 114). In other words, the asylum seeker “asserts that, notwithstanding what her culture may believe, her beliefs are in line with international [human rights] standards” (Anker 2005, 114), and/or those of the UK (UNHCR 2011b, 14). Public prohibitions of asylum seekers’ relationships, or threats that being open may result in persecution, deprives them of “universal” and “non-discriminatory” enjoyment of human rights to expression and association. To exclude sexual minorities from the public sphere could therefore constitute discriminatory persecution (see Young 1990, 40–42; Parekh 2012, 274–277 on structural injustice).

Human rights, like citizenship, require more than political tolerance. Social inclusion, such as a right to a livelihood, is necessary to be fully human (Somers and Roberts 2008, 395). Thus, the relational autonomy of asylum seekers requires gatekeepers to consciously make strong links between economic and social rights in RSD (Hathaway 1991, 117–119; Walker 2000, 72; Parekh 2012, 278). If the “integrity” of the Convention requires the *en masse* exclusion of refugees through

²⁸⁵ See further Ferreira (2016, 8–9) on “ubuntu” or “humaneness,” a notion that has “become a constitutional value” in South Africa that emphasises “interdependence, respect and equality;” Tobin (2012, 461–463) on Sachs J’s legal reasoning; Millbank (2012, 507–508) noting UNHCR Guidance in 2008 that rejected discretion in RSD with reference to Sachs J (para 113).

specification of limited categories, the non-discriminatory objectives of refugee law should at least allow for the recognition of an asylum seeker’s right to social belonging and economic security (Young 1990, 53–55 on marginalisation; Miller 1999, 295; Anker 2002, 150; Aleinikoff 2003, 290–292 on discrimination). Returning an asylum seeker to a state that would confine that individual’s existence to private life and deny them rights to open relationships essentially co-opts the UK in the inhuman and degrading treatment that can constitute persecution (Sheill 2009, 63).

A relational perspective of autonomy might be summarised as potentially both enabling and constraining – with the political community being the empowering force behind an individual’s autonomy, but also possibly the hindrance, source of dispossession, and persecution. RSD thus requires a nuanced consideration of contexts: “the power relations that shape individual action, of the subtle coercion of daily life which limit autonomy, as well of the greater pressures of social life that provide the limits as well as the opportunities for social action and individual agency” (Weeks 1995, 143). I have argued that choice is central to the normative claim to autonomy, but this should not be mistaken as a belief in the notion of absolute choice (Jamieson and Simpson 2013, 7). Yet, to different degrees, people do (or should) have agency to choose their life course. In this sense the critical question seems to be: how does context or structure constrain choice? In other words, RSD should consider how contextual constraints on the notion of autonomy can be persecutory (Figure 3).

FIG 3 Relational autonomy and persecution²⁸⁶

While these limits on autonomy affect all sexual minorities, women and trans asylum seekers may be particularly affected by deprivation of material security and economic opportunities. Citing the Montréal Principles on Women’s Economic, Social and Cultural Rights (Montréal 2002), Sheill (2009, 65) highlights that the sexual autonomy of women in particular “cannot be separated from the material conditions of their lives,” which affect “their opportunities for sexual exploration, self-determination, and other aspects of the lesbian experience” (see also Lacey 1998, 72; Walker 2000, 72; Inlender 2009; Parekh 2012). Similarly, trans individuals may be more vulnerable as they may be more visible, due to the often public manifestations of gendered norm deviance, and become immediate targets for the deprivation of economic rights (Katyal 2002, 139–140, 155). Bach (2013, 35) rightly criticises the current Asylum Policy Instructions on gender identity for neglecting that an asylum seeker’s development and expression of their gender identity “is often

²⁸⁶ This figure is my own working conceptualisation and, to my knowledge, I have drawn upon the literature cited but no other visual source to create it. Importantly, the lists of examples are non-exhaustive. Moreover, choices and contexts particular to the protection needs of other Convention refugees could be used too, such as for religion: *choices* of religious conversion, apostasy, worship, or proselytizing, and *contexts* of family and local religion, state theocracy, censorship of evangelism, and so on.

The inclusive guise of “gay” asylum not socially, medically and/or legally possible” in their country of origin (see API 2011b; see also Jamieson 2002, 516).

RSD “is a litmus test of our humanity and compassion” (Hale 2015), an indicator of community values, including the public and private intimacies of our relations. The individual political act of coming out and claiming asylum “underscore[s] the value of being beside oneself, of being a porous boundary, given over to others” (Butler 2004, 25; see also 2009, 13–14) in seeking “individual freedom and social belonging” (Weeks 1995, 29; see also Nedelsky 1996a; Lacey 1998, 119–120). Good judgment in RSD stems from “responsibility...for the flourishing of the community, [and is] an assertion of what kind of associations we want to have with others” (Wagenaar 2004, 652; see also Hayden 2006). Part two will now consider how gatekeepers may exercise *compassionate creativity* to ensure the relational autonomy of sexual minority refugees.

2 Reconceptualising judgment

The approach proposed in chapters six and seven of this thesis takes what Hathaway and Pobjoy (2012, 343–344) argue is a serious fault in *HJ and HT* and, perhaps, magnifies it. “The carefully nuanced approach” that Lord Hope calls for is “as a practical matter unviable, leading to an extraordinary opportunity for judicial subjectivity” (Hathaway and Pobjoy 2012, 343–344; cf. Millbank 2012, 517). Foster (2014) has said that jurisprudence has moved away from the social perception approach proposed by Aleinikoff (2003), because it requires adjudicators to make sociological or anthropological assessments of the PSG (cf. Aleinikoff 2003, 272, 279–280, 298–299). However, commentators in favour of a protected characteristics approach – and the case law that supports it – fail to demonstrate that a constrained, “immutable” approach does any differently when applied in RSD. The case law analytical chapters suggested that gatekeepers still make sociological assessments even when considering immutability, when they actively construct identity and persecution, especially in the evaluation of evidence (see Jacobson 2009, 316–320 on judicial engagement with culture) – though perhaps with more smoke and mirrors to prevent “fracturing the normative consensus on which the Refugee Convention is based” (Hathaway and Pobjoy 2012, 335). A more radical alternative is both feasible and beneficial.

Hathaway and Pobjoy (2012, 387–389) title their piece “Queer Cases Make Bad Law” in reference to the legal maxim “hard cases make bad law,” which implies that hard cases invoke one’s sympathy, and thereby distort the reasoned development and application of principled rules. In this final part of the thesis, I reject the reason/emotion dichotomy and offer an alternative that both acknowledges “persons whose aspirations for freedom pull at our heart-strings” (Hathaway and Pobjoy 2012, 389) and forms a principled application of the Convention. I propose *compassionate creativity* as a mode of gatekeeping, before considering relational autonomy in relation to the existing jurisprudence, and conclude with an analysis of a hard case.

2.1 *Compassionate creativity*

If power, like autonomy, is understood to be relational, such as in the authority to know, persecute, or adjudicate, sexual minorities seeking asylum are faced with better or, at least, more honest terms for inclusion (see Young 1990, 32; Lacey 1998, 9–10, 76; Oswin 2001, 355–356; Sherwin 2011, 30–31). Combining the insights that RSD is “constructivism in practice” (Sweeney 2007) and requires “empathy and imagination” (Millbank 2002), I argue that one requires *compassionate creativity* to determine whether an asylum seeker could exercise relational autonomy in their country of origin, or if refugee status is necessary for their flourishing (for similar concepts, see Nedelsky 2001a, 118; Wagenaar 2004). The legal notion of “benefit of the doubt” will be briefly linked into this discussion, after first setting out my argument for the concept of compassionate creativity.

I use specific terms, creative and compassion, to describe a process of legal interpretation and judgment, but the concept is inspired by Arendt’s “enlarged mentality” and training one’s imagination to “go visiting” (Nedelsky 2001a, 117). If legal decision-making requires some degree of reification in spite of the fact that the persecution of norm deviance constantly challenges fixed frames of reference, acknowledging the communicative action of the legal process (see Nedelsky 2001a, 108–109; 2001b, 242–244), and encouraging gatekeepers to engage in compassionate creativity might counteract the dehumanising effects of RSD.²⁸⁷

²⁸⁷ See also Lacey (1998, 120) on integrity and interdependence; Ferreira (2016, 4–13) on human-centred analysis.

I propose compassionate creativity as an interpretive standpoint of gatekeepers to determine whether or not an asylum seeker has been able to exercise relational autonomy and whether they have a well-founded fear of persecution (see Beiner and Nedelsky 2001, vii–xx). “Compassion” is an inherently relational emotion towards another, which, for the gatekeeper, is to feel or show concern for the dispossessed.²⁸⁸ So, compassionate creativity allows us to imagine the effects of dispossession of rights to a full human life (see Nedelsky 1996a, 78–79), and to see the persecutory intent of people seeking to suppress norm deviance. Adjudication processes possessed by the impulse to identify absolute truths will fail to connect the credibility of the “immutable” category with an “individual’s inner life” (see Sherwin 2011, 23 on possibility; Vine 2014, 20). Alternatively, compassionate creativity seeks to make decisions reflexively and focuses more intently on the persecution feared.

What would it look like if a gatekeeper were to exercise “creative” compassion? It would proceed with an awareness of the gatekeeper’s role, conscious of both the discursive impact of assigning categories and constantly attentive to the well-founded fear of harm that could befall the asylum seeker (see Nedelsky 2001a, 111–112). In being creative, the gatekeeper should ideally be attentive to the consequences of deploying existing categories or constructing new ones and how either action may (re)produce categorical exclusions in the discourse. Therefore, creativity is essential in both how gatekeepers interpret case law and guidance, as well as how they may anticipate the ways their own decision-making may set precedent (see Nedelsky 2001a, 112). In this sense, creativity is the construction of something new with imaginative skill, reframing the old method to suit the new form of claim (Wagenaar 2004, 649–650).

Furthermore, giving asylum seekers the “benefit of the doubt” is particularly important in credibility assessment, especially where there is a lack of evidence, and is a legal principle that compliments the argument for compassionate creativity in RSD. The UNHCR recognises that, in most cases, it will not be possible for an

²⁸⁸ While I will apply relational autonomy primarily to the asylum seeker, Nedelsky (2001a, 103–120) explains how the theory equally applies to the nature of judgment, negotiating subjectivity, being embedded in a community of reason, and reaching autonomous and valid adjudication. See also Sherwin (2011) and Nedelsky (2011).

asylum seeker to “prove” all of the facts relied on to claim international protection (UNHCR 2011b, 39–40). UNHCR guidance provides that the benefit of the doubt is appropriate where: “all the available evidence has been obtained and checked,” and the decision-maker is “satisfied as to the applicant’s general credibility,” including that the asylum seeker’s statements have been “coherent and plausible,” and do “not run counter to generally known facts” (UNHCR 2011b, 39). However, Millbank (2009b, 5–6) notes that UK decision-makers have been reluctant to give claimants the benefit of the doubt, and instead focus on coherence and plausibility. So, the normative argument for compassionate creativity may be, in addition to that legal principle, appropriate.

Compassionate creativity as an interpretive device of gatekeeping primarily seeks to shift the focus away from a conception of identity that assumes that experiences of sexual minorities mirror those of the “non-deviant” and that reinforces a hierarchy amongst sexual minorities between “good gays” versus “bad queers” (see Nedelsky 2001b, 234). Seeing the asylum claimant’s norm deviance and using a social perception approach to develop the categories of PSG and the concept of persecution promotes a more compassionate interpretation of the Convention. The dispossessed may be, simply, “nothing but human,” as Arendt writes: “a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow-man” (Arendt 1967, 300). Yet, the “[a]bility to feel pain” and “humiliation” are universal human experiences, which allow us to see past categorical differences, and form the foundations on “which solidarity is built” (Rorty 1989, xvii cited in Weeks 2007, 224).

2.2 Judgment and relational autonomy

The final section of this chapter is organised around three applications of relational autonomy and compassionate creativity. The first two sub-sections consider how the case law could be expanded upon using these tools. A theoretical hard case of Kenyan sex workers is considered in conclusion to tease out some of the implications of relational autonomy.

2.2.1 Relational autonomy and equal moral worth

The normative claim of autonomy is that finding common ground between conflicting values should prioritise “maximum individual freedom of choice within a consensus on what constitutes acceptable behaviour” (Weeks 1995, 64). Here we can look to international norms to find common ground for relational autonomy in refugee law. In its opening paragraph, the 1951 Convention states that the UN Charter and UDHR affirm “that all human being shall enjoy fundamental rights and freedoms without discrimination.”²⁸⁹ Article 29 (2) of the UDHR sets out that rights cannot be exercised to the detriment of others, and that freedoms are subject to limitations in “securing due recognition and respect for the rights and freedoms of others and of meeting the *just requirements of morality*, public order and the general welfare in a democratic society [emphasis added]” (see also Tobin 2012, 472–474). But unless additional criteria or a baseline is clearly established, there is a danger that the UK might accept another state’s explanation for the apparent persecution.²⁹⁰ One solution is to interpret the UDHR more simply, particularly by removing the concept of morality and asserting secular freedoms of gender and sexuality as fundamental to the human experience.²⁹¹ Recent UN Human Rights Council resolutions on SOGI have stated that there should be “universal respect for the protection of all human rights...for all,” guaranteed “without distinction of any kind and in a fair and equal manner.”²⁹² While noting that “various historical, cultural and religious backgrounds must be borne in mind,” the council recalled that “it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights,” including those of sexual minorities.²⁹³ Normative claims to autonomy hold that an individual’s rights should not be limited unless the exercise of them infringes

²⁸⁹ This has been cited in cases that broadened the definition of PSG and interpretation of persecution; see e.g. *K and Fornah* [2006], para 10, 85–86.

²⁹⁰ In fact, UDHR Article 29(2) was explicitly used to find that the criminalization of homosexual sex was not persecutory in an Australian case in 1994 (Millbank 2004, 204–205).

²⁹¹ “Secular” is used here as equivalent to international norms of religious non-discrimination. See also Jacobson (2009, 310–312) on the “proprietary individual.” It may also be useful to note that some cultural and religious institutions have alternative configurations of non-conforming genders, e.g. “third sex” models (see chapter one). However, I mean secular in a broader sense, including the right to deviate from the religiously endorsed non-conforming genders.

²⁹² UN Human Rights Council, *Protection against violence and discrimination based on sexual orientation and gender identity*, 15 July 2016, A/HRC/RES/32/2.

²⁹³ UN Human Rights Council, *Human rights, sexual orientation and gender identity*, 2 October 2014, A/HRC/RES/27/32.

on the rights of others or causes harm (Held 1987, 270–271; Giddens 1992; Weeks 1995, 64–73), but what constitutes “harm” is notoriously contested (see Lacey 1998, 77, 105–106); relational autonomy in this context may offer a partial solution to this dispute by positing equal moral worth through non-discrimination (see also Figure 3, above).

Current case law may be used to advocate for a wider scope of relational rights in refugee status claims, with little modification to the existing framework (Eskridge 1994, 621). In perhaps an otherwise dubious statement of cultural relativity regarding Kylie Minogue and colourful cocktails, Lord Rodger (para 78) laid the groundwork for a more expansive reading of the Convention in *HJ and HT*:

“[G]ay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of persecution.”

What I am arguing for is an extension of this principle, over and above the current standard in UK asylum law (in theory, if not practice). Protection cannot simply be based on “what is natural to them,” if “natural” is conceived as immutable, as I argued in my account of norm deviance (chapter six). RSD can circumvent fallacies in the “logic of identity” by focusing on relational rights (Young 1990, 98–99) and on what asylum seekers should be free to do regardless of their particular gender or sexual identity, as people of “equal moral worth” (Nedelsky 2001b, 250) to “their straight equivalents.”²⁹⁴ Tobin (2012, 474) observes that Lord Rodger was not imagining activities, such as Kylie and cocktails, which if infringed would actually amount to persecution, but was demonstrating the scope of rights engaged: “[t]he consequence of this approach is to shift the onus back on the state to justify any threat of an interference with any aspect of these rights” (Tobin 2012, 474). However, in practice there is still a dilemma in proving an interference amounts to being persecuted – and the UK decides. While that cannot be rectified, a stronger claim for rights might still be made.

Firstly, perhaps a reformulation of Lord Rodger’s dictum ought to be as follows: sexual and gender minorities are to be free in the society concerned, to live

²⁹⁴ See also *Islam and Shah*, 161 where Lord Hoffman discusses “persecution based on discrimination.”

their lives in any way that does not infringe on the rights of others, without the fear of persecution. Secondly, the “deviant” asylum seeker may often be deprived of relational rights that “non-deviant” citizens conforming to norms do not need or do not seek to acquire, yet the sexual minority’s assertion of that autonomy is consistent with international human rights and/or rights in the UK (Anker 2005, 114; UNHCR 2011b, 14) – i.e. “universal” equal moral worth in addition to the society concerned.

While social change is, perhaps always, ongoing, sexual minorities have made significant gains toward “the right to relate” around the world (Waaldijk 2013). Domestically, the UK has gradually developed a broader understanding of citizens’ rights to be sexual, gendered, and love differently, based on the notion that consent and choice are “utterly central ingredients to our ability to live dignified and meaningful lives” (Bamforth 2005, 12 cited in Weeks 2007, 199; see also Schulhofer 1998, 111). The minimum standards for granting asylum seekers refugee status should be comparable.²⁹⁵ Standards of equal moral worth – universal equality and freedom from persecution – should consider whether sexual minorities’ rights are respected as “normal” rights holders in the society concerned, including whether autonomy is relationally possible in so far as it does not infringe on the rights of others, and if the rights claimed by the asylum seeker are in line with international and/or UK protections.

2.2.2 The “corrupt homosexual:” Relational autonomy is political²⁹⁶

Relational rights to be public in expression and association are supported by international and UK jurisprudence (see generally *RT and RM* [2012]). The political act of coming out “[affirms] the public validity of one’s sexuality in order to safeguard one’s private choices” (Weeks 2007, 88). There do not appear to be any *a priori* reasons for isolating sexual minority refugee status from other political or religious acts of coming out as expressions of political opinions or religious beliefs.²⁹⁷ Seeking refugee status should not be viewed as passive victimhood, but as

²⁹⁵ See *HJ and HT*, para 52; Lord Rodger discussed exerting diplomatic pressure to securing sexual minorities’ rights “[b]ut, in the meantime [Signatory States] do not wash their hands of those at risk.”

²⁹⁶ *RM and BB* [2005], para 39. See also *Refugee Appeal No. 74665* [2004], para 24 on Khomeini’s statements; *Re GJ* [1995].

²⁹⁷ See e.g. *HJ and HT* [2009], para 37, where the Court of Appeal quotes the Tribunal’s determination: “It might be said that the pursuit of a homosexual lifestyle is in some ways similar to the pursuit of a political activity or even the pursuit of proselytes to a particular religious faith.”

the expressly political act that it is. The claim that the persecution of sexual minorities is political is particularly well supported by the CG case *RM and BB* [2005], where evidence was presented to show that Iranian Authorities only reported prosecutions “which satisfied their model of the corrupt homosexual” (para 39). The use of the term “corrupt homosexual” has an explicitly political motivation, but I argue that persecution is always political, whether the homosexual is perceived as corrupting to religious morals, the rule of law, social mores, and so on. Regardless of how explicit it is made in the persecutor’s intent, and whether the harm is threatened by a state or non-state actor, the target of persecutory conduct seems to be invariably perceived as “corrupting” to normativity in one form or another. The notion of the “corrupt homosexual” is significant, because legal strategies of claiming asylum that rely primarily on the vulnerability of applicants depoliticise the persecution (Parekh 2012, 272–274, 277). Relational autonomy argues that norm deviance, whether “private” or more overtly “public,” is *always* political in its subversion of compulsory heterosexuality.

In *RT and RM*, Lord Dyson sets out to apply the principle of *HJ and HT* to the protected category of political opinion, and its concealment. Freedom of thought, opinion, and expression, “whether political, philosophical or otherwise,” extends to “the right to believe or not to believe,” which is central to “a person’s dignity” (Lord Dyson, para 39). Similarly, it is the right to relate or “voluntary association” that is “fundamental...to human dignity” and not the “characteristic” of, for example, *being* gay (Aleinikoff 2003, 270, 283–284). In applying *HJ and HT* one sees an iteration of the established case law that, perhaps, opens a new door to de-essentialise problematic immutability-based determinations:

“[T]he right *not* to hold the protected beliefs is a fundamental right which is recognised in international and human rights law and...the Convention too. There is nothing marginal about it. Nobody should be forced to have or express a political opinion in which he does not believe. He should not be required to dissemble on pain of persecution” (Lord Dyson, para 42).

Importantly, the Supreme Court makes no distinction between “the conscientious non-believer, and the indifferent non-believer” but instead asserts that “[a]ll are

equally entitled” to protection under the Convention if they have a well-founded fear of persecution (Lord Dyson, para 45).

Relational autonomy re-politicises the private sphere, which is necessary because a crucial component of successful claims is to avoid becoming non-political “victims” in the narrative (see Johnson 2011, 65; Parekh 2012). Persecutory discourses in some states have pronounced that human rights are a Western construct, and that homosexuality is a white man’s disease and a symbol of capitalist extravagance (see e.g. Kouri 2012; Wilkinson 2014; Rakotomanga 2015).²⁹⁸ Rather than perpetuating the monolithic category of “normal” LGBT rights holders, i.e. “good gays,” the discursive justifications for persecution can be appropriated and used to assert the legitimacy of the political choice of norm deviance to include those “perverse” sexual minorities and “bad queers” too (see chapter four). In the particular context of refugee law, this strategy also avoids essentialising homosexuality as “a poor second choice” (D’Emilio 1998, 244–245), whereby only a “born gay” becomes and is entitled to be gay asylum seeker. Whether a person’s own experience of gender or sexuality is immutable or not should be immaterial in RSD; the only evident fact is that they are entitled to the relational autonomy to choose and actualise norm deviance, not as a privilege but as people with equal moral worth to their heterosexual counterparts.²⁹⁹

“There is nothing marginal” (Lord Dyson, para 42) about the relational autonomy of claimants with non-conforming genders and sexualities. By deploying the same discourses that are used to delegitimise, threaten, and oppress sexual minorities, RSD can attend to the public, political dimensions of persecution that are apparently required to qualify for refugee status: “gay rights are human rights” *is* propaganda (political opinion), homosexuality *is* an affliction of the soul (religion) and an *effect* of economic and social change (see Cooper 1994, 437, 443 on counterdiscourse).³⁰⁰ Rather than normalising LGBT identities in RSD, emphasising the discourses of persecution in gatekeeping would maintain the “public” visibility and political acts of being a sexual minority. The “corrupt” or “deviant” qualities of

²⁹⁸ See e.g. *Amare* [2005], para 3, 6; *Refugee Appeal No. 74665* [2004], para 24.

²⁹⁹ See Lord Rodger in *HJ and HT*, para 78.

³⁰⁰ See e.g. *RM and BB* [2005], para 45: “Islam considers homosexuality to be a sexual deviation leading to a perverted act which goes against the natural order God intended for mankind.”

being sexually and gender non-conforming, even “in the closet,” as well as “coming out” and transgressing compulsory heterosexuality in the “public” sphere, are political acts, an exercise of free conscience, and can provoke political persecution in addition to the “attributes” of being a sexual minority and member of a PSG.

2.2.3 Relational autonomy and hard cases

A relational approach to rights and choice considers the social context and its implications for self-determination (see Held 1987, 271; Lacey 1998, 110–116; Figure 3). For example, sex workers are excluded from the construct of refugee in an immutable approach, because they have “chosen” the work and thus “created” the circumstances of discrimination and persecution.³⁰¹ Yet, I argue they should still qualify for refugee status under the social perception approach – i.e. seeing persecution based on norm deviance (see Aleinikoff 2003, 286 on “circular constitution;” Inlender 2009, 371, 379) – and that persecution may be established by the deprivation of their relational autonomy as a result of the work performed. Sex workers and other claimants may be subjected to discriminatory persecution that, in the framework of relational autonomy, cannot be simply discounted as self-imposed. To take another example, Internet pornography has recently been the subject of public scrutiny and at the centre of contentious academic debates, including on the construction of sexualities; thus pornography is especially relevant here considering that greater media connectivity has expanded the scope of its production, consumption, and potential influence globally. As a hard case for refugee status, pornography raises questions about the possible extent of consent and choice, and troubles public and private dichotomies. The following example of same-sex African pornographic films amplifies these concerns like “the exaggerated propulsiveness of wearing flippers in a swimming pool” (Sedgwick 1991, 3).

Nzioka (2014), a sexual minority rights activist in Kenya, writes that recently gay porn filmmakers have paid “young boys,” “dark and black,” to feature in risky

³⁰¹ This is a simplified account; however, I do not envisage that sex work would be something that an individual “should not be required to change” under, either, international or UK law currently. If sex workers could be read-in as a PSG, I do not see why, *prima facie*, UK jurisprudence would not support a claim to fear persecution per, e.g., Simon Brown LJ (8) in *Ahmed* [1999].

sex videos (see also Cervulle and Rees-Roberts 2009 on “orientalist fetish porn”).³⁰² Purportedly as a result of their appearance in porn, many actors have been hiding in fear for their lives, lost friends, and this is compounded by their HIV status (Nzioka 2014). Whether they have a well-founded fear of persecution for refugee status would be an example of a hard case. Kenya has anti-sodomy laws, but few convictions; has denied registration of sexual minority civil society groups, yet has a vocal community of domestic activists; and the country hosts sexual minority refugees from neighbouring countries (Kalan 2011; Ali 2013; Breen and Millo 2013; Gitari 2014). In the same year the Kenyan President warned against homosexual “witch-hunts,” two men were subjected to forced HIV testing and rectal examination by authorities (Agutu 2015). Ugandan refugees have “regretted fleeing to Kenya,” where they have been harassed and attacked in camps and even mistreated by UNHCR employees (Iganza 2015; cf. Breen and Millo 2013). Criminalisation and restrictions on speech and association are common throughout Africa, and even in constitutionally progressive South Africa sexual minorities, including refugees from other parts of the continent, face systemic violence (Mudzingwa 2012; PASSOP 2013; Jaeger 2014; see also PASSOP 2014).

In this hypothetical case, a gatekeeper may infer that persecution resulting from the individual’s actions is muted by the fact that those actions were consented to and (apparently) unpunished by the state despite Kenya’s anti-sodomy laws.³⁰³ But the young men who performed now fear violent non-state retribution for their actions (Nzioka 2014). Relational autonomy would not disqualify their claim just because they had acted “rationally,” considering the constraints of the context in which those choices were made (see Lacey 1998, 78–80, 193–197; Nedelsky 2001b, 249; Downie and Llewellyn 2011, 7).

³⁰² I cannot independently verify this account, however, Nzioka is well-known in the community of sexual minority rights advocates; e.g. Nzioka was one of ten activists pictured on a controversial front-page story, “Top gays,” run by a Kenyan tabloid (Morgan 2015). Regardless of the veracity of the claims, the example of sex workers is thought provoking and relevant to this project for expanding the scope of narrowly-categorised “LGBT” case law. The story is also highly relevant in the contemporary rights landscape of Africa, including topics of postcolonialism, health, sex work, and the very rights to be a sexual minority, e.g., a gay porn actor (see e.g. Cervulle and Rees-Roberts 2009, 198–201; Rothmann 2013, 26–27; Klinken and Zebracki 2015).

³⁰³ See also *RM and BB* [2005], para 11–14, 96: “E” had appeared in a safe sex education video that showed other participants engaging in same-sex sex. Although E had only participated as a “presenter,” his fear of persecution was grounded in his involvement in a film the state had allegedly found to be obscene.

The benchmark of “rationality” is problematic in RSD. Challenging the assumptions of how “rational” potential victims or victims of violence have acted or should have behaved according to the UK requires intense scrutiny. Chief Inspector Vine (2014, 22) finds that adjudicators are entitled to disbelieve evidence of deviant behaviour that might have been avoided by the asylum seeker (and, by extension, the identity claimed) that could have been discovered by the state and resulted in persecution. Generally, the UK thus continues to hold that no credible asylum seeker would have placed herself in a position of possible harm. For example, an applicant claiming to have had sex in a family home where she may have been discovered in spite of the consequences of persecution can be dismissed as unfounded (Vine 2014, 21–22). As discussed in chapter four, like discretion, I would argue that these assumptions of rationality can be an “invidious form of victim blaming” (Millbank 2012, 504; 2013, 37; see also McCaul et al. 1990 on “foreseeability”).

On the other hand, a relational autonomy approach to determination would acknowledge that people cannot be regarded as wholly rational. The “puzzling fact” is that people often make choices that compromise their subsistence or very survival (Sherwin 2011, 17). Issues of consent and choice are particular to the circumstances of a case and practically difficult to assess (Lacey 1998, 93–94, 113–114). With respect to the example of same-sex pornography in Kenya, I would highlight that the ideas of consent and choice of the performers may be coextensive with the problematic idea of rationality (Sherwin 2011, 18–19). They consented to act, but other contextual constraints such as the availability of work in the economy, demand for risky sex in the industry, and their own sexualities, bodies, and basic human needs may have influenced that consent and choice (Lacey 1998, 117).

One must also consider how relational autonomy addresses the public/private dichotomy. The “privacy” of norm deviance is always strapped with the anxiety and fear of it being made public in an unsafe space (see Lacey 1998, 71–97; Oswin 2001, 357–358). Even in private spaces, acts and identities are potentially public. RSD should not focus on the expressed desires of an individual to live a quiet life or a political one, but on an objective analysis of the persecutory intent. That is, gatekeepers must consider the consequences of the norm deviance becoming

public.³⁰⁴ Sex work can (possibly) be hidden and unknowable, off-camera and confined to the closet but, like the persistent risk of discovery in more “discreet” deviances, the inevitable release of the film precipitated the breakdown of relationships leading to the risk of harm for the performers.

Public/private dichotomies are unsustainable when considered relationally (see Parekh 2012, 273). The public nature of pornography is an exaggerated form of a broader contemporary reality: people are all, always, under constant surveillance (Bedoya 2014; Parkinson 2014). For example, consider the means Russian gangs have used to lure sexual minorities through “discreet” private networks out into the open. Posing as sexual minorities on social media, gangs have used deception in order to subject individuals to verbal harassment and assault, posted media of the incidents online to further humiliate the victims, and threatened to reveal them to friends and relatives (Essig 2013; Parkinson 2014; Stonewall 2014; *VICE* 2014).³⁰⁵ Surveillance may have less purchase in certain localities or fewer effects on certain people (e.g. economic/class privileged sexual minorities), but as same-sex intimacy shifts from hidden relations to more open identities including the political demand for a “right to relate” (Waaldijk 2013), the possibilities for discovery and persecution may become diffuse (see also Phillips 1997, 484–486 on visibility).

Finally, the implication of the “heteronormative panopticon” is that norm deviance always exists in “glass closets” (see chapter five; Kuhar and Švab 2008; Kuhar 2012; Švab and Kuhar 2014). The “city” should not be assumed to afford anonymity. While especially applicable to the Kenyan porn actors, this is also more widely relevant than UK adjudicators seem to recognise. The myth of cities as sanctuaries (see D’Emilio 1983; Young 1990, 12–13, 236–239, 247; Eribon 2004) and safe spaces for internal relocation is based on the notion that one could be reasonably expected to resettle internally without the need of asylum (Jansen 2013; see also Jaeger 2014 on Cape Town). However, where relationships and livelihoods are at risk, the very liveability of any place in the country may always be under threat

³⁰⁴ Lacey (1998, 83) observes that “the assumption that the world can be divided into separate spheres obscures the interdependence of those [public and private] spheres and the spill-over from oppression in one sphere to subordination in another.” I argue that “private” life in RSD should be carefully bracketed and not broadly applied despite, like identity, the strategic appeal. See also Sheill (2009, 62–64) on gender, private life, and human rights, Oswin (2001, especially 351), and Parekh (2012).

³⁰⁵ See also *HJ* [2008], para 21 on Iranian authorities using internet chatrooms to entrap homosexuals.

of the exposure of the norm deviance. Fundamentally, the relational critique attempts to show that maintaining the notional possibility of absolute privacy within private life is misguided at best, and at worst undermines the very purpose of refugee status for the protection from discriminatory persecution that seeks to eradicate the deviant “private” acts.

3 Conclusion

The denial of relational autonomy is not only contrary to the Convention, but should be considered to be at the root of the definition of persecution. An open-textured reading of the Convention, a commitment to human rights discourse (e.g. the rights to expression and association), and the use of the concept of relational autonomy, all help to build an appropriate framework of refugee protection. Understanding PSG and persecution through the lenses of norm deviance and relational autonomy, respectively, is more attentive to global diversity and to local and individual genders and sexualities. The concept of norm deviance avoids essential, immutable categories, and relational autonomy avoids persecution for reasons of those reified categories – all are entitled to relational autonomy without the fear of being persecuted.

Finally, having introduced this thesis with the story of John Bosco, it is helpful to conclude this final chapter with the thoughts of an asylum seeker on what refugee protection means to him. J/HJ told adjudicators:

“I am no longer living in fear as I was when I was living in Iran... I want an average life and would like to be involved in a loving relationship. I do not believe that I should have to go without having a normal life and a partner whom I can be with openly and live in a society where I am accepted. This is what I would be forced to do without if I were forced to return to Iran.”³⁰⁶

J/HJ’s aspiration is, in sum, relational autonomy. Refugee status determination calls for “the most anxious scrutiny,” because “at stake...is fundamental rights, including the right to life itself.”³⁰⁷ The lives that sexual minority refugees have been deprived of in their countries of origin is one in which they can form and develop relationships, express themselves, and associate with others in the public sphere. It is

³⁰⁶ *J* [2006], para 12; see also *Refugee Appeal No. 74665* [2004], para 15-16.

³⁰⁷ Dyson LJ in *Sivakumar* [2001], para 30.

The inclusive guise of “gay” asylum
relational autonomy that enables the exercise of fundamental human rights without
the fear of being persecuted.

Conclusion

Arendt (1967, 294) wrote in 1951 that “[t]he more the number of rightless people increased, the greater became the temptation to pay less attention to the deeds of the persecuting governments than to the status of the persecuted.” Despite the longstanding, entrenched political impetus to focus on the narrow grounds of an individual claim, it is the persecutory intent (and its effects on refugees) that requires renewed emphasis. Understanding sexual minorities as a PSG through the concept of norm deviance, and seeing persecution through the lens of relational autonomy, achieves the aim of maintaining the integrity of the Convention, yet with a more appropriate interpretation of refugee status.

The introductory chapters in Part I first addressed whether there may be a transnationally recognisable “gay” identity, and then explored the history, international framework, and domestic implementation of refugee law. These two background chapters allowed for chapter three to propose an appropriate research design that would facilitate an exploration of the most relevant research questions. Chapter one concluded that “gay” identities are rooted in Western medico-legal discourses that have subsequently become established by “LGBT” social movements, and these categories have become “global” to some extent. However, in addition to the historical contingency of “Western” categories and the globalisation of those discourses, we still have cultural uniqueness, global diversity, and different *individual* experiences of gender and sexuality. The challenge in the asylum context, then, is how to adjudicate sexual minority claims, and what can be “known” of these identities, while remaining sensitive to different cultural notions of gender and sexuality and to individual subjectivity.

Turning to refugee law, chapter two summarised the origins and continuing significance of key instruments and institutions, as well as the core concepts of refugee status, namely the definition of Article 1A(2). The analysis here suggested that Signatory States perceived that international consensus over the meaning and application of the Convention was essential to share the “burden” of refugees. The “social group” category of the refugee definition may be an organic element of refugee law. Yet, analysis should still remain attentive to the limits of the construct of “refugeehood,” which may, like other social categorisations, simplify the social

world, become inflexible, and erase the personal histories and experiences of people fleeing persecution. Part I concluded by considering research design and methodology, socio-legal discourse analysis and the necessary theoretical tools to conduct this research. From the perspectives of constructivist and critical theories, the primary research question asked: how do UK legal institutions construct “legitimate” or “genuine” sexual minority asylum seekers in judicial discourse?

Part II of this thesis addressed the research questions in two chapters that interrogated the legal construction of the PSG and persecution, respectively, which are essential conditions for sexual minorities to be recognised as refugees. Chapter four considered the evolution of PSG, particularly the development and continued application of the discretion requirement in just over a decade of case law, until the Supreme Court recognised the expectation of discretion was contrary to the Convention; the decision in *HJ and HT* [2010] also affirmed sexual minorities’ rights to expression and association without the fear of persecution. An interrogation of the judicial construction of identity revealed that adjudicators have often sought to define the acceptable behaviours of “good gays” who may bring themselves under the Convention category of PSG, but to the exclusion of “bad queers” or “perverse” asylum seekers. Further questions remain regarding the “scope” of sexual and gender identities, and the associated behaviour that may qualify for refugee status in the UK. Post-*HJ and HT* there also remains the intractable problem of establishing the “truth” of one’s identity in claiming asylum, as well as the “seriousness” and “likelihood” of being persecuted.

The next chapter considered the interpretation of persecution and determination of whether sexual minorities are at risk. The UK no longer considers how and what persecutory treatment may be “reasonably tolerable” or is “permissible” and recognises that, in an important sense, discretion *is* persecution. However, the analysis suggested that the concept of persecution remains ambiguous, contested, and potentially exclusionary. I argued that persecution has been and remains a difficult condition to assess, leaving ample opportunity for *judicial* discretion, and critically that it allows courts to hide behind international norms or consensus in refusing refugee status. In fact, the politics of immigration control, the perceived need to adhere to an international consensus, and following a lowest

common denominator approach in the recognition of sexual minority refugees, have preoccupied the legal discourse – i.e. the political imagination of adjudicators has kept the “floodgate” closed to the masses of the world’s “bad queers.” While the UK’s recognition of refugees has indeed expanded to include persecuted “gay” people, we should remain attentive to this “inclusive guise,” the potential for exclusion in the construct of refugee arising from merely adding an additional category, and how this may in turn be used to “pinkwash” and justify the maintenance of a perceived floodgate. Based on these findings, Part III elaborated two concepts grounded in the analysis of the case law – norm deviance and relational autonomy – and argued for creative compassion in RSD.

This thesis has found that, in practice, a sexual minority asylum seeker is presumed cisgender heterosexual until they prove otherwise. The general legal rationale may be that, in a practical sense, if there is a material fact to benefit an individual, they have the burden of proving that fact or status which benefits them, such as their being gay and the risk to them of being persecuted in order to claim refugee status.³⁰⁸ However, it is the assumption that everyone is cisgender heterosexual unless they prove otherwise that I have argued is sociologically, as well as ethically, problematic: if the sex/gender and hetero/homo binaries are scrutinised, there are many different ways of being sexual and gendered. Whether or not non-normative gender and sexual identities are immutable – biologically rooted and to what degree – is beside the point. Determining refugee status on the grounds of homonormative LGBT categories is both morally wrong and a transgression of the ideals of international protection. What matters is not “how gay” or “what” an asylum seeker “is” or “does,” but whether they have a well-founded fear of persecution, and this can be assessed by whether and how the asylum seeker is normatively perceived as deviant, and whether that results in discriminatory persecution.

The sociology of identity clashes with the need for “truth” in legal frameworks – in the present case, the question of who is a “genuine” gay refugee. From a sociological perspective the sexual and gendered lives of individuals are performative, contingent, and fluid. Legal interpretation and decision-making

³⁰⁸ Thank you to Antony Duff and Claudio Michelon for their comments which brought out these points in discussion of a draft (Olsen 2015).

translates the social reality into something static, measured, and quantifiable. In some respects, this thesis has attempted to frame an epistemology of what one cannot know in refugee status determination, which is the set of “immutable” traits or “characteristics” of an individual’s inner life that should not be violated. One’s “inner life” is subjective, based on the personal experiences of an asylum seeker, which cannot be fully explained or externally verified. Yet, what cannot be known is still immeasurably important to living and experiencing gender and sexuality. What *may* be known, on the other hand, is the persecutory intent and discriminatory consequences of living a non-conforming sexual or gendered life in the country of origin.

In presuming that sexual and gender identity is something that can be known, refugee status determination has created a reified framework with unnecessary, potentially dire consequences. Alternatively, the Refugee Convention can be creatively and compassionately interpreted and applied, without the present exclusions or arbitrary narrowing of protection, and by using existing legal tools. My conclusion is that part of the solution is thinking about the problem of identity in asylum claims differently. And in discussing that problem I hope to have at least cultivated scepticism of claims to human rights and refugee status that are predicated solely on the immutability of identity. It does matter that people claim asylum on grounds of being lesbian, gay, bisexual, or transgender, but it is more important that the recognition of refugees bestows upon persons – whatever identity claimed – with equal moral worth and affirms the whole human being in the process of determining refugee status.

Appendix I – List of abbreviations and acronyms

AIA 2004 – Asylum and Immigration (Treatment of Claimants, etc.) Act 2004

AIT – Asylum and Immigration Tribunal

API – Asylum Policy Instruction

BDSM – Bondage, discipline (or domination), sadism, and masochism

CFREU – Charter of Fundamental Rights of the European Union

CJEU – Court of Justice of the European Union

CG – Country Guidance (case)

COI – Country of origin information; country information and guidance

DFT – Detained fast-track

DSSH – Difference, stigma, shame, and harm

ECJ – European Court of Justice

ECHR – European Convention on Human Rights; Convention for the Protection of
Human Rights and Fundamental Freedoms

ECtHR – European Court of Human Rights

EU – European Union

EWCA – England and Wales Court of Appeal

EWHC – High Court of Justice of England and Wales

FTT – First Tier Tribunal

FGM – Female genital mutilation

HCA – High Court of Australia

HDT – Human Dignity Trust

HRA – Human Rights Act 1998

HRBA – Human rights based approach (to determination)

IAA – Immigration Appellate Authority

IAC – Immigration and Asylum Chamber

IAT – Immigration Appeals Tribunal

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICCPR – International Covenant on Civil and Political Rights

IJ – plural IJJ – Immigration Judge(s)

IRO – International Refugee Organization

J – plural JJ – Justice(s); Judge(s)
LJ – plural LJJ – Lord(s) Justice
LGBT – Lesbian, gay, bisexual, and transgender
LGBTI – Lesbian, gay, bisexual, transgender, and intersex
MSM – Men who have sex with men
NIAA 2002 – Nationality, Immigration and Asylum Act 2002
OHCHR – United Nations Office of the High Commissioner for Human Rights
PSG – Particular social group
RSD – Refugee status determination
SOGI – Sexual orientation and gender identity
SSHJ – Secretary of State for the Home Department
TCEA 2007 – Tribunals, Courts and Enforcement Act 2007
TFEU – Treaty on the Functioning of the European Union
UDHR – Universal Declaration of Human Rights
UK – United Kingdom
UKBA – UK Border Agency
UKHL – UK House of Lords
UKLGIG – UK Lesbian and Gay Immigration Group
UKSC – UK Supreme Court
UKVI – UK Visas and Immigration
UN – United Nations
UNDP – United Nations Development Programme
UNGA – UN General Assembly
UNHCR – United Nations High Commissioner for Refugees
UNRRA – United Nations Relief and Rehabilitation Administration
UNTS – United Nations Treaty Series
US BIA – United States Board of Immigration Appeals
UT – Upper Tribunal
VCLT – Vienna Convention on the Law of Treaties

Appendix II – Glossary

adjudicators – This term is used broadly in this thesis to describe decision-makers at all levels of the asylum appeals process, including Home Office officials, tribunals, and courts. But that usage should not be confused with the title formerly held by Immigration Judges, Adjudicators. See also “gatekeeper,” and chapters two and three.

circular constitution or **circularity** – A notion crucial to the construct of what may constitute a PSG; the international consensus is that a PSG cannot be defined by “circularity” or have a “circular constitution.” That is to say the social group must exist *independently* of the persecution feared or not exist, as Lord Millet argued of domestic violence victims in *Islam and Shah* [1999], because of the persecution suffered. Lord Millet (172) dissented on the grounds of the appellants’ imputed social group: “Battered wives do not form a social group because, if the group is limited to battered wives, it is defined by the persecution, while if it is extended to include all married women, those who are battered are not persecuted because they are members of the group.” On the other hand, McHugh J (173) of the HCA wrote in *Appellant A* [1997] that “while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause [its] creation.” See also Good (2007, 71–84) on anthropological versus legal perspectives of a social group, Aleinikoff (2003) on the “social perception” approach to PSG interpretation, chapter four of this thesis, and Lord Rodger (para 77-79) in *K and Fornah* [2006] for further discussion of “circularity.”

compulsory heterosexuality – A term coined by Rich (1980; see also Butler 1991; Sedgwick 1991, 81). Compulsory heterosexuality can be generally likened to the terms “institutionalized heterosexuality” (e.g. Weeks 2007, 12) and “heteronormativity” (e.g. Warner 1993; McGhee 2001b) among others. However, I use compulsory heterosexuality to emphasise the argument that the absence of a meaningful choice or outright prohibition of sexual and gendered non-conformity can be persecutory.

concealment – see “discretion.”

core entitlements – This term refers to human rights and the assessment of persecution. In this sense persecution “is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community” (Hathaway 1991, 112). Following from this definition of persecution, Hathaway’s (1991, 108–112) widely cited “core entitlement” scheme comprises four tiers: the first being the UDHR rights translated into the ICCPR to create binding obligations, and the failure to secure these for citizens is persecutory. Second are the UDHR provisions within the ICCPR exempt in cases of a “public emergency,” when they may be infringed but not unexceptionally or in a discriminatory fashion. Third are UDHR rights recited in the ICESCR which is not binding, but these can still constitute persecution when they are not equally guaranteed to citizens. The fourth tier is the remaining non-binding UDHR rights which are not codified in international instruments and so infringements here alone rarely amount to persecution. See e.g. *Ullah* [2004], para 32, *Z* [2004], para 11, *Amare* [2005], para 17.

country assessment(s) or country of origin information (COI) – These terms are used in this thesis to discuss a range of evidential documents that are considered in determinations as, or to establish “facts” about the circumstances of a particular claim, including: UK Government reports, foreign governments’ reports, NGO research and publications, and other material relating to the social, legal, and economic status of sexual minorities in foreign countries. The UK has used specific terms for types of reports it issues but these have changed during the period from which cases have been sampled. Therefore, I use general terms to avoid confusion, and also intend to reflect on the broader scope of evidence which can be submitted to dispute or support a claim. Currently the UKVI refer to specific guidance as “Country information and guidance,” and formerly the UKBA’s Country of Origin Information Service produced Country of Origin Information Reports and the UKBA also used Operational Guidance Notes. Another key source of information in RSD is CG determinations of the UT; see generally Thomas (2008).

deviance and **deviant** – see “norm deviance.”

discretion or **concealment** – The concept of “discretion” or, as Lord Hope (*HJ and HT* [2010], para 20) termed, “concealment” stipulates that the asylum seeker would not be at risk of persecution in the country of origin if they conducted, for example, their sexual lives privately and did not flaunt their sexual identity publicly. Critically, discretion reasoning contributes to the “production of ‘invisible’ homosexuality [and] perpetuates the continued social eradication of the expression, public visibility, and even the practice of homosexuality in the countries concerned” (McGhee 2001, 25; see also Millbank 2004, 214; Johnson 2007, 108). For example, in *Z* [2004], the appellant complained in the application for permission to appeal that the SSHD and Tribunal had failed to consider “*why* [he] had conducted his personal relations discreetly,” i.e. to avoid persecution (cited in Buxton LJ, para 20). However, *Z* was not being required, according to adjudicators, but chose to be in the closet (Tribunal determination, cited in *Z* [2004], para 6). Evidence of previous discretion was often used to legitimise the requirement of future discretion in the adjudication of asylum claims until 2010. *J* [2006] would later develop a test for determining whether discretion was reasonably tolerable (see generally Buxton 2012). As discussed in the case law analytical chapters four and five, the UKSC judgment in *HJ and HT* [2010] found that discretion and reasonable tolerability were incompatible with the Convention. See also *RT and KM* [2012] regarding political opinion and *MT* [2011] regarding religion.

ejusdem generis – Meaning, “of the same kind.” This is a doctrine of legal reasoning that has been called a “legal ‘canon of construction,’” which requires that “when interpreting a list of items in a statute, one should read general items in the same spirit as those which *are* specified” (Good 2007, 75). Law and Martin (2014) give a helpful illustration of *ejusdem generis*: “when a list of specific items belonging to the same class is followed by general words (as in ‘cats, dogs, and other animals’), the general words are to be treated as confined to other items of the same class (in this

The inclusive guise of “gay” asylum example, to other *domestic* animals).” This “canon of construction” has been crucial in the legal interpretation of Article 1A(2) and PSG.

gatekeepers or gatekeeping – The concept of gatekeepers is borrowed from Bhabha (2002), who argues that all actors in the field are implicated in the inclusion and exclusion of refugees. In addition to the state’s adjudicators of asylum claims, solicitors, barristers, activists, and academics participate in the construction of refugee. For example, Zimmerman and Mahler (2011, 420) observe that academic research has contributed to the progressive recognition of LGBT refugees. Importantly, Bhabha (2002) suggests that human rights and refugee advocates actively participate in the sorting of genuine and non-genuine claims, facilitating “gatekeeping” and legitimating state practice. For instance, consider how advocating for an asylum seeker with, perhaps, a strategic preference for certain terms like LGB or T, and using the associated stereotypes to advance a claim may in turn effect the state’s recognition of refugees. Bhabha (2002, 161) argues that the process of gatekeeping “keeps migration exclusion morally defensible” or, as Luibhéid (2008, 179–180) puts similarly, the select few that receive asylum “lend credence to claims of first-world humanitarianism and democratic freedom.” I use the term gatekeeping critically, because the literature suggests that RSD is necessarily political, and constitutes an appraisal of the conditions in the country of origin (see e.g. Zolberg et al. 1989, 272–275; Miller 2005, 143, 166). See also McGhee (2001b, 38) on “specific intellectuals” and the “suspension of the system” in the inclusion of sexual minorities as a PSG.

gender identity – As defined by the preamble of the Yogyakarta Principles (2007), gender identity is “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body and other expressions of gender, including dress, speech and mannerisms.” The UKBA/UKVI use this definition of gender identity (API 2011, 4). Gender identity is explored in more depth in, especially chapters one and six. See also “sexual minority.”

genuine – see “legitimate.”

intertextual and **intertextuality** – The “intertextual perspective [sees] discourse as the recontextualising of already existing forms and meanings, one text echoing and partially replaying the forms, meanings and values of another” (Jaworski and Coupland 1999b, 53, see also 139). Therefore, the intertextual approach aims “to track how various forms of discourses, and their associated values and assumptions, are incorporated into a particular text, why, and with what effects” (Jaworski and Coupland 1999a, 9). Intertextuality is used in this study to understand how cases and concepts are cited and deployed, for example, by other judgments, government policies, and in decision-making (see Benwell and Stokoe 2006, 107).

legitimate or **genuine** – These terms are used somewhat interchangeably but a different connotation is intended in the use of each term. “Legitimate” more pertains to the accepted claim to refugee status; “genuine” is slightly broader and means to imply the asylum seeker’s sexual or gender identity is cognisable and “true,” not a fleeting desire or fantasy, but deeply felt and constitutive of human dignity. Regarding persecution, “legitimate” refers to the objective and established well-founded fear of persecution, but again “genuine” may be broader and refer, in fact, to both the objective *and* subjective well-founded fear in the assessment of credibility. In other words, an asylum seeker may have a genuine, *subjective* fear of persecution, but an adjudicator may find that is not an *objective* fear necessary to make a legitimate claim to refugee status.

logic of identity – A critical perspective of the “logic of identity” identifies in it “the danger of suppressing difference in the process of abstraction, generalisation or identification” (Lacey 1998, 154). While this notion is revisited throughout the thesis, see in particular the discussion in chapter one regarding the terms, acronyms, and categories used for sexual and gender identity.

nexus requirement – This principle originates in the Article 1A(2) clause – “for reasons of” – which dictates that an asylum seeker’s well-founded fear of being

persecuted must be a direct result of their belonging to one of the five Convention categories (Hathaway 1991, 136–137).

non-refoulement – In international human rights and refugee law, this legal principle stipulates that persons should not be returned to a state or territory where there is reason to believe they may be subjected to serious ill-treatment or persecution (de la Vega 2013).

norm – See “norm deviance.”

norm deviance or **norm deviants** – In my conceptualisation of norm deviance (see chapter six), I use the terms “norm” and “deviance” as empirical descriptors: *norms* are standards and “rules that govern social behaviour and are enforced by positive or negative sanctions;” whereas *deviance* “is the breaking of social rules” and is, therefore, different from the norm and may be sanctioned (Bruce 2006, 216, 69). While norm deviance may be broadly attributed to a number of groups or individuals, this thesis concerns norm deviance on the grounds of sex, gender and sexuality – the transgression of social conventions, such as defined sex/gender roles, socio-legal rules, or being attributed an identity viewed by wider society as perverse – which may place the asylum seeker at risk of discriminatory persecution. Chapter six argues that what is shared in common between “sexual minorities” (see below), the PSG, is a transgression of the norms of “compulsory heterosexuality” (defined above).

obiter dicta or ***obiter dictum*** – Often shorted to *obiter*, the terms mean “things said by the way” or “a remark in passing.” This term is used to describe parts of legal decisions that are included without relation to the material facts and are therefore not binding on future courts through precedent (Holland and Webb 2010, 192–194). As *obiter* is not material to the decision it does not form part of the *ratio decidendi* or *ratio* (see “precedent,” below) but *obiter* can, however, be “persuasive authority” (see below; Law and Martin 2014).

persecutory intent – Chapters six and seven argue that the asylum seeker’s identity and behaviour should be understood differently in RSD, and defined in part by the behaviour of the persecutors – i.e. the persecutory intent to suppress non-conforming sex/gender and sexuality. I argue that persecutory intent is important to the “social perception” approach (see below) because its key critique of the dominant “protected characteristics” or “immutable” approach (see below) is that to adopt a “non-triviality” requirement gives persecutors a blank check to suppress “non-fundamental” behaviours or associations (Aleinikoff 2003, 300; see also Inlender 2009, 359).

personal narrative – Used broadly in this thesis to describe asylum seekers’ accounts presented to and assessed by adjudicators and includes, for example, the consistent recounting of life events, partners, letters of support and testimony from friends and family, and even the dates of birth of significant people in an asylum seeker’s life. These examples of “personal narrative” have appeared in the case law, literature, and are generally used in the assessment of credibility.

persuasive authority – Unlike UK “precedent” (see below), adjudicators are not obliged to follow, for example, a judgment of the HCA. However, the decisions of lower courts, *obiter dictum* in previous decisions, and decisions of foreign authorities can influence the reasoning of a decision even if that court is not bound to follow the precedent (Holland and Web 2010, 158; Law and Martin 2014).

precedent – Briefly, precedent is a decision of a court that is used in subsequent cases to reach an outcome consistent with the former’s reasoning of and answer to a legal question. “Precedent is, in theory, binding on all inferior courts (and tribunals)” (Holland and Web 2010, 23). As opposed to *obiter dicta* (defined above), binding precedent is the *ratio decidendi* or *ratio* of a decision – i.e. legal reasoning – that must be followed by lower courts and tribunals and, generally, courts are also bound to follow an earlier decision of the same court. *Ratio* is the law or legal reasoning applied to the material facts of a case. More specifically, *ratio* is the “principles of law on which the court reaches its decision,” which must be “deduced” from a

decision, the material facts of the case and legal reasoning (Law and Martin 2014). See chapter two, on the structure of the UK appeals process, and chapter three on my conceptualisation of legal decision-making.

protected characteristics or immutable approach – This is an approach to the interpretation of PSG. “[T]he ‘protected characteristics’ approach examines whether a group is united by an immutable characteristic or by a characteristic so fundamental to human dignity that a person should not be compelled to forsake it” (Türk and Nicholson 2003, 17). In other words, “protected characteristics” or “immutability” considers whether a group shares an immutable characteristic which is fundamental to their human dignity that they cannot or should not be required to change or conceal it. Problematically, the approach presupposes there are “protected” or “immutable” behaviours intrinsic to categories, such as being gay, that should be used to limit the construct of refugee – i.e. it qualifies refugee protection with a “non-triviality” requirement, such as going to Kylie concerts (see e.g. Hathaway and Pobjoy 2012, 335). See in particular chapters six and seven.

psychological assessments – A term used in this thesis to refer to a range of assessments including those that consider post-traumatic stress, gender “dysphoria,” and so on. See further chapter four.

skeleton or skeleton argument – This is a document prepared by the appellant and respondent for a trial or hearing that outlines the parties’ views of the facts and how the law applies; it is usually submitted to the tribunal or court in advance of oral arguments (Law and Martin 2014). In this thesis, skeleton refers to the written briefs submitted by the asylum seeker or their legal representative and representative of the SSHD, outlining for the adjudicator(s) the case each wishes to make regarding the claim.

sexual orientation or sexual identity – As defined by the preamble of the Yogyakarta Principles (2007), sexual orientation is “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate relations with,

individuals of a different gender or the same gender or more than one gender.” I often use sexual identity in place of orientation, and it is considered in particular depth in chapters one and six. See also “sexual minority.”

sexual minority – This term “refers to people who identify themselves largely around their preferred sexual acts and the communities of those who seek out similar pleasures” (UNDP 2012, 129). Sexual minority is considered in this thesis to be inclusive of gender minorities: “people who are more comfortable living social roles or appearances that do not conform with those conventionally assigned to their biological bodies; they may not in fact identify as either men or women” (UNDP 2012, 129). See further chapter one.

social perception approach – This is an approach to the interpretation of PSG. “[T]he ‘social perception’ approach examines whether or not a group shares a common characteristic which sets it apart from society at large” (Türk and Nicholson 2003, 17). In other words, the “social perception” approach considers whether the group shares a common characteristic that sets it apart from society as different and makes those individuals vulnerable to persecution. The concept of “norm deviance” (see above) utilises a social perception analysis, and focuses determination on “persecutory intent” (see above).

subjectivity – This term is used occasionally in this thesis in its ordinary meaning of personal judgment, such as a “subjective” belief or feeling something is true, as opposed to some “objective” or shared frame of reference. I also refer to subjectivity, especially in chapter six, in relation to gender and sexuality – one’s “particular perspective, feelings, beliefs, and desires” (Solomon 2005) about their sexual or gendered self. In relation to discourse analysis the term subjectivity may refer to “the site of our consciousness, but far from being a fully independent entity, it is bound up by the structures and discourses of institutional and interpersonal order, power and ideology” (Jaworski and Coupland 1999b, 413).

travaux préparatoires – Meaning, “preparatory works.” These are the background materials used to prepare and draft a piece legislation (Law and Martin 2014) or, for our purpose here, international treaty. The preparatory works of the Refugee Convention considered in this thesis consist of the minutes of the Ad hoc Committee on Statelessness and Related Problems and further Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (see chapter two). The VCLT states that *travaux préparatoires* may be used as “supplementary means of interpretation” in Article 32 to confirm the meaning of Article 31, that a treaty be “interpreted in good faith.” See also McAdam (2011, 99–103) on the “secondary means for interpretation” of the Refugee Convention and utility of “all documents that had a formative effect on a treaty’s drafting.”

Appendix III – International instruments and preparatory works

This appendix first lists references – by year – to the key international instruments discussed in this thesis. The select list does not distinguish between binding and non-binding or international and regional instruments, but these distinctions are discussed in the thesis where it is relevant to UK obligations. The second list of references, the *travaux préparatoires* or “preparatory works” to the 1951 Refugee Convention, are cited and discussed in chapter two. The Refugee Convention’s preparatory works include the official records of the Ad Hoc Committee on Statelessness and Related Problems, and the Conference of Plenipotentiaries on the Status of Refugees which drafted and finalised the Convention, respectively. In both sections the acronym or abbreviation used in the thesis is listed first, such as “UDHR” and “A/CONF.2/SR.19,” followed by the official title. All of these documents can be found on *Refworld*, a UNHCR database.

Select international instruments

UNDR. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). Retrieved from *Refworld*.

<http://www.refworld.org/docid/3ae6b3712c.html>.

ECHR. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5. Retrieved from *Refworld*.

<http://www.refworld.org/docid/3ae6b3b04.html>.

Refugee Convention. UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137. Retrieved from *Refworld*. <http://www.refworld.org/docid/3be01b964.html>.

ICCPR. UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. Retrieved from *Refworld*. <http://www.refworld.org/docid/3ae6b3aa0.html>.

ICESCR. UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. Retrieved from *Refworld*. <http://www.refworld.org/docid/3ae6b36c0.html>.

1967 Protocol. UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267. Retrieved from *Refworld*. <http://www.refworld.org/docid/3ae6b3ae4.html>.

VCLT. United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. Retrieved from *Refworld*. <http://www.refworld.org/docid/3ae6b3a10.html>.

Preparatory works

A/CONF.2/SR.19. UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting*, 26 November 1951, A/CONF.2/SR.19. Retrieved from *Refworld*. <http://www.refworld.org/docid/3ae68cda4.html>.

A/CONF.2/SR.21. UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-first Meeting*, 26 November 1951, A/CONF.2/SR.21. Retrieved from *Refworld*. <http://www.refworld.org/docid/3ae68cdec.html>.

A/CONF.2/SR.22. UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-second Meeting*, 26 November 1951, A/CONF.2/SR.22. Retrieved from *Refworld*. <http://www.refworld.org/docid/3ae68cde10.html>.

A/CONF.2/SR.23. UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and*

Stateless Persons: Summary Record of the Twenty-third Meeting, 26 November 1951, A/CONF.2/SR.23. Retrieved from *Refworld*.
<http://www.refworld.org/docid/3ae68cda10.html>.

A/CONF.2/SR.33. UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-third Meeting*, 30 November 1951, A/CONF.2/SR.33. Retrieved from *Refworld*.
<http://www.refworld.org/docid/3ae68cde14.html>.

A/CONF.2/SR.34. UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-fourth Meeting*, 30 November 1951, A/CONF.2/SR.34. Retrieved from *Refworld*.
<http://www.refworld.org/docid/3ae68cdf0.html>.

A/CONF.2/SR.35. UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-fifth Meeting*, 3 December 1951, A/CONF.2/SR.35. Retrieved from *Refworld*.
<http://www.refworld.org/docid/3ae68ceb4.html>.

A/CONF.2/9. See A/CONF.2/SR.23.

A/CONF.2/80. UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Draft Convention Relating to the Status of Refugees. Holy See: Amendment to Article 1*, 16 July 1951, A/CONF.2/80. Retrieved from *Refworld*.
<http://www.refworld.org/docid/3ae68ce76c.html>.

A/CONF.2/107. UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Draft Convention Relating to the Status of Refugees. United Kingdom: Recommendation for Inclusion in the Final Act*, 25 July 1951, A/CONF.2/107. Retrieved from *Refworld*.
<http://www.refworld.org/docid/3ae68cdb44.html>.

Appendix IV – Select table of cases

Recurring cases referenced in the thesis are listed chronologically below.³⁰⁹ The citations are followed by a hyphen and the abbreviated forms used in the in-text citations. The simplified titles include the appellant’s denoted name/pseudonym and the year the decision was handed-down, for example, *Jain* [1999]. Case citations containing “Secretary of State for the Home Department” are abbreviated “SSHD.” For clarity, the cases are divided into two lists between domestic and international authorities. Other cases that are considered less frequently are cited in full in the thesis in footnotes. Cases examined in depth, offset in bold font, are summarised in Appendix V.

Domestic cases

R v SSHD ex parte Binbasi [1989] Imm AR 595 – *Binbasi* [1989].

***Islam v SSHD Ex Parte Shah* [1999] UKHL; [1999] I.N.L.R. 144 (referenced) – *Islam and Shah* or *Islam and Shah* [1999].**

***Jain v SSHD* [1999] EWCA Civ 3009; [2000] I.N.L.R. 71 (referenced) – *Jain* or *Jain* [1999].**

Ahmed (Iftikhar) v SSHD [1999] EWCA Civ 3003; [2000] I.N.L.R. 1 (referenced) – *Ahmed* [1999].

Horvath v SSHD [2001] 1 AC 489 – *Horvath* [2001].

Sivakumar v SSHD [2001] EWCA Civ 1196 – *Sivakumar* [2001].

***Z and M and A v SSHD* [2002] EWCA Civ 952 – *Z and M and A* [2002].**

Sepet and another v SSHD [2003] UKHL 15 – *Sepet* [2003].

R (on the application of Dawkins) v Immigration Appeal Tribunal [2003] EWHC 373 Admin – *Dawkins* [2003].

³⁰⁹ The chronology of the cases is general, by year, and I do not necessarily flag when they were heard or handed-down to correctly order where multiple cases are cited in a given year. Between decisions in a year, the higher levels of appeal are typically listed before lower authorities’ determinations.

Atkinson v SSHD [2003] EWHC 2369 (Admin) – *Atkinson* [2003].

R (on the application of Ullah) v Special Adjudicator [2004] UKHL 26 – *Ullah* [2004].

Z v SSHD [2004] EWCA Civ 1578 – *Z* [2004].

R (on the application of Hoxha) v Special Adjudicator [2005] UKHL 19 – *Hoxha* [2005].

HC v SSHD [2005] EWCA Civ 893 – *HC* [2005].

Amare v SSHD [2005] EWCA Civ 1600 – *Amare* [2005].

RM and BB (Homosexuals) Iran CG [2005] UKIAT 00117 – *RM and BB* [2005].

K and Fornah v SSHD [2006] UKHL 46 – *K and Fornah* [2006].

RG (Columbia) v SSHD [2006] EWCA Civ 57 – *RG* [2006].

J v SSHD [2006] EWCA Civ 1238 – *J* [2006].

B (claimant) v SSHD [2007] EWHC 2528 (Admin) – *B* [2007].

XY (Iran) v SSHD [2008] EWCA Civ 911 – *XY* [2008].

AK (Iran) v SSHD [2008] EWCA Civ 941 – *AK* [2008].

HJ (homosexuality: reasonably tolerating living discreetly) Iran [2008] UKAIT 00044 – *HJ* [2008].

JM (homosexuality: risk) Uganda CG [2008] UKAIT 00065 – *JM* [2008].

HJ and HT v SSHD [2009] EWCA Civ 172 – *HJ and HT* [2009].

NR (Jamaica) v SSHD [2009] EWCA Civ 856 – *NR* [2009].

MM (Iran) v SSHD [2009] EWCA Civ 1167 – *MM* [2009].

OO (Sudan) JM (Uganda) v SSHD [2009] EWCA Civ 1432 – *OO and JM* [2009].

N (claimant) v SSHD [2009] EWHC 873 (Admin) – *N* [2009].

AJ (Risk to Homosexuals) Afghanistan CG [2009] UKAIT 00001 – *AJ* [2009].

MK (Lesbians) Albania CG [2009] UKAIT 00036 – *MK* [2009].

***HJ (Iran) and HT (Cameroon) v SSHD* [2010] UKSC 31 – *HJ and HT* or *HJ and HT* [2010].**

***SW (lesbians – HJ and HT applied) Jamaica CG* [2011] UKUT 00251(IAC) – *SW* [2011].**

***LZ (homosexuals) Zimbabwe CG* [2011] UKUT 00487 (IAC) – *LZ* [2011].**

MT (Ahmadi – HJ (Iran)) Pakistan [2011] UKUT 00277(IAC) – *MT* [2011].

RT (Zimbabwe) and KM (Zimbabwe) v SSHD [2012] UKSC 38 – *RT and KM* or *RT and KM* [2012].

Aderonke Adejumo Apata (claimant) v SSHD [2015] EWHC 888 (Admin) – *Apata* [2015].

International cases

Matter of Acosta, A-24159781, United States Board of Immigration Appeals, 1 March 1985 – *In re Acosta* [1985].

Soering v UK (1989) 11 EHRR 439 – *Soering* [1989].

Attorney General of Canada v Ward [1993] 2 SCR 683 – *Ward* [1993].

Modinos v Cyprus (A/259) (1993) 16 EHRR 485 – *Modinos* [1993].

Refugee Appeal No. 1312/93, Re GJ, No. 1312/93, New Zealand: Refugee Status Appeals Authority, 30 August 1995 – *Re GJ* [1995].

A v Minister for Immigration and Ethnic Affairs and Another (1997) 2 BHRC 143 – *Appellant A* [1997].

Appellant S395/2002 v Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v Minister for Immigration and Multicultural Affairs [2003] HCA 71 – S395 [2003].

Refugee Appeal No. 74665, No. 74665, New Zealand: Refugee Status Appeals Authority, 7 July 2004 – *Refugee Appeal No. 74665* [2004].

X, Y, Z v Minister voor Immigratie en Asiel, C-199/12 - C-201/12, European Union: Court of Justice of the European Union, 7 November 2013 – *X, Y and Z* [2013].

A, B, C v Staatssecretaris van Veiligheid en Justitie, C-148/13 to C-150/13, European Union: Court of Justice of the European Union, 2 December 2014 – *A, B, and C* [2014].

Appendix V – Case summaries

In chronological order below are summaries of the main cases which are analysed in the case study chapters, four and five.³¹⁰ The cases considered include: 3 House of Lords and Supreme Court, 13 Court of Appeal, 2 Upper Tribunal (Immigration and Asylum Chamber), 3 Immigration Appeal Tribunal and Asylum and Immigration Tribunal, and 1 High Court decisions.³¹¹ The IAT determination, *RM and BB* [2005] is summarised because of the reliance many other cases in the sample placed on its findings; the two AIT determinations are considered as asylum claims which were appealed in other cases in the sample; finally, the UT (IAC) cases show how *HJ and HT* was applied. Setting out the key details of the cases here, and in some instances flagging other key cases in the jurisprudence, allows for the analysis in the case law analytical chapters to proceed with a focus on the concepts developed.³¹²

Case summaries

***Islam v SSHD Ex Parte Shah* [1999] UKHL** – hereafter *Islam and Shah* or *Islam and Shah* [1999] – The two conjoined appeals raise questions as to the interpretation of Article 1A(2) and the membership of a particular social group (PSG). The appellants were married Pakistani women forced from their homes by their husbands. Both contended that Pakistan would not protect them from persecution and that they may be subjected to criminal proceedings for adultery, a sentence for which included stoning to death. Both women had been given exceptional leave to remain but

³¹⁰ As Appendix IV the chronology is general, by year, and I do not necessarily flag when they were heard or handed down to correctly order where multiple cases are cited in a given year. My analysis is of the broader, thematic trends in the legal discourse; this is similar to the point that I do not necessarily make the success or failure of sexual minority asylum claims a core issue. Though occasionally relevant, the final outcomes are not of particular interest here given the focus is not on, for example, the veracity of claims but the juridical construction of identity and persecution.

³¹¹ The Supreme Court (UKSC) was created by the Constitutional Reform Act of 2005 and began hearing cases in 2009 as the highest appellate court in the United Kingdom for civil cases. Formerly, Lords of Appeal in the Ordinary (“Law Lords”) were professional judges appointed to the House of Lords to perform its judicial functions. The AIA 2004 replaced the Immigration Appeal Tribunal (IAT) with the Asylum and Immigration Tribunal (AIT) in 2005. See further chapter two

³¹² Where available, I have used the Westlaw UK database, accessed through the University of Edinburgh, in finding, summarising, and cross-referencing the cases discussed here. Westlaw was especially helpful where there are more technical legal issues that are tangential to this thesis but fundamental to the decision, such as in *HC* [2005] regarding the Tribunal’s remit under the NIAA 2002. While following the general format Westlaw of summaries as I found them to be logically organised, I omitted various details and added others where applicable from the text of the decisions.

appealed for refugee status. The question before the House of Lords was if they should be awarded refugee status for the unwillingness or inability of Pakistan to protect the women, or prosecute their husbands for past or possible future domestic violence, and whether the state’s failure to do so amounted to discriminatory persecution on account of their gender. Shah arrived in the UK in 1992; soon after she gave birth and claimed asylum in 1993 fearing her husband would accuse her of sexual immorality. Islam was a teacher in Pakistan with two children that arrived in the UK in 1991; her husband had been repeatedly violent since they were married in 1971; after she intervened in a school fight between two rival factions, one of which her husband was a member of, he beat her twice to the point of hospitalisation, and her claim for refugee status on grounds of political opinion had also been rejected.

The House relied strongly on *In re Acosta*’s construction of PSG, referring to people that share a common characteristic that they cannot change or should not be required to change because it is fundamental to their individual identities or consciences.³¹³ The appeals were granted, and while Lord Millet dissented there was one point on which all of the judges agreed: homosexuals could constitute a PSG under the Convention. The majority found that Islam and Shah had a well-founded fear of persecution because, like homosexuals, they belonged to a PSG which existed independently of the persecution feared.³¹⁴ Women in Pakistan suffered systemic discrimination due to their sex, and the state sanctioned, was unable or unwilling to prevent the discrimination and persecution feared by the appellants.

***Jain v SSHD* [1999] EWCA Civ 3009 – *Jain or Jain* [1999] –** The principles set out by the House of Lords in *Islam and Shah* were applied by the Court of Appeal in

³¹³ See *K and Fornah* [2006], para 14; *In re Acosta* [1985]. In *Islam and Shah*, Lord Steyn (154) accepts the reasoning of the New Zealand Refugee Status Authority in *Re GJ* [1995] as correct.

³¹⁴ Lord Millet (172) argued that, unlike homosexuals, “[b]attered wives do not form a social group because, if the group is limited to battered wives, it is defined by the persecution.” Drawing upon *Appellant A* [1997], the majority discussed this point of a circular constitution of a PSG; although discrimination is common to all five grounds, “[t]he rule is that the Convention reasons must exist independently of, and not be defined by, the persecution” (Lord Hope, 167). In *Islam and Shah*, Lord Steyn (151) cites McHugh J (173) in *Appellant A* [1997] in discussion of this point: “If it were otherwise, Art. 1(A)2 would be rendered illogical and nonsensical. It would mean that persons who had a well founded fear of persecution were members of a [PSG] because they feared persecution.” See also Lord Rodger (para 77-79) in *K and Fornah* [2006] for discussion of “circularity,” and Appendix II. The preponderance of jurisprudence on the whether a group is “circular” appears to revolve around a fear of claimants choosing to be a member of a social group subjected to persecution for the sole purpose of claiming asylum.

Jain, and how PSG applied in claims based on homosexuality. The appellant’s *sur place* claim arose when Jain,³¹⁵ an Indian national came to realise he was gay when living in the UK; 32 at the time of the appeal, he arrived in the UK at 23. Jain feared persecution if deported due to his country’s prohibition of sodomy – an infamous British colonial legacy, Section 377 of the Indian Penal Code – and being forced into an arranged marriage. The Adjudicator had dismissed that homosexuals were a PSG, and the Immigration Appeal Tribunal (IAT) found that the probability of Section 377 actually being enforced against the appellant was low. The Court of Appeal agreed with the IAT and dismissed Jain’s appeal. The court approved the IAT’s conclusions as to the infrequency of anti-sodomy prosecutions in India, and thus held that there was no risk to Jain other than possible harassment upon return, but not persecution.

The Court of Appeal did affirm that homosexuals constituted a PSG, but that in this case the IAT was entitled to find there was no reasonable likelihood Jain would be persecuted. As is discussed in the analysis in chapter four, commentators have argued that the court constructed a conduct-driven approach in *Jain*, which focused on the engagement in private, so-called “legitimate” sexual acts. The definition of persecution was also clarified, and the court stressed that the presence of anti-sodomy laws was insufficient, but that the threat of actual enforcement, or reasonable likelihood, was key. The court emphasised that the jurisprudence defined persecution as sustained and serious ill-treatment.³¹⁶ The court did not engage questions of, for example, the broader effects of anti-sodomy laws or what prohibitions may indicate about the social status of homosexuality. The court stated that if there had been a reasonable likelihood of Jain being imprisoned or suffering significant harm for engaging in private sexual acts, that may amount to persecution.

Z and M and A v SSHD [2002] EWCA Civ 952 – *Z and M and A* [2002] – The conjoined appeals of Z, M, and A primarily engaged the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), specifically Articles 3 (prohibition of torture) and 8 (right to a private and family life). The

³¹⁵ *Sur place*, meaning, the grounds of asylum have arisen while the claimant was outside the country of her nationality. For example, a woman who has come to live in the UK and later comes to identify as a lesbian or wishes to live openly (see Battjes 2013).

³¹⁶ On the definition of persecution here, see also *Kagama v SSHD* [1997] Imm AR 137 and *Sandralingum & Ravichandran v SSHD* [1996] Imm AR 97.

appeals were considered together because the appellants were alleged homosexuals from Zimbabwe. They argued their expulsion might have led to treatment in the Zimbabwe that infringed their ECHR rights,³¹⁷ in addition to departing from the Refugee Convention principle of *non-refoulement*. Zimbabwe has anti-sodomy laws, under which A and his partner, W, were given suspended prison sentences. A and W migrated to the UK, and when A’s asylum claim was refused the appellant argued the Secretary of State (SSHD) had not considered whether his removal from W, who had leave to remain at the time, was proportionate under Article 8. The SSHD appealed the IAT decision that Z should not be deported, in which the Tribunal had found Zimbabwe would interfere with Z’s right to a private life under the ECHR.

On whether or not the conditions in Zimbabwe were compatible with the ECHR, the Court of Appeal set out that this had to be considered on a case-by-case basis. The European Court of Human Rights (ECtHR) had not outlined what duties were imposed on the expelling state where there may be a restriction on an individual’s sexual expression or conduct in their country of nationality. In the decision, the court declined to clarify the scope of the ECHR with their authority under the Human Rights Act (HRA). The Court of Appeal remitted the case of Z to the IAT, and directed the Tribunal to consider whether there was a reasonable likelihood Zimbabwe would enforce the anti-sodomy law.³¹⁸ The court also remitted the case of A and instructed the IAT to consider if A were deported whether his loss of society of W would violate ECHR Article 8(1), and whether the SSHD’s reliance on Article 8(2), an exemption for immigration control, was proportionate. M’s appeal was dismissed as the claim on political opinion was found not to be credible on the facts before the IAT.

Z v SSHD [2004] EWCA Civ 1578 – Z [2004] – The IAT subsequently refused Z’s application for asylum. Z appealed again to the Court of Appeal, the grounds for which relied heavily on a High Court of Australia (HCA) decision, *S395* [2003],³¹⁹ regarding sexual orientation and the discretion requirement. The majority of the

³¹⁷ In UK law, this would violate the obligations of the SSHD under the HRA. The court specifically relies on *Soering* [1989] in considering ECHR obligations in this appeal.

³¹⁸ While a similar reasoning is applied in *Jain* regarding the prospect of enforcement, in remitting the case of Z the Court of Appeal applied *Modinos* [1993].

³¹⁹ *S395* [2003]; the appellant also drew upon Refugee Status Appeals Authority of New Zealand in *Refugee Appeal No. 74665* [2004] to assert a broader interpretation of persecution.

HCA decided that a gay asylum seeker would exercise discretion if returned to their country of origin to avoid harm; however, they should not be required to conceal their sexual orientation in order to avoid persecution, and so adjudicators must consider *why* they had been or would be discreet. The IAT supported the Adjudicator’s determination that there was no evidence homosexuals were at risk of persecution in Zimbabwe. Z argued that “persecution” existed where there was a discriminatory denial of a core human right, respect for his private life, and by extension that he had a right to live openly without fear of persecution. Drawing on *S395* [2002], Z argued that the IAT had not considered *why* he had previously been discreet in Zimbabwe.

However, Buxton LJ of the Court of Appeal concluded that Z himself had given no specific evidence addressing why he had conducted his personal relations discreetly in Zimbabwe. The court held that “persecution” did not apply to all denials of human rights, and there must also be serious harm.³²⁰ The court concluded that the IAT did not suggest, as Z argued, that his claim to refugee status was insufficient because he could act discreetly.³²¹ Z would only continue to act as he had previously, and thus there was no reason to believe that Z living discreetly in Zimbabwe with his partner, D, would result in persecution. Jacob LJ agreed with Buxton LJ’s judgment, but adds that there was a contradiction in the Z’s case. Z stated specifically that he wanted to live with D, who was in Zimbabwe, but there was no evidence that D could or wished to leave Zimbabwe. Therefore, the UK granting refugee status to Z “could not help [him] – his rights (assuming he has them) to live with D cannot be protected or achieved by asylum” (Jacob LJ, para 25). The appeal was dismissed.

***HC v SSHD* [2005] EWCA Civ 893 – HC** [2005] – The appellant, HC, was a Palestinian Muslim who was born in a Lebanese refugee camp in 1971. The SSHD did not dispute that HC was a homosexual. HC opened a video rental shop in his refugee camp; following an explosion at the shop, the police were called but there was no investigation. There was a leaflet distributed in the camp falsely accusing him

³²⁰ On the deprivation of rights the court considered *Ullah* [2004].

³²¹ Regarding whether the tribunal expected discretion of Z, court refers to *Ahmed* [1999] in reference to the Simon Brown LJ’s critical question that is whether, if returned, the claimant would behave as stated and suffer persecution which, no matter how unreasonable, a court cannot expect him to change. According to Buxton LJ, the Tribunal was only really expecting Z would act as he had previously and, regardless of the threat of persecution, he wished to live a quiet life anyway.

of having pornographic videos in the shop, and a second leaflet weeks later depicted a headless body and said HC’s video shop must close immediately. A man named “Yasser Al Khateb” told HC that he and a friend had bombed the shop and distributed the fliers because he was gay, this was against Islam, and he must leave the camp. HC argued that internal relocation to Beirut was untenable as a Muslim, because he could not live in a Christian neighbourhood and, as gay, he could not live in a Muslim one. HC arrived in the UK in 1999, claiming asylum on arrival. An Adjudicator dismissed HC’s appeal in 2003. The Adjudicator had determined the threats against the claimant had been criminal, not persecutory. Permission to appeal to the IAT was granted but this was also unsuccessful; a question before the Court of Appeal was if the IAT had overreached its remit in the consideration of evidence.

The Court of Appeal granted HC’s appeal, and found that both the Adjudicator and IAT had erred on points of law. The IAT had improperly considered the evidence of HC’s claim, where their authority to do so had been restricted by the Nationality, Immigration and Asylum Act 2002.³²² For her part, the Adjudicator had misapplied the case law and guidance relating to non-state persecution and the threats against HC, whose evidence could indeed amount to persecution.³²³ The court discussed the accumulation of factors of HC being both homosexual and a Palestinian, and how that could affect the possibility of relocating in Lebanon. The court allowed the appeal and remitted the case to the Asylum and Immigration Tribunal (AIT), under the new framework, for fresh consideration.

Amare v SSHD [2005] EWCA Civ 1600 – *Amare* [2005] – Amare was a lesbian asylum seeker from Ethiopia. The fact she was a homosexual was accepted the Adjudicator, Tribunal, and Court of Appeal; they also agreed that the appellant was therefore a member of a PSG according to precedent, and it was noted by the Adjudicator that she had a genuine subjective fear of persecution. Ethiopia’s anti-sodomy law explicitly applies to female same-sex acts, which is less common than

³²² Applying *Miftari v SSHD* [2005] EWCA Civ 481, the Court of Appeal emphasised the limited nature of the IAT’s jurisdiction under the 2002 Act which extends only to errors of law and that, as in *Miftari*, the Tribunal cannot reconsider the merits or evidence of the claim.

³²³ In discussion of HC’s appeal, Keene LJ (para 26) writes that it is well-established that persecution may be non-state, where the state is unwilling or unable to intervene, citing *R (on the application of Adan) v SSHD* [2001] 2 AC 477, and also notes that *Horvath* [2001] outlined state protection may be sufficient even where violence could still, in fact, occur.

the criminalisation of MSM. The Adjudicator and the IAT refused Amare’s asylum claim and the human rights grounds, concluding that she had not been persecuted in the past nor would she be in the future. In Amare’s appeal, it was argued that the Adjudicator and IAT had failed to consider whether living openly as a lesbian would attract persecution, and whether the accumulated effects of discrimination against women and homosexuals in Ethiopia compounded the risk of future persecution. Amare argued for a human rights-based approach to persecution in the appeal.

The Court of Appeal dismissed Amare’s appeal with reasoning similar to *Jain* [1999] and *Z* [2004],³²⁴ but Laws LJ also wrote extensively in response to the human rights-based approach advocated by the appellant. Similar to *Z*, specifically, the court affirmed that Amare could return and live discreetly; Laws LJ did not view this as the enforcement of a discretion requirement, but in fact as a statement of how she had lived previously, and that she would live a quiet life in the future. It should be noted, however, that the court found the IAT made an error of law in stating that “[a] person can properly be expected to take *some* steps to ensure the risk he faces is reduced” (cited in Laws LJ, para 11, see also 5).³²⁵ Nonetheless, the Court of Appeal underlined discretion was not required of Amare to avoid the persecution feared, but that it was merely an observation on the evidence that she had previously lived discreetly and not suffered unreasonably as a result, or experienced persecution. Regarding human rights, the court responded that state obligations were limited by what the states had contractually agreed to, and violations must be reasonably likely and of a substantial level of seriousness to qualify as persecution.

RM and BB (Homosexuals) Iran CG [2005] UKIAT 00117 – RM and BB [2005] –

The appellants were citizens of Iran whose status as homosexuals was accepted previously by the Adjudicators as well as in this IAT decision.³²⁶ The appeals were

³²⁴ See also *Jain* [1999], considered in Amare; *Z* [2004], which bears significant similarities in the reasoning of discretion.

³²⁵ According to Laws LJ, this is immaterial, because the Adjudicator had not required her to take steps to avoid persecution but suggested as a fact based on the evidence that Amare would be discreet; under the AIA 2004, an appeal must be grounded on an error of law by the Adjudicator which the Tribunal subsequently failed to correct. While it may be that IAT had not respected the jurisprudence in *Ahmed* [1999], applied in *Z* [2004], according to Laws LJ in Amare the Adjudicator made no such mistake.

³²⁶ Sitting on the IAT in this case were three members all bearing the specified title Vice President. The decision was written by “Mr D K Allen (Vice President),” who I cite as “Allen VP” where relevant. It is also important to note is that this case is flagged as a Country Guidance (CG) case, and

heard together due to the common risk claimed of being identified as homosexual and involved in homosexual practices which are punishable by imprisonment, lashings, and death in Iran. In the decision, the appellants are identified as “B” and “E.” The Adjudicator had found B to be credible, in part: B was in a sexual relationship with another man, and they had been observed and reported for homosexual practises in his partner’s house; the sentence was four years and four months in prison in addition to one hundred and twenty lashes; and the Adjudicator did find sentence was served in appalling conditions and B suffered severe ill-treatment. Following their release from prison, B was having sex with the same man in a secluded public space when officials approached them, and B fled but his partner was allegedly arrested in the attempted escape. The Adjudicator speculated there was no way of knowing the actual reason officials arrested his partner, whether he had been executed, if B’s involvement was known, or if Iran would have any interest at all in B if he was deported by the UK. E had no past history of sexual offenses, but in 2002 he had made a safe sex education video with a group of friends in which there were several people having sex and E was the presenter. Authorities had obtained the video, and the Adjudicator accepted this as credible. However, E was unable to obtain the summons allegedly sent to his family regarding the incident as evidence, because he had no contact with them as they were deeply religious and ashamed. The Adjudicator also cited a lack of evidence for the extent to which people were prosecuted in Iran for the production of pornographic videos, and concluded E was not at risk of persecution.

B’s appeal was based on the past conviction, which was argued to place him at greater risk as a known and practising homosexual. The Adjudicator is criticised for not asking why E’s uncle, with whom he is in contact, could not get the summons for evidence; yet, it is noted the state is still aware of E and on the background information it could be reasonably argued he is at risk of persecution in Iran. While the IAT found the death penalty is rarely applied, there is substantial evidence of harsh punishments and the SSHD agreed that lashing breaches ECHR Article 3. Thus, if sentenced, the appellants “would be subjected to significant prison sentences

so may have been given particular weight in Tribunal adjudications which follow it regarding homosexual claimants from Iran. All of the Tribunal decisions which I will discuss in depth are CG cases, save *HJ* [2008].

The inclusive guise of “gay” asylum and/or lashing” (Allen VP, para 123, see also 73; quoted to highlight the absence of “persecution” in the careful wording of possible harm). In passing, the IAT noted that “discretion” had not been argued before them; while they did not wish to impose that requirement, they find that private homosexual conduct in Iran is unlikely to come to the attention of authorities.³²⁷ As B’s credibility had been accepted in part by the Adjudicator, the appeal was remitted for consideration of whether he may be of interest to Iranian authorities following the second incident, for example, if B’s partner had identified him. E’s appeal was remitted on the basis that the Adjudicator should not have assumed the summons did not exist simply because his uncle was unable to send it to E, and the question of what, if any, offense E had committed under Iranian law should be clarified.³²⁸

K and Fornah v SSHD [2006] UKHL 46 – K and Fornah [2006] – While not relating to the asylum claims of sexual minorities, this House of Lords decision is significant in the interpretation of PSG, and illustrates a dynamic relationship between the Refugee Convention and the ECHR. K feared ill-treatment or persecution if returned to Iran because of the circumstances of her husband’s imprisonment. Fornah left Sierra Leone for fear of female genital mutilation (FGM). The question before the House of Lords was whether their respective fears of ill-treatment, which the SSHD accepted are violations of ECHR Article 3, constituted persecution within the meaning of the Refugee Convention Article 1A(2) category PSG, which the respondent rejected. The practical importance of the “refugee status” distinction is that they would be accorded additional protections and benefits.

The House of Lords granted the appeals, clarifying that the women were members of a PSG. Arriving at this conclusion the House considered a number of international standards including the *UNHCR Handbook and Guidelines on Gender-related Persecution* (2002), as well as the EU Council Directive 2004/83. The fact that K’s spouse was imprisoned was sufficient under the above guidance and the jurisprudence to conclude that her family was a PSG. Regarding the asylum claim of

³²⁷ See Allen VP, para 124; *S395* [2003] cited.

³²⁸ However, the IAT notes in expert evidence that: “Article 639 of the Islamic Law...could give rise to one to ten years’ imprisonment and was appropriate for someone such as E, who had provided a place for others to commit these crimes. For making and appearing on the video that would be the range of likely sentence” (Allen VP, para 52).

Fornah, the group of “intact” women created a common characteristic, not constituted by the persecution feared, of those women offset from the majority who were subjected to FGM, and this also represented systemic discrimination against all Sierra Leonean women.

RG (Columbia) v SSHD [2006] EWCA Civ 57 – *RG* [2006] – *RG* was a homosexual and HIV-positive asylum seeker from Colombia whose claim was, essentially, dismissed as bogus on the grounds he was actually here for NHS treatment. *RG* had lived more than a decade as a self-identified homosexual in Colombia but discreetly, and claimed to fear being killed by vigilante groups in his country of origin because of his sexuality and serostatus. *RG* also argued that there was increased risk of his being identified as a homosexual as he had become more overt in the expression of his sexuality since arriving in the UK. The Adjudicator found that *RG* had not experienced persecution in the past on account of his concealed sexuality, nor did he leave Colombia for this reason. The appeal was on the grounds that *RG* claimed to have a right to live openly and that the medical evidence showed a likelihood of psychological trauma, which deportation and future concealment would cause.

RG’s appeal was dismissed, as the court found that he had lived in Colombia discreetly and had not suffered actual harm nor was his fear of persecution well-founded. *RG* was found to have fabricated an asylum claim in order to gain treatment for HIV, which the court considered to have militated strongly against his credibility.³²⁹ The court also found that the rejection of *RG*’s asylum claim did not require discretion but, instead, he had not evidenced why the persecution he claimed to fear forced him to conceal his sexuality and live differently than he would have chosen to otherwise.³³⁰ In addition, it was decided that the Adjudicator made no error of law in the qualification of persecution. *RG* did not evidence a sufficiently severe or reasonably likely harm, nor did the concealment of his sexuality engage the

³²⁹ See also *Dawkins* [2003]; *Dawkins*, on the other hand, did not claim asylum immediately on arrival (para 6, 30), and appealed the decision of the SSHD upheld by the Adjudicator “for his removal to Jamaica as an illegal entrant after the refusal of [the] asylum application” (para 1). While issues of his sexuality to make a false claim did not affect the Adjudicator’s determination, Wall J clearly expresses scepticism (e.g. para 10-12, 15, 18).

³³⁰ In this respect of discretion the Court of Appeal applied *Z* [2004].

HRA/ECHR as not all rights infringements amount to persecution.³³¹

J v SSHD [2006] EWCA Civ 1238 – *J* [2006] – “J” first claimed asylum on arrival in 2001. “J” is referred to in later cases as “HJ,” but I identify the appellant as “J” in the context of this case to avoid confusion. See further *HJ* [2008], *HJ and HT* [2009], and *HJ and HT* [2010], below.

J was a homosexual from Iran, who appealed the determination of the AIT which dismissed his claim to refugee status.³³² The grounds of well-founded fear referenced the death penalty, though rarely applied, as well as other significant punishments for homosexual offences. As a “practising homosexual,” he had been discreet in Iran and was later in a relationship in the UK. The AIT decided J faced no risk of persecution if he concealed his sexuality, citing that he had done so in the past without attracting the attention of Iranian authorities. J also lost his appeal before the AIT under ECHR Articles 2, 3, and 8 which were excluded in permission to appeal to the Court of Appeal and granted under the Refugee Convention only. The appellant argued that there had been an error of law in the lack of consideration for why he had previously acted discreetly, and that the evidence presented a reasonable likelihood of serious persecution, at minimum that of imprisonment and flogging if not the death penalty, in Iran.

The Court of Appeal allowed J’s appeal, but directed the AIT to follow a test which would lead to J’s appeal being dismissed in *HJ* [2008], perhaps because the Tribunal gave additional weight to Buxton LJ’s view of the test which allowed for the modification of identity to avoid significant harm (Buxton LJ, para 20; applied in *HJ* [2008], para 46).³³³ In writing the majority of the decision, Kay LJ found on discretion or modification that J’s behaviour in Iran may have been different than he

³³¹ The case of *Amare* [2005] was considered and applied in reaching these conclusions in respect of RG. Regarding persecution, the court considered, among other cases, *Ahmed* [1999] and *Hoxha* [2005]. Inevitably, the discussion of discretion cited *S395* [2003].

³³² The AIA 2004’s transitional provisions were in force when J’s appeal was considered substantively by a tribunal so the case came before the AIT rather than the IAT, which was replaced in 2005. Instead of members of the Immigration Appellate Authority, from this case forward I refer to tribunal members as Immigration Judges (IJ), which is the title members assumed under the 2004 Act.

³³³ In *HJ and HT* [2010], para 23, Lord Hope contends Kay and Buxton LJ were “making the same point.” Kay LJ, however, would later grant J/HJ permission to appeal again following *HJ* [2008], and while Millbank (2012, 520) cites this as a “testament to the misapplication of the ‘reasonably tolerating’ approach,” I wonder if this may actually evidence Buxton LJ taking a more hard-line approach in his part of the opinion than Kay LJ really agreed to.

would have otherwise engaged in to avoid harm; future discretion may place him at risk of persecution, or be persecutory, if he were deported.³³⁴ Quoting Simon Brown LJ in *Ahmed* [1999], the court found that J “cannot be refused asylum on the basis that he could avoid otherwise persecutory conduct by modifying the behaviour...at least if that modification was *sufficiently significant in itself to place him in a situation of persecution* [emphasis added]” (cited in Kay LJ, para 10). Sir Martin Nourse and Buxton LJ agree with the opinion of Kay LJ; however, Buxton LJ (para 20) adds that in the remitted case, considered in *HJ* [2008], the AIT must determine if J “could reasonably be expected to tolerate whatever circumstances are likely to arise” if he were deported, and that he “may have to abandon part of his sexual identity” (i.e. be discreet or conceal it) in a situation which may expose him to “extreme danger” per the CG case.³³⁵ The reasoning in *J* [2006] was later overturned in *HJ and HT* [2010] because of the “reasonable tolerability” test.

***B (claimant) v SSHD* [2007] EWHC 2528 (Admin)** – *B* [2007] – B, a gay Algerian, claimed asylum in the UK and was detained in an adult prison from 1996-1997 as a minor after claiming asylum; the interim details following his release are unclear, though he appealed and spent time in Belgium. The Home Office refused his claim in 2003, and B appealed to an Adjudicator for fear of persecution in Algeria as a homosexual. The Adjudicator and Tribunal dismissed his claim, and following an unsuccessful appeal to the Court of Appeal a fresh claim was made from 2005-2006 in which the SSHD decided B’s additional matters could not be regarded as a fresh claim. Permission to appeal to the High Court was refused on the grounds of ECHR Article 8 and B’s current relationship, though this was eventually heard by Collins J, but granted in relation to the risk of persecution and whether he could not or would not be discreet in Algeria. Collins J writes that it was agreed that B was a homosexual, and the SSHD did not argue this was an attempt “as sometimes occurs...to establish a ground which is not a valid one” (para 9), and B was in a “genuine and longstanding-relationship” with S (para 33). Given that Collins J had

³³⁴ *Ahmed* [1999] and *Z* [2004] were applied by the Court of Appeal in respect of J’s asylum claim. Kay LJ (para 11) outlined the jurisprudence that purportedly supported a view of finding whether discretion would be “sufficiently significant in itself to place him in a situation of persecution.”

³³⁵ Buxton refers the AIT to *S395* [2003] regarding reasonable tolerability, and *RM and BB* [2005] for country guidance.

permitted submissions under Article 8, it may be of interest to note the substantial considerations of B’s relationship with S, including S’s past drug and alcohol misuse, B’s Muslim background, drinking little, and suffering from depression, as well as the periods of time the couple spent apart and living together (e.g. para 17, 22, 25-27, 33).

Collins J (para 33) acknowledged B had been “wrongly treated as an adult” by UK authorities, and that the (calendar) year in prison “must have scarred him to no small extent.” This was treated by Collins J as a reasonable excuse for breaking the UK’s immigration laws in those circumstances. While removal for the purposes of immigration control would normally be proportionate, when considered this against the “question of whether he can discreetly exercise his homosexuality,” Collins J found in his judgment that B’s claim was, in fact, exceptional and that the SSHD erred in not treating B’s claim as fresh (Collins J, para 35). The previous decision was quashed, and the Home Office was directed to reconsider B’s claim, and any decision should be made on the basis of a fresh claim with the right of appeal to the AIT.

AK (Iran) v SSHD [2008] EWCA Civ 941 – AK [2008] – AK was a male-to-female trans asylum seeker from Iran, or in the words of the court: “He is [a] transsexual and in need of gender reassignment” (Sedley LJ, para 1). Problematically, the decision uses male pronouns in respect of AK without explanation – i.e. from the decision we cannot know what gender AK actually used – therefore, I use the terms of the court but with express reservations. It is noted that gender reassignment is widely accepted and practised in Iran, but AK fears persecution by “the ignorant as a homosexual” in Iran (Sedley LJ, para 1). Appealing the SSHD’s refusal of asylum, AK was accepted as a member of a PSG by Atkinson IJ. However, the SSHD’s application for reconsideration succeeded before Mather IJ, who decided the previous decision made a material error of law in equating the risk to transsexuals to that of homosexuals, but the Court of Appeal disagreed with this second analysis in the present appeal. Several issues arose at different stages in the appeals process over the appellant’s legal representation (see Sedley LJ, para 7-13). Most importantly for the present case, Ince IJ proceeded to hear and decide AK’s appeal in spite of the fact his

The inclusive guise of “gay” asylum counsel abandoned the case a day before the hearing at which AK represented himself and the appeal was dismissed.

Before the Court of Appeal, the representative for the SSHD argued that AK had gathered additional evidence which placed him in a more advantageous position if the present appeal was granted. The court found that the appeal was only concerned with AK’s need for legal representation. The appeal was allowed, and the court ordered that the tribunal to consider AK’s credibility as established in addition to the evidence of the claim then available. Ince IJ should have acknowledged that for the claim to be justly adjudicated, legal representation for AK was necessary due to the complexity of the legal issues, and the hearing should have been adjourned.

HJ (homosexuality: reasonably tolerating living discreetly) Iran [2008] UKAIT 00044 – *HJ* [2008] –The remitted case of *J*, *J* [2006], was considered in *HJ* [2008], in which it was accepted that to be openly gay in Iran would attract persecution, but the issue before the AIT was “whether the need for the appellant to be discreet about his sexuality on return...would itself constitute persecution” (Hodge J, para 9). The details of *HJ*’s appeal history and evidence can be found at paragraphs 1-2, and 26-37 of this decision; however, the legal findings are themselves substantial so I focus solely on the reasoning.

Following established precedent, the AIT found that they could not decide on how *HJ* should behave, but could find and decide on how he had conducted himself in the past and would, therefore, if returned. Because *HJ* had previously been discreet it was found he could reasonably tolerate the concealment of his sexuality. Applying Buxton LJ’s (*J* [2006], para 20) rationale, that the appellant may have to give up part of his sexual identity, the Tribunal concluded that return would not “involve suppression of many aspects of his sexual identity” (Hodge J, para 46). *HJ*’s appeal remained dismissed, and his subsequent appeals were conjoined with *HT* in decisions which will be summarised below, *HJ and HT* [2009] and *HJ and HT* [2010].

XY (Iran) v SSHD [2008] EWCA Civ 911 – *XY* [2008] – *XY* was a gay man from Iran, who appealed the determination of Davies IJ, made at second stage reconsideration. Aged 25, *XY* had been in a “seven-year relationship with a friend,” *A*, and the two “had sexual intercourse at *A*’s house, when his family were absent,”

and “in a shower cubicle at the local public baths” (Stanley Burnton LJ, para 2). A was arrested on account of, according to XY’s father, their homosexual relationship, and XY believed the staff at the bathhouse may have informed authorities. XY hid at his aunt’s house until his father found a way to get him out of Iran. A month later, XY learned from his family that a court summons had been issued against him. The appellant feared being found guilty of homosexuality on return and death by stoning. Of the details above, the only accepted facts were that XY was a homosexual who had been in a long-term relationship; others at issue included whether the authorities were interested in XY, whether A was arrested, and whether XY had been summoned by a court.

XY’s primary submission before the Court of Appeal was whether Davies IJ had erred in law in failing to consider *J* [2006] on whether he “could reasonably be expected to tolerate the fact that he would have to conduct his sexual life clandestinely were he to return to Iran” (Stanley Burnton LJ, para 5). The Court of Appeal reviewed or, more accurately, relied on large excerpts of three previous decisions in reaching its conclusion: *RM and BB* [2005], para 123-124; *J* [2006], para 10-11, 16, 20; *HJ* [2008], introduction, para 41-42, 44-46. The majority of *XY* [2008] was, therefore, more of a restatement of the case law and application of reasonable tolerability, i.e. *J* [2006], than significant precedent in itself. The court dismissed XY’s appeal because, although Davies IJ had not considered *J* [2006], the findings suggested XY had a sexual relationship with A for a number of years. XY left Iran not because the concealment of this relationship was intolerable, but because he feared arrest and punishment following the arrest of A. However, this was disbelieved. XY “did not establish, or even assert, facts” which established he could not reasonably tolerate discretion in Iran (Stanley Burnton LJ, para 14).

JM (homosexuality: risk) Uganda CG [2008] UKAIT 00065 – *JM* [2008] – JM feared degrading treatment and persecution as a homosexual in Uganda. JM entered the UK as a visitor in 2000, and did not seek to renew this visa but instead claimed asylum in 2002; this would later militate against the credibility of his claim before an Adjudicator. However, all parties later accepted the appellant’s homosexuality. The SSHD refused the asylum claim, an Adjudicator dismissed the appeal, and the IAT also dismissed the appeal in 2003. When the IAT determination was quashed in

2004, the case was remitted for a fresh hearing to the AIT. The AIT found a material error of law in 2006, based on the original Adjudicator’s determination, which led to the present second stage reconsideration that included determination on fresh findings of fact based on the up-to-date evidence. The central issue put to the Tribunal was whether JM was in effect being required to be discreet in Uganda or whether, as the Adjudicator had found, he had been discreet in the UK too.

Counsel for the SSHD argued that the removal of JM to Uganda would not expose him to persecution or breach his ECHR Article 3 (ill-treatment), 8 (private and family life), or 10 (freedom of expression) rights (see *King II*, para 68-77). The SSHD’s submissions were that the evidence suggested there was no real risk to homosexuals in Uganda, even to those that publicly expressed their sexual identity. Yet, the SSHD relied on *J* [2006] in order to argue that even if JM may have to modify his behaviour to some extent that “was not sufficiently significant in itself to place the appellant in a situation of persecution” (*King II*, para 77). Contrary to the testimony of JM and other witnesses, the SSHD considered that JM had not been forced to conceal his homosexuality and any necessary modification of his identity in public in Uganda could not, therefore, be intolerable or unreasonable. On behalf of JM, Chelvan (barrister) submitted that JM would risk prosecution, arrest, and harassment in Uganda due to social hostility toward homosexuality, including the public pronouncements of political leaders and notorious “outings” in the tabloid press (see *King II*, para 79-83). Sexual identity is about more than the conduct which is criminalised in Uganda, and removing JM from the UK would at minimum breach ECHR Articles 10 and 8, where his sexual identity should be protected in the private sphere as well as its public expression. Chelvan argued for JM that any modification of conduct, and particularly that which is the result of a fear of harm, would in itself be persecutory. JM’s appeal relied heavily on the fact he was 32 and single, so his homosexuality would inevitably be discovered through the questions put to him and corresponding social expectations of marriage. Finally, in addition to a range of reports, domestic and international case law, Chelvan submitted that Article 5(2)(b) of the EU Qualification Directive suggests that the criminalisation of homosexuality appears to be in itself persecutory.³³⁶ The AIT found that there was little to no

³³⁶ Council Directive 2004/83/EC of April 29, 2004.

evidence that Uganda enforces its laws against homosexual behaviour. Despite widespread social hostility, the evidence considered did not establish the persecution of homosexuality. See further *OO and JM* [2009], below.

***HJ and HT v SSHD* [2009] EWCA Civ 172 – *HJ and HT* [2009]** – For background on HJ, see *J* [2006] and *HJ* [2008]. Here, I will summarise the information relating to HT presented in this appeal, drawing upon *HJ and HT* [2010] because that case offers more detail of HT’s claim. The second paragraph of this summary covers the legal arguments made by the appellants and the outcome. HT was a 35-year-old gay man from Cameroon. He had two same-sex relationships in Cameroon, first a two-month relationship in 1997, and then a three-year relationship that ended in 2005 after HT was attacked by a mob and fled Cameroon. Having lived discreetly, according to adjudicators, HT and his partner were seen kissing in his garden by a neighbour. Upon leaving his church, HT was attacked by members of the community who “beat him with sticks and threw stones at him,” “pulled off his clothes and tried to cut off his penis with a knife,” which resulted in his being “cut just above the penis and on his hand” as he tried to defend himself (*HJ and HT* [2010], para 44). When the police arrived and discovered why he was being attacked, they punched and kicked HT until he lost consciousness; he was hospitalised for two months following the attack (*HJ and HT* [2010], para 44). A member of his church took him in when he was released, and made travel arrangements for HT to leave Cameroon. Travelling to Canada on a false passport in 2007, HT was arrested at Gatwick and claimed asylum, but was convicted to 12 months’ imprisonment for possession of the passport.

The SSHD refused HT’s claim, as did the Tribunal in 2007, and in 2008 the Tribunal did not proceed to reconsideration, because Warr LJ did not find the previous determination to have been materially flawed. The issue in this conjoined appeal, according to the appellants, was “whether it is an answer to a claim for refugee status that the applicant be required to, or otherwise would conceal, his sexual identity in order to avoid harm of a sufficient severity as to amount to persecution” (Pill LJ, para 7). As summarised in the judgment, counsel for the appellants, HJ and HT described “the Anne Frank principle,” but Pill LJ (para 10) claimed “the validity of [that principle] is not disputed in this appeal.” It seems

obvious with the benefit of hindsight and the UKSC judgment in *HJ and HT* [2010], the Court of Appeal’s interpretation of this principle and its validity was indeed very much in question:

“It would have been no defence to a claim that Anne Frank faced well-founded fear of persecution in 1942 to say that she was safe in a comfortable attic. Had she left the attic, a human activity she could reasonably be expected to enjoy, her Jewish identity would have led to her persecution. Refugee status cannot be denied by expecting a person to conceal aspects of identity or suppress behaviour the person should be allowed to express” (Pill IJ, para 10).

Nevertheless, the Court of Appeal concluded that the *J* [2006] test, and its consideration of *S395* [2003], met the UK’s obligations under the Convention. “It is an appropriate and workable test” (Pill IJ, para 31). The *HJ* [2008] decision applied the test appropriately, and grounded this in the available COI in order to conclude that he “could reasonably be expected to tolerate conditions in Iran” (Pill IJ, para 31). HT’s asylum claim had been refused because he had previously been discreet, and the evidence suggested private homosexual relationships did not create a reasonable likelihood of persecution; purportedly, HT could also safely relocate in Cameroon.³³⁷ The Court of Appeal found similarly, and decided that the Tribunal was entitled to find that he had been discreet and that the attack was a one-off incident. Finally, an additional layer of the reasonable tolerability test appears to have surfaced in this judgment: “in assessing whether there has been a breach of [human] rights, a degree of respect for social norms and religious beliefs is in my view appropriate,” and that “[i]n considering what is reasonably tolerable in a particular society, the fact-finding Tribunal is in my view entitled to have regard to the beliefs held there” (Pill LJ, para 32). Both appeals were dismissed, and later heard by the Supreme Court in *HJ and HT* [2010].

***NR (Jamaica) v SSHD* [2009] EWCA Civ 856** – *NR* [2009] – *NR* arrived in the UK from Jamaica in 1999 when she was 13. In 2005 *NR* was sentenced as a young offender to five years’ detention for drug offenses. According to the AIT, *NR* had “experimented with different types of sexual identity” after arriving in London, and then became “sexually active” during her imprisonment, and “took the opportunity to

³³⁷ See further *Hysi v SSHD* [2005] EWCA Civ 711.

continue her experimentations with her sexual identity: indeed, there was no alternative except celibacy” (cited in Goldring LJ, para 22). In the 4 years preceding the present appeal, NR had been in a number of exclusively same-sex relationships. NR claimed that she was a lesbian, had been raped in Jamaica, would be at significant risk of being persecuted if returned, and that her removal would violate Articles 3, 8, and 10 of the EHCR.

The present appeal concerns an AIT decision from the same year which upheld the SSHD deportation order against NR. Significant legal questions in this appeal concerned the AIT, under NIAA 2002, allowing the SSHD to withdraw previous concessions made in the appeals process – the Court of Appeal found that the Tribunal acted within its discretion, and this ground of appeal was dismissed. However, the concessions and history of the findings is relevant context: the SSHD conceded NR was a lesbian, though the first Tribunal found she was not, the SSHD again conceded NR was a lesbian at reconsideration, and finally at a fresh hearing before a Tribunal (the previous having been unable to agree) the SSHD withdrew the concession that she was a lesbian, and the AIT agreed in its decision being appealed here. Thus, NR was also challenging the AIT’s findings on her sexual identity that she was not a lesbian, as summarised by Goldring LJ (para 1): “It found...that her past lesbianism was in the nature of teenage experimentation rather than a settled sexual orientation; that her present lesbian relationship was motivated by a desire to strengthen her claim to asylum.” The SSHD agreed that the AIT made an error of law, and it should have considered if her sexual history would put her at risk in Jamaica, and whether NR could reasonably be expected to tolerate a discreet life or exclusively heterosexual relationships. This second ground of appeal succeeded, and NR’s claim was remitted to a Tribunal to consider her sexual identity afresh and assessment of future risk. The Court of Appeal concluded that the previous Tribunal’s decision was based on insufficient findings regarding NR’s sexual identity and that, importantly, “[i]t is of course her sexual orientation at the time of the hearing which is important” (Goldring LJ, para 24).

MM (Iran) v SSHD [2009] EWCA Civ 1167 – *MM* [2009] – From Iran, MM arrived in the UK as an irregular migrant in 2003. MM claimed asylum the same year on grounds of homosexuality but was refused by the SSHD on the basis of his

credibility and that he could be discreet in Iran. The Adjudicator’s decision in 2003 found that MM was a homosexual, but he had not been arrested in Iran for a homosexual offence as he claimed. Instead, the Adjudicator found MM was arrested for being drunk which was the first explanation he had given, and that although homosexuality was illegal in Iran the COI indicated it was tolerated. MM converted to Christianity in 2003, baptised four days after the Adjudicator’s determination, and religion had not been raised at his hearing. In 2007 MM made a fresh claim, and sought asylum on the grounds of his homosexuality, apostasy, and mental health. Pullan IJ determined that MM was a homosexual, that the previous findings about the alleged offence were correct, and the decision referred to the appellant’s own evidence that “he had since his Christian conversion given up homosexual activity in the UK” (Rix LJ, para 7). Pullan IJ’s determination relied on a CG case,³³⁸ and found that MM was an ordinary, discreet convert who would still be able to practice his religion in Iran as opposed to an evangelist who might be at risk. The condition of his mental health was accepted, however, there would be access to care in Iran according to the decision. The appeal was therefore dismissed. Reconsideration was granted with respect to whether the established condition of MM’s mental health would impair his ability to be discreet about his religion and homosexuality. While the first stage reconsideration found that Iranian interrogation of MM as a failed asylum seeker would place him at risk given the circumstances, the second stage reconsideration went on to find that MM had exaggerated his sexuality, religiosity, and was not credible.

Two questions were considered by the Court of Appeal here: whether MM was at risk of being persecuted for apostasy, and whether he was at risk of suicide if he was returned to Iran. The appeal was allowed on the first ground; the second stage reconsideration failed to consider if in these circumstances and the state of MM’s mental health he might be at particular risk of disclosing his apostasy as well as homosexuality, and the Tribunal had instead proceeded to re-evaluate the credibility of, especially, his religious conversion. The second ground, being at risk of suicide and violation of ECHR Article 3 if he were removed, was also allowed, because the

³³⁸ *FS and others (Iran – Christian Converts) Iran CG* [2004] UKIAT 00303.

AIT had not stated its findings or considered any evidence of family support in Iran that MM denied having. MM’s appeal was remitted to the AIT for reconsideration.

OO (Sudan) JM (Uganda) v SSHD [2009] EWCA Civ 1432 – OO and JM [2009] –

The background of JM’s claim is summarised at *JM* [2008], above. In setting out the details of OO’s claim, I generously quote the decision because I find the tone used to describe the case important. OO was from Sudan, came to the UK in 2004 and claimed asylum. 36 at the time of this decision, OO claimed to have “gradually realised that he was homosexual,” which was “repudiated by his family in Sudan” but he was allowed to remain in their home (Sir David Keene, para 9). Sir David Keene (para 9) writes:

“The AIT seems to have accepted that he had had some form of sexual relationship with a man while in the Sudan but not that it was one involving anal penetration. The relevance of that is that it is penetrative anal intercourse with a man or woman which is a criminal offence in Sudan. Once in this country he had had a number of casual, discreet, homosexual relationships.”

The AIT was satisfied that the reasonable tolerability test in *J* [2006] was met. On the evidence, the determination found that Sudan had not prosecuted sodomy, there was societal but not state-based discrimination, and there was therefore no risk to OO of prosecution or persecution in Sudan.

The Tribunals in OO and JM had both found that the country of origin had anti-sodomy laws but those prohibitions were not enforced by the state; Sir David Keene (para 10) concludes on the background of the appeals that “[t]he laws were, and are, nonetheless there, and they are patently discriminatory.” Aikens LJ granted permission to appeal regarding a provision of the 2004 EU Council Directive, transposed to UK law by the 2006 regulations,³³⁹ and what in particular “constitutes an ‘act of persecution’ in circumstances where it is asserted that there are legal provisions in a country which are discriminatory so far as sexual behaviour is concerned but where these provisions may not be fully implemented in practice” (cited in Sir David Keene, para 2). In other words, are unenforced anti-sodomy laws persecutory? The conjoined appeal also dealt with two separate grounds of appeal for

³³⁹ Council Directive 2004/83/EC of April 29, 2004; Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525).

each claimant, where this summary only covers the common ground. On behalf of the appellants, Chelvan (barrister) argued that the decision in *Amare* [2005] had acknowledged that discriminatory measures could indeed amount to persecution – if sufficiently severe – and since that case there had been “a shift in international consensus” on the criminalisation of homosexuality, which should be recognised as persecutory (see Sir David Keene, para 15-17). The Court of Appeal disagreed, and found that the appellants’ evidence did not suggest there was an international consensus sufficient to conclude that *Amare* was outdated. Both appeals were dismissed.

***HJ (Iran) and HT (Cameroon) v SSHD* [2010] UKSC 31** – *HJ and HT* or *HJ and HT* [2010] – For further background on the case histories of *HJ* and *HT*, see *J* [2006], *HJ* [2008], and *HJ and HT* [2009], summarised above. These conjoined appeals revisited the question raised repeatedly in appeals already summarised, since the consideration of *S395* [2003] in *Z* [2004], which was: if an asylum seeker were to be open about her sexual identity and therefore have a well-founded fear of being persecuted in her country of origin, but would in fact be discreet to avoid persecution, whether she would qualify for refugee status. Specifically, this case addressed the reasonable tolerability test constructed in *J* [2006] to determine whether an asylum seeker was a refugee when they would be discreet. The appellants argued that the reasonable tolerability test was incompatible with the Refugee Convention, and their counsel also revisited the question of whether the Court of Appeal had incorrectly applied *S395* [2003].

The Supreme Court found that the test in *J* [2006] was indeed incompatible with the Convention, was based on a misunderstanding of international authorities and *S395* [2003] in particular, and that the test was unworkable in practice. Thus, the earlier decision was overruled; this decision was largely based on the UKSC’s interpretation and application of *S395* [2003] that said if an asylum seeker had a well-founded fear of being persecuted if they were to live openly, the claimant was a refugee for the purposes of the Convention, even if the harm could be avoided by the concealment of their sexual identity. Lord Rodger (para 82) sets out the new approach to be followed:

- The Tribunal must first establish on the evidence whether the asylum seeker is gay, or whether he would be perceived to be gay in his country of nationality.
- If so, are gay people who live openly likely to be persecuted in the claimant’s country of origin?
- If so, what would the asylum seeker do if he were returned to that country?
- If he would live openly and thus risk being persecuted, he has a well-founded fear of persecution for the purposes of Article 1A(2) even if he could otherwise avoid the risk by living discreetly and concealing his sexual identity.
- However, if in order to avoid being persecuted he would live discreetly, the Tribunal must ask *why* he would do so:
 - If the asylum seeker would be discreet because that is how he wished to live, or as the result of social pressures such as his family’s expectations, then that does not amount to being persecuted.
 - However, if the Tribunal concludes on the evidence he would live discreetly because he feared persecution, then he is a refugee.

I have used “gay” and the male pronoun to reflect the decision. However, the UKSC also makes it quite clear that this test applies to a broader spectrum of sexual behaviours and identities, and the principles of the case have been additionally extended to questions of, for example, political opinion.³⁴⁰ In short, the implication of the *HJ and HT* test is that “[t]o reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution” (Lord Rodger, para 82).

SW (lesbians – HJ and HT applied) Jamaica CG [2011] UKUT 00251(IAC) – SW [2011] – From Jamaica, SW was a lesbian, a fact that was uncontested by the SSHD. However, the SSHD had refused SW refugee status, humanitarian protection, and human rights grounds to remain on the basis of her sexual orientation. *HJ and HT* [2010] was decided while SW was waiting to appeal before the AIT which was

³⁴⁰ See further *RT and RM* [2012].

superseded by the UT in the same period. The UKSC decision rendered some of the previous legal and factual arguments made to the IJ irrelevant in this appeal. In fact, the SSHD declined to make further submissions in light of *HJ and HT* and so the substance of the respondent’s argument, which relied on *J* [2006], *HJ* [2008] and reasonable tolerability, failed before the UT in this determination. According to Gleeson IJ’s (para 64) summary, the SSHD argued “that although an open lesbian relationship may attract adverse attention in Jamaica, such attention was not at a level which engaged international protection, in that there is no consistent pattern of ill-treatment.” The SSHD invited the Tribunal to find that SW would in fact live discreetly if returned to Jamaica. Representing the appellant, Chelvan (barrister) submitted that the relevant test was whether SW would be perceived to be a lesbian in Jamaica, in order not to be perceived as a lesbian she would have to live a “heterosexual narrative,” and there was no need to show a consistent pattern of ill-treatment because discretion, following *HJ and HT*, is persecution. The Tribunal declined to go further than the UKSC, as Chelvan had suggested, because “naturally discreet” lesbians would not be persecuted. A number of conclusions are drawn for CG on the risk to lesbians in Jamaica which, though particular to an individual’s circumstances, are found to be significant and include, for example, “corrective rape” and murder. In relation to SW’s claim, the UT was persuaded by her “coherent and credible account of the gradual emergence of her sexuality in Jamaica, and of the social, religious and family difficulties it caused her, as well as her reliance on antidepressants,” and SW’s account of “her continued emergence into open lesbianism” in the UK (Gleeson IJ, para 113-114). The Tribunal remade the decision, and the appeal was allowed under the Refugee Convention.

LZ (homosexuals) Zimbabwe CG [2011] UKUT 00487 (IAC) – LZ [2011] – LZ entered the UK lawfully in 1998, overstayed her visa, and claimed asylum in 2009 on the ground of being a lesbian with a well-founded fear of being persecuted in Zimbabwe. In this case the SSHD contended that there was “societal disapproval” of homosexuality in Zimbabwe, but not persecution and therefore the *HJ and HT* test did not apply (Macleman and Holmes IJJ, para 6). The dispute before the Tribunal was essentially whether “the seriousness and extent of actual ill-treatment” amounted to persecution, which the fact-finding of this CG determination was intended to

The inclusive guise of “gay” asylum resolve (Macleman and Holmes IJJ, para 24). While LZ’s appeal succeeded, this was based on her own, quite peculiar and specific personal circumstances according to the Tribunal. The findings were quite narrow, and did not establish a “general risk” to homosexuals in Zimbabwe (Macleman and Holmes IJJ, para 113-116). Importantly here, the Tribunal addressed the perennial question of whether anti-sodomy laws are persecutory, and Macleman and Holmes IJJ (para 27) observed that it is “legally uncontentious” that the existence of anti-sodomy laws is not persecutory unless they are “routinely enforced, and penalties imposed.”

Bibliography

- Abelove, Henr, Michele A. Barale, and David M. Halperin, eds. 1993. *The Lesbian and Gay Studies Reader*. New York; London: Routledge.
- Abercrombie, Nicholas, Stephen Hill, and Bryan S. Turner. 2006. *The Penguin Dictionary of Sociology*. London: Penguin.
- Agius, Silvan. 2013. “Third Gender Option in Germany a Small Step for Intersex Recognition.” *Spiegel Online*, August 22.
<http://www.spiegel.de/international/europe/third-gender-option-in-germany-a-small-step-for-intersex-recognition-a-917650.html>.
- Agutu, Nancy. 2015. “Two Gay Men Sue State for Forced HIV Testing and Anal Examination to Prove Sexual Orientation.” *Star* (Kenya), November 5.
<http://www.the-star.co.ke/news/two-gay-men-sue-state-forced-hiv-testing-and-anal-examination-prove-sexual-orientation>.
- Ahmad, Muneer I. 2002. “The Ethics of Narrative.” *American University Journal of Gender, Social Policy & the Law* 11: 117-127.
- Akullo, Godiva. 2014. “Uganda: New Unnatural Sexual Practices Bill – the Anti-Homosexuality Act Reincarnated?” *Law Thinker*, December 7.
<http://thelawthinker.com/uganda-new-unnatural-sexual-practices-bill-the-anti-homosexuality-act-reincarnated/>.
- Alcock, Chris. 2011. *The World’s Worst Place to Be Gay?* Documentary. BBC.
<http://www.bbc.co.uk/programmes/b00yrt1c>.
- Aleinikoff, T. Alexander. 2003. “Protected Characteristics and Social Perceptions: An Analysis of the Meaning of ‘Membership of a Particular Social Group.’” In *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, edited by Erika Feller, Volker Türk, and Frances Nicholson, 263-311. Cambridge: Cambridge University Press.
- Aldrich, Robert. 2003. *Colonialism and Homosexuality*. London: Routledge.
- Ali, Noor. 2013. “Gay Somali Refugees Face Death Threats.” *Al Jazeera*, July 7.
<http://www.aljazeera.com/indepth/features/2013/06/2013630131245411453.html>.
- Altman, Dennis. 1993. *Homosexual: Oppression and Liberation*. New York: NYU Press.
- . 1996. “On Global Queering.” *Australian Humanities Review* 2.
<http://australianhumanitiesreview.org/1996/07/01/on-global-queering/>
- . 2001. *Global Sex*. Chicago; London: University of Chicago Press.
- . 2004. “Sexuality and Globalization.” *Sexuality Research and Social Policy* 1 (1): 63–68. doi:10.1525/srsp.2004.1.1.63.
- . 2008. “AIDS and the Globalization of sexuality.” *Social Identities* 14 (2): 145–60. doi:10.1080/13504630801931161.
- Amnesty International. 2013. “Observations by Amnesty International and the International Commission of Jurists on the Case X, Y and Z v Minister Voor Immigratie, Integratie En Asiel (C-199/12, C-200/12 and C-201/12) Following the Opinion of Advocate General Sharpston of 11 July 2013.” POL 33/003/2013.
<https://www.amnesty.org/en/documents/POL33/003/2013/en/>.

- Anker, Deborah. 2002. “Boundaries in the Field of Human Rights: Refugee Law, Gender and the Human Rights Paradigm.” *Harvard Human Rights Journal* 15: 133-154.
- . 2005. “Refugee Law, Gender, and the Human Rights Paradigm.” In *Passing Lines: Sexuality and Immigration*, edited by Brad Epps, Keja Valens, and Bill Johnson González, 105-136. Cambridge, Mass: Harvard University.
- Anker, Deborah, and Sabi Ardalan. 2012. “Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law.” *New York University Journal of International Law and Politics* 44: 529-557.
- API. 2010. “Sexual Orientation and Gender Identity in the Asylum Claim.” Version 4.0. UKBA, May 10.
- . 2011a. “Sexual Orientation Issues in the Asylum Claim.” Version 4.1. UKBA, August 6.
- . 2011b. “Gender Identity Issues in the Asylum Claim.” Version 1.0. UKBA, August 6.
- . 2015. “Sexual Identity Issues in the Asylum Claim.” Version 5.0. UKVI, February 11.
- Arendt, Hannah. 1967. *The Origins of Totalitarianism*. London: Allen & Unwin.
- Bach, Jhana. 2013. “Assessing Transgender Claims.” *Forced Migration Review* 42: 34-35. <http://www.forcedmigration.org/sogi>.
- Backer, Larry Catá. 1996. “Constructing a ‘Homosexual’ for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts.” *Tulane Law Review* 71: 520-590.
- Bad Object-Choices. 1991. *How Do I Look? Queer Film and Video*. Seattle: Bay Press.
- Badcock, James. 2015. “Spain Refuses Asylum to Cameroon Woman Fleeing Anti-Gay Laws.” *Telegraph*, April 13. <http://www.telegraph.co.uk/news/worldnews/europe/spain/11534044/Spain-refuses-asylum-to-Cameroon-woman-fleeing-anti-gay-laws.html>.
- Baillot, Helen, Sharon Cowan, and Vanessa E. Munro. 2012. “‘Hearing the Right Gaps’ Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process.” *Social & Legal Studies* 21 (3): 269-296. doi:10.1177/0964663912444945.
- Bakhtin, M. M. 1999. “The Problem of Speech Genres.” In *The Discourse Reader*, edited by Adam Jaworski and Nikolas Coupland, 121-132. London: Routledge.
- Bamforth, Nicholas. 2005. *Sex Rights*. New York; Oxford: Oxford University Press.
- Banakar, Reza, and Max Travers, eds. 2005. *Theory and Method in Socio-Legal Research*. Oxford: Hart Publishing.
- . 2005a. “Law, Sociology, and Method.” In *Theory and Method in Socio-Legal Research*, edited by Reza Banakar and Max Travers, 1-26. Oxford: Hart Publishing.
- . 2005b. “Introduction to Section Three.” In *Theory and Method in Socio-Legal Research*, edited by Reza Banakar and Max Travers, 133-138. Oxford: Hart Publishing.
- Barnes, Barry, David Bloor, and John Henry. 1996. *Scientific Knowledge: A Sociological Analysis*. London: Athlone.

- Batchelor, Tom. 2015. “‘Guilty until Proven Innocent:’ The Trial of LGBT Asylum Seekers Detained in the UK.” *New Statesman*, March 10.
<http://www.newstatesman.com/world/2015/03/guilty-until-proven-innocent-trial-lgbt-asylum-seekers-detained-uk>.
- Battejes, Hemme. 2013. “Accommodation: *Sur place* Claims and the Accommodation Requirement in Dutch Asylum Policy.” In *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum*, edited by Thomas Spijkerboer, 82-97. London; New York: Routledge.
- Bayefsky, Anne F., ed. 2006. *Human Rights and Refugees, Internally Displaced Persons, and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton*. Leiden; Boston: Martinus Nijhoff Publishers.
- Bayer, Kurt. 2011. “Syrian Refugee Wins Battle to Stay in Scotland.” *Scotsman*, January 16. <http://www.scotsman.com/news/Syrian-refugee-wins-battle-to.6691888.jp>.
- Bazon, Emily, John Dickerson, and David Plotz. 2015. “The ‘Is He Mussolini or Hitler?’ Edition.” *Political Gabfest*. Slate, December 15.
http://www.slate.com/articles/podcasts/gabfest/2015/12/political_gabfest_on_donald_trump_and_muslims_and_the_supreme_court_s_affirmative.html.
- BBC. 2010. “Gay Asylum Seekers Win UK Appeal.” *BBC*, July 7.
<http://www.bbc.co.uk/news/10180564>.
- . 2011. “‘Gay’ Ugandan Fears Deportation.” *BBC*, January 28.
<http://www.bbc.co.uk/news/uk-12306975>.
- . 2012. “‘Gay’ Man’s Deportation from UK to Cameroon Halted.” *BBC*, May 5. <http://www.bbc.co.uk/news/uk-17971083>.
- . 2013. “Ruling Backs Gay African Asylum Bids.” *BBC*, November 7.
<http://www.bbc.co.uk/news/world-europe-24848887>.
- . 2014. “May Orders Gay Asylum Claims Review.” *BBC*, March 28.
<http://www.bbc.co.uk/news/uk-26793130>.
- Bechhofer, Frank, and Lindsay Paterson. 2000. *Principles of Research Design in the Social Sciences*. London: Routledge.
- Beckham, Ash. 2013. *We’re All Hiding Something. Let’s Find the Courage to Open up*. Lecture presented at TEDx, Boulder.
https://www.ted.com/talks/ash_beacham_we_re_all_hiding_something_let_s_find_the_courage_to_open_up.
- Bedoya, Alvaro M. 2014. “Big Data and the Underground Railroad.” *Slate*, November 7.
http://www.slate.com/articles/technology/future_tense/2014/11/big_data_underground_railroad_history_says_unfettered_collection_of_data.html?wpsrc=s_h_all_tab_tw_ru.
- Beiner, Ronald, and Jennifer Nedelsky, eds. 2001. *Judgment, Imagination, and Politics: Themes from Kant and Arendt*. Lanham: Rowman & Littlefield.
- . 2001. “Introduction.” In *Judgment, Imagination, and Politics: Themes from Kant and Arendt*, edited by Ronald Beiner and Jennifer Nedelsky, vii-xxvi. Lanham: Rowman & Littlefield.
- Bell, Michael, and Cole Hansen. 2009. “Over Not Out: The Housing and Homelessness Issues Specific to Lesbian, Gay, Bisexual and Transgender Asylum Seekers.” Metropolitan Support Trust.
<http://www.metropolitan.org.uk/images/Over-Not-Out.pdf>.

- Benhabib, Seyla. 2006. “Response.” In *Displacement, Asylum, Migration: The Oxford Amnesty Lectures 2004*, edited by Kate E. Tunstall, 44-55. Oxford; New York: Oxford University Press.
- Benhabib, Seyla, and Judith Resnik, eds. 2009. *Migrations and Mobilities: Citizenship, Borders, and Gender*. New York; London: NYU Press.
- Bennett, Claire. 2015. “What Does an Asylum Seeker Have to Do to Prove Their Sexuality?” *Conversation*, March 5. <http://theconversation.com/what-does-an-asylum-seeker-have-to-do-to-prove-their-sexuality-38407>.
- Bennett, Claire, and Felicity Thomas. 2013. “Seeking Asylum in the UK: Lesbian Perspectives.” *Forced Migration Review* 42: 25-28. <http://www.forcedmigration.org/sogi>.
- Benson, Christi Jo. 2008. “Crossing Borders: A Focus on Treatment of Transgender Individuals in U.S. Asylum Law and Society.” *Whittier Law Review* 30: 41-66.
- Bentham, Jeremy. 1987. “Anarchical Fallacies: Being an Examination of the Declaration of Rights Issued during the French Revolution.” In “*Nonsense upon Stilts: ” Bentham, Burke, and Marx on the Rights of Man*, edited by Jeremy Waldron, 46-69. London: Methuen. Retrieved from Duke University. http://english.duke.edu/uploads/media_items/bentham-anarchical-fallacies.original.pdf.
- Benwell, Bethan, and Elizabeth Stokoe. 2006. *Discourse and Identity*. Edinburgh: Edinburgh University Press.
- Berg, Laurie and Jenni Millbank. 2009. “Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants.” *Journal of Refugee Studies* 22 (2): 195-223. doi:10.1093/jrs/fep010.
- . 2013. “Developing a Jurisprudence of Transgender Particular Social Group.” In *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum*, edited by Thomas Spijkerboer, 121-153. London; New York: Routledge.
- Berger, Peter L., and Thomas Luckmann. 1967. *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*. London: Allen Lane.
- Bersani, Leo. 1987. “Is the Rectum a Grave?” *AIDS: Cultural Analysis/Cultural Activism* 43: 197-222. doi:10.2307/3397574.
- Beyani, Chaloka. 2006. “The Role of Human Rights Bodies in Protecting Refugees.” In *Human Rights and Refugees, Internally Displaced Persons, and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton*, edited by Anne F. Bayefsky, 269-282. Leiden; Boston: Martinus Nijhoff Publishers.
- Bhabha, Jacqueline. 2002. “Internationalist Gatekeepers: The Tension between Asylum Advocacy and Human Rights.” *Harvard Human Rights Journal* 15: 155-181.
- Bilefsky, Dan. 2011. “Gays Seeking Asylum in U.S. Encounter a New Hurdle.” *New York Times*, January 28. http://www.nytimes.com/2011/01/29/nyregion/29asylum.html?_r=2.
- Blaikie, Norman W. H. 2009. *Designing Social Research: The Logic of Anticipation*. Cambridge: Polity.
- Blair, Jennifer. 2015. “‘Not a Lesbian:’ Aderonke Apata and the Impossibly High Threshold for Asylum Claims Based on Sexuality.” *Justice Gap*.

- <http://thejusticegap.com/2015/03/lesbian-home-secretary-sets-impossibly-high-threshold-asylum-claims-based-sexuality/>.
- Bolton, Ash. 2008. “Bosco Refuses to Board Plane.” *Daily Echo*, September 14. http://www.dailyecho.co.uk/news/3671714.Bosco_wins_a_last_minute_revie_w_of_deportation_case/.
- Boswell, Christina. 2000. “European Values and the Asylum Crisis.” *International Affairs* 76 (3): 537-558.
- Boswell, John. 1992. “Concepts, Experience, and Sexuality.” In *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy*, edited by Edward Stein, 133-174. New York; London: Routledge.
- Bourdieu, Pierre. 1987. “The Force of Law: Toward a Sociology of the Juridical Field.” *Hastings Law Journal* 38: 814-853.
- . 1989. “Social Space and Symbolic Power.” *Sociological Theory* 7 (1): 14-25.
- . 1991. *Language and Symbolic Power*. Edited by John B. Thompson. Cambridge: Harvard University Press.
- . 1999. “Language and Symbolic Power.” In *The Discourse Reader*, edited by Adam Jaworski and Nikolas Coupland, 502-513. London: Routledge.
- Bowcott, Owen. 2013. “Gay Asylum Seekers Feeling Increased Pressure to Prove Sexuality, Say Experts.” *Guardian*, February 3. <http://www.guardian.co.uk/uk/2013/feb/03/gay-asylum-seekers-pressure-prove-sexuality>.
- Bower, Lisa C. 1994. “Queer Acts and the Politics of ‘Direct Address:’ Rethinking Law, Culture, and Community.” *Law & Society Review* 28 (5): 1009-1034.
- Breen, Duncan, and Yiftach Millo. 2013. “Protection in the City: Some Good Practice in Nairobi.” *Forced Migration Review* 42: 54-56. <http://www.forcedmigration.org/sogi>.
- Bruce, Steve. 2006. *The SAGE Dictionary of Sociology*. London: SAGE.
- Bryant, Ben. 2014. “LGBT Asylum Seekers Say They Face Homophobic Abuse in UK Detention Centers.” *VICE News*, October 29. <https://news.vice.com/article/lgbt-asylum-seekers-say-they-face-homophobic-abuse-in-uk-detention-centers>.
- Bryman, Alan. 2004. *Social Research Methods*. Oxford: Oxford University Press.
- Burns, John F. 2011. “Ugandan Woman Wins Stay of Deportation From Britain.” *New York Times*, January 29. http://www.nytimes.com/2011/01/30/world/europe/30britain.html?_r=1.
- Butler, Judith. 1991. “Imitation and Gender Insubordination.” In *Inside/Out: Lesbian Theories, Gay Theories*, edited by Diana Fuss, 13-31. New York; London: Routledge.
- . 1997. *The Psychic Life of Power: Theories in Subjection*. Stanford: Stanford University Press.
- . 2004. *Undoing Gender*. New York; London: Routledge.
- . 2006. *Gender Trouble: Feminism and the Subversion of Identity*. New York: Routledge.
- . 2009. *Frames of War: When Is Life Grievable?* London; Brooklyn: Verso.
- . 2014. “Judith Butler Addresses TERFs and the Work of Sheila Jeffreys and Janice Raymond.” Interview by Cristan Williams. *The TERFs*.

- <http://theterfs.com/2014/05/01/judith-butler-addresses-terfs-and-the-work-of-sheila-jeffreys-and-janice-raymond/>.
- Canning, Paul. 2010. “US and UK Failing to Take Iraq’s Gay Pogrom Seriously.” *Guardian*, June 23.
<http://www.guardian.co.uk/commentisfree/2010/jun/23/gay-people-iraq>.
- Cantú, Lionel. Jr. 2009. *The Sexuality of Migration: Border Crossings and Mexican Immigrant Men*. New York; London: NYU Press.
- Carrigan, Mark, and Holly Falconer. 2015. “Meeting and Understanding the Asexual Community.” *VICE*. <http://www.vice.com/read/asexuality-carrigan-and-falconer>.
- Carter, David. 2010. *Stonewall: The Riots That Sparked the Gay Revolution*. New York: St. Martin’s Press.
- Cervulle, Maxime, and Nick Rees-Roberts. 2009. “Queering the Orientalist Porn Package: Arab Men in French Gay Pornography.” *New Cinemas: Journal of Contemporary Film* 6 (3): 197-208. doi:10.1386/ncin.6.3.197_1.
- Chalmers, James, and Fiona Leverick, eds. 2010. *Essays in Criminal Law in Honour of Sir Gerald Gordon*. Edinburgh: Edinburgh University Press. doi: 10.3366/edinburgh/9780748640706.001.0001.
- Chelvan, S. 2011. “Put Your Hands Up (If You Feel Love).” *Immigration, Asylum and Nationality Law* 25 (1): 56-66.
- . 2013. “C-199/12, C-200/12, C-201/12 – X, Y, Z v Minister voor Immigratie en Asiel: A Missed Opportunity or a New Dawn?” *European Law Blog*, November 13. europeanlawblog.eu/?p=2042. Retrieved from No5 Chambers. no5.com.
- . 2014. “At the End of the Rainbow: Where Next for the LGBTI Refugee?” Lecture presented at the Public Seminar Series, Refugee Studies Centre. <https://soundcloud.com/refugeestudiescentre/at-the-end-of-the-rainbow>.
- Christian, Dick. 1961. *The Rejected*. WNET.
<https://diva.sfsu.edu/collections/sfbatv/bundles/225539>.
- Chompsky. 2013. “Rescuing The Gay Refugee.” *Broadsheet.ie*, October 30.
<http://www.broadsheet.ie/2013/10/30/rescuing-the-gay-refugee/>.
- Clinton, Hillary. 2010. “Remarks at an Event Celebrating Lesbian, Gay, Bisexual and Transgender (LGBT) Month.” US Department of State, June 22.
<http://www.state.gov/secretary/20092013clinton/rm/2010/06/143517.htm>.
- Coalition. 2010. “The Coalition: Our Programme for Government.” HM Government.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf.
- Cooper, Davina. 1994. “Productive, Relational and Everywhere? Conceptualising Power and Resistance within Foucauldian Feminism.” *Sociology* 28 (2): 435-454. doi:10.1177/0038038594028002005.
- Conservative Party. 2015. “The Conservative Party Manifesto 2015: Strong Leadership, A Clear Economic Plan, A Brighter, More Secure Future.” Conservatives. <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf>.
- Corbin, Juliet M., and Anselm L. Strauss. 2008. *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*. Los Angeles: Sage.

- Cornell, Drucilla. 1995. *The Imaginary Domain: Abortion, Pornography & Sexual Harassment*. New York; London: Routledge.
- . 2003. “Autonomy Re-Imagined.” *Journal for the Psychoanalysis of Culture and Society* 8 (1): 144-149. doi:10.1353/psy.2003.0008.
- Costello, Cathryn, and Emily Hancox. 2014. “Policy Primer: The UK, the Common European Asylum System and EU Immigration Law.” Migration Observatory, University of Oxford.
- Cotterrell, Roger. 1995. *Law’s Community: Legal Theory in Sociological Perspective*. Oxford; New York: Oxford University Press.
- . 1998. “Why Must Legal Ideas Be Interpreted Sociologically?” *Journal of Law and Society* 25 (2): 171-192. doi:10.1111/1467-6478.00086.
- Cowan, Sharon. 2009. “‘We Walk Among You:’ Trans Identity Politics Goes to the Movies.” *Canadian Journal of Women and the Law/Revue Femmes et Droit* 21 (1): 91-117. doi:10.3138/cjwl.21.1.91.
- . 2010. “The Pain of Pleasure: Consent and the Criminalisation of Sado-Masochistic ‘Assaults.’” doi: 10.3366/edinburgh/9780748640706.003.0019. In *Essays in Criminal Law in Honour of Sir Gerald Gordon*, edited by James Chalmers and Fiona Leverick. Edinburgh: Edinburgh University Press. doi: 10.3366/edinburgh/9780748640706.001.0001.
- Cox, Tony. 2010. “Gays’ Global Search For Acceptance.” *Talk of the Nation*, August 4. <http://www.npr.org/templates/story/story.php?storyId=128981230>.
- Cragolini, Giulia. 2013. “Lesbian, Gay, Bisexual and Transgender Refugees: Challenges in Refugee Status Determination and Living Conditions in Turkey.” In *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum*, edited by Thomas Spijkerboer, 98-120. London; New York: Routledge.
- Crotty, Michael. 1998. *The Foundations of Social Research: Meaning and Perspective in the Research Process*. London: SAGE.
- Dauvergne, Catherine, and Jenni Millbank. 2003. “Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers.” *Federal Law Review* 31: 299-342.
- Davies, Bronwyn, and Rom Harré. 1990. “Positioning: The Discursive Production of Selves.” *Journal for the Theory of Social Behaviour* 20 (1): 43-63. doi:10.1111/j.1468-5914.1990.tb00174.x.
- Davies, Sian. 2008. “Bid to Save ‘Bosco’ from Being Deported.” *Daily Echo*, December 9. http://www.dailyecho.co.uk/news/3667462.Bid_to_save___Bosco___from_being_deported/?ref=rl.
- Day, Aaron. 2013. “18-Year-Old Nigerian Man Granted Asylum in Malta Following Anti-Gay Persecution.” *PinkNews*, November 24. <http://www.pinknews.co.uk/2013/11/24/18-year-old-nigerian-man-granted-asylum-in-malta-following-anti-gay-persecution/>.
- D’Emilio, John. 1983. *Sexual Politics, Sexual Communities the Making of a Homosexual Minority in the United States 1940-1970*. Chicago; London: University of Chicago Press.
- . 1998a. “Capitalism and Gay Identity.” In *Culture, Society and Sexuality*, edited by Richard Parker and Peter Aggleton, 239-247. London: Taylor & Francis.

- . 1998b. *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970*. Chicago; London: University of Chicago Press.
- . 2000. “Cycles of Change, Questions of Strategy: The Gay and Lesbian Movement After Fifty Years.” In *The Politics of Gay Rights*, edited by Craig A. Rimmerman, Kenneth D. Wald, and Clyde Wilcox, 31-53. Chicago: University of Chicago Press.
- de Lauretis, Teresa. 1991. “Film and the Visible.” In *How Do I Look? Queer Film and Video*, edited by Bad Object-Choices. Seattle: Bay Press.
- de la Vega, Connie. 2013. *Dictionary of International Human Rights Law*. Cheltenham: Edward Elgar Publishing. Retrieved from *Elgaronline*. eISBN: 9781782540700.
- de Schutter, Oliver. 2010. *International Human Rights Law: Cases, Materials, Commentary*. Cambridge: Cambridge University Press.
- de Vos, Pierre. 2000. “The Constitution Made Us Queer: The Sexual Orientation Clause in the South African Constitution and the Emergence of Gay and Lesbian Identity.” In *Sexuality in the Legal Arena*, edited by Didi Herman and Carl F. Stychin, 194-207. London: Athlone.
- Dooley, Stacey. 2016. *Sex in Strange Places: Turkey*. Documentary. BBC. <http://www.bbc.co.uk/programmes/p03kszyy>.
- Douglas, Lord Alfred. 1984. “Two Loves.” *The Chamaleon*. Retrieved from the British Library. <http://www.bl.uk/collection-items/the-chameleon>.
- Downie, Jocelyn, and Jennifer J. Llewellyn, eds. 2011. *Being Relational: Reflections on Relational Theory and Health Law*. Vancouver; Toronto: UBC Press.
- . 2011. “Introduction.” In *Being Relational: Reflections on Relational Theory and Health Law*, edited by Jocelyn Downie and Jennifer J. Llewellyn, 1-10. Vancouver; Toronto: UBC Press.
- Driessen, Patrick A. 1983. “The Wedding of Social Science and the Courts: Is the Marriage Working?” *Social Science Quarterly* 64 (3): 476-493.
- Duffy, Owen. 2015. “Bisexual Asylum Seeker Facing Imminent Deportation from UK to Jamaica.” *Guardian*, May 5. <http://www.theguardian.com/uk-news/2015/may/05/bisexual-jamaica-asylum-seeker-facing-imminent-deportation-from-uk>.
- Dugan, Emily. 2009. “Government to Face Legal Action by Returned Asylum-Seeker.” *Independent*, May 31. <http://www.independent.co.uk/news/uk/home-news/government-to-face-legal-action-by-returned-asylumseeker-1693498.html>.
- . 2014. “Aderonke Apata Deportation Case: ‘If the Home Office Doesn’t Believe I’m Gay, I’ll Send Them a Video That Proves It.’” *Independent*, June 8. <http://www.independent.co.uk/news/uk/home-news/aderonke-apata-deportation-case-if-the-home-office-doesnt-believe-im-gay-ill-send-them-a-video-that-proves-it-9509738.html>.
- . 2015. “Home Office Says Nigerian Asylum-Seeker Can’t Be a Lesbian as She’s Got Children.” *Independent*, March 3. <http://www.independent.co.uk/news/uk/home-news/home-office-says-nigerian-asylumseeker-cant-be-a-lesbian-as-shes-got-children-10083385.html>.

- Duggan, Lisa, and Nan D. Hunter. 1995. *Sex Wars: Sexual Dissent and Political Culture*. New York: Routledge.
- Edwards, Alice. 2003. “Age and Gender Dimensions in Refugee Law.” In *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, edited by Erika Feller, Volker Türk, and Frances Nicholson, 46-80. Cambridge: Cambridge University Press.
- Eide, Asbjørn, and Theresa Swinehart. 1992. “Introduction.” In *The Universal Declaration of Human Rights: A Commentary*, edited by Asbjørn Eide and Theresa Swinehart, 5-16. Oslo: Scandinavian U.P.
- Eide, Asbjørn, and Theresa Swinehart, eds. 1992. *The Universal Declaration of Human Rights: A Commentary*. Oslo: Scandinavian U.P.
- Eigenraam, Anouk. 2013. “Raad van State Vraagt Europa Om Hulp: Hoe Weet Je of Iemand Homo Is?” *NRC.nl*, March 20.
<http://www.nrc.nl/nieuws/2013/03/20/raad-van-state-vraagt-europa-om-hulp-hoe-weet-je-of-iemand-homo-is/>.
- Einarsen, Terje. 2011. “Drafting History of the 1951 Convention and the 1967 Protocol.” In *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*, edited by Andreas Zimmermann, Jonas Dörschner, and Felix Machts, 37-74. Oxford; New York: Oxford University Press.
- Elgot, Jessica. 2013. “Gay And Lesbian Asylum Seekers ‘Feel Forced To Show Sex Films To Prove Sexuality To UK Border Agency.’” *Huffington Post*, April 2.
http://www.huffingtonpost.co.uk/2013/02/04/gay-and-lesbian-asylum-seekers-sex-films-prove-_n_2615428.html.
- Elliott, Mark, and Robert Thomas. 2012. “Tribunal Justice and Proportionate Dispute Resolution.” *The Cambridge Law Journal* 71 (2): 297-324.
doi:10.1017/S0008197312000505.
- Epps, Brad, Keja Valens, and Bill Johnson González, eds. 2005. *Passing Lines: Sexuality and Immigration*. Cambridge, Mass: Harvard University.
- Eribon, Didier. 2004. *Insult and the Making of the Gay Self*. Durham; London: Duke University Press.
- Escoffier, Jeffrey. 1985. “Sexual Revolution and the Politics of Gay Identity.” *Socialist Review*, 119-153.
- Eshaghian, Tanaz. 2008. *Be Like Others*. Documentary. Wolfe Video.
- Eskridge, William N. 1994. “Gaylegal Narratives.” *Stanford Law Review* 46 (3): 607-646. doi:10.2307/1229103.
- Essig, Laurie. 2013. “How Russia’s Science of Sex Threatens Gays.” *Washington Post*, August 9. https://www.washingtonpost.com/opinions/how-russias-science-of-sex-threatens-gays/2013/08/09/b1a21128-fedf-11e2-96a8-d3b921c0924a_story.html.
- Evans, David T. 1993. *Sexual Citizenship: The Material Construction of Sexualities*. London: Routledge.
- Faiola, Anthony. 2015. “Gay Asylum Seekers Face Threat from Fellow Refugees in Europe.” *Washington Post*, October 23.
https://www.washingtonpost.com/world/europe/gay-asylum-seekers-face-threat-from-fellow-refugees-in-europe/2015/10/23/46762ce2-71b8-11e5-ba14-318f8e87a2fc_story.html.
- Fair, Alan. Unpublished. *Ashamed to Be British*.

- Fairclough, Norman. 1999. “Linguistic and Intertextual Analysis within Discourse Analysis.” In *The Discourse Reader*, edited by Adam Jaworski and Nikolas Coupland, 183-211. London: Routledge.
- Feller, Erika, Volker Türk, and Frances Nicholson, eds. 2003. *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*. Cambridge: Cambridge University Press.
- Fenton, Siobhan. 2015. “Why Is Britain Forcing Bisexual Asylum Seekers to Choose between Humiliation and Death?” *Independent*, May 8.
<http://www.independent.co.uk/voices/comment/why-is-britain-forcing-bisexual-asylum-seekers-to-choose-between-humiliation-and-death-10233052.html>.
- Feder, J. Lester. 2014. “How A Trans Rights Ruling Could Save Gay Rights In India.” *BuzzFeed News*, April 15. <http://www.buzzfeed.com/lesterfeder/how-a-trans-rights-ruling-could-save-gay-rights-in-india>.
- Ferreira, Nuno. 2015. “Portuguese Refugee Law in the European Context: The Case of Sexuality-Based Claims.” *International Journal of Refugee Law* 27 (3): 411-432. doi: 10.1093/ijrl/eev032.
- . 2016 (forthcoming). “The Humane Face of the European Union: Are EU Law and Policy Humane Enough? An Introduction.” In *The Humane Face of the European Union: Are EU Law and Policy Humane Enough?*, edited by Nuno Ferreira and Dora Kostakopoulou. Cambridge: Cambridge University Press. Retrieved from SSRN eLibrary.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658106.
- Ferreira, Nuno, and Dora Kostakopoulou, eds. 2016 (forthcoming). *The Humane Face of the European Union: Are EU Law and Policy Humane Enough?* Cambridge: Cambridge University Press.
- Filar, Ray. 2015. “How the Home Office Keeps Getting It Wrong on LGBTQ Asylum Seekers.” *openDemocracy*, March 11.
<https://www.opendemocracy.net/transformation/ray-filar/how-home-office-keeps-getting-it-wrong-on-lgbtq-asylum-seekers>.
- Finch, Janet. 1986. *Research and Policy: The Uses of Qualitative Methods in Social and Educational Research*. London: Falmer Press.
- Foster, Michelle. 2014. “The Convention Ground with the Least Clarity: A Comparative Analysis of Recent Developments in Interpreting Membership of a Particular Social Group.” Lecture presented at the University of Glasgow, 11 June.
- Foucault, Michel. 1980. *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*. New York: Pantheon Books.
- . 1990. *The History of Sexuality, Vol. 1: An Introduction*. Translated by Robert Hurley. New York: Vintage.
- Frank, David John. 2012. “Making Sense of LGBT Asylum Claims: Change and Variation in Institutional Contexts.” *New York University Journal of International Law and Politics* 44: 485-495.
- Freeman, Gary P. 1995. “Modes of Immigration Politics in Liberal Democratic States.” *International Migration Review* 29 (4): 881-902.
doi:10.2307/2547729.
- Fuss, Diana, ed. 1991. *Inside/Out: Lesbian Theories, Gay Theories*. New York; London: Routledge.

- . 1991. “Inside/Out.” In *Inside/Out: Lesbian Theories, Gay Theories*, edited by Diana Fuss, 1-11. New York; London: Routledge.
- Gallagher, Dennis. 1989. “The Evolution of the International Refugee System.” *International Migration Review* 23 (3): 579-598. doi:10.2307/2546429.
- Gevisser, Mark. 2014. “Love in Exile.” *Guardian*, November 27. <http://www.theguardian.com/news/2014/nov/27/-sp-transgender-relationship-jail-exile-tiwonge-chimbalanga>.
- Gewirtz, Paul. 1995. “On I Know It When I See It.” *Yale Law Journal* 105: 1023-1028.
- Giddens, Anthony. 1992. *The Transformation of Intimacy*. Cambridge: Polity Press.
- Gitari, Eric Mawira. 2014. Facebook post, November 19. <https://www.facebook.com/eric.mawiragitari/posts/10152863774293007?pnref=story>.
- Glaser, Barney G., and Anselm L. Strauss. 1968. *The Discovery of Grounded Theory: Strategies for Qualitative Research*. Weidenfeld & Nicolson.
- Goffman, Erving. 1968. *Stigma: Notes on the Management of Spoiled Identity*. London: Penguin.
- Golder, Ben. 2013. “Foucault, Rights and Freedom.” *International Journal for the Semiotics of Law - Revue Internationale de Sémiotique Juridique* 26 (1): 5-21. doi:10.1007/s11196-012-9259-8.
- Gomm, Rodger, Martyn Hammersley, and Peter Foster, eds. 2000. *Case Study Method: Key Issues, Key Texts*. London: SAGE.
- Good, Anthony. 2007. *Anthropology and Expertise in the Asylum Courts*. Abingdon: Routledge-Cavendish.
- Goodman, Ryan. 2012. “Asylum and the Concealment of Sexual Orientation: Where Not to Draw the Line.” *New York University Journal of International Law and Politics* 44: 407-446.
- Goodwin-Gill, Guy S. and Jane McAdam. 2007. *The Refugee in International Law*. Oxford; New York: Oxford University Press.
- Grahl-Madsen, Atle. 1966. *The Status of Refugees in International Law: Refugee Character*. Amsterdam: Sijthoff-Leyden.
- Gray, Amanda, and Alexandra McDowall. 2013. “LGBT Refugee Protection in the UK: From Discretion to Disbelief?” *Forced Migration Review* 42: 22-24. <http://www.forcedmigration.org/sogi>.
- Grewal, Inderpal, and Caren Kaplan. 2001. “Global Identities: Theorizing Transnational Studies of Sexuality.” *GLQ: A Journal of Lesbian and Gay Studies* 7 (4): 663-79.
- Guiraudon, Virginie. 2003. “The Constitution of a European Immigration Policy Domain: A Political Sociology Approach.” *Journal of European Public Policy* 10 (2): 263-283.
- Haines, Rodger. 2003. “Gender-Related Persecution.” In *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, edited by Erika Feller, Volker Türk, and Frances Nicholson, 319-350. Cambridge: Cambridge University Press.
- Hale, Stephen. 2015. “Our Asylum System Is a Litmus Test of Our Humanity.” *Huffington Post*, February 26. http://www.huffingtonpost.co.uk/stephen-hale/refugee-asylum_b_6761346.html.
- Hall, Radclyffe. 2008. *The Well of Loneliness*. London: Virago.

- Halley, Janet E. 1988. “The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity.” *UCLA Law Review* 36: 915-976.
- . 1993. “The Construction of Heterosexuality.” In *Fear of a Queer Planet: Queer Politics and Social Theory*, edited by Michael Warner, 82-102. Minneapolis; London: University of Minnesota Press.
- . 1994. “Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability.” *Stanford Law Review* 46 (3): 503-568.
- Halperin, David M. 1990. *One Hundred Years of Homosexuality: And Other Essays on Greek Love*. New York; London: Routledge.
- Hamilton, Bernard F. 2006. “Human Rights, Refugees, and the Fate of Minorities.” In *Human Rights and Refugees, Internally Displaced Persons, and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton*, edited by Anne F. Bayefsky, 235-248. Leiden; Boston: Martinus Nijhoff Publishers.
- Hammersley, Martyn, ed. 1993. *Social Research: Philosophy, Politics and Practice*. London: Sage.
- Hanna, Fadi. 2005. “Punishing Masculinity in Gay Asylum Claims.” *The Yale Law Journal* 114 (4): 913-920. doi:10.2307/4135797.
- Harrington, Christine B., and Barbara Yngvesson. 1990. “Interpretive Sociolegal Research.” *Law & Social Inquiry* 15 (1): 135-148. doi:10.1111/j.1747-4469.1990.tb00277.x.
- Hart, Jonathan Locke, and Richard W. Bauman, eds. 1996. *Explorations in Difference: Law, Culture, and Politics*. Toronto: University of Toronto Press.
- . 1996. “Introduction.” In *Explorations in Difference: Law, Culture, and Politics*, edited by Jonathan Locke Hart and Richard W. Bauman, 3-24. Toronto: University of Toronto Press.
- Harvey, Colin. 2000. *Seeking Asylum in the UK: Problems and Prospects*. London: Butterworths.
- Hathaway, James C. 1991. *The Law of Refugee Status*. Toronto: Butterworths.
- . 2005. *The Rights of Refugees Under International Law*. Cambridge: Cambridge University Press.
- Hathaway, James C., and Jason Pobjoy. 2012. “Queer Cases Make Bad Law.” *New York University Journal of International Law and Politics* 44: 315-389.
- Hayden, Bridget. 2006. “What’s in a Name? The Nature of the Individual in Refugee Studies.” *Journal of Refugee Studies* 19 (4): 471-487. doi:10.1093/refuge/fel021.
- Held, David. 1987. *Models of Democracy*. Cambridge: Polity Press.
- HDT. 2016. “Breaking the Silence: Criminalisation of Lesbians and Bisexual Women and its Impacts.” HDT, May. http://www.humandignitytrust.org/uploaded/Library/Other_Material/Breaking_the_Silence-Criminalisation_of_LB_Women_and_its_Impacts-FINAL.pdf.
- Hepburn, R. W. 2005. “Autonomy and Heteronomy.” In *The Oxford Companion to Philosophy*, edited by Ted Honderich. Oxford: Oxford University Press.
- Herman, Didi, and Carl F. Stychin, eds. 2000. *Sexuality in the Legal Arena*. London: Athlone.
- Hilberg, Raul. 1985. *The Destruction of the European Jews*. New York: Holmes & Meier.
- Hoad, Neville. 1999. “Between the White Man’s Burden and the White Man’s Disease: Tracking Lesbian and Gay Human Rights in Southern Africa.”

- GLQ: A Journal of Lesbian and Gay Studies* 5 (4): 559-584. doi: 10.1215/10642684-5-4-559.
- . 2000. “Arrested Development or the Queerness of Savages: Resisting Evolutionary Narratives of Difference.” *Postcolonial Studies* 3 (2): 133-58. doi:10.1080/13688790050115277.
- Holborn, Louise W. 1956. *The International Refugee Organization, A Specialized Agency of the United Nations: Its History and Work, 1946-1952*. New York; London: Oxford University Press.
- Holland, James A., and Julian S. Webb. 2010. *Learning Legal Rules: A Students’ Guide To Legal Method And Reasoning*. Oxford: Oxford University Press.
- Hollifield, James F. 2004. “The Emerging Migration State.” *International Migration Review* 38 (3): 885-912.
- Honderich, Ted, ed. 2005. *The Oxford Companion to Philosophy*. Oxford: Oxford University Press.
- Hunt, Alan. 1985. “The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law.” *Law & Society Review* 19: 11-37.
- Igunza, Emmanuel. 2015. “Gay Ugandans Regret Fleeing to Kenya.” *BBC*, November 10. <http://www.bbc.co.uk/news/world-africa-34764968>.
- Inlender, Talia. 2009. “Status Quo or Sixth Ground? Adjudicating Gender Asylum Claims.” In *Migrations and Mobilities: Citizenship, Borders, and Gender*, edited by Seyla Benhabib and Judith Resnik, 356-379. New York; London: NYU Press.
- Itaborahy, Lucas Paoli, and Jingshu Zhu. 2013. “State-Sponsored Homophobia: A World Survey of Laws.” ILGA. http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf.
- Ivarsflaten, Elisabeth. 2005. “Threatened by Diversity: Why Restrictive Asylum and Immigration Policies Appeal to Western Europeans.” *Journal of Elections, Public Opinion and Parties* 15 (1): 21-45. doi:10.1080/13689880500064577.
- Jacobson, David. 2009. “Multiculturalism, Gender and Rights.” In *Migrations and Mobilities: Citizenship, Borders, and Gender*, edited by Seyla Benhabib and Judith Resnik, 304-330. New York; London: NYU Press.
- Jaeger, Joel. 2014. “LGBT Visibility in Africa Also Brings Backlash.” *Inter Press Service*, September 9. <http://www.ipsnews.net/2014/09/lgbt-visibility-in-africa-also-brings-backlash/>.
- Jamieson, Lynn. 1999. “Intimacy Transformed? A Critical Look at the ‘Pure Relationship.’” *Sociology* 33 (3): 477-494.
- . 2002. “Theorising Identity, Nationality and Citizenship: Implications for European Citizenship Identity.” *Slovak Sociological Review* 34 (6): 507-532.
- . 2005. “Boundaries of Intimacy.” In *Families in Society: Boundaries and Relationships*, edited by Linda McKie and Sarah Cunningham-Burley, 189-206. Bristol: Policy Press. Retrieved from Academia.edu. http://www.academia.edu/2116908/Boundaries_of_intimacy.
- . 2012. “Intimacy as a Concept: Explaining Social Change in the Context of Globalisation or Another Form of Ethnocentrism?” *The Clarion* 1 (1). <http://clarion.ind.in/index.php/clarion/article/view/11>.

- Jamieson, Lynn, and Roona Simpson. 2013. *Living Alone: Globalization, Identity and Belonging*. Basingstoke: Palgrave Macmillan.
- Jansen, Sabine. 2013. “Introduction: Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe.” In *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum*, edited by Thomas Spijkerboer, 1-31. London; New York: Routledge.
- . 2014. “Good Practices Related to LGBTI Asylum Applicants in Europe.” ILGA, May. http://www.ilga-europe.org/sites/default/files/good_practices_related_to_lgbti_asylum_applicants_in_europe_jul14.pdf.
- Jansen, Sabine, and Thomas Spijkerboer. 2011. “Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe.” VU Amsterdam, September. Retrieved from *Refworld*. <http://www.refworld.org/docid/4ebba7852.html>.
- Jaworski, Adam, and Nikolas Coupland, eds. 1999. *The Discourse Reader*. London: Routledge.
- . 1999a. “Introduction: Perspectives on Discourse Analysis.” In *The Discourse Reader*, edited by Adam Jaworski and Nikolas Coupland, 1-44. London: Routledge.
- . 1999b. Editors’ introductions. In *The Discourse Reader*, edited by Adam Jaworski and Nikolas Coupland, 47-53, 135-140, 493-495. London: Routledge.
- Jenkins, Ellen A. 2009. “Taking the Square Peg out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers.” *Golden Gate University Law Review* 40: 67-95.
- Jimenez, Marina. 2004. “Gay Refugee Claimants Seeking Haven in Canada.” *Globe and Mail*, April 25. <http://www.theglobeandmail.com/news/national/gay-refugee-claimants-seeking-haven-in-canada/article1136511/>.
- Joel, Daphna, Zohar Berman, Ido Tavor, Nadav Wexler, Olga Gaber, Yaniv Stein, Nisan Shefi, et al. 2015. “Sex beyond the Genitalia: The Human Brain Mosaic.” *Proceedings of the National Academy of Sciences*. doi:10.1073/pnas.1509654112.
- Johnson, Toni A. M. 2007. “Flamers, Flaunting and Permissible Persecution.” *Feminist Legal Studies* 15 (1): 99–111. doi:10.1007/s10691-006-9053-7.
- . 2011. “On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings.” *Social & Legal Studies* 20 (1): 57-78. doi:10.1177/0964663910391205.
- Joppke, Christian. 1999. *Immigration and the Nation-State: The United States, Germany, and Great Britain*. Oxford: Oxford University Press.
- Jordan, Sharalyn R. 2009. “Un/Convention(al) Refugees: Contextualizing the Accounts of Refugees Facing Homophobic or Transphobic Persecution.” *Refuge* 26 (2): 165-181.
- Jubany, Olga. 2011. “Constructing Truths in a Culture of Disbelief Understanding Asylum Screening from within.” *International Sociology* 26 (1): 74-94. doi:10.1177/0268580910380978.
- Jupp, Victor, and Clive Norris. 1993. “Traditions in Documentary Analysis.” In *Social Research: Philosophy, Politics and Practice*, edited by Martyn Hammersley, 121-132. London: Sage.

- Kalan, Jonathan. 2011. “The Gray Area of Gay Refugees.” *PBS NewsHour*, April 12. http://www.pbs.org/newshour/updates/globalhealth-july-dec11-lgbt_12-04/.
- Kaleidoscope. 2015. “Speaking Out - LGBTI Rights in the Commonwealth.” Kaleidoscope Trust. <http://kaleidoscopetrust.com/speaking-out>.
- Kasino, Michael. 2012. *Pay It No Mind: Marsha P. Johnson*. Documentary.
- Katyal, Sonia. 2002. “Exporting Identity.” *Yale Journal of Law and Feminism* 14: 97-176.
- Khan, Masood. 2015. *How Gay Is Pakistan?* Documentary. BBC. <http://www.bbc.co.uk/programmes/b06kjj32>.
- Khazan, Olga. 2013. “Why Is Russia So Homophobic?” *Atlantic*, June 12. <http://www.theatlantic.com/international/archive/2013/06/why-is-russia-so-homophobic/276817/>.
- Kirby, Dean. 2015. “A Ugandan Man Is to Be Deported after ‘Failing to Prove He’s Gay.’” *Independent*, November 16. <http://www.independent.co.uk/news/uk/home-news/robert-kityo-ugandan-man-to-be-deported-after-failing-to-prove-he-s-gay-a6735341.html>.
- Kirchick, James. 2012. “It’s Not about Gay Rights — It’s about Human Rights.” *Washington Post*, March 7. http://www.washingtonpost.com/opinions/at-the-un-a-vote-for-human-rights/2012/03/05/gIQAXxG3uR_story.html.
- Kjærum, Morten. 1992. “Article 14.” In *The Universal Declaration of Human Rights: A Commentary*, edited by Asbjørn Eide and Theresa Swinehart, 217-228. Oslo: Scandinavian U.P.
- Klinken, Adriaan van, and Martin Zebracki. 2015. “Porn in Church: Moral Geographies of Homosexuality in Uganda.” *Porn Studies* 3 (1): 1-4. doi:10.1080/23268743.2015.1083882.
- Kouri, Jim. 2012. “Iran – Introduction to the Overt and Covert Aspects of Spreading Homosexuality in the World.” ACT UP, August 30. <http://actup.org/news/iran-introduction-to-the-overt-and-covert-aspects-of-spreading-homosexuality-in-the-world/>.
- Kneebone, Susan, ed. 2003. *The Refugees Convention 50 Years on: Globalisation and International Law*. Aldershot: Ashgate.
- Knight, Kyle. 2013. “Analysis: The Plight of LGBTI Asylum Seekers, Refugees.” *IRINnews*, May 7. <http://www.irinnews.org/Report/97989/Analysis-The-plight-of-LGBTI-asylum-seekers-refugees>.
- Kollman, Kelly, and Matthew Waites. 2009. “The Global Politics of Lesbian, Gay, Bisexual and Transgender Human Rights: An Introduction.” *Contemporary Politics* 15 (1): 1-17. doi:10.1080/13569770802674188.
- Kotzeva, Anna, Lucy Murray, and Robin Tam. 2008. *Asylum and Human Rights Appeals Handbook*. Oxford: Oxford University Press.
- Kratochwil, Friedrich V. 1989. *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*. Cambridge: Cambridge University Press.
- Kuhar, Roman. 2012. “The Heteronormative Panopticon and the Transparent Closet of the Public Space in Slovenia.” In *De-Centring Western Sexualities: Central and Eastern European Perspectives*, edited by Joanna Mizielińska and Robert Kulpa. Farnham: Ashgate.
- Kuhar, Roman, and Alenka Švab. 2008. “Homophobia and Violence against Gays and Lesbians in Slovenia.” *Revija Za Sociologiju* 39 (4): 267-281.

- Labour Party. 2015. “A Better Future for Britain’s LGBT Community.” UK Labour Party. <http://www.labouremail.org.uk/files/uploads/efa44ade-f0f1-8aa4-6dfe-c434014b817f.pdf>.
- Lacey, Nicola. 1998. *Unspeakable Subjects: Feminist Essays in Legal and Social Theory*. Oxford: Hart Publishing.
- Lambert, Hélène. 2006. “The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law.” *The International and Comparative Law Quarterly* 55 (1): 161–92. doi:10.2307/3663315.
- Lanchin, Mike. 2010. “UN Rebukes UK over Gay Asylum Cases.” *BBC*, July 6. <http://www.bbc.co.uk/news/10518565>.
- Landau, Joseph. 2004. “Soft Immutability and Imputed Gay Identity: Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law.” *Fordham Urban Law Journal* 32: 237–263.
- Lange, Bettina. 2005. “Researching Discourse and Behaviour as Elements of Law in Action.” In *Theory and Method in Socio-Legal Research*, edited by Reza Banakar and Max Travers, 175–194. Oxford: Hart Publishing.
- Lauterpacht, Elihu, and Daniel Bethlehem. 2003. “The Scope and Content of the Principle of *Non-refoulement*: Opinion.” In *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, edited by Erika Feller, Volker Türk, and Frances Nicholson, 87–177. Cambridge: Cambridge University Press.
- LaViolette, Nicole. 2007. “Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines.” *International Journal of Refugee Law* 19 (2): 169–214. Retrieved from *SSRN eLibrary*. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1149667.
- Law, Jonathan, and Elizabeth A. Martin. 2014. *A Dictionary of Law*. Oxford: Oxford University Press. Retrieved from *Oxford Reference*. eISBN: 9780191726729.
- Layder, Derek. 1998. *Sociological Practice: Linking Theory and Social Research*. London: Sage.
- Lazaro, Fred de Sam. 2012. *In Uganda, Gays Face Growing Social, Legal Hostility*. PBS NewsHour. <http://video.pbs.org/video/2219876121/>.
- Lennox, Corinne, and Matthew Waites, eds. 2013. *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change*. London: Institute of Commonwealth Studies. <http://commonwealth.sas.ac.uk/publications/house-publications/lgbt-rights-commonwealth>.
- LeVay, Simon. 2011. *Gay, Straight, and the Reason Why: The Science of Sexual Orientation*. Oxford; London: Oxford University Press.
- Lewis, Rachel A. 2014. “‘Gay? Prove It.’ The Politics of Queer Anti-Deportation Activism.” *Sexualities* 17 (8): 958–75. doi:10.1177/1363460714552253.
- Lindley, Richard. 1986. *Autonomy*. Atlantic Highlands: Humanities Press International.
- Loescher, Gil. 1989. “Introduction.” In *Refugees and International Relations*, edited by Gil Loescher and Laila Monahan, 1–19. Oxford: Oxford University Press.
- . 1993. *Beyond Charity: International Cooperation and the Global Refugee Crisis*. New York; Oxford: Oxford University Press.

- Loescher, Gil and Laila Monahan, eds. 1989. *Refugees and International Relations*. Oxford: Oxford University Press.
- Long, Katy. 2013. “When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection.” *Migration Studies* 1 (1): 4-26. doi:10.1093/migration/mns001.
- Long, Scott. 2004. “When Doctors Torture: The Anus and the State in Egypt and Beyond.” *Health and Human Rights* 7 (2): 114-140. doi:10.2307/4065350.
- Luibhéid, Eithne. 2005a. “Introduction: Queering Migration and Citizenship.” In *Queer Migrations: Sexuality, U.S. Citizenship, and Border Crossings*, edited by Eithne Luibhéid and Lionel Cantú, Jr., ix-xlvi. Minneapolis: University of Minnesota Press.
- . 2005b. “Heteronormativity, Responsibility, and Neo-liberal Governance in U.S. Immigration Control.” In *Passing Lines: Sexuality and Immigration*, edited by Brad Epps, Keja Valens, and Bill Johnson González, 69-101. Cambridge, Mass: Harvard University.
- . 2008. “Queer/Migration: An Unruly Body of Scholarship.” *GLQ: A Journal of Lesbian and Gay Studies* 14 (2-3): 169-190.
- Luibhéid, Eithne, and Lionel Cantú, Jr., eds. 2005. *Queer Migrations: Sexuality, U.S. Citizenship, and Border Crossings*. Minneapolis: University of Minnesota Press.
- Mackenzie, Catriona, and Natalie Stoljar, eds. 2000. *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self*. New York; Oxford: Oxford University Press.
- Malkki, Liisa H. 1995. “Refugees and Exile: From “Refugee Studies” to the National Order of Things.” *Annual Review of Anthropology* 24: 495-523.
- Manalansan, Martin F. IV. 2003. *Global Divas: Filipino Gay Men in the Diaspora*. Durham: Duke University Press.
- Marrus, Michael R. 1985. *The Unwanted: European Refugees in the Twentieth Century*. New York; Oxford: Oxford University Press.
- . 1988. *The Holocaust in History*. London: Weidenfeld & Nicolson.
- Mathysse, Charlotte. 2013. “Barriers to Justice in the UK.” *Forced Migration Review* 42: 29. <http://www.forcedmigration.org/sogi>.
- Mattocks, Natashia. 2014a. *Judgement Day – Documentary – Orashia Edwards*. <https://www.youtube.com/watch?v=vVib2Hh6Oog>.
- . 2014b. *Fighting for Asylum – Documentary – Orashia Edwards*. <https://www.youtube.com/watch?v=saTh7sXSJ44>.
- Mayr, Andrea. 2003. *Prison Discourse: Language as a Means of Control and Resistance*. Hampshire; New York: Palgrave Macmillan.
- Mazower, Mark. 2004. “The Strange Triumph of Human Rights, 1933-1950.” *The Historical Journal* 2: 379-398.
- McAdam, Jane. 2011. “Interpretation of the 1951 Convention.” In *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*, edited by Andreas Zimmermann, Jonas Dörschner, and Felix Machts, 75-116. Oxford; New York: Oxford University Press.
- McCaul, Kevin D., Lois G. Veltum, Vivian Boyechko, and Jacqueline J. Crawford. 1990. “Understanding Attributions of Victim Blame for Rape: Sex, Violence, and Foreseeability.” *Journal of Applied Social Psychology* 20 (1): 1-26. doi:10.1111/j.1559-1816.1990.tb00375.x.

- McFarland, Eric. 2014. “Iran’s Sex Change Solution.” Documentary. BBC Our World. <http://www.bbc.co.uk/iplayer/episode/b04pkr3v/our-world-irans-sex-change-solution>.
- McGhee, Derek. 2000. “Assessing Homosexuality: Truth, Evidence and the Legal Practices for Determining Refugee Status - The Case of Ioan Vraciu.” *Body & Society* 6 (1): 29–50. doi:10.1177/1357034X00006001003.
- . 2001a. *Homosexuality, Law, and Resistance*. London: Routledge.
- . 2001b. “Persecution and Social Group Status: Homosexual Refugees in the 1990s.” *Journal of Refugee Studies* 14: 20–42.
- McGivern, Mark. 2012. “You Can’t Deport Me..i’m Gay, Says Ugandan Facebook Rapist.” *Daily Record*, July 1. <http://www.dailyrecord.co.uk/news/scottish-news/you-cant-deport-meim-gay-1108523>.
- McIntosh, Mary. 1992. “The Homosexual Role.” In *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy*, edited by Edward Stein, 25–42. New York; London: Routledge.
- McVeigh, Karen. 2011a. “Fears for Safety of Ugandan Lesbian due to Be Deported.” *Guardian*, January 26. <http://www.guardian.co.uk/world/2011/jan/26/brenda-namigadde-deportation-fear-uganda>.
- . 2011b. “Gay Asylum Claims Not Being Counted despite Pledge, Admit Ministers.” *Guardian*, May 1. <http://www.guardian.co.uk/uk/2011/may/01/gay-asylum-claims-not-being-counted>.
- Mehan, Hugh. 1999. “Oracular Reasoning in a Psychiatric Exam.” In *The Discourse Reader*, edited by Adam Jaworski and Nikolas Coupland, 559–575. London: Routledge.
- Meikle, James. 2010. “Gay Asylum Seekers Win Protection from Deportation.” *Guardian*, July 7. <http://www.guardian.co.uk/uk/2010/jul/07/gay-asylum-seekers-rights-deportation>.
- Mepschen, Paul, Jan Willem Duyvendak, and Evelien H. Tonkens. 2010. “Sexual Politics, Orientalism and Multicultural Citizenship in the Netherlands.” *Sociology* 44 (5): 962–979. doi:10.1177/0038038510375740.
- Merry, Sally Engle. 1995. “Resistance and the Cultural Power of Law.” *Law & Society Review* 29 (1): 11–26.
- Mertz, Elizabeth. 1994. “Conclusion: A New Social Constructionism for Sociolegal Studies.” *Law and Society Review* 28 (5): 1243–1265.
- Miles, Nathanael. 2009. “No Going Back: Lesbian and Gay People in the Asylum Decision.” Stonewall. https://www.stonewall.org.uk/sites/default/files/No_Going_Back__2010_.pdf.
- Millbank, Jenni. 2002. “Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia.” *Melbourne University Law Review* 26: 144–177. Retrieved from SSRN eLibrary. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=676209.
- . 2004. “The Role of Rights in Asylum Claims Based on Sexual Orientation.” *Human Rights Law Review* 4: 193–228.
- . 2005. “A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation 1989–2003.” *Social & Legal*

- Studies* 14 (1): 115-138. doi:10.1177/0964663905049528. Retrieved from SSRN eLibrary. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=676121.
- . 2009a. “From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom.” *The International Journal of Human Rights* 13 (2-3): 391-414. doi:10.1080/13642980902758218. Retrieved from SSRN eLibrary. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1330175&download=yes.
- . 2009b. “‘The Ring of Truth:’ A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations.” *International Journal of Refugee Law* 21 (1): 1–33. doi:10.1093/ijrl/een040.
- . 2012. “The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law: A Reply to Hathaway and Pobjoy.” *New York University Journal of International Law and Politics* 44: 497-527.
- . 2013. “Sexual Orientation and Refugee Status Determination Over the Past 20 Years: Unsteady Progress Through Standard Sequences?” In *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum*, edited by Thomas Spijkerboer, 32-54. London; New York: Routledge.
- Miller, Alice M. 1999. “Human Rights and Sexuality: First Steps Toward Articulating a Rights Framework for Claims to Sexual Rights and Freedoms.” *American Society of International Law Proceedings* 93: 288-303.
- . 2005. “Gay Enough: Some Tensions in Seeking the Grant of Asylum and Protecting Global Sexual Diversity.” In *Passing Lines: Sexuality and Immigration*, edited by Brad Epps, Keja Valens, and Bill Johnson González, 137-187. Cambridge, Mass: Harvard University.
- Mizielinska, Joanna, and Robert Kulpa, eds. 2012. *De-Centring Western Sexualities: Central and Eastern European Perspectives*. Farnham: Ashgate.
- Mohyuddin, Fatima. 2001. “United States Asylum Law in the Context of Sexual Orientation and Gender Identity: Justice for the Transgendered.” *Hastings Women’s Law Journal* 12: 387-410.
- Montréal. 2002. “Montréal Principles on Women’s Economic, Social and Cultural Rights.” International Federation for Human Rights. Retrieved from Refworld. <http://www.refworld.org/docid/46f1462e0.html>.
- Moravcsik, Andrew. 2000. “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe.” *International Organization* 54 (2): 217-252. doi:10.1162/002081800551163.
- Morgan, Deborah A. 2006. “Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases.” *Law & Sexuality: A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues* 15: 135-161.
- Morgan, Joe. 2014. “Blind Bisexual Asylum Seeker ‘beaten’ by UK Deportation Officers.” *Gay Star News*, April 10. <http://www.gaystarnews.com/article/blind-bisexual-asylum-seeker-beaten-uk-deportation-officers100414>.
- . 2015. “Kenya Newspaper Prints List of ‘Top Homos.’” *Gay Star News*, May 11. <http://www.gaystarnews.com/article/kenya-newspaper-prints-list-top-homos110515>.
- Morsink, Johannes. 1999. *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*. Philadelphia: University of Pennsylvania Press.

- Mudzingwa, Davison. 2012. “Treatment of Gays No Better in South Africa.” *Inter Press Service*, June 26. <http://www.ipsnews.net/2012/06/treatment-of-gays-no-better-in-south-africa/>.
- Mugisha, Frank. 2011. “Gay and Vilified in Uganda.” *New York Times*, December 22. <http://www.nytimes.com/2011/12/23/opinion/gay-and-vilified-in-uganda.html>.
- . 2014. “Expanded Criminalization of Homosexuality in Uganda: A Flawed Narrative.” *Huffington Post*, January 30. http://www.huffingtonpost.com/frank-mugisha/expanded-criminalisation-_b_4690902.html?utm_hp_ref=tw.
- Museveni, Yoweri K. 2014. “President Museveni’s Statement During Signing of Anti-Homo Bill.” *Independent* (Uganda), February 24. <http://www.independent.co.ug/ugandatalks/2014/02/president-musevenis-statement-during-signing-of-anti-homo-bill/>.
- Murray, David A. B. 2014. “To Feel the Truth: Discourse and Emotion in Canadian Sexual Orientation Refugee Hearings.” *Journal of Language and Sexuality* 3 (1): 6-27. doi:10.1075/jls.3.1.02mur.
- Murray, Stephen O. 1992. “The ‘Underdevelopment’ of Modern/Gay Homosexuality in Mesoamerica.” In *Modern Homosexualities: Fragments of Lesbian and Gay Experience*, edited by Kenneth Plummer, 29-38. London: Routledge.
- Nanda, Serena. 1993. “Hijras as Neither Man nor Woman.” In *The Lesbian and Gay Studies Reader*, edited by Henr Ablove, Michele A. Barale, and David M. Halperin, 542-552. New York; London: Routledge.
- Naqvi, Mohammed Ali. 2014. *Pakistan’s Hidden Shame*. Documentary. Channel 4. <http://www.channel4.com/programmes/pakistans-hidden-shame>.
- Nassar, Daniel. 2011. “Foreign Policy: Damascus Still Has Gay Girls.” *NPR*, June 16. http://www.npr.org/2011/06/16/137217280/foreign-policy-damascus-still-has-gay-girls?ft=1&f=1001&sc=tw&utm_source=twitterfeed&utm_medium=twitter.
- Nedelsky, Jennifer. 1990. “Law, Boundaries, and the Bounded Self.” *Representations* 30: 162-189.
- . 1996a. “Reconceiving Rights as Relationship.” In *Explorations in Difference: Law, Culture, and Politics*, edited by Jonathan Locke Hart and Richard W. Bauman, 67-88. Toronto: University of Toronto Press.
- . 1996b. “Embodied Diversity and the Challenges to Law.” *McGill Law Journal* 42: 91-117.
- . 2001a. “Judgement, Diversity, and Relational Autonomy.” In *Judgment, Imagination, and Politics: Themes from Kant and Arendt*, edited by Ronald Beiner and Jennifer Nedelsky, 103-120. Lanham: Rowman & Littlefield.
- . 2001b. “Embodied Diversity and the Challenges to Law.” In *Judgment, Imagination, and Politics: Themes from Kant and Arendt*, edited by Ronald Beiner and Jennifer Nedelsky, 229-256. Lanham: Rowman & Littlefield.
- . 2011. *Law’s Relations: A Relational Theory of Self, Autonomy, and Law*. Oxford; New York: Oxford University Press.
- Neilson, Victoria. 2004. “Uncharted Territory: Choosing an Effective Approach in Transgender-Based Asylum Claims.” *Fordham Urban Law Journal* 32: 101-124.

- New Vision*. 2008. “Gay Refuses to Return to Uganda.” *New Vision*, September 15.
<http://www.newvision.co.ug/D/8/13/649825>.
- Nibley, Lydia. 2009. *Two Spirits*. Documentary. PBS Independent Lens.
<http://www.pbs.org/independentlens/two-spirits/>.
- Norton, Jim. 2013. “Prove You’re Gay or Go Home, Home Office Tells Senegalese Student.” *Guardian*, January 11.
<http://www.guardian.co.uk/education/2013/jan/11/prove-youre-gay-or-go-home-home-office-tells-senegalese-student>.
- Nzioka, Denis. 2014. “Gay Porn Shooting ‘rising’ in Kenya (part 1).” *Denis Nzioka News Agency*. <https://denisnzioka.co.ke/gay-porn-shooting-rising-in-kenya-part-1/>.
- Obaid-Chinoy, Shareem. 2011. *Transgenders: Pakistan’s Open Secret*. Documentary. Channel 4.
<http://www.channel4.com/programmes/transgenders-pakistans-open-secret/4od>.
- Obama, Barack. 2014. “Statement by President Barack Obama on the Anti-Homosexuality Bill in Uganda.” White House, February 16. The Council for Global Equality Blog.
<https://globalequality.wordpress.com/2014/02/16/statement-by-president-barack-obama-on-the-anti-homosexuality-bill-in-uganda/>.
- Odeshoo, Jason R. 2004. “Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders.” *Temple Political & Civil Rights Law Review* 14: 1-44.
- OHCHR. 2012a. “Born Free and Equal.” New York; Geneva: United Nations Office of the High Commissioner for Human Rights.
<http://www.ohchr.org/EN/NewsEvents/Pages/BornFreeAndEqual.aspx>.
- . 2012b. *Pillay on Homophobia: Punish Violence and Hatred, Not Love!* New York; Geneva: United Nations Office of the High Commissioner for Human Rights. <https://www.youtube.com/watch?v=O-tKtnvzZn8&feature=youtu.be>.
- O’Leary, Barry. 2008. “‘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.” *Feminist Legal Studies* 16 (1): 87-95. doi:10.1007/s10691-007-9080-z.
- Olsen, P. Trent. 2015. “The Inclusive Guise of Gay Asylum: Sexual Minority Asylum Recognition in the United Kingdom.” Seminar at the Centre for Law and Society, University of Edinburgh, October 29.
- O’Neill, Rory, and Panti Bliss. 2014. *Panti’s Noble Call at the Abbey Theatre*. Dublin, February 2. <https://www.youtube.com/watch?v=WXayhUzWnl0>.
- Onziema, Julian. 2014. Last Week Tonight with John Oliver: Uganda and Pepe Julian Onziema Pt. 1 & 2 (HBO). Interview by John Oliver.
<https://www.youtube.com/watch?v=G2W41pvvZs0&list=PLmKbjSZR8TZa7wyVoVq2XMHxxWREyiFc> and
<https://www.youtube.com/watch?v=QJkiWwMKwSo>.
- Oswin, Natalie. 2001. “Rights Spaces: An Exploration of Feminist Approaches to Refugee Law.” *International Feminist Journal of Politics* 3 (3): 347-364. doi:10.1080/14616740110078176.

- Padgug, Robert. 1992. “Sexual Matters: On Conceptualizing Sexual History.” In *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy*, edited by Edward Stein, 43-68. New York; London: Routledge.
- Parekh, Bhiku. 2006. “Finding a Proper Place for Human Rights.” In *Displacement, Asylum, Migration: The Oxford Amnesty Lectures 2004*, edited by Kate E. Tunstall, 17-43. Oxford; New York: Oxford University Press.
- Parekh, Serena. 2012. “Does Ordinary Injustice Make Extraordinary Injustice Possible? Gender, Structural Injustice, and the Ethics of Refugee Determination.” *Journal of Global Ethics* 8 (2-3): 269-281. doi:10.1080/17449626.2012.716790.
- Parkinson, Hannah Jane. 2014. “How Anti-Gay Groups Use ‘Russian Facebook’ to Persecute LGBT People.” *Guardian*, February 11. <http://www.theguardian.com/technology/2014/feb/11/russia-violent-anti-gay-groups-vkontakte-lgbt-sochi>.
- PASSOP. 2013. “Economic Injustice: Employment and Housing Discrimination Against LGBTI Refugees and Asylum Seekers in South Africa.” Cape Town: PASSOP. <http://www.passop.co.za/news/featured/new-report-economic-injustice-employment-and-housing-discrimination-against-lgbti-refugees-and-asylum-seekers-in-south-africa>.
- . 2014. *Gay and Lesbian Refugees in South Africa: “We Thought You’d Accept Us.”* Cape Town: PASSOP; Atlantic Philanthropies. <https://www.youtube.com/watch?v=20xDFBDgcj0>.
- Persson, Emil. 2014. “Banning ‘Homosexual Propaganda:’ Belonging and Visibility in Contemporary Russian Media.” *Sexuality & Culture* 19 (2): 256-274. doi:10.1007/s12119-014-9254-1.
- Persson, Ida. 2013. “Observing Differences: Asylum Appeals in the UK.” *The COMPAS Blog*, August 28. <http://compasoxfordblog.co.uk/2013/08/observing-differences-asylum-appeals-in-the-uk/>.
- Phillips, Oliver. 1997. “Zimbabwean Law and the Production of a White Man’s Disease.” *Social & Legal Studies* 6 (4): 471-91. doi:10.1177/096466399700600402.
- . 2000. “Constituting the Global Gay: Issues of Individual Subjectivity and Sexuality in Southern Africa.” In *Sexuality in the Legal Arena*, edited by Didi Herman and Carl F. Stychin, 17-34. London: Athlone.
- PinkNews*. 2011. “Convicted Rapist ‘Claims He’s Gay to Win Asylum.’” *PinkNews*, July 22. <http://www.pinknews.co.uk/2011/07/22/convicted-rapist-claims-hes-gay-to-win-asylum/>.
- Plummer, Kenneth, ed. 1992. *Modern Homosexualities: Fragments of Lesbian and Gay Experience*. London: Routledge.
- . 1992. “Speaking Its Name: Inventing a Lesbian and Gay Studies.” In *Modern Homosexualities: Fragments of Lesbian and Gay Experience*, edited by Kenneth Plummer, 3-27. London: Routledge.
- Portsmouth News*. 2008a. “Gay Immigrant Says He Will Be Killed in Africa.” *Portsmouth News*, September 10. <http://www.portsmouth.co.uk/news/local/gay-immigrant-says-he-will-be-killed-in-africa-1-1301574>.

- . 2008b. “I’m so Scared to Go Back - I Can’t Change How I Am.” *Portsmouth News*, September 12. <http://www.portsmouth.co.uk/news/local/i-m-so-scared-to-go-back-i-can-t-change-how-i-am-1-1301617>.
- Proctor, Robert N. 1995. “The Destruction of ‘Lives Not Worth Living.’” In *Deviant Bodies: Critical Perspectives on Difference in Science and Popular Culture*, edited by Jennifer Terry and Jacqueline L. Urla, 170-196. Bloomington: Indiana University Press.
- Puar, Jasbir K. 2006. “Mapping US Homonormativities.” *Gender, Place & Culture* 13 (1): 67-88. doi:10.1080/09663690500531014.
- Punch, Keith. 2006. *Developing Effective Research Proposals*. London: Sage.
- Quesada, Andrea, Bisi Alimi, Hasan Abdessamad, Mirosława Makuchowska, and Xiaogang Wei. 2014. “Why It Should Consider Gay Rights.” *Economist*, April 25. <http://www.economist.com/blogs/feastandfamine/2014/04/world-bank?fsrc=scn%2Ffb%2Fwl%2Fbl%2Fwhyshouldconsidergayrights>.
- Raj, Senthoran. 2014. “‘Come out’ to Immigration Officials or Be Deported? Gay Asylum Seekers Will Suffer under Morrison’s New Regime.” *Guardian*, September 26. http://www.theguardian.com/commentisfree/2014/sep/26/come-out-to-immigration-officials-or-be-deported-gay-asylum-seekers-will-suffer-under-morrison-s-new-regime?CMP=tw_t_gu.
- Rakotomanga, Sam. 2015. “The Biggest Gay Haters in Africa, Need Homosexuals the Most.” *Mail & Guardian Africa*, May 12. <http://mgafrica.com/article/2015-05-12-the-benefits-of-homosexuality-in-africa/>.
- Ramji-Nogales, Jaya, Andrew Ian Schoenholtz, and Philip G. Schrag. 2007. “Refugee Roulette: Disparities in Asylum Adjudication.” *Stanford Law Review* 60 (2): 295-412. Retrieved from SSRN eLibrary. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=983946&.
- . 2009. *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*. New York; London: NYU Press.
- Ravichandran, Balaji. 2009. “A Victory for Gay Rights in India.” *Guardian*, July 2. <http://www.theguardian.com/commentisfree/2009/jul/02/gay-rights-india-court>.
- Reams, Patrick. 2007. *A Very British Sex Scandal*. Drama. Channel 4.
- Reeves, Anthony R. 2009. “Sexual Identity as a Fundamental Human Right.” *Buffalo Human Rights Law Review* 15 (215): 215-282.
- Refugee Women’s Legal Group. 1988. “Gender Guidelines for the Determination of Asylum Claims in the UK.” Refugee Women’s Legal Group, July.
- Rehaag, Sean. 2009. “Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia.” *The International Journal of Human Rights* 13 (2): 415-436. doi:10.1080/13642980902758226.
- Reid, Graeme. 2014. “Gay in Gambia: Not a Joke.” Human Rights Watch, December 8. <https://www.hrw.org/news/2014/12/08/gay-gambia-not-joke>.
- Rich, Adrienne. 1980. “Compulsory Heterosexuality and Lesbian Existence.” *Signs* 5 (4): 631-660.
- Rimmerman, Craig A., Kenneth D. Wald, and Clyde Wilcox, eds. 2000. *The Politics of Gay Rights*. Chicago: University of Chicago Press.

- Roberts, Scott. 2013a. “David Cameron to Discuss Nigeria’s New Anti-Gay Law with Country’s Politicians and Leaders.” *PinkNews*, June 17.
<http://www.pinknews.co.uk/2013/06/17/david-cameron-to-discuss-nigerias-new-anti-gay-law-with-countrys-politicians-and-leaders/>.
- . 2013b. “Interview: S Chelvan – on Protecting the Rights of LGBT Asylum Seekers.” *PinkNews*, September 2.
<http://www.pinknews.co.uk/2013/09/02/interview-s-chelvan-on-protecting-the-rights-of-lgbt-asylum-seekers/>.
- . 2014. “Gay Immigration Group: Home Office System Still ‘extremely Unfair’ for LGBT Asylum Seekers.” *PinkNews*, September 9.
<http://www.pinknews.co.uk/2014/09/09/gay-immigration-group-home-office-system-still-extremely-unfair-for-lgbt-asylum-seekers/>.
- Robins, Jon. 2015. “Labour Promise for UK to Be Haven for LGBT Asylum Seekers.” *The Justice Gap*, April 22.
<http://thejusticegap.com/2015/04/labour-promise-for-uk-to-be-haven-for-lgbt-asylum-seekers/>.
- Robinson, Amy. 1994. “It Takes One to Know One: Passing and Communities of Common Interest.” *Critical Inquiry* 20 (4): 715-736.
- Rorty, Richard. 1989. *Contingency, Irony and Solidarity*. Cambridge: Cambridge University Press.
- Rothmann, Jacques. 2013. “‘Doing’ and ‘Using’ Sexual Orientation: The Role of Gay Male Pornographic Film in the Identity Construction of Gay Men.” *South African Review of Sociology* 44 (3): 22-41.
doi:10.1080/21528586.2013.817048.
- Rubin, Gayle S. 1993. “Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality.” In *The Lesbian and Gay Studies Reader*, edited by Henr Abelow, Michele A. Barale, and David M. Halperin, 3-44. New York; London: Routledge.
- Salter, Mark B. 2007. “Governmentalities of an Airport: Heterotopia and Confession.” *International Political Sociology* 1 (1): 49-66.
doi:10.1111/j.1749-5687.2007.00004.x.
- Sant, Gus Van. 2009. *Milk*. Drama. Focus Features.
- Schilt, Kristen, and Laurel Westbrook. 2009. “Doing Gender, Doing Heteronormativity ‘Gender Normals,’ Transgender People, and the Social Maintenance of Heterosexuality.” *Gender & Society* 23 (4): 440-464.
doi:10.1177/0891243209340034.
- Scholfield, Janet Ward. 1993. “Increasing the Generalizability of Qualitative Research.” In *Social Research: Philosophy, Politics and Practice*, edited by Martyn Hammersley, 200-225. London: Sage.
- Schor, Naomi, and Elizabeth Weed, eds. 1994. *The Essential Difference*. Bloomington: Indiana University Press.
- Schulhofer, Stephen J. 1998. *Unwanted Sex: The Culture of Intimidation and the Failure of Law*. Cambridge: Harvard University Press.
- Schuster, Liza. 2003. *The Use and Abuse of Political Asylum in Britain and Germany*. London: Frank Cass Publishers.
- Schutzer, Mathew. 2012. “Bringing the Asylum Process out of the Closet: Promoting the Acknowledgment of LGB Refugees.” *Georgetown Journal of Gender and the Law* 13: 669-707.

- Sedgwick, Eve Kosofsky. 1991. *Epistemology of the Closet*. New York; London: Harvester Wheatsheaf.
- . 2007. *Epistemology of the Closet: Updated with a New Preface*. Oakland: University of California Press.
- Seidman, Steven. 1993. “Identity Politics in a ‘Postmodern’ Gay Culture: Some Historical and Conceptual Notes.” In *Fear of a Queer Planet: Queer Politics and Social Theory*, edited by Michael Warner, 105-142. Minneapolis; London: University of Minnesota Press.
- . 1997. *Difference Troubles: Queering Social Theory and Sexual Politics*. Cambridge Cultural Social Studies. Cambridge: Cambridge University Press.
- Sen, Purna. 2015. “Introduction – Speaking Out – LGBTI Rights in the Commonwealth.” Kaleidoscope Trust. <http://kaleidoscopetrust.com/speaking-out>.
- Sheill, Kate. 2009. “Losing out in the Intersections: Lesbians, Human Rights, Law and Activism.” *Contemporary Politics* 15 (1): 55-71. doi:10.1080/13569770802674212.
- Sherwin. 2011. “Relational Autonomy and Global Threats.” In *Being Relational: Reflections on Relational Theory and Health Law*, edited by Jocelyn Downie and Jennifer J. Llewellyn, 13-34. Vancouver; Toronto: UBC Press.
- Shidlo, Ariel, and Joanne Ahola. 2013. “Mental Health Challenges of LGBT Forced Migrants.” *Forced Migration Review* 42: 9-10. <http://www.forcedmigration.org/sogi>.
- Skran, Claudena. 2011. “Historical Development of International Refugee Law.” In *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*, edited by Andreas Zimmermann, Jonas Dörschner, and Felix Machts, 3-36. Oxford; New York: Oxford University Press.
- Slaughter, Anne-Marie. 1994. “A Typology of Transjudicial Communication.” *University of Richmond Law Review* 29: 99-137.
- Śledzińska-Simon, Anna, and Krzysztof Śmiszek. 2013. “LGBTI Asylum Claims: The Central and Eastern European Perspective.” *Forced Migration Review* 42: 16-17. <http://www.forcedmigration.org/sogi>.
- Smith, Amelia. 2014. “EU Court Bans Sexuality Tests for Gay Asylum Seekers.” *Newsweek*, December 2. <http://www.newsweek.com/eu-court-bans-sexuality-tests-gay-asylum-seekers-288643>.
- Smith, Emily Kent. 2015. “Say That You Are Gay to Get to the UK, Posters Tell Migrants.” *Mail Online*, August 4. <http://www.dailymail.co.uk/news/article-3185508/Say-gay-UK-Posters-tell-migrants-lie-sexuality-claim-asylum.html>.
- Smith, Steven R., ed. 2007. *Applying Theory to Policy and Practice: Issues for Critical Reflection*. Hampshire: Ashgate.
- Solomon, Robert C. 2005. “Subjectivity.” In *The Oxford Companion to Philosophy*, edited by Ted Honderich. Oxford: Oxford University Press.
- Somers, Margaret R., and Christopher N.J. Roberts. 2008. “Toward a New Sociology of Rights: A Genealogy of ‘Buried Bodies’ of Citizenship and Human Rights.” *Annual Review of Law and Social Science* 4 (1): 385-425. doi:10.1146/annurev.lawsocsci.2.081805.105847.
- Souter, James. 2011. “A Culture of Disbelief or Denial? Critiquing Refugee Status Determination in the United Kingdom.” *Oxford Monitor of Forced Migration* 1 (1): 48-59.

- Spijkerboer, Thomas, ed. 2013. *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum*. London; New York: Routledge.
- Spivak, Gayatri Chakravorty. 1988. *In Other Worlds: Essays in Cultural Politics*. New York; London: Routledge.
- . 1994. “In a Word: Interview.” Interview by Ellen Rooney. In *The Essential Difference*, edited by Naomi Schor and Elizabeth Weed, 151-185.
- Spruill, Jennifer. 2000. “A Post-With/Out a Past?: Sexual Orientation and the Post-Colonial “Moment” in South Africa.” In *Sexuality in the Legal Arena*, edited by Didi Herman and Carl F. Stychin, 3-16. London: Athlone.
- Stanbridge, Nicola. 2013. “Asylum Seeker: ‘I Had to Prove I’m Gay.’” *Radio 4 Today Programme*. BBC News, February 27. <http://www.bbc.co.uk/news/uk-21601803>.
- Stein, Edward, ed. 1992. *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy*. New York; London: Routledge.
- Steiner, Niklaus. 1999. “Arguing about International Legal Norms in Parliamentary Asylum Debates.” *Global Society: Journal of Interdisciplinary International Relations* 13 (3): 349-366.
- Stewart, Colin. 2012. “Advice for Pseudo-LGBT Asylum Seekers.” *76 CRIMES*, May 9. <http://76crimes.com/2012/05/09/advice-for-pseudo-lgbt-asylum-seekers/>.
- . 2015. “79 Countries Where Homosexuality Is Illegal.” *76 CRIMES*. July 9. <http://76crimes.com/76-countries-where-homosexuality-is-illegal/>.
- Stonewall. 2014. “Country Briefing Russia.” Stonewall International. Retrieved from Stonewall Scotland. https://www.stonewallscotland.org.uk/sites/default/files/russia_briefing_2014_0.pdf.
- Strudwick, Patrick. 2015. “This Is What Happens In Detention Centres If You’re Lesbian Or Gay.” *BuzzFeed News*, June 23. <http://www.buzzfeed.com/patrickstrudwick/this-is-what-happens-to-lesbian-and-gay-asylum-seekers-in-de>.
- Stychin, Carl F. 1995. *Law’s Desire: Sexuality and the Limits of Justice*. London; New York: Routledge.
- . 1998. *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights*. Philadelphia: Temple University Press.
- Švab, Alenka, and Roman Kuhar. 2014. “The Transparent and Family Closets: Gay Men and Lesbians and Their Families of Origin.” *Journal of GLBT Family Studies* 10 (1-2): 15-35. doi:10.1080/1550428X.2014.857553.
- Sweeney, James A. 2007. “The ‘Lure’ of Facts in Asylum Appeals: Critiquing the Practice of Judges.” In *Applying Theory to Policy and Practice: Issues for Critical Reflection*, edited by Steven R. Smith, 19-35. Hampshire: Ashgate.
- Swiebel, Joke. 2009. “Lesbian, Gay, Bisexual and Transgender Human Rights: The Search for an International Strategy.” *Contemporary Politics* 15 (1): 19–35. doi:10.1080/13569770802674196.
- Tabak, Shana, and Rachel Levitan. 2013. “LGBTI Migrants in Immigration Detention.” *Forced Migration Review* 42: 47-49. <http://www.forcedmigration.org/sogi>.

- Taylor, Diane, and Mark Townsend. 2014. “Gay Asylum Seekers Face ‘Humiliation.’” *Guardian*, February 8. <http://www.theguardian.com/uk-news/2014/feb/08/gay-asylum-seekers-humiliation-home-office>.
- Taylor, Jerome. 2013. “‘Gay? Prove It Then – Have You Read Any Oscar Wilde?:’ Judges Accused of Asking Lesbian Asylum Seekers Inappropriate Questions.” *Independent*, April 4. <http://www.independent.co.uk/news/uk/home-news/gay-prove-it-then--have-you-read-any-oscar-wilde-judges-accused-of-asking-lesbian-asylum-seekers-inappropriate-questions-8558599.html>.
- Tebble, Adam James. 2011. “Homosexuality and Publicness: Towards a Political Theory of the Taboo.” *Political Studies* 59 (4): 921-939. doi:10.1111/j.1467-9248.2011.00884.x.
- Telegraph. 2010. “Gay Asylum Seekers Win Right to Stay in Britain.” *Telegraph*, July 7. <http://www.telegraph.co.uk/news/uknews/immigration/7876634/Gay-asylum-seekers-win-right-to-stay-in-Britain.html>.
- Terry, Jennifer. 1995. “Anxious Slippages between ‘Us’ and ‘Them:’ A Brief History of the Scientific Search for Homosexual Bodies.” In *Deviant Bodies: Critical Perspectives on Difference in Science and Popular Culture*, edited by Jennifer Terry and Jacqueline L. Urla, 129-169. Bloomington: Indiana University Press.
- Terry, Jennifer, and Jacqueline L. Urla, eds. 1995. *Deviant Bodies: Critical Perspectives on Difference in Science and Popular Culture*. Bloomington: Indiana University Press.
- Thiam, Selly. 2012. *Seeking Asylum: John Bosco Nyombi*. <https://www.youtube.com/watch?v=SLwSZaTAHWg>.
- Thomas, Robert. 2006. “Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined.” *European Journal of Migration and Law* 8: 79-96.
- . 2008. “Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom.” *International Journal of Refugee Law* 20 (4): 489-532. doi:10.1093/ijrl/een034.
- . 2009. “Refugee Roulette: A UK Perspective.” In *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*, by Jaya Ramji-Nogales, Andrew Ian Schoenholtz, and Philip G. Schrag, 146-186. New York; London: NYU Press.
- Thompson, John B. 1991. “Editor’s Introduction.” In *Language and Symbolic Power*, by Pierre Bourdieu, 1-31. Cambridge: Harvard University Press.
- Tobin, John. 2012. “Assessing GLBTI Refugee Claims: Using Human Rights Law to Shift the Narrative of Persecution within Refugee Law.” *New York University Journal of International Law and Politics* 44: 447-484.
- Townsend, Mark, and Diane Taylor. 2014. “Home Office Wouldn’t Believe I Was Gay: How Do You Prove It?” *Guardian*, February 8. <http://www.theguardian.com/uk-news/2014/feb/08/home-office-gay-asylum-seekers-questioning>.
- Tsourd, Evangelia (Lilian). 2013. “Sexual Orientation and Gender Identity: Developments in EU Law.” *Forced Migration Review* 42: 20-21. <http://www.forcedmigration.org/sogi>.
- Tucker, Angela. 2011. *(A)sexual*. Documentary. FilmBuff.

- Tuitt, Patricia. 1996. *False Images: Law's Construction of the Refugee*. London; East Haven: Pluto Press, 1996.
- Tunstall, Kate E., ed. 2006. *Displacement, Asylum, Migration: The Oxford Amnesty Lectures 2004*. Oxford; New York: Oxford University Press.
- Türk, Volker, and Frances Nicholson. 2003. “Refugee Protection in International Law: An Overall Perspective.” In *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, edited by Erika Feller, Volker Türk, and Frances Nicholson, 3-45. Cambridge: Cambridge University Press.
- UKLGIG. 2010. “Failing the Grade: Home Office Initial Decisions on Lesbian and Gay Claims for Asylum.” UKLGIG, April. <http://uklgig.org.uk/wp-content/uploads/2014/04/Failing-the-Grade.pdf>.
- . 2015. “Parliamentarians Criticise Bullying, Harassment and Abuse of LGBTI Asylum Seekers in UK Immigration Detention Centres.” UKLGIG, March 3. <http://uklgig.org.uk/?p=1701>.
- UNDP. 2012. “Global Commission on HIV and the Law: Risks, Rights, and Health.” United Nations Development Programme, July. <http://www.hivlawcommission.org/>.
- UNHCR. 1996. “Protecting Refugees: Questions and Answers.” Quoted in Kristen L. Walker 2003, 253; Inter-Parliamentary Union 2001, 43. http://www.ipu.org/pdf/publications/refugee_en.pdf.
- . 2002. “Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention And/or Its 1967 Protocol Relating to the Status of Refugees.” The UN Refugee Agency. HCR/GIP/02/01. <http://www.unhcr.org/3d58ddef4.pdf>.
- . 2008. “UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity.” Retrieved from *Refworld*. <http://www.refworld.org/docid/48abd5660.html>.
- . 2010. “Introductory Note.” Statute of the Office of the United Nations High Commissioner for Refugees, 4-5. Retrieved from *Refworld*. <http://www.refworld.org/docid/3ae6b3628.html>.
- . 2011a. “Working with Lesbian, Gay, Bisexual, Transgender & Intersex Persons in Forced Displacement.” Retrieved from *Refworld*. <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e6073972>.
- . 2011b. “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.” HCR/1P/4/enG/Rev. 3. Retrieved from *Refworld*. <http://www.refworld.org/docid/4f33c8d92.html>.
- Urla, Jacqueline L., and Jennifer Terry. 1995. “Introduction: Mapping Embodied Deviance.” In *Deviant Bodies: Critical Perspectives on Difference in Science and Popular Culture*, edited by Jennifer Terry and Jacqueline L. Urla, 1-18. Bloomington: Indiana University Press.
- Verkaik, Robert. 2009. “Deporting Gay Asylum-Seeker ‘Was Unlawful.’” *Independent*, February 20. <http://www.independent.co.uk/news/uk/home-news/deporting-gay-asylumseeker-was-unlawful-1627052.html>.
- VICE. 2014. *Young and Gay in Putin's Russia*. VICE News. <http://www.vice.com/video/young-and-gay-in-putins-russia-full-length-vice>.

- Viloria, Hida. 2013. “Op-Ed: Germany’s Third-Gender Law Fails on Equality.” *Advocate*, November 6.
<http://www.advocate.com/commentary/2013/11/06/op-ed-germany%E2%80%99s-third-gender-law-fails-equality>.
- Vine, John. 2014. “An Investigation into the Home Office’s Handling of Asylum Claims Made on the Grounds of Sexual Orientation.” ID 15101401 10/14. Independent Chief Inspector of Borders and Immigration.
<http://icinspector.independent.gov.uk/wp-content/uploads/2014/10/Investigation-into-the-Handling-of-Asylum-Claims-Final-Web.pdf>.
- Waldijk, Kees. 2013. “The Right to Relate: A Lecture on the Importance of ‘Orientation’ in Comparative Sexual Orientation Law.” *Duke Journal of Comparative & International Law* 24 (1): 161-199. Retrieved from Leiden University Repository. <https://openaccess.leidenuniv.nl/handle/1887/24927>.
- Wagenaar, Hendrik. 2004. “‘Knowing’ the Rules: Administrative Work as Practice.” *Public Administration Review* 64 (6): 643-655.
- Waites, Matthew. 2013. “United Kingdom: Confronting Criminal Histories and Theorising Decriminalisation as Citizenship and Governmentality.” In *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change*, edited by Corinne Lennox and Matthew Waites, 145-181.
<http://commonwealth.sas.ac.uk/publications/house-publications/lgbt-rights-commonwealth>.
- Waldron, Jeremy, ed. 1987. “Nonsense upon Stilts.” *Bentham, Burke, and Marx on the Rights of Man*. London: Methuen.
- Walker, Kristen L. 1996. “The Importance of Being Out – Sexuality and Refugee Status.” *Sydney Law Review* 18: 568-597.
- . 2000. “Capitalism, Gay Identity and International Human Rights Law.” *Australasian Gay and Lesbian Law Journal* 9: 58-73.
- . 2003. “New Uses of the Refugee Convention: Sexuality and Refugee Status.” In *The Refugees Convention 50 Years on: Globalisation and International Law*, edited by Susan Kneebone, 251-278. Aldershot: Ashgate.
- Wallace, Mike. 1967. *The Homosexuals*. Documentary. *CBS Reports*, March 7. Columbia Broadcasting System.
- Warner, Michael, ed. 1993. *Fear of a Queer Planet: Queer Politics and Social Theory*. Minneapolis; London: University of Minnesota Press.
- . 1993. “Introduction.” In *Fear of a Queer Planet: Queer Politics and Social Theory*, edited by Michael Warner, vii-xxxi. Minneapolis; London: University of Minnesota Press.
- Weber, Cynthia. 2015. “Queer Intellectual Curiosity as IR Method: Developing Queer IR Theoretical and Methodological Frameworks.” Paper presented at the University of Edinburgh, February 9.
- Weeks, Jeffrey. 1981. *Sex, Politics and Society: The Regulation of Sexuality Since 1800*. London: Longman.
- . 1990. *Coming Out: Homosexual Politics in Britain, from the Nineteenth Century to the Present*. London: Quartet Books.
- . 1995. *Invented Moralities: Sexual Values in an Age of Uncertainty*. New York: Columbia University Press.

- . 2007. *The World We Have Won: The Remaking of Erotic and Intimate Life*. London: Routledge.
- Wendt, Alexander. 1992. “Anarchy Is What States Make of It: The Social Construction of Power Politics.” *International Organization* 46 (2): 391-425.
- . 1999. *Social Theory of International Politics*. Cambridge: Cambridge University Press.
- Weßels, Janna. 2013. “Discretion in Sexuality-Based Asylum Cases: An Adaptive Phenomenon.” In *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum*, edited by Thomas Spijkerboer, 55-81. London; New York: Routledge.
- Whitehead, Harriet. 1993. “The Bow and the Burden Strap.” In *The Lesbian and Gay Studies Reader*, edited by Henr Abelove, Michele A. Barale, and David M. Halperin, 498-527. New York; London: Routledge.
- Wilcox, Daniel T. 2000. “Application of the Clinical Polygraph Examination to the Assessment, Treatment and Monitoring of Sex Offenders.” *Journal of Sexual Aggression* 5 (2): 134-152. doi:10.1080/135526000008413304.
- Wilets, James D. 1997. “Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective.” *Albany Law Review* 60 (3): 989-1050.
- Wilkes, Sybella. 2010. “UNHCR Urges Tolerance of Displaced People Persecuted for Their Sexuality.” UNHCR, October 1. <http://www.unhcr.org/4ca5ff566.html>.
- Wilkinson, Cai. 2014. “Putting ‘Traditional Values’ Into Practice: The Rise and Contestation of Anti-Homopropaganda Laws in Russia.” *Journal of Human Rights* 13 (3): 363-379. doi:10.1080/14754835.2014.919218.
- Wilkinson, Matt. 2014. “Say You Are Gay If You Want to Stay in UK.” *Sun*, April 22. <http://www.thesun.co.uk/sol/homepage/news/5582162/illegal-immigrants-told-to-lie-they-are-gay-to-stay-in-uk.html>.
- Wood, Linda A., and Rolf O. Kroger. 2000. *Doing Discourse Analysis: Methods for Studying Action in Talk and Text*. Thousand Oaks; London: Sage.
- Woolf, Virginia. 2008. *Orlando: A Biography*. London: Vintage Classics.
- Yeo, Colin. 2013. “Are Asylum Appeal Hearings the Same Wherever They Are Heard?” *Free Movement*, November 30. <http://www.freemovement.org.uk/2013/11/30/are-asylum-appeal-hearings-the-same-wherever-they-are-heard/>.
- . 2014. “Questions to a Bisexual Asylum Seeker in Detention.” *Free Movement*, January 24. <http://www.freemovement.org.uk/2014/01/24/questions-to-a-bisexual-asylum-seeker-in-detention/>.
- Yin, Robert K. 2009. *Case Study Research: Design and Methods*. Los Angeles: Sage.
- Yogyakarta. 2007. “Yogyakarta Principles – Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.” International Commission of Jurists. Retrieved from *Refworld*. <http://www.refworld.org/docid/48244e602.html>.
- Young, Iris Marion. 1990. *Justice and the Politics of Difference*. Princeton; Oxford: Princeton University Press.

- Zaccour, Amélie. 2015. “Gay Refugees From ISIS.” *Daily Beast*, March 30.
<http://www.thedailybeast.com/articles/2015/03/30/gay-refugees-from-isis.html>.
- Zimmerman, Andreas, and Claudia Mahler. 2011. “Art. 1A, para. 2 1951 Convention.” In *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*, edited by Andreas Zimmermann, Jonas Dörschner, and Felix Machts, 281-466. Oxford; New York: Oxford University Press.
- Zimmermann, Andreas, Jonas Dörschner, and Felix Machts, eds. 2011. *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*. Oxford; New York: Oxford University Press.
- Zolberg, Aristide R., Astri Suhrke, and Sergio Aguayo. 1989. *Escape from Violence: Conflict and the Refugee Crisis in the Developing World*. New York; Oxford: Oxford University Press.
- Zouhali-Worrall, Malika, and Katherine Fairfax Wright. 2013. *Call Me Kuchu*. Documentary.
- .