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LIVING DISCREETLY: A CATCH 22 IN REFUGEE STATUS DETERMINATIONS ON THE BASIS OF SEXUAL ORIENTATION

INTRODUCTION

Seventy six countries around the world criminalize homosexuality, maintaining severe punishments for consensual sexual activity between adults of the same sex.¹ Of these countries, five still punish homosexual acts with the death penalty.² Other countries have “morality laws” against “anti-social” or “immoral” behavior, “causing a public scandal,” etc., that are used by the police to persecute gay, lesbian, bisexual, and transgender individuals.³ Such laws enable law enforcement officials to invade private residences of individuals suspected of engaging in same sex activity;⁴ these morality laws can result in exemption from punishment for arbitrary arrests made by law enforcement on the basis of allegations and rumors with few, if any, consequences for mistreatment.⁵ Even when such laws are not implemented or enforced, they influence societal attitudes, constructing a social stigma that often legitimizes violence and abuse against people who identify as lesbian, gay, bisexual, transgender (“LGBT”), or anyone who engages in homosexual conduct.⁶ In fact, laws of this nature often encourage state and private actors to engage in violence against sexual minorities and enable impunity for such actions.⁷ Thus, escaping from their country of origin and seeking asylum may be the only option for victims facing these kinds of situations.

While political asylum may offer hope of refuge and protection, the asylum process has many problems, especially for those individuals ap-

1. For a survey of laws prohibiting homosexual conduct, see DANIEL OTTOSSON, INTL. LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS’N, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS 7–45 (2010), available at http://www.msasia.org/tl_files/2010%20resources/10-06_resources/ILGA_State_Sponsored_Homophobia_2010-2.pdf.

2. *Id.* at 45.

3. *International: Criminalization and Decriminalization of Homosexual Acts*, INTL. GAY & LESBIAN HUM. RTS. COMM’N (July 24, 2003), available at <http://www.iglhr.org/cgi-bin/iowa/article/takeaction/resourcecenter/817.html>.

4. Amnesty Intl., *Love, Hate and the Law: Decriminalizing Homosexuality*, 1, 8, 30/003/2008 (2008), available at <http://www.amnesty.org/en/library/asset/POL30/003/2008/en/e2388a0c-588b-4238-9939-de6911b4a1c5/pol300032008en.pdf>.

5. *Id.*

6. *Id.* at 7.

7. *Id.*

plying for refugee status on the basis of sexual orientation.⁸ The largest obstacle to overcome for any claimant in an asylum case is credibility, regarding whether or not the applicant will actually face persecution if returned to their country of origin.⁹ Because asylum seekers can only rarely corroborate the specific elements of their claim, refugee determinations often depend largely on the applicant's word alone.¹⁰ For sexual minorities, overcoming this credibility burden is made even more difficult because sexual orientation is generally not a visible or obvious characteristic;¹¹ unlike qualities of other oppressed groups, sexual orientation is one that must be voluntarily revealed.¹² However, many lesbians and gay men are not openly homosexual,¹³ continuing to remain discreet in order to "pass" as heterosexual and avoid the danger that comes with disclosure of their sexual identity.¹⁴ Thus, the rejection¹⁵ of the discretion requirement—that sexual minorities could, and therefore should, aid in their own protection from persecution by being discreet about their sex-

8. Nicole LaViolette, *The UNHCR's Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, AM. SOC'Y INT'L. L. INSIGHTS, July 30, 2009, intro. [hereinafter LaViolette, *The UNHCR's Guidance Note on Refugee Claims*], available at <http://www.asil.org/files/insight090730pdf.pdf>.

9. Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 367–368 (2003).

10. Jenni Millbank, *'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations*, 21 INT'L J. REFUGEE L. 1, 1–3 (2009) [hereinafter Millbank, *Ring of Truth*].

11. Laurie Berg & Jenni Millbank, *Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants*, 22 J. REFUGEE STUD. 195, 197 (2009).

12. *Id.*

13. Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 65 (2008).

14. Berg & Millbank, *supra* note 11, at 198.

15. The High Court of Australia rejected the widespread trend in earlier cases in which decision makers could expect sexual minorities to conceal their identities in order to avoid persecution. See *Appellants S395/2002 and S396/2002 v Minister for Immigration and Multicultural Affairs* (2003), 216 CLR 473 (Austl.) [hereinafter *Appellants S395/2002 and S396/2002 v Minister for Immigration and Multicultural Affairs*]. In this case, the court concluded that this discretion requirement was itself a form of persecution. *Id.* The UNHCR's Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity has also made it clear that a requirement to hide one's sexual orientation or gender identity may approximate persecution. See U.N. High Comm'r for Refugees [UNHCR], *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, ¶ 25 (Nov. 21, 2008) [hereinafter *UNHCR Guidance Note*], available at <http://www.unhcr.org/refworld/docid/48abd5660.html>. In this Guidance Note, the UNHCR states that taking reasonable steps to avoid persecutory harm is never a precondition to protection. *Id.*

uality¹⁶—of early cases has had minimal, if any, impact on the ability of LGBT claimants to succeed in sexual orientation based asylum claims.¹⁷

Although courts have begun to move away from judicially mandated discretion, the reality is that many homosexual individuals continue to live discreetly because “societal homophobia” prevails.¹⁸ That in turn means that problems of credibility continue to prevail in asylum claims based on sexual orientation. Such problems are multiplied by stereotypical images of LGBT people, such as expecting a flamboyant or feminine demeanor in gay men, or masculine, butch demeanor in lesbian women.¹⁹ Misconceptions of this nature are further compounded by cultural misunderstandings of social context and conditions in the country of origin²⁰ as well as the decision makers’ preconceived notions about sexual orientation influenced by the societal attitudes of their own country.²¹ Without a better, clearer understanding of sexual orientation and gender identity, decision makers will continue to deliver inconsistent and incoherent LGBT asylum claims.²²

This Note argues that the success rate of refugee claims based on sexual orientation will not improve, even as more countries begin to reject discretion reasoning, unless refugee decision makers can better understand the specific social contexts experienced by applicants in their home country and are better able to actively suppress their false assumptions in assessing credibility. Part I provides an overview on the rights and status of refugees and what is required of applicants to succeed in an asylum claim. Sexual orientation as a basis upon which to claim asylum generally, and in Australia and Canada specifically, is discussed. Part II examines the problem of discretion prevalent in earlier cases of asylum related to sexual orientation and gender identity. More specifically, it discusses an Australian case that rejected that notion and analyzes its im-

16. Christopher N. Kendall, *Lesbian and Gay Refugees in Australia: Now that ‘Acting Discreetly’ is No Longer an Option, Will Equality be Forthcoming?*, 15 INT’L J. REFUGEE L. 715, 716 (2003).

17. Millbank, *The Ring of Truth*, *supra* note 10, at 1.

18. Berg & Millbank, *supra* note 11, at 197.

19. UNHCR Guidance Note, *supra* note 15, at 16.

20. Arwen Swink, *Queer Refuge: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities*, 29 HASTINGS INT’L & COMP. L. REV. 251, 253–254 (2006).

21. Kagan, *supra* note 9, at 371–372. A refugee applicant’s personal and emotional impressions on an adjudicator and the adjudicator’s “gut feelings” can have a substantial impact on the outcome of a case. *Id.* at 374. In addition, social perceptions may not always capture the “true complexity of an individual’s identity.” Marouf, *supra* note 13, at 59.

22. Marouf, *supra* note 13, at 59.

pact. Finally, Part III explains the causes of the issues in credibility assessment and what should or can be done to overcome them. In doing so, it briefly compares the cases in Australia and Canada to demonstrate that even Canada, the world's leader in progressive asylum policies,²³ cannot completely avoid reliance on stereotypical assumptions in adjudicating refugee claims based on sexual orientation and gender reliance.²⁴

I. BACKGROUND ON ASYLUM LAW

A. Overview of the 1951 Convention relating to the Status of Refugees

The 1951 Convention relating to the Status of Refugees²⁵ and the 1967 Protocol relating to the Status of Refugees²⁶ codify the rights and status of refugees.²⁷ These international instruments define the term "refugee"²⁸ and establish the *non-refoulement* principle²⁹ that obligates signatory

23. Stephen Pischl, *Circumventing Shari'a: Common Law Jurisdictions' Response to Persecuted Sexual Minorities' Asylum Claims*, 5 WASH. U. GLOBAL STUD. L. REV. 425, 431 (2006).

24. See, e.g., *Khrystych v. Canada* (Minister of Employment & Immigration) [2005] F.C. 498 (Can.) [hereinafter *Khrystych v. Canada*]; *Mora v. Canada* [2004] F.C. 1158 (Can.). Note that Canadian gender guidelines direct attention to the need for sensitivity and training but they have not been utilized in claims by lesbians or gay men. See Nicole LaViolette, *Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines*, 19 INT'L J. REFUGEE L. 169, 178–188 (2007).

25. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

26. Protocol Relating to the Status of Refugees, Dec. 16, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. The Protocol extends the scope of the 1951 Convention beyond its former geographic and temporal limits. *Id.* art. 1, ¶ 3.

27. LaViolette, *The UNHCR's Guidance Note on Refugee Claims*, *supra* note 8, at 1.

28. A "refugee" is "any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, 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." 1951 Convention, *supra* note 25, art. 1 A(2).

29. Guy S. Goodwin-Gill, *Non-refoulement and the New Asylum Seekers*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980'S 103, 103–104 (David A. Martin ed., 1986). The *non-refoulement* principle is a basic human rights concept, providing the lowest level of refugee protection. See Erik D. Ramanathan, *Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence*, 11 GEO. IMMIGR. L. J. 1, 4 n.14 (1996). States party to the Convention must pass "enabling legislation that provides for adjudications and designations such as 'asylee' or 'permanent residency.'" *Id.*

states³⁰ to refrain from returning a refugee to a country where his life or freedom would be threatened.³¹ Additionally, the Office of the United Nations High Commission for Refugees (“UNHCR”) produced a handbook that tries to coherently define the central provisions of these instruments,³² “offering the basis for intergovernmental consensus on many interpretation issues.”³³

The Convention does not protect all of the refugees around the world, regardless of the extent of their misery.³⁴ Individuals “seeking asylum must satisfy two main legal tests [to succeed in a claim]: (1) they must demonstrate a well-founded fear of persecution; and (2) they must substantiate that the persecution they fear is on account of their race, religion, nationality, political opinion, or membership in a particular social group.”³⁵ In addition, the asylum seeker must show that their home country is “unwilling or unable to offer protection.”³⁶ Many countries have interpreted these provisions to include applicants claiming refugee status based on sexual orientation and gender identity.³⁷ Since the early 1990’s, countries such as Canada, the United States, Australia, and New Zealand have granted refugee status to individuals who fear persecution based on their sexual orientation or gender identity.³⁸ Most early asylum opinions

30. According to the U. N. High Commissioner for Refugees, there are 147 countries that are parties to either the 1951 Convention and/or the 1967 Protocol as of October 1, 2008. UNHCR, *States Parties to the 1951 Convention and its 1967 Protocol* (Oct. 1, 2008), available at <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>.

31. 1951 Convention, *supra* note 25, art. 33, ¶ 1.

32. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/IP/4/EngREV.1 (Jan. 1, 1992) [hereinafter *UNHCR Handbook*], available at <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>.

33. Ramanathan, *supra* note 29, at 3–4.

34. *Id.* at 5.

35. LaViolette, *The UNHCR’s Guidance Note on Refugee Claims*, *supra* note 8, at 1; see also 1951 Convention, *supra* note 25, art. 1, ¶ A(2). “A ‘particular social group’ normally comprises persons of similar background, habits or social status. A claim to fear persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e., race, religion or nationality . . . Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.” *UNHCR Handbook*, *supra* note 32, ¶¶ 77–79.

36. LaViolette, *The UNHCR’s Guidance Note on Refugee Claims*, *supra* note 8, at 1–2.

37. For a survey of countries that grant asylum to sexual minorities, see *Sexual Minorities and the Law: A World Survey* [Updated July 2006], ASYLUMLAW.ORG, <http://www.asylumlaw.org/docs/sexualminorities/World%20SurveyA1homosexuality.pdf> (last visited Sept. 1, 2009) [hereinafter *Sexual Minorities and the Law: A World Survey*].

38. *Id.*

relating to sexual orientation and gender identity in such jurisdictions addressed the question of whether LGBT individuals constitute a particular social group³⁹ rather than whether homosexuals experience a well-founded fear of persecution in their countries of origin.⁴⁰ In addition, in 1995 the United Nations High Commissioner for Refugees ("UNHCR") recognized that gay men and lesbians formed a particular social group and could therefore be granted refugee status on that basis under the terms of the Convention.⁴¹ In particular, the UNHCR stated that "persons facing . . . serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognized as refugees."⁴² While the UNHCR's statements are not binding on the courts, they may be useful in determining whether a person is a refugee as well as in interpreting the terms of the 1951 Convention and the 1967 Protocol.⁴³ Accordingly, at least eighteen countries now recognize that sexual minorities make up a social group within the meaning of the Convention's definition of refugee and are prepared to grant asylum

39. JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 163–164 (1991); *UNHCR Guidance Note*, *supra* note 15, ¶ 32. While sexual orientation is now recognized as a particular social group, it should also be noted that LGBT refugees may also show that their persecution is based upon political opinion. UNHCR, *Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation*, ¶ 6 (Sept. 3, 2004) [hereinafter *UNHCR Advisory Opinion*], available at <http://www.unhcr.org/refworld/docid/4551c0d04.html>. "For the purposes of the 1951 Convention . . . the term 'political opinion' [is] broadly interpreted to . . . include opinions on sexual orientation and gender identity." *UNHCR Guidance Note*, *supra* note 15, ¶ 30. A claimant's political opinion need not have been expressed while he/she was still living in his/her home country; it was sufficient to show that those strongly held beliefs would now subject him/her to persecution, if returned, because the opinion has come to the persecutor's attention by implication from his/her escape from the country. *See also* UNHCR *Handbook*, *supra* note 32, ¶¶ 94–96 (describing the status of refugees that are *sur place*). Along these lines, it is possible that LGBT refugees could also seek asylum on the basis of religious persecution. *See* Ramanathan, *supra* note 29, at 5; *UNHCR Guidance Note*, *supra* note 15, ¶ 31.

40. Ramanathan, *supra* note 29, at 4.

41. Amnesty Intl., *Crimes of Hate, Conspiracy of Silence: Torture and Ill-Treatment Based on Sexual Identity* 1, 26, 40/016/2001 (2001), available at <http://www.amnesty.org/en/library/asset/ACT40/016/2001/en/bb63ae8f-d961-11dd-a057-592cb671dd8b/act400162001en.pdf>.

42. Kristen L. Walker, *Sexuality and Refugee Status in Australia*, 12 INT'L J. REFUGEE L. 175, 179 (2000) (citing UNHCR, *Protecting Refugees: Questions and Answers* (Feb. 1, 2002), available at <http://www.unhcr.org/3b779dfe2.html>).

43. *Id.*

to LGBT people, provided that they satisfy the Convention's aforementioned legal tests.⁴⁴

B. Sexual Orientation-Specific Claims of Asylum

Both Canada and Australia have precedent which states that sexual orientation can form the basis for refugee protection.⁴⁵ Decisions in these countries focus on the importance of social group eligibility.⁴⁶ In Canada, the Federal Court Trial Division's decision in *Timothy Veysey v. Commissioner of the Correctional Service of Canada* provided the foundation for eventually treating sexual orientation as an "immutable characteristic capable of defining a social group."⁴⁷ While this case did not involve refugee law, the court's definition of "particular social group" in finding a violation of the equality rights provision of Canada's Charter of Rights and Freedoms is applicable in this context.⁴⁸ There, the court explained that the grounds, such as race or ethnic origin, identified in Section 15 of the Charter as prohibited grounds of discrimination, imply the characteristic of immutability, a characteristic that "would also clearly apply to sexual orientation, or more precisely to those who have deviated from accepted sexual norms."⁴⁹

Canada eventually incorporated this idea into its refugee law in the Supreme Court's 1993 decision of *Ward v. Canada (Minister of Employment & Immigration)* decision, which provided an expansive definition of the term "particular social group."⁵⁰ There, the court reviewed earlier

44. According to *Sexual Minorities and the Law: A World Survey*, *supra* note 37, last updated in July of 2006, the eighteen countries are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Latvia, Netherlands, New Zealand, Norway, South Africa, Sweden, the United Kingdom, and the United States. *Id.* It should be noted that some of these countries also allow applicants to claim transgender discrimination or persecution as the basis for their refugee status. *See id.*

45. Swink, *supra* note 20, at 252.

46. Ramanathan, *supra* note 29, at 13–19.

47. HATHAWAY, *supra* note 39, at 163. In this case, a man alleged a breach of his right to equality because prison officials refused to extend the conjugal visitation policy to homosexuals. *Id.*

48. *Id.* at 163–164.

49. *Id.* at 164. Another feature that is common to the grounds listed under the Charter which would also apply to sexual minorities is that the groups have been "victimized and stigmatized throughout history because of prejudice, mostly based on fear or ignorance." *Id.*

50. *Ward v. Canada (Minister of Employment & Immigration)* [1993] 2 S.R.C. 689 (Can.). This case had nothing to do with sexual orientation based persecution. However, it provides an important comprehensive definition of what constitutes a particular social group in Canada. *See id.*

Canadian and American precedents and identified three possible categories of social groups:

- (1) groups defined by an innate or unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.⁵¹

The court specifically noted that the first category encompasses individuals persecuted on the basis of sexual orientation or gender identity.⁵² This idea, that homosexuals constitute a particular social group, was considered by the courts as early as 1991,⁵³ and became widely accepted after the highly-publicized 1992 decision *In re Inaudi*.⁵⁴ In that case, an Argentine man was granted asylum on the grounds that he was a homosexual man and was thus a member of a particular social group that was subject to persecution.⁵⁵ The court determined that "homosexuality is an immutable characteristic, [which] alone suffices to place homosexuals in a particular social group [and] [e]ven if homosexuality were a voluntary condition, it is one so fundamental to a person's identity that a claimant ought not to be compelled to change."⁵⁶ In granting this kind of refugee status, Canada became the first North American jurisdiction to offer sex-

51. *Id.* at 715.

52. *Id.* at 716.

53. In a 1991 case involving a Uruguayan gay man, only one of two Immigration and Refugee Board of Canada panel members accepted the notion that "homosexuals . . . are definable, and form a particular social group. It is their right of conscience or human dignity that these individuals should not be required to change their sexual preference if persecuted because of their sexual preference." Sean Rehaag, *Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada*, 53 MCGILL L.J. 59, 62-63 (2008). However, this panel member agreed with the other in holding that the applicant did not qualify for refugee status. *Id.*

54. *Refugee Appeal No. 1312/93 Re GJ*, New Zealand: Refugee Status Appeals Authority, 30 August 1995 51-52 (citing *In re Inaudi*, No. T91-04459, [1992] C.R.D.D. No. 47 (Apr. 9, 1992)) [hereinafter *Refugee Appeal No. 1312/93 Re GJ*].

55. Ramanathan, *supra* note 29, at 14 (citing *In re Inaudi*, No. T91-04459, [1992] C.R.D.D. No. 47 (Apr. 9, 1992)). The court relied on an earlier German asylum case that recognized gay men as a social group to reach its conclusion that homosexuality denoted a social group within the refugee definition. *Id.*

56. *Refugee Appeal No. 1312/93 Re GJ*, *supra* note 54, at 52. It should be noted that there was a dissent in this case, but it questioned the credibility of the facts presented rather than questioning the issue of whether sexual orientation was an appropriate ground for asylum. *Id.*

ual orientation-based asylum,⁵⁷ setting an important international precedent.⁵⁸

As in Canada, the earliest Australian refugee claims relating to sexual orientation and gender identity also dealt, for the most part, with the issue of social group qualification.⁵⁹ Australia considered the concept of membership in a particular social group in *Morato v. Minister for Immigration, Local Government and Ethnic Affairs*, in which the Federal Court held that a person must “belong to or [be] identified with a recognizable or cognizable group within society that shares some experience in common” in order to be a member of a particular social group.⁶⁰ Taking cues from Canada’s jurisprudence in this area, the court refers to the “relative immutability of sexual orientation” and the “stigmatization throughout history of those who depart from accepted sexual norms.”⁶¹ The Australian Refugee Review Tribunal (“RRT”) extended this notion to include sexual minorities as a particular social group for refugee status determination purposes under the 1951 Convention.⁶² The RRT first granted an applicant asylum on the basis of sexual orientation in 1994.⁶³ This case involved a homosexual Iranian male whose father had discovered his sexuality and threatened to report him.⁶⁴ After concluding that homosexuals are capable of constituting a particular social group, the RRT granted the claimant refugee status.⁶⁵

The high court upheld the RRT’s approach to sexual orientation-based asylum claims in *Applicant A v. Minister for Immigration and Ethnic Affairs*.⁶⁶ In that decision, the court expressed the view that a group can

57. Pischl, *supra* note 23, at 431 (citing Brian F. Henes, Comment, *The Origin and Consequences of Recognizing Homosexuals as a “Particular Social Group” for Refugee Purposes*, 8 TEMP. INT’L & COMP. L.J. 377, 387 (1994)).

58. Canada was not the first country ever to grant asylum to homosexual claimants. Pischl, *supra* note 23, at 446 (citing Brian F. Henes, Comment, *The Origin and Consequences of Recognizing Homosexuals as a “Particular Social Group” for Refugee Purposes*, 8 TEMP. INT’L & COMP. L.J. 377, 383–385 (1994)). Before Canada, Germany and the Netherlands had offered refugee status to applicants claiming persecution on the basis of sexual orientation in the late eighties. *Id.*

59. Ramanathan, *supra* note 29, at 16.

60. *Morato v Minister for Immigration, Local Government and Ethnic Affairs* [1992] 111 ALR 417, 432 (Austl.).

61. N93/02240 [1994] RRTA 232 (21 Feb. 1994).

62. Walker, *supra* note 42, at 180 (citing N93/00846 [1994] RRTA 347 (8 March 1994); N93/02240 [1994] RRTA 232 (21 Feb. 1994)).

63. Swink, *supra* note 20, at 253.

64. N93/02240 [1994] RRTA, *supra* note 61.

65. *Id.*

66. *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] 190 CLR 225 (Austl.). It should be noted that this was not a sexual orientation-based claim for asylum.

constitute a particular social group under the Convention definition even if its distinguishing characteristics did not have a "public face."⁶⁷ It is "sufficient that the public [is] aware of the characteristics or attributes that, for the purposes of the Convention, unite and identify the group."⁶⁸ The court further stated that "[i]f the homosexual members of a particular society are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole, they will qualify for refugee status."⁶⁹ The courts in Australia have since recognized, both implicitly and explicitly, that sexual minorities may be considered a particular social group for the purposes of refugee status determinations.⁷⁰

II. WELL FOUNDED FEAR AND THE PROBLEM OF DISCRETION

Recognizable as a particular social group, sexual minorities will be granted refugee status upon proving a well-founded fear⁷¹ of persecution⁷² as "only those who face a genuine risk of persecution in their country of origin are entitled to the protections established by the Convention."⁷³ In order to constitute persecution, the harm feared by the applicant must be serious.⁷⁴ This kind of serious harm may involve grave human rights violations, including a threat to life or freedom, in addition to other kinds of formidable harm, "as assessed in light of the opinions, feelings and psychological make-up of the applicant."⁷⁵ While the requirement that harm be serious leads to the distinction between persecu-

Id. at 227–228. However, the court explored the definition of particular social group and discussed in dicta that homosexuals as a group could define a particular social group under the Convention. *Id.* at 249–250.

67. *Id.* at 250.

68. *Id.*

69. *Id.* The court also noted that it was not necessary for the group to have attributes that they are perceived to have. *Id.*

70. Walker, *supra* note 42, at 180.

71. HATHAWAY, *supra* note 39, at 65. "Well-founded fear" generally consists of two requirements: (1) the applicant must "perceive herself to stand in 'terror of persecution' . . . [and] it must be an extreme form of anxiety that neither feigned nor overstated, but is rather sincere and reasonable" under the circumstances; and (2) "this perception of risk must be consistent with available information on the conditions in the state of origin, as only those persons whose fear is reasonable can be said to stand in need of international protection." *Id.*

72. LaViolette, *The UNHCR's Guidance Note on Refugee Claims*, *supra* note 8, at 2.

73. HATHAWAY, *supra* note 39, at 65.

74. LaViolette, *The UNHCR's Guidance Note on Refugee Claims*, *supra* note 8, at 3.

75. *UNHCR Guidance Note*, *supra* note 15, at 7.

tion and discrimination,⁷⁶ a pattern of discrimination could, cumulatively, reach the level of harm necessary to be considered persecution.⁷⁷ Whether an applicant has sufficiently established a well-founded fear of persecution to succeed on an asylum claim under the Convention is a complex factual and legal issue.⁷⁸

Early cases of asylum claims based on sexual orientation engaged in “discretion reasoning.”⁷⁹ This idea implemented a “reasonable expectation that persons should, to the extent that it is possible, cooperate in their own protection, by exercising self-restraint such as avoiding any behavior that would identify them as gay.”⁸⁰ A common notion that was widespread among refugee decision-makers, especially those in Australia,⁸¹ was that displays of sexual behavior in public between members of the same sex could attract disapproval,⁸² thus inviting persecution;⁸³ it was thought that, unlike other minorities targeted for persecution, lesbian women and gay men could avoid the harms of persecution because they have the “option” of being discreet about their sexuality.⁸⁴

This idea of discretion undermines the purpose of the Convention by putting the responsibility of protection on the applicant who is required to ensure their own safety by keeping important aspects of their lives

76. LaViolette, *The UNHCR's Guidance Note on Refugee Claims*, *supra* note 8, at 3. Note that there has been a tendency for decision makers to distinguish between persecution and the less serious harm of discrimination as the situation of homosexual individuals has been changing—as some countries are becoming more accepting of deviations of the “norm,” others continue to severely repress sexual diversity. *Id.*

77. *UNHCR Guidance Note*, *supra* note 15, at 7.

78. LaViolette, *The UNHCR's Guidance Note on Refugee Claims*, *supra* note 8, at 3.

79. Jenni Millbank, *From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom*, 13 INT'L J. HUM. RTS. 1, 2 (2009) [hereinafter Millbank, *From Discretion to Disbelief*].

80. *Id.* See also V96/05496 [1998] RRTA 196 (15 Jan. 1998) (stating that “the right to free expression of sexuality does not extend so far as a right to publicly proclaim one’s sexuality and consequently it is reasonable to expect a homosexual to be discreet, if necessary, in the sense of avoiding overt manifestations of homosexuality such as public embracing or the public proclamation of his sexuality;” while this might be “irksome and unjust,” it would not “infringe any basic human right”).

81. See *Applicant LSL v Minister for Immigration and Multicultural Affairs* [2000] FCA 211 (Austl.); see also *Applicant WAB v Minister for Immigration and Multicultural Affairs* [2002] 121 FCR 196 (Austl.).

82. Jenni Millbank, *Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia*, 26 MELB. U. L. REV. 144, 151 (2002) [hereinafter Millbank, *Imagining Otherness*].

83. Millbank, *From Discretion to Disbelief*, *supra* note 79, at 3.

84. Kendall, *supra* note 16, at 717.

secret, rather than putting the responsibility on the receiving country.⁸⁵ In fact, any “decision that requires ‘discretion,’ . . . read silence and invisibility, in order to avoid abuse does little more than prop up those inequalities that the Convention seeks to address and which are at the core of both homophobia and sexism.”⁸⁶ By requiring discretion, the scope of protection offered under the Convention differs in relation to the five articulated grounds by “protecting the right to be openly religious but not to be openly gay or in an identifiable same-sex relationship.”⁸⁷

Discretion reasoning illustrates society’s so-called “proper place” of homosexuality, as something that is necessarily private and must be hidden rather than as something crucial to an individual’s identity.⁸⁸ While the explanation for the development of this approach is understandable, discretion reasoning is seriously flawed⁸⁹ and, therefore inappropriate in refugee status determinations.⁹⁰ It leads to incorrect assumptions and the misrepresentation of country information on the objective risk of persecution for sexual minorities, making it almost impossible for claims to succeed.⁹¹ As “this line of reasoning assume[s] that applicants should and would conform to their culture or government’s oppressive regimes in order to avoid harm,” the decision-makers in these cases failed to assess the magnitude of the potential harm and balance that harm in evaluating whether there was a real risk of persecution if the person was returned to the country of origin.⁹²

85. Millbank, *From Discretion to Disbelief*, *supra* note 79, at 3. Requiring applicants to live discreetly imposes a burden on asylum seekers who fear persecution on grounds of sexual orientation that is not imposed on asylum seekers who fear persecution on other grounds. *Appellants S395/2002 and S396/2002 v Minister for Immigration and Multicultural Affairs*, *supra* note 15, at 475.

86. Kendall, *supra* note 16, at 717. It should also be noted that requiring discretion essentially requires “the muzzling of a central aspect of a person’s identity.” *Id.*

87. Millbank, *From Discretion to Disbelief*, *supra* note 79, at 3. The five Convention grounds are race, religion, nationality, political opinion, or membership of a particular social group. See 1951 Convention, *supra* note 25, art. 1, ¶ A(2).

88. Millbank, *From Discretion to Disbelief*, *supra* note 79, at 3. “The discretion approach explicitly posited the principle that human rights protection available to sexual orientation was limited to private consensual sex and did not extend to any other manifestation of sexual identity.” *Id.*

89. *Id.*

90. See UNHCR *Guidance Note*, *supra* note 15, at 7 (explicitly stating that being forced to hide or renounce one’s sexual orientation and gender identity, “where this is instigated or condoned by the state,” may rise to the level of persecution).

91. Millbank, *From Discretion to Disbelief*, *supra* note 79, at 4.

92. *Id.* at 4. This approach precludes an assessment of risk to the “extent that on occasion there [i]s literally no assessment at all of the country situation and the risk of harm to someone who was identified as gay or lesbian.” *Id.*

Especially prevalent in Australia, where the Refugee Review Tribunal denied refugee status based several times on the notion that sexual minorities are able to avoid persecution by living discreetly,⁹³ discretion reasoning has been rejected by the High Court of Australia in its December 2003 decision *Appellants S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs*.⁹⁴ In that case, two gay men from Bangladesh sought asylum based on membership of a particular social group and the interpretation of persecution was the central issue.⁹⁵ Specifically, the question was whether it was valid law for decision makers to consider whether sexual minorities could be or should be required to be discreet and secretive in their home countries in order to avoid or lessen the risk of persecution.⁹⁶ The Tribunal rejected their claims, and while it accepted that it is impossible to live openly gay in Bangladesh, it ultimately concluded that they were not entitled to refugee protection.⁹⁷ Finding that the appellants had not suffered serious harm because of their homosexuality, the Tribunal expressly stated that they had “clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now.”⁹⁸ On appeal, the High Court by a four to three majority, held that the tribunal had erred and flat out rejected the discretion reasoning approach as invalid.⁹⁹ The court concluded that persecution does not cease to be persecution for the purpose of the Convention because those that are persecuted can and should eliminate the harm by taking action to avoid the harm within their country of nationality.¹⁰⁰ The court further stated that

93. Kendall, *supra* note 16, at 716. The issue of discretion was first raised in Australia in the case of a gay Chinese man who had been married to a woman before fleeing. V93/00242 [1994] RRTA 1150 (10 June 1994). In that case, the Tribunal found that it was not unreasonable to require an exercise of discretion and that this limitation of his sexual expression did not constitute persecution. *Id.*

94. *Appellants S395/2002 and S396/2002 v Minister for Immigration and Multicultural Affairs*, *supra* note 15.

95. *Id.* at 482–486.

96. *Id.* at 476. The question ultimately comes down to whether the discretion requirement is so serious in nature that it is intolerable or whether a denial of civil rights is “so complete and effective that it actually and seriously offends a real aspiration so held by an asylum seeker that it can be fairly said to be integral to his or her human dignity.” *Id.*

97. *Id.* at 480.

98. *Id.* Central to this finding was the assumption that homosexual men in Bangladesh will not be targets of persecution if they act discreetly. *Id.*

99. *Id.*

100. *Id.* at 485. In such situations, the requirement of well-founded fear of persecution is satisfied as that well-founded fear is the claimant’s fear that he or she will suffer harm unless that person takes measures to avoid the harmful conduct. *Id.* This is true because

whether the applicant disclosed his or her identity as a homosexual and attracted the attention of persecutors is immaterial; if the harm inflicted falls under a Convention reason and is serious enough to constitute persecution, the homosexual person is entitled to protection under the Convention.¹⁰¹

III. ISSUES OF CREDIBILITY LESSEN THE REJECTION OF DISCRETION REASONING'S IMPACT

Discretion reasoning ultimately led to the failure of decision makers to consider whether there was a real chance of persecution of the person upon repatriation.¹⁰² This failure was particularly evident where the actions of the persecutors already caused the affected individual to modify his or her conduct by hiding his or her sexual orientation or gender identity.¹⁰³ In such cases, "there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future."¹⁰⁴ Detracting from the "future-focused nature"¹⁰⁵ of the well-founded fear test, discretion reasoning makes it almost impossible for a claim based on sexual orientation to succeed unless the applicants were able to demonstrate that they had been persecuted in the past.¹⁰⁶ Thus, the Australian decision¹⁰⁷ rejecting the idea of discretion reasoning in asylum determinations shows promise of providing a solution to a variety of flaws, not just in the discretion approach but in asylum determinations based on sexual orientation and gender identity in general. But while the case is a progressive step in the right direction, and case law since the decision has shown some positive impact,¹⁰⁸ it does not address the issues of credibility that exist in making refugee status determinations based on sexual orientation and gender identity.

in the majority of cases, the applicants have acted and carried out their conduct the way they did only because of the threat of harm. *Id.* at 486.

101. *Id.* at 486.

102. *Id.* at 485.

103. *Id.*

104. *Id.*

105. Millbank, *From Discretion to Disbelief*, *supra* note 79, at 4.

106. *Id.*

107. *Appellants S395/2002 and S396/2002 v Minister for Immigration and Multicultural Affairs*, *supra* note 15.

108. See N04/49627 [2005] RRTA 7 (25 Feb. 2005) (stating that having to hide one's homosexuality to reduce the risk of harm is itself persecutory); see also N05/50670 [2005] 88 (19 May 2005) (framing the hiding of one's sexual orientation and thus living discreetly as leading a double life rather than a normal life).

Problems of credibility continue to arise in sexual orientation based asylum claims because many homosexual individuals continue to live discreetly and often times “pass” as heterosexual individuals due to the prevalence of heterosexuality as a societal “norm.”¹⁰⁹ As the applicant’s personal stories are the basis of the claim and the “foundation of virtually all of the applicant’s evidence,”¹¹⁰ hearings in the refugee forum almost always consist entirely of the applicants’ personal narratives of their experiences.¹¹¹ Thus, the assessment of credibility is inevitably susceptible to subjectivity as it requires one human being, the decision maker, to evaluate the credibility of another human being, the claimant. Decision makers are required to “assess cases that are constructed upon the frail foundation of human descriptions of extreme experiences.”¹¹² In this context, “[e]motional impressions of a person and ‘gut feelings’ can have a substantial impact”¹¹³ on the outcome of a case.¹¹⁴ The problem lies in the decision makers’ false assumptions about the conduct and appearance of homosexual individuals.¹¹⁵ Because such preconceived notions about sexual orientation and gender identity are shaped by the societal attitudes of the decision makers’ home countries,¹¹⁶ it is crucial to educate and train them in what sexual identity is and how it comes to develop, especially in individuals who identify as homosexual.

A. Demeanor as a Poor Indicator of Credibility

The necessity for better training and guidelines to help decision makers make more informed, objective decisions is evident from the continued reliance on demeanor, including physical appearance and perception of manner.¹¹⁷ Evaluations of demeanor are poor indicators of truthfulness because they are extremely dependent on the decision maker’s and the

109. Berg & Millbank, *supra* note 11, at 197.

110. Millbank, *Imagining Otherness*, *supra* note 82, at 154.

111. *Id.* The UNHCR Handbook states that asylum applicants should be given the benefit of the doubt as they are unlikely to be able to prove every element of their claim. UNHCR Handbook, *supra* note 32, at 32–33. This benefit of the doubt should be given only when the decision maker is “satisfied as to the applicant’s general credibility.” *Id.* at 32.

112. Rosemary Byrne, *Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards From the International Criminal Tribunals*, 19 INT’L J. REFUGEE L. 609, 612 (2007).

113. Kagan, *supra* note 9, at 371.

114. *Id.* Oral testimonial evidence is the “least credible and most impeachable form of evidence.” Byrne, *supra* note 109, at 612.

115. UNHCR Guidance Note, *supra* note 15, at 16–17.

116. Kagan, *supra* note 9, at 371–372.

117. Millbank, *The Ring of Truth*, *supra* note 10, at 3.

applicant's personal and cultural temperaments.¹¹⁸ Influenced by stereotypical images of the effeminate gay man or the masculine, butch lesbian woman,¹¹⁹ decision makers often tend to make assessments such as "no signs of being gay,"¹²⁰ or "looked gay."¹²¹ Such statements in asylum opinions are problematic because society's social perceptions often do not capture the "true complexity of an individual's identity."¹²² In fact, individuals have "multiple, dynamic social identities that vary according to context, and different aspects of identity may be more or less prominent in any given situation."¹²³ Thus, in a potentially nerve-wracking formal hearing, refugee applicants may be unable to confidently and accurately speak about their traumatic and painful experiences.¹²⁴ Adding further complication is the fact that many homosexual individuals continue to live secret lives in order to avoid persecution in their countries of origin.¹²⁵ In this reality, refugee applicants making claims on the basis of sexual orientation and gender identity still face an unsolvable dilemma¹²⁶ in which it is unlikely that they will pass the demeanor test: on the one hand, acting discreetly, while no longer a requirement in assessing refugee status, helps applicants avoid a threat of persecution in their home countries, yet on the other, it inhibits them from "looking" gay as many have spent countless years "passing" as straight.¹²⁷

In addition, applicants in sexual orientation based claims are likely to find answering questions about their sexuality very difficult¹²⁸ due to feelings of shame and self-hatred,¹²⁹ particularly when the questions are

118. Walter Kalin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing*, 20 INT'L MIGRATION REV. 230, 232-234 (1986).

119. UNHCR Guidance Note, *supra* note 15, at 16-17.

120. Millbank, *The Ring of Truth*, *supra* note 10, at 3.

121. *Id.*

122. Marouf, *supra* note 13, at 59.

123. *Id.*

124. Kagan, *supra* note 9, at 373-374.

125. Berg & Millbank, *supra* note 11, at 197; Millbank, *From Discretion to Disbelief*, *supra* note 79, at 5-6.

126. Kendall, *supra* note 16, at 716. While the rejection of discretion reasoning is a "win" for LGBT individuals, there is still a long way to go before these individuals will be welcomed into their receiving countries. *Id.*

127. Berg & Millbank, *supra* note 11, at 197.

128. Millbank, *The Ring of Truth*, *supra* note 10, at 4.

129. Berg & Millbank, *supra* note 11, at 197. Applicants from especially repressive societies may have only talked to a handful of people, or none at all, about their sexual orientation prior to making a claim. *Id.* at 198. Thus, the circumstances surrounding the interview will affect whether the applicant feels comfortable and safe in revealing his or her identity. *Id.*

sexually explicit and asked by an authority figure.¹³⁰ Because decision makers often interpret hesitation or lack of detail in an applicant's response to questioning as indicative of lying,¹³¹ this kind of demeanor evaluation will lead them to discredit the applicant's stories.¹³² This problem is exacerbated when applicants need to speak through an interpreter, which disrupts the communication and severely impedes the translation of both verbal and nonverbal cues.¹³³ Such inherent difficulties in evaluating an applicant's demeanor and conduct make it easy for decision makers to fall back on assumptions, instincts, or generalizations in reaching their decisions,¹³⁴ resulting in "a simplified impression" of the individual.¹³⁵ Despite the unreliability of demeanor in assessing truthfulness,¹³⁶ it continues to be recognized as an important aspect of credi-

130. Millbank, *The Ring of Truth*, *supra* note 10, at 4. Refugee applicants from countries where homosexual persecution is sanctioned by the state or encouraged will find it especially hard to disclose their identities as it will be difficult for them to trust that "state officials could be anything other than hostile" to such a disclosure. Berg & Millbank, *supra* note 11, at 198.

131. Millbank, *The Ring of Truth*, *supra* note 10, at 4. The reason behind this presumption is that decision makers have "pre-formed" expectations of how homosexual identity is expressed and understood without taking into account the diverse range of backgrounds and cultures from which the refugee applicants come. *Id.* See also Marita Eastmond, *Stories as Lived Experience: Narratives in Forced Migration Research*, 20 J. REFUGEE STUD. 248, 251 (2007) (stating that narratives must be analyzed in the social and political contexts that influence the refugee applicants' lives as they are not "transparent renditions of reality" but rather, require interpretation).

132. Millbank, *The Ring of Truth*, *supra* note 10, at 4.

133. Guy Coffey, *The Credibility of Credibility Evidence at the Refugee Review Tribunal*, 15 INT'L J. REFUGEE L. 377, 381 (2003). Asylum claimants come from countries with "norms of verbal and nonverbal expression[s]" that the decision makers are unfamiliar with, thus making an accurate evaluation of demeanor highly unlikely. *Id.* at 382. In *Kathiresan v Minister for Immigration and Multicultural Affairs*, Gray J stated that "it is all too easy for the 'subtle influence of demeanor' to 'become a cloak, which conceals an unintended but nonetheless decisive bias.'" *Id.* at 381-382 (citing *Kathiresan v Minister for Immigration and Multicultural Affairs* (unreported, Federal Court of Australia, 6, 4 Mar. 1998) (Austl.)). In fact, there are real "risks associated with making credibility assessments . . . on the basis of demeanor and conduct" as there is little empirical support that evaluators are able to reliably assess the truthfulness of an "individual's claims on the basis of demeanor and manner of presentation alone." *Id.*

134. Marouf, *supra* note 13, at 59. This is due to "the sheer complexity of social life, paired with an all-too-common lack of motivation or capacity to process others in a complex manner, [which] can lead to focusing on just one of the many available categorizations." *Id.* at 59-60.

135. *Id.*

136. Kagan, *supra* note 9, at 373.

bility assessment since decision makers continue to rely upon it,¹³⁷ thus demonstrating the need to educate decision makers.

B. Inconsistency Does Not Always Equal Fabrication

Consistency, or the lack thereof, is another aspect of credibility assessments that leads to problems and, in effect, minimizes the impact of the rejection of the discretion reasoning approach. Decision makers frequently state inconsistency as the reason for rejecting a refugee applicant's claim.¹³⁸ Inconsistencies often occur within an applicant's personal statements about their experiences or between each re-telling of their accounts.¹³⁹ Because adjudicators believe inconsistency "goes to the heart of whether a person's account is coherent,"¹⁴⁰ they often conclude that an inconsistency in evidence necessarily calls the applicant's credibility into question.¹⁴¹ However, such an automatic conclusion fails to consider the fact that there are a number of perfectly legitimate possibilities other than deliberate falsification that may give rise to inconsistencies.¹⁴² An inconsistency or contradiction does not necessarily signify fabrication as it often results from an applicant's repeated questioning;¹⁴³ since such questioning is unlikely to occur the same way on each occasion during the course of an applicant's claim,¹⁴⁴ it is almost impossible

137. Millbank, *The Ring of Truth*, *supra* note 10, at 3.

138. Kagan, *supra* note 9, at 379.

139. Millbank, *The Ring of Truth*, *supra* note 10, at 6.

140. Kagan, *supra* note 9, at 379.

141. See e.g. V99/09946 [2000] RRTA 935 (29 Sept. 2000) (concluding that the "inconsistencies between the applicant's evidence attached to his application and his written and oral evidence submitted to the Tribunal" undermined his credibility). In addition, there is a presumption that people who are telling the truth and remembering events that really happened are able to accurately recollect them the same way each time. Kagan, *supra* note 9, at 379.

142. Jane Herlihy, Peter Scragg & Stuart Turner, *Discrepancies in Autobiographical Memories—Implications for the Assessment of Asylum Seekers: Repeated Interviews Study*, 324 BRIT. MED. J. 324, 326–327 (2002). In fact, decision makers, themselves, recognize that contradictions are inevitable in every case. Millbank, *The Ring of Truth*, *supra* note 10, at 6 (citing Cecile Rousseau & Patricia Foxen, *Constructing and Deconstructing the Myth of the Lying Refugee*, in LYING AND ILLNESS 74 (Els van Dongen & Sylvie Fainzang eds., 2005)).

143. Kagan, *supra* note 9, at 377.

144. *Id.* The applicant may first submit a personal statement followed by an interview by the asylum office; the applicant may then have to testify and be cross-examined. *Id.* By the end, the applicant will have told his or her story, both orally and verbally, several times over a period of many months. *Id.*

for the applicant, or anyone else, to answer each question in exactly the same manner.¹⁴⁵

In addition, delayed revelation of information pertinent to claims of persecution plays a role in leading decision makers to conclusions of inconsistency, and, ultimately rejections of applicants' claims.¹⁴⁶ While this kind of delay may raise serious questions about the credibility of an applicant,¹⁴⁷ it is important to remember, as the UNHCR constantly reminds,¹⁴⁸ that claimants who have suffered serious trauma and human rights violations may delay revealing their experiences.¹⁴⁹ As in the demeanor context, refugee applicants may fear authority figures, may want to avoid reliving painful experiences, or may feel uncomfortable revealing information about a very private aspect of their lives, particularly in an unfamiliar and unwelcoming setting.¹⁵⁰ Decision makers must understand that while delayed revelation of important facts may sometimes be the result of fabrication, it can also result from "hyperamnesia . . . the observation that people remember more details with repeated recalls."¹⁵¹ Given such a range of possible reasons for delayed revelation of relevant information, decision makers should not immediately draw adverse inferences, automatically assuming that delayed disclosure equals falsification.¹⁵²

145. Herlihy, Scragg & Turner, *supra* note 142, at 326–327. In this study, researchers interviewed participants, asking the same questions weeks and months later, and ultimately found disparities from the first to the last interview to exist for every participant. *Id.* Upon further examination, the researchers discovered that the discrepancies between interviews had most to do with peripheral details. *Id.* at 326. See also Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 INT'L J. REFUGEE L. 293, 308 (2001) [hereinafter Cohen, *Questions of Credibility*] (conducting a review of cognitive memory research and concluding that "it is almost impossible to maintain absolute consistency, especially if it is a long time since the events to be recalled."); Juliet Cohen, *Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably be Said to Undermine Credibility of Testimony?*, 69 Medico-Legal Journal 25, 27–34 (2001) [hereinafter Cohen, *Errors of Credibility*] (showing that personal narratives may change, without necessarily being an indication of lying, because memory is affected and influenced by many factors).

146. Kagan, *supra* note 9, at 380.

147. Coffey, *supra* note 133, at 382–385.

148. UNHCR *Handbook*, *supra* note 32, ¶¶ 196–199.

149. Coffey, *supra* note 133, at 382.

150. *Id.*

151. Cohen, *Questions of Credibility*, *supra* note 145, at 297.

152. Coffey, *supra* note 133, at 382–385.

C. All Surrounding Circumstances Should be Considered in an Assessment of Whether an Individual's Expression of a Homosexual Identity is Plausible

Difficulties arise in assessing whether an individual's account of a homosexual self-identity is actually plausible because it is unclear as to what exactly constitutes a plausible expression of a homosexual identity.¹⁵³ "Given the great diversity of human experience and understanding of sexual identity both within and across genders, cultures and other divides,"¹⁵⁴ lesbians and gay men do not necessarily acknowledge and act on their sexual orientation in an identical manner.¹⁵⁵ As a result, an assessment of plausibility is often derived from false assumptions of what is likely to be the "typical evolution"¹⁵⁶ of an individual's homosexual identity.¹⁵⁷ Relying on inferences of how people would or should behave in certain situations, decision makers frequently make plausibility judgments that are based more on speculation rather than upon actual evidence.¹⁵⁸ This problem is aggravated by a lack of objective evidence to prove a refugee applicant's identification as a homosexual individual.¹⁵⁹ As in the demeanor context, plausibility determinations are based on broad generalizations and stereotypes of gay culture.¹⁶⁰ For example, in a 2004 Canadian decision, a court held that an applicant who engaged in a relationship with a woman after arriving in Canada could not be gay because it was implausible that a homosexual would carry on such a relationship.¹⁶¹ In other cases, decision makers have evaluated the truthfulness of applicants' claims of homosexuality by testing their familiarity with the gay lifestyle and scene in the country to which they escaped.¹⁶² In that context, claimants are expected to know about the gay nightclubs and other publicly gay venues in their country of relocation as proof of

153. Millbank, *The Ring of Truth*, *supra* note 10, at 8.

154. Berg & Millbank, *supra* note 11, at 203.

155. Millbank, *The Ring of Truth*, *supra* note 10, at 8.

156. Berg & Millbank, *supra* note 11, at 204.

157. Millbank, *The Ring of Truth*, *supra* note 10, at 8.

158. *Id.*

159. Millbank, *Imagining Otherness*, *supra* note 82, at 154. As already stated, an applicant's claim is almost entirely based on his/her personal narrative of his/her experience. *Id.*

160. Millbank, *The Ring of Truth*, *supra* note 10, at 9.

161. *Khrystych v. Canada*, *supra* note 24; Berg & Millbank, *supra* note 11, at 199 (citing *Khrystych v. Canada* [2004] RPDD No. 339 (15 April 2004)). In another case, the court found that it was not plausible for a woman to have her first lesbian relationship in her 50's because "most people discover their sexuality at a much younger age." Millbank, *The Ring of Truth*, *supra* note 10, at 10.

162. Millbank, *The Ring of Truth*, *supra* note 10, at 9.

their “gayness.”¹⁶³ Such expectations¹⁶⁴ do not take into account the fact that many homosexual individuals live discreetly,¹⁶⁵ adopting concealment and avoidance strategies to escape persecution and the stigma that comes with being labeled a homosexual.¹⁶⁶ Because such strategies “involve selectively disowning their sexual orientation to themselves and to others,”¹⁶⁷ it is highly likely that homosexual refugee applicants will continue to live their lives “passing” as straight by engaging in heterosexual relationships or simply choosing not to openly participate in the gay lifestyle.¹⁶⁸ Thus, presumptions based upon inaccurate “rational perceptions”¹⁶⁹ of what constitutes a plausible homosexual identity and how it is likely to be expressed make it even more apparent that decision makers must receive education and training before they are expected to adjudicate asylum claims based on sexual orientation.

CONCLUSION

Although more countries are likely to follow Australia in its explicit rejection of the discretion requirement,¹⁷⁰ the success rate of refugee claims based on sexual orientation will not improve unless refugee decision makers can better understand the specific social contexts of claimants’ home countries and are better able to actively suppress their false assumptions in assessing credibility. The 2003 Australian decision rejecting the discretion reasoning approach in sexual orientation-based asylum determinations was a step in the right direction for sexual minorities, but

163. *Id.*

164. *Id.* These expectations involve a “two-fold assumption: this is what our gay people do, therefore your doing likewise is proof of gayness, and also: if you have come from a place of oppression/covert experience of your sexuality, then the inevitable outcome of relocating should be enthusiastic engagement in cultural manifestations of gayness, because that is how ‘freedom’ is expressed.” *Id.*

165. Millbank, *Imagining Otherness*, *supra* note 82, at 197.

166. Berg & Millbank, *supra* note 11, at 198. Another possible explanation is that “claimants who have really suffered as a result of their sexuality may find the prospect of publicly-identifiable gay venues appalling rather than liberating, they may be suffering from depression or PTSD as a result of their experiences such that clubbing is not high on their list of priorities, or they may find such venues inaccessible or unpleasant for many reasons.” Millbank, *The Ring of Truth*, *supra* note 10, at 9.

167. Berg & Millbank, *supra* note 11, at 198.

168. *Id.*

169. Kagan, *supra* note 9, at 380.

170. By finally addressing issues unique to sexual minorities in the asylum context and making it clear that discretion should never be a precondition to protection, the UNHCR’s Guidance Note will likely lead more countries to reach the same result. *UNHCR Guidance Note*, *supra* note 15, ¶ 25; LaViolette, *The UNHCR’s Guidance Note on Refugee Claims*, *supra* note 8, at 5–6.

it did not resolve all of the issues inherent in these types of asylum claims.¹⁷¹ By failing to address issues of credibility, that decision neglected the fact that hearings in refugee forums frequently consist almost entirely of the applicants' personal stories.¹⁷² The assessment of applicants' credibility is therefore inevitably subject to the decision makers' preconceived notions about sexual orientation and gender identity as influenced by the societal attitudes of the decision makers' home countries.¹⁷³ Such overbroad generalizations and stereotypes combined with the fact that sexual minorities are not openly homosexual,¹⁷⁴ make it especially difficult for homosexuals to overcome the credibility obstacle.¹⁷⁵

Because refugee status determinations occur in a context where "emotional impressions"¹⁷⁶ and "gut feelings"¹⁷⁷ will most likely have a substantial impact,¹⁷⁸ it is extremely important that decision makers are thoroughly trained and educated in what constitutes sexual identity and how it comes to develop, especially in individuals who identify as homosexual. They should be aware that difficulties arise in evaluating demeanor which makes it easy for them to fall back on oversimplified social perceptions and inferences in reaching their decisions,¹⁷⁹ resulting in an inaccurate portrayal of the individual.¹⁸⁰ Acknowledging such downfalls in using demeanor as a guide in credibility assessments should help decision makers understand that a single, uniform expression of homosexuality does not exist.¹⁸¹ Decision makers must also realize that inconsistencies in personal narratives are to be expected and should not automatically disqualify an applicant as incredible since there are a variety of explanations for inconsistent stories.¹⁸² Finally, decision makers must fully understand that sexual minorities may often continue to live their lives

171. Millbank, *From Discretion to Disbelief*, *supra* note 79, at 5.

172. Millbank, *Imagining Otherness*, *supra* note 82, at 154.

173. Kagan, *supra* note 9, at 371-372.

174. Marouf, *supra* note 13, at 65.

175. Berg & Millbank, *supra* note 11, at 198.

176. Kagan, *supra* note 9, at 371-372.

177. *Id.*

178. *Id.*

179. Marouf, *supra* note 13, at 59.

180. *Id.*

181. Millbank, *The Ring of Truth*, *supra* note 10, at 8.

182. Cohen, *Errors of Recall and Credibility*, *supra* note 145, at 27-34. As previously mentioned, during the course of reviewing a claim, an applicant is questioned about his/her experiences more than once and because that questioning is unlikely to occur the same way on each occasion, it is almost impossible for the applicant, or anyone else to answer each question in exactly the same way. Kagan, *supra* note 9, at 377.

discreetly¹⁸³ and in turn remember that unfamiliarity with the gay culture of their receiving country or participation in heterosexual relationships in the past does not necessarily disprove their “gayness.”¹⁸⁴

This kind of education and training for the decision makers is crucial because many countries around the world continue to persecute sexual minorities and punish them for homosexual activity¹⁸⁵ and escaping to seek asylum in another country may be the only option for the victims facing these kinds of situations. Credibility is already a difficult obstacle to overcome¹⁸⁶ for any asylum claimant without the added complication that LGBT applicants face because homosexuality is an invisible, non-obvious characteristic.¹⁸⁷ It is made even less visible because societal homophobia continues to exist, causing many homosexuals to continue to live discreetly.¹⁸⁸ Thus, without training to educate decision makers on how to suppress misconceptions about homosexuality, refugee applicants making claims on the basis of sexual orientation will continue to face an unresolved dilemma.

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183. This is true despite the ruling rejecting the notion that homosexuals should have to live discreetly and thus help in their own protection because of the continued existence of homophobia in many countries. Ottosson, *supra* note 1, at 7–45.

184. Millbank, *The Ring of Truth*, *supra* note 10, at 9.

185. Ottosson, *supra* note 1, at 7–45.

186. Kagan, *supra* note 9, at 367–368.

187. Berg & Millbank, *supra* note 11, at 197.

188. *Id.*

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