

Introduction

Good evening from Sydney, Australia. Thank you very much for hosting me today.

My name is Douglas McDonald. I'm currently employed as a researcher by Craddock Murray Neumann Lawyers, a law firm which specializes in refugee law and advocacy. I'm also a former student at the National Law School of India University.

Before I begin, a disclaimer. I'd like to make it clear that the views expressed in my paper and my presentation are my own views, not those of my employer.

Today, I'll be discussing the relationship between non-heteronormative sexual identities and refugee law, with particular regard to the difficulties faced by many LGBTQ asylum seekers in proving that their claims for protection under the *Refugees Convention* are, in fact, true. My speech will be drawing on my own experiences as a researcher in Australia, including my involvement in cases dealing with claims based on sexuality.

LGBTQ People As Asylum Seekers

The *Refugees Convention* protects those individuals who cannot return to their countries of origin because they fear persecution for reasons of race, religion, nationality, political opinion or *membership of a particular social group*. How this definition applies to LGBTQ individuals has been a point of contention for decades. It was not until 2003 that the High Court of Australia became the first final appellate court anywhere in the world to recognise that LGBTQ people could constitute a 'particular social group', and that harm inflicted on an individual by reason of their sexuality could hence constitute persecution.

Prior to this, it had been orthodoxy in Australia – as in many other nations – that the risks faced by LGBTQ individuals could be mitigated through 'discretion' if returned to their home countries. That is, that they could choose to keep a low profile to avoid detection by the state or by homophobic individuals in their societies of origin. Taking this logic to its furthest extent, they could even be required to abstain from sexual activity altogether, or from other activities likely to expose their true sexual identities.

In the decision which finally overturned this idea – *Appellant S395/2002 and Minister for Immigration and Multicultural Affairs*, which I'll call S395 – the dissenting judges exemplified the 'discretion' orthodoxy by saying that the appellants, homosexual men from Bangladesh, could remain discreet as to their sexuality by living, quote, '*quietly without flaunting their homosexuality*', end quote.

The majority judges in S395 – Justices McHugh, Gummow, Hayne and Kirby, who is himself gay – overturned years' worth of decisions of lower courts in

finding both that lesbian, gay and bisexual people could constitute 'particular social groups' in their countries of origin for the purposes of the *Refugees Convention*. Furthermore, the Court found that they could not be expected or required to divest themselves of the very characteristics which led them to be persecuted. The judgment of Justices McHugh and Kirby asserts that, quote, '*subject to the law, each person is free to associate with any other person and to act as he or she pleases, however much other individuals or groups may disapprove of that person's associations or particular mode of life*', end quote.

A brief disclaimer as to why that statement is so momentous. Australia does not have a Bill of Rights. Our High Court has traditionally been very legally cautious, both in terms of its findings and the language it uses to express them. *S395* was decided in 2003; the next year, the High Court found that the Department of Immigration could lawfully keep asylum seekers in detention indefinitely without any prospect for release or return to their countries of origin, with two of the majority judges in *S395* in the majority in that later decision. For the High Court to issue a ringing plea for tolerance, as it did in *S395*, hence marked a substantial departure from its normal practices and rhetoric.

However. As proven by Jenni Millbank, an academic at the University of Technology Sydney, the recognition that LGBTQ individuals' experiences of harassment and harm on the basis of their sexuality may potentially give rise to claims under the Convention has *not* substantially increased their likelihood of being accepted as asylum seekers. Instead, as Millbank notes, reasons for rejecting these claims have shifted. Once, their claims would have been simply dismissed through a finding that they could remain 'discreet'. Now, it is frequently found that asylum seekers claiming to be LGBTQ are, in fact, merely lying about their sexuality or their experiences.

Even the appellants in *S395*, once remitted from the High Court to the Refugee Review Tribunal, were rejected for asylum. After years of fighting their way through courts and tribunals, they were found, for the very first time, not to be gay at all.

Obstacles to the Assessment of Credibility

In my speech today, I'll focus on two principal grounds frequently used to attack the credibility of LGBTQ asylum seekers, and the failures of each.

The **first** ground is the use of stereotypes and false assumptions in the credibility assessment process – with the related issue of conflating various forms of sexual identity, assessing asylum seekers' conduct and their risks of harm by reference to other sexual minorities in their countries of origin.

The **second** ground is by reference to how asylum seekers present their claims for protection. In particular, the drawing of conclusions from inconsistencies, vagueness or the demeanour of the applicant for protection. These tests are particularly problematic for LGBTQ asylum seekers, for reasons that I'll discuss below.

Turning to the issue of stereotypes and false assumptions.

Refugee status assessors have frequently judged asylum seekers not to be truthful about their sexuality because they do not find their claimed experiences in their country of origin to be plausible. Alternately, they do not believe that an LGBTQ individual would act in a manner such as that described by the applicant. These findings are, however, frequently shaped by the cultural context and the personal experiences of the decision-maker – which will almost always vary substantially from those of the applicant.

Asylum seekers who claim to have engaged in relationships in their country of origin are frequently questioned – down to minute details – about these relationships, only for their claimed experiences to be dismissed as ‘implausible’ based upon how the decision-maker would have acted in similar circumstances (or even in the safe context of the country in which asylum is sought). Asylum seekers are asked whether they know the names of LGBTQ advocacy groups in their countries of origin, or of prominent LGBTQ personalities, or even people who are significant to LGBTQ people in a *Western* context. It is expected that their sexuality will find cultural expression, or that they will take part in a subculture recognisable to Western eyes. Asylum seekers are asked, for example, whether any ‘art, literature, song lyrics or popular culture icons’ speak to them – fishing, that is, for some affinity for Lady Gaga, or Oscar Wilde, or Kylie Minogue – and can be rejected because, in part, they answer ‘no’.

At the same time, different forms of sexuality may be conflated or judged according to inappropriate tests. Transgender asylum seekers may be rejected because gay and lesbian people in their country of origin are treated with relative tolerance – and hence that their claimed experiences of persecution could not possibly have transpired. Men who have sex with men may be rejected because they do not identify as LGBTQ, take part in any related subculture, or show knowledge of its tenets. Even if their credibility is accepted, it may be found that it is ‘safe’ for them to return to their country of origin because other forms of sexual minorities – even if not that to which the applicant belongs – are treated with relative respect and tolerance.

These are intensely problematic ways to assess asylum seekers’ claims. Individual experiences of sexuality are intensely personal. They vary from culture to culture, and from person to person. To hold that a person’s sexual experiences, by deviating from some imagined ‘norm’, did not, in fact, happen ignores the fact that an individual may, for example, form sexual relationships with others of the same gender without identifying as lesbian, gay or bisexual, or having any knowledge of such groups. Or that country information with regard to the status of LGBTQ individuals in one area of a nation may not hold true across the country, or that such information may be otherwise biased or incomplete, or that an asylum seeker may not have access to the same information about LGBTQ groups, individuals and rights in their country of origin as the decision-maker. Or that just as different individuals conceive of sexuality in different ways, a regime or society which is relatively tolerant of

one form of sexual minority may treat other groups – even those which fall under the broad banner of ‘LGBTQ’ – altogether differently. In my experience – and based upon the observations of other researchers in this field – many refugee status assessors have proven too willing to find that an individual’s account of their experiences are implausible or concocted where, in fact, they may be eminently reasonable within the confines of an individual’s culture or personal experiences.

Turning to issues of consistency, detail and demeanour.

It is almost impossible to imagine a system for assessing whether asylum seekers are eligible for protection that does not involve, at some stage, mechanisms for determining whether the asylum seeker is being truthful about who they are, what they have experienced and what they fear will happen to them in future. Assessors will almost invariably have regard to:

- whether the asylum seeker has been consistent about what happened to them, including whether they raised their claims at the first available opportunity;
- how much detail asylum seekers have been able to provide about their claims, with a greater degree of detail sometimes, but not always, regarded as an indicator that the events recounted actually happened; and
- whether the asylum seekers were able to relate what happened to them in a naturalistic and believable manner.

All of these metrics have their place. But they cannot be taken as unerringly reliable indicators, nor can they be viewed in isolation. Indeed, each may be a completely false guide to whether an asylum seeker is telling the truth, with failure on any one of these counts explicable by reference to the asylum seeker’s personal circumstances or even the nature of their experiences.

Inconsistencies and vagueness are problematic guides to whether an asylum seeker is being truthful about their claimed experiences in their country of origin. Even as a general rule, beyond the specific challenges faced by asylum seekers in particular, memory is always subjective, unreliable and prone to variation and error. Different individuals will exhibit different levels of recall, and a uniform standard (as to how much an individual ‘should’ be able to remember) may be apt to mislead when applied to the variegated mass of actual human beings.

Memory may prove particularly unreliable when individuals attempt to recall experiences of intense trauma or emotion. Vagueness as to details of these experiences, or the provision of inconsistent accounts on different occasions, may speak as much to an asylum seeker’s reluctance to relive painful memories or their unconscious disassociation from traumatic experiences. Similarly, a flat or seemingly detached demeanour in recounting these experiences may reflect the asylum seeker’s desire to retain their composure rather than any lack of associated emotion.

These observations hold true for all asylum seekers, and particularly survivors of torture and trauma. However, they are often uniquely important to bear in mind in assessing the claims of asylum seekers who have suffered because they are, or are perceived to be, lesbian, gay, bisexual, transgender or queer. The unique stresses involved in recounting traumatic experiences are often compounded by the shame and embarrassment experienced by many asylum seekers on account of their sexuality, given that many have come from countries where sexual minorities are stigmatised. Indeed, some asylum seekers have seldom or never spoken openly of their experiences or of their sexual identities prior to seeking asylum abroad. When assessing what weight to be given to inconsistencies – including failure to raise claims based on sexuality until after their arrival in another country, or until after they have applied for protection on some other ground – decision-makers must give real weight to the possibility that asylum seekers have been motivated not by a desire to embroider their claims for protection, but by a reluctance to reveal any more than is absolutely necessary about experiences that they consider shameful or uniquely painful to recount.

Conclusion

Ordinarily, in concluding a presentation like this, one would issue various recommendations for change – through law reform, for example, or an overhaul of procedure. In this case, however, we are restricted both by institutional limits and practicality. In Australia, as in many other common law nations, courts have traditionally proven reluctant to overturn findings of fact by tribunals, except where their procedures show gross errors of due process. Beyond this, there are limits to how far policy *can* regulate these kinds of findings by decision-makers. This is because these decisions ultimately should be made on the basis of factors in individual cases, and which hence require a certain degree of discretion and common sense on the part of the decision-maker. Credibility assessment is both essential for any functioning system for determining a nation's protection obligations under the *Refugees Convention* and almost impossible to pin down to concrete formulae.

All we can call for, then, is a sense of proportion, humility and understanding. Decision-makers need to be conscious of the limits of their experience, and of the inherent limits of the information before them – both that provided by the asylum seeker and independent sources about the country from which they have fled. They need to be conscious of the diversity of human experience, and the extent to which an asylum seeker's claims may fall outside the norm for their society of origin yet still be truthful. They need to be cautious in reaching adverse conclusions based on the quality of an asylum seeker's testimony, first considering all available alternatives. Was this asylum seeker inconsistent because they were forced to improvise details about events that did not, in fact, occur? Or were they inconsistent because their memories themselves are inconsistent – the product, perhaps, of the painful circumstances in which they were produced? Did this asylum seeker present their claims in a seemingly affectless manner because they were merely recounting an overly rehearsed cover story – or because this was the only way in which they could tell the story without breaking down entirely?

It may appear unreasonably optimistic to end this presentation with a call for simple humanity. But that, ultimately, is what is required – a recognition of the fact that human lives are messy, unpredictable, and bound by no norms, and that an individual's sexual experiences and relationships, in particular, ought to conform to no pattern save that dictated by the individual themselves.