

Article

'Manufacturing Vulnerability' in UK Asylum: Shifting Standards of Proof and Sexual Diversity

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Abstract

The Nationality and Borders Act (NABA) 2022 changed the application of the standard of proof in asylum claims. Previously, the standard of proof applied to the whole claim was 'to a reasonable degree of likelihood'. Following NABA for claims lodged on or after June 28 2022, the new standard applied utilises a two-pronged approach: The decision-maker must first decide on a 'balance of probabilities' whether the asylum seeker has a characteristic which could cause them to fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. Next, the decision-maker must determine whether 'to a reasonable degree of likelihood' that the claimant would be persecuted if returned to their country of nationality. The shift in the standard of proof reverts back to pre-Karanakaran where it had been decided that one standard should be used holistically. The two-pronged approach will inevitably cause the same confusions it did prior to Karanakaran as well as have a particularly disproportionate impact on people who are basing their asylum claims on their sexual orientation. This article investigates this disproportionate impact and argues that the shift in the standard of proof manufactures vulnerability and is a missed opportunity to rectify issues already existing with the standard of proof.

Keywords: asylum; sexual diversity; standard of proof; vulnerability; Nationality and Borders Act 2022

1. Introduction

The standard of proof used in the refugee status determination (RSD) process in the United Kingdom (UK) was to 'a reasonable degree of likelihood,' which was in place for 34 years and well-established through decades of caselaw.¹ This low standard was in place to appreciate what was at risk in the asylum context, for example, the risk of death or treatment up to and including torture, as well as acknowledge that individuals may not arrive to the country with dossiers of evidence to support their claim (ibid.). The Nationality and Borders Act (NABA) 2022 shifted this well-established standard of proof to a two-pronged approach which incorporates a higher standard of proof on a 'balance of probabilities'.

In this article, it is presented that the shift in the standard of proof is an example of what this article labels as 'manufactured vulnerability.' This article adopts and builds upon Fineman's vulnerability theory and therefore begins from the premise that all humans are inherently vulnerable and the state provides resilience to combat our universal human vulnerability (Fineman 2008, 2017; Fineman and Grear 2013). This article defines vulnerability



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¹ As per *R. v Secretary of State for the Home Department Ex p. Sivakumaran* [1988] AC 958, para 994.

as a state of being susceptible to risk of harm. The article builds on the concept of vulnerability within migration studies which has been a growing area (Moreno-Lax and Vavoula 2024) to produce a new understanding of vulnerability—‘manufactured vulnerability’. In this article, the concept of vulnerability is used as lens to argue that the shift in the standard of proof in the asylum process is an example of ‘manufactured vulnerability’. It is proposed that ‘manufactured vulnerability’ arises when the state exaggerates and/or exacerbates inherent human vulnerability through law/policy/process because it disregards or does not fully acknowledge or accommodate for the impacts of inherent human vulnerability. This disregard means that the state denies human beings the resilience to protect themselves from and to combat inherent human vulnerability. In the context of asylum, ‘manufactured vulnerability’ comes from hardening of the process itself.

Rooted in law, and by using insights from psychology, this article sheds light on the problematic nature of shifting the standard of proof in asylum claims for individuals who are basing their claim on sexual orientation-based reasoning (see also Powell and Rifath 2023). It is shown that existing issues have been ignored and are now exaggerated as a result of the shift to a higher standard of proof, for example, the flawed framing of ‘sexual orientation’ as well as the impact of experiences of trauma on satisfying credibility assessments. It is argued that the change in the standard of proof creates a disproportionate impact for this group of individuals and the incorporation of the civil standard is wholly inappropriate. Sexual orientation has been an accepted basis of claiming asylum in the UK since 1999 under the ‘particular social group’ (PSG) category enshrined in the Refugee Convention.² There is various terminologies used across Asylum Policy Instructions (APIs)³ as well as in caselaw and the related literature. In this article, the term ‘sexual orientation’ is used when the discussion is related to law or policy that uses this term. Otherwise, this article adopts the term ‘sexual diversity’ to encompass the various terminologies used in this area of work and to accurately reflect the ways in which individuals may want to identify as (Powell 2021).

The article is split into four sections: The Section 1 focuses on the concept of what this article names as ‘manufactured vulnerability’. The Section 2 outlines the shifts in the standard of proof and how the civil standard is wholly inappropriate for the asylum context. The Section 3 outlines the problematic ways in which sexual orientation is framed within the RSD process. It is proposed that the RSD process, even prior to the shifted standard of proof, is disadvantaging applicants who based their claims on sexual orientation due to the framing of sexual orientation. Therefore, the shift to a higher standard of proof exacerbated existing issues with the RSD process. The final Section 6 proposes that the shift in the standard of proof is evidence of wider issues and missed opportunities and its impacts that need to be addressed for a fairer system to be in place.

2. Manufacturing Vulnerability

In this article it is argued that the shift in the standard of proof, as well as the issues around the framing of sexual orientation, is evident of a wider issue of ‘manufactured vulnerability’—this section explains the concept of ‘manufactured vulnerability’. It is proposed that vulnerability is manufactured as a result of state policy and/or procedures that are designed without recognition of inherent human vulnerability. This ‘manufactured vulnerability’ exacerbates inherent human vulnerability and means that individuals are unable to adequately engage with the demands of policy and/or procedures. It is argued that the shift in standard of proof, in the asylum context, has been made without considering

² *Islam Appellant v Secretary of State for the Home Department Respondent Regina v Immigration Appeal Tribunal and Another, Ex parte Shah* [1999] 2 AC 629.

³ These are guidance documents produced by the UK Home Office for their decision-makers.

and appreciating human vulnerability. Indeed, the asylum process, prior to this shift, also did not fully consider human vulnerability. It will be shown that people who base their asylum claims on sexual orientation reasoning in particular were already at a disadvantage in the asylum process and the shift in standard of proof exacerbates this disadvantage by manufacturing vulnerability.

There are various ways in which vulnerability has been explored within the legal context and ‘vulnerability’ itself can be seen to be a legal or quasi-legal concept. Vulnerability, as a quasi-legal concept, has been used to describe the situation of individuals or groups of individuals who are deserving of special protections or hold a special status in the law. The concept of vulnerability has also been used by law and policy-makers, in the field of asylum and migration, to justify restrictive measures—this is apparent, for example, with the UK’s attempts via the Illegal Migration Act 2023 to make it illegal for people to seek asylum when entering the state by small boats in order to make people ‘less vulnerable’ to smuggling gangs.

This article is not concerned with vulnerability as a legal concept but more of vulnerability as a concept to describe the human condition based on Fineman’s vulnerability theory (Fineman 2008, 2017; Fineman and Grear 2013). Fineman begins from the premise that all humans are universally and inherently vulnerable (Fineman 2008). Fineman’s vulnerability theory contends that resilience can be used to combat our inherent human vulnerability (Fineman 2008). Fineman proposes that the state must be responsive to provide such resilience and identifies various sources of resilience that the state must provide: physical (quality of life), human (human capital gained through education, training, knowledge and experience), social (sense of community belonging), ecological or environmental (physical environments), and existential (beliefs and culture to understand our place in the world) (Fineman 2017). It could be argued that the ‘responsive state’ must focus on making citizens more resilient to vulnerability and this responsibility does not extend to non-nationals with precarious status, including asylum seekers. However, in the asylum context, the state (the UK Home office (UKHO)) is responsible (if agreed with the individual seeking asylum) for the financial support and accommodation for people whilst they are claiming asylum. Therefore, by building on and extending the premise of Fineman’s vulnerability theory, asylum applicants are somewhat forced into reliance on the state and are certainly reliant on the state for possible protection so that the responsibility of the ‘responsive state’ could extend to these individuals.

As part of vulnerability theory, the individual is decentralised, and the focus moves to the state (or ‘institution’ or ‘institutions’ of the state) (Fineman 2017). The premise of this focus is that the state has power to alleviate individuals at risk of harm through resilience. In other words, the state has power to use law to enable particular types of harm, oppression and exclusion and thereby manufacture vulnerability. The shifting of the standard of proof in itself exemplifies the state’s power to change the goalposts. It is noted that there are limitations to the use of vulnerability theory, namely the removal of important and crucial social identities, as outlined by Cooper (2015). However, in applying vulnerability theory in this article, social identities are not ignored; indeed the RSD process in itself requires, and is based on, a focus on identity and self-identification (problematic in itself) especially when it comes to claims based on sexual orientation reasoning. In this way, this article advances and builds upon vulnerability theory whilst acknowledging and alleviating its limitations.

It is suggested here that the state, including state governments, are able to manufacture vulnerability through various stages/levels: parliamentary legislation, policy as well as via individual decision-makers. It is acknowledged that the concept of ‘manufactured’ vulnerability may suggest something deliberate or that there is some sort of intent. In

this article, it is not suggested that the state is doing something deliberate or intentional but there could be intentional ignorance when legislating about issues related to asylum. This is particularly relevant given the then Conservative government's continued attempts to reduce net migration figures through the 'New Plan for Immigration'. Others have commented on the design of NABA 2022 being intentionally restrictive on rights and law and policies related to asylum being strategically ignorant (Wilding 2022).

3. Shifting Standards

The standard of proof in asylum claims has recently been changed following NABA 2022. NABA 2022 creates a two-pronged approach (Section 32): First it must be decided, on the 'balance of probabilities', whether an applicant has, or would be perceived to have, a characteristic which could cause them to fear persecution for reasons of race, religion, nationality, membership of a particular social group (PSG) or political opinion and whether the asylum seeker does in fact fear such persecution in their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence) as a result of that characteristic. Then, it must be decided, to a reasonable degree of likelihood, whether the applicant would be persecuted if returned to their country of nationality. This two-pronged approach is not novel and was indeed used in the UK for asylum claims previously but the standard of proof was shaped and developed through decades of caselaw precedent to establish a holistic approach. The reasoning behind the separation of these elements is unclear and separating past/present persecution from future persecution is seemingly wholly unnecessary given that the presence of past/present fear of being persecuted (which is not a requirement regardless as the relevant test is having a 'well-founded fear of *being* persecuted') will inform an individual's fear of future persecution. To note, there is no need for the applicant to demonstrate that the feared persecution needs to be 'imminent' (Foster and McAdam 2022).

The Refugee Convention's definition of someone who is a refugee is declaratory in nature (in other words, someone is a refugee simply if they fulfil the definition) so the Convention does not provide a particular process of RSD or a standard of proof that must be reached for someone to be recognised as a refugee by a signatory state. However, the standard of proof is used by states as part of the RSD process. The standard of proof in the asylum context is the level that needs to be met by someone who is an asylum claimant to convince a decision-maker representing the state (in this case, the UK and the UKHO) that they should be recognised as a refugee. Essentially, a claimant must convince the decision-maker to the required standard of proof that they have a well-founded fear of being persecuted on the basis of one of the five grounds listed within the Refugee Convention. Usually, claims based on sexual orientation reasoning will fall under the PSG category⁴ so this category will be the focus in this article.

'The standard of proof' is a term used in the legal context as the threshold that must be met in order to persuade a decision-maker of a particular claim or set of events. In the criminal context, the standard of proof used is 'beyond reasonable doubt' and in the civil context on a 'balance of probabilities' is usually used. The 'standard of proof,' as a concept, is used to assess the persuasiveness of a claim or set of claims to determine a fair or 'just' outcome. Given that there are different standards used in different settings, it could be suggested that the standard of proof rests along a continuum (or spectrum), with one end being absolute certainty and the other being absolute doubt. The article begins from the premise that absolute certainty is simply not attainable within any legal proceedings and the concept of a standard of proof necessitates doubt and uncertainty. The standard of

⁴ As per *Islam* (n 3).

proof itself, be it the criminal or civil standard, dictates the level of doubt and uncertainty that may be allowed. In this section, it is argued that the proposed shift in the standard of proof to incorporate the civil standard for part of the claim is wholly inappropriate for the asylum context.

Beyond reasonable doubt in the criminal law framework is a high standard of proof to reflect the seriousness of the context. Reasoning and justification behind this high standard of proof can be found in Blackstone's commentaries from 1765 where it is outlined that 'the law holds, that it is better that ten guilty persons escape, than that one innocent suffer' (Blackstone 1765). The justification conveys the seriousness of punishment and the importance of protecting the innocent. In these situations, the standard of proof is used as part of a trial where there is a judge, potentially a jury as well as legal representatives for both the state and the individual on trial. In the civil context, the 'balance of probabilities' is used as the standard of proof. To illustrate further, the 'balance of probabilities' has been described in *Miller v Minister of Pensions* as 'if the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not'.⁵ There is little of the literature around the origins and background of the civil standard on a 'balance of probabilities' (see Leubsdorf 2016). However, this standard is usually used in the civil law setting in relation to cases about settling disputes between an individual and an organisation or between organisations with the end result being some sort of compensation, often monetary. Essentially, both these standards of proof are used in the courtroom setting and thus are courtroom standards of proof. The first decision of RSD is not dealt with within a courtroom setting; the only 'parties' involved are the claimant themselves (without necessarily being supported by a legal representative) as well as the UKHO decision-maker. To reiterate, these first decisions are an administrative decision made by a government decision-maker. In some circumstances, individuals can appeal these first decisions via tribunals.

In the asylum situation, there is no crime (or any particular 'wrongdoing'), need for punishment or perceived innocence to be assessed. With this in mind, since 1988, as established by the then House of Lords in *Sivakumaran*, the standard of proof used in immigration law is low compared to both the civil and criminal standards 'to a reasonable degree of likelihood'.⁶ This standard was described as a 'real risk'⁷ and it was accepted that 'a 10 percent chance of being shot, tortured or otherwise persecuted' was considered enough to be 'well-founded'.⁸ This relatively low standard was used because of what was at risk as well as the understanding that people who are fleeing persecution may not have gathered records of evidence prior to leaving their country of origin (ibid.). To help illustrate the scale to which the standard within the RSD process was shifted, standards of proof are often quantified as probability percentages to have clearer understandings of the level to which a decision-maker must be satisfied. As mentioned, the reasonable degree of likelihood has been described as a 10% chance.⁹ The civil standard has been described as 'more probable than not'¹⁰, meaning that a 50% chance is not enough to discharge the standard of proof, and a 51% chance should be sought. This much higher level of proof compared to what the standard used to be demonstrates a lack of appreciation of why the standard of proof was so low prior to NABA 2022.

⁵ [1947] 2 All ER 372.

⁶ *Sivakumaran* (n 1).

⁷ *ibid.*, 959; *PS (Sri Lanka) v SSHD* [2008] EWCA Civ 1213, para 11.

⁸ *Sivakumaran* (n 1), 994.

⁹ *ibid.*, 994.

¹⁰ *Miller v Minister of Pensions* [1947] 2 All ER 372.

There were questions raised about whether this pre-NABA 2022 standard of proof related to both *past/present* and *future* persecution. In 2000, *Karanakaran* clarified the standard of proof application further by urging decision-makers to use a holistic approach when assessing the claim to ‘a reasonable degree of likelihood.’¹¹ LJ Sedley in *Karanakaran* (para 16) outlines

“The civil standard of proof, which treats anything which probably happened as having definitely happened, is part of a pragmatic legal fiction. It has no logical bearing on the assessment of the likelihood of future events or (by parity of reasoning) the quality of past ones . . . More importantly, and more relevantly, a civil judge will not make a discrete assessment of the probable veracity of each item of the evidence: he or she will reach a conclusion on the probable factuality of an alleged event by evaluating all the evidence about it for what it is worth. Some will be so unreliable as to be worthless; some will amount to no more than straws in the wind; some will be indicative but not, by itself, probative; some may be compelling but contra-indicated by other evidence. It is only at the end-point that, for want of a better yardstick, a probabilistic test is applied. . . So it is fallacious to think of probability (or certainty) as a uniform criterion of fact-finding in our courts: it is no more than the final touchstone, appropriate to the nature of the issue, for testing a body of evidence of often diverse cogency.”

Then, in 2008, in *PS (Sri Lanka)* it was held that ‘the single test of whether a fear of persecution or ill-treatment is well-founded is whether on the evidence there is a real risk of its occurrence or recurrence. This straightforward formula now replaces the, sometimes confusing, variants which have been used over the years in leading cases here and abroad.’¹² It seems clear that a single test, rather than the NABA 2022 two-pronged approach, was favoured by judges due to its ease of applicability.

It is unclear what the justifications were behind the shifting of the standard of proof from the well-established lower standard. However, the then Home Secretary, Priti Patel, suggested at that time that the reason behind increasing the standard of proof in asylum claims was to tighten the asylum process and protect from unmeritorious claims (UK Government 2022). It is unclear how a standard of proof that still allows for a level of doubt would address this issue of suggested unmeritorious claims, especially when several refused claims based on sexual orientation reasoning are overturned upon appeal (UKHO 2024). It is known that a much higher standard was indeed implemented in practice and had been criticised (UKLGIG 2018). The law seems to have been changed to reflect this flawed practice rather than address the practice not reflecting the law in itself.

UKHO caseworkers use Asylum Policy Instructions (APIs) to guide them through assessing asylum claims (for more on APIs, see Sweeney 2009). The APIs are drafted to support decision-makers in their role and are derived from a combination of statutes (as well as cases) and the Immigration Rules 2006 (that are not static and are often updated). There are several APIs for assessing claims; the main APIs that this article will focus on are the ones related to assessing credibility, namely the API on assessing credibility and refugee status in asylum claims lodged on or after 28 June 2022 (API 2022) as well as for assessing sexual orientation-based claims, and the API on sexual Orientation in asylum claims (API 2016). In relation to the former, the API has been updated since the NABA 2022 but API 2016 is now 10 years out of date. The absence of an updated API about assessing claims based on sexual orientation means that there are conflicting pieces of advice across both API 2022 and API 2016. As part of the asylum process, claimants must also navigate credibility

¹¹ *Karanakaran v Secretary of State for the Home Department* [2000] EWCA Civ 11.

¹² *PS (Sri Lanka) v Secretary of State for the Home Department* [2008] EWCA Civ 1213, para 11.

assessments. Prior to the application of the standard of proof, credibility assessments are used by decision-makers to determine whether the claimant's account (or material facts) of their experiences is credible and thereby should form part of the overall claim.

API 2022 provides a non-exhaustive list of credibility 'indicators' to guide decision-makers to determine whether the claimant's account (or parts of their account) are credible; these are: (1) of sufficient detail and specificity, (2) internally consistent and coherent, (3) consistent with specific and general country information, (4) predominantly consistent with any other evidence, and (5) plausible. It appears that credibility assessments do not fully include the allowance of 'doubt' in the same way the standard of proof does. However, the 'benefit of the doubt' is a tool available to decision-makers to use in favour of the claimant when it comes to credibility. Though, it is noteworthy that the 'benefit of the doubt' section of API 2022 is less than a page of a 68-page guidance document. In practice, it has been suggested that the 'benefit of the doubt' tool is underutilised (Ferreira 2022). API 2022 acknowledges that 'the principle of the 'benefit of the doubt' reflects recognition of the difficulties some claimants face gathering evidence to support their claim, and the grave and potentially irreversible consequences if international protection is wrongfully refused.' Though, there seems to be conflation with the standard of proof later in API 2022. One 'must still consider whether, on the facts of the case, it is appropriate to give them the 'benefit of the doubt', bearing in mind that the claim must meet the 'balance of probabilities' standard; [and if it is]... more likely than not.' This sort of procedural imprecision is evident of continued manufacturing of vulnerability in that claimants are not fully able to engage with the process without being provided full understanding of procedures that are being implemented.

The low standard of proof, to a reasonable degree of likelihood, consists of a high level of acceptable doubt that in some way acknowledges and appreciates the well-documented impacts of trauma on memory (UNHCR 1998). It is known that experiences of trauma mean that there is a high probability of inconsistent memory recall to be expected and that memory recall can vary thereby resulting in different variations in stories in testimonies (Cohen 2001; Graham et al. 2014; Sarkar 2009). This is particularly problematic when decision-makers are encouraged to seek consistent testimonies as part of satisfying credibility assessments (API 2022). Though the lower level standard of proof has some appreciation of trauma, the asylum process as a whole risks retraumatising individuals due to its adversarial nature as well as the culture of disbelief and an artificially higher standard being used in practice. The increased standard of proof will potentially ignore the impacts of trauma and be at further risk of retraumatisation, as discussed later. There is further guidance provided for decision-makers about underlying factors impacting a claimant's memory, including trauma and how this may mean they may present an inconsistent account. Here, the API accepts that trauma can play a role in one's ability to engage with the asylum process but it seems that in practice there is little acknowledgement of this trauma, especially for people who are basing their claims on sexual orientation reasoning. For example, UKHO guidance, focused on asylum interviews, encourages interviewers to question details relating to torture that can easily retraumatise claimants: method of torture, any equipment employed, place of torture, and frequency (UKHO 2025). This type of questioning ignores the potential experiences of claimants and potential position of having a well-founded fear of persecution as a result of those experiences.

Credibility assessments and the standard of proof are often conflated because they are intertwined within the RSD process. An example of this is found in API 2016 that states, 'an assessment of their credibility must be made against the correct standard of proof.' The relationship between both aspects of the asylum process is complex and may mean that one increases the other (Noll 2021). Thereby, shifts in the standard of proof will in turn

create shifts in credibility assessments. The claimant must first provide evidence that the decision-maker deems to be credible and then the decision-maker must now assess the claim to a two-pronged standard of proof approach. It seems that the claimant's assertions are being assessed twice. It is proposed that one of the main issues with credibility is the continual (over)assessment of the claimant. Sweeney (2009, see also Kagan 2003) has noted that there is both a broad and narrow interpretation of credibility: credibility of the claim as a whole and credibility of the particular statements made by the claimant. It has been made clear that the narrower approach is what should be used and the broader approach is erroneous (Mackey and Barnes 2013). However, API 2022 at one point asserts the narrow approach but the guidance seems to suggest using a broader approach at times; for example, decision-makers are often advised to think about the claim as a whole in the context of credibility. Therefore, there is a question mark over whether each statement or the group of statements (the claim) is to be assessed as credible. This is yet another example of 'manufacturing vulnerability' through procedural ambiguity.

The shifted standard of proof has retained the lower standard 'to a reasonable degree of likelihood' when it comes to assessing if the applicant will face persecution or lack of protection if they were returned to their country of nationality.¹³ It is appropriate for there to be a lower standard of proof in relation to the risk of persecution if an individual were to be returned to their country of origin. However, API 2022 suggests that there is a more difficult standard to satisfy; 'whereas the first stage of the assessment is a question of looking at material facts; who a person is and what it is they actually fear, the second stage is more difficult to determine and there is an inherent degree of uncertainty in looking to the future, as opposed to assessing the past and present.' It is unclear why API 2022 suggests the second stage of the two-pronged approach to be more difficult given that past/present persecution can be indicative of future persecution and even if the first prong is not satisfied, the second is against a much lower standard of proof. Here, it is important to note that this new standard of proof only applies to claims for refugee status and does not apply to human rights claims based on Article 3 of the European Convention on Human Rights. There are few differences between human rights-based claims and asylum claims though the protections offered vary. Given the then Conservative government's narrative about removing individuals from the state, especially against the backdrop of the Rwanda plan,¹⁴ it is unclear how the shifted standard of proof fulfils the original intentions (Yeo 2024).

The application of this new shifted standard of proof in practice has inevitably caused confusion. For example, an appeal (*JCK (s.32 NABA 2022) [2024] UKUT 00100*) outlined the confusions around the application of the new two-pronged standard of proof with Upper Tribunal Judge Bruce stating that the 'tribunal has allowed the civil standard of proof to bleed into a question that can only be answered by applying the 'refugee standard' of reasonable likelihood: risk should only ever be determined with reference to the lower standard' (para 37). Judge Bruce continued,

"Moving between the varying standards is an intellectual exercise which will require discipline, but it does not, cannot, change what decision-makers have always done in taking an ultimate, holistic view of the evidence. It is not possible to evaluate subjective fear—and in many cases Convention ground—without having some regard to the context in which that fear is said to arise. . . This may prove laborious, but it is necessary in order to avoid conflating the matters of

¹³ If the applicant does not have nationality, then to the country of former habitual residence.

¹⁴ The Rwanda plan was created by the then Conservative government's plans to remove people seeking asylum from the UK to Rwanda so that their claim could be assessed there and where they would remain. The Rwanda plan was retracted following the Supreme Court judgment in *R (on the application of AAA (Syria) and others) (Respondents/Cross Appellants) [2023] UKSC 42* and despite the Safety of Rwanda (Asylum and Immigration) Act 2024 which repealed the Border Security, Asylum and Immigration Act 2025, s40.

subjective fear and actual risk, or conversely, to avoid overlooking important context.” (para 25)

4. Assessing ‘Sexual Orientation’ and the Problematic Burden of Proof

As with the shifting standard of proof so does the burden of proof. Both the standard of proof and the burden of proof are interlinked within the asylum context. Someone must prove their claim (the burden rests with them) for asylum and ensure that it reaches the necessary threshold (the standard of proof) to convince a decision-maker to approve their claim. Though the burden rests with the claimant, caseworkers are advised to work in ‘co-operation’ with the claimant to assess the claim. Assessing sexual orientation has been a long-contested practice within the RSD field. Difficulties associated with ‘proving’ sexual orientation have been widely documented (UKLGIG 2018). Yet, the UKHO is determined to base the RSD on ‘proving’ orientation in some way. Some states have used inappropriate and potentially traumatising methods such as phallometric testing¹⁵ as part of their RSD process to determine sexual orientation (UNHCR 2011). In the UK itself, people who based their claims on sexual orientation used to be subject to questioning like ‘Did you put your penis into x’s backside?’ and ‘When X was penetrating you, did you have an erection? Did X ejaculate inside you? Why did you use a condom?’ (Taylor and Townsend 2014). However, questions about sexual practices are no longer allowed during RSD following the 2014 *A, B, C* judgement of the European Court of Justice.¹⁶ Apart from shifting the focus away from behaviours, there seems to be a hyperfocus on assessing ‘identity’/‘orientation’. In this section, it is argued that the issues around the standard of proof will not be resolved without also addressing the ways in which sexual orientation is assessed in RSD.

As mentioned, to assess asylum claims based on sexual orientation, decision-makers use API 2016, which at the time of writing, has not been updated for 10 years. As mentioned, in the UK, since 1999, claiming asylum based on sexual orientation reasoning has been an accepted ground for a claim that falls under the PSG category.¹⁷ The ways in which the ‘sexual orientation’ of a claimant has been assessed has evolved and developed through caselaw. One of the most prominent cases that has influenced decision-making for claims based on sexual orientation is the landmark decision in *HJ (Iran)* 2010 where it was held that UKHO refusals can no longer be based on discretion reasoning. In other words, the UKHO was no longer allowed to refuse individuals on the basis that they can return to their country of origin and simply live discreetly by concealing their sexual orientation.¹⁸ Some have suggested that the *HJ (Iran)* judgement has moved the focus from discretion to a heightened focus on assessing sexual orientation (Wessels 2013; Millbank 2009; Hathaway and Pobjoy 2011). The resultant shift in focus means that there is more pressure for individuals to prove the basis of their claim, namely, their sexual diversity. As an unfortunate perverse result of both *HJ (Iran)* and *A, B, C* there seems to be an overfocus on realisation of sexual orientation and a development of a general culture of disbelief. A prevalent culture of disbelief from the UKHO towards people who are basing claims on their sexual orientation has been widely reported (see, for example, Jubany 2011; Anderson et al. 2014). The shift in the standard of proof will exaggerate this (over)focus on *orientation* as it means individuals are proving their sexual diversity to a higher standard.

It could be suggested that sexual diversity is a concealable identity; however, it is of course noted that people cannot control when their identity may be revealed to others.

¹⁵ Phallometric testing involves the measure of blood flow to the penis whilst being shown sexual imagery to determine male arousal.

¹⁶ *A, B and C v. Staatssecretaris van Veiligheid en Justitie* [2014] (C-148/13, C-150/13).

¹⁷ *Islam* (n 3).

¹⁸ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 3.

Given that sexual 'orientation' can be a concealable identity, there is a reliance on an individual's willingness to self-identify. Furthermore, due to the lack of available evidence within the country of origin because the individual may have fled and concealed their identity, the majority of evidence presented is the claimant's oral testimony. Given the reliance on oral testimony to act as evidence, there is pressure on the individual to self-disclose in order to ascertain the basis of their claim for asylum. Individuals may not feel comfortable to disclose their identity and indeed 'painful self-disclosure' is acknowledged and evidence is encouraged to be sought by decision-makers as per the APIs. It is noted that people may not utilise a framework of identity in order to understand their sexuality. This can make the idea of painful self-disclosure more painful because it presumes that there is something pre-existing which can be disclosed. Additionally, the asylum process assumes that an individual will trust the interviewer (or other UKHO caseworkers and representatives) to 'come out' perhaps for the first time in their lives. This assumed level of trust does not acknowledge or appreciate the experiences of being a member of a sexual minority in a state that has punitive laws about same-sex relations (Rifath and Barreto Forthcoming).

Taking into consideration the reliance on a claimant being open about their sexual diversity and reasoning for claiming asylum as well as the need they may have had to conceal their identity due to fears of persecution, it is understandable that claimants may not feel comfortable sharing details about their sexual diversity. Yet, applicants are expected to reveal their sexual diversity at the first opportunity to do so despite it being the first time they may have told anyone about their sexual diversity. Being a member of a sexual minority is a highly stigmatised identity in certain states, even in the UK, and exacerbates stress (Frost 2020). Therefore, claimants may only reveal their true reason for applying for asylum and their sexual diversity later in the RSD process when they feel comfortable to do so. However, problematically, late disclosure can have a negative impact on the credibility of the applicant (API 2016, 2022). Relatedly, it is important to note that many people are not aware that sexual orientation may give rise to a claim for asylum and some people may not have made sense of their own sexual diversity at the point the asylum claim was raised. Given that, as mentioned, sexual diversity can potentially be concealed (and is highly stigmatised) (Quinn and Earnshaw 2013) as well as the high evidentiary burden now in place as a result of a shifted standard of proof; it may be unsurprising to see applicants basing claims on different grounds at the beginning of the process.

There are existing issues related to reaching the evidential threshold for sexually diverse claimants. The shift in the standard of proof means these already existing issues are exacerbated. One of the main issues related to proving sexual diversity is because the APIs promote a Western stereotypical linear homosexual narrative. For example, decision-makers are advised to seek particular narratives related to attending gay venues (see also Dustin and Held 2021). Additionally, decision-makers are guided to utilise a model based on 'Difference, Stigma, Shame and Harm' developed by barrister Chelvan (2021). The model was created as a more sensitive approach to assessing the credibility of sexual diversity-based claims. However, this model does not fully acknowledge the varied experiences of claimants and has seemingly produced a tick box exercise for decision-makers (Dawson and Gerber 2017) and promoted a linear narrative. The elements of this model are inconsistent themselves and this inconsistency is present in the APIs. In particular, caseworkers are encouraged to investigate claimants' feelings of stigma and shame but then are encouraged to ask claimants about their knowledge of gay venues and any lack of knowledge of these venues should be investigated further. It seems that claimants are assumed to be 'out and proud' to attend gay venues whilst at the same time displaying shame about their identity. Additionally, the model promotes narratives related to wholly negative feelings about sexual diversity.

As part of this narrative, some of the accepted forms of evidence to support a claim based on sexual orientation reasoning include receipts from ‘gay venues’, photographs from Pride events and letters of support (UKLGIG 2013). When it comes to accepted evidence there have been reported inconsistencies. Rainbow Migration¹⁹ has reported that there is a catch-22 effect where, at times, knowledge and attending gay bars/clubs are seen as acceptable evidence of identity but at other times the UKHO claims that anyone can attend these venues despite their identity so this sort of evidence is not convincing or persuasive (UKLGIG 2013). Additionally, it is noted that attending these venues will cost the applicant money whilst they are potentially in receipt of only £49.18 per week, and £9.95 per week if placed in a hotel, from the UKHO. Moreover, asylum seekers can be placed in various locations and some of these might be hotels on the outskirts of cities/towns so they would need to pay for transport to attend these venues and any other support groups.

The sought linear homosexual narrative rooted in Western centric ideals allows for little cultural appreciation and this means many asylum claimants are naturally at a disadvantage because they do not present in the expected ways. For example, there is an expectation that claimants will speak openly and consistently about their experiences and sexual diversity—this is premised on the luxury of self-reflexivity which is not often enjoyed by those fleeing persecution. Furthermore, there is little acknowledgement of the cultural differences in relation to sexual diversity. For instance, the way someone in the UK lives their sexual diversity will be different from someone who lives in a state with punitive laws against same-sex relations so they may not frequent gay venues, which as API 2016 suggests is sound evidence of sexual orientation. By creating this particularly linear and homosexual framework of sexual orientation (Berg and Millbank 2009, see also Raj 2024), the UKHO is putting claimants at a dangerous disadvantage and this is example of manufacturing a further layer of vulnerability, meaning that individuals face enhanced risk of harm. This ‘manufactured vulnerability’ is further exaggerated by shifts in the standard of proof.

There are other existing issues with the asylum system that have been ignored. For example, what is not reiterated enough within the guidance is that individuals do not necessarily *need* to be a member of a sexual minority to fall within the definition of a refugee; individuals who are *perceived* to be a member of a sexual minority can also fulfil the definition (UNHCR 2008; API 2016). By seeking a particular narrative and feelings of difference, stigma, shame and harm, the API is focusing on only one aspect of the basis and this may mean that people who are perceived to be a member of a sexual minority are deemed not credible and do not meet the proof threshold. The confusion around perceived sexual orientation may derive from the issues around how membership of a PSG is determined. Dustin (2018) outlines that the determination of PSG by the UKHO is flawed due to a two-limb test being used, internal *and* external, when the focus should be on internal *or* external. The shifting of the standard of proof does not rectify this erroneous focus and will of course make it more difficult to prove this basis of claiming even if it were to be adequately acknowledged. Shifting the standard of proof will only exacerbate these illustrated existing issues about the framing of sexual orientation.

5. Wider Significance: ‘Manufactured Vulnerability’, Impacts and Missed Opportunities

This section will focus on the wider implications of shifting the standard and proof combined with the problematic framing of sexual orientation. It will be shown that these issues evidence a wider issue of ‘manufactured vulnerability’. The *shifting* of the standard of proof itself manufactures vulnerability. Any changes to the way in which the RSD is

¹⁹ Previously known as UKLGIG.

processed will inevitably be at a disadvantage to a claimant because they will need to learn and understand these shifts to appropriately engage with the process. Often people seeking asylum may receive support from various groups/organisations and learn about the way their claim will be assessed as well as the level of proof usually required. However, when there are changes to the process, the asylum-seeking community cannot rely on support from previous applicants due to the different rules now being applied and so will have to grapple with these differences and the community as a whole will have to re-learn the process. It must be noted that this point about learning the process is distinct from common myths associated with the asylum community about learning how to 'trick' the system. Claimants will not be able to simply learn a story from another successful claimant to use as their own. This is especially relevant in the context of the artificial increasing of the standard of proof in practice, as mentioned earlier.

It could be suggested that this artificial increasing of the standard of proof being used in practice was a result of compassion fatigue. Compassion fatigue is when someone who works with individuals who have experiences of trauma may steadily have lower levels of empathy towards them over time (Parnamets et al. 2020). Compassion fatigue has been reported within the immigration law sector with legal practitioners who work with asylum seekers suffering from burnout, secondary trauma and other emotional demands (see for example, Graffin 2019; Cahalane 2017). Compassion fatigue could also be a reason for why differing and generally inconsistent levels of evidence have been accepted for similar claims (Parnamets et al. 2020). The shifting of the standard of proof does not mean that this issue of compassion fatigue has been rectified. It could be possible that these shifts result in the same issue and again, artificially increasing the standard of proof in practice. This is a further example of an issue that has not been fully addressed with the shifts. Indeed, policy decisions around resources and targets could likely exacerbate issues around compassion fatigue and reduction in quality of decision-making (for more, see Hambly and Gill 2020).

The shift in the standard of proof, specifically the first prong of the increased standard related to the basis of the claim, means there is a continued (over)focus on sexual orientation reasoning. The first prong focuses on both the ground and the persecution but it does not address the issue of (over)focus. The first aspect the decision-maker must decide is 'whether the asylum seeker has a characteristic which could cause them to fear persecution' and then only 'whether the asylum seeker does in fact fear such persecution' (NABA 2022). Dustin and Ferreira (2021) have outlined the problematic focus on the ground of the claim as opposed to the persecution aspect of the claim. The shifted standard of proof seemingly continues this problematic focus with the ground being the first aspect analysed. It is unclear why the characteristic must be determined first and then the presence of fear of persecution because the Refugee Convention's definition begins with the 'well-founded fear of being persecuted' element. This reversal is an example of the power of a state to design the RSD process, and indeed manufacture vulnerability in a way that disadvantages the claimants by shifting focus and emphasis, which is further demonstrative through the overfocus on the ground/characteristic. Additionally, in *JCK* (s.32 NABA 2022) [2024] UKUT 00100, Judge Bruce specifies that:

"The decision-maker is not required here to consider whether the characteristic, or imputed characteristic, has in fact attracted persecution, or whether it will do so in the future. The simple question is whether the claimant has a protected characteristic which could cause them to fear. In many cases this will be straightforward. Applicants fearing persecution because they have an outwardly obvious characteristic such as their gender or race will have little difficulty in discharging the burden of proving this matter on a 'balance of probabilities'. Other, more opaque, characteristics could be more challenging to discern. Whether someone

is gay, or holds a particular religious or political belief is not something that can be seen with the naked eye, or by making windows into souls. It is something that must be evaluated on the evidence in the round, but care should be taken not to automatically reject, at this first stage, a claimed characteristic by reference to the overall credibility of the claim. The focus must be on the characteristics.” (para 13)

As mentioned previously, whilst the standard of proof was being addressed, there was an opportunity to focus on the importance of doubt within guidance issued to decision-makers. It is clear that ‘doubt’ plays a key role in the decision-making process; it is the acceptable level of doubt that means a claim may be accepted and then someone is offered refugee protections. However, the tool that can be used to exemplify the importance of doubt, the ‘benefit of the doubt’ principle, was not adequately emphasised in the updated credibility section of API 2022. The increased standard of proof will inevitably make it more difficult for applicants to persuade the decision-maker, and indeed perhaps the intention of the shift in itself. This is against the backdrop of the well-documented adverse impacts on wellbeing for people claiming asylum (see, for example, [Carswell et al. 2009](#) and [Mental Health Foundation 2025](#)). Applicants who now have to reach a higher threshold may feel the need to provide more evidence that is already difficult to ascertain. Applicants may feel compelled to attend particular venues when they feel uncomfortable doing so (for more see [Held 2023](#)) in order to gather evidence to support their claims. Furthermore, it is known that people tend to exaggerate or fabricate evidence to feel believed so people may feel the need to overproduce evidence or exaggerate claims to discharge the standard of proof as was acknowledged in *MA (Somalia)* where it was found unsurprising that appellants frequently give fabricated evidence in order to bolster their cases.²⁰ If people seeking asylum feel they need to convince and persuade a decision-maker to a higher degree than previously, they may exaggerate and fabricate evidence and this could in turn result in a more prevalent culture of disbelief. Indeed, the exaggeration and fabrication could be evidence of credible and genuine claims.

A further issue exemplified by the shifts in standard of proof and framing of sexual orientation is the assumption by the state (and the UKHO) that decision-makers can be objective and without their own perceptions. API 2022 acknowledges this point by stating, as per *HK*²¹,

“The difference between the life experiences of the decision-maker and the asylum seeker may distort their judgement of the account’s plausibility: ‘inherent probability, which may be helpful in some domestic cases can be a dangerous, even a wholly inappropriate factor to rely on in some asylum cases. . . indeed, it is likely that the country which the asylum seeker has left will be suffering from the sort of problems and dislocations with which the overwhelming majority of residents in this country will be unfamiliar.”

However, in practice, as highlighted by [York \(2022\)](#), decision-makers often rely on their ‘gut feelings,’ ‘professional intuition’ and the ‘kind of applicant’. Decision-makers may ‘throw into the decision some unproven or insufficiently grounded ‘facts’—with no duty to provide evidence or reasoning in support’ ([York 2022](#)).

As noted above, the shift in the standard of proof will not be applicable to human rights-based claims, namely, those related to Article 3 of the European Convention on Human Rights which protects people from ‘real risk’ of torture, or inhuman or degrading treatment. If someone seeking asylum does not reach the ‘balance of probabilities’, first

²⁰ *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49, 21.

²¹ *HK v SSHD* [2006] EWCA Civ 1037.

prong of the new standard of proof, but does satisfy the second prong, then they may be entitled to a human rights-based claim of protection (humanitarian protection). Therefore, as suggested by [Yeo \(2024\)](#), with the shifted standard of proof there may be a decline in grants of refugee status but an increase in grants of human rights-based protection. There is little difference between both grants of status; ultimately the applicant is still allowed to remain in the UK but a grant in humanitarian status does not offer the same international oversight (and accountability) that comes alongside utilisation of the Refugee Convention ([Vassiliou 2025](#)).

Even though the APIs acknowledge that claimants may have had difficult experiences, it seems the process has been designed and indeed the standard shifted without being informed by claimants' experiences of trauma. There is little focus on protecting the wellbeing of applicants and preventing retraumatisation despite there being some acknowledgement in the APIs. It is suggested that the reason the asylum process is at risk of manufacturing vulnerability is because it was designed without considering inherent human vulnerability. For example, the process does not truly account for the expected experiences of people seeking asylum, namely, a 'well-founded fear of being persecuted'—this means the individual will have a potential experience of trauma, yet the asylum process does not only not account for this trauma but seeks the opposite of what would usually be expected from someone with experiences of trauma, consistent memory recall. For RSD and UKHO decision-making process to be efficient, it is proposed that there must be consideration and appreciation of experiences of trauma. It is known that applicants come from countries where same-sex relations are punished by law. It is noted that even if these punitive laws are not used often in practice, the existence of such laws and the lack of state action to repeal these laws are evidence of acceptance of discrimination towards sexual diversity.

The shifting of the standard of proof is emblematic of a wider issue of undermining the rule of law. The RSD process and the Immigration Rules 2006 that it is based on are complex, and claimants, UKHO decision-makers, as well as legal professionals, struggle to understand them (see also [Law Commission 2020](#)). The Law Commission's 2020 report highlights the complexity of the Immigration Rules 2006 and outlines the need for the simplification of them but no such simplification has been done to date. Technical changes to the RSD process via the Immigration Rules 2006 are indicative of manufacturing vulnerability by producing further lack of clarity and transparency. The shifting of goalposts will inevitably complicate the RSD process further and it will take time for the individuals involved to understand and apply a different standard of proof. It is known that the UKHO have made errors and there is inconsistency in the decision-making ([Griffiths 2012](#)). With these issues, there is already existing mistrust between the UKHO and the claimant ([Griffiths 2012](#); [Rifath and Barreto Forthcoming](#)). It has been recently reported that UKHO decision-makers are given monetary incentives if they overperform above their targets ([Forrest 2025](#))—this leads to questions around the sacrifice of quality of decision-making for quick decisions under the guise of efficiency.

By shifting standards of proof and thereby manufacturing vulnerability, it seems that the spirit of the ultimately humanitarian Refugee Convention is not being implemented. The Refugee Convention was drafted on the basis of humanitarian principles: providing safe sanctuary, fair process and providing protection for refugees. The UK was one of the drafters of this Convention and one of the original signatories so by overlooking the core principles underpinning the Convention it seems the spirit and original reasonings and motivations for drafting the Convention are being ignored, or at best, circumvented. Additionally, it must be noted that changes in the standard of proof and alterations to the RSD process in the UK will inevitably impact the wider migration context. This change could incentivise and influence other states to alter their processing of claims and indeed

increase their own standard of proof (Bubb et al. 2011). Importantly, with the rising anti-migrant rhetoric across European states, the global nature of migration cannot be ignored or taken for granted.

6. Conclusions

In this article, it has been argued that the shift in the standard of proof as a result of NABA 2022 is evidence of the state manufacturing vulnerability. It has been shown that this shift and the ‘manufactured vulnerability’ particularly impacts people who are basing their asylum claims on sexual orientation reasoning. The change in the standard of proof is a missed opportunity to rectify other issues with the standard as well as, more importantly, credibility assessments and the burden of proof. The shift seems to be strategic to replicate long established practice that was veering away from what the standard should have been. Prior to the shift in the standard of proof, there were existing issues with the RSD process in relation to claims based on sexual orientation reasoning. The main issues, as discussed, were about the artificially elevated standard of proof being used in practice, the framing of sexual orientation as well as the confusions around credibility. The shift in the standard of proof did not address any of these issues but will inevitably exacerbate these existing issues.

If the Home Secretary, at that time, and the UKHO as an institution were focused on truly protecting the RSD process from unmeritorious claims, then they would have sought to rectify the problematic framings of sexual orientation that are based on harmful stereotypes. The current Labour government has suggested a willingness to improve decision-making and clear the asylum backlog in the UK. It has been shown that the shift in the standard of proof will not better the RSD process but will exacerbate existing issues. The decision-making process will only be improved with a clearer focus on acknowledging and appreciating the experiences of claimants as well as a culturally informed framing of sexual orientation and revisiting the shift in the standard of proof.

By manufacturing vulnerability, it could be suggested that states are using the law to remove particular refugee rights. However, it is more likely that the manufacturing of vulnerability constitutes that changes to primary law are being used to reconfigure, rather than entirely remove, rights, and this has an exacerbated impact on certain groups. It could be suggested that the manufacturing of vulnerability, via the standard of proof shift, is strategic in that the intentions of the then government was to in fact reduce migration and also reduce the state’s responsibility in providing protection. Furthermore, there are other shifts in law and policy that contribute to this concept of manufacturing vulnerability that have not been addressed in this article, namely, the continuing reductions in legal aid available for asylum (Wilding 2025).

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