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Alex Powell

Queering Refugee Law: A Study of Sexual Diversity in Asylum Policy and Practice in the
United Kingdom

Queering Refugee Law: A Study of Sexual Diversity in Asylum Policy and Practice in the United Kingdom

Alex Powell

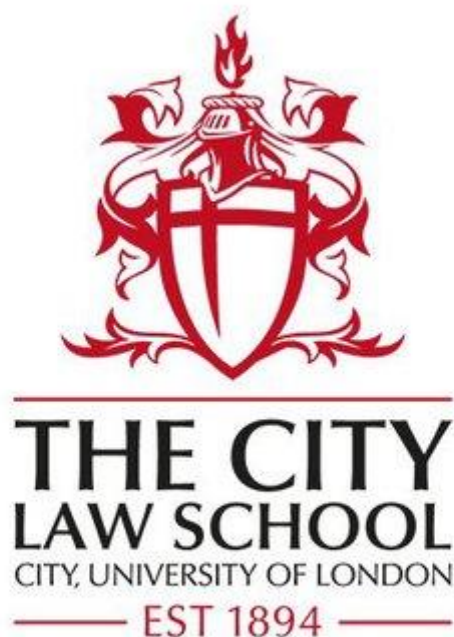
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Queering Refugee Law: A Study of Sexual Diversity in Asylum Policy and Practice in the United Kingdom

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Abstract

In 2016, the Home Office issued a new Asylum Policy Instruction on Sexual Orientation. The policy has been heralded as a move away from conduct towards identity in the Home Office's institutional conception of sexual diversity. However, the merits of this shift have received limited critical attention, with most scholarly work focusing on the failures of implementation surrounding this move and the ongoing procedural and substantive issues in asylum claims by sexually diverse people. This thesis draws on eight semi-structured interviews with sexually diverse refugees—and, therefore, former asylum seekers—to offer a queer critical analysis of the 2016 Asylum Policy Instruction: Sexual Orientation in Asylum Claims. The thesis then explores the wider cultural sources of our knowledges and discourses around sexual diversity, with a view to understanding how both the 2016 Asylum Policy Instruction and the narratives of sexually diverse refugees and asylum seekers arise are likely to be read and interpreted by decision-makers. The analysis utilises a framework of lived experience to detect mismatches between the heterogenous self-conceptions of sexual diversity held by sexually diverse refugees and asylum seekers and the forms of sexual diversity recognised within both the 2016 Asylum Policy Instruction and contemporary “western” culture. Employing a benchmark standard set around protecting the full heterogenous span of sexual diversities from human rights abuses, the thesis then offers critical considerations for future policy and research regarding sexually diverse refugees and asylum seekers.

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Chapter One: Introduction

Asylum figures as a key site within which contestations over identity and belonging are waged.¹ Within the UK, the asylum apparatus is one of few institutions which applies legal burdens of proof to the question of whether someone is—or would be perceived as—a given “sexuality”. Interestingly, this is an inversion of the previous relations between law and the sexual diversity of migrants, where “sexuality” was often mobilised as a ground of exclusion, rather than inclusion.² As this suggests, immigration and asylum law are core disciplines in which issues of sexual diversity are negotiated, adjudicated, and made governable.

In the refugee context, being recognised is a prerequisite to accessing that spectrum of rights guaranteed under the Refugee Convention.³ Thus, the asylum apparatus is a key arena in which sexual diversity can be problematised. Therefore, this thesis provides a key intervention building and drawing on queer theory, to provide an analysis of the forms of governmentality and regulation enacted on sexually diverse subjects by the UK asylum apparatus.

1.1 Research Motivations

‘They push gay people off buildings’. This was the response to my criticism of the 2016 parliamentary vote which legitimised the bombing of Islamic State⁴ in Syria.⁵ It came during

¹ It should be noted that the substantial body of this thesis was completed prior to March 2021 and all statements of law are accurate at that point. It is acknowledged that the Home Office have announced substantial changes to the way in which asylum operates in the UK. However, analysis of these changes is outside of the scope and remit of this thesis.

² See for example: Margot Canaday, “‘Who is a Homosexual?’: The Consolidation of Sexual Identities in Mid-Twentieth-Century American Immigration Law” (2003) 28 *Law & Social Inquiry* 351.

³ Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

⁴ Otherwise variously known as Daesh, Islamic State and IS.

⁵ Andrew Sparrow, ‘Cameron Wins Syria Airstrikes Vote by Majority of 174 – As It Happened’ (the Guardian, 2015) <<https://www.theguardian.com/politics/blog/live/2015/dec/02/syria-airstrikes-mps-debate-vote-america-action-against-isis-live>> accessed 12 April 2018.

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the coffee morning of an LGBT+ student society at the University of Reading. This mobilisation of what could be perceived as homonationalism—a term coined by Puar to describe the conflation of nationalist and LGBT+ rights discourse—fascinated me.⁶ In this example, a nominally liberal, and anti-war, white, gay man was defending the decision to use military force in a foreign state, with whom the UK was not at war, and doing so with a direct reference to the treatment of sexually diverse people⁷ in that country. What surprised me about his response was its inconsistency. How could the rights of sexually diverse people be viewed as a tool for legitimising military action, while the UK continued to turn away hundreds of sexually diverse asylum seekers every year? Further, this led me to consider, why is it that the UK—which so proudly proclaims its role as a “world leader” in the promotion of LGBT+ rights⁸—continues to turn away so many seemingly legitimate refugees? Why does the percentage of asylum seekers denied refugee status remain higher for those claiming protection on grounds of their sexual diversity than any other asylum ground?⁹ And why does the percentage of asylum claims by sexually diverse people which end in refusal appear to be increasing, despite the creation of new and “progressive” guidance for

⁶ See generally: Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press 2012). Stychin has also recognised that human rights, including rights related to sexual diversity, have increasingly become a metric against which the ‘progress’ of nations is assessed. See: Carl Stychin, ‘Same-sex Sexualities and the Globalization of Human Rights Discourse’ (2004) 49 *McGill Law Journal* 951.

⁷ This term is used throughout this thesis instead of more common terms such as gay, lesbian, or sexual orientation. It is ‘intended to capture all individuals who engage in sexual activity with, are attracted to, or who identify with a culture founded around a non-normative sexual practice or partner’. The term is discussed in full at section: 1.9.2.

⁸ See for example: Greg Heffer, ‘WATCH: Boris Johnson Urges LGBT People To Vote For Brexit Amid EU ‘Threat’ To Rights’ (Express.co.uk, 2016) <<https://www.express.co.uk/news/politics/655296/Video-Boris-Johnson-LGBT-Brexit-EU-referendum>> accessed 12 April 2018.

⁹ UK Lesbian and Gay Immigration Group, ‘Failing the Grade: Home office Initial Decisions on Lesbian and Gay Claims for Asylum’ (Unison 2010) <<https://uklgig.org.uk/wp-content/uploads/2014/04/Failing-the-Grade.pdf>> accessed 20 December 2017. The Home Offices own ‘experimental’ statistics also reflect a higher rate of success for non-SGM claims with 25% of asylum claims made on the basis of sexual diversity ending in success compared to roughly 31% of non-sexual diversity based claims See: Home Office, ‘Asylum Claims on the Basis of Sexual orientation’ (Home Office 2017) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663468/asylum-claims-basis-sexual-orientation.pdf. See Further: Colin Yeo, *Welcome To Britain: Fixing Our Broken Immigration System* (Biteback Publishing 2020) 118-122.

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decision-makers?¹⁰ What does this tell us about how the UK, as a state, conceives of and imagines queer lives?

This thesis has been written during a period where coverage of matters relating to immigration and asylum in the UK have rarely been out of the headlines.¹¹ Against the backdrop of the 2016 referendum vote to leave the European Union (hereafter: EU), a plethora of issues have attracted public, media, and political attention. These have ranged from the outpouring of anger generated by the Windrush Scandal¹²—which culminated in the resignation of the Home Secretary, Amber Rudd¹³—to the virtual silence¹⁴ surrounding the

¹⁰ May Bulman, 'Number Of LGBT+ Asylum Claims Rejected By Home Office Soars, Figures Show' (*The Independent*, 2018) <<https://www.independent.co.uk/news/uk/home-news/lgbt-asylum-seekers-home-office-uk-applications-2018-a8658951.html>> accessed 10 August 2020. See Further: Home Office, 'EXPERIMENTAL STATISTICS: Asylum Claims On The Basis Of Sexual Orientation' (*GOV.UK*, 2018) <<https://www.gov.uk/government/publications/immigration-statistics-year-ending-september-2018/experimental-statistics-asylum-claims-on-the-basis-of-sexual-orientation>> accessed 10 August 2020.

¹¹ See for example: Alan Travis and Nick Hopkins, 'Leaked Document Reveals UK Brexit Plan To Deter EU Immigrants' (*the Guardian*, 2017) <<https://www.theguardian.com/uk-news/2017/sep/05/leaked-document-reveals-uk-brexit-plan-to-deter-eu-immigrants>> accessed 10 August 2020; Amelia Gentleman, 'The Week That Took Windrush From Low-Profile Investigation To National Scandal' (*the Guardian*, 2018) <<https://www.theguardian.com/uk-news/2018/apr/20/the-week-that-took-windrush-from-low-profile-investigation-to-national-scandal>> accessed 10 August 2020; Amelia Gentleman, 'Home Office Criticised For 'Lack Of Urgency' In Windrush Scandal' (*the Guardian*, 2018) <<https://www.theguardian.com/uk-news/2018/dec/05/home-office-criticised-for-lack-of-urgency-identifying-victims-of-windrush-scandal>> accessed 10 August 2020; Lucia Binding, 'Fewer Than Half Of Failed Asylum Seekers Are Removed From The UK, Study Says' (*Sky News*, 2019) <<https://news.sky.com/story/fewer-than-half-of-failed-asylum-seekers-are-removed-from-the-uk-study-says-11603672>> accessed 10 August 2020; Danny Shaw, 'EU Net Migration To UK At Lowest For 16 Years' (*BBC News*, 2019) <<https://www.bbc.co.uk/news/uk-50586338>> accessed 10 August 2020; Diane Taylor, 'Investigation Prompts Rapid Upgrades To Asylum Seekers' Homes' (*the Guardian*, 2019) <<https://www.theguardian.com/uk-news/2019/aug/27/investigation-prompts-rapid-upgrades-to-asylum-seekers-homes>> accessed 10 August 2020; Jamie Grierson and Kim Willsher, 'More Than 4,000 Have Crossed Channel To UK In Small Boats This Year' (*the Guardian*, 2020) <<https://www.theguardian.com/uk-news/2020/aug/09/number-migrants-crossing-channel-uk-passes-4000-this-year>> accessed 10 August 2020.

¹² For an overview of the public and media response see generally: Colin Yeo, *Welcome to Britain: Fixing Our Broken Immigration System* (Biteback Publishing 2020) 27-63; Amelia Gentleman, *The Windrush Betrayal: Exposing the Hostile Environment* (Faber 2019); Maya Goodfellow, *Hostile Environment: How Immigrants Became Scapegoats* (Verso 2019).

¹³ 'Amber Rudd Resigns As Home Secretary' (*BBC News*, 2018) <<https://www.bbc.co.uk/news/uk-politics-43944988>> accessed 4 May 2020; Heather Stewart, Amelia Gentleman and Nick Hopkins, 'Amber Rudd Resigns Hours After Guardian Publishes Deportation Targets Letter' (*the Guardian*, 2018) <<https://www.theguardian.com/politics/2018/apr/29/amber-rudd-resigns-as-home-secretary-after-windrush-scandal>> accessed 4 May 2020.

¹⁴ There are very notable exceptions to this silence. See for example: Joe Owen, 'Five Causes Of Concern About Citizens' Rights After Brexit – And What The Government Should Do' (*The Institute for Government*, 2020) <<https://www.instituteforgovernment.org.uk/blog/five-causes-concern-about-citizens-rights-after-brexit>>

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impact of the UK's decision to leave the European Union (Hereafter: EU) on the lives of Europeans who had made their lives' here (some over several decades), and British citizens who had settled elsewhere in Europe.¹⁵ Though largely absent from the debate, stories about the experiences of those claiming asylum in the UK on the basis of their sexual diversity have occasionally gained mainstream media attention, adding impetus to the need to address continuing deficiencies in how such claims are addressed by the Home Office.¹⁶ Some of the more significant headlines, marking insights into the darker operations of the UK asylum apparatus, have been described by Juss, who notes that the gaps in the law have left a space in which violence is often perpetuated by the Home Office.¹⁷

Among the most disturbing of these examples is a scenario in which the Home Office claimed that an asylum claimant could not be both single and gay, only relenting when this position attracted significant public backlash.¹⁸ Similarly, in August 2019, the Guardian

accessed 4 May 2020; Joelle Grogan, 'The only Certainty is Uncertainty: Risk to Rights in the Brexit Process' in Tawhida Ahmed and Elaine Fahey (Eds), *On Brexit: Law, Justices and Injustices* (Edward Elgar 2019); Adrienne Yong, 'Human Rights Protection as Justice in Post-Brexit Britain: A Case Study in Deportation' in Tawhida Ahmed and Elaine Fahey (Eds), *On Brexit: Law, Justices and Injustices* (Edward Elgar 2019); Ingi Iusmen, 'Unaccompanied Migrant Children and the Implications of Brexit' in Moira Dustin, Nuno Ferreira and Susan Mills (Eds), *Gender and Queer Perspectives on Brexit* (Palgrave Macmillan 2019). Further Analysis also considered the potential impact of the Brexit process on asylum seekers. See: Ermioni Xanthopoulou, 'Legal Uncertainty, Distrust and Injustice in Post-Brexit Asylum Cooperation' in Tawhida Ahmed and Elaine Fahey (Eds), *On Brexit: Law, Justices and Injustices* (Edward Elgar 2019); Christel Querton, 'What is the Impact of Brexit on Gender and Asylum Law in the UK' in Moira Dustin, Nuno Ferreira and Susan Mills (Eds), *Gender and Queer Perspectives on Brexit* (Palgrave Macmillan 2019).

¹⁵ The campaign group 'The Three Million' have repeatedly attempted to draw attention to this issue. See Generally: (*The3million.org.uk*, 2020) <<https://www.the3million.org.uk/library>> accessed 5 May 2020.

¹⁶ See for example: Helen Pidd, 'Home Office Gives Man Asylum After Accepting People Can Be Gay And Single' (*the Guardian*, 2019) <<https://www.theguardian.com/uk-news/2019/dec/23/home-office-gives-man-asylum-after-accepting-people-can-be-gay-and-single>> accessed 5 May 2020; Jamie Grierson, 'Home Office Refused Thousands Of LGBT Asylum Claims, Figures Reveal' (*the Guardian*, 2019) <<https://www.theguardian.com/uk-news/2019/sep/02/home-office-refused-thousands-of-lgbt-asylum-claims-figures-reveal>> accessed 5 May 2020. Diane Taylor, 'Nigerian Gay Rights Activist Wins UK Asylum Claim After 13-Year Battle' (*the Guardian*, 2017) <<https://www.theguardian.com/world/2017/aug/14/nigerian-gay-rights-activist-aderonke-apata-wins-uk-asylum-claim-13-year-battle>> accessed 5 May 2020.

¹⁷ See Generally: Satvinder Juss, 'Sexual Orientation and the Sexualisation of Refugee law' (2015) 22 *International Journal on Minority and Group Rights* 128, ESP 147-151.

¹⁸ See: Helen Pidd, 'Man Faces Deportation After UK Officials Refuse To Believe He Is Gay' (*the Guardian*, 2019) <<https://www.theguardian.com/uk-news/2019/feb/22/man-faces-deportation-after-uk-officials-refuse-to-believe-he-is-gay>> accessed 10 August 2020. The implications of this have been well-theorised in journalistic

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reported that an Immigration Judge had declined an asylum claim with reference to the fact that the claimant lacked a “gay demeanour”, a position which the Home Office not only failed to distance themselves from, but actively defended on appeal.¹⁹ Some media commentators have linked this kind of stereotyping to a general trajectory towards a “less liberal” Britain in the context of Brexit.²⁰ However, as this thesis will go on to explore, these moments merely demonstrate the extent to which the instruments designed to protect the rights of marginalised people are governmental in nature. Thus, providing protection only to those who are legible in regard to liberal conceptions of subjecthood.

There have also been moments of contrasting “success”, such as the Nigerian gay rights activist Aderonke Apata who was granted refugee status in 2017 after a 13-year battle,²¹ during which one Home Office lawyer had argued, ‘you cannot be heterosexual one day and lesbian the next’.²² As this suggests, the picture is complex, with the asylum apparatus acting as a site within which contestations over the nature of sexually diverse subjectivity are fought.

The above stories are not precedential, they do not reflect the state of law and policy in the UK. However, they help to build a picture of the indignity which many sexually

terms by Ben Smoke. See: Ben Smoke, 'Deportation For Being Single? This Shows The Real Bigotry Gay People Face | Ben Smoke' (*the Guardian*, 2019) <<https://www.theguardian.com/commentisfree/2019/feb/25/deportation-single-bigotry-gay-people-yew-fook-sam-home-office>> accessed 10 August 2020.

¹⁹ Robert Booth, 'Judge Rejected Asylum Seeker Who Did Not Have Gay ‘Demeanour’' (*the Guardian*, 2019) <<https://www.theguardian.com/uk-news/2019/aug/21/judge-rejected-asylum-seeker-who-did-not-have-gay-demeanour>> accessed 10 August 2020.

²⁰ See: Hadley Stewart, 'The Rejection Of A LGBT Asylum Seeker’S Claim Shows A Rising Intolerance In Brexit Britain | View' (*euronews*, 2019) <<https://www.euronews.com/2019/08/29/the-rejection-of-a-lgbt-asylum-seeker-s-claim-shows-a-rising-intolerance-in-brex-it-britain>> accessed 10 August 2020.

²¹ Diane Taylor, 'Nigerian Gay Rights Activist Wins UK Asylum Claim After 13-Year Battle' (*the Guardian*, 2017) <<https://www.theguardian.com/world/2017/aug/14/nigerian-gay-rights-activist-aderonke-apata-wins-uk-asylum-claim-13-year-battle>> accessed 10 August 2020.

²² I have discussed this example further elsewhere. See: Alex Powell, 'Interviews with Asylum Seekers Reveal Why the Home Office Rejects So Many LGBT Claims' (*The Conversation*, 2019) <<https://theconversation.com/interviews-with-asylum-seekers-reveal-why-the-home-office-rejects-so-many-lgbt-claims-122905>> accessed 10 August 2020.

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diverse asylum seekers experience. Further, these examples help to draw attention to what is at stake when the asylum apparatus addresses the question of sexual diversity, this being a moment when the very legibility of a claimant's way of existing in the world is drawn into question. In this way, they introduce some of the issues to be explored within this thesis. Perhaps it is true that, as Amber Rudd suggested, 'the Home Office has become too concerned with policy and strategy and sometimes loses sight of the individual'.²³ On the other hand, perhaps it is the case that the policy itself, despite its proclaimed "progressive" approach to issues of sexual diversity, still fails to create a space in which sexually diverse asylum seekers can advance their lived experiences and be understood.

1.2 Research Questions

The central research question addressed by this thesis is whether there is a mismatch between the lived experiences of sexually diverse refugees and asylum seekers and knowledge(s) of "sexuality" deployed within the asylum apparatus (1). In answering this question, I also examine whether stereotypes continue to play a role in asylum claims relating to sexually diverse people and whether decision-makers are applying culturally relative conceptions of identity when assessing evidence and undertaking credibility determinations (2). Finally, the thesis employs the theoretical insights of Foucauldian scholars and queer theorists to analyse the underlying governmentality within asylum decision making, and therefore, asks what pertinent considerations should be accounted for in future studies and policy proposals which may be relevant to sexually diverse asylum seekers (3). Therefore, this research is (i) descriptive, (ii) explanatory and (iii) normative in its focus.

²³ Amelia Gentleman, 'Amber Rudd 'Sorry' For Appalling Treatment of Windrush-Era Citizens' (*the Guardian*, 2018) <<https://www.theguardian.com/uk-news/2018/apr/16/theresa-may-caribbean-representatives-windrush-immigration>> accessed 10 August 2020.

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1.3 Research Focus

Accounting for the above, the main text which this thesis critically examines is the 2016 Asylum Policy Instruction (hereafter: API).²⁴ In order to address this, through the research questions outlined above, the thesis considers Home Office policy in the context of the wider governmentalities²⁵ of sexual diversity operative in the UK. As noted above, this research is undertaken within a context where the discourse of 'LGBT+ rights' is increasingly being used to legitimise other forms of international action.²⁶ The result of this is that LGBT+ rights have become frequently fused with notions of nationalism.²⁷ Therefore, this political moment sheds light on a need to critically investigate 'what constitutes sexual identity according to the state, and how... law construct[s] sexual identity categories'.²⁸

This thesis contributes to a growing academic response to the issues raised by the asylum claims of sexually diverse people,²⁹ by providing two original contributions to the field. Firstly, the phenomenological narrative analysis approach to interviewing sexually diverse refugees centres the lived experiences of (successful) asylum claimants in a way which previous legal research has not considered. Secondly, by presenting an analysis of the

²⁴ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019.

²⁵ See section 1.9.5 for a discussion of the term governmentality.

²⁶ See Generally: Jasbir Puar, '*Terrorist Assemblages: Homonationalism in Queer Times*' (Duke University Press, Durham and London, 2012).

²⁷ Puar terms this union homo-nationalism. See: Jasbir Puar, 'Rethinking Homonationalism' (2013) 45 *International Journal of Middle Eastern Studies* 336; Jasbir Puar, '*Terrorist Assemblages: Homonationalism in Queer Times*' (Duke University Press 2012); Jasbir Puar, 'Mapping US Homonormativities (2006) 13 *Gender, Place and Culture* 67.

²⁸ Stefan Vogler, 'Legally Queer: The construction of Sexuality in LGBQ Asylum claims' (2016) 50 *Law and society review* 856, 856.

²⁹ See Generally: S Chelvan, 'At the End of the Rainbow: Where next for the Queer Refugee? Understanding Queer Refugees' Lives: Moving From Sexual Conduct to Identity in Sexual Orientation/Identity Asylum Cases in England and Wales' (PhD Thesis, Kings College London 2018); Tawseef Khan, 'Investigating the British Asylum System For Lesbian, Gay and Bisexual Asylum Seekers: Theoretical and Empirical perspectives on Fairness' (PhD Thesis, University of Liverpool 2016); Claire Bennett, 'Sexuality and the Asylum Process: The Perspectives of Lesbians Seeking Asylum in the UK' (PhD Thesis, University of Sussex 2014).

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2016 API which is informed by lived experience, queer theory, and a Foucauldian conception of power/knowledge. Combining postmodern theoretical frameworks with empirical research is still relatively rare even within traditional sociological research. However, is increasingly being recognised as a useful method for deconstructing dominant policy frameworks.³⁰

In line with the above, the research brings the work of theorist such as Dean Spade³¹, Libby Adler, Michel Foucault³², and Judith Butler³³ to bear on areas of policy which have not previously been comprehensively analysed through these lenses. Therefore, I also offer a new analysis of the role of governmentality within the UK asylum system as it relates to sexually diverse claimants.

I do this by drawing on eight qualitative interviews with sexually diverse refugees as a way of understanding the heterogenous frameworks in which they conceptualised their own sexual diversity. The benefits and limitations of this sample, and other methodological considerations are discussed further in chapter two. Interview data was also placed in conversation with previous studies which involved interviews with sexually diverse refugees,

³⁰ See for example: Max Morris, 'The Limits of Labelling: Incidental Sex Work Among Gay, Bisexual, and Queer Young Men on Social Media' (2021) Online First Sexuality Research and Social Policy

³¹ Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, & The Limits of Law* (Duke University Press 2015).

³² See Generally: Michel Foucault, *The History of Sexuality: The Will to Knowledge* (Robert Hurley Trans: Penguin 1998); Michel Foucault, *The History of Sexuality: The Use of Pleasure* (Robert Hurley Trans: Penguin Classics 2020); Michel Foucault, *The History of Sexuality: The Care of the Self* (Robert Hurley Trans: Penguin Classics 2020) Michel Foucault, *The History of Sexuality: Confessions of the Flesh* (Frederic Gros Ed; Robert Hurly Trans: Penguin Classics 2021).

³³ See Generally: Judith Butler, *The Force of Nonviolence* (Verso 2020); Judith Butler, 'Frames of War: When is Life Grievable?' (Verso Books 2009); Judith Butler, 'Precarious life: the power of mourning and violence' (Verso Books 2006); Judith Butler, 'Giving an Account of Oneself' (Fordham University Press 2005); Judith Butler 'Undoing Gender' (Routledge 2004); Judith Butler, 'Gender Trouble: Feminism and the Subversion of Identity' (Routledge 1999); Judith Butler, 'Against Proper Objects' (1994) 6.2 Differences: A journal of Feminist Cultural Studies 1; Gayle Rubin & Judith Butler, 'Sexual Traffic' (1994) 6.2 Differences: A Journal of Feminist Cultural Studies 62; Judith Butler, 'Sex and Gender in DeBeauviour's Second Sex' (1986) 72 Yale French Studies 35.

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including the work of Giametta,³⁴ Khan,³⁵ and Bennett.³⁶ The data is also compared and contrasted with the findings of the Sexual Orientation and Gender Identity Claims of Asylum (hereafter: SOGICA) project which was undertaken over the same period as my own research.³⁷ By bringing together the experiences of participants with existing data, I was able to develop a deeper understanding of how sexually diverse refugees conceive of their own “sexuality” and the extent to which their self-conceptions are reflected within current Home Office policy and practice on asylum claims.

Within the existing literature on asylum claims by sexually diverse people, a great deal of attention has been devoted to the importance of narrative.³⁸ In particular, there is a focus on the need for claimants to articulate a narrative that conforms with decision-makers’ own conceptions of sexual diversity.³⁹ Therefore, understanding whether sexually diverse refugees and asylum seekers share the conceptions of sexual diversity adopted by Home Office Policy, and implemented by decision-makers, is pivotal to assessing the capacity of the UK asylum apparatus to offer protection to asylum claimants.⁴⁰

³⁴ Calogero Giametta, “‘Rescued’ Subjects: The Question of Religiosity for Non-heteronormative Asylum Seekers in the UK” (2014) 17 *Sexualities* 583; Calogero Giametta, *The Sexual Politics of Asylum: Sexual Orientation and Gender Identity in the UK Asylum System* (Routledge 2017).

³⁵ Tawseef Khan, ‘Investigating the British Asylum System For Lesbian, Gay and Bisexual Asylum Seekers: Theoretical and Empirical perspectives on Fairness’ (PhD Thesis, University of Liverpool 2016); Tawseef Khan, ‘Sexual Orientation and Refugee Law: How Do Legal Sanctions Criminalizing Homosexuality Engage the Definition of Persecution’ in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

³⁶ Claire Bennett, ‘Sexuality and the Asylum Process: The Perspectives of Lesbians Seeking Asylum in the UK’ (PhD Thesis, University of Sussex 2014).

³⁷ For publications from this project, see: <https://www.sogica.org/en/publications/> (accessed 07/04/2021)

³⁸ See for example: Eddie Bruce-Jones, ‘Death Zones, Comfort Zones: Queering the Refugee Question’ (2015) 22 *International Journal of Minority and Group Rights* 101; Laurie Berg and Jenni Millbank, ‘Constructing the Personal Narratives of Lesbian and Bisexual Asylum Claimants’ (2009) 22 *Journal of Refugee Studies* 195; Jenni Millbank, ‘The Ring of Truth: A Case Study of Credibility Assessments in Particular Social Group Determinations’ (2009) 21 *International Journal of Refugee Law* 1.

³⁹ *Ibid.* See Also: Sabine Jansen, ‘The Netherlands: Assumptions of an emotional process of awareness, from shame to self-acceptance’ (SOGICA Conference, Online, 7-9th July 2020); Lelia Zadeh, ‘The UK: Excessive Focus on Articulation of “Self-Realisation” and Development of Identity’ (SOGICA Conference, Online, 7-9th July 2020).

⁴⁰ See 4.2.1 for a discussion of the goals of the Refugee Convention.

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1.4 Structure of the Thesis

The thesis is split into two parts. This introduction forms the first chapter of part one. This chapter sets out the arc of the thesis and places the research within a social context.

Chapter two sets out the methodological and epistemological considerations underpinning this research, focusing on both the ethical and methodological implications of conducting research using interviews with refugees, before going on to outline the analytic framework employed. The main findings of the chapter situate the research as being consistent with a Foucauldian conception of law.

Chapter three theoretically explores the nature of sexual diversity. The chapter begins by examining academic work on the socially constructed nature of the normative categories of “sexuality”, arguing for a social constructivist approach to conceptualising sexual diversity. The chapter draws on the work of Foucault and Butler to explore how the current categories through which we make sense of sexual diversity came into being and explores alternative ways in which sexual diversity has been understood across time and place.

Chapter four goes on to situate the 2016 API in its legal context. This is done by exploring both the national and international frameworks governing refugee law. Including an analysis of the goals of the Refugee Convention. Finally, the chapter offers a theoretical benchmark centred on respecting the heterogenous nature of sexual diversity and a legal benchmark centred on offering surrogate protection to members of recognised categories who have suffered human rights abuses in their countries of origin.

Chapter five begins part two of the thesis, which examines the substantive realities of the asylum system, as it is experienced by sexually diverse claimants, and sets out the implications of my findings. This is the point where participant narratives are brought into the

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thesis. Chapter five begins a step-by-step analysis of the conceptual aspects of the 2016 API, drawing on participants narratives to consider the generalizability of each aspect of the policy. Through undertaking this analysis, sites of mismatch are detected, where the conceptions of identity and truth underlying the policy are incompatible with the lived realities of sexually diverse asylum claimants.

The analysis of the 2016 API outlined above is then expanded on within chapter six, which considers the practical aspects outlined in the 2016 API, such as the process of conducting the interview. The chapter again focuses on discovering sites of mismatch between the conception of sexual diversity underlying the API and the lived realities of sexually diverse refugees. In doing so, it outlines the ways in which the refugee status determination process itself frustrates the ability of asylum claimants to put forward their narratives and be understood.

Chapter seven explores wider knowledges regarding sexual diversity within the UK. It does this through an analysis of ‘ordinary’ representations and constructions of “sexuality” within media discourses. Drawing on my Foucauldian analytic framework, as outlined in chapter two, this chapter outlines how knowledges of sexual diversity shape decision-making and therefore considers why—despite the numerous policy innovations in recent years—problems persist in decision-making related to the asylum claims of sexually diverse people.⁴¹

Finally, chapter eight reflects on the rest of the thesis to produce a series of critical considerations which future researchers and policy-makers might consider in order to better

⁴¹ See: Tawseef Khan, ‘Investigating the British Asylum System For Lesbian, Gay and Bisexual Asylum Seekers: Theoretical and Empirical perspectives on Fairness’ (PhD Thesis, University of Liverpool 2016).

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account for the heterogenous lived realities of sexually diverse people. This section does not seek to make concrete recommendations, but rather to give pause for critical reflection on the complex nature of human lives and to offer examples of common pitfalls which future researchers and policy-makers in this area should seek to avoid.

1.5 Interdisciplinarity

As the foregoing thesis outline suggests, this research is an interdisciplinary endeavour drawing together methods from law, sociology, philosophy, anthropology, and cultural studies. By bringing together these disciplines and their tools, the thesis seeks to bring to light and disrupt unchallenged assumptions governing the UK's approach to the asylum claims of sexually diverse people.⁴² Through doing this, I engage with the shift from a conduct focused approach to an identity focused approach in conceptualising sexual diversity within the UK asylum apparatus. To achieve this, analysis focuses both on law and policy, as well as the wider social and philosophical knowledges from which these structures of thought arise. Therefore, not only does the thesis draw on methods from various disciplines to analyse law, it takes an interest in matters outside of law and provides an understanding of the legal institutions and rules examined which is rooted in a Foucauldian governmentality based conception of law.⁴³ This is important because the issues arising within refugee law are necessarily political in nature and cannot be appropriately understood when they are viewed as a matter of objective, administrative decision-making.⁴⁴

⁴² Drawing on the insights of Halberstam, this situates the thesis as a work of Queer Theory. See Generally: Jack Halberstam, *Female Masculinity* (Duke University Press 1998) ESP 13.

⁴³ Constitutive here is a reference to the constitutive theory of law as discussed in section 3.5.3. See also: Naomi Mezey, 'Out of the Ordinary: law, Power, Culture and the Commonplace' (2001) 26 *Law and Social Inquiry* 145; Alan Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (Routledge 1993).

⁴⁴ Jean-Yves Carlier, 'The Geneva Refugee Definition and the 'Theory of Three Scales' in Francis Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999) 40.

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Indeed, my understanding of the issues raised by the asylum claims of sexually diverse people is that, far from being a strictly legal matter, they relate to the diffuse knowledges of “sexuality” present within a society. These everyday knowledges being the day-to-day, mundane ways in which people make sense of the world. They form a part of the wider governmentality within a given society and can often be derived from popular culture. These knowledges inform us about factors such as what constitutes sexual difference in a “western” context. Thus, in line with Nelken, I argue: ‘What counts as legal knowledge, or knowledge for law, is something that changes over time. And this mainly happens outside the courtroom’.⁴⁵ This claim goes no further than requiring an acknowledgment of the fact that courts and other decision-makers are required to consider sociological “facts” as a part of their decision-making process.⁴⁶ Therefore, to understand the issues facing sexually diverse asylum seekers and refugees, we need to look outside of matters of doctrinal law, and to consider the experiences of those interacting with the legal interface. Producing knowledge of this kind—which is attuned to sociological and philosophical concerns—requires methods from multiple disciplines to be brought to bear on the study of law.

Rather than seeking legal coherence, I focus on presenting the experiences of participants and discussing how these correspond with the knowledge of sexual diversity deployed within the asylum apparatus. Thus, an understanding rooted solely in the methods of doctrinal law would be inadequate to generate insights into my research questions. Indeed, this thesis could be categorised as being concerned with a topic—akin to other life experience

⁴⁵ David Nelken, ‘Getting at Law’s Boundaries’ (2006) 15 *Social and Legal Studies* 598, 602.

⁴⁶ See: Chris Ashford, Max Morris and Alex Powell, ‘Bareback Sex in the Age of Preventative Medication: Rethinking the “Harms” of HIV Transmission’ (2020) 84 *The Journal of Criminal Law* 596.

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studies, such as critical race theory and gender studies—rather than being concerned with a discipline, as such.⁴⁷

An original contribution offered by my thesis arises partially from the interdisciplinary approach adopted. As I will explore, within the enclosed overview of existing theory and practice, most of the existing literature addressing sexually diverse asylum claims is written from a legal perspective, focusing on the legal framework as it relates to sexually diverse asylum seekers. My thesis, instead, attempts to give voice to asylum seekers themselves, allowing them to articulate their experiences of the process, and the extent to which it was able to comprehend their sexual diversity. This represents an opportunity to consider the asylum framework from the perspective of those who are both external to—yet intrinsically bound within—the apparatus. Additionally, the utilisation of queer theory and Foucauldian methods represents a critical interjection, giving pause for further reflection, during a period in which academics, practitioners, and charities, have increasingly aligned themselves with an identarian approach to liberation and social justice orientated goals.⁴⁸ Indeed, I argue that, to a certain extent, the strategic nature of the strategic essentialism originally involved in the idea of sexual identity has been forgotten, with some LGBT+ organisations operating as if sexual identity were a fundamental truth.⁴⁹

To be clear, this thesis is interdisciplinary because it seeks to understand an issue in the most complex manner possible, rather than simply using a range of disciplines to develop

⁴⁷ Julie Thompson Klein, 'A Taxonomy of Interdisciplinarity' In Robert Frodeman (ed), *The Oxford Handbook of Interdisciplinarity* (Oxford University Press 2010) 21.

⁴⁸ These issues have been highlighted by other critical scholars. See for example: Judith Butler, 'Imitation and Gender Insubordination' in Ann Garry and Marilyn Pearsall (eds), *Women, Knowledge and Reality: Explorations in Feminist Philosophy* (Routledge 1996). See also: Alex Powell, 'Normative Understandings: Sexual Identity, Stereotypes, and Asylum Seeking' in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020).

⁴⁹ See for example: Joseph Massad, 'Re-Orienting Desire: The Gay International and the Arab World' (2002) 14 *Public Culture* 361.

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one understanding of that issue. As Klein argues, ‘since the late nineteenth century, taxonomies of knowledges in the Western intellectual tradition have been dominated by a system of disciplinarity that demarcate domains of specialised enquiry’.⁵⁰ My interest is not just in the law as it relates to sexually diverse refugees and asylum seekers, but in understanding the interaction of sexually diverse asylum seekers, and their conceptions of their own sexual diversity, with a legal process that is required to adjudicate directly on sexual diversity. To produce this understanding, I adopt tools from various disciplines. However, I take an approach that sets aside disciplinary coherence in favour of complexity. Klein further argues that ‘integration is the most common benchmark’ for interdisciplinary work.⁵¹ This can be contrasted, for example, with a multidisciplinary approach which juxtaposes disciplines while keeping them separate to broaden knowledge.⁵² Thus, the key to the interdisciplinarity of this thesis is that, rather than simply using tools from other disciplines to expand on a legal understanding of the issues raised, I seek to draw on numerous tools to produce an integrated understanding which fits securely neither within the discipline of law, nor any other discipline. This fits with the “Integrated ID” model of interdisciplinarity identified by Boden—often referred to as the only true interdisciplinarity⁵³— which states the purest use of interdisciplinary methods will end up resulting in alteration of conceptual categories and a questioning of the current structure of knowledge.⁵⁴ This being precisely what my research questions call for—a questioning of the knowledge(s) deployed within the asylum apparatus.

⁵⁰ Julie Thompson Klein, ‘A Taxonomy of Interdisciplinarity’ In Robert Frodeman (ed), *The Oxford Handbook of Interdisciplinary* (Oxford University Press 2010) 15.

⁵¹ *ibid* 17.

⁵² *ibid*.

⁵³ *ibid* 20. See Also: Lisa Lattuca, *Creating Interdisciplinarity: Interdisciplinary Research and Teaching Among College and University Faculty* (Vanderbilt University Press 2001) 171.

⁵⁴ Margaret Boden, ‘What is Interdisciplinarity’ in Richard Cunningham (ed) *Interdisciplinarity and the Organization of Knowledge in Europe* (European Commission 1999) 19-22.

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1.6 Current Scholarship and Practice

There is a growing body of scholarship which engages with the issues raised by sexually diverse asylum claims.⁵⁵ Broadly construed, the literature can be split into two periods, namely pre-and-post the decision in *HJ (Iran) and HT (Cameroon)*.⁵⁶ I have adopted this distinction as a way of arranging the existing scholarship. Due to the intersections between sexual and gender diversity, material relating to gender identity and gender diversity claims is also considered.⁵⁷ However, though it has expanded in recent years, this remains a relatively limited body of scholarship. Again, due to the links between the rights of women and the rights of sexually diverse people, scholarship regarding women's asylum claims is also considered within this overview of existing scholarship.

⁵⁵ See for example: Jenni Millbank, "'The Ring of Truth': A Case Study of Credibility Assessments in Particular Social Group Refugee Determinations' (2009) 21 *International Journal of Refugee Law* 1; Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 *Journal of Refugee Studies* 195; James Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 *International Law and Politics* 315; Jenni Millbank, 'The Rights of Lesbians and Gay Men to Live Freely, Openly and on Equal Terms is not Bad Law: A Reply to Hathaway and Pobjoy' (2012) 44 *International Law and Politics* 497; Rachel Lewis, 'Deportable Subjects: Lesbians and Political Asylum' (2013) 25 *Feminist Formations* 174; Thomas Spijkerboer, 'Sexual Identity, Normativity and Asylum' in Thomas Spijkerboer (ed), *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge 2013); Rachel Lewis, "'Gay? Prove It!': The Politics of Queer Anti-deportation Activism' (2014) 17 *Sexualities* 958; Eddie Bruce-Jones, 'Death Zones, Comfort Zones: Queering the Refugee' (2015) 22 *International Journal on Minority and Group Rights* 101; Stefan Vogler, 'Legally Queer: The Construction of Sexuality in LGB Claims' (2016) 50 *Law & Society Review* 856; Calogero Giametta, *The Sexual Politics of Asylum: Sexual Orientation and Gender Identity in the UK Asylum System* (Routledge 2017); Siobhan McGuirk, '(In)Credible Subjects: NGOs, Attorneys, and Permissible LGBT Asylum Seeker Identities' (2018) 41 *Political and Legal Anthropology Review* 4; Leifa Mayers, 'Globalised Imaginaries of Love and Hate: Immutability, Violence, and LGBT Human Rights' (2018) 26 *Feminist Legal Studies* 141; Rosa Dos Ventos Lopes Heimer, 'Homonationalist/Orientalist Negotiations: The UK Approach to Queer Asylum Claims' (2019) 24 *Sexuality and Culture* 174; John Marnell, Elsa Oliveira & Gabriel Hossain Khan, "'It's About Being Safe and Free To Be Who You Are': Exploring the Lived Experiences of Queer Migrants, Refugees and Asylum Seekers in South Africa' (2020) 24 *Sexualities* 86; Sarah Singer, "'How Much of a Lesbian are you?': Experiences of LGBT Asylum Seekers in Immigration Detention in the UK' in Richard Mole (ed), *Fringe: Queer Migration and Asylum in Europe* (UCL Press 2021).

⁵⁶ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596.

⁵⁷ The phrase gender identity is here used to signify individuals who are transgender or otherwise gender non-conforming. I recognise that there is a large body of scholarship addressed towards gender-based asylum claims, however, this literature does not necessarily correlate to gender identity asylum.

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Despite the growing literature on the topic of sexual diversity, it was not until the 1999 conjoined appeals of *Shah and Islam*⁵⁸ that the potential of sexual diversity providing a claim to membership of a Particular Social Group was accepted by courts in the UK.⁵⁹

Therefore, while there is a good deal of refugee law literature prior to 1999, little of this bears direct relevance to the issues addressed in this thesis.

As well as studies relating directly to asylum claims by sexually diverse people, this overview of theory and practice also looks at wider literature on sexually diverse people. In particular, attention is offered to literature which focuses on conceptions of identity and their relation to sexual diversity outside of a European and American context, such as work focusing on sexual diversity in African and the Middle Eastern countries. A brief exploration of the literature addressing asylum claims on the basis of gender is also offered here.

1.6.1 Pre-HJ (Iran) and HT (Cameroon)

Prior to *HJ (Iran) and HT (Cameroon)*,⁶⁰ much of the literature—bearing in mind that this search is limited to literature written in the aftermath of the 1999 decisions which confirmed that ‘homosexuals’⁶¹ could constitute a Particular Social Group—is directed towards highlighting the issues raised by ‘expected (voluntary) discretion’.⁶² This was a feature of

⁵⁸ *Islam v Secretary of State for the Home Department and R v Immigration Appeals Tribunal Ex p Shah* [1999] UKHL 20, [1999] 2 AC 629.

⁵⁹ It should be noted that the idea of sexual diversity being capable of engaging the particular social group head of the refugee convention had been implicitly accepted in the unreported case of *Vraciu*. See: *Vraciu* IAT (11559) (1995, Unreported). Khan offers a fuller explanation of the background to this. See: Tawseef Khan, ‘Investigating the British Asylum System for Lesbian, Gay and Bisexual Asylum Seekers: Theoretical and Empirical perspectives on Fairness’ (PhD Thesis, University of Liverpool 2016) 158-159.

⁶⁰ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596.

⁶¹ This being the terminology of the House of Lords in *Shah and Islam*, as opposed to my own. See: *Islam v Secretary of State for the Home Department and R v Immigration Appeals Tribunal Ex p Shah* [1999] UKHL 20, [1999] 2 AC 629.

⁶² S Chelvan, ‘Put Your Hands up (If You Feel Love): A Critical Analysis of *HJ (Iran)* and *HT (Cameroon)*’ (2011) 25 *Journal of Immigration, Asylum and Nationality Law* 56, 58.

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many “western”⁶³ asylum systems. In effect, the criterion entailed a ‘reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection’.⁶⁴ In practice, this meant the law required sexually diverse claimants to remain in their country of origin and keep their sexual diversity secret. Millbank has investigated the links between the current UK approach to sexual diversity asylum claims and the public/private divide in the UK, which has regularly construed “sexuality” as being a private matter and thus not something that needs to be publicly manifested.⁶⁵ Magardie has argued that the high refusal rate for pre-2010 claims was partially due to continuing prejudice against sexual and gender diverse people in the UK.⁶⁶ The core rationale behind the discretion criterion was the idea that claimants did not have a well-founded fear of persecution if they could avoid the persecution by acting discreetly. As several scholars highlighted, this resulted in a higher chance of asylum claims by sexually diverse people ending in rejection.⁶⁷ Millbank argued this higher chance of rejection left sexually diverse asylum seekers forced to rely on forms of complementary protection.⁶⁸ Hanna also argued that discretion reasoning often meant those who conformed to heterosexual norms stood little chance of success.⁶⁹ Indeed, the

⁶³ This term is used to apply to the vague range of territories organised around European/American culture. The term is both imprecise and problematic, assuming a false unity between several deeply divergent national and cultural epistemologies. Nonetheless, it is used on occasion in this thesis to avoid awkward compound terms when attempting to refer to legal and scholastic systems retaining points of significant similarity.

⁶⁴ V95/03527 [1996] RRTA 246, 247.

⁶⁵ Jenni Millbank, ‘A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation 1989-2003’ (2005) 14 *Social and Legal Studies* 115.

⁶⁶ Sheldon Magardie, “‘Is the applicant Really Gay?’” *Legal Responses to Asylum Claims Based on Persecution Because of Sexual Orientation* (2003) 55 *Agenda Empowering Women For Gender Equality* 81.

⁶⁷ Thomas Spijkerboer, ‘Sexual Identity, Normativity and Asylum’ in Thomas Spijkerboer, *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge 2013) 221.

⁶⁸ Jenni Millbank, ‘A Preoccupation with Perversion: The British Response to Refugee Claims on The Basis of Sexual Orientation 1989-2003’ (2005) 14 *Social and Legal Studies* 115, 118-119.

⁶⁹ Fadi Hanna, ‘Punishing Masculinity in Gay Asylum Claims’ (2005) 114 *The Yale Law Journal* 913.

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continuation of this trend has led some to argue discretion reasoning continues to operate within sexual diversity asylum claims.⁷⁰

Alongside the focus on discretion, issues around credibility are present in earlier literature with McGhee looking at credibility issues as early as 2001.⁷¹ Millbank also began conducting research into credibility during the early 2000s.⁷² While, in the international context, Bitel argued the question of whether the applicant is *really* gay ‘is one of the most fundamental questions which representatives must face when... claiming protection because of being homosexual’.⁷³ The findings of this early credibility research are broadly consistent with those made in the post-2010 landscape. Across chapters five, six and seven of this thesis, my own reflections on credibility can be found. Unlike previous research in this area, my analysis focuses on the limitations arising from the inclusion-based identity politics strategy adopted by practitioners. As I expand on in chapter eight, this is not to say that such inclusion is not valuable, merely that it has strategic limitations which should be considered, at both a scholastic and a pragmatic level.

⁷⁰ Tawseef Khan, ‘Investigating the British Asylum System For Lesbian, Gay and Bisexual Asylum Seekers: Theoretical and Empirical perspectives on Fairness’ (PhD Thesis, University of Liverpool 2016) 132-135; Thomas Spijkerboer, ‘Sexual identity, Normativity and Asylum’ in Thomas Spijkerboer, *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge 2013) 221;231; Janna Weßels, ‘HJ (Iran) and HT (Cameroon) – Reflections on a new test for sexuality-based asylum claims in Britain’ (2012) 24 *International Journal of Refugee Law* 815, 827.

⁷¹ Derek McGhee, ‘Homosexual Refugees in the 1990s’ (2001) 14 *Journal of Refugee Studies* 1.

⁷² Jenni Millbank, ‘A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation’ (2005) 14 *Social and Legal Studies* 115; Jenni Millbank, “‘The Ring of Truth:’ A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations’ (2009) 21 *International Journal of Refugee Law* 1; Laurie Berg and Jenni Millbank, ‘Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants’ (2009) 22 *Journal of Refugee Studies* 195.

⁷³ David Bitel, ‘Membership of a Particular Social Group- The Issue of Sexual Orientation Persecution’, (International Bar Association Conference, Cancun, Mexico 2001 Cited in Sheldon Magardie, “‘Is the applicant Really Gay?’” *Legal Responses to Asylum Claims Based on Persecution Because of Sexual Orientation*’ (2003) 55 *Agenda Empowering Women for Gender Equality* 81.

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Other literature pre-*HJ (Iran) and HT (Cameroon)*⁷⁴ focused on the legal framework both nationally⁷⁵ and internationally.⁷⁶ Moving out to the broader topic of refugee law, much of the literature of this period focuses on clarifying the meaning and scope of Refugee Law. As Hathaway argues, the 1990s were taken up with addressing vexing definitional issues.⁷⁷ Other aspects of this body of work focus on the relationship between Refugee Law and International Human Rights Law.⁷⁸ Theorists such as Juss also directed their focus at the implementation of the UK's international obligations in a domestic context, with a particular focus on the operation of administrative frameworks.⁷⁹ In general, while useful work was undertaken in the period leading up to the decision in *HJ (Iran) and HT (Cameroon)*⁸⁰, the changes brought about by that decision mean it is only of limited relevance to this research. Therefore, greater attention is devoted to research undertaken after 2010.

1.6.2 Post-*HJ (Iran) and HT (Cameroon)*

Much of the literature following *HJ (Iran) and HT (Cameroon)* has focused on credibility issues, as well as on analysing the impacts of the decision and the new test it introduced. For

⁷⁴ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596.

⁷⁵ See for Example: Derek McGhee, 'Accessing Homosexuality: Truth, Evidence and the Legal Practices for Determining Refugee Status—The Case of Ioan Vraciu' (2000) 6 *Body and Society* 29; Derek McGhee, 'Queer Strangers: Lesbian and Gay Refugees' (2003) 73 *Feminist Review* 145.

⁷⁶ See for Example: Sheldon Magardie, "'Is the applicant Really Gay?'" Legal Responses to Asylum Claims Based on Persecution Because of Sexual Orientation' (2003) 55 *Agenda Empowering Women for Gender Equality* 81; Fadi Hanna, 'Punishing Masculinity in Gay Asylum Claims' (2005) 114 *The Yale Law Journal* 913; Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 *The International Journal of Human Rights* 391.

⁷⁷ James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 1.

⁷⁸ James Hathaway, *The Rights of Refugees Under international Law* (Cambridge University Press 2005); James Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 *International Law and Politics* 315, 331.

⁷⁹ See Generally: Satvinder Juss, *Immigration, Nationality and Citizenship* (Mansell Publications 1993); Satvinder Juss, *A Guide to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* (Cavendish 2005).

⁸⁰ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596.

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example, Bruce-Jones⁸¹, Millbank⁸², Khan⁸³ and I⁸⁴ have explored the need for claimants to present their sexual diversity in a manner consistent with decision-makers' conceptions of sexual diversity. Similarly, Juss has explored how the decision may have contributed to requests for sexually explicit evidence.⁸⁵ Furthermore, Raj has analysed the extent to which the emotions and sexual interactions of sexually diverse asylum seekers are circumscribed by homonormative⁸⁶ ideas of intimacy,⁸⁷ and Wessels has looked at the relationship between future behaviour and a grant of refugee status.⁸⁸ This is significant as the final part of the test set down in *HJ (Iran) and HT (Cameroon)* requires to decision-makers to determine how an asylum claimant would, as a matter of fact, behave if returned to their country of origin.⁸⁹ As Millbank⁹⁰ and Chelvan⁹¹ have argued, it seems likely that the move from discretion is to blame for the renewed focus on credibility. As this literature suggests, the new focal point of

⁸¹ Eddie Bruce-Jones, 'Death Zones, Comfort Zones: Queering the Refugee Question' (2015) 22 *International Journal of Minority and Group Rights* 101.

⁸² Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 *The International Journal of Human Rights* 391.

⁸³ Tawseef Khan, 'Investigating the British Asylum System For Lesbian, Gay and Bisexual Asylum Seekers: Theoretical and Empirical perspectives on Fairness' (PhD Thesis, University of Liverpool 2016) ESP 173-180.

⁸⁴ Alex Powell, 'Normative Understandings: Sexual Identity, Stereotypes, and asylum seeking' in Chris Ashford & Alexander Maine (ed), *The Research Handbook on Gender, Sexuality and the law* (Edward Elgar 2020).

⁸⁵ Satvinder Juss, 'Sexual Orientation and the Sexualisation of Refugee Law' (2015) 22 *International Journal on Minority and Group Rights* 128.

⁸⁶ The term homonormative refers to the need for LGBTQ+ people to articulate and perform their identities in a manner consistent with heterosexual norms. For example, the expectation that individuals will have an emotional connection with sexual partners could rightly be described as homonormative. See Further: Lisa Duggan, 'The New Homonormativity: The Sexual Politics of Neoliberalism' in Russa Castronovo & Dana Nelson (eds) *Materialising Democracy: Toward a Revitalized Cultural Politic* (Duke University Press 2002) 175-194.

⁸⁷ Senthoran Raj, 'Queering Fears: Pro-LGBTI Refugee Cases' in Chris Ashford, Alan Reed and Nicola Wake 'Legal Perspectives on State Power: Consent and Control' (Cambridge Scholars Publishing, 2016) 132, 142.

⁸⁸ Jana Wessels, 'The Art of Drawing Lines: Future Behaviour and Refugee Status' in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

⁸⁹ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596.

⁹⁰ Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual orientation in Australia and the United Kingdom' (2009) 13 *International Journal of Human Rights* 391.

⁹¹ S Chelvan, 'Put Your Hands up (If You Feel Love): A Critical Analysis of HJ (Iran) and HT (Cameroon)' (2011) 25 *Journal of Immigration, Asylum and Nationality Law* 56, 60.

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asylum claims made by sexually diverse people is on authenticating the claimant's sexual diversity.

This is not to say credibility issues did not exist prior to 2010. Nor is it to claim that they do not exist for other asylum grounds. However, Rainbow Migration (then known as the UK Lesbian and Gay Immigration group or UKLGIG) found that between 2011-2013 86% of rejections of asylum claims by sexually diverse people related to lack of credibility.⁹² This demonstrates the depth of the credibility issues in sexual diversity claims. Harvey repeated the claim that the ending of discretion reasoning had increased the focus on credibility before the Home Affairs Select Committee in 2013.⁹³ Further, Juss has examined the numerous blind spots in the *HJ & HT* decision, arguing that the lack of answers provided by the court in relation to several issues has resulted in a politics shrouded in orientalism which has resulted in refugee law as a whole becoming more sexualised.⁹⁴ However, what is currently lacking from the literature produced in this period is an attempt to understand whether or not knowledges and discourses of sexual diversity employed in the asylum apparatus correspond to the lived experiences of sexually diverse people. This is particularly significant when it is considered that much of the current literature appears to endorse the direction of the 2016 API, which has been viewed as a move from focusing on conduct to focusing on identity.⁹⁵

Khan's thesis did address the failure to recognise the intersectional nature of identities by the Home Office and its decision-makers. His work also encapsulates a call for the asylum

⁹² UK Lesbian and Gay Immigration Group, 'Missing the Mark' (Unison 2013) <<https://uklgig.org.uk/wp-content/uploads/2014/02/Missing-the-Mark.pdf>> accessed 12 December 2017.

⁹³ Alison Harvey, 'Oral Evidence Taken Before the Home Affairs Committee July 2nd, 2013, Q286.

⁹⁴ Satvinder Juss, 'Sexual Orientation and the Sexualisation of Refugee Law' (2015) 22 *International Journal on Minority and Group Rights* 128.

⁹⁵ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019.

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system to better engage with diversity of identity among sexually diverse people.⁹⁶ My thesis goes a step further and directly compares knowledges and discourses of sexual diversity which are common within the UK, with the ways in which claimants conceive of their own identities, orientations, and experiences.

While much of the literature produced since *HJ (Iran) and HT (Cameroon)*⁹⁷ focuses on credibility as an issue, little addresses the lived experiences of sexually diverse asylum claimants. Giametta has undertaken interviews with asylum seekers in the UK focusing on the discursive production of the ‘sexual victim’.⁹⁸ In earlier research, Giametta also focused on religiosity among sexually diverse refugees.⁹⁹ Similarly, Bennett wrote her doctoral thesis on the experiences of lesbian asylum seekers in the UK, using a methodology that included interviews.¹⁰⁰ However, as her focus was solely on lesbians, there remain gaps around the experiences of gay, bisexual, and transgender claimants, as well as those who do not align their identity with normative (liberal) categories. For example, framing previous studies as being about LGBT+ people may have excluded relevant voices as those coming forward are likely to have been people who already identified with those identities and labels. Khan’s thesis addressed the issue of fairness within sexual and gender minority claims and included an engagement with the role of identity verification and credibility in asylum claims based on

⁹⁶ See Generally Tawseef Khan, ‘Investigating the British Asylum System For Lesbian, Gay and Bisexual Asylum Seekers: Theoretical and Empirical perspectives on Fairness’ (PhD Thesis, University of Liverpool 2016).

⁹⁷ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596.

⁹⁸ Calogero Giametta, *The Sexual Politics of Asylum: Sexual Orientation and Gender Identity in the UK Asylum System* (Routledge 2017). See also: Alison Jobe, ‘Telling the Right Story at the Right Time: women seeking asylum with stories of trafficking into the sex industry’ (2020) 54 *Sociology* 936.

⁹⁹ Calogero Giametta, ‘“Rescued” Subjects: The Question of Religiosity for Non-heteronormative Asylum Seekers in the UK’ (2014) 17 *Sexualities* 583.

¹⁰⁰ Claire Bennett, ‘Sexuality and the Asylum Process: The Perspectives of Lesbians Seeking Asylum in the UK’ (PhD Thesis, University of Sussex 2014).

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sexual diversity.¹⁰¹ However, as his engagement was part of a wider review of the fairness of the asylum system for sexually diverse people, I will offer a more focused account and thus provide additional depth to the issues around credibility and identity.

McGuirk has undertaken an investigation into asylum seekers' sexually diverse identities—involving interviews with sexually diverse refugees and asylum seekers—in the US context.¹⁰² However, due to the differing interpretations of the Refugee Convention¹⁰³ and their implications for practice between states, this leaves space for a similar analysis to be undertaken in the UK context. My own work looks to build on what Bennett, Giametta, and Khan have begun, investigating how guidance and practice coheres with the lived experiences of sexually diverse refugees and asylum seekers.¹⁰⁴ As explored in chapter two, I attempt to gain access to this lived experience through the use of semi-structured interviews.¹⁰⁵

Khan has also looked at the role of criminalisation of conduct and identity within refugee countries of origin, arguing that criminalisation is a form of persecution.¹⁰⁶ Giametta has looked at the impact that asylum filtering devices have on sexually diverse asylum claimants.¹⁰⁷ Heimer has looked at the impact of homonationalism on the framing of asylum

¹⁰¹ Tawseef Khan, 'Investigating the British Asylum System for Lesbian, Gay and Bisexual Asylum Seekers: Theoretical and Empirical perspectives on Fairness' (PhD Thesis, University of Liverpool 2016)

¹⁰² Siobhan McGuirk, '(In)Credible Subjects: NGOs, Attorneys, and Permissible LGBT Asylum Seeker Identities' (2018) 41 *Political and Legal Anthropology Review* 4.

¹⁰³ Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

¹⁰⁴ It should also be noted that the barrister S Chelvan has recently completed a doctoral thesis addressing the issue of sexual minority asylum which has been submitted at Kings College London. At present, I have not been able to access this and thus am not able to discuss his findings. See: S Chelvan, 'At the End of the Rainbow: Where Next for the Queer Refugee?: Understanding Queer Refugees Lives: Moving from Sexual Conduct to Identity in Sexual Orientation/Identity Asylum Cases in England and Wales' (PhD Thesis, Kings College London 2019).

¹⁰⁵ See Section 2.3.2.

¹⁰⁶ Tawseef Khan, 'Sexual Orientation and Refugee Law: How Do Legal Sanctions Criminalizing Homosexuality Engage the Definition of Persecution' in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

¹⁰⁷ Calogero Giametta, 'New Asylum Protection Categories and Elusive Filtering Devices: The case of 'Queer asylum' in the UK and France' (2020) 46 *Journal of Ethnic and Migration studies* 142.

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on the basis of sexual diversity, arguing that this has contributed to the requirement for sexually diverse asylum claimants to present their identities in a recognisable or “western” manner, demonstrated through visibility, individualism and consumerism.¹⁰⁸ This is complemented by the work of Mayblin, who has looked at the role of complexity reduction in Home Office policy-making, offering an interesting perspective on how complex sociological phenomena become flattened and simplified amongst policy-makers, resulting in un-nuanced policy which fails to reflect the complexity of human lives.¹⁰⁹

In the European context, the SOGICA project focused on exploring the experiences of sexual diversity and gender identity asylum claimants across Europe.¹¹⁰ The project looked specifically at Germany, Italy, and the UK and attempted to understand the approach of European institutions. This research was taken to consider how the EU and European nations can analyse sexual diversity claims more fairly. The project has yielded a raft of relevant publications, with many setting out the environment in which sexually diverse claimants in the UK are required to make their case.¹¹¹ My project sits alongside SOGICA with both projects seeking to expand understanding of the issues impacting sexually diverse asylum seekers from different perspectives. Crucially, while the contributions of the SOGICA project are extremely valuable, they are largely undertaken from a more traditionally legal viewpoint and, therefore, do not offer the same framework of Foucauldian critical analysis as this thesis

¹⁰⁸ Rosa Does Ventos Lopes Heimer, ‘Homonationalist/Orientalist Negotiations: The UK Approach to Queer Asylum Claims (2020) 24 *Sexuality and Culture* 174.

¹⁰⁹ Lucy Mayblin, ‘Imagining Asylum, Governing Asylum Seekers: Complexity Reduction and Policy Making in the UK Home Office’ (2019) 7 *Migration Studies* 1.

¹¹⁰ Publications available at: <https://www.sogica.org/en/publications/> (accessed 09/04/2021).

¹¹¹ See Generally: Nina Held, ‘What does a Genuine Lesbian Look Like? Intersections of Sexuality and Race in Manchester’s Gay Village and the UK Asylum System’ in Francesca Stella et al (eds) *Sexuality, Citizenship and Belonging: Transnational and International Perspectives* (Routledge 2015); Nina Held, ‘“They Look at You Like an Insect That Wants to be Squashed”: An Ethnographic Account of the Racialised Sexual Spaces of Manchester’s Gay Village’ (2017) 20 *Sexualities* 535; Moira Dustin, ‘Many Rivers to Cross: The Recognition of LGBTIQ Asylum in the UK’ (2018) 30 *International Journal of Refugee Law* 104.

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does.¹¹² Thus, although my research deals with many of the same issues as their work, it presents alternative considerations and implications which should be considered in consort by future researchers and policy-makers alike. Their focus on the European context—while including the UK as a case study—also means that their findings may be impacted by Brexit and its associated discourses.

Continuing with the issues raised by credibility and the burden of proof, Chelvan has proposed an alternative method of credibility determination which he calls the Difference, Stigma, Shame, Harm (DSSH) model.¹¹³ This model suggests a new way of thinking through credibility. The model informs the 2016 API, leading to the focus on a narrative of difference. Predictably, this model seeks to shift decision-makers to a focus on the presence of difference, stigma, shame, and harm as establishing one's membership of a particular social group defined by their sexual orientation/identity and, through this, their eligibility for refugee status. However, Dawson and Greber are sceptical of the DSSH model's appropriateness for analysing lesbian and bisexual claims.¹¹⁴ As they point out, Chelvan, like many other theorists in this field, presents an account which focuses on experiences common to the narratives of gay men, rather than sexual and gender diverse people more generally. This is a problem present across both scholarship and society more broadly. I expand on

¹¹² I attended the SOGICA final conference between the 7th and 9th of July 2020 and saw presentations on the project's findings first-hand. See for details: The SOGICA Conference 7-9 July 2020, Online. <https://www.sogica.org/en/final-conference/> last accessed 10/08/2020.

¹¹³ See generally: S Chelvan, 'Put Your Hands Up (If you Feel Love)' (2011) 25 *Immigration, Asylum and Nationality Law* 56; S Chelvan, 'LGBTI Asylum Claims—The Difference, Stigma, Shame, Harm Model' (Legal Updates 2018) <http://www.righttoremain.org.uk/legal/lgbti-asylum-claims-the-difference-shame-stigma-harm-model/> accessed 27 July 2018.

¹¹⁴ Jasmine Dawson and Paula Gerber, 'Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?' (2017) 29 *International Journal of Refugee Law* 292.

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critiques of the model by offering critiques of the 2016 API which it informed within chapters five and six of this thesis.¹¹⁵

Within other literature, the *HJ (Iran) and HT (Cameroon)*¹¹⁶ decision has also come in for some criticism in its own right. Hathaway and Pobjoy accuse the judgement of undermining the coherence of refugee law.¹¹⁷ Wessels argues the new focus on credibility can be understood as an extension of discretion reasoning.¹¹⁸ As I have argued elsewhere, one of the core elements required to present a credible narrative is to perform your identity openly and outwardly.¹¹⁹ This, of course, relies on an a priori assumption that sexual diversity is understood as an identity. This means that those who are discreet often continue to be denied protection.¹²⁰ In fact, the potential of denying protection to those who would be discreet, as a matter of fact, was left open by *HJ (Iran) and HT (Cameroon)*.¹²¹ As Vogler has argued, the requirement to present one's identity visibly often leads to rejection for those who have not come out and publicly proclaimed themselves as a sexually diverse person.¹²² Further, as

¹¹⁵ Chapters 4 and 5.

¹¹⁶ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596.

¹¹⁷ James Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 *International Law and Politics* 315, 331.

¹¹⁸ Janna Webels, 'Discretion in Sexuality-Based Asylum Cases: An Adaptive Phenomenon' in Thomas Spijkerboer, *Sexual Orientation: Gender Identity and Asylum* (Routledge 2013) 55-57.

¹¹⁹ Alex Powell, 'Normative Understandings: Sexual Identity, Stereotypes and Asylum Seeking' in Alexander Maine and Chris Ashford (eds), *The Research Handbook on Gender Sexuality and Law* (Edward Elgar 2020).

¹²⁰ Kristen Walker, 'The Importance of Being Out—Sexuality and Refugee Status' (1996) 18 *Sydney Law Review* 568; Keith Southam, 'Who am I and Who Do You Want Me to be—Effectively Defining a Lesbian, Gay Bisexual and Transgender social Group in Asylum Applications' (2011) 86 *Chicago-Kent Law Review* 1363; Eddie Bruce-Jones, 'Death Zones, Comfort Zones: Queering the Refugee Question' (2015) 22 *International Journal on Minority and Group Rights* 101, 114.

¹²¹ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596 [82-83].

¹²² Stefan Vogler, 'Legally Queer: The Construction of Sexuality in LGBTQ Asylum Claims' (2016) 50 *Law & Society Review* 856, 863.

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Wessel's has argued, the Test established in *HJ (Iran) and HT (Cameroon)* requires decision-makers to draw crude assumptions about the future conduct of asylum claimants.¹²³

The requirements in terms of making one's sexual diversity visible have been explored in some depth. For example, Jordan has argued the requirement for claimants to be open about their sexual diversity is an example of a requirement to meet masculine and ethnocentric standards of sexual visibility.¹²⁴ Millbank critiques the pressure on claimants to engage with the LGBT+ community in the receiving country and to know the current situation on LGBT+ rights in their country of origin.¹²⁵ Lewis has highlighted the pressure on claimants to have had partners and to be open about this.¹²⁶ Nasser-Edin et al. have argued this requirement is particularly onerous when sexual diversity is conceived in universal terms.¹²⁷ Finally, Khan has argued that the requirement of proving one's sexual identity and the evidential difficulties which arise in claims by sexually diverse people, as well as the test given by *HJ (Iran) and HT (Cameroon)*, have resulted in sexual diversity claimants having to surmount greater hurdles than other asylum claimants.¹²⁸

A further area that has received noteworthy attention is the evidential difficulties arising in asylum claims made by sexually diverse people. For example, McDonald-Norman argues a core issue facing those claiming asylum on the basis of their Sexual diversity is the lack of country information which provides details on the issues sexually diverse people face

¹²³ Jana Wessels, 'The Art of Drawing Lines: Future Behaviour and Refugee Status' in Satvinder Juss (ed), *The Research Handbook on International Refugee Law* (Edward Elgar 2019).

¹²⁴ Sharalyn Jordan, 'Un/Conventional Refugees: Contextualising the Accounts of Refugees Facing Homophobic or Transphobic Persecution' (2009) 26 *Refuge* 165, 173.

¹²⁵ Jenni Millbank, "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 *International Journal of Refugee Law* 1, 19.

¹²⁶ Rachel Lewis, "'Gay? Prove it:": The Politics of Queer Anti-Deportation Activism' (2014) 17 *Sexualities* 958, 963.

¹²⁷ Nof Nasser-Eddin, Nour Abu-Assad, Aydan Greatrick, 'Reconceptualising and Contextualising Sexual Rights in the MENA Region: Beyond LGBTQI Categories' (2018) 26 *Gender and Development* 173, ESP 184.

¹²⁸ Tawseef Khan, 'Investigating the British Asylum System For Lesbian, Gay and Bisexual Asylum Seekers: Theoretical and Empirical perspectives on Fairness' (PhD Thesis, University of Liverpool 2016) 133-150.

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within a number of countries.¹²⁹ As he pinpoints, often when there is a lack of country information, decision-makers assume there is a lack of persecution.¹³⁰ This issue is particularly pertinent to sexually diverse women as a majority of their lives, and therefore their persecution, is experienced in the private sphere. Wessels argues that the difficulties of producing objective evidence often mean decision-makers basing their decisions on ‘Ignorance or...heterosexual biases’.¹³¹ Similarly, Goodwin-Gill and McAdam warn that Country information ‘often gives only a general impression, more or less detailed, of what is going on’.¹³² Scavone has drawn attention to the unusual evidentiary position sexually diverse asylum seekers are placed in.¹³³ Good argues asylum decision-makers often pick and choose evidence to suit their desired result.¹³⁴ Finally, Jubany highlights the role workplace cultures have on decision-making and the interpretation of available country of origin information.¹³⁵ Jubany’s findings suggest a continuing culture of disbelief within the Home Office, in which decision-makers look for reasons to disbelieve claimants.

1.6.3 Literature Addressing Gender Based Asylum Claims

Feminist researchers have conducted essential work which draws attention to the gendered aspects of refugee law. These works build on the insights of feminist scholars such as Simone de Beauvoir, who have pinpointed the ways in which women are subjugated within the

¹²⁹ Douglas McDonald-Norman, ‘No one to Bear Witness: Country Information and LGBTQ Asylum Seekers’ (2017) 33 *Refuge* 88.

¹³⁰ *Ibid* 89; 91-93.

¹³¹ Jana Wessels, *Sexual Orientation in Refugee Status Determination* (Oxford University Refugee Studies Centre 2011) 46.

¹³² Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press 2007) 547.

¹³³ Heather Scavone, ‘Queer Evidence: The Peculiar Evidentiary Burden Faced by Asylum Applicants with Cases Based on Sexual Orientation and Identity’ (2013) 5 *Elon Law Review* 389.

¹³⁴ Anthony Good, ‘Undoubtedly an Expert? Anthropologists in British Asylum Courts’ (2004) 10 *The Journal of the Royal Anthropological Institute* 113, 124.

¹³⁵ Olga Jubany, ‘Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within’ (2011) 26 *International Sociology* 74.

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‘private’ domain.¹³⁶ Theorists such as Heaven Crawley have been pivotal at bringing to bear core feminist insights—such as the idea that the personal is political—to refugee law.¹³⁷ In doing this, feminist scholarship has sought to draw attention to the narrow and masculine terms in which the refugee has traditionally been conceived.

Feminist scholars have argued gender claims could be taken under the political opinion ground of the Refugee Convention instead of the Particular Social Group ground.¹³⁸ Honkala has expanded on this, arguing that forced marriage claims are framed as non-political, suggesting that this demonstrates the patriarchal ways in which ‘politics’ is defined within international law.¹³⁹ In other work, she has explored the limitations such a patriarchal approach to defining politics has on the ability of women to succeed in their asylum claims.¹⁴⁰ These are both themes I take up, arguing that—much like women fleeing forced marriage—a great deal of the harm experienced by sexually diverse asylum seekers happens in the private sphere, and has traditionally not been recognised as being political in nature. The result of this is that sexually diverse asylum claimants struggle to dispense with the burden of proof required for their asylum claims to be granted. In this regard, it should be noted that claimants who are both women and sexually diverse may experience intersecting issues. Within chapter eight, I discuss how looking at the claims of some sexually diverse claimants through the Political Opinion ground could begin to remedy this position.¹⁴¹ The

¹³⁶ See: Simone De Beauvoir, *The Second Sex* (Constance Borde and Sheila Malvony-Cheallier trans: Vintage Books 2011) ESP 451-653.

¹³⁷ Heaven Crawley, *Refugees and Gender: Law and Process* (Jordan Publishing 2001) 17-35. See Also: Efrat Arbel, Catherine Dauvergne & Jenni Millbank, *Gender in Refugee Law: From Margins to Centre* (Routledge 2014).

¹³⁸ Heaven Crawley, ‘Gender, Persecution and the Concept of Politics’ (2000) 9 *Forced Migration Review* 17.

¹³⁹ Nora Honkala, ‘“She, of course, Holds no Political Opinions: Gendered Political Opinion Ground in Women’s Forced Marriage Asylum Claims’ (2017) 26 *Social and Legal Studies* 166.

¹⁴⁰ Nora Honkala, ‘The Rights of Women Seeking Asylum: Procedural and Evidential Barriers to Protection’ in Satvinder Juss (ed), *The Research Handbook on International Refugee Law* (Edward Elgar 2019).

¹⁴¹ See Section 8.3.12.

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issue of the gendered way in which the political is currently conceived is repeatedly taken up within the gendered asylum literature.¹⁴² For example, MacKinnon focuses on the framing of women's political asylum claims in the US context.¹⁴³ Her focus on gendered logics can be usefully linked to ideas of public/private divide which interact with ongoing debates surrounding the provision of refugee protection to sexually diverse people.

Lewellyn has analysed the role of biological essentialism in shaping state response to claims founded on female circumcision and domestic violence.¹⁴⁴ The role of essentialism will also be a pertinent consideration within this study. This is because essentialism arises in regard to the conceptions of sexual diversity adopted by decision-makers. More specifically, decision-makers' ideas of what constitutes reasonable or believable behaviour for a sexually diverse person—alongside factors such as decision-makers' conceptions of what constitutes a political opinion—influences how they apprehend and deal with specific aspects of claimants' narratives. Put another way, this is simply a case of realising that certain ways of viewing the world centred around the essence of phenomena come to be stressed in service to the idea of making the world simpler to apprehend and understand. These are themes I expand on in chapter eight of this thesis.

1.6.4 Wider Asylum Literature

Further literature of relevance considers the political nature of the Refugee Convention itself and notes the political and social contingency of asylum.¹⁴⁵ Firstly, Nafziger argues the

¹⁴² See for example: Amy Schuman and Carol Bohmer, 'Gender and Cultural Silences in the Political Asylum Process' (2014) 17 *Sexualities* 939; Harriet Samuels, 'Women Asylum Seekers in the Current Crisis: A Conversation' (2017) 25 *Feminist Legal Studies* 99.

¹⁴³ See for example: Sarah Mackinnon, 'Positioned in/by the state: Incorporation, Exclusion, and Appropriation of Women's Gender Based Claims to Political Asylum in the United States' (2011) 97 *Quarterly Journal of Speech* 178.

¹⁴⁴ Cheryl Lewllyn, 'Sex Logics: Biological Essentialism and Gender-Based Asylum Cases' (2017) 61 *American Behavioural Science* 1120.

¹⁴⁵ Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

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refugee definition handed down in the Refugee Convention was only intended to be temporary in the aftermath of the Second World War.¹⁴⁶ Despite this, Steinbock argues it has become a cornerstone of contemporary forced migration.¹⁴⁷ However, Malley suggests there remains no necessary coherence between common language invocations of the term refugee and the Convention definition.¹⁴⁸ Hathaway¹⁴⁹ and Goodwin-Gill¹⁵⁰ have both highlighted the Refugee Convention as a dynamic instrument with its meaning shifting over time. Campbell illustrates the role of Home Office policy within the approach to asylum claims, suggesting that political—as much as legal—changes impact on the ability of claimants to rely on receiving international protection.¹⁵¹ Indeed, Hathaway pinpoints that ‘the greatest challenge facing refugees arriving in the developed world has traditionally been to convince authorities that they are, in fact, entitled to recognition of their refugee status’.¹⁵² This is one of the core issues my thesis seeks to address. How (if at all) do the lived experiences of sexually diverse asylum seekers and refugees correspond to the knowledges and discourses of sexual diversity deployed within the asylum apparatus? And how does this impact the ability of sexually diverse people to be recognised as refugees?

Turning to the Refugee Convention itself, Lehmann considers the status of the convention today, arguing that it is reaching the limits of its capacity to be creatively

¹⁴⁶ James Nafziger, ‘Refugee Law, A Commemorative Introduction’ (1992) 28 *Willamette law Review* 703, 706.

¹⁴⁷ Daniel Steinbock, ‘The Refugee Definition as Law: Issues of Interpretation’ in Frances Nicholson and Patrick Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999) 13.

¹⁴⁸ William Malley, *What is a Refugee?* (Hurst & Company 2016) 37-42.

¹⁴⁹ James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 4; James Hathaway and Jason Pobjoy, ‘Queer Cases Make Bad Law’ (2012) 44 *International Law and Politics* 315, 331.

¹⁵⁰ Guy Goodwin-Gill, ‘The Dynamic of International Refugee Law’ (2013) 25 *International Journal of Refugee Law* 651.

¹⁵¹ John Campbell, *Bureaucracy, Law and Dystopia in the United Kingdom’s Asylum System* (Routledge 2017) 16-98.

¹⁵² James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 1.

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interpreted.¹⁵³ Hathaway¹⁵⁴ and Spijkerboer¹⁵⁵ have looked at the role of barriers to entry and how these interact with the rights enshrined under the Refugee Convention. While Juss and Mitchell have looked at the role of what they term the gatekeepers to asylum, namely country guidance, indiscriminate violence, and the potential for internal relocation, in terms of how these phenomena interact with the rights protected under the Refugee Convention.¹⁵⁶ While each of these arguments are relevant and pertinent, this thesis focuses more directly on the national issues regarding the administrative and legal framework for refugee status determination within the UK. This focus is partly pragmatic, beginning from the standpoint that no document offering a greater level or scope of protection than the Refugee Convention would gain international support within the current geo-political climate.

1.6.5 Queer and Post-Colonial Scholarship

Given the focus of this thesis, it is also pertinent to consider some aspects of queer and post-colonial scholarship. These theoretical perspectives are explored with a view to analysing how existing contributions to these bodies of literature relate to the approach adopted within this thesis.

A useful starting point is with the work conducted regarding the experiences of LGBT+, sexually diverse, and queer Muslims. As Jivraj and De Jong have argued in the context of Dutch asylum claims and Tschalaer has argued in the context of Germany,

¹⁵³ Julian Lehmann, 'At the Crossroads: the 1951 Geneva Convention Today' in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

¹⁵⁴ James Hathaway, 'The Emerging Politics of Non-Entrée' (1992) 91 *Refugees* 40; Thomas Gammeloft-Hansen & James Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Colombian Journal of Transnational Law* 235.

¹⁵⁵ Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20 *European Journal of Migration and Law* 452.

¹⁵⁶ Satvinder Juss and Jeni Mitchell, 'Gatekeepers of Asylum: UK Country Guidance, Indiscriminate Violence and Internal Relocation' in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

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claimants basing their claim on sexual diversity are likely to face incredulity and disbelief if they are a Muslim.¹⁵⁷ Therefore, the work Ziba Mir-Hosseini and Vanja Hamzic have undertaken into the conceptual difficulties many people face in understanding the lives of queer Muslims, and the complications associated with the simplistic notion that Islam represses sexual diversity, presents a useful starting point.¹⁵⁸ Hamzic has extended this research further, exploring the complicated relationship between international LGBT+ rights activism and human rights frameworks and conceptions of the queer Muslim.¹⁵⁹ Similar contributions, such as that of Nasser-Eddin, Abu Assab and Greatrick, have shown the issues that can arise when attempts are made to universalise “western” frameworks for understanding sexual and gender diversity.¹⁶⁰ The considerations both Hamzic and Nasser-Eddin et al draw attention to have informed my own approach to this study, contributing to a scepticism directed towards universal identity categories and seeking to detect the implicit assumptions underlying such conceptual frameworks.

In a similar vein, both post-colonial scholars such as Abu Assab¹⁶¹, and queer theorists such as Adler¹⁶² and Spade,¹⁶³ have offered critical examinations of the roles which

¹⁵⁷ See Generally: Suhraiya Jivraj & Anisa De Jong, ‘The Dutch Homo-Emancipation Policy and its Silencing Effect on Queer Muslims’ (2011) 19 *Feminist Legal Studies* 143; Mengia Tschalaer, ‘Between Queer Liberalisms and Muslim Masculinities: LGBTQI+ Muslim Asylum Assessment in Germany’ (2020) 43 *Ethnic and Racial Studies* 1265.

¹⁵⁸ Ziba Mir-Hosseini & Vanja Hamzic, *Control and Sexuality: The Revival of Zina Laws in Muslim Contexts* (Women Living Under Muslim Laws 2010).

¹⁵⁹ Vanja Hamzic, ‘Unlearning Human Rights and False Grand Dichotomies: Indonesian Archipelagic Selves Beyond Sexual/Gender Universality’ (2012) 4 *Jindal Global Law Review* 157; Vanja Hamzic, ‘The Case of “Queer Muslims”: Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Legal and Social Ethos’ (2011) 11 *Human Rights Law Review* 237.

¹⁶⁰ Nof Nasser-Eddin, Nour Abu-Assab & Ayden Greatrick, ‘Reconceptualising sexual rights in the MENA region: Beyond LGBTQI Categories’ (2018) 26 *Gender & Development* 173.

¹⁶¹ Nour Abu-Assab, Nouf Nasser-Eddin & Roula Seghaier, ‘Activism and the Economy of Victimhood: A Close Look at NGO-ization in Arabic Speaking Countries’ (2020) *Online First Interventions* 1.

¹⁶² Libby Adler, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Duke University Press 2018). See Also: Libby Adler, ‘Life at the Corner of poverty and Sexual Abjection: Lewdness, Indecency and LGBTQ Youth’ in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender, Sexuality and Law* (Edward Elgar 2020).

¹⁶³ Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, & The Limits of Law* (Duke University Press 2015).

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charities and NGOs play in setting law reform agendas around the rights of sexually diverse people. Specifically, all point to an inherent conservatism resulting from the reliance of such organisations on funding and on maintaining good relations with institutions, such as the Home Office. Similar pressures impact the key charities working to help sexually diverse asylum seekers and refugees. Therefore, while I am grateful for the assistance which charities have provided to this study—alongside the extremely valuable work they do assisting sexually diverse asylum claimants—this study takes forward an awareness of the extent to which charitable organisations can act as gatekeepers and prevent alternative perspectives from being properly considered.¹⁶⁴ Of course, many of these organisations are simply employing strategic essentialism. In that they are attempting to help sexually diverse asylum seekers in the ways they believe will be the most effective. However, as Rubin has noted, ‘it is an exercise in futility to anoint any particular critical stance or political movement with permanent transgressive or revolutionary status.’¹⁶⁵ In this regard, all the study is seeking to do is to analyse and draw attention to the costs which arise because of these deployments of strategic essentialism.¹⁶⁶ Rather than to imply criticism or blame of such organisations.

Much of the literature previously considered has been written from a queer or post-colonial perspective reflecting mainly on the Middle East. It is similarly important to look towards the literature of post-colonial scholars from other refugee countries of origin, such as those based in African nations. One way of approaching such an examination is to look at collections of anthropological essays. Although many of these essays are written by white

¹⁶⁴ Nuno Ferreira, ‘Fake SOGI Asylum Claims as a Form of Epistemic Injustice’ (SLSA Annual Conference, Cardiff University, 2021).

¹⁶⁵ Gayle Rubin, ‘A Little Humility’ In David Halperin and Valerie Traub (eds), *Gay Shame* (University of Chicago Press 2010) 369-370.

¹⁶⁶ See: Joshua Gamson, ‘Must Identity Movements Self-Destruct? A Queer Dilemma’ (1995) 42 *Social Problems* 390.

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academics, from colonial perspectives, as Tamale has argued, they can be useful for showcasing the autochthonous conceptions of sexual diversity which have historically existed within some refugee countries of origin.¹⁶⁷ Therefore, it is important that this thesis is read with an awareness that collections such as *Boy-Wives and Female Husbands: Studies of African Homosexualities*¹⁶⁸ and *African Sexualities: A Reader*¹⁶⁹ exist, and document some of the various ways in which sexual diversities have manifested themselves across the African continent.¹⁷⁰

As Murray and Roscoe argue, in concluding a collection of essays they edited on the topic of sexual diversity across Africa,

All [African] societies had words—many words, with many meanings—for these [same-sex] practices... There is substantial evidence that same-sex practices and patterns were “Traditional” and “Indigenous”. Although Contact between Africans and non-Africans has sometimes influenced both groups sexual patterns, there is no evidence that one group ever “introduced” homosexuality to the other.¹⁷¹

Though it is hard to escape the colonial and othering way in which they discuss African¹⁷² conceptions of sexual diversity, this quote nonetheless gives an important reminder that

¹⁶⁷ Sylvia Tamale, ‘Researching and Theorising Sexualities in Africa’ In Sylvia Tamale (Ed), *African Sexualities: A Reader* (Pambazuka Press 2015) 14-17.

¹⁶⁸ Stephen O Murray and Will Roscoe (eds), *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillan 1998).

¹⁶⁹ Sylvia Tamale (Ed), *African Sexualities: A Reader* (Pambazuka Press 2015).

¹⁷⁰ See also: Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar 2019); Vanja Hamzic, *Sexual and Gender Diversity in the Muslim World: History, Law and Vernacular Knowledge* (I.B Tauris 2016); Ziba Mir-Hosseini & Vanja Hamzic, *Control and Sexuality: The Revival of Zina Laws in Muslim Contexts* (Women Living Under Muslim Laws 2010); Oyeronke Oyewumi, *The Invention of Women: Making an African Sense of Western Gender Discourses* (University of Minnesota Press 1997); Ifi Amadume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (Zed Books 1987);

¹⁷¹ Stephen O Murray and Will Roscoe, ‘Diversity and Identity: The Challenge of African Homosexualities’ in Stephen O Murray and Will Roscoe (eds), *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillan 1998) 267.

¹⁷² It should be noted that Africa is a continent which has a diverse range of practices and knowledges. The use of this phrase is, therefore, problematic. However, it is used here for simplicity.

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sexual diversity exists both prior to, and in other modalities than, the ways in which Europeans have come to conceive of contemporary “sexuality”

1.7 The Purpose of My Research: Identifying a Gap

This research seeks to remedy an omission in scholarship by offering an assessment of the 2016 API and the governmentality which underlies both the policy and its application.¹⁷³ This analysis is performed through exploring the lived experiences of eight people who have successfully claimed asylum on the basis of their sexual diversity. The interview participants came from a wide range of backgrounds with three being from Egypt, one from Oman, one from Nigeria, two from Uganda (one of whom had spent a period of their adulthood living in Nigeria), and one from Indonesia. Therefore, one of the core original contributions of this thesis is this focus on the lived experiences of sexual diversity among sexually diverse asylum seekers. While numerous scholars have interviewed asylum decision-makers or lawyers specialising in sexual and gender minority claims, few have undertaken empirical research into how sexually diverse refugees and asylum seekers experience their own sexual diversity.¹⁷⁴

Alongside the above, this thesis contributes a more critical orientation to law and policy than previous research in this area, drawing on the insights of Foucauldian theory as well as queer and post-colonial theories to critically interrogate the knowledges and discourses around sexual diversity. This enables me to critically address the assumptions

¹⁷³ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019.

¹⁷⁴ Some notable exceptions being Khan, Giametta, and Bennett. See: Tawseef Khan, 'Investigating the British Asylum System For Lesbian, Gay and Bisexual Asylum Seekers: Theoretical and Empirical perspectives on Fairness' (PhD Thesis, University of Liverpool 2016); Calogero Giametta, '*The Sexual Politics of Asylum: Sexual Orientation and Gender Identity in the UK Asylum System*' (Routledge 2017); Claire Bennett, 'The Perspectives of Lesbians Seeking Asylum in the UK' (PhD Thesis, University of Sussex 2014).

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underlying previous academic research, such as the idea that sexual orientation and sexual identity are appropriate frameworks through which to understand and analytically characterise the experiences of sexually diverse people.

Therefore, the core original contribution of this thesis is an analysis which focuses on the extent to which the 2016 API – and wider knowledges of “sexuality” – are able to account for the heterogenous range of sexual diversities as they are lived by sexually diverse people. Thus, the first original contribution of my thesis lies in its focus on lived experience as a means of analysing whether there is a mismatch between the 2016 API and the lives of sexually diverse refugees and asylum seekers (1). Secondly, the use of an interdisciplinary methodology sets my thesis out as distinctive and allows it to question the assumptions which currently underly the legal asylum framework, in a manner that more traditional, doctrinally constrained, projects have been unable to (2). Thirdly, the use of a queer and critical approach allows the thesis to interrogate existing structures of knowledge in this area. Accounting for these three original contributions, the core overall contribution of this thesis is to offer a *queering* of the current 2016 API and the interpretative matrix through which it will be read, pinpointing areas of mismatch and presenting a series of considerations which future researchers and policy-makers in this area need to consider.

1.8 Definition of Terms

This section will offer a definition of the theoretical, conceptual, or politically contested terminology used within this thesis. In doing so, I seek to pre-empt questions about my usage of language, and to pinpoint the theoretical impulses driving my adoption of certain terms. As Hamzic reminds us, when using terminology regarding human behaviour, it is important to be

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aware of the continuing potential for contestation, dispute and re-definition.¹⁷⁵ As a result of this, when considering terminology we are required to ‘depart from either extreme of the essentialist versus constructionist conceptions and posit that the complex notion of who we are is derived from the interplay of inherent preconditions and malleable effects of social upbringing’.¹⁷⁶ As Discussed in chapter two, definitions of terminology and wider theoretical concepts also interact in important and valuable ways with matters of methodology and epistemology. Simply put, the language we employ directly shapes how we perceive and make sense of the world.¹⁷⁷

1.8.1 Queering

The terms ‘queering’ or ‘queer’ are used in numerous contexts with vastly differing meanings intended. The meaning will often depend on the political orientation of its user. Indeed, one of the primary critiques levelled at some works of queer theory is that it is inarticulate and unclear and therefore undemocratic.¹⁷⁸ As Zanghellini has suggested, there is an extent to which,

We would not be queer theorists if we were not narcissistically invested in a vision of ourselves as romantic antiheroes. This is one of the reasons that account for some of the deliberate silences and ambiguities in our work: we try to avoid spelling out some assumptions or judgements that align with normative exercises of practical reason,

¹⁷⁵ Vanja Hamzic, ‘The Case of “Queer Muslims”’: Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Legal and Social Ethos’ [2011] 11 Human Rights Law Review 237, 239.

¹⁷⁶ Ibid, 239.

¹⁷⁷ See Further: Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Alan Sheridan trans: Routledge 1989). ESP: 33-38; 235-264; 272-321.

¹⁷⁸ Martha Nussbaum, ‘The Professor of Parody: The Hip Defeatism of Judith Butler’ (1999) 220 *The New Republic* 37; Anne Oakley, *Gender on Planet Earth* (The New York Press 2002) 190.

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lest we should come across as a little pedestrian, a little too uncool relative to our impossibly queer academic colleague.¹⁷⁹

However, in view of this, it seems to me imperative that I ensure my own use of the term queering is clearly defined at this early stage. My use of the term queering follows Halberstam, who situates queer as being a part of a process of disrupting underlying assumptions.¹⁸⁰ I adopt this definition here.

Halberstam's definition of queering as a process of disrupting underlying assumptions is also consistent with the definitions provided by other theorists. Abes and Kasch, for example, state that 'queer theory critically analyses the meaning of identity, focusing on intersections of identities and resisting oppressive social constructions of sexual orientation and gender'.¹⁸¹ Central to their definition is the idea of 'resisting oppressive social constructions', something which inherently requires the disruption of underlying assumptions. For example, to resist the oppressive social construction of gender, one is first required to disrupt the idea that gender is an innate or intrinsically biological phenomenon.

Obviously, the terms queer, queering, and queer theory are intertwined. However, as will be explained in subsequent sections, queer carries a dualistic meaning, which is not always coherent with the one here provided for queering.¹⁸² For this reason, a separate definition of queer is provided later in this definition of terms.

Accounting for the above, my definition of queering both within the title of this thesis and within its stated original contributions centres on disrupting the underlying knowledges

¹⁷⁹ Aleardo Zanghellini, 'Antihumanism in Queer Theory' (2020) 34 *Sexualities* 530, 540.

¹⁸⁰ Jack Halberstam, *Female Masculinity* (Duke University Press 1998) 13.

¹⁸¹ Elisa Abes and David Kasch, 'Using Queer Theory to Explore Lesbian College Students' multiple dimensions of identity' (2007) 48 *Journal of College Student Development* 619, 620.

¹⁸² Stychin offers a useful discussion of the inter-relations between queerness and queer theory. See: Carl Stychin 'Being Gay' (2014) 40 *Government & Opposition* 90, 95-102.

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and discourses of sexual diversity which pervade both the 2016 API and the ways in which decision-makers approach issues relating to sexual diversity.

1.8.2 Sexually Diverse People

This thesis uses the term ‘sexually diverse people’ in order to refer to refugees and asylum seekers who are claiming asylum on the basis of their “sexuality”.¹⁸³ This is in contrast with the majority of literature addressed to sexual diversity asylum claims which employs the term sexual orientation.¹⁸⁴ However, building on the work of Savin-Williams—who contends that the term “sexuality” conflates sexual identity, sexual orientation, and sexual behaviour¹⁸⁵ – I argue that the term sexual orientation presents an account which focuses only on attraction, thus failing to account for the role of both sexual behaviour and the wider signifiers of sexual identity within the context of refugee status determinations.¹⁸⁶ Considering Home Office Asylum Policy¹⁸⁷ and the words of lord Rodger in *HJ (Iran) and HT (Cameroon)*¹⁸⁸, as well as academic insight, I argue asylum claims currently focus on the claimants’ sexual identities,

¹⁸³ It is acknowledged that the use of the term sexually diverse people may prove to be over inclusive. For example, BDSM practitioners may quite rightly consider themselves to be sexually diverse people. However, accounting for the potentially life threatening impact of adopting too narrow of a definition, I consider it preferable to be over rather than under inclusive when adopting terminology.

¹⁸⁴ See for example: For example, Millbank interchangeably uses the terms sexual identity and sexual orientation. See: Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations’ (2009) 21 International Journal of Refugee Law 1, 1-34; Jenni Millbank, ‘Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation’ (2003) 18 Georgetown Journal of Immigration Law 71.

¹⁸⁵ Stychin has also usefully summarised the issues that arise when seeking to determine the relationship between sexual activities, desires, and behaviours. See: Carl Stychin ‘Being Gay’ (2014) 40 Government & Opposition 90, 91-95.

¹⁸⁶ He explains this through the example of a closeted teenage boy, who holds a heterosexual *identity*, in terms of identifying as straight; a gay *orientation*, because he is exclusively attracted to members of the same sex; and no sexual *behaviour*, because he has yet to explore partnered sexual activity. See: Rich Savin-Williams, ‘*The New Gay Teenager*’ (Harvard University Press 2005) 27-48.

¹⁸⁷ Despite their decision to deploy the term sexual identity within the title. See: UK Visas and Immigration, ‘Asylum Policy Instruction: Sexual Orientation In Asylum Claims’ (Home Office 2016).

¹⁸⁸ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596, [78].

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rather than their sexual orientation.¹⁸⁹ Therefore, using the term sexual orientation would be misleading. Indeed, while sexual identity is often dependent on sexual orientation, sexual identity is itself further reaching and yet also narrower, considering a range of social and sexual conduct which is neither inherently, nor necessarily, implicated in sexual orientation. More directly, sexual identity includes social, sexual, political, and economic commitments. As Khan has argued:

Law and society must imbibe the reality that sexual orientation is part of a more substantial sexual identity... Additionally, identity formation can be a long-term process, especially for groups whose sexual or gender expressions are stigmatised and/or actively oppressed socially¹⁹⁰

The new framework for the claims of sexually diverse people is a part of a movement to shift the discussion from being about sexual behaviour to being about identity.¹⁹¹ While, as I develop in subsequent chapters, I do not accept the premise that an unchallenged movement towards sexual identity is a helpful approach for ensuring that sexually diverse asylum seekers receive the protection they need, its increased relevance does render the use of the term sexual orientation outdated and inaccurate when discussing the framework for claiming asylum on the basis of sexual diversity.

However, I also seek to avoid the use of the term sexual identity, at least outside of quotations or descriptions of its current role within refugee status determination. This is in

¹⁸⁹ Alex Powell, 'Normative Understandings: Sexual Identity, Stereotypes, and Asylum Seeking' in Chris Ashford and Alexander Maine (eds), *The Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020); Alex Powell, 'Interviews With Asylum Seekers Reveal Why The Home Office Rejects So Many LGBT Claims' (*The Conversation*, 2019) <<https://theconversation.com/interviews-with-asylum-seekers-reveal-why-the-home-office-rejects-so-many-lgbt-claims-122905>> accessed 12 May 2020.

¹⁹⁰ Tawseef Khan, 'Investigating the British Asylum System For Lesbian, Gay and Bisexual Asylum Seekers: Theoretical and Empirical perspectives on Fairness' (PhD Thesis, University of Liverpool 2016) 9.

¹⁹¹ *Ibid*

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respect of the outcomes of my interviews, as well as my wider engagement with queer and post-colonial theory. As I explore in chapter five, there are large numbers of people for whom being sexually diverse does not constitute an identity. Given that the purpose of this thesis is to explore whether knowledges and discourses on sexual diversity correspond to the ways in which refugees and asylum seekers understand themselves, it would undermine the core research objectives of this thesis to adopt the term sexual identity.

The use of sexual behaviour as a way to signify and discuss sexually diverse people, would suffer from similar limitations to both sexual orientation and sexual identity, in that it gives precedence to just one aspect of sexual diversity over others. Additionally, if adopted within the wider legal landscape, it would undoubtedly lead to the kind of practices prohibited by the *A, B, and C* decision, with a focus returning to providing evidence of sexual activity which would inevitably risk being sexually explicit in nature.¹⁹² Despite this, it is crucial that account is taken of the inadequacy of an overreliance on the use of either “western” conceptions of identity, and of the fact that within some cultures, sexual diversity continues to be viewed as a form of conduct rather than being in relation to either identity or orientation. Therefore, while I do not employ the use of the term sexual behaviour, I do argue that sexual behaviour is often too readily dismissed—for very prevalent and understandable reasons—from discussions regarding how we should understand sexual diversity.

Similar terminological issues have been faced by sexual health organisations. Originally intended to relate the risks of infection with sexually transmissible conditions such as HIV with behaviours instead of identities, sexual health services and charities began

¹⁹² *Cases A-148 to C-150, ABC v Staatssecretaris van Veiligheid en Justitie* [2014] ECRI- 2406.

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adopting conduct-driven language such as ‘men who have sex with men’ (MSM).¹⁹³

Although their original aim was to reduce stigma produced by HIV, they have gained a secondary function, operating as more inclusive signifiers which can help to include a wider range of people requiring sexual health support, but not identifying with an “at risk” group, to gain access to that support. As Morris has documented in the context of sex worker outreach, overly identarian frameworks may prevent people from accessing the support which they require.¹⁹⁴ However, this approach to terminology has been critiqued, with some researchers arguing that it erases sexually diverse identities.¹⁹⁵ This criticism centres around the idea that such conduct-driven language ignores the social dimensions of “sexuality”. I would argue, given that the language is designed to capture those people who do not identify with those social and cultural aspects of sexual diversity, that these critiques are ill-conceived. Indeed, given the increased sexual health needs of men who have sex with men, irrespective of their identity, the adoption of such language appears a sensible and pragmatic step.¹⁹⁶

The adoption of similar language in the context of this research was considered. Specifically, I considered the implications of adopting terminology such as MSM. However, while simplified language may make sense in regard to public health policy—nobody contracts a sexually transmitted infection because of their identity or an attraction they do not act on—such an essentialising of sexual diversity down to behaviour would be inappropriate

¹⁹³ Rebecca Young & Ilan Meyer, ‘The Trouble with “MSM” and “WSW”’: Erasure of the Sexual Minority Person in Public Health Discourse (2005) 95 *American Journal of Public Health* 1144, 1144-1145.

¹⁹⁴ See: Max Morris, ‘Incidental Sex Work: Casual and Commercial Encounters in Queer Digital Spaces’ (PhD Thesis, Durham University 2018) 223-224; Max Morris, *The Limits of Labelling: Incidental Sex Work Among Gay, Bisexual, and Queer Young Men on Social Media* (2021) Online First Sexuality Research and Social Policy.

¹⁹⁵ Rebecca Young & Ilan Meyer, ‘The Trouble with “MSM” and “WSW”’: Erasure of the Sexual Minority Person in Public Health Discourse (2005) 95 *American Journal of Public Health* 1144.

¹⁹⁶ As Savin-Williams has documented to phenomenon of men who do not identify as either gay or bisexual having sex with other men is relatively widespread. See generally: Ritch Savin-Williams, *Mostly Straight: Sexual Fluidity Among Men* (Harvard University Press 2017).

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for understanding the more complex social relations involved in sexual diversity. Therefore, just as a sexual orientation must be rejected for essentialising sexual diversity down to a matter of attraction, so too must MSM be rejected for essentialising sexual diversity down to behaviour.

Accounting for the above, this thesis employs the phrase sexually diverse people. The term is intended to capture anyone who engages in sexual activity with, is attracted to, or who identifies with, a culture founded around a non-normative sexual practice or partner. In setting the term out this broadly, the research is equally equipped to address the experiences of people adopting a gay or lesbian identity in a contemporary “western” style, as it is to those who have incidentally or occasionally had sexual activity with members of the same sex, as well as capturing those who may identify with a sexually diverse group despite having no desire to engage in sexual or romantic activity of any kind. For example, the use of sexually diverse people helps to ensure that asexual people—some of whom may also identify as gay or lesbian, or any other form of sexual diversity, alongside their asexuality—are included within discussions. Additionally, the focus on sexually diverse people leaves room for participants’ own self-conceptions to be centred, allowing space for individuals to construct their own narrative and their own framework for making sense of that narrative.

It is recognised that this terminology could also capture other marginalised sexual minorities such as those who participate in BDSM practices, those who consider themselves sexually ‘fluid’, and others. However, given the potential harms that may arise if the asylum system conceives of sexual diversity in too narrow of a manner, I argue that adopting over-inclusive terminology is preferable to adopting under-inclusive terminology.

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1.8.3 From LGBT+ Politics to Queer Politics

As a corollary of these decisions around terminology, the term LGBT+ is not employed as a form of identity within this thesis, save from its inclusion within quotes by participants or other authors, or where LGBT+ is used in contrast to the ways in which participants or theorists from other cultural backgrounds understand their diversities, identities, and political commitments.

LGBT+ is commonly used as an umbrella term designating a number of different identity categories. Specifically, it refers to gay men, lesbians, bisexual people, people under the trans umbrella and an expanding range of other identities. Crucially, however, each of these identities are commonly seen as fixed and capable of clearly demarcating boundaries.¹⁹⁷ Indeed, one of the tactics employed by equality campaigners has been to stress the immutable and prior status of LGBT+ identities.¹⁹⁸ This phenomenon is another form of strategic essentialism and involves choosing to present an identity in a simplified—or essentialised—manner in order to achieve a given political goal.¹⁹⁹

In this context, a good example of strategic essentialism is the ‘born this way’ narrative which has been utilised in the US context to counter the claim that people choose to be gay and are, therefore, morally culpable and blameworthy for their sexual diversity. Johnson warns that the ‘born this way’ myth, like all other myths of origin, has a tendency to

¹⁹⁷ As Stychin has argued, the very fact that, for example, gay is seen as an identity suggests that it must have a lively of stability. See: Carl Stychin ‘Being Gay’ (2014) 40 *Government & Opposition* 90. See Also: Alex Powell, ‘Normative Understandings: Sexual identity, Stereotypes, and Asylum Seeking’ in Chris Ashford and Alexander Maine (eds), *The Research Handbook on Gender, Sexuality and Law* (Edward Elgar 2019); Thomas Spijkerboer, ‘Sexual identity, Normativity and Asylum’ in Thomas Spijkerboer, *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge, 2013) 217.

¹⁹⁸ Marie Draz, ‘Born this Way?: Time and the Coloniality of Gender’ (2017) 31 *The Journal of Speculative Philosophy* 372, 372-373. See also: Tim Johnson, ‘Beyond “Born This Way”’ (2015) 5 *PhiloSOPHIA* 140, 140-144.

¹⁹⁹ Gayatri Spivak, ‘Criticism, Feminism and the Institution’ (1985) 1 *Thesis Eleven* 175, 175-187.

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provide a complete and totalizing view of the world, which ‘can lead to fascist thinking.’²⁰⁰

Despite this, it should also be noted that people outside of the west do not necessarily identify with the terms lesbian, gay, bisexual or transgender, and may not express their sexual diversities in a manner consistent with them.²⁰¹ Nor will all consider sexual diversity to be a status they were born into.

As a result of the political commitments often associated with LGBT+ charities, organisations, and campaign groups, the term can also be associated to a strategic and intellectual approach to issues of equal rights and sexual diversity. Adler has termed this ‘LGBT[+] equal rights discourse’, arguing that this is a ‘host of narrative practices evident in contemporary... equal rights advocacy... The discourse comprises a cluster of constituent strands that depict, characterise and represent LGBT[+] people’.²⁰² LGBT+ equal rights discourse has, in recent years, adopted an increasingly normative thrust, targeting agendas such as marriage equality or tougher sentences for hate crime.²⁰³ Often, the framing of arguments by LGBT+ organisations—and by many members (primarily white gay men) of the community itself—toe an assimilationist line attempting to secure rights and tolerance by accentuating the similarities between themselves and the norm and disclaiming differences.²⁰⁴ This focus on sameness and an assimilation to the neo-liberal state makes the standpoint of

²⁰⁰ Tim Johnson, ‘Beyond “Born This Way”’ (2015) 5 *PhiloSOPHIA* 140, 141.

²⁰¹ For example, in Nepal, men who are the receptive partner in sexual encounters with other men take on identities such as Hijra. Men who are the penetrative partner in sex with other men take on the label TA. The Hijra label is actually closer to the western conception of transgender identity, with Hijra’s being categorised as a third gender. Otherwise put, in societies like Nepal, sexual object choice does not yield a sexual identity role. Rather, sexual role leads to the attribution of a gender identity. For this reason, it is incumbent on researchers working at the intersections of sexuality and migration not to apply western signifiers. See Kyle Knight, ‘Outliers: Sunil Babil Pant, The Blue Diamond Society, and Queer Organizing in Nepal.’ (2014) 19 *Studies in Nepali History of Society* 113.

²⁰² Libby Adler, ‘*Gay Priori: A Queer Critical Legal Studies Approach to Law Reform*’ (Duke university Press 2018) 3.

²⁰³ *Ibid* 105-107.

²⁰⁴ See Further: Chris Ashford, Max Morris and Alex Powell, ‘Bareback Sex in the Age of Preventative Medication: Rethinking the “Harms” of HIV Transmission’ (2020) 84 *The Journal of Criminal Law* 596, 606-607.

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LGBT+ rights a limited one for engaging in a critique of state policy. As explored in chapter eight, the framework of LGBT+ equal rights discourse sits within the same scheme of governmentality as the *latest Asylum Policy Framework* and thus does not offer a useful analytic purchase for pointing out mismatches between the lived experiences of sexually diverse refugees and the knowledges and discourses of sexual diversity deployed within the asylum apparatus.

LGBT+ equal rights discourse can be contrasted with queer politics. As mentioned in 1.8.1, Queer politics seeks to disrupt social structures, breaking them apart by focusing on their underlying assumptions and drawing attention to who they exclude.²⁰⁵ Queer, as a term, should be understood in a dualistic way. Firstly, it has associations to queering and queer theory as discussed previously. Secondly, it is understood as an identity, or perhaps as the anti-identity identity. These two understandings are not mutually exclusive. Indeed, often the reason for the stigma and discrimination directed at queer people is that their identity performances disrupt underlying assumptions about the world.

At the outset of this thesis, I had expected to utilise the term queer to describe participants and those exhibiting non-heteronormative behaviours and identities instead of sexually diverse people. However, having interacted with both participants and organisations working in the sector, I now argue that the term entails too many political commitments and, much like LGBT+, is not embraced as an identifier by many sexually diverse people from refugee countries of origin. Specifically, queer as an “identity” entails commitments to the radical contingency of identity, viewing all identities as a product of the social conditions in

²⁰⁵ Spade offers an instructive vision of what a programme of queer law reform may look like in the context of Trans rights within the US. See: Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, & The Limits of Law* (Duke University Press 2015) 94-139.

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which they have been produced. This lack of fixed borders means that some of the inherent issues which usually face identarian progressive platforms can be avoided. As Valdes identifies, queerness is not constrained to a discrete identity or identification, but instead reveals our non-normative sexual, gendered, and cultural differences.²⁰⁶ This quality is particularly important when dealing with the issues confronting asylum seekers, as it is often not sexual diversity itself that sits at the root of their persecution. Indeed, as Nassir-Edin et al have found within the Middle East and North Africa (MENA) region, ‘even [heterosexual] couples that do not wish to have children are frowned upon and considered non-normative according to societal expectations’.²⁰⁷ Though this is a position I sympathise with, four of my eight participants felt that, despite growing up in contexts without a strong sense of LGBT+ community, they had been born into their identity. Therefore, I will not adopt a signifier of identity/non-identity that could potentially erase their self-conceptions. However, the thesis does utilise queer in the other sense of the term, offering queer politics as a counterbalance—and perhaps a more desirable path—to the LGBT+ equal rights discourse currently informing much policy and practice regarding sexual diversity.

A further reason for my selection for the term queer over LGBT+ draws on critiques made by Duggan of the homonormative nature of LGBT+ culture. Duggan’s critique argues that, increasingly privileged members of the LGBT+ community—such as white gay men—form de-politicised constituencies who prop up, rather than challenge, traditional structures of classed, racialised, and gendered violence and power.²⁰⁸ This is similar to the critique

²⁰⁶ Francisco Valdes, ‘Queering Sexual Orientation: A Call for Theory as Praxis’ in Martha Fineman, Jack Jackson and Ada Romero (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate 2009) 107.

²⁰⁷ Nof Nasser-Eddin, Nour Abu-Assab & Aydan Greatrick, ‘Reconceptualising and Contextualising Sexual Rights in the MENA Region: Beyond LGBTQI Categories’ (2018) 26 *Gender & Development* 173, 180.

²⁰⁸ Lisa Duggan, ‘The New Homonormativity: The Sexual Politics of Neoliberalism’ in Russ Castronovo & Dana Nelson (eds) *Materialising Democracy: Toward a Revitalized Cultural Politics* (Duke University Press 2002) 175-194.

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intended when Adler describes LGBT+ equal rights discourse. Therefore, taking account of this distinction, and giving weight to recent research demonstrating the specific temporality of LGBT+ rights and identities within the “West”,²⁰⁹ I argue that it is possible for the asylum apparatus to be LGBT+ inclusive, while continuing to exclude queer people.²¹⁰ In this respect, I note the increasingly normative status attained by “Western” LGBT+ people, with some theorists even claiming that middle-class gay men are able to access alternative forms of ‘*Gay Capital*’²¹¹ that privilege them socially, and contrast this to the continued social exclusion experienced by queer people.

Finally, it is important to take note of the potentially racialised and secularised connotations of LGBT+ politics.²¹² Rahman has noted that officials commonly read religions, and in particular Islam, as being incompatible with performing an LGBT+ identity.²¹³ Other theorists have noted the racialised nature of LGBT+ identities,²¹⁴ with some arguing that gay is coded as white.²¹⁵ These arguments are all the more compelling within the context of the current political moment which Puar claims involves an increasing fusion of LGBT+ identities with nationalism.²¹⁶ Importantly, many gay organisations have also supported these

²⁰⁹ See Generally: Jasbir Puar, ‘Mapping US Homonormativities’ (2006) 13 *Gender, Place and Culture*; Jasbir Puar, ‘Terrorist Assemblages: Homonationalism in Queer Times’ (Duke University Press 2012).

J Puar, ‘Rethinking Homonationalism’ (2013) 45:2 *International Journal of Middle Eastern Studies*; N Nasser- 3
²¹⁰ Stychin pinpointed these concerns during the early 2000s. see: Carl Stychin, ‘Same-sex Sexualities and the Globalization of Human Rights Discourse’ (2004) 49 *Mcgill Law Journal*. 951, 965-968.

²¹¹ Max Morris, “‘Gay Capital’ In Gay Student Friendship Networks: An Intersectional Analysis of Class, Masculinity, and Decreased homophobia’ (2018) 35 *Journal of Social and Personal Relationships* 1183.

²¹² Deborah Morgan, ‘Not Gay Enough for the Government: Racial and Sexual stereotypes in Sexual Orientation Asylum Cases’ (2006) 15 *Law and Sexuality* 135.

²¹³ Momin Rahman, ‘Queer as Intersectionality: Theorising Gay Muslim Identities’ (2010) 44 *Sociology* 944.

²¹⁴ See for example: Calogero Giametta, “‘Rescued’ Subjects: The Question of Religiosity for Non-Heteronormative Asylum Seekers in the UK’ (2014) 17 *Sexualities* 583; Momin Rahman, ‘Queer as Intersectionality: Theorising Gay Muslim Identities’ (2010) 44 *Sociology* 944.

²¹⁵ Deborah A. Morgan, ‘Not gay enough for the government: Racial and sexual stereotypes in sexual orientation asylum cases’ (2006) 15 *Law & Sexuality: Rev. Lesbian, Gay, Bisexual & Transgender Legal Issues* 135.

²¹⁶ See generally: Jasbir Puar, ‘*Terrorist Assemblages: Homonationalism in Queer Times*’ (Duke University Press 2012).

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lines of argument, endorsing politicians who create hostile environments for ethnic minorities and non-nationals.²¹⁷

The significance of this distinction between queer and LGBT+ to my thesis comes in the ways in which the terms will be used. As my interest lies in analysing whether knowledges of sexual diversity deployed within the asylum apparatus are compatible with the epistemologies of sexual diversity held by sexually diverse refugees and asylum seekers, I argue that adopting a framework based in LGBT+ equal rights politics would not provide meaningful responses to the research questions addressed in this thesis. This is so because the core purpose of this research is to attempt to critique and test assumptions about the universalisability of these (LGBT+) identities and, therefore, to make space for queer and diverse identities which may currently go unrecognised. Therefore, while I do not attribute the term queer to any participant—except for when this term was selected by them as a form of self-identification—and refer to all claimants by their self-identification as indicated at interview, I advance a line of argument which focuses on these differences between LGBT+ and queer inclusion, engaging in a critical analysis that considers the points of mismatch between the heterogenous lived experiences of sexually diverse asylum claimants and the conceptions of identity and truth underlying UK asylum policy and decision-maker practice.

1.8.4 Apparatus

The term apparatus is frequently employed within this thesis. My meaning in employing this term follows Agamben's characterisation of Foucault's meaning. Agamben defines apparatus as a 'heterogenous set that includes virtually anything, linguistic, non-linguistic, under the same heading: discourses, institutions, buildings, law, police measures, philosophical

²¹⁷ Chris Ashford, Max Morris & Alex Powell, 'Bareback Sex in the Age of Preventative Medication: Rethinking the "Harms" of HIV Transmission' (2020) 84 *Journal Of Criminal Law* 596, 606-607.

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propositions, and so on'.²¹⁸As we can see from Agamben's definition, apparatus is a broad term to describe any structure of thought/language/institution that might arise within the social world. My use of this term should therefore situate me within a body of critical scholarship, as will be expanded on within my epistemology section.²¹⁹When the term apparatus is used, therefore, it should be understood as referring not just to institutions and laws, but also to political and social discourses, ideas, values, and even the architectural environment in which refugee status determinations are undertaken.

1.8.5 Governmentality

This thesis draws on the Foucauldian concept of governmentality as a way of understanding the practice of administration involved in refugee status determinations, and the relationships between law, policy, and knowledge. Foucault offered a definition of governmentality in his lectures at the College de France. He defined governmentality as:

1. The ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target: populations, as its principal form of knowledge: political economy, and as its essential technical means: apparatuses of security.
2. The tendency which, over a long period and throughout the West, has steadily led towards the pre-eminence over all other forms (Sovereignty, discipline, etc) of this type of power which may be termed government, resulting, on the one hand, in a

²¹⁸ Giorgio Agamben, *What Is Apparatus and Other Essays* (Stanford University Press, 2009) 3.

²¹⁹ See section: 2.5.

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formation of a whole series of specific governmental apparatuses, and on the other, in the development of a whole complex of saviours.²²⁰

In essence, Foucault's point in this definition is to say that governmentality is the nature of power within the contemporary state, and that this form of power emerges around diffuse sources and functions to 'govern' the population. In this way, governmentality can be viewed as the fusion between rationality and government. As Dean has defined the term, governmentality can therefore be seen as 'how we think about governing others and ourselves in a wide variety of contexts'.²²¹

In effect, the value of governmentality is that it demonstrates the linkages between disparate cultural artifacts—such as the conceptions of sexual diversity embedded within government policy and those demonstrated within film and television—and helps us to conceptualise how the underlying knowledge emerging from these sources is linked. This follows Dean's argument that the process of analysing government involves looking at those structures which attempt to shape and sculpt people through choices, needs, wants, desires, and representations.²²²

To properly understand Foucault's conception of governmentality, it is necessary to take the term government in the broad sense in which Foucault understood the term, which includes the "common sense" of government—such as that involved in the political idea of governing—and a wider sense which includes the idea of self-control—best understood as the idea of government being the 'conduct of conduct'—and control of the family.²²³

²²⁰ Graham Burchell, Colin Gordon, & Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991) 102-103.

²²¹ Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (Sage Publications 1999) 212.

²²² *ibid* 12.

²²³ *ibid* 16-37.

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United Kingdom

1.9 Concluding Remarks

This chapter has laid out the arc of the thesis overall, offering a framework for how the chapters fit together. It has then offered a summary of the key literature in the field, including a consideration of wider bodies of literature which bear relevance to the research questions addressed, before going on to offer a definition of the key terms employed within the thesis. Chapter two outlines the methodologies and epistemologies employed within this research in further detail.

Chapter Two: Methodology and Epistemology

This research employs a mixed methods framework that brings together four distinct methodological approaches. The use of multiple methods ensures that each research subject is treated with an appropriate approach. This mixed methods approach is in line with the scavenger methodology identified by Halberstam as being at the heart of a queer methodology.²²⁴ Halberstam argues that,

A queer methodology, in a way, is a scavenger methodology that uses different methods to collect and produce information on subjects who have been deliberately or accidentally excluded from traditional studies of human behaviour. The queer methodology... refuses the academic compulsion toward disciplinary coherence.²²⁵

As Halberstam articulates, then, my use of mixed methods is in line with other queer projects.

2.1 Legal Framework and Documentary Analysis

Firstly, one method is devoted to looking at issues which are broadly doctrinal in nature. This method is primarily deployed within chapter four. Here, I examine the legal framework underpinning sexual diversity asylum claims in the UK. Beginning with an analysis of the international framework, and then focusing on the apparatuses through which this international framework is implemented at the domestic level. Undertaking this legal analysis enables me to situate the API, examined in chapters five and six, within a legal context. In

²²⁴ Jack Halberstam, *Female Masculinity* (Duke University Press 1998) 13.

²²⁵ *ibid.*

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essence, this is a black letter analysis outlining the existing position of the law. The chapter then considers two ready-made reform packages.

2.2 Theorising Sexual Diversity

A second method focuses on looking at theoretical accounts of sexual diversity. Through doing this, the thesis explores the ways in which sexual diversity is contemporarily understood within the UK. I then draw on the work of queer theorists to situate these conceptions as being underpinned by particular cultures, and accompanied by a number of unuttered assumptions. To recognise these assumptions, I draw on a subset of theoretical work which looks at the socially constructed nature of the sexual identities commonly adopted in the UK, US, and other European states. I particularly focus on the work of Foucault²²⁶ and Butler,²²⁷ both of whom draw attention to the role of power in producing social categories. Through drawing on the work of Foucauldian queer theorists, I draw attention to the ideas which underly the prevalent conceptions of sexual diversity within the UK and offer examples of times and places where alternative epistemologies of sexual diversity existed.

These theoretical explorations are based on a desk-based study of literature regarding the nature of sexual diversity. The material considered is critical in nature, questioning accepted narratives regarding “sexuality”. This approach is predominately employed within chapters three and seven. I will elaborate on this approach further in chapter three.

²²⁶ Michel Foucault, *The History of Sexuality: The Will to Knowledge* (Robert Hurley Trans: Penguin 1998); Michel Foucault, *The History of Sexuality: The Use of Pleasure* (Robert Hurley Trans: Penguin 1992); Michel Foucault, *The History of Sexuality: The Care of the Self* (Robert Hurley Trans: Penguin 1998); Michel Foucault, *The History of Sexuality: Confessions of the Flesh* (Robert Hurely Trans; Frederic Gros Ed: Penguin 2021.)

²²⁷ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1999); Judith Butler, *Undoing Gender* (Routledge 2004); Judith Butler, *Giving an Account of Oneself* (Fordham University Press 2005); Judith Butler, *Frames of War: When is Life Grievable* (verso 2010).

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2.3 Knowledge Production: Semi-Structured Interviews

Alongside the above, the lived experiences of sexually diverse refugees are drawn on in chapters five, six and seven. These experiences are accessed through a series of semi-structured, qualitative interviews. These interviews were undertaken as a way of gaining insight into the asylum apparatus as it is experienced by its subjects. Elam and Fenton have argued that semi-structured interviews—of the type undertaken in this research—are the best approach to sensitive topics.²²⁸ This is because the researcher is on hand to ensure appropriate action²²⁹ is taken if the participant becomes uncomfortable and because the participant is given the space to tell their own story, while minimising any prior research assumptions. Although, as events transpired, that was not necessary at any point during the interview process. Nonetheless, being on hand to intervene if the situation required was useful as it meant that risks of re-traumatisation²³⁰ to participants were minimised.

In this study, it was important to avoid, as far as possible, assumptions about how participants might understand their own sexual diversity. If I had utilised a questionnaire with closed questions, it would not have been possible to gain access to how the people I spoke to understood their own diversity. This is because quantitative methods cannot capture the heterogenous forms through which sexual diversity may be understood. This is due to their reliance on tick boxes. Thus, using semi-structured interviews better enabled the study to be responsive to participants experiences and uses of language.²³¹ Given that the purpose of this thesis is to explore areas of epistemic mismatch between asylum claimants and the way in

²²⁸ Gillian Elam and Kevin Fenton, 'Researching Sensitive Issues and Ethnicity: Lessons from Sexual Health' (2003) 8 *Ethnicity and Health* 15, 19-20.

²²⁹ Such as suspending the interview.

²³⁰ Re-traumatisation is here defined as occurring when recounting a narrative results in the participant re-experiencing traumatic events. See: Ariel Shidlo and Joanne Ahola, 'Mental Health Challenges of LGBT Forced Migrants' (2013) 42 *Forced Migration Review* 9, 9.

²³¹ The base questions taken into each interview are provided as an appendix. See: Appendix 1.

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which knowledges and discourses of sexual diversity are deployed within the asylum system, giving participants the space to speak in their own terms was important.

Each interview took place in a semi-private setting—such as a café—on a one-to-one basis between myself and the participant.²³² Interviews were open ended, with an average of two hours being spent on each interview. With the approval of the participants, all interviews were recorded utilising my mobile phone to allow for later transcription. All recordings were saved directly to a password protected storage location and identified only by participant number to minimise any risks to participants. Looking at the work of Bennett²³³ and Giametta,²³⁴ there is a growing recognition of the valuable contribution interview-based research can make to knowledge about sexually diverse refugees and asylum seekers.

2.3.1 Sampling

I adopted a hands-off approach to sampling. This was because I did not wish to prejudice my results by applying overly selective criteria. As mentioned above, this was significant as sampling itself is contingent on the prior assumptions made by the researcher. Nonetheless, my exclusion criteria were that all participants must self-describe as being sexually diverse and must have been granted asylum in the UK for a reason relating to sexual diversity.

I chose to focus on successful claimants. This decision was made in-light of the risks that someone unable to secure status would face if their situation became known to officials.

The focus on successful claimants was also motivated by an ethical consideration, in that I

²³² Participants will be offered the opportunity to select a location of their choosing, this is to ensure that participants are able to select a place they are comfortable and likely to feel safe.

²³³ Claire Bennett, 'Sexuality and the Asylum Process: The Perspectives of Lesbians Seeking Asylum in the UK' (PhD Thesis, University of Sussex 2014).

²³⁴ Calogero Giametta, *The Sexual Politics of Asylum: Sexual Orientation and Gender Identity in the UK Asylum System* (Routledge 2017).

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did not wish to ask those who had been denied to re-live what may have been a traumatic experience.²³⁵

Obviously, this focus on successful claimants is a consideration which should be borne in mind when reading the study, because it means that only people bearing forms of diversity that were recognised by the Home Office were interviewed. However, even with this limitation, substantial areas of mismatch were detected (as documented in chapters five, six and seven).

The semi-structured interviews were supported by informal conversations and interactions with people currently going through the asylum process, as well as those supporting and working with sexually diverse asylum seekers. Additional insights were gained through interactions with organisations which support sexually diverse asylum seekers. While these informal exchanges are not directly examined in this thesis, they have undoubtedly guided my analysis in subtle ways.

Returning to the exclusion criteria outlined above, it is obvious that only those with experience of the process of applying for asylum in the UK, in relation to their sexual diversity, would be able to contribute perspectives which bear relevance to my research questions. Therefore, the use of exclusion criteria limiting the potential participant pool to this group was a justified and necessary step within the process of sampling.

The Study successfully enrolled eight participants fitting the exclusion criteria laid out above. It should also be noted that a further 3 participants expressed an interest in participating and had arranged interviews. However, these interviews were cancelled due to

²³⁵ This being their interactions with the UK asylum apparatus itself. It is, of course, recognised that many asylum seekers and refugees, regardless of whether their claims had been successful, may experience trauma as a result of their previous experiences.

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the COVID-19 pandemic which resulted in a university wide prohibition on face-to-face research. Although the study had ethical approval to conduct interviews over the telephone, none of the three potential participants wished to proceed with a telephone interview. At the point that these interviews were cancelled, an assessment based on the concept of information power—as outlined below—had already determined that sufficient narratives had been gathered to address the research questions. However, It is recognised that it may have been preferable to have undertaken further interviews. Nonetheless, due to the timing of COVID-19, the study needed to progress on the basis of the interviews that had already been conducted.

The adequacy of the sample was assessed with reference to the concept of ‘information power’,²³⁶ which proposes that the adequacy of sample size should be judged in respect of (a) The aim of the study; (b) the specificity of the sample; (c) the use of established or existing theory and literature; (d) quality of interview dialogue; (e) the analysis strategy to be employed.²³⁷ Using these five criteria, a determination was made in consultation with my supervision team, that a sufficient range of perspectives had been gathered. This determination took account of the aims of the study, which revolved around assessing whether the UK apparatus could apprehend the heterogeneity of ways in which sexual diversity is experienced. These aims required a deep analysis of the data and thus were suited to a small sample. The determination also took account of both the specificity of the sample and the ability to corroborate the evidence with existing literature and theory. Both of these tended towards the suitability of a smaller sample. Finally, the high quality of the interviews—with participants providing very deep insights into the ways in which their own

²³⁶ Kirsti Malterud, Volkert Siersma, and Ann Guassora, ‘Sample Size in Qualitative Interview Studies: Guided by Information Power’ (2016) 26 *Qualitative Health Research* 1753.

²³⁷ *ibid.*

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sexual diversity is experienced—and the qualitative analysis strategy pursued, both also indicated the appropriateness of the sample size employed.

While seeking people who wished to participate in the study, I also engaged with charities and practitioners working with sexually diverse refugees and asylum seekers. I am particularly indebted to these organisations—names have been withheld to avoid the risk of identifying participants—for allowing me to attend some of their workshops and events. Conversations with members enhanced my clarity of thinking on the issues as they are understood by asylum claimants. Additionally, conversations with members helped to bring home some of the contemporary concerns facing sexually diverse asylum seekers outside of the asylum process itself, such as concerns regarding lack of housing and the difficulties in obtaining mental health support. Members also expressed profound concerns about Brexit and the rising levels of anti-immigration sentiment and racism in the UK. While these factors are unlikely to formally affect the process for claiming asylum based on sexual diversity, the fact that sexually diverse asylum seekers are so concerned about them helps to demonstrate how political discourses can adversely impact certain populations.

Other members of these groups told me of how many institutions and businesses did not understand refugee status and would tell them that it was illegal for them to, for example, rent to refugees. The core point here is that attending meetings and mixing socially with sexually diverse refugees and asylum seekers, while not constituting a research method, has contextualised and informed my thinking in numerous ways. In particular, it has helped to develop my thinking around the interaction between wider discourses of immigration control and the concerns of sexually diverse asylum seekers.

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Other charities offered useful insights and encouragements during the study. For example, Rainbow Migration, while lacking the resources to assist in finding potential participants, offered repeated encouragements to the project and I am grateful to trustees such as Dr Eddy Bruce-Jones and the executive director Leila Zadeh for taking the time to communicate with me regarding their work. I also found support among Refugee Law practitioners such as Liz Barratt at Bindmans LLP who offered interesting reflections on the practical aspects of refugee status determination and the gaps between the practical issues faced by lawyers and the analysis undertaken by academics. Again, while these were not formally part of the research process, issues raised during these conversations have informed my approach to this project.

As articulated above, many of the study participants were located through collaboration with charities. I acknowledge that Savin-Williams has critiqued research regarding sexual diversity for relying overly on convenience samples²³⁸—such as those provided by support groups. However, this approach to sampling was adopted due to the difficulty of finding participants who fit the exclusion criteria.

Lee and Renzetti have noted the difficulty researchers dealing with sensitive topics have in gaining appropriately sized samples²³⁹ and have drawn attention to the effective use of support groups by others researching sensitive topics.²⁴⁰ Therefore, while I was mindful of the potential that drawing on such groups was likely to lead to oversampling of troubled members of the community, this was approach was justified and necessary. Other approaches

²³⁸ Rich Savin-Williams, 'A Critique of Research on Sexual Minority youths' (2001) 24 *Journal of Adolescence* 5, 7-9. See also: Max Morris, "'Gay Capital" in Gay Student Friendship Networks' (2018) 35 *Journal of social and Personal Relationships* 1183.

²³⁹ Raymond Lee and Claire Renezetti, 'The Problem of Research Sensitive Topics: An Overview and Introduction' (1990) 33 *American Behavioural Scientist* 510, 516.

²⁴⁰ *ibid*, 517.

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to sampling—such as relying only on an open call for participants—would not have been a practical way of gaining access to an appropriate sample. Indeed, producing such a call at the outset of the study did not lead to a response from any participants at all. In total, three participants of the study were contacted through the support groups and five participants agreed to be interviewed after another participant had put us in contact. Presently, there is limited data on my participant group.²⁴¹ Therefore, even accounting for the potential methodological limitations my sampling methods present, this study remains a valuable contribution to existing knowledge.

Sampling within this study presented a range of theoretical issues. Lee and Renzetti argue ‘sampling decisions can rarely be divorced from theoretical issues, particularly those dealing with how populations are to be defined.’²⁴² This thesis encounters this exact problem because, adopting a Foucauldian concept of discourse, I argue that the way we talk about social phenomena itself produces social reality. Therefore, were I to uncritically adopt the identarian categories of sexual diversity observed in the “west”, namely LGBT+ identities, as a method of creating a representative sample, I would risk entrenching and enforcing those very categories. If this were to occur, then the very purpose of undertaking the study would be undermined. This is because the ability of participants to articulate the ways in which they understand their own sexual diversity would be constrained. I have sought to rectify this by relying on participants self-identification. However, this may be inadequate as participants

²⁴¹ Notable exceptions include: Calogero Giametta, *The Sexual Politics of Asylum: Sexual Orientation and Gender Identity in the UK Asylum System* (Routledge 2017); ULKGIG & Stonewall, ‘No Safe Refuge: Experiences of LGBT Asylum Seekers in Detention’ (2016) available at (Uklgig.org.uk, 2017).

<https://uklgig.org.uk/wp-content/uploads/2017/03/no_safe_refuge.pdf> accessed 5 November 2017; Katherine Fobear, “‘I Thought We Had No Rights’ – Challenges in Listening Storytelling and Representation of LGBT Refugees” (2015) 9 *Studies in Social Justice* 102.; David Murray, ‘Real Queer: “Authentic” LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System’ (2014) 56 *Anthropologica* 21

²⁴² Raymond Lee and Claire Renzetti, ‘The Problem of Research Sensitive Topics: An Overview and Introduction’ (1990) 33 *American Behavioural Scientist* 510, 517.

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might have felt pressure to self-identify as one of the accepted categories, particularly in a context where a white male presenting researcher was asking them to describe their sexual diversity. In some cases, such pressures may have in fact arisen from the time of their asylum claim, where their representative will have assisted them in articulating their sexual diversity in terms comprehensible to decision-makers. I readily acknowledge that this approach, relying on self-identity as a safeguard, is far from adequate and suggest that greater work into how to ensure a sample is representative without reifying pre-determined categories is needed. However, this work is beyond the scope of the thesis.

2.3.2 Qualitative Interviews

As outlined above, the study drew on interviews with a small sample of participants. Therefore, this section demonstrates the value of qualitative interviews. It then goes on to explain what is meant by the term ‘mismatch’ within the context of research question one.

Unpacking the ways in which qualitative interviews are used within this thesis is important because as Koven has argued, ‘interviews are not one monolithic, predictable type of encounter that is equally familiar to everyone’.²⁴³ Rather, interviews differ greatly depending on their intended purpose, and the broader epistemology of the researcher(s). In this study, I employed a mixed phenomenological narrative inquiry and ethnographic approach.

Phenomenological narrative inquiry interviews focus on the experiences of participants with a view to understanding the meanings they attach to these experiences.²⁴⁴ In

²⁴³ Michele Koven, ‘Interviewing: Practice, Ideology, Genre, and Intertextuality’ (2014) 43 Annual Review of Anthropology 499, 500.

²⁴⁴ Simon Hoffding and Kristian Martiny, ‘Framing a Phenomenological Interview: What, Why and How’ (2016) 15 Phenomenological Cognitive Science 539; Cristina Black, Per A Gustafsson, Ing Beth Larsson and Carina Bertero, ‘Mangaging the Legal Proceedings: An Interpretive Phenomenological Analysis of Sexually

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general, this approach tends to draw on smaller samples ‘since the aim is to reveal something of the experience of each of a set of individuals based on very careful examination of each individual’.²⁴⁵ Ethnographic approaches focus on situating these experiences and events in participants’ own cultural worlds and articulating them in participants’ own terms.²⁴⁶ By combining the two, I seek to understand the experiences of participants in their own terms, with a view to analysing whether there is a mismatch between their self-understanding and the knowledges and discourses of sexual diversity deployed within the 2016 API. First and foremost, then, these interviews sought to explore issues of epistemology.

Within this study, phenomenological narrative inquiry provides insights into two pivotal phenomena. Firstly, the ways in which sexually diverse refugees and asylum seekers experience their own diversities/identities. Secondly, the ways in which sexually diverse refugees feel their diversities/identities were interpreted by the UK asylum apparatus. Historically, phenomenological analysis has been employed for lived experience studies. For example, significant works such as Simone de Beauvoir’s *The Second Sex*²⁴⁷ or Frantz Fanon’s *Black Skin White Mask*²⁴⁸ employed a phenomenological approach to analysis. Each of these studies draws on lived experiences to develop a conception of how different social experiences play a role in forming identities and how these identities impact one’s life. In the

Abused Children’s Experience with the Legal Process’ (2011) 35 Child Abuse & Neglect 50; Mira Crouch and Heather McKenzie, ‘The Logic of Small Samples in Interview-Based Qualitative Research’ (2006) 45 Social Science Information 483, ESP 485. See also for influencing, without strictly directing, my understanding the phenomenological interview process: Claire Petitmengin, Anne Remillieux, and Camila Valenzuela-Mogulliansky, ‘Discovering the Structures of Lived Experience: Towards a Micro-Phenomenological Analysis Method’ (2019) 18 Phenomenology and the Cognitive Sciences 691.

²⁴⁵ Cristina Black, Per A Gustafsson, Ing Beth Larsson and Carina Bertero, ‘Mangaging the Legal Proceedings: An Interpretive Phenomenological Analysis of Sexually Abused Children’s Experience with the Legal Process’ (2011) 35 Child Abuse & Neglect 5, 52.

²⁴⁶ Kathryn Roulston and Myungweon Choi, ‘Qualitative Interviews’ in Uwe Flick, *The Sage Handbook of Qualitative Data Collection* (Sage Publications 2018) 235.

²⁴⁷ See: Simone De Beauvoir, *The Second Sex* (Constance Borde and Sheila Malvony-Cheallier trans: Vintage Books 2011).

²⁴⁸ Frantz Fanon, *Black Skin White Mask* (Trans) (Richard Philcox Trans: Grove Press 2007).

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case of Fanon and De Beauvoir, the inquiry is auto-ethnographic in nature, building from the authors' own experiences and engaging in conversation with wider cultural products.

However, their methods are equally applicable to a study undertaken through the medium of semi-structured interviews.

Similarly, by asking questions about the ways in which participants have experienced their own sexual diversity, I sought to recognise gendered, heteronormative, and performative assumptions operating in refugee status determinations. This was achieved by asking questions such as: 'Has the way in which you understand your sexual diversity changed over the last five years?', 'Did you feel able to articulate yourself fully and in your own terms when framing your asylum claim?', 'How did the questions you were asked during your substantive Home Office interview make you feel?'²⁴⁹ By asking questions such as these, I sought to understand participants' self-conceptions of their sexual diversity. It is these self-conceptions which can then be compared to conceptions adopted within the asylum apparatus. Questions also looked at the forms of evidence participants were asked to provide. This is useful for understanding how decision-makers approach the evidential issues. For example, how do decision-makers approach the issue of determining whether or not a claimant has had contact with the LGBT+ community? Was this merely through the word of claimants, or do they seek other forms of evidence?

This comparison of participant's lived experiences of sexual diversity to the conceptions demonstrated within the asylum apparatus goes to the heart of what is meant by the term 'mismatch'. Use of this term within my research question is intended to refer to detecting inconsistencies between how sexually diverse people experience the world and the

²⁴⁹ See Furthe: Appendix 1.

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knowledges of sexual diversity deployed by the asylum apparatus. To this end, the interviews were self-consciously subjectivist in approach, aiming to draw attention to the experiences and perspectives of sexually diverse refugees, as people, rather than producing generalizable data.

Even though the evidence gathered is not generalisable, I argue that, considering the costs of flawed decision-making in refugee law, mismatches detected by this study draw attention to areas where further research is required. The key considerations and implications for future research and policy are fully outlined in chapter eight.

2.3.3 Interviewing Refugees and Ethical Considerations

The one unifying feature of all asylum claims is that the claimant needs to have demonstrated a ‘well-founded fear of persecution.’²⁵⁰ Often—though it need not—this ‘well-founded fear’ will link to past experiences of persecution. Even where such a fear does not arise in respect of historical experiences of persecution, asylum claimants may have lived their lives in fear of persecution and potentially suffered significant trauma as a result. Therefore, there is a particularly high risk that refugees will be traumatised subjects. This means there is additional pressure on researchers to ensure that any risks of re-traumatisation are minimised.

As Cowles identifies, topics which are likely to cause harm to participants by eliciting powerful emotional responses such as anger or fear are rightly categorised as sensitive.²⁵¹ However, it is important to recognise that, as Lee and Renzetti have argued, in the right circumstances, any subject can be considered sensitive and present a risk of traumatising

²⁵⁰ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

²⁵¹ Kathleen Cowles, ‘Issues in Qualitative Research on Sensitive Topics’ (1998) 10 *Western Journal of Nursing Research* 163, 167.

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participants.²⁵² Thus, the interviews were understood to be potentially highly sensitive events, not least for those who had negative experiences of being “interviewed” by the Home Office.

The status of participants as potentially traumatised subjects partially motivated my decision to employ a phenomenological narrative inquiry approach, as outlined above. To reiterate, this was because it encourages the interview to proceed in a more natural manner. Because of this, I hope to have avoided creating uncomfortable power dynamics that could have reminded participants of previous encounters with authority figures. In particular, I attempted to avoid recreating—or triggering memories of—interview experiences participants will have been subjected to by the Home Office. As the methods avoided an overly inquisitorial approach—preferring instead to allow the interview encounter to develop in a more authentic, conversational manner—this should have ensured the power dynamics present in Home Office asylum interviews were not recreated. Similarly, it is hoped that by attempting to undertake interviews in a more friendly way, hierarchy within the interview encounter will have been minimised.

In order to prevent participants feeling ashamed or humiliated and to prevent re-traumatisation, I attempted to build up rapport with participants.²⁵³ This helped to ensure that participants felt comfortable and showed that I was someone they could trust and be open with. Booth and Booth identify a two-way exchange as being important to developing rapport.²⁵⁴ In line with this, I encouraged effective rapport by offering participants

²⁵² Raymond Lee and Claire Renzetti, ‘The Problem of Research Sensitive Topics: An Overview and Introduction’ (1993) 33 *American Behavioural Scientist* 510, 510-514. See also: Gillian Elam and Kevin Fenton, ‘Researching Sensitive Issues and Ethnicity: Lessons from Sexual Health’ (2003) 8 *Ethnicity and Health* 15,16.

²⁵³ Virginia Dickson-Swift et al, ‘Doing Sensitive Research: What Challenges do Qualitative Researchers Face?’ (2007) 7 *Qualitative Research* 327, 331-334.

²⁵⁴ Tim Booth and Wendy Booth, ‘The Use of Depth Interviewing with Vulnerable Subjects: Lessons from a Research Study of Participants with Learning Difficulties’ (1994) 39 *Social Science and Medicine* 415, 417.

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information about myself. In particular, I shared information relating to my own sexual diversity, including the ways my self-perception is at times misaligned with common portrayals of sexually diverse men in the UK.

Sharing aspects of my own narrative not only allowed participants to view the interview encounter as a reciprocal situation, but also helped in creating an informal, non-hierarchical atmosphere. Elam and Fenton argue that power imbalances can be a cause of discomfort to interview participants.²⁵⁵ Therefore, prior to beginning any recording of the encounter, I engaged in a conversation with participants. This allowed them a chance to familiarise themselves with me and gave space for rapport to develop.²⁵⁶ With participant permission, I turned on the recording equipment once the conversation had begun to turn towards the subject matter of the interview. Clowes has documented this approach—of beginning the encounter as if it were an informal friendly chat—as being an effective way to make participants feel at ease.²⁵⁷ Even once the interview had begun, I built up gradually to more sensitive questions—those relating to sexual diversity—beginning with questions about participants' current lives, such as enquiring about their living arrangements, working life and friendship networks.²⁵⁸ This was done in order to allow participants to take some time to adjust to the interview setting. Additionally, this approach offered space to assess whether participants brought up sexual diversity without prompting. This offered another avenue for understanding the weight they placed on sexual diversity within their day-to-day lives.

²⁵⁵ Gillian Elam and Kevin Fenton, 'Researching Sensitive Issues and Ethnicity: Lessons from Sexual Health' (2003) 8 *Ethnicity and Health* 15, 17.

²⁵⁶ *ibid.*, 20.

²⁵⁷ Kathleen Cowles, 'Issues in Qualitative Research on Sensitive Topics' (1988) 10 *Western Journal of Nursing Research* 163, 168.

²⁵⁸ Gillian Elam and Kevin Fenton, 'Researching Sensitive Issues and Ethnicity: Lessons from Sexual Health' (2003) 8 *Ethnicity and Health* 15, 20.

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In stating this, it is important to recognise that, in some cases, ethical procedures themselves reinforced hierarchies during interview encounters. This is because they increase the formality of an interview encounter in unhelpful ways. For example, the informal conversations I had, as a way of making participants feel at ease, would often be undermined by the need to talk them through the participant information sheet and the consent form. While these ethical controls are important, it was obvious some participants felt snapped back into an interviewer-interviewee hierarchy by having to fill them out. In general, these snapping back moments were easily remedied by returning to friendly, non-focused conversation for a few minutes before easing into the interview itself. However, note should be taken of the potential for ethical controls themselves to create discomfort for participants.

I am mindful of Peckover's argument that, as opposed to being supportive, building rapport with participants could be seen as coercive.²⁵⁹ While this argument makes an important point, it should also be recognised that there is a substantial difference between the roles of interviewers and health visitors, at whom her argument was originally levied. I lack the institutional power to impose sanctions on participants in the way health visitors do. Although, I do possess a level of institutional privilege and social capital that participants could, in certain circumstances, have felt compelled to act in response to. Therefore, while I considered Peckover's argument, I continued to attempt to establish good rapport with all participants. Maintaining an overly formal approach, particularly when dealing with participants who may have previous bad experiences with authority figures, could be construed as being far more coercive than building rapport.

²⁵⁹ Sue Peckover, 'Supporting and Policing Mothers: An Analysis of the Disciplinary Practices of Health Visiting' (2002) 38 *Journal of Advanced Nursing* 369, 369-375.

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On the other side of the coin, Fobear argues that: ‘For many who have lived in silence for most of their lives because of homophobia and transphobia, being able to share their story with outsiders can induce a sense of pride and accomplishment’.²⁶⁰ This aligns with other researchers who have found that participating in interview-based research can be therapeutic for participants, insofar as it allows them an opportunity to talk openly about their feelings.²⁶¹ In this regard, Rosetto characterised the interview process as ‘therapeutic in that it offers a space for catharsis through sharing’.²⁶²

In laying out how they think the interview encounter can be made comfortable for ethnic minority participants, Elam and Fenton further recommend that researchers are ethnically matched with participants to make them feel more comfortable and to provide shared cultural language.²⁶³ However, Murray has argued that, due to the cultural taboos surrounding sexual diversity in some refugee countries of origin, sexually diverse refugees may be less comfortable and forthcoming around those from the same ethnic or national background as they are.²⁶⁴ Therefore, while I am reflexive about my own status as a white, middle-class man possessing significant educational and institutional privilege, I do not believe that my whiteness had a negative impact on the willingness of participants to engage in open exchanges with me. As explored within the reflexivity section of this chapter (see below), I am mindful of the other impacts that my own status could have had on the interview

²⁶⁰ Katherine Fobear, ‘“I Thought We Had No Rights” – Challenges in Listening Storytelling and Representation of LGBT Refugees’ (2015) 9 *Studies in Social Justice* 102, 103.

²⁶¹ Kelly Rosetto, ‘Qualitative Research Interviews: Assessing the Therapeutic Value and Challenges’ (2014) 31 *Journal of Social and Personal Relationships* 482.

²⁶² *ibid* 484.

²⁶³ Gillian Elam and Kevin Fenton, ‘Researching Sensitive Issues and Ethnicity: Lessons from Sexual Health’ (2003) 8 *Ethnicity and Health* 15, 22-23.

²⁶⁴ David Murray, ‘Real Queer: “Authentic” LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System’ (2014) 56 *Anthropologica* 21, 25.

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process, both in terms of conducting the interviews and how data was subsequently analysed.²⁶⁵

The methods developed for this research were also designed to minimise the potential of secondary trauma and other risks accruing to myself. For example, Lee and Renzetti talk of researchers putting themselves in situations where their personal security may be jeopardized or where they may face stigma for work they have done with certain communities.²⁶⁶ However, Lee-Treek and Linkogle argue that researchers often fail to take seriously risks to their own safety or welfare offering only ad-hoc consideration when they are already in the field.²⁶⁷ Therefore, to minimise the risks of secondary trauma, I frequently discussed my interviews (in a non-specific and non-identifying manner) with my supervisors and others such as my partner (a qualitative sociologist of sexualities). This involved me talking openly about my emotions, rather than the content of the interviews. However, by allowing myself to discuss how the encounters were impacting me, I was able to minimise secondary trauma and ensure that others could advise me to seek help if necessary. While undertaking the interviews, but particularly during the process of transcription, I did feel a level of distress about some of the experiences that participants had shared. However, by utilising appropriate breaks and giving myself time and space to reflect, I was able to process and deal with these emotions without suffering lasting secondary trauma.

Other researcher risks that could potentially have arisen revolved around meeting participants in locations selected by them. Where possible, I visited locations prior to the interview to familiarise myself with the surroundings and ensure that it was suitable for the

²⁶⁵ See further: Section 2.3.5.

²⁶⁶ Raymond Lee and Claire Renzetti, 'The Problem of Research Sensitive Topics: An Overview and Introduction' (1990) 33 *American Behavioural Scientist* 510, 511-512.

²⁶⁷ Geraldine Lee-Treweek and Stephanie Linkogle, '*Danger in the Field: Risk and Ethics in Social Research*' (Routledge 2000) 1.

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recording equipment and to protect the privacy of both myself and participants. Two participants selected membership-based locations, such as office spaces, or social enterprise focused private members clubs, which I was unable to visit in advance. However, these institutions possessed extensive online presence, allowing me to digitally familiarise myself prior to the interview itself.

2.3.4 Limitations

The study draws on a small sample, with the main substantive thrust emerging from the eight semi-structured interviews undertaken between March 2018 and February 2020.²⁶⁸ This means drawing quantitative data from the study, as well as any attempt to generalise findings, is not possible. However, as the focus of the study is on producing qualitative accounts of lived experiences among sexually diverse refugees—who, by being refugees, have experience of being asylum seekers—a small sample produced relevant and valuable information.

While the results of this study are not generalisable, they suggest focus points for future research as well as drawing attention to shortcoming of existing knowledges of sexual diversity within the UK. For example, by focusing on the lived experiences of participants, it was possible to spot and draw attention to how the current asylum process distorts or obscures the self-conceptions of diverse refugees and asylum seekers. Thus, this research is undertaken to complicate overly general understandings, rather than to provide concrete answers, in line with the queer theoretical approach I adopt. Schrier argues that, rather than relying on generalisability as a metric for the validity of qualitative studies, we should instead focus on ‘the relationship between our observations and the case in its entirety: how well is

²⁶⁸ Note that some researchers embrace the use of small samples as a method which facilitates closer association and engagements with respondents’ narratives. Even going so far as to claim that ‘in principle one “case” can lead to new insights.’ See: Mira Crouch and Heather McKenzie, ‘The Logic of Small Samples in Interview-Based Qualitative Research’ (2006) 45 *Social Science Information* 483, 493.

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the variability within a given instance represented in our observations?’²⁶⁹ To put this another way, one way we can judge the validity of qualitative data is by looking at how well the data represents the *heterogeneity and diversity* of lived experiences among sexually diverse refugees.

Thus, it is argued that, under a qualitative conception of knowledge production, this thesis presents a valuable contribution to research in the field of sexually diverse refugees and asylum seekers. Effectively, the thesis draws attention to cases in which the asylum apparatus is unable to account for and legibly read the lived experiences of sexually diverse asylum claimants and refugees. Each of these strands helps to pinpoint the key issues, as sexually diverse refugees themselves understand them.

In addition to the above, the number of participants I engaged with was in-line with similar studies. Marshall et al argue that citing precedent for a sample size is a form of external justification.²⁷⁰ In this regard, they identify that most phenomenological interviews employ a sample of around 6-10 participants.²⁷¹ When undertaking a study of how victims of child sexual abuse experience the legal process, Black et al drew on a sample of 10 participants to establish the key themes experienced by the victims of child sexual abuse in the court room.²⁷² Therefore, the sample drawn on in this research is accordance with similar studies.

²⁶⁹ Magarit Schrier, ‘Sampling and Generalization’ in Uwe Flick, *The Sage Handbook of qualitative Data Collection* (Sage Publications 2018) 87.

²⁷⁰ *ibid* 13.

²⁷¹ *ibid* 13

²⁷² Christian Black, Per A Gustafsson, Ingbeth Larsson, Carina Bertero, ‘Managing the legal Proceedings: An Interpretive Phenomenological Analysis of Sexually Abused Children’s Experience with the Legal Process’ (2011) 35 *Child Abuse and Neglect* 50.

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A further difficulty encountered in this research arose in encouraging sexually diverse women to participate. Of the eight participants recruited for this study, seven identified as men and one as a woman. As a result of this, the ability of the study to reflect on the lived experiences of sexually diverse women is limited. However, the interview undertaken was supplemented by considering the findings of Claire Bennett, who has researched the experience of lesbian refugees in the UK based on a larger sample.²⁷³ This means I could look to other research to support the interview I undertook.

The limited number of sexually diverse women interviewed was also supplemented by focusing on theoretical research. Despite this, it is noted that the ability of this thesis to reflect on how sexually diverse women experience and conceive of their sexual diversity is restricted. As a point of reflection, it seems likely that my own status as a male interviewer may have limited the number of women willing to participate. As such, all claims about sexually diverse women's experiences should be read with a consideration of the sample size and interviewer characteristics. Nonetheless, given the novel approach undertaken in this thesis, and the richness of the interview that was undertaken, it is argued that the study still presents a range of interesting and pertinent considerations.

The study was also confined in geographical scope. Of the eight participants, seven were living in London (the other was living in Manchester) at the time of the interview and six had made their asylum claim and undertaken their substantive interview in a London Home Office facility (with two undertaking their interview in a Newcastle Home Office facility). As a result of this, findings about the approach of decision-makers refer primarily to London facilities. It is not possible to be sure that approaches are repeated on a national scale.

²⁷³ Claire Bennett, 'Sexuality and the Asylum Process: The Perspectives of Lesbians Seeking Asylum in the UK' (PhD Thesis, University of Sussex 2014).

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The reason for the London focused interview strategy is simply that—despite reaching out to organisations and charities across the UK—those willing to help with the study were disproportionately based in London, where I also lived at the time of the study.

While this geographical limitation is recognised, I argue that the 2016 API, as well as the wider discourses and knowledges of sexual of sexual diversity on which the API draws, have applicability to the entirety of the UK. Therefore, while the study should be read with an awareness of the geographical limitation identified, it is argued that findings are likely to have broader application.

2.3.5 Reflexivity

Evolving primarily from feminist insights and research, the concept of reflexivity has gained increasing prominence within the humanities.²⁷⁴ Although reflexivity has developed to have a number of different strands, the most frequently engaged with remains an analysis of the power relations between the interviewer and the participant, alongside a consideration of the biases the researcher brings to the encounter.²⁷⁵ This is because the interview, in bringing together an individual who has knowledge of specific phenomenon, and an individual who has institutional backing and an interest in that phenomenon, frequently involves power relations. For this reason, ‘the researcher needs to remain aware of how power manifests itself before, during, and after the interview to carry out data collection appropriately and ethically’.²⁷⁶

²⁷⁴ See for example: Anne Oakley, ‘Interviewing Women: A Contradiction in Terms?’ in Helen Roberts (ed), *Doing Feminist Research* (Routledge & Kegan Paul 1981); Rahel Wasserfall, ‘Reflexivity, Feminism and Difference’ (1993) 16 *Qualitative Sociology* 23; Kathleen Rich, ‘Exploring Participant Centred Reflexivity in the Research Interview’ (2009) 43 *Sociology* 356.

²⁷⁵ See: Edgar Rodriguez-Dorans, ‘Reflexivity and Ethical Research Practice while Interviewing on Sexual Topics’ (2018) 21 *International Journal of Social Research Methodology* 747, 747-748.

²⁷⁶ *ibid* 747.

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Consideration of power relations involves giving attention to how the researcher and participant have been differently socialised and considering the role of institutions in creating hierarchies within social interactions. In my case, there is a need to consider relations of power along numerous axis. It was also crucial to consider how these may intersect to produce complex power dynamics. While I attempted to neutralise power imbalances within the interview encounter, through methods discussed above, it must be recognised that simply by virtue of being the one asking the questions, I was placed in a position of power. To minimise this, I made clear to participants that they were welcome to ask me questions and attempted to provide them with clear and frank answers when they did.²⁷⁷ However, due to my institutional status, and the ethical protocols we were required to go through before beginning the interview, I was clearly demarcated as the official in the encounter. This is likely to mean that power imbalances will have been difficult to avoid.

Alongside the inherent power imbalance generated by the interviewer/participant relation, there is also a need to consider the role my own whiteness played in the interviews. As previously stated, Elam and Fenton have argued that ethnic matching can be an effective way of ensuring that power imbalances in an interview encounter are minimised.²⁷⁸ Therefore, it is important that I noted the role ethnicity may have played in structuring the interviews. As well as in dictating both what information participants felt willing and able to disclose to me, and how I interpreted that information. However, as other researchers have pinpointed, people who have fled a country or culture in order to escape persecution relating to their sexual diversity may in fact be uncomfortable around other people with whom they

²⁷⁷ See further: Kevin Waby, 'Interviews as Encounters: Issues of Sexuality and Reflexivity when men Interview Men About Commercial Same Sex Relations (2010) 10 *Qualitative Research* 639.

²⁷⁸ Gillian Elam and Kevin Fenton, 'Researching Sensitive Issues and Ethnicity: Lessons from Sexual Health' (2003) 8 *Ethnicity and Health* 15, 22-23.

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share an ethnic or cultural heritage.²⁷⁹ This problem has been articulated numerous times with reference to the role of interpreters within asylum interviews.²⁸⁰ Accounting for this, it is possible that being white British, within the very specific context of the interview encounter, and deeply mediated by problematic frameworks such as homonationalism, may have actually made participants feel more comfortable in disclosing details of their sexual diversity.

However, even if this was the case, there is also a need to acknowledge the impact my whiteness may have had on my ability to effectively analyse participants' narratives. My identity as a white gay man may have led me to make assumptions about which aspects of a narrative were relevant. I attempted to minimise this through adopting the narrative inquiry approach to analysis. This framework centres participants' narratives over the researchers' analytic view. Therefore, it is hoped this mediated the impact my whiteness had on my interview analysis.

Similarly, consideration should be given to my status as a man. The study began with an aim of speaking to people of diverse genders. However, when searching for participants I struggled to find self-identified women and gender minorities to participate in the research. It is very likely that my own gender identity, and the way in which I, as a masculine presenting person, am socially perceived, played a part in the difficulty I had recruiting women and gender diverse people to participate.

²⁷⁹ David Murray, 'Real Queer: "Authentic" LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System' (2014) 56 *Anthropologica* 21, 25.

²⁸⁰ See generally: Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 *Journal of Refugee Studies* 195, 199-201; Barry O'Leary, "'We Cannot Claim Any Particular Knowledge of the Ways of Homosexuals, Still Less of Iranian Homosexuals...'" The Particular Problems Facing Those Who Seek Asylum on the Basis of Their Sexual Identity' (2008) 16 *Feminist Legal Studies* 87, 94.

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In the 1990s, Williams and Heikes claimed that ‘we could find no studies that presented information documenting the importance of the researcher’s gender in the in-depth interview’.²⁸¹ However, this has changed markedly over the past 30 years.²⁸² Feminist research has drawn attention to ‘the historical exploitation of women subjects and the silencing of their voices by androcentric research methods, patriarchal assumptions, and uncritical acceptance of women’s subordinate status and alleged “difference”’.²⁸³ Such historic exploitation presents a series of issues within interviews. Firstly, while I would identify myself as a postmodern feminist, and would never wish to consciously endorse any schema which presented women as in any sense less able, complex, and agentic as men, I have been socialised as a man within what remains a patriarchal society. Therefore, it is likely that my ability to comprehend the narratives of sexually diverse women and gender minorities will have been compromised by socialisation.

In this regard, it is pertinent to bear in mind that many participants experienced the issues around their sexual diversity in an intersectional way, with reflections also focusing on their ethnic or cultural backgrounds.²⁸⁴ While I have attempted to be sensitive to this, I have

²⁸¹ Christine Williams and Joel Heikes, ‘The Importance of Researchers Gender in the In-depth Interview: Evidence from Two Case Studies of Male Nurses’ (1993) 7 *Gender and Society* 280, 282.

²⁸² See for example: Doha Abualsaud, ‘Men Pause and Women Talk too much: Power and Gender Negotiations in Eliciting Data During Semi-Structured Interviews’ (2019) 4 *Journal of Advanced Research in Social Sciences and Humanities* 210; Mary Santovec, ‘In Qualitative Interviews, Gender Does Matter’ (2014) 23 *Women in Higher Education* 17; Alex Broom, Kelly Hand & Phillip Tovey, ‘The Role of Gender, environment and Individual Biography in Shaping Qualitative Interview Data’ (2009) 12 *International Journal of Social Research Methodology* 51.

²⁸³ Terry Arendell, ‘Reflections on the Researcher-Researched Relationship: A Woman Interviewing Men’ (1997) 20 *Qualitative Sociology* 341, 342.

²⁸⁴ The concept of intersectionality was originally recognised by Kimberle Crenshaw as a way of pinpointing the inadequacy of anti-discrimination laws which only allowed an action to be brought on the basis of one identity category, such as discrimination on the basis of gender. Instead, Crenshaw highlights that Black Women suffer discrimination as Black Women and that the nature of this discrimination cannot be understood or captured by simply adding together the impacts of racism and gender discrimination. See: Kimberle Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Anti-racist politics’ (1989) 1 *University of Chicago Legal Forum* 139. See also: Kimberle Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’ (1990) 43 *Stanford Law Review* 1241.

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again been socialised in a particular context—within a former imperial power, with a general public that continually enact everyday racism and xenophobia—and therefore need to be mindful of the ways in which the assumptions which I bring to the interview may have impacted on both disclosure within the interview itself and my subsequent analysis.²⁸⁵

While it is impossible to eradicate the impact that our cultural, social, and discursive biases have on research—this implies that, as I have argued in a different context, objective research about social and legal topics is effectively impossible²⁸⁶—by recognising the assumptions we bring to a research encounter, the impact this has on both the interview and subsequent analysis, can be considered by readers. This allows avenues for critique to be openly considered. In stating this, my intention is that readers can bring an awareness of the limitations I, as both an interviewer and an analyst, possess so that appropriate considerations are borne in mind when reading the findings of this study.

2.3.6 Transcription

When transcribing the interviews, I was careful to ensure that participant anonymity was protected. To achieve this, identifying information was redacted. This helped to minimise any risk of data being compromised. I transcribed each interview in the immediate aftermath of meeting with the participant. This assisted me in consolidating my understanding of participants' experiences. It also facilitated the inclusion of visual cues I noticed and noted during the interview. The integration of these visual cues helped to add depth to the narratives and served as an interpretative aid when reviewing the transcripts during later stages of analysis.

²⁸⁵ See: Terry Arendell, 'Reflections on the Researcher-Researched Relationship: A Woman Interviewing Men' (1997) 20 *Qualitative Sociology* 341,343.

²⁸⁶ See Alex Powell, 'The Will of The People: (Parliamentary) Sovereignty and Brexit' in Tawhida Ahmed and Elaine Fahey (eds) *'On Brexit: Law, Justice and Injustices'* (Edward Elgar 2020).

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As McLellan, Macqueen, and Neidig have recognised, transcription is itself a part of the research process.²⁸⁷ The approaches adopted to transcribing audio data can have a dramatic impact on the results of a research study. To ensure that transcriptions are of a consistent and high quality, I developed a short set of rules which guided transcription of the data. These rules drew on the work of methodological theorists across a range of disciplines. One set of principles that influenced my own approach is the *seven principles for transcribing audio interviews* provided by psychotherapists Mergenthaler and Stinson.²⁸⁸

Their principles are that transcription rules should:

- 1- *Preserve the morphological naturalness of transcription.* Keep word forms, the form of commentaries, and the use of punctuation as close as possible to speech presentation and consistent with what is typically acceptable in written text.
- 2- *Preserve the naturalness of the transcript structure.* keep text clearly structured by speech markers (i.e., like printed versions of a play or movie transcript).
- 3- *The transcript should be an exact reproduction.* Generate a verbatim account. Do not prematurely reduce text.
- 4- *The transcription rules should be universal.* Make transcriptions suitable for both human researcher and computer to use.
- 5- *The transcription rules should be complete.* Transcribers should require only these rules to prepare transcripts. Everyday language competency rather than specific knowledge (e.g., linguistic theories) should be required.

²⁸⁷ Eleanor McLellan, Kathleen Macqueen, and Judith Neidig, 'Beyond the Qualitative Interview: Data Preparation and Transcription' (2003) 15 *Field Methods* 63, 63-65.

²⁸⁸ Erhard Mergenthaler and Charles Stinson, 'Psychotherapy Transcription Standards' (1992) 2 *Psychotherapy Research* 125, 129-130.

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- 6- *The transcription rules should be independent.* Transcription standards should be independent of transcribers as well as understandable and applicable by researchers as well as third parties.
- 7- *The transcription rules should be intellectually elegant.* Keep rules limited in number.²⁸⁹

Although these principles were originally designed for creating psychotherapy transcripts, they are equally applicable to the production of lived experience transcripts as they aid in the production of rules which encourage consistency and clarity in how to approach transcription efforts. All transcription within the project was personally conducted by me. Thus, the focus in generating my own rules needed to be on the production of a consistent and principled approach to transcription which can be explained to others with reference to the transcription rules, instead of requiring the creation of rules which others could follow.

When constructing my own transcripts, the following rules were applied to ensure the quality and consistency of transcription.

- 1- *all audio recordings will be transcribed verbatim and in full, without omission.* This means that even periods of the interview which do not appear directly relevant should be included in the transcript, as should all interjections by the researcher.
- 2- *Transcripts should authentically reflect the interaction, so far as this is possible.* All elisions (gaps or overlaps in speech), mispronunciations, slang and grammatic errors should be included in their original form. Occasions where background noise, or difficulty with recording equipment leave a section difficult to follow should also be clearly marked within the transcript.

²⁸⁹ *ibid.*

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- 3- *Long pauses and other verbal cues such as laughter should be referenced within the transcription.* Short breaks in conversation, or rapid changes in topic should be reflected with ellipses. Longer breaks or other verbal cues such as laughter or indications of thought such as ‘ummm’ should be specifically mentioned within the text.
- 4- *Consistent formatting across transcripts should be adopted.* All transcripts should have pertinent information as well as the transcript number located at the top of the page in size 14 Times New Roman text. The transcription itself should be in size 12 Times New Roman text and should have researchers’ questions or comments in bold, with participants’ speech being reflected in standard Times New Roman text.
- 5- *Time stamps may be used discretionally to allow easy access to interesting points of the interview.* Although the transcription is not intended to be a site of data reduction, time stamps may be included to pinpoint interesting passage of the interview. This is intended to allow researchers to re-confirm transcription of central passages more easily through re-consulting audio recordings while finalising the transcription process.

Application of these five rules is intended to produce simple and consistent transcripts.

2.4 Analytic Framework for Interview Analysis

When analysing and presenting the data, I have avoided making generalisations or oversimplifications relating to the narratives which arose in the interviews. Instead, I have sought to ‘represent the views of research subjects in as rich and multi-vocal a way as possible’.²⁹⁰ Crucially, I did not attempt to impose any general theory on my data, applying

²⁹⁰ Ian Greener, *Designing Social Research: A Guide for the Bewildered* (Sage 2011) 105.

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theory only where it arose from the reading. I have attempted to present the experiences of participants as directly as possible, while commenting on how their experiences link to certain theoretical and epistemological frameworks. As Lieblich, Tuval- Mashiach & Zilber argue, ‘One of the clearest ways of learning about the inner world is through verbal accounts and stories presented by individual narrators about their lives and their experienced reality, In other words, narratives provide us with access to people’s identity and personality’.²⁹¹ It is these experiences of reality I have sought to explore.

This approach to the interview data aligns with the narrative inquiry approach as outlined by Clandinin.²⁹² In this regard, I argue that the focus on narrative approaches within social and political discourses has been intensified by a cultural and linguistic turn which has accompanied a movement away from exclusively positivist frameworks of analysis.²⁹³ Although narrative inquiry approaches are more common within arts based research—such as research into music—their focus on how experiences are co-constructed through a relational framework which comprises interaction (in terms of the social and cultural networks in which an individual’s conceptions developed), continuity (in terms of how participants experiences have developed over time) and situation (which refers to how participants experiences link to specific locations) presents a useful analytic framework for considering lived experiences.²⁹⁴ These three points of analysis help to draw out participants experiences in a situated context that accounts for the role of culture, temporality, and location. In so doing, they can usefully bring to light the interaction of different social forces

²⁹¹ Amia Lieblich, Rivka Tuval-Mashiach and Tamar Zilber, *Narrative Research: Reading, analysis and interpretation* (Sage 1998) 6.

²⁹² Jean Clandinin, ‘Narrative inquiry: A Methodology for Studying Lived Experience’ (2006) 27 *Research Studies in Music Education* 44.

²⁹³ See: Amia Lieblich, Rivka Tuval-Mashiach and Tamar Zilber, *Narrative Research: Reading, analysis and interpretation* (Sage 1998) 1.

²⁹⁴ Jean Clandinin, ‘Narrative inquiry: A Methodology for Studying Lived Experience’ (2006) 27 *Research Studies in Music Education* 44, 47.

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with the events that have occurred within the participants' life. They can also be useful for understanding how these occurrences have shaped participants sexual diversities, and indeed the extent to which these diversities has manifested in identities. In this way, participants narratives are examined in a context which accounts for the pervasive role of socialisation in shaping how they experience the world. Accounting for this, as Lieblich, Tuval-Mashiach & Zilber argue, Narrative Inquiry 'may be used for comparison among groups, to learn about a social phenomenon or historical period, or to explore a personality'.²⁹⁵

In philosophical terms, these forms of analysis involve a departure from more positivist accounts stressing that 'there is neither a single, absolute truth in human reality nor one correct reading or interpretation of a text'.²⁹⁶ In this sense, the focus of analysis lies on troubling knowledges regarding sexual diversity. It should be noted that all the above corresponds to a Foucauldian approach to knowledge as it is founded in the idea that discourse itself shapes our understanding of reality, and thus reality itself.

However, simply outlining that I have adopted a narrative inquiry approach fails to fully explain how data has been analysed. There is also a need to identify where my analytic framework fits on the holistic-categorical spectrum and on the form-content spectrum. Lieblich, Tuval-Mashiach and Zilber outline the significance of these different approaches.²⁹⁷ Essentially, a categorical analysis focuses on specific excerpts of a narrative, while a holistic analysis focuses on the interview as a whole. The categorical approach is commonly adopted when the researcher 'is primarily interested in a problem or a phenomenon shared by a group of people'.²⁹⁸ As my primary interest is in understanding how sexual diversity is conceived

²⁹⁵ Amia Lieblich, Rivka Tuval-Mashiach and Tamar Zilber, '*Narrative Research: Reading, analysis and interpretation*' (Sage 1998) 2.

²⁹⁶ *ibid* 1.

²⁹⁷ *ibid* 10; ch 4-7.

²⁹⁸ *ibid* 10.

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among refugees and asylum seekers, I have adopted a categorical approach. However, the research text—each interview transcript represents a whole research text—was originally approached as a whole, and considerations of the narrative as a whole remained pertinent throughout my analysis. So, therefore, while a categorical analysis was deployed, considerations of the research text as a whole served as an interpretative aid to understanding participants' narratives.

Along the other axis, a content-based analysis focuses on the narrative itself, examining what events transpired, who was present, and how this made the participant feel. This form analysis focuses on the structure of the narrative plot, the choice of metaphors and words, and the style of narrative deployed. On this axis, I have adopted a mixed approach. This takes account of both the content and forms of participant narratives. This is because, within asylum claims, credibility determinations are often founded on both the content and form of a claimant's narrative. For example, a focus on offering an internally coherent and chronological narrative is often as important as being able to offer a narrative that corresponds both to the guidance and the decision-makers' expectations of what constitutes a credible narrative. Put another way, decision-makers look to both the content and the form when undertaking credibility determinations, and therefore this study does the same.

In the legal context, stories have long held a special place in the validation, or frustration, of rights claims. As Brooks argues, narrative and rhetoric continue to hold a central role within legal reasoning.²⁹⁹ This is consistent with a Foucauldian understanding of law which views law as being part of the wider governmentality present within a state.³⁰⁰ For

²⁹⁹ Peter Brooks, 'The Law as Narrative and Rhetoric' in Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the law* (Yale University Press 1996) 14-22. See also: Martha Minow, 'Stories in Law' in Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press 1996).

³⁰⁰ See section: 2.5.

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this reason, the focus narrative inquiry places on personal narratives, above a focus on generalizable themes, allows for a closer analysis of the relationship between the ways in which sexually diverse refugees and the discourses and knowledges of sexual diversity deployed within the UK asylum apparatus.³⁰¹ As Brooks claims, ‘Narrative has a unique ability to embody the concrete experience of individuals and communities, to make other voices heard, [and] to contest the very assumptions of legal judgement’.³⁰² Given the research goals discussed in chapter one, I argue that Brooks characterisation of narrative challenging the assumptions of legal judgement powerfully demonstrates the appropriateness of the methods employed to the research goals pursued.

Representing the narratives of participants in the most authentic way possible is important because as Fobear recognises: ‘Stories matter for refugees. Refugees make sense of their past and present experiences, interact with each other, and participate in cultural, political, and social conversations through sharing their stories’.³⁰³ Indeed, even their recognition as legitimate recipients of protection is generally dependent on their ability to advance a ‘credible’ narrative.³⁰⁴ Therefore, Murry argues, their stories can be powerful tools to bring attention to the issues of anti-queer and anti-migrant/anti-refugee prejudice.³⁰⁵

A final consideration that is of increasing necessity to any researcher based the in “west” and addressing international sexual and gender diversity rights, is the problem of

³⁰¹ For a consideration of the ways in which human lives are experienced in the messiest terms, defying easy categorisation or organisation as opposed to the expectations of clean coherent narratives demanded by law see: Alan Derashowitz, ‘Life is not a Dramatic Narrative’ in Peter Brooks and Paul Gerwitz (eds), *Law’s Stories: Narrative and Rhetoric in the Law* (Yale University Press 1996)

³⁰² Peter Brooks, ‘The Law as Narrative and Rhetoric’ in Peter Brooks and Paul Gerwitz (eds), *Law’s Stories: Narrative and Rhetoric in the Law* (Yale University Press 1996) 16.

³⁰³ Katherine Fobear, ‘“I Thought We Had No Rights” – Challenges in Listening Storytelling and Representation of LGBT Refugees’ (2015) 9 *Studies in Social Justice* 102, 102-103.

³⁰⁴ David Murray, ‘Real Queer: “Authentic” LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System’ (2014) 56 *Anthropologica* 21, 22.

³⁰⁵ *ibid* 26.

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homonationalism.³⁰⁶ Puar defines homonationalism as ‘arrangements of...sexual exceptionalism—homonormativity—that complicates the dichotomous casting away of the nation as only supportive and productive of heteronormativity and disallowing of homosexuality.’³⁰⁷ She also traces the frequent deployment of LGBT+ rights as a framework for legitimising state violence and the othering of non-“western” states.³⁰⁸ In making a claim for asylum based on one’s sexual diversity, a claimant must demonstrate, in effect, two things. Firstly, the credibility of their claimed identity, or at least the identity they claim they would be perceived as; and, secondly, that they have a well-founded fear of persecution for reason of that identity. As Murray has pointed out, this means that asylum seekers narratives are often compelled to include a disclaiming of one’s country of origin for its ‘backwards’ treatment of sexually diverse people and a story of gratitude and respect to the receiving country and its ‘progressive’ values.³⁰⁹ This contributes to a discourse which legitimises the imperialism of European states, and the US, and undermines autochthonous attempts to protect the rights of sexually and gender diverse people.³¹⁰

In stating this, note should be taken of the fact that some proponents of homonationalism have been critiqued for applying the framework in overly broad ways.³¹¹ Some applications of homonationalism step into an overly simplistic line of analysis which

³⁰⁶ Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press 2007); Jasbir Puar, ‘Mapping US Homonormativites’ (2006) 13 *Gender, Place & Culture: A Journal of Feminist Geography* 67.

³⁰⁷ Jasbir Puar, ‘Mapping US Homonormativites’ (2006) 13 *Gender, Place & Culture: A Journal of Feminist Geography* 67, 68.

³⁰⁸ See generally: Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, 2007).

³⁰⁹ David Murray, ‘Real Queer: “Authentic” LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System’ (2014) 56 *Anthropologica* 21, 27-29.

³¹⁰ See Generally: Nof Nassier-Edin, Nour Abu-Assab, Aydan Greatrick, ‘Reconceptualising and Contextualising Sexual Rights in the MENA Region: Beyond LGBTQI Categories’ (2018) 26 *Gender and Development* 173.

³¹¹ See for example: Aleardo Zanghellini, ‘Are Gay Rights Islamophobic? A Critique of Some Uses of the Concept of Homonationalism in Activism and Academia’ (2012) 21:3 *Social & Legal Studies* 357.

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situates LGBT+ activism in some contexts as inherently carrying racist undertones. For example, Zanghellini's critique of Decolonizequeer, in which he challenges the overly broad application of homonationalism with regard to the East End Pride organised in 2011,³¹² arguing that the authors engage in overstated critiques that make 'inappropriate' rhetorical moves, is endorsed for drawing attention to a problematic over-application of the concept.³¹³ However, I argue that homonationalism nonetheless presents a useful consideration of the ways in which discourses in their presentation of the world can endorse, produce, or be interpreted as embracing, certain groups while disavowing others. Thus, I argue that scholars who study sexual diversity at a global level, across cultures, should be vigilant about the potential of endorsing schemas of thought that hierarchise social groups and re-produce violent epistemologies and ways of making sense of the world. Thus, homonationalism is here adopted as a methodological caution, rather than a direct analytic framework or conceptual deployment.

Accounting for the role of homonationalism, I have sought to avoid, wherever possible, imposing quasi-imperial ideals on participant's narratives or othering the cultures from which they have originated. To avoid this, I have presented participants accounts of their countries of origin as directly as possible, without offering analysis of their experiences in their countries of origin. Instead, I have focused on their feelings about and experiences of sexually diversity, as well as their experiences in the UK.

2.5 Epistemology

³¹² See the original Decolonize Queer letter here: Jin Haritaworn, et al, 'From Gay Pride to White Pride? Why marching on East London is racist. (Decolonizequeer, 2011) <https://research.kent.ac.uk/decolonizing-sexualities-network/decolonize-queer> accessed 22 June 2021.

³¹³ Aleardo Zanghellini, 'Are Gay Rights Islamophobic? A Critique of Some Uses of the Concept of Homonationalism in Activism and Academia' (2012) 21:3 *Social & Legal Studies* 357. 361-365.

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The following section outlines the epistemological frameworks which underly this research.

In offering this outline, I directly address the ways in which these frameworks have influenced the methods adopted and the direction of analysis. In what follows, it is also important to bear in mind that law itself—given the liberal way in which law is conceived by most people, at least within the ‘west’—functions as an epistemological framework. This is a framework which codes some factors as relevant sites of analysis and disclaims others as irrelevant.³¹⁴ In order to account for this, I argue that a key aspect in any legal research project should be to outline the author’s jurisprudential standpoints.

2.5.1 Foucault and the Law

As has been established, this research adopts a Foucauldian approach which is grounded in concepts of discourse, governmentality, and the fusion of power/knowledge. Adoption of Foucauldian approaches within a legal context could be viewed as controversial, particularly when the aim of the study is to improve recognition of sexually diverse people for the purposes of a rights-based framework.³¹⁵ This is primarily due to Foucault’s critique of liberal rights as put forward in *Discipline and Punish*³¹⁶ and elsewhere.³¹⁷ However, as I will argue, Foucault also offers useful insights for thinking through the issues presented by recognition for the purposes of the Refugee Convention. A further engagement with Foucault’s work around “sexuality” can be found in chapter three.

³¹⁴ Pauline Westerman, ‘Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law’ in Mark Van Hoecke (ed) *Methodologies of Legal Research: Which kind of Method for What Kind of Discipline?* (Hart publishing 2011) 91.

³¹⁵ See Further: Brent Pickett, ‘Foucaultian Rights?’ (2000) 37 *The Social Science Journal* 403.

³¹⁶ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan Trans: Penguin Books 1991) ESP 105-293.

³¹⁷ Michel Foucault, ‘Governmentality’ in James D Faubion (ed), *Michel Foucault: Power. Essential Works 1954-84* (Robert Hurley Trans: Penguin 2020) ESP 213.

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As Hooke has argued, ‘it is fair to say that Foucault supports a vague sense of the right to be different.’³¹⁸ Gordon further notes Foucault’s endorsement, towards the end of his life, of wide-reaching relational rights and even of the utility of law as a tool for resisting certain forms of governmental power.³¹⁹ Further, it should be noted that, as Zanghellini has argued, queer Foucauldian scholarship could and should be viewed as a form of counter-normativity, rather than anti-normativity.³²⁰ In this context, counter-normativity is focused on opposing dominant norms, whereas anti-normativity is a rejection of all prescriptive projects. So, Zanghellini’s point is that while Foucauldian scholarship performs a valuable role in the ‘repudiation of dominant norms’ it does not have to entail any ‘renunciation of prescriptive projects’.³²¹ Indeed, in pursuing ‘justice for sex and gender outsiders’ the key issue is creating space both conceptually and legally for diversity.³²² Thus, it is this right to be different, the right to reject the mode of government currently being enacted upon one as a subject, which is adopted in this research as a link between the framework of Foucauldian scholarship, queer theory, and the ability of sexually diverse asylum seekers to rely on the protections offered under the Refugee Convention. Indeed, I follow Zanghellini in seeking to use Foucauldian queer theory in order to advance what are, at their core, fundamentally humanistic aims.³²³ This is because such aims do rest on an implicit acceptance of the idea that human well-being is important and that, therefore, we need to work towards a world where ‘concern for people’s well-being is not dependent on their participation in socially normative relational,

³¹⁸ Alexander Hooke, ‘The Order of Others: Is Foucault’s Antihumanism against Human Action’ (1987) 15 *Political Theory* 38, 47.

³¹⁹ Colin Gordon, ‘Introduction’ in James Faubion (ed), *Michel Foucault: Power. Essential Works of Foucault 1954-1984: Volume Three* (Robert Hurley Trans: Penguin Books 2020) xxix-xi.

³²⁰ Alcardo Zanghellini, ‘Queer, Antinormativity, Counter-Normativity and Abjection’ (2009) 18 *Griffith Law Review* 1.

³²¹ *ibid* 1.

³²² *ibid* 4.

³²³ See Further: Alcardo Zanghellini, ‘Antihumanism in Queer Theory’ (2020) 23 *Sexualities* 530.

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intimate, and sexual scripts'.³²⁴In legal terms, therefore, I use Foucauldian theory to analyse the normativising problems with legal frameworks. However, I do not entirely reject the potential of law to be enact less violent norms.

Another Foucauldian theorist, Butler, has argued that the binding nature of law and legal judgements itself cements the systems of power/knowledge that Foucault argues are central to contemporary rights-based ways of approaching the world.³²⁵ Pickett supports this, arguing that the main issue Foucault takes with rights is that they rely 'on a view of people as having a true nature... this reinforces the process of normalisation'.³²⁶ Butler, as interpreted by Loizidou, further suggests that a Foucauldian conception of law sees legal systems as essentially performative in nature.³²⁷ Thus, in a similar manner to gender norms, legal systems function by installing themselves into discourse as necessary grounds.³²⁸ When it refers to possible identities, this is bio-politics (or bio-power) in its truest sense.³²⁹ Because law here functions as one way of determining which lives are liveable and viable. Of course, in line with Foucault and Butler's thought, this form of power always contains within itself the potential of resistance, as it is through resistance to normalising powers that one is able to fully become a subject.³³⁰

Crucially, this means that legal discourse both competes and combines with discourses such as those which currently focus on the 'problem' of immigration,³³¹ as well as

³²⁴ *ibid* 534.

³²⁵ Judith Butler, *The Force of Nonviolence* (Verso 2020) 132.

³²⁶ Brent Pickett, 'Foucaultian Rights?' (2000) 37 *The Social Science Journal* 403, 406.

³²⁷ See further: Elena Loizidou, *Judith Butler: Ethnics, Law, Politics* (Routledge 2007).

³²⁸ Judith Butler, *Gender Trouble* (Routledge 1999) 16.

³²⁹ Michel Foucault, *The History of Sexuality. Volume 1: The Will to Knowledge* (Penguin 1984) 136-138.

³³⁰ See further: Elena Loizidou, *Judith Butler: Ethnics, Law, Politics* (Routledge 2007) 17-20.

³³¹ See for Example: Matthew Robinson, 'End Free Movement' - Theresa May's Plans to Cut Low-Skilled Migration Post-Brexit Backed (Express.co.uk 2018). <<https://www.express.co.uk/news/politics/1019591/Theresa-May-Brexit-news-immigration-low-skilled-migrants-EU-Migration-Advisory-Committee>> Accessed 29 September 2018; 'PM: Immigration Targets Still

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those which stress that sexually diverse people were ‘born this way’ with a fully realised and pre-social identity.³³² This is, in and of itself, a productive form of power, because, as Foucault argues, knowledge is constructed within a historical context and instead of merely acting on a subject, knowledge itself contributes towards the production of that subject.³³³ Thus, this research proceeds with an understanding that refugee status determination both draws on and itself produces forms of knowledge regarding sexual diversity. These forms of knowledge arise from different social domains as diverse as medicine and popular culture.³³⁴ The implication of this is that the subject of the sexually diverse refugee is produced by a range of contrasting and conflicting knowledges and practices.

The essential claim here is that legal and administrative systems do not simply reach objective results. Rather, such systems draw on other forms of knowledge and themselves produce knowledges through which identities and ways of being are brought into existence. This means that legal systems should be considered to be themselves operating as a part of the wider governmentality within a given state. They operate alongside knowledges from a diverse range of fields which are deployed and (re)produced within the rationalities of government.

Thus, the UK asylum apparatus must look to other disciplines to determine what is a knowable sexual diversity. But, in rendering decisions regarding what is a knowable sexual diversity, the asylum system itself (re)produces the categories of sexual diversity. This is

Important’ (BBC News 2018) <<https://www.bbc.co.uk/news/uk-politics-39840503?>> accessed 29 September 2018.

³³² See: Tim Johnston, ‘Beyond “Born This Way”’ (2015) 5 *PhiloSPOHIA* 140.

³³³ Michel Foucault, ‘Truth and the Judicial Forms’ in James Faubion (ed), *Michel Foucault: Power. Essential Works of Foucault 1954-1984: Volume 3* (Robert Hurley Trans: Penguin 2020) 3.

³³⁴ See Generally: Michel Foucault, ‘Governmentality’ in James D Faubion (ed), *Michel Foucault: Power. Essential Works 1954-84* (Robert Hurley Trans: Penguin 2020)

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simply the insight that, as Loizidou states, ‘power is not located in one space or in the hands of the ruler, but it is to be found everywhere. This affects our formation as subjects’.³³⁵

2.5.2 Law as Performative

As the above argument suggests, this thesis understands law in Foucauldian and Butlerian terms. Although Foucault never advanced a complete theorisation of law, he gave several indications of how he thought law figured within his approach to making sense of the operation of power with the contemporary state.³³⁶ Butler develops on the work of Foucault in their own writing about gender, and Loizidou has drawn on this to advance a theorisation of law as performative.³³⁷ This theorisation of law is also adopted within this research.

Law as performative draws on Butler’s theorising of gender as a process. The approach builds on Butler’s conceptions ‘of the relationship between “life” and institutions that promote, regulate, and sustain life’.³³⁸ This helps us to understand the role legal apparatuses play in the governmentality of a state. Further, it offers the opportunity to consider the ways in which it contributes to imposing limits on what constitutes a liveable life. Thus, my adoption of this mode of conceptualising law is motivated because, as Loizidou argues, totalising conceptions of law lead the intelligibility of lives to come under threat.³³⁹ In this sense, law is not only responsible for producing values, identities and norms as highlighted in the discussion of Foucault above, but—when conceptualised in absolute terms—also represents a limit zone where certain forms of subjects’ very being is foreclosed.³⁴⁰

³³⁵ Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (GlassHouse 2007) 4.

³³⁶ See for an overview: Ben Golder & Peter Fitzpatrick, *Foucault and Law* (Routledge 2010).

³³⁷ Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (GlassHouse 2007).

³³⁸ *ibid* 2.

³³⁹ *ibid* 12.

³⁴⁰ See Further: Robert Cover, ‘Violence and the Word’ (1986) 95 *Yale Law Journal* 1601.

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This power of foreclosure is perhaps at its most clandestine within refugee status determinations relating to sexual diversity. In such cases, law is forced to reckon with “identity” in a direct sense. It is required to provide—in line with the test laid down in *HJ (Iran) and HT (Cameroon)*³⁴¹ and taking account of the appropriate Home Office guidance—an answer to the question of identity as its first task. For example, in seeking to provide an answer within the refugee status determination context, lawyers, decision-makers, and judges, following the guidance of legislators and policy-makers, must determine what represents an intelligible performance of sexual diversity and whether the person before them corresponds to this or would be perceived as doing so.

Thus, as I have argued in another context,³⁴² legal concepts are a form of knowledge without ontological basis. Legal categories can be said to be performative in that they construct their own significance in their instantiation. Otherwise put, the very speaking of a legal judgement also functions as its enactment, to the effect that declarations of legal decisions are themselves the instances which make law. Law is, in this light, simply another regime of knowledge and discourse through which individual conduct can be examined, assessed, and categorised; or to use a Foucauldian language, governed. This regime of knowledge is not special, rather it figures as one way of understanding the world among many.³⁴³ Often law will borrow from, or deploy, knowledges derived from other disciplines to support its judgements. For example, law may borrow from cultural industries—which, while not siloed or separated spheres of knowledge—offer alternative disciplinary insights for categorising social phenomena.

³⁴¹ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596.

³⁴² Chris Ashford, Max Morris & Alex Powell, ‘Bareback sex in the Age of Preventative Medication: Rethinking the “Harms” of HIV Transmission’ (2020) 84 *The Journal Of Criminal Law* 596, 611.

³⁴³ Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (GlassHouse 2007) 12-13.

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In this regard, legal categories can also gain significance within other disciplines of governance. For example, the idea of the refugee has also gained a life of its own outside of the framework of the Convention. This provides a clear demonstration of law's performative power to function as a site of knowledge production. This, in turn, demonstrates its positionality as a part of the wider apparatus of government. For example, in recent debates over migrant and refugee entry into the UK the media have (or have at least attempted to) supplanted the legal frameworks for determining the legitimacy of an individual's claim for asylum by themselves designating those coming to the UK as 'economic migrants.'³⁴⁴ Obviously, this does not function to determine the actual status of those coming to the UK. However, such interventions themselves impart 'knowledge' which may be taken on board by decision-makers. For example, in her ethnography of the Home Office, Jubany noted a workplace culture that had embedded expectations that asylum claimants were lying to, or attempting to mislead, Home Office decision-makers.³⁴⁵ It is hard to separate these expectations, on the part of Home Office decision-makers, from the wider context in which many asylum seekers were being falsely accused of being economic migrants coming to the UK in search of employment, rather than fleeing a well-founded fear of persecution.³⁴⁶ This example is useful for drawing attention to the power of discourse to shift knowledges across disciplines, as well as within the discipline in which the interjection was originally made.

The core point here is that contestations over what constitutes sexual diversity are greatly impacted by the ways in which immigration judges and Home Office decision-makers

³⁴⁴ See For example: Greg Heffer, 'Nigel Farage Dismisses Racism Claims Over Ukip's New EU Referendum Poster' (Express.co.uk 2018) <<http://www.express.co.uk/news/politics/6805445/Nigel-Farage-dismisses-racism-claims-over-new-EU-referndum-poster>> Accessed 29 September 2018.

³⁴⁵ See Generally: Olga Jubany, 'Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within' (2011) 26 *International Sociology* 74.

³⁴⁶ Dominic Casciani, 'Why Are Migrants Crossing The English Channel?' (*BBC News*, 2020) <<https://www.bbc.co.uk/news/uk-53699511>> accessed 12 August 2020.

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conceive of such diversity. Therefore, consideration of the inter-relationship between different domains of governmentality such as the legal and the cultural is crucial to understanding how law and policy concerning sexual diversity operate and the ways in which such law and policy exist as part of a wider cultural framework.³⁴⁷

2.5.3 Implications of Law as Performative

Such a theory of law, of course, rejects the claim that law is autonomous. In this regard, it is argued that law is at least in some sense indeterminate.³⁴⁸ However, as previously outlined, this project does not reject the potential of prescriptive projects. So, I do not argue that law is radically indeterminate.³⁴⁹ Rather, I argue that, while it is possible to identify better or worse answers, finding correct answers to legal issues involves engaging with a far wider range of discourses and knowledges than most positivist accounts of legal decision-making would accept.³⁵⁰ Therefore, I argue that any attempt to understand it as a closed off or complete system becomes unintelligible. This is a departure from standard liberal approaches to law which interpret law as a separate domain from politics. The traditional, liberal approach to law is well characterised in former Supreme Court president David Neuberger's claim that:

law is somewhat remote, somewhat detached, somewhat to be feared. This is partly because justice has always to be detached, almost Olympian. Judges famously take an oath to dispense justice without fear, favour, affection or ill will: these are human features, emotions, which we have to forswear.³⁵¹

³⁴⁷ Judith Butler, 'Merely cultural' (1997) 52/53 *Social Text* 265.

³⁴⁸ See generally: Brian Leiter, 'Legal Indeterminacy' (1995) 1 *Legal Theory* 481.

³⁴⁹ *ibid.*

³⁵⁰ See for example: HLA Hart, *The Concept of Law* (Clarendon Press 1961)

³⁵¹ David Neuberger & Peter Riddel, *The Power of Judges* (Claire Foster-Gilbert ed) (Haus Publishing 2018) 22.

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On this view, law is a separate realm operating to give objective judgements unimpeded by social and cultural influence. Adopting a view of law as performative involves a rejection of this interpretation of law and instead situates law as just one competing discourse—which sits alongside and is deeply intertwined with others—on how the world should be understood.³⁵²

Taking the law as performative perspective enables me to recognise the mutual interplay between cultural practices and administrative decision-making. For example, it shows the interaction of cultural perceptions of gender and sexual non-conformity, cross-border migration, and asylum seeking with the legal categories available under the asylum apparatus to recognise and make sense of sexual diversity. This is because, as Loizidou articulates, the law as performative approach to analysis involves placing the body at the centre of analysis. This entails recognising that the body is a subject on which multiple competing discourses (such as law and culture) are enacted.³⁵³ Therefore, adopting this orientation enables me to demonstrate how current Home Office policy on addressing asylum claims by sexually diverse people is itself a product of the way in which sexual diversity is socially known. This is to say, in essence, that the relationship between law and culture is dialectical with each shaping the other. Crucially, adopting such an understanding of law provides the intellectual space to recognise the impact that ‘gay equal rights discourse’ and the strategies its proponents have employed has also had on legal conceptions of sexual diversity.³⁵⁴

³⁵² Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (GlassHouse 2007) 12-13.

³⁵³ *Ibid* 20-23.

³⁵⁴ I take the term ‘Gay Equal Rights Discourse’ from the work of Libby Adler. See generally: Libby Adler, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Duke university Press 2018) ESP 3-10.

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2.6 Chapter Conclusions

This chapter has identified the methodological and epistemological positions adopted within the research. Specifically, it has identified that I utilised a series of phenomenological narrative inquiry interviews in order to try and understand the lived experiences of sexually diverse refugees in the UK. In total eight interviews were conducted. These lived experiences were then contrasted with Home Office policy on sexual diversity. This analytical work was undertaken while adopting a Foucauldian conception of law which situates law as a performative. The law as performative position entails law as being inseparable from culture and politics. Instead, law is envisaged as being both a product of, and productive of, culture, politics, and forms of knowledge. Building on these positions, chapter three theorises sexual diversity, arguing for it to be conceived in heterogenous ways.

Chapter Three: Theorising Sexual Diversity

This chapter offers a theoretical exploration of sexual diversity, where I advocate for social constructivist conceptions of sexual diversity that broaden our understanding beyond “western” notions of what it means to be LGBT+. These theoretical reflections on the nature of sexual diversity help with pinpointing mismatches between Home Office policy and the heterogenous ways in which sexual diversity is lived and conceptualised. Thus, the chapter explores different ways in which sexual diversity has historically and spatially been conceived.

3.1: Sexual Diversity in History and Theory

Commentators such as Spijkerboer have argued that UK asylum policy adopts a limited understanding of sexual diversity which is only in accordance with the normatively accepted categories of sexual identity.³⁵⁵ The result of this is that, ‘LGBT people are assigned to a specific and quite narrow space where we can be LGBT—but only one category at a time, preferably for life, and only to the extent they identify with one of those exact categories’.³⁵⁶ As explored in chapters five and six, this is despite attempts to word the 2016 API in broad terms which allow for diverse presentations of sexually diverse identities. As such, those who do not portray their identities in a normative, recognised, and/or “westernised” manner are

³⁵⁵ Thomas Spijkerboer, ‘Sexual Identity, Normativity and Asylum’ in Thomas Spijkerboer, *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge 2013). See Also: Alex Powell, ‘Normative Understandings: Sexual Identity, Stereotypes, and Asylum Seeking’ in Chris Ashford and Alexander Maine (eds), *The Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020); Eddie Bruce-Jones, ‘Death Zones, Comfort Zones: Queering the Refugee Question’ (2015) 22 *International Journal on Minority and Group Rights* 101, 114; Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations’ (2009) 21 *International Journal of Refugee Law* 1.

³⁵⁶ Thomas Spijkerboer, ‘Sexual Identity, Normativity and Asylum’ in Thomas Spijkerboer, *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge 2013) 224-225.

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less likely to succeed in their claims. For example, Rainbow Migration identified that 86% of rejected claims between 2011 and 2013 were denied due to ‘lack of credibility’.³⁵⁷

Raj has argued that there is an anxiety about potential false claims within the Home Office and Tribunal service.³⁵⁸ This anxiety can be seen in one immigration Judge’s claim that asylum claims on the basis of sexual diversity are ‘easy to make and impossible to disprove’.³⁵⁹ In asylum claims, the claimant is required to demonstrate ‘on the balance of probabilities’ that they have a well-founded fear of persecution. When claiming based on sexual diversity, the claimant needs to show—in accordance with this burden of proof—that they are, or would be perceived as, sexually diverse. However, as I have argued elsewhere, asylum claims based on sexual diversity often lack objective evidence and therefore come to be based on narrative.³⁶⁰ This focus on narrative can be linked to discourses of ‘authenticity’ which operate within the LGBT+ community. These discourses of authenticity see people’s identity expressions and the process of coming out and joining a community often being expected to follow a pre-ordained process which matches to what is considered a normative form of identity development.³⁶¹ Indeed, as Stychin has argued, ‘for many the most important gay act in identity formation is ‘coming out’.³⁶²

³⁵⁷ UK Lesbian and Gay Immigration Group, ‘Missing the Mark’ (Unison 2013) <<https://uklgig.org.uk/wp-content/uploads/2014/02/Missing-the-Mark.pdf>> accessed 12 December 2018.

³⁵⁸ See generally: Senthurun Raj, ‘Affective Displacements: Understanding Emotions and Sexualities in Refugee Law’ (2011) 36 *Alternative Law Journal* 177; Senthurun Raj, ‘A/Effective Adjudications: Queer Refugees and the Law’ (2017) 38:4 *Journal of Intercultural Studies* 453; Senthurun Raj, ‘Queering Fears: Pro-LGBTI Refugee Cases’ in Chris Ashford, Alan Reed and Nicola Wake *Legal Perspectives on State Power: Consent and Control* (Cambridge Scholars Publishing 2016) 126; 147-148

³⁵⁹ *Krasniqi v Secretary of State for the Home Department* [2001] UKIAT 01TH02140, [2].

³⁶⁰ See generally: Alex Powell, ‘Normative Understandings: Sexual Identity, Stereotypes and Asylum Seeking’ in Chris Ashford and Alexander Maine (eds), *The Research Handbook on Gender, Sexuality and The Law* (Edward Elgar 2020).

³⁶¹ See Generally: Kirsten McLean, ‘“Coming Out Again”: Boundaries, Identities and Spaces of Belonging’ (2008) 39 *Australian Geographer* 303. See also: Mark Blasius, ‘An Ethos of Lesbian and Gay Existence’ in Mark Blasius (ed), *Sexual Identities, Queer Politics* (Princeton University Press 2001) ESP 143.

³⁶² Carl Stychin ‘Being Gay’ (2014) 40 *Government & Opposition* 90, 91.

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The judgement in the combined cases of *HJ (Iran) & HT (Cameroon)*³⁶³ has provided the test which should be applied when considering asylum claims made on the basis of sexual diversity.³⁶⁴ The first stage of the test, as it was articulated by Lord Roger, is that the decision-maker should ‘ask itself whether it is satisfied on the evidence that he is gay’.³⁶⁵ This means that, whenever a claim on the basis of sexual diversity arises, the first task with which the Home Office or Tribunal concerns itself is establishing the credibility of the claimant in their proclaimed “sexuality”. It is this first stage which I look at throughout this thesis.

3.1.1 A Circle that Squared Me Out: The Problem of Categorisation

As Weeks has identified, ‘the sexual categories and languages we deploy to place people, and place ourselves, in a complex and diverse world, have become critical factors in shaping contemporary structures of sexuality and gender’.³⁶⁶ As Stychin has further recognised, there has been a ‘universalizing of same-sex sexualities as identities.’³⁶⁷ Indeed, even those of us who would prefer not to attach an identity-based category to our sexual selfhood will likely find ourselves ascribed one by others. The process of ascription is social, but crucially, also forms a part of legal frameworks, with access to certain rights—such as the right to claim asylum on the basis of sexual diversity—being contingent on being recognisably related to one of the normatively accepted categories of sexual diversity. As a work of counter-

³⁶³ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596.

³⁶⁴ It should be noted that the test itself applies to all particular social group-based asylum claims. But the judgement was regarding gay men, so this was the language adopted by the judges in the Supreme court.

³⁶⁵ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596 [82].

³⁶⁶ Jeffery Weeks, ‘Beyond the Categories’ (2015) 44 *Archive of Sexual Behaviour* 1091, 1092.

³⁶⁷ Carl Stychin, ‘Same-sex Sexualities and the Globalization of Human Rights Discourse’ (2004) 49 *Mcgill Law Journal* 951, 954. See also: Dennis Altman, *Global sex* (University of Chicago Press 2002).

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normativity, this thesis attempts to broaden the scope of normative recognition and thus open protection to a wider range of potential claimants.

Although, the 2016 API stresses to decision-makers that claimants may not understand their sexual diversities in the same way as sexually diverse people in the UK, as I argue across chapters five and six, this fails to pull the conception of diversity underlying the policy away from “western” categorical logics, or, as Grabham has noted, ‘the law’s propensity to categorise’.³⁶⁸ Of course, this categorical nature is implicit in the conception of law outlined in chapter two. Otherwise put, law deploys certain discursive categories for making sense of social phenomena. However, critical scholars should always seek to interrogate whether these categories are an appropriate way of making sense of those phenomena.

When discussing “sexuality” there has, in recent years, been a proliferation of categories. This could be seen to have increased the pressure to identify with a category.³⁶⁹ This has been manifested in the various expansions of the LGBT+ acronym, for example to LGBTIQ+.³⁷⁰ Being within one of these categories can, in certain contexts, determine whether or not one is intelligible within the apparatuses of decision-making. Intelligibility is key to being recognised and protected as a subject.³⁷¹

It should be noted that, even when a person does not directly identify with one of the categories, they will often be socially ascribed a role by others, based on how their social

³⁶⁸ Emily Grabham, ‘Intersectionality: Traumatic Impressions’ in Emily Grabham, Davina Cooper, Jane Krishnadas and Didi Herman (eds) *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge 2008) 186.

³⁶⁹ Jeffery Weeks, ‘Beyond the Categories’ (2015) 44 *Archive of Sexual Behaviour* 1091, 1094

³⁷⁰ Multiple variants of this acronym exist, however, listing or examining them is not within the prevue of this chapter.

³⁷¹ Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (GlassHouse 2007) 1-23.

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performances are interpreted. For this reason, even if, as I expand on in chapters five and six, the 2016 API does not require claimants to identify themselves as lesbian or gay, it still sets out a framework for analysing claims which leads decision-makers to assess them in relation to these categorical identities.

More broadly, alignment with a recognisable identity can also be crucial in determining access to intelligibility, and therefore grievability. In this sense, being recognisable by others not only impacts one's ability to rely on legal rights, but also the ability to register as a life worth protecting from violence. This is a theme I expand on in chapter seven, analysing how those performing forms of sexual diversity not recognised within the UK may struggle to draw attention to the violence enacted against them and, thus, to motivate legal reforms to assist them.³⁷² In referring to grievability, I am drawing again on the work of Butler, who has argued that different lives are endowed with different levels of privilege or precarity by discourse.³⁷³ Butler's framework of *grievable life* provides a useful way of understanding what counts as a life, what constitutes a life worth living, and what makes a life worthy of protection. Butler builds on the reflection of Foucault that, 'For millennia, man remained what he was for Aristotle: a living animal with the additional capacity for political existence; modern man is an animal whose politics places his existence as a living being in question'.³⁷⁴ This link is well drawn out in Butler's argument that

to be a body is to be exposed to social crafting and form... in other words, the body is exposed to socially and politically articulated forces as well as to claims of sociality—

³⁷² See section: 7.3.

³⁷³ See Generally: Judith Butler, *Frames of War: When is Life Grievable?* (Verso Books 2009) 1-15. See also: Judith Butler, *Precarious life: the power of mourning and violence* (Verso Books 2006); Judith Butler *Undoing Gender* (Routledge 2004) 18-39.

³⁷⁴ Michel Foucault, *The History of Sexuality: The Will to Knowledge* (Robert Hurley Trans: Penguin 1998) 143.

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including language, work, and desire — that make possible the body's persisting and flourishing.³⁷⁵

The relation between these two insights is that Butler's argument encapsulates Foucault's view that politics places one's existence as a subject into question and argues that political forms of articulation are what make one's very preservation possible. What is really at stake, therefore, when questioning whether a life is grievable, is the political existence of the body in question; their very status as a legal person or, as I expand on in, the ability for harm enacted against them to register as violence and articulate demands for redress.³⁷⁶ This point can be exemplified by Baars, who has argued that because intersex identities are not legible within national laws, violence aimed at intersex people with a view to forcing them to accept a legible male or female identity—generally imposed violently from birth—is often not recognised as violence at all.³⁷⁷

In line with the above, I would endorse Butler's argument that 'the epistemological capacity to apprehend a life is partially dependent on that life being produced according to norms that qualify it as a life'.³⁷⁸ At their broadest interpretation, the norms that qualify life are categories ('adult' 'child' 'lesbian', etc.); each identity category can be interpreted as a cluster of norms that lend an individual (varying levels of) intelligibility as a legitimate social and political being. The result of this is that each person is provided with, as a result of the different categories to which they belong, different levels of protection from violence. This protection from violence further motivates episodes of grief and the pressure for reform when violence is instantiated against them. Put another way, grievability is a way of understanding

³⁷⁵ Judith Butler, *Frames of War: When is Life Grievable?* (Verso Books 2009) 3.

³⁷⁶ See: Section 7.3.

³⁷⁷ Grietje Baars, 'Queer Cases Unmake Gendered Law, or, Fucking Law's Gendering Function' (2019) 45 *Australian Feminist Law Journal* 15, 19-23.

³⁷⁸ Judith Butler, *Frames of War: When is Life Grievable?* (Verso Books 2009) 3.

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which categories of life are seen as worth protecting and mourning. In the production of this grievability, law plays a significant role. For example, as Baars notes, if law offers recognition to certain categories—such as male and female—those who do not fit within these categories can face enactments of violence.³⁷⁹

Thus, categories are central to being intelligible.³⁸⁰ As such, they impact both social and legal perceptions of what is a valuable life. Agamben has further described the conditions which apply when one's life is determined to not be grievable, or when one's humanity is not intelligible.³⁸¹ In constructing his framework of *bare life*, the condition under which one's existence is reduced to the purely biological fact of life shorn of any guarantees of the quality of that life, Agamben argues that 'the refugee causes the secret presupposition of the political domain—bare life—to appear for an instant within that domain'.³⁸² The very existence of the refugee is a political question; posed in the form of a refugee status determination. In providing an answer to that question, one of the key considerations is the fit of the claimant within one of categories governing our ability to make sexual diversity intelligible. Those asylum seekers who do not fit within a recognisable schema are cast into bare life, deprived of a protective state, and exposed to the multifarious sites of violence that this condition permits.

More directly, even outside of categories of sexual diversity such as lesbian or gay, an asylum claimant must be categorizable under one of the heads of the Refugee Convention.³⁸³

³⁷⁹ Grietje Baars, 'Queer Cases Unmake Gendered Law, or, Fucking Law's Gendering Function' (2019) 45 *Australian Feminist Law Journal* 15, 19-23.

³⁸⁰ For an explanation of master statuses see Linda Lindsey, *Gender Roles: A Sociological Perspective* (Prentice Hall 1994).

³⁸¹ See Generally: Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998) 1-12.

³⁸² *Ibid* 131.

³⁸³ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

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Those which do not fit one of the categories of protection cannot rely on the Convention for protection. A contemporary example would be those fleeing the effects of climate change, even where these effects may be a threat to the life of the asylum claimant. This is because, although they may qualify for forms of complementary protection, fleeing climate change is not a recognised ground for asylum under The Convention.³⁸⁴ As this shows, refugee law is always contingent on logics of categorisation, whether at an individual, political, or existential level. As will be developed later, this has a particularly notable impact on the asylum claims of women and sexually diverse people.

The claims of sexually diverse people are generally analysed under the Particular Social Group ground. This is not the only ground under which they could be analysed, with some theorists pointing out that the asylum claims of both women and sexually diverse people might be better suited to the Political Opinion ground.³⁸⁵ The deployment of the Particular Social Group ground, I argue, motivates the further application of categorising logics in the form of the focus on identarian methods of understanding sexual diversity as explored in chapters five and six.

3.1.2 The “Sexuality” Conflation

Consideration should also be given to the relatively low numbers of people, even within the “west”, who identify with one of the normatively recognised LGBT+ categories. Savin-Williams has claimed that, historically, within the US, a ‘majority of individuals attracted to their own sex or engaging in same-sex sexual behaviour do not identify as homosexual’.³⁸⁶ If

³⁸⁴ See: Matthew Scott, ‘Climate Refugees and the 1951 Convention’ in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

³⁸⁵ See for example: Nora Honkala, “‘She, Of Course, Holds No Political Opinions’”: Gendered Political Opinion Ground in Women’s Forced Marriage Claims’ (2017) 26 *Social and Legal Studies* 166

³⁸⁶ Rich Savin-Williams, ‘Who’s Gay? Does it Matter?’ (2006) 15 *Current Directions in Psychological Science* 40, 41.

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the evidence on which Savin-Williams' claim is based continues to be replicated today—which he suggests it does, through interviews with people holding a seemingly expanding number of identity labels for sexual diversity, including 'mostly straight'³⁸⁷—then questions must be asked regarding the continued reliance on categories that the majority of those to whom they supposedly apply do not take up. This is particularly significant where these categories are deployed as if they were the totality of knowledge and discourse around sexual diversity. Similarly, more recent studies have found that many men who engage in activities and have attractions marking them out as sexually diverse do not identify as either gay or bisexual.³⁸⁸

In light of the above, there is a need to question the perceived stability of such categories. Research has shown that, particularly among women, identification with categories of sexual diversity is rarely for life. Indeed, Savin-Williams found that in a 7 year study 'nearly two thirds of women changed their sexual identity at least once because the label did not adequately capture the diversity of their sexual and romantic feelings'.³⁸⁹ Similar social research around sexual fluidity in women has also been conducted by Diamond³⁹⁰ and Rust.³⁹¹ Considering this, the use of identity categories as a way of

³⁸⁷ Rich Savin-Williams, *Mostly Straight: Sexual Fluidity Among Men* (Harvard University Press 2017).

³⁸⁸ See generally: Rich Savin-Williams, *Mostly Straight: Sexual Fluidity Among Men* (Harvard University Press 2017); Tony Bridges & Rachel Whaley, 'Bud-Sex, Dude-Sex and Heteroflexible Men: The Relationship Between Straight Identification and Social Attitudes in a Nationally Representative Sample of Men with Same-Sex Attractions or Sexual Practices' (2017) 61 *Sociological Perspectives* 426 ;Jane Ward, 'Dude-Sex: White Masculinities and "Authentic" Heterosexuality Among Dudes Who Have Sex With Dudes' (2008) 11 *Sexualities* 414.

³⁸⁹ Rich Savin-Williams, 'Who's Gay? Does it Matter?' (2006) 15 *Current Directions in Psychological Science* 40, 42.

³⁹⁰ Lisa Diamond, 'Sexual Identity, Attractions, and Behaviour among Young Sexual Minority Women over a 2-year Period' (2000) 36 *Developmental Psychology* 241; Lisa Diamond, 'A New View of Lesbian Subtypes: Stable Versus Fluid Identity Trajectories over an 8-year Period' (2005) 29 *Psychology of Women Quarterly* 119. See also: Lisa Diamond, *Sexual Fluidity: Understanding Women's Love and Desire* (Harvard University Press 2008).

³⁹¹ Paula Rust, "'Coming Out" in the Age of Social Constructionism: Sexual Identity Formation Among Lesbian and Bisexual Women' (1993) 7 *Gender and Society* 50.

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conceiving of sexual diversity—at least when they are being conceived of as a fixed status – relies on unfounded assumptions regarding the stability and fixity of sexual diversities.

Taking account of this empirical research, an expectation for people claiming asylum based on their sexual diversity to present a sexual narrative that is consistent with one of the currently available categories of sexual diversity, including being able to demonstrate the links between social, romantic and sexual behaviour, would be misguided. Further, there is a need to account for how these categories, and their perceived stability, interact with social norms existing in cultures outside of the “west”. Chelvan has pointed out that, far from being a passive phenomenon, being discreet about one’s sexual diversity involves the performance of numerous actions. For example, he has drawn attention to the pressures to marry and have children in order to avoid ‘detection’.³⁹² Similarly, the Equality and Human Rights Commission, intervening in the Supreme Court, argued that the term discretion was inaccurate to what the pre-2010 process was asking of claimants, stating instead that the appropriate term would be a request to ‘conceal’ their sexual identity.³⁹³ Further discussion of the role of discretion within sexual diversity asylum claims is offered within chapter four. However. The key point here is that the pressures involved with concealing one’s identity lead people into behaviours which are incompatible with the perceived stability of the categories to which they are associated. This can result in adverse credibility findings being made if someone comes to lodge an asylum claim on the basis of sexual diversity later in life.³⁹⁴ As this suggests, the expectations commonly held regarding sexual diversity, taken in combination

³⁹² S Chelvan, ‘Put Your Hands Up (If you Feel Love)’ (2011) 25 *Immigration, Asylum and Nationality Law* 56, 60. See Also: Calogero Giametta, *The Sexual Politics of Asylum: Sexual Orientation and Gender Identity in the UK Asylum System* (Routledge 2017) 45.

³⁹³ The Equality and Human Rights Commission, ‘*HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department — Case for the Equality and Human Rights Commission*’ (2010) [29]; [44].

³⁹⁴ See For example: *J v Secretary of State for the Home Department* [2006] EWHC 1238, [13]. See Further: Alex Powell, ‘Normative Understandings: Sexual Identity, Stereotypes and Asylum Seeking’ in Chris Ashford and Alexander Maine (eds), *The Research Handbook on Gender, Sexuality and The Law* (Edward Elgar 2020).

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with the social realities existing in asylum seeker countries of origin, can lead to double binds. The result of this is that behaviour used as a form of self-protection is later used as evidence that their claim for asylum is not credible.

The reflections made above are pertinent beyond the field of refugee law. For example, Neller has noted that the same issues arise within the drafting of hate speech legislation arguing that ‘While the list of categories within a particular law may be expanded, such a list can never be all-inclusive nor account for the ways in which different types of identity might intersect, interact or be fluid’.³⁹⁵ Other theorists have pinpointed similar issues in respect of hate crime legislation³⁹⁶ and anti-discrimination law.³⁹⁷ It should be noted that both refugee and hate crime protection can be provided on the basis of perceived diversity. However, perceived diversity only creates space for those whose performances of diversity sufficiently resemble the way in which such diversities are known and spoken about.

In all these cases, people are denied access to social and legal protection due to their failure to perform their diversities in accordance with prevailing knowledges and discourses. In regard to sexual diversity, these frameworks are dependent on essentialised, fixed and binary ways of being or being perceived. As Bruce-Jones argues, this shows the effective requirement facing individuals claiming asylum is to align their performances of sexual diversity with the pre-existing conceptions held by the decision-maker.³⁹⁸

³⁹⁵ Jen Neller, ‘The Need for new Tools to Break the Silos: Identity Categories in Hate Speech Legislation’ (2018) 7 *International Journal for Crime Justice and Social Democracy* 75, 75.

³⁹⁶ See for example: Neil Chakraborti and Jon Garland, ‘Reconceptualizing Hate Crime Victimization Through the Lens of Vulnerability and “difference”’ (2012) 16 *Theoretical Criminology* 499.

³⁹⁷ See for example: Rachel A.D. Bloul, ‘Anti-discrimination Laws, Islamophobia, and Ethnicization of Muslim Identities in Europe and Australia’ (2008) 28 *Journal of Muslim Minority Affairs* 7.

³⁹⁸ Eddie Bruce-Jones, ‘Death Zones, Comfort Zones: Queering the Refugee Question’ (2015) 22 *International Journal of Minority and Group Rights* 101.

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3.1.3 The Sexual self

Finally, there is a need to question the way in which sex is viewed as a meaningful and objective indicator of selfhood.³⁹⁹ In particular, this brings to light problems for those who identify as heterosexual but have sexual contact with members of the “same” sex. These groups are, within existing logics of sexual diversity, marked as repressed or self-oppressing. This denies them both the agency to define their own diversities, and the ability to be socially recognised as valid, and therefore valuable, beings. Of course, they could still succeed in an asylum claim if decision-makers decide that they would be perceived as expressing a recognisable form of sexual diversity by potential persecutors in their country of origin. However, the current identity focused methods of approaching such claims are likely to preclude many who do not identify with a recognised identity-based way of conceptualising sexual diversity from being able to rely on convention protection.

This is a particularly serious issue when it is considered that people from outside of a European or American context may not view sexual diversity as being a meaningful aspect of their identity. For example, within some countries in the Middle East, (and elsewhere) “sexuality” is seen as being a matter of conduct rather than one of identity.⁴⁰⁰ This is discussed further in chapter five, with reference to countries such as Oman.⁴⁰¹ However, the significance of it is that some people understand sexual diversity as being something they do, rather than something they Are. This can mean that claimants from some refugee countries of

³⁹⁹ Jane ward, “‘Dude-sex: White Masculinities and ‘Authentic’ Heterosexuality Among Dudes Who have Sex with Dudes’ (2008) 11 *Sexualities* 415.

⁴⁰⁰ This way of conceptualising “sexuality” was also prevalent within pre-modern Europe. See further: Michel Foucault, *The History of Sexuality: The Will to Knowledge* (Robert Hurley Trans: Penguin 1998).

⁴⁰¹ See Section 5.1.

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origin can struggle to provide a narrative which conforms to the ways in which “we” understand sexual diversity in the UK.

Alternatively, within some South Asian cultures, some performances of sexual/gender diversity—which in a UK context might be considered or read as a gay male identity—are understood as constituting a third gender.⁴⁰² In a similar register, French Polynesia and areas of Hawai’i have the concept of the Mahu—commonly recognised as being male bodied people who adopt feminine social roles, including child-rearing—which, while not invariably corresponding to same sex conduct and attraction, often captures people who engage in same-sex sexual behaviour.⁴⁰³ Although, as Zanghellini argues, colonial laws have led those connotated by the term Mahu to encounter different fates in French Polynesia and Hawai’i.⁴⁰⁴ Accounting for the preceding, it is important that space is made for those who hold different conceptions of the relationship between sex and gender to advance their own narratives.

In similar regard, in some Latin American cultures, sexual role, rather than the UK’s focus on sexual object choice, is regarded as being the primary factor in how identity is conceived of and understood.⁴⁰⁵ It is perhaps notable that the activo/passivo conception deployed within some Latin American cultures is similar to the conception of sexual diversity suggested to have been prevalent within Ancient Greece, where a man who took the active role in a sexual encounter with an individual who was either younger or of a lower social

⁴⁰² See: Michael Bochenek & Kyle Knight, ‘Establishing a Third Gender Category in Nepal: Process and Prognosis’ (2012) 26 *Emroy International Law Review* 11.

⁴⁰³ See Further: Alcardo Zanghellini, ‘Queer Kinship Practices in Non-Western Contexts: French Polynesia’s Gender-Variant Parents and the Law of La Republique (2010) 37 *Journal of Law and Society* 651, 662-667; Alcardo Zanghellini, ‘Sodomy Laws and Gender Variance in Tahiti and Hawai’I’ (2013) 2 *Laws* 51.

⁴⁰⁴ *ibid.*

⁴⁰⁵ See: Alex Carballo-Dieiguez, Curtis Dolezal, Luis Nieves, Franciso Diaz, Carlos Decena, & Ivan Balan, ‘Looking For A Tall, Dark, Macho Man... Sexual role Behaviour Variations in Latino Gay and Bisexual Men’ (2010) 6 *Culture, Health & Sexuality: An International Journal for Research, Intervention and Care* 159.

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stature would not be attributed any identity by which to distinguish them from other men within the society.⁴⁰⁶

Furthermore, to return to the example of South Asian conceptions of sexual diversity, in Nepal the rights of third gender people are protected within the constitution.⁴⁰⁷ This presents a useful reminder that the framework of LGBT+ equal rights discourse and law reform is not the only conception of sexual diversity capable of gaining legal recognition and protection. Indeed, as I have argued in the context of criminal law reform, the objectives of LGBT+ rights organisations and the types of law reform they pursue may be inadequate—or even unhelpful—in protecting the rights of the most marginalised sexually diverse people if these types of reform are founded on normative agendas that stress the similarity of LGBT+ people to cisgendered heterosexual people.⁴⁰⁸ This is because, in proclaiming the sameness of one group to the mainstream society, those who are less willing, or less able, to comply with social norms can be detrimentally impacted⁴⁰⁹. This point has also been well argued by Nadine El-Enany in the context of immigration and citizenship laws.⁴¹⁰

The key point to take from this section is that sexual diversity is vastly more complex than the identity-driven ways in which it is commonly understood within countries such as the UK. This does not mean that identities are an invalid way of understanding or conceptualising sexual diversity. However, it does mean that they are not the only way in

⁴⁰⁶ Aleardo Zanghellini, *The Sexual Constitution of Political Authority: The “Trials” of Same-Sex Desire* (Routledge 2015) 25-64. See Also: Michel Foucault, *The History of Sexuality: The use of Pleasure* (Robert Hurley Trans: Penguin Classics 2020) 185-215.

⁴⁰⁷ See Further: Michael Bochenek & Kyle Knight, ‘Establishing a Third Gender Category in Nepal: Process and Prognosis’ (2012) 26 *Emroy International Law Review* 11.

⁴⁰⁸ Chris Ashford, Max Morris, & Alex Powell, ‘Bareback Sex in the Age of Preventative Medication: Rethinking the “Harms” of HIV Transmission (2020) 84 *The Journal Of Criminal Law* 596, 606-607.

⁴⁰⁹ See further: Libby Adler, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Duke University Press 2018) 3.

⁴¹⁰ See generally: Nadine El-Enany, *Bordering Britain: Law, Race, and Empire* (Manchester University press 2020).

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which sexual diversity can be conceptualised. The significance of this for the research questions addressed in this thesis lies in establishing that categories of sexual diversity are produced in particular contexts, rather than being universal truths.

3.2 Notes on Foucault's Genealogy of Sexual Diversity

Having explored the limitations of categorical frameworks for understanding sexual diversity, this section documents how such categories came into being and suggests how they have come to hold such normative, legal, and social power. Following Weeks, my starting point lies in the rejection of any assumption that there are fixed identities through which sexual diversity is represented across times and cultures.⁴¹¹ Evidence in support of this claim can be taken from the numerous alternative conceptions of sexual diversity that exist, or have existed, across the world. A small sample of these were discussed above.

Identity categories are often treated as if they are universal and exist as ontological realities, independent of the context in which they are formed. This viewpoint has become increasingly common within the LGBT+ community and society more generally.⁴¹²

Arguably, the idea that sexual identities are naturally occurring, independent of social forces, can be seen as a motivating factor in the neo-colonialist phenomenon of homonationalism.⁴¹³

Indeed, as Halperin has recognised, even using the phrase social constructivism—and thus suggesting that identities are not absolute or pre-social—in the wrong circles can make one seem “backwards”.⁴¹⁴ This relates to the strategic essentialism involved in claiming that

⁴¹¹ Jeffrey Weeks, *Sexuality and its Discontents: Meanings, Myths, & Modern Sexualities* (Routledge 1985) 6.

⁴¹² See for example: Tim Johnston, ‘Beyond “Born This Way”’ (2015) 5 *PhiloSPOHIA* 140; Steven Sideman, ‘The Social Construction of Sexuality’ (W.W. Norton 2003) 3-13; Libby Adler, ‘Gay Priori: A Queer Critical Legal Studies Approach to Law Reform’ (Duke University Press 2018); Dean Spade, ‘Normal Life: Administrative Violence, Critical Trans Politics, & The Limits of Law’ (Duke University Press 2015).

⁴¹³ See generally: Jasbir Puar, ‘Mapping US Homonormativites’ (2006) 13 *Gender, Place & Culture* 67; Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press 2007); Jasbir Puar, ‘Rethinking Homonationalism’ (2013) 45 *International Journal of Middle Eastern Studies* 336.

⁴¹⁴ David Halperin, *How to Do the History of Homosexuality* (Chicago University Press 2002) 11.

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LGBT+ identities are immutable and occur irrespective of social circumstance. The concept of strategic essentialism was first coined by the post-colonial scholar Spivak. She utilised this term to refer to the ways in which social groups mobilize based on a shared characteristic and, in so doing, temporarily erase or ignore—which is to say essentialise—differences between the members.⁴¹⁵ The reason for utilizing strategic essentialism is that it allows social groups to bring forward their identity in a simplified manner to make certain political demands, such as social recognition or legal rights.

In the context of LGBT+ rights, the use of strategic essentialism has been hugely productive in securing rights and protections for those who perform their diversities in accordance with normative frameworks. For example, the narrative that sexually diverse people have no choice about their sexual identity, that we are ‘born this way’, has arguably played a key role in progressive realisation of rights for sexually diverse people in recent years.⁴¹⁶ This can be seen in recent slogans of LGBT+ rights charities such as Stonewall, who have deployed adverts informing the British public that ‘some people are gay, get over it’.⁴¹⁷ These adverts may have contributed to the process of normalising LGBT+ identities, as shown by long term declines in homophobic social attitudes.⁴¹⁸ However, while campaigns such as these have been productive, they have also utilised strategic essentialism in a way

⁴¹⁵ Gayatri Spivak, ‘Criticism, Feminism and the Institution’ (1985) 1 Thesis Eleven 175, 175-187.

⁴¹⁶ See Further: Alex Powell, ‘Normative Understandings: Sexual Identity Stereotypes and Asylum Seeking’ in Chris Ashford and Alexander Maine (Eds), *The Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020) 156-157.

⁴¹⁷ See For Example: ‘Get Over It!’ (Stonewall, 2020) <<https://www.stonewall.org.uk/our-work/campaigns/get-over-it>> accessed 16 July 2020.

⁴¹⁸ Although there has been a levelling off in the falling numbers of people believing that “same-sex” relationships are “always wrong” this levelling off comes at the end of a period of extended decline. See: Nancy Kelley, ‘Natcen Social Research’ (*Natcen.ac.uk*, 2019) <<https://natcen.ac.uk/blog/over-the-rainbow>> accessed 16 July 2020. See Also: Max Morris, “Gay Capital” In *Gay Student Friendship Networks: An Intersection Analysis of Class, Masculinity and Decreased Homophobia* (2018) 35 *Journal of Social and Personal Relationships* 1183; Ben Clements and Clive Field, ‘Public Opinion Toward Homosexuality and Gay Rights in Great Britain’ (2014) 78 *Public Opinion Quarterly* 523.

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which gives the impression that sexual identities exist independently of the social and cultural conditions in which they arise. As I have argued elsewhere, this can be problematic for those who do not understand themselves in this way, or who adopt alternative ways of expressing their sexual diversity, when they come to be faced with administrative state processes.⁴¹⁹

Tactics of strategic essentialism can often exclude the most marginal from the benefits and recognition gained by others. This is because the very function of strategic essentialism is to re-code marginalised groups as compatible with the mainstream, but for their organising characteristic. However, not all members of these marginalised groups are able to comply with the norms required by mainstream society.⁴²⁰ For example, Spade offers a compelling argument for the ways in which the reform agenda pursued by LGBT+ charities and campaign groups in the US has failed to help marginal and racialised queer and transgender people.⁴²¹ This is because they have prioritised inclusion in harmful structures instead of seeking to dismantle these structures. Similarly, Adler has demonstrated how adopting strategic essentialism, and focusing on the narrowness of the differences between heterosexual and LGBT+ people, can lead to close-minded law reform projects which do not account for the multifarious ways in which sexually diverse people are different from heterosexual people.⁴²²

Along similar lines, it should be noted that Spivak herself questioned the utility of strategic essentialism. In her later work, she argued that her ideas had been misapplied in

⁴¹⁹ See: Alex Powell, 'Normative Understandings: Sexual Identity Stereotypes and Asylum Seeking' in Chris Ashford and Alexander Maine (Eds), *The Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020).

⁴²⁰ See further: Amy Brandzel, *Against Citizenship: The Violence of the Normative* (University of Illinois Press 2016).

⁴²¹ Dean Spade, 'Normal Life: Administrative Violence, Critical Trans Politics, & The Limits of Law' (Duke University Press 2015).

⁴²² See: Libby Adler, *Gay Priorities: A Queer Critical Legal Studies Approach to Law Reform* (Duke University Press 2018).

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support of non-strategic, nationalist and nativist versions of essentialism that were often falsely viewed as strategic.⁴²³ To this end, I would argue that the term ‘strategic’ is the key aspect in strategic essentialism, and that while stressing the innate status of sexual identities such as lesbian and gay may have at one point been productive—assisting a raft of legal reforms which have undoubtedly improved the standard of life enjoyed by many sexually diverse people—it should be borne in mind that this act of assimilation was, in line with Spivak’s original intention, purportedly temporary and in pursuit of clear goals. Thus, the idea that sexually diverse people’s identities are not a choice and instead that we are ‘born this way’ should be viewed as a strategic invocation, rather than a truth claim. To link this into my argument, then, the problems now encapsulated within the knowledges and discourses of sexual diversity that are deployed within asylum policy and practice can themselves be located in the use of strategic essentialism within previous LGBTQ+ rights struggles. This essentialism utilised discourses of pre-ordained identity to respond to specific political challenges. These same discourses are now employed within the APIs and have come to form a central part of the way in which sexual diversity is conceptualised within the UK. However, as the underlying claim—that sexual diversity is a biologically determined social fact—is not “true”, or at least is oversimplified, it will be argued that the trade-offs of these essentialisms have created additional epistemological hurdles which sexually diverse asylum seekers are required to clear.

The role of strategic essentialism, and of the different forms of sexual diversity it has occluded within an American and European context, can be best understood by looking at how categories of sexual diversity prominent in the “West” came into being. In outlining this,

⁴²³ Gayatri Chakravorty Spivak, *Other Asias* (Blackwell publishing 2008) 260.

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I will comment on the appropriateness of applying ideas drawn from these categories of sexual diversity as a means of determining the eligibility of people to secure refugee status under the Refugee Convention.⁴²⁴ To undertake this inquiry, I draw on Foucault's four volumes on the *History of Sexuality*,⁴²⁵ where he undertook a 'genealogy'⁴²⁶ of "western" organisations of sexual identity. Of course, to focus only on Foucault would be reductive. It is important to recognise that Foucault was neither the first, nor the only, scholar to espouse a social constructivist view of sexual identity.⁴²⁷ However, he has perhaps given the most complete and influential accounts of how contemporary categories of "sexuality" have come to hold an ontological status in contemporary "western" society.⁴²⁸ Importantly, Foucault's work draws attention to the role of discourses in producing our knowledges about sexual diversity. However, it should be noted that other scholars such as Gleeson have argued that Foucault places too much weight on the impact of medical categories to the development of LGBT+ identities, at the expense of considering the productive power of legal responses such as the Wolfenden Report.⁴²⁹

Uniting the work of both Gleeson and Foucault is a recognition that the way in which we make sense of same-sex activity—the ways in which we render it intelligible— are

⁴²⁴ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

⁴²⁵ Michel Foucault, *The History of Sexuality: The Will to Knowledge* (Robert Hurley Trans: Penguin 1998); Michel Foucault, *The History of Sexuality: The Use of Pleasure* (Robert Hurley Trans: Penguin Classics 2020); Michel Foucault, *The History of Sexuality: The Care of the Self* (Robert Hurley Trans: Penguin Classics 2020). Michel Foucault, *The History of Sexuality Volume 4: Confessions of the Flesh* (Frderic Gros Ed; Robert Hurley Trans: Penguin Books 2021).

⁴²⁶ Genealogy can be understood in this sense as an attempt to understand 'the regime of power-knowledge-pleasure that sustains the discourse on human sexuality in our part of the world.' Michel Foucault, *The History of Sexuality: The Will to Knowledge* (Robert Hurley Trans: Penguin 1998) 11.

⁴²⁷ See for example: Monique Wittig, *The Straight Mind and Other Essays* (Beacon Press 1992).

⁴²⁸ Gayle Rubin & Judith Butler, 'Sexual Traffic' (1994) 6.2 *Differences: A Journal of Feminist Cultural Studies* 62, 83. For another interesting account of how our views on human sexuality (orientation, behaviour, and identity) has developed see: Vern Bullough, 'Homosexuality and the medical model' (1976) 1 *Journal of Homosexuality* 99.

⁴²⁹ See: Kate Gleeson, 'Discipline, Punishment and the Homosexual in Law' (2007) 28 *Liverpool Law Review* 327.

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socially constructed. As this section merely seeks to show that the development of sexual diversities within the UK has been a historical and contextual development, it is therefore not necessary to determine whether law or medicine has played the bigger role in the development. Nonetheless, I would suggest that both should be regarded as having played a crucial role.

Foucault's central claim is that, far from the traditional conception of a journey from repression to liberation,⁴³⁰ sexual diversity has become the subject of a series of incitements to speech; and that this has resulted in a movement from what he termed an *ars erotica* (erotic art) to a *scientia sexualis* (science of sexuality).⁴³¹ As Foucault put it, 'Under the authority of a language that had been carefully expurgated so that it was no longer directly named, sex was taken charge of, tracked down as it were, by a discourse that aimed to allow it no obscurity, no respite'.⁴³² In stating this, it is important to recognise that Foucault is not claiming sexually diverse people enjoyed greater freedoms historically, merely that associations between episodic behaviour and social identities were not made.⁴³³ An example of this can be taken from the treatment of same-sex conduct within ancient Greece as discussed above.

A core aspect of Foucault's argument lies in the idea that sex was allowed no obscurity.⁴³⁴ This claim is wrapped up in the deployment of categorical frames of understanding where someone either is inside or outside the category of people who participate in sexual activity with members of their "own" sex. On Foucault's argument,

⁴³⁰ Michel Foucault, *The History of Sexuality: The Will to Knowledge* (Robert Hurley Trans: Penguin 1998)

⁴³¹ *ibid* 57.

⁴³² *ibid* 20.

⁴³³ Rictor Norton, "F* ck Foucault. Or, how eighteenth-century homosexual history validates the essentialist model." (UCLA Mellon Sawyer Seminar Homosexualities, 2010)

⁴³⁴ Michel Foucault, *The History of Sexuality: The Will to Knowledge* (Penguin 1998) 21.

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while sodomy had been an incidental action—often tolerated, so long as it was conducted in a sufficiently discreet manner—the ‘birth of the homosexual’ changed this, moving from a temporary action to a permanent identity, or, in Foucault’s terms, a pathology.⁴³⁵ As he put it, ‘not only will you confess to acts contravening the law, but you will seek to transform your desire, your every desire, into discourse’.⁴³⁶ Thus, the previous obscurity offered by the distinction between action and identity was lost, subsumed to a discourse which assumed that a combination of desire and action constituted identity itself. Gleeson supplements this by outlining how the Wolfenden Report and subsequent 1967 partial decriminalisation of same-sex activity played a key role in cementing the relationship between actions and identities.⁴³⁷

In converting actions and desires into discourse, Foucault draws attention to the ways in which systems of thought bind together “sexuality” and truth.⁴³⁸ Foucault claims that: ‘When this whole thicket of disparate sexualities was labelled, as if to disentangle them from one another... It appears, in fact, that the function of the power exerted in this instance was not that of interdiction’.⁴³⁹ What he means by this is that the designation of different identity categories was never intended to be a means by which to oppress, rather, according to this argument, the aim was to bring alternative forms of sexual behaviour under the eyes of power, to produce from them a form of truth, and, in doing so, to make those bodies governable.⁴⁴⁰ Contemporaneously, similar strands of thought can be found in Duggan’s concept of homonormativity, which sees sexually diverse people tolerated so long as they comply with society in regard to practices such as consumption and participation in the

⁴³⁵ *ibid* 42-43.

⁴³⁶ *ibid* 21.

⁴³⁷ Kate Gleeson, ‘Discipline, Punishment and the Homosexual in Law’ (2007) 28 *Liverpool Law Review* 327, 330-343.

⁴³⁸ Michel Foucault, *The History of Sexuality: The Will to Knowledge* (Robert Hurley Trans: Penguin 1998) 56; 68.

⁴³⁹ *ibid* 41.

⁴⁴⁰ *ibid* 136-139.

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labour market.⁴⁴¹ Similarly, Puar's concept of homonationalism, which sees sexually diverse identities tolerated as long as they subscribe to patriotic logics, contains the same idea of bringing "sexuality" under the eyes of power and effectively producing a docile set of identities which do not challenge existing power structures.⁴⁴² As Adler⁴⁴³ and Spade⁴⁴⁴ have also argued, the effects of these deployments of power is that radical political goals are abandoned, with requests for inclusion within existing power structures instead prioritised.

Returning to Foucault, in almost direct contradiction to the common liberation narrative surrounding LGBT+ rights, which he argues begins with the 'repressive hypothesis',⁴⁴⁵ Foucault claims that

[T]he machinery of power that focused on this whole alien strain did not aim to suppress it, but rather to give it an analytical, visible and permanent reality: it was implanted in bodies, slipped in beneath modes of conduct, made into a principle of classification and intelligibility, established as a *raison d'être* and a natural order of disorder.⁴⁴⁶

In other words, sexual identities were a deployment of governmental power which produced governable subjects. This argument has been affirmed by other theorists such as Moran, who

⁴⁴¹ Lisa Duggan, 'The New Homonormativity: The Sexual Politics of Neo-Liberalism' in Russ Castronovo & Dana Nelson (eds), *Materializing Democracy: Towards a Revitalized Cultural Politics* (Duke University Press 2002).

⁴⁴² Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press 2007); Jasbir Puar, 'Mapping US Homonormativites' (2006) 13 *Gender, Place & Culture: A Journal of Feminist Geography* 67.

⁴⁴³ See generally: Libby Adler, *Gay Priorities: A Queer Critical Legal Studies Approach to Law Reform* (Duke University Press 2018); Libby Adler, 'Life at the Corner of Poverty and Sexual Abjection: Lewdness, Indecency and LGBTQ Youth' in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender, Sexuality and Law* (Edward Elgar 2020).

⁴⁴⁴ See Generally: Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, & The Limits of Law* (Duke University Press 2015).

⁴⁴⁵ Michel Foucault, *The History of Sexuality: The Will to Knowledge* (Robert Hurley Trans: Penguin 1998)

⁴⁴⁶ *ibid* 44.

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claims that the idea of homosexual conduct in the UK was in fact a creation of the Wolfenden Committee, and Parliament,⁴⁴⁷ in the process of partially decriminalising homosexual acts.⁴⁴⁸ To put this more simply, his argument is that the entire concept of homosexual conduct—that is, acts that mark one as a homosexual—did not exist as a legal entity prior to decriminalisation; rather there was only the criminal act of gross indecency.

To fully understand Foucault's argument, note must also be taken of his understanding of power. Foucault did not conceive of power as a monolithic force from above; rather he considered it to be multifarious in nature, arising from multiple sources and enabling forms of resistance as a part of itself.⁴⁴⁹ In general terms, he understood everything from laws to conversations by the watercooler to be features of the apparatus which operated in line with the prevailing governmentality of the state.⁴⁵⁰ It is only by accounting for this understanding of power that we are able to comprehend Foucault's claim that, in response to the pathologizing of sexually diverse people as homosexuals,⁴⁵¹ 'homosexuality began to speak in its own behalf, to demand that its legitimacy of "naturalness" be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified'.⁴⁵² By this, he meant that, subjects often begin to utilise the categories through which they are made governable as a way of demanding rights and protections for that group. So, when

⁴⁴⁷ Leslie Moran, 'The Homosexualization of English Law' in Carl Stychin and Didi Herman 'Legal Inversions: Lesbians, Gay Men, and the Politics of Law' (Temple University Press 1995) 4-21.

⁴⁴⁸ Sexual Offences Act 1967, S1.

⁴⁴⁹ Michel Foucault, *The History of Sexuality: The Will to Knowledge* (Robert Hurley Trans: Penguin 1998) 138-144.

⁴⁵⁰ These ideas were explored most prominently within Foucault's later lectures. See: Michel Foucault, *The Birth of BioPolitics: Lecturers at the College De France 1978-1979* (Michel Senellart Ed: Palgrave Macmillan 2010).

⁴⁵¹ It should be noted that due to the public/private divide and other forms of patriarchy operative in the UK and Europe at this time, it was primarily male same-sex desire that came to public attention and thus much of the early drive towards forming identities around sexual diversity is closely moulded on to the ways in which men who have sex with men came to be identified, and to identify themselves.

⁴⁵² Michel Foucault, *The History of Sexuality: The Will to Knowledge* (Robert Hurley Trans: Penguin 1998) 101.

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someone proclaims that they are gay, or, indeed, resists the application of that category, they in-fact play a role in producing that very category of being.

This, then, according to Foucault's argument, is how the categories of sexual identity we now draw on came into being; through a dual process based in the heterogenous nature of power relations beginning with a desire to take charge of sexually diverse people, to produce them as something which could be directed towards a productive end, and then subsequently through people identifying with these terms themselves and demanding that their identity be recognised and protected. The use of these categories/identities served to make (our) bodies governable, categorizable, and capable of being conceptualised at a population level.

3.3 Gender Performativity (or the Social Construction of Gender)

The ways in which we understand gender can also be argued to be socially constructed. The purpose of arguing for the social construction of gender is to ground the fact that gender identity can, and will, be differently expressed between cultures and that, therefore, the expectation for those from different cultural backgrounds to present a recognisable narrative of gender difference or discomfort would be incorrect. The significance of examining this lies in the fact that within some cultures sexual and gender diversity are understood to be more closely related than they are within the Anglo-American context. This can be contrasted with the UK where gender and "sexuality" are often treated as free-floating variables which are analytically distinct from one another. Although some elements of sexually diverse identities (such as camp gays and butch lesbians) do involve gendered aspects, it should also be noted that these are not necessarily applicable to people from other cultures and should not be seen as exhaustive of the ways in which gender and sexual diversity can be expressed.

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This analysis ought not to be necessary, in light of the fact that the 2016 API explicitly prohibits decisions being made on the basis of stereotypes.⁴⁵³ Similarly the *A, B, and C* decision states that refugee status determinations should not be made exclusively on the basis of stereotypes.⁴⁵⁴ However, as I argue in chapters five and six, the limited way in which we conceive of stereotypes means that they creep back into our conceptions of sexual diversity even if we state that we oppose their usage. Additionally, several examples which have recently come to light demonstrate the fact that some decision-makers fall back on obviously stereotypical expectations that sexual diversity will be accompanied by gendered implications, such as having a certain demeanour or behaving in a certain way.⁴⁵⁵

In presenting an account of gender performativity,⁴⁵⁶ Butler has offered an insightful examination not only of how gender has come to occupy its current position, but also of how it comes to occupy a presumed ontological status. Butler's argument largely builds on the work of de Beauvoir's famous claim that: 'one is not born, but rather becomes, woman'.⁴⁵⁷ In essence, Butler holds that as opposed to saying one 'becomes' a woman, we should in fact work from the standpoint that one is always in the process of 'becoming' gendered through the repetition of cultural norms.⁴⁵⁸ In this sense, gender is what we *do*, rather than what we *are*.

⁴⁵³ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 7.

⁴⁵⁴ *Cases C-148 to C-150, ABC v Staatssecretaris van Veiligheid en Justitie* [2014] ECRI- 2406.

⁴⁵⁵ See for example: Robert Booth, 'Judge Rejected Asylum Seeker Who Did Not Have Gay 'Demeanour'' (*the Guardian*, 2019) <<https://www.theguardian.com/uk-news/2019/aug/21/judge-rejected-asylum-seeker-who-did-not-have-gay-demeanour>> accessed 16 July 2020.

⁴⁵⁶ Judith Butler, '*Gender Trouble*' (Routledge 1999) ESP 31-39;175-190.

⁴⁵⁷ See: Simone De Beauvoir, *The Second Sex* (Constance Borde and Sheila Malvony-Cheallier trans: Vintage Books 2011) 301.

⁴⁵⁸ Judith Butler, '*Gender Trouble*' (Routledge 1999) 9-11.

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The core of Butler's argument is that it is the repeated performance of social scripts that creates gender.⁴⁵⁹ However, they argue that the forces which compel us to perform these acts are then rendered invisible. This happens primarily because we assume that the subject is prior to the performance. The reality, according to Butler, is that the subject of 'woman' is in fact (re)produced by these acts.⁴⁶⁰ As White summarises, 'The Continual reiteration of social scripts—and thus regimes of power—is what gives life and specific shape to what are then mistaken as pre-existing entities with ontological status'.⁴⁶¹

Of course, what sets Butler's work apart from other feminist intellectual works is their critique of sex.⁴⁶² While their critique of gender is recognisable as a feature of a general scheme of post-structural feminist argument, Butler's views around the category of sex and its links to gender marks them out as offering a more radical critique than most. Specifically, Butler argues that sex only gains the appearance of a monolithic entity, comprising solely of male and female, to the extent that it covers over sexual difference.⁴⁶³ In essence, they argue that sex is always already gendered and that no clear division between sex and gender stands up to scrutiny. Their critique of sex is significant in bringing to the fore the radical nature of Butler's thought. This shows that, rather than merely offering a critique of the social meanings which attach themselves to sex, i.e., gender, they instead focus on the socially constructed nature of sex categories themselves. For, by their argument, gender in most feminist thought is assumed to merely attach itself to male and female which are often

⁴⁵⁹ *ibid* 31-39;175-190.

⁴⁶⁰ *ibid* 30.

⁴⁶¹ Stephen White, 'The World Turns: Ontology and Politics in Judith Butler' (1999) 32 *Polity* 155, 158.

⁴⁶² See Generally: Judith Butler, 'Sex and Gender in De Beauvoir's *Second Sex*' (1986) 72 *Yale French Studies* 35; Judith Butler, *Gender Trouble* (Routledge 1999) 11;14.

⁴⁶³ Judith Butler, 'Against Proper Objects' (1994) 6.2 *Differences: A journal of Feminist Cultural Studies* 1, 3.

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interpreted to be the limits of sex.⁴⁶⁴ Their claim is, therefore, that not only gender, but also sex, is socially constructed.⁴⁶⁵

Support for Butler's ideas can be drawn from the work of Fausto-Sterling. Fausto-Sterling uses her biological research to demonstrate that, although there are bodily differences between men and women, these can just as easily be attributed to environmental factors—which are often produced under the belief that sex difference is a naturally occurring phenomenon—as they can be to reductive biological arguments.⁴⁶⁶ Central to advancing her argument is a critique of the way in which the parameters of scientific studies are confined by underlying assumptions. In this way, Fausto-Sterling's work fits into a legacy of queer and feminist efforts to disrupt underlying assumptions, and therefore to expose the existence of lives which have traditionally been ignored within studies of human behaviour.⁴⁶⁷

Three key insights can be drawn from this work on the socially constructed nature of sex and gender. Firstly, the underlying assumption of sexual diversity as it is conceived in a “western” context—at least when it is thought of as relating to fixed sexual object choice—is itself socially constructed. By which I mean, sex, is constructed through both law and medicine through means such as the issuing of birth certificates, passports, and gender recognition certificates. Acknowledging this renders the forms of sexual diversity covered under the LGBT+ umbrella constructed identities which are themselves dependent on underlying constructed identities, namely sex. Secondly, the way in which we construct studies can lead to results which reify these underlying assumptions (see chapter two). For

⁴⁶⁴ Judith Butler, ‘Sex and Gender in DeBeauvoir's Second Sex’ (1986) 72 *Yale French Studies* 35, 35.

⁴⁶⁵ See Generally: Judith Butler, ‘Sex and Gender in DeBeauvoir's Second Sex’ (1986) 72 *Yale French Studies* 35; Judith Butler, *Gender Trouble* (Routledge 1999) 11;14.

⁴⁶⁶ Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books 2000) 1-30 ESP 5-6.

⁴⁶⁷ This follows Halberstam's definition of Queer. See: Jack Halberstam, ‘*Female Masculinity*’ (Duke University Press 1998) 13.

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example, the assumption that people will identify with labels such as gay and lesbian can be central to social scientists' attempts to create representative samples. While this can be productive in terms of trying to ensure various groups are representative, it can also limit the focus of research, with the result that the true diversity of human behaviour and ways of being are suppressed. These issues were highlighted in chapter two during my discussion of sampling.⁴⁶⁸ Thirdly, and finally, this critique of sex/gender, demonstrates that factors which affect core aspects of human life can themselves be socially constructed, without recourse to any ontological reality. This helps to comprehend how socially constructed status can come to hold such strong normative power that they occupy positions in legal frameworks. For example, this is useful for seeing how constructions such as LGBT+ identities have come to hold the key to determining whether sexually diverse people from a diverse range of countries can rely on the protections promised under the Refugee Convention.

3.4 The Gay International

A point which must be recognised in discussing the social construction of sexual diversity is that, contrary to common conceptions, the idea that such identities are legally, medically, and socially constructed does not imply that they are easy to change.⁴⁶⁹ Rather, as Butler and Rubin have argued, the scripts governing the expression of sexual diversity have been crafted over a very long time (many centuries), and moving out of them may also be a long and fraught process.⁴⁷⁰ Thus, the idea that asylum seekers could become 'out and proud' when they enter the UK, or any other European country, is deeply misguided. Indeed, people will often retain the socialisation they received during childhood and adolescence in their countries of origin. Therefore, it is possible that an asylum claimant who comes from a

⁴⁶⁸ See section: 2.3.1.

⁴⁶⁹ Anne Fausto-Sterling, 'Frameworks of Desire' (2007) 136 *Daedalus* 47, 51.

⁴⁷⁰ *ibid* 69-70.

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culture in which sexual diversity is not considered to be an identity may—while retaining sexual behaviour and desire that could leave them open to the threat of persecution—never adopt an identity in the sense that the term is commonly deployed here.

The above exploration of sexual identity construction corresponds to the insights of Massad who describes a ‘Gay International’ premised on the assumption that:

Homosexuals, gays, and lesbians are universal categories that exist everywhere in the world and based on this prediscursive axiom, the Gay International sets itself the mission of defending them by demanding that their rights as “homosexuals” be granted where they are denied and be respected where they are violated.⁴⁷¹

As Massad outlines, the Gay International assumption, as a function of its “activism”, seeks to stabilise the perceived instability of sexual desire among people who do not conform to “western” categories of gay or straight identity.⁴⁷²

The point of the above is to demonstrate, firstly, that the claim that sexual diversity is intrinsic and biological in nature—the claim that we are ‘born this way’—is not a universal truth about the world. Rather, it is a strategic deployment made with specific goals in mind. Further, as Massad argues, this deployment has become prominent on the international stage with a neo-colonial undercurrent.⁴⁷³ Despite this attempt at internationalisation, and the success of such ideas in the UK, I argue that there remains no intrinsic evidence in favour of fixed identity. Rather, the evidence supports the idea that categories are brought into being based on specific and contingent social realities. Secondly, this overview suggests that

⁴⁷¹ Joseph Massad, ‘Re-Orienting Desire: The Gay International and the Arab World’ (2002) 14 *Public Culture* 361, 363.

⁴⁷² *ibid* 365.

⁴⁷³ *ibid*.

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asylum policy/practice should avoid ideas which are founded upon “western” conceptions of LGBT+ identity, because these will not necessarily be represented among people coming from different cultures.

The implication of this is that sexually diverse refugees and asylum seekers may have alternative ways of conceiving of their own sexual diversity or may simply think of their sexual diversity in terms of behaviour and express themselves as such. However, this would not mark them out as suffering from internalised homophobia or as being repressed, rather it would simply establish their alternative epistemology of sexual diversity. Otherwise put, it has been argued that sexually diverse asylum seekers may have different epistemologies regarding sexual diversity to those held by UK institutions. If the UK is to comply with the goals of the Refugee Convention, as explored in the next chapter, the UK asylum apparatus must be capable of recognising and treating as equally valid, real, and deserving of protection all of the ways in which sexual diversity is conceived globally.

In stating this, it is also pertinent to note Zanghellini’s critique of Massad, which is based on the fact that, in presenting his narrative, Massad ‘dismiss[es] those native queers [who adopt LGBT+ identities] as metropolitan and upper or middle class... hence always already less authentically native than the common folk, the true repository of cherished tradition’.⁴⁷⁴ This critique is apposite, given the attempt Massad makes to set up two competing and homogenised ways of conceiving sexual diversity, namely the “western” and native conceptions. However, the argument I am making here requires no such dismissal of those who adopt LGBT+ identities. Rather, it requires only an acceptance of the claim that sexual diversity has been differently organised within some places and time periods to the

⁴⁷⁴ Aleardo Zanghellini, ‘Are Gay Rights Islamophobic? A Critique of Some Uses of the Concept of Homonationalism in Activism and Academia’ (2012) 12:3 *Social and Legal Studies* 357, 365.

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way in which it is presently organised within the Anglo-American sphere and a concomitant recognition that, while some may well adopt identities which are consistent with LGBT+ identities, not all will do so.

The above analysis has demonstrated the contingency of the ways in which sexual diversity is currently understood and organised within the UK. Going forward, this theoretical background provides a context for understanding the heterogeneous ways in which sexual diversity can be conceptualised. This context is deployed in order to provide conceptual space to think through the different knowledges and discourses of sexual diversity that could be enacted within the asylum apparatus. Through this deployment, the mismatches I identify are linked to a theoretical background.

Chapter Four: The Existing Legal Framework

I now turn to explore the original goals of the Refugee Convention, as well as setting out the wider international legal framework of Refugee Law. Building on the work of Carlier, I show that ‘the convention does not suffer from any legal or conceptual weaknesses.’⁴⁷⁵ Instead, I argue that the issues raised are political and relate to the ways in which claims are analytically characterised at the level of administrative policy and decision-making.⁴⁷⁶ This again links to the Foucauldian approach to law outlined above, as the analysis considers how identities and narratives are constructed and interpreted within the refugee framework, concluding that the problems which arise relate to the way in which knowledge is deployed within the state administrative processes of the UK, rather than within the international legal framework itself. The chapter concludes by considering alternative policy approaches which could be taken under the current legal framework and the impacts that adopting these approaches might yield. Comment on whether these different approaches would remedy the mismatches identified can then be offered in chapter eight.⁴⁷⁷

4.1 (in)Credible Claims

The analysis begins by looking at the framework of international refugee law before going on to analyse how this has been implemented within the UK legal system. This legal outline is

⁴⁷⁵ Jean Yves Carlier, ‘The Geneva Refugee Definition and the “Theory of Three Scales”’ in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999) 40. See Also: Julian Lehmann, ‘At the Crossroads: The 1951 Geneva Convention Today’ in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

⁴⁷⁶ Heather Crawley, ‘Gender, Persecution and the Concept of Politics’ (2000) 9 *Forced Migration Review* 17, 19.

⁴⁷⁷ See section: 8.7.

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then developed further through the policy analysis undertaken in chapters five and six. As I am specifically addressing the asylum claims of sexually diverse people, particular focus is given to the role of burden of proof and the credibility determination process. This is because, discharging the evidential burdens associated with attaining refugee status has now become one of the central barriers facing sexually diverse asylum seekers.⁴⁷⁸

The current criteria for sexual diversity asylum claims contain a mix of tests distilled from case-law and administrative policy—as Dustin has identified, UK guidance and practice have mostly developed on an ad-hoc basis⁴⁷⁹—causing some confusion as to which procedures apply and has led to inconsistency between decisions.⁴⁸⁰ Therefore, as I expand on in chapter seven, instances of decision-maker discretion within the system occur frequently. This is true, regardless of whether the system aims to facilitate them.

The origins of the modern conception of Asylum can be found in the 1951 Geneva Refugee Convention. This international legal agreement sets out a number of obligations which ratifying states have in respect of refugees. Although beyond the scope of this thesis, there is an expansive literature covering the different obligations, limitations, and exclusions outlined under the Convention.⁴⁸¹ The definition of a refugee is set out in Article 1A(2) of the Refugee Convention,⁴⁸² and was amended by the amended by the Protocol on Refugee

⁴⁷⁸ See Generally: Moira Dustin, ‘Many Rivers to cross: The Recognition of LGBTQI Asylum in the UK’ (2018) 30 *International Journal of Refugee* 104; Jenni Millbank, ‘“The Ring of Truth”: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations’ (2009) 21 *International Journal of Refugee Law* 1.

⁴⁷⁹ Moira Dustin, ‘Many Rivers to Cross: The Recognition of LGBTQI Asylum in the UK’ (2018) 30 *International Journal of Refugee law* 104, 105.

⁴⁸⁰ *Ibid.*

⁴⁸¹ See generally: James Hathaway and Michelle Foster, *The Laws of Refugee Status* (Cambridge University Press 2014); James Hathaway, *The Rights of Refugees Under International law* (Cambridge University Press 2005).

⁴⁸² Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

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Status.⁴⁸³ Prior to this, the concept of refugee status existed but there was dispute as to what criteria qualified a person as such. The text of Article 1A(2) as amended reads as follows:

A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; 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.⁴⁸⁴

At present, the claims of sexually diverse people are usually taken to fall under the Particular Social Group ground of the convention.⁴⁸⁵ The fit of asylum claims based on sexual diversity within the framework set-out by the Convention is no longer controversial, having gained acceptance across the EU⁴⁸⁶ (which impacted UK law as the UK was a member state at the time) and UNHCR levels.⁴⁸⁷ However, this recognition has not always been the case. The original framers of the Refugee Convention never envisaged that refugee status would cover individuals claiming asylum based on sexual diversity.⁴⁸⁸ As Honkala explains, ‘in the absence of Gender as a Convention ground, the Refugee Convention has been traditionally

⁴⁸³ Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol).

⁴⁸⁴ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), Article 1 (A) 2.

⁴⁸⁵ Nora Honkala, ‘“She, Of Course, Holds No Political Opinions”: Gendered Political Opinion Ground in Women’s Forced Marriage Claims’ (2017) 26 *Social and Legal Studies* 166, 166.

⁴⁸⁶ European Union: Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), (20 December 2011), OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU.

⁴⁸⁷ UN High Commissioner for Refugees, ‘Guidelines on Gender-Related Persecution Within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees’ (7 May 2002) 30, U.N. Doc HC/GIP/02/01.

⁴⁸⁸ Julian Lehmann, ‘At the Crossroads: The 1951 Geneva Convention Today’ in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

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interpreted through the [straight] male perspective.⁴⁸⁹ Indeed, It was not until the 1999 case of *Shah & Islam* that the potential for Asylum on the basis of persecution due to either gender or sexual diversity was accepted.⁴⁹⁰

4.2 The Goals of the Convention

In order to produce a useful benchmark against which current policy and practice can be analysed, it is useful to look to the goals of the Refugee Convention. Following Lord Bingham in *Januzi*, I take the text of the Refugee Convention itself as the starting point of analysis when attempting to discern its goals.⁴⁹¹ This is because the text ‘expresses what the parties to it have agreed’.⁴⁹² However, as Lord Hope expressed in *HJ (Iran) and HT (Cameroon)*,

persecution for reasons of homosexuality was not perceived as a problem by the High Contracting Parties when the Convention was being drafted. For many years, the risk of persecution in countries where it now exists seemed remote. It was the practice for leaders in these countries simply to insist that homosexuality did not exist. This was manifest nonsense, but at least it avoided the evil of persecution. More recently, fanned by misguided but vigorous religious doctrine, the situation has changed dramatically.⁴⁹³

Lord Hope is correct to identify that persecution on the basis sexual diversity was not anticipated as an issue by the framers of the convention. Nonetheless, some useful insight can

⁴⁸⁹ Nora Honkala, ‘The Rights of Women Seeking Asylum: Procedural and Evidential Barriers to Protection’ in Satvinder Juss (ed), *Research Handbook International Refugee Law* (Edward Elgar 2019) 295.

⁴⁹⁰ *Islam (AP) v Secretary of State for the Home Department and R v Immigration Appeal Tribunal Ex parte Shah* [1999] UKHL 20; [1999] 2 A C 629 (HL).

⁴⁹¹ *Januzi v Secretary of State for the Home Department & Ors* [2006] UKHL 5, [2006] 2 A.C. 426

⁴⁹² *ibid* [4].

⁴⁹³ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596 [30].

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be gleaned by looking to the text of the convention, beginning with the preamble which informs us that the Higher Contracting Parties have agreed that,

[T]he Charter of the United Nations and the Universal Declaration of Human Rights Approved on 10th December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights without discrimination⁴⁹⁴

As this suggests, the rights of people should be protected even in scenarios where their country of origin is unable or unwilling to safeguard those rights. The Preamble further supports this position by stating that, ‘Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these rights and freedoms’.⁴⁹⁵ Taken together, the two preceding excerpts clarify that the core goal of the Refugee Convention lies in providing surrogate protection of fundamental rights.

This point can be developed further by drawing on Hathaway’s argument that international refugee law ought to be read in reference to international human rights standards.⁴⁹⁶ One important aspect that we can draw from this is the idea that the obligations under the Convention develop over time, accommodating, in particular, forms of social group not previously anticipated within the ambit of the Convention.⁴⁹⁷ However, as Lehmann

⁴⁹⁴ Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137, Preamble.

⁴⁹⁵ *ibid.*

⁴⁹⁶ See generally: James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005).

⁴⁹⁷ Julian Lehmann, ‘At the Crossroads: The 1951 Geneva Convention Today’ in Satvinder Juss (ed), *The Research Handbook on International Refugee Law* (Edward Elgar 2019) 2-8; James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 4; James Hathaway and Jason Pobjoy, ‘Queer Cases Make Bad Law’ (2012) 44 *International Law and Politics* 315, 331; Guy Goodwin-Gill, ‘The Dynamic of International Refugee Law’ (2013) 25 *International Journal of Refugee Law* 651.

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notes—despite the capacity of the Convention definition to expand—there are limitations on how inclusive the Convention definition can be.⁴⁹⁸

Nonetheless, taking all this together, the general goal of the Refugee Convention is effectively, as Lord Hoffman established in *Shah and Islam*, ‘to give protection to certain classes of people who have fled from countries in which their human rights have not been respected’.⁴⁹⁹ The ability of the Convention to fulfil its goals is limited by the procedural approaches adopted by states. These procedural approaches relate to issues such as the evidential threshold required for an asylum claim to succeed. Put another way, the administration of state level mechanisms is a core component in the effective implementation of international protection.

Despite the impact that national level policies can have on the level of protection provided by the convention, the goal of providing protection against human rights abuses to certain classes of people—including sexually diverse people—provides a benchmark against which the policy and practice adopted by the United Kingdom can be assessed. Linking back to the Foucauldian framework adopted in this thesis then, the core benchmark against which the current operation of the UK asylum apparatus can be judged is in its capacity to protect the right to be different.

4.3 Implementation of the Refugee Convention in a Domestic Law Context

The UK is a dualist state. This means that international agreements to which the UK government agree, do not take immediate legal effect at the national level. Indeed, only Parliament—or other bodies empowered to do so by an act of parliament, such as the

⁴⁹⁸ *ibid.*, 6-15.

⁴⁹⁹ *R v Immigration Appeal Tribunal, EX P Shah* [1999] 2 AC 629, 655.

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devolved legislatures and administrations in Scotland,⁵⁰⁰ Wales⁵⁰¹ and Northern Ireland⁵⁰²— can change primary legislation in the UK. For this reason, domestic legislation is required to give effect to the definition of, and rights given to, refugees under the convention.

A key point which should be considered here, therefore, is the possibility of states adopting different interpretations and implementations of international frameworks. These differing interpretations have tangible effects, both in regard to the legislative framework provided for considering refugee status claims and the ways in which this framework is administrated. As I explore in chapter seven, administrative violence can occur when administrative practices fail recognise the needs of claimants.⁵⁰³

In the UK context, the legal framework is drawn from a complex mix of law, policy, and bureaucratic administration.⁵⁰⁴ Broadly speaking, asylum, as with many other immigration related matters, is covered under the Immigration Rules. The Immigration Rules are a quasi-legislative⁵⁰⁵ set of regulations laid by the Secretary of State for the Home Department pursuant to S3(2) of the Immigration Act 1971. Issues relating to asylum and refugee status currently sit within part 11 of the Immigration rules.⁵⁰⁶ Alongside the Immigration Rules, several other legislative provisions touch on the issue of asylum.⁵⁰⁷ Among the other legal sources touching the issue of refugee status are The Refugee or Person

⁵⁰⁰ Scotland Act 1998.

⁵⁰¹ Northern Ireland Act 1998.

⁵⁰² Government of Wales Act 1998.

⁵⁰³ See: Section 7.3.

⁵⁰⁴ See Further: John Campbell, *Bureaucracy, Law and Dystopia in the United Kingdom's Asylum System* (Routledge 2016).

⁵⁰⁵ See: *Odelola v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 3 All ER 1061.

⁵⁰⁶ The rules can be accessed online. See: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>. Date of access: 20/04/2020.

⁵⁰⁷ See Generally: Immigration Act 1971; Immigration and Asylum Act 1999; Nationality Immigration and Asylum Act 2002; Asylum and Immigration (Treatment of Claimants) Act 2004; Borders, Citizenship and Immigration Act 2009; Immigration Act 2014; Immigration Act 2016.

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in Need of International Protection (Qualification) Regulations 2006 (Hereafter: Qualification Regulations 2006) which bring the Convention definition of a refugee into UK law.

In most cases, those claiming asylum based on their sexual diversity will be claiming under the Particular Social Group ground of the convention. As Hathaway has argued, this convention ground is intended to allow for the Convention to develop as a living instrument.⁵⁰⁸ This shows its role in allowing refugee law to mirror the expanding scope of human rights norms. According to Regulation 6 of the Qualification Regulations 2006,

“A group shall be considered to form a particular social group where, for example,

- Members of that group share an innate characteristic, or a common background that cannot be changed
- Or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it
- That group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.⁵⁰⁹”

Under UK law, precedent has firmly established the ability of sexual diversity—referred to as both homosexuality and sexual orientation in case law and scholarship—to constitute a Particular Social Group.⁵¹⁰ Therefore, discussion of the extent to which sexual diversity fits under these categories is unnecessary at this stage, although such a discussion is undertaken

⁵⁰⁸ James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 4; James Hathaway and Jason Pobjoy, ‘Queer Cases Make Bad Law’ (2012) 44 *International Law and Politics* 315, 331; Guy Goodwin-Gill, ‘The Dynamic of International Refugee Law’ (2013) 25 *International Journal of Refugee Law* 651.

⁵⁰⁹ UK Visas and Immigration, ‘Asylum Policy Instruction: Sexual Orientation In Asylum Claims’ (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 11.

⁵¹⁰ See: *Islam (AP) v Secretary of State for the Home Department and R v Immigration Appeal Tribunal Ex parte Shah* [1999] UKHL 20; [1999] 2 A C 629.

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in chapter five. This is because the way in which a social group is defined has an effect on how membership of that group is determined. The mix of primary legislation, secondary legislation, and international law is further complicated by the mass of administrative policy relating to refugee status. Further detail regarding the relationship between law and policy can be found in chapter seven⁵¹¹ and a detailed analysis of the 2016 policy on asylum claims by sexually diverse people can be found in chapters five and six.

Going forward, this chapter explores how the law regarding asylum claims has developed in the UK context since 1999, when the potential of claiming asylum on the basis of sexual diversity was accepted.

4.4 The Discretion Era

*Shah and Islam*⁵¹² and *Jain*⁵¹³ cemented the idea that sexual diversity can constitute a Particular Social Group for the purposes of the Convention. However, as Chelvan identifies, ‘The effect of *Jain* was that the court’s understanding of the lives of gay men resulted in a purely “conduct-driven approach” reducing their lives to the engagement of the sexual act... in the so-called “privacy” of the bedroom’.⁵¹⁴ As this shows, the acceptance of the fit of sexual diversity based claims within the asylum framework was the start, not the conclusion, of the effort to ensure that sexually diverse people receive protection under the Convention.⁵¹⁵

⁵¹¹ See section: 7.1.

⁵¹² *Islam (AP) v Secretary of State for the Home Department and R v Immigration Appeal Tribunal Ex parte Shah* [1999] UKHL 20; [1999] 2 A C 629.

⁵¹³ *Jain v. Secretary of State for the Home Department* [1999] EWCA Civ 3009.

⁵¹⁴ S Chelvan, ‘Put Your Hands Up (If you Feel Love)’ (2011) 25 *Immigration, Asylum and Nationality Law* 56, 57.

⁵¹⁵ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

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The distinction between behaviour and identity that Chelvan and other theorists identified proved to be a major obstacle to sexual diversity based asylum claims, providing a logical justification for the use of discretion reasoning which was so prevalent in the UK asylum process prior to 2010.⁵¹⁶ This is underlined by the decision of the Immigration and Asylum Tribunal in the case of *HJ (Iran)* where it was concluded that, giving weight to all the evidence, HJ would be able to carry out his homosexual activities in Iran without serious detriment to his private life and without forcing him to suppress many aspects of his sexual diversity.⁵¹⁷ In this sense, the tribunal effectively took the fact that HJ would be able to live a discreet life while attracting sexual partners to be evidence that he could return to Iran without fear of persecution. Thus, his sexual diversity was reduced to sexual behaviour, without a consideration of the wider impact his sexual diversity may have on his day-to-day life.

The idea of discretion was underpinned by a ‘reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection’.⁵¹⁸ This was not only common practice within the UK, but also a widespread practice employed in numerous jurisdictions, such as Australia.⁵¹⁹ However, the UK was one of the longest to delay abandoning the practice, with discretion reasoning continuing to be employed in its full form

⁵¹⁶ See Generally: S Chelvan, ‘Put Your Hands Up (If you Feel Love)’ (2011) 25 *Immigration, Asylum and Nationality Law* 56; Jenni Millbank, ‘From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom (2009) 13 *International Journal of Human Rights* 391.

⁵¹⁷ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596 [19] (citing the Tribunal at [44]).

⁵¹⁸ *RRT Case No V95/03527*, [1998] RRTA 246.

⁵¹⁹ See Generally: Ghassan Kassisieh, ‘From Lives of Fear to Lives of Freedom: A review of Australian refugee decisions on the basis of sexual orientation’ (Gay & Lesbian Rights Lobby 2008), 64–70.

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until 2010.⁵²⁰ Some theorists argue that discretion reasoning still continues to play a major role in refugee status determinations regarding the claims of sexually diverse people.⁵²¹

Millbank has argued that the practice of discretion reasoning within the UK was merely an application of the British approach to sexually diverse people within the field of Refugee Law.⁵²² Crucially, in undertaking this analysis, Millbank draws links between the discourses surrounding the partial-decriminalisation of homosexuality—such as the need to erase the “homosexual problem”—and the UK’s approach to the asylum claims of sexually diverse people.⁵²³ In particular, Millbank stresses how both subjugate sexual diversity to the realm of the private.⁵²⁴ Adler, in another context has explored how the use of privacy rights to protect sexual diversity can leave the most marginal members of a community outside the scope of protection.⁵²⁵ Though she discusses the role of the US right to privacy in litigating to gain rights and protections for LGBT+ people in the US, with a view to outlining how this excludes homeless LGBT+ people, her reflections can equally be applied to the flaws incumbent in basing the approach to refugee law on the public/private divide. As previously explored, sexual diversity is manifested in multiple ways and cannot simply be reduced to either a private or a public dimension. For example, in many cultures, declining to marry and have children may be read as a political statement that contests local norms, and may be

⁵²⁰ Australia abandoned the practice in a 2003 decision. See: *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*; *Appellant S396/2002 v Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia: High Court, 9 Dec 2003; See also: Catherine Dauvergne and Jenny Millbank, 'Before the High Court: *Applicants S396/2002 and S395/2002*, a Gay Refugee Couple from Bangladesh' (2003) 25 *Sydney Law Review* 97.

⁵²¹ Jana Wessels, 'HJ (Iran) and HT (Cameroon) – Reflections on a New Test for Sexuality-Based Asylum Claims in Britain' (2012) 24 *International Journal of Refugee Law* 815.

⁵²² Jenni Millbank, 'A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation 1989-2003' (2005) 14 *Social and Legal Studies* 115

⁵²³ *ibid* 115-116.

⁵²⁴ *ibid* 117.

⁵²⁵ Libby Adler, 'Life at the Corner of Poverty and Sexual Abjection: Lewdness, Indecency, and LGBTQ Youth' in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020).

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perceived as indicating that person is a sexually diverse person. This is shown in Giametta's finding that in many cases heterosexual marriage within the Country Of Origin was adopted in order to keep sexual diversity secret.⁵²⁶ In this sense, the idea that sexual diversity could be banished entirely from the public sphere—that it could be kept as a discrete activity taking place only in private—relies on an overly simplistic and behaviouristic understanding of sexual diversity.

At its most extreme, discretion reasoning functioned as a catch all excuse for rejection. As Dustin has identified, arguments deployed in support of rejecting claims where the applicant could avoid persecution by acting discreetly demonstrated a troubling amount of circular thinking.⁵²⁷ For example, one Judge claimed that

It is the respondent's position that self-restraint due to fear will be persecution only if it is such that a homosexual person cannot reasonably be expected to tolerate such self-restraint. Where a person does in fact live discreetly to avoid coming to the attention of the authorities, he is reasonably tolerating the position.⁵²⁸

In this passage, the fact of living discreetly is taken as evidence, in and of itself, that it would be tolerable for the claimant to do so, without any exploration of how this situation might impact the claimant. Considering this, discretion reasoning must be regarded as a key contributor to the startling 98% rejection rate in sexual diversity asylum claims recorded by Rainbow Migration prior to 2010.⁵²⁹

⁵²⁶ Calogero Giametta, *The Sexual Politics of Asylum: Sexual Orientation and Gender Identity in the UK Asylum System* (Routledge 2017) 45.

⁵²⁷ Moira Dustin, 'Many Rivers to Cross: The Recognition of LGBTQI Asylum in the UK' (2018) 30 *International Journal of Refugee Law* 104, 109-112.

⁵²⁸ *HJ v Secretary of State for the Home Department* [2008] UKAIT 00044 [10].

⁵²⁹ UKLGIG, 'Missing the Mark: Decision Making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims' (Unison 2013) 10.

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4.4.1 HJ (Iran) and HT (Cameroon): Progress?

In 2010, the Supreme Court made a landmark decision in *HJ (Iran) and HT (Cameroon)*, holding that mandatory discretion, otherwise known as the reasonable tolerability test,⁵³⁰ was incompatible with the Refugee Convention.⁵³¹ The decision was initially celebrated by groups such as Rainbow Migration, who heralded it as a ‘key factor in the improvement of first decisions’.⁵³² The Law centre described it as a ‘fundamental shift in asylum law’.⁵³³ However, it has come in for some noteworthy criticism from academics. Hathaway and Pobjoy—in a strongly worded critique of the decision—argued that it undermined the disciplinary coherence that had previously existed between refugee law and international human rights norms.⁵³⁴ They were particularly critical of the courts failure to consider the differing operations of endogenous and exogenous harm, suggesting that the scope of protecting had been stretched too far by the decision.⁵³⁵ Chelvan,⁵³⁶ and Millbank,⁵³⁷ predicted that the decision would place greater emphasis on asylum seekers to prove their identities. Wessels argued that the decision maintained discretion reasoning and has required decision-makers to make decisions regarding what the future conduct of asylum claimants will be.⁵³⁸

⁵³⁰ See for example: Jana WeBels, ‘Reflections on a New Rest for Sexuality-Based Asylum Claims in Britain’ (2012) 24 *International Journal of Refugee Law* 815, 815-820.

⁵³¹ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596.

⁵³² UK Lesbian and Gay Immigration Group, ‘Missing the Mark’ (Unison 2013) <<https://uklgig.org.uk/wp-content/uploads/2014/02/Missing-the-Mark.pdf>> accessed 12 December 2017.

⁵³³ Law Centre (NI) Information Briefing, ‘HJ (Iran): A Fundamental Shift in Asylum Law’ (Mar 2011), <<http://www.lawcentreni.org/Publications/Law%20Centre%20Information%20Briefings/HJIranMarch2011.pdf>> accessed 12 Aug 2018.

⁵³⁴ James Hathaway and Jason Pobjoy, ‘Queer Cases Make Bad Law’ (2012) 44 *International Law and Politics* 315, 331.

⁵³⁵ *Ibid.*, 346-358.

⁵³⁶ S Chelvan, ‘Put Your Hands Up (If you Feel Love)’ (2011) 25 *Immigration, Asylum and Nationality Law* 56, 57.

⁵³⁷ Jenni Millbank, ‘From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom’ (2009) 13 *The International Journal of Human Rights* 391, 391-414.

⁵³⁸ See: Jana Wessels, ‘HJ (Iran) and HT (Cameroon) – Reflections on a New Test for Sexuality-Based Asylum Claims in Britain’ (2012) 24 *International Journal of Refugee Law* 815; Jana Wessels, ‘The Art of Drawing

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Juss has further argued that in laying down the new test, while also offering no guidance about how decision-makers are to determine whether a claimant is actually a sexually diverse person, the judgement encouraged the use of stereotypes and sexually explicit evidence.⁵³⁹

It appears—giving weight to Rainbow Migration’s finding that 86% of rejected claims between 2011 and 2013 were based on lack of credibility⁵⁴⁰—that Millbank and Chelvan were correct in their predictions. The new test seemingly has re-directed the central issue in asylum claims by sexually diverse people to credibility. This is unsurprising given the full test laid down by the Supreme Court.⁵⁴¹ The first stage of the test requires the decision-maker to ‘ask itself whether it is satisfied on the evidence that he is gay’.⁵⁴² Secondly, they should ‘ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant’s country of nationality’.⁵⁴³ Thirdly, they should consider ‘what the individual applicant would do if he were returned to that country.’⁵⁴⁴ If they would live openly, they are a refugee. If they would live discreetly due to a fear of persecution, they are also a refugee. However, if they would naturally be discreet, or be discreet out of a wish not to disappoint friends/family, they do not qualify as a refugee. This final question over whether or not they would be discreet and why, is the primary issue which Wessels has pinpointed with the test laid down in *HJ (Iran) and HT (Cameroon)*, arguing that it places too much focus on an analysis of future

Lines: Future Behaviour and Refugee Status’ in Satvinder Juss (ed), *Research Handbook in International Refugee Law* (Edward Elgar 2019).

⁵³⁹ Satvinder Juss, ‘Sexual Orientation and the Sexualisation of Refugee Law’ (2015) *International Journal on Minority and Group Rights* 128.

⁵⁴⁰ UK Lesbian and Gay Immigration Group, ‘Missing the Mark’ (Unison 2013) Available at <<https://uklgig.org.uk/wp-content/uploads/2014/02/Missing-the-Mark.pdf>> accessed 12th December, 12.

⁵⁴¹ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596, [82-83].

⁵⁴² *ibid* [82].

⁵⁴³ *ibid*.

⁵⁴⁴ *ibid*.

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behaviour.⁵⁴⁵ Her concerns are justified. However, the concern of this thesis is with the first stage of the test. Namely, how does a claimant convince a decision-maker that they are a sexually diverse person and is the way in which they must do this consistent with their own conceptions of sexual diversity.

As the test makes clear, the first task facing a decision-maker, when they are presented with an asylum claim made based on sexual diversity, is to determine the validity of the claimant's sexual diversity.⁵⁴⁶ Due to the lack of objective evidence present in such claims, decision-making in this area will often boil down to a determination of whether or not the decision-maker considers the narrative of the claimant to be credible. The issues around deal with claimant narratives are explored further in chapters five and six.⁵⁴⁷

Within the asylum claims of sexually diverse people, as with other asylum claims, the burden of proving eligibility for protection lies with the claimant. While some decision-makers have claimed that sexual diversity based asylum claims are 'easy to make and impossible to disprove',⁵⁴⁸ Millbank has highlighted the difficult evidentiary position sexually diverse asylum claimants are placed in, arguing that the lack of objective evidence available to prove sexual diversity means such claims end up being largely narrative based.⁵⁴⁹ This means that the credibility determinations, made by the decision-maker, are often central to whether the claim succeeds.

⁵⁴⁵ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596.

⁵⁴⁶ Or the sexual diversity they would be perceived as.

⁵⁴⁷ ESP: Section 6.6.

⁵⁴⁸ *Krasniqi v Secretary of State for the Home Department* [2001] UKIAT 01TH02140, [2].

⁵⁴⁹ See Generally: Jenni Millbank, "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 *International Journal of Refugee Law* 1; Laurie Berg & Jenni Millbank, 'Constructing the Personal narratives of Lesbian, Gay and Bisexual Asylum Claimants [2009] *Journal of Refugee Studies* 195.

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4.4.2 The Burden of Proof and the Credibility Determination Process

Given that the first point of focus within asylum claims based on sexual diversity lies in establishing the validity of the claimant's sexual diversity, the process of evidence gathering, and assessing the credibility of claims, has come to hold a central role within such claims. In particular, the narrative driven nature of claims, and the lack of objective evidence, means that the key to the success or failure can often lie with the credibility findings made by the decision-maker. Or, where the case is a tribunal appeal, the findings of the Immigration Judge. UNHCR have recognised the importance of credibility determinations, stating that they are a 'core element of the adjudication of asylum applications.'⁵⁵⁰

The importance of providing evidence to satisfy the burden of proof, or of convincing decision-makers of the credibility of the claim, for people claiming asylum based on sexual diversity, is not only an issue within the UK. Indeed, other jurisdictions have employed "scientific" methods to verify identities. For example, the Czech Republic, until recently, employed the practice of phallometry as a method of determining the credibility of individuals proclaimed sexual identities.⁵⁵¹ Further, the Court of Justice of the European Union has intervened as recently as 2018 to outlaw the use of psychological tests by member states.⁵⁵² Previously these methods had been employed by states such as Hungary.⁵⁵³ The use of such methods is consistent with Raj's argument that decision-makers feel great anxiety

⁵⁵⁰ UN High Commissioner for Refugees, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, (Brussels 2013).

⁵⁵¹ UN High Commissioner for Refugees 'UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation', (Brussels 2011).

⁵⁵² *Case C-473/16 F v Bevándorlási és Állampolgársági Hivatal* [2018] ECLI 1.

⁵⁵³ Barbara Leonard, 'Hungary Slammed For Testing Asylum Seeker'S LGBT Status' (*Courthousenews.com*, 2018) <<https://www.courthousenews.com/hungary-slammed-for-testing-asylum-seekers-lgbt-status/>> accessed 1 August 2018.

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around the potential for false claims.⁵⁵⁴ This, itself, is likely linked to the politicised nature of immigration and asylum issues, particularly in the aftermath of Brexit discourses regarding the need for the UK to “take back control” of its borders as well as political interventions such as the introduction of the net-migration cap.⁵⁵⁵

Issues relating to the burden of proof have been considered by Swinney, who analysed the 2009 Asylum Policy Instruction on the burden of proof in refugee status determinations.⁵⁵⁶ As he argues, many decision-makers are confused as to the exact requirements of the burden of proof and supplant it with their own conceptions credibility. Under UK Law, the burden of proof falls on the asylum claimant. However, all that is required for a claim made under the Refugee Convention⁵⁵⁷ is that there is a “reasonable degree of likelihood.”⁵⁵⁸ This is a lower threshold than the civil burden of proof, which is “on the balance of probabilities.” Indeed, a claimant is not required to show that the facts they claim are more likely than not to be true. All they need to show is, effectively, that what they are claiming is plausible. As the 2015 API on Credibility points out, this burden may also be listed—and I would argue it would be better understood—as requiring the facts to be “reasonably likely”. As Swinney points out, however, decision-makers often assess claims on the basis of whether or not they believe them to be true.⁵⁵⁹ This is in direct contradiction to the 2015 API on credibility, which points out that, ‘A caseworker does not need to be

⁵⁵⁴ See: Senthoran Raj, ‘A/Effective Adjudications: Queer Refugees and the Law’ (2017) 38 Journal of Intercultural Studies 453.

⁵⁵⁵ See further: Colin Yeo, *Welcome to Britain: Fixing Our Broken Immigration System* (Biteback Publishing 2020).

⁵⁵⁶ See generally: James Sweeny, ‘Credibility, Proof and Refugee Law’ (2009) 21 International Journal of Refugee Law 700.

⁵⁵⁷ Other forms of asylum claim such as those made pursuant to Article 3 of the ECHR or under other international law principles carry a different (usually higher) Burden of Proof.

⁵⁵⁸ *R v Secretary of State for the Home Department, ex p Sivakumaran* [1988] AC 958.

⁵⁵⁹ See Generally: James Sweeny, ‘Credibility, Proof and Refugee Law’ (2009) 21 International Journal of Refugee Law 700.

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“certain”, “Convinced” or even “Satisfied” of the truth of the account—that sets too high a standard of proof. It is enough that it can be accepted.’⁵⁶⁰ Clearly where claims are being assessed to a higher standard than is legally required, a spirit of co-operation and support for potentially vulnerable asylum seekers is lacking. Where decision-makers have doubts they are required to put their doubts to the claimant, so that the claimant is presented with an opportunity to respond to them.⁵⁶¹

The standard of proof is then accompanied by a focus on credibility. Credibility determination entails decision-makers deciding what the material facts to the claim are and then looking at the evidence in support of each of these facts while taking the whole claim in the round.⁵⁶² The role of the decision-maker when determining credibility is well summarised in *SM*,

It is the task of the fact-finder, whether official or judge, to look at all the evidence in the round, to try and grasp the story as a whole and to see how it fits together and whether it discharges the burden of proof. Some aspects of the evidence may themselves contain seeds of doubt. Some aspects of the evidence may cause doubt to be cast on other parts of the evidence... Some parts of the evidence may shine with the light of credibility. The fact-finder must consider all the points together; and... although some matters may go against and some matters may count in favour of

⁵⁶⁰ UK Visas and Immigration, ‘Asylum Policy Instruction: Assessing Credibility and Refugee Status’ (2015 Home Office). Available at: (*Assets.publishing.service.gov.uk*, 2015). <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397778/ASSESSING_CREDIBILITY_AND_REFUGEE_STATUS_V9_0.pdf> accessed 21 May 2020.

⁵⁶¹ *Ibid.*

⁵⁶² UK Visas and Immigration, ‘Asylum Policy Instruction: Assessing Credibility and Refugee Status’ (2015 Home Office). Available at: (*Assets.publishing.service.gov.uk*, 2015). <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397778/ASSESSING_CREDIBILITY_AND_REFUGEE_STATUS_V9_0.pdf> accessed 21 May 2020.

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credibility, it is for the fact-finder to decide which are the important factors...and to reach his view as a whole on the evidence as a whole.⁵⁶³

What this makes clear is that decision-makers should not look at any factor in isolation, rather they are required to consider the claimants interviews, narrative, objective evidence, and other facts, such as country of origin information as a whole.

The 2015 API on credibility sets out a structured process for analysing credibility informing decision-makers that,

[A]fter looking at all of the evidence and keeping the relatively low standard of proof in mind, the claimant's statements and other evidence about the facts can be accepted if they are:

- Of sufficient detail and specificity
- Internally consistent and coherent (to a reasonable degree)
- Consistent with specific and general COI
- Plausible⁵⁶⁴

Even where the burden of proof has not been discharged fully, it is still possible for the claimant to be offered the benefit of the doubt. To intensify confusion in this area, consideration of benefit of the doubt requires decision-makers to consider the "personal Credibility" of the claimant. This is not the same as the credibility of the claim, on which focus has thus far been directed. Personal credibility focuses on whether the claimant is believable as a person, rather than on whether or not their evidence is believable. Therefore,

⁵⁶³ *SM (Section 8: Judge's Process) Iran* [2005] UKAIT 00116, [2006] INLR 149 [10].

⁵⁶⁴ UK Visas and Immigration, 'Asylum Policy Instruction: Assessing Credibility and Refugee Status' (2015 Home Office). Available at: (*Assets.publishing.service.gov.uk*, 2015).
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397778/ASSESSING_CREDIBILITY_AND_REFUGEE_STATUS_V9_0.pdf> accessed 21 May 2020.

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personal credibility considers matters such as whether the claimant's claim was made in a timely manner after entry to the UK. However, in cases where a decision-maker, despite not being satisfied of the credibility of the claimant's narrative, considers that they are personally credible, it is open to that decision-maker to offer the benefit of the doubt in respect of the material fact in question.

Millbank's work has focused in on the credibility determination process—with specific reference to how it applies within asylum claims based on sexual diversity⁵⁶⁵— in undertaking this research she has detected the existence of two different forms of consistency operating within credibility determinations.⁵⁶⁶ These are internal consistency, which relates to the narrative coherence of the claim. In effect, this is a requirement for the claimant to present themselves with a coherent and clear narrative. While the requirement of narrative consistency can prove problematic—particularly when consideration is given to the impact of trauma on memory and the time which may have passed since the events took place⁵⁶⁷— consideration of the issues around consistency is beyond the scope of this thesis. Therefore, we focus on the second form of consistency identified by Millbank, this being external consistency. External consistency is related to ideas such as plausibility. This being one of the factors which is intended to direct decision-makers in deciding whether or not the evidence they have been presented with is credible. It involves considering whether the claim is consistent with other forms of knowledge regarding the situation in question.

⁵⁶⁵ See Generally: Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 *International Journal of Refugee Law* 1

⁵⁶⁶ *ibid* 11.

⁵⁶⁷ Jane Herlihy, Peter Scragg and Stuart Turner, ‘Discrepancies in Autobiographical Memories – Implications for the Assessment of Asylum Seekers: Repeated Interview Studies’ (2002) 324 *British Medical Journal* 324.

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Millbank is very critical of decision-makers placing an overreliance on plausibility.⁵⁶⁸ In essence, plausibility, leads decision-makers to consider whether the events and experiences the claimant is describing are believable. This can be problematic, as plausibility can only be considered by reference to one's own lived experience. For example, a decision-maker might feel that an asylum claimant not wishing to contact the police after being threatened is not plausible. However, making such a determination fails to recognise that different people in different contexts may have alternative conceptions of and relations to authority figures. In essence, both plausibility in a narrow sense and external consistency, in a wider sense, involve an examination of the credibility of a claimant's narrative with reference to common narratives, tropes, and expectations traditionally associated with the group in question. For example, the 2015 Asylum Policy Instruction refers to an excerpt from the case of *MM (DRC-Plausibility) Democratic Republic of Congo* [2005] UKIAT 00019 which included a judicial remark that,

It was the sheer improbability of one individual wrestling himself from a guard, leaving his clothes in the guard's hand, then evading another five of them, vaulting a two-meter wall, with no one shooting at him, even to wound him, or shouting for others to come, which caused the adjudicator to reject the story. She was fully entitled to do so, and to reach in consequence the overall credibility conclusion which she did.⁵⁶⁹

⁵⁶⁸ Jenni Millbank, "'The Ring of Truth': Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 International Journal of Refugee Law 1, 11-16.

⁵⁶⁹ *MM (DRC-Plausibility) Democratic Republic of Congo* [2005] UKIAT 00019 cited in UK Visas and Immigration, 'Asylum Policy Instruction: Assessing Credibility and Refugee Status' (2015 Home Office). Available at: ([Assets.publishing.service.gov.uk](https://assets.publishing.service.gov.uk), 2015). <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397778/ASS_ESSING_CREDIBILITY_AND_REFUGEE_STATUS_V9_0.pdf> accessed 21 May 2020.

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As this suggests, the core focus of external consistency essentially lies with considering whether the evidence presented by the claimant corresponds to external forms of knowledge. In *MM* that knowledge was regarding various factors such as the number of guards a single person might be able to avoid. In other contexts, external consistency might refer to known (or presumed) facts about what sexually diverse people do within a given country.

To develop this somewhat, the decision in *Y v SSHD* established that, in regarding a decision as not credible, a decision-maker is not entitled to do so only because of a sense that the narrative would not be plausible if the events took place in the UK. This is helpful in terms of forcing decision-makers to acknowledge that different events and ideas may exist within different cultures. However, this was sadly undermined as the court also affirmed that in judging whether or not a claim is credible, decision-makers are entitled to regard a claim as lacking credibility based on their own ‘common sense’.⁵⁷⁰ As I explore further in chapter seven, this is very dangerous ground as the “common sense” of any decision-maker is itself entirely based in normative ideas derived from the culture in which they have been socialised. Put another way, common sense will relate to a national, social, and cultural context.

The issues around external consistency-based reasoning with regard to sexual diversity are well put by Lord Hope in *HJ (Iran) and HT (Cameroon)*, where he observed that,

Behaviour which reveals one’s sexual orientation, whether one is gay or straight, varies from individual to individual. It occupies a wide spectrum, from people who

⁵⁷⁰ *Y v Secretary of State for the Home Department* [2006] EWHC 122; [2006] All ER 395.

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are naturally reticent and have no particular desire to establish a sexual relationship... to those who wish... to proclaim in public their sexual identity.⁵⁷¹

As Lord Hope's statement exposes, there are no objective external criteria against which the credibility of sexual diversity can be assessed. Because of this, external consistency is often focused on characteristics that stereotypically attach themselves to each identity category. These characteristics are largely based on the behaviours which are seen as normative for those who identify with a specific category of sexual diversity, such as gay or lesbian. Generally, this means that those performances of sexual diversity which most closely resemble sexual identities common within the UK are most likely to succeed.

4.4.3 External consistency in focus

To properly understand how the Convention is currently interpreted in relation to sexual diversity asylum claims, it is useful to look at some of the norms forming the focus of enquiry within a limited number of appeals. Though this thesis is mostly focused on first-instance decision making, and the impact of the 2016 API on this, looking to the forms of evidence that have been prevalent within appeals can be informative as to how the issue of proving sexual diversity is approached by immigration judges. This, in turn, allows a more informed assessment of the UK's overriding governmentality regarding sexual diversity.

These decision-maker expectations are not a part of the law, neither in terms of the international agreements, legislation, or administrative policy. Thus, as Nelken recognises, 'What counts as legal knowledge, or knowledge for law, is something that changes over time. And this mainly happens outside the courtroom'.⁵⁷²As I expand on in chapter seven, many of

⁵⁷¹ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596, [22].

⁵⁷² David Nelken, 'Getting at Law's Boundaries' (2006) 15 *Social and Legal Studies* 598, 602.

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these norms come from diverse knowledges and discourses regarding the ways that sexual diversity is commonly expressed. This demonstrates the central role of knowledges around sexual diversity within asylum decision-making.

One of these norms is an expectation for sexual behaviour—though it should be noted that following the decision in *A, B and C*, this is not a matter on which decision-makers are permitted to elicit evidence⁵⁷³—to align clearly and consistently with the claimed sexual identity. This, of course, rests on a prior requirement for sexual diversity to be understood and articulated as an identity. Proxies for sexual behaviour such as relationships, socialising, usage of dating applications, and questions over whether or not the claimant has children are employed. This can be evidenced in the incredulity shown towards claimants who have had sexual relations with the “opposite” sex.⁵⁷⁴ Or in the disbelief shown towards those who have not sought a partner for an extended period.⁵⁷⁵ As this suggests, credibility appears to rest partially on the idea that sexual behaviour and social behaviour will be aligned with sexual identity. One tribunal judge made this abundantly clear stating that:

Any potential persecutor is on a simple basis likely to consider men who have sex with men as gay, and men who do not have sex with other men as not being gay.

Therefore, there is a real question mark as to whether or not the appellant would be perceived by any potential persecutor as gay.’⁵⁷⁶

⁵⁷³ *Cases C-148 to C-150, ABC v Staatssecretaris van Veiligheid en Justitie* [2014] ECRI- 2406.

⁵⁷⁴ For example, asylum seekers who have children seem to be frequently denied on the basis that their children are evidence that they cannot be a same sex attracted person. See for example: Emily Dugan, ‘Home Office says Nigerian Asylum-Seeker can’t be a Lesbian as she’s got Children (The Independent, 3 March 2015) ><http://www.independent.co.uk/news/uk/home-news/home-office-says-nigerian-asylum-seejer-can-t-be-a-lesbian-as-she-s-got-children-10083385.html>> accessed 26 July 2018.

⁵⁷⁵ See for Example: *AT v Secretary of State for the Home Department* (5th April 2018) PA/11307/207, [5]; *SH (Bangladesh) v Secretary of State for the Home Department* (9th February 2018) PA/07322/2017, [8].

⁵⁷⁶ *FJI v Secretary of State for the Home Department* (28th February 2018) AA/00740/2016, [19].

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Given the context, where being discovered would likely lead to severe suffering or even death, the expectation that claimants will be able to demonstrate their identity through social behaviour—and that they will be able to provide witnesses to corroborate such behaviour—fails to account for the social realities in which many sexually diverse people exist. Indeed, as I expand on in chapter seven, it may be that the prohibition on sexually explicit evidence brought about by the decision in *A, B and C* has undermined the ability of asylum claimants to dispense with the burden of proof.⁵⁷⁷ This has, in turn, forced attention to be focused on more identarian aspects such as social participation in the LGBT+ community.

A second factor that exposes itself within asylum decision-making relates to forming, or joining, communities founded on sexual diversity both within the claimant's country of origin and within the country where they are seeking to claim asylum.⁵⁷⁸ For example, some claimants were disbelieved because they had not interacted with LGBT+ social or political groups.⁵⁷⁹ Despite the fact that, as Millbank expresses, some of us are just 'homebodies' without a particular desire to go out and socialise in such environments.⁵⁸⁰ In essence, much as Dawson and Gerber recognise, 'The issue of "recognition and association" within the LGBTI community is intimately tied to credibility assessments in refugee claims'.⁵⁸¹ Due to the focus on interaction with the wider community of sexually diverse people within the 2016

⁵⁷⁷ See section: 8.3.

⁵⁷⁸ Jasmine Dawson and Paula Gerber, 'Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?' (2017) 29 *International Journal of Refugee Law* 292, 312 -313.

⁵⁷⁹ See for example: *Mr FR v The Secretary of State for the Home Department* (19th May 2017) PA/04550/2016, [12]; [48].

⁵⁸⁰ Jenni Millbank, "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 *International Journal of Refugee Law* 1, 19.

⁵⁸¹ Jasmine Dawson and Paula Gerber, 'Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?' (2017) 29 *International Journal of Refugee Law* 292, 312.

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API, this theme is also present within initial Home Office decisions and, as such, is further expanded on within chapter five.

What these two forms of reasoning demonstrate is that within the current approach to the asylum claims of sexually diverse people there appears to be a need for claimants to have channelled their sexual desires into a series of relationships, communities, and social groupings. In other words, there is a need for claimants to perform identities recognisable to a “western” audience. This requirement is particularly clear in the claim of one tribunal judge that the claimant in question displayed ‘a total absence of any understanding of what it means to be gay’.⁵⁸²

The expectations for how gay identities will be expressed are perhaps most clearly laid out, however, in Lord Rogers’—admittedly well meaning—exultation that,

In short, what is protected is the applicant’s right to live freely and openly as a gay man. That involves a wide spectrum of conduct, going well beyond conduct designed to attract sexual partners and maintain relationships with them. To illustrate the point with trivial stereotypical examples from British Society: Just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates.⁵⁸³

⁵⁸² *Mr Syed Kazim Hussain Shah v Secretary of State for the Home Department* (2nd March 2018) PA/03564/2017, [16].

⁵⁸³ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596, [78].

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As these ‘trivial stereotypical examples from British Society’ show, there are several behaviours which are viewed as indicative of being a sexually diverse person. These expectations ‘result in lesbian, gay, and bisexual asylum seekers needing to visibly demonstrate their identity, as a form of proof, in a way that other asylum seekers do not’.⁵⁸⁴ This is despite the fact, as Juss has argued, that

the suggestions... were always self-indulgent and unlikely to bear much resemblance to the realities of everyday life for many in the world today, if only because a gay asylum seeker from Africa was not going to be found “drinking exotically coloured cocktails” in the bars of Kampala, Kano or Kiribati, if he had spent his time dodging persecution from state authorities. The judgement serves to typify the conceptualisation today of refugee rights as bourgeois rights.⁵⁸⁵

As Juss notes, it is crucial that the ‘bourgeois’, consumption-based span of rights envisaged by Lord Rodger are not permitted to occupy all the conceptual space for sexually diverse refugees and asylum seekers. Especially as such experiences are highly unlikely to be representative of the lived realities of all sexually diverse people. Going forward, this chapter concludes by considering the different administrative avenues which are commonly proposed as a method of improving the ability of the asylum apparatus to respond to the asylum claims of sexually diverse people.

⁵⁸⁴ Jasmine Dawson and Paula Gerber, ‘Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?’ (2017) 29 *International Journal of Refugee Law* 292, 298.

⁵⁸⁵ Satvinder Juss, ‘Sexual Orientation and the Sexualisation of Refugee Law’ (2015) *International Journal on Minority and Group Rights* 128, 134.

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4.5 Approaches to Reform in the Administration of Asylum Claims by Sexually Diverse People

Having explored theoretical work into the nature of sexual diversity and considered the current legal framework, I now turn to some of the proposed solutions to the ongoing issues within refugee status determinations in claims made by sexually diverse people. I explore two of the proposals as to how refugee status determinations could be made more responsive to the heterogenous lived experiences of sexually diverse people. Firstly, I explore the potential for the asylum claims of sexually diverse people to be examined through the Difference, Stigma, Shame, and Harm model proposed by Chelvan. While Chelvan's model has been partially incorporated into the 2016 API, which is considered in chapters five and six, the model also deserves exploration on its own merits. I then explore the proposal of altering the ways in which the claims of sexually diverse people are analytically characterised, looking at the possibility of processing them under the Political Opinion ground.

4.5.1 The DSSH Model

When people are persecuted for reason of their sexual diversity, this is rarely related to a specific identity. For example, someone arrested for sexual activity with a person who is perceived as being of the "same" sex, in a state where this is an offence, would not be able to rely on a defence that they are in fact bisexual or heterosexual. In this scenario, it is the conduct that is criminalised. Similarly, if one is accosted due to their perceived sexual identity, this is likely to relate to certain traits that are culturally linked to such an identity. What this tells us is that it is not identity itself that is persecuted. Rather, it is the actions or traits, or the failure to be able to articulate a convincing heterosexual narrative, that suggest a person is non-normative, and which thus results in the potential for persecution.

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Chelvan has recognised this effectively in presenting his proposal for analysing asylum claims by sexually diverse people through a Difference, Stigma, Shame, and Harm (DSSH) model.⁵⁸⁶ This thesis would have considered his recently completed doctoral study ‘At the End of the Rainbow: Where Next for the Queer Refugee? Understanding Queer Refugees Lives: Moving From Sexual Conduct to Identity in Sexual Orientation/Identity Asylum Cases in England and Wales’. However, it has been placed under embargo meaning I am not able to offer an analysis.⁵⁸⁷ Nonetheless, Chelvan’s DSSH model has been well-documented in other sources and has been partially adopted by the Home Office in the 2016 API.

The DSSH model presents a major step forward in the assessment of credibility and has been recognised by UNHCR as a more appropriate way of undertaking credibility assessments in sexual diversity claims.⁵⁸⁸ As Dawson and Greber characterise it, the model ‘seeks to help assessors move away from sexually explicit or inappropriate questions by focusing on the “narrative of difference” in the lived experience of asylum seekers’.⁵⁸⁹ In essence, Chelvan’s model offers a new way to analyse the asylum claims of sexually diverse people.⁵⁹⁰

⁵⁸⁶ Jennifer Rumbach, ‘Module 02: Conducting Interviews’ (IOM and UNHCR 2015) available at <<http://www.unhcrexchange.org/pdfjs?file=%2Fcontents%2F188294%2Fpreivew&id=188294>> accessed 13th July 2018.

⁵⁸⁷ S Chelvan, *At The End of the Rainbow: Where next for the Queer Refugee? Understanding Queer Refugees Lives: Moving From Sexual Conduct to Identity in Sexual Orientation/Identity Asylum Cases in England and Wales* (PhD Thesis, Kings College London 2019).

⁵⁸⁸ See: UN High Commissioner for Refugees, ‘Guidelines on International Protection NO.9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees’ (23 October 2012) U.N. DOC HCR/GIP/12/09.

⁵⁸⁹ Jasmine Dawson and Paula Gerber, ‘Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?’ (2017) 29 *International Journal of Refugee Law* 292, 293.

⁵⁹⁰ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

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The first focus of Chelvan's model is difference. Crucially, the focus on identifying a difference calls for something less specific than the category-driven investigation outlined above. The focus on difference enables wider conceptions of sexual diversity to be accounted for and also helps to recognise that in many cases asylum claimants may have suffered persecution because they do not appear heterosexual enough, rather than because they are of any identity. By focusing on difference, Chelvan's model holds the potential to improve administrative decision-making helping many more asylum seekers gain recognition. The merits of this model have been shown in practice in the success of asylum claimants such as Aderonke Apata.⁵⁹¹

As this marks out, starting with a focus on identifying a difference from the rest of society, rather than focusing on authenticating a proclaimed identity, allows the system to be more flexible and to recognise the multifarious reasons—relating to sexual diversity—that might result in a well-founded fear of persecution. Focusing on difference makes space for those whose behaviour—such as gender non-conformity—is likely to render them as targets for harm within their country of origin, even if their sexual diversity is not manifested in a clearly delineated identity. These people may previously have struggled to advance a credible narrative, particularly when the focus of decision-making was directed towards sexual conduct. For example, claimants who had children from previous relationships, or who are bisexual, may have to explain sexual conduct and relationships with partners of the “opposite” sex. However, I find it hard to disagree with Dawson and Gerber's assessment that the DSSH model ‘continues to perpetuate ontological constructions of non-heterosexuality as

⁵⁹¹ Diane Taylor, 'Nigerian Gay Rights Activist Wins UK Asylum Claim After 13-Year Battle' (*the Guardian*, 2017) <<https://www.theguardian.com/world/2017/aug/14/nigerian-gay-rights-activist-aderonke-apata-wins-uk-asylum-claim-13-year-battle>> accessed 22 May 2020.

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linear and ultimately fixed'.⁵⁹² Indeed, Chelvan has argued that DSSH is part of a broader push to assess the credibility of sexual minorities in terms of identities rather than sexual practices.⁵⁹³ This risks reinserting the same problematic assumptions explored above, where I noted how identity is not a universal construct but, rather, specific identities form in the context of complex webs of social relations. Indeed, as I explore in chapter five, for claimants from some asylum seeker countries of origin, the idea that sexual diversity is an “identity” at all will not register. Rather, sexual diversity may be conceptualised as a form of conduct or may be a matter unimportant to self-perception. In this sense, I argue that Chelvan’s model results in modes of analysis which privilege claimants presenting their sexual diversity in a format recognisably related to European identities.

Thus, while the focus on difference is refreshing, and certainly a step in the right direction, it does not entirely address the issues which arise in performing credibility determinations on claims based on sexual diversity. Indeed, it continues to organise credibility determinations around an essentially fixed conception of sexual diversity. This can be seen in the focus which Chelvan places on a stage model of sexual development, moving from the recognition of childhood difference to adult or adolescent realisation of same-sex attraction – which is then expected to represent a coherent explanation for that childhood difference.⁵⁹⁴ As explored across chapters five, six and seven, these problematic tropes are also reproduced within the 2016 API.

⁵⁹² Jasmine Dawson and Paula Gerber, ‘Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?’ (2017) 29 *International Journal of Refugee Law* 292, 293.

⁵⁹³ S Chelvan, ‘Put Your Hands Up (If you Feel Love)’ (2011) 25 *Immigration, Asylum and Nationality Law* 56, 60-62.

⁵⁹⁴ Keith Best, ‘What is the Reasonable Way for UK Asylum Seekers to Prove they are Gay’ (Independent 2018) <https://www.independent.co.uk/voices/comment/what-is-the-reasonable-way-for-uk-asylum-seekers-to-prove-they-are-gay-8879686.html> accessed 2 August 2018.

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The second stage of Chelvan's model calls for an analysis of the stigma directed towards this difference. Some theorists have claimed that the stigma, or animosity, directed towards sexually diverse people is evidence that a Particular Social Group exists.⁵⁹⁵ This is because such animosity is evidence that there is a social perception that such a group exists.⁵⁹⁶ Within the DSSH model, stigma can be located in any public negative attitude or action directed towards a characteristic that marks an individual or group out as different. While it is understandable that there must be a distinct social group, the reliance on stigma rather oversimplifies the issue. As previously mentioned, there are societies in which sexual diversity does not register as a distinctive category. Nonetheless, salient social factors— influenced by sexual diversity—may still lead to potential persecution. For example, it may be the case that a woman who is only attracted to other women declines to marry. In this case, she may face stigma, but this stigma relates to her refusal to comply with societal norms around marriage, rather than directly to her sexual diversity. Therefore, if Chelvan's model is to be useful it needs to adopt a wide framework for recognising stigma, rather than focusing overly on sexual diversity itself. It is recognised that a woman claiming on these terms may have a claim based on her gender and opposition to forced marriage, nonetheless as a sexually diverse person, an effective asylum system would require the ability to recognise that her fear of persecution might arise on an intersectional basis due to her status as a sexually diverse woman within her country of origin. That is to say, even if the society in question does not recognise a distinct group identified by their sexual diversity, a sexually

⁵⁹⁵ Jennifer Rumbach, 'Module 02: Conducting Interviews' (IOM and UNHCR 2015) available at <<http://www.unhcrexchange.org/pdfjs?file=%2Fcontents%2F188294%2Fpreivew&id=188294>> accessed 13 July 2018.

⁵⁹⁶ S Chelvan, 'LGBTI Asylum Claims—The Difference, Stigma, Shame, Harm Model' (Legal Updates, 2018) available at <http://www.righttoremain.org.uk/legal/lgbti-asylum-claims-the-difference-shame-stigma-harm-model/> accessed 27 July 2018.

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diverse woman may possess additional vulnerabilities when compared to heterosexual women which a focus on stigma alone will struggle to recognise.

The third stage is shame. Chelvan claims that shame is internalised stigma.⁵⁹⁷ He argues that shame arises from the social prejudice directed at difference and that shame can be effective evidence that a certain group is persecuted.⁵⁹⁸ While I maintain that Chelvan's formulation is a step in the right direction, the use of shame as a criterion gives pause for thought. In relying on shame, the DSSH model has circumscribed the emotional responses available to sexually diverse asylum seekers. If one takes the model at its strictest terms, activists who refuse to be ashamed of their sexual diversity would not be able to succeed in gaining recognition as a refugee. This would be the case even if they possessed a form of difference which is culturally stigmatised and had previously suffered harm amounting to the level of persecution or feared that they would suffer such harm in future. If Chelvan's formulation is to genuinely aid sexually diverse refugees and asylum seekers, this point needs further elaboration and clarification. This clarification should recognise that there is no universal response to being stigmatised. Rather, different people respond to their experiences in disparate ways. Failing to account for this and focusing on looking for experiences of shame would risk leaving the DSSH model under-inclusive.

The final criterion within Chelvan's model is harm. This is the persecution. In rather self-explanatory terms, all that is required here is that harm amounting to the level of persecution is feared for well-founded reasons. This is already covered under the persecution element of the convention so does not require further elaboration.

⁵⁹⁷ *ibid.*

⁵⁹⁸ *ibid.*

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While the DSSH model has contributed to changing policy, I hold that the shame aspect, and the focus on a developmental account of diversity, undermines its potential. However, it does demonstrate the potential of offering alternative methods of understanding, analysing, and accrediting the claims of sexually diverse asylum seekers within the existing legal framework. In this regard, its contribution to shifting Home Office policy should be recognised and its potential to herald further improvements in practice appreciated.

4.5.2 Analytically Characterised

An alternative route to assist in providing sexually diverse asylum seekers with a hearing compatible with the goals of the Refugee Convention would be to reconsider the ways in which sexual diversity is analytically characterised within the administrative process of refugee status determination.⁵⁹⁹ Crawley, utilising feminist modes of analysis, has claimed that many of the issues which arise in the context of Women's asylum claims relate to the ways in which such claims are analytically characterised.⁶⁰⁰ Honkala has taken this further, arguing that the categorisation of women claiming asylum in resistance to forced marriage as falling under the Particular Social Group head of the convention has ignored the political agency of refugee women.⁶⁰¹ Similarly, I will explore the argument that sexually diverse asylum seekers should be characterised as articulating a form of political opinion, with a focus on their opposition to the social norms operative within their country of origin.

Through doing this, I will suggest an alternative reform pathway which (as I argue in chapter

⁵⁹⁹ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

⁶⁰⁰ Heather Crawley, 'Gender, Persecution and the Concept of Politics' (2000) 9 *Forced Migration Review* 17

⁶⁰¹ Nora Honkala, "'She, Of Course, Holds No Political Opinions": Gendered Political Opinion Ground in Women's Forced Marriage Claims' (2017) 26 *Social and Legal Studies* 166.

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eight) could better support sexually diverse asylum claimants in gaining recognition as refugees in some cases.⁶⁰²

The present characterisation of sexual diversity based asylum claims as falling under the Particular Social Group as opposed to the Political Opinion head of the convention is dependent on a particular conception of the political.⁶⁰³ Principally, the asylum apparatus conceives of the political in male terms— legitimising the claims of those fleeing potential violence at the hands of the state for their affiliation to a particular political organisation— while denying the political nature of claims that rest on persecution for the rejection of social norms.

Taking a feminist interpretation of the political—which accounts for the fact that the personal is political—it can be argued that the rejection of social norms is, in and of itself, a political act.⁶⁰⁴ Thus, if such an act draws persecution, either from the state, or from non-state actors whom the state finds itself unable (or unwilling) to defend the claimant from, there is no reason why claims made on the basis of sexual diversity could not be considered as political opinion. Indeed, the United Nations High Commissioner for Refugees stated as early as 1991—in offering guidelines for the protection of refugee women—that ‘others may be seen as having made a religious or political statement in transgressing the social norms of their society’,⁶⁰⁵ suggesting UNHCR endorsement for the idea of rejecting social norms being a political opinion.

⁶⁰² See section: 8.12.

⁶⁰³ Nora Honkala, “‘She, Of Course, Holds No Political Opinions’”: Gendered Political Opinion Ground in Women’s Forced Marriage Claims’ (2017) 26 *Social and Legal Studies* 166, 168.

⁶⁰⁴ *Ibid* 169-172.

⁶⁰⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Protection of Refugee Women*, July 1991, 71.

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The guidelines set down by UNHCR are non-binding. However, what they do offer is evidence that such a reading of the convention is not only legally coherent, but considered plausible within the UN agency tasked with monitoring the implementation of the Convention. As this shows, many of the issues confronting sexually diverse people in their efforts to be recognised as refugees do not come from the Convention itself, but rather arise from how states have analytically characterised such claims. It is this analytic characterisation which is effectively articulated within the 2016 API. In effect, this policy is the state instructing administrative decision-makers as to how they should approach, understand, and analyse the factors of a claimant's narrative.

The primary issue, regarding the ways in which such claims are currently characterised, can be linked to the “western” conception of the public/private divide. “Sexuality”, within the debate over the public/private divide, is traditionally consigned to the private realm. This is true in both a political and a legal sense. For example, looking to the jurisprudence regarding the interpretation of the European Convention on Human Rights and Fundamental Freedoms,⁶⁰⁶ the right to a private life is repeatedly invoked as supporting the rights of “same” sex couples.⁶⁰⁷ Similarly, as Adler has pointed out, a legal developments in the US regarding the protection of the rights of sexually diverse people have centred around the protection of the home as a private space.⁶⁰⁸ Further, looking at the development of the criminal law regarding the regulation of ‘gross indecency’,⁶⁰⁹ it becomes clear that one of the motivating factors in the partial-decriminalisation of homosexuality was a desire to dismiss

⁶⁰⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

⁶⁰⁷ See for example: *Ghidan v Godin-Mendoza* [2004] UKHL 30; [2004] WLR 113.

⁶⁰⁸ Libby Adler, ‘Life at the Corner of Poverty and Sexual Abjection: Lewdness, Indecency, and LGBTQ Youth’ in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020).

⁶⁰⁹ Criminal Law Amendment Act 1885, S11.

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the 'homosexual problem' to the realm of the private.⁶¹⁰ Millbank has pointed out similar dynamics in the early UK treatment of sexually diverse asylum seekers.⁶¹¹ Otherwise put, as opposed to being a move of tolerance, or liberalism, the move to decriminalise was an attempt to depoliticise same-sex activity and banish it to the realm of the private.

Crucially, then, the issue of sexual diversity is frequently interpreted to be a private matter, outside of the scope of legal regulation. But also, therefore, outside of the scope of legitimation as a political stance. Rather, it is banished to the realm of the private and is recognised only as a form of social activity, legitimately conducted within the private sphere. By recognising that the characterisation of sexual diversity based claims as falling within the ambit of Particular Social Group is a decision made by individual states, as opposed to a necessary interpretation of the Refugee Convention,⁶¹² space is opened to consider how claims might be interpreted differently.

The Political Opinion route centres the rejection of social norms as the reason for the well-founded fear of persecution. This is in opposition to the current processes whereby individuals are recognised when they articulate a narrative which fits with sexual diversity as recognised by administrative agencies. In this sense, focusing on understanding the claims of sexually diverse people as a political opinion may have the power to enable more sexually diverse people to be recognised as refugees under the terms of the Convention, without needing to maverick through the raft of credibility issues that current plague claims made based on sexual diversity.

⁶¹⁰ See Generally: Leslie Moran, 'The Homosexualisation of English Law' in Carl Stychin and Didi Herman *Legal Inversions: Lesbians, Gay Men and the Politics of Law* (Temple University Press 1995).

⁶¹¹ Jenni Millbank, 'A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation 1989-2003' (2005) 14 *Social and Legal Studies* 115.

⁶¹² Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

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When considering the ability of states to interpret the convention, it is pertinent to consider the differences between the grounds. The grounds are formally regarded as being without a hierarchy.⁶¹³ However, Grahl-Madsen has argued that the Particular Social Group ground was effectively an ‘afterthought’.⁶¹⁴ Consequentially, less explanatory material exists. This enables states a greater level of discretion when deciding what claims will qualify under this ground. Arguably, this played a role in legitimising the use of discretion reasoning within sexual diversity claims even while similar reasoning was disallowed within religious or political claims.⁶¹⁵

4.6 A Benchmark Standard

This chapter has examined the goals of the Refugee Convention. By doing this, I have set down a benchmark standard around offering surrogate protection to certain classes of people from human rights abuses as being the core goal of the Refugee Convention. This core goal will be used as a benchmark against which to assess current policy and practice. Moving forward from this, I have examined the current legal framework, with a view to understanding how the approach of the Home Office fits under the broader network of international and domestic law. The purpose of doing this was to offer context to the analysis of subsequent chapters.

The chapter has also considered two proposed alternatives to the current approach to sexual diversity claims. These were the DSSH model or the use of the Political Opinion ground. Going forward, the understanding of the international and domestic framework—

⁶¹³ *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38

⁶¹⁴ Atle Grahl-Madsen, *The Status of Refugees in International Law* (Sitjhoff 1966) 219.

⁶¹⁵ Allan Briddock, ‘The Recognition of Refugees Based on Sexual Orientation and Gender Identity in the UK: An Overview of law and Procedure’ (2016) 4 *Birkbeck law Review* 123, 129; *Ahmed (iftikhar) v Secretary of State for the Home Department* [1999] EWCA Civ 3003; [2000] INLR 1.

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paired with an appreciation of the political difficulty of securing legal change in matters relating to immigration and asylum at the current moment—can offer a benchmark against which these proposals can also be considered.⁶¹⁶

Furthermore, this chapter has demonstrated that the issues raised by the current asylum apparatus are not explicitly related to the legal framework, by which I mean the Refugee Convention.⁶¹⁷ Rather, they lie in the ways in which states interpret and analytically characterise the claims of sexually diverse asylum seekers, which can be complicated by the narratives of sexually diverse refugees themselves, as explored in the next few chapters.

⁶¹⁶ See: Chapter Seven.

⁶¹⁷ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

Chapter Five: The 2016 API and Conceptualising Sexual Diversity

The most recent version of the Asylum Policy Instructions relating to Sexually diverse asylum claimants, *Sexual Orientation in Asylum Claims*, was published in 2016.⁶¹⁸

Representing a minor modification of the 2015 policy, it attempts to further shift the focus of refugee status determinations, in respect of sexually diverse claimants, to identity rather than behaviour.⁶¹⁹ In assessing this API, it should be understood that in the period since the 2010 judgement in *HJ (Iran) and HT (Cameroon)*,⁶²⁰ there has been a shift from discretion to disbelief, as described in the preceding chapters.⁶²¹ This mirrors the situation Millbank found in Australia in the aftermath of the *S395 and S396* decisions.⁶²² These decisions—like *HJ (Iran) and HT (Cameroon)*—outlawed the practice of requiring claimants to return to their country of origin and be discreet so that their sexual diversity would not be discovered, as contrary to the Refugee Convention. However, Millbank argues that ‘the overall impact of the decision has been far more muted, and arguably even thwarted by the practices of

⁶¹⁸ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019.

⁶¹⁹ S Chelvan, 'Put Your Hands Up (If you Feel Love)—A Critical Analysis of *HJ (Iran) and HT (Cameroon) [2010]*' (2011) 25 *Journal of Immigration, Asylum and Nationality Law* 56; Jasmine Dawson and Paula Gerber, 'Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation' (2017) 29 *International Journal of Refugee Law* 292.

⁶²⁰ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31; [2011] 1 AC 596.*

⁶²¹ See Generally: Alex Powell, 'Normative Understandings: Sexual Identity, Stereotypes and Asylum Seeking' in Chris Ashford & Alexander Maine, *Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020); S Chelvan, 'Put Your Hands Up (If you Feel Love)' (2011) 25 *Immigration, Asylum and Nationality Law* 56, 57; UK Lesbian and Gay Immigration Group, 'Missing the Mark' (Unison 2013) Available at <<https://uklgig.org.uk/wp-content/uploads/2014/02/Missing-the-Mark.pdf>> accessed 12th December, 2018.

⁶²² *S395/2002 and S396/2002 v MIMA* (2003) 216 CLR 473.

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decision-makers at lower levels'.⁶²³ Considering the findings of Rainbow Migration, that (between 2011 and 2013) 86% of rejections were based, at least in part, on negative credibility findings, it seems this pattern has been repeated in the UK.⁶²⁴ Therefore, this chapter, in conjunction with chapter six, assesses the 2016 API for its compatibility with the lived experiences of sexually diverse refugees.

Focusing on the API is important because, as Juss notes, under the *HJ (Iran) and HT (Cameroon)* test: 'first, the claimant has to show he is genuinely a homosexual. If not, he fails come what may. But the Court gives us no guidance on how to determine an applicant's sexuality'.⁶²⁵ Therefore, my primary focus in assessing this API is to look at how sexual diversity is conceived within it. To examine the knowledges and discourses that the policy brings into the asylum apparatus. I then contrast these conceptions of sexual diversity with interview participants' own self-conceptions and other academic research, with a view to determining mismatches in how sexual diversity is conceived and understood.

The structure of the next two chapters follows that of the API, exploring how the 2016 API conceives of sexual diversity, and placing this conception in conversation with participants' self-conceptions. My concern at the outset is that both the 2016 API, and the UK more broadly, currently have a conception of sexual diversity which depends on 'pre-existing understandings of what is proper and tolerable behaviour on the part of sexual minorities'.⁶²⁶

⁶²³ Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 *The International Journal of Human Rights* 391, 391.

⁶²⁴ UK Lesbian and Gay Immigration Group, 'Missing the Mark' (Unison 2013) Available at <<https://uklgig.org.uk/wp-content/uploads/2014/02/Missing-the-Mark.pdf>> accessed 12th December, 2018.

⁶²⁵ Satvinder Juss, 'Sexual Orientation and Sexualisation of Refugee Law' (2015) 22 *International Journal on Minority and Group Rights* 128, 141.

⁶²⁶ Jenni Millbank 'Sexual Orientation and Refugee Status Determination Overt the Past 20 Years: Unsteady Progress Through Standard Sequences?' In T Spijkerboer (ed), *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge 2013) 40.

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Therefore, I undertake this analysis by drawing on the API itself, exploring it section by section, and attempting to discern the underlying assumptions, knowledges, and discourses on which it is based. While also placing these sections in conversation with the narratives of participants.

5.1 Asylum Policy Instruction: Sexual Orientation in Asylum Claims

An API is a document designed to guide decision-makers in how to assess claims. As Sweeney notes, ‘the APIs and APUs are influential but non-legislative documents designed to help decision-makers by drawing together law and good practice’.⁶²⁷ The API is significant, because, while the legal framework is clear about what kinds of questions and forms of evidence cannot be accepted when trying to assess a claimant’s sexual diversity, it provides little guidance on what questions and forms of evidence decision-makers should be looking for. Thus, without a policy which is sensitive to how sexually diverse people conceptualise themselves, ‘decision-makers still have no idea what claimants need to do to prove their sexual orientation’.⁶²⁸

The API approaches sexual diversity asylum claims (listed as sexual orientation within the API itself) from a variety of perspectives. Its three stated objectives are:

- To provide an opportunity for the claimant to put forward sufficient evidence to establish their case
- To encourage full disclosure of all relevant facts, allowing the caseworker to investigate and consider the evidence about a particularly sensitive

⁶²⁷ James Sweeney, ‘Credibility, Proof and Refugee Law’ (2009) 21 *International Journal of Refugee Law* 700, 704.

⁶²⁸ Rachel Lewis, ‘“Gay? Prove It”: The Politics of Queer Anti-Deportation Activism’ (2014) 17 *Sexualities* 958, 963.

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subject to identify and protect those who would face persecution if returned to their country of origin.

- In the case of claims based on a risk of persecution for being lesbian, gay and bisexual (LGB), to establish whether the claimant is in fact LGB and the relevance of that to the asylum claim.⁶²⁹

Given the focus of this thesis, my primary interest is with those aspects of the policy relating to objective three. However, analysis is also contextualised with regard to the first two objectives. For example, it is relevant to consider whether, in light of the second goal being to encourage full disclosure, decision-maker conduct discourages claimants from being forthcoming. In this respect, analysis also focuses on factors such as whether the forms of evidence anticipated within the API are likely to encourage claimants to bring forward their own experiences of sexual diversity.

5.2 Language and terminology

The first substantive section of the policy, which directly relates to objective 3 of the above, addresses issues around language and terminology and, in so doing, also touches on some of the complications regarding identity-based frameworks for conceptualising sexual diversity. The section begins by instructing decision-makers that ‘LGB is an acronym used in many western cultures for lesbian, gay, or bisexual’.⁶³⁰ The reference to the “western” connotations of the term’s lesbian, gay and bisexual is a useful pointer. As Nasser-Eddin, Abu-Assab and Greatrick have argued, “lesbian”, “gay” and “bisexual” are not necessarily used outside of the

⁶²⁹ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 6.

⁶³⁰ *ibid* 6.

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“western” context.⁶³¹ The API goes on to state that LGB is often used to ‘encompass a person’s social identity and community’.⁶³² While the policy is careful to state that LGB ‘does not suggest that LGB people are a homogenous group with a shared or collective identity, representation or experience of linked issues’,⁶³³ the close alignment it makes between sexual diversity and social identity/community is problematic. This is because such a conception suggests that sexual diversity will correlate to group identities or ways of being. This misses the fact that for some asylum seekers their sexual diversity will not be an identity at all. As I have argued elsewhere, those coming from cultures in which sexual diversity is thought of as a form of behaviour or attraction may struggle to articulate a narrative which complies with the API.⁶³⁴ For example, as Abdullah,⁶³⁵ told me:

I never really identified with my sexuality. I recognised my sexuality, I accepted it, I was okay with it. I even lived with it. But the thing is, here is where it gets more complicated, identity is a very difficult word to identify. In every culture there is a certain set of values associated with identity.⁶³⁶

He went on to say that within Omani culture, identity is associated with characteristics such as one’s faith group, tribe, or nationality, but not with one’s sexual attraction or behaviour.

⁶³¹ Nof Nassier-Edin, Nour Abu-Assab, Aydan Greatrick, ‘Reconceptualising and Contextualising Sexual Rights in the MENA Region: Beyond LGBTQI Categories (2018) 26 Gender and Development 173. See also: Joseph Massad, ‘Re-Orienting Desire: The Gay International and the Arab World’ (2002) 14 Public Culture 361.

⁶³² UK Visas and Immigration, ‘Asylum Policy Instruction: Sexual Orientation In Asylum Claims’ (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 6.

⁶³³ *ibid* 6.

⁶³⁴ Alex Powell, ‘Interviews With Asylum Seekers Reveal Why The Home Office Rejects So Many LGBT Claims’ (*The Conversation*, 2019) <<https://theconversation.com/interviews-with-asylum-seekers-reveal-why-the-home-office-rejects-so-many-lgbt-claims-122905>> accessed 26 September 2019; Alex Powell, ‘It Felt Like They Were Looking For Something Very Specific’: Stereotypes And Essentialism In The Sexual Orientation Asylum Policy Instruction’ (*SLSA Blog*, 2020) <<http://sfsablog.co.uk/blog/blog-posts/virtualslsa2020-it-felt-like-they-were-looking-for-something-very-specific-stereotypes-and-essentialism-in-the-sexual-orientation-asylum-policy-instruction/>> accessed 2 July 2020.

⁶³⁵ All participant names changed to protect participant anonymity.

⁶³⁶ Abdulla, Omani Refugee to Author.

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The result of this is that, for him, sexual diversity did not feature as anything more than his desires and his behaviours. In this regard, he added that:

Their [the Home Office's] understanding of homosexuality was that of a gay person. To me, gay is so different than homosexual. I mean homosexual is your sexual attraction, full stop. But when you are gay it is not just your attraction; it is also how you express your attraction and the slogans which you use to express that attraction and the way that you conduct yourself in relation to that attraction. So, basically, you have to re-culture yourself in accordance with that attraction and if you have not re-cultured yourself yet, then you are not gay yet. You are just homosexual.⁶³⁷

While the API is clear that the terms LGB or homosexual are not always used as a form of self-identification, the focus on language in making this point is far too narrow.⁶³⁸ The current framing of the API suggests simply that those from other cultural backgrounds may use different terms to describe their sexual diversity, but that those terms will describe essentially the same stable, fixed, and gradually developed identities as those seen in the UK.

The reality is that different societies have different ways of conceptualising the role of sex and identity within the life of an individual or community.⁶³⁹ Indeed, it is possible that some may not see sexual diversities—such as primarily being attracted to members of the “same” sex—as making them different from other people in their country of origin. However,

⁶³⁷ *ibid.*

⁶³⁸ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 6-7.

⁶³⁹ In raising this point, it should be borne in mind that the section 'responding to a claimant's narrative: Issues around difference' does implicitly recognise that different societies will have different ways of conceiving of sexual diversity. See: UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation in Asylum Claims' (Home Office) 2. 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019 26-27.

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they may still suffer harms rising to the level of persecution for their perceived violation of gender norms or religious norms within that society. Strikingly, this is an issue which has also been identified by Rainbow Migration, who assist a large number of sexual minority asylum seekers every year. In email correspondence, their Executive Director told me that ‘the issue of SOGIECS [Sexual Orientation, Gender Identity and Expression, and Sex Characteristics] being seen as an identity is something, we have come across at UKLGIG’.⁶⁴⁰ What this shows is that this issue is beginning to gain recognition within some of the organisations who work with sexually diverse asylum seekers.

Alongside recognition from Rainbow Migration, in other research, I have discovered the same expectations of fixed and stable identity within the reasoning of Immigration Judges at tribunal level.⁶⁴¹ For example, when undertaking a review of upper-tribunal cases, I found that one judge had refused a claim on the basis that the claimant had demonstrated a ‘total absence of any understanding of what it means to be gay’.⁶⁴² While, as recently as 2014, a Home Office Barrister attempted to argue that ‘you can’t be a heterosexual one day and a lesbian the next day. Just as you can’t change your race’.⁶⁴³ Although neither of these statements are precedential, or necessarily indicative of the way that all officials conceive of sexual diversity, they paint a picture of how different knowledges and discourses around sexual diversity are deployed by officials.

⁶⁴⁰ Leila Zadeh, Executive Director Rainbow Migration in email correspondence to author. 25/09/2019.

⁶⁴¹ I have explored this expectation for a visible manifestation of community elsewhere. See: Alex Powell, ‘Normative Understandings: Sexual Identity, Stereotypes and Asylum Seeking’ in Chris Ashford & Alexander Maine, *The Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020).

⁶⁴² *Mr Syed Kazim Hussain Shah v Secretary of State for the Home Department* (2nd March 2018) PA/03564/2017, [16].

⁶⁴³ Emily Dugan, ‘Home Office Says Nigerian Asylum Seeker Can’t Be a Lesbian as She’s got Children’ (The Independent, 27 May 2015) <<http://www.independent.co.uk/news/uk/home-news/home-office-says-nigerian-asylumseeker-cant-be-a-lesbian-as-shes-got-children-10083385.html>> accessed 03 October 2019.

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While the key considerations at the end of the section note that it is ‘important to recognise that some individuals may hold a completely different perception of their own sexual orientation from those implied by the term LGB’,⁶⁴⁴ the terminology section of the API frames things far too narrowly. It may be the case that those from some social contexts may not perceive their own sexual diversity as being important at all. This would not stop them being persecuted. However, the current thrust of the API, in framing many of these issues as being purely about language and terminology, fails to sufficiently stress how heterogenous conceptions of sexual diversity may be. A more appropriate approach to the different terminologies would also need to account for the role of socialisation and discourse in shaping our epistemologies. This would require a recognition that, far from just using different words to mean an essentially stable phenomenon—sexual identity—claimants from some backgrounds and cultures may inhabit a different set of knowledges regarding sexual diversity.⁶⁴⁵

By taking account of the impact of discourse and recognising the cultural contingency of the sexual identity-based modes of thinking through which sexual diversity is currently conceived we can produce policies which recognise that:

The perception of what homosexuality is, for instance, can differ from one country to another... Talking to people who do not use the words we use in the European context, including because they may not even know them, doesn’t happen without sensitivity.

⁶⁴⁴ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 8.

⁶⁴⁵ Foucault has explored the transition between historical and contemporary knowledge about sexuality in a manner which may be constructive for understanding how different knowledges come into being and operate. See: Michel Foucault, *The History of Sexuality 1: The Will to Knowledge* (Robert Hurley Trans: Penguin 1998) ESP 75-115.

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You have to understand and accept that their experience may not be described by the words we would use, or that equality-promoters would use in the European context.⁶⁴⁶

The section ends by instructing decision-makers that, 'it will be necessary to establish how the claimant perceives themselves and how their behaviour or characteristics are perceived by the society which they are from'.⁶⁴⁷ While this usefully reminds decision-makers that sexual diversity which figures as an identity will be a highly personal matter, and that each individual may conceive of their sexual diversity in divergent ways, it does not go far enough.

Firstly, by framing the consideration only in terms of how their behaviours or characteristics are perceived by the society they are from, the policy fails to account for the role of omission in creating questions about an individual's fit within a society and, indeed, the suspicion that they may be sexually diverse. For example, Masani told me:

I was forced to marry. I had no choice. Because if I had refused then my sexuality would have been suspected. But when I came here, they said I was not a lesbian because I had been married. The letter made it sound so simple, you had a husband... Therefore, it is not credible that you are a lesbian.⁶⁴⁸

As this shows, sometimes, far from needing to consider how behaviours and characteristics may be viewed by the society in their country of origin, decision-makers need to consider how the things someone may not want to do might be perceived in that culture. This

⁶⁴⁶ Joël Le Déroff quoted in Tawseef Khan, 'Investigating the British Asylum System For Lesbian, Gay and Bisexual Asylum Seekers: Theoretical and Empirical perspectives on Fairness' (PhD Thesis, University of Liverpool 2016) 178.

⁶⁴⁷ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 8.

⁶⁴⁸ Masani, Ugandan Refugee to Author.

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corresponds with Giametta's argument that one of the primary strategies adopted by sexual minorities attempting to hide their sexual diversity within their country of origin is heterosexual marriage.⁶⁴⁹ Indeed, as Chelvan has argued, the pressure to fulfil normative demands such as marriage or having children, and thus the actions one must undertake to keep their sexual diversity secret within their country of origin, increase with age.⁶⁵⁰

Accounting for the above, it is argued that those claiming asylum on the basis of sexual diversity may find that this diversity is revealed by their failure to convincingly articulate a heterosexual narrative,⁶⁵¹ rather than any behaviours which clearly manifest their sexual diversity to the outside world.⁶⁵² Although it should be borne in mind that, on occasion, matters culturally connected to, but not an inherent part of, sexual diversity may also be factors which render a given individual vulnerable to persecution. This was recognised by Chataluka, who told me:

I will never get married. That's why I escaped, because I don't want to. I think, the woman has the right to know the person she is with. Because all my gay friends I

⁶⁴⁹ Calogero Giametta, *The Sexual Politics of Asylum: Sexual Orientation and Gender Identity in the UK Asylum System* (Routledge 2017) 45.

⁶⁵⁰ S Chelvan, 'Put Your Hands Up (If you Feel Love)' (2011) 25 *Immigration, Asylum and Nationality Law* 56, 60.

⁶⁵¹ This idea has been explicitly recognised by the Court of Appeal. See: *LC (Albania) v Secretary of State for the Home Department* [2017] EWCA Civ 351.

⁶⁵² See Generally: S Chelvan, 'The Assessment of Credibility of Women... Victims of Torture... Within the Decision-Making Process and Whether this is Reflected in Appeal Outcomes' (Home Affairs Select Committee 2013).

<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71vw32008_HC71_01_VIRT_Home_Affairs_ASY-35.htm> Accessed 02 October 2019. It should also be noted again that the policy does make some recognition of the fact that persecution often arises due to a perceived violation of heterosexual norms rather than from the claimants sexual identity per se. See UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016)<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019 26-27.

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knew in Egypt, they are all married and have kids now, but they are still having their relationships with me.⁶⁵³

In the same register, it should be considered that some—or even many—claimants will have lived a traditionally ‘heterosexual narrative’. Perhaps out of a fear of discovery, or simply because they were unaware of their sexual minority diversity. Take for example Masani, who, as discussed above, married to keep her sexual diversity a secret. The idea that a heterosexual narrative will always be absent is, in this register, a potentially dangerous one.

The point here is that the API mis-construes issues which go to the very core sexual diversity as simply being matters of language. In doing this, it gives decision-makers the impression that all they require is to find the words that asylum seekers use to express concepts that fundamentally resemble those utilised in the UK. This risks giving decision-makers the impression that their task is to find the language which claimants use for their “gay” “lesbian” or “bi-sexual” identity, rather than the complex, culturally aware, interpretation a fair process would demand of decision-makers.

5.3 Legislation and Legal Framework

After exploring language and terminology, the API then explores the legislative framework. It begins by going through the Refugee Convention⁶⁵⁴ and the Qualification Directive.⁶⁵⁵ The section then discusses the relevant caselaw, starting with the evidential impact of the

⁶⁵³ Chataluka, Egyptian Refugee to Author.

⁶⁵⁴ UN General Assembly, ‘Convention Relating to the Status of Refugees’, 28 July 1951, United Nations, Treaty Series, vol. 189, 137. See Also: UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, 267.

⁶⁵⁵ European Union: Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU.

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judgement of the Court of Justice of the European Union in *C-148/13*, *C-149/13* and *C-150/13* (otherwise known as *A, B and C*).⁶⁵⁶ This ruling addresses what forms of evidence can be relied on in claims brought on the basis of sexual diversity. The API states that,

The court in *A, B and C* ruled that:

- Questions based solely on stereotypical behaviour cannot be relied on in order to assess evidence put forward by a claimant: any assessment made solely on the basis of stereotyped notions associated with homosexuals will not satisfy the requirements of EU law...
- Detailed questioning in regard to sexual practices must not be asked: any such questions are contrary to the fundamental rights guaranteed by the EU charter of Fundamental Rights...
- Sexually explicit evidence, even if it is provided voluntarily by the claimant, must not in any circumstances be accepted: such evidence does not necessarily have probative value and would of its nature, infringe human dignity...
- Adverse credibility findings cannot be made merely because a claimant did not raise issues of sexual orientation on the first occasion in which they claimed asylum.⁶⁵⁷

While the API does present a useful summary of the decision in *A, B and C*, it fails to offer sufficient guidance for decision-makers. For example, while it correctly points out that decisions cannot be based purely on stereotypes, it fails to identify what constitutes a stereotype. Admittedly, this same criticism can be raised of the judgement in *A, B, & C* itself.

⁶⁵⁶ *Cases C-148 to C-150, ABC v Staatssecretaris van Veiligheid en Justitie* [2014] ECRI- 2406.

⁶⁵⁷ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 10.

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However, the API, as a form of guidance for decision-makers, represented an opportunity to identify how decision-makers are expected to apply the legal framework, including the caselaw. This is important because, while most would recognise that basing a decision on a person's appearance or mannerisms would be basing a decision on stereotypes (even this has been justified by the Home Office at Tribunal),⁶⁵⁸ fewer are likely to recognise that questions about who someone associates with and the spaces they attend are equally stereotypical.⁶⁵⁹ Indeed, the API openly encourages decision-makers to look to such factors when assessing a claimant's narrative, stating that,

To enable claimants to present their case, it may be necessary to ask questions about where claimants have socialised or whether, for example, they have been members of clubs, groups, or organisations, including through social media. Where a claimant has indicated that they have interacted with the LGB community, questions enabling the claimant to detail their knowledge and/or interactions with LGB contacts, groups and activities (in either their country of origin or the UK) may be useful.⁶⁶⁰

During my interviews, all eight respondents said that they had been asked to provide photos of themselves at pride events and in gay venues, as well as providing evidence of a wider gay life such as through the provision of cinema stubs and other evidence that they had been on dates with members of the "same"-sex. These requests often came from their representatives.

⁶⁵⁸ Given the inaccessibility of decisions at the first-tier tribunal, information on this is available only in news reports. See: Robert Booth, 'Judge Rejected Asylum Seeker Who Did Not Have Gay 'Demeanour'' (*the Guardian*, 2019) <<https://www.theguardian.com/uk-news/2019/aug/21/judge-rejected-asylum-seeker-who-did-not-have-gay-demeanour>> accessed 26 September 2019.

⁶⁵⁹ Millbank has also argued that while stereotypes around features such as appearance rarely play in the written reasons given for a decision, they continue to be given significant weighting by some decision-makers. See: Jenni Millbank, "'The Ring of Truth': Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 *International Journal of Refugee Law* 1, 7.

⁶⁶⁰ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 23.

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However, such requests would only occur if the representatives believed that providing such evidence would make a claim more likely to succeed. I suggest, therefore, that the provision of such evidence is an expected part of a successful asylum claim.

Participants also mentioned how questions during their substantive interview placed significant focus on their interactions with others. For example, all referred to how providing testimonies from other sexually diverse people was perceived to be important to the success of their claim. Some participants were encouraged by their representatives to provide photos of themselves in gay venues and at pride events, others received the same encouragement from support groups and their members. For example, Chataluka told me that

What my solicitor helped me with was that she asked me about certain things should be in my evidence. For example, I would have to attend pride and take pictures there. Which was the first time ever I had been to pride. I went with my friends; it was a great time. But I was a bit nervous about it. Because people in public like that, you never know what will happen. Also, to go to gay clubs and take pictures as much as you can, out with friends. So, I built up a case properly and I think that we went about it in a very professional way.⁶⁶¹

This is itself a stereotype; it represents an expectation for someone to attend given spaces and events due to their association with a social group. In this sense, claimants' experiences linked to attending venues traditionally associated with sexually diverse people in the UK context comes to be analytically characterised as a form of evidence in support of a claimant's sexual diversity, rather than a stereotype attributed to that diversity and thus

⁶⁶¹ Chataluka, Egyptian Refugee to Author.

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prohibited as being a sole basis for a decision in accordance with the decision in *A, B, and C*.⁶⁶²

As a result of this, the Home Office have produced a policy which, while superficially adhering to the requirements of retained EU law, in fact, relies substantially on stereotypes in setting out how decision-makers should approach the question of determining whether the claimant has cleared the burden of proof with regard to their sexual diversity.

The Oxford English Dictionary defines a stereotype as a ‘widely held but fixed and oversimplified image or idea of a particular type of person or thing’.⁶⁶³ Thus, the idea that someone who is of a given form of sexual diversity will enter certain spaces, or keep certain company, is a prime example of a stereotype. It represents a fixed understanding of what being part of a particular kind of person entails, and that fixed understanding is, of course, greatly oversimplified. It does not account for the heterogenous, diverse, and often culturally specific experiences people have. Indeed, many of the ideas, behaviours, and characteristics thought to constitute identities can rightly be understood as stereotypical. These are often embraced by groups themselves as forms of in-group humour and a way of developing shared experiences.⁶⁶⁴ Nonetheless, they are oversimplified and, ultimately, flawed expectations which result in portraying groups as fixed and homogenous.

Accounting for the above, the idea that any probative value can be gained from photos of people at pride parades or socialising in gay bars is misguided. Indeed, as Millbank has

⁶⁶² *Cases A-148 to C-150, ABC v Staatssecretaris van Veiligheid en Justitie* [2014] ECRI- 2406.

⁶⁶³ 'Stereotypical | Definition Of Stereotypical By Lexico' (*Lexico Dictionaries / English*, 2019) <<https://www.lexico.com/en/definition/stereotypical>> accessed 3 October 2019.

⁶⁶⁴ Max Morris, “‘Gay Capital’ In Gay Student Friendship Networks: An Intersectional Analysis of Class, Masculinity, and Decreased homophobia’ (2018) 35 *Journal of Social and Personal Relationships* 1183.

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argued, many sexually diverse people have no desire to enter LGBT+ and queer spaces.⁶⁶⁵ I argue that, by permitting analysis of this kind of evidence, the policy subtly continues to rely on discretion reasoning. This is because it undermines the ability of claimants to be sexually diverse and not visibly manifest this in their behaviour. The result of seeking evidence such as this is that, as Lewis has argued, sexually diverse people who are claiming asylum are required to ‘perform a visible identity’.⁶⁶⁶ That visible manifestation of sexual diversity is then assessed with reference to narrow and stereotyped conceptions of what represents a credible sexual identity that corresponds to the forms of sexual diversity commonly observed in the UK.

On this note, the expectation for sexually diverse claimants to be able to evidence a history of attending LGBT+ spaces, proving, as it did for the participants that I spoke to, to be a ubiquitous requirement, seems particularly ignorant of the lived realities of asylum claimants.⁶⁶⁷ For example, those claiming asylum are entitled to a living allowance of just £37.75 per week for each person in their household.⁶⁶⁸ Many are displaced to areas such as Middlesbrough or other areas in the North of England which have fewer queer spaces than large cities such as London or Manchester.⁶⁶⁹ This means that accessing such venues can be at

⁶⁶⁵ Jenni Millbank, ‘“The Ring of Truth”: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations’ (2009) 21 *International Journal of Refugee Law* 1, 19.

⁶⁶⁶ Rachel Lewis, ‘“Gay? Prove It”: The Politics of Queer Anti-Deportation Activism’ (2014) 17 *Sexualities* 958,961. See also: Tawseef Khan, ‘Investigating the British Asylum System For Lesbian, Gay and Bisexual Asylum Seekers: Theoretical and Empirical perspectives on Fairness’ (PhD Thesis, University of Liverpool 2016) 132.

⁶⁶⁷ I have explored this expectation for a visible manifestation of community elsewhere. See: Alex Powell, ‘Normative Understandings: Sexual Identity, Stereotypes and Asylum Seeking’ in Chris Ashford & Alexander Maine, *Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020);

⁶⁶⁸ ‘Asylum Support’ (GOV.UK, 2019) <<https://www.gov.uk/asylum-support/what-youll-get>> accessed 3 October 2019.

⁶⁶⁹ Note should be taken that areas such as Manchester also have a very large gay scene. However, given the low levels of financial assistance provided travel to these areas is often prohibitively expensive.

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best outing, and at worst, impossible.⁶⁷⁰ Indeed, the Government's website reminds those seeking asylum support that 'you cannot choose where you live. It is unlikely you'll get to live in London or South East England'.⁶⁷¹ Keenan has argued that the current framework expects sexually diverse refugees and asylum seekers to have 'the capital and the desire to spend time and money on commercial recreational activities', despite the fact that the state fails to provide them with the capital, and numerous causes may mean they lack the desire.⁶⁷² Further, the expectation fails to account for the different cultures which claimants may originate from. Some will have religious and cultural prohibitions on the consumption of alcohol. Others may be living with people from their country or culture of origin and may fear the consequences of their sexual diversity being discovered and potentially shared with others within their communities. For example, Abeo told me:

I was taken to this apartment in Middlesbrough... I was staying with three other people. And that was also a big thing for me because, I don't know these people, so I don't know how much of my sexuality I can bring. So, I had to go back into the closet, because they would bring their girlfriends, or they would bring their friends and I can't do that. As Much as I would love to hang out with them and have drinks, I can't because once the conversation had come up, "Oh you don't bring girls, are you gay?" So that became like a tough thing for me, so I would spend a lot of time in my room.⁶⁷³

⁶⁷⁰ Amelia Hill, 'UK'S Asylum Dispersal System Close To 'Catastrophic Failure' (*the Guardian*, 2018) <<https://www.theguardian.com/uk-news/2018/sep/06/uk-asylum-dispersal-system-failure-letter-council-leaders>> accessed 3 October 2019.

⁶⁷¹ 'Asylum Support' (*GOV.UK*, 2019) <<https://www.gov.uk/asylum-support/what-youll-get>> accessed 3 October 2019.

⁶⁷² Sarah Keenan, 'Safe Spaces for Dykes in Danger? Refugee Law's Production of the Vulnerable Lesbian Subject' in Sharon FitzGerald (ed) *Regulating the International Movement of Women: From Protection to Control* (Routledge 2011) 36.

⁶⁷³ Abeo, Nigerian Refugee to Author.

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By way of a further example, Bennett, drawing on her own doctoral research, described the experience of a Muslim woman who believed that her asylum claim, and specifically her credibility, had been undermined in the eyes of the decision-maker because she lacked knowledge of the “scene” in Manchester. She lost credibility in this context despite considering that ‘going to clubs was neither an appropriate nor desirable option’.⁶⁷⁴ As this shows, many will not wish, or feel able, to associate with other sexually diverse people, and the expectation for people to do so undermines the stated intentions of the policy. Even where this is not a direct expectation, successful claimants having such evidence may entrench it in decision-makers’ minds as being something which is indicative of a genuine claim.

In this regard, it is interesting that the policy informs decision-makers that sexually explicit evidence is forbidden and that, even if it were not, it would not necessarily have probative value, while failing to consider that photos of someone socialising in an LGBT+ friendly or queer space are no more likely to have probative value and may actually be less coherently aligned to the ways in which sexually diverse people experience their sexual diversity than sexually explicit evidence.

The issue which again presents itself is that those features commonly associated with LGBT+ lives in the UK are expected to be present within the narratives of all people who defy heterosexist norms. All sexually diverse people appear, from the forms of evidence permitted and recommended by the 2016 API, to be conceived of as possessing an essentially shared experience. The issues around this lack of attention to what constitutes a stereotype are exacerbated by the next section of the policy which states that,

⁶⁷⁴ Claire Bennett, ‘Lesbians and United Kingdom Asylum Law: Evidence and Existence’ in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (Eds), *Gender in Refugee law: From Margins to Centre* (Routledge 2014) 148.

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The Court of Justice of the EU[‘s]... ruling also made it clear that the Home Office do not have to accept someone is LGB simply because they say so. It held that such declarations merely constituted the starting point in the process and were subject to proper assessment of facts and circumstances.⁶⁷⁵

This is, of course, accurate; the judgement does state that self-identification is merely a starting point of analysis.⁶⁷⁶ However, the policy could do more to remind decision-makers that, in many cases, their own narrative may be the only evidence which a claimant is able to supply. As a result of this, it would be useful to remind decision-makers of the low standard of proof that applies to an asylum claim at this juncture. All that is required is for the claimant to show that there is a ‘reasonable degree of likelihood’ that they are a sexually diverse person. In many cases, this burden could be discharged entirely with narrative evidence. However, the policy’s framing suggests to decision-makers—the majority of whom do not have a legal education, or indeed the time, to allow them to investigate the exact legal framework for themselves⁶⁷⁷—that something other than the narrative or words of the claimant is required to validate their sexual diversity. This, in and of itself, is likely to contribute to the expectation that asylum claimants will be able to submit photographs and testimonies to support their sexual diversity.

⁶⁷⁵ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 10.

⁶⁷⁶ *Cases C-148 to C-150, ABC v Staatssecretaris van Veiligheid en Justitie* [2014] ECRI- 2406 [49].

⁶⁷⁷ While the Home Office responded to my request for information on the qualifications of decision-makers by informing me that the provision of such data would breach the £600 spending limit for a freedom of information request they did inform me that ‘There are many different roles across the asylum directorate and roles are not filled purely based on an educational requirement. Vacant posts can be filled by internal moves, work experience etc’ What this tells us is that the Home Office continues to consider applications from people without degree level education. See: FOI Response 55421 (26 September 2019).

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5.4 Interrelations of race, religion, and sexual diversity

The policy then moves to discuss the interrelations of race, religion, and sexual diversity. This is, on the whole, a useful section which stresses that the persecution feared by sexually diverse people may relate to the specific ethnic, religious, or national communities which they are a part of within their country of origin.⁶⁷⁸ Crucially, the policy reminds decision-makers that ‘a particular ethnic group may express hostility and discrimination towards LGB people that is not experienced by the LGB community in other parts of the country’.⁶⁷⁹ This is significant because some may suffer persecution because they are a sexually diverse person within the communities they are a part of, rather than because hostility to sexual diversity is endemic across the whole of their country of origin. For example, during my data collection I had conversations with people from South Africa who feared persecution because they were sexually diverse as well as being a member of the Zulu community. It should, of course, be noted that South Africa is now largely seen as a country which is friendly to sexually diverse people. Indeed, it is one of a few countries in the world which has a constitution that directly protects sexual and gender diversity.⁶⁸⁰ What this shows is that the policy is right to draw attention to the fact that people may suffer persecution due to their membership of specific social groups alongside their status as a sexually diverse person. Thus, the policy rightly requires decision-makers to consider the potential that the fear of persecution might be complex in nature.

⁶⁷⁸ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 10.

⁶⁷⁹ *Ibid*, 10.

⁶⁸⁰ Constitution of the Republic of South Africa, 1996. Ch 2, S9.

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The policy also usefully pinpoints an argument recognised within chapter four of this thesis as being one of the possible reform methods outlined in previous research concerning sexually diverse refugees and asylum seekers.⁶⁸¹ Namely, it states that,

in considering political opinion as a convention reason, where LGB practices are viewed as contrary to the policies, methods or beliefs of the potential actors of persecution, a claimant may apply for asylum based on a fear of persecution for acting in opposition to political opinion.⁶⁸²

While this is again useful, the policy repeats the failure to recognise the role of omission.⁶⁸³

This is particularly problematic to cases involving sexually diverse women who may suffer persecution as if they were sexually diverse women simply for refusing to conform to common or normative expectations such as those around marrying or having children.⁶⁸⁴ In this sense, it is regrettable that reference to the potential of sexual diversity giving rise to an asylum claim on the basis of political opinion is not expanded on in any meaningful way within the 2016 API. For example, it would have been useful to have explored the ways in which being a sexually diverse person could give rise to actual or imputed political opinions that may result in a well-founded fear of persecution.

⁶⁸¹ See section: 4.5.2.

⁶⁸² UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 10.

⁶⁸³ Note should be take on Pages 26-27 of the policy which do briefly draw attention to the role of failing to be heterosexual enough. See: ⁶⁸³ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019 26-27.

⁶⁸⁴ Jasmine Dawson and Paula Gerber, 'Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?' (2017) 29 *International Journal of Refugee Law* 292, 315-320.

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Honkala has argued that women who oppose social norms around marriage are engaging in a political act and therefore could, and arguably should, engage with the Political Opinion head of the Refugee Convention.⁶⁸⁵ In particular, she situates the resistance to gendered norms as itself being a political act. The arguments Honkala advances can be applied to sexually diverse people who, as the policy itself recognises, are often persecuted more for their non-adherence to social, political, and religious norms than their sexual diversity per se. If sexually diverse people are thought of on this basis, then the need to consider the credibility of their sexual diversity is removed. Instead, all that is required is a recognition that they either are, or would be perceived as, violating a norm in the country in question. Of course, this could bring credibility issues of its own, but there would no longer be a need to directly address identity. Indeed, the policy itself recognises this in the section on ‘Responding to a Claimant’s Narrative: Issues Around Difference’.⁶⁸⁶ Here the policy states that,

Most LGB asylum claimants live their lives in which straight is considered the norm. From the perspective of the persecutor, the issue can be the fact that the individual is not conforming to common prevailing normative heterosexual stereotypes. In effect, the behaviour which may give rise to harm, harassment or persecution may not be LGB behaviour... but behaviour or lifestyles which are deemed not to be heterosexual enough.⁶⁸⁷

⁶⁸⁵ Nora Honkala, “‘She, of Course, Holds no Political Opinions’”: Gendered Political Opinion Ground in Women’s Forced Marriage Asylum Claims’ (2017) 26 *Social and Legal Studies* 166.

⁶⁸⁶ UK Visas and Immigration, ‘Asylum Policy Instruction: Sexual Orientation In Asylum Claims’ (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 26.

⁶⁸⁷ *ibid*, 26.

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While this is a helpful section, its position at the end of the substantive policy renders it as an afterthought. It also fails to recognise that within societies with the most oppression, there may not be a stable conception of heterosexuality at all. Rather, heterosexuality may simply be seen as normal, with deviation from that norm being strictly policed; or, in perhaps a more totalitarian vein, considered to be impossible. The policy further states that:

In many cases, an LGB person's first awareness of their developing sexual orientation may be a perception of feeling "different" from other peer members of their community. Such perceptions of difference need not relate to feelings around sexuality, they may well pre-date sexual awakenings and begin in childhood.⁶⁸⁸

This fails to recognise that some claimants may not consider themselves to be different from other members of their community. While advocates of the DSSH model have sought to argue that 'feelings of difference in a heterosexist world are universal,'⁶⁸⁹ this seems an oversimplification. To put this more clearly, feelings of difference will only be experienced—and perhaps more importantly be capable of being communicated to others—if that difference is conceivable. If a culture, or the community, lacks a conception of sexual diversity, it is unlikely that a narrative of difference will exist in terms the DSSH model or almost any frameworks of knowledge derived from the "west" can understand. It is true that the claimant might feel discomfort but transposing this discomfort into a narrative of difference in the manner the policy suggests will rarely prove to be simple for claimants. None of this would, however, prevent them being persecuted for their sexual diversity within their country of

⁶⁸⁸ *ibid.*, 26.

⁶⁸⁹ Elizabeth Connely, 'Queer, Beyond a Reasonable Doubt: Refugee Experiences of "Passing into Membership of a Particular Social Group' (UCL Migration Research Unit Working Papers 2014/3) 29.

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origin. Indeed, those cultures in which difference is least able to be conceived, are often those in which norms around gender and sexual diversity are most rigidly policed.

Moving forward, the policy informs decision-makers that,

A wide variety of indicators may be presented in narratives by claimants, which may suggest a sense of being different or “apart from”. Such indicators may include childhood behaviours indicating strong identification with the opposite gender, while for others experiences of difference may be manifested in unusual feelings and strong emotions towards another person of the same sex. Other indicators may be:

- Recognition that the claimant is not like other girls/boys in childhood or adolescence
- Feelings of isolation
- Self-doubt and loneliness
- Gradual recognition of sexual and emotional attraction to members of the same sex or feelings of not wanting to be exposed to others.⁶⁹⁰

While the policy reminds decision-makers that ‘not every LGB person will have experience of or be able to communicate any sense of being different’⁶⁹¹ and that ‘caseworkers must have no expectations of any “common” themes to be presented’,⁶⁹² the use of a list such as the one included within the policy appears to promote a checklist style approach. There is a strong correspondence between the list of likely points around recognising difference and the questions participants detailed being asked. In some scenarios, such as the case of Aderonke

⁶⁹⁰ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 26-27.

⁶⁹¹ *Ibid*, 27.

⁶⁹² *Ibid*, 27.

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Apata, this focus on difference may be helpful.⁶⁹³ However, considering the policy itself recognises the manifest reasons why narratives of difference may not arise in some claimants' cases, giving a section specifically addressing them seems misguided. Further, the focus on difference may encourage conflicts between the ways in which claimants and decision-makers understand the world. As Millbank and Berg argue, claimants stand little chance of success if their narrative challenges any central aspects of the decision-makers' understanding of the world.⁶⁹⁴ In this way, far from being universal, the narrative of difference requested is anchored to a specific set of behaviours and emotions which correspond to decision-makers own ways of making sense of the world. These ways of making sense of the world include the binarizing logic present within most depictions of sexual diversity within the UK.

It is also pertinent to consider Dawson and Gerber's critique of the narrative of difference approach in respect of how 'the normative elements of gender atypicality, or feeling different from other children of the same gender, a lack of sexual interest in members of the opposite sex, and resulting same sex sexual experimentation are often not applicable to women'.⁶⁹⁵ This is a particularly important point because research has shown that many sexually diverse women have no memories of childhood difference and that identity consolidation often focuses on recognition of a strong emotional relationship with one

⁶⁹³ Diane Taylor, 'Nigerian Gay Rights Activist Wins UK Asylum Claim After 13-Year Battle' (*the Guardian*, 2019) <<https://www.theguardian.com/world/2017/aug/14/nigerian-gay-rights-activist-aderonke-apata-wins-uk-asylum-claim-13-year-battle>> accessed 3 October 2019.

⁶⁹⁴ Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay, Bisexual Asylum Claimants' (2007) 22 *Journal of Refugee Studies* 195, 196-197.

⁶⁹⁵ See: Jasmine Dawson and Paula Gerber, 'Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?' (2017) 29 *International Journal of Refugee Law* 292, 307. See Also: Lisa Diamond and Rich Savin-Williams, 'Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women' (2000) 56 *Journal of Social Issues* 297.

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specific individual.⁶⁹⁶ To put this more clearly, sexually diverse women may lack a narrative of difference—even if they originate from a culture which has categories of sexual diversity similar to the UK—because they may not have been aware of their sexual diversity before recognising their attraction to another person.

5.5 Determining Membership of a Particular Social Group

The policy then moves on to discuss the issue of determining membership of a particular social group.⁶⁹⁷ Given the impact of the Qualification Directive⁶⁹⁸ and the *UNHCR guidelines on International Protection no 9: Claims to Refugee Status based on sexual orientation*,⁶⁹⁹ the ability for people claiming asylum on the basis of their sexual diversity to be classified under the Particular Social Group head of the Refugee Convention is no longer controversial. Nonetheless, the approach taken by the UK to constructing Particular Social Groups is partially responsible for the focus on proving sexual identity. To reiterate that test in brief, decision-makers must ask themselves,

- 1- Firstly, whether the claimant is in fact, or would be perceived of as gay
- 2- Secondly, they must ask themselves whether openly gay people within the claimant's country of origin would have a well-founded fear of persecution
- 3- Thirdly, they must consider whether or not the applicant would be open upon their return

⁶⁹⁶ Lisa Diamond and Rich Savin-Williams, 'Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women' (2000) 56 *Journal of Social Issues* 297.

⁶⁹⁷ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 11.

⁶⁹⁸ Council Directive (2011/95/EU) of 13 December 2011 on Standards for the Qualification of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted [2011] OJL337/9

⁶⁹⁹ United Nations High Commissioner for Refugees (UNHCR), *Guidelines on International Protection NO9: Claims to Refugee status based on Sexual Orientation and/or Gender Identity Within the Context of Article 1(A)2 of the Convention and/or its 1967 Protocol Relating to the Status of Refugees* (2012) UN Doc HCR/GIP/12/09.

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- 4- If they would be discreet, then the decision-maker is required to consider why they would be so.⁷⁰⁰

If the asylum seeker would be open on their return, then, provided the first two limbs of the test have been satisfied, they are a refugee. If they would be discreet due to a fear of persecution, then they are a refugee. However, if they would be discreet due solely to their personal preference, or due to social factors such as to please their family, then they do not qualify as a refugee. In stating this, it is important to reflect on the difficult interpretative work this requires of decision-makers in terms of discerning where societal pressures end and persecutory obligation begins.

As this test makes clear, the first job a decision-maker is confronted with when addressing a claim made on the basis of sexual diversity is deciding whether they are satisfied that the asylum seeker is a sexually diverse person in the manner which they have claimed, or that they would be perceived as such. On this measure, the API on sexual diversity compounds the difficulties which decision-makers face.

As argued above, there is no behaviour which can be directly viewed as being indicative of a sexually diverse identity. And some claimants may not conceptualise their sexual diversity as an identity at all. This leaves decision-makers with an exceptionally difficult task. Therefore, it is disappointing that the API does not offer more constructive advice on how to determine whether someone is a sexually diverse person. For example, it would have been helpful if the API had offered decision-makers guidance on what constitutes

⁷⁰⁰ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596 [82].

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sexual diversity for the purposes of asylum claims instead of leaving this as a matter decided by the wider regimes of knowledge and discourse around sexual diversity.

As I have argued elsewhere, the law has few answers when it comes to asking what represents a genuine sexually diverse identity.⁷⁰¹ Even in recent years, there have been significant developments around the way in which sexual diversity is understood and talked about. The impact of this on the way in which sexual diversity is conceptualised in the asylum apparatus is clear in the move from a conduct-driven approach in *Jain*,⁷⁰² to an approach that, I argue, relies too much on identarian frameworks within the 2016 API. This approach, as Millbank has argued, closely mirrors shifting social and legal conceptions of minority sexual identities and behaviours within wider British society.⁷⁰³

Bearing in mind the preceding reflections, the section on determining membership of a particular social group begins by stating that,

To consider whether an individual can be recognised as a member of a particular social group, it is important to have reason to conclude whether or not they are LGB, or would be treated as such, and whether LGB people are perceived to have a distinct identity in their country of origin.⁷⁰⁴

⁷⁰¹ See generally: Alex Powell, 'Normative Understandings: Sexual Identity, Stereotypes and Asylum Seeking' in Chris Ashford & Alexander Maine, *The Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020).

⁷⁰² *Jain v. Secretary of State for the Home Department* [1999] EWCA Civ 3009 (CA). Chelvan usefully discusses the development of the law in relation to sexual minority asylum claims in the UK. See: S Chelvan, 'Put Your Hands Up (If you Feel Love)' (2011) 25 *Immigration, Asylum and Nationality Law* 56, 56-66.

⁷⁰³ Jenni Millbank, 'A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation 1989-2003' (2005) 14 *Social and Legal Studies* 115.

⁷⁰⁴ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 11.

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However, this raises more questions than answers. Firstly, considering the API's own earlier admission that many claimants may not be comfortable or familiar with the terminology or implications of LGB, why does the policy now collapse exclusively into a discussion of these identity categories? The implication of this, to an inattentive decision-maker, might be that what is required is for the claimant to have an identity of lesbian, gay or bisexual, rather than to possess a form of sexual diversity in the more general sense. Secondly, why does the policy collapse discussion of the claimant's identity into consideration of whether or not 'LGB people are perceived to have a distinct identity in their Country of Origin'? By collapsing the discussion of the need to establish the claimant's identity into the discussion around the recognition of sexually diverse identities in the country of origin, the policy effectively limits the ways in which sexual diversity can be conceived. This is significant because it is possible for sexually diverse people to be marginalised and persecuted on that basis, even if their country of origin lacks a shared conception of sexual diversity. This point was well drawn out in the narrative of Chataluka who, in describing his own difficulties in seeking to obtain gay conversion therapy in his Country of Origin (Egypt), told me that,

Because he is known as specialised in homosexual cases and people was fighting him [a doctor specialising in gay conversion therapy] bad because they thought he is putting gay people together and people don't want to believe that there is gay people in the Middle East or in Egypt so people are like fighting him back.⁷⁰⁵

One way of conceptualising this response is to say that, in his view, people in Egypt reject the premise that there is a distinct conception of sexually diverse people in the country. Instead, they code activities which, in the "West", indicate identity as being simply a case of (deviant)

⁷⁰⁵ Chataluka, Egyptian Refugee to Author.

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behaviour. As a result of this, they reject ideas such as utilising gay conversion therapy because to embrace them would involve admitting that gay Egyptians exist in the first place. In other words, they conceptualise sexual diversity in terms of behaviour rather than identity and thus do not adopt clear labels for those who are sexually diverse. However, this does not change the fact that persecution may arise. Indeed, persecution may specifically focus on banishing those behaviours from the society in question. It could be the case that the reason sexually diverse people are seen as lacking a distinct status within the claimant's country of origin is that repression—often carried out by means persecutory under the convention—has succeeded in making the heterosexual majority believe that their national identity is inherently heterosexual.⁷⁰⁶

This interrelation of national and sexual identity can be seen in the claims often made by religious leaders in countries such as Uganda, that being gay is 'unAfrican'⁷⁰⁷. Although, as Massad has argued, it should be considered that such claims often only arise in response to the activism and statements of "western" influenced LGBT+ organisations.⁷⁰⁸ The construction of sexual diversity as being purely a matter of sexual identity, then, fails to recognise the conditions in which many claimants are socialised. Given the history of the UK, with regard to understanding sexual diversity as a matter of behaviour, it is deeply surprising

⁷⁰⁶ Rahul Rao has explored this phenomenon in the context of India. In some senses, his theorising could be viewed as a reversal of Jasbir Puar's Homonationalism. Whereby the country seeks to disown the intersections between nationalism and sexual minority rights. Exemplifying their sovereignty by coding themselves as explicitly heterosexual. See: Rahul Rao, 'Queer Questions' (2014) 16 *International Feminist Journal of Politics* 199, ESP 203-205; 207.

⁷⁰⁷ Rahul Rao, 'Re-membering Mwanga: Same-Sex Intimacy, Memory and Belonging in Postcolonial Uganda' (2015) 9 *Journal of East African Studies* 1; Amar Wahab, "'Homosexuality is UnAfrican'?: Un-mapping Transnational Discourses in the Context of Uganda's Anti-Homosexuality Bill/Act' (2016) 63 *Journal of Homosexuality* 685. See also: Carl Stychin, 'Same-sex Sexualities and the Globalization of Human Rights Discourse' (2004) 49 *McGill Law Journal* 951, 955.

⁷⁰⁸ Joseph Massad, 'Re-Orienting Desire: The Gay International and the Arab World' (2002) 14 *Public Culture* 361, 371-383.

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that British government institutions do not recognise this.⁷⁰⁹ To be clear, what the policy fails to recognise in this section is that ‘all queers are not the same’.⁷¹⁰

In addition to this, within countries such as Nepal, sexual diversity is considered as a form of gender identity. Under the Nepali constitution, those attracted to members of their own biological sex are considered to be third gender.⁷¹¹ While earlier sections of the policy correctly pinpoint that some cultures do not draw a distinction between sexual identity and gender identity,⁷¹² the failure to note this in the section addressing determining membership of a particular social group potentially compounds the culture of disbelief others have noted around sexual diversity asylum claims.⁷¹³ To put this another way, by speaking simply of LGB identities within this section, the API encourages incredulity towards claimants who conceive of sexual diversity status in terms unrecognisable to decision-makers. This would apply equally to claimants from some Latin American cultures, where sexual diversity is differentiated on the basis of sexual role, as opposed to sexual object choice.⁷¹⁴

The issues around lack of a distinctive identity may prove to be even more profound within the narratives of sexually diverse women. Outside of Anglo-American cultures, there are alternative conceptions of the public/private divide, as well as widely held perceptions

⁷⁰⁹ Offences Against the Person Act 1861, S11.

⁷¹⁰ Rahul Rao, ‘Queer Questions’ (2014) 16 *International Feminist Journal of Politics* 199, 210.

⁷¹¹ Mara Malagodi and Alex Powell, ‘A Rose by Any Other Name is Just as Sweet: Constitutional identity and Third Gender in Nepal’ (8th Asian Constitutional Law Forum, Vietnam National University, 3-5th December 2019).

⁷¹² UK Visas and Immigration, ‘Asylum Policy Instruction: Sexual Orientation In Asylum Claims’ (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 6-7.

⁷¹³ See generally: Vaughn Robinson, ‘Cultures of Ignorance, Disbelief and Denial: Refugees in Wales’ (1999) 12 *Journal of Refugee Studies* 78; Sarah Gibson, ‘Testimony in a Culture of Disbelief: Asylum Hearings and the Impossibility of Bearing Witness’ (2017) 17 *Journal for Cultural Research* 1; Olga Jubany, ‘Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within’ (2011) 26 *International Sociology* 74; James Soutar, ‘A Culture of Disbelief or Denial? Critiquing Refugee Status Determination in the United Kingdom’ (2011) 1 *Oxford Monitor of Forced Migration* 48.

⁷¹⁴ See: Section 3.1.

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that female “sexuality” does not exist.⁷¹⁵ These mean that, even in countries where male sexually diverse people are considered to have distinct identities, women’s sexual diversity may not be recognised.⁷¹⁶ This again raises questions over whether the policy fails to properly consider the experiences of claimants in calling for LGB identities to be conceived of as distinct in the country of origin. For example, Masani told me that,

I can understand how here, or in places where you are protected, people might want to create an identity around what they do, but to assume that just because someone is fleeing a country due to their sexual interest this must be an identity that means all these different things is just wrong.⁷¹⁷

What this tells us is that the statement that decision-makers should have a reason to conclude whether LGB people are perceived to have a distinct identity within their country of origin is misguided. Indeed, as Masani’s narrative demonstrates, it is entirely possible for people to suffer persecution for their sexual diversity without that sexual diversity being recognised as a distinctive sexual identity within their country of origin. Indeed, for sexually diverse women, persecution often arises due to their failure to conform to heterosexual norms, as opposed to being in relation to their sexual diversity.

In order to avoid many of the above problems, it is suggested that the policy could instruct decision-makers to place a greater reliance on the self-identification of asylum

⁷¹⁵ See Laurie Berg and Jenni Millbank, ‘Developing a Jurisprudence of Transgender Particular Social Group’ in Thomas Spijkerboer (ed), ‘Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum’ (Routledge 2013) 121-122.

⁷¹⁶ See Suzanne Brenner on the ways in which women’s sexuality and bodies become a key cultural battle ground for renegotiating the public/ private divide. See: Suzanne Brenner, ‘Private Moralities in the Public Sphere: Democratization, Islam and Gender in Indonesia’ (2011) 113 *American Anthropologist* 478, ESP 481-482. See Also: Jenni Millbank, ‘Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation’ (2003) 18 *Georgetown Immigration Law Journal* 71; Rahul Roa, ‘Queer Questions’ (2014) 16 *International Feminist Journal of Politics* 199, 203.

⁷¹⁷ Masani, Ugandan Refugee to Author.

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claimants. Though it is acknowledged that some such as Chelvan have expressed an anxiety that placing greater weight on self-identification could lead to a rise in false claims that undermines “genuine” sexually diverse asylum claimants.⁷¹⁸ I argue that such concerns are ill-founded. Such concerns are ill-founded, because, as theorists such as Chelvan have themselves pointed out, sexually diverse identities are often stigmatised within refugee countries of origin.⁷¹⁹ Therefore, I argue that there are often profound cultural injunctions which would discourage claimants from falsely identifying themselves as sexually diverse.

5.6 The Qualification Regulations

The policy continues, considering the legal framework, by telling us that under Regulation 6 (1) of the Qualification Regulations,

A group shall be considered to form a particular social group where, for example,

- Members of that group share an innate characteristic, or a common background that cannot be changed
- Or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it
- That group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.⁷²⁰

Here, the policy merely repeats the legal framework established within the Qualification Regulations. However, these regulations—introduced to transpose the 2004 EU Qualification

⁷¹⁸ The Emotional Journey and the DSSH Model: A Positive Tool for Credibility Assessment’ (SOGICA Conference, Online, 7-9 July 2020).

⁷¹⁹ S Chelvan, ‘Put Your Hands Up (If you Feel Love)’ (2011) 25 *Immigration, Asylum and Nationality Law* 56.

⁷²⁰ UK Visas and Immigration, ‘Asylum Policy Instruction: Sexual Orientation In Asylum Claims’ (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 11.

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Directive into UK law⁷²¹—demonstrate the difficult fit of sexually diverse people within the Particular Social Group framework.

The first example of how a group can be viewed as constituting a Particular Social Group—which depends on an innate characteristic or common background which cannot be changed—presents a theoretical issue in respect of asylum claims by sexually diverse people. This is because there is an ongoing debate about the extent to which sexual diversity is genetically determined. Some (and, as discussed in chapter three, I count myself among this group) argue that sexual diversity is strongly influenced by social construction.⁷²² As I have argued elsewhere, many LGBT+ rights activists⁷²³ have responded to negative utilisation of the social constructivist position by arguing that sexual minorities were born this way.⁷²⁴ Johnson has defined the born this way phenomenon as the ‘political and quasi-scientific claims that sexual diversity, presented as a form of identity, is an immutable and intrinsic fact’.⁷²⁵ In the Refugee Law context, this idea of innate status has been productive, providing a grounding to consider sexually diverse people as a Particular Social Group. This is because, in line with the regulations outlined above, ‘Whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change or should not be required to change.’⁷²⁶

⁷²¹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted *OJ L 304, 30.9.2004*.

⁷²² See for example: Steven Sideman, *The Social Construction of Sexuality* (Third Ed WW Norton 2015); Yvonne Zylan, *States of Passion: Law, Identity, and the Social Construction of desire* (Oxford University Press 2011); Michel Foucault, *The History of Sexuality 1: The Will to Knowledge* (Robert Hurley Trans: Penguin 1998).

⁷²³ This phrase is intended as a way of describing those who propose law reform agendas in the terms Libby Adler described as LGBT Equal Rights Discourse. See Generally: Libby Adler, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Duke University Press 2018) 3-8.

⁷²⁴ See: Alex Powell, ‘Normative Understandings: Sexual Identity, Stereotypes and Asylum Seeking’ in Chris Ashford & Alexander Maine, *The Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020)

⁷²⁵ Tim Johnston, ‘Beyond “Born This Way”’ (2015) 5 *PhiloSPOHIA* 140, 140

⁷²⁶ James Hathaway, *The Law of Refugee Status* (Butterworths 1991) 160.

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However, the reality of sexual diversity being an innate characteristic should be questioned, given the strong arguments advanced to dispute this position. These arguments were explored in chapter three. To recap briefly, for a Butlerian/Foucauldian constructivist, identities such as that of a gay man are created and re-created by our actions in the world. In this register, both gender and sexual identities are a series of gestures and affectations. These actions are then mistaken as pre-existing entities with innate status, because, as Butler argues, it is our very undertaking of them which creates gender and sexual identity.⁷²⁷ The core implication of this is that sexual diversity, while core to the being of sexually diverse people, may not be either innate or unchangeable.

Thus, while the idea of sexual diversity being innate—the idea that we are born this way may be productive in terms of motivating the acceptance that sexual diversity can fit within the Particular Social Group ground of the Refugee Convention, there is a need to be cautious when defining social groups. How a particular social group is defined will have an impact on how the asylum apparatus determines whether the claimant is a member of that group. Therefore, it is important that overreliance is not placed on biological and innate conceptions of sexual diversity. Indeed, as I argue in chapter eight, it may be that asylum claims by sexually diverse people could be better understood if they were considered as a form of Political Opinion.⁷²⁸ In stating this, I echo Rehaag's call to move towards a 'queer refugee jurisprudence' which recognises the 'fluid and contextual nature of sexual and gender identity'.⁷²⁹

⁷²⁷ *Ibid.*

⁷²⁸ See section: 8.1.2.

⁷²⁹ Sean Rehaag, 'Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia' (2009) 13 *The International Journal of Human Rights* 415, 419.

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The reason this is significant is that the way in which a Particular Social Group is defined carries implications for how membership of that group will be determined. Therefore, if the Particular Social Group is regarded as being constituted by an innate characteristic, this will lead to decision-makers interpreting the features of that group as also being innate. The result of this is that the group being based on innate status is likely to link to a more universalised way of conceptualising sexual diversity. With the result that performances of sexual diversity which do not align with the conceptions of sexual diversity prevalent in the UK are more likely to be disbelieved or discounted.

The second form of social group identified focuses on a group where people ‘share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it’.⁷³⁰ While this approach may be more easily applicable to sexual diversity, questions must be raised regarding the focus on identity. We have already heard from the narratives of Masani and Abdullah that this identity-based approach to defining membership of a Particular Social Group linked by sexual diversity is flawed in some cases. This sentiment was further echoed by Chataluka who told me that, ‘My mother is still asking me, when are you getting married, when are you getting married... It is always a big attention [when people are unmarried], yeah. Especially when they get old’.⁷³¹ As this demonstrates, it is often the defiance of social, political, and religious norms within the country of origin that leads sexually diverse people to be persecuted, rather than any specific identity they possess.

If an asylum claim by a sexually diverse person is being approached on the basis that they are suffering persecution as a member of a Particular Social Group, then this is the

⁷³⁰ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 11.

⁷³¹ Chataluka, Egyptian Refugee to author.

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definition of group—out of those offered within the regulations—to fit them. However, a subtle change has been undertaken in the formulation of these group types since they were first enumerated by the Canadian Supreme Court in *Ward*.⁷³² The grounds given in *Ward* stated that the concept of a Particular Social Group embraced,

1. groups [that] are 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 historical permanence.⁷³³

Each has changed slightly in their journey to the Qualification Regulations. The changes to grounds one and three are not relevant to the ability of sexually diverse people to fit more comfortably in the Particular Social Group framework. However, the second form of social group identified in *Ward*, when framed around the issue of fundamental human dignity, fits far more squarely than the idea of something being fundamental to identity or conscience. Put more clearly, the notion of fundamental human dignity, embracing the right to a relative level of self-determination, is more capable of engaging with the diverse and heterogenous ways in which sexually diverse people exist in the world than the idea of something being fundamental to identity or conscience.

When constructed around fundamental human dignity, it is possible for this second ground to improve the ways in which Particular Social Groups are conceptualised in a manner less suggestive of fixity and normativity of group members. Thus, as I will expand on

⁷³² *Canada (Attorney General) v Ward* [1993] 2 SCR 689.

⁷³³ *Ibid.*

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in chapter eight, changes to the Qualification Regulations—of a relatively minor nature—could assist in accommodating the heterogenous nature of sexual diversity within the UK asylum apparatus.

The final group type identified within the regulations and repeated within the API is that the group is regarded as being different by the surrounding society.⁷³⁴ For reasons addressed above, this will not be appropriate to all sexually diverse people. In those cases where the country in question criminalises same-sex conduct, it would be. It would also be relevant in refugee countries of origin where people are targeted directly because of their sexual identity. However, as explored previously, this will not apply to all sexually diverse people. Given the high level of context dependence, this form of establishing sexually diverse people as a Particular Social Group should be used with caution. This is particularly significant because the way in which the group is defined will naturally impact the decision-makers' reasoning with respect to whether the claimant is a member of that group.

As the analysis above shows, each of the aspects of considering a Particular Social Group, in both policy and legislation, do not map perfectly on to the heterogenous forms sexual diversity may take. Some of the ways in which Particular Social Groups could be framed more inclusively are discussed in chapter eight.

This chapter has explored the conceptual knowledges and discourses of sexual diversity that are deployed within the 2016 API. It has been shown that, despite its attempts to be inclusive, the policy is not successful in pulling the asylum apparatus away from stereotypical and identity-driven frameworks for conceptualising sexual diversity. The next

⁷³⁴ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 11.

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chapter builds on these conceptual foundations and analyses the practical and evidential guidance given to decision-makers who are conducting Home Office interviews with sexually diverse people.

Chapter Six: The Home Office Interview Encounter

This chapter continues to explore the 2016 API with regard to whether or not its conception of sexual diversity is consistent with the ways in which sexually diverse refugees and asylum seekers conceive of their own sexual diversity. My analysis focuses on the sections of the policy dealing with the interaction between the claimant and the decision-maker, with a particular focus on the guidance given to decision-makers with regard to the substantive Home Office interview encounter. However, given the Foucauldian framework adopted within this thesis—and the circular way in which the API was drafted—a clean division between the theoretical issues discussed previously and the practical issues associated with the Home Office interview encounter is not possible. As such, theoretical points continue to be made in regard to the interview guidance, and chapters five and six should be read in conjunction.

6.1 Preparing for Interview: LGB Specifics to Consider

In addition to the themes explored in chapter 5, the API moves to discuss the considerations that decision-makers should make before proceeding to interview sexually diverse asylum claimants.⁷³⁵ Here it states that:

A claimant may qualify for asylum when they fear persecution on account of their actual or perceived sexual orientation that does not, or is deemed not to conform to

⁷³⁵ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 12-15.

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prevailing political, social or cultural norms in their country of origin. An asylum claim may also be founded on the basis that the claimant will be perceived as LGB regardless of their actual sexual orientation.⁷³⁶

This section of the policy is useful because it reminds decision-makers that a perceived (or actual) failure to comply with social norms in the country of origin often lies at the heart of an asylum claim made on the basis of sexual diversity. As Masani's narrative informed us, the issues often revolve around matters such as not wanting to marry or have children or simply not being seen as outwardly "heterosexual enough". Or, to put that more bluntly, failing in behaviour and speech to demonstrate a sufficient attraction to members of the "opposite" sex, or to conform to the expected characteristics of the gender role socially imposed on the claimant.

The policy goes on to note that sexual diversity should not be considered merely in terms of behaviour. It informs decision-makers that,

An LGB person's sexual orientation is not solely, or even necessarily partly, defined by their participation in sexual behaviour and, in any case, this aspect of their behaviour may, in some claims, be irrelevant due to factors such as religious belief or cultural restrictions.⁷³⁷

It is interesting to note that here the policy only informs decision-makers about the potential impact of cultural and religious restrictions on the sexual behaviour of claimants, even though

⁷³⁶ *ibid.*, 12.

⁷³⁷ *ibid.*, 12.

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identical reasoning could be employed to call into question the Home Office's focus on social behaviour as discussed in the previous chapter.⁷³⁸

As discussed previously, all respondents in my study identified that they had been asked to provide photographic evidence of them socialising with other sexually diverse people, attending gay spaces and pride parades, and be knowledgeable about wider gay and LGBT+ culture. Often these requests had come from their own lawyers or representatives. Five of the participants identified that their representatives had asked them to provide photos. A further two were advised to provide photographs of themselves attending pride by representatives of charities. While Masani, whose initial claim was refused, was directly informed that a lack of evidence of interaction with the LGBT+ community had undermined her credibility.⁷³⁹ The fact that lawyers, and charities, who exist to help asylum seekers secure their status recommend providing evidence of this nature, suggests that it is a common expectation within the asylum system. Therefore, there is a need to more clearly account for the isolation that sexually diverse people from other countries and cultures might feel. This isolation has cultural roots and functions along identical lines to the prohibition on focusing on sexual behaviour set out above. For example, Babu told me that,

One of the things I wanted to mention is that there is very limited resource for actually meeting people who are gay, or who have been through the same thing from a similar background... So, I promised that I wouldn't turn away or turn down any person who needs help.⁷⁴⁰

⁷³⁸ See: Chapter 5. ESP: Section 5.1.

⁷³⁹ Masani, Ugandan Refugee to Author.

⁷⁴⁰ Babu, Egyptian Refugee to Author.

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This is significant because, if sexually diverse people are to feel comfortable attending gay spaces, they need to feel that these spaces are welcoming for them. A part of feeling welcome in a space may include seeing others who look and sound like you also attending that space. Held has conducted research showing the pervasive levels of racism within gay and LGBT+ spaces, and the issues that ethnic minorities might have with being made to feel welcome in such spaces.⁷⁴¹ Therefore, it is important that decision-makers are aware that many spaces traditionally attended by sexually diverse people are in fact coded as white and may therefore be inaccessible or unwelcoming for ethnic minorities, or those of different religious or cultural backgrounds.

It is also important to consider the fact that most LGBT+ spaces, and indeed wider aspects of gay culture, are bound up with the consumption of alcohol. However, some asylum seekers will come from cultural or religious backgrounds in which the consumption of alcohol is prohibited. They, therefore, may not feel comfortable attending spaces where alcohol is consumed, or indeed in which they feel pressure to consume alcohol. It is particularly surprising that the API does not note this, considering that in the above quoted passage it directly recognises the impact that cultural and religious “restrictions” may have on the sexual behaviour of sexually diverse people. These cultural issues around alcohol came through in my conversation with Chataluka who told me that drinking was new to him, having been something he had not experienced prior to coming to the UK and that now,

I don't drink much as well, and when I drink, I probably just have a glass of wine or something now... I don't drink much and I don't mix... And I don't stay out long. If I am with my friends, they can stay there to probably 5 in the morning and just go to

⁷⁴¹ Nina Held, “‘They Look at you like an Insect that Wants to be Squashed’: an Ethnographic Account of the Racialised Spaces of Manchester’s Gay Village” (2017) 20 *Sexualities* 535.

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different clubs, but I just go by 11 or 12 you know. I don't stay much outside of that.⁷⁴²

As this suggested, Chataluka was socialised in a climate where drinking is less common and did not feel a desire to stay out late and drink. It is important that the API does more to draw attention to the fact that for many asylum seekers, alcohol fuelled LGBT+ spaces may not be comfortable. In this regard, it should also be noted that gay venues are often relatively sexualised places which can make people from certain religious and cultural backgrounds, or even those who are shy or asexual/less sexual, feel uncomfortable. Accounting for these factors, the arguments the policy advances for why interviews should not focus on the sexual behaviour of claimants could be equally applied to the forms of social behaviour that decision-makers frequently rely on when attempting to establish the sexual diversity of a claimant.

Therefore, I argue that the policy fails to remind decision-makers of the multiple reasons why social behaviour may not be useful for determining whether or not the claimant is a sexually diverse person. A core theme of the interviews conducted was that significant reliance was placed on photographs of claimants in “gay” spaces, at pride parades and spending time with other sexually diverse people. Not only are these stereotypes, as explored in chapter 5, but they are also lacking in awareness of social and cultural context. Similarly, participants in this study felt that great weight was placed on evidence of romantic and social relationships. For example, Eko told me that the central evidence in his claim was ‘a statement from my partner, my friend about I am gay’,⁷⁴³ while Chataluka told me that,

⁷⁴² Chataluka, Egyptian Refugee to Author.

⁷⁴³ Eko, Indonesian Refugee to Author.

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Probably, the second half of the interview, mostly, was more about my boyfriend and what we do together and what we say to each other. Chats with me, with him, screenshots since we started chatting on a gay application, the first time we met, holidays together. So, it was like very organised, we have chats first time, WhatsApp Chats, pictures together, pictures with friends. Holidays. Also, what the passion will be when you talk about your boyfriend, the passion was there, and I think they felt it.⁷⁴⁴

All participants, except for Masani, had been able to mention their current or previous same-sex partners during the course of their asylum claim. Given that the interviews focused on speaking to those who had been successful in their claims, it is perhaps telling that so many felt that heavy reliance had been placed on their romantic relationships. As was reported by the Guardian newspaper in 2019, those who do not have a history of romantic relationships may, under the current API, face a risk of being disbelieved.⁷⁴⁵

Some participants, such as Abasi, Babu and Abeo, felt that the questions about their romantic relationships were asked as a backdoor route to sexually explicit information. For example, Abasi told me about how,

They would ask in a way that they do not want any kind of sexual information. But they actually still want it. You know what I mean? It is not put down in the question, but they want it ... yes, it did make me feel uncomfortable.⁷⁴⁶

⁷⁴⁴ Chataluka, Egyptian Refugee to Author.

⁷⁴⁵ Ben Smoke, 'Deportation For Being Single? This Shows The Real Bigotry Gay People Face | Ben Smoke' (*the Guardian*, 2019) <<https://www.theguardian.com/commentisfree/2019/feb/25/deportation-single-bigotry-gay-people-yew-fook-sam-home-office>> accessed 11 June 2020; Helen Pidd, 'Home Office Gives Man Asylum After Accepting People Can Be Gay And Single' (*the Guardian*, 2019) <<https://www.theguardian.com/uk-news/2019/dec/23/home-office-gives-man-asylum-after-accepting-people-can-be-gay-and-single>> accessed 11 June 2020.

⁷⁴⁶ Abasi, Egyptian Refugee to Author.

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As I have argued elsewhere, the questions posed by decision-makers regarding romantic relationships often appear to be attempts to confirm a claimant's identity by considering their sexual behaviour, based on an implicit—and heterosexist—assumption that romantic and sexual relationships go hand in hand.⁷⁴⁷

This, of course, elides the many previously referenced ways in which sexual diversity becomes visible over time, such as declining to marry or failing to demonstrate sufficient interest in members of the 'opposite' sex. In the case of each of the factors discussed above, the policy draws attention to them as potential questions to be raised during interviews with claimants. However, the ubiquity of these questions being asked—and claimants feeling that significant weight was placed upon them—suggests that what may have been intended to be guide as to how decision-makers can best help claimants to articulate their narrative has now become 'calcified in an interrogation style which assumes that there is a typical evolution of self-identity'.⁷⁴⁸

6.2 Stigmatisation, Shame and Secrecy

The subsequent section deals with stigmatisation, shame, and secrecy. This is informed by the Difference, Shame, Stigma, Harm model suggested by Chelvan.⁷⁴⁹ While direct examination of this model on its own merits was offered in chapter four, this section will explore the terms of the policy rather than repeating the direct engagement with that model.⁷⁵⁰

⁷⁴⁷ Alex Powell, 'Normative Understandings: Sexual Identity, Stereotypes and Asylum Seeking' in Chris Ashford & Alexander Maine, *The Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020).

⁷⁴⁸ Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay, Bisexual Asylum Claimants' (2007) 22 *Journal of Refugee Studies* 195, 206.

⁷⁴⁹ Chelvan's model is substantially outlined by Dawson and Gerber. See: Jasmine Dawson and Paula Gerber, 'Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Base on Sexual Orientation?' (2017) 29 *International Journal of Refugee Law* 292.

⁷⁵⁰ See section: 4.5.1.

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This section of the API informs decision-makers that ‘LGB people may originate from countries in which they are made to feel ashamed, humiliated and stigmatised due to their sexual orientation’.⁷⁵¹ This represents a helpful reminder to decision-makers that they are dealing with vulnerable people and need to take account of this in their approach to the interview encounter. The section goes on to inform decision-makers that:

Claimants may reference in their narratives, elements of strong disapproval from external sources, indicating that the claimant’s sexual orientation and or conduct is seen to be unacceptable, immoral, sinful, and socially disgusting... Where evidence of stigmatisation has been presented, caseworkers should explore whether disapproval has been targeted generally against the LGB community or directly against the claimant, and if so, what particular social, legal, cultural or religious norms the claimant feels their persecutors believed they were transgressing.⁷⁵²

This passage reveals something interesting about the way in which the Home Office conceives of sexual diversity. The policy here correctly identifies that the claimant’s sexual diversity may have been viewed as immoral, sinful, or politically unacceptable. However, it goes on to call for caseworkers to explore whether that disapproval is targeted against the LGB community or directly against the individual. This is an oversimplification which encourages decision-makers to view sexually diverse people as coherent groupings centred around discrete and easily recognisable identity categories. As already established, in some contexts, this is not the case. The view that there is always a ‘community’ may encourage decision-makers to engage in siloed thinking that disregards the narratives of claimants who

⁷⁵¹ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 12.

⁷⁵² *ibid*, 12.

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have not engaged with other sexually diverse people at any point in their lives. Interestingly, the section itself goes on to pinpoint some of the reasons why claimants may not have engaged with others, formed a sense of community, or share their forms of self-expression with other sexually diverse people. This is because it recognises that ‘many claimants may have kept aspects of and sometimes, large parts of their lives secret. Many will have engaged in avoidance strategies, such as, only revealing their orientation to a very limited circle of people (or to no one at all)’.⁷⁵³ As this suggests, there are a number of reasons why a claimant may not have formed, or even be aware of the existence of, communities of sexually diverse people in their country of origin.

Babu’s narrative around his experiences of growing up in Egypt also pinpoints a further issue with the assumption that there is a stable LGB community in other cultures. He told me that,

One of the most interesting things is like how gender identity and sexuality, all of these things, like you know homosexuality and on the broader scale in these countries such as Egypt were influence by colonialism. Because, prior to colonialism sexuality was not an issue. Like a lot of Arabic literature actually talks about men falling in love with other men and how absolutely fine it was hundreds of years before colonialism. And then once colonial powers overtook those countries, they changed the laws and these regulations that they put in place to make them perceive the things that Europe was perceiving at the time and among them was the idea of sexuality; that

⁷⁵³ *ibid*, 13.

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homosexuality was wrong. This was only imposed from a European perspective and now it has become what it is today.⁷⁵⁴

In effect what his statement demonstrates is that the idea of sexual diversity being a significant element of who someone is can itself be conceptualised as a “western” concept.⁷⁵⁵ Many historic and some current cultures do not view sexual or gender identity, orientation, or expression as being a basis on which to form a community. This idea was also present in the narrative of Abdullah who told me that,

In the Gulf region, or let’s say in the wider region, so let’s say in the Middle East, in a sense, identity is not who you associate with or what you do or what you feel. Identity is your faith group, your tribe, your nationality. And there is an evolving extra part to it today which is corporatism, so which kind of group of corporations you are associated with. This is how it works. So, when you say what do you identify as. If you ask any Omani to identify themselves, even if they were the proudest and outest gay man or woman, they wouldn’t even end up saying that they are gay... Sexual Identity is viewed as something you do. It doesn’t undermine when I say something you do. You write with your left hand as well, that is something you do... It’s like when I say religion is man-made, man-made is not a bad word, it just shows how great man is.⁷⁵⁶

⁷⁵⁴ Babu, Egyptian Refugee to Author.

⁷⁵⁵ This is explored in significant depth within the work of Michel Foucault. See: Michel Foucault, *The History of Sexuality: The Will to Knowledge* (Robert Hurley Trans: Penguin 1998) 51-115.

⁷⁵⁶ Abdullah, Omani Refugee to Author.

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In conversation, I further asked Abdullah why he thinks that sexual and gender identity have developed as a way of making sense of sexual diversity in “western” countries such as the UK but not in areas of the Gulf region. His response is illuminating, as he told me that,

I feel it is an identity in the West because it comes across as a confrontation to the church because the church was an identity and still is an identity in certain ways.

Homosexuality was a way... okay... let's start it this way chronologically. So, first there was the church and within the church there was a confession booth, then there was a revolt against the church and with the revolt against the church there was a revolt against everything the church entails including the confession booth. Now, in the revolt version, the confession booth became the pride parade where you confess your sexuality to the street, rather than to a priest. So, in a way, it is a parallel to the confession booth. In Middle Eastern culture we don't have confession booths in our prayer spaces, including churches, including mosques, your priest is not someone you go to and confess or talk about your inner problems or whatever... Anyway, the reason I feel that sexuality is an identity in the west is because of how the discourse from church to the revolt against the church happened.⁷⁵⁷

What these two responses display is that many people from refugee countries of origin may feel that viewing sexual diversity through the lenses of identity or community is a Christian or colonial imposition. For this reason, they may feel uncomfortable providing a narrative in the terms that the policy document suggests decision-makers should seek it. Given that the section in question literally exists to make decision-makers aware of the potential factors which may limit the ability of claimants to advance a coherent narrative within the context of

⁷⁵⁷ *ibid.*

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a substantive asylum interview, it is concerning that a potentially problematic worldview—which may make the interview a source of cognitive dissonance for claimants—is asserted and encouraged as the way to approach interviews with sexually diverse asylum seekers.

The idea that understanding sexual diversity as a form of sexual identity is a “western” imposition was not shared by all participants. For example, Abeo told me that,

I think there is a universality of identity, that gay men are always in love with other man and gay women are always in love with other women. So that is a universality of identity. Now, how we then socially express it, depends on the environment where we find ourselves.⁷⁵⁸

What this shows is that even those who hold “identity” to be “universal”, and who, therefore, will likely express a self-understanding in line with the policy, still see the way in which that identity is expressed as being culturally contingent. Following this logic, the expectation for people to express themselves in terms consistent with an Anglo-American conception of sexual diversity remains flawed. As does language suggesting that there will always be a community that resembles the LGBT+ community within the country of origin. Abeo expressed frustration with the process telling me that,

If you ask me do I go to gay parties, and I say yes there are gay parties, and you say do I go, and I say no I don't go to gay parties and you say oh so you are not gay, that is a disservice. Because you can say oh people here go to gay clubs, but people here go to gay clubs because there is a freedom to do so, and even if you don't want to go there is freedom.⁷⁵⁹

⁷⁵⁸ Abeo, Nigerian Refugee to Author.

⁷⁵⁹ *ibid.*

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As this suggests, even though Abeo understood his sexual diversity as being something universal, that is not dependent on location or time, he still felt frustrated that decision-makers had not seemed able to understand the impact that culture and other social factors might have on how sexual diversity is expressed. As he told me, he felt insulted, as if he had been shown disrespect, by the ways in which decision-makers responded to his narrative.

Accounting for this, I argue that the focus on stigmatisation, shame, and secrecy fails to account for the impact that the cultural backgrounds of sexually diverse asylum claimants may have had on how they understand themselves. In many cases, such as those explored above, feelings of indignation and anger may be as likely as feelings of shame. Further, I argue that the presumption made by this section, that there is an LGBT+ community against whom the claimants experiences of persecution can be judged, leads to unhelpful assumptions being made by decision-makers and undermines the policies earlier encouragements not to expect claimants to describe shared or community-based experiences.

6.3 Painful Self-Disclosure

The next section of the policy focuses on the limitations claimants may face when it comes to advancing a coherent narrative in an interview. The policy notes that for some claimants ‘accepting one’s own sexual orientation... may only come in later stages of life’,⁷⁶⁰ going on to note that ‘this must not be seen as undermining the “genuineness” of an individual’s claim’.⁷⁶¹

Considering the stance taken by the policy about ‘painful-self disclosure’ it is concerning and surprising that all participants noted that their interviews placed significant

⁷⁶⁰ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 13.

⁷⁶¹ *ibid*, 13.

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focus on examples of childhood difference. For example, Eko told me how his interview had focused significantly on his playing with girls as a child and his like of toys which were gendered female.⁷⁶² Similarly Chataluka talked about how questions had focused overtly on childhood incidents of cross-dressing and wearing his mother's makeup and clothes.⁷⁶³ While it is, of course, entirely true that some claimants may have these experiences, looking for examples of childhood or adolescent differences as evidence of sexual diversity fails to recognise that societies with more rigid gender norms are unlikely to allow for such exploration. Indeed, as the section further recognises, it is possible, or even likely, that those who have witnessed stigma for phenomena such as gender non-conformity may avoid behaviour which is considered to constitute this. Therefore, it is possible that sexually diverse asylum seekers may be less, rather than more, likely to be able to refer to childhood incidents of gender non-conformity.

The section goes on to recognise that 'where stigmatisation may have inhibited an individual coming to terms with their true sexual identity and openly expressing it, feelings of self-denial and shame may persist'.⁷⁶⁴ While this is true, the policy should beware the potential for circumscribing the emotional responses of claimants. For example, Abdullah told me how his experiences of coming to terms with his identity did not include any conception of shame or self-denial. Rather, he saw himself as an activist who was contributing to changing the discourse on sexual minority rights within Oman.⁷⁶⁵

⁷⁶² Eko, Indonesian Refugee to Author.

⁷⁶³ Chataluka, Egyptian Refugee to Author.

⁷⁶⁴ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 13.

⁷⁶⁵ Abdullah, Omani Refugee to Author.

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The difficulty with the framing of this section of the policy is that it presumes that someone will have felt shame because of the persecution they have experienced in their country of origin. In this sense, the responses available to the claimant are closed off and, much as Raj has argued, ‘Emotion, desire and feeling are obscured by largely ethnocentric administrative methods of verification... which produces a caricatured, stereotyped and overdetermined legal trope of the gay or lesbian asylum seeker’.⁷⁶⁶ While many claimants may have felt shame, others will have felt indignation, anger, or even passion. As has been seen in the context of the struggle for the rights of sexually diverse people within the UK and US, refusing to be ashamed or silent can often be one of the primary forms of resistance adopted by those suffering persecution as a result of their sexual diversity,⁷⁶⁷ making the policy contradictory even by its own ethnocentric standards.

The problem with this presumption, that claimants will be ashamed due to the treatment they have received on account of their sexual diversity, is recognised in the subsequent section of the policy which states that:

In many cases, the harm suffered will have been experienced within a private, emotional and psychological sphere and as such, in comparison to other types of claim, this may limit the availability of any documentary evidence available to them to present their case. Additionally, discrimination and oppressive environments can often lead to a lack of information about the actual treatment within a particular country.⁷⁶⁸

⁷⁶⁶ Senthorun Raj, ‘Affective Displacements: Understanding Emotions and Sexualities in Refugee Law’ (2011) 36 *Alternative Law Journal* 177, 177.

⁷⁶⁷ See for example: Shaun Cole, ‘Gay Liberation Front and Radical Drag, London 1970s’ (2017) 4 *QED: A Journal in LGBTQ Worldmaking* 165; David Fernbach, *The Rise and Fall of Gay Liberation Front* (Gay Culture Pamphlet 1973).

⁷⁶⁸ *Ibid*, 14.

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This section of the policy is crucial. All decision-makers need to be aware that those making claims based on sexual diversity are unlikely to have access to the same forms of evidence as other claimants. This means that people claiming asylum based on their sexual diversity, more than almost any other category of claimant (perhaps with the exception of claims based on gender), come to be based on the narrative of claimants. However, the preceding sections directly circumscribe the emotional responses of claimants, encouraging decision-makers not to believe those narratives that do not conform to prior expectations regarding how claimants may have felt about the experiences they have had over the course of their lives. One way of understanding this is through the idea of second order stereotypes as promoted by theorists such as Ziskou.⁷⁶⁹ Second order stereotypes lead to expectations around the narratives of asylum claimants, such as ideas that they will have certain emotional or developmental experiences. These ideas may lead some decision-makers to deny valid claims because the policy assumes a particular response. To be more inclusive of the heterogeneous ways in which people experience sexual diversity, the policy needs to do more to inform decision-makers of the different emotional experiences sexually diverse asylum claimants may have had and to remind decision-makers that everyone responds differently to their experiences. In short, far from assisting asylum seekers in presenting their narratives of sexual diversity, the section the policy addressing “painful self-disclosure” circumscribes the emotional responses of claimants leaving decision-makers anticipating a particular emotional response.

6.4 Country Information and Guidance Reports

Another significant aspect of the API is the advice it provides decision-makers on how to approach country information and guidance. The section states that

⁷⁶⁹ Sophia Zisakou, ‘Credibility assessment in asylum claims based on SO by the Greek Asylum Service’ (SOGICA Conference, Online, 7-9th July 2020).

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before interviewing a claimant, assessing credibility, considering internal relocation or deciding whether there is a need for protection, decision-makers should be aware of the status and treatment of LGB individuals in the claimant's country of origin. This should be by reference to the specific sections on handling claims made by LGB persons in COI and country-specific guidance products provided by the country policy and information team... and other relevant background material.⁷⁷⁰

While it is good that the policy requires decision-makers to consult the Country of Origin Information on the state in question, it should also remind decision-makers that a failure to mention sexual diversity within that guidance can be taken to mean neither a lack of persecution nor of the non-existence of sexually diverse people in that country. This may seem an obvious point. However, given the cultures of denial which numerous studies have evidenced any room for confusion can prove damaging to claimants.⁷⁷¹ Despite the numerous studies in which the culture of denial has been raised, it has yet to be comprehensively addressed.⁷⁷²

This issue is perhaps compounded by the fact that the policy goes on to state that sexually diverse people can be:

A particular claim group on whom it can be sometimes difficult to obtain relevant, current and accurate information. That can be because individuals within such groups

⁷⁷⁰ *ibid*, 17.

⁷⁷¹ See generally: Vaughn Robinson, 'Cultures of Ignorance, Disbelief and Denial: Refugees in Wales' (1999) 12 *Journal of Refugee Studies* 78; Sarah Gibson, 'Testimony in a Culture of Disbelief: Asylum Hearings and the Impossibility of Bearing Witness' (2017) 17 *Journal for Cultural Research* 1; Olga Jubany, 'Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within' (2011) 26 *International Sociology* 74; James Soutar, 'A Culture of Disbelief or Denial? Critiquing Refugee Status Determination in the United Kingdom' (2011) 1 *Oxford Monitor of Forced Migration* 48.

⁷⁷² See for example: See: UK Lesbian and Gay Immigration Group, *Still Falling Short: The Standard of Home Office Decision-Making in Asylum Claims Based on Sexual Orientation and Gender Identity* (UKLGIG 2018) available at https://uklgig.org.uk/?page_id=1225.

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may opt to live discreetly and/or because there is a lack of reporting on their treatment in the country of origin. As in all claims, the burden is on the applicant to establish their case.⁷⁷³

This effectively tells decision-makers that they can refuse claimants simply because the Home Office is unable to find adequate information on conditions within their country of origin. As outlined above, for many sexually diverse asylum seekers, the only forms of evidence they will have are their own narratives. This is compounded because, in many refugee countries of origin, media reporting on persecution against sexually diverse people is likely to be limited or non-existent. This means that, where a claimant's narrative is not believed, the Home Office is effectively permitting decision-makers to make an unevidenced assumption that the country of origin is safe for sexually diverse people. Obviously, the legal burden of proof remains with the claimant. However, the framing of this policy punishes sexually diverse asylum claimants for the persecution they have suffered, by framing the likely consequences of a persecutory environment as a reason for denying a claim.⁷⁷⁴ A more adequate response would recognise that a lack of information on sexually diverse people may itself constitute substantial evidence of a general climate of persecution. Indeed, as many women in European countries have historically experienced, the denial or erasure of "sexuality" is often evidenced by cultures of silence.⁷⁷⁵ Therefore, I argue, that if the policy is to account for the lived realities of sexually diverse asylum claimants, it needs to count a lack of Country of Origin Information on sexually diverse people as, at worst, something to

⁷⁷³ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 18.

⁷⁷⁴ Vogler has expanded on this. See: Stefan Vogler, 'Legally Queer: The construction of Sexuality in LGBTQ Asylum claims' (2016) 50 *Law and society review* 856, 863.

⁷⁷⁵ Amy Shuman and Carol Bohmer, 'Gender and Cultural Silences in the Political Asylum Process' (2014) 17 *Sexualities* 939, 940.

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approach with a view to giving the benefit of the doubt. Or, preferably, as a form of evidence that supports an environment where there is a general lack of free expression for sexually diverse people which may constitute evidence of a persecutory climate within the Country of Origin.

6.5 Conducting the [Home Office] Interview

The section regarding conducting interviews with sexually diverse claimants begins by discussing the role of interpreter and interviewer arrangements. The section informs decision-makers that ‘claimants are asked at the screening interview if they would like a male or female interviewer’.⁷⁷⁶ While this is useful, it fails to consider the other axis of discomfort which interviewers and interpreters may trigger. For example, Murray has suggested that some sexually diverse people may be uncomfortable around members of the same ethnic or cultural group as them.⁷⁷⁷ This was in evidence in the narrative of Babu who told me of his distress and concern on meeting his lawyer and finding that she was wearing a headscarf. He told me that, ‘She was Muslim and the moment I saw her, I still remember, I was like, I am losing this case. She is wearing a headscarf and she is coming for an interview for a gay guy—I am definitely losing my case’.⁷⁷⁸ As this suggests, allowing interviewers to be selected only on the basis of gender may not be adequate to ensure claimants are comfortable. Indeed, with respect to sexually diverse people who may have come to associate people from their Country of Origin with a certain view of sexual diversity, it may be that the most pertinent factors to claimant comfort go unaddressed within the API.

⁷⁷⁶ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 22.

⁷⁷⁷ David Murray, 'Real Queer: "Authentic" LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System' (2014) 56 *Anthropologica* 21, 25.

⁷⁷⁸ Babu, Egyptian Refugee to Author.

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As the above suggests, claimants may not feel able to discuss their sexual diversity with interviewers or interpreters (or, indeed, their own legal counsel) from the same ethnic, religious, or national group as them. Given the linguistic limitations the Home Office face, it is obviously not always going to be possible to provide claimants with exactly the arrangements they request. However, the policy could and should go much further in making decision-makers aware of the discomfort claimants may feel and should, at the absolute minimum, inform decision-makers that factors such as ethnicity, might, like gender, have an impact on how forthcoming sexually diverse asylum claimants feel able to be. Obviously, it is pertinent here to recognise that claimants such as Babu are expressing a form of prejudice. While their prejudice may be unjustified, and will be something that they need to address, it should be borne in mind how sensitive a time asylum applications can be for a claimant. Therefore, every possible step should be taken to ensure claimants are as comfortable as possible during their interview.

The policy also addresses the issues around translation and language that may arise while conducting the interview. It states that:

“Where it is known that the asylum claim includes sexual orientation issues, it will be useful in advance of the interview to establish with the interpreter the available words in the language of origin and whether they carry any derogatory connotations. This is because the familiar western terms of ‘homosexual’, ‘gay’ or ‘bi’ may not, when translated, be used as forms of self-identification by all people (or in particular

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cultures) and, while the terms may exist in certain cultures, they may have very different and possibly derogatory connotations.”⁷⁷⁹

This aspect of the policy is useful because it reminds decision-makers that the ways in which sexual diversity is framed in the UK are not universal. Rather, they are culturally and temporally specific. However, the policy goes on to undermine this by repeating the errors made in the section on terminology.⁷⁸⁰ It does this by informing decision-makers that,

The interviewer should establish what words are to be used in both English and in the individual’s native language of origin to reference, as appropriate,

- The concepts of hetero, homo and bi-sexuality
- The way in which the interpreter will explain any contact or encounters
- To ensure they do not cause offence or imply a derogatory connotation.⁷⁸¹

However, this again presumes that claimants originate in cultures and countries that have a concept of hetero, homo, or bisexuality. While, in an increasingly globalised world, most countries will have come across such conceptions, it remains the case that some do not possess such conceptual frames. For example, as explored in chapter three, within some Latin American cultures, the roles of *activos* and *passivos* are more frequently used as a framework for understanding sexual diversity.⁷⁸² These roles correlate to sexual role, rather than to sexual

⁷⁷⁹ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 22.

⁷⁸⁰ *ibid*, 6-8.

⁷⁸¹ *ibid*, 22.

⁷⁸² Tomas Almaguer, 'Chicano Men: A Cartography of Homosexual Identity and Behaviour' in Henry Abelove, Michele Barale and David Halperin (eds) *The Lesbian and Gay Studies Reader* (Routledge 1993) 257.

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object choice. In principle, a receptive sexual partner is socially coded in a manner close to nineteenth century “western” conceptions of womanhood, while the active—or penetrative—sexual partner is socially coded in line with traditional conceptions of masculinity.

Accounting for this, the limited framing of the policy may lead decision-makers to attempt to pigeonhole claimants into an “western” conception of sexual roles and identities. This may result in disbelief simply because decision-makers have a different way of conceptualising sexual diversity than the claimant they are being asked to assess. Put another way, this section of the policy sets the stage for issues of epistemological dispute between claimants and decision-makers.

Admittedly the subsequent section on language issues does recognise that concepts such as sexual identification or orientation may not be represented in all languages and suggests that decision-makers should use the language which claimants themselves use.⁷⁸³ This would be strengthened if the policy recognised that in some cases, people may not possess the words to articulate a sexual diversity at all. Rather, they may present a narrative that, in the round, refers to sexual diversity, without ever attributing to it a specific name or meaning. In other words, the policy continues to perpetuate a logic which centres around sexual diversity being expressed through clearly demarcated identity categories, instead of enabling sexual diversity to be understood in a wider sense not constrained by the ways in which it is commonly expressed in the UK.

⁷⁸³ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 27.

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6.6 Discharging the Burden of Proof

The next section addresses how claimants dispense with the burden of proof. The section begins by noting that,

In order to qualify for asylum, a claimant must have a well-founded fear of persecution on the basis of their sexual orientation: the required threshold of which is ‘to a reasonable degree of likelihood’, it follows that they will need to establish their case to a reasonable degree of likelihood that they are or are perceived to be of the sexual orientation in question.⁷⁸⁴

This section of the policy usefully identifies the appropriate standard of proof. However, it fails to stress to decision-makers how low of a burden the reasonable degree of likelihood is. As Sweeney has explored in respect of the API on credibility, decision-makers are often unclear on what the burden of proof entails, and how it relates to the question of credibility.⁷⁸⁵ As a result of this, some decision-makers may supplant the burden of proof with the requirements of credibility, a matter further complicated when it is remembered that the asylum system takes account of both the credibility of the claimants narrative, and also their personal credibility.⁷⁸⁶ This means that ensuring decision-makers know how the burden of proof and credibility interact is crucial to ensuring that refugee status determinations are carried out in a fair manner. If decision-makers are not aware of this, it is possible that they will apply too high of a burden and deny claims that, when correctly addressed, should be

⁷⁸⁴ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 22.

⁷⁸⁵ See Generally: James Sweeney, 'Credibility, Proof and Refugee Law' (2009) 21 *International Journal of Refugee Law* 700.

⁷⁸⁶ *ibid* 700-701.

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accepted.⁷⁸⁷ The failure to further break down the appropriate burden of proof for decision-makers, many of whom are without formal legal qualification, can be very damaging for claimants.

Many of the issues Sweeney critiques in the 2008 rebrand of the 2006 API on credibility are repeated in the most recent edition of that policy.⁷⁸⁸ Therefore, it is inadequate to simply say that the 2016 API on sexual diversity does not need to expand on the burden of proof requirement and its relation to credibility. Further, as I have argued elsewhere, credibility comes to hold a particular importance in asylum claims based on sexual diversity,⁷⁸⁹ because, as the API itself recognises, such claims are often unsupported by documentary evidence.⁷⁹⁰ The result of this is that the success or failure of a claim will often rest on the credibility findings made by the decision-maker.

Accounting for the significance of the burden of proof to a claim, and the fact that many sexually diverse asylum claimants will be without “objective evidence” to support their claim, the 2016 API should do more to identify what a reasonable degree of likelihood entails. To be clear, there is no requirement for an asylum seeker to prove any aspect of their

⁷⁸⁷ Both Women’s Aid and UKLGIG have identified issues around decision-makers requiring a higher standard of proof than the reasonable degree of likelihood standard. See: Asylum Aid, ‘Unsustainable: the quality of initial decision-making in women’s asylum claims’ (2011 Asylum Aid); UK Lesbian and Gay Immigration Group, *Still Falling Short: The Standard of Home Office Decision-Making in Asylum Claims Based on Sexual Orientation and Gender Identity* (UKLGIG 2018) available at https://uklgig.org.uk/?page_id=1225, 33-36.

⁷⁸⁸ UK Visas and Immigration, ‘Asylum Policy Instruction: Assessing Credibility and Refugee Status’ (Home Office 2015)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397778/ASSESSING_CREDIBILITY_AND_REFUGEE_STATUS_V9_0.pdf> accessed 30th September 2019.

⁷⁸⁹ Alex Powell, ‘Normative Understandings: Sexual Identity, Stereotypes and Asylum Seeking’ in Chris Ashford & Alexander Maine, *The Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020)

⁷⁹⁰ UK Visas and Immigration, ‘Asylum Policy Instruction: Sexual Orientation In Asylum Claims’ (Home Office 2016)<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 23.

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claim, nor is there a requirement for them to show that their claim is beyond doubt. All they need to show is that it is likely that what they are claiming took place.

Ensuring decision-makers are informed as to the burden of proof is particularly important because the term credibility is regularly deployed—and indeed has been central to a large percentage of rejected asylum claims by sexually diverse people⁷⁹¹—without being clearly defined and properly differentiated from the burden of proof in such claims. As Sweeney points out the ‘The UN Refugee Convention makes no mention of credibility.’⁷⁹² Others have argued the term is ‘conceptually elusive and adjudicatively influential.’⁷⁹³ While the 2016 API does have a separate section detailing the role of credibility, it would be useful if greater attention was devoted to examining the correct burden of proof and outlining exactly how this interacts with credibility.⁷⁹⁴ This is because, as Sweeney has identified, the Home Office—as well as Immigration Judges operating in the UK—tends to adopt a broad view of credibility which sees the statement that a claim is credible as an effective shorthand for saying that ‘the applicant’s statements are true and that he or she warrants international protection.’⁷⁹⁵ This, combined with a further tendency to mistake the question of whether something is credible, with the question of whether it is true, often sees credibility based analysis effectively instituting a higher burden of proof than the legal framework requires.⁷⁹⁶

⁷⁹¹ See: UK Lesbian and Gay Immigration Group, ‘Missing the Mark’ (Unison 2013) Available at <<https://uklgig.org.uk/wp-content/uploads/2014/02/Missing-the-Mark.pdf>> accessed 12th December, 2018.

⁷⁹² James Sweeney, ‘Credibility, Proof and Refugee Law’ (2009) 21 *International Journal of Refugee Law* 700, 701.

⁷⁹³ Guy Coffey, ‘The Credibility of Credibility Evidence at the Refugee Review Tribunal’ (2003) 15 *International Journal of Refugee Law* 377, 377.

⁷⁹⁴ UK Visas and Immigration, ‘Asylum Policy Instruction: Sexual Orientation In Asylum Claims’ (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019 33-35.

⁷⁹⁵ James Sweeney, ‘Credibility, Proof and Refugee Law’ (2009) 21 *International Journal of Refugee Law* 700, 701, 708.

⁷⁹⁶ *ibid.*, 710; 719.

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However, UNHCR has suggested that credibility is an alternative to proof, rather than a feature of it. The UNHCR handbook states that the burden of proof is on the applicant but that a decision-maker should ‘use all the means at his disposal to produce the necessary evidence in support of the application.’⁷⁹⁷ The handbook goes on to note that,

Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.⁷⁹⁸

As this makes clear, the 2016 API—in a mistake that is sadly not remedied by the API on Assessing Credibility and Refugee Status⁷⁹⁹—far from clarifying the position for decision-makers, further confuses things by failing to properly explain the role of credibility and how the burden of proof should be applied. The correct burden of proof was identified in the case of *Sivakumaran*, as a ‘reasonable degree of likelihood.’⁸⁰⁰ The API could go further in reminding decision-makers just how low this standard is. To be clear, all that is required is for the claimant to show that it is likely that the claim is factual. The fact that a decision-maker may doubt their claim, is not relevant. Indeed, given the weighting the Home Office places on refugee status determinations being objective, it is surprising that decision-makers are not reminded of this. If it is likely, as one composite question—following *Karanakaran*—

⁷⁹⁷ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees: UN doc. HCR/IP/4/Eng/REV.1, 2nd Edn, Geneva, 1992
⁷⁹⁸ *ibid.*

⁷⁹⁹ UK Visas and Immigration, ‘Asylum Policy Instruction: Assessing Credibility and Refugee Status’ (Home Office 2015)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397778/ASSESSING_CREDIBILITY_AND_REFUGEE_STATUS_V9_0.pdf> accessed 30th September 2019.

⁸⁰⁰ *R v Secretary of State for the Home Department ex Parte Sivakumaran and Others* [1997] UKHL 1, [1998] 1 All ER 193.

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that the claimant has a well-founded fear of persecution for a convention reason, they are a refugee and are therefore entitled to all the protections this entails.⁸⁰¹

The 2016 API goes on to remind decision-makers that ‘The provision of extrinsic supporting evidence is not a pre-requisite for a genuine claim. The Home Office accepts that most claimants may not be able to provide any extrinsic evidence.’⁸⁰² This is an important point because, as previously discussed, many claimants are unable to provide supporting evidence for their narratives.⁸⁰³ However, the 2016 API goes on to state that ‘where a claimant has extrinsic evidence, it will be considered, for example membership of dating sites or support groups’.⁸⁰⁴ The problem with placing this in the 2016 API is that it appears to have been interpreted by decision-makers as being a key marker for a credible claim. As discussed previously, all eight of participants recorded being asked about forms of evidence such as photos of them attending support groups, social venues such as bars and clubs, and accessing dating sites.⁸⁰⁵ Furthermore, five participants had their representative encourage them to provide photos of them attending LGBT+ spaces. This suggests that an expectation has formed around accessing LGBT+ groups and venues.

I have already addressed the issues raised by the next section which informs decision-makers that in order to enable claimants to present their case it may be necessary to ask

⁸⁰¹ *Karanakaran v Secretary of State for the Home Department* [2000] EWCA Civ 11, [2000] 3 All ER 449.

⁸⁰² UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 23.

⁸⁰³ See: Section 5.1.

⁸⁰⁴ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 23.

⁸⁰⁵ See: Section 5.1.

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questions about where and with who claimants socialise.⁸⁰⁶ Having already discussed these issues, I will not revisit them. However, it is a matter of great concern that the 2016 API informs decision-makers that, ‘Any perceived lack of contact with the LGB community, is a relevant area of investigation to explore and they should be considered on a case by case basis in the round with all other evidence.’⁸⁰⁷ This is deeply problematic, because it takes what the policy proclaims as an opportunity—and I have shown to be an embracement of stereotypes—and presents this as a reason which could found a decision to deny an asylum claim.’ Put another way, not only does the policy recommend stereotypes as a form of evidence, but it also sets up a lack of compliance with stereotypes as grounds for negative inferences to be drawn.

Thus, I argue that, even if it was not intended to, the current framing of the 2016 API leads claimants without extrinsic evidence to support their claims facing a higher risk of being disbelieved and has, to an extent, created a tick box approach with respect to the forms of evidence expected in an asylum claim made by a sexually diverse person. These problems are enhanced by the lack of clarity within the API as to how decision-makers should apply the correct burden of proof, as well as the lack of detail about how this burden of proof relates to the issue of credibility.

6.7 Considering self-identification as Lesbian, Gay or Bisexual

The next section of the API explores the significance of self-identification, The API reminds decision-makers that,

⁸⁰⁶ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 23.

⁸⁰⁷ *ibid*, 23.

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Many LGB individuals will have lived as heterosexuals in order to avoid suffering the negative consequences that identification as being LGB entails. Many lesbian women and gay men may feel obliged to conform outwardly to family and social expectations of them and will currently or have previously lived in heterosexual relationships, be married, and/or have children.⁸⁰⁸

This is significant because, as explored previously, marriage and adherence to social norms is one of the ways in which sexually diverse people may be forced to act in order to keep their sexual diversity a secret for the wider society in which they live. The policy goes on to state that,

Evidence of existing or former opposite-sex relationships, or parenthood (both of which may need to be explored at interview) may be considered relevant in a credibility assessment, but must not automatically be taken as evidence which indicates a lack of credibility and must not lead to an automatic rejection.⁸⁰⁹

While the policy is very clear about this not leading to an automatic rejection, narratives such as Masani's as well as high-profile cases such as that of Aderonke Apata,⁸¹⁰ demonstrate that decision-makers continue to place significant weight on "opposite" sex relationships and children. Further, while the policy notes multiple potential explanations for relationships with members of the "opposite" sex, it still advances an ultimately fixed conception of sexual diversity, which sees explanations as resulting from the need to hide one's sexual diversity,

⁸⁰⁸ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 24.

⁸⁰⁹ *ibid*, 24.

⁸¹⁰ Diane Taylor, 'Nigerian Gay Rights Activist Wins UK Asylum Claim After 13-Year Battle' (*the Guardian*, 2019) <<https://www.theguardian.com/world/2017/aug/14/nigerian-gay-rights-activist-aderonke-apata-wins-uk-asylum-claim-13-year-battle>> accessed 3 October 2019.

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rather than from factors such as changing desire or later realisation of being a sexually diverse person. This viewpoint is reinforced by the fact that Dawson and Gerber have critiqued the DSSH model—on which this policy is partially based—as something which ‘continues to perpetuate ontological constructions of non-heterosexuality as linear and ultimately fixed.’⁸¹¹ By perpetuating this ontological standpoint both the policy and the model fail to account for the significant body of academic research demonstrating that both male⁸¹² and female⁸¹³ “sexuality” is fluid in nature as explored in chapter three.⁸¹⁴ Therefore, the policy should go further in recognising that some people may simply have changed their “sexuality”, to manifest a form of sexual diversity which means that they require protection, regardless of their history. While others may be bisexual—or another form of sexual diversity characterised by desire for more than one sex/gender in partners—and could still suffer persecution while maintaining a relationship with an “opposite” sex partner.

The ability of the Home Office to properly account for this is arguably undermined by the policy’s statement that ‘it may be appropriate to ask questions surrounding the reasons for marriage. If the claimant can provide a consistent and reasonable explanation of why they are married and or/have children, that should be taken into account in weighing the credibility of the evidence.’⁸¹⁵ Because the policy fails to expand on the term reasonable, the door is left open for decision-makers to consider identities in fixed terms and to fail to recognise sexual fluidity. Put more simply, I argue that by offering a socially loaded term such as reasonable,

⁸¹¹ Jasmine Dawson and Paula Gerber, ‘Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful For Determining Claims by Women for Asylum Based on Sexual Orientation’ (2017) 29 *International Journal of Refugee Law* 292, 292-293.

⁸¹² Rich Savin-Williams, *Mostly Straight: Sexual Fluidity Among Men* (Harvard University press 2017).

⁸¹³ Lisa Diamond, ‘Sexual Identity, Attractions and Behaviour Among Young Sexual-Minority Women Over a 2-year Period’ (2000) 36 *Developmental Psychology* 241.

⁸¹⁴ See generally: 2.1.

⁸¹⁵ UK Visas and Immigration, ‘Asylum Policy Instruction: Sexual Orientation In Asylum Claims’ (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 25.

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the policy effectively leaves it to decision-makers to decide what they determine to be reasonable. The likely result of this is that decision-makers will form judgements in accordance with those they see day to day, the contents of these day-to-day narratives is explored in more depth within chapter seven. The result of this is likely to be that sexual fluidity and non-monosexual forms of sexual diversity will be ignored. This chimes with Spijkerboers argument that,

Sexualities which deviate from the dominant norm are only comprehensible if they take a particular form. This is most easily visible in credibility assessment...LGBT people are assigned to a specific and quite narrow space where we can be LGBT—but only one category at a time, preferably for life, and only to the extent they identify with one of those exact categories.⁸¹⁶

There are also examples of positive policy recognition in this section as the policy states that ‘interviewing officers should be aware that lesbian and gay relationships may bear little resemblance to relationships in the UK.’⁸¹⁷ Obviously, this appropriately informs decision-makers that relationships may not look the same as they do in the UK. However, what it does not do is provide decision-makers with guidance on how to identify what the types of relationship it anticipates they will come across might look like.

The policy goes on to state that, following the decision of the Court of appeal in *NR (Jamaica)*,⁸¹⁸ the relevant factor to a claim is the claimants ‘current identity.’⁸¹⁹ While this is

⁸¹⁶ Thomas Spijkerboer, ‘Sexual Identity, Normativity and Asylum’ in Thomas Spijkerboer (ed), *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge 2013) 224-225.

⁸¹⁷ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016)<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 25.

⁸¹⁸ *NR (Jamaica) v Secretary of State for the Home Department* [2009] EWCA Civ 856.

⁸¹⁹ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016)<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 15.

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helpful, in that it implicitly acknowledges the fact that some identities and orientations are flexible, it remains subject to the same cultural and conceptual issues as the section on terminology.⁸²⁰ Further, it continues the problematic overreliance on identarian conceptual frameworks for understanding sexual diversity as explored throughout this thesis.

The policy goes on to advise decision-makers as to how they can seek to ascertain what a claimant's current identity is, informing decision-makers that,

A detailed account of someone's experiences in relation to the development and realisation of their sexual orientation can help to establish their credibility by establishing how and when they realised that they were of that orientation. It is therefore important to establish the range of life experiences that may have informed or affected an individual's sexual orientation or how they are perceived. The focus of any such enquiry **must not** be on sexual activity.⁸²¹

The difficulty with this section of the policy is that it appears to conflate orientation and identity. As explored previously, many participants, such as Masani and Abdullah drew a distinction between their sexual attraction (orientation) and identities. As Savin-Williams has argued, "sexuality" itself has three component parts, sexual orientation-referring to whom an individual is attracted; sexual identity, referring to how the individual identifies; and sexual behaviour, referring to the sexual activity in which the individual participates.⁸²² This section of the policy—in discussing how a detailed account of experiences can help to establish credibility, while also, admittedly in accordance with EU law, denying the potential of any

⁸²⁰ See: Section 5.1.

⁸²¹ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 25.

⁸²² Rich Savin-Williams, *The New Gay Teenager* (Harvard University Press 2005) 27-48.

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sexually explicit topics—confuses orientation and identity. Instructing decision-makers to look for factors more consistent with identity development than orientation. As several participants pointed out, this is inconsistent with the ways in which sexually diverse people from other cultures may understand themselves.⁸²³

To be clear, the main problem with this passage is that it is effectively informing decision-makers that a good way for claimants to demonstrate their sexual diversity is to offer a narrative of identity development, similar to the coming out narrative commonly expected within countries such as the UK. As Stychin has argued, within the “western” framework for understanding sexual diversity, ‘coming out’ is viewed as a key moment of identity formation.⁸²⁴ However, for reasons already addressed in chapter five, many sexually diverse people may not have such a narrative, and, indeed, such an approach may be a particularly blunt tool when dealing with claimants from societies which do not conceive of sexual diversity as a form of identity or even of orientation, but rather, as being a form of behaviour. The expectation for a narrative of sexual identity development is again well expressed as being a second-order stereotype of the kind pinpointed by Ziskaou in the Greek context, Jansen in the Dutch context, and Zadeh in the UK context.⁸²⁵

The section ends by stating that ‘If there is insufficient evidence to establish that the claimant is LGB, then, having taken account of all the evidence in the round, claims can be

⁸²³ See Further: Etienne Luijbeid, ‘Queer/Migration: an Unruly Body of Scholarship’ (2008) 14 *GLQ: A Journal of Lesbian and Gay Studies* 169, 172.

⁸²⁴ Carl Stychin, ‘Same-sex Sexualities and the Globalization of Human Rights Discourse’ (2004) 49 *Mcgill Law Journal*. 951, 954.

⁸²⁵ See generally: Sophia Zisakou, ‘Credibility assessment in asylum claims based on SO by the Greek Asylum Service’ (SOGICA Conference, Online, 7-9th July 2020); Sabine Jansen, ‘Pride or Shame? LGBTI Asylum in the Netherlands’ (SOGICA Conference, Online, 7-9 July 2020); Lelia Zadeh, ‘The UK: Excessive Focus on Articulation of “Self-Realisation” and Development of Identity’ (SOGICA Conference, Online, 7-9th July 2020).

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refused.⁸²⁶ This, in essence, is the problem with the 2016 API as a whole. It offers an account of how decision-makers should approach the issue of considering whether or not a claimant has successfully demonstrated their sexual diversity. However, the account it offers is founded on a series of theoretically flawed and culturally contingent assumptions about how sexual diversity will manifest. Specifically, it anticipates claimants offering an account of identity development which sees claimants realising their orientations and gradually formulating an identity around this orientation. This identity is then expected to guide where they socialise and who they socialise with. Many of these assumptions are, as I have shown, inconsistent with the lived experiences of sexually diverse people. Indeed, they fail to account for the fact that, as Luibheid has argued, ‘normative sexualities (not just those deemed deviant) require historicization, are produced within relations of power, and change, including through migration.’⁸²⁷ In essence the policy, as it stands, permits decision-makers to reject claims which do not present in a manner consistent with their own conceptions of sexual diversity.⁸²⁸ In this sense, I have argued that there are numerous mismatches between the conceptions of sexual diversity adopted by the 2016 API and the lived experiences of sexually diverse refugees and asylum seekers.

In order to remedy this, this thesis proposes that greater weight be placed on self-identification as a sexually diverse person. It is further argued that concerns regarding the potential of this generating a higher number of false claims are misguided due to the social and cultural significance of someone identifying as sexually diverse. I argue that, in most

⁸²⁶ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019.

⁸²⁷ Eithne Luibhéid, 'Queer Migration: An Unruly Body of Scholarship' (2008) 14 *GLQ: A Journal of Lesbian and Gay Studies* 169, 172.

⁸²⁸ See further: Eddie Bruce-Jones, 'Death Zones, Comfort Zones: Queering the Refugee Question' (2015) 22 *International Journal on Minority and Group Rights* 101, 114.

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cases, social and cultural injunctions would prevent any substantial rise in “false claims” if self-identification were to be given a stronger weighting within the asylum process.⁸²⁹

6.8 Concluding Remarks

As I have argued across the last two chapters, the policy fails in its stated objectives and perpetuates several mismatches between its conception of sexual diversity and the lived experiences of sexually diverse refugees and asylum seekers. Firstly, far from providing an opportunity for claimants to provide evidence, the policy risks entrenching ‘hegemonic understandings of what constitutes an authentic “narrative of difference.”’⁸³⁰ This is because, as I have argued above, it perpetuates ontological and fixed conceptions of identity which do not correspond to the heterogenous lived realities of sexually diverse people. In doing this, the policy risks ‘imposing Western gay male narratives on other sexual minorities.’⁸³¹ Indeed, its attempt to be broad and to recognise the differing forms sexual diversity can take continues to be moored to ‘ways [of understanding sexually diverse people] that are deemed legible to adjudicating states, (trans)national publics, and supranational bodies.’⁸³²

Thus, I argue that the findings Dawson and Gerber made around the suitability of the DSSH model for assessing the claims of sexually diverse women are equally applicable to the approach adopted within the API. As Dawson and Gerber argue,

rather than advancing an understanding of the diverse and complex experiences of gender and sexuality and allowing for the lived experiences of asylum seekers to be

⁸²⁹ See section: 5.5 and 8.2.

⁸³⁰ Jana Wessels, ‘Sexual Orientation in Refugee Status Determination’ (2011) Refugee studies Centre Working Paper Series No 74, 18.

⁸³¹ *ibid.*, 305.

⁸³² Etienne Luiheid, ‘Heteronormativity and Immigration scholarship: A Call for Change’ (2004) 10 GLQ: A Journal of Lesbian and Gay Studies 227, 237.

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received as legitimate, the “narrative of difference” model may actually encourage and reinforce a “tick-box” approach to sexual identity formation.’⁸³³

On the second stated objective, the policy also fails. Far from encouraging an open dialogue and attempting to ensure that claimants are comfortable, the policy risks othering vulnerable people by embracing and proposing conceptions of sexual diversity which may be incompatible with their self-conception. Thus, while aims of the policy are positive and progressive, we must take account of how, ‘putatively progressive movements have been slow to recognize difference, much less work through it... The imperative of solidarity has often flattened out difference through the construction of false universals.’⁸³⁴ In this sense, it is crucial that further critical analysis is directed towards the identity-based approach to sexual diversity in order to determine if it actually assists the most marginalised sexually diverse people in the manner that its proponents claim that it does.

If the policy is to succeed in its stated objectives, it must recognise that sexually diverse people are not a homogenised and universalizable group, and that, consequently, attempts to offer a simplified method of recognition, such as a focus on a narrative of difference, are always doomed to failure. This is because these methods of recognition are enmeshed in specific and contingent knowledges and discourses that will not easily map on to other contexts. In this case, the attempt to provide concrete themes risks turning the interview into a checklist. A checklist which does not correspond to the heterogenous lived experiences of many sexually diverse people.

⁸³³ Jasmine Dawson and Paula Gerber, ‘Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful For Determining Claims by Women for Asylum Based on Sexual Orientation’ (2017) 29 *International Journal of Refugee Law* 291, 305.

⁸³⁴ Rahul Roa, ‘Queer Questions’ (2014) 16 *International Feminist Journal of Politics* 199, 211.

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On the final stated objective, which is ‘to establish whether the claimant is in fact LGB and the relevance of that to the asylum claim’, the policy also fails. As I have argued above, the policy presents a conception of identity development consistent with “western” gay men. By relying on stereotypes, such as those around the places sexually diverse people go to and the people they socialise with, and failing to recognise that a staged model of identity development may not adequately allow for some claimants to explain their sexual diversity, the policy leaves decision-makers ill-equipped to assess sexual diversity asylum claims.

Given the number of changes which would be required to make the policy capable of recognising the diversity of lived experiences and self-conceptions that sexually diverse asylum seekers may have, this author encourages policy-makers and future researchers to reconsider the reliance it places on identity. In the next chapter, I explore the wider governmentalities of sexual diversity in the UK, linking the conception of sexual diversity embodied within the asylum apparatus to wider governmental knowledges regarding sexual diversity.

Chapter Seven: Knowledge(s) of Immigration, “sexuality” and Violence

This chapter situates the APIs within the context and discourses of the Immigration Rules. It then goes on to analyse how the conceptions of sexual diversity deployed within the API correspond to representations of sexual diversity within popular culture. In this regard, popular culture is shown to give access to ‘ordinary’ portrayals of sexual diversity. This is to say that, through observing popular culture, it is possible to access contemporary knowledges and discourses regarding sexual diversity. Finally, the chapter ends by considering the administrative violence inflicted on sexually diverse people when they seek to claim protection under a flawed process.

To develop this argument, I draw on Foucault’s concept of governmentality as a way of understanding how ordinary knowledge about sexual diversity comes to permeate the reasoning of asylum decision-making. I argue that media can provide access to ordinary knowledges regarding socio-legal phenomena. As Berlant has argued, ordinariness is informative due to ‘Its very popularity or its effects on everyday life or its expressions of emblematic knowledge... [it] requires reflection on what is merely undramatically explicit’.⁸³⁵ Thus, I argue that ordinary portrayals of sexually diverse people offer access to knowledge regarding sexual diversity in the UK.

⁸³⁵ Laurent Berlant, *Collegiality, crisis, and cultural studies* (1998) Profession 119, 119.

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7.1 The Immigration Rules

In January 2020, the Law Commission published their ‘*Simplification of the Immigration Rules*’ Report.⁸³⁶ The Commission developed principles against which the current state of the Immigration Rules could be considered and proposals for their replacement made. The report took consultation from a number of key immigration stakeholders, including Immigration Judges and charities working with asylum seekers in the UK.⁸³⁷ One of the key motivators for the report was that ‘it is widely acknowledged that the Rules have become overly complex and unworkable. They have quadrupled in length in the last 10 years’.⁸³⁸ Specifically, the report identifies that they have increased from under ‘300 pages in 2008 to around 1133 pages by the end of 2018’.⁸³⁹ This means that, even when matters related to refugee status determination are solely confined to Part 11 of the Immigration Rules, decision-makers will often struggle to locate the relevant provisions outside of the APIs.⁸⁴⁰ This is particularly likely due to the fact that Home Office Decision-makers are not required to possess a formal legal education.⁸⁴¹ Indeed, the Law Commission report found that even Immigration Practitioners and Immigration Judges have problems interpreting the Rules correctly due to their complexity and the frequency with which they change.⁸⁴²

⁸³⁶ The Law Commission, ‘Simplification of the Immigration Rules’ Law Com No 388 (House of Commons Library, 2020).

⁸³⁷ *ibid* 23-30.

⁸³⁸ *ibid* 1.

⁸³⁹ *ibid* 32.

⁸⁴⁰ This is especially pertinent considering the institutional pressures and constraints which exist within the Home Office. See Generally: Olga Jubany, ‘Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within’ (2011) 26 *International Sociology* 74

⁸⁴¹ Khan draws attention to this fact see: Tawseef Khan, ‘Investigating the British Asylum System For Lesbian, Gay and Bisexual Asylum Seekers: Theoretical and Empirical perspectives on Fairness’ (PhD Thesis, University of Liverpool 2016) 94-100.

⁸⁴² The Law Commission, ‘Simplification of the Immigration Rules’ Law Com No 388 (House of Commons Library, 2020) 33-34.

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Where policy does not provide adequate information to front-line decision-makers, claimants may find themselves subjected to forms of administrative violence perpetuated by the very processes which promised them protection. Examples of this can be seen in some recent media stories. For example, there is the case of Aderonke Apata, who was forced to wait 13 years for her status as a refugee to be recognised.⁸⁴³ During this waiting period she was unable to work, volunteer, plan her life or properly engage with civil society.⁸⁴⁴ In section 7.3, I explore situations like this as forms of administrative violence perpetuated by the British state against asylum seekers. A second example is that of Yew Fook Sam, who was left fearing deportation because neither the Home Office nor the first-tier immigration judge believed that someone could be both gay and single.⁸⁴⁵

As I argue in chapter eight, addressing these incidents of administrative violence requires the asylum system to be more attentive to the heterogenous lived experiences of sexually diverse people.

7.1.1 Asylum Claims and the Immigration Framework: Complexity, Bureaucracy, Absurdity

As outlined above, the Immigration Rules have become a matter of ever-increasing complexity. This section explores the framework around the APIs in order to examine the extent to which they respond to the need for clear and easy to follow policy. Most provisions governing immigration in the UK are passed by statements of changes laid before parliament

⁸⁴³ Diane Taylor, 'Nigerian Gay Rights Activist Wins UK Asylum Claim After 13-Year Battle' (*the Guardian*, 2019) <<https://www.theguardian.com/world/2017/aug/14/nigerian-gay-rights-activist-aderonke-apata-wins-uk-asylum-claim-13-year-battle>> accessed 3 October 2019.

⁸⁴⁴ Elsewhere I have written about the impact of the work ban on the wellbeing of asylum seekers. See: Alex Powell, 'Work Ban Forces Asylum Seekers Into Destitution – But We Now Have A Chance To Change This Policy' (*The Conversation*, 2019) <<https://theconversation.com/work-ban-forces-asylum-seekers-into-destitution-but-we-now-have-a-chance-to-change-this-policy-112254>> accessed 7 February 2020.

⁸⁴⁵ Helen Pidd, 'Home Office Gives Man Asylum After Accepting People Can Be Gay And Single' (*the Guardian*, 2020) <<https://www.theguardian.com/uk-news/2019/dec/23/home-office-gives-man-asylum-after-accepting-people-can-be-gay-and-single>> accessed 18 February 2020.

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by the Secretary of State for the Home Department pursuant to their powers under the Immigration Act 1971.⁸⁴⁶ This ability to make changes by secondary legislation leads to frequent and highly politicised changes to the rules. This, in turn, results in pockets of indeterminacy and confusion. Where such indeterminacy arises, it is argued that the ordinary knowledge of decision-makers is used to fill gaps.⁸⁴⁷

The Immigration Rules themselves occupy a quasi-legal status. In *Odelola*, they were held to be statements of administrative policy regarding how the Home Office will operate. However, they are also legally binding.⁸⁴⁸ In *Pankina*, Sedley LJ stressed the constitutional importance of parliamentary oversight, given the quasi-legal nature of the Immigration Rules and their capacity to impact individual rights.⁸⁴⁹ This view has now been confirmed by the Supreme Court in *Alvi*.⁸⁵⁰ Following this, it is clear that the Immigration Rules are administrative policies which give rise to legal obligations. In other words, while it is possible for the Secretary of State to exercise discretion in favour of a claimant—meaning they can grant claims even when the claimant has not met the terms set out in the policy—the Home Office is bound to give effect to the rules when a claimant meets their terms.⁸⁵¹ However, the immigration rules are not primary legislation. This is significant when consideration is taken of the numerous statutes which have a bearing on the asylum context.

Considering the level of complexity required to understand the position of the Immigration Rules within the legal hierarchy, it is unsurprising that summaries of the

⁸⁴⁶ S 3(2). Juss has been critical of the decision to place immigration regulation into the form of delegated legislation rather than placing it on a primary legislative footing. See: Satvinder Juss, *Discretion and Deviation in the Administration of Immigration Control* (Sweet and Maxwell 1997) 42.

⁸⁴⁷ See Section: 7.2.

⁸⁴⁸ *Odelola v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 3 All ER 1061

⁸⁴⁹ *Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719, [2011] 1 All ER 1043 [13], [16], [21].

⁸⁵⁰ *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, [2012] 4 All ER 1041.

⁸⁵¹ *Secretary of State for the Home Department v KG (India)* [2016] EWCA Civ 477, [2016] All ER 164.

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appropriate law policy need to be provided within the APIs. However, as explored in the previous chapters, the way in which the API interprets the framework can have consequences for claimants with regard to how their claim is processed and analytically characterised.⁸⁵² For example, the 2016 API on sexual diversity asylum claims takes an approach to discharging the Burden of Proof which suggests to decision-makers that forms of objective evidence are required. In doing this, it also fails to remind decision-makers that the relevant standard against which each aspect of the claim should be judged is that of a reasonable degree of likelihood.⁸⁵³ Further, it endorses a conflation of credibility and burden of proof which, I have argued in chapter six, leads to a higher burden being placed on asylum claimants than the legal framework requires.⁸⁵⁴ Each of these, are examples of the policy misleading decision-makers as to the legal framework they are required to apply. Similarly, in chapter five, I advanced an argument that the limited interpretation of stereotypes endorsed by the 2016 API effectively undermines the core thrust of the *A, B and C* decision of the European Court of Justice.⁸⁵⁵

7.1.2 Complexity, Prescription, Discretion

As I have argued in the previous chapter, the 2016 API on sexual diversity is, in some respects, overly prescriptive with the result that it leads to a tick box approach being adopted by decision-makers. This cannot be separated from a broader trend, recognised in the Law Commission Report, of overly prescriptive approaches being adopted to immigration law and

⁸⁵² One further example pointed out by UKLGIG is the mis-ordering of the questions comprising the *HJ (Iran)* and *HT (Cameroon)* test within both the APIs and Country of Origin Guidance. This, they argue, results in some decision-makers adopting a flawed approach which is not entirely compatible with the legal framework. See: UK Lesbian and Gay Immigration Group, *Applying HJ (Iran) and HT (Cameroon) to Asylum Claims Based on Sexual Orientation* (UKLGIG 2018) available at https://uklgig.org.uk/?page_id=1225.

⁸⁵³ See section 6.6.

⁸⁵⁴ *Ibid.*

⁸⁵⁵ See: 5.1

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policy in recent years.⁸⁵⁶ The reason for adopting such an approach is that, ‘it has been the traditional concern of administrative law that a high degree of discretionary authority should not be placed in the hands of officials.’⁸⁵⁷ However, as the Law Commission have argued, this drive towards prescription results in a rising spiral of complexity, fuelling frequent changes to the Immigration Rules.⁸⁵⁸ While, such a prescriptive approach should tend towards consistency in decision-making, I argue that overly complex systems may promote pockets of discretion.

An example of an area in which the API is overly prescriptive is with respect to its listing of the ways in which claimants may present a narrative of difference. Here, it informs decision-makers that,

A wide variety of indicators may be presented in narratives by claimants, which may suggest a sense of being different or “apart from”. Such indicators may include childhood behaviours indicating a strong identification with the opposite gender, while for others experiences of difference may be manifested in unusual feelings and strong emotions towards another person of the same sex. Other indicators may be:

- Recognition that the claimant is not like other girls/boys in childhood or adolescence
- Feelings of isolation
- Self-doubt and loneliness

⁸⁵⁶ The Law Commission, ‘Simplification of the Immigration Rules’ Law Com No 388 (House of Commons Library, 2020) 32-64.

⁸⁵⁷ Satvinder Juss, *Discretion and Deviation in the Administration of Immigration Control* (Sweet and Maxwell 1997) 1.

⁸⁵⁸ The Law Commission, ‘Simplification of the Immigration Rules’ Law Com No 388 (House of Commons Library, 2020) 32-40.

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- Gradual recognition of sexual and emotional attraction to members of the same sex or feelings of not wanting to be exposed to others.⁸⁵⁹

As I have argued elsewhere, the presence of extensive rules can mean that decision-makers disavow their own discretion and fail to maintain an awareness of the impact their judgements can have on a given claim.⁸⁶⁰ Additionally, such prescriptive environments can lead to decision-makers failing to maintain an awareness of the impact that their decisions can have on those who appear before them.⁸⁶¹ For example, in the listing above, one of the aspects which decision-makers are told may form part of a narrative is ‘feelings of isolation’. However, this (at least to an extent) is contradicted by a further section of the API which instructs decision-makers to enquire about the interactions claimants had with LGBT+ groups.⁸⁶² If one section of the API is instructing decision-makers to enquire about feeling isolated, and another is asking them to look for accounts of community, a discretion arises. This is because an easily justifiable response is provided to the decision-maker regardless of how they interpret the claimant’s narrative. In reality, this means that two specific, but contradicting, parts of the policy give greater space for decision-maker’s interpretations. As a result of this, despite appearing to be extremely prescriptive, the API offers decision-makers a far-reaching discretion about how the experiences of the claimant are analytically characterised. The decision-maker can either decide that the claimant’s isolation

⁸⁵⁹ Uk Visas and Immigration, ‘Asylum Policy Instruction: Sexual Orientation in Asylum Claims (Home Office 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/sexual-orientation-in-asylum-claims-v6.pdf accessed 20th September 2019, 26-27.

⁸⁶⁰ Alex Powell, ‘Officials Working Within Hostile Government Departments Are Not Free From Blame’ (*The Conversation*, 2018) <<https://theconversation.com/officials-working-within-hostile-government-departments-are-not-free-from-blame-98741>> accessed 7 February 2020.

⁸⁶¹ This is a phenomenon Hannah Arendt has described as the banality of evil. See Generally: Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking Press 1963).

⁸⁶² Uk Visas and Immigration, ‘Asylum Policy Instruction: Sexual Orientation in Asylum Claims (Home Office 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/sexual-orientation-in-asylum-claims-v6.pdf accessed 20th September 2019, 23.

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demonstrates their narrative of difference or they can decide that their lack of interaction with other sexually diverse people is evidence that they are not genuinely the identity they claim. In each case, they can then refer to the API in support of the interpretation they have made. Thus, prescription, counter-intuitively, may result in pockets of discretion.

Butler's concept of petty sovereigns offers a useful way to conceptualise and theorise these pockets of discretion. Butler's concept draws on the reflections of Foucault about the changing nature of power within society, from the role of the almighty sovereign to a series of diffuse systems of power which have come to be encapsulated under the term *governmentality*.⁸⁶³ This idea is also intrinsically linked to his concept of bio-power, which refers to the power of the state administered at the level of life.⁸⁶⁴ Otherwise put, governmentality is the new shape which power adopts within a contemporary bio-political epoch. Governmentality is a conjunction of government and rationality. It sees people effectively governing themselves. Thus, power is shifted from the central authority and instead distributed diffusely amongst the population.⁸⁶⁵ Under this model, governing principles lead people to modify their own behaviour. Butler has taken this further, arguing that the diffuse nature of bureaucratic regimes of governmentality allow extraordinary power to be exercised with limited checks enacted upon it. Put another way, states of exception are created where bureaucrats exercise extraordinary decision-making power. Thus, as she has argued in the context of Guantanamo Bay, 'Petty Sovereigns abound, reigning in the midst of

⁸⁶³ Michel Foucault, 'The Subject and Power' in Michel Foucault, *Power: Volume 3: Essential Works of Foucault 1954-1984* (Jim Faubion, Ed; Robert Hurley Trans: Penguin 2002) 326.

⁸⁶⁴ See Michel Foucault, *The History of Sexuality: The Will to Knowledge* (Robert Hurley Trans: Penguin 1998) 136-138.

⁸⁶⁵ See: Michel Foucault, *The Government of Self and Others: Lectures at the Collège de France 1982-1983* (Frank Gros Ed; Graham Burchell Trans, Palgrave Macmillan 2010).

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bureaucratic... institutions mobilized by aims and tactics of power they do not inaugurate or fully control. And yet such figures are delegated with the power...'⁸⁶⁶

While asylum decision-makers are required to apply a framework, and their decisions can be appealed through the tribunal and judicial review, the concept of Petty Sovereigns offers a useful way of thinking through the significance of their decisions and the relative impunity offered by their “bureaucratic” role. In this sense, I argue that overly prescriptive rules can lead to patterns of disavowal in which bureaucrats claim that the decisions they make are objective assessments. As opposed to being products of their own histories and ideologies. The result of such a system is that frameworks of accountability are undermined and matters core to claims are decided by largely unaccountable civil servants.

Despite their proclaimed bureaucratic role, individual Home Office decision-makers also possess a rather extensive general discretion arising from their role in determining which facts are material to the claim, and whether they have been proved. Individual decision-makers are tasked with determining whether a claimant’s marriage to someone of the “opposite” sex was due to the fact that they are “heterosexual”, and therefore not a refugee, or rather whether it was, as Giametta has documented, a common strategy for hiding one’s sexual diversity.⁸⁶⁷ This, while it may not be seen as such by the decision-makers, constitutes a site of discretion, because it is an area in which decision-makers are required to make (sociological) judgements regarding how a narrative should be interpreted.

While the API offers guidance on how decision-makers should approach the question of credibility, these notes are unlikely to stop decision-makers assessing whether they find the

⁸⁶⁶ Judith Butler, *Prekarious Life: The Power of Mourning and Violence* (Verso 2004) 56.

⁸⁶⁷ Calogero Giametta, *The Sexual Politics of Asylum: Sexual Orientation and Gender Identity in the UK Asylum System* (Routledge 2017) 45.

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claimants account to be believable in reference to their own standards of believability. What decision-makers conceive of as believable will itself be a product of their own experiences and the way in which they have been socialised.⁸⁶⁸

Decision-makers also supplement the impact of their discretion by, on occasions, operating outside of the legal or policy framework. Juss has termed this state one of ‘administrative lawlessness’.⁸⁶⁹ Rainbow Migration have detailed situations where decision-makers failed to apply the proper legal test for discretion, resulting in denials at first-instance.⁸⁷⁰ In this regard, Abeo told me about how:

she [the Home Office Caseworker] had to ask these questions again and then she started those questions and I remember that the interview that was supposed to take a few hours took almost two days because I just kept breaking down. I just couldn’t be able to talk about those things and, you know, everyone keep telling me that they can still deport me and the whole idea that I could be deported kept nagging at the back of my head.⁸⁷¹

This suggests that some decision-makers are still employing what Juss termed the ‘discrepancy system’ where they repeatedly ask similar questions to try and generate discordant responses which can be used as evidence of the claimants’ lack of credibility.⁸⁷²

This is in contravention of the APIs’ instruction that decision-makers should attempt to aid

⁸⁶⁸ See: Peter Brooks & Paul Gewirtz (eds), *Law’s Stories: Narrative and Rhetoric in Law* (Yale University press 1996).

⁸⁶⁹ Satvinder Juss, *Immigration, Nationality and Citizenship* (Continuum International Publishing 1994) 87.

⁸⁷⁰ See: UK Lesbian and Gay Immigration Group, *Still Falling Short: The Standard of Home Office Decision-Making in Asylum Claims Based on Sexual Orientation and Gender Identity* (UKLGIG 2018) available at https://uklgig.org.uk/?page_id=1225, 33-36. See Also: UK Lesbian and Gay Immigration Group, *Applying HJ (Iran) and HT (Cameroon) to Asylum Claims Based on Sexual Orientation* (UKLGIG 2018) available at https://uklgig.org.uk/?page_id=1225

⁸⁷¹ Abeo, Nigerian Refugee to author.

⁸⁷² Satvinder Juss, *Discretion and Deviation in the Administration of Immigration Control* (Sweet and Maxwell 1997) 62-67.

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claimants in proving their claims.⁸⁷³ This approach to decision-making was also noted by Jubany, with one of the decision-makers she interviewed stating that, ‘You must bring out the real reasons, test the evidence. You must give them a chance to say what they need to say and afterwards you test what they actually say. Point out the discrepancies, that is your job, find out the discrepancies in what they say and decide’.⁸⁷⁴ Other participants identified similar practices. For example, Abasi told me about how,

one of the things my solicitor mentioned was that if I confuse them with any of the questions I answered during the interview and my statement says something else, even if the dates are like one day different, that would make a problem. Say, they would basically ummm, they would just accuse me of lying.⁸⁷⁵

Similarly, Babu told me that during his interview,

A lot of the questions were repetitive, so they would ask you the same questions and they would just rephrase it in a few ways. Just to make sure that your answers are exactly the same. Because this is how I think they pin the people who are like claiming false cases. Like, so they would ask the question, but then later on they would ask the same question.⁸⁷⁶

As Jubany has noted, the legal stance of the UK system upholds decision-makers as performing an entirely bureaucratic role within the asylum process.⁸⁷⁷ This disavowal of the

⁸⁷³ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 22.

⁸⁷⁴ Olga Jubany, ‘Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within’ (2011) 26 *International Sociology* 74, 80.

⁸⁷⁵ Abasi, Egyptian Refugee to Author.

⁸⁷⁶ Babu, Egyptian Refugee to Author.

⁸⁷⁷ Olga Jubany, ‘Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within’ (2011) 26 *International Sociology* 74, 79-81.

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importance, significance, and mutability of the decisions officials make has itself been supported by the thrust of academic inquiry, which has focused predominantly on the legal, while failing to consider the role that those implementing this framework play in the process. However, it should be noted that Bailott, Cowan and Munro have provided useful explorations of the role of decision-makers and political discourses in creating environments in which female victims of sexual assault can be assisted in feeling comfortable to make disclosures within the asylum process.⁸⁷⁸

In situations where decision-makers have acted in a manner contrary to law or policy appeals or a judicial review will be possible. As the Law Commission report notes, the current complexity of the Immigration Rules leads to numerous appeals because decision-makers make mistakes in applying the law.⁸⁷⁹ However, such appeals should not be seen as an acceptable substitute for good first-instance decision-making. The delays caused by appeals and remitted decisions can cause financial and emotional harm to claimants.⁸⁸⁰ For example, Adroa told me about his difficulty in waiting for his status to be recognised for five years,

Christmases could just come and pass by. Summer comes, winter comes, and I was just living, just surviving. Every single day was different. There wasn't any kind of

⁸⁷⁸ See Further: Helen Bailott, Sharon Cowan, & Vanessa Munro, "Hearing the Right Gaps": Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process' (2012) 21 *Social and Legal Studies* 269; Helen Bailott, Sharon Cowan, & Vanessa Munro, 'Second-hand Emotion? Exploring the Contagion and Impact of Trauma and Distress in the Asylum Law Context (2013) 40 *Journal of Law and Society* 509.

⁸⁷⁹ The Law Commission, 'Simplification of the Immigration Rules' Law Com No 388 (House of Commons Library, 2020) 23-30.

⁸⁸⁰ See for example: Shakib Mohammad Afzali, 'Delayed Asylum Decisions Waste Not Only Time But Opportunities And NHS Money' (*the Guardian*, 2019) <<https://www.theguardian.com/the-guardian-foundation/2019/jun/20/delayed-asylum-decisions-waste-not-only-time-but-opportunities-and-nhs-money>> accessed 6 March 2020.

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particular time when things were consistent. It was very very difficult. Time just passed away.⁸⁸¹

During the time claimants are forced to wait for an appeal or judicial review which, even if successful, may only lead to a remittance to the first instance decision-maker, asylum claimants are unable to plan their lives or participate in public life. This can lead to feelings of isolation and loneliness for asylum claimants and, as will be explored in the third section of this chapter, can be construed as a form of administrative violence. Additionally, it should be recognised that considering the very limited provisions the UK makes for those in the process of applying for asylum, prolonged applications can, and often does, lead to destitution.⁸⁸² Some claimants also struggle to find and access legal support enabling them to bring forward an appeal, and, as conversations with participants made clear, many applicants are not aware of the asylum process and may not understand that they have a right to appeal.

7.1.3 The Limits of Process: Natural Discretion at the Human Interface

The interaction between the asylum claimant and the decision-maker is ultimately a human one. Indeed, as Hardy argues, refugee status is ultimately an issue of recognition.⁸⁸³ It is for this reason that Juss argued for a model of cultural jurisprudence in immigration adjudication.⁸⁸⁴ Cultural jurisprudence involves decision-makers operating in a manner which recognises the role of culture in constructing claimants' experiences and narratives. As he

⁸⁸¹ Adroa, Ugandan Refugee to author.

⁸⁸² Alex Powell, 'Work Ban Forces Asylum Seekers Into Destitution – But We Now Have A Chance To Change This Policy' (*The Conversation*, 2018) <<https://theconversation.com/work-ban-forces-asylum-seekers-into-destitution-but-we-now-have-a-chance-to-change-this-policy-112254>> accessed 3 March 2020. See Also: May Bulman, 'A Growing Number Of Refugees And Asylum Seekers Are Falling Destitute In Britain, Figures Show' (*The Independent*, 2018) <<https://www.independent.co.uk/news/uk/home-news/number-of-refugees-and-asylum-seekers-falling-into-poverty-soars-in-a-year-show-figures-a8195746.html>> accessed 9 March 2020.

⁸⁸³ Cynthia Hardy, 'Refugee Determination: Power and Resistance in Systems of Foucauldian Power' (2003) 35 *Administration & Society* 462, 467–8.

⁸⁸⁴ Satvinder Juss, *Discretion and Deviation in the Administration of Immigration Control* (Sweet and Maxwell 1997) 10-41.

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correctly identified, ‘it is immediately plain...that an adversarial approach by a White, male... interviewing an illiterate village woman in purdah (i.e., veiled), will be totally counter-productive’.⁸⁸⁵ This is because the decision-maker will struggle to separate the ways in which they approach the issues of fact-finding and credibility from their own lived realities. Their experiences will play a role in directing the questions they ask, the level of weight which they put on given factors, and the narratives they determine to be credible. In this way, it is important to recognise that while policy may direct decision-makers to undertake a given method of investigation, such as looking for a narrative of difference, their conceptions of what constitutes that narrative of difference are going to be shaped by their own experiences. This may, on first sight, be interpreted as a radical claim. However, as Baldwin and Hawkins have argued,

What is regarded as a “decision” actually consists of two very different components. We typically regard a legal decision as concerning action, e.g. arrest, sentence or settlement. More subtle, however, are the prior decisions to be made in defining the “facts” or matters deemed relevant to the decision. “Facts” in legal cases are by no means self-evident but have to be matters for interpretation by decision-makers. Some of the central concepts in legal decisions, such as “crime” or “record”, “Culpability” or “Compliance”, often involve considerable interpretive work by a decision-maker, because the exercise of discretion involves a search for meaning.⁸⁸⁶

Some participants recognised the impact that the decision-maker they dealt with had on their claim. For example, Babu told me that,

⁸⁸⁵ *ibid* 7.

⁸⁸⁶ Robert Baldwin & Keith Hawkins, ‘Discretionary Justice—Davis Reconsidered’ [1984] Public Law 580, 580.

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It makes a difference [who the decision-maker is] because it is related also to how the person perceives these kinds of cases... [I]t doesn't just end at your case, it keeps haunting you for years... you can have a terrible case worker and they reject your case. But then you appeal it and it gets accepted... It all depends on how the case worker wants to perceive your answers and how they go about it. If they want to believe you, they will believe you and tick the boxes. You're good to go. If not, they will stop you and take you through hoops.⁸⁸⁷

In a similar vein Abdullah told me that,

I did notice my interviewer trying to help me. For example, after I had finished with an answer he would look at me and rephrase what I just said and ask me if that is what I meant and I would say yes and he would type that down. Of course, when people do that, they are trying to help you... or they are somehow on your side of things.⁸⁸⁸

Although the brunt of analysis has focused on the 2016 API itself, analysis of decision-maker practice is also relevant, because the decision-makers are themselves a part of the asylum apparatus. They interpret, apply, and give effect to the API. Therefore, analysis of how they perform their role is useful to informing a wider conception of how the apparatus operates.

Given this, it is pertinent to consider what part decision-makers themselves play in the shift from conduct to identity-based conceptions of sexual diversity. This move from conduct to identity fits within the broader framework proposed by theorists such as Spade as being a step in the evolution of lesbian and gay politics. As Spade argues,

⁸⁸⁷ Babu, Egyptian Refugee to Author.

⁸⁸⁸ Abdulla, Egyptian Refugee to Author.

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The idea posited by... early sexologists that rather than being behaviours which anyone could act upon or experience, homosexual desires or acts make someone a certain type of person—a homosexual—was thoroughly taken up and forms a key premise of today's lesbian and gay politics.⁸⁸⁹

I follow Spade, who goes on to argue that an uncritical acceptance of identity as the basis of policy undermines attempts to assist the most marginalised sexually diverse people.⁸⁹⁰

To be clear, then, my argument is not that decision-makers supplant the API with their own conceptions of sexual diversity. Rather, my argument is that decision-makers fill-out areas of indeterminacy with ordinary knowledge. In this sense, what I am referring to as natural discretion, does not figure as a form of agency for decision-makers. Rather, it is a stage their implicit assumptions impinge on their judgements. In this sense, my claim is no more radical than saying that it is difficult to have an unmediated interaction with reality and that how we perceive the world is impacted by our own cultural and social experiences.

In recognition of this, I would add to my critique of the API being overly prescriptive in ways which encourage a tick-box approach, that it is also under-prescriptive in ways which allow culturally contingent conceptions of identity politics to permeate the decision-making process. For example, as mentioned in chapter five, while the policy informs decision-makers that 'it is important to recognise that some individuals may hold a completely different perception of their own sexual orientation from those implied by the term LGB', the API offers no further guidance about how claimants perceptions might be articulated.⁸⁹¹ Simply

⁸⁸⁹ Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, & The Limits of Law* (2nd ED, Duke University Press 2015) 54.

⁸⁹⁰ *ibid*

⁸⁹¹ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation in Asylum Claims; (Home Office 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/sexual-orientation-in-asylum-claims-v6.pdf accessed 20th September 2019, 8.

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put, coaching the desired approach to decision-making in terms such as ‘difference’ does nothing to encourage an inclusive approach, unless decision-makers are familiar with the cultures of claimants they interact with. Given that, when contacted under a freedom of information request, the Home Office informed me that all training is carried out by an in-house team over just five weeks, receiving training of appropriate specificity seems improbable.⁸⁹²

An appropriate standard of training would require decision-makers to receive training and specialisms in cases focusing on certain countries and cultures, which would enable them to become familiar with autochthonous conceptions of sexual diversity. This would, it is admitted, still not be helpful in terms of assisting claimants whose identities are non-normative. Obviously, there are limitations to the ability of the Home Office to provide training that enables such a culturally specific approach to be taken. However, the current combination of policy and training does not equip decision-makers for the magnitude of decisions they are required to make. In particular, more needs to be done to ensure decision-makers are aware that their conception of reality may differ in fundamental ways from claimant’s conceptions and that a differing interpretation of events, phenomena or identities is not a legitimate ground for refusal.

In the next section, I will argue that the knowledge drawn on by asylum decision-makers, in order to flesh out the 2016 API, relates to forms of ordinary knowledge regarding sexual diversity. These forms of knowledge form a part the day-to-day, mundane ways in which we make sense of the world. Popular culture, in the form of television, films, and other

⁸⁹² Freedom of Information Response: 55996 (2019).

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cultural products offers a vantage point for reviewing the forms of ordinary knowledge within a given society.

7.2 Exotically Coloured Cocktails, Kylie Concerts, and the Narrative of Difference

When handing down judgement in *HJ (Iran) and HT (Cameroon)*⁸⁹³ Lord Rodger set out that,

just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates.⁸⁹⁴

As Lord Rodger himself admits, these are largely trivial stereotypes from British society.⁸⁹⁵

In line with the work of Foucault and Butler, as explored above, un-uttered stereotypes and preconceptions such as these come to be (re)produced within everyday life. This section will look at how stereotypes are inculcated and shaped by popular culture and how these conceptions of reality may come to impact on administrative decision-making.⁸⁹⁶ Popular culture can be a useful way of understanding forms of knowledge prevalent within a society because, as Cover has argued,

History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in

⁸⁹³ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596.

⁸⁹⁴ *ibid* [78] (Lord Rodger).

⁸⁹⁵ *ibid*.

⁸⁹⁶ Naomi Mezey has explored the interrelations between law and culture. See: Naomi Mezey, 'Law as culture' (2001) 13 *Yale Journal of Law and the Humanities* 35.

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experience, in the narratives that are the trajectories plotted upon material realities by our imaginations.⁸⁹⁷

Put another way, this section examines how the contents of a narrative of difference come to be filled out by “western” conceptions of difference. The result is that stereotypes come to be central to how claimant’s sexual diversity is evidenced.⁸⁹⁸

The policy itself—which was explored in more depth in chapters five and six⁸⁹⁹—informs decision-makers and claimants that,

In many cases, an LGB person’s first awareness of their developing sexual orientation may be a perception of feeling “different” from other peer members of their community. Such perceptions of difference need not relate to feelings around sexuality, they may well pre-date sexual awakenings and begin in childhood.⁹⁰⁰

The core reason that concepts such as the narrative of difference fail to pull us away from “western” formulations of sexual diversity is that all aspects of social life are shaped, modulated, and interpreted through discourse.⁹⁰¹ Adler helps us to understand the importance of language and popular culture to our relationship with reality by explaining that, ‘A discourse...can make some ideas seem natural and others inconceivable, depending on

⁸⁹⁷ Robert Cover, ‘The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative’ (1983-4) 97 *Harvard Law Review* 4, 5.

⁸⁹⁸ *Cases C-148 to C-150, ABC v Staatssecretaris van Veiligheid en Justitie* [2014] ECR I-2406; Uk Visas and Immigration, ‘Asylum Policy Instruction: Sexual Orientation in Asylum Claims; (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/sexual-orientation-in-asylum-claims-v6.pdf> accessed 20th September 2019, 22-28

⁸⁹⁹ See Generally: Chapters 4 & 5.

⁹⁰⁰ Uk Visas and Immigration, ‘Asylum Policy Instruction: Sexual Orientation in Asylum Claims; (Home Office 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/sexual-orientation-in-asylum-claims-v6.pdf> accessed 20th September 2019, 26.

⁹⁰¹ I follow Foucault’s definition of discourse as being ‘practices that systematically form the objects of which they speak’. See: Michel Foucault, ‘*The Archaeology of Knowledge and the Discourse on Language*’ (Sheridan Smith Trans: Vintage 1982) 49;135-140.

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whether the ideas make sense according to the terms of the discourse whether they sound in its key'.⁹⁰² For this reason, how decision-makers conceive of policy demands such as a narrative of difference will depend on the discourses within they are enmeshed. Cover, who in this regard agrees with the Foucauldian theory employed as framework in this thesis, draws out the point well by arguing that,

if there existed two legal orders with identical legal precepts and identical, predictable, patterns of public force, they would nonetheless differ essentially in meaning if, in one of the orders, the precepts were universally venerated while in the other they were regarded as fundamentally unjust.⁹⁰³

In stating this, it should be borne in mind that discourse is always in the process of being made, and that the potential of resistance is itself an intrinsic part of discourse.⁹⁰⁴ For this reason, no precept is likely to be permanently venerated or universally accepted, nor is any likely to be entirely disavowed or viewed as unjust. Thus, as Bruce-Jones has argued, the very methods employed to argue that one claimant is credible impact the expectations decision-makers will have for future claimants.⁹⁰⁵ Some participants also recognised this in discussing the kinds of evidence they felt decision-makers wanted from them. For example, Abdullah told me about how there were times when the decision-maker in his claim seemed to be open to accepting sexually explicit evidence, and that he was concerned that if he

⁹⁰² Libby Adler, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Duke University Press 2018) 6.

⁹⁰³ Robert Cover, 'The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative' (1983-4) 97 *Harvard Law Review* 4, 7.

⁹⁰⁴ Naomi Mezey, 'Law as Culture' (2001) 13 *Yale Journal of Law and the Humanities* 35, 37.

⁹⁰⁵ Eddie Bruce-Jones, 'Death Zones, Comfort Zones: Queering the Refugee Question' (2015) 22 *International Journal of Minority and Group Rights* 101, 114.

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provided such evidence, other claimants coming before that decision-maker may face that as an expectation. He told me that,

the only reason why I didn't want to engage in that kind of questionnaire is that I don't want the comfort out of giving explicitly private answers to make the interviewer too comfortable doing this again and again to others. Otherwise, if that interviewer who was someone else on a personal capacity, I wouldn't have any problem giving them answers to those kinds of questions.⁹⁰⁶

This passage shows that, despite such evidence being forbidden, some decision-makers are allowing claimants to feel that submitting it could help their case. However, it is also significant because it shows how some asylum claimants refuse to comply with—and therefore seek to disrupt—hegemonic understandings of sexual diversity. In this sense, Abdullah's actions in not wishing to display such evidence, even if it may have helped his individual case, can be characterised as an act of queer resistance against the UK asylum apparatus.

Exploring the ways in which sexual diversity is framed within popular culture can help us to understand how different norms operate. By tracing such popular cultural narratives, we can seek to understand the knowledges regarding sexual diversity prevalent within the UK and attempt to detect how these aspects of popular culture may reflect knowledges that are deployed within decision-makers' interpretations of both the terms of the 2016 API and the narratives of sexually diverse people claiming asylum in the UK.

The potential of cultural and discursive factors of social life to interact with the operation of law has long been recognised by Law and and Film, scholars as well as by

⁹⁰⁶ Abdullah, Omani Refugee to Author.

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proponents of the critical legal studies movement and the many ways in which that theoretical framework has been developed.⁹⁰⁷ For example, Sherwin argues that Law ‘is both a co-producer and a by-product of mainstream culture. The stamp of the latter continually falls upon the meanings the law produces’.⁹⁰⁸ Effectively, Sherwin’s argument is simply that laws and policies are written in a particular social-context and that this context comes to condition both what those policies state and how they are interpreted. For this reason, where open textured language is employed, those applying policies in practice will do so considering themes from wider cultural discourses. In many cases, these themes can be traced through their appearance within pop-culture. This is consistent with Hammond’s argument that within a highly media driven society, visibility itself is moulded by popular culture.⁹⁰⁹

In undertaking this exploration of crossovers between the approaches of decision-makers and popular culture, it is also pertinent to bear in mind Beck’s argument that

the foundations of the industries and cultures of the mass media have changed dramatically and concomitantly all kinds of transnational connections and confrontations have emerged. The result is that cultural ties, loyalties and identities have expanded beyond borders and systems of control. Individuals and groups who surf transnational television channels and programmes simultaneously inhabit different worlds.⁹¹⁰

⁹⁰⁷ Satvinder Juss engages in a useful discussion of the relationship between law and culture and legalism. See: Satvinder Juss, *Discretion and Deviation in the Administration of Immigration Control* (Sweet and Maxwell 1997) 26-28.

⁹⁰⁸ Richard K. Sherwin, “Framed,” in John Denvir (ed), *Legal Reelism: Movies as Legal Texts* (University of Illinois Press 1996) 71.

⁹⁰⁹ Joyce Hammond, ‘Making a Spectacle of Herself: Lesbian Visibility and K.d. Lang on Vanity Fair’s Cover’ (1997) 1 *Journal of Lesbian Studies* 1.

⁹¹⁰ Ulrich Beck, *The Cosmopolitan Vision* (Polity Press 2004) 7.

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The implication of this is that it is no longer possible to clearly delineate the impact of a cultural product to a specific geographic space. Thus, it is certainly the case that depictions of sexual diversity within “western” cultural products may have influenced both how sexual diversity is expressed within some refugee countries of origin as well as the responses of potential persecutors to visible manifestations of that sexual diversity.⁹¹¹ However, the act of cultural translation is rarely simple. Therefore, it should not be assumed that a level of cultural communication and sharing equates to complete, comprehensible, or recognisable cultural translation. Representations, values, and identities, despite the impact of colonialism and globalisation, will never be universal. Rather, they continue to be the product of specific histories, cultures, and experiences. Even where a cultural product is shared, how it is interpreted by the communities viewing it will be different. Specifically, the interpretations will be guided by the historical, social, and cultural experiences readers bring to the encounter.

7.2.1 Queer as Folk: Pop-Culture, sexual diversity, and Russel T Davies

This section explores some of the interrelations between popular culture and the experiences of people claiming asylum on the basis of their sexual diversity. The starting premise of this section is drawn from Hilton-Morrow and Battles who argue that,

If you were born in the late 1980s, you have grown up in an era of unprecedented visibility for GLBTQ individuals, communities, and issues... If it once was possible to never see gays or lesbians in the media, today it is difficult not to see gays and lesbians, and increasingly bisexuals...References to various forms of sexual and

⁹¹¹ Whitaker discusses the extent to which cultural products from western countries have impacted conceptions of sexual diversity within the middle east. See: Brian Whitaker, *Unspeakable Love: Gay & Lesbian Life in the Middle East* (SAQI 2013) 113-116; 217-219.

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gender identities appear in TV shows, movies, magazines, popular music, video games, books, the news, and the Internet.⁹¹²

The significance of this is that for people existing within the contemporary media landscape, seeing representations of sexual diversity within “western” media is an almost ubiquitous experience. For this reason, I argue that much contemporary knowledge regarding sexual diversity is communicated through popular culture. At the least, we can use popular culture as a vantage point from which to view prevalent conceptions. Therefore, analysis of what these representations are, and the potential impact they may have on how decision-makers conceive of sexual diversity and what constitutes a recognisable ‘narrative of difference’, or the role stereotypes play, is significant for understanding how decision-makers approach the question of whether someone is recognised as being sexually diverse or not.

Firstly, some participants documented a feeling that decision-makers expected their difference to have manifested at an early age. This was accompanied by the expectation of having examples of childhood gender non-conformity. Those who shared such experiences with decision-makers felt that this had helped them in establishing their credibility. For example, as explored in Chapter five, Chataluka told me that he had used dressing up in his mother’s wigs and clothes when he was a child as evidence of his sexual diversity.⁹¹³ He also indicated that this was a form of evidence that the decision-maker had openly inquired about.⁹¹⁴ This idea of sexual diversity being manifested through childhood gender non-conformity can be seen as a frequent trope in representations of sexual difference within

⁹¹² Wendy Hilton-Morrow & Kathleen Battles, *Sexual Identities and The Media: An Introduction* (Routledge 2015) 70.

⁹¹³ Chataluka, Egyptian Refugee to Author.

⁹¹⁴ *ibid.*

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popular culture prevalent in the Anglo-American context.⁹¹⁵ Cultural products such as *Glee* demonstrate sexually diverse people growing up and realising their sexual identities as teenagers.⁹¹⁶ This is not to claim that everyone watches *Glee* or other shows such *Love Victor*, rather it is to recognise that depictions of sexually diverse characters in media cement specific knowledges regarding sexual diversity.⁹¹⁷ In the context of *Glee*, characters are shown to recognise and come to terms with their identity during their teenage years, generally either beginning the show as an out character, or going through a process of painful self-recognition which culminates in “coming out” and forming a relationship with another sexually diverse character. Often, the first trope in depicting this narrative of realisation is demonstrating the character becoming increasingly comfortable with gender non-conformity. Further Cultural products in the Anglo-American context repeatedly affirm the idea that sexual diversity begins to manifest itself at an early age and culminate in the eventual recognition of a fully formed sexual identity.⁹¹⁸ Hilton-Morrow and Battles have further expanded on the increasing visibility of sexually diverse youth within cultural products.⁹¹⁹

Products such as *Love Simon* also demonstrate the focus on ‘coming out’ within narratives of “western” sexual diversity.⁹²⁰ The idea of coming out underlies the idea of a narrative of difference, this effectively being the idea that a sexually diverse person will gradually realise their difference from members of the surrounding society and over time will

⁹¹⁵ It should be noted that these representations themselves arise from psycho-social developmental models of sexuality. See further: Sigmund Freud, *Three Essays on the Theory of Sexuality* (Verso Books 1905); Richard Krafft-Ebing, *Psychopathia Sexualis; eine klinisch-forensische studie* (Enke 1886).

⁹¹⁶ *Glee* (Fox 2009-2015).

⁹¹⁷ *Love Victor* (Hulu 2020-2021).

⁹¹⁸ To pick an obvious example, there is the character of Nathan Maloney (played by Charlie Hunnam) who is shown to come to his gay identity in his mid-teenage years. Specifically, he is first encountered as a 15 year old who, shortly after accepting his own identity, quickly re-orientates his entire lifestyle around this identity. See: *Queer as Folk* (Channel 4 1999-2000).

⁹¹⁹ See: Wendy Hilton-Morrow & Kathleen Battles, *Sexual Identities and The Media: An Introduction* (Routledge 2015) 69-99.

⁹²⁰ *Love Simon* (Dir Greg Beranti: Fox 2018).

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come to articulate this as their identity. The focus on coming out has been highlighted by Puar, alongside a focus on visibility, as contributing to an ‘international gay and lesbian human rights industry’ which itself contributes to a system in which international human rights is co-constitutive with racist and nationalist logics.⁹²¹ In the context of US asylum claims, Mayers has argued that some claimants may as a result of this logic—of coming out and visibility—feel forced to castigate the culture within their country of origin as backwards, due to its reluctance to permit visible performances of sexual diversity, in order for their claim to be accepted.⁹²² This same tendency has been highlighted by Keenan in asylum claims in the UK, Canada and Australia, where she also articulates the requirements for claimants to present their identities in a manner consistent with decision-makers and Immigration Judges own conceptions of sexual diversity.⁹²³ In this sense, both cultural products and the asylum apparatus demand that sexual diversity is channelled into a specific model that involves coming out and the performance of a visible sexual identity.

Furthermore, the focus on identity itself links to several popular cultural tropes. During our interview Abdullah told me that he had some issues in articulating his asylum claim because he does not understand “sexuality” as an identity.⁹²⁴ When asked whether this had led to any problems in his claim, he told me, ‘In a way yes, during the interview. Because in the interview they were asking me questions where I was forced to identify with my

⁹²¹ Jasbir Puar, ‘Rethinking homonationalism. *International Journal of Middle East Studies*’ (2013) 45(2) *International Journal of Middle Eastern Studies* 336, 338. See Also: Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press 2007).

⁹²² Leifa Mayers, ‘Globalised Imaginaries of Love and Hate: Immutability, Violence, and LGBT Human Rights’ (2018) 26 *Feminist Legal Studies* 141, 144-152.

⁹²³ Sarah Keenan, *Subversive property: Law and the production of spaces of belonging* (Routledge 2014) 128-150.

⁹²⁴ Brian Whitaker has also noted the fact that many individuals within the Gulf region view sexuality through the lens of action or behaviour rather than identity. Though it should be noted that Whittaker himself is sceptical of the significance of this distinction. See: Brian Whitaker, *Unspeakable Love: Gay & Lesbian Life in the Middle East* (SAQI 2013) 213-216.

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sexuality'.⁹²⁵ While Abdullah told me that he was 'happy to give an answer that is culturally appropriate to the understanding of my interviewer',⁹²⁶ the fact that anyone would feel a need to give their responses in a manner that is culturally appropriate to the interviewer is concerning. It is, as I argued across chapters five and six, the 2016 API itself which encourages an identity-driven approach. Nonetheless, this approach cannot be separated from a cultural context in which sexual diversity is viewed as an identity which is expected to be central to someone's life.

Taking the example of Anglo-American products ranging from *Victim*⁹²⁷ to *Queer as Folk*,⁹²⁸ gay or homosexual identity is shown as something which fundamentally distinguishes someone from wider society. More specifically, "sexuality" is seen as marking the protagonist as a certain kind of person, who, due to being that kind of person, does certain things. These things include spending time with particular people or attending certain places. While some more recent cultural products such as *Glee* attempt to show sexually diverse youth in a relatively similar circumstance to their heteronormative colleagues, the presence of coming-out narratives and aspects of queer tension in such representations mean that identity persists as a point of differentiation between sexually diverse characters and their heterosexual counterparts. Even if this differentiation is depicted as something to be celebrated, little space is left for those who do not view sexual diversity as an identity.

Thus, I argue, the lack of representation within Anglo-American media of characters for whom their sexual diversity is not an identity means that people articulating alternative narratives of sexual diversity risk being unintelligible. An example of the people whose

⁹²⁵ Abdullah, Egyptian Refugee to Author.

⁹²⁶ *ibid.*

⁹²⁷ *Victim* (Dir Basil Deardon 1961).

⁹²⁸ *Queer as folk* (Channel 4 1999-2000).

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sexual diversity is underrepresented would be, for example, queer British Muslims who continue to practice their religion, or people who understand their sexual identity as being fluid and contingent rather than being a permanent status. Additionally, those who understand their sexual diversity as a behaviour or who—*notwithstanding* their sexual diversity—do not view themselves as different from other members of society are also underrepresented. It is, I argue, partly on account of this underrepresentation and the deployments of essentialism regarding sexual diversity, that some lawyers and activists have sought to claim that narratives of difference are a constant in the lives of sexually diverse people from any country or context.⁹²⁹

The impact that such expectations can have on sexually diverse asylum seekers can be illuminated by returning briefly to the narrative of Abdullah. As Abdullah told me, some cultures do not understand “sexuality” as a form of identity, reserving identity for familial, cultural and corporate ties. Thus, to claimants from less individualistic cultures, the idea of sexual identity—as opposed to sexual orientation (i.e., attraction) or sexual behaviour—may itself be unintelligible. This is because they have been socialised in an environment where people understand themselves as being part of a family or tribe, first and foremost, rather than as being an individual. In this sense, certain Anglo-American representations of sexually diverse identities are not compatible with more communitarian conceptions of the self. While the narrative of difference could be experienced in terms of feeling sexually attracted to members of the same sex, this form of evidence is currently prohibited under the 2016

⁹²⁹ For Example: S Chelvan, ‘The Emotional Journey and the DSSH Model: A Positive Tool for Credibility Assessment’ (SOGICA Conference, Online, 7-9 July 2020).

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API.⁹³⁰ This corresponds to recent findings by Rainbow Migration who, in one report, noted that,

UKLGIG has welcomed the focus on sexual identity rather than sexual practices in Home Office credibility assessments. This has largely been facilitated by examining a person's emotional development. With this important change, however, comes the need for critical reflection on a slightly different emerging issue. While apparently intended as non-prescriptive in the APIs, the Home Office use of this type of exploration has often resulted in swinging the pendulum away from sexual conduct to excessive focus on claimants being able to articulate sophisticated accounts of self-realisation (stories of recognising one's identity), searching for evidence of a particular account of development of identity.⁹³¹

Particularly significant here is Rainbow Migration's note that the approach currently taken by decision-makers to the 2016 API could be interpreted as a misapplication.⁹³² As this suggests, decision-makers are adopting one way of applying the 2016 API, rather than interpreting it as providing non-exhaustive examples.

In a similar vein, participants told me about how having a certain sexual or romantic history was often viewed as evidence that their narrative was not credible. For example,

Abasi told me about how,

⁹³⁰ Uk Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation in Asylum Claims; (Home Office 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/sexual-orientation-in-asylum-claims-v6.pdf accessed 20th September 2019, 23.

⁹³¹ UK Lesbian and Gay Immigration Group, *Still Falling Short: The Standard of Home Office Decision-Making in Asylum Claims Based on Sexual Orientation and Gender Identity* (UKLGIG 2018) available at

https://uklgig.org.uk/?page_id=1225, 23-26.

⁹³² *ibid.*

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They were asking me about people that I've been with, how long I've been with them. Like partners and stuff. They wanted to make clear that I am gay. There was something here about one of the people that I was with, one of my exes. They were asking a lot of questions about him, because at the moment we are friends... they would ask the questions in a way that they don't want any sexual information, but they actually still want it.⁹³³

Similarly, Babu told me that

They would ask me questions that were borderline [in terms of asking sexually explicit questions], like you can answer quite elaborate and explain. Which I did because I didn't want to give a chance of them thinking "oh possibly he is not gay".⁹³⁴

These kind of questions suggest that decision-makers see relationships as an integral part of being a sexually diverse person. However, as discussed in my definition of terms⁹³⁵ and the work of Savin-Williams, there is rarely a perfect alignment of orientation, behaviour, and identity.⁹³⁶ As this suggests, someone may have had multiple relationships with people of the "opposite" sex and none with people of the "same" sex, and yet still be sexually diverse. Furthermore, some claimants may have had sexual orientations and identities that have changed over time.

Despite the above, numerous cultural products work to secure an understanding of sexual diversity as being something innate that people are born into. For example, Lady Gaga's *Born This Way*,⁹³⁷ as an interjection into the debate on whether sexual

⁹³³ Abasi, Egyptian Refugee to Author.

⁹³⁴ Babu, Egyptian Refugee to Author.

⁹³⁵ See: Section 1.9.2.

⁹³⁶ Rich Savin-Williams, *The New Gay Teenager* (Harvard University Press 2005) 27-48.

⁹³⁷ Lady Gaga, 'Born This Way'.

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identity/orientation is a choice, has played a role in cementing the idea of sexual diversity as being something pre-given.⁹³⁸ This conception can be found within several further anti-homophobic cultural products, to the point where it can be considered to have obtained a level of cultural hegemony.⁹³⁹

Furthermore, the cultural effects of *Born This Way* suggest that sexual diversity is a universal status, thus erasing claims which rest on culturally relative experiences of sexual diversity. While the API is clear that some claimants may not express themselves in “western” terms such as lesbian, gay, or bisexual, it cannot account for the intuitive response of decision-makers to unfamiliar narratives, terminologies and self-conceptions.

Similarly, the reliance on photographs and narratives of claimants socialising with other members of sexually diverse communities can be traced to numerous social depictions of sexually diverse people as being enmeshed in networks with other members of that sexually diverse grouping, attending parties or other queer associated events such as pride, and adopting a stance of hyper visibility vis-à-vis the straight world. For example, recent depictions of sexually diverse people on television have included: *Queer as Folk*;⁹⁴⁰ *Ru Paul’s Drag Race*⁹⁴¹ (And its UK Counterpart, as well as other numerous spin-off shows)⁹⁴²; *The New Normal*;⁹⁴³ *Cucumber*;⁹⁴⁴ *Pose*;⁹⁴⁵ *The L Word*.⁹⁴⁶ I do not by any means proclaim this to

⁹³⁸ As Mayers has explored in the US context, a great deal of legal thought and history also contributes to this conception of sexual diversity. See: Leifa Mayers, ‘Globalised Imaginaries of Love and Hate: Immutability, Violence, and LGBT Human Rights’ (2018) 26 *Feminist Legal Studies* 141, 149-152.

⁹³⁹ Cultural Hegemony is deployed by Gramsci to ‘explore the relation between culture and power under capitalism’. Jackson Lears, ‘The Concept of Cultural Hegemony: Problems and Possibilities’ (1985) 90 *The American Historical Review* 567, 568.

⁹⁴⁰ *Queer as Folk* (Channel 4 1999-2000).

⁹⁴¹ *Ru Paul’s Drag Race* (Logo TV 2009-2016); (VH1 2017-Present).

⁹⁴² *Ru Paul’s Drag Race UK* (BBC Three Online 2019-Present).

⁹⁴³ *The New Normal* (NBC 2012-2013).

⁹⁴⁴ *Cucumber* (Channel 4 2015).

⁹⁴⁵ *Pose* (FX 2018- Present).

⁹⁴⁶ *The L Word* (Showtime 2004-2009).

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be an exhaustive list, but it is crucial to recognise that in each of these depictions sexually diverse people are portrayed as forming a self-contained community, focused around intra-community socialising and open—visible—manifestations of sexual diversity.⁹⁴⁷ When combined with a policy permitting questions about a perceived lack of interaction with other sexually diverse people, this could lead to claimants feeling compelled to provide photographic evidence of themselves socialising with other sexually diverse people.

The findings of the SOGICA study have confirmed that concerns regarding a switch to identity-based conceptions of sexual diversity are present across European asylum systems and have, as one of their final recommendations, recommended moving away from stereotypical reasoning.⁹⁴⁸ Further, Leilah Zadeh, has documented the reliance of the Home Office on developmental narratives and the emotional dimensions of identity.⁹⁴⁹ As discussed in chapter five, these stereotypes are often not recognised as such because of the ways in which sexual diversity is presently analytically characterised.⁹⁵⁰

For example, Abasi told me about how he felt the Home Office ‘needed a lot of convincing’. Detailing how he used ‘photos of going to clubs and going to pride... just to support my statements.’⁹⁵¹ These photos were primarily required to show that he was an active participant in the LGBT+ community, in-line with the way gay identities are understood in the UK. Similarly, Chataluka told me about how his case was helped by the fact that he is a

⁹⁴⁷ See further: Giovanni Porfido, ‘Queering the Small Screen: Homosexuality and Televisual Citizenship in Spectacular Societies (2009) 12 *Sexualities* 161; Sebastian Buckle, *Homosexuality on the Small Screen: Television and Gay Identity in Britain* (Bloomsbury 2018).

⁹⁴⁸ ‘Final Recommendations | SOGICA’ (*Sogica.org*, 2020) <<http://www.sogica.org/en/final-recommendations/>> accessed 11 July 2020.

⁹⁴⁹ Lellia Zadeh, ‘The UK: Excessive Focus on Articulation of “Self-Realisation” and Development of Identity’ (SOGICA Conference, Online, 7-9 July 2020).

⁹⁵⁰ See section: 5.1

⁹⁵¹ Abasi, Egyptian Refugee to Author.

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person who keeps a lot of data... it was just all what left from my relationships or my private life. So, when I used to chat with people, I used to save a copy of the chats and have them on my external hard drive. Photos too, photos of my ex-boyfriends.⁹⁵²

He went on to admit that to generate the evidence of him going to clubs he had to ‘do it every week... to take pictures and more’ but that he would not generally do this outside of the context of producing evidence in order to support his asylum claim.⁹⁵³

Alongside these aspects of modern pop-culture, recognition should also be given to the role of older literary works in transmitting knowledge about sexual diversity. Sedgwick has examined the role literary texts—such as *Billy Budd* and *the Picture of Dorian Grey*—have played in establishing contemporary knowledge structures around homosexual and gay identities.⁹⁵⁴ She argues that,

The year 1891 [was] a good moment to which to look for a cross-section of the inaugural discourses of modern homo/heterosexuality—in medicine and psychiatry, in language and law, in the crisis of female status, in the career of imperialism. *Billy Budd* and *Dorian Gray* are among the texts that have set the terms for a modern homosexual identity.⁹⁵⁵

Given the wealth of work already done on the role of literature in shaping sexual diversity, I do not devote further attention to the matter in this thesis. However, the role of the literature in shaping sexual diversity—as explored by the footnoted authors—should be considered in

⁹⁵² Chataluka, Egyptian Refugee to Author.

⁹⁵³ *ibid.*

⁹⁵⁴ Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press 2008) ESP 67-131.

⁹⁵⁵ *ibid* 49.

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addition to the wider analysis here offered.⁹⁵⁶ The key insight to be gained from this analysis, is the recognition that conceptions of sexual diversity are historically rooted forms of knowledge and that, therefore, even when neutral terminology is employed, it is a difficult for decision-makers to escape the impacts of the culture in which they have been socialised and to offer assessments that do not (re)produce dominant discourses on sexual diversity.

7.2.2 Regimes of Knowledge, Thinkability and the Epistemology of the Closet

The title of this section is borrowed from Sedgwick's 1990 title *Epistemology of the Closet*.⁹⁵⁷ In this text, Sedgwick delineates how *Regimes of Knowledge* come to dominate our understandings of phenomena such as sexual diversity. Her regimes of knowledge, like Foucauldian discourse, build a picture of how certain forms of knowledge set the terms of discussion. They are useful for assisting us to understand how binaries such as that between hetero-and-homosexuality structure debates. As she put it,

I am attempting to make the strongest possible introductory case for a hypothesis about the centrality of this nominally marginal [the binary between hetero and homo sexuality], conceptually intractable set of definitional issues to the important knowledges and understandings of twentieth-century Western culture as a whole.⁹⁵⁸

The significance of this, therefore, is analysing how knowledge regarding topics such as sexual diversity impact all acts of cultural significance. These impacts are particularly

⁹⁵⁶ Jeffery Meyers, *Homosexuality and Literature 1890-1930* (Bloomsbury 2016); Joseph Bristow, *Effeminate England: Homoerotic Writing After 1885* (Columbia University Press 1995); Scott Nelson, 'Narrative Inversion: The Textual Construction of Homosexuality in E.M Forster's Novels' (1992) 26 *Stylistics and strategies* 310; Brian Reade, *Sexual Heretics: Male Homosexuality in English Literature from 1850-1900* (Routledge 1970). See also: Jessica Murray, 'A Zombie Apocalypse: Opening Representational Spaces for Alternative Constructions of Gender and Sexuality' (2013) 29 *Journal of Literary Studies* 1.

⁹⁵⁷ Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press 2008).

⁹⁵⁸ *ibid* 2.

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profound in the refugee context because status determinations rest on a third party accepting the validity of the claimant's diversity.

Sedgwick takes this further by reflecting on the role of ignorance in structuring relations of knowledge. Understanding the role of ignorance is important because a failure to understand the role of ignorance may mean that some performances of diversity are not recognised. Specifically, Sedgwick argues that,

If ignorance is not—as it evidently is not—a single manichean, aboriginal maw of darkness from which the heroics of human cognition can occasionally wrestle facts, insights, freedoms, progress, perhaps there exists instead a plethora of *ignorances*, and we may begin to ask questions about the labor, erotics, and economics of their human production and distribution. Insofar as ignorance is ignorance of a knowledge—a knowledge that may itself, it goes without saying, be seen as either true or false under some other regime of truth—these ignorances, far from being pieces of the originary dark, are produced and correspond to particular knowledges and circulate as part of particular regimes of truth.⁹⁵⁹

Thus, an analysis of ignorances which is attentive to the aspects of sexual diversity which are not mentioned within either cultural products or within the Home Office's 2016 API is called for. In this sense, I look to offer a brief examination of the ways in which ignorance comes to structure Refugee Status Determinations. In offering this examination, I attribute to ignorance a position of equality with knowledge.

⁹⁵⁹ *ibid.*, 8.

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Firstly, it is important to recognise, that in the aftermath of the decision of the European Court of Justice in *A, B, and C*,⁹⁶⁰ direct discussion of sexual activity is not permitted during an asylum claim.⁹⁶¹ This represents an important point in ensuring that asylum seekers are treated with dignity. However, it requires a degree of critical examination. This is because, by denying the ability to refer to, or ask questions regarding, sexual activity, a form of ignorance is established as a central feature of such asylum claims. Because evidence cannot be gathered regarding sexual activity, the regime of truth that prioritises narratives of self-realisation and social participation is instead mobilised. For those who are not out, or are not able to articulate a complex narrative of self-realisation, the focus on social participation can prove to be a roadblock in discharging the evidential burdens of an asylum claim.

As has been argued in the preceding chapters, the focus on sexual activity that was widely reported on prior to the *A, B, and C* decision has been replaced with a focus on social activity. For example, Eko told me that, ‘I always joined for the Pride London from 2013, so my lawyer provided pictures from the pride I was joining and then I had a statement from all my friends saying that I was gay’.⁹⁶² In this way, it is important to recognise the role of ignorance towards—or active avoidance of—discussion of sexual activity in structing the Home Office approach under the 2016 API. As documented by Masani, this can lead to problems for those claimants who do not have a partner or social networks linked to their sexual diversity. Masani told me that,

⁹⁶⁰ *Cases C-148 to C-150, ABC v Staatssecretaris van Veiligheid en Justitie* [2014] ECRI- 2406.

⁹⁶¹ This does not stop information relating to sexual activity being discussed, it merely means that such information is never directly requested. See: Alex Powell, ‘Normative Understandings: Sexual Identity, Stereotypes, and Asylum Seeking’ in Chris Ashford and Alexander Maine, *The Research Handbook on Gender, Sexuality, and the Law* (Edward Elgar 2020).

⁹⁶² Eko, Indonesian Refugee to Author.

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My lawyer had told me to do things like go to a lesbian bar and take photos and go to pride and take photos, but I was just doing that to try and satisfy them that I was a lesbian. In the end, this was what made me not successful in my first application.⁹⁶³

Masani felt that her first claim failed primarily because she was not able to provide enough evidence of her participation in social networks based around sexual identity, as well as not being able to provide a narrative of self-realisation linked to this identity. The issues she faced are likely to have been compounded by the fact that she had previously been in a heterosexual marriage. Given the focus on identarian and societal frameworks it is likely membership of heteronormative institutions such as marriage may lead to decision-makers requiring more from asylum claimants, even if the marriage itself is provided with a compelling explanation.

Connectedly, it is important to consider the position in which this leaves those claimants who are single or not seeking a relationship. The story of Yew Fook Sam presents an interesting point of exploration here. Sam's story made national news after the Home Office attempted to argue at tribunal that he could not be gay because he had not had a "same" sex relationship.⁹⁶⁴ This also shows how ignorance continues to play a constitutive role in knowledges regarding sexual diversity. Principally, it shows how "common-sense" thinking interpolates sexual diversity through a single axis of analysis. It is premised on the assumption that if a claimant is genuine, they will be seeking protection so that they can 'come out', live openly, and find a partner. In this sense, an ignorance of the heterogenous nature of sexual diversity comes to structure the way in which sexually diverse people are

⁹⁶³ Masani, Ugandan Refugee to Author.

⁹⁶⁴ Helen Pidd, 'Home Office Gives Man Asylum After Accepting People Can Be Gay And Single' (*the Guardian*, 2019) <<https://www.theguardian.com/uk-news/2019/dec/23/home-office-gives-man-asylum-after-accepting-people-can-be-gay-and-single>> accessed 13 April 2020.

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understood. Of course, the reality is that sexual diversity includes among its number those seeking monogamous relationships, those seeking sexual gratification without any social ties, and those who do not seek any kind of relationship at all.

In this sense, the current approach is structured by an ignorance to the many diverse forms that relationships may take.⁹⁶⁵ This ignorance is not in alignment with the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.⁹⁶⁶ These principles define sexual orientation as, ‘each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender and or the same gender or more than one gender.’⁹⁶⁷ In line with this definition, sexual attraction and sexual activity both form a part of globally agreed best practice on attempting to define sexual diversity.⁹⁶⁸

As Hamzic points out, the Yogyakarta principles are successful in avoiding essentialist and limited definitions of sexual diversity by avoiding reliance on social, sexual, or emotional aspects and offering a more holistic approach which enables a diverse range of people to be recognised as being sexually diverse.⁹⁶⁹

Alongside this, as the API notes, decision-makers are required to have regard to the Country-of-Origin Guidance when interviewing and examining any asylum claimant.

However, Country Guidance itself contains several omissions which impact Refugee Status Determinations. In the UK context, Country of Origin Guidance is drawn from various

⁹⁶⁵ Berg and Millbank have also drawn attention to the effective requirement of monogamous relationships to successful asylum claims. See: Laurie Berg & Jenni Millbank, ‘Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Seekers’ (2009) 22 *Journal of Refugee Studies* 195.

⁹⁶⁶ ‘Yogyakarta Principles,’ available at: <http://www.yogyakartaprinciples.org> [last accessed 6th May 2020]

⁹⁶⁷ *ibid.*

⁹⁶⁸ See Further: Vanja Hamzic, ‘The Case of “Queer Muslims”’: Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Social Ethos’ [2011] 11 *Human Rights Law Review* 237, 249-252.

⁹⁶⁹ *ibid.*, 239; 249-252.

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sources.⁹⁷⁰ However as Douglas McDonald-Norman has argued, information on sexual diversity within such guidance is often highly limited.⁹⁷¹ Thus another ignorance is given a central role in the process.

Sedgwick's work around ignorances can be supplemented by looking at Tamale's work regarding the function of silences. Tamale argues that,

[There are] different meanings attached to the concept of silence. Though in the dominant Western tradition voice is valorised and silence constructed as a total blank, in many African cultures silence can be as powerful and as empowering as speech. For instance, studies have shown that there is a legitimate silence surrounding the sexualities of some African women, one that is ambiguous and not able to be engaged.⁹⁷²

This approach corresponds to Sedgwick's interpretation of ignorance, positing silences—like ignorance—as themselves being a form of knowledge. In this sense, a failure to be attentive to the role of ignorance and silences may lead decision-makers to misunderstand the nature of sexual diversity within different societies. Put another way, I am arguing that a silence or ignorance regarding the cultural role of silence may undermine the ability of decision-makers to understand how sexual diversity is conceptualised within refugee countries of origin. Because, as Tamale's work informs us, silence can itself be seen as a form of empowerment within the sexual lives of women from Africa. This may mean, for example, that far from

⁹⁷⁰ An in-depth legal analysis of Country Guidance Determinations has been undertaken by Vogelaar. See: Femke Vogelaar, 'A Legal Analysis of a Crucial Element in Country Guidance Determinations: Country of Origin Information' (2019) 31 *International Journal of Refugee Law* 492.

⁹⁷¹ See Generally: Douglas McDonald-Norman, 'No One to Bear Witness: Country Information and LGBTQ Asylum Seekers' (2017) 2 *Refuge* 88.

⁹⁷² Sylvia Tamale, 'Researching and Theorising Sexualities' in Sylvia Tamale (Ed), *African Sexualities A Reader* (Pambuzuka Press 2011) 13.

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suggesting a lack of autochthonous expression of sexual diversity, silence may itself communicate different conceptions of sexual diversity. However, if silence is merely interpreted as a lack of knowledge or an absence of communication, this complexity is elided.

A final form of structuring ignorance which requires examination is that around the social circumstances of asylum claimants while in the UK. As previously explored, all participants documented experiences which included being asked to provide photographic evidence and testimonies of their engagement with other LGBT+ people. Such expectations fail to account for the material circumstances of asylum seekers. For example, in chapter five we explored the experience of Abeo when he first came to the UK, we looked at how he was living in a shared apartment in Middlesbrough. As Abeo's narrative made clear, there are a multitude of circumstances which may prevent asylum seekers from manifesting their sexual diversity. These circumstances might relate to housing, as they do in Abeo's case. But also, as I have argued elsewhere, they might relate to financial hardship which prevents people from entering gay and lesbian spaces, many of which can be prohibitively expensive.⁹⁷³

Other considerations, such as fears of being seen by family based in the UK, or a desire to remain a part of a community which continues to practice aspects of the culture within the claimant's country of origin, may also play a role. Each of these factors may impact the ability of claimants to meet with Home Office expectations of an active engagement with other sexually diverse people. In turn, this lack of an ability to meet and engage with others sexually diverse people may mean that anticipated narratives of self-

⁹⁷³ See: Alex Powell, 'Work Ban Forces Asylum Seekers Into Destitution – But We Now Have A Chance To Change This Policy' (*The Conversation*, 2019) <<https://theconversation.com/work-ban-forces-asylum-seekers-into-destitution-but-we-now-have-a-chance-to-change-this-policy-112254>> accessed 19 March 2020.

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realisation and discovery are not applicable to the claimant because they have had limited engagement with others who understand their diversity in these terms.

Regardless of the exact reason why, the expectations within the 2016 API are dependent on an ignorance of the material circumstances of sexually diverse asylum claimants. Instead, these forms of evidence operate on a flawed assumption that asylum seekers have access to the means to play an active part in sexually diverse communities and, in so doing, to produce evidence to support their claimed identity. In essence, therefore, putting aside problems with contemporary knowledge on sexual diversity, there is also an urgent need to consider the economic and social limitations claimants face. The sexual diversity of asylum claimants does not occur within a vacuum. Sexually diverse people claiming asylum in the UK are subject to economic, educational, and social pressures. Currently, a fundamental ignorance of these factors—as shown by the assumptions of means made in the 2016 API—operates at the heart of the UK asylum apparatus.

The central point of this section has been to show that as well as needing to account for the forms of knowledge regarding sexual diversity, there is also a need to account for the role of ignorances. This need is particularly keen because, as Spade has argued, certain categories of knowing—certain questions that people simply come to accept as necessary and pertinent information—'shape the world into those categories that, ultimately are taken for granted by most and thus appear ahistorical and apolitical.'⁹⁷⁴

⁹⁷⁴ Dean Spade, 'Normal Life: Administrative Violence, Critical Trans Politics, & The Limits of Law' (Duke University Press 2015) 76.

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7.3 Not Gay Enough for the Government: Administrative Violence in the UK Asylum System

This section explores the ways in which the governmental knowledges and ignorances explored in this thesis lead to claimants experiencing forms of administrative violence which undermine the goals of the Refugee Convention.⁹⁷⁵

The Refugee Convention, as discussed in chapter four, was created in the aftermath of the Second World War.⁹⁷⁶ The original goals of the convention lay in offering a form of surrogate protection to people exposed to violence and persecution within their Country of Origin.⁹⁷⁷ Although the Convention itself is an instrument of international law, its implementation is a matter for the administrative frameworks of individual states. No international body has any enforcement powers over the Convention, with the UNHCR adopting only a monitoring and advisory role. As a result of this, where administrative frameworks are imposed in ways which do not take account of the lived experiences of asylum claimants, forms of administrative violence can be enacted against those requiring asylum precisely because of their vulnerability to persecution.

The violence experienced by people interacting with the UK asylum apparatus can come in the form of re-traumatisation, arising from being required to share their experiences at the point of interview. It can also come in the form of emotional or psychological harm caused by the drawn-out process, a time during which the fear of deportation is never far from one's mind and when opportunities for self-realisation and improvement⁹⁷⁸—through

⁹⁷⁵ UN General Assembly, 'Convention Relating to the Status of Refugees', 28 July 1951, United Nations, Treaty Series, vol. 189, 137. See Also: UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, 267.

⁹⁷⁶ James Nafziger, 'Refugee Law, A Commemorative Introduction' (1992) 28 *Willamette law Review* 703, 706.
⁹⁷⁷ *ibid.*

⁹⁷⁸ For example, Abasi told me that: 'So, I claimed asylum in January, the second interview was in July and waiting is the hardest part because I wasn't sure what was going to happen. At any point they could just tell me okay, you're not welcome to stay so just take your stuff and go home.' Abasi, Egyptian Refugee to Author.

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methods such as undertaking gainful employment—are denied. Violence can also come in the form of symbolic violence, caused by having one’s way of understanding the world denied.

Butler has argued that law enacts violence by cementing existing regimes of governmentality.⁹⁷⁹ In the guise of refugee law, the potential of law to act as an infliction of violence is effervescent and clear. This is because the decision-maker possess the potential to—through their act of interpretation of both the facts of the scenario and the legal framework—return the asylum claimant to a space of persecution and danger. Thus, as Butler argues, ‘legal violence is there, not only in sentencing practices... but also in the binding character of law’.⁹⁸⁰ In administrative processes, this legal violence is often all the worse because the people undertaking the act of interpretation disclaim that interpretation as pure bureaucracy. Thus, they disregard their own interpretive role and articulate a decision as if it were a ubiquitous, and objective, decision of the state.⁹⁸¹ In so doing, they employ objective languages, leading to results such as the Home Office informing asylum claimants that, despite their lived experiences it has been found that ‘you are not a homosexual’.⁹⁸²

When thinking about administrative violence, it is important to question why certain instantiations of violence give rise to political energy, while others do not. Compare for example, the public outcry at the Windrush scandal⁹⁸³ to the continuing—with some notable

⁹⁷⁹ Judith Butler, *The Force of Nonviolence* (Verso 2020) 132.

⁹⁸⁰ Judith Butler, *The Force of Nonviolence* (Verso 2020) 132.

⁹⁸¹ I have explored this disclaiming of responsibility elsewhere. See: Alex Powell, ‘Officials Working Within Hostile Government Departments Are Not Free From Blame’ (*The Conversation*, 2018) <<https://theconversation.com/officials-working-within-hostile-government-departments-are-not-free-from-blame-98741>> accessed 23 March 2020.

⁹⁸² See: Nick Gill, ‘Nothing Personal: A Legal Analysis of a Crucial Element in Country Guidance Determinations: Country of Origin Information’ *Geographies of Governing and Activism in the British Asylum System* (John Wiley and Sons 2016) 48-75.

⁹⁸³ See for example: Amelia Gentleman, *The Windrush Betrayal: Exposing the Hostile Environment* (Faber Publishing 2019); Maya Goodfellow, *Hostile Environment: How Immigrants Became Scapegoats* (Verso 2019).

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exceptions⁹⁸⁴—indifference shown by the British Public to the issues faced by asylum seekers.⁹⁸⁵ The different treatment of these two issues is useful for demonstrating the role that frameworks of knowledge have on how reality is conceptualised. Butler has posited one way of thinking through this, arguing that

lives appear one way or the other only when viewed from specific historical perspectives; they acquire and lose value depending on the framework in which they are regarded, which is not to say that any given framework has the full power to decide the value of life. The differential ways in which the value of life is gauged are informed by tacit schemes of valuation according to which lives are deemed to be more or less grievable; some achieve iconic dimensions—the absolutely and clearly grievable life—while others barely make a mark—the absolutely ungrievable, a loss that is no loss.⁹⁸⁶

In this sense, I argue that the current apparatus which focuses so heavily on preventing unmeritorious claims situates asylum seekers as ungrievable, as a life not worth living, and therefore, as individuals who do not demand immediate political action to remedy injury they suffer. I argue this because, rather than focusing on ensuring that those requiring it receive protection, there is anxiety to prevent false claims.⁹⁸⁷ As a result of this, and in direct

⁹⁸⁴ See for example: Kirstie Brewer, 'How Do I Prove A Thing I've Tried To Hide My Whole Life?' (*BBC News*, 2020) <<https://www.bbc.co.uk/news/stories-51636642>> accessed 23 March 2020; Jamie Grierson, 'Home Office Refused Thousands Of LGBT Asylum Claims, Figures Reveal' (*the Guardian*, 2020) <<https://www.theguardian.com/uk-news/2019/sep/02/home-office-refused-thousands-of-lgbt-asylum-claims-figures-reveal>> accessed 23 March 2020.

⁹⁸⁵ This was demonstrated forcefully on August 11th, 2020, when 49% of the British Public reported having little or no sympathy for asylum seekers who had crossed the channel from France. See: 'Daily Question | 11/08/2020 | YouGov' (*Yougov.co.uk*, 2020) <<https://yougov.co.uk/topics/travel/survey-results/daily/2020/08/11/f4dc7/1>> accessed 13 August 2020.

⁹⁸⁶ Judith Butler, *The Force of Nonviolence* (Verso 2020) 73.

⁹⁸⁷ Raj has argued that refugee status determinations are dominated by this desire to ensure that false claimants are refused. See: Senthurun Raj, 'Affective Displacements: Understanding Emotions and Sexualities in Refugee Law' (2011) 36 *Alternative Law Journal* 177; Senthurun Raj, 'Queering Fears: Pro-LGBTI Refugee Cases' in

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contradiction to the instructions of the 2016 API, the default position of many decision-makers is that claimants are attempting to deceive in order to gain false residency in the UK⁹⁸⁸—that they are, in some way, not deserving of protection—and that, therefore, they do not figure as lives worth sheltering.

The significance of drawing attention to the violence perpetuated by the asylum apparatus lies in drawing attention to the role of politics in refugee status determination. That is, to make the claim that systems of administration are not merely bureaucratic or legal acts of interpretation but rather pre-eminently political questions. To be more precise, the question of refugee classification sits within the scheme of bio-politics. Thus, refugee status determinations serve as points at which states decide whether or not to foster the lives of claimants or to return them to zones where they face the potential of violence.

To quote Foucault then, the value of recognising the experiences of asylum claimants as a form of violence lies in drawing attention to the reality that,

The real political task ... is to criticize the workings of institutions that appear to be both neutral and independent; to criticize and attack them in such a manner that political violence that has always exercised itself through them will be unmasked so that one can fight against them.⁹⁸⁹

Chris Ashford, Alan Reed and Nicola Wake, *Legal Perspectives on State Power: Consent and Control* (Cambridge Scholars Publishing 2016) 126; 147–8; Senthurun Raj, 'A/Effective Adjudications: Queer Refugees and the Law' (2017) 38(4) *Journal of Intercultural Studies* 453. This tendency has also been pinpointed by Jubany. See: Olga Jubany, 'Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within' (2011) 26 *International Sociology* 74, 74-80. Finally, I have explored this in the context of Tribunal and Upper Tribunal decision-making. See: Alex Powell, 'Normative Understandings: Sexual Identity, Stereotypes, and Asylum Seeking' in Chris Ashford and Alexander Maine, *The Research Handbook on Gender, Sexuality, and Law* (Edward Elgar 2020).

⁹⁸⁸ See generally: Olga Jubany, 'Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within' (2011) 26 *International Sociology* 74.

⁹⁸⁹ Noam Chomsky and Michel Foucault, *Human Nature: Justice Vs Power* (Dutch Television, 1971), online video, <http://video.google.com/videoplay?docid=16344948707339`080#>. Accessed 6th April 2020.

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The next section, therefore, offers a working definition of administrative violence, before I go on to discuss some of the experiences recounted by participants and brought to light within recent media coverage.

7.3.1 Arendt on Violence: Bureaucracy and Administrative Violence

Traditional definitions of violence have focused on it as an ultimate manifestation of political power. For example, Wright-Mills argues that ‘all politics is the struggle for power; the ultimate kind of power is violence’.⁹⁹⁰ In this guise, violence is envisaged as something spectacular, as a manifestation of pure power. Often it is viewed as taking the form of the concentration camp or police brutality of the kind best captured in Giorgio Agamben’s *Homo Sacer*.⁹⁹¹ This, is, in my view, an overly narrow definition which fails to account for the multiple guises that violence may take. Indeed, some of the most prevalent forms of violence within contemporary liberal societies are not physical. As Spade has argued, in the context of analysing the legal treatment of transgender people in the US legal system, violence often figures as a series of ‘daily, mundane, business as usual acts.’⁹⁹² Indeed, as Arendt has argued, often the most disturbing thing about violence is its mundanity.⁹⁹³ As Arendt has further argued, the contemporary form of government most often permitted to dispense violence is ‘bureaucracy or the rule of an intricate system of bureaus in which no men, neither one of the

⁹⁹⁰ Charles Wright Mills, *The Power Elite* (Oxford University Press 2000) 171.

⁹⁹¹ See generally: Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998).

⁹⁹² Dean Spade, ‘Normal Life: Administrative Violence, Critical Trans Politics, & The Limits of Law’ (Duke University Press 2015) 151.

⁹⁹³ Hannah Arendt, ‘Eichmann In Jerusalem’ (*The New Yorker*, 1963)

<<https://www.newyorker.com/magazine/1963/02/16/eichmann-in-jerusalem-i>> accessed 6 April 2020. See also: Alex Powell, ‘Officials Working Within Hostile Government Departments Are Not Free From Blame’ (*The Conversation*, 2018) <<https://theconversation.com/officials-working-within-hostile-government-departments-are-not-free-from-blame-98741>> accessed 6 April 2020; Hannah Arendt, *On Violence* (Harcourt 1970).

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best, nor the few or the many, can be held responsible, and which could properly be called rule by nobody'.⁹⁹⁴

My definition of administrative violence builds on these reflections about mundanity to consider administrative violence as containing three key features borrowed from Hannah Arendt. Firstly, 'Violence is by nature instrumental; like all means, it always stands in need of guidance and justification through the need it pursues.'⁹⁹⁵ For example, the instantiations of violence created by the UK asylum system are justified—if they are recognised at all—on the basis of a need to ensure that false claimants are denied. The Second is an awareness of the relationship between violence and power.⁹⁹⁶ Although, it should be noted that violence is often motivated precisely because a lack of power is felt.⁹⁹⁷ However, violence is most commonly an enactment made by a person or institution wielding a form of power, even if that power is merely the physical brunt of a weapon. For example, the capacity to place asylum claimants into immigration detention is an example of the institutional powers possessed by the Home Office. It marks their capacity to enact violence against asylum claimants. Thirdly, I follow Arendt in arguing that 'the greater the bureaucratization of public life, the greater will be the attraction of violence.'⁹⁹⁸ This links to her reflections regarding the banality of evil for, as she puts it, 'In a fully developed bureaucracy there is nobody left with whom one can argue, to whom one can present grievances.'⁹⁹⁹ In this case, the example to draw on, again, is that of the refused asylum claim. When an asylum claim is refused, the former claimant is exposed to a lack of social, economic and emotional support and potential

⁹⁹⁴ Hannah Arendt, *On Violence* (Harcourt 1970) 38.

⁹⁹⁵ *ibid* 51.

⁹⁹⁶ *ibid* 52.

⁹⁹⁷ As Arendt notes violence is often a question of implements, such as weapons, as much as it is one of power. See: Hannah Arendt, *On Violence* (Harcourt 1970) 53.

⁹⁹⁸ *ibid* 81.

⁹⁹⁹ *ibid* 81.

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deportation upon the decision of the Home Office. While it is true that appeal to an Immigration Judge is possible, this itself can lead to several months in which the claimant is not eligible for support. In this sense, I associate the delays, formalism, and structural nature of institutions such as the Home Office themselves with administrative violence.

To draw all of this together, building on the three preceding reflections, administrative violence can be understood as *injury sustained through the implementation of instrumental, formal processes which are justified as a social necessity, and operating at a level of abstraction, where attribution of individual responsibility is obscured or entirely denied.*

Thus, adopting this definition, it can be seen that a plethora of actions which take place in the asylum apparatus constitute enactments of administrative violence. Often, this violence is the result of scepticism regarding claims or the inability of Home Office decision-makers to act quickly and correctly when assessing such claims. Linking back to the previous sections, therefore, the key point is that administrative violence is often the result of mismatches between the expectations of decision-makers and the lived realities of claimants. That is to say, when an asylum claimant does not articulate a narrative which aligns with ordinary conceptions of and discourses about sexual diversity, administrative violence can result.

7.3.2 Administrative Violence and Exclusion: Isolation, Boredom & Lack of Purpose

As previously mentioned, one means through which administrative violence may be inflicted is through the use of immigration detention. Only three participants were subject to detention or holding. Nonetheless, all three described the distress this caused them. Indeed, in all cases the distress was recounted in similar terms as the persecution they had fled in their country of origin. For example, Babu told me that,

It was very unlawful of them to actually detain me and there was nothing that I had done wrong, you know, I just claimed asylum. But then I was put in a detention centre

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and I had to wait another 6 or 7 hours before I was actually transferred from Croydon to that detention centre... I can't remember what it's called now. And you're only allowed one phone call and then they take your phone away from you so you can't call your family, you can't call anyone. You can't have a smartphone in there because they are afraid that people will take pictures and report that to authorities and stuff or even like Human Rights Watch.¹⁰⁰⁰

In Babu's case, he told me about how he had been detained despite having more than 6 months remaining on his visa. He situated the confusion and distress caused by being detained as having a lasting impact on his mental health. In this scenario, Babu also told me about how, even after having his claim granted, he was anxious that when the time came to renew his claim after 5 years he would be returned to detention.

Babu's scenario is a prime example of how administrative violence can arise within a system designed to protect those fleeing persecution. Babu's experience meets all three of the articulated criteria for administrative violence. The harm he suffered—mental health trauma and distress—was caused by an institutional formal process justified with the need to ensure that people without proper legal status can be prevented from remaining in the UK. Additionally, the process operates at a level of abstraction whereby no individual can be properly held to account for the experience's Babu endured.

Babu's own interpretation of this was that the operative hearing his screening interview did not believe he was a sexually diverse person. If this interpretation is correct, Babu was subject to administrative violence precisely because the decision-maker at screening adopted a flawed and limited conception of Babu's sexual diversity before even

¹⁰⁰⁰ Babu, Egyptian Refugee to Author.

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taking the time to undertake a substantive interview. As a result of this, Babu was left feeling anxious about future interactions with the Home Office. As previously mentioned, this anxiety was particularly related to the requirement to reapply for status after 5 years. Because of this anxiety, Babu's ability to move on and build a life in the UK had been limited. His narratives around future interactions with the Home Office demonstrated clear distress and fear, suggesting that his experience of being detained has had a lasting impact on both his mental health and on his relationship with authority figures in the UK.

In a similar register, other participants recounted how the interview itself had left them feeling distressed due to re-traumatisation and the lingering threat of deportation. For example, as we discussed in chapter five, Abeo was left distressed by the repetition of the same questions. He situated repeatedly having to re-live traumatic experiences as a cause of frustration and distress. He also indicated that the repeated questioning had left him feeling anxious that he was being disbelieved. This led him to fear that he was imminently facing deportation to a country where he had just fled an assassination attempt.

Other participants were distressed by issues such as a lack of privacy in the facility in which they undertook their screening interview. For example, Adroa told me of how,

I went there for the screening and that is the first time I put my case forward and it was a very very difficult time. I remember by then, one of the most challenging things was the lack of privacy. It was just like an open building, there was no kind of little space where you could speak to anybody. You could just speak to someone behind a screen with a microphone and you just have to shout. I'm apply for asylum ... what... on the grounds WHAT? And they just read everything, is it political? No. Is it Religious? No. Is it family? No. And there was no tick for sexuality. And then I have

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to say it is because I am a gay man and there are people there that are listening, because you have to shout so that you could be heard. Otherwise, she cant hear and she was asking and asking. So then I was expected to just give that kind of information... and I didn't want to express myself because by the way for the first time I am standing in front of someone and expressing my sexuality.¹⁰⁰¹

For Adroa, the lack of privacy led to him feeling traumatised. Here, the formally required process of properly investigating the asylum claim itself figures as a form of administrative violence, exposing claimants to potential re-traumatisation and anxiety and maintaining the possibility of deportation as a continuing threat throughout the asylum process.

A further form of violence centres on the delay's asylum claimants face during the process. These delays can arise in terms of awaiting a decision, having a decision incorrectly denied and resultantly being without status for a period, and from the time involved in appealing a decision. A relatively extreme example can be taken from the case of Aderonke Apata who was left to wait 13 years before having her status as a refugee recognised on the basis that the Home Office did not believe she was a lesbian because she had children.¹⁰⁰²

When speaking at an LGBT+ History Month event hosted by Bindmans LLP, Aderonke described the distress she had experienced as a result of the delays in recognising her status.¹⁰⁰³ In particular, she drew attention to the significant mental health trauma she had suffered from the limitations imposed on her livelihood. She identified herself as having suffered depression and linked this to being prohibited from working and undertaking other

¹⁰⁰¹ Adroa, Ugandan Refugee to Author.

¹⁰⁰² See: Diane Taylor, 'Nigerian Gay Rights Activist Wins UK Asylum Claim After 13-Year Battle' (*the Guardian*, 2017) <<https://www.theguardian.com/world/2017/aug/14/nigerian-gay-rights-activist-aderonke-apata-wins-uk-asylum-claim-13-year-battle>> accessed 10 April 2020.

¹⁰⁰³ Aderonke Apata, 'LGBT History Month Panel Event: How the State Really Views Us'. (Bindmans LLP February 25th 2020).

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fulfilling activities. There are numerous other examples of the impact that a delay in gaining recognition can have. For example, as already explored, Adroa described how it took 5 years for his status to be recognised. During this time he told me about how felt he was surviving as opposed to living. While suffering these delays, claimants are prohibited from properly participating in social life, with bans on working and volunteering¹⁰⁰⁴ and a prohibition on leaving the country for travel or other reasons.¹⁰⁰⁵ Delays such as these can be construed as a form of administrative violence for reasons well put by Arendt. Namely the fact that,

What makes a man a political being is his faculty of action; it enables him to get together with his peers, to act in concert, and to reach out for goals and enterprises that would never enter his mind, let alone the desires of his heart, had he not been given this gift—to embark on something new.¹⁰⁰⁶

In this sense denying asylum claimants the right to work, volunteer and be a part of public life while their application is awaiting a decision denies them the ability to exist as political beings and is likely to result in negative mental and physical health consequences. This chimes with the findings of the campaign group Refugee Action who have found that the work ban represents a significant cause of social exclusion among asylum seekers.¹⁰⁰⁷ Indeed, as some of their participants noted, the ban and other forms of social exclusion to which asylum seekers are exposed can have longer-term consequences causing depression and other

¹⁰⁰⁴ See: Alex Powell, 'Work Ban Forces Asylum Seekers Into Destitution – But We Now Have A Chance To Change This Policy' (*The Conversation*, 2018) <<https://theconversation.com/work-ban-forces-asylum-seekers-into-destitution-but-we-now-have-a-chance-to-change-this-policy-112254>> accessed 10 April 2020.

¹⁰⁰⁵ Conversely, such a prohibition can still be considered to exist when an individual is de facto in the UK illegally, because returning would entail significant difficulty with the result that few are likely to choose to leave for anything but the most serious reasons.

¹⁰⁰⁶ Hannah Arendt, *On violence* (Harcourt 1970) 82.

¹⁰⁰⁷ 'Lift The Ban Report' (*Refugee-action.org.uk*, 2018) <<https://www.refugee-action.org.uk/wp-content/uploads/2018/10/Lift-the-Ban-report.pdf>> accessed 10 April 2020. 12.

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mental health conditions which continue to impact refugees ability to integrate and be a part of society even after they have been granted status.¹⁰⁰⁸

These fit the previously offered definition of administrative violence, because they are often justified on the mistaken notion that such policies will reduce the number of claimants coming to the UK.¹⁰⁰⁹ This shows that the violence is instrumental. Similarly, as decisions emerge from the Home Office as a body, they are undertaken at a relatively high level of abstraction. Thus, these experiences all fit the definition of administrative violence articulated in this chapter.

One final form of violence which should be considered is the symbolic violence that is inflicted when identity is disputed, or claimants are forced to identify themselves in culturally uncomfortable terms. As I explored in some depth within chapter five, the requirement of identifying oneself at all can figure as a reminder of the forces of colonialism and make some asylum claimants feel uncomfortable. Alongside this, some other claimants may feel restricted by being forced to articulate themselves in unfamiliar terms. For example, Abasi told me about how he felt that his queer identity ‘is more than just being gay or lesbian... it’s a spectrum’.¹⁰¹⁰ However, he went on to tell me how he ‘just kept things standard’ for the Home Office’.¹⁰¹¹ On the advice of his lawyers he just pretended to be ‘straightforwardly’ gay. This was because he was warned that demonstrating the sexual fluidity, he felt make his claim appear inauthentic to the decision-maker.

¹⁰⁰⁸ *Ibid* 11-14.

¹⁰⁰⁹ See: Lucy Mayblin and Poppy James, 'Is Access To Work Really A Pull Factor For Asylum Seekers?' (*The Conversation*, 2016) <<https://theconversation.com/is-access-to-work-really-a-pull-factor-for-asylum-seekers-57757>> accessed 10 April 2020.

¹⁰¹⁰ Abasi, Egyptian Refugee to Author.

¹⁰¹¹ *Ibid*.

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The issues with this form of symbolic violence are complex. However, at their most basic, they see a person, who has already been compelled to flee their country of origin because of their fear of being persecuted, forced to adopt a way of being which is not consistent with their internal reality. If they fail to orient themselves correctly, they will potentially face deportation. Deportation, in turn, marks a return to the threat of persecution they were originally fleeing. Indeed, in some societies, having claimed asylum may render them as a potential target of further violence, in addition to that previously feared.¹⁰¹²

In this sense, the need to identify itself figures as a form of symbolic administrative violence. Those whose sexual diversity does not fit prevailing knowledge of sexual diversity face erasure. This erasure is justified, at least implicitly, on the need to be able to identify “genuine” claims. This violence figures deeply as impersonal and bureaucratic in nature. This is because those who fail to perform their identity and comport their narrative in recognisable terms will be written to with the decision of the Home Office as an institution. As Masani articulated after her first asylum claim was refused, ‘The letter made it sound so simple. You had a husband in Uganda. Therefore, it is not credible that you are a lesbian.’¹⁰¹³

This form of violence can leave claimants feeling that the threat of harm remains unless they adopt institutionally sanctioned ways of being. In this sense, precisely the same dynamics of violence and persecution that claimants are fleeing come to be (re)instantiated within the complex bureaucracies of Home Office decision making. Thus, I argue that administrative processes which are not responsive to the lived experiences of asylum

¹⁰¹² Abdullah, Omani Refugee to Author.

¹⁰¹³ Masani, Ugandan Refugee to Author.

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claimants result in experiences of administrative violence which undermine the goals of the Refugee Convention.¹⁰¹⁴

7.4 Concluding Remarks

This chapter has put forward a three-part argument. Firstly, that the 2016 API explored in depth in chapters five and six is both under and over inclusive in a number of ways and that these exclusions/inclusions emerged from the wider forms of knowledges/ignorances in which the policy is enmeshed. The second part then argued that ordinary knowledges of sexual diversity can be accessed through portrayals offered within popular culture. Finally, the third part has explored the forms of administrative violence that accrue when these limited conceptual frameworks are applied to asylum claimants, with a particular focus on the impacts that such approaches can have on the mental well-being of claimants. In the next chapter, I explore the key implications of this study for future research and policy relating to sexually diverse refugees and asylum seekers.

¹⁰¹⁴ See Section: 2.2.1.

Chapter Eight: Conclusions and Implications for Research and Policy

This thesis began by asking the question of whether or not there is a mismatch between the ways in which people claiming asylum on the basis of their sexual diversity understand themselves and the knowledges and discourses of sexual diversity which are deployed within the asylum apparatus. More specifically, the thesis has drawn on eight semi-structured interviews with people granted asylum in the UK on the basis of their sexual diversity to test the appropriateness of the 2016 API '*Sexual Identity in the Asylum claim*' and the knowledges and discourses of sexual diversity which it deploys for assessing the asylum claims of sexually diverse people.

The thesis has proceeded over eight chapters across two parts. Chapter one explored key terms, offered an overview of previous literature, and set out the arch of the thesis. Chapter two explored methodological and epistemological considerations underlying this thesis. The chapter outlined three different methodological approaches. The first of these was a critical black letter approach for the documentary and legal aspects of this thesis. The methodology, then, explored the approach to semi-structured interviews undertaken within this study, including ethical considerations and protocols adopted. Finally, the chapter explores the approach undertaken to interview analysis, as well as offering an overview of the authors epistemological standpoints. The epistemology set out a performative Foucauldian account of law and legal decision making. Chapter three then explored the theoretical aspects of sexual diversity, with a view to examining the cultural and historical situatedness of the knowledges of sexual diversity deployed within the "west". Chapter four drew on the goals of the Refugee Convention to establish a benchmark standard for the administration of the UK

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asylum apparatus, in terms of its responsiveness to the international framework of refugee law. Chapters one to four form the first part of this thesis, setting the groundwork for the analysis offered in part two. These chapters should be seen as setting up a framework of analysis and offering readers guidance as to how the study has been approached, and indeed, what the epistemology of the author has been in undertaking this research.

Part two of the thesis, contains a further four chapters which form the core substantive analysis undertaken. Chapters five and six explore the 2016 API on sexual diversity. This API is explored by placing each of its sections in conversation with the lived experiences of sexually diverse refugees who have been granted refugee status in the UK on the basis of their sexual diversity. Access to these lived experiences came through semi-structured interviews undertaken by the author. By placing the lived experiences of sexually diverse refugees in conversation with the 2016 API, the chapter identifies areas of mismatch between Home Office asylum policy and the ways in which Sexually diverse refugees and asylum seekers understand their own diversity. The split between chapters five and six follows the structure of the API itself, with chapter five loosely considering the theoretical and linguistic issues that analysis of asylum claims by sexually diverse people raises and chapter six focusing on how the API frames issues such as the substantive interview itself. However, as a Foucauldian scholar, sustaining such as separation between theory and practice proved difficult. chapter seven then builds on this, using popular culture as a vantage point from which to consider the relations of power, knowledge, and discourse in which the API has been written and interpreted. This analysis is then followed with an analysis of the forms of administrative violence which can arise when people claim asylum through a flawed administrative process. Finally, chapter eight offers a series of pressing concerns,

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considerations and reflections for future research and policy regarding sexually diverse refugees and asylum seekers.

8.1 Key Findings

The core findings in this thesis have revolved around several mismatches between the knowledges and discourses of sexual diversity deployed within the 2016 API and the lived experiences of sexually diverse refugees and asylum seekers. Firstly, it has been found that the 2016 API adopts an overly narrow conception of stereotypes. In doing this, the API fails to account for a phenomenon that is coming to be called second order stereotypes.¹⁰¹⁵ The effect of adopting this overly narrow conception is that stereotypes have come to be endorsed—including within the 2016 API itself—as a core form of evidence within asylum claims by sexually diverse people. These stereotypes relate to the spaces, communities and knowledges that sexually diverse refugees and asylum seekers are presumed to have attended or engaged with.¹⁰¹⁶ The API also encourages second order stereotypes in terms of its expectation that asylum claimants will be able to offer a complex narrative of self-actualisation, self-realisation, or emotional identity development.¹⁰¹⁷ As the analysis in chapter five demonstrated, these stereotypes will often be mismatched to the ways in which sexually diverse people from refugee countries of origin experience their sexual diversity. As explained later in this chapter, this mismatch prompts a need to critically reconsider the way in which sexual diversity is commonly conceptualised, so that space can be created for a more heterogenous range of diversities to be recognised.

¹⁰¹⁵ See section: 5.1.

¹⁰¹⁶ See: Sophia Zisakou, 'Credibility assessment in asylum claims based on SO by the Greek Asylum Service' (SOGICA Conference, Online, 7-9th July 2020).

¹⁰¹⁷ See section: 5.1-5.3. See Also section: 7.2.

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The second mismatch found in this thesis arises from the overly identitarian approach to sexual diversity endorsed within the 2016 API. While this study affirms the idea that moving from conduct to identity has been a positive step, which has assisted the asylum apparatus in respecting the fundamental dignity of sexually diverse asylum seekers, it is argued that the pendulum has now swung too far. The result of this is mismatches between decision-makers and asylum claimants from cultures and societies in which sexual diversity is not conceived in terms of identity. This point is deeply linked to the first mismatch identified. However, it goes further than simply relating to stereotypes becoming a part of the refugee status determination. Rather, this second mismatch relates to the fact that many decision-makers appear to interpret the API as requiring claimants to express a sexual identity. This is, however, not consistent with how some sexually diverse people experience their sexual diversity, with their narratives instead stressing behaviour or desire. Most prominently, these expectations manifest themselves in anticipating things such as a coming out narrative, or, in a manner linked with the first mismatch identified, attending spaces which, in the context of the UK, have become culturally linked to sexually diverse identities.

Such expectations also link to the knowledges and discourses around sexual diversity that are commonly deployed within the UK. This is to say that, because sexual diversity is commonly viewed as being an identity—and a fundamental truth—in the UK context, the deployment of these knowledges and discourses within the API should be recognised as linking to a wider social framework, as opposed to simply being a feature of the API on its own terms.

The third mismatch revolves around the idea of difference. This is, again, similar to, but not synonymous with, the use of stereotypes around place and socialisation as a form of evidence and the focus on narratives of development. As this thesis has shown, much of the

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process of proving one's sexual diversity currently relies on demonstrating the ways in which someone is different from other people within their country of origin. However, as I have shown in chapters five and six, the expectation of having an articulatable narrative of difference relies on a number of expectations which may not be present within the lived experiences of sexually diverse refugees and asylum seekers. Indeed, as I have argued in chapter seven, often the meaning of ideas such as difference will come to be filled out by culturally contingent depictions of sexually diverse people. Therefore, as explored within the recommendations for future research and policy, there is a need to recognise that simply using non-specific terms such as difference may fail to pull the UK asylum apparatus away from culturally specific conceptions of sexual diversity.

A fourth mismatch arises from the material limitations facing sexually diverse refugees and asylum seekers. This is most clandestine, again, in relation to the API's call for evidence based on socialisation and interaction with the LGBT+ community. Put simply, the ability to undertake such interaction relies on asylum seekers possessing the material resources to attend such spaces. This, of course, links to the arguments advanced by theorists such as Lisa Duggan and Jasbir Puar regarding the consumerist aspects of sexually diverse cultures within contemporary "western" countries.¹⁰¹⁸ The core point to this mismatch is that neither the 2016 API, nor the wider culture in which the conceptions of decision-makers are contoured and informed, do enough to recognise the exclusionary impacts of poverty on the ability of people to attend queer spaces. Therefore, it is argued that there is a mismatch

¹⁰¹⁸ Jasbir Puar, 'Terrorist Assemblages: Homonationalism in Queer Times' (Duke University Press 2012); Lisa Duggan, 'The New Homonormativity: The Sexual Politics of Neoliberalism' in Russ Castronovo & Dana Nelson (eds) *Materialising Democracy: Toward a Revitalized Cultural Politics* (Duke University Press 2002) 175-194.

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between the expectations of decision-makers and the means which sexually diverse refugees and asylum seekers actually have at their disposal.

A fifth mismatch arises from the failure of the 2016 API to recognise the desire, or need, for many sexually diverse refugees and asylum seekers to remain in contact with other people from their countries and communities of origin. This might mean remaining in contact with people in their country of origin while living in the UK, or it might mean living in communities with others from their countries of origin in the UK. In either case, current expectations about coming out do not respect the realities of living in a diverse and multicultural society. Living among, or wishing to retain a relationship with, family members and others from their country of origin may impact the abilities of refugees and asylum seekers to “come out” or openly declare their sexual diversity. This can have an impact on a number of the other mismatches above, such as being one reason why a refugee might not conform to the stereotypical and identity-driven expectation to attend and socialise in certain spaces. Or it might relate to the lack of financial support and disproportionate rates of hardship experienced by refugees and asylum seekers. The core point here, as with almost all of these mismatches, is that current policy does not account for the heterogenous and messy lives of sexually diverse people. Instead, the API articulates a list of expectations which, while they may be present in the narratives of many sexually diverse people in the UK, remain little more than tropes and stereotypes commonly associated with one, culturally contingent, way of conceiving of sexual diversity.

8.2 Research Questions and Answers

Research question (1) asked whether there is a mismatch between the lived experiences of sexually diverse asylum seekers and the knowledges and discourses of sexual diversity

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deployed within Home Office Asylum Policy Instructions on how decision-makers should assess issues arising in asylum claims made on the basis of sexual diversity. This question can be answered in the affirmative. There are numerous mismatches between the lived realities of sexually diverse refugees and asylum seekers and the knowledges and discourses of sexual diversity endorsed within the 2016 API as outlined in the section above.

While it is noted that the 2016 API is not intended as an exhaustive list, but rather a range of issues to assist sexually diverse asylum seekers in presenting their narrative, it has, nonetheless, been shown that the API has the result of producing a tick-box style approach that is dependent on a series of expectations which are mismatched with the lived experiences of sexually diverse refugees and asylum seekers. As has been argued, one of the reasons for this is that the API is operating in a context where there are a certain knowledges of sexual diversity are present. These knowledges, therefore, come to govern the ways in which sexual diversity is commonly understood.

Research question (2) asked whether stereotypes continue to play a role in asylum claims by sexually diverse people and whether decision-makers are applying culturally relative conceptions of identity when assessing evidence and undertaking credibility determinations. Like research question (1), this research question has returned an affirmative answer. Indeed, as I explored in chapter five, the 2016 API situates stereotypes as being a key form of evidence in support of a claimant's sexual diversity. These stereotypes relate to factors such as expectations over where people who are sexually diverse will congregate or who they will socialise with, as well as the kinds of emotional experiences and narrative of identity they will have. Additionally, as analysed in chapter seven, this research question also touches on how decision-makers will conceive of the narrative of difference they are expecting to see from sexually diverse asylum seekers.

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Finally, research question (3) sought to pinpoint pertinent considerations for future studies and policy proposals relating to asylum claims by sexually diverse people. Responses to this question are set out in the next section. The crucial insights relate to not relying on overly identarian frameworks when designing research and policy. Insights also relate to maintaining an awareness of the cultural specificity of knowledges and discourses. The pertinent example explored in this thesis is the ways in which the conceptions of stereotypes and the narrative of difference came to be filled out by “western” forms of identity relating to depictions of sexually diverse people within “western” popular culture.

8.3 Implications for Policy and Research

Given the small sample size employed within this study, it has not been possible to offer generalisable recommendations. Nonetheless, the study has made several findings which present pertinent considerations for future researchers and policy-makers seeking to address the issues facing sexually diverse refugees and asylum seekers, as well as researchers and policy-makers addressing wider issues around sexual diversity. Therefore, this section offers an overview of the key recommendations and implications to be drawn from this research.

8.3.1 Identity Politics: Problem or Solution

As identified previously, the 2016 API represents a part of a wider shift from conduct to identity within refugee status determinations for sexual diversity claims.¹⁰¹⁹ This swing towards identity has also been recognised by members of Rainbow Migration, who warned that decision-makers appear to be focusing on eliciting complex narratives of self-realisation

¹⁰¹⁹ See: Alex Powell, ‘Normative Understandings: Sexual Identity, Stereotypes, and asylum seeking’ in Chris Ashford & Alexander Maine (ed), *The Research Handbook on Gender, Sexuality and the law* (Edward Elgar 2020); Eddie Bruce-Jones, ‘Death Zones, Comfort Zones: Queering the Refugee Question’ (2015) 22 *International Journal of Minority and Group Rights* 101; S Chelvan, ‘Put Your Hands Up (If you Feel Love)’ (2011) 25 *Immigration, Asylum and Nationality Law* 56, 60.

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and identity development.¹⁰²⁰ As addressed in chapter five, this identarian conceptual framework has been useful on a macro level, providing a fundamental status which has assisted sexually diverse people in constituting Particular Social Groups for the purposes of the Refugee Convention.¹⁰²¹ However, as I have argued, identity is not a universal way in which sexual diversity is conceived. Therefore, the first finding that this study presents is the need to critically consider the reliance on identity politics when addressing matters of sexual diversity in the UK context. This further requires that decision-makers and policy-makers recognise the impact of discourse and, therefore, take appropriate steps to ensure that they do not allow the way in which sexual diversity is manifested in the UK to impact their approach to sexual diversity claims. The core point here, then, is the need to recognise that sexual diversity may manifest itself in a heterogenous and diverse range of ways.

In relation to sexually diverse refugees and asylum seekers the reliance on identity is reified by both the 2016 API itself, and by the wider structures of knowledge and discourse regarding sexual diversity.¹⁰²² This has led to the identity-driven approach being adopted and has been endorsed by many LGBT+ rights charities, support groups, as well as by academics and policy-makers seeking to improve the situation facing sexually diverse people throughout the UK.¹⁰²³ Evidence of the impact of identity politics on the current API was explored in chapters five and six which examined the 2016 API in terms of its suggestion that interactions with the LGBT+ community in the UK, usually through the form of photographs of an asylum claimant in spaces generally associated with sexually diverse people, could be

¹⁰²⁰ See: Leila Zadeh, 'The UK: Excessive Focus on Articulation of "Self-Realisation" and Development of Identity' (SOGICA Conference, Online, 7-9 July 2020); UK Lesbian and Gay Immigration Group, *Still Falling Short: The Standard of Home Office Decision-Making in Asylum Claims Based on Sexual Orientation and Gender Identity* (UKLGIG 2018) available at https://uklgig.org.uk/?page_id=1225

¹⁰²¹ See section: 5.6.

¹⁰²² See section: 5.1. See Also: Chapter 7.

¹⁰²³ See sections: 17.5. and 3.2.

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used as a form of evidence.¹⁰²⁴ Chapter seven also explored the concept of the narrative of difference, which is endorsed within the 2016 API as an approach which may assist sexually diverse asylum claimants in proving their sexual diversity.¹⁰²⁵ This narrative of difference is often expected to figure as part of a complex realisation of identity, framed in terms of a narrative of emotional difference. As I argued in chapter five, expectations such as these are representative of an a priori assumption that sexual diversity is universally understood as an identity, even though such an assumption is not consistent with the lived experiences of many sexually diverse people.¹⁰²⁶

Each of the above-mentioned examples of identity politics was further developed within chapter seven, which looked at wider “western” knowledges of sexual diversity through the “ordinary” portrayals provided in popular culture.¹⁰²⁷ For example, chapter seven explored how some modern popular cultural depictions of sexually diverse people endorse identarian logics which come to inform the knowledges decision-makers bring to issues such as establishing a narrative of difference.

The significance of this is in drawing attention to the lack of critical appraisal contemporary identarian approaches to sexual diversity are given. The result of this lack of critical appraisal is that many interventions intended to aid the cause of sexually diverse people are blunted by their failure to correspond to the lived realities of sexually diverse people. Indeed, as Adler and Spade have suggested, the deployment of frameworks for inclusion which are not critically aware of who they exclude can function to make the

¹⁰²⁴ See sections: 5.3 and 6.1.

¹⁰²⁵ See section: 7.2.

¹⁰²⁶ See section: 5.1.

¹⁰²⁷ See generally: Chapter 7.

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situation worse for the most precarious people.¹⁰²⁸ Thus, the first implication for future research and policy this study provides is a warning regarding overreliance on, or a priori assumptions in favour of, identarian conceptions of sexual diversity. Included with this research implication is the need to offer further critical assessment of the DSSH model which has a substantial role in setting the themes through which the asylum claims of sexually diverse people come to be assessed.

It is not disputed that identity politics has been an effective global vehicle for achieving rights for sexually diverse people, particularly those who identify with one of the recognised LGBT+ identities. For example, in the case of international refugee law, identity politics has helped to establish that sexually diverse people can constitute a Particular Social Group for the purposes of the Refugee Convention. This is significant because, as Hathaway has argued, ‘whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change or should not be required to change.’¹⁰²⁹ In this case, identity is considered—under the “born this way” narrative—to be something which cannot be changed and thus to assist sexually diverse people in making up a social group. However, I argue that a number of factors are elided in the (strategic) essentialism involved in promoting this as totalising knowledge regarding sexual diversity.¹⁰³⁰ In a similar

¹⁰²⁸ See Generally: Libby Adler, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Duke University Press 2018). See Also: Libby Adler, ‘Life at the Corner of poverty and Sexual Abjection: Lewdness, Indecency and LGBTQ Youth’ in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender, Sexuality and Law* (Edward Elgar 2020); Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, & The Limits of Law* (Duke University Press 2015).

¹⁰²⁹ James Hathaway, *The Law of Refugee Status* (Butterworths 1991) 160.

¹⁰³⁰ Libby Adler and Dean Spade have both explored both the costs and the benefits of the tactics and strategies adopting by LGBT campaign groups and activists. See Generally: Libby Adler, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Duke University Press 2018). See Also: Libby Adler, ‘Life at the Corner of poverty and Sexual Abjection: Lewdness, Indecency and LGBTQ Youth’ in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender, Sexuality and Law* (Edward Elgar 2020); Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, & The Limits of Law* (Duke University Press 2015).

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register, it is not disputed that the themes identified under the DSSH model, such as the search for a narrative of difference and an exploration of stigma and shame, might be useful for some asylum claimants. However, it is crucial that future policy and research carries an awareness of the heterogenous experiences present among sexually diverse people and thus is pursued in a manner able to account for the differing ways in which sexual diversity is experienced.

Within asylum claims by sexually diverse people, the born this way narrative manifests in expectations such as the narrative of difference explored in chapter five.¹⁰³¹ In particular, the idea that people are born sexually diverse, with an identity that they simply need to realise, rather than their identity being something they construct from the context in which they are socialised and encultured, underlies some of the focus on childhood difference identified in chapter five.¹⁰³² Similarly, the idea that sexual diversity is a lifelong identity, linked to experiences as early as childhood, helps to contextualise and explain some of the incredulity directed towards sexually diverse asylum seekers who have had previous relationships with members of the “opposite” sex. As articulated in chapter five, while these may be a form of difference that some asylum seekers are able to showcase, overreliance on these kinds of evidence result in other forms of sexual diversity—such as those that see sexual diversity as simply a behaviour, or those that do not view sexual object choice as being significant to who a person is at all—being occluded.¹⁰³³

Accounting for this, I reiterate that the first key implication of this study is the need to be cautious about adopting the framework of identity as a way of understanding sexual

¹⁰³¹ See section: 5.4.

¹⁰³² *Ibid.*

¹⁰³³ See Generally: Chapter 5. ESP 5.1.

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diversity. Even where sexual identity is useful for understanding the claimant's sexual diversity, it is crucial that future policy and research recognises that expectations of a detailed narrative of self-realisation, expressed with a focus on emotions, may be inapplicable to sexually diverse asylum seekers. This is particularly likely to be true of those claimants who have intersectional claims, such as being a sexually diverse woman, where their access to education and social materials to support the development of an identity may have been limited. At the least, studies and policies aiming to have international relevance, should not assume that identity is an appropriate framework through which to approach sexual diversity. Rather, such studies should be required to argue positively for any decision to employ identity as a framework for conceptualising sexual diversity.

Given that there is no consensus regarding the biological or social basis of sexual diversity—at least outside of a consensus of political (strategic) essentialism—this study encourages policy-makers to avoid employing essentialised knowledges and instead to conceive of sexual diversity in the broadest terms possible, including aspects such as behaviour and desire when considering how sexual diversity should be understood.

8.3.2 Self-Identification

As explored in chapter six, the 2016 API follows the *A, B and C* decision in situating self-identification as a starting point in discerning whether or not a claimant is actually a sexually diverse person.¹⁰³⁴ This means that even if a claimant positively identifies themselves with a familiar category of sexual diversity such as stating that they are a gay man, they will still be required to provide further evidence to support this self-identification.

¹⁰³⁴ *Cases C-148 to C-150, ABC v Staatssecretaris van Veiligheid en Justitie* [2014] ECRI- 2406.

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As has been argued across chapters five and six, much of the evidence which is taken as supporting this self-identification is stereotypical in nature, relating to factors commonly attaching to a given identity within the “west” rather than being necessary features of that identity. Therefore, I argue that such evidence should, much like sexually explicit evidence currently is, be considered to be of limited probative value.

Given that it has been argued that many of the forms of evidence highlighted under the 2016 API and identified as being frequently deployed within refugee status determinations based on sexual diversity are not appropriate, another key implication of this study is the need to shift how sexual diversity is evidenced. On this score, a key point which future researchers and policy-makers should consider is placing more weight on self-identification.

The approach of placing more weight on self-identification has been highlighted as a positive solution to some of the issues present in sexual diversity asylum claims made in the Netherlands and other European countries by Jansen.¹⁰³⁵ While self-identification would not be a panacea—As I have argued, not all sexually diverse people experience and understand their sexual diversity as an identity—it is argued that shifting to a greater reliance on it for those who do draw on identity as a language through which to understand their sexual diversity would limit the current overreliance on stereotypes. Furthermore, such an approach would reduce the likelihood of administrative violence within the asylum apparatus as it would reduce instances of symbolic violence that currently emerge when claimants who have self-identified are informed that their self-identification has been found to be false.

¹⁰³⁵ See: Sabine Jansen, ‘Pride or Shame? LGBTI Asylum in the Netherlands’ (SOGICA Conference, Online, 7-9 July 2020).

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The common reason given for rejecting self-identification—a line of argument taken up by both advocates for sexually diverse refugees and representatives of the state—is that self-identification would lead to an increased number of false claims.¹⁰³⁶ However, I have argued that this anxiety over the potential for false claims is ill-founded, primarily for reasons already explored within chapter seven.¹⁰³⁷

Firstly, it is argued that the costs to asylum seekers of self-identifying as sexually diverse limits the likelihood of false claims occurring. As has already been discussed, many asylum claimants will avoid being out in the UK because of a fear being ostracised by others from their country of origin. For this reason, asylum claimants who are not sexually diverse people are unlikely to be willing to suffer the social costs associated with such a disclosure. These issues were discussed further in chapters 5 and 6.¹⁰³⁸

Secondly, it is argued that even if such false claims do occur, the fact of having self-identified as a sexually diverse person may place asylum claimants at risk of persecution on the basis of their imputed or perceived sexual diversity. In this sense, I argue that even if a prospective claimant is not “genuinely” a sexually diverse person, the very act of claiming asylum or of adopting any form of self-identity—even within the current legal and policy framework of asylum—could leave them with the potential of being perceived of as a sexually diverse person and could therefore make them a refugee. Indeed, as Abdullah informed me, within some refugee countries of origin, having claimed asylum can in and of

¹⁰³⁶ For example, when presenting the DSSH model the barrister S Chelvan said he feared permitting self-identification would lead to an increased number of false claims and that this would harm genuine asylum claimants. S Chelvan, ‘The Emotional Journey and the DSSH Model: A Positive Tool for Credibility Assessment’ (SOGICA Conference, Online, 7-9 July 2020).

¹⁰³⁷ See section: 7.3.

¹⁰³⁸ See section: 5.5 and 6.7.

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itself lead to one being ostracised or shunned within their country of origin, or among others from their country or culture of origin.

Thirdly, it is argued that, given the significant stigma attached to sexually diverse people within some refugee countries and communities of origin, the chance of a large number of false claims is limited. This is primarily because there is a significant chance that people from cultures which are not accepting of sexual diversity are themselves likely to have negative views of sexually diverse people. On this basis, I argue that even if self-identification were accepted, the actual number of people willing to associate themselves with what they see as a negative social role is likely to be very low.

To recap, a further implication of this study is the need to critically re-assess the role of self-identification in asylum claimants based on sexual diversity. In this regard, researchers should devote more attention to the potential impacts of adopting a system of self-identification and policy-makers should consider providing for greater reliance to be placed on self-identification when making refugee status determinations.

8.3.3 Behaviour, Ignorance and A, B and C

Building on the last section, both this study and other studies looking at the situation facing sexually diverse asylum seekers in the UK and across Europe, have identified that the current process for determining the status of sexually diverse refugees focuses overly on complex narratives of identity development and social behaviour. This is a shift from the previous position where decision-making was focusing overly on sexual behaviour as determinative of sexual diversity. Following the *A, B and C* decision, detailed questions

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regarding sexual behaviour are prohibited.¹⁰³⁹ This is reflected in the 2016 API which effectively invited decision-makers to shut down sexualised topics, even where these are raised by the claimant.¹⁰⁴⁰

While it is accepted that expecting claimants to discuss their sexual behaviour and attractions during asylum interviews would undermine the dignity of asylum claimants, it is, nevertheless, the case that the current refusal to allow asylum claimants to discuss their sexual behaviour as a part of the evidence in support of their asylum claim, when they choose to do so, leads to certain knowledges of sexual diversity being privileged. The knowledges that are privileged by disallowing discussion of sexual behaviour are those which focus on identity development and expected social engagement with other members of the LGBT+ community.

The result of this privileging is that those claimants for whom sexual behaviour or desire might be the only way in which their sexual diversity is manifested are denied the opportunity to put forward their claims. Therefore, the second implication of this research is that future policy and research focusing on sexually diverse asylum seekers and refugees should contain an awareness that, while it is inappropriate as an expectation, sexual behaviour and desire may, in some cases, be the only forms of evidence which asylum claimants have to support their sexual diversity.

Accounting for this, it is suggested that policy-makers should reconsider prohibitions on decision-makers hearing sexually explicit evidence when addressing asylum claims based

¹⁰³⁹ *Cases C-148 to C-150, ABC v Staatssecretaris van Veiligheid en Justitie* [2014] ECRI- 2406.

¹⁰⁴⁰ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office. 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 23.

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on sexual diversity. This does not mean that sexually explicit photographs or videos should be accepted; they should not. However, where a sexually diverse claimant responds to questions about their sexual diversity in terms of sexual desire or sexual behaviour this should not be viewed as an indication that they lack credibility and they should be allowed to put forward their evidence. Furthermore, space should be made for appropriate and sensitive follow up questions, in the same way as they would be permitted to put forward their evidence if they were speaking on the topic of their emotions or social interactions.

Connectedly, decision-makers should not anticipate that claimants will have had an emotional response to their sexual behaviour or any significant emotional connection to the person this behaviour was with. Such expectations are heteronormative stereotypes which make unsupported links between romantic and sexual attraction. Rather, as the analysis in chapter seven has suggested, decision-makers should be conscious of their socialisation and permit claimants to advance their sexual diversity in their own terms. Follow up questions should focus on establishing the self-conception being put forward by claimants, instead of attempting to understand the narrative of claimants in relation to any pre-conceived expectations.

8.3.4 Materiality and the Importance of Social Context

Another key implication from the findings of this study is the need for policy to be more aware of the material circumstances of refugees and asylum seekers and the impact these circumstances may have on their ability to provide evidence to support their sexual diversity. As Stychin has argued, linkages are often drawn between sexual diversity and practices of consumption.¹⁰⁴¹ However, asylum policy needs to recognise that these linkages exist only in

¹⁰⁴¹ Carl Stychin, 'Being Gay' (2014) 40 *Government & Opposition* 90, 95-102.

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a “western” context and that there are no inherent links between sexual diversity and consumption. Further, policy needs to recognise the social and material circumstances of asylum seekers which may mean that they are economically or socially excluded from many of the activities that might otherwise be considered as indicative of a sexually diverse identity.

At its most simplistic, this is a call for policy to retain an awareness that many sexually diverse people, but especially those from refugee countries of origin, may be systematically excluded from spaces and communities founded around sexual diversity. As explored, such exclusions might arise from a number of factors, such as lacking an income and thus not being able to afford to socialise in what can be prohibitively expensive spaces. Or, as I also developed in chapter five, such material constraints may relate to living arrangements such as when people are living with members of their family or other members of their community from whom they may—for various reasons—wish or need to keep their sexual diversity a secret.

While most research already possess an awareness of the multitude of reasons why sexually diverse refugees and asylum seekers may not have been able to interact with other sexually diverse people, this awareness has not yet been properly reflected in policy.¹⁰⁴² For example, as I explored in chapter five, the 2016 API informs decision-makers that a perceived lack of interaction with the LGBT+ community is an issue to be explored. While this is not saying that such a lack of interaction is a ground for refusal, the requirement for

¹⁰⁴² See For Example: Mengia Tschalaer, ‘Between Queer Liberalisms and Muslim Masculinities: LGBTQI Muslim Asylum Assessment in Germany’ (2020) 7 *Ethnic and Racial Studies* 1265; Nina Held, “‘They Look at You Like an Insect That Wants to be Squashed’”: An Ethnographic Account of the Racialized Sexual Spaces of Manchester’s Gay Village’ (2017) 20 *Sexualities* 535; Nina Held, ‘Comfortable and Safe Spaces? Gender, Sexuality and “Race” in Night time Leisure Spaces’ (2015) 14 *Emotion, Space and Society* 33; Jenni Millbank, “‘The Ring of Truth’”: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations’ (2009) 21 *International Journal of Refugee Law* 1.

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sexually diverse asylum seekers to account for a lack of interaction demonstrates a lack of awareness of the material and social circumstances in which sexually diverse asylum seekers live.

In many cases, sexually diverse people claiming asylum in the UK will not have been in a financial or social situation which enabled them to attend spaces traditionally associated with the LGBT+ community. Therefore, a further implication of this study is the need for policy-makers and decision-makers to demonstrate a greater awareness of the material situations in which sexually diverse refugees reside.

This greater awareness should primarily relate to more readily recognising that, due to material constraints, every expectation they would have normally have of forms of evidence which may support someone's claim to be a sexually diverse person—such as their attendance at certain spaces or socialising with other sexually diverse people—may not be borne out in the narratives of sexually diverse asylum claimants. This implication links to the above-mentioned overreliance on identity politics as a way of conceptualising sexual diversity. This is so because contemporary identities such as gay and lesbian have become bound up with consumption and other capitalist practices of which sexually diverse refugees and asylum seekers, who will have been socialised in different contexts, may have neither the means nor the desire to partake.¹⁰⁴³

8.3.5 Translators, Interviewers and the limits of inclusivity

A further implication of this study is the need to consider the potential role interviewers and translators may have on the ability of sexually diverse asylum seekers to present their

¹⁰⁴³ Lisa Duggan, 'The New Homonormativity: The Sexual Politics of Neoliberalism' in Russ Castronovo & Dana Nelson (eds) *Materialising Democracy: Toward a Revitalized Cultural Politic* (Duke University Press 2002) 175-194.

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narrative in a confident, consistent and comfortable way. As discussed in chapter six, the 2016 API currently permits asylum claimants to request that their interviewer or translator is of a given gender—for example, it is possible under the 2016 API to request that their claim is heard by a female interviewer—but the same provisions do not apply to requesting an interviewer or translator of a different race, ethnicity, or cultural group.

Obviously, the ability of claimants to request the gender of their interviewer is useful and can assist sexually diverse people to feel more comfortable in the interview encounter. Nonetheless, as Murray has argued, sexually diverse asylum seekers may be particularly uncomfortable talking about their experiences in front of others from their country of origin, cultural background, or ethnic group.¹⁰⁴⁴ For this reason, I argue that the API does not go far enough in ensuring that claimants are fully comfortable in the interview encounter.

Building on this, a further implication of this study is the need for policy-makers and researchers to further consider the role that interviewers and translators may have in making sexually diverse asylum claimants (un)comfortable in the interview encounter. In particular, this implication should be considered with reference to the potential role translators may have in circumscribing the willingness of sexually diverse asylum claimants to be forthcoming. However, it should also be considered in terms of the potential prejudices and biases that translators might be bringing into their own translation work.

Of course, it is accepted that, at a practical level, sourcing translators able to speak a given language on a given day might be difficult and prohibitively expensive. It is also recognised that there are inclusion issues arising from the idea of permitting asylum

¹⁰⁴⁴ David Murray, 'Real Queer: "Authentic" LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System' (2014) 56 *Anthropologica* 21, 25.

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claimants to request that their interviewers and translators are, or are not, of a given race or from a given cultural background. Nonetheless, this study found that the current approach to requesting interviewer characteristics was not sufficient to make participants feel comfortable in the interview encounter. Therefore, another a key implication of this study is the need to critically consider the approach take to interviewer and translator selection within asylum policy. At the least, the policy should recognise how the selection of translators and interviewers may make claimants uncomfortable and should take steps in order to address this.

Additionally, I argue that analysis of the impact of interviewer and translator characteristics—such as whether the asylum claimant and interviewer/translator share a country of origin—would present a valuable avenue for future study which would assist in understanding how refugees and asylum seekers experience the UK asylum apparatus.

8.3.6 Stereotypes: Conservative Constructions

A third implication of this study is the need to critically consider what constitutes a stereotype. This is significant because, as explored in chapters five, six and seven, this thesis argues that the current way in which stereotypes are conceived within the UK asylum apparatus is overly narrow.¹⁰⁴⁵ This links to the over-reliance on identity politics addressed in section 7.1 and also pointed out as the first implication to be addressed at section 8.3.1. At its most simplistic, I argue that the current identity focused approach to refugee status determination leads to stereotypes being analytically characterised as evidence for—and an intrinsic part of—sexual diversities.

¹⁰⁴⁵ See: Chapter 5. ESP 5.1.

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These stereotypes link, for example, to ideas regarding sexually diverse people socialising in certain spaces or having a certain form of narrative. Indeed, as argued in chapter seven, in many cases these stereotypical ideas will be reflected in popular culture with frequent filmic depictions helping to cement forms of knowledge that are used to fill out undertheorized ideas such as the narrative of difference requested under the 2016 API.¹⁰⁴⁶

In line with this, a further implication of this study is the need for subsequent policy and research to critically appraise the prior assumptions on which they are based in order to detect situations when stereotypes are being deployed. In order for policy to limit the ability of external factors to influence the approach of decision-makers, it will be necessary for policy-makers to do more to fully explain what they mean by the terms they deploy. For example, an extended exploration of the idea of a narrative of difference might assist in ensuring that decision-makers do not fall back on ethnocentric conceptions of difference founded in ordinary knowledges of sexual diversity. Of course, this may not be enough, because, as argued in chapter seven, the concept of difference is itself rooted in a specific cultural and historical knowledges and discourses which may render it inappropriate to assist sexually diverse people from outside of a “western” background in demonstrating their sexual diversity.

It is recognised that adopting a broader conception of stereotypes may lead to many of the forms of evidence currently relied on by individuals seeking to demonstrate their sexual diversity being re-classified as stereotypes. This was particularly pronounced among the participants to this study, all of whom alluded to being questioned on their engagements with other sexually diverse people and the majority of whom felt that being able to provide photos

¹⁰⁴⁶ See Generally: Chapter 7.

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of themselves attending events such as a pride and socialising with other sexually diverse people was central to proving their claims. Accounting for this, the implication for policy is not as simple as saying that such forms of evidence should be excluded. Rather, the implication to be drawn from this study is that decision-makers should be provided with extensive training on recognising their underlying assumptions and the policy should be drafted more tightly to make clear that while stereotypical evidence such as photos at events like pride should be permitted where voluntarily submitted, decision-makers should not draw any negative inferences regarding those who are unable to provide such evidence. By striking this balance, policy will be able to reflect the reality that while such evidence may be useful under an identity focused approach to sexual diversity, any expectation of such evidence is, essentially, as much a stereotype as the idea that someone who is gay will look a certain way or walk in a certain manner.

8.3.7 Lost in Translation: Language and Terminology are issues of identity

A further implication of this study is the need for both policy-makers and researchers to critically reconsider what constitutes an issue of language within refugee status determinations. This implication arises from two conjoined findings of the study, which themselves link back to the issues regarding over reliance on identity politics as pinpointed in section 7.1. In stating this, the difficulty of separating linguistic issues from issues of theory should be noted. This is to say that policy should recognise that often issues that are theoretical in nature—relating, for example, to the question of what constitutes sexual diversity—will be mistaken as issues of language. Therefore, it is important that policy-makers and researchers working with sexually diverse refugees and asylum seekers need to think more critically about what is determined to be an issue of language and what is considered to be a wider issue.

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In stating this, it is accepted that under the Foucauldian approach to law adopted in this thesis language is considered to have broader impact than under other epistemologies. However, I argue that under the epistemology of most decision-makers, as well as that of most everyday readers, saying an issue is one of language implies that the debate is a matter of terminology—meaning that it relates simply to how an essentially stable construct will be defined—rather than being a matter of substance.

Therefore, this study suggests that links between language and knowledge need to be more thoroughly explored by policy-makers and researchers working with sexually diverse asylum seekers. In particular, the study warns that starting from the perspective that asylum claimants might employ different terms to refer to their sexual diversity, but that these terms will ultimately just be a different way of referring to the same stable identities we are familiar with in the UK, relies on a number of unsustainable underlying assumptions.¹⁰⁴⁷

The first of these assumptions is that sexually diverse asylum seekers possess terms and language in which to discuss their sexual diversity. While many sexually diverse asylum seekers will possess such terms, some will not. Therefore, the 2016 API, while attempting to be inclusive and ensure that asylum claimants are addressed in terms which are familiar and comfortable for them, may be setting up the encounter to be one of disbelief and mistrust from the outset. This mistrust may arise because the API is setting up decision-makers to expect that claimants will have a language and terminology in which they are able to discuss their sexual diversity openly.

In this sense, a further implication of this study is the need for researchers and policy-makers to consider adopting a more performative conception of sexual diversity which

¹⁰⁴⁷ See section 3.2.

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recognises that the ways in which we talk about, conceive of and perform sexual diversity themselves construct the categories of sexual diversity. This is in opposition to the current position where terms such as lesbian and gay are conceived of as a language through which to discuss pre-existing sexual identities.¹⁰⁴⁸

8.3.8 Culture of the Home Office: Hostile Environment, Brexit, and the Culture of Disbelief

This study did not consider the culture of the Home Office specifically. Nonetheless, its findings correspond to studies which have looked at the internal workplace cultures within the Home Office. For example, Jubany's research found a culture in which denying claimants was valorised and that many workers began from a position which assumed that asylum claimants were lying.¹⁰⁴⁹ In a similar register, voices such as Jansen and Grønningsæter warned that the DSSH models used in some asylum claim might, in combination with existing cultures of disbelief and denial, such as those present within the Home Office, lead to a tick box approach being adopted within refugee status determinations based on sexual diversity.¹⁰⁵⁰

The cultures of disbelief and denial within the Home Office have been extensively evidenced.¹⁰⁵¹ The cultures are most frequently attributed to a fear of admitting false

¹⁰⁴⁸ See Further: Alex Powell, Normative Understandings: Sexual Identity, Stereotypes, and Asylum Seeking in Chris Ashford and Alexander Maine, *Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020) 161- 163.

¹⁰⁴⁹ Olga Jubany, 'Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within' (2011) 26 *International Sociology* 74, 74-80.

¹⁰⁵⁰ See: Sabine Jansen, 'The Netherlands: Assumptions of an Emotional Process of Awareness, From Shame to Self-Acceptance' (SOGICA Conference, Online, 7-9th July 2020); Adrea Gustafsson Grønningsæter, 'Norway: Expectations of "Self-Actualisation" and Detailed Reflections on One's Sexual Orientation' (SOGICA Conference, Online, 7-9th July 2020).

¹⁰⁵¹ Nick Gill, *Nothing Personal?: Geographies of Governing and Activism in the British Asylum System* (John Wiley and Sons 2016); Sarah Gibson, 'Testimony in a Culture of Disbelief: Asylum Hearings and the Impossibility of Bearing Witness' (2013) 17 *Journal of Cultural Research* 1; Olga Jubany, 'Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within' (2011) 26 *International Sociology* 74

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claimants, as argued by Raj.¹⁰⁵² As Yeo argues, however, the culture should also be seen as relating to the statements and targets set by politicians.¹⁰⁵³ For example, it is difficult to separate the anxiety over the potential for false claimants from a political epoch where discussions around immigration are partially focused on achieving a “net-migration” target, which aims to reduce the total sum of people entering the UK to the tens of thousands.¹⁰⁵⁴

As discussed in chapter five, this study saw seven of eight participants explain that they felt a large reason they were successful in their asylum claims was that they were able to provide photographs of, and testimonies to, their attendance in LGBT+ spaces and at events such as pride. As this suggests, proving sexual diversity has become calcified in a relatively formulaic manner with those who are able to demonstrate that their identity conforms to the stereotypical expectations of decision-makers, regarding the ways in which sexually diverse people live, most likely to be successful. A part of this formulaic manner arises from the cultures of disbelief operating within the Home Office. These cultures see those claimants who can provide extrinsic evidence as providing a corroborated claim, which is therefore more believable. Similarly, those claimants who are able to articulate a complex narrative of self-realisation, which conforms to decision-makers expectations for how sexual diversity will be experienced, are in a position to provide an account which is corroborated by the external knowledges which decision-makers bring to the interview encounter.

However, as was discussed in chapters four and six, the burden of proof for refugee status does not require claimants to prove their claims, merely to show that there is a reasonable degree of likelihood that what they are saying is true.¹⁰⁵⁵ Therefore, this default

¹⁰⁵² Senthoran Raj, ‘Queering Fears: Pro-LGBTI Refugee Cases’ in Chris Ashford, Alan Reed and Nicola Wake *Legal Perspectives on State Power: Consent and Control* (Cambridge Scholars Publishing, 2016) 132, 142.

¹⁰⁵³ Colin Yeo, *Welcome To Britain: Fixing Our Broken Immigration System* (Biteback Publishing 2020) 15-27.

¹⁰⁵⁴ *Ibid*, 15-27; 109-145.

¹⁰⁵⁵ See sections: 4.4.2 and 6.6.

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towards “objective” evidence such as photographs—and familiar narratives such as that of coming out and self-realisation—can themselves be situated as being a feature of the culture of disbelief. Of course, this culture is supplemented by the work of well-meaning lawyers who, in wishing to assist the client before them, encourage their clients to produce and provide photographic evidence in support of their claims or encourage clients to speak in the language of identity, difference, and self-realisation even where this does not come naturally to the applicant. As Bruce-Jones has argued, decision-makers, charities, and practitioners should all be considerate of the how the forms of evidence provide in support of one asylum claim can impact on the expectations of how future claimants should support their claims.¹⁰⁵⁶

In line with the above, a further implication of this study is the need for policy-makers to keep in mind the culture of disbelief present within the Home Office when drafting policy proposals. Under the current workplace culture of the Home Office, even policy which is intended to be helpful to claimants becomes subsumed under the approach adopted by decision-makers. In particular, this should mean that policy-makers and researchers are sceptical regarding the use of lists. This is because, within the current work-place culture of the Home Office, such devices are likely to become interpreted as checklists, regardless of whether this was their initial purpose.

Given the current political context, in which there is a hostile environment for undocumented migrants, an ongoing—if practically unachievable—target of cutting net migration to the tens of thousands, and a series of Brexit discourses on the need to cut immigration into the UK, it is unlikely that this culture of disbelief will alter in the near future. Indeed, it is submitted that policy-makers and researchers need to conduct their work

¹⁰⁵⁶ Eddie Bruce-Jones, ‘Death Zones, Comfort Zones: Queering the Refugee Question’ (2015) 22 *International Journal of Minority and Group Rights* 101.

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with a continuing awareness of the culture of disbelief and ensure that their proposals and findings are presented in a manner which takes account of the impact this culture may have on decision-making.

As discussed in chapter five, this problem is particularly acute in asylum claims by sexually diverse people, where claimants are unlikely to have any objective evidence in support of their claims and where unacknowledged stereotypes held by decision-making may impact on how claims are considered. Therefore, it is even more crucial that future policy development and research concerning sexually diverse asylum claimants are undertaken with an awareness of the culture of disbelief and written in a way which recognises how decision-makers will approach issues of interpretation.

8.3.9 Refugee Status and the Conflation with Immigration

As discussed in chapter one, the current moment also throws a light on social and political discourses which are attempting to supplant the legal process of refugee status determinations by labelling asylum seekers as economic migrants.¹⁰⁵⁷ These discourses are promoted by both voices within the media and by politicians on the right of the political spectrum. They link to factors such as the “net migration” target identified above, as well as the idea of “taking back control of our borders” as articulated by supporters of Brexit.

As explored above, while these factors were not considered as a direct part of this study, they form a part of the wider context. Many participants recounted experiences of persecution, discrimination and racism in the UK and linked these to feelings among the British population that immigration was currently too high. Indeed, when I attend meetings of

¹⁰⁵⁷ See for example: Patrick Worrall, 'Factcheck: Are Most Asylum Seekers Really Economic Migrants?' (*Channel 4 News*, 2017) <<https://www.channel4.com/news/factcheck/factcheck-are-most-asylum-seekers-really-economic-migrants>> accessed 17 July 2020.

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asylum support groups, attendees identified anxiety around Brexit and the impact this might have on the future of the UK asylum system as being continuously on their minds.

Of course, refugee status—such as that granted in line with the Refugee Convention—is a matter of international protection rather than being one of immigration. On this basis, I argue that policy-makers and researchers should undertake further work into the appropriateness of situating the rules governing asylum within the framework of the Immigration Rules. Further, questions should be raised about the appropriateness of the Home Office as the body responsible for determining whether claimants are refugees.

As Yeo has argued, recent years have seen issues of UK immigration at the forefront of British politics.¹⁰⁵⁸ This has led to intense media and public scrutiny on Home Office decision-making. The result of this scrutiny has effectively been to politicise the work of the Home Office, with such politicisation being furthered by the setting of arbitrary targets such as the idea of reducing “net-migration” to the tens of thousands.¹⁰⁵⁹

Despite these discourses, refugee status is a recognised human right. The right to refugee protection is enshrined not just within the Refugee Convention, but also within the Universal Declaration of Human Rights.¹⁰⁶⁰ Indeed, as theorists from Hathaway to Goodwin-Gill have recognised, refugee law is most logically read as a part of the wider framework of international human rights law.¹⁰⁶¹ In this sense, while refugee status determination is always

¹⁰⁵⁸ Colin Yeo, *Welcome To Britain: Fixing Our Broken Immigration System* (Biteback Publishing 2020) 15-27.

¹⁰⁵⁹ See: 'Reality Check: Conservative Manifesto On Immigration' (*BBC News*, 2017) <<https://www.bbc.co.uk/news/election-2017-39975187>> accessed 13 August 2020.

¹⁰⁶⁰ UNGA Res 217 A(III) (UDHR), Art 14.

¹⁰⁶¹ James Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 *International Law and Politics* 315; Guy Goodwin-Gill, 'The Dynamic of International Refugee Law' (2013) 25 *International Journal of Refugee Law* 651. James Hathaway, *The Rights of Refugees Under international Law* (Cambridge University Press 2005).

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a political matter, viewing it as a part of immigration policy invites unhelpful connotations which limited the ability of decision-makers to respond to the needs of asylum seekers.

Having established that refugee status is a right, it is important to recognise that immigration, while I may personally wish for a liberal system which permits the free movement of people on a fair and equal basis, is ultimately a matter of state policy. This, in the case of the UK, will become particularly poignant in a post-Brexit context.

As the two preceding paragraphs suggest, then, it is possible to draw a sharp distinction between refugee status and immigration law. Accounting for this, it is suggested that future research investigates the possible results of removing responsibility for asylum decision-making from the Home Office and handing this to an independent non-government (but publicly funded) body.

Even if there is not a tangible improvement in first-instance decision-making, it is suggested that such a change may go some way towards reducing the anxiety and administrative violence identified in chapter seven.¹⁰⁶² At the very least, such a reform would help to reassure claimants that the wider political vision of the government of the day is not impacting on day-to-day decision making with the context of refugee status determination.

8.3.10 Traumatic Histories: Violence and the Lasting Reach of the Home Office

When speaking to the participants in this study, many recounted experiences of violence. Most of these experiences of violence formed a part of the narrative of how they came to flee and seek protection in the UK. However, others spoke of violence experienced at the hands of the Home Office. In section 7.3, I theorised administrative violence as a way of

¹⁰⁶² See: Section 7.3.

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understanding these experiences.¹⁰⁶³ This approach to understanding administrative violence demonstrates the role of Home Office decision-making processes in creating environments of harm and violence experienced by asylum claimants. In line with this, a further key implication of this study is that policy-makers and researchers need to be aware of the potential for the administrative processes associated with the asylum apparatus to represent a form of violence enacted against asylum claimants. Alongside this, future research and policy must be aware of the impact that such forms of administrative violence may have on refugees in the aftermath of their experiences with the Home Office.

In this regard, this study demonstrates the need to re-examine what we consider to be violence and to consider the ways in which current decision-making processes may themselves produce violence against asylum claimants. This is particularly important for policy-makers, who need to maintain a continuous awareness of the potential for seemingly objective, administrative practices to cause harm claimants.

This implication is a significant one because, as discussed in chapter six, negative interactions with the Home Office can have long-term implications for asylum claimants.¹⁰⁶⁴ Of particular note here is the fact that refugees are required to re-apply for their status after five years. Many participants expressed distress and concern at the prospect of having to go through the asylum process again. This was suggestive of a mistrust of the Home Office and a perception that their status in the UK was at risk.¹⁰⁶⁵

Similarly, as addressed in the above section, claimants may feel anxious about political discourses within the UK and fear the impact that such discourses may have on them

¹⁰⁶³ *ibid.*

¹⁰⁶⁴ *ibid.*

¹⁰⁶⁵ *ibid.*

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when they need to reapply for status. Thus, there is a need for research and policy to be aware not just of the interactions of the asylum claimant with the apparatus but also the wider impact of claimant's experiences on their ability to settle in the UK.

This violence—or fear of future violence—impacts claimants not just in their interactions with the Home Office, but also in their wider lives. In particular, participants recounted experiences of depression and anxiety which impacted their ability to settle in the UK and construct a life for themselves. This is primarily because they felt a continued need to act in accordance with the expectations of the Home Office, but also because they felt that they were continuing to live with the threat of deportation hanging over their head.

In this regard, the study also suggests that researchers need to undertake further work into how their pre-existing biases may constrain the ways in which violence is understood and, therefore, strengthen the ability to study the role of violence within given fields such as the asylum system itself. What I mean by this is that, as discussed in chapter seven, the current conceptions of violence prevent attention being drawn to the negative impact current Home Office practice can have on the well-being of asylum claimants.¹⁰⁶⁶ Alongside this, there is a need for research and policy to address political discourses and how these discourses impact the lives of asylum seekers.

8.3.11 The impact of Violence on the Ability to Present a Credible Narrative

On the other side of the coin, this study also pinpoints the need for policy-makers and researchers to be aware of the impact that historic experiences of violence, symptoms of depression and anxiety, and wider post-traumatic stress can have on the ability of sexually

¹⁰⁶⁶ *ibid.*

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diverse people to advance a narrative that is credible in the terms expected by decision-makers.

A recurrent theme within participant interviews was that participants struggled with the fact that they were expected to talk to decision-makers about traumatising experiences without having been offered any kind of mental health care. As this suggests, the current approach deployed by the asylum apparatus does not do enough to ensure that the welfare of claimants has been provided for prior to expecting them to speak openly about their experiences. In line with this finding, the study echos the call of asylum charities in calling for the mental health needs of asylum seekers to be provided for within the context of the asylum process.¹⁰⁶⁷

This call applies not just to sexually diverse asylum seekers but to anyone claiming asylum in the UK. The key implication for policy-makers and researchers here is the need to be aware of the potential for sexually diverse asylum seekers to be struggling from mental health issues and the impact that such issues might have on their ability to articulate a coherent and “credible” narrative of what they have experienced. I argue that policy should be drafted in a manner that is sensitive to these issues. Alongside this, I argue that the Home Office should do more to provide mental health care in advance of substantive asylum interviews to ensure that asylum seekers are not harmed by the process.

Relatedly, this study has demonstrated evidence in the narratives of some participants¹⁰⁶⁸ that the Home Office is continuing to apply what Juss termed ‘discrepancy systems’ where questions are repeatedly asked in order to generate discrepant answers, to

¹⁰⁶⁷ This focus on mental health campaigning was shared at meetings attended by the author personally.

¹⁰⁶⁸ See: Section 7.1.2.

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justify refusing an asylum claim.¹⁰⁶⁹ This is, of course, an approach which is discordant with the 2016 API which instructs decision-makers to assist claimants and presenting their claims and states that claimants should be offered the opportunity to address any perceived inconsistencies.¹⁰⁷⁰ Nonetheless, a further implication of this study is the need for policy-makers to go further in instructing decision-makers not to target discrepancies in the narratives of asylum claimants. This is particularly important in the context of sexually diverse asylum seekers due to the fact that, under the current identity-driven approach to conceptualising sexual diversity, milestones are often deployed within questioning as a way of establishing how identity has developed. This, when deployed with sexually diverse people who do not conceive of their sexual diversity in terms of identity, can lead to discordant answers which—in the absence of explicit instructions to the contrary—may lead decision-makers to determine that such discrepancies are demonstrative of a lack of credibility on behalf of the claimant.

Relatedly, researchers and policy-makers should also be conscious of the potential that sexually diverse asylum seekers may find it difficult to express a narrative in terms of feelings, emotions and self-realisation if they have not had an opportunity to reflect on their feelings and experiences or been provided with a language in which to articulate a narrative of self-reflection.

¹⁰⁶⁹ Satvinder Juss, *Discretion and Deviation in the Administration of Immigration Control* (Sweet and Maxwell 1997) 62-67.

¹⁰⁷⁰ UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019.

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8.3.12 Sexual Diversity as Political Opinion

Finally, there is a need for future research and policy to reconsider whether or not the Particular Social Group is the most appropriate way of analysing asylum claim on the basis of sexual diversity. Feminist theorists such as Honkala have argued that gender-based asylum claims made when fleeing situations such as forced marriage could be better understood through the Political Opinion ground.¹⁰⁷¹

Both the current Home Office API and the United Nations High Commissioner for Refugees have recognised the potential of sexual diversity asylum claims being analysed through the political opinion ground of the Refugee Convention.¹⁰⁷² In principle, sexual diversity constitutes a Political Opinion because as discussed in chapter five, sexual diversity generally manifests in defiance of social norms.

Significantly, approaching sexual diversity claims through the framework of Political Opinion does not require the same identity-driven logics as the current Particular Social Group Approach does. Although note should be taken of the fact that credibility related issues do, and will, still arise in claims taken under the political opinion ground. Nonetheless, I argue that future research should look at the potential of analysing asylum claims made by sexually diverse people as Political Opinions.

In stating this, I do not argue that Political Opinion should be utilised exclusively. Rather, policy should offer further guidance on how and when a claimant's sexual diversity

¹⁰⁷¹ Nora Honkala, "'She, Of Course, Holds No Political Opinions": Gendered Political Opinion Ground in Women's Forced Marriage Claims' (2017) 26 *Social and Legal Studies* 166.

¹⁰⁷² UN High Commissioner for Refugees (UNHCR), *Guidelines on the Protection of Refugee Women*, July 1991, 71; UK Visas and Immigration, 'Asylum Policy Instruction: Sexual Orientation In Asylum Claims' (Home Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf> Accessed 20th September 2019, 10.

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may result in them holding or being imputed to hold Political Opinions. For example, a sexually diverse woman who declines an offer of marriage may be interpreted as breaching social norms regarding marriage within their country of origin. If a claimant is struggling to dispense with the burden of proof in respect of the Particular Social Group ground, then, it is argued, analysis under the Political Opinion head may be of assistance.

This implication is particularly poignant if others are not adopted. This is precisely because the Political Opinion head avoids many of the identarian issues identified as arising from the current approach. Therefore, further study of using Political Opinion should be undertaken by researchers to explore whether such an adjustment may be of assistance. Additionally, policy-makers should consider amending the APIs to offer more guidance to decision-makers and claimants about when and how the Political Opinion may be a more useful way of approaching the asylum claims of sexually diverse people.

8.4 Summary

This thesis has investigated the capacity of the 2016 API on sexual diversity asylum claims, and the knowledges and discourses of sexual diversity which it employs, to recognise the heterogenous experiences of sexual diversity among people who have claimed asylum on the basis of their sexual diversity. The research has found that there are substantial mismatches between the knowledges of sexual diversity commonly deployed within the UK context and the ways in which sexually diverse refugees and asylum seekers make sense of their own sexual diversities.

In finding these mismatches, the research has also put forward a range of policy and practice implications which it is hoped will assist in making conceptual space for future research and policy to consider the wider issues around sexual diversity asylum claims. Thus,

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while the study has not sought to offer generalisable results, it has demonstrated some of the key issues and brought fresh theoretical perspectives to bear on the issues facing sexually diverse asylum seekers.

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Appendix One: Interview Topic Guide



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Introduction:

- Thank you very much for taking the time to see me.
- I would like to briefly start by running through the participant information sheet, if that's okay with you? (Run through participant information sheet)
- Sign 2 copies of the consent form (1 for the participant and 1 to be retained)
- Are you okay with being recorded? (If yes, turn on the audio recorder)
- "I have some basic topics on this sheet in front of me. However, you should feel free to direct the conversation as you are comfortable. I may make one or two notes if there is anything I think might be worth coming back to, but please try not to let that distract you."

Topics:

Tell me a little about yourself?

- Particularly looking to see how early, if at all, the subject of gender or sexual identity comes up when the individual describes themselves.
- In order to make the question less open, give examples such as where do you live, where do you work, any significant relationships? (do not mention gender or sexual identity).
- Follow up questions on any points of interest or anything that is unclear.

Can you tell me a little about how you came to the UK?

- If there is no mention of the asylum process, ask a follow up question on how the participant navigated the asylum process.
- Make note of and return to any references to gender or sexual identity.

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So, can you tell me a little bit about your “sexuality”?

- This should be posed in a very open way and asked in a manner which makes it seem like a natural progression from the previous question.
- If the participant’s identity is queer or not recognisable as immediately conforming to western metrics of gender or sexual diversity, ask if there was any difficulty in demonstrating their gender and sexual difference

How do you feel about discussing your identity?

- This section should be open to reflexivity. The researcher should make it clear to the participant that it is okay for them to admit to being uncomfortable in this interview.
- If the participant states that they are uncomfortable, then follow this up with questions about the asylum process itself.

How did you find the process of applying for asylum in the U.K.?

- Did you understand what was going on?
- Were you aware of how and where you could access legal support?
- Do you think the process is capable of treating sexual and gender identity-based claims properly?
- Did you ever feel pressured to present your identity in a particular way to strengthen your claim?

Conclusion

- Ask if there is anything they would like to add
- Remind the participant of their right to withdraw.
- Ask if they want to be informed of how, when, and where they can access the thesis.
- Offer them the option of being sent details of available support groups.