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**Gender- and sexual orientation-related asylum claims in English courts:
Credibility in judicial decision-making**

Nuno Ferreira[•]

Rute Caldeira[°]

Abstract:

This article examines and compares the way in which human rights violations related to gender and sexual orientation are dealt with by the Asylum and Immigration Tribunal (AIT) in England. Hence credibility assessment and subjectivity in the process of asylum decision-making are addressed. More specifically, the present paper analyses the reasons-giving in the asylum decision-making process at the appeal level in gender and sexual orientation related claims, uncovering in particular the subjective variables at play. The article concludes on the basis of the literature and the decisions examined that, in most cases, the assessment of the appellants’ credibility in gender and sexual orientation related asylum claims is intimately related to the presiding judges’ perception of the veracity of the appellants’ sexuality, or to the judge’s considerations on how the appellants ought to physically and socially behave as a male or female and/or convey their sexuality if returned to their country of origin. In addition, in both situations, and more often than not, international legal instruments and / or principles are of little relevance for a decision-making process that due to the very nature of the claims has to rely heavily on credibility assessments - of one’s individuality or of one’s collective belonging.

[•] Lecturer in Law, University of Manchester, e-mail address: nuno.ferreira@manchester.ac.uk.

[°] Senior Researcher, UK Red Cross, e-mail address: rute.caldeira@gmail.com. The opinions expressed in this article are solely those of the author and do not in anyway reflect those of UK Red Cross.

1. Introduction: The asylum adjudication process and the assessment of credibility

The procedures for the adjudication and determination of the refugee status in the UK are regulated by international legal instruments¹ as well as by specific European and national legislation². The Asylum and Immigration Tribunal (AIT) abides by this legislation, which predicts the difficulties inherent to the asylum claim, specifically the scarcity of objective evidence³. This scarcity of objective evidence to consubstantiate an asylum claim is the by-product of the cause that led to the claim itself. An asylum claimant is, in principle, somebody who was forced to flee, or finds him or herself unable to return to his/her country of nationality (or a third country) due to a well-founded fear of persecution on the basis of his/her race, religion, political opinion, and/or membership of a particular social group⁴. An asylum claimant is therefore very unlikely to be able to return to his/her country of nationality because, as a victim of sustained persecutory actions, s/he will face real risk of torture, inhuman and degrading treatment, or even death. Hence it is this impossibility of returning, due to underlining real risk, which founds all refugee claims.

Yet, the existence, or this quasi-tangibility, of real risk ought to be assessed. In the large majority of asylum cases, the only evidence an asylum claimant is able to produce is his/her own statement. When retelling their story, asylum claimants are concomitantly producing evidence and acting as their own witnesses. This synchronicity of roles played by the same actor – the asylum-claimant – is a structural feature in asylum claims. Asylum claimants usually have fled their country of nationality where

¹ The 1951 Convention and 1967 Protocol Relating to the Status of Refugees.

² The European Convention on Human Rights, Article 3; European Union Refugee Qualification Directive, which has been incorporated in the UK Immigration Rules.

³ The Refugee Qualifications Directive for instance provides that where aspects of an asylum claimant's statements are not supported by documentary or other evidence, those aspects will not need confirmation when all the following conditions are met: (i) the applicant has made a genuine effort to substantiate his application; (ii) all material factors at the appellant's disposal have been submitted and a satisfactory explanation regarding any lack of other relevant material has been given; (iii) the applicant's statements have been found to be coherent and plausible and do not run counter to the available specific and general information relevant to the applicant's case; (iv) the applicant has made an asylum or human rights claim at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and (v) the general credibility of the applicant has been established. See also *Kasolo v Secretary of State for the Home Department* [1996].

⁴ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979; Council Directive 2004/83/EC of 29th April 2004, OJ L 304, 30.9.2004, pp. 12-23.

they were victims, or potential victims, of sustained persecutory actions mostly carried out, or simply ignored, by state agents who cannot, or are not willing to, offer them protection. Hence, asylum claimants are not in a position to request from these agents proof of their persecutory actions. Nor can it be expected that those who persecute will willingly give evidence against themselves. In most cases, then, the only proof asylum claimants have is their own story and only they are in the position to tell it. In the vacuum of objective (factual and documentary) evidence, the credibility of their story becomes a disputed field in the process of adjudication of asylum. Consequently, the assessment of credibility is inextricably linked to all other elements relevant to the determination of asylum claims. In sum, as pointed out by Clayton, “[i]n determining refugee claims the question of credibility is both everything and nothing.”⁵

It has been acknowledged that, in account of their gender and/or sexuality, many female and homosexual asylum-seekers face particular difficulties in establishing their claims and obtaining a positive assessment of their credibility.⁶ In this paper, we aim to explore the issues arising from the assessment of credibility in claims involving female or homosexual asylum-seekers or somehow influenced by gender or sexuality –related issues. We will divide our analysis in three parts: in the first part (section 2), we will discuss the main complexities relating to the assessment of credibility, in general, and will unravel some of the substantive and procedural issues involved; in the second part (section 3), we will concentrate on how gender matters (and on *how* exactly gender matters) in the assessment of an asylum-seeker’s credibility; finally in the third part (section 4), we will focus our attention on matters of sexuality and the influence that these have on how adjudicators assess the credibility of homosexual asylum-seekers. In all the discussion below, most of the attention will be placed on what happens during the phase of judicial adjudication, i.e., how judges in Immigration Appeal Tribunals deal with the assessment of credibility of individuals seeking to see their refugee status legally recognised.

⁵ Gina Clayton, *Immigration and Asylum Law*, Oxford, OUP, p. 428.

⁶ See, particularly with regard to women, the Canadian Guidelines “Women Refugee Claimants fearing Gender-related Persecution”, Immigration and Refugee Board (IRB), 1993 (updated in 2003); and Audrey Macklin, “Refugee Women and the Imperative of Categories”, *Human Rights Quarterly* 17/2 (1995) 213-277, 248 ff.

2. The Assessment of Credibility: Substantive and Procedural Issues

While according to the general legal principle the burden of proof rests on the claimant, in asylum cases this principle is limited insofar as “the duty to ascertain and evaluate all the relevant facts is shared between the applicant” and those who are responsible for examining his/her claim (or the examiner)⁷. Additionally, because of the usual scant evidential material to support some of the claimant’s statements, claimants may be afforded the ‘benefit of the doubt’. The main purport of these rules is the establishment of a lower standard of proof than the one required in criminal law cases for instance. In asylum cases, whereby the ultimate objective of the determination of refugee status is humanitarian, the standard of proof “is satisfied if an applicant has demonstrated a ‘serious possibility’, ‘good reason’, ‘valid basis’ or ‘real or reasonable chance or likelihood’ of persecution”.⁸

Yet the applicability of these rules is nevertheless subject to the decision-maker’s assessment of the claimants’ credibility. The benefit of the doubt, for instance, shall only be afforded to claimants if and when a claimant’s account “appears credible” to the examiner who has to be “satisfied as to the applicant’s general credibility” whose statements “must be coherent and plausible, and must not run counter to generally known facts”⁹. Factual and documentary evidence ought to be properly researched and gathered in order to assess the credibility of the claimant’s account. This objective evidence, however, may not be sufficient to cover all aspects of the claimant’s story. This does not necessarily mean that the claimant’s statements are contrary to generally known facts. It may simply mean that there are no known facts to support the claimant’s statements, which may nevertheless be true. It is in the void of corroboration that the decision-maker, in this case the immigration judge, is called upon to give the claimant the benefit of the doubt and to either allow or refuse his/her appeal.

⁷ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, and Home Office, “Asylum Instruction on Assessing Credibility in Asylum and Human Rights Claims”.

⁸ Gorlick, 2003: 370.

⁹ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status. See, also, Home Office Guidance “Considering the Asylum Claim”, under “Well-Founded Fear – Credibility”.

The assessment of credibility is hugely important for the outcome of asylum appeals. Hence its importance, as well as its problematic nature, is well recognised throughout the asylum jurisdiction. As the assessment of credibility in asylum is not an objective assessment guided by a ‘scientific method’, much is left to the individual, in such cases to the fact-finder and adjudicator. The Court of Appeal stated that judging credibility “is inevitably a difficult and imperfect exercise. Different tribunals hearing the same witnesses may reach quite different views”¹⁰ and the higher courts acknowledged that the assessment of credibility lends itself to undercurrent inconsistencies.¹¹ The ultimate risk is to err and in the asylum jurisdiction this risk of error is higher than in any other kind of other kind of legal proceedings¹². Wrong credibility findings may ultimately produce either one of the following consequences: on the one hand, an appellant whose account was in fact and in substance credible and, therefore, who was genuinely at risk on return, may have his/her appeal dismissed; alternatively, an appellant who has produced a bogus asylum claim¹³ may have his/her appeal allowed and consequently be granted refugee status.

The credibility assessment exercise, which in turn is integral to the process of adjudication of asylum, is a two-fold process since it is both subjective and objective. It is subjective precisely because it is a human process and the human element cannot, in any way, be eliminated. Assessing credibility involves the handling of facts, not law, by the decision-maker¹⁴. Given the lack of corroborative evidence present in many asylum appeals, this means that much can come down to the approach adopted by the individual immigration judge in assessing whether or not the claimant is credible. There is, therefore, always the risk that different judges will assess credibility differently because the task involves essentially an assessment that is dependant on the subjective approach of the individual immigration judge. This has led some to compare the adjudication

¹⁰ *HF (Algeria) v Secretary of State for the Home Department* [2007] EWCA Civ 445, para.25.

¹¹ *HK v Secretary of State for the Home Department* [2006] EWCA Civ 1037, para 27 (Neuberger LJ); *Gheisari v Secretary of State for the Home Department* [2004] EWCA Civ 1854, paras.10 and 12 (Sedley LJ) and 20 (Pill LJ).

¹² Thomas, Robert, “Risk, Legitimacy, and Asylum Adjudication” (2007) 58(1) *Northern Ireland Legal Quarterly* 49-77

¹³ A bogus asylum claimant is somebody who constructs an untruthful account with the intent to deceive a country’s public authorities in order to gain entrance and ultimately residence rights in that particular country.

¹⁴ Thomas, Robert, op. cit.

process to a game of luck or to a “lottery”¹⁵ whose outcome depends greatly, if not entirely, on the adjudicators’ common sense and own individual experiences¹⁶. Interestingly, this high degree of ‘subjectivity’ in decision making is at odds with the necessary degree of consistency and equality of treatment that should be characteristic of every adjudication process.

However, the issue of subjectivity is unavoidable and extremely complex to solve. There are several factors that amount to subjectivity and that do not solely revolve around the immigration judges’ exercise of discretion in decision-making. These factors are: the hearing as a pre-codified social interactional space; the (in)evitable use of common sense; cross-cultural differences (or distances) and the evaluation of demeanour; language and interpretation; mental health condition of, and the impact of trauma and torture on, those who have claimed asylum.

At any rate, the objectivity of this assessment of credibility, and the overall process of decision-making, is said to be greatly enhanced by the consideration of ‘objective evidence’ and by the application of the correct legal rules. The objective evidence available is usually compounded by: the appellants’ Statement of Evidence forms (SEF forms), interview and witness statements; Home Office Country of Origin Information Reports; other country reports (e.g., State Departments, Amnesty International, Human Rights Watch reports); country expert reports; country guidance cases; medical expert reports; age assessment reports; news reports; documentary evidence (e.g., arrest warrants, identity cards, political membership cards); and graphic evidence (e.g., photographs, video recordings, graphic propaganda paraphernalia). However, the boundary between the subjective and the objective in the examination and assessment of credibility is a feeble one. The consideration of objective elements might, to a certain extent, curb the role played by human discretion and hence by subjectivity, but never as much as the several subjective factors impact on the way objective evidence is subjectively considered.

¹⁵ Catriona Jarvis, *For these or Any Other Reasons: An Examination of Judicial Assessment of the Credibility of Asylum Seekers in the United Kingdom with Particular Reference to the Role of the Immigration Adjudicator*, London, July 2000 (copy with authors)[0], p. 19.

¹⁶ John Linarelli, “Violence Against Women and the Asylum Process”, 60 *Alb. L. Rev.* 977 1996-1997, 982.

This is the inevitable dialectics between the subjective and the objective inherent in the assessment of credibility and, more generally, in the process of adjudication of asylum claims. This dialectics influences the nature and the weight to be attributed to identifiable instances of lack of consistency and plausibility inasmuch as it impacts on the decision-makers' judgment on credibility. In order to better comprehend and capture the density of the process of assessment of credibility, it is important to expose the complexity of this dialectics, examining each factor on its own as well as in relation to each other. The danger of course "is that a decision maker's subjective interpretation of a claim can lead to unfounded assumptions based not on objective information but on the individual's own experiences and beliefs, undermining the balance and fairness of an assessment [of a claim's credibility]." ¹⁷ This danger is, as we will discuss in the following sections, exacerbated in asylum requests involving gender and sexuality matters.

3. Assessment of Credibility: Gender Matters

Gender ¹⁸ is one of the most contentious elements within the discussions around fairness in the assessment of asylum claims. In asylum claims, gender ought to be recognised as one of the factors to be considered when taking into account the personal circumstances of each individual asylum claimant ¹⁹. However, this consideration, and especially the consideration of the female gender identity, is hindered by the non-consideration of gender in the law or by its stereotyped uses. Put differently, whilst adjudicators are made aware of the need to consider gender and female gender identity when assessing the individual circumstances of the claimants, the applicable law either remains oblivious to gender differences or tends to perpetuate unfounded stereotypes. For instance, both the 1951 Convention Relating to the Status of Refugees (hereinafter the

¹⁷ Home Office, "Asylum Instruction on Assessing Credibility in Asylum and Human Rights Claims".

¹⁸ Gender is here understood as in a sociologically constructed identity as opposed to an essentialised biological one. See, for instance, Asylum Policy Instruction (API) / October 2006, "Gender Issues in the Asylum Claim", p. 2.

¹⁹ See, for example, the Home Office Guidance "Considering the Asylum Claim", under "Well-Founded Fear – Factors to take into account in assessing a claim".

“Convention”), the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, and the UK Guidances and Asylum Policy Instructions use male-biased language, without at any point safeguarding the gender-neutral significance of these texts. Furthermore, by distinguishing girls from other children, the Convention is clearly inspired by a stereotyped concept of the female gender identity that portrays women as submissive and/or fragile, comparable only to, and in the same category as children. The disappearance of the Immigration Appellate Authority’s Asylum Gender Guidelines 2000 has not contributed to improve this situation in the UK, as the Asylum Policy Instruction (API) on “Gender Issues in the Asylum Claim”²⁰ has not yet been able to compensate the void left by the former.²¹ This situation contrasts sharply with what happens in the USA or Canada, for example, where decision-makers have to follow specific Guidelines in cases involving female asylum-seekers²². Nevertheless, even if one recognises some merit to the Asylum Policy Instruction on “Gender Issues in the Asylum Claim”, the high standards imposed by API are well known for not being respected in practice.²³

It has been rightly argued that “[a]sylum cases have developed on the basis of male experiences. It is extremely difficult for women to discuss, in the detail necessary to prove their case, some of the physical, mental and emotional harms inflicted upon them.”²⁴ To further complicate the due consideration of the role that gender may play in asylum claims and the way in which one’s gender identity may lend certain specificities to a claimants’ account, one should not forget the importance of the cultural context and background of the claimants themselves.²⁵ More often than not, appellants are originally from non-European countries, do not speak English (at least not as their native language)

²⁰ Asylum Policy Instruction (API) / October 2006, “Gender Issues in the Asylum Claim”

²¹ Claire Bennett, *Relocation, Relocation: The impact of internal relocation on women asylum seekers*, Asylum Aid, 2008,

<http://www.asylumaid.org.uk/data/files/publications/89/Relocation_Relocation_research_report.pdf>, accessed on 26 January 2009.

²² See the Canadian Guidelines “Women Refugee Claimants fearing Gender-related Persecution”, Immigration and Refugee Board (IRB), 1993 (updated in 2003); and the US “Considerations for Asylum Officers Adjudicating Asylum Claims from Women”, Immigration and Naturalization Service (INS), 1995. See, also, the United Nations High Commissioner for Refugees “Guidelines on the Protection of Refugees Women”, 1991.

²³ Gina Clayton, *Immigration and Asylum Law*, 3rd Edition, OUP.

²⁴ John Linarelli, “Violence against Women and the Asylum Process”, 60 *Alb. L. Rev.* 977 1996-1997, 984.

²⁵ In the same sense, see *HK v SSHD* [2006] EWCA Civ 1037.

but mostly other Indo-European languages and dialects and Afro-Asiatic languages; and practice different faiths. Immigration judges are very likely to have never been in contact with, or embedded in, societies from where appellants originally come from and were socialised into. And this may well impact negatively on the decision-makers' decision. As Linarelli put it, "some officials appear to have a perception that the testimony from an alien lacks credibility if it is beyond the experiences of the decision maker hearing the information."²⁶ Immigration judges, with scant objective evidence to go on and without first-hand empirical knowledge, cannot but imagine these societies and try to adjust their common sense's interpretive categories and subjective principles of judgment to these imagined societies. In fact, through this process of imagination, which is compounded with the examination of the available objective information and evidence, the appellant undergoes yet again another process through which s/he is produced as the Other. This Other is the product of researched facts, documentary evidence, and sometimes as well of "ideological suppositions, images, and fantasies"²⁷ that increase the tendency to essentialise and stereotyping the Other.

In the case of women, this tendency to essentialise and stereotyping leads to the production of statements that would be inconceivable were these to apply to women in the UK. For instance, in *HM (Somali Women-Particular Social Group) Somalia*, when considering whether women in Somalia would amount to a particular social group subject to serious risks and harms and not afforded protection, the Immigration Judges concluded that women were indeed subjected to systematic legal and societal discrimination, but did not accept that women were not afforded protection. The adjudicators therefore stated that although there is

"no national system of Government in Somalia (...) in large parts of the territory of Somalia there are some areas under the control of regional administrations which perform the essential functions of

²⁶ John Linarelli, "Violence Against Women and the Asylum Process", 60 *Alb. L. Rev.* 977 1996-1997, 982.

²⁷ Edward Said, *Orientalism*, Harmondsworth, Middlesex: Penguin Books, 1985, p. 90.

government within their respective territories, albeit there remain significant levels of armed conflict and inter-clan fighting.”²⁸

Furthermore, the judges noted that in areas where no regional administrations were in control, although “inadequate viewed as a whole, there are ways in which the clan structure of Somali society ensures some degree of protection for some women”²⁹, namely through the ‘durmah’ principle, according to which in a widowed woman’s case the brother of the deceased has “the opportunity” to marry his widowed sister-in-law. Whether or not in such cases women have the opportunity to decline is not investigated by the Immigration Judges, who nevertheless judged it as the least of the evils.

Interestingly, the Immigration Judges concluded that women in Somalia “form a PSG [particular social group] not just because they are women, but because they are extensively discriminated against”³⁰. Whether they would be extensively discriminated against were they men, is not at all clear.

Gender and cultural norms are not completely ignored, as the Home Office Guidance “Considering the Asylum Claim” (hereinafter the “Guidance”) explicitly mentions that these should be taken into account, in relation to the Convention reasons in general and to the asylum claimant’s demeanour in particular, when determining objectively whether, based on the facts established, there are reasonable grounds to believe the asylum claimant would suffer persecution for a Convention reason³¹. However, the cultural context and, above all, how gender and cultural background are intertwined and form a key factor in how female asylum claimants may be perceived, essentialised, stereotyped and may recount their stories, may not be offered the due attention within the decision-making process, in particular with regard to the assessment of ‘credibility’. A deceptively minor, but in fact significant, example of this, regards the inability female claimants may demonstrate in keeping eye contact with the adjudicator. Although this may be interpreted as a clear lack of sincerity in the light of the

²⁸ *HM (Somali Women-Particular Social Group) Somalia* [2005] UKIAT 00040.

²⁹ *HM (Somali Women-Particular Social Group) Somalia* [2005] UKIAT 00040.

³⁰ *HM (Somali Women-Particular Social Group) Somalia* [2005] UKIAT 00040.

³¹ Home Office Guidance “Considering the Asylum Claim”, under “Well-Founded Fear – Objectivity” and “Convention Reasons – Gender”.

communicational and cultural standards of an European, in general, or a British adjudicator, in particular, and thus lead to a negative finding of credibility, it may also be easily explainable in the light of the claimant's social, cultural and religious background.³²

For instance, one of the crucial elements to determine the credibility of an asylum claimant is the willingness and expediency in providing the authorities with all the relevant information and proof available. Furthermore, the claim must be made "at the earliest possible time, unless the person can show good reason for not having done so"³³. Yet it is possible that in many cases female asylum claimants purposively delay their claim for fear of exposing their experiences of sexual abuse. This fear may be due to sentiments of shame and guilt rooted in cultural perceptions.³⁴ Whether this is a strong enough reason to delay a claim is something that depends wholly from the judge deciding that particular appeal. Gender and cultural norms are said to constitute 'reasonable explanations'³⁵. However, it is not hard to imagine a decision determining that, in the case of an asylum claim only made a few months, or even years, after arriving to the UK, it is irrelevant that a woman has been raised in a culture that condemns any autonomous or activist behaviour from women.

The "reluctance to disclose relevant information" is explicitly alluded to when considering gender-related issues with regard to assessing Convention reasons in an asylum application³⁶. This should, therefore, be an equally relevant element, amongst others, to consider when assessing the credibility of female asylum-seekers. This is rightly acknowledged by the Asylum Policy Instruction (API) "Gender Issues in the Asylum Claim", where several grounds for a woman not to reveal certain information are suggested, such as feelings of guilt, shame, concerns about family dishonour, and so

³² In this sense, see also Canadian Guidelines "Women Refugee Claimants fearing Gender-related Persecution", Immigration and Refugee Board (IRB), 1993 (updated in 2003).

³³ s. 8 of Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

³⁴ Similarly accepted in the UK, see *R v Lucas* (1981) 2 All ER 1008 (Lord Lane CJ). See also Audrey Macklin, "Refugee Women and the Imperative of Categories", *Human Rights Quarterly* 17/2 (1995) 213-277, 247-248.

³⁵ "Asylum Instruction on Assessing Credibility in Asylum and Human Rights Claims", under "Background to Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004".

³⁶ Home Office Guidance "Considering the Asylum Claim", under "Well-Founded Fear – Objectivity" and "Convention Reasons – Gender".

forth. However, adjudicators may overlook cases of women suffering from rape trauma syndrome, which may account for lack of memory, loss of control, lack of self-confidence and low self-esteem. There does not seem to be much ground to believe that female asylum-seekers' "reluctance to disclose relevant information" is usually dealt with fairly, as the UK asylum adjudication system, particularly in its first stage at the Home Office, has been described as i) using minor ambiguities and discrepancies to discredit applicants, even when not having any bearing on the basis of the claim, ii) showing little sensitivity towards those who suffered trauma, particularly torture and rape, iii) producing unreasonable assertions about the credibility of asylum-seekers, and iv) displaying a general tendency to disbelief.³⁷

Even when a female asylum-seeker willingly discloses all required information for the judge to decide on the claim, including information regarding events of sexual violence, the adjudicator may choose to hold such account of the facts as implausible, thus essentially denying the claimant the necessary credibility. Jarvis reports the case of a Polish Roma woman who claimed that she had been raped and, simultaneously, shouted racial abuse at. The (male) adjudicator in question argued that, although not questioning the episode of rape, he did not accept that a man would, under those circumstances, shout such abuse, and consequently rejected this account of the facts.³⁸ This decision illustrates how, by being unable to go beyond his personal (culturally-biased male) experience and to conceive of a significantly different social and personal context, the adjudicator demonstrated a severe lack of empathy and ultimately entirely undermined the credibility (as well as the claim) of the female claimant.³⁹

³⁷ See Asylum Aid, *Still no Reason at All: Home Office Decisions on Asylum Claims*, 1999, <http://www.asylumaid.org.uk/data/files/publications/46/Still_No_Reason_At_All.pdf>, accessed on 7 March 2009; Mary Coussey, *Independent Race Monitor: Annual Report 2004-5*, 5 July 2005.

³⁸ Catriona Jarvis, *For these or Any Other Reasons: An Examination of Judicial Assessment of the Credibility of Asylum Seekers in the United Kingdom with Particular Reference to the Role of the Immigration Adjudicator*, London, July 2000 (copy with authors)[0], p. 33.

³⁹ See, also, on how adjudicators may fail to recognise rape as a form of persecution, may challenge the credibility of women who have been victims of rape, and may deny the connection between sexual abuse and a Convention ground, Audrey Macklin, "Refugee Women and the Imperative of Categories", *Human Rights Quarterly* 17/2 (1995) 213-277, 226.

The social role(s) attributed to women in different social and cultural settings⁴⁰ will also determine women's unorthodox and unconventional political and religious expressions that may amount to Convention reasons. For example, by simply bringing her veil slightly backwards and thus unveiling a few centimetres of hair, a woman may be communicating her profound dislike of certain religious authorities. In certain societies, women's political subversive activities may be 'reduced' to what in other societies may be considered slightly passive and therefore less gave actions such as cooking for political dissidents or providing occasional hiding places and shelter. Furthermore, while male subversive political conduct may be retaliated or punished with torture and assassination, in some societies female political activity is more likely to be suppressed through the use of sexual violence.⁴¹ In fact, independently of their political activities women may be raped and subjected to sexual violence in times of war because sexual violence may be used as a weapon, a strategy of war by both belligerent sides⁴² Although the importance of gender-cum-cultural/religious/political matters in relation to Convention reasons is already formally accepted⁴³, that same importance has not yet been sufficiently, expressly and *directly* connected to findings on credibility of asylum claimants.

A clear example of how the lack of weight given to gender-cum-cultural/religious/political elements may work against the claims of female asylum-seekers regards those situations in which women present their claims only after the claims presented by another male asylum-seeker has been refused. The latter may refer to the woman's husband, father, brother or son, but regardless of that, it is extremely

⁴⁰ See, generally, on this matter, Audrey Macklin, "Refugee Women and the Imperative of Categories", *Human Rights Quarterly* 17/2 (1995) 213-277, 238-239.

⁴¹ John Linarelli, "Violence Against Women and the Asylum Process", 60 *Alb. L. Rev.* 977 1996-1997, 983. Exemplifying how British courts have stubbornly and to the limits of the absurd refused to recognise the political dimension of sexual violence, see, for example: *R v Special Adjudicator ex p Okonkwo* [1998] Imm AR 502; *R v IAT ex p Arafat Shaban* [2000] Imm AR 408; *R (N) v SSHD* [2002] EWCA Civ 1082; and *Farhat Saeed Chaudhary* 00/TH/00304.

⁴² See, for instance, Kaldor, Mary (1998), *New and Old Wars: Organized Violence in a Global Era*, Cambridge: Polity Press; Seifert, Ruth (1996), "The Second Front. The Logic of Sexual Violence in Wars". *Women's Studies International Forum*, vol. 19, nos. 1-2, pp. 35-43; Skejlsbæk, Inger (2001), "Sexual Violence and War: Mapping Out a Complex Relationship". *European Journal of International Relations*, 7 (2), pp.211-237; Goldstein, Joshua S. (2001), *War and Gender. How Gender Shapes the War System and Vice Versa*, Cambridge: Cambridge University Press.

⁴³ See, for example, Asylum Policy Instruction (API) / October 2006, "Gender Issues in the Asylum Claim", pp. 8 and 10.

common for women's claims to be secondary to those of their male relatives. As Jarvis explains, "given that it is the norm for women to be treated as dependants of their husbands or other male relatives at the time when the application is made, this would appear to be an area in which women face a grave disadvantage should they later lodge a claim to recognition in their own right."⁴⁴ In other words, an adjudicator will be considerably more likely to make a negative assessment of a female asylum-seeker's credibility if her claim has only been lodged after her male relative's claim has been denied. This being more the rule than the exception, the extent of the harm caused to female asylum-seekers by such unjust negative findings of credibility is arguably immense. Adjudicators should, therefore, be more alert to the advice offered by the Refugee Women's Legal Group, to the effect that delays by women in presenting applications in their own name should not lead to any negative consequences with regard to the assessment of their credibility.⁴⁵

Another way the gender of the asylum claimant may, albeit indirectly, relate to the assessment of his/her credibility, regards the possibility of returning or of relocating in another part of the country of origin. Although dogmatically separate notions, credibility and the possibility of return/relocation may be interconnected insofar as the allegation of an asylum claimant that he/she would not be able to return or to move to a different part of his/her country of origin in the light of his/her gender (combined, for example, with the fact of having been sexually abused), may create in the mind of the decision-maker the impression that such account of the facts is not credible and, therefore, the credibility of that asylum claimant becomes (unfairly) questionable.⁴⁶

In this regard, it is relevant to recall that "a person will not be excluded from refugee status merely because he [sic] could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect

⁴⁴ Catriona Jarvis, *For these or Any Other Reasons: An Examination of Judicial Assessment of the Credibility of Asylum Seekers in the United Kingdom with Particular Reference to the Role of the Immigration Adjudicator*, London, July 2000 (copy with authors)[0], p. 21.

⁴⁵ RWLG, "Gender Guidelines for the Determination of Asylum Claims in the UK", July 1998.

⁴⁶ See, in the same sense, Audrey Macklin, "Refugee Women and the Imperative of Categories", *Human Rights Quarterly* 17/2 (1995) 213-277, 250-251.

him [sic] to do so.”⁴⁷ Coherently, the API on “Gender Issues in the Asylum Claim” states, particularly with regard to women, that the ‘reasonableness’ of relocation should take into consideration gender issues, as “financial, logistical, social, cultural and other factors may mean that women face particular difficulties”, in particular widows or single parents⁴⁸. Despite of this API, it has been found that internal relocation “is being simplistically applied without sufficient evidence-based analysis and scrutiny of risks”, which is why “[a]nalyzing the cultural context and social position of women when assessing the appropriateness of internal relocation is essential”.⁴⁹

Finally, it is worth mentioning that it has been found, in the light of the opinions provided by some adjudicators themselves, that appellants have slim probabilities of winning their claim if they do not attend the court hearing or if they attend the hearing but do not offer oral evidence.⁵⁰ Despite such practice having been considered an error of law by a vast number of AIT’s decisions⁵¹, adjudicators persist in assessing more negatively the evidence produced under the circumstances described. The relevance of this to female asylum-seekers’ claims is evident: women who have suffered sexual violence or with certain cultural or religious backgrounds will be extremely reluctant to speak about their experiences, produce oral evidence about the exact facts that substantiate their asylum claims, or even appear in public at all, let alone in such exposed environments as court audiences. The probabilities of women under these circumstances seeing their refugee status legally recognised may, therefore, be significantly diminished by adjudicators’ unawareness of the reasons behind the non-

⁴⁷ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, para. 91.

⁴⁸ Asylum Policy Instruction (API) / October 2006, “Gender Issues in the Asylum Claim”, p. 7.

⁴⁹ Claire Bennett, *Relocation, Relocation: The impact of internal relocation on women asylum seekers*, Asylum Aid, 2008, <http://www.asylumaid.org.uk/data/files/publications/89/Relocation_Relocation_research_report.pdf>, accessed on 26 January 2009.

⁵⁰ Catriona Jarvis, *For these or Any Other Reasons: An Examination of Judicial Assessment of the Credibility of Asylum Seekers in the United Kingdom with Particular Reference to the Role of the Immigration Adjudicator*, London, July 2000 (copy with authors)[0], p. 19.

⁵¹ See *Alli* (12703), *Kaleem Ahmed* (12774), *Akhtar* (13291), *Shah* (13957), *Mohinder Singh* (15592), *Gok* (15971), *Coskuner* (16769), all cited in Catriona Jarvis, *For these or Any Other Reasons: An Examination of Judicial Assessment of the Credibility of Asylum Seekers in the United Kingdom with Particular Reference to the Role of the Immigration Adjudicator*, London, July 2000 (copy with authors)[0], p. 20.

appearance of the claimant in court or of the lack of oral evidence, and ultimately by unduly valuing such aspects at all.⁵²

4. Assessment of Credibility: Sexuality Matters

Sexuality is, as one might easily imagine, on the basis or at least somehow related to several kinds of persecution leading individuals to fleeing their own countries.

When discussing the Convention reason of religion, and when needing to determine ‘genuine religious conversion’, decision-makers are asked to carefully prepare questions, tailoring them to the individual case and not expecting ‘unrealistic level of specialist knowledge’⁵³. Within the context of religion, this means, for example, that “just because somebody claims to have recently converted to Christianity, this does not mean they will be able to remember how many books there are in the Bible or to list Jesus’ twelve disciples.” We argue that similar reasoning should apply to sexuality-related issues. This translates, for example, into the fact that simply because an asylum claimant claims to be homosexual, that does not mean that that individual will be aware of all gay venues and organisations that exist in his/her country, or even home town, let alone in the UK or place of residence in the UK.

The lack of knowledge about gay venues, organisations or social groups, either in the country of origin or in the UK, should not, at least *per se*, lead a decision-maker to believe that an asylum claimant’s account of his/her is not credible. As for any other circumstances, decision-makers are under the obligation to “give due weight to *all* the facts of the case”⁵⁴.

⁵² See, also, although looking at this issue from a slightly different angle, Audrey Macklin, “Refugee Women and the Imperative of Categories”, *Human Rights Quarterly* 17/2 (1995) 213-277, 251.

⁵³ Home Office Guidance “Considering the Asylum Claim”, under “Convention Reasons – Religion”.

⁵⁴ Home Office Guidance “Considering the Asylum Claim”, under “Well-Founded Fear – Credibility”.

Similarly to what has been mentioned with regard to gender matters, the assessment of an asylum claimant's credibility may *in casu* be linked to his/her sexuality, in particular when the issue of relocation arises. In analogy to what the API on "Gender Issues in the Asylum Claim" states with regard to women⁵⁵, the 'reasonableness' of relocation should take into consideration sexuality issues, namely one's sexual orientation, which, depending on the cultural and socio-economic context of a particular asylum claimant, may have an impact on the actual possibility of that individual relocating to a different region of his/her home country. That clearly does not seem to be the case presently, in the light of cases such as *M v IAT*⁵⁶, where courts found that homosexual appellants were able to return to their home countries and/or relocate within them, since their safety would be secured as long as they refrained from "flaunting" their sexuality or in anyway letting others know about their sexual orientation.

Finally, and similarly to what has been mentioned above in relation to female asylum-seekers' claims, the fact that adjudicators often value negatively the non-attendance of claimants to court hearings or their unwillingness to offer oral evidence,⁵⁷ may particularly affect claims related to the sexuality of asylum-seekers. Independently of the gender, past sexual experience, and religious or cultural background of the asylum-seeker in question, it is undisputable that, to a greater or lesser extent, hardly any individual will willingly and gladly appear in court and speak about his/her sexuality. This aspect of one's personality and life being so extremely intimate for, and constitutive of, the great majority of individuals, it is highly understandable that an asylum-seeker will preferably not show up in court nor discuss openly the facts that substantiate his/her asylum claim and that relate to his/her sexuality. That being the case, the fact that these circumstances will very likely (even if not expressly) be valued against that individual's claim is all the more regrettable.

⁵⁵ Asylum Policy Instruction (API) / October 2006, "Gender Issues in the Asylum Claim", p. 7.

⁵⁶ *The Queen on the application of M v IAT (SSHD interested party)* [2005] EWHC 251 (Admin).

⁵⁷ Catriona Jarvis, *For these or Any Other Reasons: An Examination of Judicial Assessment of the Credibility of Asylum Seekers in the United Kingdom with Particular Reference to the Role of the Immigration Adjudicator*, London, July 2000 (copy with authors)[0], p. 19.

5. Conclusion

Gender and sexuality will no doubt go on for a long time being the root of extremely intricate asylum-seekers' claims. One can detect in the fields of law and sociology opposing trends with regard to such matters. While some scholars may dedicate all their efforts to deconstruct categories of gender and sexual orientation, others may, often for strategic and pragmatic reasons, exploit those categories to ensure better protection to those asylum-seekers who ground their claims on elements related to their gender or sexuality. As Macklin rightly concludes, this has "generated an unresolved tension between theory and practice".⁵⁸ Yet another tension identified by Macklin, and in her view of even greater importance, is that between, on the one hand, the understanding and construction asylum-seekers may possess of their own identity and experiences (for example, with regard to their gender, sexuality or religion), and, on the other hand, the categorisation and objectivisation of asylum-seekers and their claims into standards and notions that do not reflect asylum-seekers' view of themselves and interpretation of themselves.⁵⁹

Gender and sexuality surely play an increasingly visible and significant role in asylum-seekers' claims. Whether theoretical or pragmatic interests should prevail in the way these matters are dealt with in the adjudication process of these claims is still disputed. The same is valid for whether priority should be given to the asylum-seekers' self-identification or to superimposed objective, legal categories. At any rate, it should be indisputable that these dimensions of the claims of many asylum-seekers need to be treated in a much more sensible and adequate way, resorting to more sophisticated, diverse and appropriate cultural and social notions.

⁵⁸ Audrey Macklin, "Refugee Women and the Imperative of Categories", *Human Rights Quarterly* 17/2 (1995) 213-277, 216.

⁵⁹ Audrey Macklin, "Refugee Women and the Imperative of Categories", *Human Rights Quarterly* 17/2 (1995) 213-277, 254-256.