

Memory and trauma in LGBTQ+ women's asylum claims on sexual orientation and gender identity (SOGI) grounds: disregarded, dismissed and denied

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Abstract

This research delves into the relationship between trauma and memory in relation to LGBTQ+ women's claims for international protection in the UK on SOGI grounds, and looks at how the impacts of these are currently dealt with in asylum procedures. The research explores how memory and trauma exacerbate existing barriers faced by LGBTQ+ women during their refugee status determination (RSD) procedures, how these issues influence the coherence of their narratives of their persecution, and how this impacts decision-makers' assessments of their credibility and ultimately the outcome of their claims for asylum on SOGI grounds in the UK. Fundamentally, the research reveals how UK RSD procedures, in both policy and practice, deal with the impact of psychological trauma on memory in the assessment of LGBTQ+ women's asylum claims on SOGI grounds in the UK, paying close attention to how medical evidence outlining the memory impairment resulting from persecution-related trauma is interpreted and considered by decision-makers. Through a comprehensive analysis of case law spanning a 10-year period, the research finds that the UK asylum system currently deals with the compounding effects of trauma and memory in LGBTQ+ women's claims for asylum on SOGI grounds inconsistently, and in a way that is entirely at odds with both international and domestic RSD policy and guidance.

Keywords *women, queer asylum, psychological trauma, memory, credibility assessment*

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Abbreviations

BAME – Black, Asian and Minoritised Ethnic

IAC – Immigration and Asylum Chamber

IMA – Illegal Migration Act

LGBTIQ+ – Lesbian, Gay, Bisexual, Trans, Intersex and Queer (the '+' acknowledges that this is not an exhaustive list of diverse SOGIESC identities)

MPSG – Membership of a Particular Social Group

NABA – Nationality and Borders Act

PTSD – Post Traumatic Stress Disorder

RMA – Rape Myth Acceptance

RSD – Refugee Status Determination

SGBV – Sexual and Gender-based Violence

SOGI – Sexual Orientation and Gender Identity

SOGIESC – Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics

UK – United Kingdom

UNHCR – United Nations High Commissioner for Refugees

1. Chapter One: Introduction, Wider Context and Methodology

1.1 Introduction

This research builds upon existing research in the field of queer asylum¹ to shed further light on how queer women seeking asylum on grounds of sexual orientation and gender identity (SOGI) in the UK become subject to the pervasive culture of disbelief in asylum decision making. In particular, the research seeks to highlight how this plays out in the interpretation of medical evidence presented by LGBTQ+ women which outlines issues of trauma and the impacts upon memory. First and foremost, the research is concerned with how the impacts of psychological trauma on memory and cognitive function affect decision-maker's credibility assessments of LGBTQ+ women's claims for asylum on SOGI grounds in the UK. The overarching aim of the research is to improve SOGI asylum decision-making by deepening our collective understanding of the impact of trauma on memory, and in particular, queer memory,² in relation to claims for asylum on SOGI grounds, and by interrogating how these interrelated barriers are dealt with within the UK asylum system in LGBTQ+ women's claims for protection. The research seeks to provide well-founded recommendations for decision-makers on how to ensure asylum decision-making procedures accommodate holistically for these sensitivities in an inclusive, trauma-informed and SOGI-sensitive manner. The notion of epistemic violence³ in the context of SOGI asylum will form the lens through which analysis, findings and conclusions are drawn, exploring how LGBTQ+ women are subjected to epistemological injustices throughout their asylum procedures, particularly where issues of trauma and memory arise, paying close attention to power imbalances from an intersectional standpoint, and what this means in particular in asylum outcomes for queer women racialised as Black. The author recognises the diversity of the multitude of identities under the umbrella term 'LGBTQ+' women, including the identities and experiences of trans women. However, owing to the author's recognition that the experiences of trans women in SOGI claims for asylum are unique and worthy of separate investigation, the research in question explores the legal experiences of women who in their claims for asylum identified as gay, lesbian, or bisexual. The author uses the term 'queer' and 'LGBTQ+' interchangeably to encompass these sexual identities.

The central point of interrogation of this research is to explore how the impact of psychological trauma on human memory comes to impact the credibility assessments and final asylum claim outcomes of LGBTQ+ women in the UK. Following an outline of the adopted methodology and approach, the paper will begin by reviewing relevant literature, moving from the general to the specific. In the first instance, the interplay between trauma and memory will be examined, moving to the relevance of this interplay for asylum claims, followed by what this means specifically for LGBTQ+ women claiming asylum on SOGI grounds in the UK, to then outline the resulting analytical framework. The substantive chapters, three and four, analyse identified cases where memory and trauma came to impact upon queer women's ability to form what is defined by the UK Home Office as, a "coherent narrative", in their asylum claim, and how both their autobiographical and medical evidence were then interpreted by the judges. The final chapter draws the analysis to conclusion followed by resulting recommendations for decision-makers.

1.2 Wider Context

This research does not delve into the impact and implications that the recently enacted Nationality and Borders Act (NABA) 2022⁴ and Illegal Migration Act (IMA) 2023⁵ pose for women seeking asylum in the UK on SOGI grounds, or indeed what the new legislation means for how the UK asylum system will, or will not, deal with the effects of trauma on memory in the determination of their substantive cases. Given what both of these profound legislative changes pose for the narrowing access to asylum in the UK for all seekers of sanctuary, the specific implications for LGBTQ+ women will no doubt be unique, and indeed worthy of

1 Held, N., 'What Does a "Genuine Lesbian" Look Like? Intersections of Sexuality and "Race" in Manchester's Gay Village and in the UK Asylum System' (2016) and Dustin, M., 'Pathways to Refugee Protection for Women: Victims of Violence or Genuine Lesbians?' (2022).

2 Meyer, M.D.E., "On Remembering the Queer Self: The Impact of Memory, Trauma and Sexuality on Interpersonal Relationships." (2007)

3 Ferreira, N., Utterly Unbelievable: The Discourse of 'Fake' SOGI Asylum Claims as a Form of Epistemic Injustice, *International Journal of Refugee Law*, Volume 34, Issue 3-4, 303–326 (2022)

4 Nationality and Borders Act, 2022, United Kingdom. Available at: <https://www.legislation.gov.uk/ukpga/2022/36/contents/enacted> [Accessed 10 February 2024]

5 Illegal Migration Act, 2023, United Kingdom. Available at: <https://www.legislation.gov.uk/ukpga/2023/37/enacted> [Accessed 10 February 2024]

its own independent research. Of particular relevance to queer women is the shift in approach by the UK government in moving away from the United Nations High Commissioner for Refugees' (UNHCR) "either/or" approach to adopt the "cumulative test" in assessing Membership of a Particular Social Group (MPSG)⁶ meaning that a woman who identifies as LGBTQ+, for example, will now have to prove that she is both queer and perceived as such in her country of origin, increasing the threshold that must be met.

Similarly, this research does not consider how issues of trauma and memory in LGBTQ+ women's cases for asylum in the UK on SOGI grounds are exacerbated by the increased waiting times within the UK asylum system owing to the current asylum backlog, which at the time of writing stands at over 177,000⁷ people awaiting an initial decision on their asylum claim. Equally, the research does not delve into what the impacts of inadmissibility rules within both NABA and the IMA will look like in practice, and how these pieces of legislation come to create differential experiences of the UK asylum procedures and access to subsequent rights, such as family reunification. What these protracted experiences of limbo would and will mean for queer women in terms of compounding existing trauma and impacts on memory is not encompassed within this research, but is recognised as worthy of further exploration.

1.3 Methodology

Although the research questions under study could have been approached by conducting primary, participatory research with LGBTQ+ women in a way that seeks to shift and remove barriers to power with marginalised individuals and communities, due to limited resources available to the author in order to approach this in an ethical and meaningful way, this research is desk-based in nature, taking an inductive approach to carrying out secondary data collection of publicly available case law on asylum claims on SOGI grounds lodged by LGBTQ+ women in the UK, and analysing the data qualitatively. Analysis is drawn from relevant asylum procedures through an intersectional lens, identifying cases where memory surrounding persecution has been a factor affecting credibility tests, such as for example through lack of detail, inconsistencies in narrative, or late disclosure of sexual orientation. The research takes an intersectional approach through paying close attention to the relationship between sexuality, gender identity, race, and social class, and the roles these intersecting identities play in relation to trauma, memory and subsequent access to protection. This intersectional approach stems from the recognition of the specific challenges faced by female applicants⁸, and how for queer women seeking international protection, these barriers are compounded⁹.

Given that cases from the First-tier Tribunal (Immigration and Asylum Chamber) are not available to the public, all the cases included in this research are from the Upper Tribunal's (Immigration and Asylum Chamber)¹⁰ publicly available database. The researcher recognises that this poses an inherent limitation on the research, however, as the intention was not to examine all possible cases to generate a representative sample, cases were chosen intentionally where sufficient detail was given about the initial decision and the substantive claim as a whole to fully address the research questions. The approach taken was to conduct legal doctrinal analysis of the chosen case law, following purposive sampling in order to retrieve the richest and most relevant data to the central research question.¹¹ It is also important to highlight the poten-

6 Immigration Law Practitioners' Association and Women for Refugee Women Briefing for the House of Lords Committee Stage for the Nationality and Borders Bill – Part 2: Asylum, Clause 32 Amendment, 2022. Available at: <https://ilpa.org.uk/wp-content/uploads/2022/01/ILPA-and-WRW-Part-2-Clause-32-Particular-Social-Group-Amendment.pdf> [Accessed August 30 2024].

7 The Refugee Council, *The Asylum Backlog and Asylum Accommodation*, June 2023. Available at: <https://www.refugeecouncil.org.uk/wp-content/uploads/2023/06/The-asylum-backlog-and-asylum-accommodation-June-2023.pdf> [Accessed August 30 2024]. Pg. 1: The estimated 177,899 people is based on the ratio of people to outstanding cases for cases that were awaiting a decision at the end of March 2023 (133,607 cases relating to 172,758 people).

8 British Red Cross VOICES Network, *We want to be strong, but we don't have the chance: Women's experiences of seeking asylum in the UK* (January 2022) [1.1.2]. Available at: <https://www.redcross.org.uk/about-us/what-we-do/we-speak-up-for-change/womens-experiences-of-seeking-asylum-in-the-uk> Accessed 23 August 2024.

9 Venturi, D. "Beyond the Rainbow? An Intersectional Analysis of the Vulnerabilities faced by LGBTIQ+ Asylum-Seekers", *European Journal of Migration and Law* 25, 4 (2023): 474-500, doi: <https://doi.org/10.1163/15718166-12340164>

10 The First-tier Tribunal Immigration and Asylum Chamber is responsible for handling appeals against some decisions made by the UK Home Office relating to entry clearance to, permission to stay in, and deportation from the UK. The Upper-tier Tribunal is responsible for handling appeals against decisions made by the First-tier Tribunal (Immigration and Asylum) relating to visa applications, asylum applications and the right to enter or stay in the UK.

11 Moser, A. and Korstjens, I., 'Series: Practical Guidance to Qualitative Research. Part 3: Sampling, Data Collection and Analysis' (2017) 24 *European Journal of General Practice* 9.

tial limitations surrounding representativeness of the data sample given that all cases under analysis had been refused and were being appealed, this poses inherent limitations on any conclusions drawn around the 'quality' of decision-making more broadly in these types of cases. This is important to consider when analysing what the findings tell us and drawing out subsequent recommendations in the final chapters. However, given that several cases under analysis were submitted de novo to the First Tier Tribunal – some multiple times – the research can still be considered to make a contribution to our understanding of decision-making practices in LGBTQ+ women's claims for asylum on SOGI grounds where the impacts of trauma on memory can be seen to be a significant factor affecting credibility assessments.

A series of keywords were used to conduct the data collection stage of the research, which included, 'lesbian', 'bisexual woman', 'gay woman', 'LGBT woman', 'lesbian - trauma', 'lesbian - PTSD', 'lesbian - memory', and, 'lesbian - remember'. Over forty cases were reviewed, a total of twenty-six cases identified as relevant to the study, and seven selected for in-depth analysis due to their particular relevance – given the direct illustration of how trauma and memory are dealt with in LGBTQ+ women's claims for asylum in the UK. The data collected and analysed in this research spans the ten-year period from 2012 to 2022 owing to several considerations: firstly, in order for the research to be relevant, case law is analysed from a recent time period, and at the same time, a relatively narrow period of a decade, so as to give a "snapshot" of current practice by decision-makers when assessing psychological trauma and its impact on memory in LGBTQ+ women's claims for asylum on SOGI grounds in the UK. The research does not look at case law and rulings prior 2010, since this is the year that the "discretion test" was overruled through the landmark case *HJ (Iran) and HHT (Cameroon) v Secretary of State for the Home Department*¹², which represented a shift in decision-making on claims for asylum on sexual orientation grounds in the UK¹³. Similarly, the research does not look at decisions made after the introduction of the Nationality and Borders Act in June 2022, and therefore neither does the research encompass rulings made following the enactment of the Illegal Migration Act in July 2023, both of which undoubtedly pose profound challenges for LGBTQ+ women's access to protection in the UK.

The research will consolidate the existing literature around stereotyping and heteronormative credibility tests for LGBTQ+ women claimants,¹⁴ the pervasive culture of disbelief¹⁵ and the intersectionality of race, gender and sexuality,¹⁶ and hone in on the complexities surrounding overlapping identities, to examine how, if at all, refugee law, policy and practice are able to accommodate for these complexities in the UK. This research will therefore fill the comparable gap in the literature when compared with cis-male LGBTQ+ claimants, recognising that it is often precisely this invisibility that serves to construct LGBTQ+ women asylum claimants as 'deportable subjects',¹⁷ impacting their access to international protection.

The cases selected for in-depth analysis in chapters three and four are summarised in the below table:

Case	Year of Decision	Sexual Orientation and Gender Identity (SOGI)	Country of Origin
AO	2021	Lesbian Woman	Nigeria
ay	2017	Lesbian Woman	Cameroon
rn (1)	2016	Lesbian Woman	Uganda
rn (2)	2017	As above	As above
hkm	2016	Lesbian Woman	Cameroon
SN	2018	Lesbian Woman	Uganda
Ms C O	2019	Bisexual Woman	Nigeria

12 *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010, available at: https://www.refworld.org/cases,UK_SC,4c3456752.html [Accessed 30 October 2024].

13 Wessels, J., *HJ (Iran) and HT (Cameroon) – Reflections on a new test for sexuality-based asylum claims in Britain*, *International Journal of Refugee Law*, Volume 24, Issue 4, (2012), 815-839, <https://doi.org/10.1093/ijrl/ees057>

14 Dustin, M., *Many Rivers to Cross: The Recognition of LGBTQI Asylum in the UK*. *International Journal of Refugee Law*, (2018) [online] 30(1). Available at: https://academic.oup.com/ijrl/article/30/1/104/5045619?utm_source=TrendMD&utm_medium=cpc&utm_campaign=International_Journal_of_Refugee_Law_TrendMD_0 [Accessed 30 October 2024].

15 Lewis RA, "Gay? Prove It": The Politics of Queer Anti-Deportation Activism' (2014) *Sexualities* 958.

16 Tschalaer, M., 'Victimhood and femininities in Black lesbian asylum cases in Germany', *Journal of Ethnic and Migration Studies*, (2020), 1–18.

17 Lewis, R., *Queering deportability: The racial and gendered politics of lesbian anti-deportation activism*. (2021)

2. Chapter Two: Reviewing the Literature, Forming an Analytical Framework

2.1 Memory as a Fallible Friend

This chapter delves into the interplay between memory, trauma and the asylum process, particularly for LGBTQ+ women, and emphasises the fallibility of human memory, and its variability, even in non-traumatic situations¹⁸. As will be explored, traumatic stress, like post-traumatic stress disorder (PTSD), can severely affect memory, with associated symptoms such as anxiety, depression, and memory disturbances.

There exist entire bodies of research compiling extensive clinical studies that outline the fallible nature of human memory. Research has shown that even in the absence of traumatic stress or psychological trauma, there is wide-ranging variability in a person's ability to record, retain and retrieve memories.¹⁹ Some people appear to possess a comparable ease to recall memories, whereas others may struggle to summon past events, facts and the details surrounding these. Clinical research further demonstrates that even memories of what could be considered the most important, and indeed traumatic of life events, can be extremely challenging to recall with any detail or accuracy, or even at all.²⁰ Gaps in memory, absence of detail and overall inconsistencies arising, therefore can be considered a natural phenomenon in the way that any individual creates, stores, and retrieves memories²¹. These interrelated phenomena however, pose significant challenges for the "coherence" of a narrative for individuals navigating asylum procedures, which is a central element of credibility assessments.

The effects of psychological trauma and traumatic stress on specific areas of the brain and their functions in regulating memories and recall ability are well researched.²² For example, clinical research has illustrated how following an experience of traumatic stress, changes occur in brain areas including the hippocampus, amygdala, and medial prefrontal cortex, that mediate alterations in memory, shedding light on the physiological impact of trauma on the human brain, and in particular recall ability²³. Similarly, the broader effects of traumatic stress upon the human brain are equally understood to result in conditions such as depression, insomnia, personality disorders and dissociation²⁴. The research states that for many survivors of trauma, PTSD can become an integrated reality, altering how they experience life²⁵. People living with PTSD experience increased symptoms of anxiety, depression, dissociation, distress, and indeed profound memory disturbances.²⁶ The specific alterations in memory function studied in individuals with PTSD include dissociative amnesia – meaning an inability to coherently recall everyday events – deficits in autobiographical memory, deficits in verbal declarative memory, an attentional bias for trauma-related material, and frontal lobe-related impairments.²⁷ Further research has delved into the exacerbating impacts upon the general fallibility of human memory of psychological trauma and traumatic stress, and how this becomes particularly pertinent in the context of judicial procedures.²⁸ It soon becomes easy to see how profoundly these biological phenomena would impact upon an individual's ability to meaningfully participate in refugee status determination (RSD) procedures, and focusing specifically on the experiences of LGBTQ+ women, it is worth noting the studied impacts of shame upon memory²⁹. Equally, there is literature to support the proposal that shame memories have traumatic mem-

18 Howe, M. L. & Knott, L. *The fallibility of memory in judicial processes: Lessons from the past and their modern consequences* in *Memory* (2015) 23(5), 633-656. doi: 10.1080/09658211.2015.1010709

19 United Nations High Commissioner for Refugees (UNHCR), *Beyond Proof: Credibility Assessment in EU Asylum Systems* [Preprint] (2013). Available at: <https://www.unhcr.org/51a8a08a9.pdf> [Accessed 30 October 2024], 57.

20 Morgan-III, C. A. et al., 'Accuracy of Eyewitness Memory for Persons Encountered during Exposure to Highly Intense Stress', *International Journal of Law and Psychiatry*, (2004) vol. 27, no. 3, p. 265-79; Valentine, T. and Mesout, J., 'Eyewitness Identification under Stress in the London Dungeon', *Applied Cognitive Psychology*, (2009) vol. 23, no. 2, 151-61.

21 Ibid.

22 Bremner, J.D. "Traumatic stress: Effects on the brain," *Dialogues in Clinical Neuroscience*, (2006) 8(4), pp. 445-461. Available at: <https://doi.org/10.31887/dcn.2006.8.4/jbremner>. [Accessed 30 October 2024]

23 Bremner, J.D. (2006), 447

24 Ibid.

25 Ibid.

26 Ibid, 460

27 Ibid.

28 Howe, M. L. & Knott, L. *The fallibility of memory in judicial processes: Lessons from the past and their modern consequences* in *Memory* (2015) 23(5), pp. 633-656. doi: 10.1080/09658211.2015.1010709

29 Cavalera C and Pepe A, 'Social Emotions and Cognition: Shame, Guilt and Working Memory' (2014) 112 *Procedia - Social and Behavioral Sciences* 457

ory characteristics³⁰, clearly posing particular challenges for queer women seeking protection on SOGI grounds in how they would be able to recall experiences of persecution to form a “coherent narrative”³¹.

2.2 Traumatic Memory and the Asylum Claim

The UNHCR’s Guidance Note on the Psychologically Vulnerable Applicant in the Protection Visa Assessment Process³² sets out the conditions for a fair and trauma-informed approach to assessing claims for international protection where psychological trauma impacts on the applicant’s cognitive abilities and poses barriers to their safe and meaningful participation in RSD procedures. The guidance emphasises careful consideration of medical and medico-legal evidence when examining apparent inconsistencies in an applicant’s narrative and their inability to recall particular events³³. Similarly, the guidance looks specifically at the relevance of psychological evidence in relation to credibility assessments, how psychological trauma can impact upon an applicant’s behaviour, presentation and personal testimony, inviting decision-makers to consider carefully whether perceived inconsistencies – including late disclosure, specificity and detail of autobiographical accounts, and coherence of a narrative – may well have a cogent explanation based on the applicant’s cognitive impairment brought about by trauma, stressing how PTSD in particular poses significant barriers to recall.³⁴

Research undertaken by UNHCR on trauma, memory and credibility assessments reveals the inevitability of some level of inconsistency in memory, even in non-traumatic situations.³⁵ It discusses ‘hypermnnesia’,³⁶ where details may expand with repeated recalls, producing an elaboration of the original version with few verbatim repetitions and much new detail added – noting therefore that information not provided in an initial interview, for example, may be indicative not of inconsistency, but of the normal functioning of memory.³⁷ The research also highlights that the context in which memories are recalled guides their reconstruction, and how when people retell events, they may take a different perspective for different audiences and purposes³⁸. Therefore, inconsistencies may arise between earlier and later statements delivered in different circumstances or to different people. The impact this has in the context of queer women recounting experiences of persecution to perceived figures of authority such as asylum decision-makers, is relevant to this study. Although the UNHCR’s guidance rightly warns against poor practice in RSD procedures on SOGI grounds such as stereotyping during LGBTQ+ credibility assessments, outlining the particular barriers posed for LGBTQ+ applicants in participating meaningfully in RSD procedures, such as shame as an inhibiting factor³⁹, the research does not take into consideration the specific experiences of queer women and the impact of trauma stemming from their unique experiences of SOGI persecution and SGBV. The UNHCR defines experiences of SGBV as any harmful act that is perpetrated against one person’s will and that is based on socially ascribed (gender) differences between males and females, and is often linked to unequal gender relations within communities and abuses of power⁴⁰. Interestingly, the research does look at the gendered implications of memory, and how women’s disadvantaged societal position can place them at a further disadvantage when it comes to recall.⁴¹ However, the research fails to take this further to look at how the compounding marginalisation of being both a woman and LGBTQ+ affects recall, and indeed how experiences of persecution and psychological trauma particular to this social group compound restrictions

30 Matos, M. and Pinto-Gouveia, J. “Shame as Traumatic Memory,” *National Library of Medicine* [Preprint]. (2010) Available at: <https://doi.org/10.1002/cpp.659>.

31 The UNHCR states that an applicant’s statement must be “coherent and plausible”; The UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 3, December 2011, 204, 44 <https://www.refworld.org/policy/legalguidance/unhcr/2011/en/84592> [accessed 01 October 2024].

32 UN High Commissioner for Refugees (UNHCR), *Guidance Note on the Psychologically Vulnerable Applicant in the Protection Visa Assessment Process*, November 2017, available at: <https://www.refworld.org/docid/5ae2d74d4.html> [accessed 22 April 2024]

33 *Ibid.*, 37.

34 *Ibid.*, 54.

35 UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (2013), 57.

36 Evans Cameron, E., ‘*Refugee Status Determinations and the Limits of Memory*’, *International Journal of Refugee Law*, vol. 22, no. 4, (2010), 496.

37 UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (2013), 58.

38 *Ibid.*, 60.

39 UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (2013), 72.

40 UN High Commissioner for Refugees (UNHCR), *Action against Sexual and Gender-Based Violence: An Updated Strategy*, June 2011, <https://www.refworld.org/policy/strategy/unhcr/2011/en/78569> [accessed 07 October 2024]

41 UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (2013), 69.

around memory and recall.

In view of what is currently understood about the impacts of trauma on memory, it is worth questioning why the expectation for SOGI applicants for international protection to remember, recall and recount their experiences of fear and persecution in a way that is deemed to be “coherent” by decision-makers, continues to be so rigid. The effects of trauma upon the human brain, memory, and further impacts of shame may be accounted for on paper, in policies and guidance, yet it is unclear how this plays out in practice. This research will reveal what this means specifically for LGBTQ+ women, their overlapping identities and reasons for fear of persecution and the compounding barriers posed for them. Considering the literature in the round, both from a clinical psychiatry perspective and in the particular context of RSD policy and guidance, it becomes clear that decision-makers are urged to resist forming assumptions around trauma, autobiographical recall and their perceived consistency or coherence of a narrative⁴². Equally, they are warned against considering a particular material fact to be “of too great importance” not to recall or recount, or with the putative appropriate level of detail⁴³. What neither the policy guidance nor the literature does so far, however, is draw together the specific experiences of queer women and the impact of trauma stemming from their experiences of persecution, including SGBV and SOGI persecution, how these impact on memory and how this then plays out in RSD procedures.

2.3 Memory and the Culture of Disbelief

As has just been discussed, UNHCR's own research ‘Beyond Proof’, highlights the limitations of human memory and decision-makers’ resistance to acknowledge these intricacies when assessing asylum claims⁴⁴. The research outlines that psychological studies challenges the common assumptions often made by RSD interviewers and decision-makers, revealing that our understanding of human memory and behaviour is far from uniform, particularly around experiences of trauma.⁴⁵ The question, therefore, of “who gets to decide” on the norm, acceptable divergences from this established norm, and resulting “truth”, becomes particularly relevant, and forms the basis of compounding injustices faced by LGBTQ+ women asylum applicants racialised as Black, as we will see throughout the course of this research paper. Recent research exploring the concept of “epistemic injustice” in the context of credibility assessments of SOGI asylum applicants points to the fact that, by default, asylum systems privilege the epistemic resources of asylum decision-makers over claimants, thus legitimising the former's prerogative to ‘arbitrarily and ambiguously misinterpret asylum applicants’ experiences, cultures, and countries.’⁴⁶ This concerning phenomenon is illustrated in the subsequent chapters of this research, demonstrating the particular challenges for female SOGI applicants. As will be seen in chapter three, what is described as ‘institutional comfort’⁴⁷ enjoyed by decision-makers can translate into testimonial injustice in several forms, namely through denying applicants’ experiences, ignoring available information, and deciding which information or criteria to use.⁴⁸

Credibility is paramount in international protection claims, particularly in SOGI-based asylum appeals, as is highlighted in existing literature exploring the inconsistent ability of UK asylum procedures to effectively assess LGBTQ+ women's claims for international protection.⁴⁹ The focus on the MPSG nexus rather than the establishment of a “well-founded fear”, or “real risk of serious harm” when assessing credibility is also highlighted as being problematic in these types of cases, in addition to the challenges of recognising SGBV linked to women SOGI claimant's sexuality and its role in shaping a “coherent narrative”. When it comes to addressing the notion of “memory lapses”⁵⁰ in RSD procedures – typical of survivors of violence and trauma – existing research goes some way in addressing the impact of trauma on memory recall for LGBTQ+

42 Ibid, 64, 2.2.

43 Ibid, 139, 2.2.

44 Ibid, 64, 2.2

45 UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (2013), pg. 58.

46 Ferreira, N., Utterly Unbelievable: The Discourse of ‘Fake’ SOGI Asylum Claims as a Form of Epistemic Injustice, *International Journal of Refugee Law*, Volume 34, Issue 3-4, October/December 2022, Pages 303–326, <https://doi.org/10.1093/ijrl/eeac041>, 8.

47 Sertler, E., ‘The Institution of Gender-Based Asylum and Epistemic Injustice: A Structural Limit’ (2018) 4(3) *Feminist Philosophy Quarterly* 3.

48 Ibid, chapter 2.

49 Dustin, M., 2022. ‘Pathways to Refugee Protection for Women: Victims of Violence or Genuine Lesbians?’, *Refugee Survey Quarterly*, Volume 41, Issue 3, 393–419, <https://doi.org/10.1093/rsq/hdac013>

50 Ibid, Chapter 6.

women applicants and how this is, or is not, dealt with during UK asylum procedures, However, the existing studies do not further explore this phenomenon as a unique, exacerbating factor affecting queer women's credibility assessments on SOGI grounds. The role of medical evidence in illustrating these factors in these cases will be the focus of subsequent chapters.

While the UNHCR's Age, Gender, and Diversity Policy stresses the avoidance of homogenising refugee experiences⁵¹ and the most recently updated Handbook on Procedures and Criteria for Determining Refugee Status advises giving the benefit of the doubt to asylum applicants⁵² the Handbook also sets a problematic precedent by requiring "coherent and plausible"⁵³ statements without considering the factors that may affect coherence and plausibility, granting discretion to decision-makers. In the context of this research, it is vital to understand what a "coherent narrative" means for LGBTQ+ women in RSD procedures.

Furthermore, although No. 9 of UNHCR's International Protection Guidelines, which addresses RSD procedures for SOGI-based asylum claims⁵⁴ rightly recognises the relevance of the 2007 Yogyakarta Principles⁵⁵ and acknowledges the impact of trauma on LGBTQ+ asylum applicants⁵⁶ it does not address diminished recall capacity. No. 9 of the Protection Guidelines also fails to consider how psychological trauma alters memory recall in RSD procedures specifically. Although the Handbook does acknowledge the need for different approaches when applicants suffer from mental health issues, emphasising expert medical advice and evidence to inform decision-making⁵⁷ they also call for more scrutiny in cases where applicants are considered "mentally disturbed", stating the purported need for caseworkers to be "more searching than in a 'normal' case and [calling] for a close examination of the applicant's past history and background".⁵⁸ This is problematic guidance not only because it does not encourage a trauma-informed, supportive approach to facilitating asylum procedures with applicants experiencing mental health disorders such as PTSD, but also because it is neither holistic nor intersectional in its declaration of how to approach decision-making in these situations, paying no attention to the interrelated factors that could impede their ability to participate meaningfully in their asylum procedures, including factors such as shame or power dynamics and how these relate particularly to female SOGI claimants, or indeed those that come to compound these barriers, such as race and social class.

Similarly, the Home Office's Asylum Policy Instruction on Sexual Orientation in Asylum Claims states that 'consideration of the claim should first focus upon whether the account itself is credible'.⁵⁹ It further suggests this means considering whether the account is sufficiently detailed,⁶⁰ without defining what this threshold entails, allowing for concerning levels of discretion in how this is interpreted by decision-makers. This instruction also neglects the impact of trauma on memory and the subsequent (in)ability to provide autobiographical detail consistent with what might be considered "a coherent narrative".

2.4 Women and 'SOGI Asylum'

Despite increasing interest in the topic of 'queer asylum', or 'SOGI asylum', the specific experiences and challenges faced by LGBTQ+ asylum-seeking women – which are indeed unique – are notably less researched

51 UN High Commissioner for Refugees (UNHCR), *UNHCR Policy on Age, Gender and Diversity*, 8 March 2018, available at: <https://www.refworld.org/docid/5bb628ea4.html> [Accessed 30 October 2024]

52 UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, 203. Available at: <https://www.refworld.org/docid/5cb474b27.html> [Accessed 30 October 2024]

53 Ibid, 204.

54 UN High Commissioner for Refugees (UNHCR), *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) HCR/GIP/12/01, available at: <https://www.refworld.org/docid/50348afc2.html> [Accessed 30 October 2024]

55 Principle 23: The Right to Seek Asylum on SOGI Grounds. International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007), available at: <https://www.refworld.org/docid/48244e602.html> [Accessed 30 October 2024]

56 Point 59, pg. 180. UNHCR 2019 *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*.

57 Ibid, 210

58 Ibid, 212.

59 United Kingdom: Home Office, *Asylum Policy instruction - Sexual orientation in asylum claims*, 3 August 2016, Version 6.0. Available at: <https://www.refworld.org/docid/57b6d5414.html> [Accessed 30 October 2024], 33

60 United Kingdom: Home Office, *Asylum Policy instruction - Sexual orientation in asylum claims*, 3 August 2016, Version 6.0., 33.

than those of gay, cis-male asylum claimants seeking protection on SOGI grounds⁶¹. This research is interested in understanding this 'intersectional invisibility'⁶² and in bridging this gap. The research will consider, for example, how LGBTQ+ women's experiences of SGBV are presented to form an application, and how the complexities of overlapping experiences, combined with the compounding impacts of psychological trauma and memory impairment, are assessed, through which lens, and to what level of consistency. Similarly, although alternative models to current practice in this field, such as 'credibility tests', have been proposed, for example, Chelvan's 'Difference, Stigma, Shame, Harm (DSSH) model',⁶³ comparatively little research has been conducted around how these alternatives relate to the current realities and legal experiences of LGBTQ+ asylum-seeking women specifically, and this research therefore contributes to the debate from a distinctly unique angle.

There is a growing body of literature on the (in)ability of asylum systems to assess SOGI claims for asylum in a fair and consistent manner, including various interrogations of where and why certain inconsistencies arise, and how they may be best remedied⁶⁴. This includes the inability for RSD law, policy and practice to fully address the fear of persecution of the applicant, and instead – as will be highlighted further throughout this research – adopting an excessive burden of 'proof' in the assessment of the claimant's MPSG nexus, which is particularly worthy of scrutiny when considering the compounding impacts of trauma and memory. Existing literature in this field also discusses the pervasive notion of the "culture of disbelief", defined as a culture, or habitus, that emerges when various structures and agents, with varying capital, combine to create a negative decision-making environment⁶⁵, and how this is particularly true of SOGI asylum adjudication, even in cases where there is ample relevant "evidence" available to decision-makers⁶⁶. This research aims to build upon this existing body of literature by developing these critiques through narrowing the line of questioning further to look at the specific implications of the compounding phenomena of memory and trauma for LGBTQ+ women's asylum claims.

Research in the field of SOGI asylum points to the colonialist and racialised – and as I will argue further, patriarchal and gendered – underpinnings of the very systems which people seeking protection are forced to navigate, which is particularly relevant to this research in that all six LGBTQ+ women in the cases under analysis are from former British African colonies. This research, which explores Black queer women's experiences of the German asylum system reveals the need to challenge deeply ingrained racial and sexual stereotypes within RSD procedures for LGBTQ+ women seeking protection on SOGI grounds, and how these stereotypes significantly influence "Western decision-maker's imagination"⁶⁷ and perceptions of a coherent and a credible narrative.

Existing research also addresses the invisibility of LGBTQ+ women's identities and the overt sexualisation of their experiences, highlighting the unique challenges faced by LGBTQ+ women who may have been married or have children.⁶⁸ Similarly, both Dustin and Held emphasise the need to move beyond binary categories of LGBTQ+ women being either "victims of violence", or "genuine lesbians".⁶⁹ The difficulty in 'proving' overlapping persecution experiences for LGBTQ+ women has also been drawn out in previous studies,⁷⁰ particularly when gender-based persecution occurs in private spheres. This research underscores the importance of recognising multifaceted identities and unique experiences of persecution. It also advocates for a departure from narrow expectations of 'proof' in MPSG assessments, which are central to credibility

61 Akbari R, Vogler S., Intersectional Invisibility: Race, Gender, Sexuality, and the Erasure of Sexual Minority Women in US Asylum Law. *Law & Social Inquiry*. (2021), 46(4):1062-1091. doi:10.1017/lsi.2021.15

62 Ibid.

63 Dawson, J. and P. Gerber 'Assessing the refugee claims of LGBTI people: is the DSSH model useful for determining claims by women for asylum based on sexual orientation?' *International Journal of Refugee Law* 29(2), (2017), 292–322.

64 Dustin, M. and Ferreira, N., 'Improving SOGI Asylum Adjudication: Putting Persecution Ahead of Identity'. *Refugee Survey Quarterly*, (2021), 40(3). Available at: <https://academic.oup.com/rsg/article/40/3/315/6324087> [Accessed 30 October 2024].

65 Anderson, J. et al., *The culture of disbelief: An ethnographic approach to understanding an under-theorised concept in the UK asylum system*. (2014) Available at: <https://www.rsc.ox.ac.uk/files/files-1/wp102-culture-of-disbelief-2014.pdf> Accessed September 10 2024].

66 Ferreira, N., Utterly Unbelievable: The Discourse of 'Fake' SOGI Asylum Claims as a Form of Epistemic Injustice, *International Journal of Refugee Law*, Volume 34, Issue 3-4, (October/December 2022), 303–326, <https://doi.org/10.1093/ijrl/eeac041>

67 Tschalaer, M., 2020., chapter 2.

68 Dustin, M., 2018, 1.

69 Held, N., 'What Does a "Genuine Lesbian" Look Like? Intersections of Sexuality and "Race" in Manchester's Gay Village and in the UK Asylum System' in Francesca Stella and others (eds), *Sexuality, Citizenship and Belonging: Trans National and Intersectional Perspectives* (Routledge 2016).

70 Neilson, V. 'Homosexual or Female – Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims Symposium: Globalization, Security & Human Rights: Immigration in the Twenty-First Century', *Stanford Law & Policy Review* 16 2005.

assessments. For instance, LGBTQ+ women openly acknowledging their sexuality may have more evidence to support their MSPG nexus, but openness about sexuality might contradict claims of persecution, impacting negatively on credibility⁷¹. Conversely, women who have concealed their sexuality owing to fear may have less evidence to support their persecution claims. Trauma and memory further compound these challenges. In summary, this research synthesises existing literature on heteronormative credibility tests for LGBTQ+ women claimants, the pervasive culture of disbelief and the intersectionality of race, gender and sexuality. It delves into the interplay between memory and trauma, drawing on established knowledge in claims for international protection⁷² to assess their impact on asylum decision-making for LGBTQ+ women claimants on SOGI grounds in the UK.

2.5 Analytical Framework

It is well-documented that the 1951 Refugee Convention⁷³ was not drafted with the specific experiences of women in mind.⁷⁴ This 'gender deficiency' can be extended to include LGBTQ+ asylum claimants and their experiences of persecution. Given also that no considerations were given in the *Travaux Préparatoires* of the overlapping experiences of SGBV and persecution on SOGI grounds of women, this stark deficiency is certainly true, then, of the unique experiences of LGBTQ+ women, the inherent invisibility of whom is deeply rooted, and poses far-reaching implications for their access to international protection.

Over the past three decades, feminist scholarship has offered key insights into the lived experiences of refugee women, seeking to disrupt homogenous narratives and refusing to accept constructed identities. Building upon the advocacy of scholars that explore "refugee labelling", this research similarly encourages a looking beyond the gendered and racialised construction of labels,⁷⁵ an honouring of self-identification, and a recognition of the fact that the term "refugee" encompasses an incredibly diverse group of people and identities, the heterogeneity of which reflects identities such as gender, race, national origin, culture, social class, age, (dis)ability and sexual orientation.⁷⁶ Recognising also that the refugee experience cannot be understood through interrogating a single one of these independently, and thinking specifically of the compounding layers of oppression the identities "queer refugee women" carry with them, this research adopts intersectionality as a theoretical framework rooted in this understanding. Furthermore, in order to unpick the power dynamics at play during LGBTQ+ women's asylum claims in the UK on SOGI grounds, this research adopts a decolonial perspective, interrogating Western epistemologies and power hierarchies. For this reason, this research will draw upon the notion of "epistemic injustice" in relation to SOGI claims for asylum⁷⁷ as a theoretical framework to analyse, reveal and critique particular power dynamics at play, the ways in which female SOGI claimants are deprived of epistemic agency, and the resulting impact for LGBTQ+ women's asylum procedures, and how issues surrounding memory and trauma exacerbate these compounding barriers.

In addition, through adopting this queer, critical epistemological framework, enquiring through a queer theory lens offers a unique window through which to peer into the construction of narratives of LGBTQ+ women's intersecting identities, needs, and experiences throughout UK asylum procedures, and what issues of trauma and memory mean for this process of construction. Recognising the risks posed to the narrowing scope of refugee protection when queer women's identities are not considered holistically in RSD

⁷¹ Dustin, M., 2018, 1.

⁷² Herlihy, J. and Turner, S., Asylum claims and memory of trauma: sharing our knowledge. *British Journal of Psychiatry*, [online] 191(1), (2007) 3-4. Available at: <https://www.cambridge.org/core/journals/the-british-journal-of-psychiatry/article/asylum-claims-and-memory-of-trauma-sharing-our-knowledge/BDBD0282E250630BAA81C03D330AA141>. [Accessed 30 October 2024].

⁷³ UN General Assembly, *Convention Relating to the Status of Refugees*, (28 July 1951), United Nations, Treaty Series, vol. 189, 137.

⁷⁴ Chow, E., "Not There Yet": Women Fleeing Domestic Violence & The Refugee Convention", UNSWLawJlStuS 32; (2020) UNSWLJ Student Series No 20-33.

⁷⁵ Cole, G., Beyond Labelling: Rethinking the Role and Value of the Refugee 'Label' through Semiotics. *Journal of Refugee Studies*, (2017) 31(1), 1-21, and Zetter, R., (1991) Labelling Refugees: Forming and Transforming a Bureaucratic Identity, *Journal of Refugee Studies*, Volume 4, Issue 1, (1991), 39-62, <https://doi.org/10.1093/jrs/4.1.39>

⁷⁶ Taha, D., *Intersectionality and other critical approaches in Refugee Research*. Intersectionality and Other Critical Approaches in Refugee Research, LERRN. (2019) Available at: <https://carleton.ca/lerrn/wp-content/uploads/Intersectionality-and-Other-Critical-Approaches-in-Refugee-Research.pdf> [Accessed 30 October 2024].

⁷⁷ Ferreira, N., Utterly Unbelievable: The Discourse of 'Fake' SOGI Asylum Claims as a Form of Epistemic Injustice, *International Journal of Refugee Law*, Volume 34, Issue 3-4, October/December 2022, Pages 303-326, <https://doi.org/10.1093/ijrl/eeac041>

procedures,⁷⁸ adopting an intersectional analytical framework for this research becomes essential. Drawing also on both queer and feminist theoretical frameworks to conduct critical analysis of relevant case law, bringing in an intersectional approach to look at how intersecting identities affect how LGBTQ+ women are able to participate in RSD procedures, this research will use the resulting framework built upon the notion of epistemic injustice and violence to assess the impact on their access to international protection. Throughout the research, the author is guided by the principle of reflexivity, understanding this to be a self-critical, sympathetic introspection, and the self-conscious analytical scrutiny of the self as a researcher.⁷⁹ As a queer woman herself, the author's interest in interrogating and ultimately disrupting the power dynamics at play in queer women's claims for asylum is evident, which makes the iterative approach to reflexivity all the more essential, remaining mindful of positioning as a producer of knowledge through this particular prism.

Considering psychological trauma and the impact on memory within this wider context, as has been discussed in the preceding sub-sections of this chapter, the literature firmly suggests in the round that if the impacts on recall of psychological trauma are not acknowledged, and sufficient weight is not given to medico-legal reports which outline the psychological impacts of the claimant's trauma on their memory, credibility assessments will not take a trauma-informed approach, will lack empirical grounding, and the overall implications for LGBTQ+ women and their access to international protection will be grave.

78 Pittaway E. and Pittaway, E., 'Refugee woman': a dangerous label: Opening a discussion on the role of identity and intersectional oppression in the failure of the international refugee protection regime for refugee women, (2004), *Australian Journal of Human Rights*, 10(1), 119-135.

79 England, K., Getting Personal: Reflexivity, Positionality, and Feminist Research. *The Professional Geographer*, (1994) 46, 80-89. <https://doi.org/10.1111/j.0033-0124.1994.00080.x>

3. Chapter Three: Unpicking the ‘Coherent Narrative’

3.1 Interpreting medical evidence in LGBTQ+ women’s claims for asylum

The following two chapters look at seven specific cases from six female SOGI asylum applicants between the ten-year period from 2012 to 2022. Decisions made at the Upper Tribunal will be analysed through an intersectional lens, drawing on the notion of epistemic injustice as a theoretical framework. The analysis seeks to uncover what particular Home Office policy and guidance might mean for Black, LGBTQ+ women, and to understand the conditions under which the presentation of a “coherent narrative” within asylum procedures is actually possible, and ultimately who gets to construct these. In this chapter, the four cases chosen depict decision-making that centred around the judge’s own formulations of what was, and was not, perceived to be a “coherent narrative”. Chapter four will build on this to illustrate - through the three selected cases - how the deeply ingrained culture of disbelief comes to impact on queer women’s claims for international protection on SOGI grounds, and how issues surrounding memory and trauma exacerbate this phenomenon.

Notable deficiencies in the Home Office’s own guidance on the interpretation of medical evidence in asylum claims⁸⁰ include failing to outline specific considerations for medical evidence of sexual or gender-based violence, the need to read these guidelines in conjunction with the Policy Instruction on Sexuality in Asylum Claims, and no mention of evidence related to the impact of psychological trauma on memory. These guidelines do, however, set out important red lines with regards to the interpretation of medico-legal evidence relevant to the below cases under analysis, including the inappropriateness of decision-makers providing subjective opinion about a claimant’s behaviour, making clinical judgements, or substituting their own opinion on late disclosure or discrepancies in the testimony when a clinical explanation has been provided in the medical report.⁸¹ This can be interpreted as a clear warning against enabling or committing epistemological injustices in RSD procedures and one that is particularly relevant to the claims of LGBTQ+ women on SOGI grounds where trauma impacts their memory and subsequent credibility.

As both UK domestic policy and UNHCR guidance highlight, significant emphasis is put on the importance of authorities assessing an applicant’s level of vulnerability⁸² and their resulting ability to participate in RSD procedures and “fulfil the requirements” normally expected of an applicant. The role of medical evidence in assisting decision-makers to assess this fairly and accurately, is therefore relevant, and will be further explored below through the case law under analysis. It is widely understood that there are insufficiencies in how medical evidence is interpreted in UK RSD procedures,⁸³ and this analysis will therefore build upon this understanding to look closer through a queer lens at how this plays out in LGBTQ+ women’s claims for asylum on SOGI grounds. Given that international law and jurisprudence hold that rape and other forms of sexual violence may constitute torture,⁸⁴ the interpretation of women’s experiences of rape and other forms of sexual violence in the below cases also brings into view the relevance and application of the Istanbul Protocol,⁸⁵ which is embedded within the Home Office’s own guidance on the interpretation of medical evidence in asylum claims.⁸⁶ Paragraph 234 of the Protocol highlights that “[t]he psychological consequences of torture occur in the context of personal attribution of meaning, personality development and social, political and cultural factors”,⁸⁷ warning decision-makers against the impacts of epistemic injustices arising from ambiguously misinterpreting asylum applicants’ experiences, cultures and countries⁸⁸ through making presumptions as to how an applicant who may have experienced torture or trauma is

80 Immigration, U.V. and (2022) *Medical evidence in asylum claims: Caseworker guidance*, GOV.UK. Available at: <https://www.gov.uk/government/publications/medical-evidence-in-asylum-claims> [Accessed 30 October 2024].

81 Ibid, pg. 24.

82 UN High Commissioner for Refugees (UNHCR), *Guidance Note on the Psychologically Vulnerable Applicant in the Protection Visa Assessment Process* (November 2017).

83 Amnesty International, *Get it Right: How Home Office Decision Making Fails Refugees*, February 2004. Available at: https://www.amnesty.org.uk/files/get_it_right_0.pdf [Accessed 30 October 2024].

84 *Aydin v. Turkey*, 57/1996/676/866, Council of Europe: European Court of Human Rights, (25 September 1997), available at: <https://www.refworld.org/cases,ECHR,3ae6b7228.html> [Accessed 30 October 2024].

85 UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Istanbul Protocol”)*, 2004, HR/P/PT/8/Rev.1.

86 Immigration, U.V. and (2022) *Medical evidence in asylum claims: Caseworker guidance*, GOV.UK.

87 Para 234, OHCHR (2004), *Istanbul Protocol*.

88 Ferreira, N., Utterly Unbelievable: The Discourse of ‘Fake’ SOGI Asylum Claims as a Form of Epistemic Injustice, *International Journal of Refugee Law*, Volume 34, Issue 3-4, October/December 2022, Pages 303–326, <https://doi.org/10.1093/ijrl/eeac041>

expected to behave, present their account, and participate in their own RSD procedures, without regard to the myriad experiences, identities and compounding barriers that are at play when assessing a person's claim for asylum.

The Home Office's guidance on the interpretation of medical evidence in asylum claims also asserts that it is not the role of decision-makers to dispute clinical findings, or to make clinical judgements regarding medical matters generally.⁸⁹ As we will see in the following sub-chapters, a lack of adherence to this particular guidance has profound impacts for LGBTQ+ women asylum claimants, including in cases where a decision-maker puts forward an opinion on what ought to be physically possible or survivable, speculates on causation of physical or psychological injuries, questions the accuracy of a diagnosis, substitutes their own opinion on late disclosure or discrepancies in the testimony when a clinical explanation has been provided in the medical report, or provides speculation about the amount of detail with which a particular traumatic event ought to be remembered.⁹⁰ In each of the cases in this chapter, at least one of these inappropriate clinical judgements was put forward, subsequently leading to adverse credibility findings, and ultimately the erroneous dismissal of these women's initial claims for asylum.

3.2 The case of OAO

The first case under analysis is that of *OAO vs. SSHD*,⁹¹ which was an appeal against the decision of the First-tier Tribunal made in February 2021, and for which permission was granted on all grounds by the Upper Tribunal in October 2021, where the appeal was remitted *de novo* to the First-tier Tribunal to be reheard by any judge except the First-tier Tribunal who made the initial erroneous decision – the reasons for which will be explored below.

The appellant was a Nigerian national identifying as lesbian, with her SOGI-related persecution forming the basis of her UK international protection claim. She also cited experiences of SGBV, including rape as a minor, along with recent SOGI-motivated abuse and SGBV. Her asylum claim was denied in late 2020, primarily due to negative credibility findings surrounding her lesbian identity. This scepticism permeated her entire claim, disregarding both her testimonial and medical evidence, which highlighted her vulnerability, PTSD, and their impact on her memory and ability to provide a coherent narrative. Regarding the appellant's psychological vulnerability, the Upper Tribunal's decision provided insights into the First Tribunal's ruling. It noted the appellant's referral for a psychiatric review in May 2020, which diagnosed her with PTSD and trauma-related auditory hallucinations.⁹² In July 2020, a psychiatric review noted low mood, self-talk, flashbacks, and a heightened startled response. Medication was prescribed to address these issues. However, the compelling evidence of trauma's impact on the appellant's vulnerability, mental state, and ability to participate meaningfully in her RSD procedures was inexplicably dismissed. The manner in which this medical evidence of the impact of trauma on the appellant's vulnerability, mental state and ability to recall and participate meaningfully in her RSD procedures was dismissed, is what made this case so indicative of the power dynamics at play in RSD procedures, and highlights Ferreira's notion of "epistemic injustice" in SOGI asylum cases,⁹³ where knowledge, collective understanding, and "truths" come to be constructed by Western decision-makers, and claimants themselves only get to exist at the periphery of this construction. Through the case of *OAO*, a Black, LGBTQ+ woman from an ex-British colony claiming asylum on SOGI grounds, we see how this epistemological injustice clearly plays out in the UK asylum system.

Starting with the credibility of the sexuality of the appellant, and therefore her MSPG, the Upper Tribunal judge considered that she "did not provide a *sufficient level of detail* about when she discovered her sexuality, *did not remember* the online articles that she had read, and failed to describe the emotional journey in understanding her own sexuality",⁹⁴ symptomatic of the over-reliance on autobiographical testimony that must align with Western decision-makers' preconceived perceptions of LGBTQ+ people's journeys with their own identity – and in this case, LGBTQ+ women racialised as Black. The judge failed to consider the

89 Immigration, U.V. and (2022) *Medical evidence in asylum claims: Caseworker guidance*, GOV.UK.

90 Ibid.

91 *OAO v. Secretary of State for the Home Department*, [2021] UKUT 02394 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), Available at: <https://tribunalsdecisions.service.gov.uk/utiac/pa-02394-2020> [Accessed 30 October 2024]

92 Ibid.

93 Ferreira, N., 2022, 303–326.

94 *OAO v. Secretary of State for the Home Department*, [2021] UKUT 02394 (IAC)

reasons why it could be unreasonable to expect the appellant to recall past experiences with “sufficient” level of detail, particularly given the specific context of this case, and the medical evidence put forward outlining these very reasons. Following consideration of the medical report, the judge concluded, “that he cannot place any reliance upon the report and that he cannot not be satisfied that the appellant is suffering symptoms of PTSD which would materially affect her ability to give evidence. He also found that the medical report did not give any support to her case.”⁹⁵ It is worth noting the extent to which the Home Office’s own guidance and directives were disregarded in this case: in the first instance, in the judge’s inability to implement the guidance on the interpretation of medico-legal reports outlined in *JL (medical reports-credibility) China* [2013] UKUT 145 (IAC), which stated that even where medical experts rely heavily on the account given by the person concerned, their reports did not lack or lose their status as independent evidence.⁹⁶ Furthermore, the judge failed to consider both the “Guidance Note” and Practice Direction in relation to vulnerable witnesses,⁹⁷ in addition to the Presidential Guidelines regarding Vulnerable Appellants,⁹⁸ which stated that the Tribunal must determine for itself how the vulnerability of an appellant affected the evidence or how any inconsistencies in an account can be explained by such vulnerability.⁹⁹ In the appellant’s case her schizophrenia or trauma may have accounted for her failure to give a coherent and consistent account of past events, but the judge gave no consideration to this. Having rejected the appellant’s medical evidence, the judge posited that because she did not give oral evidence, she had not made out her case, thus resulting in the negative credibility assessment which led to the refusal of her claim. It was subsequently agreed, however, that a further medical report should be obtained to identify “whether the appellant requires any special measures or reasonable adjustments in the substantive hearing”¹⁰⁰. The follow-up assessment was produced in December 2020. In this report, Dr Sahota gave the medical opinion that the appellant was not fit to attend court due to symptoms of trauma having a significant impact on her capacity to participate and her vulnerability to stress¹⁰¹. The judge was “very critical” of this report and concluded that the appellant was not suffering from PTSD¹⁰². It was found by the Upper Tribunal that the judge, through dismissing the medical evidence provided by a qualified medical professional, outlining the appellant’s severe mental health conditions and her inability to participate in her asylum procedures, committed a serious error of law¹⁰³.

This case is particularly illustrative of the inability of the UK asylum system to accommodate the myriad impacts of trauma on LGBTQ+ women’s abilities to meaningfully present their claim for international protection, in that the judge extended his negative credibility findings from the appellant’s sexual orientation, disputing her claim that she was a lesbian, to her experience of SOGI and SGBV-related torture and abuse, and ultimately to the medical evidence depicting this and how her subsequent trauma had come to impact on her ability to provide a consistent and detailed account of past events to make up a “coherent narrative” and thus outlined her claim for protection. Furthermore, through his dismissal of Dr Sahota’s conclusions of the appellant’s mental vulnerabilities, the judge in this case failed to consider and implement the Home Office’s own ‘Medical Evidence in Asylum Claims’ guidance which states that it is not for decision-makers “to dispute clinical findings or make clinical judgements about medical evidence or medical matters generally”,¹⁰⁴ nor is it for judges to “question the accuracy of a diagnosis”.¹⁰⁵ Furthermore, through his speculative conclusion that the appellant was incredible owing to memory relapse and a lack of detail in her narrative,¹⁰⁶ the judge further disregarded the Home Office’s same guidance which warns decision-makers against “speculation about the amount of detail with which a particular traumatic event

95 Ibid, at [31] to [43]

96 *JL (medical reports-credibility) China* [2013] UKUT 145 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), Available at: <https://tribunalsdecisions.service.gov.uk/uti/ac/2013-ukut-145> [Accessed 30 October 2024].

97 *AM (Afghanistan) v Secretary of State for the Home Department*, [2017] EWCA Civ 1123, United Kingdom: Court of Appeal (England and Wales), 17 May 2017, available at: https://www.refworld.org/cases,GBR_CA_CIV,598491284.html [Accessed 30 October 2024]

98 Senior President of Tribunals, ‘Joint Presidential Guidance Note No. 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant’, (2010), Practice Note, Tribunal Judiciary.

99 Ibid.

100 *OAO v. Secretary of State for the Home Department*, [2021] UKUT 02394 (IAC), para 10.

101 Ibid, [2].

102 Ibid, [10].

103 *OAO v. Secretary of State for the Home Department*, [2021] UKUT 02394 (IAC), [2] – [3].

104 Immigration, U.V. and (2022) *Medical evidence in asylum claims: Caseworker guidance*, GOV.UK.

105 Ibid.

106 *OAO v. Secretary of State for the Home Department*, [2021] UKUT 02394 (IAC)

ought to be remembered";¹⁰⁷ in addition to the UNHCR's guidance specifically related to the assessment of SOGI claims for asylum,¹⁰⁸ which points to the negative impact of stereotyping and failing to consider the compounding barriers of shame and fear, which in the case of OAO is particularly relevant, given her experiences of both SGBV by family members coupled with the SOGI nature of her claim.

This case highlights the danger of judges substituting their own opinions for clinical explanations and underscores the impact of such epistemic violence on the outcomes of LGBTQ+ women's RSD procedures when the very system meant to enable their protection privileges the hermeneutical resources of decision-makers over them, their experiences, and their truths.

3.3 The case of a y

The case of *a y v. SSHD*¹⁰⁹ concerned a Cameroonian woman who identified as lesbian and whose initial claim for asylum was based on her sexual orientation and the SGBV, including rape, that she suffered as a result. The appellant set out her case to the First-tier Tribunal which included her accounts of intra-familial sexual abuse, the discovery on the part of her family of her sexual orientation, her subsequent relationship with her partner [J], with whom she fled to the UK, and their prior rape and abuse on the part of the authorities owing to their sexual identities. The appellant was assessed and considered to be a vulnerable witness, and the appeal to the Upper Tribunal was made on the basis that the Judge failed to treat her evidence under this consideration, namely by failing to abide by the Joint Presidential Guidance Note (No. 2) of 2010, Child, Vulnerable Adult and Sensitive Appellant Guidance.¹¹⁰ However, despite averred consideration of the appellant's mental state, the impacts of trauma on memory being particularly relevant to this case, and the appellant's resulting inability to meaningfully participate in her asylum procedures, the appeal before the Upper Tribunal was dismissed on all accounts.

The impact of trauma on memory was central to *a y's* case in the way that her credibility as a refugee applicant was assessed. The judge began to outline discrepancies in the appellant's accounts of her persecution, stating: "it was reported by Dr Bonnet that the appellant, when speaking of her rape at the hands of the authorities, recounted that her clothes were ripped off her whereas in interview she indicated that they had removed their clothes in case matters became worse."¹¹¹ As has been highlighted in the introductory chapters of this paper, there are a myriad of reasons why, when recounting autobiographical events of a traumatic nature, discrepancies in the detail may arise with repetition of recall. As is highlighted in the UNHCR's research on memory and credibility assessments¹¹², in addition to hypermnesia, where repeated recalls offer greater detail, the context in which memories are recalled also guides their reconstruction. It seems logical, therefore, to derive that *a y*, when recounting her rape to a female medical professional, where there may be a more trusting relationship established, may adopt a different perspective to that within the context of an asylum interview. It should be noted therefore, that this would not constitute an indication of her incredibility, but rather of the normal function of human memory. Despite the UNHCR advising explicitly that "inconsistencies may (therefore) arise between earlier and later statements delivered in different circumstances or to different people";¹¹³ rather than using this understanding of the fallibility of memory and the particular relevance and necessary considerations of this in LGBTQ+ women's claims for asylum on SOGI grounds, the inconsistencies in *a y's* accounts instead formed the basis of her case's refusal at the First-tier Tribunal, and subsequent dismissal of her appeal at the Upper Tribunal.

The First-tier Tribunal decision in *a y's* case warrants closer examination, particularly concerning the discrepancies in her testimony. The judge raised concerns about the time it took her to flee following the reported incidents of rape and whether she had been married before¹¹⁴, highlighting how lesbian or bisexual

107 Immigration, U.V. and (2022) *Medical evidence in asylum claims: Caseworker guidance*, GOV.UK.

108 UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (2013), 57.

109 *a y v. Secretary of State for the Home Department*, [2018] UKUT 02664 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber) Available at: <https://tribunalsdecisions.service.gov.uk/utiac/pa-02664-2015> [Accessed 30 October 2024]

110 Senior President of Tribunals, 'Joint Presidential Guidance Note No. 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant', (2010), Practice Note, Tribunal Judiciary.

111 *a y v. Secretary of State for the Home Department*, [2018] UKUT 02664 (IAC) [17].

112 Page 57, UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (2013).

113 *Ibid.*, 60.

114 *a y v. Secretary of State for the Home Department*, [2018] UKUT 02664 (IAC), paras 15 and 17.

women with children or previous marriages face scepticism in their UK asylum claims, often resulting in disbelief of their MPSG.¹¹⁵ In *a y's* case, the judge claimed to have carefully considered Dr Bonnet's report and acknowledged the potential impact of trauma on memory. However, despite these considerations, the judge ultimately discredited *a y's* account, stating that she had failed to prove the events she described actually occurred and that she was perceived as a lesbian. This decision raises questions about the burden of proof placed upon the appellant, especially regarding her sexual orientation, and therefore MPSG. The judge seemed to prioritise establishing her sexuality over understanding the impact of trauma on her ability to present a coherent narrative. It remains unclear from the decision how the judge's understanding of trauma's effects on memory influenced the final ruling. A more effective assessment of *a y's* fear of persecution should have started by evaluating the barriers she faced in providing a coherent account due to her traumatic experiences. This approach would have led to the creation of a supportive environment to facilitate her meaningful participation in her own RSD procedures. Instead, the decision seems to favour what decision-makers perceive as plausible, consistent, and coherent in LGBTQ+ women's asylum claims, disregarding the complexities of trauma and memory.

It could be argued further that by concluding that "It [was] clear from the reasoning of the judge that poor memory and lack of past recall [was] not of itself an answer to the discrepancies as identified in this case"¹¹⁶ and subsequently dismissing the appeal, the Upper Tribunal judge undermines the epistemic agency of the appellant, instead favouring the interpretation of events of the First-tier Tribunal judge. Although it could also be argued that the claimant's absence from her hearing at the First-tier Tribunal placed her at an epistemological disadvantage, it is worth questioning the role and responsibilities of the asylum system and those who uphold this system in creating the conditions for safe and meaningful participation of female LGBTQ+ claimants in their own asylum procedures, and how the lack of such conditions comes to impact negatively on their claims, as can be seen in this case. The judge notes that, "the appellant attended the hearing with a small child but there is little reference in interview, or indeed at the hearing, to her having been pregnant or having given birth to a child."¹¹⁷ and though this note is presumably intended to add to the argument that the appellant is incredulous and deceptive, it is worth questioning to what extent UK asylum procedures can be said to be both gender- and trauma-informed, if appellants are expected to recall past traumatic experiences of sexual abuse in front of their own children, despite the existence of extensive research and guidance against this practice,¹¹⁸ including in the Home Office's own guidance from 2010 on Gender Issues in the Asylum Claim¹¹⁹, as well as co-produced research and policy recommendations by women with lived experience of the UK asylum system.¹²⁰ It is important to note that *a y's* appeal was dismissed at the Upper Tribunal¹²¹.

3.4 The case(s) of *r n*

The case of *r n*¹²² was particularly illustrative of how decision-makers approach RSD procedures of LGBTQ+ women when their PTSD impairs their ability to recall and account events related to their persecution and grounds for asylum. The significant material errors in law by two First-Tribunal judges led to the appellant's appeal being remitted for *de novo* consideration in the First-Tribunal for the third time, the course of which

115 Dustin, M., Many Rivers to Cross: The Recognition of LGBTQI Asylum in the UK. (2018) *International Journal of Refugee Law*, and, Lewis, R., (2014), "Gay? Prove it": The politics of queer anti-deportation activism.

116 *a y v. Secretary of State for the Home Department*, [2018] UKUT 02664 (IAC).

117 *Ibid*, [12].

118 Asylum Aid, *Every Single Woman. A Comparison of Standards for Women in the Asylum System with Standards for Women in the Criminal Justice, Prison and Maternity Systems in the UK*, Asylum Aid, (2008), 15. "Childcare during asylum interviews" is covered in Home Office, *Gender Issues in the Asylum Claim, Version 3.0, 2018, 30.*, and Dustin, M., 'Pathways to Refugee Protection for Women: Victims of Violence or Genuine Lesbians?', *Refugee Survey Quarterly*, (2022), Volume 41, Issue 3, Pages 393–419, <https://doi.org/10.1093/rsq/hdac013>.

119 Home Office, *Gender Issues in the Asylum Claim, Version 3.0, 2018, 30*. Available at: <https://www.refworld.org/docid/4cc7ff092.html> [Accessed 30 October 2024]

120 British Red Cross VOICES Network, *We want to be strong, but we don't have the chance: Women's experiences of seeking asylum in the UK*, January 2022, para 1.1.2. Available at: <https://www.redcross.org.uk/about-us/what-we-do/we-speak-up-for-change/womens-experiences-of-seeking-asylum-in-the-uk> [Accessed 23 August 2024].

121 *a y v. Secretary of State for the Home Department*, [2018] UKUT 02664 (IAC), [4] and [23].

122 First Appeal: *r n v. Secretary of State for the Home Department*, [2017] UKUT 00726 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), Available at: <https://tribunalsdecisions.service.gov.uk/utiac/aa-00726-2015> [Accessed 30 October 2024]
Second Appeal: *r n v. Secretary of State for the Home Department*, [2022] UKUT 00726 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), Available at: <https://tribunalsdecisions.service.gov.uk/utiac/aa-00726-2015-6e97fe09-9180-4ec0-b192-8fef12343e9d> [Accessed 30 October 2024]

unnecessarily spun several years, and the psychological impact of this upon the appellant should not go without notice. The judge's findings in both the first and second decisions at the First-Tribunal centred around the notion of adverse credibility findings, primarily related to the appellant's experiences of SGBV, her identity as a lesbian and subsequent MPSG and SOGI grounds for asylum. In the first decision, the judge did not properly take the evidence before him into account¹²³, which led to a miscalculation on his part with regards to the appellant's age, one of several factors that led to his adverse credibility finding. Thus, when presenting her case for asylum, stating the year in which she first began to realise that she was gay, the judge immediately concluded that there were inconsistencies in her story and that she had invented her own account of events, which in turn contributed to the adverse credibility findings that led to the dismissal of her claim. This appears to be another example of a deeply ingrained culture of disbelief with regard to LGBTQ+ women's claims for asylum in the UK, leading to epistemic injustice playing out in their asylum procedures through the privileging of the epistemic resources available to decision-makers within the asylum system over those of claimants,¹²⁴ which in this case gave rise to the judge seemingly arbitrarily misinterpreting *r n*'s own experiences of her sexual identity.

The incredulity displayed by the judge in this first hearing extended to the outright dismissal of the appellant's account of her own rape, her difficulty in fully recalling a relevant address, and a medico-legal report provided by the appellant's doctor, outlining her PTSD diagnosis and in which it was stated that "memory and recall were impaired in PTSD and appellant may find it difficult to give a stage by stage description of her experiences."¹²⁵ It was found in the Upper Tribunal that the First Tribunal judge had failed to apply the relevant guidance in his interpretation of the evidence before him, as well as in his lack of considerations of the plausible explanations for the appellant's conduct. Namely, there was no application of the UNHCR Guidelines on Sexual Orientation and/or Gender Identity in RSD procedures¹²⁶ discussed in previous chapters, nor was there consideration of the Home Office's own Asylum Policy Instruction on Sexual Orientation in the asylum claim,¹²⁷ which outlines the need for decision-makers to take into account "all mitigating reasons why a person may be inconsistent or unable to provide details of material facts such as age; gender; mental or emotional trauma; fear and/or mistrust of authorities; education, feelings of shame; painful memories, particularly those of a sexual nature [...]"¹²⁸ I would take this argument further to suggest that the Home Office's own guidance on both the interpretation of medical evidence in asylum claims, as well as the guidance on assessing credibility in asylum claimants more broadly, was overlooked by the judge in stating that he did not find the appellant's evidence that she had been raped credible, giving no other reason than that it simply did not have "the ring of truth"¹²⁹ to it, seemingly owing to the lack of "sufficient detail" provided by the appellant.¹³⁰ The judge's speculation and substitution of opinion ignores the Home Office's own policy guidance which states "[t]he shame and trauma that a person has experienced as a result of gender-based harm may, however, result in their oral testimony being less than complete, coherent or consistent."¹³¹ The appellant had been diagnosed with moderate PTSD and the judge erred in failing to consider the presented medico-legal report and the relevant guidance when considering why the appellant did not provide further details. The guidance on Medical Evidence in Asylum Claims warning decision-makers against the "substitution of your own opinion on late disclosure or discrepancies in the testimony when a clinical explanation has been provided in the medical report,"¹³² as well as "speculation about the amount of detail with which a particular traumatic event ought to be remembered"¹³³, was overlooked. Medical evidence showed that memory and recall were affected by the appellant's PTSD and the judge did not take this into account. The Upper Tribunal consequently found that the judge had made

123 *r n v. Secretary of State for the Home Department*, [2017] UKUT 00726 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), Available at: <https://tribunalsdecisions.service.gov.uk/utiac/aa-00726-2015>, [1, 2 and 3].

124 Ferreira, N., Utterly Unbelievable: The Discourse of 'Fake' SOGI Asylum Claims as a Form of Epistemic Injustice, *International Journal of Refugee Law*, Volume 34, Issue 3-4, (October/December 2022,) 303–326, <https://doi.org/10.1093/ijrl/eeac041>

125 *r n v. Secretary of State for the Home Department*, [2017] UKUT 00726 (IAC)

126 UN High Commissioner for Refugees (UNHCR), *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, HCR/GIP/12/01

127 United Kingdom: Home Office, *Asylum Policy instruction - Sexual orientation in asylum claims*, (3 August 2016), Version 6.0

128 *Ibid.*, 34.

129 *r n v. Secretary of State for the Home Department*, [2017] UKUT 00726 (IAC) [8]

130 *Ibid.*, [4] and [5]

131 United Kingdom: Home Office, *Considering Asylum Claims and Assessing Credibility*, 2012

132 Immigration, U.V. and (2022) *Medical evidence in asylum claims: Caseworker guidance*, GOV.UK.

133 *Ibid.*

statements of no basis as to the appellant's credibility, and that he did not give full reasons for the adverse findings¹³⁴. By overlooking the relevant evidence as to the difficulties that the appellant would have faced in both talking about her sexual identity and recalling autobiographical detail in light of her suffering from PTSD, the judge erroneously dismissed her case for asylum, leading to the unnecessary remittal of her case de novo to the First-Tribunal, where yet another unfounded dismissal would be made, appealed and remitted de novo to the First-Tribunal for the second time.

In the second appeal of *r n* to the Upper Tribunal, a similar decision-making approach was adopted by the second judge: namely, that a second relevant medico-legal report submitted as evidence was wholly dismissed¹³⁵. This second report outlined the appellant's PTSD, the impact of this on her ability to recall events, a generalised impairment in declarative memory as a symptom of her PTSD and that accurate recall of information was not limited to the traumatic events itself¹³⁶. In playing down the relevant expert opinion of a medical professional, and suggesting that the appellant may have been able to feign her symptoms in order to rely on such evidence in her claim, the judge provides his own lay assumptions as to the effects of PTSD, again in conflict with both the UNHCR's and the Home Office's own policy and guidance¹³⁷, which was found to amount to an error of law. It is important to also ask ourselves at this point if a man who, for example, had perhaps experienced violence in the context of conflict, would be found by a (male) judge to be "feigning his symptoms" with the intention of deceiving? Or is this assumption again indicative of a deeply ingrained culture of disbelief around both SOGI asylum claimants¹³⁸ and sexual violence experienced by women?¹³⁹ I would argue that in both this and the previous appeal, the judges exercise epistemic violence through interpreting evidence through their own privileged lenses, as well as adhering to the feminist concept of "rape myth acceptance" (RMA) – a gender-stereotypical thinking pattern which arises in *r n*'s RSD procedures in both judge's dismissals of her accounts of her SGBV. Though purported to be objective in how decision-makers engage with the relevant legal provisions, this way of interpreting evidence clearly privileges the white, cis-hetero male's experiences¹⁴⁰.

The Upper-Tribunal also found that in postulating as an alternative that the appellant might well have suffered PTSD as a result of "other traumatic experiences", the judge's theory failed to properly engage with the medical expert's view put forward in the report that the appellant's symptoms were "highly consistent" with her claimed experiences.¹⁴¹ The judge further surmised that the appellant's perceived lack of distress when presenting her evidence was indicative of her lack of credibility, and placed great weight on her apparently "inconsistent" demeanour¹⁴², rather than considering the relevant policy and guidance which outlines the dissociative states commonly experienced by those suffering from PTSD, particularly when recalling traumatic events, which is set out in the UNHCR's guidance on credibility assessments¹⁴³. Despite the guidance also stating that there is ample evidence that memories of traumatic events, such as sexual violence, differ from normal memories, and that sensory encoding, dissociation, circumscribed memory retention, recall deficit, avoidance, and poor concentration are all symptoms of post-traumatic stress disorder¹⁴⁴, when considering the appellant's evidence and autobiographical accounts of her rape and SOGI-related violence, the judge again dismissed the medical evidence before him which supported the evidence and accounts put forward by the appellant, and instead concluded of his own accord that the appellant was incredible owing to inconsistencies in her narrative, and had even gone as far as to have been deceptive in order to shape the doctor's medico-legal report to her own advantage.

It is worth noting, however, that despite the dismissal of the decision at the First Tier Tribunal for the second

134 *r n v. Secretary of State for the Home Department*, [2022] UKUT 00726 (IAC) [8].

135 *Ibid*, [10].

136 *Ibid*, [4].

137 Namely, United Kingdom: Home Office, *Asylum Policy instruction - Sexual orientation in asylum claims*, (3 August 2016), Version 6.0

138 Ferreira, N., Utterly Unbelievable: The Discourse of 'Fake' SOGI Asylum Claims as a Form of Epistemic Injustice, *International Journal of Refugee Law*, Volume 34, Issue 3-4, (October/December 2022), and Dustin, M., Pathways to Refugee Protection for Women: Victims of Violence or Genuine Lesbians?, *Refugee Survey Quarterly*, (September 2022) Volume 41, Issue 3.

139 Roels, L., How protecting your daughter can lead you to being denied international protection in Belgium: On Rape Mythology, Delayed Disclosure, and Asylum, (2023), Refugee Law Initiative

140 Feminist jurisprudence supports this theory, see for example: Charlesworth, H., Chinkin, C., & Wright, S. (1991). Feminist Approaches to International Law. *American Journal of International Law*, 85(4), 613-645. doi:10.2307/2203269

141 *r n v. Secretary of State for the Home Department*, [2022] UKUT 00726 (IAC), para 12.

142 *Ibid*, [30].

143 UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (2013), 62.

144 *Ibid*, [153].

time, the Upper Tribunal expressed in this second appeal that “it is unreasonable to expect this Tribunal to ignore every inconsistency, hesitation and gap in recall”.¹⁴⁵ I would argue that this shows a need for Tribunal judges to engage further with the relevant policy, guidance, and literature discussed in this and previous chapters, to enable decision-makers to fully *understand* the reasons behind inconsistencies, hesitations and gaps in recall that may occur in LGBTQ+ women's claims for asylum on SOGI grounds, and to come to see them as the symptoms of compounding barriers experienced in asylum procedures by LGBTQ+ women asylum claimants, rather than feeling expected to “ignore” them. Overall, through this chapter we have seen how the UK asylum system privileges the epistemological assumptions of decision-makers to the detriment of LGBTQ+ asylum seeking women on SOGI grounds. Clear parallels can be drawn from the cases of *OAO*, *ay* and *rn* in the following ways: all women had suffered trauma as a result of their persecution which had subsequently impacted upon their memory and recall ability, all women presented medical evidence from a clinical practitioner to evidence this – giving explanation as to discrepancies in narrative and the need to consider this in their credibility assessments – and in all three cases, this evidence was either disregarded, dismissed or denied by the judges, with *rn* undergoing this twice.

4. Chapter Four: The Culture of Disbelief Prevails

4.1 Beyond belief: The cases of *hkm*, *S N*, and *Ms C O*

In the previous chapter, through the case of *r n*, we saw how through the judge miscalculating the appellant's age and subsequently concluding that her account of when she discovered her own sexuality to be implausible, the appellant was found to be non-credible and subsequently had her claim dismissed at the First-tier Tribunal – twice. Though it could indeed be argued that this error in calculation was a simple human error, it is the assumptions and conclusions drawn from the error that are significant. These conclusions, in addition to the further dismissal of medico-legal evidence brought before the judge, begin to paint the picture that despite ample policy and guidance related to both interpreting evidence when memory has been impacted by psychological trauma, as well as removing specific barriers faced by SOGI asylum claimants, in practice LGBTQ+ women's claims for asylum on SOGI grounds and their accounts of their experiences are 'beyond belief' to decision-makers. Perceived inconsistencies or implausibilities are centred in their adverse credibility findings and dismissals even when there is clear medical evidence that explains the inability of the claimant to provide what may be expected to be a "coherent narrative", often owing to the impacts of experienced trauma on memory and recall.

In this chapter we will look at three more cases¹⁴⁶ from the Upper Tribunal which build upon the themes drawn from the previous chapter, having been dismissed or denied based upon negative credibility findings, both in terms of their sexual identities, and therefore MPSG, as well as the violence and trauma they claim to have suffered. All of the women suffered from PTSD and cognitive impairments to their memory, concentration and recall ability, and all had provided medical reports outlining this as part of their claims for asylum. In all three cases, the women had provided multiple reports outlining the impacts of the experienced psychological trauma on their memory, and in all three cases, these medical reports were, as in the previous chapter, either disregarded, dismissed or denied by the judges. Two of these three cases were then remitted de novo to the First-Tier Tribunal, which speaks to clear procedural problems in the bias and discrimination on the part of the judges who, in disregard to both international and domestic legislation and guidance, went against the evidence before them to substitute their own opinions and draw conclusions as to the "deliberate deception" of these women, just as we saw in the case of *a y* in chapter three.

The case of *hkm*¹⁴⁷, a lesbian woman from Cameroon who suffered sexual violence on account of her sexual identity, illustrates the arbitrary interpretation of medical evidence by asylum and immigration judges. Two medical reports were presented to the judge, one outlining the physical injuries suffered by the appellant – consistent with her account of experienced persecution – and the other highlighting the impact of her PTSD on her memory, and the resulting barriers to her being able to provide a "coherent narrative". It was found that the judge had resorted to speculation when deciding that some of the appellant's account was implausible with regards to the specific injuries she had obtained, despite these being evidenced in the medical report, which stated that "the appellant's injuries could not have been caused in any way other than that given by the appellant", and had thus erred in law by failing to take account of the medical evidence and arriving at his own negative credibility findings. Further, when deciding the issue of credibility, the judge had not considered the effect of PTSD on the appellant's memory. This case sheds further light on how in such an epistemologically unfair system, through having their truths doubted and denied, LGBTQ+ women racialised as Black (and from former British colonies) experience further acts of epistemological violence¹⁴⁸ through their asylum procedures in the UK. The same lack of a decision-making process rooted in policy, guidance and good practice can be seen in the case of *S N*¹⁴⁹, a lesbian woman from Uganda who, as a result of the PTSD she suffered, was also experiencing memory and concentration problems, which was evidenced through the provision of two medical reports by a psychologist and consultant psychiatrist. Despite there also being references to the appellant not understanding questions and giving an incoherent

¹⁴⁶ *hkm v. Secretary of State for the Home Department*, [2017] UKUT 08305 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), Available at: <https://tribunalsdecisions.service.gov.uk/utiac/aa-08305-2014> [Accessed 30 October 2024], *S N v. Secretary of State for the Home Department*, [2018] UKUT 13029 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), Available at: <https://tribunalsdecisions.service.gov.uk/utiac/pa-13029-2016-eae86294-61e6-452e-a74e-28e205772da4> [Accessed 12 July 2023] and *Ms C O v. Secretary of State for the Home Department*, [2019] UKUT 06932 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), Available at: <https://tribunalsdecisions.service.gov.uk/utiac/pa-06932-2018> [Accessed 30 October 2024].

¹⁴⁷ *hkm v. Secretary of State for the Home Department*, [2017] UKUT 08305 (IAC).

¹⁴⁸ Prearo, M., 'The Moral Politics of LGBTI Asylum: How the State Deals with the SOGI Framework' (2020) 34 *Journal of Refugee Studies* 1454.

¹⁴⁹ *S N v. Secretary of State for the Home Department*, [2018] UKUT 13029 (IAC).

answer, the judge determined the issue of the credibility of the appellant's account without considering her mental health and memory difficulties, dismissing the medical evidence before him. In failing to have regard to the medical issues when considering credibility, it was again found that the judge fell into error, and the case was remitted de novo to the First-tier Tribunal.

We see parallel injustices play out in the case of *Ms C O*¹⁵⁰, a bisexual woman from Nigeria who claimed asylum in the UK on SOGI grounds after being raped and violently attacked by a group of men upon being found in an intimate relationship with another woman. The appellant had provided medical reports outlining the injuries she suffered as a result of the attack, in addition to a psychiatric report submitted on her behalf stating she was suffering from PTSD and a mild depressive disorder. The psychiatrist referred to poor concentration and difficulty with recollection, which are not considered in the hearing. In the decision, the judge sets out his own speculation as to *Ms C O*'s injuries, stating, "it seems to me that this is a low number of scars to have resulted from a severe assault by several people and involving scissors and knives, as described"¹⁵¹. Just as in the case of *OAO*, in drawing his own inferences and finding the account to be implausible, the judge goes against the Home Office's own guidance on assessing asylum claims with medical evidence, and in doing so, was found to have erred in law. The inability of this judge to consider this woman's experiences of persecution in a holistic manner also contributed to his erroneous negative credibility findings, in re-producing the binaries of "victim of violence" vs. "genuine lesbian"¹⁵² in stating that "she had not established she was bisexual or the victim of domestic violence as claimed"¹⁵³, further denying the reality of queer women's experiences and identities and leading to flawed decision-making. Heteronormative stereotyping also impacted the judge's decision-making, as seen where he points out that, "the appellant had given no real account about discovering her sexuality"; highlighting her "inability to remember the full name of her claimed 1st same-sex partner"¹⁵⁴. Would a cis, straight man be expected to give an account of his "discovery" of his sexuality, or indeed remember the full name of his first sexual partner? The judge's denial of *Ms C O*'s identity and experiences are underscored in the subsequent paragraph, wherein he states he "finds it difficult to accept" that "despite being severely beaten and raped she was able to take a photograph of her injuries and send these on her phone to her sister"¹⁵⁵, indicative again of the positioning of the decision-maker's 'intuition' as justification of denying LGBTQ+ women's experiences and subsequent access to international protection¹⁵⁶. Despite the provision of medical evidence stating the impact of her PTSD on her concentration and ability to recall past experiences, *Ms C O*'s account of her experiences was found to be non-credible, and ultimately her appeal at the Upper Tribunal was dismissed.

4.2 Disregarded, dismissed and denied

Having examined the specifics of the cases under study, we begin to see that the common thread woven through them all is the extent to which they have been subjected to epistemological violence and injustices in how the very system designed to protect them comes to privilege the voices of those in power above their own. In deciphering the conditions under which these women's truths are de- and reconstructed, it is important to question and consider the who and the why. The Diversity of the Judiciary 2020 Statistics¹⁵⁷ are particularly helpful in their answering of the question "who gets to decide?", illustrating how only 7% of court judges are Black, Asian and Minoritised Ethnic (BAME) and one third female. It was clear from the pronouns provided in the case law that all seven judges who dismissed the six women's claims for protection on SOGI grounds at the First Tribunal identified as male, and five of these seven judges were found by Upper Tribunal judges to have erred in law in their decision-making. This notion, central also to feminist theory, that the law privileges the cisgender, heterosexual, white males, is therefore particularly true of queer women's experiences of the law in the context of claiming asylum based on SOGI grounds, where

150 *Ms C O v. Secretary of State for the Home Department*, [2019] UKUT 06932 (IAC).

151 *Ibid.*, [34].

152 Dustin, M., Pathways to Refugee Protection for Women: Victims of Violence or Genuine Lesbians?, *Refugee Survey Quarterly*, Volume 41, Issue 3, (September 2022), 393–419, <https://doi.org/10.1093/rsq/hdac013>

153 *Ms C O v. Secretary of State for the Home Department*, [2019] UKUT 06932 (IAC), para 7.

154 *Ms C O v. Secretary of State for the Home Department*, [2019] UKUT 06932 (IAC), Para 21.

155 *Ibid.*

156 Ferreira, N., 2022., Chapter 2.

157 Ministry of Justice, Diversity of the Judiciary Statistics, *Diversity of the judiciary: Legal professions, new appointments and current post-holders*, (2020). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918529/diversity-of-the-judiciary-2020-statistics-web.pdf [Accessed 23 August 2024].

– as this research has found – not only their experiences, but their very identity is disbelieved and denied.

Ultimately, the findings from this research build upon existing arguments challenging the law's objectivity¹⁵⁸, revealing how the UK asylum system employs prejudiced, discriminatory hermeneutical resources available to those in positions of decision-making power, silencing and undermining queer women's narratives, experiences and claims for protection. Through the analysis of the cases presented in this research, a clear pattern emerges in how epistemological injustices play out in LGBTQ+ women's claims for asylum on SOGI grounds in the UK, building on the well-documented notion of the 'culture of disbelief'¹⁵⁹, and forming three clear stages: Firstly, through decision-makers' *disregard* of the available and relevant policy guidance, the necessary policy frameworks and instructions are not adopted in order to properly interpret and assess LGBTQ+ women's claims for asylum on SOGI grounds. Secondly, through *dismissing* medical evidence presented by clinical professionals which outlines the claimant's experiences of trauma, the impact this has on her memory impairment, and the imperative consideration of this when assessing her credibility – instead substituting their own opinions and conclusions for relevant medico-legal evidence – judges exercise an excessive and inappropriate use of discretion and commit profound contributory, epistemological injustices¹⁶⁰, ultimately amounting to errors in law. Finally, and fundamentally, when presenting their cases for international protection on SOGI grounds in their UK asylum procedures, LGBTQ+ women are *denied* their epistemic agency, their own experiences, narratives and identities, and significantly – they are denied the protection they seek.

158 Banović, D., Queer Legal Theory. In: Vujadinović, D., Álvarez del Cuavillo, A., Strand, S. (eds) *Feminist Approaches to Law. Gender Perspectives in Law*, (2023), vol 1. Springer, Cham. https://doi.org/10.1007/978-3-031-14781-4_4

159 Anderson, J. et al., *The culture of disbelief: An ethnographic approach to understanding an under-theorised concept in the UK asylum system*. (2014) Available at: <https://www.rsc.ox.ac.uk/files/files-1/wp102-culture-of-disbelief-2014.pdf> [Accessed September 10 2024].

160 Ferreira, N., 2022., Chapter 2.

5. Chapter Five: Conclusion and Recommendations

5.1 Conclusion

In summary, the cases analysed in this research have illustrated that queer women's protection needs, experiences and their cases for asylum in the UK are ultimately disregarded, dismissed, and denied. In all of the cases analysed in the previous chapters, medical evidence outlining the impacts of trauma on memory and what this would mean for their ability to present a "coherent narrative" of their persecution was dismissed – and in multiple cases, such as that of *OAO* and *hkm*, these clinical observations were substituted arbitrarily with the judge's own opinion and conclusion. The fact that medical evidence is not believed speaks clearly to the pervasive culture of disbelief, which appears to permeate every aspect of the decision-making process for LGBTQ+ women's claims for asylum on SOGI grounds – from credibility assessments, to their sexual identities and MPSG, and underlying experiences of persecution, all of which become intertwined. The arbitrary dismissal of medical evidence amounting to errors in law during RSD procedures, such as in the analysed cases in chapter four of *SN* and *Ms CO*, further underscores the explored notion of epistemic violence and injustice, and calls into question the impartiality and objectivity of decision-makers' positionality, and ability to fairly consider and interpret relevant guidance, legislation and evidence. These findings also speak to a lack of "parity in participation"¹⁶¹, brought about by epistemic injustices, which, as we have seen through this research, can be said to be true of the UK asylum decision-making context, the institutions that make up this system, and the resulting interactions framed within this. The notion of epistemic injustice is inextricably linked to the findings of this research, and how this poses particular challenges for women SOGI applicants given their overlapping identities and marginalisation of being racialised Black, LGBTQ+ women, and how the "truths" of their lived experiences as both women and queer, come to be constructed in the context of the power dynamics at play within a UK asylum tribunal.

Despite recognising the relatively small number of cases analysed in this study, the proportion of cases which were subsequently remitted de novo to the First-tier Tribunal for reconsideration by another judge, is arguably still significant - five out of seven cases, or 71%. The overturning of these decisions is indicative of the judges' flawed approaches to decision-making, a consequence of their favouring of their own epistemic truths, failing to consider in the round the evidence before them outlining the impact of trauma on the women's memory, the resulting vulnerabilities and effects on their capacity to meaningfully participate in their own asylum procedures, and ultimately raises questions around the quality of Home Office decision-making in these types of SOGI claims, affirming the notion of an acute "discourse of fakeness" in credibility assessments of SOGI applicants¹⁶², and drawing this together with research highlighting the failures in UK decision-making around credibility assessments of queer women¹⁶³. This drawing together of the literature around deep concerns for SOGI decision-making more broadly, the specific implications for LGBTQ+ women, analysed through the lens of the compounding factors of memory impacted by trauma, is where this research makes a unique contribution in its findings. Despite the potential limitations in terms of the representativeness of the cases under study in this paper laid out in the methodology – in that given they had all reached the Upper Tribunal it could be argued that a certain degree of poor quality in decision-making could already be expected – it is clear from the cases under study that there is plenty to be gleaned from judges approaches to decision-making in these particular cases. It is hard to see how it could be considered mere anomaly in decision-making, given that in the case of *rn*, for example, her case was heard, scrutinised and dismissed by a total of four different judges, before being again remitted de novo to the First-tier Tribunal for reconsideration by a different judge.

5.2 Recommendations

Based on the findings from this research, in order to improve asylum decision-making for LGBTQ+ women's claims for protection on SOGI grounds in the UK, decision-makers should adopt and consider the relevant guidance and policy, both domestic and international, including those put forward by the UNHCR, that specifically look at how to create and sustain the conditions for an inclusive and trauma-informed decision-making procedure for queer, female SOGI claimants. This includes considering and applying relevant

161 Ferreira, N., 2022.

162 Ibid.

163 Dustin, M., 2022.

policy guidance in order to effectively deal with the impacts of trauma on memory in LGBTQ+ women's claims for asylum on SOGI grounds, such as Home Office guidance on the interpretation of medical evidence, Gender Issues in the Asylum Claim and the Asylum Policy Instruction on Sexuality in the Asylum Claim, paying close attention to where decision-makers are warned against committing and enabling epistemic injustices, such as through domestic and international guidance warning against the substitution of opinion for medical evidence and clinical conclusions. By adopting and correctly implementing relevant policy guidance in RSD procedures, decision-makers could play a vital role in upholding the objectivity of the law and mitigating the epistemic injustices such as those committed against the women in this study. Furthermore, through correct application of relevant policy and guidance, the Home Office could take tangible steps to improving the accuracy and consistency in decision-making for SOGI claimants, including through implementation of the findings and recommendations of relevant reports, such as the Women and Equalities Committee (2023) report¹⁶⁴, which recommends that the Home Office should demonstrate it is taking effective steps to mitigate the risk of unequal effects in the asylum process for LGBTQ+ claimants, avoiding the need for appeals and overturned decisions, as we have seen in the substantive chapters of this research.

Furthermore, as this research has demonstrated, there are concerning implications for queer women racialised as Black when intersectional approaches are not adopted. UK adjudicators should therefore apply the concept of intersectionality in LGBTQ+ women's cases for international protection on SOGI grounds, recognising their diverse identities and experiences of persecution. For example, we saw in the case of *r n* how the judge's inability to recognise and account for her identity as both a lesbian and a woman having experienced gender-based violence, and the interrelated persecution she experienced – exacerbated by the judge's inability to account for the impacts of trauma her memory – led to inadequacies in the decision-making, leading to her claim's dismissal and subsequent remittal to the First-tier Tribunal on two occasions. In addition to considering the relevant guidance and policies, in order to remove the barriers faced by LGBTQ+ women who have experienced trauma and/or PTSD throughout their asylum procedures, decision-makers must consider all the interrelated factors that could impede their ability to participate meaningfully in their asylum procedures, including issues around shame, power dynamics at play, and the cognitive impact that trauma has on memory and recall.

By adopting these recommendations and creating the conditions for a fair and trauma-informed approach to assessing SOGI claims for international protection from women who have suffered psychological trauma which is impacting on their cognitive abilities and posing barriers to their safe and meaningful participation in RSD procedures, the quality of decision-making on LGBTQ+ women's claims for asylum in the UK on SOGI grounds would be improved, ensuring that the right decision is made the first time round, and limiting the need for appeals. Above all, through the application of these recommendations, the epistemic agency of queer women seeking protection in the UK on SOGI grounds could be upheld throughout their asylum procedures, limiting the scope for epistemological violence and injustices committed against them, and sustaining an asylum system which respects and protects their narratives, experiences and identities.

¹⁶⁴ Women and Equalities Committee 4th Report. Equality and the UK asylum process Volume 1. Report, House of Commons, UK Parliament, Session 2022-2023, Number HC93, (27th June 2023), 72, [5] Available at: <https://committees.parliament.uk/publications/40580/documents/198406/default/> [Accessed 10 September 2024]

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