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ABSTRACT

The process of applying for asylum can be a long and complicated one. With a wide range of individuals seeking safety from a variety of countries and for a plethora of different reasons, all agents in the process must make meanings with any information they are able to discover in order to ascertain who will be granted asylum. As part of the process, if asylum is denied, applicants can appeal, and it is selected appeals from this group which form the data set for this thesis.

Whilst it can be stated that all asylum seekers have less power than the officials who are judging them, it is suggested in this work that lesbians have less power than most. Due to their intersectionality, they lack power on many levels – as asylum seekers, as women, as homosexuals, and as homosexual women in a system which is more suited to male political activists, leaving them at a power deficit in comparison to those who are assessing the veracity of their claims.

As human beings, it is difficult to escape preconceptions, and some officials involved in these asylum interviews appear to have preconceived ideas about what constitutes a lesbian, the attitude to lesbianism in the given country as well as an individual's rights to live a full and open life. When these individuals are in a position of greater power the narratives are coloured by their preconceptions sometimes leading to denial of asylum.

In the following pages, the cases of eight women are examined. Their cases are tabulated and patterning is drawn out. The information is examined under the theoretical lens of “Asylum as construction work” as this clarifies the power relationships in the asylum process.

In all cases there is an appellant who is attempting to create a credible reality for their claim and an official who is attempting to manufacture an official reality as documentation for a claim. This thesis explores the role power has to play in the construction of reality.

Ideas are suggested as to how this power imbalance may be addressed from the inside – making the process a clearer, fairer and more equitable experience for all involved and helping to ensure

the UK's reputation as a fair and inclusive country reaches beyond LGBT citizens to LGBT asylum-seekers.

Amongst the conclusions drawn are: many actors within the system were proven to have the power to present their versions of reality and construct facts, although power relations were shown to be asymmetric; lesbian asylum seekers were found to hold very little power in the UK asylum system; records were found to be a result of the construction of facts yet are also involved in constructing them and structures such as the asylum system are able to be changed by the actions within them.

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INTRODUCTION

The UK is considered a leader in LGBT rights on the world stage, but is said to perform disappointingly when it comes to the treatment of LGBT people who are seeking asylum.

A study by Stonewall in 2010 stated “-the treatment of one group of asylum-seekers is materially less fair than that of others simply on the grounds of their sexual orientation,” (Ben Summerskill, quoted in Miles, 2010, p. 2). This study consisted of interviews with lesbian, gay and bisexual asylum seekers, legal professionals, asylum support workers and staff from the UK Border Agency, and summarized that the UK asylum system made “fundamental errors of judgment”, presumptions about certain aspects of sexual orientation and even accused the system of homophobia (*ibid.* p.3-36).

Research carried out by Claire Bennet and Felicity Thomas in 2013 about the experiences of lesbians within the UK asylum system also found that certain procedures and parts of the asylum process can be “-confusing, disempowering and traumatic,” (pp. 25-28).

In November 2017, the UK Home Office released statistics of “Asylum claims on the basis of sexual orientation” that revealed that between July 2015 and March 2017 sexual orientation was raised as either the main, or one of the bases for 6% of all asylum cases in the UK. Of these, 73.95% of asylum-seekers were rejected (Home Office, 2017). Within these statistics, there is no indication of how many of these applicants are women. In 2016, however, of all asylum-seekers, women only accounted for 25% of applicants.

The UK Home Office statistics are not detailed enough to allow for a comprehensive analysis to be undertaken, and the records of asylum-interviews and decisions are not publicly available. In this light, appeals cases were the chosen data. Appeals cases provide a lens to view many steps of the asylum system, as they often quote or refer to past decisions made in the initial asylum decision or other courts, as well as the background of the cases themselves. The chosen cases demonstrate that lesbian asylum seekers suffer from accumulated power deficits in being asylum seekers, women, homosexuals and homosexual women.

RESEARCH QUESTIONS

This work attempts to investigate the experience of homosexual women when attempting to appeal their cases. The questions to be addressed are as follows:

What can the appeals cases of lesbians seeking asylum based on their sexual orientation show regarding the power dynamics between the various actors in the asylum system, and can the power dynamics be changed?

- What processes are involved in the UK asylum system?
- What issues do lesbian asylum-seekers face?
- Who has the power to construct facts within the asylum system?
- Can the structure of the asylum system be changed from within?

In order to answer these questions, the legal framework of asylum claims will be discussed, and the steps involved in the UK asylum system will be unfolded. Literature will then be used to uncover problems that lesbians face in claiming asylum.

Next, the theory of “Asylum as construction work” by Julia Dahlvik - a theory of power relations within the administration of asylum will be explored and applied to the appeals cases of lesbian asylum-seekers. This will be followed by suggestions of changes that can be made to the UK asylum system from within, based on the appeals cases in the data set, the issues commonly faced by lesbians and elements of the ‘Asylum as construction work’ theory. Such changes would go some way to redressing the unequal balance of power in the asylum system and ensure that UK’s reputation as a forward thinking and tolerant country begins to be reflected in the ways it deals with some of the most powerless people in the asylum system.

METHODOLOGY

The data chosen for this thesis are the records of appeals cases of lesbian asylum seekers, seeking asylum based on their sexual orientation. As mentioned above, appeals cases provide a lens through which various steps of the asylum procedure can be seen. The appeals cases were found through the *Refworld* case law database (<http://www.refworld.org/cases.html>). The term “lesbian” was searched in the “Full text” field, “United Kingdom of Great Britain and Northern Ireland” was chosen in the “Country of asylum” field, and the cases were sorted “by relevance”. The ‘most relevant’ cases were chosen, though some cases were filtered out as the appellants within them were not homosexual women. This provided a range of cases that were judged at different levels of court, which suited the aim of analyzing appeals cases which was to gain an insight into different procedures within different levels of the asylum system.

The theory ‘Asylum as construction work’ was chosen as it is a way to analyze the underlying power dynamics of bureaucratic processes within asylum systems. This was a good fit for the chosen data which is a part of the process as well as explaining elements of it. This theory was applied to the data in order to clarify the power structures within the system.

As the appeals cases were judged at different courts at different times, they were not of a consistent structure. In order to ease the analysis and enable a comparison based on the elements that were relevant to analysis, the data was tabulated based on said elements.

The analysis, in combination with the issues faced by lesbians as found within literature, was used to posit recommendations to rebalance the structures of power to some extent, and to change the asylum structure from within.

2 THE UK ASYLUM SYSTEM

This chapter was written based on information obtained from the UK Government's website (<https://www.gov.uk/claim-asylum>), unless stated otherwise. This source was used as it contains the most up-to-date information available.

2.1 CLAIMING ASYLUM IN THE UK

Asylum-seekers must apply for asylum as soon as they arrive in the UK or as soon as they begin to fear persecution in their countries of origin if they are already in the UK. This is done at an asylum 'screening', which either happens at the UK border or at the asylum screening unit which is situated in Croydon, England. If the asylum-seeker is in the UK when they need to apply for asylum, they are required to either make an appointment with the asylum screening unit by telephone, or to go between 7:30 and 16:00 Monday to Friday if they have nowhere to live. If they do make an appointment by telephone, they will be called back and asked questions about themselves and their families and whether they need help with housing which can take up to 30 minutes. If they claim asylum at the UK border, they must inform a Border Force officer.

Asylum applications are registered and applicants are screened. According to the UK government's website - asylum screening can take up to four hours and asylum-seekers may be detained once it is completed. Asylum-seekers are able to ask for an interpreter to be present at their screening, and have the right to request a male or female interviewer and interpreter, but the requested gender is not always available. At the screening, they are photographed, their fingerprints are taken and they undergo an interview to check their identity, where they are from and why they think they need asylum. They must also disclose whether they or a dependant takes any medication and reveal any relevant medical information. According to the Home Office's *Asylum Policy instruction: Sexual orientation in asylum claims Version 6.0*, "-the asylum claim must not be substantively explored during the screening process," and only a brief description of why the applicant is attempting to claim asylum need be explored and documented (2016, p.40), although this has not always been adhered to in practice.

The case is then given to a caseworker. The asylum-seeker will be sent an asylum registration card by post, unless they are detained. According to the website, there may be cases in which the Home Office cannot send the asylum registration card instantly. In this scenario, they will send an appointment letter with instructions on the next steps to take.

The next step in the asylum-seeking process is an asylum interview. This takes place shortly after the screening, with the caseworker who decides whether the application is successful or not. In addition to this, the caseworker should give the applicant an explanation of the asylum process as well as instructions of necessary steps to take while waiting for their asylum decision. One of these steps is to attend regular reporting meetings. If they do not attend these reporting meetings, they could be detained. The asylum-seeker is allowed to send a written statement to the caseworker before the interview to support their claim. This must be in English. They are also allowed to take a legal representative into the interview with them, and are allowed to request an interpreter. If a legal representative is not present, the asylum-seeker can also request for the interview to be sound recorded, but this must be requested at least a day before the interview. If the legal representative is late or does not show up, the interview will take place regardless.

The applicant is interviewed alone, without any family members, and the interview is treated in confidence. The UK government's website states that the asylum-seeker should talk about how they were persecuted in their country of origin and why they are afraid to go back. It also states that if they do not tell their caseworker everything that should be considered in the claim, it could count against them. They are advised to take any evidence of persecution that they have, as well as their birth certificate, passport and medical records if they are available. If the caseworker believes that further evidence could help the application, the asylum-seeker may be asked to send further evidence after the interview. The caseworker writes an interview record which consists of notes taken during the interview. A copy of this is given to the asylum-seeker after the interview is finished.

The outcome of asylum applications are usually decided within six months, but can take longer if evidence needs to be verified, personal circumstances need to be checked or if the asylum-seeker needs to attend more interviews. Asylum-seekers can also be detained at an immigration removal

centre whilst waiting for a decision. Apart from not attending regular reporting meetings, the UK government's website does not state any reasons why this would happen. In this situation, they can be released once they get permission to stay in the UK, made to stay until they are removed from the UK if they do not receive permission to stay or detained and removed if it is determined that a country other than the UK has the obligation to offer them asylum. Despite the lack of information on scenarios in which asylum-seekers may be detained, the website does note that they will not usually be detained if they are:

- A child
- Elderly
- Family with children
- Pregnant
- Accepted as being a victim of trafficking
- Able to provide independent evidence of torture
- Suffering from a mental or physical condition that can't be managed, or presents a risk to others, in an immigration removal centre.

2.2 OUTCOMES OF THE ASYLUM CLAIM DECISION

There are four possible decisions that can be made on asylum claim: permission to stay as a refugee; permission to stay for humanitarian reasons; permission to stay for other reasons and no reason to stay.

If the applicant qualifies for asylum and is given permission to stay as a refugee, they and their dependants receive 'leave to remain' for five years. This simply means that they can stay in the UK as refugees for five years and then apply to settle in the UK after these five years. Those who receive permission to stay for humanitarian reasons can also stay in the UK for five years if they do not qualify as a refugee but cannot return to their countries of origin and need protection. This stay is referred to as 'leave to enter' or 'leave to remain', and just like refugees, they are able to apply for settlement in the UK after these five years. If the applicant does not qualify to stay in the UK for either of these reasons, they may be given 'permission to stay for other reasons'. The

amount of time that they are allowed to stay in the UK depends on their situation. They might also be allowed to apply to settle in the UK towards the end of their stay, and can also apply to extend their stay.

If the decision is made that there is no reason for the applicant to stay in the UK, they must leave. This can either be done willingly where they can receive some help with returning, or forcefully. If they are forced to leave, the applicant will receive a letter notifying them of what will happen. After this letter, they may be detained at an immigration removal centre with no warning, and then forcibly taken out of the UK.

Asylum-seekers, as well as others applying to stay in the UK, may be able to appeal against the decision. If the Home Office has refused their claim, decided to deport them or refused to issue residence documents under EEA Regulations, revoked protection status, taken away someone's British citizenship or made a decision before 6 April 2015, an appeal can be made to the Immigration and Asylum Chamber First-tier Tribunal, which is independent of the government. A request to appeal must be made within 14 days of the decision, but the tribunal may agree to hear the appeal if the request is after these 14 days depending on the explanation of why it was made late. If the applicant has no right to appeal in this way, they may be able to ask the Home Office for an administrative review, but there are also criteria that have to be fulfilled for this to be an option.

2.3 OTHER COURTS - APPEALS

According to righttoremain.org.uk, if the First-tier Tribunal reaches a positive decision, refugee status is granted to the applicant, though this decision can also be appealed by the Home Office. If the appeal is dismissed, the applicant is often detained and their appeal rights are often exhausted. They will then go through the removals process unless they make a fresh claim. (<https://righttoremain.org.uk/toolkit/asylumdecision.html>)

In this case, the applicant or their lawyer submits new evidence or documentation to the Home Office, who then decide whether the claim meets the criteria of a fresh claim. If it is considered a

fresh claim, the applicant is granted or refused asylum (<https://righttoremain.org.uk/toolkit/freshclaim.html>).

Alternatively, there may be a possibility for the applicant to appeal to other courts (<https://righttoremain.org.uk/toolkit/asylumdecision.html>). The applicant must receive permission in order to appeal to the Immigration and Asylum Upper Tribunal (<https://righttoremain.org.uk/toolkit/utt.html>). In the application for permission, it is necessary for the applicant to demonstrate that an error of law was made by the judge in the First-tier Tribunal (*ibid.*).

If a case is dismissed by the Upper Tribunal, it is an option for some, in theory, to appeal to the Court of Appeal (England and Wales), Court of Appeal (Northern Ireland) or Court of Session (Scotland). If a case is refused in such a court, it may then be possible to appeal to the Supreme Court, which is the highest appellate court in the UK (<https://righttoremain.org.uk/toolkit/courts.html>).

If there is a valid argument that the UK has failed to protect the human rights of an applicant under the European Convention on Human Rights, the case can be taken to the European Court of Human Rights. This court considers both individual cases such as asylum cases, and national legislation or policy (*ibid.*). Asylum and human rights cases are usually heard at the European Court of Human Rights after permission for a judicial review is refused (*ibid.*).

3. LEGAL FRAMEWORK

3.1 1951 CONVENTION & 1967 PROTOCOL - UNHCR

The 1951 *Convention Relating to the Status of Refugees (The 1951 Convention)* and the 1967 *Protocol Relating to the Status of Refugees (The 1967 Protocol)* are the first legal instruments that should be looked to as they contain the first legal definition of the term *refugee*. In addition to this, the *1951 Convention* was the first international agreement regarding the most fundamental features of refugeedom.

Within these instruments, the term *refugee* is defined as someone who, for reason of well-founded fear of persecution because of race, religion, nationality, membership of a particular social group or political opinion, is unable or unwilling to return to their country of origin (UNHCR, 2010). In addition to this definition, the *1951 Convention* and *1967 Protocol* provide a description of the rights of displaced people and the legal obligations of protection of these people by States. The ‘guardian’ of the *1951 Convention* and its *1967 Protocol* is UNHCR, the UN Refugee Agency, and States are therefore expected to cooperate and comply with them in relation to protecting the rights of refugees.

3.2 HOMOSEXUAL ASYLUM-SEEKERS AS MEMBERS OF A ‘PARTICULAR SOCIAL GROUP’

3.2.1 INTERNATIONALLY

Those seeking asylum owing to their actual or perceived sexual orientation can apply for refugee status based on well-founded fear of persecution on account of religion, political opinion, or membership of a particular social group, depending on the context of the claim. The most common ground for these claims, however, is ‘membership of a particular social group’ (UNHCR, 2012, pa.40). As noted by Derek McGhee, ‘membership of a particular group’ is the only point of entry for ‘non-traditional’ refugees who are not represented under the other provisions in Article 1A (2) of the 1951 Convention (2001, pa 1.2). According to UNHCR’s *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*, “The term

membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human right norms” (2011, pa 1.3/p. 92). As there is no clear guidance on what constitutes a ‘particular social group’ in the *1951 Convention* and its *1967 Protocol*, the discourse regarding the reason for including this provision has been used in different ways, to both the advantage and disadvantage of homosexuals seeking asylum (McGhee, 2001, pa. 1.2). UNHCR has since clarified its definition of a ‘particular social group’ as being an actual or societally perceived group of persons who “-share a common characteristic other than their risk of being persecuted,” (2012, pa.44). Furthermore, they have noted that this common characteristic is often one which is innate, unchangeable or fundamental to the identity, conscience or exercise of human rights of the actual or perceived group and that LGBT persons are members of ‘particular social groups’ within the meaning of the refugee definition under a correct implementation (*ibid.* pa.44-46).

The concept of a ‘particular social group’ being defined by a shared, fixed characteristic is first seen in a legal context in a judgment made in 1985 by the United States Board of Immigration Appeals entitled *A Matter of Acosta*. According to McGhee, this is also the first case in which refugee law was used in accordance with international human rights law (2001, pa. 4.1). The United States Board of Immigration Appeals found “persecution on account of membership of a particular social group” to mean targeted persecution of a person belonging to a group of individuals who share a common, immutable characteristic. An immutable characteristic was defined as an attribute that is either beyond the power of a person to change, or ought not to be required to be changed on account of it being fundamental to individual identity or conscience (US Board of Immigration Appeals, cited in McGhee, 2001). In this judgment, the US Board of Immigration Appeals also noted that whether an individual could be classed as a member of a particular social group should be determined case-by-case (*ibid.*). In 1986, in the case of *Sanchez-Trujillo v Immigration and Naturalisation Service*, the idea that a particular social group should be a cohesive group first appeared. This ruled out the inclusion of homosexuals as a particular social group as a cohesive group was defined as being a group of people closely and officially connected with one another (*Sanchez-Trujillo v Immigration and Naturalisation Service*, 1986).

In 1993, the Canadian Supreme Court proposed three possible cases which could constitute a ‘particular social group’:

1. Groups defined by an innate or unchangeable characteristic
2. Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association
3. Groups associated by a former voluntary status, unalterable due to historical permanence (Canada V Ward, 1993 *cited in* McGhee, 2001).

Another noteworthy case is that of *Re: GJ*, the unreported decision of the New Zealand Refugee Status Appeals Authority in 1995. In this decision, an Iranian homosexual’s application for refugee status was successful, using the immutable characteristic criteria established in the cases of *A Matter of Acosta* and *Canada v. Ward*, and ruling that homosexuals should not be expected to renounce or alter their actions or behaviour to circumvent persecution;

“Sexual orientation presents little difficulty...sexual orientation is a characteristic which is either innate or unchangeable or so fundamental to identity or to human dignity that the individual should not be forced to forsake or change the characteristic. Sexual orientation can, therefore, in an appropriate fact situation, be accepted as a basis for finding a social group for the purposes of the Refugee Convention,” (Re: GJ 1995: 57).

3.2.2 WITHIN THE UK

In the UK, in the case of *Secretary of State for the Home Department v. “S.”*, Mr S’s lawyers used the *A Matter of Acosta*, *Canada v. Ward* and *Re:GJ* cases as the foundation for their ‘skeleton argument’ which was submitted to the Court of Appeal in the UK, the appeal being planned for November of 1996. This was the first instance in which the concept of homosexuals being included in the ‘particular social group’ category appeared, in a legal setting, in the UK. The case never reached the Court of Appeal due to Mr S being granted full refugee status on the basis of persecution for political reasons beforehand, a move later considered to be an effort to

circumvent having to make such a monumental judgment on the issue of including homosexuals within this category by Mr S's judge.

Two years later, in 1998, Sorin Mihai - a practising homosexual from Romania - *was* granted refugee status due to being a “-member of a particular social group with a well founded fear of being persecuted if returned to Romania,” (McGhee, 2001). The inclusion of homosexuals in the definition of ‘particular social group’ in UK Refugee Law was then cemented in a case that, in fact, did not include homosexual applicants at all. Alternatively, it was a case regarding whether women in Pakistan could constitute a ‘particular social group’ (*R v. Immigration Appeal Tribunal ex parte Shah* *all England Law Reports 12 May 1999, 555h*). According to McGhee, this is where there was a shift in focus from the individual’s attributes and conduct to the treatment of social groups by the state in their countries of origin (2001). The *A Matter of Acosta, Canada v. Ward* and *RE:GJ* decisions were quoted in this case in order to oppose the confining criteria that was prevalent in International refugee Law that members of a social group had to be a ‘cohesive group’ and to inspire a wider interpretation for the purposes of asylum.

3.3 LESBIANS AS MEMBERS OF A PSG

As lesbians are homosexuals, it is, or *should* be, easy to include them as fitting the ‘particular social group’ Convention ground at a legal level, based on the decisions cited above. In addition to this, as stated earlier, UNHCR Guidance has since noted that under an accurate application of refugee law, LGBT persons are members of ‘particular social groups’. What is harder to prove, however, is that lesbians fit the legal definition of persecution - especially as a result of their sexual orientation. This will be explored further in Chapter 4.

3.4 THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The Council of Europe drafted the Convention for the Protection of Human Rights and Fundamental Freedoms (The European Convention on Human Rights, or ECHR) in 1950 (Rainey, Wicks & Ovey, 2017, p. 4). It entered into force in 1953 and largely guarantees civil

and political rights along with its fourteen Protocols (Rainey, Wicks & Ovey, 2017, p. 86, 666). Much like the 1951 Convention, it developed as a response to World War II and its horrors, but also in conjunction with the development of human rights which began much earlier (Rainey, Wicks & Ovey, 2017, p. 3). The ECHR established the European Court of Human Rights, an independent judicial process at Strasbourg that makes decisions on whether member states have breached the Convention (Greer, 2014, pp. 417-418). The ECHR contains no express provision relating to asylum (Mole & Meredith, 2010, p. 19), yet the jurisprudence that has developed as a result of the Convention organs between 1989 and 2009 determines the standards of rights that asylum-seekers should possess throughout Europe (*ibid.*).

3.4.1 ARTICLE 3

The protection of asylum-seekers in the ECHR is situated in Article 3; “Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment,” (Council of Europe, 1950, p. 6). This Article protects those threatened with extradition, expulsion or deportation to states in which they are likely to face such ill-treatment (Mole & Meredith, 2010, pp. 20-24). This prohibition is described as “absolute and fundamental” as well as achieving the status of a *jus cogens* (peremptory norm) in international law (Pievsky, 2005, p. 169). This Article has become especially important since the securitization of migration in Europe. Individuals who have been accused of activity that would commonly permit deportation are protected under Article 3 if faced with threats of extradition and expulsion, and so it protects some of those who are not otherwise protected under refugee law (Harvey, 2000, pp. 382-383). The extra-territorial effect of Article 3 was first shown in *Soering v the United Kingdom* in 1989 (European Court of Human Rights, 2016). An applicant - a German national risked being sentenced to death if extradited to the USA for committing murder. As he was detained in a prison in the UK, he complained that this extradition would violate Article 3 of the ECHR, as people on death row suffer psychological trauma and stress whilst waiting for execution, as well as inhuman and degrading treatment and punishment. Although the ECHR does not rule the actions of States not party to it, the Court concluded that the United Kingdom would violate Article 3 of the Convention if it extradited the applicant to the USA. This extra-territorial effect

is particularly useful in the cases of asylum-seekers, including those seeking asylum based on their sexual orientation.

As the UK is party to the Convention, they are bound to meeting the obligations contained within it and have also incorporated it into the *Human Rights Act 1998* (Pievsky, 2005, p. 169).

3.4.2 ARTICLE 8

For those that attempt to challenge deportation orders for reasons of deprivation of the right to private and family life, Article 8 is applicable (Harvey, 2000, p. 383). This Article reads:

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others,” (Council of Europe, 1950, p. 10).

Whilst the right to marry and found a family is protected separately under Article 12 and Article 5, Protocol 7, Article 8 is usually more relevant in regards to asylum-seekers.

Both Article 3 and Article 8 of the ECHR are “-flexible, and hence adaptable to the evolving societal reality,” (Nykänen, 2012, p. 62). Whilst this adaptability would be perceived by many to be rational and fair, both provisions are also, therefore, sometimes applied inconsistently (*ibid.*). Unlike Article 3, the rights protected under Article 8(1) are not absolute as Article 8(2) permits derogations of it, allowing interference if in accordance with law (*ibid.*).

Though removal of a person could raise issues under Article 8, the threshold is high; “Article 8 of the ECHR provides protection only against *arbitrary* interference in the rights protected under it.” (*ibid.*). Three conditions have to be met in order for Article 8 to be deemed relevant; “1) the

situation has to fall within the scope of private and family life protected under this provision; 2) the measure complained of has to be such as to be regarded as *interference* in the rights protected under it; and 3) the interference must not be justifiable under Article 8(2) of the ECHR,” (*ibid.*).

The prohibition on State interference of an individual’s family and private life is referred to as a negative obligation. States also have a positive obligation under this Article; to allow family ties to develop and to take appropriate measures for family reunification.

The European Court of Human Rights first ruled that actions performed in the field of immigration control could affect the right to respect for family life under Article 8 in the judgment *Abdulaziz, Cabalis and Balkandali v. the United Kingdom* in 1985 (*ibid.*, p. 60). Article 8 is particularly relevant to LGBT+ asylum seekers as removal to their countries of origin could constitute interference with their right to private and family life, as is apparent with the appeal cases in the selected data.

4 LESBIANS: WOMEN, HOMOSEXUALS AND HOMOSEXUAL WOMEN.

4.1 WOMEN

Female applicants accounted for just 25% of all asylum applications in the UK in 2016 (Refugee Council, 2018, p. 10). This vastly unequal proportion of female to male applicants is not unusual, as the Refugee Council stated that the proportion of female applicants remained at around a third of the total amount between the years of 2003 and 2012 (2012, p.1) and 21-28% between 2012 and 2016. In part, this is because women and girls are often classed as dependents of their husbands or parents/guardians and therefore are not applicants in their own right. In addition to this, however, in many of the countries from which people are forced to flee, women may find it particularly difficult to leave these countries and enter a new one. This is a result of women being societally subordinate, being unable to be independent with restricted ability to work, earn and control their own money (European Parliament, 2016, p. 8; Neilson, 2005, p. 2), lacking knowledge about their rights (European Parliament, 2016, p. 8) and the means to travel internationally, in some societies (Refugee Council, 2012, p. 1).

Women and girls are subject to various forms of persecution and human rights abuses around the world. Many of these types of persecution, as well as the bases of persecution, are the same as those which men face. In addition to this, women and girls may face persecution due their status of being female. UNHCR's *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* provides some examples of forms of persecution that are prevalent in the cases of women and girls, such as: “-rape,”; “-dowry-related violence, female genital mutilation, domestic violence,”; “-trafficking,” and “-forced prostitution,” (2002, pa. 9-18). Even when the basis for persecution is the same as is faced by men, the persecution faced by women is more likely to involve sexual violence and rape (Refugee Council, 2012, p. 6). Women may also face harsher penalties for political participation than men as some social and cultural norms prohibit the involvement of women in this sphere (Crawley, p. 18). For the reasons stated above in regards to the restrictions that women face in their countries of origin, many female applicants are open to further abuses *en route* such as being forced to exchange sex in order to escape and travel to a safer country or are being raped by smugglers (Refugee council, 2012, p.1).

Once female asylum-seekers begin the asylum process in the UK, it has been reported that they face further obstacles; “They face obstacles in terms of accessing the asylum seeking process, in the course of the ‘*fact-finding*’ process in relation to their claims for asylum and also in terms of ignorance of issues re: gender-related persecution,” (Asylum Aid, 2003, p. 11). In addition to this, female interpreters and interviewers are not guaranteed to be available (<https://www.gov.uk/claim-asylum/screening>). Childcare was reported to not always be available in 2003 (Asylum Aid, p.11), and the UK Government’s website makes no reference to childcare options today. Female asylum-seekers are said to be less able, generally, to provide evidence for their application compared to men (European Parliament, 2016, p. 7) and female victims of sexual torture, abuse or gender-based persecution might find particular difficulty in reporting their history (*ibid.*). Furthermore, internationally, female asylum seekers face difficulties in gaining asylum due to the fact that historically, it has been proven difficult for the persecution faced in gender-based asylum claims to be proven to be because of women’s membership of a particular social group (Neilson, 2005, p. 4). Decision makers have been hesitant to include “women” in the category of this convention ground because of the potential of it involving half the world’s population (*ibid.*).

In 2003, it was reported that at the initial decision stage, 75% of applications for asylum made by women were denied (Asylum Aid, p. 11). A study made by Asylum Aid between 2007 and 2010 on the quality of initial decision-making in women’s asylum claims also found that 42% of cases in their research (cases made by women) which were initially unsuccessful, were overturned on appeal. Compared with only 28% of decisions being overturned of all asylum cases on average, it is clear that women, at least during this period, were being unfairly judged in their initial interviews (Asylum Aid, 2011, p.5). Of forty-five cases in this study, 87% were initially refused, mainly for the reason that the UK Border Agency did not believe their claims (*ibid.*). This is a reality which Natasha Walter, who set up the organization Women for Refugee Women, is said to have witnessed over the years;

“-women who are crossing borders to flee persecution often struggle to convince authorities that they deserve protection. Since setting up Women for Refugee Women six

years ago, I have been struck time and again by the ways in which women are discredited even in the process which should grant them protection.” (Dorling *et al.*, 2012, p. 3).

It has long been argued, at different levels, that various aspects of life have been structured around the male experience. Inger Skjelsbæk and Dan Smith, in their book *Gender, Peace and Conflict*, contend that “...male norms and male behaviour have been taken to represent the *human* norm,” (Skjelsbæk & Smith (eds.), 2001, p. 1). More narrowly, British barrister, broadcaster and member of the House of Lords, Baroness Helena Kennedy QC, states that “Law was not made with women in mind...” and that “-law has developed along lines which have rarely incorporated the experience of women,” (Women for Refugee Women, 2012, p. 2). Even more specifically, Victoria Neilson believes the same of asylum law, positing that definitions of persecution have, historically, been based on a male model of political activity (2005, p. 2).

Although women face many problems, including persecution or discrimination which mounts to the level of persecution in many countries, for the very reason that they are women, they also face problems because of the way that key elements of the Refugee Convention are understood and specifically, what is believed to be political action (Crawley, p. 20). Another problem is said to be the way in which decision makers generate the entirety of the determination process based on a dichotomy of public and private spheres, actions and persecution (*ibid.*).

Where the power balance between men and women is largely unequal, men often act in the public and political sphere whilst women operate in the private sphere (Dijkema, 2001, p. 3). In their *Guidelines on Gender-Related Persecution*, UNHCR state:

“The image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experiences of women in some societies. Women are less likely than their male counterparts to engage in high profile political activity and are more often involved in ‘low level’ political activities that reflect dominant gender roles” (2002)

This highlights the fact that the asylum system and refugee law is based on a model of male, political activism, which women do not always fit.

4.2 HOMOSEXUALS

Heteronormativity is defined as “-the dominant sexual model of social, cultural, political, and economic organization, including the way it organizes identities, experiences, regimes of truth and knowledge, and ideologies of gender and sex,” (Goldberg, 2016, p. 2). Dominant discourses and practices are based on the notion that the majority of relationships in society are heterosexual (*ibid.*).

As noted in the legal framework, just like gender, homosexuality is not explicitly referenced as a basis of persecution that is covered under the *1951 Convention* (McGhee, 2001, [1.2]). For this reason, the point of entry for those with a well-founded fear of persecution based on their sexual identity is ‘membership of a particular social group’ (*ibid.*; Neilson, 2005, p, 3). As the asylum system was created following a heteronormative framework, homosexuals are considered “-non-traditional refugees,” (McGhee, 2001, [1.2]), and with no guidance on what constitutes a ‘particular social group’ in the *1951 Convention* or its *1967 Protocol*, individuals seeking asylum based on their sexual identity have faced much difficulty in gaining asylum throughout the years (*ibid.*).

The difficulties faced include constituting a ‘particular social group’ at all (see Chapter 3), having to describe their sexual identity in a language implying immutability (Lewis, 2010, p. 428; McGhee, 2001), and the issue of being expected to return to their countries of origin and become, or remain discreet (Weßels, 2011, pp.24-25).

4.3 HOMOSEXUAL WOMEN

As lesbians are both women, and homosexuals, they face some issues which pertain to those in both categories, as a result of lying in the intersection of both. Lesbians are said constitute a

small percentage of sexual orientation-based claims as compared to gay men, and are granted asylum less than them (Neilson, 2005, p. 18). One reason for this is said to be due to the fact that female asylum-seekers in general constitute a smaller percentage of asylum claims than men (*ibid.*, p. 2).

Unlike women more generally, lesbian women are more easily categorized as being part of a 'particular social group' by being under the same 'homosexual' category as gay men (*ibid.*, pp. 3-5). The difficulty that they face, however, is meeting the legal definition of persecution, as the cases of gay men often do not contain the same kinds of violence and abuse suffered by lesbians (*ibid.*, pp. 5-6).

As discussed earlier, gender-based asylum cases are affected by the public/private sphere dichotomy. According to Victoria Neilson, the public/private sphere divide also affects other claims. Lesbians, who may be claiming asylum based on persecution for reason of their homosexuality, political opinion or religion as a result of their homosexuality or sexual practice, are also more highly probable to encounter persecution in the private rather than the public arena (*ibid.*, p. 2) by non-state agents (Lewis, 2010, p. 425). Adversely, homosexual men are more likely to face harm in the public sphere, and therefore, the facts in their cases conform more closely to pre-existing precedents for asylum claims (Neilson, 2005, p. 2).

As a consequence, proving asylum eligibility is said to be harder for women who have relationships with, or are attracted to, other women, when seeking asylum based on their sexual orientation, than gay men (*ibid.*). Evidence and documents that could strengthen the claims of lesbians are difficult to obtain as a result of the persecution emanating from non-state actors (Lewis, 2010, p. 425). Neilson believes that it is not just asylum law which is based on a male model, but more specifically that the system around sexual-orientation based claims is judged from a male model where activities that happen in public result in persecution which happens in public (2005, p. 18). This is said to be another reason that lesbians file a lower number of applications and receive less asylum grants than gay men (*ibid.*). The National Center for Lesbian Rights claim that it is the largest challenge that lesbian asylum-seekers face, noting "The

primary challenge facing a lesbian asylum applicant is proving her persecution or well-founded fear of persecution in a world that denies her visibility as a lesbian and the visibility of her abuse,” (2006, p. 9). Also, as Rachel Lewis notes, the number of lesbians applying and receiving asylum being so low as compared to other groups also “-[makes] it more difficult for asylum advocates to invoke legal precedents in the context of lesbian asylum cases,” (2010, p. 425).

In addition to this, lesbian asylum-seekers are said to often be judged on the basis of Euro-American lesbian stereotypes, prejudices of decision makers and heterosexist assumptions (Lewis, 2010, p. 430). In order to fit these standards and be granted asylum, advocates such as Barry O’Leary are said to encourage applicants to assimilate to Western gender and sexuality norms and “reproduce dominant narratives predicated on visibility and an identity in the public sphere,” which, in turn, reproduces the incorrect ideas of how ‘real’ lesbians look and behave rather than undermining them (*ibid.*, p. 431). In being judged on such stereotypes, prejudices and assumptions, the steps that lesbian asylum-seekers take to protect themselves in their countries of origin can ultimately hurt the claim for protection by making it harder to prove their sexual identity (*ibid.*, p. 434).

5 THEORETICAL FRAMEWORK: ASYLUM AS CONSTRUCTION WORK

In ‘Asylum as construction work: Theorizing administrative practices’, Julia Dahlvik studies the migration regime through the lens of the administration of asylum, and focuses on the role of social construction in the asylum procedure (2017, pp. 369-382). This theory acknowledges the interplay of “-political decision-making, legal frameworks, and institutional configurations,” that exist within the regime and explores the social processes between caseworkers and asylum-seekers (*ibid.*, pp. 370-371). It therefore views the asylum procedure, and its defining elements, as both a legal and social construct (*ibid.*, pp. 373). It is rooted in the broader sociological theory of ‘social structuration’.

‘Social structuration’ is a theory first proposed by Anthony Giddens. Giddens analyzed society through the concepts of actions and structures. He argued that social structures and social actions are “-recursively and reflexively produced”, meaning that they are constantly created at the same exact point in time and through the same behaviours (Allan, 2006, p. 266). Giddens saw social structures and social activity as being in a reciprocal relationship; structure enabling and limiting actions, and actions reproducing or changing structures simultaneously (*ibid.*).

Dahlvik argues that the social practices of decision-making officials in determining refugee status go beyond labelling, categorization, othering and prejudices, and consist of the construction of facts, artefacts and (in)credibility (*ibid.*, p. 369). Facts, artefacts and (in)credibility are *constructed* within the procedure rather than merely *found* or *uncovered* as certain actors within the system, at times indirectly, attain power to define facts by making information valid and legitimate or disregarding it (*ibid.*, pp. 396-382).

5.1 THE CONSTRUCTION OF FACTS

Compared with other legal procedures, a prominent issue with the legal procedures of asylum processes is lack of evidence. Dahlvik looks to the decision making process of caseworkers after asylum applicants have been interviewed. At this stage, in order to make a decision, the role of the caseworker is to investigate in order to determine more about the applicant’s past, present

and future circumstances. Dahlvik describes the search for facts as “-a negotiation process in a field of asymmetric power relations,” (*ibid.*, p. 373). Due to the lack of evidence existing in asylum cases, caseworkers have to turn to other information and knowledge. Dahlvik’s study was based in Austria and caseworkers were said to consult the Country of Origin Information (COI) Unit of the Ministry of Interior and expert reports on medical, language and other issues (*ibid.*, p. 374). In her study, caseworkers were said to have room to influence the ‘evidence’ by questioning the COI unit in a certain way or commissioning a certain expert for a certain report (*ibid.*). The decision makers, therefore, do not simply uncover a ‘truth’ that may be biased but construct facts in an interpretative way (*ibid.*, p. 375). As documents play such a vital role in the construction of facts, texts are not seen simply as social facts within this theory, but forms of action (*ibid.*). They are seen as a *part* of social reality, whilst also commenting on and interpreting it (*ibid.*). According to Dahlvik, statements made by informants must be considered an accurate and justified portrayal of reality in order for the information to be accepted as fact.

Although asylum procedures lack evidence compared to other legal procedures, the two are similar in that different versions of reality are pitted against each other by a decision maker who decides what facts are true and thus constructs what is deemed as a “-final valid reality,” in regards to the procedure (*ibid.*).

5.2 THE CONSTRUCTION OF (ARTE)FACTS

According to the Oxford English dictionary, the word ‘artefact’ stems from the Latin ‘*factum*’ - ‘something made’ and ‘*arte*’ - ‘by or using art’ (<https://en.oxforddictionaries.com/definition/artefact>). Julia Dahlvik studied the construction of artefacts in the practices of bureaucrats within the asylum system, and the artefact which held the most importance within the asylum procedure was the “-individual record,” (*ibid.*, p 375). As noted by Dahlvik, records represent the centrepiece of modern bureaucracy, are both based on and depend on written text, and contain only the information that is deemed relevant by actors within the system who hold power and responsibility (*ibid.*). Furthermore, Dahlvik quotes a principle first introduced by Roman law; “What is not in the records, is not in the world,” (*ibid.*). As she notes, this principle exemplifies that nothing exists, as far as the procedure is concerned,

unless it is included in the records. Records are thus seen to represent the result of reality construction processes through those who document them (*ibid.*).

5.3 CONSTRUCTION OF (IN)CREDIBILITY

As Dahlvik notes, the concept of ‘credibility’ does not directly equate with that of ‘truth’, and decision-makers are argued to be involved in constructing both (*ibid.*, p. 377). Many asylum applicants are rejected due to credibility issues, despite credibility being largely subjective. Judging whether an applicant’s identity, background, history, current life and fears for the future are credible is a difficult process.

External credibility is linked to the construction of facts as discussed in the first subsection of this theory; an interpretation by the decision-maker of the asylum-seeker’s account judged against other versions of reality. Internal credibility, however, can be based on the inconsistencies, behaviour, detail and depth of answers and knowledge of general issues and personal experiences of the asylum-seeker. According to Dahlvik, the indicators used and the way that they are measured are developed by the officials, making the asymmetry of power all the more apparent (*ibid.*, pp. 378-379). The standards used are personal or that of a Western socialization, and as a result, Dahlvik notes, “-it seems almost impossible for the claimant to discern what exactly is expected of her and what exactly are the consequences of not meeting these expectations,” (*ibid.*). Furthermore, the standard accounts, answers and behaviour of asylum-seeking individuals may be expected to fit within a very narrow range of criteria. An example from Dahlvik’s study is that being unaware of the years that events happened can signify incredibility, whilst knowing dates by heart can also raise suspicion (*ibid.*).

Using this theory in analysing the practices within Dahlvik’s study exhibited how the interactions between asylum-seeker and state official were problematic, and the findings supported the idea of construction work of credibility (*ibid.*).

6 ANALYSIS – “ASYLUM AS CONSTRUCTION WORK”

This chapter is an analysis of the records of appeals cases that form the data set, using the theory “Asylum as Construction Work”. This theory will be used in order to uncover the power dynamics in the construction of facts, (arte)facts and (in)credibility of the cases, as well as exploring the possibility of the asylum system being changed by the actions within it.

6.1. THE CONSTRUCTION OF FACTS

As Dahlvik notes, compared to other legal procedures, asylum procedures lack evidence. This problem is exacerbated in the cases of those that are seeking asylum based on their sexual orientation, as it is markedly difficult to provide evidence of one’s sexual orientation, or the persecution faced as a result of a lesbian identity, as noted in Chapter 4.

6.1.1 *THE POWER OVER FACTS*

As earlier explored, whether at the UK border or at the asylum screening unit, every asylum claim in the UK begins with asylum-seeking individuals informing the interviewer of the basic facts of their case. At this point, the asylum-seeker has the power in constructing these facts, and in theory, the interviewer has no power in deciding whether the facts themselves are true.

The asylum interview is the first stage in which asylum-seeking individuals lose power over determining what is a fact regarding their histories, their current lives and their fears for the future, as well as their very identities. This is made apparent when examining the reasons given for negative decisions in the initial asylum interview which is the initial point in which the asylum procedure can be seen to be a “-field of asymmetric power relations,” as noted by Dahlvik (2017, p. 373), as officials look beyond the applicant and his/her facts to search for, or be presented with other versions of reality to judge it against and construct the facts in their decision. This negotiation and construction of facts by decision makers and other actors continues throughout different levels of appeals at different courts. Although the appeals cases

studied do not contain every detail of each step in the asylum procedures that the asylum-seekers face, some of the reasons for negative decisions preceding the cases are recorded, as can be seen in the following table:

Table 1 Reasons given and recorded for past negative decisions

Name	Reasons given and recorded for past negative decisions (case immediately preceding current appeal, unless stated otherwise)
JD (homosexual - MDC supporter - internal relocation) Zimbabwe [2004] UKIAT 00259	<p><u>Initial claim</u></p> <p>"Taken at its highest, he considered the Appellant to be a low-level supported or the MDC. She could not properly be described as an activist or a leader and had only attended three or four rallies." (pa. 6)</p> <p>No risk of ill-treatment that would amount to persecution or violation of Article 3 rights (ECHR) - "Having considered the report of Mr Matyszak" (pa. 8)</p> <p>Possible for sexuality to be invisible to others by means of concealment - based on Mr Matyszak's suggestion. Not considered that this restriction on ability to express sexual orientation was a limitation on the Appellant's freedom sufficiently to engage Articles 3 or 8 of the ECHR (pa. 8)</p>

AMARE
[2005] EWCA
Civ 1600

Initial Claim

Held that she had not been persecuted in the past, and could conduct herself as she did in Ethiopia before and not face persecution: appellant's fear judged as not being well founded. (pa. 3-4)

Immigration and Asylum Tribunal

Assesment set against background set out in CIPU assessment (country report). No harrassment or persecution suffered in the past, despite homosexuality being illegal and not well regarded in Ethiopian society. (pa. 6)

Judged as being able to develop homosexual relationships in Ethiopia "without the serious possibility of being prosecuted or convicted of offences arising from her homosexuality." (pa.6)

"Her simple wish is to form relationships with other women that may develop into a sexual relationship akin to marriage. Such relationships are no ore 'flamboyant' than most heterosexual relationships." "Sharing a home (or homes) with a partner in an urban setting in a relationship where each goes out to work, may raise questions about the appellant's sexuality by those around her but the background material does not establish it will result in harm to her." (pa. 6)

No more family support in UK than Ethiopia - if estranged from parents, reduces the risk of forced marriage and marital rape (pa. 6).

Discreetness/concealment does not limit her fundamental right to be a homosexual or infringe on her right to a private life (pa. 6)

"It is true that she will not receive the approbation afforded her as a wife and mother in traditional Ethiopian society and this probably amounts to discrimination. It is the inevitable consequence of her sexual orientation. Such differential treatment cannot, in our judgment, overcome the high threshold necessary to amount to persecution or an Article 3 violation." (pa. 6)

"-we do not consider differential impact [upon the nature of the relationship or relationships that she will form in due course in Ethiopia compared to that which she could form in the UK] justifies the description of persecution or amounts to inhuman or degrading treatment. Similarly, whilst it amounts to a limitation on the enjoyments of her private life, the interference is not such as to amount to an Article 8 violation." (pa. 6)

<p>LS (Uzbekistan) [2008] EWCA Civ 909</p>	<p><u>Initial claim</u></p> <p>"-sexual relationships between women are not illegal in Uzbekistan and although he accepted that the police were known to abuse their position when interrogating those who are accused of committing criminal offences, he did not accept the appellant's account of her experiences because she had not committed, nor was she accused of having committed, any offence," (pa. 4)</p> <p>"-he did not accept that she was at risk of suffering ill-treatment of a kind that could properly be described as persecution or that would violate her rights under Arts 2 and 3 of the European Convention on Human Rights," (pa. 4)</p> <p><u>Immigration and Asylum Tribunal</u></p> <p>"-he did not accept her account of the events which had preceded her arrival in this country." (pa. 6)</p> <p>"-He accepted that she had experienced some discrimination and social exclusion and could be expected to do so in the future if she were to return to Uzbekistan, but he did not accept that it was likely to amount to anything that could be described as persecution or that would infringe her rights under the Convention," (pa. 6)</p> <p><u>Reconsideration</u></p> <p>"-rejected the appellant's account as incredible in all significant respects," - sexual orientation and account of events - and therefore that "-she was at risk of ill-treatment in Uzbekistan by reason of her sexuality," (pa. 10).</p> <p>"-would not be at risk of persecution or ill-treatment for any of the reasons put forward," - including "-whether, if the appellant were returned to Uzbekistan, she would be at risk of ill-treatment by virtue of the fact that she had left the country illegally and subsequently claimed asylum abroad," (pa. 11-12)</p>
<p>NR (Jamaica) [2009] EWCA Civ 856</p>	<p><u>Immigration and Asylum Tribunal</u></p> <p>"She did not have a lesbian identity as she claimed" (pa.1)</p> <p>"That her past lesbianism was in the nature of teenage experimentation rather than a settled sexual orientation"</p> <p>"That her present lesbian relationship was motivated by a desire to strengthen her claim for asylum" (pa. 1)</p> <p>"It rejected her account that she had been raped in Jamaica and left as a result of criminal gangs" (pa. 1)</p>

<p>SB (Uganda) [2010] EWHC 338 (Admin)</p>	<p><u>Initial claim</u></p> <p>Credibility not accepted with regards to detainment on account of her sexual identity or that she was a lesbian</p> <p><u>Appeal of deportation decision</u></p> <p>Being on a "wanted list" for not complying with reporting requirements after being granted bail following being detained in Uganda would only be known to police in Kampala. Even in Kampala - no evidence that ill-treatment would amount to persecution, as it did not when she was arrested on the other two occasions.</p> <p>Claimant exaggerated risk on return in order to work in the UK and support her family. Claimant had conducted sexual relationships discreetly in the past and could continue if returned, and avoid persecution.</p> <p><u>Further representation - new application</u></p> <p>Treated as application to discharge deportation order and refused - certified as being clearly unfounded. No barrier to removal.</p> <p><u>Further representation with "additional objective evidence including evidence relating to the Anti-Homosexuality Bill,"</u></p> <p>Treated as application to discharge the deportation order, refused and certified as clearly unfounded.</p> <p><u>Response to further representations</u></p> <p>Application and asylum claim certified as clearly unfounded under "section 94(2)" (denying the Claimant in-country right of appeal)</p> <p>Unfounded under "section 96(1) of the 2002 Act due to Claimant failing to "raise matters earlier than she now sought to rely upon" (denying the Claimant any right of appeal at all)</p>
<p>SW (lesbians - HJ and HT applied) Jamaica CG [2011] UKUT 00251 (IAC)</p>	<p>"-there is always the possibility of harm but no one is entitled to absolute protection," (pa. 13)</p> <p>"-no real change in her behaviour and lifestyle in the United Kingdom sufficient to bring about a risk of harm if she were to be returned to Jamaica," (pa. 14)</p> <p>Not all reasons were put forward in this document.</p>
<p>LZ (homosexuals) Zimbabwe CG [2011] UKUT 00487 (IAC)</p>	<p><u>Initial claim</u></p> <p>"-even if the appellant did face ostracism from her family and social discrimination, that would not constitute persecution; that there is a homosexual scene in Zimbabwe, especially in urban areas, from which she could derive support; and that if necessary she could relocate within Harare, or elsewhere in Zimbabwe," (pa. 1)</p> <p><u>Immigration and Asylum Tribunal</u></p> <p>"-although attitudes towards lesbians in some quarters might be significantly disapproving, the appellant would not suffer ill-treatment or persecution as a result of her sexuality," (pa. 2)</p>

<p>AR and NH (lesbians) India [2016] UKUT 00066 (IAC)</p>	<p><u>FIRST APPELLANT'S APPEAL</u></p> <p><u>First application</u></p> <p>"-refused to grant the first appellant refugee status humanitarian protection or leave to remain on human rights grounds, having regard to the first appellant's sexual orientation and her relationship with the second appellant."</p> <p><u>First-tier Tribunal</u></p> <p>Accepted the appellant's lesbian sexual orientation and relationship - but had been discrete with their relationship in India and would continue to do so.</p> <p>Thought it pure speculation that appellant was "-at risk of acts of persecution or serious harm from members of the local community in her home area." (pa. 15)</p> <p>Rejected Article 3 claim - based on "asserted risk of suicide if she were returned to India" (pa. 15)</p> <p>"The private life asserted was no sufficient to outweigh the legitimate aim of main of effective immigration control." (pa. 16)</p>
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Any negative result portrays the loss of power that the asylum-seeking individual faces over constructing facts, and displays that the decision makers are the actors that hold power to ultimately do so. However, what they also show is the interplay of claims, evidence, legal frameworks and possible personal opinion, beliefs, life experience or stereotyping that feeds into the construction of facts. In the case of *JD (homosexual - MDC supporter - internal relocation) Zimbabwe [2004] UKIAT 00259*, for example, the reasons given for the rejection of the initial asylum claim proves that the facts were constructed by judging JD's account, Mr Matyszak's report and Articles 3 and 8 of the *European Convention of Human Rights* against each other. In *AMARE [2005] EWCA Civ 1600*, the reasons recorded in the appeals case for the negative decision from the Immigration and Asylum Tribunal shows interplay of the appellant's account, CIPU country report, the *European Convention of Human Rights* and the *1951 Refugee Convention* in constructing the facts, as well as some possible personal belief or speculation. In *NR (Jamaica) [2009] EWCA Civ 856*, the reasons for the Immigration and Asylum Tribunal dismissing her appeal that are recorded in the case show an interplay of less elements, but demonstrate that the life experiences or personal opinion of the decision makers can influence the construction of facts and ultimately, the decision made; "She did not have a lesbian identity as she claimed,"; "That her past lesbianism was in the nature of teenage experimentation rather than a settled sexual orientation,"; "That her present lesbian relationship was motivated by a

desire to strengthen her claim for asylum,” [1]. Although the judgments on the appellant’s sexuality and motivations may have been based on evidence and issues of credibility, the fact that her lesbianism was “-in the nature of teenage experimentation,” and that sexuality has to be settled in order to be valid clearly show elements of personal belief or life experience rather than being grounded in law or guidance.

6.1.2 VERSIONS OF REALITY

In the appeals cases that comprise the data set, the appellants, the respondents or defendants and those that represent them have power in presenting their versions of reality. In addition to this, they, as well as the decision maker, have power in choosing to present certain background information and evidence, such as country of origin information (COI) and expert reports, just like the asylum decisions in Dahlvik’s study.

The following table shows the amount of background information or evidence used in each case, throughout the asylum procedure, as far as is recorded:

Table 2 Background information used throughout the asylum procedure steps

Name	Background information used throughout the asylum procedure steps, recorded in the appeals case
JD (homosexual - MDC supporter - internal relocation) Zimbabwe [2004] UKIAT 00259	<p>Report by Mr Matyszak "which [Adjudicator] regarded as well researched, well balanced and reliable," pa. 7</p> <p>The Country Report for Zimbabwe, prepared by CIPU in April 2004 (pa. 13)</p>
AMARE [2005] EWCA Civ 1600	<p><u>Initial asylum claim</u></p> <p>"-appellant's evidence and that of whom she had a sexual relationship," (accepted by adjudicator) (pa. 3)</p> <p>"-in-country information"</p> <p><u>Immigration and Asylum Tribunal</u></p> <p>International measures (such as the ICCPR, the ICESCR, Universal Declaration of Human Rights of 1948, ECHR & Refugee Convention)</p> <p>Country Report prepared by CIPU</p>
LS (Uzbekistan) [2008] EWCA Civ 909	<p><u>Immigration and Asylum Tribunal</u></p> <p>Screening interview notes, statement from appellant - greater detail of circumstances and events leading up to arrival, report from expert witness on political and social conditions in Uzbekistan & reports from US Department of State and other sources on conditions in Uzbekistan.</p>
NR (Jamaica) [2009] EWCA Civ 856	<p><u>First Tribunal</u></p> <p>"-expert report produced by the appellant from Mr. Sobers" (pa. 4)</p> <p>"The basis of the withdrawal of the first concession was said to be the Home Office's Operational Guidance Note on Jamaica dated 7 February 2008" (pa. 16)</p> <p>Account of psychologist Renee Cohen (pa. 22)</p> <p><u>Court of Appeal</u></p> <p>Country of Origin Information Report on Jamaica of November 2007 (pa. 17)</p>

<p>SB (Uganda) [2010] EWHC 338 (Admin)</p>	<p><u>Claimant: expert advice:</u></p> <p>Reports of Dr Michael Jennings</p> <p>Report of Mr Paul Dillane ("the AI Report")</p> <p>Report from Dr Chris Dolan</p> <p>The Immigration Advice Service Country Information Centre Country of Origin Information Report ("the COI Report")</p> <p><u>Secretary of State & Mr Mandalia:</u></p> <p>JM (Uganda) v Secretary of State for the Home Department [2009] EWCA Civ 1432 (which ruled that legislation of anti-homosexuality laws was not enforced and that there was no evidence of arrest or harassment from the Ugandan authorities or the population generally) (pa. 44)</p>
<p>SW (lesbians - HJ and HT applied) Jamaica CG [2011] UKUT 00251 (IAC)</p>	<p>Mr Sobers' evidence (Mr Auburn for the respondent argued that he was not impartial as a human rights campaigner and criticisms of the Jamaican government in a newspaper, though he argued back that he could still give impartial evidence) (pa. 40-41)</p> <p><u>Appellant and respondent:</u></p> <p>HJ and HT caselaw</p>
<p>LZ (homosexuals) Zimbabwe CG [2011] UKUT 00487 (IAC)</p>	<p><u>Appellant:</u></p> <p>Report by Dr Oliver Phillips (pa. 8) ("His evidence has been of high value, although we have not accepted all of his conclusions," (pa. 8))</p> <p>Report by Dr L B Aguilar</p> <p>About 100 pages of newspaper reports and other information</p> <p><u>Respondent</u></p> <p>"- a bundle comprising some 34 shorter items;" a UKBA report of a Fact Finding Mission; a Country of Origin Information Report (COIR); transcripts of interviews carried out in Harare by the First Secretary of the British Embassy with representatives of three Zimbabwean organizations.</p> <p><u>Quoted in the background material of both</u></p> <p>Suggestion of incidents of "corrective rape" is quoted from US State Department Country Report on Human Rights Practices, Zimbabwe, 2010.</p> <p><u>This Court</u></p> <p>"We have taken into account since the hearing a BBC News report of 24 October 2011, and representatives' written comments thereon, as explained below." (pa. 14)</p> <p>"We have identified a further relevant statutory provision of Zimbabwean criminal law." (pa. 15)</p>

This data does not always indicate who submitted the evidence, as the records do not always make it clear. Unlike the data in the previous table, it also does not show how or whether the evidence presented was weighted in the final decision. What this data does show, however, is the number of versions of reality that the decision maker has in order to construct facts, and therefore the complexity of the construction itself.

Certain cases, such as that of *LS (Uzbekistan) [2008] EWCA Civ 909*, do show the evidence that went into certain judgments or decisions at certain points of the asylum procedure, as seen in the following table:

Table 3 Example evidence that went into judgement/decision

Name	Court/Level	Judgment/Decision	Evidence that went into the judgment/decision
<p>LS (Uzbekistan) [2008] EWCA Civ 909</p>	<p>Asylum and Immigration Tribunal</p>	<p>"-he did not accept her account of the events which had preceded her arrival in this country. He accepted that she had experienced some discrimination and social exclusion and could be expected to do so in the future if she were to return to Uzbekistan, but he did not accept that it was likely to amount to anything that could be described as persecution or that would infringe her rights under the Convention. He therefore dismissed her appeal," [6]</p>	<p>* "-evidence contained in the notes of her screening interview," * "-a statement from the appellant, in which she repeated in greater detail her account of the circumstances and events which had led up to her arrival in this country," * "-a report from an expert witness, Miss Marjorie Farquharson, on political and social conditions in Uzbekistan," * "-reports from the United States Department of State," * "-other sources on conditions in Uzbekistan," [5] * 1951 Refugee Convention * European Convention on Human Rights</p>
	<p>Reconsideration (adjourned hearing)</p>	<p>"-reject the appellant's account as incredible in all significant respects," ("the appellant's sexual orientation and her account of the events which had led her to seek asylum in this country," [10]</p>	<p>* "-the notes of the appellant's screening interview, the statement she had made for the hearing before Immigration Judge Narayan, a supplementary statement made by the appellant for the purposes of the reconsideration, Miss Farquharson's original report and also a supplementary report she had made for the reconsideration, as well as reports on conditions in Uzbekistan from Amnesty International, the US State Department and Human Rights Watch," [9]</p>
		<p>"-the appellant would not be at risk of persecution or ill-treatment," [12] "-by virtue of the fact that she had left the country illegally and subsequently claimed asylum abroad," [11]</p>	<p>* The core of the appellant's account being untrue [11] * OM (Returning Citizens) CG [2007] UKAIT 00045 (Country Guidance) [11] * European Convention on Human Rights [11]</p>

In this case, several pieces of evidence and thus several versions of reality are seen to be used to form each part of the decision at each stage, and thus the final reality or facts.

6.1.3 THE ASYMMETRY OF POWER AND ULTIMATE CONSTRUCTION OF FACTS

Despite various actors having power in presenting their versions of reality, the power to construct facts is shown to be asymmetric as the decision maker has the ultimate power to pit these different versions of reality against each other, decide what facts are true, and thus *construct* what are deemed ‘facts’ with regards to the procedure, as noted in Chapter 5.

In *JD (homosexual - MDC supporter - internal relocation) Zimbabwe [2004] UKIAT 00259*, for example, a report is brought into consideration, written by Mr Matyszak. Although Mr Matyszak’s background, expertise or the reason his report was selected is not made apparent within the written record of this appeals case, what is noted is the fact that the Adjudicator’s decision to refuse asylum to the applicant was heavily based on the report;

“Having considered the report of Mr Matyszak, the Adjudicator concluded that the Appellant was not at risk of ill-treatment of sufficient severity to amount to persecution or a violation of her Article 3 rights. Mr Matyszak had suggested that it was possible for lesbians to adopt “a position of invisibility”; in essence, concealing their sexual orientation to an extent that it remained private, or largely so. The Adjudicator did not consider that a restriction on the Appellant’s ability to express her sexual orientation in this way imposed a limitation on the Appellant’s freedom sufficiently severe to engage Articles 3 or 8 of the European Convention,” [8]

In this instance, whoever brought Mr Matyszak’s report into the case had some power over constructing facts, as did Mr Matyszak himself. The Adjudicator, however, held the ultimate power in deciding to believe Mr Matyszak’s judgments on the situation regarding lesbians in Zimbabwe, regarding the report to be “-well researched, well balanced and reliable,” [7], deciding which sections of the report to use in his judgment and how to interpret it.

Within the same case, at the Immigration Appeal Tribunal, the decision makers, Mr. Andrew Jordan, Ms C. St Clair and Mr S.S.Percy, also use Mr Matyszak’s report as material to discover facts about the situation of lesbians in Zimbabwe and to decide whether the Adjudicator was in

error, as well as a Country Report for Zimbabwe prepared by CIPU in April 2004 [10-14]. The decision makers' power to construct facts regarding the appellant's case at this stage of the asylum procedure is less obvious, as technically, it was a decision on whether the Adjudicator erred in judgment. However, as the decision was on the possible error in judgment of the asylum-seeker's account not disclosing persecution or Article 3 ill-treatment (ECHR), assessment of the risk of return and concealment being an option for her, the validity of her fear of persecution was questioned and the decision makers did hold power to construct facts regarding the case.

In conclusion, the asylum-seekers in the cases analyzed lose power over determining the facts of their case at the asylum interview stage. Multiple versions of reality are pitted against each other in the form of, for example, accounts, evidence, country guidance case law, country guidance reports and expert reports, which are presented by various actors within the procedure. Each one of these actors have some power in the construction of facts, but as the ultimate power to construct facts lies with the decision maker, the power relations are asymmetric. No evidence can be found within the case-law analysis of decision makers influencing the evidence to the extent that was evident in Dahlvik's study. This does not indicate that these forms of influence are not existent in the UK asylum system in cases relating to the sexual orientation of female asylum-seekers, but simply that they are not present in the records of the appeal cases within the data set. The construction of facts within the cases analysed have proven to be interpretive, regardless of the records not demonstrating said influence.

6.2 THE CONSTRUCTION OF (ARTE)FACTS

In the data set of case law in this study, much like in Dahlvik's study, the obvious artefacts are also records - those of appeals cases at different courts within the UK. As far as anyone who was not a part of the procedure is concerned, and as far as the procedure itself is concerned, nothing that is outside of the record exists outside of speculation, as is highlighted in the analysis above. To a certain extent, those involved in the appeals case hold some power over what is available to record, by providing background information, selecting background evidence, raising certain aspects of the cases preceding the appeal case and quoting certain aspects of them, as seen in the previous sub-section. In this way, these actors use their power to discern what facts they find

relevant to the case and how much detail to specify, and thus shape what is available to be recorded in the texts. The individual or individuals that produce these records also have the power to construct facts by constructing these artefacts, as it is possible for certain details to be included over others at the recording stage.

By looking at the case law in the data set, the amount of pages ranges from eight to forty seven. One reason for this vast difference is that three of the eight cases are ‘Country Guidance’ cases, meaning that along with judging the individual case and allowing or denying the appeal, the cases are chosen to give legal guidance for a specific country, or a distinct group within a specific country, by the immigration tribunal, before the decision is made, which can then be used for future cases (<http://www.righttoremain.org.uk/legal/understanding-case-law/>). This illustrates just how different the records of appeal cases can be and that varying amounts of detail are considered relevant enough to include and record in each case. The cases that are not ‘Country Guidance’ cases vary between eight and eighteen pages. The reason for the length and detail of the Country Guidance cases is, however, also relevant to examine, as the decisions made in these case are determined by the immigration tribunal to be established on the best evidence available at that time (*ibid.*). This is yet another element of the asylum procedure in which officials have power in constructing facts and manufacturing hierarchies of importance, though it also illustrates that the structure of the asylum system is able to be changed by the actions of those within it, which will be discussed in chapter 6, section 4.

The amount of detail recorded varying from case to case can be seen by examining various aspects of the case law in the data set, one example of which is the amount of detail provided of the background of the case before applying for asylum, as can be seen in the following table:

Table 4 Reasons for claiming asylum

Name	Reason for claiming asylum - recorded in the appeals case
<p>JD (homosexual - MDC supporter - internal relocation) Zimbabwe [2004] UKIAT 00259</p>	<p>Went by coach to South Africa and flew from South Africa to the UK using her own passport 4 days later, granted six months leave to enter as a visitor (pa. 2 & 4)</p> <p>Applied for asylum 1 week before expiration of leave (pa. 2)</p> <p>Fearing return to Zimbabwe based on sexual orientation and involvement with MDC (Movement for Democratic Change) (pa. 3)</p> <p>Formed a sexual relationship with a woman (Ms Moyo) in October 2000 when living with her uncle - conversation between the two of them was overheard and Appellant was only permitted to remain in her uncle's house under strict supervision (pa. 3)</p> <p>Joined the MDC in November 2000. Attended three MDC rallies - two with Ms Moyo. December 2001 - supporters of Zanu PF attempted to disrupt the meeting, Appellant was assaulted by police officers, arrested and detained for two weeks, questioned about involvement with MDC and released due to her uncle (pa. 3)</p> <p>Zanu PF supporters came to her uncle's house, threw a stone through a window and taunted the appellant's sexuality (pa. 3)</p> <p>Zimbabwe: Lesbians are not criminalized, though political leaders are said to make homophobic remarks, widespread condemnation against homosexuals and opposition of homosexuals by Zimbabwe government. Impossible to live as a lesbian in rural areas and difficult in urban areas.</p>
<p>AMARE [2005] EWCA Civ 1600</p>	<p>Father - Eritrean, Mother - Ethiopian. Eritreans in Ethiopia exposed to arrest, imprisonment and deportation.</p> <p>Member of ELFRC (organisation banned in Eritrea) (pa. 2)</p> <p>Removal directions specified Eritrea as removal destination - Home Office Presenting Officer amended directions to specify Ethiopia.</p> <p>Only live issue before the adjudicator: "-whether she would be at risk by reason of the fact that she is a homosexual", not "whether the appellant if returned might be persecuted on political or racial grounds. (pa. 2)</p> <p>Homosexual - has had 2 previous homosexual relationships in the past. "Her parents did not, and do not, know about her homosexuality," pa. 3</p>

<p>LS (Uzbekistan) [2008] EWCA Civ 909</p>	<p>An air stewardess who, on a flight from Uzbekistan to Birmingham, left the plane at Birmingham and did not return to her duties. Stayed a week in Birmingham before making an asylum application.</p> <p>Lesbian, fearing persecution if returned. Caught kissing another female air stewardess on the plane with whom she was in a relationship with. The employee that found them reported them to her employer who then informed her parents. She was kicked out of the house.</p> <p>When sharing a flat with her girlfriend, harassment and violence from people who found out. Harassment at the airport led to appellant and girlfriend complaining to the police, who beat and raped them more than once, leading to injuries for which they were treated at hospital.</p> <p>First claim to asylum denied</p> <p>Sexual relationships not illegal between women in Country of Origin.</p> <p>Police only abuse their position when interrogating those who are accused of committing a crime, which the appellant had not.</p> <p>The appellant may face discrimination and harassment on return, but not persecution or a violation of human rights</p> <p>Appeal to the AIT</p> <p>Refused account of events preceding arrival to the UK. The discrimination and social exclusion faced in the past and which could be faced on return would not amount to persecution or an infringement of human rights</p>
<p>NR (Jamaica) [2009] EWCA Civ 856</p>	<p>(Not much of a background story documented with regards to sexuality)</p> <p>The Appellant arrived in the UK in 1999 at the age of almost 14. Sentenced to 5 years detention for conspiracy to supply heroin and crack cocaine. Ordered to be deported by Secretary of State (pa. 1)</p> <p>Account: "-she had been raped in Jamaica and left as a result of criminal gangs" and claimed to have a lesbian identity.</p>
<p>SB (Uganda) [2010] EWHC 338 (Admin)</p>	<p>Claimant arrived in the UK in 2005 on a visitor visa valid until 9 February 2005. Overstayed and arrested (pa. 5)</p> <p>"She was found to have a false Ugandan passport and, on 28 May 2008, she was convicted of possessing the identity document of another, and sentenced to 12 months' imprisonment. She was also recommended for deportation" (pa. 5)</p> <p>Claimed asylum on 25 June 2008 - lesbian, risk on return. Twice detained in Uganda on account of her sexual identity (pa. 6)</p>

<p>SW (lesbians - HJ and HT applied) Jamaica CG [2011] UKUT 00251 (IAC)</p>	<p>Lesbian from Jamaica who had a number of discreet lesbian relationships as well as boyfriends (pa. 31)</p> <p>Lesbian relationships were "brokered through an internet chat room specific to lesbians called 'Women for Women' (W4W) (pa. 31)</p> <p>No harm by reason of sexual orientation while in Jamaica (pa. 31)</p> <p>"In Jamaica, the appellant had the support of her brother and her former boyfriend," (pa. 27)</p> <p>"Her employer had discovered her discreet lesbianism and that had caused no difficulty," (pa. 27)</p> <p>Identified as possible lesbians in W4W's third outing to a bar and DJ began to play openly hostile popular songs and men in the bar began offering to 'sort them out' "-in a manner which made it quite plain that they were considering rape," (pa. 32)</p> <p>Suffered clinical depression and stress</p> <p>Came to the UK in 2003 as an accountancy student, came out as a lesbian and "-has had a series of fairly short but intense lesbian relationships with women here," "The appellant has been a member of Black Lesbians UK (BLUK) and has also taken part in a Gay Pride march," (pa. 34) // "The appellant has not experienced several open lesbian relationships in the United Kingdom, none of which amounted to family life within the meaning of Article 8 ECHR;" (pa. 27)</p> <p>Lived in a house with two Jamaican men for a time whilst in the UK - forced to buy and use separate crockery from them after bringing a girlfriend home for the weekend after they smashed all the crockery for the appellant having polluted it (pa. 35)</p> <p>Would not resume living discreetly if returned to Jamaica as she has spent over 7 years in the UK and was not prepared to risk her depression returning. Would only date someone who was prepared to be seen with her in public, (pa. 37)</p> <p>The appellant and her current girlfriend would end the relationship if the appellant was returned (pa. 39).</p>
<p>LZ (homosexuals) Zimbabwe CG [2011] UKUT 00487 (IAC)</p>	<p>Entered the UK lawfully 13 years before hearing and overstayed.</p> <p>Sought asylum in 2009 - risk of persecution as a lesbian.</p> <p>"-it is not desirable for this determination to make her identity public. Under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we have set out the particular reasons for the decision in her case in Appendix B. We have not included matters likely to identify her in the main body of this determination. Appendix B will therefore not appear in the reported determination, and its disclosure is prohibited." pa. 17</p> <p>"To preserve anonymity, we have not applied Practice Statement 3.7 and have not incorporated in full the reasons for finding error of law in the AIR determination." pa. 18</p>
<p>AR and NH (lesbians) India [2016] UKUT 00066 (IAC)</p>	<p>Two lesbian women who have entered into a civil partnership in the UK (pa. 1).</p>

The detail on the reasons for claiming asylum varies from *NR (Jamaica) [2009] EWCA Civ 856* in which there is no story documented with regards to NR's sexuality or the persecution that she suffered as a result of it, to the case of *SW (lesbians – HJ and HT applied) Jamaica CG [2011] UKUT 00251 (IAC)* which records details such as the relationships that SW has been in, how she brokered said relationships, the amount of outings that she went on with the W4W group, the harm she faced as well as her psychological state.

This increases the asymmetry in power between the asylum-seeker and those that work within the UK asylum system, as although their legal representative can decide to submit certain background information and evidence, what is available to the decision maker is the aspects included in the records of their previous cases (those which are deemed relevant by those in power), and what is available of the appeals cases in the data set is what is deemed relevant, once again, by those in power.

The weight and power of the information that is recorded is particularly clear in *JD (homosexual - MSC supporter - Internal relocation) Zimbabwe [2004] UKIAT 00259* when although the letter by the Secretary of State notes that the asylum-seeking individual was not deemed as being credible, the decision maker in the appeals case finds that she was deemed credible in the case itself, and therefore does not have to remake any decisions based on credibility or hold this against her.

6.3 CONSTRUCTION OF (IN)CREDIBILITY

In 'Asylum as construction work', Dahlvik argues that decision-makers construct credibility and incredibility. The reason given for this is that external credibility is linked to the construction of facts, and that internal credibility is based on factors that are chosen by officials, and are measured in different ways by each official, possibly as a result of their personal beliefs and standards, or that of a Western socialization.

As decision makers construct facts with regards to the cases in the data set, as seen in section 1 of this chapter, they can also be said to be constructing external credibility or incredibility. The construction of internal credibility, however, is more difficult to see within the data.

The table below shows whether or not the credibility of the asylum-seekers was recorded to be denied at some stage of the asylum system, and if so, regarding what:

Table 5 Credibility denied noted

Name	Credibility denied at some stage of the process and noted in the case law
JD (homosexual - MDC supporter - internal relocation) Zimbabwe [2004] UKIAT 00259	Yes, though wrongly - Denied in the refusal letter despite the judge not claiming denial of credibility and this then being overturned in the appeals case
AMARE [2005] EWCA Civ 1600	No
LS (Uzbekistan) [2008] EWCA Civ 909	<p>Yes</p> <p>AIT Appeal Respondent challenged account of experiences as being incredible Immigration Judge did not accept account of events preceding arrival in the UK or that fear of persecution was well-founded and dismissed appeal</p> <p>First stage reconsideration Some argument over whether the findings made by the Immigration Judge in relation to appellant's credibility were open to challenge - this flaw was accepted to be reconsidered Respondent wished to challenge the appellant's assertion that she was a practicing lesbian (therefore questioning her credibility)</p> <p>Second stage reconsideration Immigration Judge rejected appellant's account as incredible "- in all significant respects," (pa. 10)</p>

<p>NR (Jamaica) [2009] EWCA Civ 856</p>	<p>Yes</p> <p>Asylum and Immigration Tribunal</p> <p>Credibility about lesbian identity, genuineness of her present lesbian relationship and account of being raped in Jamaica and left as a result of criminal gangs was denied.</p> <p>Court of Appeal</p> <p>Judged that the above denial of credibility was "-not without difficulty," - based on what was said shortly in two reports. Lesbian identity found credible and appeal allowed on this ground.</p>
<p>SB (Uganda) [2010] EWHC 338 (Admin)</p>	<p>Yes</p> <p>Initial asylum claim</p> <p>Credibility denied by Defendant with regards to the applicant being twice detained in Uganda on account of her sexual identity as she claimed, or that she was a lesbian at all. Claim refused.</p> <p>First Appeal</p> <p>Judged as credible with regards to lesbian identity and being detained twice on account of her sexual identity. Credibility/ well-foundedness of fear denied and appellant found to have "-exaggerated the risk on return, her decision to stay in the United Kingdom being less to do with a fear of return to Uganda and more to do with supporting her family through difficult times by working here and sending money back to Uganda." (pa. 7)</p> <p>High Court of Justice</p> <p>Found an error in the Secretary of State's conclusion that "- there was no chance of a tribunal finding that, contrary to his own view, if she were returned to Uganda, there would be risk of the Claimant being persecuted on the ground that she was a lesbian," (pa. 53)</p> <p>Showing a claim not to be "clearly unfounded" should be a low hurdle to overcome - "Where there is any such risk, the statutory scheme required the issue of risk to be tested before an independent tribunal whilst the applicant is in the United Kingdom," (pa. 24)</p>

<p>SW (lesbians - HJ and HT applied) Jamaica CG [2011] UKUT 00251 (IAC)</p>	<p>Yes</p> <p>The findings of the previous cases were not noted, although:</p> <p>Application for reconsideration</p> <p>One of the three grounds was that “-the Immigration Judge had made findings of fact and credibility at the civil standard of balance of probabilities rather than the lower standard of real risk or reasonable degree of likelihood which is the appropriate standard of proof for international protection claims,” - on this basis, the positive findings were to stand and the negative were to be remade</p> <p>Asylum and Immigration Tribunal</p> <p>Appellant found to be credible with regards to her account and sexual orientation</p>
<p>LZ (homosexuals) Zimbabwe CG [2011] UKUT 00487 (IAC)</p>	<p>No</p>
<p>AR and NH (lesbians) India [2016] UKUT 00066 (IAC)</p>	<p>Yes (first appellant)</p> <p>Initial claim</p> <p>Refugee status, humanitarian protection or leave to remain on human rights grounds refused "-having regard to [her] sexual orientation and her relationship with the second appellant," [13]</p> <p>First-tier Tribunal appeal</p> <p>First appellant's lesbian sexual orientation and relationship with the second appellant accepted by the Judge</p>

In five of the eight cases, the credibility of asylum-seeking individuals was denied at some stage. In looking at this data, it is not possible to determine whether incredibility was constructed for internal reasons, such as the reasons set out by Dahlvik in her study, mentioned in Chapter 5. However, credibility and incredibility are proven to be constructed by decision makers in the data set in some way.

6.4 THE STRUCTURE CHANGING FROM WITHIN

As Anthony Giddens’ ‘social structuration’ theory proposes, structures are able to be changed by the action of those within it. An example of this in the asylum system was given in section 6.2, with certain cases being chosen as ‘Country Guidance’ to use as evidence in future cases.

Although the officials are the ultimate actors in constructing facts by approving and denying evidence and accounts, all actors have a chance to play a role in changing the structure by the evidence and accounts that they present. As noted in <http://www.righttoremain.org.uk/legal/understanding-case-law/>; “The country guidance system isn’t as rigid as ‘precedent’ - it can accommodate individual cases, changes, fresh evidence and other circumstances”. The legal system in general, as a structure, exemplifies Giddens’ ‘social structuration’ theory, as the system sets boundaries and rules for actions within it, and the actions within it also reproduce and change the structure. This is due to it being common and accepted for judgments and decisions from past case law to be used in making new judgments and decisions. This is exemplified in chapter 3, section 2. Each case presented in this section is shown to reproduce or change the system by building on elements of previous cases and being used by cases succeeding it.

7 CHANGING THE SYSTEM FROM WITHIN

“-the treatment of asylum seekers is one of the powerful measures of who we are as a nation and of our values.” (Baroness Helena Kennedy QC *in* Women for Refugee Women, 2012, p. 2).

As seen in the analysis above, the appeals cases of lesbians seeking asylum based on their sexual orientation reveal the asymmetric power relations involved in the construction of facts, (arte)facts and (in)credibility. Artefacts, in the form of records, are both the result of this construction, and part of the construction itself. The cases have also highlighted the duality of structure and actions, and that although power relations are asymmetric; actions ruled by the system are able to change the system itself. Decision makers will always have the ultimate power of construction within the asylum system. However, the system could be changed in order to ensure more fairness to lesbian asylum cases.

At an indirect level, by offering childcare during hours in which asylum-seekers attend interviews, hearings etc., it would make the system more accessible for women, including lesbian women, which was noted as an issue in Chapter 4. This would in turn allow more women, including lesbian women, to be heard and their cases recorded, which could then be used as guidance cases. This would address the issue noted by Rachel Lewis of the difficulty advocates face in invoking legal precedents set in women and lesbian women’s claims.

The UK asylum system should also guarantee the availability of female interpreters and interviewers. This could make lesbian asylum-seekers more comfortable in disclosing their truth, and possibly at an early enough stage and with sufficient detail to more closely fit the credibility standards of decision makers.

More space needs to be created for persecution in sexual orientation-based claims to be judged from a female perspective. This would mean acknowledging that private actions can lead to persecution and that persecution by private actors is also valid. As noted in Chapter 4, the asylum system and the system surrounding sexual orientation claims are based on a model of male, political activism. As can be seen in the table below, in six of the eight cases, the harm, violence or potential harm or violence was denied the status of persecution in at least one decision:

Table 6 Negative Decisions based on harm not amounting to persecution

Name	Negative decisions based on harm not amounting to persecution
<p>JD (homosexual - MDC supporter - internal relocation) Zimbabwe [2004] UKIAT 00259</p>	<p><u>Initial asylum claim</u></p> <p>No risk of ill-treatment that would amount to persecution of violation of Article 3 rights (ECHR)</p> <p><u>Immigration Appeal Tribunal</u></p> <p>Conclusion of Adjudicator was entirely justified by the evidence</p>
<p>AMARE [2005] EWCA Civ 1600</p>	<p><u>Initial asylum claim</u></p> <p>Accepted appellant's evidence and that of a woman with whom she had a sexual relationship. Accepted sexuality, that homosexuality was illegal in Ethiopia and that she was part of a social group under the Refugee Convention. Accepted appellant had a genuine subjective fear of persecution on return, but held that she had not been persecuted in the past, and could conduct herself as she did in Ethiopia before and not face persecution - appellant's fear judged as not being well founded. (pa. 3-4)</p> <p><u>Immigration and Asylum Tribunal</u></p> <p>Assessment set against background set out in CIPU assessment (country report). No harassment or persecution suffered in the past, despite homosexuality being illegal and not well regarded in Ethiopian society. (pa. 6)</p> <p>Judged as being able to develop homosexual relationships in Ethiopia "without the serious possibility of being prosecuted or convicted of offences arising from her homosexuality." (pa.6)</p> <p>"Her simple wish is to form relationships with other women that may develop into a sexual relationship akin to marriage. Such relationships are no ore 'flamboyant' than most heterosexual relationships." "Sharing a home (or homes) with a partner in an urban setting in a relationship where each goes out to work, may raise questions about the appellant's sexuality by those around her but the background material does not establish it will result in harm to her." (pa. 6)</p> <p>No more family support in UK than Ethiopia - if estranged from parents reduces the risk of forced marriage and marital rape (pa. 6).</p> <p><u>Court of Appeal</u></p>

	<p>“If Ms Webber’s argument for a human rights based approach to persecution were to be accepted without qualification as she advanced it, there would in my judgment be a risk that tribunals might make what could be described as the opposite mistake. The convention is not there to safeguard or protect potentially affected persons from having to live in regimes where pluralist liberal values are less respected,” “It is there to secure international protection to the extent agreed by the contracting States.” (pa.31)</p> <p>“-persecution might shift and stretch as the international consensus develops, the Convention’s guarantees remain limited by the two conditions I have described.” (pa. 31)</p> <p>“Absent international consensus burdens will be imposed upon those States which are most liberal in their interpretations and whose social conditions are most attractive, and that would carry great risks” Jain (caelaw) “Likewise” “if courts proceed to apply the Convention without marked respect for the edge or reach of what the contracting States agreed.” (pa. 32)</p>
LS (Uzbekistan) [2008] EWCA Civ 909	No negative decisions based on this
NR (Jamaica) [2009] EWCA Civ 856	No negative decision based on this
SB (Uganda) [2010] EWHC 338 (Admin)	<p><u>Appeal of deportation decision (B)</u></p> <p>No evidence that ill-treatment in Kampala would amount to persecution, as it did not when she was arrested on the other two occasions. Claimant had conducted sexual relationships discreetly in the past and could continue if returned, and avoid persecution.</p>
SW (lesbians - HJ and HT applied) Jamaica CG [2011] UKUT 00251 (IAC)	<p><u>Initial Claim</u></p> <p>"-there is always the possibility of harm but no one is entitled to absolute protection," (pa. 13) "-no real change in her behaviour and lifestyle in the United Kingdom sufficient to bring about a risk of harm if she were to be returned to Jamaica," (pa.14)</p>
LZ (homosexuals) Zimbabwe CG [2011] UKUT 00487 (IAC)	<p><u>Initial claim</u></p> <p>"-even if the appellant did face ostracism from her family and social discrimination, that would not constitute persecution; that there is a homosexual scene in Zimbabwe, especially in urban areas, from which she could derive support; and that if necessary she could relocate within Harare, or elsewhere in Zimbabwe," (pa. 1)</p> <p><u>Immigration and Asylum Tribunal</u></p> <p>"-although attitudes towards lesbians in some quarters might be significantly disapproving, the appellant would not suffer ill-treatment or persecution as a result of her sexuality," (pa. 2)</p>

AR and NH (lesbians) India [2016] UKUT 00066 (IAC)	<p><u>First-tier Tribunal</u></p> <p>Accepted the first appellant's lesbian sexual orientation and relationship - but had been discrete with their relationship in India and would continue to do so. Thought it pure speculation that appellant was "-at risk of acts of persecution or serious harm from members of the local community in her home area." pa. 15</p>
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Of particular note is case *AMARE [2005] EWCA Civ 1600* in which the appellant's legal representative used a human rights-based approach to persecution before the Court of Appeal. As the decision maker noted, “-persecution might shift and stretch as the international consensus develops,”. In this case, the decision maker did not take on the responsibility of accepting the appeal based on these grounds, but what constitutes persecution should take into account the persecution faced specifically by women and homosexual women.

In order to guarantee that there is no ignorance of gender or sexual identity issues, UNHCR Guidelines should be referred to in each case involving lesbians, as was suggested by Mr Chelvan in the case of *SW (lesbians - HJ and HT applied) Jamaica CG [2011] UKUT 00251 (IAC)*. In this case, Mr Chelvan asked the tribunal to consider the UNHCR Guidance Note of November 2008 when arguing that “Lesbians, as women and lesbians, suffered a double bind of expected norms from which they were protected in Jamaica only where they could demonstrate what Mr Sobers had described as a 'heterosexual narrative',”. By today, UNHCR have produced guidance on gender issues and sexual orientation-based claims that should be used in each case. This would also address the issue of lesbians being judged on the basis of Euro-American stereotypes, prejudices of decision makers and heterosexist assumptions. To avoid the re-iteration of these stereotypes, prejudices and assumptions, advocates should also not advise clients to change their narratives, looks and behaviour.

Finally, more records should be kept on sexual orientation-based cases. Government statistics were only released in the UK due to a Freedom of Information Act (https://www.whatdotheyknow.com/request/statistics_on_asylum_claims_made). John Vine, in *An Investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation* noted many issues in the recording of sexual orientation-based cases such as only a third of them being recorded on the Home Office database (2013, p.3) and the loss of

certain records (*ibid.*, p. 19). Women for Refugee Women also noted that statistics are not available for the key issues of asylum with regards to women (2012, p. 6). Furthermore, the statistics on sexual orientation-based cases released by the UK government did not, at any point, separate any statistics based on gender. Records have been found to represent and construct facts.

Without recording and flagging asylum claims, interviews and appeals cases correctly, and without publishing correct statistics, it is impossible to discern the truth. Furthermore, it is difficult to notice any structural or procedural issues with regards to lesbian claims without doing so. Recording asylum and appeals claims in a detailed manner is also important as these cases can be used as guidance or precedence for future cases.

8 CONCLUSIONS AND FUTURE WORK

8.1 CONCLUSIONS

This thesis sought to answer the question: “What can the appeals cases of lesbians seeking asylum based on their sexual orientation show regarding the power dynamics between the various actors in the asylum system, and can the power dynamics been changed?”

By applying the theory of ‘Asylum as Construction Work’, the appeals cases revealed that lesbian asylum-seekers hold very little power in the UK asylum system. Incremental power losses occur at every level of their identities as asylum-seekers, as women and as lesbians. This is shown at three levels: the construction of facts, the construction of (arte)facts, and the construction of (in)credibility.

Within the appeals cases, many actors within the system were proven to have the power to present their versions of reality and construct facts, but relations of power were shown to be asymmetric as the decision maker has the ultimate power to construct facts, and (in)credibility, by presenting background information, deciding the weight given to said information and interpreting it for the final decision.

Furthermore, records themselves are involved in the construction of facts. They are the result of the construction of facts and (in)credibility, but the construction of the records has also proven to have power in constructing facts by including and excluding certain elements of the case. The records of the appeals cases have enabled the uncovering of complexities and power dynamics within the cases of the asylum-seeking individuals, but in their exclusion of certain aspects, have not allowed a deep analysis in regards to, for example, the construction of (in)credibility.

Some of the cases being flagged as Country Guidance cases and others using cases such as *HJ* & *HT* have shown that although the structure of the asylum system has an effect on the actions within it, the actions also have an effect on the structure by reproducing or changing it.

The power dynamics have been proven to be able to be shifted slightly as although structures constrain the actions of those within them, the actions of those within them also have the power to change the structures. In this way, suggestions have been made of ways in which the power dynamics within the asylum system could be changed by looking at the problems that lesbians face set out in Chapter 4 and those which are also apparent in the appeals cases studied.

8.2 FURTHER WORK

Some suggestions for further work include:

- A temporal analysis of the appeals cases by situating them in the time in which they were produced and against guidance available at that time.
- Provide a deeper analysis of the power dynamics involved in constructing facts, (arte)facts and (in)credibility in the UK asylum system by conducting interviews with relevant officials.
- To measure and analyse the asylum system in practice against the yardstick set out by UNHCR and UK guidelines.

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