Towards Intersectional Justice: Judicial Engagement with Queer Women's Asylum Claims in New Zealand

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Abstract

This article analyses the first-level refugee appeal cases in New Zealand by queer women through utilizing an intersectional feminist lens. While New Zealand is often seen as welcoming towards individuals who claim asylum on the grounds of sexual orientation, it has been argued that tribunal judges set high thresholds for establishing the credibility of queer women's asylum applications compared to queer men. An analysis of the decisions of the New Zealand Immigration and Protection Tribunal highlights the judiciary's increasingly progressive understanding of the challenges faced by queer women, contributing to critical analysis challenging intersectional discrimination impacting queer women.

Keywords: gender; sexuality; intersectionality; asylum; New Zealand.

[A] INTRODUCTION

Even though sexual orientation and gender identity (SOGI) are accepted as grounds for persecution in international refugee law, lesbian, gay, bisexual, transgender, and queer (LGBTQ) persons continue to face substantial difficulties in the refugee status determination systems of countries that are often seen as welcoming towards SOGI asylum claims (Ferreira 2022; Sussner 2022; Lasowski & Ors 2023: 605; Millman 2023). A growing body of LGBTQ migration scholarship emphasizes the importance of considering the intersection of gender and sexual orientation in lesbian, bisexual, and queer (LBQ) women's asylum claims and the precarity of queer[1] women in the national refugee status determination systems (Dauvergne & Millbank 2003; Millbank 2003; Neilson 2005; Berg & Millbank 2009; Keenan 2011; Bennett 2013; Arbel & Ors 2014; Dawson &

[1] This article uses the term "queer women" interchangeably with "LBQ women". The author acknowledges that even though the use of the term "queer" aims to be encompassing, not all lesbian or bisexual women espouse that term.

Gerber 2017; Held 2023; Lewis 2023). While sexual orientation is deeply important to the majority of queer women's asylum claims, scholars frequently raise concerns that policy makers, asylum authorities, and the judiciary tend to assess queer women's asylum claims through the lens of gender or sexual orientation, but not both (Millbank 2003; Berg & Millbank 2009: 202; Arbel & Ors 2014; Lewis 2014; Tschalaer 2021; Dustin 2022; Millman 2023: 521). Mengia Tschalaer (2021) further argues that, as race complicates queer women's access to asylum, asylum narratives of women of colour are often complex and should take into account the intersection with race in addition to gender and sexual orientation.

The lack of an intersectional approach (Crenshaw 1989) to the refugee determination process can be argued to result in a failure to identify a wide range of human rights violations connected to sexual orientation. In the context of queer asylum, such violations typically include sexual abuse and assault, forced opposite-sex marriage, marital rape, domestic violence, "corrective rape" by police officers or members of the community, harassment, discrimination in housing and employment, destruction of property, blackmail, and so-called conversion therapy (Lasowski & Ors 2023: 606 & 610). The use of intersectionality as an analytical lens acknowledges the multi-faceted ways in which LBQ women attempt to protect themselves in their everyday lives and avoid violating established social and religious boundaries (Tschalaer 2021).

New Zealand, along with other states globally, has seen increasing numbers of asylum claims by LGBTQ persons in recent years (Kiel 2022). Despite this, Mariza Avgeri (2025: 194) notes that asylum claims based on sexual orientation or gender-based harm have often faced obstacles both in refugee and human rights adjudication until relatively recently. Consequently, existing scholarship on asylum-seeking LBQ women frequently highlights the shortcomings of national asylum decision-making and appeals processes. There are some recent exceptions to the narrative that gender-related elements of asylum cases are scarce, however. In the past few years, for instance, the Court of Justice of the European Union (CJEU) has adopted a progressive gender-sensitive approach towards refugee protection (Nicolosi & Lagrand 2026: 158). Despite this, the CJEU's jurisprudence on sexual orientation discrimination in the context of women's asylum claims remains largely undeveloped.

The significance of the article lies in the potential it creates for a more inclusive understanding of the protection needs of LBQ women based on asylum jurisprudence emerging from New Zealand. While the focus of the New Zealand Immigration and Protection Tribunal (hereinafter the

Tribunal) is on discrimination on grounds of gender and sexual orientation, it explicitly recognizes that gender and sexuality should be considered in relation to other factors, including age, ethnicity, and religion, which interact to place LBQ women at risk of gender-based violence in multiple ways. Therefore, the decisions of the Tribunal have wider significance for the development of a more inclusive understanding of women's protection needs in other jurisdictions and the development of international refugee law in general.

This article focuses on nine first-level refugee appeal cases before the Tribunal between 2017 and 2025. The author searched the decisions directly through the website of the New Zealand Ministry of Justice (nd). The decisions chosen for analysis demonstrate how the national asylum regime establishes ontological borders that distinguish between successful and unsuccessful asylum applicants along the lines of gender, sexuality, race or ethnicity, and religion. By doing so, this article highlights the Tribunal judges' increasing understanding of the challenges faced by queer women in the national asylum process, while also underlining room for improvement. Whereas previous research has maintained that asylum adjudicators and authorities fail to understand that women and men experience heteronormative persecution on the grounds of sexual orientation very differently, resulting in a higher burden of proof for queer women to demonstrate the credibility of claims (Arbel & Ors 2014: 5; Dawson & Gerber 2017), this article argues that the Tribunal recognizes these differences by emphasizing the intersectionality of gender, sexuality, and gender-based violence in many of its decisions.

This article is structured in the following way. Section [B] sets the research context by examining challenges faced by queer women in national asylum processes, including stereotypical notions of gender and sexual orientation, the invisibility of LBQ women in asylum jurisprudence globally, and the nature of private harms experienced by queer women. Section [C] provides an analysis of nine decisions of the Tribunal in order to assess how its judges increasingly make decisions that recognize the intersectional nature of the appellants' asylum claims, the consistency of their narratives based on the available information about the country of origin, supporting testimonies, and, in some cases, academic literature supporting their claims. Section [D] addresses concluding considerations and proposes ways for improving the assessment of queer women's asylum claims by lower-level decision-makers.

[B] CHALLENGES FACED BY LBQ WOMEN IN THE ASYLUM PROCESS

Stereotypical notions of gender and sexual orientation

One of the prevalent issues in queer asylum scholarship is the highly stereotyped and Western idealizations around gender and sexuality that judges have relied on to reject queer asylum claims in countries that seemingly offer the potential for more freedoms for asylum seekers (Millbank 2009; Millman 2023: 505 and 527). Eithne Luibhéid (2019) criticizes the expectations in national asylum policy instructions and guidance that LBQ women must conform to the outward, neoliberal expressions of sexual identity, which assume a stable, coherent, and fully realized identity at the time of their asylum application. Moira Dustin (2018: 110) argues that such assumptions effectively penalize asylum seekers whose lived experiences or cultural backgrounds do not conform to these expectations. Further, the reason why LBQ women often hide their sexual orientation in their country of origin is related to their need to protect themselves from harm motivated by their gender or sexual orientation, especially where the general climate of the country is homo- or transphobic (Tschalaer 2021: 3542).

The so-called "discretion reasoning" is another topic that commonly emerges in the scholarly debates concerning SOGI asylum claims, especially in the context of the examination of whether an asylum applicant faces the risk of persecution at home if they tell no one they are queer, that is, they are "discreet" about their sexual identity (Lewis 2014; Kiel 2022). While the Tribunal does not apply discretion reasoning to its decisions, many countries have, at least in the past, required queer applicants and appellants to demonstrate that their decision not to disclose their sexual orientation to others in the country of origin was due to a fear of persecution rather than a decision to be discreet (Dawson & Gerber 2017: 295). The Tribunal has regularly held in its decisions that "no one is required to … modify their behaviour to avoid persecution" (*EU (Tonga)* 2025: paragraph 43) and that a lesbian appellant has the "right to freely express her identity, including her sexuality, which is protected by Articles 2 (non-discrimination) and 17 (right to freedom from arbitrary or unlawful interference with her privacy, family and home)" of the International Covenant on Civil and Political Rights (*CN (Philippines)* 2022: paragraph 93).

An increasing number of scholars indicate that interviews with queer women reveal that women frequently face stereotypical assumptions of

how they should behave during their asylum process (see eg Lewis 2014; Danisi & Ors 2021; Tschalaer 2021; Danisi & Ferreira 2022; Kiel 2022). Although, asking sexually explicit questions or making stereotypical assumptions about how LBQ women should behave based on their sexual orientation is not only a violation of their human dignity and right to privacy, but also ineffective in proving one's queerness (Kiel 2022: 81). Yet, asylum authorities continue to ask LGBTQ asylum seekers such questions (Dawson & Gerber 2017: 299; Danisi & Ors 2021: 297). Asylum authorities in several European states, including the United Kingdom (UK) and Germany, are argued to commonly rely on stereotypes that LBQ women are not thought to be queer based on their physical appearance, a history of an opposite-sex marriage which has produced children, or that all queer women will immediately come out upon their arrival in the country of asylum (Bennett 2013; Lewis 2014: 965; Tschalaer 2021: 354; Danisi & Ferreira 2022: 8). Carmelo Danisi and Nuno Ferreira (2022: 3) argue that queer women's experiences of early or forced marriages and motherhood in cases where they do not have a choice whether they will be married and have children are recurrently used to undermine their asylum claims on the grounds of sexual orientation. The fact that a woman has not consented to the marriage may not make any difference because being married with children is seen as a deviation from the normative queer lifestyle. Therefore, queer women are seen to satisfy heteronormative societal expectations of marrying and having children (Danisi & Ferreira 2022). Yet, a woman's departure from her country of origin signals her refusal and lack of consent to forced marriage (Honkala 2022: 490).

The United Nations High Commissioner for Refugees (UNHCR 2015) acknowledges that LBQ women face challenges in the process of seeking asylum because SOGI-specific information about countries of origin that would be helpful in the context of their claim is not always available. The lack of information about countries of origin relating to LBQ women is connected to the invisibility of queer women asylum jurisprudence globally. This is because the failure to properly consider the intersection of gender and sexuality often stems from inadequate information about queer women in the country-of-origin information reports (Dawson & Gerber 2017). Rachel Lewis (2014: 964) argues that in the context of LBQ women's asylum cases, courts are quick to conclude that they do not face persecution in the country of origin if there is no documented evidence of human rights abuses against LBQ women in the country-of-origin information reports. Asylum claims by LBQ women pose particular challenges to adjudicators especially when the country-of-

origin information is silent on queer women's experiences of persecution (Danisi & Ors 2021: 234). Additionally, there is also evidence that courts and tribunals have made decisions on LBQ women's asylum cases by referring to country conditions based on experiences of gay men. According to Jake Millman (2023: 506-507), this is in part because the nature of discrimination and persecution experienced by queer women is often private and in part because there is very little scholarship on their experiences that may be beneficial to their claims.

Invisibility of LBQ women in asylum case law across jurisdictions

The issue of visibility of sexual orientation arises frequently in existing scholarship concerning LBQ asylum-seeking women. There are several explanations for this. First, existing research suggests that the global LGBTQ asylum system is highly gendered due to the assumption that men are persecuted for their political activities, whereas women most frequently claim asylum as family members of successful refugees. There is a widespread agreement among scholars that the definition of the term "refugee" in Article 1A(2) of the 1951 Convention relating to the Status of Refugees (the Refugee Convention) was initially set out to protect Western, white, middle-class men from harm by the military or the police after openly criticizing the state and its institutions (Neilson 2005: 419; Rehaag 2009; Luibhéid 2019; Tschalaer 2021: 3534). Second, scholars suggest that queer women suffer invisibility in asylum scholarship and practice because fewer asylum applicants are women (Millman 2023: 507). This idea is supported by others who argue that queer women are less likely to leave their countries when facing persecution, given the limits placed on women by patriarchal forces (Macklin 1995: 221; Millbank 2003; Schiele 2024: 3).

Third, the invisibility of queer women is further exacerbated by the fact that lower-level decision-makers may be unfamiliar with the type of harms that LBQ women may face. The UNHCR (2015) acknowledges that asylum authorities do not always have adequate understandings of diverse SOGI experiences in different cultural contexts. These factors may seriously affect the assessment of the protection needs of queer women, by negatively impacting the examination and assessment of the credibility of individual asylum claims (UNHCR 2011). The invisibility of queer women in asylum case law across jurisdictions is compounded by the fact that, while courts and tribunals recognize that both a queer woman and a queer man can be considered to be a member of a "particular social group" under Article 1A(2) of the Refugee Convention, the situations of queer

men often fit better within the established precedents concerning asylum because they are more likely to suffer public forms of harm (Neilson 2005: 420; Dawson & Gerber 2017: 316). Due to asylum officials' continued assumption that LBQ women are less likely to face persecution in their countries of origin because there are fewer incidences of women being attacked or harmed in public than LBQ men, scholars suggest that queer women are most likely to succeed in sexual orientation-based claims in cases where they can demonstrate that they have experienced harm in the public sphere in their country of origin (Keenan 2011; Lewis & Naples 2014: 915).

Scholars argue that LBQ women do not typically experience harms that predominantly affect queer men, including arrest, detention, or torture due to the criminalization of consensual same-sex conduct, although LBQ women claiming asylum may experience sexual assault at the hands of state officials such as the police or prison guards (Dawson & Gerber 2017; García Rodríguez 2023). While LGBTQ persons can reasonably fear persecution due to criminalization of same-sex consensual conduct, considering that some countries impose corporal punishment or death, in practice such laws are often drafted in such a way that they apply exclusively or mainly to men (Dustin 2018; Kiel 2022). Laws impacting on queer women are nevertheless common because countries may enact a whole host of other laws and policies to persecute, prosecute, and stigmatize LBQ women (Lasowski & Ors 2023: 606). When the tribunal judges find that a queer woman does not have a reason to fear persecution because the legislation in the country of origin prohibits consensual same-sex conduct between men but does not include female same-sex relationships, the judiciary fails to see the ways in which LBQ women are persecuted by non-state actors in the country of origin. In the decisions of the Tribunal, the lack of state protection against so-called private harms is often central to finding that the appellant needs international protection.

The nature of private harms experienced by queer women

In addition to the types of violence that also affect queer men, including mob violence and honour killings, queer women overwhelmingly experience private forms of harm committed by men who are members of their immediate or extended family or wider community (Millbank 2003: 75; Dawson & Gerber 2017: 317). Additionally, violence against women is far more likely to occur in the home or workplace and is more likely to consist of "sexualised forms of assault", including rape and forced

marriage (Millbank 2003: 75). As gender-based violence is frequently seen as outside the view of the law or law enforcement in the countries of origin, asylum claims based on gender-based violence, including forced marriage, rape, forced pregnancies, and intimate partner violence, often also impacting queer women, have frequently gone unrecognized within national asylum systems (Lewis 2014: 964; Arbel & Ors 2014; Dawson & Gerber 2017: 317; Dustin 2022). Scholars increasingly recognize that queer women experience coerced marriage, intrafamilial physical aggression, sexual violence within marital contexts, sexual harm within familial circles, and enforced pregnancies and abortions (Tschalaer 2021: 3534; Dustin 2022). Positively, the Tribunal recognizes that, in cases where the country of origin fails to enact legislation protecting queer women from forced marriage and marital rape *(EH (Bangladesh)* 2024) or due to negligent attitudes of the police (*CN (Philippines)* 2022), these types of instances are examples of intersectional persecution on grounds of gender and sexual orientation. For instance, even though the Philippines had adopted legislation prohibiting violence against women, the Tribunal noted that, because the societal discrimination against LBQ women permeated the police, they could not rely on police officers not to be complicit in the harm they experienced (*CN (Philippines)* 2022: paragraph 103).

The private nature of persecution and violence queer women endure presents challenges for their asylum applications (Millman 2023). While it is of benefit to LBQ women that courts and tribunals recognize non-state persecution and family-based violence, the private forms of violence and persecution perpetrated by non-state actors make it difficult for queer women to provide corroborating evidence because the private nature of persecution is less likely to lead to tangible pieces of evidence such as police records (Millbank 2002; 2003). Tschalaer (2021) criticizes the centrality of tangible evidence such as public reports, letters of support from non-governmental organizations and faith groups, as well as social media to corroborate a claim of persecution. This links to the argument by Victoria Neilson (2005), Sarah Keenan (2011), and Rachel Lewis and Nancy Naples (2014) that queer women are likely to succeed in their claims if they can demonstrate that their experiences of persecution have occurred in the public sphere.

The UNHCR (2011) has acknowledged that the risk of not recognizing the intersectional nature of persecution on grounds of gender and sexual orientation is further exacerbated by the difficulty queer women face in discussing their SOGI experiences, especially if they have been subjected to sexual and gender-based violence. Tschalaer (2021: 3540-

3541) argues that the lack of information about persecution facing queer women and their unwillingness to talk about their experiences enables asylum assessors to trivialize the experiences of queer women of colour. To illustrate the range of issues discussed in this section, the next section analyses nine appeal cases before the Tribunal in recent years.

[C] APPEALS CASES BEFORE THE TRIBUNAL

Insufficient evidence of serious harm or same-sex relationships

While the Tribunal acknowledges the intersectional nature of persecution in many of its decisions concerning asylum-seeking LBQ women, over the years it has rejected several appeals because it either has not seen an imminent threat of persecution or it has doubted the queer women's account of their sexual orientation in the absence of evidence attesting the nature of their relationship in the form of chat and text messages, corroborating testimonies, or letters of support. The issue in these cases is that the appellant must convince the Tribunal of the existence of serious harm. The type of events that the Tribunal considers to constitute serious harm differs.

In an appeal by a white, South African lesbian couple in *BX (South Africa)* (2017), the Tribunal ordered the couple's deportation because it was not convinced that the couple, who had been together for over three decades, feared serious harm upon return to South Africa. The Tribunal raised several concerns in its decision. Essentially, it did not think that the couple had an objective, well-founded fear of being persecuted because they had remained in New Zealand over eight years before claiming asylum. While the Tribunal accepted that black lesbians may face vulnerability to incidents of gender-based violence, including corrective rape in South Africa, it did not accept that the couple had established an objective well-founded fear of being persecuted upon their return on the grounds of their sexual orientation and socio-economic background. It considered that the low-level harassment, verbal abuse and violent incidents that BX had been subjected to nearly 25 years previously were not sufficiently serious as they were limited in number and historical in nature (paragraph 65). Consequently, the Tribunal concluded that the evidence was insufficient to establish a real chance of serious harm to BX in the context of objective country-of-origin information reports as no records existed of her reporting the incidents to a doctor, a hospital or the police (paragraphs 65-66).

Ndumiso Ngidi & Ors (2026: 705) argue that even though South Africa has legalized same-sex marriage and the country's Constitution explicitly prohibits discrimination based on sexual orientation, LGBTQ persons experience high levels of verbal harassment, threats of violence, sexual violence and coercive policing of their sexuality. While experiences of verbal harassment and threats of violence are often seen as less harmful in comparison to physical violence, they have severe psychological and social consequences, including chronic anxiety, depression, and isolation (Ngidi & Ors 2026: 705). When the authorities deem experiences of violence either as unrelated to the LGBT asylum claim, or an asylum claim simply as not credible, they erase queer women's experiences of persecution in their decisions (Tschalaer 2021).

In *AO (Indonesia)* (2022), the Tribunal considered an appeal by a lesbian woman in her mid-twenties who claimed to fear serious harm in Bali, with hostility and intolerant attitudes towards the LGBTQ community rising in Indonesia since 2020. The Tribunal was concerned about the credibility of her evidence, specifically the existence of her lesbian relationship in Bali (paragraph 61). The absence of a same-sex relationship makes the decision-makers doubt the genuineness of LBQ women's asylum narratives (Tschalaer 2021: 3541). In *AO (Indonesia)* (2022: paragraph 62), the Tribunal noted that AO was unable to provide any substantive evidence of the nature of the couple's relationship beyond various photographs. It also viewed negatively the unwillingness of AO's former girlfriend to appear before the Tribunal even though she was in New Zealand (paragraph 62). It further doubted the genuineness of AO's asylum claim because it coincided with large numbers of asylum claims submitted by Indonesian and Malaysian nationals, who had made similar claims in their application forms, several of whom lived at the same residential address in New Zealand, and who were represented by the same lawyer (paragraph 54).

While the Tribunal observed that little information existed about LBQ women in Bali, possibly because of the community's low profile and lack of visibility, there was no evidence that LBQ women faced arrests or violent incidents (*AO (Indonesia)* 2022: paragraph 96). Although the existing country-of-origin information suggested that high-profile individuals who were open about their sexuality could face hostility in social media, the Tribunal did not consider that AO was likely to face systematic discrimination or serious harm because of her sexuality upon return (paragraphs 96-98 & 100). Yet, Susanti (2024: 515) notes that the Indonesian People's Consultative Assembly and the Indonesian House of Representatives openly oppose LGBTI rights.

The Tribunal's decision in this case can, however, be criticized on the grounds that, when the judiciary denies that an LBQ woman experiences persecution, it reflects the general invisibility of queer women's situation (Keenan 2011; Millbank 2003) in Bali due to the absence of relevant country-of-origin information relating to sexual orientation. Even though Indonesia has never criminalized same-sex consensual conduct (Colangelo 2024), it does not mean that LBQ women do not face persecution there just because they live largely invisible lives (Sussner 2022: 48).

While the Tribunal acknowledged that it was notoriously difficult for the appellants to establish their sexual identity in a tribunal setting, in *ST (India)* (2024: paragraphs 42 & 46) it nevertheless concluded that it had concerns in relation to other aspects of the account of an Indian woman in her mid-forties. While ST produced photographs showing her with another woman as evidence, nothing in the photographs established the nature of their relationship (paragraph 65). Consequently, she lacked a well-founded fear of being persecuted in India because of her sexual orientation (paragraphs 44 & 81).

Both *AO (Indonesia)* (2022) and *ST (India)* (2024) reveal how the absence of sufficient evidence of same-sex relationships results in the Tribunal doubting the genuineness of the appellant's experiences. The two decisions also highlight the need for queer asylum applicants to produce evidence of intimate conversations over dating apps or social media, which may convince the decision-makers of the existence of a same-sex relationship in the country of origin (Danisi & Ferreira 2022: 13). At the same time, however, it must also be noted that it is often difficult for queer women from conservative societies to prove their asylum claims as they may have never had a romantic relationship with another woman for the fear of the consequences of engaging in same-sex relationships (Neilson 2005: 347; Dawson & Gerber 2017: 314). For instance, both Tschalaer (2021: 3541) and Dustin (2022: 407) note that LBQ women from sub-Saharan countries like Uganda and Zimbabwe may be fearful of disclosing their sexual orientation due to the risk of violence or imprisonment. The lack of protection by the police further exacerbates the fear of being outed, making the claimants very cautious to come out in a country of asylum. Therefore, the expectation that queer women can provide evidence of same-sex relationships ignores the impossibility of being an openly queer woman in a conservative society (Tschalaer 2021).

Danisi & Ferreira (2022: 12) note that authorities' approach towards asylum claims on the grounds of sexual orientation is contradictory. While the authorities want to see evidence of an intimate bond between a

couple, they refuse to accept the existence of a relationship when they are shown pictures featuring the couple together. In order to establish the importance of a relationship for the purposes of asylum, authorities often assess intimate relationships through a heteronormative perspective, emphasizing long-term monogamous same-sex relationships without questioning the fact whether these are even attainable in most conservative societies (Danisi & Ferreira 2022: 13; García Rodríguez 2023: 526). Dustin (2018) proposes that, instead of asking appellants to prove that they are queer, the decision-makers should be asking questions such as whether the applicant is from a country where LGBTQ persons are persecuted and whether they would be viewed as LGBTQ upon return. The next subsection focuses on appeal decisions where the appellants have claimed asylum in New Zealand on grounds of gender-based violence and sexual orientation.

Gender-based violence and discrimination against queer women

Many of the appeal cases concern claims focusing on gender-based violence such as forced marriage and sexual and marital violence against LBQ women in the countries of origin. In addition to sexual orientation, other personal characteristics such as religion, ethnicity and age play a role in many of the decisions concerning LBQ women, albeit in a subtle way. The Tribunal frequently mentions that the women are of a certain nationality and ethnicity and that they come from socially conservative countries and families (*AW (Malaysia)* 2018; *CN (Philippines)* 2022; *EH (Bangladesh)* 2024). The women's ages are also mentioned in most decisions. It appears women who have been successful on appeal before the Tribunal in recent years are usually unmarried lesbian or bisexual women in their twenties and thirties.

The analysis demonstrates that the Tribunal often deals with gender and sexual orientation together, recognizing that queer women's fear or experience of harms such as forced marriage and sexual or marital violence are related to the appellant's sexual orientation. For instance, in *EH (Bangladesh)* (2024: paragraph 64), the Tribunal explicitly notes that the young Muslim lesbian appellant's predicament arose from "the intersectionality between her sexual orientation and her gender", which are both covered by the ground of the membership of a particular social group. This is important because many LBQ women are persecuted on the basis of their sexuality and are also exposed to gender-based violence. Therefore, they should be covered by the country guidance relating to both forms of persecution in particular countries (Dustin 2022: 402).

Consequently, the Tribunal's approach differs significantly from the approach often adopted in the UK asylum system, where official guidance and case law assumes that women asylum claimants are fleeing either gender-based violence or discrimination on grounds of sexual orientation, but not both (Dustin 2022: 394).

Olivia Kiel (2022: 64) suggests that one of the decisive factors in the Tribunal's reasoning is the credibility of the narrative. In other words, whether the appellant is able to present a claim which is coherent, plausible and does not contain contradictory claims. Kiel (2022) criticizes the centrality of the credibility assessment in the Tribunal's decisions by stating that it can essentially influence the success of the appellant on appeal. However, more recent decisions demonstrate that, in addition to scrutinizing the narrative of the appellant alongside the corroborating testimonies, a large part of the Tribunal's assessment focuses on the country-of-origin information and prospective harm upon return. This differs from the argument made by several scholars according to whom courts and tribunals in many other jurisdictions focus on the credibility assessment and the question of whether the appellant is really queer (Tschalaer 2021; Dustin 2022).

EH (Bangladesh) (2024) is an illustrative example of a decision where the Tribunal gives the benefit of the doubt to the narrative of a lesbian appellant in her twenties, who was still exploring her sexuality at the time of her initial asylum application. The Tribunal was satisfied that EH would face serious consequences for exploring and expressing her sexual orientation in Bangladesh, where same-sex activity is criminalized. However, it is also worth noting that in other instances the Tribunal has been a little more dubious about appellants who claim to have identified as LBQ later in life, in their mid-forties or early sixties (*FY (Sri Lanka)* 2020; *ST (India)* 2024). Even though Sri Lanka also criminalizes same-sex activities, it is plausible that the age of the appellant and her history of relationships with both men and women meant that the Tribunal did not consider her at risk of persecution on the grounds of sexual orientation.

Many of the decisions analysed for the purposes of this article concern forced marriage and lack of state protection against gender-based violence, committed either by members of their families or the wider community. As in many societies LBQ women face expectations to marry, the absence of marriage may raise questions about their sexual orientation. Tschalaer (2021) notes that many LBQ women from societies that criminalize same-sex activities may feel the pressure to marry so as not to attract unwanted attention to themselves from members of the community who perceived

them as LBQ. Four cases (*AW (Malaysia)* 2018; *CN (Philippines)* 2022; *EH (Bangladesh)* 2024; *JF (Sri Lanka)* 2024) concern the pressure from the women's family to marry. In *JF (Sri Lanka)* (2024: paragraph 200), the bisexual appellant in her early thirties had been forced to marry against her will before arriving in New Zealand. The Tribunal noted that, as she was diagnosed with autism spectrum disorder in New Zealand, she would be more vulnerable than others to abuse and exploitation and subject to further unwanted and non-consensual sexual assaults if she was to return to Sri Lanka and remarry against her will (paragraph 108).

The other three decisions raised the issue of lack of state protection against forced marriage, marital rape, and conversion therapy, which have all been recognized as human rights violations connected to sexual orientation (Lasowski & Ors 2023). In *AW (Malaysia)* (2018: paragraphs 73-74), the Tribunal recognized that the appellant, a single Muslim woman in her early thirties, could not expect any support or protection against forced marriage from the state (paragraph 74). It further noted that the appellant's "continued unmarried state would only raise the 'suspicion' that she was lesbian" (paragraph 73). Additionally, her parents were hostile towards LGBTQ persons and the prevailing societal and state view in Malaysia was that LGBTQ persons needed to be "cured" (paragraph 73). Therefore, far from offering protection against persecution facing LBQ women in Malaysia, the state contributed to the existence of the risk (paragraph 74).

The lack of state protection was decisive also in *CN (Philippines)* (2022). The Tribunal noted that the lesbian appellant in this case lacked access to state protection due to widespread discrimination against LBQ women in the Philippines. It was satisfied that there was a real chance that her religiously conservative, Catholic family would try to force her to undergo conversion therapy if they found out that she was queer (paragraph 100). Similarly, in *EH (Bangladesh)* (2024: paragraph 54) the Tribunal accepted that should a young lesbian Muslim woman return to Bangladesh, her consent to the forced marriage was unlikely to be genuine and, if she refused, she would be ostracized (paragraph 59). It was further evident that the state failed to protect women and underage girls from marital rape (paragraph 50).

In all these cases, the Tribunal concluded that forced marriage is a gender-related form of persecution, as recognized in several national and international refugee law documents as well as in legal scholarship (see eg *EH (Bangladesh)* 2024: paragraphs 57 & 61 citing Dauvergne & Millbank 2010). In finding that each of the appellants is a refugee within the meaning of the Refugee Convention, the Tribunal seemingly

recognizes that the protection need is based on sexual orientation, being a woman and refusing a forced marriage (Dustin 2022).

[D] CONCLUSION

Many of the recent appeal decisions of the Tribunal highlight the fact that women's experiences as LBQ, of certain age, ethnicity and religion contribute to the specificity of their treatment and experiences and may be relevant to an asylum claim. The successful appellants often came from socially and religiously conservative societies or families and often faced rejection by their family members if their families discovered that they were LBQ and/or if they refused to conform to societal expectations, which often included marrying men their families had chosen (eg *AW (Malaysia)* 2018; *EH (Bangladesh)* 2024; *EU (Tonga)* 2025). The appellants also often experienced gender-based violence and sexual violence at the hands of members of their extended families (*AW (Malaysia)* 2018), members of the community, or complete strangers (*HV (Sri Lanka)* 2023; *CN (Philippines)* 2022). In some instances, the women's parents had indicated they would attempt to cure or convert their daughters by taking them to spiritual healers or forcing them to undergo conversion therapy (*AW (Malaysia)* 2018: paragraphs 72-73; *CN (Philippines)* 2022).

While Arbel and colleagues (2014) argue that there is some evidence that queer women are sometimes more successful on appeal than queer men, Millman (2023: 520) found this not to be the case in New Zealand, where queer men have had a significantly higher success rate on appeal compared to queer women. According to Millman (2023: 501), one reason for this is that Tribunal judges in New Zealand set a higher threshold for queer women to establish that they are credibly LBQ. While this article did not evaluate queer women's success rates on appeal, many of the successful appeal decisions discussed in section [C] suggest that the Tribunal accepts that queer women are unable to rely on the state for the protection of their rights in their home countries. Indeed, the absence of state protection against gender-based violence and discrimination is central in virtually all of the successful appeals considered in this article.

What these cases also suggest is that lower-level decision-makers fail to properly consider the gendered elements of LBQ women's asylum claims (Danisi & Ors 2021; Dawson & Gerber 2017). As many recent decisions of the Tribunal highlight the prevalence of violence and discrimination against queer women, especially in countries in South-East Asia which criminalize same-sex consensual relationships but do not criminalize sexual and gendered-based violence, it could be argued

that it is likely that the lower-level decision-makers and practitioners are unable to recognize the ways in which sexual orientation exacerbates gender-based violence in cases where such violence is state-condoned and supported. It would therefore be essential that national refugee and protection officers undergo mandatory and regular training on sexual orientation-related country-of-origin information as this would equip the officers with appropriate knowledge and skills to deal with LBQ women's asylum claims without preconceptions based on nationality or ethnicity of LGBTQ claimants from particular countries of origin (Danisi & Ors 2021: 220; Tschalaer 2021; Ferreira 2022: 324).

Overall, the Tribunal's recent decisions concerning asylum appeals by LBQ women are significant and important as they adopt an intersectional approach to identify various human rights violations connected to sexual orientation. The Tribunal generally adopts a view that recognizes that LBQ women have a right to enjoy a range of basic rights, including freedom from discrimination in everyday life, encompassing the ability to access employment or housing; the right to enjoy their lives free from violence, intimidation, fear and psychological harm; freedom to explore their sexual orientation, and freedom to form intimate relationships and love a person of their choosing. The Tribunal's nuanced understanding of the forms of persecution that LBQ women experience in societies where homophobia, intolerance and discrimination against LGBTQ persons are widespread, demonstrates that the Tribunal judges accept that no one deserves to live their lives under a constant threat of being subjected to treatment that undermines their right to dignity, equality, and personal autonomy in society. The inclusive and rights-based approach adopted by the Tribunal judges serves as inspiration for courts and tribunals in other jurisdictions when addressing similar asylum claims in the future.

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References

Arbel, Efrat, Catherine Dauvergne & Jenni Millbank. *Gender in Refugee Law: From the Margins to the Centre*. Abingdon & New York: Routledge, 2014.

Avgeri, Mariza. "Gender Identity, Asylum and the ECHR: A Critical Doctrinal Analysis of Extraterritorial Gender Rights." *Amicus Curiae* 7(1) (2025): 183-205.

Bennett, Claire. "Claiming Asylum on the Basis of your Sexuality: The Views of Lesbians in the UK." *Women's Asylum News* (115) (2013) 1-4.

Berg, Laurie & Jenni Millbank. "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants." *Journal of Refugee Studies* 22(2) (2009): 195-223.

Colangelo, Anthony J. "The Emerging Crime of Persecution Based on Sexual Orientation." *Northwestern Journal of Human Rights* 22(3) (2024): 215-304.

Crenshaw, Kimberlé. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics." *University of Chicago Legal Forum* (1989): 139-167.

Danisi, Carmelo & Nuno Ferreira. "Legal Violence and (In)Visible Families: How Law Shapes and Erases Family Life in SOGI Asylum in Europe." *Human Rights Law Review* 22(1) (2022): 1-31.

Danisi, Carmelo & Ors. *Queering Asylum in Europe: Legal and Social Experiences of Seeking International Protection on Grounds of Sexual Orientation and Gender Identity*. Cham: Springer, 2021.

Dauvergne, Catherine & Jenni Millbank. "Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers." *Federal Law Review* 31(2) (2003): 299-342.

Dauvergne, Catherine & Jenni Millbank. "Forced Marriage as a Harm in Domestic and International Law." *Modern Law Review* 73(1) (2010): 57-88.

Dawson, Jasmin & Paula Gerber. "Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?" *International Journal of Refugee Law* 29(2) (2017): 292-322.

Dustin, Moira. "Many Rivers to Cross: The Recognition of LGBTQI Asylum in the UK." *International Journal of Refugee Law* 30(1) (2018): 104-127.

Dustin, Moira. "Pathways to Refugee Protection for Women: Victims of Violence or Genuine Lesbians?" *Refugee Survey Quarterly* 41(3) (2022): 393-419.

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

García Rodríguez, Diego. "Critiquing Trends and Identifying Gaps in the Literature on LGBTQ Refugees and Asylum-Seekers." *Refugee Survey Quarterly* 42 (2023): 518-541.

Held, Nina. "'As Queer Refugees, We Are out of Category, We Do not Belong to One, or the Other': LGBTIQ+ Refugees' Experiences in 'Ambivalent' Queer Spaces." *Ethnic and Racial Studies* 1(21) (2023): 1898-1918.

Honkala, Nora. "'An Unhappy Interlude': Trivialisation and Privatisation of Forced Marriage in Asylum-Seeker Women's Cases." *Refugee Survey Quarterly* 41(3) (2022): 472-497.

Keenan, Sarah. "Safe Spaces for Dykes in Danger? Refugee Law's Production of the Vulnerable Lesbian Subject." In *Regulating the International Movement of Women: From Protection to Control*, edited by Sharron Fitzgerald, 29-47. Abingdon & New York: Routledge, 2011.

Kiel, Olivia. "'The Tribunal Does not Accept the Appellant's Claim that He Is Gay': Queer Refugee Appellants in New Zealand." *New Zealand Journal of Public and International Law* 20(1) (2022): 59-112.

Lasowski, Patrick & Ors. "Persecution and Migration Experiences of Lesbian, Gay, Bisexual, Transgender, Queer/Questioning, and Other Sexual and Gender Minority Asylum Seekers." *Journal of Traumatic Stress* 36(3) (2023): 605-616.

Lewis, Rachel. "'Gay? Prove It': The Politics of Queer Anti-Deportation Activism." *Sexualities* 17(8) (2014): 958-975.

Lewis, Rachel. "Queering Deportability: The Racial and Gendered Politics of Lesbian Anti-deportation Activism." *Sexualities* 26(7) (2023): 748-764.

Lewis, Rachel & Nancy Naples. "Introduction: Queer Migration, Asylum, and Displacement." *Sexualities* 17(8) (2014): 911-918.

Luibhéid, Eithne. “Sexualities and International Migration.” In *International Handbook of Migration Studies*, edited by Steven J Gold & Stephanie J Nawyn, 215-224. Abingdon & New York: Routledge, 2019.

Macklin, Audrey. “Refugee Women and the Imperative of Categories.” *Human Rights Quarterly* 17(2) (1995): 213-277.

Millbank, Jenni. “Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia.” *Melbourne University Law Review* 26 (2002): 144-177.

Millbank, Jenni. “Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation.” *Georgetown Immigration Law Journal* 18(1) (2003): 71-110.

Millbank, Jenni. “From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom.” *International Journal of Human Rights* 13(2/3) (2009): 391-414.

Millman, Jake M. “Disparities in Queer Asylum Recognition Rates on the Basis of Gender: A Case Study of Australia and New Zealand.” *Virginia Journal of International Law* 63(3) (2023): 497-534.

Ministry of Justice (Te Tāhū o te Ture). “Refugee/Protection Decisions.” Nd.

Neilson, Victoria. “Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims.” *Stanford Law and Policy Review* 16(2) (2005): 417-444.

Nicolosi, Salvatore Fabio & Türkan Ertuna Lagrand, “Integrating Gender Equality into International Refugee Law: The Contribution of the Court of Justice of the European Union.” *European Journal of International Law* 37(1) (2026): 155-181.

Ngidi, Ndumiso Daluxolo & Ors. “Violence and Discrimination against LGBTIQ + Individuals in South Africa: Legal Rights vs Lived Realities.” *Sexuality Research and Social Policy* (2026) 23: 698-709.

Rehaag, Sean. “Bisexuals Need not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia.” *International Journal of Human Rights* 13(2-3) (2009): 415-436.

Schiele, Maximilian. “The Role of Gender in Asylum Migration to Europe: Analysing Country-Level Factors of Gendered Selection of Asylum

Seekers to Europe." *Journal of Immigrant and Refugee Studies* (2024) 24(3): 565-580.

Susanti, Ida. "Shifting Paradigms: The Controversy and Complexity of LGBTI Protection in Indonesia as the Biggest Muslim Country." *Athens Journal of Law* 10(4) (2024): 497-518.

Sussner, Petra. "Addressing Heteronormativity: The Not-So-Lost Requirement of Discretion in (Austrian) Asylum Law." *International Journal of Refugee Law* 34(1) (2022): 31-53.

Tschalaer, Mengia. "Victimhood and Femininities in Black Lesbian Asylum Cases in Germany." *Journal of Ethnic and Migration Studies* 47(15) (2021): 3531-3548.

United Nations High Commissioner for Refugees (UNHCR). "Guidelines on International Protection No 2: 'Membership of a Particular Social Group' within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees." UN Doc HCR/GIP/02/02, 2002.

United Nations High Commissioner for Refugees (UNHCR). *Need to Know Guidance: Working with Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Forced Displacement*, 2011.

United Nations High Commissioner for Refugees (UNHCR). "Guidelines on International Protection No 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees." UN Doc HCR/ GIP/12/09, 2012.

United Nations High Commissioner for Refugees (UNHCR). *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees Division of International Protection*, 2015.

United Nations High Commissioner for Refugees (UNHCR). "Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees." UN Doc HCR/1P/4/ENG/REV.4, 2019.

Cases

AO (Indonesia) [2022] NZIPT 801936

AW (Malaysia) [2018] NZIPT 801371

BX (South Africa) [2017] NZIPT 801194-195

CN (Philippines) [2022] NZIPT 802006

EH (Bangladesh) [2024] NZIPT 802303

EU (Tonga) [2025] NZIPT 802439

FY (Sri Lanka) [2020] NZIPT 801610

HV (Sri Lanka) [2023] NZIPT 802088

JF (Sri Lanka) [2024] NZIPT 802428

ST (India) [2024] NZIPT 802449

Legislation, Regulations and Rules

Constitution of the Republic of South Africa 1996

Convention relating to the Status of Refugees (signed 28 July 1951, entry into force 22 April 1954) 189 UNTS 137

International Covenant on Civil and Political Rights (adopted 16 December 1966; entry into force 23 March 1976) 999 UNTS 171