



## King's Research Portal

DOI:

[10.1007/s12119-019-09633-3](https://doi.org/10.1007/s12119-019-09633-3)

*Document Version*

Publisher's PDF, also known as Version of record

[Link to publication record in King's Research Portal](#)

*Citation for published version (APA):*

Heimer, R. D. V. (2020). Homonationalist/Orientalist Negotiations: The UK Approach to Queer Asylum Claims. *Sexuality & Culture*, 24(1), 174-196. <https://doi.org/10.1007/s12119-019-09633-3>

### **Citing this paper**

Please note that where the full-text provided on King's Research Portal is the Author Accepted Manuscript or Post-Print version this may differ from the final Published version. If citing, it is advised that you check and use the publisher's definitive version for pagination, volume/issue, and date of publication details. And where the final published version is provided on the Research Portal, if citing you are again advised to check the publisher's website for any subsequent corrections.

### **General rights**

Copyright and moral rights for the publications made accessible in the Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognize and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the Research Portal

### **Take down policy**

If you believe that this document breaches copyright please contact [librarypure@kcl.ac.uk](mailto:librarypure@kcl.ac.uk) providing details, and we will remove access to the work immediately and investigate your claim.



# Homonationalist/Orientalist Negotiations: The UK Approach to Queer Asylum Claims

Rosa dos Ventos Lopes Heimer<sup>1</sup>

© The Author(s) 2019

## Abstract

By bringing together the theoretical lenses of homonationalism and orientalism, this paper is intended to help the understanding of how tensions were negotiated between representations of the UK as a protector of LGBTI rights and its policies on (queer) asylum. Through a discourse analysis of the Supreme Court decision on *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* (2010) and subsequent sexuality-based asylum tribunal decisions, I unveil the discursive work performed by these interventions. I argue that the judgment put forward homonationalist/orientalist discourses representing non-Western societies as homophobic, fundamentalist, traditional and backwards, while Western countries were repositioned as their mirror: secular, progressive and modern—founded on the principles of sexual liberation and tolerance. Whilst such representations are not a novelty, I contend that this homonationalist/orientalist framing was instrumental in performing a double work of simultaneous inclusion/exclusion, whereby the narrative of the UK as a homonational benevolent state could be regenerated. It addressed a long-standing controversial element of the UK asylum policy on sexuality-based claims by asserting that the UK would no longer require queer asylum seekers to go back to their countries and ‘repress’ their sexuality. However, whilst the decision presumably includes sexual others who fit into a predetermined Western homonormative narrative, at the same time, it projects ‘repression’ onto racialised queer bodies, thus effectively recreating a reasoning to legitimately exclude them from the refugee entitlement. Although nearly a decade has passed since this seminal ruling, its Othering effects have endured and continue to embed asylum decisions in dangerously harmful ways. This is illustrated by the ways in which some queer asylum seekers have their cases overturned based on arguments that depict them as sexually repressed, discreet and family oriented, as opposed to Western ‘liberated gays’—marked by specific norms of visibility, individualism and consumption practices.

**Keywords** Asylum · Sexuality · Queer asylum-seekers · Homonationalism · Orientalism · UK

---

Extended author information available on the last page of the article

## Introduction

In the past decades, there have been increasing tendencies by Western nations to include and mobilize sexual diversity as integral to their narratives of progress. In the United Kingdom this is particularly illustrated by milestones such as the recognition of overseas same-sex partnerships; a law, in 2011, allowing same-sex partners to register civil partnerships; and the passing of the Same-sex Marriage Act, in 2014. These moves towards what Puar (2007, 2013) has termed ‘homonationalism’ arguably help to successfully portray an image of the UK as a ‘modern’ and ‘progressive’ nation, committed to the inclusion of its lesbian, gay, bisexual, transgender, and/or intersex (LGBTI) citizens.

Contradictorily, when it comes to the protection of LGBTI Others seeking asylum into its territories due to sexuality-based persecution, the UK has occupied an ambivalent position, for its general immigration policy has rather been inclined towards exclusion. This should be understood as part of a broader context in which, since the 1970s, European countries’ attitudes in relation to immigration started to shift significantly towards restriction. Changes in economic conditions, a rise in unemployment and concerns around the ‘cultural threat’ supposedly posed by non-Western migrants have fuelled social anxieties, generating ever stricter immigration policies and the reinforcement of borders (McLaren and Johnson 2007; Bade 2008; Huntington 1997). In the UK, this is particularly noticeable in the ways in which the widespread rise in anti-immigrant sentiments has been in the centre of election campaigns and harsh government policies designed to cut down on net migration (Charteris-Black 2006; Hogan and Haltinner 2015; Partos and Bale 2015). The UK has indeed provided a hostile environment for migrants and asylum seekers, where consistently high asylum refusal rates<sup>1</sup> persist along with inhumane routine practices of detention and deportation of asylum seekers (Kotsioni 2016; Gibney 2008; Lewis et al. 2017). The treatment towards LGBTI asylum seekers has by no means been better, in fact, refusal rates tended to be higher for sexuality-based asylum claims. A study by UKLGIG (Gray 2010) analysing claims from 2005 to 2009, found that 98–99% of the claims based on sexual orientation were rejected by the Home Office—in contrast to 73% of general claims—with one of the major grounds for refusal being the so-called ‘discretion requirement’.<sup>2</sup> That is, the notion that the claimant could be ‘reasonably’ expected to act discreetly upon return to their home country in order to avoid persecution. By exposing the Home Office’s lack of sensitivity and training in dealing with sexuality-based claims, as well as homophobic misconceptions in the ways the asylum policy was being implemented, studies (Miles 2010; Gray 2010) contributed to the destabilisation of Britain’s totalising image of modern superiority based on sexual tolerance and liberation.

<sup>1</sup> According to statistics from a House of Common briefing paper (Sturge 2019), in 2004, the percentage of asylum applicants refused at initial decision reached its highest point at 88%. Although it subsequently fell to 59% in 2014, it increased again to 67% in 2018. In 2014, the UK Home Office was accused of having a polemic reward scheme aimed at hitting a target of 70% of failed asylum cases (Taylor et al. 2014).

<sup>2</sup> The study found that 56% of cases reviewed have been refused on this ground.

However, in 2010, the UK Supreme Court (SC) promoted a significant change in the approach to sexuality-based asylum claims. In the seminal decision *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*,<sup>3</sup> the SC rejected the controversial ‘reasonably tolerable’ test<sup>4</sup> and set out new guidance to be applied when assessing sexuality-based asylum claims. The judgment, which overturned a previous Home Office guidance, was welcomed by the Home Secretary, at the time, Theresa May, who asserted: ‘*I do not believe it is acceptable to send people home and expect them to hide their sexuality to avoid persecution*’ (Home Office 2010). One of the UK’s leading barristers in LGBTI asylum, Chelvan (2010, 57), also enthusiastically welcomed the decision, asserting that it ‘*marked a phenomenal day, not just for LGBTI asylum law, but also for asylum law, LGBTI rights, and British justice!*’. Although there seemed to be a consensus around the positive role the SC judgment had played, bringing a promise of promoting fairer treatment for queer asylum seekers, years after the judgment, studies have continued to show very poor improvements, with injustices still perceived to be undermining the rights of queer refugees (Gray 2010; Wessels 2012; Bachmann 2016).

In this article, I aim to understand how the SC judgment has discursively worked to solve tensions between the UK’s self-constructed image as a modern protector of LGBTI rights and the government’s goal to restrict the number of refugees granted asylum. My analysis is particularly guided by scholarly work on ‘orientalism’ (Said 1978) and ‘homonationalism’ (Puar 2007), in the quest to understand how dominant representations of the West and its Other have been mobilised and reproduced. The framework provided by these concepts helps to uncover the ways in which geographical temporalities and sexualised/racialised subjects are discursively (re)produced and regulated by legal discourses. I take a Foucauldian approach to discourse that conceives discursive practices as productive (Foucault 1972). As Foucault (1978) notes in *History of Sexuality, Volume I*, legal discourses have historically played a major role in the production and regulation of sexual subjects. The legal discourse reproduced by the SC is invested with a performative power: its ‘authoritative speech’ performs ‘a certain action and exercise[s] a binding power’, and it is productive of that which it is apparently only describing (Butler 1990, 1993, 171).

Through a discursive analysis of the SC judgement on *HT and HJ* and subsequent court cases in which the new asylum guidance has been applied, I aim to unfold the underpinning assumptions and the discursive work performed by legal discourses. For this purpose, I consider statements and regulations formulated by specific judges as supra-individual rhetoric, representative of the legal discourse. I am attentive to the productive effect of what is said as well as what is left unsaid—the silences and gaps—within the text (Tonkiss 2004). The analysis is closely linked to the text; however, it goes beyond, in that it intends to account for both the ‘interpretative context’ and the ‘rhetorical organization’ of the discourses enacted by the judiciary (Tonkiss 2004).

<sup>3</sup> Hereafter I refer to this decision as *HJ and HT*.

<sup>4</sup> The test allowed a decision-maker to refuse a sexuality-based asylum application on the basis that the applicant could ‘reasonably tolerate’ going back to their country and acting ‘discreetly’ (i.e. concealing their sexuality) in order to avoid persecution.

Several authors have proven the usefulness of the concept of homonationalism to study LGBTI asylum, in particular, to theorise the ways in which sexual politics are deployed to produce uneven geopolitical temporalities and complex dynamics of inclusion/exclusion (Murray 2014; Llewellyn 2017; Raboin 2017; White 2014). However, whilst issues surrounding credibility in LGBTI asylum have been widely theorized through these lenses (Murray 2014; Llewellyn 2017), less attention has been paid to the racialized discourses around sexual discretion and repression similarly produced through homonationalist/orientalist narratives of asylum. In what follows, I briefly review the literature setting out a context in which UK/European anti-immigration practices and discourses are necessarily tied to colonial history, historical and more recent forms of orientalism and homonationalism. I then proceed to provide an analysis of the Supreme Court judgement and subsequent sexuality-based asylum cases where new guidance has been applied.

The SC decision addressed a long-standing controversial element of the UK asylum policy on sexuality-based claims by asserting that the UK would no longer require queer asylum seekers to go back to their countries and ‘repress’ their sexuality. However, I would argue that whilst the decision presumably includes sexual others who fit into a predetermined Western homonormative narrative, at the same time, it projects ‘repression’ onto racialised queer bodies, thus effectively recreating a reasoning to legitimately exclude them from the refugee entitlement. Although nearly a decade has passed since the Supreme Court judgement, its Othering effects have endured and continue to embed asylum decisions in dangerously harmful ways. This is illustrated by the ways in which some queer asylum seekers may have their cases overturned based on arguments that depict them as sexually repressed, discreet and family oriented, as opposed to Western ‘liberated gays’—marked by specific norms of visibility, individualism and consumption practices.

### **Anti-immigration at the Crossroads of Orientalism and Homonationalism**

The construction of non-Western migrants as cultural Others has been imperative in legitimising exclusion based on their lack of Western values. As Huntington (1997) notes, rising European phobias around migration not only feared a possible assault on jobs and welfare, but were also concerned with the loss of national identity caused by a supposed ‘cultural clash’—particularly embodied in the figure of Muslim migrants. In this process, the role played by sexuality as a European distinguishing mark has become increasingly important in legitimising migrants’ exclusion.

Europe’s political and ideological power has long depended on the production of orientalist discourses to legitimise its dominance. As Said (1978, 3) argues, ‘European culture gained in strength and identity by setting itself off against the Orient as a sort of surrogate and even underground self’. In this process, sexuality has always played an important role as a cultural signifier, although the ways in which it has been deployed have shifted over time to serve various interconnected ends. Post-colonial scholars (Levine 2000, 2003; McClintock 1995; and Stoler 2002) have

denounced how ‘Western orientalism painstakingly constructed the colonial other by differentiating their sexual deviancy or abnormality from accepted Western sexual practices’—which ultimately served to legitimise its different forms of colonial power (Chari 2001, 282).

However, in recent times, changing understandings of sexuality have led to a reconfiguration of its role in the marking of a Western superior identity. Sexual liberation/tolerance and gender equality have progressively come to represent markers of Western identity as modern, progressive and superior. The recent recognition of certain rights of LGBTI people in Western nations has been interpreted as an inclusion of sexual Others into citizenship (Sabsay 2012; Stychin 1998). Such political movement of partly including an ‘acceptable’ form of ‘homosexuality’ into national imaginations points towards the emergence of what Puar (2007, 2) defines as ‘homonationalism’. That is, the incorporation of a ‘homonormative’ (Duggan 2003) form of homosexuality—to a pre-existing heteronormativity model—into the representation of the nation, as a means of marking its exceptionalism whilst excluding racial and sexual Others. This homonationalist representation of Western nations is deeply invested into a sexual politics mobilised to define ‘sexual freedom’ as a sign of progress and modernity in direct opposition to what is often seen as ‘pre-modern’ religious migrant communities (Butler 2008).

In the aftermath of the 9/11 attacks, polarised and totalising images of the West against non-Western societies and communities marked by ideas of sexual freedom, modernity and progress have become instrumental to at least two different ends. While the US has mobilised such rhetoric to legitimise its expansionist military ‘civilising mission’, Europe has primarily deployed it in a defensive way to protect its borders against undesired migrants (Fassin 2010; Grewal 2005; Puar 2007). Authors have analysed the ways in which different European nations have come to represent themselves as a ‘sexual democracy’ (Fassin 2010, 513) in ways that justify harsher anti-immigration policies. They have claimed to be secular, progressive and modern by asserting their tolerance and advanced political agenda on gender equality and sexual rights, in direct opposition to migrant communities, especially Muslims, often portrayed as backwards, traditional, and homophobic (Butler 2008; Fassin 2010; Haritaworn et al. 2008; Hubbard and Wilkinson 2014; Mepschen and Duyvendak 2012). In regards to the British context, Haritaworn et al. (2008) note that especially after 9/11, gay and lesbian mainstream media and activists have actively participated in an ‘Islamophobic’ project, by reproducing an imaginary of ‘Muslim homophobia’ in contrast to (and threatening) ‘British gay liberation’. The mobilisation of these images have contributed to restrict immigration, incite racism and Islamophobia and assault the rights of migrants (Haritaworn et al. 2008).

In this sense, the UK must be situated in this wider European context in which orientalist Othering processes embedded in sexuality discourses are put forward to sustain European anti-immigration discourses, policies and practices. In such a landscape, then, what meaning does sexuality-based asylum policy assume in the UK? The provision of sexuality-based refugee asylum could provide a fertile terrain to homonationalist representations of the UK as a safe space and benevolent defender of non-Western queers in need of protection from the supposedly ‘backwards’ homophobic cultures of their own countries. By extension, such images could also work

towards confirming the need to protect ‘modern’ Britain from those ‘homophobic cultures’, thus legitimising stricter immigration policies.

Nonetheless, the narrative of the UK as a benevolent homonationalist state has been challenged by its own practices in relation to sexuality-based asylum. Indeed, as it has been argued, although hospitality may be place within an homonationalist strategy in relation to LGBTI asylum claimants, in the UK, it ‘exists in tension with the configuration of asylum as a social problem’ (Raboin 2017, 669). Several UK studies have exposed injustices in the treatment of sexuality-based asylum claims. For example, policy reports by organisations such as Stonewall and the UK Lesbian and Gay Immigration Group (UKLGIG) (Miles 2010; Gray 2010) have unveiled systematic problems encountered in the way asylum decisions are made by the Home Office, revealing the poor quality of decisions, specific challenges faced by sexuality-based claims, disproportionate high rates of rejection for those claims, bias in the decision-making process, a lack of training and misuse of policy guidance.

It could be argued that such voices problematise, to some extent, the coherence of homonationalist representations of the state. And indeed, the UK SC judgment on *HJ and HT* in (2010) can be considered to at least partially respond to that. For rejecting the ‘reasonably tolerable/discretion test’ (based on which most negative decision were being made), it has been celebrated as a ‘fundamental shift in the UK asylum law’ and considered to have had positive implications far beyond sexuality-based claims (Law Center 2011, 1). However, while there has been some progress following the UK SC determination,<sup>5</sup> a new trend has arisen whereby claims started to be overwhelmingly refused on the grounds of ‘credibility’<sup>6</sup> (Gray and McDowall 2013; Yoshida 2013). In fact, the ruling has triggered a shift from refusing asylum on the grounds of discretion to disbelief.<sup>7</sup> As the literature shows, although ‘credibility’ has always been a major issue, it has progressively played an ever-greater role in sexuality-based asylum determinations.

In this sense, while the UK Supreme Court’s seminal decision initially appears with an implicit promise to address stark injustices in the treatment of sexuality asylum claims, it has not guaranteed a fundamental change in determination outcomes. Therefore, it urges us to question: what exactly has the SC decision addressed? What discourses does the decision implicitly mobilise and what discursive work does it further do? What implications does it have on the production of queer postcolonial subjects? These questions are posed in an attempt to make sense of the wider and complex implications of the new test on the assessment of sexuality-based asylum claims. By guiding my analysis through these queries, in the next sections I aim to reveal the discourses and assumptions mobilised and deployed by the SC

<sup>5</sup> For example, a new Home Office guidance for dealing with sexuality persecution claims (incorporating the changes proposed by the SC decision) has been issued and there has been a slight increase in positive sexuality-based asylum determinations (Gray and McDowall 2013; Yoshida 2013).

<sup>6</sup> That is, when the claimant’s sexual identity is disbelieved.

<sup>7</sup> Accordingly, a 2013 report by UKLGIG (Yoshida 2013), has found that 86% of refusal letters reviewed have based their refusal on ‘credibility’ grounds, compared to 60% for tribunal decisions.



determination and how the exclusion of certain racialized queer others has been enabled through the reproduction of orientalist representations positing them as essentially different from Western liberated queers.

### **Orientalist/Homomationalist Discourses in the UK Supreme Court**

The SC judgment on *HJ and HT* (2010) has been driven by a need to clarify a test to ‘be applied when considering whether a gay person who is claiming asylum [...] has a well-founded fear of persecution in the country of his or her nationality based on membership of that particular social group’.<sup>8</sup> Its main outcome was to reject the controversial ‘reasonably tolerable’ test and set out a clearer guidance for asylum decisions on sexuality-based persecution claims. However, the brief introduction to the SC decision on *HJ and HT* by Lord Hope illustrates the ways in which a Homomationalist/Orientalist framing of the UK (and Western societies in general) versus refugee-sending countries (non-Western countries) has been embedded in the discourses and the operating logic of the judgement.

The need for reliable guidance on this issue is growing day by day. *Persecution for reasons of homosexuality was not perceived as a problem* by the High Contracting Parties when the Convention was being drafted. *For many years the risk of persecution in countries where it now exists seemed remote. It was the practice for leaders in these countries simply to insist that homosexuality did not exist.* This was manifest nonsense, but at least *it avoided the evil of persecution.* More recently, fanned by misguided but *vigorous religious doctrine*, the situation has changed dramatically. *The ultra-conservative interpretation of Islamic law that prevails in Iran is one example. The rampant homophobic teaching that right-wing evangelical Christian churches indulge in throughout much of Sub-Saharan Africa is another.*

[...]

The fact is that *a huge gulf* has opened up *in attitudes to and understanding of gay persons* between societies on either side of the divide. It is one of the most demanding social issues of our time. Our own government has pledged to do what it can to resolve the problem, but it seems likely to grow and to remain with us for many years. In the meantime more and more gays and lesbians are likely to have to seek protection here, as protection is being denied to them by the state in their home countries. *It is crucially important that they are provided with the protection that they are entitled to under the Convention – no more, if I may be permitted to coin a well known phrase, but certainly no less.*<sup>9</sup>

In an orientalist manner, these statements recreate a representation of Western societies as mirror images of their non-Western Others. A division between

<sup>8</sup> *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, (2010), para 1.

<sup>9</sup> *Ibid.*, (2010), para 3.



Western and the Rest is clearly set out in relation to their attitudes towards gay persons. The statements produce a binary opposition between them based on the supposedly sexual tolerance and secularism of the West, against the sexual intolerance and religious fundamentalism of its Other. Such generalizations underplay differences and particularities encountered among the societies that are inscribed under either pole, suggesting them to be internally homogeneous.

The above assertion of a need to set out clear guidance on the resolution of sexuality-based asylum claims is justified by two different but related reasons. Firstly, the lack of a precise definition under the Refugee Convention, which is attributed to the fact that homophobic persecution was not perceived as a problem at the time of its signature. Thus, the judge subtly suggests that persecution due to ‘homosexuality’ would have been included in the Convention had the High Contracting Parties identified it to occur. In doing so, he fails to acknowledge that homophobic persecution was also normalized and enshrined in the laws of countries represented by the Contracting Parties at the time of the signature of the Convention—including Western countries and the UK, where, for example, there existed laws criminalising sodomy.<sup>10</sup> Instead, sexual tolerance rather appears as a foundational principle of those societies.

Secondly, the urgency of the matter seems to be driven by the perception that non-Western countries’ attitudes towards ‘homosexuality’ have changed since the signature of the Convention, shifting from allegedly ignoring the existence of ‘homosexuality’ altogether to endorsing homophobic persecution. It is implicitly assumed that non-Western countries have always been inherently homophobic, although they only recently manifested it following the growing spread of religious fundamentalisms (namely, Islam and evangelical Christianity). An specific form of cultural essentialism appears to be put to work here to produce an idea of those countries as naturally homophobic. In contrast, this representation could be problematised and disrupted by a more nuanced social and historical analysis, which would necessarily need to account for colonialism and its legacies. For example, several authors have suggested that homophobia in former British colonies can be partly understood as a postcolonial legacy of sexual moral codes imposed by British colonial power (Gupta 2008; Phillips 2007). In addition, studies have also denounced the strong influence of American evangelical churches in the propagation of homophobic hatred across Sub-Saharan Africa.<sup>11</sup>

Hence, this discursive representation subtly presumes Western societies to be founded on principles of sexual freedom, with homophobic violence only occurring ‘out there’. It comes to the surface a particular way in which “asylum links queerness, liberalism and nationalism by simultaneously forgetting old discourses on homophobia and fostering new ones” (Raboin 2017, 674). This polarised image—contrasting State-protectors and State-persecutors of lesbian and gay

<sup>10</sup> The UK only decriminalised sodomy in Northern Ireland in 1982, after being forced by the European Court of Human Rights (Hildebrandt 2014). Meanwhile in the US, states’ sodomy laws were only completely invalidated by the US Supreme Court in 2003 (Kane 2007).

<sup>11</sup> See, for example, Anderson (2011) or Gettelman (2010).

people—becomes instrumental in justifying a need for international intervention, in which the British government is represented as personally invested. It effectively reproduces a particular variant of racialized ‘salvation’ narratives historically relied upon by asylum and human rights discourses (Raboin 2017; Mutua 2001; Grewal 1999), in which Western societies are now to ‘rescue brown gays’ (Bracke 2012, 247).

However, ‘salvation’ is cautiously reserved for the truly deserving ones, for alarm about the ‘likely growing numbers’ of gay refugees remains pervasive. Indeed, the judge’s observance that the law should provide ‘no more’ but ‘no less’ than what supposedly intended by the Convention could be interpreted as conveying a concern surrounding a possible ‘abuse’ of the refugee entitlement through its unintended extension to undeserving Others. The wording of the judgment illustrates the tension between the UK’s desire, on the one hand, to represent itself as a progressive state, which respects international agreements and offers sanctuary for those persecuted by ‘pre-modern’ countries, and, on the other hand, to restrict immigration from those same countries. This tension appears to have been, at least partially negotiated by the measures introduced by the SC, namely, the rejection of the ‘reasonably tolerable’ test and the creation of a new one.

### **Reconstructing Britain’s Progressive Narrative: The Rejection of the ‘Reasonably Tolerable’ Test**

Prior to the 2010 SC determination, the UK’s case law on sexuality-based asylum claims was based on the ‘reasonably tolerable’ test. It consisted of asking whether a person who had a well-founded fear of persecution due to their sexuality could ‘reasonably’ be expected to tolerate living in ‘discretion’. Thus, the test justified the rejection of sexuality-based asylum cases on the basis that applicants could be ‘discreet’ or could ‘conceal’ their sexuality in order to avoid persecution in their home countries. The SC unanimously rejected the ‘reasonably tolerated test’. The decision argued that a refugee applicant could not be ‘expected’ to change their behaviour in order to avoid persecution in their home country, considering it to be contrary to the principles of the Refugee Convention. Arguably, the Court’s decision has performed a discursive role by correcting what has been considered a ‘historical wrong’ (Chelvan 2010, 66). The effect of the judgment has been to counter the perception of the United Kingdom as oppressing non-Western queer subjects—or forcing them to repress their sexuality. This image seems to have been very controversial and damaging for a nation that seeks to represent itself as modern and superior—especially by using the language of sexual rights and sexual liberation for such purposes. Thus, the rejection of the ‘reasonably tolerable’ test appears to have worked towards solving such a paradox.

The rejection of the ‘reasonably tolerable’ test has been discursively accompanied with a rhetoric that contributes to reinforcing the image of the UK as a modern

and progressive nation, by reasserting its commitment to the protection of LGBTI people's right to a 'free' life. In rejecting that applicants could be expected to 'reasonably tolerate' to live their sexuality 'discreetly', Lord Rodger contends that the Convention should protect the right to live 'freely and openly':

In short, *what is protected is the applicant's right to live freely and openly as a gay man*. That involves a wide spectrum of conduct, going well beyond conduct designed to attract sexual partners and maintain relationships with them. To illustrate the point with *trivial stereotypical examples from British society*: just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, *so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates*. Mutatis mutandis – and in many cases the adaptations would obviously be great – *the same must apply to other societies*. In other words, *gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men*, without the fear of persecution.<sup>12</sup>

This passage describes an 'open and free' gay sexuality in direct opposition to 'straight' sexuality, thus reproducing hetero/homo categories as a binary symmetrical opposition. It neglects the existence of a relation of subordination between those terms—which Sedgwick (1990) warns us against. Instead, it assumes that 'gay' and 'straight' are equally able to live 'freely and openly' in British society. This view works towards including homonormativity into the national imaginary, without disturbing the pre-existing heteronormative model but simply adding to it. In this regard, such representation falls within a homonationalist construction, in that it produces the state as an 'exceptional' sexually inclusive nation and a safe space for queers (Puar 2007).

In addition, the judge's statement reveals an essentialist conception of sexual identity. While a naturalised conception of sexual identity had already been introduced by previous case law, the judge further established causality links by introducing the idea of an 'openly' 'gay' performance arising from there. It suggests the existence of an inner essence that is natural—and substantively different from the straight essence—to gay men, which should be manifested if they lived 'openly and freely'. It presupposes a gay inner self producing an intelligibly gay public performance, which is here defined through 'homonormative' terms, deeply embedded in white and liberal consumption practices (Duggan 2003). As discussed in the next section, what follows from such reasoning is that a failure to be recognised within this model is then interpreted as discretion, implicitly suggesting an embodied notion of repression—acting as a barrier to the expression of a gay natural being. This is instrumental to justify the exclusion of those supposedly repressed gays from the refugee category.

<sup>12</sup> HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department, (2010), para 78 [Emphasis added].

## Protecting the Nation from Non-assimilable Queers: The Orientalist Design of the New Test

Although the ruling has been praised for effectively rejecting the ‘reasonably tolerable’ test, the positive interpretation of the Court’s ruling has been challenged by Wessels (2012), as the author contends, the problematic reasoning of the new test proposed by the Court can indeed very easily lead to misinterpretations. Wessels notes that the test constructs two different categories of gay people, those who live an ‘openly gay life’ and those who voluntarily or naturally choose to live ‘discreetly’. The author argues that to base decisions on these wrongly assumes that ‘discreet’ behaviour can successfully protect claimants from homophobic persecution, and thus fails to recognise the on-going threat of discovery of one’s sexuality. Although I concur with her analysis, there is however, a further need to question the underpinning orientalist discourses allowing for racialised sexual others to be problematically portrayed as ‘discreet’ as opposed to Western liberated queers.

I therefore propose to unveil the ways in which the orientalist rationale used by the SC decision to reject the ‘reasonably tolerable test’ has subsequently been recycled, informing the concepts upon which the new test seems to be strategically designed—in an exclusionary fashion. The new test builds on Lord Rodger’s insistence that what the Convention protects is ‘the right to live freely and openly as a gay man’. Consequently, the test is constructed around the idea that homophobic persecution is restricted to those who live their sexuality ‘openly and freely’. A ‘free and open’ life, in this context, becomes a normative ideal against which applicants are assessed. The new test proposed by the Court is here summarised:

1. The tribunal must ask itself whether it is satisfied that the applicant is gay or would be perceived as gay;
2. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that *gay people who lived openly* would be liable to persecution.
3. If so, the tribunal should ask what the applicant would do, either: a) live ‘openly’—and therefore be eligible to refugee; or b) live ‘discreetly’.
4. In the latter case (b), the Tribunal should go on to ask why the applicant would live ‘discreetly’, for which the test already prescribes two different options as the causes leading to such ‘behaviour’ and the determination outcomes that should follow from each:

(4.1) If the tribunal concludes that *the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. [...] Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.*

(4.2) If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted.<sup>13</sup>

As established above, to satisfy the test, applicants would have to prove not only their sexuality but also that they would choose to live it ‘openly and freely’. Thus, what follows from Lord Rodger’s previous reinforcement and naturalisation of the dyad homo/hetero is the production of a new binary, namely that of ‘gay liberated’ versus ‘gay discreet/repressed’. This binary seems to be organised along other oppressive ‘epistemologically charged pairings’, such as the closet/coming out, secrecy/disclosure, private/public, and natural/artificial (Sedgwick 1990, 72).

Hence, the new test requires applicants to successfully reiterate the norms through which the effect of a ‘free and open’ gay identity—completely ‘out of the closet’—is produced and sustained in order to have their claim recognised. These norms, however, are likely to be unstable and self-contradictory, although constructed in direct opposition to performances understood to be heterosexual or based on a discreet/repressed gay sexuality. As Sedgwick (1990, 10) puts it, binaries can be conceived ‘as sites that are peculiarly densely charged with lasting potentials for powerful manipulation—through precisely the mechanisms of self-contradictory definition or, more succinctly, the double bind’. The ability to manipulate and ‘to set the terms, and profit in some way from, the operations of such an incoherence of definition’, in this context, would be heavily influenced by differences of power between asylum seekers and decision makers—which are already greatly determined by the asylum system itself (Sedgwick 1990, 11).

Furthermore, if the tribunal is convinced that the applicant would live ‘discreetly’, the applicant must then effectively evidence that this would not be due to any reasons other than persecution. I contend that in describing that some applicants would ‘choose’ to live ‘discreetly’ (i.e. repress their sexual identity) in order to avoid facing ‘social pressure’ (such as distressing ‘parents or embarrass[ing] friends’), it in fact performatively produces those very same subjects, it calls them into being (Butler 1990). It creates a category which can only be inhabited by an already racialised (non-Western) subject, given that it is constructed as the mirror image of a British ‘free and open’ gay subject. This discursive production puts at work a orientalist framing of non-Western subjects as guided by traditional family values. As Puar (2007, 22) notes:

The paradigm of gay liberation and emancipation has produced all sorts of troubling narratives: about the greater homophobia of immigrant communities and communities of color, about the stricter family values and mores in these communities, about a certain prerequisite migration from home, about coming-out teleologies.

<sup>13</sup> HJ and HT (2010), para 82 [Emphasis added]. Some words have been changed in order to reduce the text. However, the text has not been modified in number 2, 4.1, or 4.2, given that the exact words are important for the analysis.

Homomationalist/orientalist narratives similar to those mentioned by Puar (2007) seem to be implicitly underpinning the legal discourse produced here, which forecasts ‘the greater homophobia’ and ‘stricter family values and mores’ of non-Western cultures as already foreclosing the rise of a ‘liberated gay subject’. In establishing causality between the repression of a gay sexual identity and a natural/social will to repress it, the law produces the effect of a pathologized non-Western gay subject—unable to free themselves from their ‘backwards’ cultures, rooted in family traditions—as opposed to the quintessential modern gay subject. This discursive production of queer asylum seekers as repressed by their own cultures perpetrates an Othering process in which non-Western gays are seen as essentially different from British liberated gays. In addition, this is also instrumental in justifying their exclusion from the refugee category, given they are now seen as naturally unable to exercise their right to live ‘freely and openly’ (rather than being demanded and forced to do so). The exclusionary productive-effect of organising the new test around the idea of the right for an ‘open and free’ life extends itself from the homomationalist/orientalist framing put forward by the SC. Ultimately, it projects ‘repression’ onto asylum seekers’ racialised bodies to create a rationale for their exclusion.

### **Inhabiting Orientalist Categories: The Operationalisation of the New Test**

I now turn to the analysis of asylum tribunal judgements to assess the application of the SC’s proposed test in practice. In this exercise I intend to provide a glimpse of the discursive work that the legal test performs, particularly focusing on how ‘discretion’ has been understood. I do not aim to give a comprehensive analysis of the cases nor of the application of the new test. Furthermore, given the lack of statistics on sexuality-based asylum claims, it is not possible to fully assess the relative role ‘discretion’ plays in the determination outcomes of sexuality-based asylum claims.

Ultimately, the discussion intends to uncover the ways in which the design of the new test works towards imposing on asylum seekers a Western model of gay liberation, which is likely to be based on normative ideas of visibility, consumption and individualism. Therefore, on the one hand, it privileges certain applicants who successfully present a linear, progressive narrative of ‘coming out’. On the other hand, it effectively engages in an Othering process those applicants whose narratives diverge from such a model, constructing them as ‘naturally repressed’ and thus not belonging to the ‘free’ West. Arguably, in doing so, the image of the UK as a modern protector of LGBTI rights is preserved, as it appears to be including those asylum seekers who are effectively seeking ‘liberation’, while reinforcing and extending the Orientalist image of non-Western states as traditional to racialised queers who do not fit into a Western model of gay emancipation. Authors have already revealed how homomationalism inscribes visual, coherent and linear homosexual identities as the only ones worth of protection, in ways that asylum seekers ability to have their sexuality recognized as ‘credible’ becomes contingent on performing particular Western narratives of coming out (Llewellyn 2017; Berg and Millbank 2009). However, my analysis goes further in showing how the failure

to enact these narratives will significantly increase asylum seekers' likelihood of being read as repressed or naturally discreet in ways to effectively exclude them from being granted asylum.

### The Implantation of Sexual Repression

In what follows, by reviewing cases heard by the Upper Tribunal (Immigration and Asylum Chamber)<sup>14</sup> and the Court of Appeals—from years subsequently after the SC decision (2012 and 2013) as well from more recent years (2017 to 2018/2019), I provide an analysis of how the new test established by the SC has since been applied in ways that have allowed for refusal of queer asylum cases on grounds of a supposed voluntary/natural 'discretion'/repression. It is noticeable that even when credibility in relation to sexual identity has been accepted, decision makers attempt to reject those cases by mobilizing homonationalist/orientalist notions that suggest non-Western queers to be culturally or naturally discreet, that is, repressed—and therefore not in need for protection.

There can be identified at least two main rationale used by negative decisions refusing queer asylum seekers based on a suppose sexual repression/cultural or natural discretion. Firstly, such arguments are often used when there appears to be a perceived lack of sufficient engagement in the UK gay nightlife and therefore a failure to sustain a coherent homonormative narrative. Secondly, when asylum seekers' narrative of persecution intertwines with family issues in ways that allows for their representation as too concerned for their families, as too family oriented.

The first is clearly illustrated in the *Upper Tribunal (Immigration and Asylum Chamber) (2013) Appeal Number: AA/07288/2013*, where the tribunal dealt with the asylum claim of two Pakistani 'gay lovers'. The judge rejected their application on the basis that both were 'naturally private' individuals by asserting:

They have no particular desire to socialise with other gays. [...] the Appellants had behaved discreetly in a free and open country like the United Kingdom out of their own choice, they would behave in likewise manner in Pakistan.<sup>15</sup>

The conclusion that these two men would act 'discreetly' appears to be directly connected to the fact that they do not frequent the UK 'gay scene', and therefore do not socialise with gay people. These findings reinforce the view that the new test pushes applicants to provide evidence that they have a 'gay lifestyle', showing them to be integrated in the 'gay community' and publicly announcing an 'outed' gay identity. This is similarly found in the *Upper Tribunal (Immigration and Asylum Chamber) (2019a) Appeal Number: PA/13838/2017*, where despite oral evidence by the

<sup>14</sup> The final outcome is not available for all the cases here analysed since these hearings are mostly to decide whether or not a decision from First-Tier tribunal should be set aside and remitted back for a fresher hearing.

<sup>15</sup> Upper Tribunal (Immigration and Asylum Chamber) (2013) Appeal Number: AA/07288/2013, para 17.



claimant—a Pakistani gay man—suggesting a narrative that aligns with normative expectations of what living an open and free gay life should consist of, the case was refused based on discretion:

He had claimed he attended LGBT clubs and had registered himself on gay websites. Despite these claims he had *not adduced any evidence of membership or pictures of him with other gay men* relying on the fact that he could not print out such information in a library. [...] *his decision to live discreetly was through choice rather than a fear of persecution.*<sup>16</sup>

In the case of another Pakistani gay asylum seeker, *Upper Tribunal (Immigration and Asylum Chamber) (2018) Appeal Number: PA/07345/2017*, the rationale for rejection was also based on a supposed deliberate “choice” to live discreetly in an open and free country. However, in this case, the arguments suggest not only an expectation for queer asylum claimants to attend to more visibly public gay parties but also to have a more normative model of monogamous relationship with a fixed partner:

I find he has chosen to live discreetly while in the UK. The appellant described only attending private intimate parties with friends. He has not had a committed open relationship in the UK but rather, from his description, only discreet encounters. [...] I do not find the appellant has provided any evidence to show that he has lived an openly gay life in the UK or has openly expressed his sexuality in any way, despite bringing free to do so. I find his behaviour on return is likely to mirror his behaviour in the UK.<sup>17</sup>

Contrarily, in the *EWCA CIV 834 in The Court of Appeal (Civil Division) (2012)*, an appeal case concerning a Malaysian asylum applicant, the tribunal was satisfied with the claimant’s evidence showing certain level of participation in the UK gay night-life. However, the tribunal considered that the failure to ‘come out’ to his family was stronger evidence of his allegedly ‘discreet nature’. The judge concludes that:

The appellant said [...] he had not told his parents about his sexuality to spare them heartache. He has said that he will only tell people he is gay if they ask. I find that it is in the nature of this Appellant to be discreet. He is someone who is sensitive to his family’s feelings [...]<sup>18</sup>

Similarly, in an asylum case of a Bangladeshi gay man, a decision was negatively made on the basis that he would supposedly act discreetly solely due to family pressures, even though he had provided evidence to the contrary. His appeal was heard by the Upper Tribunal in 2019 where the decision of the First-tier judge was set aside due to an identified material error of law, where the following is explained:

<sup>16</sup> Upper Tribunal (Immigration and Asylum Chamber) (2019a) Appeal Number: PA/13838/2017, para 16, 17.

<sup>17</sup> Upper Tribunal (Immigration and Asylum Chamber) (2018) Appeal Number: PA/07345/2017, para 5.

<sup>18</sup> *Ibid.*, para 34.

She had arguably also erred in finding *the only reason why the Appellant might be discreet about his sexuality on return was fear of disapproval by his family* because he had given additional reasons at his interview by an Immigration Officer and in his witness statement.<sup>19</sup>

Such constructions seem to implicitly oppose (non-Western) ‘family tradition’ to (Western) individualism; in doing so, it appears to interpret any form of attachment to the former as evidence of a ‘natural’ inability to live ‘freely and openly’. Interestingly, a comparable reasoning has been noticed in the Israeli gay activism context, in which a supposedly inability of ‘homosexual Palestinians’ to ‘come out’ has often been explained through ideas around ‘repressiveness’, supposedly arising from an ‘essential’ aspect of the ‘Arab culture’, seen as fundamentally embedded in ‘family honor’ (Ritchie 2010, 564).

### The Deployment of Sexual Liberation Narratives

As discussed in the previous cases, the orientalist framing of the SC test application has actively portrayed non-Western queers as naturally/culturally repressed based on arguments revolving around lack of gay visibility and family concerns. Nonetheless, the homonationalist framing of the test has also guaranteed the relative maintenance of an image of homonational benevolence through a selective inclusion of non-western queer others who adequately deploy homonormative narratives of sexual liberation.

In contrast with the previous cases, in *SW (lesbians—HJ and HT applied) Jamaica v. Secretary of State for the Home Department (2011)*<sup>20</sup> a successful claim in which a Jamaican woman sought asylum based on persecution due to her lesbian identity, the applicant has shown an ability to construct a narrative of exceptionalism, in which the law could recognise her as passing from a position of repression to liberation. She proved to have ‘come out’ to friends and family and has made her identity publicly visible through participating in the LGBTI scene—in the nightlife and activism.

After assessing whether the applicant was likely to behave discreetly about her sexuality, the tribunal concluded that the claimant was not “‘*naturally discreet*’ and [...] any return to discreet living would be by reason of her fear of persecution rather than by reason of social pressure”.<sup>21</sup> The summary of her oral evidence offers an insight into the ways the applicant effectively produced a narrative evidencing that she was fully ‘out’, i.e. living ‘free and openly’. The claimant is first portrayed as living a life of ‘secrecy’ in Jamaica, having ‘discreet’ lesbian relationships in order to avoid public attention:

<sup>19</sup> Upper Tribunal (Immigration and Asylum Chamber) (2019b) Appeal Number: PA/05105/2018, para 9.

<sup>20</sup> This is a reconsideration by the Asylum and Immigration Tribunal, of a Jamaican woman’s appeal against the Secretary of State for the Home Department’s decision to refuse her recognition as a refugee on the basis of sexual orientation.

<sup>21</sup> *SW Jamaica v. Secretary of State for the Home Department (2011)*, para 121 [Emphasis added].

Generally, though, the appellant had to live a very discreet life in Jamaica and she felt frustrated, trapped and restricted. She felt less of a human; she resented the freedoms which heterosexual people had to express their sexuality publicly.<sup>22</sup>

It then progressively describes how the appellant discovers that she could be sexually liberated in Western countries: 'Her visits to the United States [...] have shown her *how different life could be in a country where she was free to express her sexuality [...]*'.<sup>23</sup> Subsequently, the applicant is described as being 'out' in the UK and enjoying its 'freer atmosphere'. She is described to have had various 'short but intense'<sup>24</sup> lesbian relationships, and that, 'she marched in *Gay Pride in 2005 [...]* She had become more open about her sexuality: her Facebook friends now knew of her orientation, including those still living in Jamaica'.<sup>25</sup> The applicant is said to have told her two sisters that she was a lesbian, while her mother also became aware after being told by another relative.<sup>26</sup> She is described as currently being in a relationship with a woman who she met in a London nightclub. Her trajectory is described as a 'liberating coming out' process of 'accepting herself'.<sup>27</sup>

The case appears to successfully mark both the exceptionality of the West as a place of sexual liberation and her own exceptionality in relation to both the backward homophobic culture of her home country, and in relation to those less liberated gays who have not yet successfully let their 'true' liberated sexual self to 'come out'. This interpretation makes a parallel with Haritaworn et al.'s (2008, 83) identification of how in the UK, the public representation of a few 'liberated gay Muslims' has been instrumental to sustain the image of a liberal and progressive West. The author asserts that 'not only do they thereby confirm the exceptionality of the West; they also emerge as exceptions to the rule that most women and gays 'from this culture' are in fact 'repressed'.

### The Production of Self-repressed Queers

As can be seen from the discussed cases, in order for an asylum applicant to satisfy to the tribunal that they will not act discreetly for reasons other than persecution there has to be reproduced a Western model of gay liberation and emancipation. This is based on a 'coming out metaphor' which, however, is not 'universally available', as Perez (2005, 177–178) notes:

Coming out promises liberation and celebrates a species of individualism in the form of self-determination. Conceptually and materially, that freedom and self-determination are premised on the property of whiteness. The closet narrativizes gay and lesbian identity in a manner that violently excludes or includes the subjects it names according to their access to specific kinds of privacy, property, and mobility.

<sup>22</sup> Ibid., Appendix A, para 8 [Emphasis added].

<sup>23</sup> Ibid., Appendix A, para 8 [Emphasis added].

<sup>24</sup> Ibid., para 34.

<sup>25</sup> Ibid., Appendix A, para 18 [Emphasis added].

<sup>26</sup> See Ibid., Appendix A, para 10–12.

<sup>27</sup> Ibid., Appendix A, para 28.

The specific narrative of ‘coming out’ required by the homonationalist/orientalist framing of the asylum decision-making process appears to rely on the individualist model described above. This is highly problematic and does not account for the fact that ‘the closet is not a monolithic space and coming out is not a uniform process’ (Manalansan 1995, 438). In addition, the ability to perform a gay ‘outed’ identity through participating in the pink economy, marching in gay prides, or frequenting ‘gay venues’ is also deeply contingent on intersectionality (Crenshaw 1991), particularly relating to class and racial privileges. In reading any divergence from the prescribed Western ‘coming out’ model as a sign of ‘repression’, the law, thus, indeed produces racialised ‘gays who cannot properly be gays’ (Perez 2005, 177).

Ability to perform an on-going ‘outed’ narrative to resist interpretations of discretion/repression requires levels of assimilation into the normative UK gay life that may prove difficult to racialized queer asylum seekers, particularly due to widespread racism found in gay clubs<sup>28</sup> and economic constraints. In fact, even where financial condition has been recognized as a barrier for asylum seekers in accessing clubs, this has not prevented their subsequent framing as discreet and therefore ineligible to refugee status. This is clearly shown in the case of a Bangladeshi man who was considered to be in a ‘discreet’ relationship, given that they “do not socialise a great deal, rarely go to nightclubs due to lack of funds and otherwise continue their relationship discreetly. [They are] living a relatively quiet life”.<sup>29</sup> Indeed, it has been argued that homonationalist discourses put forward through LGBTI asylum narratives not only work towards sustaining an exceptional image of the UK, but also produce promises of happy queers futures which are often unattainable to queer others (even when they are formally granted refugee status)—for its full access is contingent on an exclusionary market economy (Raboin 2017).

As the analysis of specific asylum cases suggests, the new test has been designed upon homonationalist/orientalist notions that tend to portray non-Western sexual identities as naturally repressed or excessively embedded in family traditions as oppose to a prescribed Western model of modern gay liberated identities. In doing so, the test works to only selectively include queer asylum seekers when they are able to fit into this homonormative model (as token exceptions), whilst simultaneously excluding those who fall outside it by projecting repression onto their racialized queer bodies.

## Conclusion

The interpretation of the refugee law in relation to sexuality-based asylum claims in the UK has constructed a narrative in which initially, through the practice of the ‘reasonably tolerable’ test, the United Kingdom could be interpreted as contributing to the sexual oppression or repression of queer asylum seekers. I

<sup>28</sup> Held and Leach (2008) provide an interesting analysis of experiences of non-belonging of racialised subjects in lesbian and gay spaces.

<sup>29</sup> Upper Tribunal (Immigration and Asylum Chamber) (2019c) Appeal Number: PA/00431/2018, para 11.

contend that what follows from such a narrative is a displacement of the idea of repression which transfers the responsibility for the allegedly sexual repression of non-Western queers from British refugee jurisprudence to asylum seekers themselves. In other words, repression passes from being seen as something that the UK is forcing upon asylum seekers—in order to not welcome them into the nation—to being something that is produced either by their inherent nature or by their family values, supposedly inherited from the very same culture they flee from. Thus, on the one hand, by ceasing to repress asylum seekers' sexuality and promising to protect the right of gay people to live 'openly and freely', the United Kingdom reinstates its homonationalist image as a progressive, modern and superior nation. On the other hand, by producing non-Western queers as repressed, it effectively creates a reasoning for their exclusion from the nation: they cannot be 'helped/saved' for their 'cultural/natural' differences render them unable to live their sexuality openly and freely even in an 'open and free' country.

This paper has explored the contradictions between the representation of the UK as a promoter of LGBTI rights and its policy approach towards sexuality-based asylum claims. Although it is accepted that the SC *HJ and HT* (2010) judgment has played a role in negotiating tensions between contradictory images, the quality of the changes put forward by the Court remains questionable. The analysis of the SC discursive framing argues that it has reproduced a homonationalist/orientalist representation of Western and non-Western societies. The latter were portrayed as inherently homophobic and traditional as opposed to Western societies, inversely constructed as sexually liberated and modern. Arguably, this framing has also been extended to inform the design and application of the new asylum guidance dealing with sexuality-based claims, the effects of which are still on-going.

I have suggested that the rejection of the 'reasonably tolerable' test and the production of a new one have worked towards effectively restoring a homonationalist representation of the United Kingdom, while still working towards excluding racialised Others. In rejecting the 'reasonably tolerable' test, the SC countered the perceived notion that the UK was repressing non-Western queers. However, the design of a new test proposed by the Court has been informed by orientalist constructions of the Other, in doing so it effectively produced a new category of allegedly 'discreet' queers, implicitly understood as sexually repressed. This category can only be inhabited by already racialised queers, and works towards excluding them from the refugee category, for they are seen as naturally or culturally unable to enjoy their right to live 'freely and openly'.

As several scholars suggest (White 2013; Luibhéid 2014; Lewis and Naples 2014; Mole 2017) and I have aimed to further through my own analysis of LGBTI asylum, homonationalism has become key in producing hierarchical sexual telologies of progress between nations and their respective queer subjects in ways that have engendered complex dynamics of inclusion/exclusion. In particular, I have intended to reveal how refugee law in the UK has become a powerful site for racist and orientalist manipulation, in which the state's homonationalist narrative is reconstructed at the expense of less privileged racialised sexual subjects. The way in which refugee law has been interpreted is charged with a potential for

further perpetration of symbolic and material violence against those whom it is supposed to protect. The considerations put forward in this work, thus, urge us to remain wary of a ‘*Western nativism* [...] intent on forcing people into “freedom”, [...] that considers assimilating the world into its own norms as ipso facto “liberation” and “progress”’ (Massad 2008, 42).

## Compliance with Ethical Standards

**Conflict of interest** Author Rosa dos Ventos Lopes Heimer declares that she has no conflict of interest.

**Ethical Approval** This article does not contain any studies with human participants or animals performed by the author.

**Open Access** This article is distributed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted use, distribution, and reproduction in any medium, provided you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license, and indicate if changes were made.

## References

- Anderson, John. (2011). Conservative Christianity, the Global South and the Battle over Sexual Orientation. *Third World Quarterly*, 32(9), 1589–1605.
- Bachmann, C. L. (2016). *No Safe Refuge: Experiences of LGBT Asylum Seekers in Detention*. London: Stonewall and UK Lesbian and Gay Immigration Group (UKLGIG).
- Bade, Klaus. (2008). *Migration in European History*. Oxford: Blackwell Publishing Ltd.
- Berg, L., & Millbank, J. (2009). Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants. *Journal of Refugee Studies*, 22(2), 195–223.
- Bracke, Sarah. (2012). From ‘Saving Women’ to ‘Saving Gays’: Rescue Narratives and Their Dis/continuities. *European Journal of Women’s Studies*, 19(2), 237–252.
- Butler, Judith. (1990). *Gender Trouble: Feminism and the Subversion of Identity*. London: Routledge.
- Butler, Judith. (1993). *Bodies that Matter: On the Discursive Limits of ‘Sex’*. London: Routledge.
- Butler, Judith. (2008). Sexual Politics, Torture, and Secular Time. *The British Journal of Sociology*, 56(1), 1–23.
- Chari, Hema. (2001). Colonial Fantasies and Postcolonial Identities: Elaboration of Postcolonial Masculinity and Homoerotic Desire. In John C. Hawley (Ed.), *Post-Colonial, Queer: Theoretical Intersections* (pp. 277–304). Albany: State University of New York Press.
- Charteris-Black, Jonathan. (2006). Britain as a Container: Immigration Metaphors in the 2005 Election Campaign. *Discourse and Society*, 17(5), 563–581.
- Chelvan, S. (2010). Put Your Hands Up (If You Feel Love). *Journal of Immigration, Asylum and Nationality*, 25(1), 56.
- Crenshaw, Kimberle. (1991). Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color. *Stanford Law Review*, 1991, 1241–1299.
- Duggan, Lisa. (2003). *The Twilight of Equality: Neoliberalism, Cultural Politics, and the Attack on Democracy*. Boston: Beacon Press.
- EWCA CIV 834 in The Court of Appeal (Civil Division) (2012) *On Appeal from Upper Tribunal Immigration and Asylum Chamber*—Appeal Number: AA/01323/2011. <http://www.refworld.org/pdfid/4fedc3502.pdf>.
- Fassin, Eric. (2010). National Identities and Transnational Intimacies: Sexual Democracy and the Politics of Immigration in Europe. *Public Culture*, 22(33), 507–529.
- Foucault, Michel. (1972). *The Archaeology of Knowledge*. London: Tavistock.

- Foucault, Michel. (1978). *The History of Sexuality: An Introduction* (Vol. I). New York: Random House.
- Gettelman, Jeffrey. 2010. Americans' Role Seen in Uganda Anti-gay Push. *New York Times*. <http://www.nytimes.com/2010/01/04/world/africa/04uganda.html>. Accessed 4 January.
- Gibney, Matthew J. (2008). Asylum and the Expansion of Deportation in the United Kingdom. *Government and Opposition*, 43(2), 146–167.
- Gray, Laura M. (2010). *Failing the Grade: Home Office Initial Decision on Lesbian and Gay Claims for Asylum*. London: UKLIG.
- Gray, Amanda and McDowall, Alexandra. 2013. LGBT Refugee Protection in the UK: From Discretion to Belief? In *Sexual Orientation and Gender Identity and the Protection of Forced Migrants*, eds. Marion Coudrey and Maurice Herson. *Forced Migration Review*, 42(22): 19. <http://www.refworld.org/pdfid/517eab7f4.pdf>.
- Grewal, Inderpal. (1999). "Women's Rights as Human Rights": Feminist Practices, Global Feminism, and Human Rights Regimes in Transnationality. *Citizenship Studies*, 3(3), 337–354.
- Grewal, Inderpal. (2005). *Transnational America: Feminisms, Diasporas, Neoliberalisms*. Durham: Duke University Press.
- Gupta, Alok. (2008). *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism*. New York: Human Rights Watch.
- Haritaworn, Jin, Tauqir, Tamsila, & Erdem, Esra. (2008). Gay Imperialism: Gender and Sexuality Discourse in the 'War on Terror'. In Adi Kuntsman & Esperanza Miyake (Eds.), *Out of Place: Interrogating Silences in Queerness/Raciality* (pp. 71–95). London: Raw Nerve Books Ltd.
- Held, Nina, & Leach, Tara. (2008). 'What Are You Doing Here?': The 'Look' and (Non) Belongings of Racialised Bodies in Sexualised Space. In Adi Kuntsman & Miyake Esperanza (Eds.), *Out of Place: Interrogating Silences in Queerness/Raciality* (pp. 139–157). York: Raw Nerve Books Ltd.
- Hildebrandt, Achim. (2014). Routes to Decriminalization: A Comparative Analysis of the Legalization of Same-Sex Sexual Acts. *Sexualities*, 17(1/2), 230–253.
- HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, 2010. UKSC 31, United Kingdom: Supreme Court. <http://www.refworld.org/docid/4c3456752.html>. Accessed 7 July.
- Hogan, Jackie, & Haltinner, Kristin. (2015). Floods, Invaders, and Parasites: Immigration Threat Narratives and Right-Wing Populism in the USA, UK and Australia. *Journal of Intercultural Studies*, 36(5), 520–543.
- Home Office. 2010. Sexuality judgement welcomed. *Home Office* <https://www.gov.uk/government/news/sexuality-judgement-welcomed>. Accessed 7 July.
- Hubbard, Phil, & Wilkinson, Eleanor. (2014). Welcoming the World? Hospitality, Homomationalism, and the London 2012 Olympics. *Antipode*, 00, 1–18.
- Huntington, Samuel P. (1997). *The Clash of Civilizations*. London: Simon & Schuster UK Ltd.
- Islam (A.P.) v. Secretary of State for the Home Department*. 1999. R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.), Session 1998–1999, United Kingdom: House of Lords (Judicial Committee). <http://www.refworld.org/docid/3dec8abe4.html>. Accessed 25 March.
- Kane, Melinda D. (2007). Timing Matters: Shifts in the Causal Determinants of Sodomy Law Decriminalization, 1961–1998. *Social Problems*, 54(2), 211–239.
- Kotsioni, Ioanna. (2016). Detention of Migrants and Asylum-Seekers: The Challenge for Humanitarian Actors. *Refugee Survey Quarterly*, 35(2), 41–55.
- Law Center. 2011. *HJ (Iran): A Fundamental Shift in Asylum Law*. *Law Center* <http://www.lawcenterin.org/Publications/Law%20Centre%20Information%20Briefings/HJIranMarch2011.pdf>. Accessed March.
- Levine, Philippa. (2000). Orientalist Sociology and the Creation of Colonial Sexualities (Reconstructing Femininities: Colonial Intersections of Gender, Race, Religion and Class). *Feminist Review*, 56, 5–21.
- Levine, Philippa. (2003). *Prostitution, Race and Politics: Policing Venereal Disease in the British Empire*. New York: Routledge.
- Lewis, Rachel A., & Naples, Nancy A. (2014). Introduction: Queer Migration, Asylum, and Displacement. *Sexualities*, 17(8), 911–918.
- Lewis, Hannah, Waite, Louise, & Hodkinson, Stuart. (2017). "Hostile" UK Immigration Policy and Asylum Seekers' Susceptibility to Forced Labour. In Francesco Vecchio & Alison Gerard (Eds.), *Entrapping Asylum Seekers: Social, Legal and Economic Precariousness* (pp. 187–215). London: Palgrave Macmillan UK.
- Llewellyn, Cheryl. (2017). Homomationalism and Sexual Orientation-Based Asylum Cases in the United States. *Sexualities*, 20(5–6), 682–698.



- Luibhéid, Eithne. (2014). Afterword: Troubling Identities and Identifications. *Sexualities*, 17(8), 1035–1040.
- Manalansan, Martin F. (1995). In the shadows of Stonewall: Examining Gay Transnational Politics and The Diasporic Dilemma. *GLQ: A Journal of Lesbian and Gay Studies*, 2(4), 425–438.
- Massad, Joseph A. (2008). *Desiring Arabs*. Chicago: University of Chicago Press.
- McClintock, Anne. (1995). *Imperial Leather: Race, Gender, and Sexuality in the Colonial Context*. New York: Routledge.
- McLaren, Lauren, & Johnson, Mark. (2007). Resources, Group Conflict and Symbols: Explaining Anti-Immigration Hostility in Britain. *Political Studies*, 55(4), 709–732.
- Mepschen, Paul, & Duyvendak, Jan Willem. (2012). European Sexual Nationalisms: The Culturalization of Citizenship and the Sexual Politics of Belonging and Exclusion. *Perspectives on Europe*, 42(1), 70–76.
- Miles, Nathanael. (2010). *No going Back: Lesbian and Gay People and the Asylum System*. London: Stonewall.
- Mole, Richard C. M. (2017). Homonationalism: Resisting Nationalist Co-optation of Sexual Diversity. *Sexualities*, 20(5–6), 660–662.
- Murray, David A. B. (2014). Real Queer: “Authentic” LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System. *Anthropologica*, 56(1), 21–32.
- Mutua, Makau W. (2001). Savages, Victims, and Saviors: The Metaphor of Human Rights. *Harvard International Law Journal*, 42(1), 201–245.
- Partos, Rebecca, & Bale, Tim. (2015). Immigration and Asylum Policy Under Cameron’s Conservatives. *British Politics*, 10(2), 169–184.
- Perez, Hiram. (2005). You Can Have My Brown Body and Eat It, Too! *Social Text*, 23(3–4), 84–85, 171–191.
- Phillips, Richard. (2007). Histories of Sexuality and Imperialism: What’s the Use? *History Workshop Journal*, 63(1), 136–153.
- Puar, Jasbir. (2007). *Terrorist Assemblages: Homonationalism in Queer Times*. Durham: Duke University Press.
- Puar, Jasbir. (2013). Rethinking Homonationalism. *International Journal of Middle East Studies*, 45(2), 336–339.
- Raboin, Thibaut. (2017). Exhortations of Happiness: Liberalism and Nationalism in the Discourses on LGBTI Asylum Rights in the UK. *Sexualities*, 20(5–6), 663–681.
- Ritchie, Jason. (2010). How Do You Say “Come Out of the Closet” in Arabic? Queer Activism and the Politics of Visibility in Israel-Palestine. *GLQ: A Journal of Lesbian and Gay Studies*, 16(4), 557–575.
- Sabsay, Leticia. (2012). The Emergence of the Other Sexual Citizen: Orientalism and the Modernisation of Sexuality. *Citizenship Studies*, 16(5–6), 605–623.
- Said, Edward W. (1978). *Orientalism*. London: Penguin Books.
- Sedgwick, Eve K. (1990). *Epistemology of the Closet*. Berkeley: University of California Press.
- Stoler, Ann Laura. (2002). *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule*. California: University of California Press.
- Sturge, Georgina. (2019). *Asylum Statistics: Briefing Paper*. London: House of Commons Library.
- Stychin, Carl F. (1998). *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights*. Philadelphia: Temple University Press.
- SW (lesbians—HJ and HT applied) *Jamaica v. Secretary of State for the Home Department*, CG. 2011. UKUT 00251(IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber). <http://www.refworld.org/docid/4e0c3fae2.html>. Accessed 24 June.
- Taylor, Diane and Mason, Rowena. 2014. Home Office Staff Rewarded with Gift Vouchers for Fighting Off Asylum Cases. Incentives for Officials Who Hit Target of Winning 70% of Tribunal Cases Include Vouchers, Cash Bonuses and Extra Holidays. *The Guardian*. <http://www.theguardian.com/uk-news/2014/jan/14/home-office-asylum-seekers-gift-vouchers>. Accessed 14 January.
- Tonkiss, Fran. (2004). Analysing Discourse. In C. Seale (Ed.), *Researching Society and Culture* (pp. 245–260). London: Sage.
- Upper Tribunal (Immigration and Asylum Chamber). 2013. Appeal Number: AA/07288/2013. <https://tribunalsdecisions.service.gov.uk/utiac/aa-07288-2013>.
- Upper Tribunal (Immigration and Asylum Chamber). 2018. Appeal Number: PA/07345/2017. <https://tribunalsdecisions.service.gov.uk/utiac/pa-07345-2017-7e378895-31eb-42cf-967b-c16de64c130f>.

- Upper Tribunal (Immigration and Asylum Chamber). 2019a. Appeal Number: PA/13838/2017. <https://tribunalsdecisions.service.gov.uk/utiac/pa-13838-2017>.
- Upper Tribunal (Immigration and Asylum Chamber). 2019b. Appeal Number: PA/05105/2018. <https://tribunalsdecisions.service.gov.uk/utiac/pa-05105-2018>.
- Upper Tribunal (Immigration and Asylum Chamber). 2019c. Appeal Number: PA/00431/2018. <https://tribunalsdecisions.service.gov.uk/utiac/pa-00431-2018>.
- Wessels, Janna. (2012). HJ (Iran) and HT (Cameroon)—Reflections on a New Test for Sexuality-Based Asylum Claims in Britain. *International Journal of Refugee Law*, 24(4), 815–839.
- White, Melissa Autumn. (2013). Ambivalent Homonationalisms: Transnational Queer Intimacies and Territorialized Belongings. *Interventions*, 15(1), 37–54.
- White, Melissa Autumn. (2014). Documenting the Undocumented: Toward a Queer Politics of No Borders. *Sexualities*, 17(8), 976–997.
- Yoshida, Keina. (2013). *Missing the Mark: Decision Making on Lesbian, Gay (Bisexual, Trans and Inter-sex) Asylum Claims*. London: UKLGIG.

**Publisher's Note** Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

## Affiliations

Rosa dos Ventos Lopes Heimer<sup>1</sup> 

✉ Rosa dos Ventos Lopes Heimer  
rosa.heimer@gmail.com

<sup>1</sup> King's College London, University of London, 30 Aldwych, London WC2B 4BG, UK