

**OLIVIA KIEL**

**“THE TRIBUNAL DOES NOT ACCEPT THE  
APPELLANT’S CLAIM THAT HE IS GAY”  
QUEER REFUGEE APPELLANTS IN NEW ZEALAND**

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***Abstract***

*Sexual minority asylum seekers are all united by a similar characteristic—a diverse sexual orientation. It is not something which can be physically pointed to or demonstrated, rather, something that must be understood by declaration of their mind and their heart. However, in order to secure refugee status in New Zealand, they must effectively prove their sexual orientation to public officials. Fundamentally, this involves an assessment of their credibility. If denied refugee status at first instance, they may appeal to the Immigration and Protection Tribunal, or prior to 2010, the Refugee Status Appeals Authority. These specialist appellate bodies are granted the power to finally investigate refugee status claims by sceptically implementing their subjective fact-finding skills in search of an objective truth about these individuals’ invisible identities. The credibility assessment they undertake is unrestrained by any legal or formal process. This paper presents an analysis of the practical methods of assessing the credibility of sexual minority refugee appellants by a case study of decisions of the Immigration and Protection Tribunal and Refugee Status Appeals Authority.*

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## *I Introduction*

Sexual minority asylum seekers are all united by a similar characteristic—a diverse sexual orientation. This manifests invisibly as a core part of their identity. It is not something which can be physically pointed to or demonstrated, rather, something that must be understood by declaration of their mind and their heart.<sup>1</sup> Where they fear persecution in their country of origin, they may flee to New Zealand and claim refugee status on the basis of their sexual orientation. To do this, they must effectively prove their sexual orientation to public officials in order to meet the refugee definition.<sup>2</sup> Fundamentally, this involves an assessment of their credibility.<sup>3</sup> If denied refugee status at first instance, they may appeal to the Immigration and Protection Tribunal (the Tribunal), or prior to 2010, the Refugee Status Appeals Authority (the Authority).<sup>4</sup> These specialist appellate bodies are granted the power to finally investigate refugee status claims by sceptically implementing their subjective fact-finding skills in search of an objective truth about these individuals’ invisible identities.<sup>5</sup> The credibility assessment they undertake is unbridled by any legal or formal process. They are empowered with considerable scope to determine how to assess the credibility of appellants before them. The method that has practically resulted from this has been infiltrated by personal biases leading to the imposing of evidentiary and behavioural standards of ‘objective honesty’ and ‘authentic queerness’. Therefore, sexual minority appellants who experience and understand their invisible identity in their personal religious, cultural and linguistic contexts are forced to satisfy the members’ external standards of authenticity. If they cannot, their personal account is often deemed

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<sup>1</sup> 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 UNHCR/IP/4/ENG/REV.4 (reissued April 2019) at 169 [the UNHCR Handbook].

<sup>2</sup> Immigration Act 2009, s 135; and see *Refugee Appeal No 1312/93 NZRSAA*, 30 August 1995 [*Re GJ*].

<sup>3</sup> See Robert Thomas *Administrative justice and asylum appeals a study of tribunal adjudication* (Hart Publishing, Oxford, 2011) at 134.

<sup>4</sup> Immigration Act, ss 194–195.

<sup>5</sup> See David Murray “Queer Forms: Producing Documentation in Sexual Orientation Refugee Cases” (2016) 89 *Anthropol Q* 465 at 22; and Jenni Millbank “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 *Int J Refug Law* 1 at 29.

“unreliable”,<sup>6</sup> “not true”,<sup>7</sup> “a ploy on [their] part to secure refugee status”,<sup>8</sup> or “not truthful in any material respect”.<sup>9</sup>

This paper analyses a case study of written decisions of the Tribunal and the Authority to extrapolate the methods practically adopted to assess the credibility of sexual minority appellants. Broadly, credibility is indicated by the consistency of one’s claim, their demeanour and the plausibility of their account. This paper explains how appellants who cannot present their claim in the expected ‘authentic’ ways, risk the forsaking of potentially life-saving asylum. It concludes that lack of legal restraint has led to reliance on these indicators which are conceived on personal assumptions, rather than research, scholarship and international advice, resulting in an administrative failure in New Zealand for the past 26 years. If this process is left unrestrained, it risks the denial of life-saving protection to deserving individuals, and risks the practical entrenchment of these credibility indicators which ultimately undermine the dignity of claimants.<sup>10</sup>

## *II Legal framework for queer asylum seekers*

Throughout history queer individuals have been subject to sexual and gender-based violence, physical attacks and killings, torture, arbitrary detention, denial of fundamental human rights and discrimination in societies in their employment, health, social groups and education.<sup>11</sup> Many nations criminalise consensual same-sex relations, some of which impose corporal punishment or death.<sup>12</sup> This criminalisation can lead to the inherent (or indeed explicit) state sanctioning and tolerance of abuse and persecution by non-state actors, leaving queer individuals without protection. There are intersecting factors which

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<sup>6</sup> *Refugee Appeal No 76414* NZRSAA 4, 27 January 2010.

<sup>7</sup> *AY (South Africa)* [2015] NZIPT 800763.

<sup>8</sup> *Refugee Appeal No 76566* NZRSAA 107, 7 October 2010.

<sup>9</sup> *Refugee Appeal No 76484* NZRSAA 62, 19 May 2010.

<sup>10</sup> Millbank, above n 5, at 29.

<sup>11</sup> UNHCR Handbook, above n 1, at 166.

<sup>12</sup> See Human Dignity Trust “Map of Countries that Criminalise LGBT People” (27 June 2021) Human Dignity Trust < [humandignitytrust.org](http://humandignitytrust.org)>.

may exacerbate the discrimination and persecution of these individuals such as biological sex, gender identity, intersex characteristics, religion, nationality, socio-economic status and HIV status.<sup>13</sup>

This widespread and severe ill-treatment of queer individuals often sees them marginalised and isolated within society, feeling unable to live their authentic lives to love and exist freely. It is for these reasons that many queer individuals flee their home country and seek asylum in nations that can provide protection of their identity. In recent years there has been an increasing number of claims of refugee status by queer individuals, globally and within New Zealand.<sup>14</sup>

### *A Immigration process*

Asylum seekers may claim refugee status either upon arrival to New Zealand, or through a relevant government official if already onshore.<sup>15</sup> Claims are lodged with the Refugee Status Branch in Auckland where they will be assigned to a refugee and protection officer. After lodging, the Branch will receive and acknowledge the claim and provide claimants with the opportunity to submit a written statement detailing their claim. An officer will then interview the claimant and send a post-interview report to them (and/or their representative) for comment. The claimant then has an opportunity to provide supplementary submissions in support of their claim before it is finally determined by the officer. If the officer approves their claim- recognising the claimant as a refugee (or a protected person)-<sup>16</sup> the claimant may apply for a visa to remain in the country. If their

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<sup>13</sup> UNHCR Handbook, above n 1, at 166.

<sup>14</sup> See Radio New Zealand “LGBT asylum seekers granted refugee status in NZ” *RNZ* (online edition, Wellington, 18 June 2017).

<sup>15</sup> Ministry of Business, Innovation & Employment *Claiming Refugee and Protection Status in New Zealand* (New Zealand Immigration, Wellington, June 2015) at 5. Note: protected person status does not cover claims on the ground of queerness and therefore this paper does not explore the law related to this further.

<sup>16</sup> The legal recognition of a person as a “protected person” under the Immigration Act is distinct from recognition as a refugee, however for each claim considered by a Refugee and Protection Officer, they must determine whether to recognise the claimant as a refugee and whether to recognise the claimant as a protected person on the grounds set out in ss 130–131.

claim is declined, they must leave New Zealand or lodge an appeal with the Tribunal.<sup>17</sup> Appeals to the Tribunal must be considered de novo.<sup>18</sup> The Tribunal will, similarly to the refugee and protection officer in the first instance, determine whether to recognise the individual as a refugee or protected person in accordance with the Immigration Act 2009.<sup>19</sup>

### *B Refugee definition*

An individual is a refugee where they meet the definition of refugee provided in the United Nations Convention Relating to the Status of Refugees.<sup>20</sup> Recognition as a refugee affords a legal status relating to their presence in New Zealand. According to the Convention, a refugee is a person who:<sup>21</sup>

...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, *membership of a particular social group* or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

This definition does not explicitly provide grounds for queer individuals to claim refugee status on, however in the 1995 decision of *Re GJ*, the Authority interpreted the “membership of a particular social group” category to extend to protect LGBTQIA+ queer individuals.<sup>22</sup> When considering the meaning of “social group” it was held that the fundamental themes underpinning international refugee protection of defending human rights and anti-discrimination should be accounted for.<sup>23</sup> The Authority held that sexual

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<sup>17</sup> Immigration Act, s 194(1).

<sup>18</sup> Immigration Act, s 198(1)(a).

<sup>19</sup> Immigration Act, ss 195 and 198(1).

<sup>20</sup> Immigration Act, s 129; see United Nations Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954).

<sup>21</sup> United Nations Convention Relating to the Status of Refugees, art 1A(2) (emphasis added).

<sup>22</sup> *Re GJ*, above n 2.

<sup>23</sup> At 25–26.

orientation represented an internal characteristic so fundamental to one’s identity and dignity that they should “not be forced to forsake or change” their authentic self to live free from persecution or discrimination.<sup>24</sup> In that case the Authority observed that “...homosexuals in Iran are a cognisable social group united by a shared internal characteristic, namely, their sexual orientation”, and so the persecution GJ feared was for a Convention reason.<sup>25</sup> Notably, the Authority later held that it was “sufficient for the refugee claimant to establish that the Convention ground is a contributing cause to the risk of being persecuted”; their queerness need not be the sole cause of that risk, but relevantly causal of that risk.<sup>26</sup> The United Nations Refugee Agency provides advice in the form of a handbook (the UNHCR Handbook) to state governments when applying the definition.<sup>27</sup>

Since those cases, Immigration New Zealand, the Authority and later the Tribunal have come to recognise many claimants with diverse sexual and gender identities as refugees, on the ground of membership of a particular social group, including transsexual and transgender claimants, lesbian claimants, bisexual claimants and intersex claimants.

### *C Onus of proof*

Claimants (and subsequent appellants) of refugee status must establish their claim, which is done by meeting the requirements of the aforementioned definition.<sup>28</sup> Part of this requires establishing their membership of a particular social group, which involves effectively proving their queerness. The adjudicator will then determine the claim in accordance with the Immigration Act.<sup>29</sup> While the burden of proof is on the claimant, the Court of Appeal have held that the adjudicator must bear in mind the inevitable vulnerability of the claimant who has fled their home and therefore give them the benefit of the doubt.<sup>30</sup> This requires a

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<sup>24</sup> At 57.

<sup>25</sup> At 59.

<sup>26</sup> *Refugee Appeal No 72635 NZRSAA 344*, 6 September 2002 at [173].

<sup>27</sup> UNHCR Handbook, above n 1.

<sup>28</sup> Immigration Act, ss 135 and 226(1).

<sup>29</sup> Immigration Act, ss 125, 129, 193.

<sup>30</sup> *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 at [24]–[25]; see also *BV v Immigration and Protection Tribunal* [2014] NZCA 594 at [6].



generous appreciation of the risks they could face if made to return to their country of origin.<sup>31</sup>

#### *D Credibility assessment*

While refugee status determination is based on assessing the risk an individual would face upon return to their home country, it is credibility of their account which provides “the principal factual basis on which that assessment is undertaken”.<sup>32</sup> Described as the “single most important determinant of asylum cases”,<sup>33</sup> credibility assessments are practically the biggest hurdle in refugee status determination appeals. It is the disbelief of an individual’s account which sees many appeals of queer claimants fail and be denied the protection of the New Zealand state. Sexual minority asylum seekers represent a unique class of claimants; often arriving in New Zealand with little personal possessions, documents or family and friends who could corroborate their claim about their queer identity. Their oral account of their identity and history will often be the only account.<sup>34</sup>

Upon submission of their initial claim, claimants must provide the Refugee Status Branch with a detailed outline of their claim to refugee status. For those claimants wishing to argue this on the basis of their queerness, this process involves detailing their queerness (for example their sexual orientation or gender identity). Some scholars describe this process as a construction of an “identity narrative”;<sup>35</sup> an account of the claimant’s background which may discuss self-identification, self-realisation of their queerness, personal perceptions, non-conformity, family relationships, experiences of shame, trauma and/or persecution they may have endured, community relationships and romantic and sexual relationships.<sup>36</sup> Part of the assessment of credibility of a claimant and their account will involve the assessment of the credibility of their identity narrative.

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<sup>31</sup> *Jiao v Refugee Status Appeals Authority*, above n 30, at [27].

<sup>32</sup> Thomas, above n 3, at 134.

<sup>33</sup> At 43.

<sup>34</sup> *DS (Iran)* [2016] NZIPT 800788 at [1]; and UNHCR Handbook, above n 1, at 181.

<sup>35</sup> Laurie Berg and Jenni Millbank “Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants” (2009) 22 *J Refug Stud* 195 at 3.

<sup>36</sup> UNHCR Handbook, above n 1, at 181.

The credibility requirement of claimants and appellants is formed on a basis of mistrust;<sup>37</sup> those with meritless claims can and have lied in order to obtain refugee status.<sup>38</sup> It therefore assumes that credibility assessments can distinguish those with false claims from honest truth-tellers, by discovering an account of objective facts using a neutral third party.<sup>39</sup> However, as scholars and decision-makers have expressed, it is an unrealistic task.<sup>40</sup> It presumes that an expert can verify truth as distinguished from falsehood using credibility indicators not hugely different to decisions made about credibility in everyday communication.<sup>41</sup> Scholarship notes therefore, that assessing credibility can be “poorly understood”,<sup>42</sup> and it would be “injudicious” to rely on it as a primary tool for resolution of claims.<sup>43</sup> Despite this, credibility remains a core part of the refugee determination process in New Zealand, unrestrained by any legal or formal process. Many cases involving sexual minority claimants and appellants turn on the credibility of a claimant’s account of their queerness. Their ability to consistently recall and present facts, to present a plausible account and have an ‘honest’ demeanour is often determinative to their claim.

### *III Case study background*

Approximately 300 individuals seek asylum in New Zealand every year, and about 150 claims of refugee or protected person status are approved.<sup>44</sup> Since 1995 there have been

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<sup>37</sup> Murray, above n 5, at 22.

<sup>38</sup> James P Eyster “Searching for the Key in the Wrong Place: Why ‘Common Sense’ Credibility Rules Consistently Harm Refugees” (2012) 30 Boston Univ Int Law J 1 at 29; and see for example *CU (Pakistan)* [2018] NZIPT 801202 at [62].

<sup>39</sup> Murray, above n 5, at 22; and Millbank, above n 5, at 29.

<sup>40</sup> Audrey Macklin “Truth and Consequences: Credibility Determination in the Refugee Context” (paper presented to International Association of Refugee Law Judges, 1998) at 139.

<sup>41</sup> Trish Luker “Decision Making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Review Tribunal” (2013) 25 Int J Refug Law 502 at 518.

<sup>42</sup> Sean Rehaag “‘I Simply do not Believe...’: A Case Study of Credibility Determinations in Canadian Refugee Adjudication” (2017) 38 WRLSI 38 at 42.

<sup>43</sup> Eyster, above n 38, at 34.

<sup>44</sup> Human Rights Commission *Treating asylum seekers with dignity and respect: The economic, social and cultural rights of those seeking protection in New Zealand* (Human Rights Commission, Discussion Paper, June 2017) at 6.

several claimants every year whose claims of refugee status, based in part or fully on their queerness, have been declined that have appealed that decision. To complete this case study, I read all publicly available decisions of sexual minority claimants who had appealed their first-instance denial of refugee status because their sexual orientation made them fear returning to their country of origin.<sup>45</sup> I began with *Re GJ* which was decided in August 1995 by the Authority. This landmark case was the first in which the Authority held that a homosexual claimant had a well-founded fear of persecution for a Refugee Convention reason (meaning the claimant met the definition of refugee).<sup>46</sup>

In total I read 73 decisions, of which three concerned the appeals of couples. A list of the decisions is contained in appendix I of this paper. Of the 76 appellants throughout these decisions, 37 were successful and were granted refugee status, and 39 were denied.<sup>47</sup> Of those appellants who were denied, the Authority and the Tribunal found the queerness of 22 to be credible, and of 17 to be not credible. Sixty-one of the appellants self-identified as men/male and 15 as women/female. These men and women self-identified their queerness in the following ways:

- Fifty of the appellants self-identified in their claim as “gay” or “homosexual” (all of whom were men);
- Eleven self-identified as “bisexual” (seven were men, four were women);
- Eleven self-identified as “lesbian” (ten were women, one was male); and
- Four self-identified as queer in another way or were not sure about how to describe their queerness (all of whom were men).<sup>48</sup>

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<sup>45</sup> See appendix I. See also Ministry of Justice “Refugee/Protection Decisions” (11 May 2021) Immigration & Protection Tribunal <[forms.justice.govt.nz/search/IPT/RefugeeProtection/](https://forms.justice.govt.nz/search/IPT/RefugeeProtection/)>.

<sup>46</sup> *Re GJ*, above n 2; see also Doug Tennent with Katy Armstrong and Peter Moses *Immigration and Refugee Law* (3<sup>rd</sup> ed, LexisNexis, Wellington, 2017).

<sup>47</sup> See appendix II.

<sup>48</sup> One claimant self-identified as “homosexual or bisexual” in *Refugee Appeal No 74627 NZRSAA 153*, 12 May 2004; one claimant self-identified as “gay or bisexual” in *DA (Pakistan)* [2018] NZIPT 801351; one claimant self-identified as having “a sexual preference for transgender women” in *AM (Jordan)* [2017] NZIPT 800972; and one claimant self-identified as “heterosexual” in *Refugee Appeal No 76175 NZRSAA 37*, 30 April 2008 after being “converted” from “homosexual” as he had self-identified in an earlier claim. I included this case as it discussed the credibility of each of his identities.

Self-identification is integral to understanding and respecting queer identities.<sup>49</sup> For this reason, when discussing decisions of the Authority and the Tribunal, this paper has adopted the identity labels and descriptive terms relating to an appellant’s queerness as used in the decision. However, it is acknowledged that queerness is often fluid and unable to be determinatively labelled, and that upon arrival to New Zealand some asylum seekers may not self-identify with English labels or terms. Further, “queer” and one’s “queerness” is used in this paper to describe “all identities and expressions outside of the heterosexual, monogamous and gender normative majority”.<sup>50</sup>

Prior to the passing of the Immigration Act in 2009, there were four appellate bodies hearing appeals on different immigration matters. Refugee status appeals were considered by the Authority (mentioned above). The Act replaced these with a single tribunal (the Immigration and Protection Tribunal) to improve efficiency and consider multiple grounds of appeal.<sup>51</sup> Legally there are no significant differences between the procedures of both bodies and so throughout this case study I have not sought to distinguish the credibility assessments of either.

In the absence of any legal method of assessing credibility, the proceeding sections of this paper detail and analyse the indicators of credibility as deduced from the case study under three overarching indicators: consistency of an appellant’s account, their plausibility and their demeanour.<sup>52</sup> They represent the tools employed by decision-makers in New Zealand, in fact explicit reference to the “plausibility” or “consistency” or “demeanour” of an appellant’s account is routine.<sup>53</sup> These also reflect the commonly used indicators in other

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<sup>49</sup> UNHCR Handbook, above n 1, at 169.

<sup>50</sup> OutLine “Glossary of terms” (29 June 2021) OutLine < [outline.org.nz/glossary/](http://outline.org.nz/glossary/)>.

<sup>51</sup> Immigration Bill, Commentary, as reported from the Transport and Industrial Relations Committee 132-2 at 23.

<sup>52</sup> UN High Commissioner for Refugees *Beyond Proof: Credibility Assessment in EU Asylum Systems* (May 2013) at 29.

<sup>53</sup> See for example *Refugee Appeal No 76414*, above n 6, at [68] where the Authority remarked: “Considered in the round, the Authority finds this appellant is so lacking in credibility, through inconsistencies, implausibilities and mobility in his evidence, that it is simply not possible to reach

jurisdictions, as identified by international review of refugee determination,<sup>54</sup> and scholarship,<sup>55</sup> including by overseas decision-makers themselves.<sup>56</sup>

#### *IV Consistency as an indicator of credibility*

Immigration adjudicators assess the internal and external consistency of an appellant’s claim as an indication of their credibility.<sup>57</sup> For one’s claim to be internally consistent, they may be judged on their ability to recount statements throughout their claim consistently,<sup>58</sup> for example, the Tribunal may ask questions relating to details from their original statement of claim to verify their truthfulness.<sup>59</sup> Negative inferences are often drawn when appellants alter their identity narrative or omit to remember previously included details in their claim.<sup>60</sup> For one’s claim to be externally consistent, the decision-maker will assess the consistency of an appellant’s account with external evidence and facts-found.<sup>61</sup> Where such inconsistency arises, it typically indicates the implausibility of one’s account.<sup>62</sup> Almost two thirds of all decisions included in this case study explicitly mentioned the “consistency” or “inconsistency” of the appellant’s account.<sup>63</sup>

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sustainable conclusions on any part of his claim...”; and see for example *AE (Egypt)* NZIPT 800226 where the Tribunal remarked: “Having regard to the otherwise consistent and plausible information given by the appellant, as well as his demeanour, the Tribunal accepts these explanations.”

<sup>54</sup> UN High Commissioner for Refugees, above n 52, at 7–9 and 29.

<sup>55</sup> Millbank, above n 5, at 1–2.

<sup>56</sup> Macklin, above n 40, at 137–139.

<sup>57</sup> Allan Mackey, Martin Treadwell, Bridget Dingle and Bruce Burson for the International Association of Refugee Law Judges (IARLJ) *A Structured Approach to the Decision Making Process in Refugee and other International Protection Claims* (IARLJ, Haarlem, The Netherlands, 2017) at 12–14 [IARLJ]; and UN High Commissioner for Refugees, above n 52, at 29.

<sup>58</sup> Millbank, above n 5, at 11.

<sup>59</sup> IARLJ, above n 57, at 12–14; and UN High Commissioner for Refugees, above n 52, at 12.

<sup>60</sup> Rehaag, above n 42, at 40.

<sup>61</sup> IARLJ, above n 57, at 12.

<sup>62</sup> At 15.

<sup>63</sup> See appendix II.

While assessing consistency can sometimes indicate fabrication, it is important to acknowledge that in the case of queer refugee appellants there are significant considerations that must inform the value of any inconsistencies.<sup>64</sup>

One consideration is that memory is a complex mechanism enabling us to recall past events, which can be diminished for a range of factors.<sup>65</sup> Questions about past events are often pertinent to the claims of sexual minority appellants as decision-makers are concerned with the development and realisation of one’s queer identity throughout their life.<sup>66</sup> However, many queer refugee appellants bear past trauma, discrimination and hatred associated with their queerness which may contribute to their capacity in presenting a claim.<sup>67</sup> Distress and trauma can impact the ability of memory to be accurate and when appellants are asked to discuss past experiences which may trigger such feelings, it is likely for their recollection to be restricted.<sup>68</sup> Further, dissociation as a result of triggering discussion can occur, sometimes leading appellants to be wholly unable to recall past experiences at all.<sup>69</sup>

It must also be considered that memory declines over time.<sup>70</sup> Appellants vary in age, from 18 years old to elderly.<sup>71</sup> When an appellant is asked to discuss the details of events that occurred a long time ago— in the case of queer appellants, often events that occurred when the appellant was a child— the recollection of facts consistently must be treated with delicacy and sympathy.<sup>72</sup>

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<sup>64</sup> Millbank, above n 5, at 12.

<sup>65</sup> Eyster, above n 38, at 34.

<sup>66</sup> See for example the UNHCR Handbook, above n 1, at 182.

<sup>67</sup> At 168.

<sup>68</sup> Millbank, above n 5, at 13; and Rehaag, above n 42, at 42.

<sup>69</sup> Berg and Millbank, above n 35, at 201.

<sup>70</sup> Millbank, above n 5, at 12.

<sup>71</sup> See *FY (Sri Lanka)* [2020] NZIPT 801610 where the claimant was in her late 60s.

<sup>72</sup> See Jason Ward “‘Prove it’ Working with LGBTQ+ Asylum Seekers who Must Prove their Sexuality to Stay in the UK” (2018) 39 *Dramatherapy* 141 at 144.

Lastly, there are multiple factors that may affect an individual’s willingness to share their identity with public officials.<sup>73</sup> Despite this, adjudicators can come to expect full and transparent compliance by appellants throughout their appeal, including a consistent claim from day one.<sup>74</sup> Due to the environment queer asylum seekers have fled, it is common for many to bear shame associated with their queerness. Familial and/or parental rejection, traumatic experiences with public officials and cultural and/or religious rejection can contribute to feelings of shame or embarrassment that can lead appellants to be reluctant to openly discuss their queerness. After fleeing their origin country for no trivial reason, asylum seekers will face the confronting juxtaposition of entering a culturally disparate country.<sup>75</sup> As appellants must establish their case, they are expected to speak openly about their queerness without guarantee that they will not be ultimately disbelieved.<sup>76</sup> The prospect of reliving feelings of shame and rejection by immediately coming out to a stranger who is a public official in a foreign country causes many queer asylum seekers to refrain from presenting their queerness as a ground in their refugee claim.<sup>77</sup> Further, appellants can perceive reactions by interpreters or adjudicators, including verbal and body language use, as judgmental and negative. This can lead appellants to feel reserved in their disclosure of personal details.<sup>78</sup> Interpreters, especially, often come from the same cultural or linguistic community as the appellant and as a result appellants may fear that personal details could be communicated to the wider cultural community.<sup>79</sup>

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<sup>73</sup> See Thomas Spijkerboer “Normativity and credibility of sexual orientation in asylum decision making” in T Spijkerboer (ed) *Fleeing Homophobia* (Routledge, Oxford, 2013) 154 at 162.

<sup>74</sup> Berg and Millbank, above n 35, at 196.

<sup>75</sup> Edward Alessi, Sarilee Kahn, Hanna Kim, Christina Olivieri and Leah Woolner “Promoting the wellbeing of lesbian, gay, bisexual and transgender forced migrants in Canada: providers' perspectives” (2017) 19 *Culture, health & sexuality* 1165 at 1166.

<sup>76</sup> Nicole LaViolette “Sexual Minorities, Migration, and the Remaining Boundaries of Canadian Immigration and Refugee Laws” in D Douglas, A Go and S Pashang (eds) *Unsettled Settlers: Barriers to Integration* (De Sitter, Toronto, 2012) 29 at 38–39.

<sup>77</sup> At 39; Ward, above n 72, at 146; and Alessi and others, above n 75, at 1166.

<sup>78</sup> LaViolette, above n 76, at 38.

<sup>79</sup> At 38.

The UNHCR Handbook acknowledges the unwillingness of claimants to come out at first instance and provides appropriate advice to immigration adjudicators:<sup>80</sup>

Discrimination, hatred and violence in all its forms can impact detrimentally on the applicant’s capacity to present a claim. Some may be deeply affected by feelings of shame, internalized homophobia and trauma, and their capacity to present their case may be greatly diminished as a consequence...Adverse judgements should not generally be drawn from someone not having declared their sexual orientation or gender identity at the screening phase or in the early stages of the interview.

*A Unwillingness to come out to public officials*

There is an interesting contrast between the approaches in the earlier years of the Authority and the later years of the Tribunal with regards to appellants who were not forthcoming with their queerness at the beginning of their claim. In the earlier decisions, such as *Re GJ*, *Refugee Appeal No 74665* and *Refugee Appeal No 74946*, negative inferences were very rarely drawn from appellants who did not disclose their queerness from the initial stages of their claim.<sup>81</sup> The Authority seemingly approached such appellants with empathy and expressed grave understanding of the reasons why one would not come out immediately at the submission of their claim. This can be starkly contrasted with the approach of the Tribunal in recent years, such as in *AE (Egypt)* and *FY (Sri Lanka)*, where appellants who had not disclosed their queerness until a later point in their claim were judged with significant scepticism and often found to be not credible.<sup>82</sup> This is an expectation that “authentic” queer appellants will come out at first instance to immigration officials, despite personal considerations which may impact their readiness to do so.

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<sup>80</sup> UNHCR Handbook, above n 1, at 168.

<sup>81</sup> *Re GJ*, above n 2; *Refugee Appeal No 74665* NZRSAA 228, 7 July 2004; and *Refugee Appeal No 74946* NZRSAA 293, 8 September 2004.

<sup>82</sup> *AE (Egypt)*, above n 53; and *FY (Sri Lanka)*, above n 71.



In the case of *Re GJ*, the appellant was a 29 year-old man from Iran who claimed to be in fear of persecution because he self-identified as homosexual.<sup>83</sup> Upon arriving to New Zealand in 1992, GJ initially submitted his refugee status claim on a different ground (desertion of military service). He did not raise his sexual orientation until the hearing of his appeal by the Authority.<sup>84</sup> He admitted to the Authority that his initial claim contained information that was false because he had acted on the advice of a misinformed friend about the refugee determination process.<sup>85</sup> The Authority remarked that his sexual orientation was a “genuine” limb of his case and it understood the “sensitive reasons” he had provided for not disclosing it until his appeal.<sup>86</sup>

In 2004, in the decision of *Refugee Appeal No 74665*, the Authority considered the appeal of a 25 year-old man from the Islamic Republic of Iran who self-identified as homosexual.<sup>87</sup> His initial claim for refugee status was made on the basis of his involvement in a fatal motor-vehicle accident.<sup>88</sup> However, two days before his appeal hearing he notified the Authority that he wished to add a new ground to his claim, being his sexual orientation.<sup>89</sup> At the hearing he revealed the accident was a fabricated lie, due to his lack of understanding of the asylum seeking process and embarrassment talking about “sexual matters”, especially where both his assigned refugee and protection officer and interpreter were women. He then detailed what can be described as his coming-out story; recalling his realisation of his sexuality and emotional distress he was subject to because of that.<sup>90</sup> The Authority considered his amended claim, apparently sympathetically, and wrote:<sup>91</sup>

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<sup>83</sup> *Re GJ*, above n 2, at 4 and 11. Note: he also claimed to be in fear of persecution due to his clandestine activities in support of the banned Tudeh Party.

<sup>84</sup> At 14.

<sup>85</sup> At 20.

<sup>86</sup> At 14 and 21.

<sup>87</sup> *Refugee Appeal No 74665*, above n 81.

<sup>88</sup> At [6]–[10].

<sup>89</sup> At [2].

<sup>90</sup> At [11]–[17].

<sup>91</sup> At [22].

Ordinarily, a refugee claimant who, two days prior to the appeal hearing, advances an entirely new claim and who during the hearing acknowledges the falsity of the original claim, faces a substantial credibility hurdle. However, having seen and heard the appellant we are satisfied that the motor vehicle accident story was a pretext to mask that which he believed he could not reveal, namely his sexual orientation...His misguided persistence with the original false claim has not deflected a finding that he is an otherwise credible witness.

Later in 2004 the Authority considered the appeal of a 37 year-old woman from Chile.<sup>92</sup> In 1998 she fled to Australia and sought refugee status on fabricated political grounds due to fear that her true reason for fleeing (her identity as a lesbian) would be disclosed to her family. Upon being denied refugee status there, she travelled to New Zealand in 2002 and claimed refugee status on the basis that she was a lesbian and feared persecution in Chile.<sup>93</sup> The Authority considered her inconsistent accounts and nonetheless found her to be credible, stating:<sup>94</sup>

...such initial non-disclosure is not infrequent in sexual orientation claims; see for example [*Re GJ*]. Such non-disclosure is not necessarily inconsistent with a genuinely-held fear of being persecuted.

While her appeal was ultimately denied as she could not prove a well-founded fear of being persecuted, this sympathetic approach of the Authority here represents a curious contrast to the approach in later years.

In the case of *AE (Egypt)* in 2012, AE, who was in his 30s and from Egypt, claimed refugee status on the basis of his involvement in a political party which exposed him to serious harm during the political context at the time.<sup>95</sup> After being made aware by the Refugee Status Branch about doubts regarding his claim, he raised the ground of his sexual

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<sup>92</sup> *Refugee Appeal No 74946*, above n 81, at 1.

<sup>93</sup> At 2.

<sup>94</sup> At 6.

<sup>95</sup> *AE (Egypt)*, above n 53.

orientation, self-identifying as homosexual. When asked by the Tribunal why he did not raise it immediately upon claiming refugee status, he explained that his distrust of the police and judicial system in Egypt had produced a similar view of the New Zealand authorities. Further, due to his cultural background he was not comfortable with discussing his sexuality.<sup>96</sup> The Tribunal drew a negative inference from this late disclosure, however they explained that it was not so doubtful as to be incomprehensible:<sup>97</sup>

The appellant’s failure to disclose his sexuality at an early stage leaves the Tribunal with some doubt about this aspect of his claim. However, his explanation that his reticence is grounded in the taboos surrounding gay life in Egypt is not implausible.

More recently, an appellant who did not come out at first instance was found not credible by the Tribunal in 2017. In the case of *FY (Sri Lanka)*, FY came to New Zealand from Sri Lanka aged 61.<sup>98</sup> She self-identified as bisexual. She had realised her attraction to women as well as men when she was 25 years-old but refrained from acting on it out of fear for her life being disrupted. However, eventually in 2012 she began a friendship with a woman, DD, which developed into a romance. They often met in secret to spend time together, but one day were unfortunately spotted holding hands in a garden by locals. FY’s home quickly became the target of attacks, and she was verbally harassed upon leaving. Eventually FY felt she could not leave her home. FY relocated in 2017 to New Zealand with her boyfriend (who was a New Zealand citizen) and claimed refugee status.

While being interviewed by the refugee and protection officer at her initial claim, FY discussed her relationship with DD, but described it as merely a friendship.<sup>99</sup> The officer asked if they shared sexual encounters, but FY denied this. However, upon receiving her post-interview report which indicated that the officer was concerned about her claim, FY

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<sup>96</sup> At [29].

<sup>97</sup> At [30].

<sup>98</sup> *FY (Sri Lanka)*, above n 71.

<sup>99</sup> At [39]–[41].

submitted a letter revealing the true nature of her relationship with DD, including detailed accounts of their romantic and intimate experiences and harassment they endured.<sup>100</sup>

The Tribunal found her inconsistent account doubtful and asked FY why she had not disclosed the true nature of her relationship with DD in the initial stages of her claim. FY explained that she was concerned about a Sinhalese interpreter present who had “spoken and looked at her in a judgmental way which made her lose confidence”.<sup>101</sup> When the Tribunal asked her why she had not conveyed this concern to her lawyer she explained that she was nervous her sexuality would be disclosed to her family in Sri Lanka.<sup>102</sup>

FY’s account was found to be not credible on the basis of her late disclosure of her sexuality. The Tribunal did not accept that she was not informed of the limits of confidentiality and so should have been transparent throughout the entire process. They explained:<sup>103</sup>

...[FY] is an educated woman in her early 60s. Her employment history in Sri Lanka indicates that she has worked as an office clerk and for a non-government organisation where she was required to interview people...the appellant is a capable woman and she has not lived a sheltered life.

They concluded that “the inconsistencies and the evolving nature in the appellant’s evidence regarding her romantic relationship with DD are such that the Tribunal can have no confidence” that facts contained in her submissions took place.<sup>104</sup>

The approach of the Authority in the early decisions appears to represent a genuine effort to consider all the circumstances surrounding inconsistencies in an individuals’ appeal. The Authority acknowledged that this type of inconsistency was not uncommon, nor was it

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<sup>100</sup> At [40].

<sup>101</sup> At [41].

<sup>102</sup> At [42].

<sup>103</sup> At [44].

<sup>104</sup> At [47].

suggestive of falsity of one’s claim. However, the approach of the Tribunal throughout the years and eventually the decision of *FY (Sri Lanka)* in 2020 illustrates an expectation of full and transparent compliance with immigration officials from the initial stages of a claim.<sup>105</sup> In that case, FY’s submissions as to why she was reluctant in doing so were boldly disregarded, without any apparent attempt to understand her circumstances. This expectation disregards any of the considerations that decision-makers should have when judging the unwillingness of a queer asylum seeker to come out immediately, and further, directly defies the advice of the UNHCR contained in their handbook.

### *B Coherent recollection of facts*

Consistent and coherent recollection of general facts by appellants is understood to be indicative of credible evidence.<sup>106</sup> Decision-makers expect that an appellant’s account and personal narrative will be coherently communicated, subject to personal factors that may inhibit one’s ability to do so. As discussed above, factors such as trauma, distress and age can impact memory-recollection and can impact the willingness of appellants to share evidence with decision-makers.<sup>107</sup> Throughout decisions of the Authority and the Tribunal, the ability of an appellant to recall facts coherently played a significant role in the assessment of their credibility, as illustrated in *Refugee Appeal No 74811-812*, *Refugee Appeal No 76484* and *DT (India)*.<sup>108</sup> Both bodies routinely expressed acknowledgment of the factors that may lead to incoherent recollection of facts and evidence. They would often extend the benefit of the doubt to appellants who were incoherent in their recollection of evidence, but that had personal histories which may inform or justify such incoherence.<sup>109</sup>

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<sup>105</sup> *FY (Sri Lanka)*, above n 71.

<sup>106</sup> IARLJ, above n 57, at 15.

<sup>107</sup> At 14 of this paper.

<sup>108</sup> *Refugee Appeal No 74811-812* NZRSAA 85, 17 March 2004; *Refugee Appeal No 76484*, above n 9; and *DT (India)* [2017] NZIPT 801159.

<sup>109</sup> See for example *DT (India)*, above n 108.

In the 2004 decision *Refugee Appeal No 74811-812*, the Authority heard the appeals of a same-sex couple, referred to as A and B, from Bangladesh.<sup>110</sup> They both self-identified as homosexual. The Authority considered each of their accounts of their queerness to be not credible, strongly informed by their incoherent recollection of facts.<sup>111</sup> For example, in his written statement, B described a pivotal moment in his realisation of his attraction to men being prompted by feeling compelled to pick up a magazine depicting two men kissing.<sup>112</sup> However, when asked about the magazine at his appeal hearing he described the magazine as having a blank cover, which in Bangladesh indicated it was a pornographic publication, and that he had picked it up as he was curious about what material it contained. Further, in his written submission he noted that he had bought the magazine, but at the hearing he explained that he had put it back on the shelf. When asked by the Authority why these two accounts were contradictory, he explained that he did not buy the magazine but had thrown it down a manhole. Despite the magazine event occurring roughly 14 years prior to the hearing, the Authority considered that passage of time still could not explain the major incoherence of B’s recollection, and so rejected that evidence entirely.<sup>113</sup>

In the case of *Refugee Appeal No 76484*, the Authority heard the appeal of a man in his late-30s from Pakistan, and a national of South Africa, who self-identified as homosexual.<sup>114</sup> Before the Authority, he recounted his up-bringing including his romantic relationships with men, and described experiences he had endured due to his targeting by an extremist group in South Africa.<sup>115</sup> The man was illiterate, and the Authority noted that he did not have the benefit of an interpreter upon his initial claim of refugee status. As for the matter of his credibility, the Authority considered that the multiple inconsistencies in

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<sup>110</sup> *Refugee Appeal No 74811-812*, above n 108. Their appeal was heard together. However, I recount this decision with caution as the approach of the Authority in this case did appear to be problematic. For example, the claimants were in a de-facto relationship and had their land-lady provide evidence attesting to their living together in a one-bedroom flat as a couple.

<sup>111</sup> At 5.

<sup>112</sup> At 10.

<sup>113</sup> At 11.

<sup>114</sup> *Refugee Appeal No 76484*, above n 9.

<sup>115</sup> At [4]–[30].

his claim and the mobility of his evidence suggested it was “untrue”.<sup>116</sup> For example, much of his account included reference to a previous relationship with a man, AA, in Pakistan. The Authority noted inconsistencies between his account provided in his written statement (scribed by his lawyer) and his oral evidence at the hearing. His written statement recounted that after a year together, AA told him that their relationship was “wrong” and that he no longer wished to have a sexual relationship him.<sup>117</sup> However, at his interview with the Refugee Status Branch, the appellant said he was the one who ended the relationship. He reiterated this before the Authority. After being questioned about the discrepancy, he explained he could not remember what his written statement contained. Another discrepancy regarded AA’s sexual history, which the appellant described markedly differently before the Authority than in his written statement. The Authority considered his illiteracy and the fact that he and his lawyer had drafted the statement while the appellant was detained in prison, but found this environment could not have accounted for such a discrepancy.<sup>118</sup> It explained that this was because his English, while his second language, was adequate, and these discrepancies compounded its apparent falsity.<sup>119</sup>

Then in 2017, in the case of *DT (India)*, the Tribunal heard the appeal of DT who was 22 years-old and self-identified as homosexual.<sup>120</sup> Before the Tribunal, DT recounted his life in an Indian city and discussed his coming-out story whereby he realised his attraction to men while studying in tertiary education.<sup>121</sup> On one occasion in 2012 when he was staying with members of his extended family, he was awoken by his cousin who informed him that people were coming to the house to seize him. DT suspected his family had realised he was gay and were intending to kill him. Between his interviews with the Refugee Status Branch and with the Tribunal, DT incoherently recalled the time at which he was awoken by this cousin. His evidence was mobile, firstly recalling it occurred at 4–5am, then 3–4am, and finally 1–2am. While the Tribunal considered that this suggested a “strong flavour of

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<sup>116</sup> At [59].

<sup>117</sup> At [55].

<sup>118</sup> At [55]–[58].

<sup>119</sup> At [59].

<sup>120</sup> *DT (India)*, above n 108.

<sup>121</sup> At [3]–[31].

implausibility”, they extended the benefit of the doubt to him as he had been “otherwise frank and candid” with them.<sup>122</sup>

The above cases illustrate that coherency (or lack of coherency) in the recollection of facts by appellants is taken as an indicator of the credibility of their account, by the Authority and the Tribunal. Notwithstanding this, the Authority and the Tribunal have demonstrated an acknowledgment of the personal factors that may impact the ultimate coherency of one’s recollection of facts, and their willingness to nonetheless find the appellants account credible. It should be noted however that these cases and others must be considered in light of all aspects of the decision made. For example, in the first and second case recalled, there was evidence of the Authority directing questions of a sexual nature towards the appellants. In both cases the Authority did not acknowledge how such questions may affect the emotional capacity of refugee appellants to discuss such matters with public officials.

#### *V Demeanour as an indicator of credibility*

Relying on the demeanour of appellants is seen as a substantial tool for assessing credibility.<sup>123</sup> Demeanour can describe the behaviour or physical appearance of the appellant at their hearing from which inferences about their character may be drawn.<sup>124</sup> In the decisions of the Authority and the Tribunal, these elements are considered, particularly the conformity of an appellant’s appearance to queer stereotypes and behaviour at their hearing.

Many decision-makers, including the current deputy chair of the Tribunal, are cognisant of the difficulties arising out of inferences made about an appellant’s demeanour.<sup>125</sup> As they have acknowledged, demeanour and presentation of an appellant must be understood in the context of their ethnicity, gender and age. Cultural differences in behaviour, and mental

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<sup>122</sup> At [40].

<sup>123</sup> UN High Commissioner for Refugees, above n 52, at 29.

<sup>124</sup> Millbank, above n 5, at 6.

<sup>125</sup> IARLJ, above n 57, at 22.



health factors, can impact demeanour.<sup>126</sup> Therefore, “extreme caution” must be exercised when assessing the credibility of an appellant taking into account their demeanour.<sup>127</sup>

#### *A Physical appearance of sexual minority appellants*

As understood broadly at an international law level, human sexuality is a physical, romantic and/or emotional attraction to others.<sup>128</sup> It therefore manifests as an invisible characteristic; it is not something you can see externally. While some sexual minority individuals may wish to alter their appearance in a way contravening typical gender displays, some will not. Therefore, it is important that adjudicators do not assess the credibility of a sexual minority individual’s claim to be queer based on appearance, particularly the presence or absence of physical stereotypes an appellant may display.<sup>129</sup>

Decisions in earlier years demonstrate that the Authority did in fact judge queer appellants on their outward appearance. In 2000 they had “no doubt” as to an appellant’s sexual orientation, finding him “demonstrably homosexual”.<sup>130</sup> In 2004 they found one appellant to be “immediately identifiable” as gay.<sup>131</sup> In both cases the Authority did not shed light on exactly what it was about these appellants that made it clear they were queer. Also in 2004, they appeared to draw an inference from an appellant negating his claim to be homosexual, explaining: “While he claims to be distinctively gay, the Authority could not discern this from his physical presentation at the hearing.”<sup>132</sup> The worrying implication from this statement is that the decision-maker considered it would be possible to discern the sexual orientation of an individual from their physical appearance. This utterly false assumption represents an alarming misunderstanding of queer identities.

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<sup>126</sup> Millbank, above n 5, at 32.

<sup>127</sup> IARLJ, above n 57, at 22.

<sup>128</sup> UNHCR Handbook, above n 1, at 168.

<sup>129</sup> At 180; and UN High Commissioner for Refugees, above n 52, at 35.

<sup>130</sup> *Refugee Appeal No 71623* NZRSAA 112, 13 April 2000.

<sup>131</sup> *Refugee Appeal No 74337* NZRSAA 81, 16 March 2004 at [38].

<sup>132</sup> *Refugee Appeal No 76484*, above n 9, at [58].

While decisions of the Authority in these earlier years did not contain any appellants who were explicitly denied refugee status due to their inability to conform to external stereotypes, an inference can be drawn. The explicit acknowledgement of some sexual minority individuals who did appear in a way which apparently conformed to stereotypical queer appearances demonstrates the credit afforded to appearance in credibility assessment. However, sexual minority individuals should have their queerness assessed by inquiring into their emotions, *in spite of* their appearance. The precedent of decisions such as those referenced illustrates the weight given to appearance in claims involving queer appellants, so it can be inferred that appearance may have weighed negatively on other appellants’ claims.

By 2005, decisions of the Authority contained acknowledgement of the unreliability and unfairness of using physical appearance as an indicator of queerness.<sup>133</sup> In one case where counsel for an appellant pointed out the “feminine appearance and mannerisms” of a male appellant, the Authority did inappropriately comment on the appellant’s physical appearance but proceeded to reject any reliance on such as an indicator of his credibility. They commented:<sup>134</sup>

Appearances are subjective and can be manipulated. In addition, appearance is a most unreliable guide to an individual’s sexuality. We neither agree with counsel’s description of the appellant, nor derive assistance from his appearance and mannerisms.

In the years following that decision, the Tribunal has not explicitly commented on how the appearance of appellants affects the credibility of their queerness— at least not in a manner similar to the early 2000s. However, there are some cases featuring peculiar comments about the appearance of an appellant. Whether these were relied on as indicators of credibility are not clear, however, mention of appearance is worrying due to the possibility that it contributed to the decision-maker’s credibility assessment.

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<sup>133</sup> *Refugee Appeal No 75466 NZRSAA 117*, 19 April 2005.

<sup>134</sup> At [77].

In 2010 an appellant produced photographs to the Authority in support of their appeal.<sup>135</sup> They provided images taken with a same-sex partner, AA, and images with a former partner of the opposite sex, CC. The Authority compared the images “allegedly taken with AA” to the images with CC which they described as reflective of a “warm or intimate relationship”.<sup>136</sup> An inference that can be drawn is that the images with AA were not similarly reflective and led to a negative indication about the character of the appellant’s and AA’s relationship. Ultimately the Authority considered the evidence in relation to AA could not be relied upon, and the appellant was found not credible.

In the 2015 decision of *AY (South Africa)*, AY was a 48 year-old woman from South Africa, Zambia and Lesotho, who self-identified as bisexual.<sup>137</sup> At her hearing she discussed her upbringing and coming out story. As evidence supporting her appeal, she provided the Tribunal with two photographs of her and a woman named BB who she discussed having a previous romantic relationship with. One photograph showed them hugging, the other showed them kissing. The Tribunal remarked that the photos were “*aptly* described by counsel as ‘awkward’” and gave them limited weight in assessing her credibility.<sup>138</sup> This case does not signal overt reliance on the appearance of the appellant for their credibility, but it does illustrate that appearance played a role.

Decisions in earlier years indicate the willingness of the Authority to consider the appearance of a sexual minority appellant when assessing the credibility of their claim to be queer. While these decisions reflected an appellant’s appearance affirming their claimed queerness, it does not necessarily mean that appearance was not being considered for positive *and negative* assessments of credibility.<sup>139</sup> After admission in 2005 of the unreliability of appearance in understanding the credibility of a sexual minority appellant’s

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<sup>135</sup> *Refugee Appeal No 76414*, above n 6.

<sup>136</sup> At [82].

<sup>137</sup> *AY (South Africa)*, above n 7.

<sup>138</sup> At [68] (emphasis added).

<sup>139</sup> *Millbank*, above n 5, at 6.

queerness, the later years lacked explicit mention of appearance as an indicator of credibility. This suggests that the Tribunal’s understanding of identity as an invisible characteristic deepened. However, as the cases discussed demonstrate, appearance is not being completely disregarded and may be worryingly playing a role in the assessment of appellants’ credibility.

### *B Behaviour at the hearing*

The general assumption is that if somebody is lying, their demeanour will indicate so. This is notwithstanding the fact that many studies throughout history have revealed demeanour to be an unreliable indicator of truthfulness.<sup>140</sup> As Audrey Macklin, former member of the Immigration and Refugee Board of Canada, explains, the examination of demeanour presupposes that truth-telling “authentic” appellants look the same.<sup>141</sup> However, because behaviour is an external expression of internal thoughts and feelings, it can be misconstrued for many reasons. The International Association of Refugee Law Judges advises decision-makers to exercise “extreme caution” when drawing inferences from an appellant’s demeanour.<sup>142</sup> For example, avoiding eye contact may be considered respectful by appellants from certain cultures, or may reflect a sense of *whakamā* due to the topic matter being discussed. However, it could be misconstrued as one being dismissive of their case. Inferences from behaviours and demeanour at the hearing are extremely vulnerable to error, especially where the decision-maker does not have a sufficient understanding of an appellant’s cultural and/or religious background.

The behaviour of an appellant at their hearing is often deliberately described in the decisions of the Authority and the Tribunal. Perceptions about appellants’ authenticity in delivering their accounts is contributing to their assessed credibility. Notably, indications about their credibility have been both positive and negative, with some appellants’

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<sup>140</sup> See Millbank, above n 5, at 42.

<sup>141</sup> Macklin, above n 40, at 137.

<sup>142</sup> IARLJ, above n 57.

behaviour apparently implying falsity and some implying honest truth-telling.<sup>143</sup> Throughout the entire time-period of decisions, such inferences were drawn in a similar manner.

Positive inferences about credibility drawn from the demeanour of appellants typically reflected behaviours widely assumed to be objectively honest, such as calmness, spontaneity and clear articulation. The Authority, in 1997, considered that the account from a self-identified lesbian woman from Malaysia was “honest and credible” as she spoke “clearly” and provided details in a “spontaneous manner”.<sup>144</sup> She appeared as a “thoughtful, intelligent woman who had put a considerable amount of effort towards preparing her own case before instructing counsel”.<sup>145</sup> In 1999 the Authority heard the appeal of a man from Iran who self-identified as homosexual.<sup>146</sup> It explained that his “demeanour at the hearing was appropriate with the account given”. He seemed to “resist opportunities to embellish his account”. Overall, without any specific comments on his behaviour the Authority explained that when he was “giving his evidence he appeared to be recalling genuine experiences he had had, in a direct and detailed manner”.<sup>147</sup> More recently in 2019, AQ from Cameroon presented before the Tribunal as “an intelligent, university-educated woman who delivered her evidence in an articulate and coherent manner”.<sup>148</sup> With these cases being noted, there were also two cases in which the demeanour of the appellant was considered “appropriate” to the subject-matter and with the account given, without any explanation.<sup>149</sup>

On the other hand, there have been negative inferences drawn about the credibility of appellants from their demeanour. In 2001, when hearing the appeal of a self-identified

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<sup>143</sup> Contrast for example *Refugee Appeal No 71185* NZRSAA 67, 31 March 1999; and *Refugee Appeal No 71930* NZRSAA 128, 22 March 2001.

<sup>144</sup> *Refugee Appeal No 2151* NZRSAA 418, 13 November 1997.

<sup>145</sup> *Refugee Appeal No 2151*, above n 144.

<sup>146</sup> *Refugee Appeal No 71185*, above n 143.

<sup>147</sup> *Refugee Appeal No 71185*, above n 143.

<sup>148</sup> *AQ (Cameroon)* [2019] NZIPT 801410 at [27].

<sup>149</sup> *Refugee Appeal No 71185*, above n 143; and *Refugee Appeal No 75419* NZRSAA 72, 25 February 2005.

homosexual man from Shanghai, the Authority was unimpressed with his behaviour where:<sup>150</sup>

...[he] frequently [took] long pauses, both before [he] replied and in the middle of his reply. He applied stalling tactics in that he would often ask for a question to be repeated or some minor clarification before embarking on an answer. The appellant gave the impression of dissembling and being evasive in his answers.

Further negative inferences were drawn from the behaviours of appellants in contexts explicitly addressing the topic of their past sexual experiences. These cases give rise to further specific considerations by the decision-maker as they are likely to impact the appellant’s demeanour significantly.

One significant element of the account of many sexual minority appellants is evidence reflecting romantic and sexual experiences of the appellant. Sometimes, this information is volunteered through their claim, sometimes it is elicited by the decision-maker when asking questions. However, as discussed throughout this paper, queer sexual and romantic orientations are internal characteristics reflecting one’s personal identity.<sup>151</sup> For sexual minority individuals, coming to the realisation that one is queer does not require experience of romantic or sexual experiences. For this reason, the UNHCR Handbook advises that assessment of credibility must be undertaken in a sensitive way, where questions should focus on the appellants personal perceptions, feelings and experiences, rather than sexual practice or history.<sup>152</sup> While inevitably, romantic and sexual history will arise in many cases involving sexual minority appellants, detailed questions about this should be avoided.<sup>153</sup> Not only are questions of a sexual-nature ineffective in proving one’s queerness, they can cause appellants to feel uncomfortable or offended and discourage their willingness to discuss evidence with the Tribunal openly.<sup>154</sup> This can be for many reasons,

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<sup>150</sup> *Refugee Appeal No 71930*, above n 143, at [26].

<sup>151</sup> See also UNHCR Handbook, above n 1, at 183.

<sup>152</sup> At 181.

<sup>153</sup> At 183.

<sup>154</sup> See Spijkerboer, above n 73, at 160–162.

including cultural beliefs, religious beliefs, familial pressure, inner turmoil and confusion.<sup>155</sup> Despite these considerations, scholars identify that it is common for immigration adjudicators to ask questions about an appellant’s sexual history, often expecting compliant and articulate answers to demonstrate their queerness.<sup>156</sup> Passages from decisions of the Authority and the Tribunal reveal that such questions *are in fact* being asked of appellants during oral hearings. These decisions indicate a propensity by the Authority and Tribunal to sexualise the identity narrative of appellants. This can evoke behaviours which may be viewed or misconstrued as “untruthful” demeanour, it can see appellants unwilling to participate in the process and answer questions, and overall indicates the Authority’s and the Tribunal’s self-reflection as a body capable of finding “authentic” queer appellants based on their preconceived notions of what it means to be queer which are not appropriate.<sup>157</sup>

In the case of *Refugee Appeal No 74151* in 2005, an Iranian appellant gave evidence about a group of friends he had attended parties with for over a decade.<sup>158</sup> He explained that the group bonded over their experiences being members of an oppressed minority (all self-identifying as homosexual). Together they would behave freely and share romantic and sexual encounters. The decision in that case revealed that the Authority asked the appellant to “explain what sexual activity, if any, took place at the parties”.<sup>159</sup> When the appellant did not initially provide an answer, the Authority “prompted that one such activity might have been oral sex” to which the appellant “became visibly shaken at the thought”.<sup>160</sup> While the Authority acknowledged the challenges for individuals discussing such a private matter with officials, they held that it could not explain his response which was “far from bashfulness” and “inarticulate”.<sup>161</sup> They inferred that his demeanour indicated “distaste at

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<sup>155</sup> Berg and Millbank, above n 35, at 203.

<sup>156</sup> At 203.

<sup>157</sup> See Millbank, above n 5, at 17.

<sup>158</sup> *Refugee Appeal No 74151* NZRSAA 350, 2 December 2005.

<sup>159</sup> At 6.

<sup>160</sup> At 7.

<sup>161</sup> At 7.

the prospect of describing that which was foreign to him”.<sup>162</sup> Jenni Millbank, a scholar who has previously undertaken research on refugee appeals in Australia and New Zealand, argued that in this decision the “degree of confidence expressed by the decision-maker in being able to clearly distinguish between such emotional states, in a complete stranger, is very troubling”.<sup>163</sup> Further, in 2005, an appellant who “gave oral evidence there were only three occasions when he had engaged in sexual relations other than in a bedroom” was asked questions regarding these occasions.<sup>164</sup>

Overall, both negative and positive inferences were drawn from the demeanour of appellants to indicate their credibility throughout the years studied. Often the “objective” behaviours expected by the Authority and Tribunal of “authentic” appellants involved spontaneity in answering questions and being polite and calm. This, argues Millbank, is “particularly troubling” when the nature of evidence and questions may evoke different behaviours, even from appellants who are telling their truth.<sup>165</sup> Indeed, as the UNHCR Handbook notes, cultural differences and trauma impact significantly on the behaviour of appellants.<sup>166</sup> Similarly, when forced to discuss typically private sexual matters, appellants can respond in a way reflective of their emotions which are informed by their cultural and religious beliefs. This is of course notwithstanding the fact that evidence regarding the sexual history of an appellant is not necessary to prove their queerness.

## *VI Plausibility as an indicator of credibility*

Decision-makers consider the plausibility of an appellant’s account when assessing their credibility. For example, decision-makers may compare the compatibility of one’s claim

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<sup>162</sup> At 7.

<sup>163</sup> Millbank, above n 5, at 11.

<sup>164</sup> *Refugee Appeal No 75466*, above n 133.

<sup>165</sup> See page 30 of this paper, regarding the propensity of the Authority and the Tribunal to sexualise the identity narrative, unwillingness of claimants to share personally with officials and discussions of trauma evoking reactive behaviours.

<sup>166</sup> UNHCR Handbook, above n 1, at 91.



with established knowledge and common sense.<sup>167</sup> The International Association of Refugee Law Judges endorses the use of plausibility as contributing to credibility assessment criteria which represents “best practice” and ensures “high quality decisions”.<sup>168</sup> However, it is endorsed conditionally, and rightfully so. Decision-makers must be aware of the risks in importing their personal views of authenticity or truth, in order to remain objective and impartial.<sup>169</sup> Whether a fact is considered to be plausible or not, may:<sup>170</sup>

...potentially reflect the subjective view of the judge about human behaviour or perceptions about the country of origin, which is very often a place he or she has never lived in or experienced in any manner beyond the superficial.

In light of these considerations, the UNHCR Handbook advises decision-makers to acknowledge that “a fact is not implausible because it would not occur in an EU Member State or in the personal life of the decision-maker”.<sup>171</sup> It suggests that “a finding of implausibility must be based on reasonably drawn and objectively justifiable inferences”. However, as Millbank argues, it is difficult to understand how there could be a “plausible” account of someone’s queerness because there is no single way to be queer.<sup>172</sup>

In the Authority and the Tribunal, plausibility of an appellant’s account of their queerness is often considered when assessing the credibility of their claim. Almost a third of all decisions explicitly noted how “plausible” or “implausible” certain evidence was.<sup>173</sup> Some cases featured evidence which was described as “absurd”,<sup>174</sup> and “not capable of belief”<sup>175</sup>

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<sup>167</sup> Luker, above n 41, at 502.

<sup>168</sup> IARLJ, above n 57, at 12.

<sup>169</sup> See Eyster, above n 38, at 39.

<sup>170</sup> IARLJ, above n 57, at 16.

<sup>171</sup> UNHCR Handbook, above n 1, at 35. Note: “EU Member State” is used in this regard to generally refer to states party to relevant refugee conventions, including New Zealand.

<sup>172</sup> Millbank, above n 5, at 17.

<sup>173</sup> See appendix II.

<sup>174</sup> *Refugee Appeal No 75466*, above n 133.

<sup>175</sup> *Refugee Appeal No 75466*, above n 133.

and evidence which had an “air of unreality”.<sup>176</sup> As the decisions of the Authority and Tribunal reveal, decision-makers do have preconceptions about “authentic” queer appellants. Whether this is in the form of evidentiary expectations of such appellants (such as the corroboration by witnesses or consumption of queer media), or behavioural expectations (such as coming-out upon arrival in New Zealand, seeking queer people or frequenting queer social environments), the decision-makers are considering the plausibility of facts included in appellants’ accounts. This is occurring without regard for the biases they may hold as decision-makers in the unique cultural, religious and political context of New Zealand.<sup>177</sup>

#### *A Coming out upon arrival and seeking other queer people*

“Coming out” as a queer person to others is a personal choice. Sometimes, that choice can be taken away,<sup>178</sup> however, where this has not occurred, the decision to come out to friends, colleagues, family, community members and others is a decision that rests with the queer individual. There are many factors to be considered when determining how safe it is to come out, and indeed some factors may be so significant that queer individuals choose to refrain from doing so. For instance, where asylum seekers have grown up in environments fearing persecution, most will have spent much of their lives concealing their queerness for their personal safety.<sup>179</sup> Or, internalised feelings of shame may have caused some to have spent a long time in denial of their queer identity, and not sharing it with others. Further, despite the asylum offered by host countries, it usually represents a largely unfamiliar environment. Resettlement can be difficult for queer refugee claimants, and this often sees them relying on their cultural diaspora community for wellbeing support and solidarity.<sup>180</sup> Out of fear of disclosure to relatives or receiving negative responses from within that community, concealing their queer identity is common. Because of these valid reasons for

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<sup>176</sup> *GH (India)* [2019] NZIPT 801488.

<sup>177</sup> See Murray, above n 5, at 22; and see Alessi and others, above n 75, at 1174.

<sup>178</sup> For example, sometimes a confidant will “out” one to others, or sometimes one may be observed in a situation intimate with another.

<sup>179</sup> Berg and Millbank, above n 35, at 200.

<sup>180</sup> Alessi and others, above n 75, at 1166.

concealing one’s identity and not seeking other queer people, standards of expected behaviours by “authentic” queer appellants are inappropriate to enforce. Nevertheless, it is common for immigration officials to expect asylum seekers to come out upon arrival to their host country and seek other queer people.<sup>181</sup> This is illustrated by the decisions of *Refugee Appeal No 74151* and *GK (India)*.<sup>182</sup> Where an appellant has deliberately chosen to not come out upon arrival or pursue queer relationships, it can impact negatively on their apparent authenticity.

In 2005, in the case of *Refugee Appeal No 74151*, the Authority heard the appeal of a man in his 30s from Iran who self-identified as homosexual.<sup>183</sup> In 1981 he was detained and mistreated as a result of his being caught having relationships with men.<sup>184</sup> By 2000 he had endured years of harassment and felt no longer able to live authentically in Iran, so he came to New Zealand in search of a life free from persecution.<sup>185</sup> Upon arrival he went to live with his sister, BB, and her family who lived in New Zealand. He told BB about his queer identity, but her family did not know. After arriving in New Zealand and living with BB’s family, the appellant had not entered into any romantic relationships. In part, he explained, because he still felt he had a partner in DD, a man whom he had been in a relationship with prior to leaving Iran.<sup>186</sup>

The Authority found it “perplexing that he has not in fact pursued any aspect of life as a homosexual in the very country to which he came for safe haven”.<sup>187</sup> After asking the appellant why he had not done so, he explained he had no desire to because of his feelings towards DD. The Authority was also stunned at his decision to live with BB and her family,

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<sup>181</sup> At 1173.

<sup>182</sup> *Refugee Appeal No 74151*, above n 158; and *GK (India)* [2019] NZIPT 801429.

<sup>183</sup> *Refugee Appeal No 74151*, above n 158.

<sup>184</sup> At 2.

<sup>185</sup> At 3.

<sup>186</sup> At 4.

<sup>187</sup> At 9.

because most of them were “unaware of his homosexuality and [their] constant presence would make living an open homosexual life impossible”.<sup>188</sup>

In 2019, in the case of *GK (India)*, the Tribunal heard the appeal of a 22 year-old man, GK, who self-identified as homosexual.<sup>189</sup> GK discovered he was gay when he was 14, and moved from India to New Zealand aged 17 as an international student.<sup>190</sup> Not only did he do so to further his studies, he knew New Zealand was more accepting of homosexuality. Upon arrival to New Zealand, GK decided to flat with CC, a young Sikh man from his village in India.<sup>191</sup> While studying, GK worked at a hotel. There, he was introduced by a colleague to a man, AA, who was a New Zealand citizen. They began an intimate relationship and moved in together as partners. In order to remain in New Zealand, in 2017 GK wished to apply for a work visa on partnership grounds. However, AA recommended he tell his parents in India before applying.<sup>192</sup> So, GK called his father and told him about his relationship with AA, to which his father grew angry and upset about his being in a relationship with a man, and hung up. Over the following weeks GK could not make contact with any of his relatives and soon discovered that his father had informed them that he was gay. He further found out that his father had publicly denounced him in a Punjabi newspaper and threatened to kill him.<sup>193</sup> Not long after, GK and AA’s relationship deteriorated and GK entered into a short-term relationship with another man, FF. He eventually claimed refugee status with the Refugee Status Branch at the end of 2017 where his claim was declined. He subsequently appealed to the Tribunal.<sup>194</sup>

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<sup>188</sup> At 9.

<sup>189</sup> *GK (India)*, above n 182.

<sup>190</sup> At [9].

<sup>191</sup> At [10].

<sup>192</sup> At [12]–[16].

<sup>193</sup> At [17].

<sup>194</sup> At [20].

The Tribunal was dumbfounded at GK’s decision to live with CC upon arriving to New Zealand, especially in light of the fact that he had travelled to New Zealand because he knew it was more accepting of queer identities. The Tribunal commented:<sup>195</sup>

It is surprising that, given that purpose, he would choose to remain flatting with a young man from his village, from whom it was imperative that his sexuality remain a secret, for more than a year.

When GK was asked why he wished to remain living with CC, he explained that “[CC] would have reacted adversely and have informed [his] parents and the Sikh community”.<sup>196</sup> However, the Tribunal was unimpressed by his explanation and concluded that it was “surprising” that he did not take “any steps at all to find a life away from those who, he claims, would turn on him and betray him to his parents”.<sup>197</sup> Further, despite evidence of his previous short- and long-term relationships with men in New Zealand, the Tribunal could not come to accept that GK had sufficiently sought other queer people in New Zealand. It was frustrated by GK’s apparent making “no effort at all to engage with the gay community here or to explore his own sexuality further”.<sup>198</sup>

In both cases, the decisions of the appellants to conceal their identity, at least to their housemates, impacted significantly on their assessed credibility. The Authority and the Tribunal were not satisfied that these decisions were plausible in light of the appellant’s relocation to New Zealand. Comments were made in both cases about the appellants’ lack of pursuit of queer relationships, which is particularly striking given that both provided evidence of queer relationships in their personal accounts.

In light of the significant considerations by queer appellants to decide to come out and seek other queer people in their host country, these comments of the Authority and the Tribunal

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<sup>195</sup> At [29].

<sup>196</sup> At [29].

<sup>197</sup> At [30].

<sup>198</sup> At [29].

are worrying. While it is not my intention to comment on the accuracy of any decision made, it is difficult to accept that the credibility of both discussed appellants was adequately assessed, when both decisions lacked appropriate analysis of these considerations. Indeed, the choices of each appellant to live with a family member or a friend from the same village should not be perplexing as the decision-maker in each case described. It is understandable for an appellant to choose to live with someone they know and can find solidarity in when arriving in a country unknown to them. Further, the decision of the appellant in *Refugee Appeal 74151* to not pursue romantic relationships was explained by him but rejected by the Authority.<sup>199</sup>

### *B Corroboration by witnesses*

As made clear by the International Association of Refugee Law Judges, corroboration of an appellant’s account by witnesses is not a requirement for its credibility.<sup>200</sup> This is because producing corroborative evidence can be difficult for appellants and there are often very practical reasons for its absence.<sup>201</sup> In the cases of queer refugee appellants, it is common for the evidence of an appellant to be the only available evidence.<sup>202</sup> This is almost inevitable where there is fear of persecution at the hands of family members or their community.<sup>203</sup> Fear of coming out, whether in their country of origin or host country, may result in appellants concealing their queer identity.<sup>204</sup> Nevertheless, external consistency between the appellant’s account and other information and evidence, especially corroborated by a witness, is considered to support its plausibility and be a reliable indicator of credibility.<sup>205</sup>

Another form of evidence considered to be a reliable indicator of credibility is the corroboration by a sexual minority appellant’s same-sex partner. For most sexual minority

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<sup>199</sup> *Refugee Appeal No 74151*, above n 158.

<sup>200</sup> IARLJ, above n 57, at 20.

<sup>201</sup> *AQ (Cameroon)*, above n 148, at [150].

<sup>202</sup> Millbank, above n 5, at 399; and UNHCR Handbook, above n 1, at 183.

<sup>203</sup> UNHCR Handbook, above n 1, at 183.

<sup>204</sup> Berg and Millbank, above n 35, at 197; and LaViolette, above n 76, at 41.

<sup>205</sup> UN High Commissioner for Refugees, above n 7, at 32.

appellants, it is inevitable that same-sex relationships form part of their accounts of their queerness.<sup>206</sup> However, queerness relating to one’s sexual/romantic identity is an individual characteristic, albeit a characteristic which affects their relationships with others, but an identity first and foremost. It does not require evidence of relationships to be genuine.<sup>207</sup> For this reason, the UNHCR Handbook recommends that decision-makers must be cautious as to how they understand evidence of the sort, especially appellants who bring no evidence of such. It is not a legitimate concern that an appellant will not bring evidence of the sort to prove their claim.<sup>208</sup>

The decisions of the Authority and the Tribunal contain curious findings about how corroborating witnesses impacted the assessment of appellants’ credibility. I recorded 24 cases in which the appellant’s account of their queerness and surrounding evidence was corroborated in some way by a related witness (a non-medical professional, non-same-sex partner, merely someone related to the appellant in some way). The types of witnesses providing corroborative evidence included friends,<sup>209</sup> queer friends who had met the appellant through an LGBTQIA+ organisation,<sup>210</sup> family members,<sup>211</sup> landlords,<sup>212</sup> and organisers of LGBTQIA+ organisations.<sup>213</sup> Of those cases containing such evidence, 21 appellants were found to be credible.<sup>214</sup> Only three were found not credible.<sup>215</sup>

There were also interesting ways in which the Authority and the Tribunal treated appellants who brought same-sex partners to corroborate their appeal. Throughout the entire period, explicit comments about the lack of corroborative evidence of this sort were rare.<sup>216</sup>

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<sup>206</sup> UNHCR Handbook, above n 1, at 182.

<sup>207</sup> At 182. See also *AY (South Africa)*, above n 7, at [59].

<sup>208</sup> *Alessi and others*, above n 75, at 1174.

<sup>209</sup> See for example *HR (India)* [2019] NZIPT 801474.

<sup>210</sup> See for example *AO (Pakistan)* [2013] NZIPT 800322.

<sup>211</sup> See for example *AI (Russia)* [2016] NZIPT 800944.

<sup>212</sup> See for example *Refugee Appeal No 74811-812*, above n 108.

<sup>213</sup> See for example *AC (Uganda)* [2013] NZIPT 800397.

<sup>214</sup> Or 87.5 per cent.

<sup>215</sup> Or 12.5 per cent.

<sup>216</sup> See *Refugee Appeal No 76484*, above n 9, at [54] where the Authority noted: “No corroborative evidence of any gay relationship or activity has been presented to the Authority.”

However, those appellants who brought corroborative evidence by a same-sex partner were most often found to be credible. In fact, of the 73 cases studied, 18 featured evidence by a current same-sex partner in corroboration of the appellant’s appeal. Of those, 16 appellants were ultimately found to be credible, and two were found to be not credible.

These findings ultimately lead me to ask the question: could having a related-witness or same-sex partner to corroborate one’s claim be recognised implicitly as a “gold standard” of evidence?<sup>217</sup> In other words, could bringing such evidence be viewed as the ultimate confirmation of credibility of one’s queerness? As one appellant expressed, she “‘almost wished’ that she had a girlfriend, so that she could prove her identity to the Tribunal”.<sup>218</sup> It is particularly striking that almost 90 per cent of appellants who brought same-sex partners were found to be credible. Further, it is even more compelling that over 87 per cent of appellants who brought a related-witness were found to be credible. However, with such a small number of appellants I cannot accurately conclude these decisions represent anything more than indicative of a possibility. Nonetheless, witness evidence to corroborate one’s claim was certainly a compelling indicator of credibility considered by the Authority and the Tribunal.

### *C Consumption of queer media*

Three decisions of the Authority and the Tribunal include instances of seemingly offhand comments about appellants’ consumption of queer media, specifically literature. These comments demonstrate that the decision-maker expected an authentic queer appellant to have consumed queer media. Negative indicators of their credibility were drawn where they had not. However, I have recognised this particular indicator of credibility as an anomaly, unreflective of any commonly adopted tools to assess the credibility of queer appellants. This is because all three decisions containing such comments, *Refugee Appeal No 74151*, *Refugee Appeal No 75569* and *GK (India)*, were heard by the same member of

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<sup>217</sup> See Murray, above n 5, at 466.

<sup>218</sup> *AT (Zimbabwe)* [2015] NZIPT 800798.



the Authority and later the Tribunal, CM Treadwell.<sup>219</sup> In the absence of any mention of appellants’ consuming queer media in any other decisions by other members, this likely represents a personal preconception of authentic queer claimants by that member informed by his own biases. However, for the purposes of this paper, I will proceed to present them as they have played a significant role in the assessment of each of the involved appellants’ credibility.

In the case of *Refugee Appeal No 74151*, the Authority heard the appeal of a man in his 30s from Iran in 2005. He claimed refugee status on the basis of him being homosexual.<sup>220</sup> Before the Authority, he discussed his personal history of male partners and described harassment and detention in which he was mistreated throughout the 1980s and 1990s.<sup>221</sup> The written decision, delivered by CM Treadwell, contained a discussion of the available evidence to the Authority. It included a comment that the appellant “...reads no gay literature”.<sup>222</sup> Ultimately, his account was considered not credible as there was “no credible evidence to establish that he is homosexual”.<sup>223</sup>

Also in 2005, in the case of *Refugee Appeal No 75569*, the Authority considered an appeal from a man from Bangladesh who feared returning there as he was homosexual.<sup>224</sup> After discussing his realisation of his queer identity at 15 years-old, he shared with the Authority his relationships with men in his adult life and why he feared returning to Bangladesh because of this.<sup>225</sup> The written decision recorded evidence which the Authority regarded did not establish the appellant as homosexual. The Authority stated:<sup>226</sup>

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<sup>219</sup> *Refugee Appeal No 74151*, above n 158; *Refugee Appeal No 75569* NZRSAA 324, 1 November 2005; and *GK (India)*, above n 182.

<sup>220</sup> *Refugee Appeal No 74151*, above n 158, before CM Treadwell (Chairperson) and RJ Towle (Member).

<sup>221</sup> At 2–4.

<sup>222</sup> At 9.

<sup>223</sup> At 10.

<sup>224</sup> *Refugee Appeal No 75569*, above n 219, before CM Treadwell (Chairperson) and RJ Andrews (Member).

<sup>225</sup> At 2–7.

<sup>226</sup> At 14.

In spite of being articulate and reasonably well-educated, the appellant was unable to demonstrate any personal interest in homosexuality. He has not, for example, read any homosexual literature, or magazines.

Ultimately the Authority found itself “unable to rely on any of the appellant’s evidence” and found his account not credible.<sup>227</sup>

In 2019, the Tribunal heard the appeal of GK who was a 22 year-old citizen of India.<sup>228</sup> GK shared his upbringing and personal history, discussing his realisation of his sexuality and relationships with men he had experienced while in New Zealand.<sup>229</sup> GK explained that his realisation of his identity was natural to him in that he accepted that was “the way nature had made him”.<sup>230</sup> The written decision, delivered by CM Treadwell, contained discussion of doubts about GK’s case. One such doubt was as to his self-acceptance without struggle of his identity. It read:<sup>231</sup>

The appellant’s account of his early years after the emergence of his sexuality is surprisingly devoid of real substance...He denied ever exploring his sexuality in any real way, maintaining that he had not sought out any information, either from others, in books or online.

GK was not considered to be a refugee as the doubts about his case indicated to the Authority that his account of being homosexual was not credible.<sup>232</sup>

#### *D Frequenting queer social environments*

Membership of or the frequenting of LGBTQIA+ organisations or establishments represents engagement in behaviours that are often expected of “authentic” queer

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<sup>227</sup> At 7 and 15.

<sup>228</sup> *GK (India)*, above n 182, before CM Treadwell (Member).

<sup>229</sup> At [5]–[21].

<sup>230</sup> At [26].

<sup>231</sup> At [26].

<sup>232</sup> At [53].

claimants.<sup>233</sup> Immigration officials can be persuaded by such evidence as to the credibility of an appellant’s queerness as it conforms to their behavioural expectations. This arises out of conceptions of queer behaviours in the New Zealand context. However, as scholar Jenni Millbank has noted, this expectation involves a two-fold assumption: firstly, “*this is what our gay people do, therefore your doing likewise is proof of gayness*”, and secondly, expression of freedom after fleeing an environment where one had a fear of persecution should manifest in behaviours where one seeks “unprecedented” solidarity.<sup>234</sup> But as she and others note, behaviour is influenced significantly by structural and cultural considerations.<sup>235</sup> Not engaging with other members of the LGBTQIA+ community in their host country may be explained due to cultural and/or linguistic barriers, religious factors, economic factors and fear of exposure.<sup>236</sup> While many may find, for example, attending a gay bar liberating, there will also be many who will find it appalling or inaccessible.<sup>237</sup> In fact it is common for sexual minority refugee claimants to encounter intersectional exclusion in mainstream queer communities, arising from homophobia and racism.<sup>238</sup>

Throughout decisions of the Authority and the Tribunal, the ability of an appellant to bring evidence of their involvement in an LGBTQIA+ organisation or frequenting of LGBTQIA+ establishments was viewed as a powerful indicator of their credibility. In fact, the evidence brought by some appellants was particularly striking in how great of a role it played in the assessment of their credibility by the Authority and the Tribunal. I also discovered that negative inferences were drawn from some appellants who were unable to provide such evidence.

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<sup>233</sup> Alessi and others, above n 75, at 1173; and see Murray, above n 5, at 466.

<sup>234</sup> Millbank, above n 5, at 18.

<sup>235</sup> At 19; and Alessi and others, above n 75, at 1173.

<sup>236</sup> UNHCR Handbook, above n 1, at 182. See also *AY (South Africa)*, above n 7, at [183].

<sup>237</sup> Millbank, above n 5, at 19.

<sup>238</sup> Shari Brotman and Edward Lee “Identity, Refugeeeness, Belonging: Experiences of Sexual Minority Refugees in Canada” (2011) 48 *Can Rev Sociol* 241 at 259.

In 2012, the Tribunal heard the appeal of AE who was in his 30s and a citizen of Egypt.<sup>239</sup> He brought evidence from two duty managers of a major bar in Auckland to support his claim to be homosexual.<sup>240</sup> Mr Henkel and Mr Gray explained in handwritten letters that the bar was frequented by many members of Auckland’s gay community, and both confirmed they had seen AE there. The Tribunal also heard from Mr Henkel in person who recalled seeing AE frequently at the bar and had conversed with him about their shared sexual identities.<sup>241</sup>

In 2015, the Tribunal heard the appeal of AT from Zimbabwe who was of Ndebele ethnicity.<sup>242</sup> She self-identified as bisexual. After arriving in New Zealand, AT had been attending a centre for LGBTI individuals.<sup>243</sup> Her appeal was supported by the evidence of two professionals from the centre who corroborated AT’s sexuality and struggles with gender identity. The evidence of the professionals was described as “candid”.<sup>244</sup>

In 2016 the Tribunal heard the appeal of CF who was from Pakistan and self-identified as bisexual.<sup>245</sup> At the hearing, counsel for CF filed his bank statements which showed a number of transactions at an iconic gay bar in Auckland.<sup>246</sup> There were also many cases in which appellants shared their online dating profile or messages with the Tribunal as evidence of engaging in same-sex relationships.<sup>247</sup>

In other decisions, the absence of evidence of these behaviours was taken as an indicator of falsity. The Authority, in 2005, had doubts as to an appellant’s queerness where he had “joined no association or organisation for the promotion and support of homosexuals,” nor

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<sup>239</sup> *AE (Egypt)*, above n 53.

<sup>240</sup> At [25].

<sup>241</sup> At [22]–[24].

<sup>242</sup> *AT (Zimbabwe)*, above n 218.

<sup>243</sup> At [18].

<sup>244</sup> At [50].

<sup>245</sup> *CF (Pakistan)* [2016] NZIPT 800962.

<sup>246</sup> At [26].

<sup>247</sup> See for example *Refugee Appeal No 74502 NZRSAA 95*, 24 March 2004; and *AC (Uganda)*, above n 213.

had he “visited any gay club or social institution”.<sup>248</sup> The Tribunal, in 2013, also had doubts about one appellant due to his “limited activity in homosexual advocacy groups”.<sup>249</sup> Then again in 2019 it noted that an appellant enjoyed spending time at gay bars, but had “never joined any formal gay group”.<sup>250</sup>

On the other hand, however, there were cases in which the inclusion of such evidence impacted negatively on the credibility of the appellant. Particularly, where the evidence of membership appeared not to be genuine. In 2004 an appellant who brought evidence of his involvement in a support club for gays and lesbians in Tauranga was supported by a letter of the club management.<sup>251</sup> However, the Authority were doubtful of the reliability of the letter as the appellant was not able to answer any questions about his involvement with the club, nor corroborate some of the details in the letter about his involvement with the club.<sup>252</sup> In 2005, another appellant also brought evidence of membership to the same club.<sup>253</sup> The Authority found that despite having attended twice, his short-lived membership indicated that he joined “solely for the purpose of obtaining a membership card which could be produced to bolster his refugee claim”.<sup>254</sup>

Physical evidence of appellants engaging in these behaviours are a powerful indicator of credibility throughout the entire time period studied. Indeed, in 2019 the Tribunal was still concerned about the absence of such evidence from one appellant.<sup>255</sup> As discussed above however, this indicator of credibility is concerning as it creates standards for appellants that are conceived on expectations of “authentic” queer appellants, as arising in the New Zealand context. There are many factors impacting the appeal of some LGBTQIA+ organisations or establishments, and for some appellants they may not wish to be

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<sup>248</sup> *Refugee Appeal No 74151*, above n 158.

<sup>249</sup> *AC (Uganda)*, above n 213, at [38].

<sup>250</sup> *GH (India)*, above n 176, at [10].

<sup>251</sup> *Refugee Appeal No 75211 NZRSAA 430*, 21 December 2004.

<sup>252</sup> At 17.

<sup>253</sup> *Refugee Appeal No 75569*, above n 219.

<sup>254</sup> At 14.

<sup>255</sup> *GH (India)*, above n 176, at [10].

involved.<sup>256</sup> Overall, this credibility indicator appears to impose external or physical evidentiary expectations to an identity which is an invisible characteristic; just because someone does not join these groups or go to these bars does not mean that they are not queer.

## *VII Conclusion*

With no legal method for assessing the credibility of sexual minority refugee appellants, this paper has detailed the practical indicators of credibility relied on by the Authority and the Tribunal in New Zealand by a case study of all published decisions concerning such appellants. The indicators represent behavioural and evidentiary expectations; expected consistency, expected demeanour and expected standards of plausibility in order to be deemed credible. They rely on a typified construction of an authentic sexual minority claimant, in spite of the understanding that sexuality is an invisible characteristic understood uniquely by every individual.<sup>257</sup> Those who are unable to indicate their credibility accordingly are subsequently deemed not credible and denied recognition as a refugee. These expectations are impossible for many appellants to meet, and so defy scholarly research and international literature on the unique experiences of sexual minority individuals. They also amount to an approach utterly contrary to advice of the UN Refugee Agency in their Handbook. The longer the construction of this process remains in the hands of those making decisions, the longer such protection will be unfairly withheld, and the current indicators of credibility risk systemic entrenchment.<sup>258</sup>

Broadly, an appellant’s ability to coherently recall facts throughout their claim is treated as a significant indicator of credibility. The Authority and the Tribunal appear to have historically acknowledged the many personal factors that may impact the ability of an appellant to coherently recall facts, and make judgments balancing these with other factors in cases. Further, consistency of one’s claim internally, with their own recalled evidence,

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<sup>256</sup> Alessi and others, above n 75, at 1166; and Brotman and Lee, above n 238, at 259.

<sup>257</sup> Luker, above n 41, at 514.

<sup>258</sup> Millbank, above n 5, at 29.

and externally, with evidence from outside sources, represents a powerful indicator of credibility of sexual minority appellants. However, negative inferences about the credibility of one’s claim are drawn due to inconsistencies where the appellant has not disclosed their queerness upon initial claiming of refugee status, and where they display incoherency in recalling facts.

In early cases considering sexual minority appellants (1995–2004) the Authority appeared to treat those who did not come out upon initial claiming of refugee status with empathy and understanding. In the first case considering that sexual orientation was a refugee convention reason, *Re GJ*, the Authority understood the “sensitive reasons” for the appellant not disclosing his queerness until his appeal.<sup>259</sup> This is in stark contrast with the approach of the Tribunal in later years which was expressly unforgiving with regards to late disclosure of queerness.<sup>260</sup> The Tribunal have often been doubtful of why certain appellants would not come out to officials at first instance, finding such behaviour implausible. However, this indicator of credibility represents an unfair conception of queerness without consideration for the experiences of claimants that may see them unwilling to come out.<sup>261</sup> The staunch disregard of appellants’ explanations as to why they did not initially come out undermines their dignity, especially when compared with the approach of the Authority in earlier years that displayed apparent understanding of such explanations.

The demeanour of appellants at their hearing is another indicator of their credibility, albeit to an extent. Both the Authority and the Tribunal express their acknowledgment of the unreliability of demeanour in assessing one’s credibility, and have often self-reflected on perceptions of demeanour which may not be entirely accurate. However, demeanour plays a role in indicating credibility of sexual minority appellants, including the appellant’s behaviour at the hearing and their physical appearance.

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<sup>259</sup> *Re GJ*, above n 2, at 21.

<sup>260</sup> See *FY (Sri Lanka)*, above n 71.

<sup>261</sup> See Spijkerboer, above n 73, at 162; and UNHCR Handbook, above n 1, at 168.

In early cases of sexual minority appellants (before 2005), positive inferences about the credibility of their queerness were explicitly drawn from their physical appearance.<sup>262</sup> In proceeding years, the Authority and the Tribunal have demonstrated a greater awareness of the inappropriateness of relying on physical appearance as an indicator of someone’s queerness,<sup>263</sup> however comments about the appearance of appellants have continued. There have been recent comments about the appearance of appellants in photos.<sup>264</sup> The implication of approaching credibility by relying on appearance is that stereotypes of “authentic” queer claimants persist. It represents a compelling disregard for the understanding of queerness as an invisible characteristic, manifesting uniquely in all.

Positive and negative inferences are drawn from the behaviours of appellants at their hearing. The behaviours interpreted as objectively honest are clear articulation, responding to questions spontaneously and providing direct answers.<sup>265</sup> On the other hand, the behaviours that apparently indicate falsity include pausing, evasiveness when questioned and appearing disinterested or shaken by discussion.<sup>266</sup> However, regard for the factors affecting behaviour by the decision-maker is rare. Also, where the Authority or the Tribunal attempt to sexualise the appellant’s identity narrative, negative inferences are often drawn from the response of appellants, despite research suggesting that this is not an appropriate practice in the determination of refugee status.<sup>267</sup> Despite demeanour being a visual or external indicator of credibility, the honesty or dishonesty it apparently denotes is easily misinterpreted and is subjectively constructed. It is judged on internal standards of authenticity which arise on the basis of commonly displayed behaviour, and what behaviour is expected of an authentic individual in one country may be wildly different to another.<sup>268</sup>

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<sup>262</sup> See for example *Refugee Appeal No 71623*, above n 130.

<sup>263</sup> *Refugee Appeal No 75466*, above n 133, at [77].

<sup>264</sup> *Refugee Appeal No 76414*, above n 6.

<sup>265</sup> See for example *Refugee Appeal No 2151*, above n 145.

<sup>266</sup> See for example *Refugee Appeal No 71930*, above n 143.

<sup>267</sup> See for example *Refugee Appeal No 74151*, above n 158.

<sup>268</sup> *Millbank*, above n 5, at 32.



Extensively, how plausible or implausible one’s claim is to the decision-maker has impacted significantly on their accepted credibility. Where facts as communicated by an appellant defy what a decision-maker considers as plausible, it has often been viewed as fabrication. There were several identifiable features of claims that the Authority and the Tribunal considered plausible for appellants to engage in. These included: coming out upon arrival in New Zealand and seeking other queer people, corroboration by witnesses and same-sex partners, consuming queer media and frequenting queer social environments.

In some cases, the behaviour of appellants who did not come out upon their arrival in New Zealand and did not seek other queer people, has been viewed as implausible. The Authority and the Tribunal have expressed their concern at appellants who conceal their queer identity from their housemates and friends, despite evidence from those appellants explaining their reasons why.<sup>269</sup> This represents an overt disregard for the personal factors impacting a queer refugee claimant’s decision to come-out and seek other queer people. In fact, both cases discussed featured appellants who chose to live with someone familiar upon arrival to New Zealand; not at all an alarming decision when immigrating across the world to a culturally different environment.

Appellants who have brought a related witness to corroborate their account are mostly found to be credible. Further, two thirds of historical sexual minority appellants who have brought a same-sex partner to corroborate their account have been found credible. In both cases the evidence of such a witness apparently offers a compelling indication of the appellant’s credibility. In the case of an appellant who could not bring such evidence it is not clear how the absence of corroboration would impact on their credibility.

There were three alarming cases in which the absence of consuming queer media, specifically literature, impacted negatively on the credibility of the appellant.<sup>270</sup> I indicated that I have treated these cases as an anomaly, unreflective of any general indicators of

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<sup>269</sup> See *Refugee Appeal No 74151*, above n 158; and *GK (India)*, above n 182.

<sup>270</sup> See *Refugee Appeal No 74151*, above n 158; *Refugee Appeal No 75569*, above n 219; and *GK (India)*, above n 182.

credibility of appellants due to the fact that all three cases were heard by the same member, CM Treadwell. However, it is important to note the inappropriate nature of these decisions through their implication that in order to be authentically queer one must consume queer media. Indeed, as reiterated throughout this paper, queerness as an identity is personal to every individual and the expectation of appellants to conform to certain behaviour conceived from stereotypes is egregiously offensive.

The frequenting of queer social environments or membership of LGBTQIA+ organisations was taken as an indicator of credibility of many appellants. Many appellants who brought evidence of the sort were taken to have given credible accounts of their queerness,<sup>271</sup> and appellants who could not provide such evidence were viewed critically.<sup>272</sup> On two occasions, evidence of membership of such an organisation was viewed as fabricated for the purposes of securing refugee status.<sup>273</sup>

Overall, most indicators of credibility defy scholarly research concerning the experiences of refugee claimants and international literature and advice on refugee determination. They also offend the dignity of sexual minority individuals by a typifying of characteristics expected of sexual minority claimants with no theoretical backing. Indeed, *why* consistency indicates credibility, *why* certain demeanour illustrates truth-telling and *why* an individual’s account is plausible, is subjectively construed upon our values, prejudices and environment.<sup>274</sup> As Macklin from the Immigration and Refugee Board of Canada explained, every decision-maker “brings [their] own complicated baggage to every act of judgment”.<sup>275</sup> Many of the credibility indicators identified broadly under consistency, demeanour and plausibility are inevitably informed by personal experiences within a cultural, social, ethnic and religious context, and so are not fair to impose on another from

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<sup>271</sup> See for example *AE (Egypt)*, above n 53.

<sup>272</sup> See for example *AC (Uganda)*, above n 213.

<sup>273</sup> *Refugee Appeal No 75211*, above n 251; and *Refugee Appeal No 75569*, above n 219.

<sup>274</sup> Macklin, above n 40, at 140.

<sup>275</sup> At 140.

a completely different context.<sup>276</sup> This case study has revealed that baggage held by decision-makers is evidently not being left at the door in New Zealand, with simplifications of authentic behaviours relating to sexual minority appellants present in the deduced indicators of credibility.

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<sup>276</sup> Cecile Rousseau and others "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board" (2002) 15 J Refug Stud 43 at 62.

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*AT (Zimbabwe)* [2015] NZIPT 800798.  
*AY (South Africa)* [2015] NZIPT 800763.  
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*Refugee Appeal No 75211* NZRSAA 430, 21 December 2004.  
*Refugee Appeal No 75419* NZRSAA 72, 25 February 2005.  
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*IX Appendix I: case study*

Year	Refugee status granted	Refugee status denied	Queerness deemed credible	Case name	Claimant information	Queerness	Ground(s)
1995	1		1	<i>Refugee Appeal No 1312 [Re GJ]</i> NZRSAA 343, 30 August 1995.	Man, 29, Iran	Homosexual	Banned support of political party and homosexuality
1996	1		1	<i>Refugee Appeal No 1856/93 [Re ED]</i> NZRSAA 6, 25 April 1996.	Man, 35, Russia	Homosexual	Homosexuality (which must be viewed in context of difficulties with Russian authorities)
1997		1	1	<i>Refugee Appeal No 2151</i> NZRSAA 418, 13 November 1997.	Woman, 29, Malaysia	Lesbian	On a number of grounds, including her claim to be a lesbian in a lesbian relationship
1999		1	0	<i>Refugee Appeal No 71779</i> NZRSAA 385, 29 December 1999.	Man, 30, Libya	Homosexual	Homosexuality

1999	1		1	<i>Refugee Appeal No 71185</i> NZRSAA 67, 31 March 1999.	Man, 30, Iran	Homosexual	Homosexuality
1999		1	1	<i>Refugee Appeal No 71355</i> NZRSAA 263, 14 October 1999.	Female, 32, China	Lesbian	Homosexuality and their political opinions
2000	1		1	<i>Refugee Appeal No 71623 [2000]</i> NZRSAA 112 (13 April 2000)	Man, 20s, Iran.	Homosexual	Homosexuality
2001		1	0	<i>Refugee Appeal No 71930</i> NZRSAA 128, 22 March 2001.	Man, 32, Shanghai	Homosexual	Homosexuality
2004		1	0	<i>Refugee Appeal No 74811-812</i> NZRSAA 85, 17 March 2004.	Claimant A: Man, 20s, Bangladesh Claimant B: Man, 20s, Bangladesh	A: Homosexual B: Homosexual	A: Homosexuality B: Homosexuality
2004		1	1	<i>Refugee Appeal No 74502</i> NZRSAA 95, 24 March 2004.	Man, 43, Brazil	Bisexual	Homosexuality
2004		1	1	<i>Refugee Appeal No 75211</i> NZRSAA 430, 21 December 2004.	Man, 20s, Iran.	Homosexual	Homosexuality

2004	1		1	<i>Refugee Appeal No 75379</i> NZRSAA 377, 26 November 2004.	Man, Iran	Homosexual	Homosexuality
2004	1		1	<i>Refugee Appeal No 74337</i> NZRSAA 81, 16 March 2004.	Man, 27, Czech Republic of Roma ethnicity	Homosexual	Homosexuality
2004	1		1	<i>Refugee Appeal No 75380</i> NZRSAA 378, 26 November 2004.	Man, Iran	Homosexual	Homosexuality
2004	1		1	<i>Refugee Appeal No 73605</i> NZRSAA 271, 13 August 2004.	Man, 25, Iran	Homosexual	Homosexuality against the background of being poorly viewed and mistreated by Iranian authorities
2004	1		1	<i>Refugee Appeal No 74665</i> NZRSAA 228, 7 July 2004.	Man, 25, Islamic Republic of Iran	Homosexual	Homosexuality (Sexual Orientation)

2004	1		1	<i>Refugee Appeal No 74338</i> NZRSAA 82, 16 March 2004.	Man, 30s, Republic of Cuba	Homosexual	Imprisonment as a teenager, homosexuality and marriage to a foreign national
2004	1		1	<i>Refugee Appeal No 74627</i> NZRSAA 153, 12 May 2004.	Man, 29, Iran	Homosexual or bisexual	Sexual Orientation
2004		1	1	<i>Refugee Appeal No 74946</i> NZRSAA 293, 8 September 2004.	Woman, 37, Chile	Lesbian	Lesbian
2005		1	1	<i>Refugee Appeal No 75250</i> NZRSAA 33, 28 January 2005.	Man, 30s, Nigeria	Homosexual	Homosexuality
2005		1	0	<i>Refugee Appeal No 74151</i> NZRSAA 350, 2 December 2005.	Man, 30s, Iran	Homosexual	Homosexuality
2005	1		1	<i>Refugee Appeal No 75419</i> NZRSAA 72, 25 February 2005.	Man, 30s, Tehran	Homosexual	Homosexuality

2005		1	1	<i>Refugee Appeal No 75093</i> NZRSAA 136, 23 May 2005.	Man, Turkey, 39, stateless	Homosexual	Homosexuality and his conversion to Christianity
2005		1	0	<i>Refugee Appeal No 75466</i> NZRSAA 117, 19 April 2005.	Man, 18, Iran	Homosexual	Homosexuality
2005		1	0	<i>Refugee Appeal No 75569</i> NZRSAA 324, 1 November 2005.	Man, Bangladesh	Homosexual	Homosexuality
2005		1	1	<i>Refugee Appeal No 74054</i> NZRSAA 131, 17 May 2005.	Man, 38, Chile	Homosexual	Homosexuality
2006	1		1	<i>Refugee Appeal No 75272</i> NZRSAA 87, 16 May 2006.	Man, 19, Iran	Homosexual	Homosexuality
2006	1		1	<i>Refugee Appeal No 75376</i> NZRSAA 173, 11 September 2006.	Man, 35, Iran	Bisexual	Bisexuality and conversion to Christianity
2007		1	1	<i>Refugee Appeal No 76052</i> NZRSAA 89, 23 October 2007.	Man, late 20s, Czech Republic	Homosexual	Homosexuality

2007		1	1	<i>Refugee Appeal No 75094</i> NZRSAA 66, 27 August 2007.	Man, Sinhalese from Sri Lanka, early 30s	Homosexual	Homosexuality
2007		1	0	<i>Refugee Appeal No 75788</i> NZRSAA 43, 12 June 2007.	Woman, Zimbabwean, early 40s	Lesbian	Lesbian
2008	1		1	<i>Refugee Appeal No 76152</i> NZRSAA 1, 8 January 2008.	Man, early 30s, Nigeria	Homosexual	Homosexuality
2008	1		1	<i>Refugee Appeal No 76175</i> NZRSAA 37, 30 April 2008.	Man, mid-30s, from Iran	Heterosexual (fraud claim)	Conversion to Christianity
2009		1	0	<i>Refugee Appeal No 76426</i> NZRSAA 96, 17 December 2009.	Man, 30, a national of Guinea-Bissau of Balanta ethnicity	Homosexual	Homosexual relationship with a senior military official
2010		1	0	<i>Refugee Appeal No 76566</i> NZRSAA 107, 7 October 2010.	Man, Egypt, almost 50	Homosexual	Homosexuality
2010		1	0	<i>Refugee Appeal No 76414</i> NZRSAA 4, 27 January 2010.	Man, Nigeria, late 20s	Homosexual	Homosexuality

2010		1	0	<i>Refugee Appeal No 76484</i> NZRSAA 62, 19 May 2010.	Man, South Africa born in Pakistan, late 30s	Homosexual	Homosexuality and ethnicity
2011	1		1	<i>AD (Egypt)</i> [2011] NZIPT 800177.	Man, Egypt	Homosexual	Homosexuality
2012	1		1	<i>AE (Egypt)</i> [2012] NZIPT 800226.	Man, Egypt, born in 1980s	Homosexual	Homosexuality and political involvements
2012	1		1	<i>BS (Iran)</i> [2012] NZIPT 800351.	Man, Iran, roughly 25	Homosexual	Homosexuality
2013	1		1	<i>AO (Pakistan)</i> [2013] NZIPT 800322.	Man, early 50s, Pakistan	Homosexual	Homosexuality
2013	1		1	<i>AC (Uganda)</i> [2013] NZIPT 800397.	Man, Uganda, late 30s	Homosexual	Homosexuality
2014	1		1	<i>AM (Egypt)</i> [2014] NZIPT 800656.	Man, Egypt, born in 1970s	Homosexual	Homosexuality

2015	1		1	<i>AT (Zimbabwe)</i> [2015] NZIPT 800798.	Woman, early 30s, Zimbabwe, Ndebele ethnicity	Bisexual (but also doesn't feel comfortable in her gender identity)	Bisexuality
2015		1	1	<i>AM (The Philippines)</i> [2015] NZIPT 800673.	Man, Philippines	Homosexual	Homosexual and HIV positive
2015		1	0	<i>AY (South Africa)</i> [2015] NZIPT 800763.	Woman, claims to be a citizen of South Africa, Zambia and Lesotho	Bisexual	Bisexuality
2015		1	1	<i>AC (Israel)</i> [2015] NZIPT 800886.	Man, late 30s, Israel citizen. Born and raised in one of the states of the former Soviet Union.	Gay	Homosexuality
2016	1		1	<i>AI (Russia)</i> [2016] NZIPT 800944.	Woman, 20s, Russia	Lesbian	Lesbian



2016	1		1	<i>CF (Pakistan)</i> [2016] NZIPT 800962.	Man, Pakistan	Bisexual	Bisexuality
2016	1		1	<i>BL (South Africa)</i> [2016] NZIPT 800968.	Woman, 30s, South Africa	Lesbian who self-identifies as male	Lesbian and gender diversity
2017	1		1	<i>DS (India)</i> [2017] NZIPT 801073.	Man, India, Muslim	Gay	Gay
2017		1	1	<i>DT (India)</i> [2017] NZIPT 801159.	Man, 28, Hindu, India	Homosexual/Gay	Homosexuality
2017		1	1	<i>BN (South Africa)</i> [2017] NZIPT 800973-75.	Claimant AA: woman, 33, South Africa Claimant BB: woman, 28, South Africa, (and their daughter CC, aged six years)	AA: Lesbian BB: Lesbian	AA: Lesbian couple BB: Lesbian couple

2017	1		1	<i>AM (Jordan)</i> [2017] NZIPT 800972.	Man, 30, Jordan, he is Palestinian	Sexual preference towards transgender women	Sexual preference towards transgender women
2017		1	1	<i>AH (United States)</i> [2017] NZIPT 801212.	Man, USA, Jewish	Bisexual	Anti-LGBT and Anti-Semitism
2017		1	1	<i>BX (South Africa)</i> [2017] NZIPT 801194-195.	Claimant AA: woman, 58, South Africa Claimant BX: woman, 56, South Africa	AA: Lesbian BX: Lesbian	AA: Lesbian BX: Lesbian
2018	1		1	<i>AB (Morocco)</i> [2018] NZIPT 801308.	Man, 26, Arab, from Morocco, raised Sunni Muslim faith	Gay	Sexual Orientation
2018	1		1	<i>DA (Pakistan)</i> [2018] NZIPT 801351.	Man, Pakistan, late 30s	Gay or Bisexual	Sexual Orientation

2018		1	1	<i>FJ (India)</i> [2018] NZIPT 801291.	Man, 25, India, of South Indian ethnicity and a Hindu	Gay	Gay
2018	1		1	<i>BY (Bangladesh)</i> [2018] NZIPT 801235.	Man, mid-30s, Bangladesh	Gay	Gay
2018		1	0	<i>AN (Cameroon)</i> [2018] NZIPT 801154.	Man, Cameroon, Ngolo-Oroko ethnicity	Gay	Gay and arrest warrant
2018	1		1	<i>FU (India)</i> [2018] NZIPT 801305.	Man, India, early 30s	Gay	Sexual Orientation
2018	1		1	<i>AW (Malaysia)</i> [2018] NZIPT 801371.	Woman, Malaysia, early 30s	Lesbian	Lesbian
2019	1		1	<i>HR (India)</i> [2019] NZIPT 801474.	Man, late 30s, India	Gay	Sexuality

2019	1		1	<i>AP (Jordan)</i> [2019] NZIPT 801341.	Man, mid-40s, Jordan, married and has three children in Jordan	Gay	Sexual identity
2019		1	0	<i>AQ (Cameroon)</i> [2019] NZIPT 801410.	Woman, young, Cameroon	Bisexual	Bisexuality
2019		1	0	<i>GK (India)</i> [2019] NZIPT 801429.	Man, 22, India	Homosexual	Homosexuality
2019		1	1	<i>GH (India)</i> [2019] NZIPT 801488.	Man, 22, India	Bisexual	Bisexuality
2019		1	1	<i>IR (India)</i> [2019] NZIPT 801640.	Man, 29, India, Muslim	Gay	Gay
2020	1		1	<i>AV (Egypt)</i> [2020] NZIPT 801705.	Man, Egyptian citizen by descent, born in Libya in 1978	Bisexual	Sexual Orientation

2020		1	0	<i>FY (Sri Lanka)</i> [2020] NZIPT 801610.	Woman, late 60s, Sri Lanka	Bisexual	Bisexuality
2020	1		1	<i>AL (Ukraine)</i> [2020] NZIPT 801695.	Man, Ukraine citizen, born mid-1960s	Bisexual	Bisexual, pro-Ukrainian activist, married to a Ukrainian
2020		1	1	<i>AY (Brazil)</i> [2020] NZIPT 801742.	Man, Brazil, born in 1967	Homosexual	Harmed by state agents and subjected to wrongfully criminal proceedings

**X Appendix II: quantitative analysis**

Total number of decisions in the case study.	73
Total number of claimants in the case study.	76
How many claimants were granted refugee status?	37 /76
How many claimants were denied refugee status?	39 /76
Of the claimants who were denied refugee status, the queerness of how many were found to be not credible?	17 /39
Of the claimants who were denied refugee status, the queerness of how many were found to be credible?	22 /39
How many claimants were men/male?	61 /76
How many claimants were women/female?	15 /76
How many claimants self-identified as “Bisexual”?	11 (7 men, 4 women)
How many claimants self-identified as “gay” or “homosexual”?	50 (all men)
How many claimants self-identified as “Lesbian”?	11 (10 women, one who self-identified as “male”)
How many claimants self-identified their queerness as something else or they were not sure?	4
How many decisions explicitly mentioned “plausibility” or “implausibility” of an appellant’s claim at least once?	24 /73
How many decisions explicitly mentioned the “demeanour” of an appellant at least once?	4 /73

How many decisions explicitly mentioned “consistency” or “inconsistency” of an appellant’s claim at least once?	48 /73
How many decisions featured evidence by a current same-sex partner in corroboration of an appellant’s claim?	Approx. 18 /73
Of those cases, how many of those appellants’ queerness were ultimately found credible?	16 /18
Of those cases, how many of those appellants’ queerness were ultimately found not credible?	2 /18
How many decisions featured evidence by a related-witness (non-medical professional, non-same-sex partner) in corroboration of an appellant’s claim?	24 /73
Of those cases, how many of those appellants’ queerness were ultimately found credible?	21 /24
Of those cases, how many of those appellants’ queerness were ultimately found not credible?	3 /24