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WHAT DOES A GENUINE LESBIAN/GAY RELATIONSHIP LOOK LIKE IN THE EYES OF ASYLUM DECISION MAKERS?

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Nina Held

How do you know that they are not just friends, not just two women who know each other well, have worked and lived together and have therefore established a certain closeness between them?

You described how they were dancing and kissing, could they not just be friends who had a bit fun with each other on a night out?

A few weeks ago, as part of my ongoing involvement with the **Lesbian Immigration Support Group (LISG)**, a voluntary-led support group for bisexual and lesbian asylum seekers and refugees in Manchester, I was a witness in an asylum tribunal for a lesbian couple from Pakistan. The couple, Mariam and Zainab, seek protection in the UK on grounds of their sexual orientation. As I often did, I felt strongly about the case and about the fact that they had been refused. I was outraged by the Home Office's *Reasons for Refusal Letter* (RFR) outlining that they were not believed to be a lesbian couple because of a small number of inconsistencies in their narratives. I was sure that the judge, hearing the case, could not come to the same conclusion as the Home Office. Although I had been a volunteer for LISG for more than seven years and had written numerous support letters during that time, this was the first time that I agreed to be a witness in court. Sitting in the waiting area before I was called in, I was nervous – not surprisingly considering what was at stake. I felt vulnerable being asked questions by the Home Office representing officer, which questioned my reliability as a witness and the authenticity of my knowledge. I answered her questions relating to Mariam and Zainab's 'relationship status' as best as I could. But how do you explain the difference between a friendship and a relationship? How do you explain the blatantly obvious to someone who is seeking to disprove the 'evidence' before them, often it seems in a seemingly instrumental way – to keep immigration numbers down?

In the UK justice system, the burden of proof lies with the claimant to show that s/he is a refugee, i.e. s/he needs to provide the evidence for her/his claim. Although the standard of proof is 'a reasonable degree of likelihood', claims are often refused because of minor discrepancies. In my work with LISG, I have seen many cases where women were not believed to be *genuine* lesbians (see Held 2016). Given that the inclusion of

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'lesbian sex' remains ever-elusive in UK sexuality and marriage laws, it remains extremely difficult for women to establish that their relationships are genuine, even in long-term partnerships. In this era of precarity, when citizenship rights and refugee status are at stake, it is perhaps timely to revisit the slippery question and ask: What does a genuine lesbian/gay relationship look like, and how can this be proven in the eyes of asylum decision-makers?

After having seen many injustices asylum seekers and refugees face in the UK through my work with LISG and **Freedom from Torture**, I recently decided to return to academia (after six years' post-doctoral work in the voluntary sector). My position has thus shifted from the frontline to research, but in both cases my aim has been to better understand the experience of sexuality and immigration and in doing so make a difference to people's lives.

Together with two other researchers and the project leader, I am now working on the project **SOGICA – Sexual Orientation and Gender Identity Claims of Asylum**, funded by the European Research Council (ERC). This project is investigating how asylum claims based on sexual orientation and gender identity (SOGI) are treated in the UK, Germany and Italy, and aims to develop recommendations on decision-making processes in these European asylum systems so that claims by individuals and couples like Mariam and Zainab can be treated more fairly.

The number of SOGI asylum claims and acceptance rates in Europe is unknown, as most EU member states do not record the grounds for claiming asylum. In the UK, the Home Office has started recording numbers on SOGI claims, but these numbers have not yet been published. The European study **Fleeing Homophobia**, published in 2011, indicated that there is no consistency in how the EU member states treat SOGI claims. Asylum seekers who seek international protection on the basis of their sexual orientation and/or gender identity need to show that they have a 'well-founded fear of being persecuted for reasons of [...] membership of a particular social group' (1951 Geneva Convention Relating to the Status of Refugees). This means that claimants need to prove that they belong to the particular social groups of lesbian/bisexual/gay/transgender/intersex.

There are currently 73 countries (and 5 entities) in the world (40% of all countries) with legislation in place that **criminalises same-sex consensual acts** between adults. Many of the laws in these countries were imposed during British colonial rule (such as Pakistan, where Mariam and Zainab are from). However, Italy is the only country in the EU where the existence of such laws is sufficient for the proof of fear of persecution.

In the UK, since 1999, asylum claims based on SOGI have been recognised as grounds to claim asylum. Since then it has been accepted that women and lesbians and gay men can form a 'particular social group' (**Shah and Islam v Secretary of State for the Home Department, House of Lords, 2 A.C. 629, 1999**). **Failing the Grade**, a report by the London-based UK Lesbian and Immigration Support Group (UKLIG) published in 2010, found that asylum claims based on SOGI were disproportionately refused. From the cases they looked at 98-99% of LGBT asylum seekers had been refused in the first instance in contrast to 73% of all initial asylum claims. This low percentage suggests that finding proof for the claimant's SOGI and his/her fear of persecution is difficult. The high refusal rate impacts on SOGI asylum claimants' lives: not being believed causes distress; it increases the length of the asylum process and the accompanying uncertainties; and often involves experiences of detention and destitution. Many SOGI claimants live a life in limbo for many years.

Before a landmark ruling by the **Supreme Court (HJ and HT)** in July 2010, the Home Office (and courts) found it easy to argue that SOGI claimants can go back to their country of origin, maybe relocate, and live their lives 'discreetly' in order to not fear persecution, in fact suggesting that claimants go back into the closet. The UKLIG (2010) found that while before 2010 the Home Office refused the majority of SOGI claims on grounds of such arguments, in the majority of negative decisions made between 2010 and 2013 the claimants' **SOGI was not believed**. At LISG we also witnessed this shift in argumentation in HO RFRs now focusing the burden of proof on providing evidence for the claimant's SOGI. However, what counts as evidence is contested.

Over the last years, the 'threshold' for proving SOGI has risen. SOGI claimants are now expected to collect evidence in the form of support letters from individuals and LGBT organisations (who must explain why they think that the person is lesbian or gay and/or that two people are in a relationship); photos of nights out in lesbian and gay venues and participation in Gay Pride events. Out of desperation, claimants sometimes submit intimate photographs and videos of themselves with their partners, and in **one case** the Home Office interviewer directly asked a claimant to submit photos of a sexual nature (although the **Court of Justice of the European Union** ruled in 2013 that such types of evidence violate human dignity).

The evidence gathered here conforms to a particular Western model of sexuality, one that is 'out and proud' and which presumes that sexual identity and sexual conduct are interchangeable. Decision-making by the Home Office (and the courts) is often based on certain LGBT stereotypes and inappropriate questioning – for instance asking whether the claimant has read Oscar Wilde? What LGBT means? Details about sexual practices? In my volunteering work for LISG I have seen many refusals on grounds of credibility, where a delay in disclosure of sexual orientation, previous heterosexual relationships, having children, religious beliefs, and even




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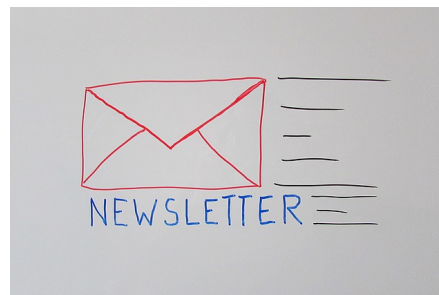
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older age have been used to undermine the women's claims. Decision-makers rarely consider how sexuality intersects with gender, 'race', religion, age, and class for SOGI asylum claimants in ways that may differ from white, middle-class gay men, for instance.

In asylum decisions, **assumptions about human behaviour** are often based on Western understandings, as was also the case in the decision made on Mariam and Zainab's appeal. Contrary to my expectations, the judge did not believe that the two women are lesbians in an intimate relationship. In a move that I had seen many times before in decisions by the Home Office and the courts, she did not put any weight on my evidence. She failed to consider cultural differences and how **trauma impacts on memory** in asylum and had already decided that the two women lacked credibility, and thus were *not* a genuine lesbian couple because of apparent inconsistencies, contradictions, and implausibility in their accounts.

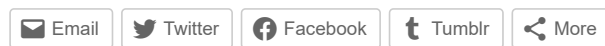
Whilst the UK praises itself for being progressive in terms of LGBT rights, not everyone is listened to equally; the justice system draws clear boundaries of who belongs and who does not belong to the group of LGBT people. The impact of such injustices can be life shattering. When Mariam and Zainab received the decision, they both experienced adverse mental health. Fearing for their lives and the threat of being deported led Zainab to attempt suicide. Mariam had suffered from severe depression for the last one and a half years with her condition worsening day-by-day and she is now in the care of a Crisis Team. Her mental health has deteriorated to such an extent since their refusal; this has now put an enormous strain on their previously happy relationship.

Mariam and Zainab's solicitor has submitted an appeal against the decision on the basis that the judge who heard the initial case made errors of law. The underlying Western stereotypical assumptions however persist; what constitutes a *genuine* lesbian relationship and the burden of proof remains an elusive and sometimes brutalising process.

Reference:

Held, Nina (2016) "What does a 'genuine lesbian' look like? Intersections of sexuality and 'race' in Manchester's Gay Village and in the UK asylum system." In: Stella, Francesca, Taylor, Yvette, Reynolds, Tracey and Rogers, Antoine (eds.) *Sexuality, citizenship and belonging: trans-national and intersectional perspectives*. Routledge: London, pp. 131-148.

Nina Held works as a post-doctoral research fellow on the ERC-funded project SOGICA – Sexual Orientation and Gender Identity Claims of Asylum (2016-2020), based at the University of Sussex, where she is also a teaching fellow. Nina did her PhD on *Racialised Lesbian Spaces* (2011) in Women's Studies at the Centre for Gender and Women's Studies at Lancaster University. Before joining Sussex, Nina worked in different voluntary organisations such as Trafford Rape Crisis, Freedom from Torture and the Lesbian Immigration Support Group.

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