

SEX, LIES, AND VIDEOTAPE: CONSIDERING THE ABC CASE AND ADOPTING THE DSSH METHOD FOR THE PROTECTION OF THE RIGHTS OF LGBTI ASYLUM SEEKERS

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I. INTRODUCTION

The United Nations High Commissioner for Refugees (UNHCR) estimated in 2017 that there were 65.6 million displaced people worldwide.¹ By mid-2014, there were 1.2 million asylum seekers worldwide.² Among the millions who seek refuge are individuals who face perse-

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1. ISSAC KASAMANI, UNHCR, GLOBAL TRENDS 2016: FORCED DISPLACEMENT IN 2016 1, 2 (2017), <http://www.unhcr.org/5943e8a34.pdf>.

cution in their nation of origin due to their sexual orientation and/or gender identity. LGBTI (lesbian, gay, bisexual, transgender, and intersex) people who apply for asylum are often met with the challenge of proving that they face persecution in their home country if they remain there. As a result, nations that assess refugees have struggled in constructing a process to determine whether a person's claim of being LGBTI is credible.

In 2014, the European Court of Justice (ECJ) decided the *A,B,C v. Staatssecretaris van Veiligheid* case (ABC case).³ The Court ruled that certain practices were a violation of the right to human dignity under Article 1 and the right to privacy under Article 7 of the Charter of Fundamental Rights of the European Union.⁴ The ABC case should be given consideration and reviewed by any jurisdiction in determining the limits for assessing an application of asylum for an LGBTI person. However, the ABC case does not go as far as to provide affirmative measures for nations to take. In this instance, the DSSH method, developed by S. Chelvan, should be adopted by nations that adjudicate applications for asylum on the basis of sexual orientation.

I will begin with a summary of the challenges LGBTI asylum seekers face. I will then discuss instances where the rights of LGBTI asylum seekers have been called into question and will then detail why the ABC case should be considered by other jurisdictions outside of the European Union. Finally, I will argue that the DSSH method is a solution for protecting the rights of LGBTI asylum seekers while ensuring that nations engage in practices that are in accordance with international law; I will also analyze any possible opposition to the method.

II. BACKGROUND

lowed World War II,⁶ the crafting of the Convention on the Status of Refugees,⁷ and the attempts to include LGBTI people in the framework

Security Council ratified it.¹⁵ In 1946, the UN General Assembly passed a resolution to create the International Refugee Organization (IRO).¹⁶ The principal activity of the IRO was the resettlement of ref-

tories, nations are obligated to provide assistance, shelter, and access to education and work for refugees.²⁷

The 1951 Convention and 1967 Protocol provide the definition of refugee in the international context.²⁸ An asylum seeker is a person who has applied for recognition as a refugee.²⁹ If authorities determine that the applicant meets the definition of a refugee they are granted asylum.³⁰ The 1951 Convention does not define how states are to determine refugee status.³¹ Instead, the establishment of asylum proceedings and refugee status determinations are left to each state party to develop.³² Over the years, states arrived at interpretations for some of the key language of the convention.³³ There is no universal consensus as to what constitutes “membership in a particular social group.”³⁴

B. LGBTI Asylum History

The world has seen great advancement in the area of civil and human rights for LGBTI people. The latter half of the twentieth century and beginning of the twenty-first century saw the decriminalization of homosexuality in much of the developed world.³⁵ In addition, same sex couples in many nations may enter into relationships, recog-

prisonment or even capital punishment.³⁷ In Nigeria, it is illegal for gay people to organize meetings or form clubs.³⁸ On January 7, 2014, President Goodluck Jonathan signed the Same-Sex Marriage Prohibition Act, which criminalizes all same sex unions and marriages.³⁹ In Iran, sex between two men is punishable by death.⁴⁰ Men can even be flogged for a lesser offense such as kissing.⁴¹ Additionally, the practice of “corrective rape” against lesbians is prevalent even in the first nation to include LGBTI protections in its Constitution, South Africa.⁴² Corrective rape is also a phenomenon that occurs in Jamaica.⁴³ Angelina Jackson, a LGBT rights activist in Jamaica, was raped at gunpoint by a group of anti-gay rapists who posed as lesbians to lure her to a remote trail.⁴⁴ When she went to the police, Jackson says that they did not take her claim seriously and were more concerned with the fact that she identified as a lesbian.⁴⁵ A lack of response from law enforcement to anti-LGBTI attacks is a frequent concern expressed by LGBTI people living in Jamaica.⁴⁶

As recently as May 2017, reports claimed that the Russian authorities actively persecute gays in Chechnya.⁴⁷ A local Russian news-

paper reported that police in Chechnya had rounded up 100 gay men and held them in special detention centers.⁴⁸ Chechen leader Ramzan Kadyrov went as far as to deny the existence of gays in Chechnya, saying, “You cannot arrest or repress people who just don’t exist in the republic.”⁴⁹ It is within these sorts of hostile and often life threatening environments that LGBTI people pursue asylum claims outside of their home nations.

The core principle of the 1951 Convention on the Status of Refugees is that no one who is determined to be a refugee shall be returned to a nation where they face threats to their life or freedom.⁵⁰ While the original convention did not provide language for the protection of sexual minorities,⁵¹ since the 1990s, many countries have interpreted it to include LGBTI people.⁵² Article 1A(2) of the Convention states that a person who “owing to well-founded fear of being persecuted for ‘membership of a particular social group’ may be deemed a refugee and granted refugee status.”⁵³ In recent years, that clause has been interpreted by many states to include the LGBTI community as a particular social group.⁵⁴ Interpretation of the term “membership of a particular social group” has varied across jurisdictions for many years.⁵⁵ In 2002, the UNHCR presented guidelines that helped to reconcile the varying interpretations around the phrase.”⁵⁶

48. *Id.*

49. *Id.*

50. Convention Relating to the Status of Refugees, *supra* note 7, art. 33.

51. *See id.* (providing protections for many individuals but staying silent in regards to protecting sexual minorities).

52. *See* Janna Wessels, *Sexual Orientation in Refugee Status Determination*, REFUGEES STUDTUD

Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and the 1967 Protocol related to the Status of Refugees.⁶⁴ The UNHCR published these guidelines, which define such terms as “persecution,” under the context of LGBTI asylum seekers.⁶⁵ Throughout the guidelines, the UNHCR emphasizes on recognizing that LGBTI asylum seekers’ experiences may differ from case to case and that factors, such as culture and religion, should be considered when adjudicating an asylum application.⁶⁶ Not all LGBTI applicants will have experienced persecution in the same way or even at all. The possibility, immediacy, and degree of persecution may be assessed to determine the potential consequences faced by the applicant if they were denied asylum and returned back to their home country.⁶⁷

While the process of applying for asylum varies across nations, each nation has established its own asylum processes. In the case of the European Union, the framework for granting asylum status is given in Directive 2004/83.⁶⁸ Article 4 of the Directive outlines the assessment of facts and circumstances necessary to complete the asylum process.⁶⁹ It allows members states to: “consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.”⁷⁰

Directives in the European Union are not self-executing; therefore member states are permitted leeway in applying the directive within their borders.⁷¹

64. UNHCR, Guidelines on Int’l Protection No. 9, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012).

65. *See id.* ¶ 6 (citing UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶¶ 51-53, U.N. Doc. HCR/1P/4/ENG/REV. 3 (Jan. 1992) [hereinafter UNHCR Handbook]) (defining persecution as “involve[ing] serious human rights violations, including a threat to life or freedom as well as other kinds of serious harm. In addition, lesser forms of harm may cumulatively constitute persecution. What amounts to persecution will depend on the circumstances of the case, including the age, gender, opinions, feelings and psychological makeup of the applicant.”).

66. *Id.* ¶ 3.

67. *Id.* ¶ 18.

68. Council Directive 2004/83, art. 4, 2004 O.J. (L 304) 12, 15 (EC).

69. *Id.*

70. *Id.*

71. *See* Alicia Hinarejos, *On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-executing, Supreme?*, 14 EUR. L.J. 620, 630 (2008).

C. Failures of LGBTI Asylum Adjudication

Along with the duty to assess asylum applications for their credibility, nations must also consider the sensitive nature of LGBTI asylum cases. The question that is often centered in this debate is “How do you prove someone is gay?”⁷² Believing that such an inquiry is the goal of the asylum adjudication process has had dire consequences.⁷³ For example, in recent years, information about the United Kingdom’s assessment of LGBTI asylum seekers has come under scrutiny. In 2014, a confidential document from the UK Home Office was leaked to the press.⁷⁴ The documents revealed the questions that an official from the Border Agency asked a bisexual asylum seeker.⁷⁵ The questions were of an explicit nature concerning the applicant’s sexual preferences and behaviors: “‘Did you put your penis into x’s backside?’ . . . ‘When X was penetrating you did you have an erection? . . . Why did you use a condom?’ . . . ‘What is it about the way that men walk that turns you on?’”⁷⁶ The official from the Home Office asked the asylum seeker these questions over the course of five hours.⁷⁷ Following the release of this damning information about the UK Border Agency, the LGBTI rights group Stonewall released a report.⁷⁸

The report found that in the UK, LGBTI asylum seekers often find themselves in scenarios that would not be conducive to a successful disclosure of their experiences to a border agent.⁷⁹ Upon arrival to a port of entry, UK border agents attempt to assess the identity of the asylum seeker and determine their credibility.⁸⁰ Given the sensitive nature of discussing sexual orientation and/or gender identity, especially as the grounds for seeking asylum, the interview process for an applicant is often times quite tense.

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selves in sexual situations.⁹⁰ Some nations have even gone as far as administering tests in order to assess the credibility of a claim for asylum stemming from LGBTI identity.⁹¹

In the Czech Republic, authorities used phallometry to determine whether a male⁹² applicant had homosexual attractions.⁹³ Phallome-

perform a homosexual act in order to prove his homosexuality.¹⁰⁷ The Dutch authorities denied A's second application in July 2011.¹⁰⁸

In June 2012, the Dutch government denied the asylum claim of B, an Afghan national, on the ground that his statements concerning his homosexuality were "vague, perfunctory and implausible."¹⁰⁹ The state authorities believed that he should have been able to provide "more details about his emotions and his internal awareness of his sexual orientation."¹¹⁰

C was a national of Uganda.¹¹¹ When C first applied for asylum in the Netherlands, he did so for reasons other than persecution on the basis of his sexual orientation.¹¹² When the state authorities first denied his application, he did not challenge the finding, but instead reapplied based on the fear that he would be harmed in his home country because of his homosexuality.¹¹³ C provided a video recording of himself performing "intimate acts with a person of the same sex" to the authorities who carried out the assessment of his application.¹¹⁴ The authorities denied his application in October 2012 for a lack of credibility.¹¹⁵ The Staatssecretaris claimed that: (1) C should have declared his fear of persecution for his sexual orientation on his first application; (2) he did not clearly explain "how he became aware of his homosexuality[:]" and (3) that he could not answer questions about any Dutch LGBTI rights organizations.¹¹⁶

The three men appealed their respective decisions to the Rechtbank-Gravenhage, the Dutch court of first instance. The court dismissed A and C's appeals as "unfounded" and dismissed B's appeal by concluding that "the Staatssecretaris could have reasonably found the B's statements concerning his homosexuality were not credible."¹¹⁷ The men subsequently appealed to the Raad van State, an advisory board to the Dutch government and legislature. The men asserted that the questions asked by the Dutch authorities constituted a breach of human dignity and a breach of the right to private life under the Char-

107. *A, B, C*, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 24.

108. *Id.* ¶ 25.

109. *Id.* ¶ 26.

110. *Id.*

111. S. Chelvan, *supra* note 106.

112. *A, B, C*, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 27.

113. *Id.* ¶ 28.

114. *Id.*

115. *Id.* ¶ 29.

116. *Id.*

117. *Id.* ¶ 31-32.

ter of Fundamental Rights of the European Union.¹¹⁸ The Raad van State referred the cases collectively to the ECJ for a preliminary ruling.¹¹⁹ The ECJ sought to determine the limits that Directive 2004/83¹²⁰ and the Charter of Fundamental Rights impose on member states when assessing the credibility of an asylum applicant's declared sexual orientation and how these methods may differ from other grounds of persecution.¹²¹

On December 2, 2014, the ECJ delivered its opinion on the ABC case.¹²² It held that Directive 2004/83, read in light of the Charter, establishes limits on authorities evaluating an asylum application for fear of persecution due to sexual orientation.¹²³ However, member states are not obliged to accept declared sexual orientation as fact.¹²⁴ The declaration by the applicant is merely a starting point in assessing an application's credibility.¹²⁵

According to the ECJ, member states may consider it an applicant's duty to provide information to substantiate their asylum re-

118. *Id.* ¶ 35. The Charter of Fundamental Rights of the European Union, promulgated in December 2000, contains political, social, and economic rights for EU citizens under EU law. Article 3 & Article 7 of the Charter, respectively, state that “[e]veryone has the right to respect for his or her physical and mental integrity” and “[e]veryone has the right to respect for his or her private and family life, home and communications.” Charter of Fundamental Rights of the European Union, art. 3 & 7, Dec. 18, 2000, 2000 O.J. (C 364) 1.

119. *A, B, C*, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 43.

120. See Council Directive 2004/83, art. 4, 2004 O.J. (L 304) 12, 15 (EC) (“(1) Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to

quest.¹²⁶ This may include requiring confirmation of statements made by applicants regarding their declared sexual orientation.¹²⁷ However, any assessments meant to determine an applicant's credibility must be in accordance with the Charter.¹²⁸ The Court looked specifically at four practices: (1) the use of stereotypes; (2) the questioning of an applicant's sexual practice; (3) the administering of "tests" or allowing applicants to submit photographs and videos; and (4) denying asylum due to an applicant's failure to raise persecution for sexual orientation in their initial claim.¹²⁹ The Court found that all of these practices violated the Charter.¹³⁰

First, the Court held that the use of stereotypes is a violation of Article 4(3)(c) of Directive 2004/83.¹³¹ Stereotypical notions about the behavior and experiences of LGBTI people are limiting and do not take into account the varied proclivities, experiences, and knowledge that LGBTI asylum seekers might have before they file an application.

Second, the Court held that questions relating to applicants' sexual practices violate the right to privacy under Article 7 of the Charter.¹³² The Court recognized that the Charter permits authorities to interview an applicant regarding their declared sexual orientation.¹³³ However, questions about sexual practices, especially when such information is divulged to an official, invade upon the privacy rights of asylum applicants.¹³⁴

Third, the Court held that administering tests to prove an applicant's sexual orientation violates the right to human dignity under Article 1 of the Charter.¹³⁵ In addition, the Court prohibited the production of evidence to substantiate an applicant's claimed sexual orientation.¹³⁶ The Court noted that tests, which sometimes require the submittal of evidence, not only infringe upon human dignity, but, from an evidentiary stance, lack probative value.¹³⁷

126. *Id.* ¶ 50.

127. *Id.* ¶ 51.

128. *Id.* ¶ 53.

129. *Id.* ¶ 59.

130. *Id.*

131. *Id.* ¶ 9, 60-63.

132. *Id.* ¶ 64; see Charter of Fundamental Rights of the European Union, *supra* note 118, art. 7.

133. *A, B, C*, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 64.

134. *Id.*

135. *Id.* ¶ 65.

136. *Id.* ¶ 72.

137. *Id.* ¶ 65.

Finally, the Court held that under Directive 2004/83, an applicant's failure to raise their declared sexual orientation as grounds for seeking asylum, prompted by a well-founded fear of persecution, should not be held against them.¹³⁸ The Court noted that, while the Directive may permit member states to oblige asylum seekers to submit all material necessary to assess the application "as soon as possible," the sensitive nature of sexual orientation claims makes a difference.¹³⁹ An applicant fleeing from a nation where their sexual orientation is stigmatized may not feel comfortable divulging their declared identity at first instance.¹⁴⁰

B. Justification for Considering the ABC Case

The ruling by the ECJ in the ABC case is highly persuasive. Jurisdictions assessing the application of LGBTI persons who possess a well-founded fear of persecution in their nation of origin should consider and give weight to the ABC case ruling. While certain progressive nations have reached a consensus that LGBTI people deserve recognition under the phrase "membership in a social group,"¹⁴¹ an inconsistency remains as to the limits placed on assessing an LGBTI asylum application.

Prohibiting the use of stereotypes as a factor in the evaluation of an LGBTI asylum seeker's application is consistent with international human rights and human dignity principles. The Yogyakarta Principles bestow upon LGBTI people a sense of dignity.¹⁴² Competent authorities in nations that assess potential LGBTI asylum seekers' applications prevent the violation of international human rights laws by precluding asylum adjudicators from using stereotypes in evaluations. In addition, many nations already recognize that LGBTI people deserve equal treatment in areas including housing, employment, education, and immigration.¹⁴³ In such nations, precluding the use of stereotypes in asylum adjudication ensures that nations follow their own domestic laws.

138. *Id.* ¶ 70.

139. *Id.* ¶ 68-69.

140. *Id.* ¶ 70-71.

141. Convention Relating to the Status of Refugees, *supra* note 7, art. 1(A)(2).

142. YOGYAKARTA PRINCIPLES, *supra* note 57, at 11 (Principle 3 states that "[e]ach person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.").

143.

Prohibiting adjudicators from asking applicants about their sexual practices furthers the recognition of the dignity of LGBTI people. Researchers emphasize that focusing on the sexual activities of the applicant rather than the persecution they face because of self-identification as a member of a social group misses the mark.¹⁴⁴ Asylum applicants rarely face persecution because they are not caught performing a sexual act; rather, persecution typically arises from asylum seekers' claimed sexual orientations and identities.¹⁴⁵

Further, nations should either prohibit or tightly limit tests as a means of assessing asylum applications of LGBTI persons. As the ECJ noted, tests to "prove" the sexual orientation of an applicant violate their dignity.¹⁴⁶ In addition, tests for sexual orientation and the submission of video and photographic evidence of sexual orientation do not carry great probative value. Moreover, securing such evidence is overly invasive. The ECJ correctly recognizes that subjecting LGBTI persons to tests on the basis of their sexual orientation or gender identity undermines their human rights.¹⁴⁷ States should intervene when they become aware that this sort of conduct is taking place within their jurisdiction.¹⁴⁸

Jurisdictions should also consider the negative impact of denying an LGBTI asylum applicant the ability to raise a claim of asylum based on their sexual orientation if they do not raise such a claim at first instance. LGBTI asylum seekers find themselves outside of their home nation, seeking refuge because their original environment threatens their safety and liberty. Adjudicating bodies should consider the various cultural and particularized experiences of an LGBTI asy-

144. Erin Gomez, *The Post-ABC Situation for LGB Refugees in Europe*, 30 EMORY INT'L L. REV. 475, 487 (2016) (citing Volker Türk, *Ensuring Protection to LGBTI Persons of Concern*, 25 INT'L J. REFUGEE L. 120, 124 (2013)).

145. Cf. Gomez, *supra* note 144 (citing Türk, *supra* note 144).

146. Joined Case C-148/13, C-149/13, & C-150/13, A, B, C v. Staatssecretaris Van Veiligheid en Justitie, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 65 (Dec. 2, 2014).

147. Yogyakarta Principle 18 states that,

No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

YOGYAKARTA PRINCIPLES, *supra* note 57, at 23.

148. States shall: a) Take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms.

Id.

lum applicant.¹⁴⁹ The development of individual sexual orientation does not follow any singular, traditional path with which an asylum official may be familiar.¹⁵⁰ Therefore, authorities must be flexible to this reality.¹⁵¹

The likely criticism to the above arguments is in regard to their extraterritorial nature because the ECJ decided the ABC case. The ECJ only has purview over the member states of the European Union and only interprets European Union law. One might imagine a judge in a U.S. federal district court hearing a challenge to the practices of the U.S. Citizenship and Immigration Service wherein an EU court decision is offered as authority. The judge might react by asking, “Why should we care what they say in Europe?” However, it is not a completely strange occurrence for a U.S. court to cite foreign law and cases.¹⁵² As Associate Justice Ginsburg once proclaimed, “I frankly don’t understand all the brouhaha latterly from Congress and even some of my colleagues about referring to foreign law.”¹⁵³ In addition, while the Yogyakarta Principles are not binding law in any jurisdiction, the progressive nations that grant asylum to LGBTI people have ratified treaties that call upon them to take action to protect the rights of *all* people.¹⁵⁴

149. See Gomez, *supra* note 144, at 476 (citing Nina Haase, *EU Court Examines If ‘gay’ is Grounds for Asylum*, DW (Feb. 24, 2014), <http://www.dw.com/en/eu-court-examines-if-gay-is-grounds-for-asylum/a-17454674>) (“Applicants who have struggled with their sexual identities in their countries of origin will not necessarily fully accept their LGB sexuality immediately upon entering the receiving country and often will still be developing their sexual identities during an asylum application.”).

150. See Gomez, *supra* note 144, at 476 (first citing S. Chelvan, *supra* note 106; and then citing Louis Middelkoop, *Dutch Court Asks Court of Justice to Rule on the Limits of Verification of the Sexual Orientation of Asylum Seekers*, EUR. L. BLOG (Apr. 23, 2013), <http://europeanlaw-blog.eu/2013/04/23/dutch-court-asks-court-of-justice-to-rule-on-the-limits-of-verification-of-the-sexual-orientation-of-asylum-seekers/>).

151. See Gomez, *supra* note 144, at 476 (first citing S. Chelvan, *supra* note 106; and then citing Middelkoop, *supra* note 150).

152. See generally Stephen Yeazell, *When and How U.S. Court Should Cite Foreign Law*, 26 CONST. COMMENT 59, 61, 73 (2009) (quoting and citing video of Justice Ruth Bader Ginsburg).

153. *Id.* at 73 (quoting and citing video of Justice Ruth Bader Ginsburg).

154. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); Convention on the Elimination of All Forms of Discrimination Against Women, art. 1, Dec. 18, 1979, 1249 U.N.T.S. 20378; International Convention on the Elimination of All Forms of Racial Discrimination, art 1, Mar. 7, 1966, 660 U.N.T.S. 9464.

IV. THE DSSH METHOD

A. *Background on DSSH and Chelvan*

While the ECJ's ruling in the ABC case is highly instructive to other jurisdictions on how they should consider interpreting their own asylum laws, it does not provide affirmative alternatives to prevent the type of unlawful practices that have often occurred in asylum proceedings. Thus, the DSSH method provides a "gap filler" to the ABC case.¹⁵⁵ The DSSH method stands as a tool to ensure that competent adjudicators do not breach the limits of the ABC case while assessing applications for asylum from LGBTI persons based on their sexual orientation or gender identity.

S. Chelvan, a barrister from the UK, first developed the DSSH method while pursuing his Law PhD at the Kings College London.¹⁵⁶ Chelvan debuted the method at a conference in April 2011.¹⁵⁷ Chelvan noted that, since a landmark case in 2010 in the UK, advancements occurred in how authorities in the UK viewed LGBTI asylum laws.¹⁵⁸ That year, the UK Supreme Court ruled in favor of the Home Department in the joint case of HJ & HT v. Secretary of State.¹⁵⁹ In that case, an Iranian man and a Cameroonian man brought cases after applying for asylum in the UK.¹⁶⁰ The Court held that the Home Office's unofficial policy of reasonable tolerable discretion was unlawful.¹⁶¹

155. S. Chelvan, *At the End of the Rainbow: Where Next for the LGBTI Refugee?*, REFUGEE STUD. CTR. (Jan. 24, 2014), <https://www.rsc.ox.ac.uk/news/at-the-end-of-the-rainbow-where-next-for-the-lgbti-refugee-s-chelvan>; see also *LGBTI Asylum Claims – the Difference, Stigma, Shame, Harm Model*, RIGHT REMAIN (Aug. 7, 2014), <http://www.righttoremain.org.uk/legal/lgbti-asylum-claims-the-difference-shame-stigma-harm-model/>.

156. See S. Chelvan, *From ABC to DSSH: How to Prove That You are a Gay Refugee*, FREE MOVEMENT (July 23, 2014), <https://www.freemovement.org.uk/from-abc-to-dssh-how-to-prove-that-you-are-a-gay-refugee/>.

157. See *id.*

158. See Mary O'Hara, *Legal Aid Barrister of the Year: 'It's A Very Dangerous to be Gay in'*, GUARDIAN (July 16, 2014, 3:00 PM), <https://www.theguardian.com/society/2014/jul/16/legal-aid-barrister-dangerous-world-gay-asylum-seekers-s-chelvan>.

159. HJ (Iran) (FC) and HT (Cameroon) (FC) v. Secretary of the State for the Home Department [2010] UKSC 31 (appeal taken from 2009 EWCA Civ 172).

160. *Id.*

161. Catherine Baksi, *Legal Hackette Lunches with S. Chelvan*, LEGAL HACKETTE'S BRIEF (Jan. 25, 2016), <https://legalhackette.com/2016/01/25/legal-hackette-lunches-with-s-chelvan/> (explaining the Home Office policy of reasonable tolerable discretion, "[w]here it accepted claimants were gay and would face persecution or death if returned to their home countries, it suggested they could avoid such threats by voluntarily exercising discretion and concealing their sexuality").

After the UNHCR convened a meeting in 2011 in Geneva to discuss LGBTI asylum claims,¹⁶² national governments called for the UNHCR to devise a questionnaire that authorities could use to assess LGBTI asylum application in accordance with international human rights laws and principles.¹⁶³ Chelvan rejected this call for a questionnaire because of the arbitrary nature of a numeric-based system.¹⁶⁴ For Chelvan, the key to assessing the application of an LGBTI asylum seeker is difference.¹⁶⁵ For it is difference that makes the asylee the initial target of their persecutor and therefore a member of the particular social group under the language of the 1951 Convention related to the Status of Refugees.¹⁶⁶ Moreover, it is not necessarily a sexual act that brings the LGBTI applicant to the attention of their persecutor, but, rather, a recognition by the persecutor that the asylum applicant does not conform to that society's dominant idea of acceptable sex and gender roles.¹⁶⁷

B. Implementing the DSSH Method

DSSH stands for "Difference, Stigma, Shame, Harm."¹⁶⁸ Using this model, the adjudicator poses open ended, narrative-based questions to elicit responses from the asylum applicant. The first stage focuses on difference.¹⁶⁹ The interviewer asks the applicant questions about when they knew they were different than "other boys and girls" and when they knew they fell outside the norms of their gender's behavior.¹⁷⁰ Because an applicant is likely to recognize that they were different from their peers and what the culture in their home country expected of them, this leads to an awareness and discussion of stigma.

162. See Jesse Bernstein, *Human Rights First Welcomes Attention on LGBTI Refugees – Urges Continued Reforms to Ensure Protections*, HUFFPOST (Oct. 13, 2010, 8:08 PM), https://www.huffingtonpost.com/human-rights-first/hrf-welcomes-attention-on_b_762012.html.

163. See Baksi, *supra*

The topic of stigma prompts the applicant to discuss issues like when and how they recognized that others disapproved of their identity or conduct. Stigma is tightly connected with regional social/cultural/religious norms.¹⁷¹ The issue of stigma can also lead to a discussion of when and how asylum applicants learned that the majority of their originating society disapproved of their identity and/or conduct and that society implemented laws and cultural practices to respond to LGBTI people in an oppressive manner.¹⁷²

The stigma attached to the applicant's identity will often lead to feelings of shame around their identity.¹⁷³ The shame attached to the stigma may impact the asylum seeker in such a way that leaves them isolated and alienated by the society at large.¹⁷⁴ However, the last phase of the DSSH model is perhaps the most important. The applicant will discuss what events occurred that gave them the well-founded fear of persecution in their home country.¹⁷⁵ The harm might be in the form of violence from a state actor. The state actor might threaten the applicant with torture, detention, or even capital punishment.¹⁷⁶ The persecutor might be a non-state party. In some instances, the threat may come from within the family, such as in the case of honor killings.¹⁷⁷

In October 2012, the UNHCR formerly endorsed the DSSH method.¹⁷⁸ S. Chelvan presented his findings to the UNHCR in Geneva, which found the arguments compelling.¹⁷⁹ In December 2013, the Migrationvert (the Swedish Migration Board) invited Chelvan to Stockholm to give a presentation to the board.¹⁸⁰ Court lawyers and judges attended Chelvan's presentation.¹⁸¹ As of 2014, the government of New Zealand chose to adopt the DSSH method as part of its

171. Chelvan, *supra* note 156.

172. Chelvan, *supra* note 168, at 31.

173. *Id.* at 32.

174. *Id.*

175. *Id.* at 37.

176. *Id.* at 34.

177. See generally Gregg Zoroya, 'Honor killings': 5 Things to Know, USA TODAY (June 9, 2016, 12:35 PM), <https://www.usatoday.com/story/news/world/2016/06/09/honor-killings-united-nations-pakistan/85642786/> (Honor killings are a form of extreme punishment exacted to regain family honor in the wake of what is considered a sexual crime, such as adultery or other sexual impropriety and homosexuality).

178. Sweden – "Changing the Chapter" in *Understanding LGBTI asylum claims*, NO.5 BARRISTERS CHAMBERS (Dec. 4, 2013), <http://www.no5.com/news-and-publications/news/668-sweden-changing-the-chapter-in-understanding-lgbti-asylum-claims/>.

179. *Id.*

180. *Id.*

181. *Id.*

asylum review process.¹⁸² In addition, the governments of Germany, Finland, and Cyprus reviewed the DSSH method for potential adoption by their government agencies.¹⁸³

UN member states that assess the application of LGBTI asylum seekers should adopt the DSSH method. After only just a few short years, the DSSH method enjoys support from a growing list of progressive nations who are committed to providing a refuge for asylum seekers fleeing persecution, while maintaining the integrity of their asylum adjudication process.¹⁸⁴ Given that the UNHCR, which designates a framework for the global community on refugee and asylum policies, adopted the DSSH method,¹⁸⁵ there is great potential for it to be recognized beyond just a handful of nations.

States that have ratified the 1951 Refugees Convention should apply the DSSH method. In order for the DSSH to expand its reach in the future, this paper recommends that ratifying nations draft the DSSH method as an optional protocol. Optional protocols attach to previously establish Tw h510319 Tw T*():ogi

protocol would be the diplomatic mechanism that could ensure that the method has the widest reach possible among progressive nations.

While the DSSH method is innovative in its approach to assessing applications for asylum while respecting the rights of applicants, it is nevertheless flawed in some ways that would require addressing prior to an adoption by the UN in an optional protocol. For example, the DSSH method does not provide safeguards to ensure that false narratives cannot pass as credible. While government agencies desire sensitivity towards the experiences of asylum seekers, there is a continued need to protect the integrity of the asylum process. Over time, a system could develop where applicants who do not possess legitimate claims for refugee status are able to slip through the system because they know just the right statements to make in order to seem credible.

Furthermore, opposition to DSSH may rest upon the method's emphasis on a showing of self-identification as LGBTI. If harm is the most crucial step in determining whether states should grant asylum, how significant is it that the applicant actually self-identify as LGBTI

yond the spaces where they confront hate.¹⁹¹ By giving consideration to the ECJ's ABC case, governments will ensure that they are upholding the values found within their own domestic laws that would give LGBTI refugees freedom whilst also defending international human rights. In addition, the adoption of the DSSH method via an optional protocol is an exciting opportunity for nations that already have a commitment to protecting LGBTI people. By taking the necessary steps, nations can guarantee that they provide LGBTI people the dignity they deserve through a process that acknowledges this social group's vulnerabilities and power.

191. See Convention Relating to the Status of Refugees, *supra* note 7; UNHCR, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 1 (Sept. 2011), <http://www.unhcr.org/en-us/4ec262df9.pdf#zoom=95>.

