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“Discretion”, persecution and the act/identity dichotomy

Reducing the Scope of Refugee Protection

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Working Paper Series

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“Discretion”, persecution and the act/identity dichotomy: Reducing the Scope of Refugee Protection

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I. Introduction: Shifting the focus

Can it ever be accepted that ‘someone could lawfully be required to “live discreetly” in their country of origin in order to avoid persecution?’¹ Alice Edwards observed that ‘the appetite and imagination of the judiciary for new tests which limit refugee recognition rates seems interminable.’² The idea of concealment, that is, ‘discretion reasoning’ in its manifold expressions,³ is arguably one of those tests. Though Courts have often held it to be incompatible with the objective and purpose of the 1951 Convention Relating to the Status of Refugees, studies such as the Fleeing Homophobia Report have demonstrated that the idea that asylum claimants, and in particular LGBT people, conceal their protected identity continuously reappears in refugee status determinations in different guises.⁴ According to Jenni Millbank, ‘[r]easoning premised on assumptions about the ease, naturalness, and legal correctness of concealing lesbian, gay, and bisexual identity is one of, if not the, most significant and resilient barriers to the fair adjudication of sexual orientation’,⁵ and that ‘[d]iscretion reasoning is extraordinarily widespread, resistant to challenge and strongly associated with high rejection rates for lesbian, gay and bisexual refugee claims.’⁶ The issue has arisen particularly in sexual orientation/gender identity cases, but it is also an issue in cases based on political opinion⁷ and religion.⁸ So what makes it so resilient?

This paper argues that one of the reasons for this resilience is that discretion is based on an underlying is/does dichotomy that functions as a double bind. ‘Discretion’ reasoning refers to the assumption or expectation that a person change or hide the characteristic they are persecuted for and thus not come to the attention of potential persecutors. In other words, they would *act* discreetly so as to conceal their *identity*. In this sense, an act/identity (or ‘is/does’) dichotomy is at the core of any ‘discretion’ reasoning. Conversely, a distinction between activities and identity will easily (if not invariably) lead to ‘discretion reasoning’: Hiding a characteristic (concealment), always involves the idea that a person refrains from conduct

¹ Alice Edwards (2012) ‘Distinction, Discretion, Discrimination: The new frontiers of gender-related claims to asylum’, paper presented at the Gender, Migration and Human Rights Conference at the European University Institute, Florence, Italy, 19 June 2012, 8-9.

² *Ibid*, 2.

³ ‘Discretion’ has been the object of academic debate for some time, see eg Catherine Dauvergne and Jenni Millbank (2003) ‘Before the High Court: Applicants S396/2002 and S395/2002, a Gay Refugee Couple from Bangladesh’, 25 *Sydney Law Review* 97; Jenni Millbank (2009) ‘From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom’, 13(2/3) *International Journal of Human Rights* 391. Christopher N. Kendall (2003) ‘Lesbian and Gay Refugees in Australia: Now that “Acting Discreetly” Is no Longer an Option, Will Equality Be Forthcoming?’ 15 *International Journal of Refugee Law* 715. Janna Wessels (2012) ‘HJ (Iran) and HT (Cameroon) - Reflections on a new test for sexuality-based asylum claims in Britain’, 24(4) *International Journal of Refugee Law* 815.

⁴ Sabine Jansen and Thomas Spijkerboer (2011) *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, Vrije Universiteit Amsterdam, September 2011, 33-41.

⁵ Jenni Millbank (2012) ‘The Right of Gay Men and Lesbians to Live Freely, Openly, and on Equal Terms Is Not Bad Law: A Reply to Hathaway and Pobjoy’ 44(2) *New York University Journal of International Law and Politics* 497, 501.

⁶ *Ibid*, 506.

⁷ Edwards above n 1, citing the UK Court of Appeal for England and Wales case of *RT (Zimbabwe) and Others v. Secretary of State for the Home Department* [2010] EWCA Civ 1285, 18 November 2010.

⁸ Hemme Battjes (2013) ‘*Sur place* claims and the accommodation requirement in Dutch asylum policy’, in Thomas Spijkerboer (ed) *Fleeing Homophobia – Sexual Orientation, gender identity and asylum*, London: Routledge, 82-97.

related to, or expressing the, identity. At the same time, certain acts or behaviour may be expected or required as proof of an identity ('*indiscretion* requirement', or 'discretion requirement in reverse' as applied in France⁹): as long as a person hid their identity, they were not perceived as 'different' by potential persecutors and therefore not at risk. By making that distinction, decision-makers are able to refuse to offer protection and thus indirectly prohibit any acts or behaviour they do not deem 'reasonably required to reveal or express'¹⁰ the identity on the one hand, and require certain acts or behavior they deem 'central' to the identity on the other.

That is/does dichotomy is deeply enshrined in dominant discourse on sexual minorities. As Spijkerboer pointed out, this 'discourse finds it no more than *natural* to refer lesbian, gay, bisexual, and transgendered people to discretion.'¹¹ That is, 'discretion' in their conduct is assumed as a natural element of their sexual orientation. Sedgwick noted in her seminal 1990 book 'Epistemology of the Closet' that 'for many people [the gay closet] is still the fundamental feature of social life; and there can be few people, however courageous and forthright by habit, however fortunate in the support of their immediate communities, in whose lives the closet is not still a shaping presence.'¹² Unsurprisingly, then, it has also shaped sexuality-based asylum claims. Several authors have addressed this problem of an is/does dichotomy in the past, such as O'Dwyer for the United States, who pointed to the problem of the 'artificial distinction between persecution on account of homosexual *status or identity*, which some circuits hold warrants protection, and punishment for homosexual *acts*, which some circuits hold does not warrant such protection'.¹³ LaViolette also harshly criticized the distinction between status and conduct as early as 1997, as it permits discrimination against people on the basis of their sexual behaviour and public sexual identity.¹⁴ This discretion/disclosure debate from the area of sexual orientation can – in the slightly different formulation of 'activity-based' risks¹⁵ – also be found in the context of religion¹⁶ and political opinion¹⁷ claims.

⁹ Cf Jansen and Spijkerboer above n 4, 36.

¹⁰ James C. Hathaway and Jason Pobjoy (2012) 'Queer Cases Make Bad Law' 44(2) *New York University Journal of International Law and Politics* 315, 382.

¹¹ Thomas Spijkerboer (2012) 'Two remarks on queer law and queer politics: Thomas Spijkerboer responds to Jenni Millbank & Guglielmo Verdirame', Panel 3 of the Online Symposium of the NYU Journal of International Law and Politics, Vol. 44:2, available at: <http://opiniojuris.org/2012/03/09/two-remarks-on-queer-law-and-queer-politics-thomas-spijkerboer-responds-to-jenni-millbank-guglielmoverdirame/>.

¹² Eve Kosofski Sedgwick (1990) *Epistemology of the Closet*, Berkeley/Los Angeles: University of California Press, 68.

¹³ Paul O'Dwyer (2008) 'A well-founded fear of having my sexual orientation claim heard in the wrong court', *New York School Law Review*, 52: 185-212, 136. Note that this was especially true for early decisions, such as in the United States Board of Immigration Appeals case of *Matter of Toboso-Alfonso*, A-23220644, 12 March 1990: 'The government's actions against him were not in response to specific conduct on his part (e.g., for engaging in homosexual acts); rather, they resulted simply from his status as a homosexual.'

¹⁴ Nicole LaViolette (1997) 'The immutable refugees: sexual orientation in Canada (A.G.) v. Ward', *University of Toronto Faculty Law Review*, 55(1): 1-42, 30.

¹⁵ See eg Rodger P.G. Haines, James C. Hathaway, and Michelle Foster (2002) 'Claims to Refugee Status based on Voluntary but Protected Actions - Discussion Paper No. 1, Advanced Refugee Law Workshop, International Association of Refugee Law Judges, Auckland, New Zealand, October 2002', 15(3) *International Journal of Refugee Law* 430; Hathaway and Pobjoy above n 10.

¹⁶ See eg Court of Justice of the European Union *Federal Republic of Germany v Y (C-71/11)*, *Z (C-99/11)*, C-71/11 and C-99/11, 5 September 2012.

In order to understand the resilience of discretion reasoning in refugee status determinations, it therefore appears essential to better understand the dynamics that an act/identity distinction triggers in refugee claims. It is assumed that the act/identity distinction is an unstable relationship that works in both ways and is full of inconsistencies that provide different points of entry for the various forms of ‘discretion’ reasoning. A principled analysis of the different ways in which the focus shifts between behaviour and status during the process, in the eyes of decision-makers, applicants, their lawyers as well as researchers, may reveal how ‘discretion reasoning’ operates in refugee status determinations and help demonstrate why it has proven so resilient.

This paper therefore addresses the ways in which the interrelationship between identity and acts, both ambiguous concepts themselves and defined in relation to each other, operate in refugee status determinations, and thereby reduce the space for protection. In a first step, it will be outlined how the act/identity dichotomy functions as a double bind for asylum claimants. In a second step, this understanding of the act/identity double bind will be applied to the persecution analysis in refugee status determination: It will be examined how a preoccupation with the ‘behaviour’ of the claimant has led to an assumption of ‘activity-based risks’ and a resulting distinction between (protected) acts at the ‘core’ of an identity and (non-protected) acts at the ‘margins’ of that identity. It will be demonstrated that the separation of acts and identity shifts the focus in the analysis away from the persecutory harm and the perpetrator towards the claimant, her acts and entitlements. Moreover, this separation confuses the refugee status determination as the *act* is ‘moved around’ and variously assessed in different stages of the determination process, thereby adding a series of additional hurdles for claimants.

II. The act/identity dichotomy as a double bind: invariably ‘discreet’

According to Alice Edwards, it is unclear how the issue of ‘discretion’ crept (back) into refugee claims, but that it has the potential to undermine one of the basic tenets of refugee law – ‘that the Convention protects persons who possess a well-founded fear of being persecuted on account of their attributes or opinions.’¹⁸ Indeed, ‘discretion reasoning’ persists in spite of the fact that the five Convention grounds (race, religion, nationality, membership of a particular social group and political opinion), that have been summarised as ‘fundamental characteristics’, should not be hidden. Article 1A(2) of the 1951 Convention relating to the status of refugees states:

‘the term “refugee” shall apply to any person who ... owing to well-founded fear of being persecuted *for reasons of race, religion, nationality, membership of a particular social group or*

¹⁷ See eg the UK Supreme Court case *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012.

¹⁸ Edwards, above n 1, 9. See also McHugh and Kirby JJ in their joint submission in the Australian High Court case of *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* [2003] HCA 71, 9 December 2003 at [13]: ‘The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention.’

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.'

As Lord Dyson put it in a recent UK Supreme Court decision: 'The Convention reasons reflect characteristics or statuses which either the individual cannot change or cannot be expected to change because they are so closely linked to his identity or are an expression of fundamental rights.'¹⁹ This position is generally accepted and has been endorsed in several guiding documents. For example, the UNHCR Guidelines on religion state at paragraph 13: 'Applying the same standard as for other Convention grounds, religious belief, identity, or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution'.²⁰ Whoever is persecuted because she or he possesses one of these fundamental characteristics therefore is in principle entitled to refugee protection *without* any requirement to *hide* their fundamental characteristic.

This general principle is undermined by the act/identity dichotomy. Decision-makers as well as other stakeholders seem to consciously or subconsciously make a distinction between identity and acts in a claimant. A particular difficulty with 'fundamental characteristics' such as religion, political opinion, sexual orientation and many others is that they are not necessarily immediately visible but need to be disclosed. Comparing homophobia with other 'modern oppressions', Sedgwick conceived of the revelation of different oppressed identities as follows :

'Racism, for instance, is based on a stigma that is visible in all but exceptional cases (cases that are neither rare nor irrelevant, but that delineate the outlines rather than coloring center of racial experience); so are the oppressions based on gender, age, size, physical handicap. Ethnic/cultural/religious oppressions such as anti-Semitism are more analogous [to homophobia] in that *the stigmatized individual has at least notionally some discretion – although, importantly, it is never to be taken for granted how much – over other people's knowledge of her or his membership in the group: one could 'come out as' a Jew or Gypsy, in a heterogeneous urbanized society, much more intelligibly than one could typically 'come out as', say, female, Black, old, a wheelchair user, or fat.*'²¹

Millbank noted that there are 'multiple and complex possibilities around the way that behaviour may reflect or relate to an identity... An activity may *express* the identity or it may *reveal* the identity.'²² So acts *disclose* the identity to others, and others *infer* the identity from acts. This may not always be accurate, which is why refugee protection also extends to those with an *imputed* political opinion or religion or who are *perceived as* gay by their potential

¹⁹ UK Supreme Court: *RT (Zimbabwe)*, above n 16, per Lord Dyson at [25].

²⁰ UNHCR (2004) *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 28 April 2004, HCR/GIP/04/06, at [13]. See also, UNHCR (2002) *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, paragraph 6. Similarly, in internal flight or relocation cases, the claimant should not be expected or required to suppress his or her religious views to avoid persecution in the internal flight or relocation area. See UNHCR (2003) *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, paragraphs 19, 25.

²¹ Sedgwick, above n 12, 75.

²² Millbank (2012), above n 5, 513.

persecutors.²³ This is the clearest way to illustrate that revelation (disclosure) and concealment ('discretion') are never entirely in the hands of the person concerned. As Millbank noted, the difficulty in trying to delimit the relationship between act and identity is compounded because expression and revelation can occur in ways that are deliberate or inadvertent, and may be deliberate for some purposes or audiences but inadvertent for others.²⁴ This is particularly so in persecutory environments, where exposure of a particular identity may result in serious harm and is therefore particularly delicate.

'Discretion reasoning' then results from the 'systematic ways in which acts and identities generate incoherence and instability'.²⁵ The complex relationship of acts and identity can be described as contradictory – though inherently connected, the concepts are consistently understood as separate. Drawing on Eve Kosowski Sedgwick²⁶ and Janet Halley²⁷, it is possible then to conceive of both concepts as symbolic systems that are systematically arranged in a binary opposition with the following characteristics:

1. The two conceptual systems (acts and identity) are matched in their opposition to one another in an unsettled and dynamic tacit relation according to which, term B (eg, acts) is not symmetrical with but subordinated to term A (eg, identity);²⁸
2. The preferred discourse requires the submerged one to make it work: *identity* depends for its meaning on the simultaneous subsumption and exclusion of *acts* – hence, the question of priority between the supposed central and the supposed marginal discourse is irresolvably unstable because *acts* are at once internal and external to *identity*;
3. That instability can be the source of suppleness and resilience, because the two discourses can be flipped: the one that was submerged and denied can become express, and it in turn can be covertly supported by the one that was preferred.

As a result of this arrangement, the master of a double bind always has somewhere to go.²⁹ In the refugee context, this translates to a situation where the refugee decision maker may always send a claimant back to 'discretion'. To illustrate the way that the act/identity double bind functions, consider a man who self-identifies as gay, but got married in order to hide his sexual orientation in his home country and never had a same-sex relationship.³⁰ The decision-maker may find that the claimant is not at risk in his home country because he will not act in a way that his sexual orientation will come to the knowledge of his potential persecutors. In other words,

²³ See eg UNHCR (2001) 'The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', April 2001, at [25]. See also: UNHCR (1992) 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', January 1992, at [80]; Supreme Court of Canada: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 30 June 1993, 747.

²⁴ Cf Millbank (2012), above n 5, 513-14.

²⁵ Janet Halley (1993) 'Reasoning about Sodomy: Act and Identity in and after *Bowers v. Hardwick*', 79(7) *Virginia Law Review* 1721-1780, 1747.

²⁶ Sedgwick, above n 12, 9-10.

²⁷ Halley, above n 24, 1748-49.

²⁸ Because the relation is dynamic, it could just as well be the other way round (identity subordinated to acts), and the priority can be flipped at any time.

²⁹ Halley, above n 24, 1749.

³⁰ See eg Australian Immigration Review Tribunal cases *MA5-04358*, 19 January 2006 (concerning a man from Chile who identifies as bisexual but never had a same-sex relationship); *TA1-11498*, 7 February 2006 (concerning a gay man from Chile who got married to hide his sexual orientation but secretly maintained same-sex relationships) and *MA6-01843*, 1 November 2006 (concerning a married gay man from Costa Rica).

he will be 'discreet'. Thus, while the decision-maker would accept the claimant's identity as protected, his acts would not be seen to put him at risk of persecution. As a result, the claim fails and the applicant will have to return to his home country and continue being 'discreet'. Conversely, in a different context, if the same man were put in male-only immigration detention and started a relationship with a fellow inmate (that is, *not* be 'discreet'),³¹ the arrangement of the concepts may be flipped: the decision-maker may find that the claimant's acts are due to the context where only men are available and do not properly indicate his sexual orientation (in other words, his identity). The claim fails and as a result, the applicant will have to return to his home country and go back to being 'discreet'. Jenni Millbank has observed one such flip: She showed how the trend has shifted from 'discretion' to 'disbelief' in Australia and Britain after the Australian High Court had rejected the notion that decision-makers could 'expect' refugee applicants to conceal their sexual orientation.³² This shift arguably represents a flip of the discourses – after routinely relying on the absence of acts and finding that genuinely gay claimants could be expected to behave 'discreetly', the relation shifted and cases failed because of a purported absence of identity irrespective of acts which equally forced failed applicants to return to secrecy.

So an act/identity dichotomy is at the core of any 'discretion' reasoning. An 'identity per se'³³ is – consciously or subconsciously – distinguished from acts expressing or revealing this identity. This distinction is problematic in refugee status determination as it appears to exclude claimants from protection: They are damned if they do and damned if they don't.

III. Distorting the persecution analysis: Separating acts from 'identity per se'

Using the lens of the act/identity dichotomy is useful to explore the different ways in which claimants face a double bind. The dichotomy manifests itself in refugee status determination in many different ways. It plays a role in questions of fact, such as in the assessment of credibility³⁴ and in the analysis of the country of origin information, eg where a state criminalises 'homosexual conduct'.³⁵ But it also affects doctrinal issues, such as the analysis of the particular social group as a Convention ground³⁶ and the persecution analysis.

The remainder of this paper will focus on the latter: It will be demonstrated that an is/does dichotomy in the persecution analysis shifts the focus away from the persecutory harm feared and reverses the onus of Convention protection. This trend can be made out in both case law

³¹ See for example the Australian Federal Magistrates Court case of *SZJSL v Minister for Immigration & Another* [2007] FMCA 313, 19 February 2007.

³² Millbank (2009), above n 3.

³³ Hathaway and Pobjoy, above n 10, 333.

³⁴ A claimant may be found to lack credibility when failing to provide an account of either same-sex sexual relations (acts) or same-sex emotional and romantic attraction (identity), see eg Louis Middelkoop (2013) 'Normativity and credibility of sexual orientation in asylum decision making' in: Thomas Spijkerboer (ed) *Fleeing Homophobia – Sexual Orientation, gender identity and asylum*, London: Routledge, 154-175.

³⁵ Criminal laws generally address sexual conduct rather than sexual identity, see eg Millbank (2012), above n 5, 513.

³⁶ What defines a group? Is it an innate and unchangeable characteristics? Can a group be accepted that is based on 'just acts'? see eg Kristen L. Walker (2000) 'Sexuality and Refugee Status in Australia' 12(2) *International Journal of Refugee Law* 175.

and academic debate to varying degrees. Though its expressions differ, the underlying uniting feature is the reliance on the claimant's conduct. In the 2010 UK Supreme Court case of *HJ (Iran)*, Lord Dyson declared by reference to the case of *Ahmed v SSHD* from 1990 that 'It is well-established that in asylum cases it is necessary for the decision-maker to determine what the asylum-seeker *will do* on return.'³⁷ The ways in which this preoccupation with the applicant's future behaviour affects the entire analysis will be explored by reference to case law from a series of jurisdictions, including the UK, Canada, New Zealand, Australia, Germany and the EU and underpinned by a discussion of academic literature on 'discretion' reasoning and activity-based risks.

The decision of the Court of Justice of the European Union in *Germany v Y and Z* is relied on to structure the analysis.³⁸ The decision dealt with the joined cases of Y (C-71/11) and Z (C-99/11), two Pakistani nationals seeking refugee protection on religious grounds. The questions referred by the Bundesverwaltungsgericht (Federal Administrative Court of Germany) included (1) whether an infringement of the right of the individual to live his faith openly and fully is likely to be an 'act of persecution', (2) whether the concept of an act of persecution is restricted to infringements affecting a 'core area' of freedom of religion and (3) whether it is reasonable to expect a person to give up the practice of religious acts that would expose him to danger to his life, freedom or integrity.³⁹ Each of these aspects will be addressed in turn in the light of the act/identity dichotomy.

(1) Infringement of a fundamental right as 'act of persecution'

The way the questions were framed in the referral in Y (C-71/11) and Z (C-99/11) indicates that the infringement of the freedom of religion itself (i.e., the impossibility to practice their

³⁷ UK Supreme Court: *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, 7 July 2010, per Sir Dyson [109], referring to *Ahmad v Secretary of State for the Home Department* [1990] Imm AR 61.

³⁸ CJEU: *Federal Republic of Germany v Y (C-71/11), Z (C-99/11)*, above n 16.

³⁹ The questions referred:

1. *Is Article 9(1)(a) of the directive ... to be interpreted as meaning that not every interference with religious freedom which infringes Article 9 of the ECHR constitutes an act of persecution within the meaning of [the former provision], and that a severe violation of religious freedom as a basic human right arises only if the core area of that religious freedom is adversely affected?*
2. *If Question 1 is to be answered in the affirmative:*
 - (a) *Is the core area of religious freedom limited to the profession and practice of faith in the areas of the home and neighbourhood, or can there be an act of persecution, within the meaning of article 9(1)(a) of the directive ..., also in cases where, in the country of origin, the observance of faith in public gives rise to a risk to life, physical integrity or freedom and the applicant accordingly abstains from such practice?*
 - (b) *If the core area of religious freedom can also comprise the public observance of certain religious practices:*
 - *Does it suffice in that case, in order for there to be a severe violation of religious freedom, that the applicant feels that such observance of his faith is indispensable in order for him to preserve his religious identity?*
 - *Or is it further necessary that the religious community to which the applicant belongs should regard that religious observance as constituting a central part of its doctrine?*
 - *Or can further restrictions arise as a result of other circumstances, such as the general conditions in the country of origin?*
3. *If Question 1 is to be answered in the affirmative:*
 - *Is there a well-founded fear of persecution, within the meaning of article 2(c) of the directive ..., if it is established that the applicant will carry out certain religious practices – other than those falling within the core area – after returning to the country of origin, even though they will give rise to a risk to his life, physical integrity or freedom, or can the applicant reasonably be expected to abstain from such practices?*

religion in public) was constructed as the persecution feared. In this view, the persecutory act consists in the limitation of a right, as may be the prohibition to publicly proclaim the relevant (religious, political, sexual etc) identity. The harm feared is thus presented as the fact that a positive right (freedom to) is curtailed. This conception of the persecutory act however bears the risk of a shift in focus from the persecutor to the persecuted, where the latter has to defend her right to 'act' in a certain way rather than receive protection.

State protection and the entitlements of the claimant

This difference in focus with its harmful consequences (which will be explored in further detail below) arguably arises out of a concern to frame persecution in terms of human rights. The Convention does not provide a definition of the term persecution. As Atle Grahl-Madsen remarked in his seminal 1966 book *The Status of Refugees in International Law*: 'It seems as if the drafters have wanted to introduce a flexible concept [of persecution] which might be applied to circumstances as they arise; or in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men.'⁴⁰ So while 'persecution' remained undefined in the Convention, decision-makers and academics have struggled to conceive of the term. A widely accepted and influential approach was proposed by James Hathaway in his 1991 book. He moved to offer an understanding of persecution grounded in human rights and based on the basic tenets of the Convention, which he identified as 'a liberal sense of the types of past or anticipated harm which might warrant protection abroad' as well as 'a fundamental preoccupation to identify forms of harm demonstrative of breach by a state of its basic obligations of protection.'⁴¹ Drawing on these precepts, he then proposed the following definition: 'persecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection'.⁴²

In order to define these basic human rights, he turned this around and stated that where there is a breach of those core entitlements that the State should protect, then this constitutes persecution. The State's obligations towards its citizens are codified in the International Bill of Rights: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights mark core, universally recognized values that a State is required to protect.⁴³ In his analysis, Hathaway accordingly defines the 'core entitlements' by reference to the different international human rights instruments and organizes them in the following four tiers: First and second tier rights are those contained in the Universal Declaration on Human Rights (UDHR) which are made binding by their inclusion in the ICCPR and ICESCR. First tier rights (such as freedom from arbitrary deprivation of life, freedom from torture and cruel inhuman and degrading treatment) are non-derogable, second tier rights (including freedom from arbitrary arrest, right to family life) are derogable in cases of national emergency. The third tier comprises rights enunciated in the UDHR that are also codified in the ICESCR which poses less immediate obligations on states (right to work, entitlement to food etc). The fourth tier is composed of rights that are found in the UDHR but not contained in other instruments (such as the right to own property). Hathaway argues that breaches of first tier and second tier rights (the latter in non-emergency cases only)

⁴⁰ Grahl-Madsen (1966) *The Status of Refugees in International Law – Volume I: Refugee Character*, Leiden: Sijthoff, 193.

⁴¹ James C. Hathaway (1990) *The Law of Refugee Status*, Toronto: Butterworths, 104.

⁴² *Ibid*, 104-105.

⁴³ *Ibid*, 106-107.

would always constitute persecution, whereas breaches of third tier rights would only be considered persecutory in particularly severe or discriminatory cases, and breaches of fourth tier rights would very rarely be considered as persecution.⁴⁴

This framework has indeed been received as a helpful ‘principled approach’ to identify harms that are persecutory.⁴⁵ Indeed, the definition of persecution in the EU Qualification Directive bears similarities with Hathaway’s approach. Art. 9 in Chapter III of the Directive states:

- ‘1. Acts of persecution within the meaning of article 1A of the Geneva Convention must:
- (a) Be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the [ECHR]; or
 - (b) Be an accumulation of various measures, including violations of human rights, which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).’

However, the definition in the Qualification Directive does not make explicit reference to the failure of State protection. Yet it is this fact that Hathaway’s framework relies on the State’s obligations towards its citizens in international human rights law to understand which breaches of rights reach the threshold of persecution that has sometimes led to confusion as decision-makers get caught up in the question of what a claimant is *entitled to* as derived from the State’s obligation to protect rather than focussing on what the claimant is *seeking protection from, ie, the actual persecution feared*.⁴⁶

Thus, Hathaway’s framework is applied to the applicant rather than to the persecutor and the consequences of the persecutory act on the claimant. However, it is the harm feared that must constitute a breach of one of the core entitlements as outlined in Hathaway’s framework. The question of state protection is separate from that analysis and is *not* whether the State must protect a particular right but rather whether applicants are *unable or unwilling* to avail themselves of the protection of their country of origin from the particular persecutory harm feared. It is clear from the Refugee Convention itself that ‘being persecuted’ and State protection are separate elements.⁴⁷ But here it appears that the term state protection as relied upon from international human rights law to understand the persecutory harm is then confounded with the element of state protection in the refugee definition. It thus merges risk and state protection⁴⁸ which leads to shifting the focus from the persecutor and the harm feared to the claimant and her rights.

⁴⁴ Hathaway (1990), above n 41, 108-112.

⁴⁵ See eg Supreme Court of Canada: *Canada (Attorney General) v. Ward*, above n 22 (as an early decision drawing heavily on Hathaway’s framework and often relied on by other judgments in a range of jurisdictions).

⁴⁶ ‘Refugee recognition is restricted to situations in which there is a risk of a type of injury that is inconsistent with the basic duty of protection owed by a state to its population’, New Zealand Refugee Status Appeals Authority: *Refugee Appeal No. 74665*, 7 July 2004, at [124].

⁴⁷ ‘[T]he term “refugee” shall apply to any person who ... 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’, see Article 1A(2) of the 1951 Convention relating to the status of refugees.

⁴⁸ ‘[B]ecause the Convention is concerned with protection against a condition or predicament – being persecuted – consideration must be given to both the nature of the risk and the nature of the state response (if any), since it is the combination of the two that gives rise to the predicament of being persecuted.’ Hathaway and Pobjoy, above n 10, 320.

Based on these different conceptions, two distinct understandings of persecutory harm have emerged that can be identified in case law and literature:

1. Focus on the Claimant: The prohibition of or impossibility (for the claimant) to exercise certain practices related to the Convention ground is in itself the persecutory act. In other words, the persecutory harm here *consists in* the fact that the relevant Convention ground may not be publicly proclaimed.
2. Focus on the Persecutor: Certain practices (acts, behaviour) of the claimant may be *triggers* of persecutory harm (exercised by the persecutor), which may be imprisonment, death or any other sustained or systemic violation of human rights. In other words, persecutory harm *follows* the public proclamation *or any other form of revelation* of the relevant Convention ground.

The first view is fundamentally problematic with respect to the focus it places and the assumptions it makes. An example for this kind of reasoning can be found in the New Zealand case *Refugee Appeal No 74665/03*:

‘A prohibition is to be understood to be within the ambit of a risk of “being persecuted” if it infringes basic standards of international human rights law. Where, however, *the substance of the risk* does not amount to a violation of a right under applicable standards of international law, it is difficult to understand why it should be recognised as sufficient to give rise to a risk of “being persecuted”.’⁴⁹

In fact, it is debatable whether this approach is really different at all from the second approach or whether it just wrongfully places a different focus: It suggests that the infringement of the right that is the basis for the Convention ground the applicant bases her claim on has to amount to persecution – whereas the adverse consequences that are the actual substance of the risk and therefore have to reach the threshold of persecutory harm are ignored. And if that is not found to be the case, she would be expected to avoid the adverse consequences precisely by respecting the limitation – without consideration of the consequences that would ensue if she did not respect it, or, for that matter, if her identity were revealed in any other way. It assumes that it is in the power of the applicant to *avoid* the adverse consequences and based on that ignores the persecution feared.

A similar reasoning can be found in the recent decision of the UK Supreme Court *RT (Zimbabwe) and others*, where Lord Dyson, by reference to the earlier cases *HJ (Iran)* (UK), *Appellant S395/2002* (Australia) and *Refugee Appeal No 74665/03* [2005] (New Zealand), found that ‘refugee status cannot be denied by requiring of the claimant that he or she avoid being persecuted by forfeiting a fundamental human right’.⁵⁰ Inversely, this would suggest that refugee status *can* be denied by requiring of the claimant that he or she avoid being persecuted (ie, change her behaviour and be ‘discreet’) if that is *not* deemed to involve forfeiting a fundamental human right. Accordingly, the New Zealand Refugee Status Appeals Authority, notably represented among others by Rodger Haines QC, found in *Refugee Appeal No 74665/03* that ‘if the right sought to be exercised by the applicant is not a core human right, the “being persecuted” standard of the Convention is not engaged.’⁵¹ So the focus shifts away from an

⁴⁹ New Zealand Refugee Status Appeals Authority: *Refugee Appeal No. 74665*, above n 46, at [115].

⁵⁰ UK Supreme Court: *RT (Zimbabwe)*, above n 17, per Lord Dyson at [20].

⁵¹ New Zealand Refugee Status Appeals Authority: *Refugee Appeal No. 74665*, above n 46, at [82].

applicant seeking protection from persecutory harm to an applicant who is ‘seeking to exercise a human right’.

Wellfoundedness and real risk

The suggestion to focus on the consequences of hiding a fundamental characteristic was arguably intended as an answer to what Hathaway and Pobjoy termed the ‘conundrum’⁵² that is created when ‘discretion’ is taken to mean that there is no real chance for the risk to accrue. Sir Dyson in *HJ (Iran)* put the question this way:

‘How can a gay man, who would have a well-founded fear of persecution if he were to live openly as a gay man on return to his country, be said to have a wellfounded fear of persecution if on return he would in fact live discreetly, thereby probably escaping the attention of those who might harm him if they were aware of his sexual orientation?’⁵³

Or, as Hathaway and Pobjoy termed it, ‘how can an implausible risk be real?’⁵⁴ It would thus provide an alternative basis to establish persecutory harm for applicants who will ‘behave discreetly’. This becomes clear in the New Zealand case *Refugee Appeal No 74665/03* where Rodger Haines QC found at [129]:

‘If he returns to Iran the appellant will not be able to live openly as a homosexual and will have to choose between denying his sexual orientation or facing the risk of severe judicial or extra-judicial punishment.’⁵⁵

When presented as interchangeable alternatives as in this case, it appears to be an attractive approach that would strengthen the case for many applicants. However, it *builds on* ‘discretion reasoning’: It still draws a line between open and ‘discreet’ (those ‘denying their sexual orientation’) behaviour and assumes that if a person will ‘deny his sexual orientation’ (in other words, behave ‘discreetly’) then the ‘severe judicial or extra-judicial punishment’ will not be the relevant risk anymore. This is empirically unsound and involves an assumption that risks are activity-based.

The assumptions: Activity-based risks and the unsafe closet

An assumption that risk of persecution arises from a person’s behaviour – and that it is therefore entirely within the power of that person to manage that risk by ‘simply’ desisting from that behaviour – is particularly recurrent in sexual orientation, religion and political opinion cases. Rodger Haines, James Hathaway and Michelle Foster dedicated a whole Discussion Paper to the question of whether it matters that a risk ‘accrues from action, rather than *simply from the applicant’s civil or political status*’.⁵⁶ They chose three ‘commonly encountered factual contexts’ for their study – ‘practice of a non-majoritarian religion, oppositional political activism, and living an openly homosexual life’.⁵⁷ In their paper, they correctly reject the idea that a claim should not be recognised where the ‘risk accrues only to a subset of persons within the

⁵² Hathaway and Pobjoy, above n 10, 331.

⁵³ UK Supreme Court: *HJ (Iran) and HT (Cameroon)*, above n 37, per Sir Dyson at [109].

⁵⁴ Hathaway and Pobjoy, above n 10, 340.

⁵⁵ New Zealand Refugee Status Appeals Authority: *Refugee Appeal No. 74665*, above n 46, at [129].

⁵⁶ Haines, Hathaway and Foster, above n 15.

⁵⁷ *Ibid*, 431.

protected group who undertake a particular form of action'. They offer three examples for this sort of scenario for each of their case studies where a claim should be recognised:

'Thus, not all Jews may be at risk, but only those who wear a yarmulke; not all socialists may be threatened, but only those who advocate publically for an end to privatization of public corporations; and not all homosexuals are targeted, but only those who routinely cohabit as a same-sex couple.'⁵⁸

In this context, the authors concede that 'it is often the case that it is the activities undertaken which reveal the status of the applicant as a member of a protected group.'⁵⁹ However, the authors fail to provide examples for cases where risk would accrue from what they term 'simply status'. Arguably, this would be the case if all members of the protected group were targeted, regardless of the way in which their group membership is revealed. It remains unclear whether in their view this *includes* those 'triggers' (ways of exposure or revelation) that can be attributed to the applicant's own conduct where that conduct is not deemed to be 'protected' – since it is precisely this question of whether the 'action in question is, or is not, within the ambit of the protected interest' that in their view becomes 'the relevant question' (see discussion of 'core' and 'marginal' acts below).⁶⁰

However, this view that risks are activity-based and thus within the power of the applicant to manage is empirically flawed: The closet is a very unsafe place.⁶¹ Acts and identity are very closely connected and disclosure and discretion are never entirely in the hands of the person concerned: Acts may disclose or hide an identity; and identity can be expressed or suppressed through acts. Importantly, this may be conscious or unconscious, intended or unintended and does not only depend on the person him or herself but also on the 'recipient' of the message. The latter may view certain acts or other small signifiers (or the lack thereof) as indications of an identity – or not. So, to repeat the observation by Sedgwick quoted above, while the persecuted individual has at least notionally some discretion over other people's knowledge of her or his membership in the group, importantly, it is never to be taken for granted how much.⁶² The door of the closet is never quite shut – there is no universal 'on/off switch'.⁶³ Millbank and Dauvergne observed that '[t]he question of being "out" is never answered once and for all, it is a decision made over and over, each day and in each new social situation'⁶⁴ and that 'even an individual who wishes to hide, who desperately wishes – and takes all possible steps – to remain closeted does, in fact become increasingly "visible" with the passage of time.'⁶⁵ So this reasoning does not take into account the fact that, although the applicant might in fact seek to live in a 'discreet' way, persecution may still be imminent as soon as the applicant's identity is discovered or is outed against her will by others.⁶⁶ There is a permanent risk that this will

⁵⁸ Ibid, 432. Note that these examples are not substantiated by case law or other sources and arguably seem 'constructed'.

⁵⁹ Ibid, 432.

⁶⁰ Ibid, 432.

⁶¹ Jansen and Spijkerboer, above n 4, 8.

⁶² Sedgwick, above n 12, 75.

⁶³ Cf Hathaway and Pobjoy, above n 10, 326.

⁶⁴ Dauvergne and Millbank, above n 3, 122.

⁶⁵ Ibid.

⁶⁶ Jansen and Spijkerboer, above n 4, 38.

happen be it by accident, through rumours or through growing suspicion.⁶⁷ Also the absence of certain expected activities and behaviour identifies a difference between them and other people and may place them at risk of harm.⁶⁸ So the state of “closeted-ness” is ‘always a potentially permeable one.’⁶⁹ This implies a permanent risk of persecution.

It is thus clear that to understand risks as ‘activity-based’ confines the examination. To draw on an observation by Gummow and Hayne JJ in the Australian case of *S395/2002*, asking whether a particular behaviour on the part of the applicant would put her at risk would be a narrow inquiry that would ‘be relevant to whether an applicant had a well-founded fear of persecution for a Convention reason only if the description given to what the applicant would do on return was not only comprehensive, but exhaustively described the circumstances relevant to the fear that the applicant alleged. On its face it appears to be an incomplete, and therefore inadequate, description....’⁷⁰ Indeed, there can be no such thing as activity-based risks under the Refugee Convention: the Convention reasons describe characteristics rather than acts. If a person were persecuted for a particular act only that would not engage the Convention. That is the role of the nexus requirement: Persecution needs to be feared ‘for reasons of’ religion, political opinion or sexual orientation. The Convention is engaged when an act is viewed (nexus) as an indication or signifier of that characteristic (Convention ground, see also discussion of nexus below).

The focus: Anne Frank and endogenous harms

Not only can a person merely *reduce* (rather than entirely manage and *avoid*) a risk, the fact that she can and will *try to* avoid it does not change the nature of the risk in the sense that the substance of the risk changes. This can be illustrated by reference to what has been termed the ‘Anne Frank principle’.⁷¹ This – contested – comparison was proposed by Madgwick J in the Australian political opinion case of *Win v Minister for Immigration and Multicultural Affairs* [2001]⁷² and has since often been relied upon in the context of ‘discretion’ reasoning. Madgwick J said:

‘[U]pon the approach suggested by counsel for the respondent, Anne Frank, terrified as a Jew and hiding for her life in Nazi-occupied Holland, would not be a refugee: if the Tribunal were satisfied that the possibility of her being discovered by the authorities was remote, she would be sent back to live in the attic. It is inconceivable that the framers of the Convention ever did have, or should be imputed to have had, such a result in contemplation.’⁷³

⁶⁷ This point has been made by many scholars, see eg Dauvergne and Millbank, above n 3; Ghassan Kassisieh (2008) ‘From Lives of Fear to Lives of Freedom: A review of Australian refugee decisions on the basis of sexual orientation’ Gay & Lesbian Rights Lobby, 69; Jansen and Spijkerboer, above n 4, 8; Wessels, above n 3; see also UNHCR (2012) *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, at [32].

⁶⁸ Cf UNHCR Guidelines on Sexual Orientation above n 67, at [32]. See also: UK Upper Tribunal (Immigration and Asylum Chamber) case of *SW (lesbians - HJ and HT applied) Jamaica v. Secretary of State for the Home Department*, UK, CG [2011] UKUT 00251(IAC), 24 June 2011.

⁶⁹ Dauvergne and Millbank, above n 3, 122.

⁷⁰ Australian High Court: *Appellant S395/2002*, above n 18, per Gummow and Hayne JJ at [83].

⁷¹ UK Supreme Court: *HJ (Iran) and HT (Cameroon)*, above n 37, per Lord Walker at [96].

⁷² Federal Court of Australia: *Win v Minister for Immigration and Multicultural Affairs* [2001] FCA 132 (23 February 2001) at [18].

⁷³ Federal Court of Australia: *Win v MIMA*, above n 72, at [18].

Notably, Madgwick used this ‘historical example’ to illustrate the point that there ‘appears to be no reason why, ... a denial of freedom to express one’s political opinion *may* not, of itself, constitute persecution.’⁷⁴ However, this view was rejected when the same question was discussed in the course of the litigation of the UK case of *HJ (Iran)*. Indeed, as Sir Dyson clarified in *HJ (Iran)*, it is absurd and unreal:

‘In this case the Secretary of State argued that had Anne Frank escaped to the United Kingdom, and had it been found (improbably, as the Secretary of State recognised) that on return to Holland she would successfully avoid detection by hiding in the attic, then she would not be at real risk of persecution by the Nazis, and the question would be whether permanent enforced confinement in the attic would itself amount to persecution. Simply to re-state the Secretary of State’s argument shows that it is not possible to characterise it as anything other than absurd and unreal. It is plain that it remains the threat to Jews of the concentration camp and the gas chamber which constitutes the persecution.’⁷⁵

Not only does it come down to ‘an unnecessary complication, and lead[s] to confusion’⁷⁶, it is also perverse to say that a risk is not real when a person who genuinely (and objectively) fears it and therefore seeks to *reduce* it as best as possible by hiding is thus said to be not at risk. That person remains persecuted – which is why she remains in hiding. If anything, the fact that she endures the hiding is an indication of her genuine fear of a real risk.⁷⁷ Otherwise, the worse the persecutory environment gets, and the more deeply the affected persons therefore have to hide their fundamental characteristic, the less well-founded would be their fear. In fact, this seems to be the basis of a decision by the Administrative Court of the German State of Baden-Württemberg that conducted a sort of mathematical assessment to establish that the low number of reported cases of imprisonment of ‘discreet’ gay men and lesbians (Amnesty International mentions 17 cases for the period of March 2011 to March 2012) in relation to the assumed total number of gay people in Cameroon (estimated by the judges at 100.000 by reference to a clinical lexicon) is not sufficient to establish a ‘real risk’ as the ‘persecution density’ is not high enough.⁷⁸ It comes to this conclusion after listing over several pages a series of evidence testifying to the persecutory environment that exists for ‘openly’ gay people in Cameroon,⁷⁹ in particular noting that gay people have to hide their sexual orientation and live in constant fear of denunciation and further persecution by persons from their immediate environment such as neighbours, landlords or acquaintances⁸⁰ and that gay people often abstain from reporting theft, robbery or harassment due to their fear that the perpetrators may reveal their sexual orientation to the police.⁸¹ That is indeed absurd.

So framing an ‘infringement of a fundamental right’ as persecution changes the focus of the analysis. It concentrates on the victim rather than the perpetrators and makes the victim

⁷⁴ Federal Court of Australia: *Win v MIMA*, above n 72, at [18], emphasis in original.

⁷⁵ UK Supreme Court: *HJ (Iran) and HT (Cameroon)*, above n 37, per Lord Collins at [107] citing *Win v MIMA* [2001] FCA 132. See also Sir Dyson at [116-118].

⁷⁶ UK Supreme Court: *HJ (Iran) and HT (Cameroon)*, above n 37, per Lord Walker at [96].

⁷⁷ See also Jenni Millbank (2013) ‘Sexual orientation and refugee status determination over the past 20 years – Unsteady progress through standard sequences?’ in Thomas Spijkerboer (ed): *Fleeing Homophobia – Sexual Orientation, gender identity and asylum*, London: Routledge, 32-54.

⁷⁸ Verwaltungsgerichtshof Baden Württemberg (Administrative Court of the Federal State of Baden-Württemberg, Germany), Judgment of 07 March 2013 – A 9 S 1872/12, 36-37.

⁷⁹ *Ibid*, 24-35.

⁸⁰ *Ibid*, 26 and 29.

⁸¹ VGH Baden Württemberg, Judgment of 07 March 2013 – A 9 S 1872/12, above n 78, 29.

(through her acts) responsible for the risk. This interpretation has therefore been rejected by some decision-makers, such as Sir Dyson J in *HJ (Iran) and HT (Cameroon)*:

[T]he phrase “being persecuted” in article 1A(2) refers to the harm caused by the acts of the state *authorities* or those for whom they are responsible. The impact of those acts on the *asylum-seeker* is only relevant to the question whether they are sufficiently harmful to amount to persecution. But the phrase “being persecuted” does not refer to what the asylum-seeker does in order to avoid such persecution. The response by the victim to the threat of serious harm is not itself persecution (whether tolerable or not) within the meaning of the article.⁸²

In the case before the CJEU cited above, Advocate General Bot came to the same conclusion in his opinion presented to the Court⁸³ and noted, ‘persecution is characterized not by the fact that it occurs in the sphere of freedom of religion, but by the nature of the repression inflicted on the individual and its consequences.’⁸⁴ This point was taken up in the Judgment of the Court: ‘It follows that acts which, on account of their intrinsic severity as well as the severity of their consequences for the person concerned, may be regarded as constituting persecution must be identified, not on the basis of the particular aspect of religious freedom that is being interfered with but on the basis of the nature of the repression inflicted on the individual and its consequences ...’⁸⁵ However, both Advocate General Bot and the full court appear to be hesitant to entirely reject approach (1) to persecution: In very similar terms they conclude that ‘a violation of the right to freedom of religion may constitute persecution within the meaning of Article (9)(1)(a) of the Directive where an applicant for asylum, as a result of exercising that freedom in his country of origin, runs a genuine risk of, in alia, being prosecuted or subjected to inhuman or degrading treatment or punishment...’⁸⁶ Arguably, this convoluted formulation breaks down to a person facing persecutory harm (prosecution or inhuman or degrading treatment or punishment) for reasons of religion. Adding the ‘violation of the right to freedom of religion’ to the equation does nothing but confuse. So viewing the infringement of a fundamental right as the harm feared should be rejected as it applies the ‘being persecuted’ standard to the wrong instance and assumes that the claimant is in a position to manage the risk. Moreover, this understanding then leads to a preoccupation with the applicant’s behaviour and a highly questionable distinction between ‘core’ and ‘marginal’ acts as will be outlined in the next section.

⁸² UK Supreme Court: *HJ (Iran) and HT (Cameroon)*, above n 37, per Sir John Dyson at [120].

⁸³ The Court of Justice of the European Union has one judge per EU country and is helped by eight ‘advocates-general’ whose job is to present opinions on the cases brought before the Court. They must do so publicly and impartially; see: <http://europa.eu/about-eu/institutions-bodies/court-justice/>.

⁸⁴ Court of Justice of the European Union: *Federal Republic of Germany v. Y and Z (Opinion of Advocate General Bot)*, C 71/11 and C 99/11, 19 April 2012, at [52], see also [44-46].

⁸⁵ Judgment at [65].

⁸⁶ Judgment at [67], see also Opinion at [86]: ‘...a severe violation of freedom of religion, regardless of which component of that freedom is targeted by the violation, is likely to amount to an “act of persecution” where the asylum seeker, by exercising that freedom or infringing the restrictions placed on the exercise of that freedom in his country of origin, runs a real risk of being executed or subjected to torture, or inhuman or degrading treatment, or being reduced to slavery or servitude or of being prosecuted or imprisoned arbitrarily.’

(2) Concept of persecution restricted to ‘core area’ of freedom

Approach (1) to persecution (‘being persecuted’): The relevant freedom is always fundamental – act/identity dichotomy to curb scope

Viewing the infringement of a fundamental right as the relevant persecutory harm (as in view (1) above) then swiftly turns into an assessment of the applicant’s behaviour: through the detour of what a State is required to protect the enquiry turns into an assessment of whether the claimant was actually entitled to whatever drew attention to her status. The NZRSAA states in *Refugee Appeal No 74665/03*: ‘The human rights standard requires the decision-maker to determine first, the nature and extent of the right in question and second, the permissible limitations which may be imposed by the state.’⁸⁷ Yet it would seem that applying the ‘infringement of a fundamental human right’ standard to the ‘being persecuted’ analysis, the relevant human right would almost always be found to be ‘fundamental’: The rights that the Convention grounds can be linked to, such as freedom of religion and freedom of thought for claims based on religion and political opinion respectively, are clearly fundamental. Note that the case is not as clear for cases based on membership of a particular social group (MPSG) – the uncertainty what fundamental right to draw on for sexuality-based claims, (*Privacy vs. Equality*)⁸⁸, suggests that this approach, in addition to being problematic for all Convention grounds, disproportionately affects MPSG claims because in these cases, it is sometimes not even given that their right is indeed deemed fundamental.

In this broad definition, however, in order to delimit those applicants who are genuinely entitled to protection from those who are not, courts and scholars have then engaged in determining the ‘metes and bounds’ of the fundamental right sought to be exercised by the claimant.⁸⁹ According to the NZRSAA, for the purpose of refugee determination, the focus must be on ‘the minimum core entitlement conferred by the relevant right’. Similarly, Hathaway and Pobjoy criticised the judges of the UK case *HJ (Iran)* and the Australian case *S395/2002*: ‘Beyond identifying “sexual orientation” as a form of protected status, there was a duty on the courts to grapple with the scope of activities properly understood to be inherent in, and an integral part of, that status.’⁹⁰ Thus, it has been argued that where the risk of harmful action is only that ‘*activity at the margin of a protected interest is prohibited*, it is not logically encompassed by the notion of “being persecuted”.’⁹¹

In this line, Haines, Hathaway and Foster suggested that for persons at risk of being prohibited from engaging in public or overt activities, the denial of public exercise is unlikely to be within the ambit of a fear of ‘being persecuted’ where the relevant right encompasses no public dimension.⁹² Lord Rodger in *HJ (Iran)* ‘respectfully [saw] the attractions’ of the approach put forth by the New Zealand Refugee Status Appeals Authority in *Refugee Appeal No 74665/03*, and summarised it as follows:

⁸⁷ New Zealand Refugee Status Appeals Authority: *Refugee Appeal No. 74665*, above n 46, at [115].

⁸⁸ See eg Hathaway and Pobjoy, above n 10, 315.

⁸⁹ New Zealand Refugee Status Appeals Authority: *Refugee Appeal No. 74665*, above n 46, at [82].

⁹⁰ Hathaway and Pobjoy, above n 10, 335.

⁹¹ New Zealand Refugee Status Appeals Authority: *Refugee Appeal No. 74665*, above n 46, at [90].

⁹² Haines, Hathaway and Foster, above n 14, 439-40.

[T]he authority ... preferred to use a human rights framework in order to determine the limits of what an individual is *entitled to do and not to do*. That approach might, for instance, be relevant if an applicant were claiming asylum on the ground that he feared persecution *if he took part in a gay rights march*.⁹³

So according to this view, 'a fundamental human right' cannot be forfeited, but the 'simple act' of participating in a gay rights march possibly can – because the act may not be a 'fundamental human right', or rather, not 'covered' by the relevant fundamental right. The right appears to become a stand-in for identity: nobody disputes that the claimant has a right to *be gay*. But acts are viewed as separate from that identity, which has repercussions for the persecution analysis as decision-makers seem to trail off from the actual question.

Lord Dyson, in the UK Supreme Court case of *RT (Zimbabwe) and others* found the particular attraction of the New Zealand approach in that it facilitated a determination of whether *the proposed action* by the claimant was 'at the *core* of the right or at its *margins*'.⁹⁴ Circumscription (or 'discretion'), then, is expected if whatever the claimant 'does' is not 'protected'; without consideration of the consequences feared, however harmful.⁹⁵ The examples that the New Zealand Refugee Status Appeals Authority provides for the kind of activity that are deemed to be at the margin of a 'protected right' provides an idea of the sort of exercise this task would require. The Authority enumerates: The prohibition on a homosexual from adopting a child, the denial to post-operative transsexuals of the right to marry, the prosecution of homosexuals for sado-masochistic acts. The Authority suggested that, whether or not any of these involved breaches of human rights, they could not be said to amount to persecution since the prohibited activities in each case were at the margin of the protected right.⁹⁶ This is expressed in strong terms in the end of *Refugee Appeal No 74665/03*:

'Once those boundaries have been identified it is possible to determine whether the *proposed action* by the claimant is at the core of the right or at its margins and whether the prohibition or restriction imposed by the state is lawful in terms of international human rights law. If the proposed action is at the core of the right and the restriction unlawful, we would agree that the claimant has no duty to avoid the harm by being discreet or by complying with the wishes of the persecutor. If, however, the proposed activity is at the margin of the protected interest, then *persistence in the activity in the face of the threatened harm is not a situation of "being persecuted"* for the purposes of the Refugee Convention. *The individual can choose to carry out the intended conduct or to act "reasonably" or "discreetly" in order to avoid the threatened serious harm. None of these choices, however, engages the Refugee Convention.*⁹⁷

In *HJ (Iran)*, both Lords Rodger⁹⁸ and Dyson⁹⁹ agree with this holding, finding that a determination of whether the applicant's proposed or intended action lay at the core of the right or at its margins was useful in deciding whether or not the prohibition of it amounted to persecution. So suddenly, the issue under scrutiny for decision-makers becomes the analysis whether the 'proposed actions' of a claimant are 'protected' by international human rights law –

⁹³ UK Supreme Court: *HJ (Iran) and HT (Cameroon)*, above n 35, per Lord Rodger at [72], emphasis added.

⁹⁴ UK Supreme Court: *RT (Zimbabwe)*, above n 16, per Lord Dyson at [114], emphasis added.

⁹⁵ Cf Haines, Hathaway and Foster, above n 15.

⁹⁶ New Zealand Refugee Status Appeals Authority: *Refugee Appeal No. 74665*, above n 46, at [99-102].

⁹⁷ *Ibid*, at [120].

⁹⁸ UK Supreme Court: *HJ (Iran) and HT (Cameroon)*, above n 37, at [72].

⁹⁹ UK Supreme Court: *HJ (Iran) and HT (Cameroon)*, above n 37, at [114-115], though he sees no scope for it for sexual orientation cases, but rather political opinion and religion cases.

it becomes a situation where a person asks permission to ‘do’ something or behave in a certain way. This arguably trivialises the claims of refugees. In the words of Spijkerboer, ‘[t]o formulate this as the question of whether one’s hairstyle is protected by international human rights law reflects a fundamental misunderstanding of what refugee protection means in situations such as these.’¹⁰⁰

Indeed, it insinuates that the claimant is somehow inconvenienced by the fact that he cannot ‘do’ something and ‘live as freely and as openly ... as he would be able to if he were not returned.’¹⁰¹ This then drives decision-makers to reflexively defend that the ‘purpose [of the Convention is] not to guarantee to asylum-seekers when they are returned all the freedoms that are available in the country where they seek refuge.’¹⁰² For example, in *RT (Zimbabwe)*, a political opinion case, Lord Dyson confirms his support for the New Zealand approach, noting that the ‘distinction is valuable because it focuses attention on the important point that persecution is more than a breach of human rights’.¹⁰³ Arguably, this floodgate concern arises out of the distorted application of human rights to the persecution analysis: If the focus were properly on the persecutory harm rather than on the entitlements of the claimant, there would be much less scope for it. Indeed, as Millbank pointed out, ‘[i]f a lesbian is *unable* to marry in her country of origin, she could not be said to be persecuted for this reason alone.’¹⁰⁴ Her wish to marry will only be relevant if it reveals her sexual identity and consequently leads to persecutory harm, as will be outlined in the next section.

Approach (2) to persecution: Nexus vs Convention ground – Two separate elements

The idea of ‘protected and unprotected (or core and marginal) acts’ is then also transposed to approach (2) for understanding persecutory harm. Haines, Hathaway and Foster state: ‘Similarly, where the risk of a *broader range of persecutory harm ensues* only from taking such marginal actions, the risk is unlikely to be “for reasons of” religion, political opinion, sexual identity, or whatever other Convention ground is relied upon’.¹⁰⁵ So here, acts are analysed in the context of the nexus requirement and the analysis of the act becomes an additional hurdle for a claimant:

‘Understanding the predicament of “being persecuted” as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection means that the refugee definition is to be approached not from the perspective of what the refugee claimant can do to avoid being persecuted, but from the perspective of the fundamental human right in jeopardy *and the resulting harm*. If the right proposed to be exercised by the refugee claimant in the country of origin is at the core of the relevant entitlement *and serious harm is threatened*, it would be contrary to the language context, object and purpose of the Refugee Convention to require the refugee claimant to forfeit or forego that right and to be denied refugee status on the basis that he or she could engage in self-denial or discretion on return to the country of origin.’¹⁰⁶

¹⁰⁰ Spijkerboer, above n 11.

¹⁰¹ UK Supreme Court: *HJ (Iran) and HT (Cameroon)*, above n 37, per Lord Rodger at [35c].

¹⁰² *Ibid*, per Lord Rodger at [15].

¹⁰³ UK Supreme Court: *RT (Zimbabwe)*, above n 17, at [50].

¹⁰⁴ Millbank (2012), above n 5, 510, citing two unsuccessful Australian cases of lesbians from the Philippines who had based their claims on their wish to marry their partners.

¹⁰⁵ Haines, Hathaway and Foster, above n 15, 437-38.

¹⁰⁶ New Zealand Refugee Status Appeals Authority: *Refugee Appeal No. 74665*, above n 46, at [114].

So in addition to the ‘serious harm threatened’, the claimant will also have to show that the ‘right proposed to be exercised ... is at the core of the relevant entitlement’. This formulation is rather cryptic. Arguably, it means that the ‘proposed action’ by the claimant is at the core of the fundamental right and that in addition, serious harm will result, such as illustrated by Haines QC in Refugee Appeal No. 74665/03:

“There is no right to same-sex marriage in international human rights law and the claimed right is at, if not beyond, the margin of what international human rights law regards as being the protection owed to homosexuals. On the other hand, a prohibition of consensual homosexual acts, *if accompanied by penal sanctions of severity which are in fact enforced*, may well found a refugee claim. There is no easy formulation. It cannot be said that *criminalisation of consensual homosexual acts is on its own sufficient to establish a situation of “being persecuted”*.”¹⁰⁷

Holding that a wider range of persecutory harm only warrants protection if the claimant’s *act* triggering that persecution can be viewed as being ‘covered’ by a fundamental human right because otherwise the persecution cannot be said to be ‘for reasons of’ religion/political opinion/ sexual orientation adds an untenable test as an additional hurdle to the ‘being persecuted’ analysis that has no place in the inquiry. Indeed, any assessment of the *act* on the part of the claimant that triggered persecution is a ‘particularly invidious form of victim blaming’, as Jenni Millbank noted in the context of discretion reasoning,¹⁰⁸ because it makes the claimant responsible for the harm suffered. Instead, in line with Millbank’s suggestion, acts and identities in the context of refugee claims cannot be separated and categorized in that way.¹⁰⁹ Because once acts and identity are separated, they can be ‘moved around’ independently in the refugee status determination. The act/identity dichotomy is created at the level of the Convention ground (the reason why the person is persecuted) – and then there is a confusion as to where to locate the *act* element, with a variety of different suggestions. Haines for example was of the view that:

‘As a matter of treaty interpretation the well-founded element cannot do the work which properly belongs to the “being persecuted” element. Failure to recognise that the issue of voluntary but protected actions falls to be analysed as a human rights issue within the “being persecuted” element dangerously distorts the refugee enquiry into an apparently simplistic examination whether there is a risk of serious harm.’¹¹⁰

So while Haines here defends the idea that the *act* is to be moved to the ‘being persecuted’ element as in approach (1) above, an alternative suggestion was to move it to the nexus (‘for reasons of’) element as in approach (2) above. The rationale behind this was that if an act only marginally connected to the Convention ground *triggered* a wider range of harm, then the harm could not be said to be ‘for reasons of’ the Convention ground. However, as Jenni Millbank pointed out, this reasoning represents a fundamental misunderstanding of the nexus requirement.¹¹¹ The nexus element requires a connection between the persecution feared and the Convention ground. They are separate elements: the membership of a particular social group element is satisfied when the claimant is or is perceived to be gay – an identity disclosed/perceived in multitudinous ways, including, but not limited to, conduct of the

¹⁰⁷ New Zealand Refugee Status Appeals Authority: *Refugee Appeal No. 74665*, above n 46, at [103].

¹⁰⁸ Millbank (2012), above n 5, 504.

¹⁰⁹ Ibid, 512-13.

¹¹⁰ New Zealand Refugee Status Appeals Authority: *Refugee Appeal No. 74665*, above n 46, at [119].

¹¹¹ Cf Millbank (2012), above n 5, 510-512.

claimant or the lack thereof. The nexus requirement is satisfied either when the harm is directed at the person because he is perceived to be gay or when the state fails to protect the person because he is perceived to be gay. So the 'for reasons of' element is the perspective of the persecutor and/or state. How the Convention ground is revealed, gathered, expressed etc is impossible to know and irrelevant. There may be thousands of actual or perceived signifiers. It is not within the knowledge or power of the applicant to foresee which will be taken as signifier. So the nexus requirement is not intended to address any conduct on the part of the applicant. Rather, it requires that the applicant must be persecuted because the persecutor thinks or will think he is gay – for whatever reason.¹¹²

Yet the view that persecution is restricted to a core area of freedom involves the idea that claimants should exercise restraint in their 'conduct' and be 'discreet' about 'marginal conduct' and that only persons persecuted for their 'identity per se' or 'activities at the core of a fundamental right' are entitled to protection. This is an unreal and outright impossible distinction: It is unclear what 'simply status' means in real terms for political opinion, religion, sexual orientation and it is impossible to know which 'signifiers'¹¹³ (whether the applicant's own conduct or otherwise) will draw attention to the identity and trigger persecutory harm. This approach is also problematic because in a persecutory environment, where persons seek to reduce the risk by concealing their identities, it is likely to be marginal or inadvertent conduct only loosely associated with the status that will then reveal the same. As Spijkerboer pointed out,

'[i]t may be sheer stupidity that made a hair get out from under a chador which brought the religious police to believe an Iranian woman was a loose woman. Hiding forbidden political or religious materials in stupid places may expose someone's political or religious convictions.'¹¹⁴

To say that these people are then not at risk of persecution for a Convention ground is absurd. In the words of Gummow and Hayne JJ in the Australian case of *S395*:

'Addressing the question of what an individual is *entitled* to do ... leads on to the consideration of what modifications of behaviour it is reasonable to require that individual to make without entrenching on the right. This type of reasoning ... leads to error. It distracts attention from the fundamental question. ... considering what an individual is entitled to do is of little assistance in deciding whether that person has a well-founded fear of persecution.'¹¹⁵

In the case of C-71/11 and C-99/11 before the CJEU, an identification of a 'core area in religion is therefore clearly rejected by Advocate General Bot as this would be 'subject to the risk of arbitrariness',¹¹⁶ because the 'meaning or impact of the public expression of a religious belief will differ according to time and context'¹¹⁷ and because the specific importance of different aspects of religion 'will vary according to the precepts of the religion concerned ... and the personality of the individual.'¹¹⁸ In its decision, the Court then correctly states that '[F]or the purpose of determining, specifically, which acts may be regarded as constituting persecution within the meaning of Article 9(1)(a) of the [Qualification] Directive, it is unnecessary to

¹¹² See also: UNHCR (2001), above n 23, at [25].

¹¹³ Cf Spijkerboer above n 11.

¹¹⁴ Ibid.

¹¹⁵ Australian High Court: *Appellant S395/2002*, above n 18, at [83].

¹¹⁶ CJEU: *Federal Republic of Germany v. Y and Z (Opinion of Advocate General Bot)*, above n 84, at [41].

¹¹⁷ Ibid, at [42].

¹¹⁸ CJEU: *Federal Republic of Germany v. Y and Z (Opinion of Advocate General Bot)*, above n 84, at [44].

distinguish acts that interfere with the “core areas” (“forum internum”) of the basic right of freedom of religion, which do not include religious activities in public (“forum externum”), from acts which do not affect those purported “core areas”.¹¹⁹ While the rejection of a distinction between ‘core’ and ‘marginal’ areas is to be welcomed, the persistence of the infringement of the basic right of freedom of religion demonstrates a continued confusion between the elements ‘being persecuted’ and ‘for reasons of’. The persecution itself will interfere with any number of fundamental rights, such as the right to life or the right to bodily integrity. The role of religion lies in the Convention ground (the infringement of the right to bodily integrity results from the person being perceived as belonging to a minority religion) and partly the nexus requirement (the bodily integrity of members of this religion is infringed upon, but members of the majority religion are being left alone).

(3) Expecting a person to give up the practice of acts vs what a person ‘will do’

The third question referred by the Bundesverwaltungsgericht (German Federal Administrative Court) to the CJEU in the case of C-71/11 and C-99/11 was ‘whether a refugee’s fear of persecution is well-founded within the meaning of article 2(c) of the [Qualification] Directive where the refugee intends, on his return to his country of origin, to perform religious acts which will expose him to danger to his life, his freedom or his integrity or whether it is, rather, reasonable to expect that person to give up the practice of such acts’.¹²⁰ While rejecting any such *requirement*, the Court found that ‘where it is established that, upon his return to his country of origin, the person concerned *will follow a religious practice* which will expose him to a real risk of persecution, he should be granted refugee status, in accordance with Article 13 of the Directive.’¹²¹ The Judgment of the CJEU continues by stating: ‘The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.’¹²² So for cases where it is established that the applicant *will* act in a way that draws attention to her status, the fact that she *could* avoid it is irrelevant. However, the Court stops short of considering the case where the claimant cannot convince the decision-maker that she ‘will follow a practice’ that exposes her identity, that is, where the applicant is thought to be ‘discreet’. As the latter question follows logically from the former, each of them will be addressed here in turn.

What the applicant ‘will do’ – future behaviour and ‘living openly’

The question of what the applicant will do on return was also discussed in similar terms in the UK Supreme Court decision *HJ (Iran) and HT (Cameroon)*. In both cases, concealment creeps back into the test to be applied as it is constructed around a distinction between ‘open’ and ‘discreet’ conduct, giving considerable weight to expected or assumed *behaviour (or activities)*

¹¹⁹ CJEU: *Federal Republic of Germany v Y (C-71/11), Z (C-99/11)*, above n 16, at [62].

¹²⁰ CJEU: *Federal Republic of Germany v. Y and Z (Opinion of Advocate General Bot)*, above n 84, at [5].

¹²¹ CJEU: *Federal Republic of Germany v Y (C-71/11), Z (C-99/11)*, above n 16, at [79]. The judgment continued at [80]: ‘In the light of the above considerations, ... Article 2(c) of the Directive must be interpreted as meaning that the applicant’s fear of being persecuted is well - founded if, in the light of the applicant’s personal circumstances, the competent authorities consider that *it may reasonably be thought that, upon his return to his country of origin, he will engage in religious practices which will expose him to a real risk of persecution*. In assessing an application for refugee status on an individual basis, those authorities cannot reasonably expect the applicant to abstain from those religious practices’.

¹²² CJEU: *Federal Republic of Germany v Y (C-71/11), Z (C-99/11)*, above n 16, at [79].

of claimants. The UK Supreme Court held that ‘the tribunal must [...] consider *what the individual applicant would do* if he were returned to [his] country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution – even if he could avoid the risk by living ‘discreetly’.¹²³

When integrating this question of future behaviour into their new test, the Judges of the UK High Court drew on cases around religious persecution. Among others, they relied on the 1999 case of *Ahmed (Iftikhar)*, involving a Pakistani national of Ahmadi faith, who had been persecuted in his local area by reason of his religion which requires proselytism. Here, Judge Simon Brown argued:

‘Essentially ... in all asylum cases there is ultimately but a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason? If there is, then he is entitled to asylum. It matters not whether the risk arises from his own conduct in this country, however unreasonable. It does not even matter whether he has cynically sought to enhance his prospects of asylum by creating the very risk on which he then relies - cases sometimes characterised as involving bad faith. When I say that none of this matters, what I mean is that none of it forfeits the applicant's right to refugee status, provided only and always that he establishes a well-founded fear of persecution abroad.’

This paragraph seems to clearly rule out any sort of ‘discretion requirement’. It also rightly focuses on the question whether the applicant has a well-founded fear of persecution for a Convention ground. However, the Judge then continues:

‘[...] Here, ... the conduct in question by definition will not have occurred and indeed will not occur if asylum is granted. But I cannot see how this consideration avoids the need to address the critical question: *if returned, would the asylum seeker in fact act in the way he says he would and thereby suffer persecution?* If he would, then, however unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, in my judgment he would be entitled to asylum.’¹²⁴

It is in this paragraph that the question of future conduct is introduced that the Judges in *HJ and HT* then use to apply to sexuality-based claims. Yet the reliance on conduct is problematic in several respects. Firstly, the situation in the Ahmadi case is constructed as purely activity-based¹²⁵ and described by Judge Simon Brown in such a way that persecution is exclusive to those Ahmadis who proselytise: ‘After all, had he wished to avoid persecution in the past he could always simply have ceased his activities.’¹²⁶ This case is a good example for a misleading line of reasoning that follows from the inquiry into the claimant’s future behaviour: It disregards the relation that the *act* of proselytism has with the claimant’s religious *identity* and the fact that a criminalization of the public expression of faith is essentially aimed at the faith itself (just like the criminalization of ‘sodomy’ is not only aimed at inhibiting same-sex sexual acts, without impacting on ‘sexual orientation *per se*’). So the fact that the Ahmadi claimant wishes to proselytise first and foremost reveals him as a holder of the Ahmadi faith. In his opinion on the CJEU cases C-71/11 and C-99/11, which also involved two Ahmadi claimants,

¹²³ UK Supreme Court: *HJ (Iran) and HT (Cameroon)*, above n 37, per Lord Rodger at [82].

¹²⁴ Court of Appeal of England and Wales: *Ahmed (Iftikhar) v Secretary of State for the Home Department*, Unreported, 5 November 1999, per Simon Brown LJ, 5.

¹²⁵ See also discussion of activity-based risks above.

¹²⁶ Court of Appeal of England and Wales: *Ahmed (Iftikhar)*, above n 124, 6.

Advocate General Bot came to a similar conclusion: ‘In fact, regardless of the efforts that the person concerned may make in his way of life in public, he will remain a heretic, a dissident or homosexual in his country of origin. And we know that in some countries, all activities, even the most insignificant, can be a pretext for all sorts of abuses.’¹²⁷

Secondly, according to the CJEU, claimants must establish that they *will act* in a way that will expose them to persecution where in fact, if they were returned, they would likely do everything to reduce any sort of behaviour that would reveal their religion *because* that would increase their risk of serious harm. There is something inherently illogical in this situation. Lord Hope recognised as much in *HJ (Iran)*: ‘Unless he were minded to swell the ranks of gay martyrs, when faced with a real threat of persecution, the applicant would have no real choice: he would be compelled to act discreetly.’¹²⁸ And indeed, in a dazzling circularity of reasoning, that seems often to be precisely the reason why claimants are disbelieved when they state that they ‘will follow a practice’ that will reveal their identity. In *N01/40155* [2003], the Australian RRT refused the refugee application in part because the applicant lived a ‘quiet’ life in Ghana and it rejected the applicant’s claim that he would tell potential employers about his sexual identity.¹²⁹ So it becomes a hurdle for applicants to convince decision-makers of their intended future behaviour and an almost impossible task for decision-makers to predict likely future behaviour of applicants. Indeed, it is hard to see what evidence such an assessment would be based on other than assuming a continuation of past behaviour. This was the case for example in the UKAIT case of *JM (Homosexuality)*, where, despite the applicant’s express wish for openness, the tribunal dismissively held that he was not ‘somebody who is reasonably likely to proclaim his homosexuality to all and sundry whom he meets or to taxi drivers in the course of a journey.’¹³⁰ Yet the very fact that claimants are seeking protection indicates a rupture in that past behaviour. Advocate General Bot noted in his opinion that ‘To expect an asylum-seeker to behave reasonably while he lives in ... insecurity and fear ... is a risky gamble, and the right of asylum cannot be based on such a prognosis.’ In his view, such an approach would ‘amount to recklessness’.¹³¹

Thirdly, and confusingly, in its ruling the CJEU holds that ‘a relevant factor to be taken into account in determining the level of risk to which the applicant will be exposed in his country of origin on account of his religion’ is the ‘subjective circumstance that the observance of a religious practice in public, which is subject to the restrictions at issue, is of particular importance to the person concerned in order to preserve his religious identity.’¹³² When applying the CJEU ruling, the German Administrative Court of Baden-Württemberg interpreted this to mean that while no distinction is to be made between ‘discreet’ and ‘non-discreet’ conduct, the *relevant conduct must be of particular importance for the identity* of the person concerned.¹³³ As the Administrative Court then finds that the claimant in their case, a gay man from Cameroon, will continue to behave as before (which can arguably be characterised as

¹²⁷ CJEU: *Federal Republic of Germany v. Y and Z (Opinion of Advocate General Bot)*, above n 84, at [105].

¹²⁸ UK Supreme Court: *HJ (Iran) and HT (Cameroon)*, above n 37, per Lord Rodger at [59]. See also similarly Sir Dyson in the same decision at [123].

¹²⁹ Australian Refugee Review Tribunal: *N01/40155* [2003] RRTA 138 (Austl.); see also: *Millbank* (2012), above n 5, 503, fn 20.

¹³⁰ UK Asylum and Immigration Tribunal: *JM Homosexuality* [2008] UKAIT 00065 at [148]; see also: *Millbank* (2012), above n 5, 503, fn 20.

¹³¹ CJEU: *Federal Republic of Germany v. Y and Z (Opinion of Advocate General Bot)*, above n 84, at [105].

¹³² CJEU: *Federal Republic of Germany v Y (C-71/11)*, *Z (C-99/11)*, above n 16, at [70].

¹³³ VGH Baden-Württemberg, Judgment of 07 March 2013 – A 9 S 1872/12, above n 78, 19.

relatively 'openly') and that this is of particular importance to him,¹³⁴ the judges are not faced with the question of what happens when the conduct is not deemed to be important to the claimant. However, if this interpretation gains traction, there is a real risk that it will twist into another version of 'discretion': Not only will a claimant have to prove that he 'will act' in a certain way, but also that this is of particular importance to him – otherwise, he will arguably be sent back and on the premise that he can be expected to avoid that behaviour.¹³⁵ Again, here, the risk is viewed as activity-based and therefore, there is an assumption that secrecy and safety are synonymous.¹³⁶

So once the focus turns on the claimant's future behaviour, decision-makers lose sight of the ways in which this is linked to the claimant's *identity*, and, moreover, and particularly, the actual persecution feared. This reasoning assumes an act/identity distinction also in the eyes of the persecutor: It pretends that it is in fact certain *acts* that are persecuted rather than the religion (ie, identity) overall. A whole range of complicated issues then follow, including, how the decision-maker assesses which acts ('certain religious practices') would 'expose [the claimant] to a real risk of persecution' (at 80) in the eyes of the persecutor. As Millbank clearly showed, *any* form of behaviour that deliberately or accidentally exposes the sexual identity *to the persecutors* may play a role in identifying the person as a member of the social group.¹³⁷

If the applicant 'won't do' – future behavior and 'living discreetly'

While the CJEU itself does not address the situation of a person who would be found to be 'discreet', the Administrative Court of Baden-Württemberg, applying the ruling to a sexual orientation case, does envisage such a situation and draws on the 'why test' as introduced by the UK Supreme Court judgment in *HJ (Iran) and HT (Cameroon)*.¹³⁸ The Supreme Court had held that if the tribunal 'concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so.'¹³⁹ If the reason for 'discretion' is found to be personal, such as familial or social pressures, then this is to be taken into account.¹⁴⁰ So just as the UK Supreme Court, the Administrative Court of Baden-Württemberg accepts 'discretion by choice' as a valid protection from persecution.¹⁴¹ In addition it refers to the 'societal reality' in which 'sexual conduct tends to take place in private' and affirms the view that the role of the Refugee Convention is not to provide the full extent of the European Charter of

¹³⁴ VGH Baden-Württemberg, Judgment of 07 March 2013 – A 9 S 1872/12, above n 78, 22.

¹³⁵ Note that in the UK Supreme Court case of *RT (Zimbabwe)*, above n 19, at [42], Lord Dyson rejected any such qualification in strong terms by reference to the earlier UK Supreme Court case of *HJ (Iran) and HT (Cameroon)*, above n 37: 'A focus on how important the right not to hold a political or religious belief is to the applicant is wrong in principle. The argument advanced by Mr Swift bears a striking resemblance to the Secretary of State's contention in *HJ (Iran)* that the individuals in that case would only have a well-founded fear of persecution if the concealment of their sexual orientation would not be "reasonably tolerable" to them. This contention was rejected on the grounds that (i) it was unprincipled and unfair to determine refugee status by reference to the individual's strength of feeling about his protected characteristic (paras 29 and 121) and (ii) there was no yardstick by which the tolerability of the experience could be measured (paras 80 and 122).'

¹³⁶ Cf Millbank (2012), above n 5, 500, fn. 13.

¹³⁷ Millbank (2012), above n 5, 510-512.

¹³⁸ Cf Edwards, above n 1, 9; see also for a discussion: Wessels, above n 3.

¹³⁹ UK Supreme Court: *HJ (Iran) and HT (Cameroon)*, above n 37, at [82].

¹⁴⁰ VGH Baden-Württemberg, Judgment of 07 March 2013 – A 9 S 1872/12, above n 78, 20.

¹⁴¹ Cf. Wessels, above n 3.

Fundamental Rights or the European Convention on Human Rights. Again, this extra 'loop' in reasoning builds on 'discretion' and, as a reflexive consequence, on lesser human rights standards for asylum seekers.

So the focus on what the applicant *will do* is problematic and misleads the assessment. Judges Gummow and Hayne had stated in S395 that 'the question of what an individual is *entitled to do* ... distracts attention from the fundamental question' as it is 'of little assistance in deciding whether that person has a well-founded fear of persecution.'¹⁴² The above suggests that the whole question of what an individual will do distorts the analysis. It comes down to *first* asking how the applicant will behave in the future to *then* proceed to inquire whether this will expose him to persecution. The analysis is therefore made completely dependent upon the applicant's expected future behaviour. Undertaken in this order, the analysis seems to imply that the Convention protects activities and behaviour, which opens the door to calls for limits on the "protected activities", such as the ones consistently voiced by Hathaway and Haines. Instead, any *activity* may be relevant insofar as it may *reveal* the protected *identity* of the person to the persecutor such that a risk of harm follows because of that identity.¹⁴³ They are 'signifiers' that indicate the identity. In this way, limitations on the range of 'protected activities' are neither possible nor necessary. This would also avoid the critical question whether those activities that decision-makers deem acceptable in the sense of 'protected' conduct would indeed coincide with those activities that persecutors take as indicators of the sexual orientation.

So in a million different ways, there is a return to the same reasoning: When risks are viewed as activity-based, secrecy becomes synonymous with safety. This assumption then entails a wide variety of proposals as to how to distinguish 'acceptable' from 'unacceptable' activities and the inevitable question what an applicant is entitled to – invariably leading to 'less than us'. And so 'discretion logic' prevails.

IV. Conclusion

In spite of numerous attempts to end it, 'discretion reasoning' has proven to be particularly adaptive and resistant in refugee claims. This paper has shown that this resistance may be due to the more fundamental issue of a distinction between identity and acts in refugee status determination. This act/identity dichotomy confuses the refugee status determination because once acts are separate from identity, they can be moved around and analysed as part of the 'being persecuted', the 'for reasons of', the 'well-founded' or even the 'state protection' elements rather than the Convention ground as an inseparable part of identity. And in every one of these other elements, it adds an additional hurdle in that either, the act must be 'covered' by the relevant human right, or it must be at the 'core' of the 'protected interest' (ie, the relevant religion, political opinion, or sexual orientation) or it must be 'of particular importance' to the claimant. The claimant must convince the decision-maker that he will indeed 'act' in a particular way or she must convince the decision-maker that the lack of an 'act' is due to fear. If any of this is not found to be the case, then the claimant is expected to (continue to) desist from that act based on the presumption that as a consequence, she will not face persecution – although the situation remains unchanged: She is still gay/a heretic/a political opponent and

¹⁴² Australian High Court: *Appellant S395/2002*, above n 18 at [83].

¹⁴³ Cf *Millbank* (2012), above n 5.

gays/heretics/political opponents remain persecuted. As such, the act/identity dichotomy leads to a restrictive interpretation of the refugee definition that reduces the scope of protection and excludes genuine refugees.

Moreover, through the focus on their acts, applicants are made at least partly responsible for their persecution as the act/identity dichotomy turns the refugee status determination into a particularly invidious form of victim blaming that assumes that if only the claimant didn't 'act' that way she wouldn't have a problem. So the persecution analysis is twisted and confined to assessing the likely behaviour of the applicant rather than the actual persecution feared. This then leads to calls to circumscription as there appears to be a concern that receiving countries should not be obliged to protect 'trivial' activities, refusing to offer protection to somebody who purportedly 'comes here because he wants to drink exotically coloured cocktails' (to use the oft-cited and misunderstood metaphor from *HJ (Iran) and HT (Cameroon)*).¹⁴⁴ As the above analysis showed, this approach is fundamentally wrong as it misplaces the focus: It asks the wrong question.¹⁴⁵

So as long as an is/does dichotomy operates, 'discretion reasoning', prevails. Separating the act from the identity in refugee status determination entails the question what an applicant 'will do' and fundamentally misleads the analysis: It will invariably turn back into one of the innumerable versions of 'discretion'.

¹⁴⁴ Cf Hathaway and Pobjoy, above n 10, in reaction to a passage from the UK Supreme Court case of *HJ (Iran) and HT (Cameroon)*, above n 35, per Lord Rodger at [78], as well as Millbank's reply to their piece: Millbank (2012), above n 5.

¹⁴⁵ Cf Australian High Court: *Appellant S395/2002*, above n 18, at [82].