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Legislating Identities: Bureaucratic Necropolitics, Displacement of Queer
Refugees and Inequities in UK Immigration

Artículo de investigación que, para completar los requisitos del Programa de
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Fredel Granados Chávez

168369

Relaciones Internacionales

Dr. Ronald Guy Emerson

San Andrés Cholula, Puebla.

Verano I

Hoja de firmas

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Fredel Granados Chávez 168369

Director de Tesis

Ronald Guy Emerson

Presidente de Tesis

Alison Elisabeth Lee

Secretaria de Tesis

Dainzú López de Lara Espinosa

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Fredel Granados Chávez

Abstract

This article aims to scrutinize the legislation that dictates the identities and experiences of queer refugees and asylum seekers looking to enter the United Kingdom. It does so through the perspective of the necropolitical process of forced migration, employing the Nationality and Borders Act as a reference. It then highlights the existence of bureaucratic necropolitics within this issue. Using a qualitative methodological approach, this research seeks to shed light on the intricate dynamics of bureaucratic necropolitics, *pro-morituri* immigration laws, and their implications for queer refugees and asylum seekers. It was revealed that the deliberate deployment of specific language and methodologies within this law can inflict severe harm and endanger the lives of queer refugees.

Key words

Bureaucratic Necropolitics, Refugees, Queer studies

Introduction

The plight of queer refugees and asylum seekers facing uncertainty and persecution is an urgent and complex issue within the context of forced migration. As they seek safety and a chance of a dignified life, their journeys are marred by the legislation that governs their experiences. One of the most problematic laws concerning this issue in contemporary times is the Nationality and Borders Act (NABA).

The Nationality and Borders Act brought forth in the House of Commons on the 6th of July 2021 and subsequently granted the status of Royal Assent on the 28th of April 2022 (UK Parliament, 2022), assumes a crucial role in the regulation of immigration, asylum, and the United Kingdom's response to modern slavery. Representing a legislative framework, this act encompasses a wide array of matters relating to these domains. Its objective is to establish a system that governs the admission, protection, and status of individuals seeking refuge within the UK's borders.

A fundamental requirement for the acceptance of an asylum claim under the Nationality and Borders Act is the demonstration of endangerment stemming from factors such as race, religion, nationality, political opinion, sexual orientation, or gender identity (Nationality and Borders Act, 2022). Equally significant is the prerequisite that applicants must convincingly establish their inability to access adequate protection from the authorities in their country of origin.

From 2015 to 2021, 10,974 applications involving sexual orientation or gender identity claims have been submitted to the UK (UK GOV, 2022). 59% of applications were refused, with the tendency of refusal progressively increasing (UK GOV, 2022). The approval of asylum claims is heavily reliant on the availability of evidence, which is often

scarce. Consequently, the evidence needed in the pursuit of refuge by queer individuals is widely believed to be easily fabricated and impossible to substantiate. As the number of queer refugees continues to rise, issues of credibility and stereotyping become more prevalent (Gartner, 2015). Queer refugees are compelled to present themselves in ways that are easily comprehensible to the decision-makers, to enhance their chances of a successful claim. Hence, the Nationality and Borders Act could inadvertently transform non-normative identities into active participants in perpetuating the UK's heteronormative and Eurocentric perceptions of queerness (Gartner, 2015). By failing to acknowledge the wide range of LGBTQIA+ identities, the Act perpetuates a climate of marginalization, exclusion, and erasure. It denies the realities and unique struggles of each individual within the community, effectively stripping them of their agency and human rights. This dismissal of diversity further perpetuates a harmful narrative that homogenizes the queer experience.

As a result, the Act increases the vulnerability among queer individuals, exacerbating the risk of harm and even death. By stating, yet negating the distinctive needs and challenges faced by LGBTQIA+ individuals, it denies them access to vital support systems, resources, and protections that could mitigate the risks they face, whilst simultaneously enjoying the benefits of being recognized as an LGBTQIA+ friendly country. This refusal to recognize diversity effectively contributes to a climate of social and structural violence, leaving queer individuals more susceptible to discrimination, violence, and other forms of harm.

The article analyzes the issue through the lens of the theory of the necropolitical process of forced migration. It uses a qualitative methodological approach to investigate the issue, such as a lexicological review of the Nationality and Borders Act by contrasting each problematic clause of the Act with an identifying element of necropolitics. The lexicological

review consists of analyzing the textual and contextual content of the included laws. The qualitative aspect allows for an in-depth exploration of personal narratives and experiences, capturing the nuances of the individuals involved. The timeframe employed for this analysis is from 2015 to the publication year of the Nationality and Borders Act, 2022, with data from the UK's national statistics on asylum claims on the basis of sexual orientation (2022).

It's worth mentioning that the use of the term "queer" in this article is intended to encompass the diverse sexual orientations and gender identities beyond the scope of heteronormativity. It has historically been used as a derogatory and offensive slur against LGBTQIA+ individuals. However, over time, it has been reclaimed by some members of the LGBTQIA+ community as a positive and inclusive term of self-identification. In this context, the term "queer" is used respectfully to include various non-heterosexual and non-cisgender identities. It is essential to recognize that individual preferences regarding terminology may vary, and some individuals may not identify with or prefer the term "queer." Some other terminology used in the legislation and throughout this article includes "LGBTQIA+" and "SOGI". It should be assumed that these also refer to the term queer. The intent of using this word is to foster understanding and inclusivity while acknowledging the complex and evolving nature of LGBTQIA+ identities.

The purpose of this article is to answer two main research questions: How is the Nationality and Borders Act necropolitics? How does the UK's bureaucratic necropolitics policy affect the experiences of queer, displaced bodies? Through these questions, the expected hypothesis is that the UK's queer migratory legislation, the Nationality and Borders Act, falls under the purview of bureaucratic necropolitics. It promotes the displacement and

harm of queer refugees, and benefits from the production of such, through the international response to the UK's adherence to the rule of law.

The legislative framework of the United Kingdom is characterized as one that strategically employs LGBTQIA+ clauses to enhance its positive image, thereby capitalizing on the associated benefits without necessarily implementing substantial measures to address the needs of this marginalized community. By incorporating these clauses into its legislation, the UK creates an impression of inclusivity and progressive values, which enhances its reputation and allure to individuals seeking a welcoming environment.

This approach allows the UK to reap the advantages of international admiration, leading to increased interest from individuals who aspire to live in a country known for its purported LGBTQIA+ inclusivity. Yet, in reality, the UK falls short of fulfilling its obligation to provide necessary avenues for entry and protection to those in dire circumstances. This selective approach ultimately allows the UK to maintain its positive image while effectively sidestepping the responsibility of actively accommodating LGBTQIA+ individuals who face persecution or endangerment in their home countries.

The article will include the context and background on the UK's asylum clauses referring to SOGI, an introduction to the Nationality and Borders Act, along with its structure, its problematization through a lexicological review contrasting the nationality and borders act and necropolitics, and finally, a series of conclusions and recommendations.

Background of discriminatory legislation in the UK

Despite the enactment of the Nationality and Borders Act, it is important to note that the Act falls short in explicitly addressing the specific concerns and needs of LGBTQIA+ refugees and asylum seekers. Regrettably, this practice of omission and neglect towards queer individuals and their experiences appears to be a recurring trend within the UK's asylum framework. The Sexual Offences Act of 1967, was the first to legalize homosexual acts, only between men above the age of 21, as the criminalization of homosexual acts between women was never strictly banned (UK Parliament, 2023). This is a clear example of a pattern of discriminatory omission within legislation.

Then came the Criminal Justice and Public Order Act of 1994, and its reform in 2001. It allowed strictly gay men above the age of 16 to consent to private homosexual acts (UK Parliament, 2023). Gross indecency was shunned in both of these acts and was defined as any public homosexual act between two men short of sodomy. This crime could be met with up to five years of imprisonment, an unlimited fine, or both (UK Parliament, 2023). However, the action was never explicitly defined in any legislation, and was left up to the interpretation of the court. In other words, the representation of LGBTQ+ identity was left up to the perception of policymakers.

Previous iterations of asylum laws involving sexual orientation and gender identity in the UK were primarily influenced by a blend of domestic legislation and international human rights principles, yet they failed to adequately confront and address the unique challenges faced by LGBTQIA+ individuals.

The absence of explicit provisions pertaining to SOGI in the Nationality and Borders Act raises concerns about the level of recognition and protection afforded to LGBTQIA+ refugees and asylum seekers. By recognizing SOGI as a valid claim for danger yet neglecting

to specifically acknowledge the vulnerabilities of this marginalized group, the Act is actively choosing what experiences and identities are deserving of acquiring the life-saving support required to navigate the asylum process effectively.

The issue of efficiency within the UK asylum system has garnered attention, as evidenced by its approval statistics. Nearly 50% of the LGBTQIA+ asylum claims that were initially refused by the Home Office are overturned upon appeal (George, 2022). This alarming trend highlights the significant number of LGBTQIA+ individuals whose credibility is initially discredited, only to be later vindicated through the appeal process. Such a high rate of successful challenges indicates systemic deficiencies in the initial assessment and decision-making processes, which can have grave consequences for the individuals involved (George, 2022).

Another notable concern is the absence of a mechanism to accurately track LGBTQIA+ individuals entering the country. While the UK government offers an analysis of its experimental statistics of queer asylum, it is important to note that these statistics primarily focus on sexual orientation and neglect to account for gender identity (UK GOV, 2022). This incomplete approach limits our understanding of the unique experiences and vulnerabilities faced by transgender, non-binary, and gender non-conforming individuals within the asylum system. By failing to adequately capture the complexities of gender identity, the current tracking mechanisms may overlook crucial aspects of the lived realities and specific challenges faced by LGBTQIA+ individuals seeking asylum.

Structure of the Nationality and Borders Act

The newest addition to the UK's asylum framework, the Nationality and Borders Act is organized into seven parts, each addressing crucial aspects of immigration, nationality,

asylum, age assessments, modern slavery, and miscellaneous provisions (NABA, 2022). The first part of the Act delves into matters of nationality, encompassing discussions on British Overseas Territories citizenship, British citizenship, the powers vested in the Secretary of State concerning citizenship, as well as the registration process for stateless minors.

The second part of the Act focuses on asylum-related considerations. It concentrates on crucial aspects such as the treatment and support of refugees, the determination of a suitable place for claim submission, inadmissibility criteria, required supporting evidence, the issuance of priority removal notices, sanctions for late evidence submission, appeal mechanisms, removals to safe countries, and an interpretation of the refugee convention.

Immigration control constitutes the third part of the Act, containing provisions for immigration offenses and associated penalties, non-compliance, regulations concerning work in United Kingdom waters, enforcement measures, removal procedures, and the granting of immigration bail.

The Act's fourth part discusses age assessments, addressing matters such as the interpretation of age, referral or assessment of individuals subject to immigration control by local authorities, the utilization of scientific methods in age assessments, regulations governing the assessment process, appeal mechanisms, and civil legal services relating to age assessments.

The fifth part of the Act focuses on modern slavery, addressing various facets of combatting and providing support to victims of slavery or human trafficking. It includes provisions on the information related to being a victim, consequences of late compliance with information notices, identification of potential victims, recovery periods for identified

potential victims, disqualification from protection, assistance and support measures, and the granting of leave to remain for victims of slavery or human trafficking.

The Act also encompasses a miscellaneous section, and schedules addressing specific aspects such as the waiver of presence requirements in the UK, deprivation of citizenship without notice, expedited appeals when a priority removal notice has been served, removal of asylum seekers to safe countries, penalties for failure to secure goods vehicles, maritime enforcement, and the reentry of prisoners to the UK. These schedules help delineate specific procedures and requirements related to the Act's provisions.

Problematizing the Nationality and Borders Act

To analyze the most problematic provisions within the Nationality and Borders Act, it is crucial to examine them through the theoretical frameworks of the necropolitical process of forced migration, necropolitics, queer necropolitics, and ultimately arrive at the concept of bureaucratic necropolitics. Each theory will be contrasted with a provision pertaining to the Nationality and Borders Act.

The theory of the necropolitical process of forced migration, as introduced by author Ariadna Estévez (2022: 245), discloses the dynamics between bureaucratic apparatuses, discourses, policies, and strategies within the framework of necropolitics. This theory highlights the critical role played by institutional structures in exerting power and control over marginalized populations, particularly within the context of forced migration.

In the necropolitical process of forced migration, bureaucratic instruments function as key instruments through which political power is wielded to perpetuate control and domination. These apparatuses are characterized by their ability to shape and manipulate the experiences, trajectories, and outcomes of communities seeking refuge or fleeing persecution

(Estévez, 2022). By subjecting these populations to systematic harm and violence, either through active means or through omission, these instruments serve to maintain and reinforce the existing power dynamics. By keeping this structure, the UK also controls the narrative on its LGBTQIA+ clauses. The nation benefits from being perceived as inclusive, when it is far from the truth.

This is also how necropolitical legislation benefits from the harm and displacement of queer refugees. By neglecting and suppressing their existence, the Act dehumanizes and devalues them, relegating them to the periphery of society. In doing so, it serves as a mechanism for perpetuating systemic violence and oppression against them. The deliberate erasure of their identities and experiences reinforces a power structure that thrives on the subjugation and dispossession of marginalized groups, allowing those in power to maintain their dominance unchallenged. Furthermore, the discourses employed within the necropolitical process of forced migration play a pivotal role in legitimizing and justifying the practices of exclusion, marginalization, and violence. These discourses construct narratives and representations that position certain individuals as "other" or as threats to the established order (Estévez, 2022).

Moreover, the harm and displacement experienced by queer individuals under this legislation create a state of vulnerability that is exploited to the benefit of those in power. The legislation effectively weaponizes this vulnerability, utilizing it as a means to further consolidate authority and suppress dissent.

Furthermore, the discourses employed within the necropolitical process of forced migration play a pivotal role in legitimizing and justifying the practices of exclusion,

marginalization, and violence. These discourses construct narratives and representations that position certain individuals as "other" or as threats to the established order (Estévez, 2022). Policies are also devised and implemented within the necropolitical process of forced migration to further solidify control and domination. An example of this is the Nationality and Borders Act. With its provisions, it is designed to limit the agency and mobility of queer, forcibly displaced individuals, placing them in vulnerable and precarious positions. By restricting their identity, restricting their access to protection, and subjecting them to punitive measures, this policy perpetuates the already-mentioned cycle of violence and marginalization.

Necropolitics, a concept introduced by Achille Mbembe (2019), encapsulates the exercise of power and control over populations through the manipulation of life and death. It represents a form of governance that operates beyond the traditional realm of biopolitics, which in turn, focuses on the regulation and management of life (Foucault, 1979). Instead, necropolitics delves into the deliberate administration and exploitation of mortality, with emphasis on the production of death and suffering.

According to Mbembe (2019), necropolitics relies on three important elements. The first one is selective exposure to harm or death. Necropolitics operates by choosing or forcing certain populations to be hurt. It does so by creating conditions where their lives are rendered disposable, or insignificant. The deliberate production of death and harm targets marginalized groups who are treated as spare populations or obstacles to dominant political interests. The Nationality and Borders Act fulfills this element through omission. It exemplifies a concerning pattern of omission that sabotages the protection of individuals

based on their sexual orientation and gender identity. While the Act acknowledges the potential risks faced by individuals of diverse SOGI, it fails to establish an inclusive mechanism to effectively address these concerns. This omission not only hinders the Act's ability to safeguard the rights and well-being of LGBTQIA+ individuals but also reveals a disconcerting misalignment within the broader asylum framework.

Part 2, Clause 32 of the policy recognizes the importance of considering SOGI within the asylum process (NABA, 2022). However, upon closer examination, it becomes evident that this recognition does not translate into concrete action or data collection. This is highlighted by the asylum statistical report spanning from 2015 to 2021 (UK GOV, 2022), where gender identity-related information is completely ignored.

The second element is spatial control, in other words, the geographical boundaries and their control (Mbembe, 2019). A representation of this element are the offshore processing centers proposed in Part 2, clause 26 of the Act (UK GOV, 2022). This clause covers the use of accommodation centers, including those situated outside the United Kingdom's territory, for the purpose of assessing individuals' asylum applications or determining the admissibility of their claims (Rainbow Migration, 2021).

According to the work of Mbembe (2019), the deployment of such centers serves to confine and segregate individuals, reinforcing existing systems of power and marginalization. These spatial arrangements not only physically constrain individuals but also contribute to the perpetuation of violence and exploitation. By confining asylum seekers to specific locations, often in isolated or, in this case, homophobic areas, the authorities exert control over their movements, limiting their agency and subjecting them to increased vulnerability (Mbembe, 2019).

Queer necropolitics, a concept emerging from critical queer theory and influenced by necropolitics, examines the intersecting dynamics of power, violence, and death within the context of queer experiences and identities (Puar, 2017). It focuses on how oppressive systems and structures produce and manage death, suffering, and exclusion specifically targeting queer individuals and communities (Puar, 2017).

Queer necropolitics encompasses two key elements that can be found in the Nationality and Border's Act. The first one, heteronormative violence is the belief that heteronormativity, as a dominant social and cultural framework, perpetuates violence against queer individuals (Merchia & Sommer, 2019). Heteronormativity imposes strict norms and expectations around gender and sexuality, marginalizing and stigmatizing non-conforming identities. This violence can manifest through physical attacks, political discrimination, psychological harm, and social exclusion.

Part 2, clauses 31 and 32 of the Nationality and Borders Act address the evaluation of an asylum seeker's well-founded fear of persecution based on their sexual orientation and gender identity (NABA, 2022). These clauses establish a two-part standard of proof that decision makers must adhere to. The first aspect requires the decision maker to assess, on the balance of probabilities, whether the asylum seeker possesses a characteristic that could lead to a genuine fear of persecution based on their SOGI. Furthermore, it needs an examination of whether the individual genuinely fears such persecution in their country of nationality due to those particular characteristics (Shawstone Associates, n.d).

Once the initial determination has been made, the decision maker must proceed to evaluate whether there is a 'reasonable likelihood' that if the asylum seeker were to be repatriated to their home country, they would face persecution based on the aforementioned

characteristics, and whether they would lack adequate protection in that context (Shawstone Associates, n.d).

The guidelines fail to adequately capture the diversity of identities within the spectrum of sexual orientation and gender identity. A traditional standard of proof, which relies on testimonies from family members, close acquaintances, or co-workers, presents a significant limitation. Considering that individuals fleeing their homes due to persecution based on their SOGI face precarious circumstances, it becomes unreasonable to expect them to obtain corroborating letters explicitly disclosing their identities.

Moreover, an additional issue arises from the tendency to discredit LGBTQIA+ individuals based on heteronormative stereotypes. By adhering to these stereotypes, the guidelines reinforce a heteronormative standard, perpetuating the marginalization of individuals whose identities and survival are reduced to the rigid requirements imposed by the policy. Some of these include the traditional family ideal, a heterosexual husband and wife, and their children. However, the definition of a family must be flexible enough to include LGBTQ+ identities. If they are not accounted for within legislation, it can lead them to a place of further vulnerability.

The second element of queer necropolitics is the role of state violence and legal oppression (Puar, 2017). This refers to the existence of repressive laws, policies, and legal systems that criminalize non-heteronormative expressions, relationships, and identities. A representation of this element can be found in clauses 10, 11, and 12 (NABA, 2022). These clauses outline the differentiated treatment afforded to these distinct categories of individuals seeking asylum. Group 2 refugees, encompassing those who have traveled through a third

country or failed to lodge an immediate asylum claim, are subjected to a distinct set of regulations and limitations (Rainbow Migration, 2021).

If they are successful in their asylum claims, group 2 refugees would likely be granted only temporary protection, in contrast to the current practice of providing 5-year refugee leave to remain with the possibility of eventually settling in the UK. Under this revised framework, their cases would be subject to regular reviews, aimed at assessing the probability of their removal from the country (Rainbow Migration, 2021).

Living under the strain of temporary protection status, which entails limited access to rights such as family reunion, would inevitably expose individuals to heightened stress and anxiety, negatively impacting their mental health and impeding their ability to integrate effectively into the UK. LGBTQIA+ refugees, who would face the ongoing burden of concealing their sexual orientation and/or gender identity. The constant fear of persecution, should they be forcibly returned to their country of origin, would compel them to hide their authentic selves, exacerbating their vulnerability and perpetuating a culture of secrecy and invisibility (Rainbow Migration, 2021)

An additional concern in the Nationality and Borders Act are trauma deadlines. These deadlines in Clauses 26 and 58 of the Act, grant the government the powers to impose a specified timeframe within which potential victims of persecution must submit all pertinent evidence to the relevant authorities (NABA, 2022). The compliance with these deadlines assumes a pivotal role in the decision-making process, as it becomes a determining factor in assessing an individual's eligibility for asylum.

The introduction of trauma deadlines raises fundamental questions about the fairness and effectiveness of the asylum procedure. By imposing strict temporal constraints on the

submission of evidence, the Act places a burden on vulnerable individuals who have endured traumatic experiences, potentially hindering their ability to gather and present comprehensive documentation within the stipulated timeframe.

In such a rigid framework, decision makers may disregard evidence presented after the prescribed deadline, deeming it inconsequential or futile (Ferrera, 2022). The imposition of such deadlines is also affected by a heteronormative way of thought. The belief that sexuality or gender identity may be objectively represented within a certain timeframe is biased.

A final crucial element that intersects both necropolitics and queer necropolitics is the exercise of power through violence (Mbembe, 2019). This manifestation of power encompasses the deliberate utilization of force, coercion, and the manipulation of harm and death as tools for domination and control over populations (Mbembe, 2019). The infliction of violence serves the purpose of establishing and perpetuating desired power dynamics. Such violence can originate from direct sources, such as military forces, which may be employed as deterrents or coercive measures to achieve specific objectives (UNESCO, 1980).

However, it is equally important to recognize that indirect power sources, such as legislative power, also play a significant role in shaping the well-being and integrity of individuals. While their impact may not be immediately apparent, they contribute to the overall framework that governs the lives of marginalized communities. The Nationality and Borders Act provides representation of how bureaucratic necropolitics, the administration of harm and mortality through adherence of law and legislative means, is present in contemporary discourse. This is evident through the critical examination of the Act's most

contentious provisions, which shed light on the problematic nature of its policies and their potential implications for vulnerable LGBTQI+ individuals.

Conclusions and recommendations

In conclusion, this article has undergone a critical examination of the legislation governing the experiences of queer refugees and asylum seekers, seeking entry into the United Kingdom. By adopting the lens of the necropolitical process of forced migration and focusing on the Nationality and Borders Act, it has revealed the presence of bureaucratic necropolitics within this complex issue.

Through this examination, it becomes evident that the experiences of queer refugees and asylum seekers are shaped not only by overt acts of violence but also by subtle, systemic forms of oppression embedded within legislative practices. The UK's legislative framework strategically employs LGBTQIA+ clauses as a means to bolster its international standing and attract interest from individuals around the world. Nevertheless, the dissonance between the appearance of inclusivity and the actual implementation of policies highlights a significant gap that calls into question the UK's genuine commitment to ensuring the safety and well-being of LGBTQIA+ individuals who are seeking refuge or a better life within its borders. By recognizing the existence and impact of bureaucratic necropolitics, policymakers, activists, and scholars can work towards dismantling these structures of power and advocating for more inclusive and just asylum policies.

To effectively address the bureaucratic necropolitics present in the Nationality and Borders Act, it is crucial to explore the initiatives that prioritize the fair treatment of asylum claims based on sexual orientation and gender identity. One recommendation is the

establishment and adequate funding of projects such as SOGICA: Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge.

The SOGICA project offers a pioneering approach aimed at creating a comprehensive and empirically-grounded understanding of the legal experiences and status of asylum-seekers across Europe who seek international protection based on their SOGI. By conducting in-depth comparative research, this project seeks to illuminate the complexities and challenges faced by LGBTQIA+ individuals navigating European asylum systems (SOGICA, 2020).

Another recommendation is to ensure that the insights and recommendations generated by LGBTQIA+ refugees and asylum seekers, as well as the academia are actively integrated into policy discussions and decision-making processes. The findings and expertise of this project can inform legislative reforms, guidelines, and training programs aimed at improving the treatment and assessment of asylum claims based on SOGI across the world. An additional step that could be taken in order to ensure less traumatic processes concerning queer refugees are expert witnesses in court proceedings. By providing objective information to help resolve disputed issues, they can reduce the prospect of revictimization.

Moving forward, further research is needed to truly answer the question of how does the UK's bureaucratic necropolitics framework affect the experiences of queer, displaced bodies. The quantitative data past the publication of the Nationality and Borders Act is not yet available, but would be useful to further confirm this claim, as well as the interplay between legislation, bureaucracy, and the experiences of queer refugees and asylum seekers. By amplifying marginalized voices and engaging in collaborative efforts, a more compassionate and equitable asylum system that upholds the rights and dignity of all

individuals, irrespective of their sexual orientation or gender identity can be created. Finally, the goal is to foster an environment where queer refugees and asylum seekers have the freedom to express their identity how they see fit, without risking their integrity or ultimately, their lives.

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