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Proving a Well-Founded Fear: The Evidentiary Burden in Refugee Claims Based on Sexual Orientation

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A publication of

THE INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION
AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND

*This publication was made possible through the generous support of
The San Francisco Foundation,
The Paul Rapoport Foundation,
The Boehm Foundation,
The Chicago Resource Center
and James Hormel.*

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FOUNDATION

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ISBN 1-884955-00-2

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Originally published in 42 UCLA L. Rev. 1115

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Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 Cornell Int'l L.J. 605 (1993)

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IJ Grants Asylum to HIV Positive Man, General Counsel Issues HIV Instructions, Interpreter Releases at 901, July 8, 1991

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Book Design PETER HOWELLS
Typesetting LESLIE MINOT
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Proving a Well-Founded Fear

The Evidentiary Burden in Refugee Claims Based on Sexual Orientation

by NICOLE LAVIOLETTE*

When Kureishi, a gay man from Pakistan, left his home country in December of 1992, he did so in a hurry.¹ He had been arrested and sexually assaulted by the police, his boyfriend had died in mysterious circumstances, and his family considered him a source of shame and dishonour. He bought a false passport and made his way to the United States, and then finally to Canada where he applied for refugee status. Like most refugees, Kureishi came to Canada with no written evidence to substantiate his story of abuse and persecution beyond what could be adduced from his own testimony. But unlike most refugees, lesbians and gay men like Kureishi have a more difficult time following their arrival in Canada in obtaining information to support their refugee claim. Individuals who base their refugee claims on sexual orientation face additional burdens in seeking to corroborate their fears of persecution. Indeed, several claims have been rejected in Canada because the gay or lesbian applicants were unable to provide sufficient documentation of the allegations of persecution they were making.

Contrary to many other human rights violations,

abuses against gay men and women are rarely documented. In the course of adjudicating claims of persecution based on sexual orientation, both the claimant and the Immigration and Refugee Board (IRB) have been unable to submit what has been perceived as acceptable evidence on the situation of gay men and lesbians in their countries of origin. The result has been that lesbian and gay claimants have faced tremendous difficulties in meeting the evidentiary burden required of applicants for refugee status.

This paper will examine the nature and consequences of the evidentiary problems facing women and men who make refugee claims based on sexual orientation persecution. I will begin the discussion by briefly surveying the nature of a refugee hearing and the role of documentary evidence in the refugee determination process. I will then illustrate some of the problems encountered by lesbians and gay men by focusing on one aspect of the legal test which must be met by a claimant, and that is the requirement that a person have a 'well-founded fear of persecution.'² It will be seen that documentation on human rights violations against sexual minorities is

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¹Eleanor Brown, "Pakistani Accepted as a Refugee" *Xtra!* (21 September 1994); *Re H.* (Y.N.) [1994] CRDD No. 13 (QL).

²The scope of this paper does not allow me to examine the full range of evidentiary problems faced by lesbian and gay refugee claimants. For instance, women and men claiming to be homosexuals must satisfy panel members at their hearing that they really are lesbian or gay in order to meet the requirement that their persecution be one of the five grounds enumerated in the law, in this case membership in a particular social group. Claimants must also prove that their allegations constitute 'persecution' and not simply 'discrimination'. Finally, some claimants may have to convince a panel that they do not have an internal flight alternative, or that circumstances in their country have not changed substantially since they fled. For the purposes of this discussion, I will limit myself to illustrating some of the evidentiary obstacles faced by lesbians and gay men in supporting their claims that their fear of persecution is well-founded.

often very difficult to find. If information exists, refugee panels of the Convention Refugee Determination Board (CRDD) of the IRB have sometimes questioned the bias of the sources. I will conclude my examination by evaluating recent steps taken by the IRB to overcome some of the documentary problems that exist in cases dealing with sexual orientation issues.

The Refugee Hearing

The CRDD is one of three divisions which makes up the Immigration and Refugee Board. It is responsible for hearing claims for refugee status which originate within Canada. Upon application for refugee status, individuals eligible to make claims are referred to the CRDD for a determination of their claim. Most claims will proceed to a full hearing presided over by one of two members of a refugee panel of the CRDD for a final decision in each case.³ The Immigration Act⁴ provides that these proceedings shall be as informal and expeditious as is consistent with fair treatment.⁵ Indeed, as an administrative tribunal, the Immigration and Refugee Board is not bound by legal or technical rules of evidence. The CRDD may base a decision on evidence it considers credible and trustworthy in the circumstances of the case.⁶ Moreover, the CRDD may take judicial notice of any facts, information or opinion within its specialized knowledge.⁷

According to the Immigration Act, a Convention refugee is a person who has a well-founded fear of persecution on one of the five grounds listed in the statutory definition.⁸ In order to meet the requirements of the Convention refugee definition (well-founded fear, persecution, link to one of the five grounds), a refugee claimant must present supporting evidence at the full hearing. The claimant's testimony may constitute the whole of the evi-

dence if it is "plausible, credible and frank."⁹ In many cases however, the testimony of an applicant is supported by some form of external corroboration.

It is important to note that because an individual need only fear a future risk of persecution,¹⁰ evidence of individualized past persecution is not necessary, but it is certainly an important indicator of the treatment awaiting the claimant if they should return home.¹¹ In the absence of evidence of past persecution, a claim may be established by evidence that "persons similarly situated to the claimant are at risk in the state of origin."¹² In any case, evidence to support a refugee claim normally consists of the testimony of the claimant and general evidence of a country's human rights record. Evidence from witnesses, including experts witnesses may also be introduced in the course of a claim.¹³

Both the claimant and the CRDD share the responsibility of fact-finding. This process is assisted by the IRB's national network of publicly accessible Documentation, Information and Research Centres (DIRBs), which collect and summarize available sources of relevant information.¹⁴

Lesbians and gay men must meet the same evidentiary burden as all other refugee claimants, that is, they must prove that they have a well-founded fear of persecution based on one of the five enumerated grounds. However, the obstacles these applicants and the CRDD face presents particular problems in the area of fact finding. To illustrate this point, I will review the difficulties encountered in trying to prove the element of a 'well-founded fear' in refugee claims based on sexual orientation.

Well-Founded Fear

In order to meet the Convention's definition of a refugee, a person must be unable or unwilling to return

³About twenty-seven percent of all finalized refugee claims are dealt with through an expedited process which does not require a full hearing. See Gerald H. Stobo, "The Canadian Refugee Determination System" (1994) 29 *Texas Int'l L. J.* 383 at 394 (1994).

⁴R.S.C. 1985, c. I-2.

⁵*Ibid.* s. 68(2).

⁶*Ibid.* s. 68(3).

⁷*Ibid.* s. 68(4).

⁸'Convention refugee' is defined in the *Immigration Act* as "any person who by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion is outside the country of the person's nationality and is unable or, by reasons of that fear, is unwilling to avail himself of the protection of that country...". *Ibid.* s.1.

⁹James Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 84. The Federal Court of Appeal has stated that a claimant's testimony will be presumed to be credible if the applicant swears to the truth of the allegations. This premise will apply only if there is no reason to doubt the sworn testimony of the claimant. *Ibid.*

¹⁰*Ibid.* at 66.

¹¹*Ibid.* at 87.

¹²*Ibid.* at 89.

¹³Nurjehan Mawaani, "Evidentiary Matters at the Immigration and Refugee Board in an Age of Diversity" (1994) 8:1 *Canadian Journal of Administrative Law and Practice* 41 at 42.

¹⁴Hathaway, *supra* note 9 at 81.

home due to a well-founded fear of being persecuted. It is generally understood that this phrase, 'a well founded fear of being persecuted', contains both a subjective and an objective requirement. These dual criteria were recognized in Canada in *Adjei v. Canada*.¹⁵ The Federal Court held that the fear of persecution is two-fold. On the one hand, the "fear must be present in the mind of the applicant for the definition of Convention refugee to be met."¹⁶ On the other hand, this subjective fear must also have an objective basis, that is, the "refugee's fear must be evaluated objectively to determine if there is valid basis for that fear."¹⁷ The court held that an applicant's fear of persecution will be well-founded if there is a 'reasonable chance' that persecution will take place. This test requires that there need not be more than a 50 percent chance but more than a minimal possibility.¹⁸

In reality, the difficulty in evaluating a claimant's subjective fear has led decision-makers to rely on objective evidence even at the first stage of the test. James Hathaway argues that Canadian courts should dispense of the requirement of proving subjective fear when a strong objective foundation exists. It is clear that even the most "fervently stated fear of persecution" will not be enough if objective evidence tends to deny the existence of risk.¹⁹ The practical result is that objective evidence of a reasonable chance of persecution is a necessary and decisive element in any refugee claim.

Gay and lesbian refugee claimants have encountered some difficulties in providing sufficient objective evidence of well-founded fear. Generally, assessments of whether a refugee claim has an objective basis are made by relying on a broad cross-section of official and non-governmental sources in addition to the testimony of the claimants themselves. Refugee claims based on sexual orientation encounter a specific set of problems in the area of fact-finding. Firstly, in many countries very little information is available on human rights violations against sexual minorities. Secondly, when available information has originated from lesbian and gay human rights associations, sometimes the evidence has been dismissed as biased and unreliable.

Existing Documentation

Several reasons lie behind the absence of information on human rights violations against lesbians and gay men. First, it is important to look at the general sources of documentation for most refugee cases. International non-governmental organisations (NGOs) play an important role in monitoring and advocating for human rights, and institutions like the Immigration and Refugee Board rely heavily on their work. While an increasing number of NGOs are beginning to document abuses against lesbians and gay men, they remain a minority. Up until recently, the largest international human rights organisations refused to document the situation of lesbians and gay men. Amnesty International was lobbied for seventeen years before it finally decided to view people imprisoned for their homosexuality as prisoners of conscience in 1991.²⁰ Other prominent human rights organisations have only very recently worked on behalf of lesbians and gay men.²¹ Many more NGOs continue to maintain that the rights of homosexuals are not human rights issues.²²

While international governmental institutions have begun to recognize the legitimate rights of sexual minorities within the frame of international law,²³ such recogni-

¹⁵Shawn Syms, "Amnesty Bows to Pressure to Fight Persecution of Lesbians and Gays." *Rites* (November/December 1991).

¹⁶For instance, it was only in 1994 that Human Rights Watch, a well-respected human rights organization based in the U.S.A., adopted a statement opposing human rights violations against lesbians and gay men: Human Rights Watch, "Two Recent HRW Actions" Press Release (24 July 1995). The International Commission of Jurists incorporated lesbian and gay equality into its mandate in 1994: John Fisher, "A Revolution That's Going Global" *Xtra!* (5 August 1994) 13. The first Canadian NGO public report on human rights violations against lesbians and gay men was published in April 1996 by the Inter-Church Committee on Human Rights in Latin America: ICCHRLA, *Violence Unveiled: Repression Against Lesbians and Gay Men in Latin America* (Toronto: ICCHRLA, 1996).

¹⁷The resistance of the international NGO community was evident at the 1993 United Nations World Conference on Human Rights held in Vienna. A first draft of the report of the NGO forum to be presented to a Plenary Session of the World Conference made no mention of the sexual minority issues that were discussed in several workshops of the Forum. Only after extensive lobbying were lesbians and gay men mentioned in the Final Report. International Lesbian and Gay Association, ILGA Report, *The International Lesbian and Gay Association at the United Nations World Conference on Human Rights* (1 July 1993).

¹⁸In March 1994, the United Nations Human Rights Committee released a communication regarding a complaint it had received from a gay man in Tasmania. Nicholas Toonen petitioned the Committee,

¹⁵(1989), 7 Imm. L. R. (2d) 169 at 171.

¹⁶*Ibid.*

¹⁷*Ibid.* at 172.

¹⁸*Ibid.* at 173.

¹⁹Hathaway, *supra* note 9 at 71.

tion has not translated into an increased reporting of the human rights violations perpetrated against sexual minorities. The United Nations Commission on Human Rights has issued only one report on lesbians and gay men.²⁴ The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities has ignored calls by gay and lesbian human rights organisations to appoint a special rapporteur to undertake a comprehensive study of discrimination against lesbian and gay people.²⁵ More recently, the Fourth United Nations Conference on Women dropped any direct reference to sexual orientation in the final platform document which issued from the conference.²⁶

The lack of documented information with respect to violations against lesbians and gay men is often the result of "the underlying climate of homophobia"²⁷ which permeates most countries. One human rights activists in Ecuador noted that while human rights abuses are known to occur, "people are too frightened to come forward and denounce them."²⁸ Simply forming a gay and lesbian organization in many countries is often an extremely difficult and dangerous act because of discriminatory laws and state persecution which prohibits the establishment of such organisations. States have denied lesbian and gay organisations the right to register as a legal entity,²⁹ the right to meet and hold conferences,³⁰

and the right to distribute and publish information on homosexuality.³¹ This makes it extremely difficult to form national associations, let alone international links which could document violations of the human rights of sexual minorities. In countries where gay and lesbian organisations do exist, some groups are reluctant to spotlight the human rights situation of sexual minorities due to the fear of reprisals. Moreover, where homosexuals are threatened by state violence and repression, women and men lead secret and discreet lives. NGOs, even if they are willing to explore abuses against lesbians and gay men, are unlikely to have the means to monitor the human rights situations of those who live covert lives.

The scarcity of human rights documentation, and the serious consequences this has for claimants, is evident in many IRB decisions. In *Re R. (U.W.)*,³² a gay man from Uruguay was unable to present to the refugee panel any documentary evidence on the treatment of homosexuals in Uruguay by state officials. This led the panel to conclude that the documentary record did not support the fear of persecution the claimant alleged, and his request for asylum was denied. A similar conclusion was reached in a case involving a gay man from Jordan.³³ The claimant advised the Board that he had tried for years to find documentary evidence which would support his claims that gay men are persecuted by Jordanian authorities, but to no avail. In that case, the claimant's counsel and the Refugee Hearing Officer had also searched for documentary evidence but nothing was found which indicated that homosexuality is unlawful or even persecuted in Jordan.³⁴

alleging that two provisions of the Tasmanian Criminal Code which prohibited consensual homosexual relations violated his rights under the Covenant on Civil and Political Rights. The Committee agreed with Toonen, finding the impugned sections to have violated rights guaranteed by the Covenant. *Nicholas Toonen v. Australia*, U.N. GAOR, Hum. Rts. Comm., 15th Sess., Case No 488/1992, U.N. Doc. CCPR/c/50/D488/1992 (Apr 4, 1994). Since the Toonen decision, the United Nations Human Rights Committee has issued a note of concern regarding laws that outlaw homosexual contact in its reports on state signatories' compliance with the International Covenant on Civil and Political Rights.

²⁴Commission on Human Rights, *The Legal and Social Problems of Sexual Minorities*, UN ECOSOC, 1988, E/CN.4/Sub.2/1988/31 (1987).

²⁵"UN Briefed on Lesbian and Gay Human Rights" *Gay Times* (October 1992) 29.

²⁶Rex Wockner, "A Critical Mass" *The Advocate* (17 October 1995) 20.

²⁷ICCHRLA, *supra* note 21 at 7.

²⁸*Ibid.*

²⁹For instance, lesbian and gay associations in Argentina, Costa Rica and Honduras were denied the right to register as a legal entity, preventing them from opening a bank account, renting meeting space and generally doing business openly and legally. *Ibid.* at 17.

³⁰An international lesbian and gay conference was forced to move locations after government and church officials in Guadalajara, Mexico, denounced the gathering as immoral. A lesbian conference in Costa Rica was held in a secret and well-guarded location after public and

church officials denounce the international meeting and threats were received by organizers. In El Salvador, a women's conference was branded a lesbian and left-wing gathering by a national newspaper, resulting in the cancellation of hotel space and death threats to organizers. *Ibid.*

³¹A lesbian in Greece was convicted and sentenced to a jail term for publishing 'indecent material' in a lesbian and gay newspaper. Amnesty International, EUR 25/15/92, "Greece: Violations of the Right to Freedom of Expression" (November 1992). Both Austria and Great Britain have enacted legislation making it unlawful to publicly advocate, promote or encourage homosexuality. P. Tatchell, *Europe in the Pink: Lesbian and Gay Equality in the New Europe* (London: GMP Publishers, 1992) 99 & 102. In Nicaragua, Penal Code 204 criminalizes the promotion of homosexuality with one to three years imprisonment: International Gay and Lesbian Human Rights Commission, Rachel Rosenbloom, ed. *Unspoken Rules: Sexual Orientation and Women's Human Rights* (San Francisco: International Gay and Lesbian Human Rights Commission, 1995) at 133.

³²[1991] CRDD No. 501 (QL).

³³[1992] CRDD No. 397 (QL).

³⁴*Ibid.*

Not only did panel members decide that the absence of evidence failed to support the claimant's fear of persecution, but they also considered it an indication that homosexuals as a group are *not* persecuted in Jordan. Claimants from Mexico and Brazil also failed to convince the IRB that their fears of persecution were well-founded due to a lack of documentary evidence.³⁵

Often, if documentary evidence on the global status of sexual minorities is to be found, it originates from lesbian and gay organisations themselves. Lesbian and gay associations which investigate and compile human rights documentation often undertake this kind of human rights work because of the refusal of other governmental and non-governmental human rights organisations to consider the plight of gay men and lesbians. Juan Pablo Ordoñez, a human rights lawyer who recently authored a report on Colombia, reports that a Human Rights Ombudsman for the city of Barranquilla, Colombia, told him that:

The moment a faggot begins hanging around my house, [his] human rights are over...I'd rather have a daughter who is a whore than a faggot son...[If I were to have a homosexual child] I would treat him like the family dog, just like any other case from my office. I believe I love my dog more than I'd love a faggot.³⁶

Ordoñez has had his life threatened for investigating abuses against sexual minorities and had to leave Colombia as a result. In Uruguay, the family of a lesbian who was arrested by the military and subsequently disappeared, joined an association for the relatives of the disappeared. But when the women's sexual orientation became known, the association ignored her family and abandoned all efforts to find her.³⁷ In the Philippines, a lesbian working for a human rights organization was fired when the Board of Directors found out about her sexual orientation.³⁸ The lack of interest and, in many cases, the open hostility to lesbian and gay issues on the

part of human rights organisations has convinced many lesbians and gay men to document human rights violations themselves in order to draw international attention.

Internationally, several groups have formed to attract attention to the plight of gay men and lesbians. Growing activism of regional and national groups in North America and Europe resulted in the formation of the International Lesbian and Gay Association (ILGA) in 1978. The aim of this organization has been to monitor, publicize, and campaign against the oppression of homosexuals the world over.³⁹ A federation, its membership currently comprises over 300 lesbian and gay organisations in 50 countries throughout Africa, Asia and the Pacific, Europe, North America, Latin America, and the Caribbean. It publishes a regular newsletter, which includes information about the human rights situation of lesbians and gay men in different countries, as well as a comprehensive global legal and social survey on the status of sexual minorities.⁴⁰

Another organization, the International Gay and Lesbian Human Rights Commission (IGLHRC) was established in 1991 by activists from the United States and the Soviet Union. The mandate of this group is to advocate for the human rights of sexual minorities and people with HIV/AIDS by monitoring and documenting human rights violations, and then exposing and mobilising letter-writing campaigns on the most egregious cases in coordination with local activists.⁴¹ It publishes regular information on human rights violations, including some of the first ever country specific reports on the status of gay men and lesbians.⁴² One of the divisions of IGLHRC is the Asylum Project which is responsible for providing documentary evidence to lesbian and gay refugee claimants, their lawyers, and governmental institutions like the IRB.

³⁵Tatchell, *supra* note 30.

³⁶The newsletter is entitled the *ILGA Bulletin* and is published 4 times a year. The last international survey of the global status of lesbians and gay men can be found in Rob Tielman and Taco de Jonge, "World Survey on the Social and Legal Position of Lesbians and Gay Men", in Aart Hendriks et al, eds, *The Third Pink Book. A Global View of Lesbian and Gay Liberation and Oppression* (Utrecht: Interfacultaire Werkgroep Homostudies, 1993) 185. A fourth edition is slated to be published soon.

³⁷International Gay and Lesbian Human Rights Commission, 1995 Annual Report (1996).

³⁸IGLHRC has published country specific reports on Russia, Colombia, and Brazil (forthcoming). It has also published a global survey on the rights of lesbians: Rachel Rosenbloom, ed., *Unspoken Rules: Sexual Orientation and Women's Human Rights* (San Francisco: IGLHRC, 1995).

³⁹See *Re X. (W.B.)* [1992] CRDD No. 549 (QL); *Re Q. (B.C.)* [1993] CRDD No. 209 (QL); *Re T. (F.N.)* [1993] CRDD No. 326 (QL); *Re H. (Y.F.)* [1994] CRDD No. 185 (QL).

⁴⁰Juan Pablo Ordoñez, *No Human Being Is Disposable* (San Francisco: International Gay and Lesbian Human Rights Commission, 1995) at 65-66.

⁴¹Rachel Rosenbloom, ed., *Unspoken Rules: Sexual Orientation and Women's Human Rights* (San Francisco: IGLHRC, 1995) at 232.

⁴²Testimony of Elizabeth Lim, *The International Tribunal on Human Rights Violations Against Sexual Minorities* (International Gay and Lesbian Human Rights Commission, October 1995) at 8-9.

In addition to those international organisations, gay and lesbian activists have also organized and established regional networks in Asia,⁴³ Latin America and the Caribbean,⁴⁴ and in Eastern Europe.⁴⁵ Some lesbians have been active in their own international organisations like the International Lesbian Information Service.⁴⁶ Finally, hundreds of national and local associations have been formed which focus on social activities, political organising and documenting human rights violations.⁴⁷

While lesbian and gay associations are often the only source of documentary evidence, early decisions of the CRDD on sexual orientation cases indicate a strong preference for materials which originate from mainstream human rights organisations, as opposed to lesbian and gay associations. The decision in *Re H. (Y.F.)*⁴⁸ provides a good illustration of how the absence of evidence of persecution in publications from mainstream human rights organisations impacts negatively on gay and lesbian refugee claimants. In that case, a gay man from Brazil claimed a well-founded fear of persecution because of his membership in a particular social group, namely homosexuals in Brazil. Despite the presentation of documentary evidence on extra-judicial killings of gay men and lesbians collected by a Brazilian gay and lesbian group, panel member Robert Gaudet denied the refugee claim, stating that

if there was a serious possibility that homosexuals, as a particular social group, had a well-founded fear of persecution because of their sexual orientation, the panel is of the opinion that one or more of the human rights publications would cite this as a concern...[however] the panel was not able to find any reference to such a concern in the recent

Amnesty International Report or Human Rights Watch World Report.⁴⁹

This view was repeated in *Inaudi*,⁵⁰ where one of the panel members noted that human rights reports from Human Rights World Watch, Lawyers Committee for Human Rights, Amnesty International, and the U.S. State Department did not highlight homosexuals as being at risk of persecution in Argentina.⁵¹ What these panels failed to acknowledge was that those organisations were not mandated to investigate human rights violations against sexual minorities, or had only recently adopted policies to document human rights violations and had not in effect begun to collect information.⁵² The absence of any references to human rights violations was not an adequate indication that such abuses do not occur in Brazil and Argentina. Certainly not when some of the better known mainstream human rights organisations had yet to investigate the status of lesbians and gay men in those countries.

In other cases, CRDD panels found materials from gay and lesbian organisations to be lacking in credibility. For instance, in *Inaudi*, panel member Larry Colle dismissed reports submitted by the gay claimant's counsel because

most of the documentary evidence is from gay advocacy groups or publications that would understandably highlight and possibly exaggerate the issues of the homosexual community. These publications are in my view one-sided.⁵³

In *Re H. (Y.F.)*,⁵⁴ the Brazilian case referred to earlier, documentary evidence which suggested that gay men, lesbians, and transvestites in Brazil are victims of systematic violence and extra-judicial killings was dismissed by the panel. The source of the evidence was the Grupo Gay da Bahia, one of Brazil's most active gay and lesbian organisations, and the panel refused to accept their findings as credible without corroboration from other sources like mainstream newspapers or human rights organisations.⁵⁵ In the case involving Kureishi, the gay

⁴³Neil Miller, *Out in the World* (New York: Random House, 1992) at 130-143; Gillian Rodgeron, "Bangkok Hosts First Asian Lesbian Conference" *Rites* (March 1991).

⁴⁴"Latinos Get Organized" *Outrage* (July 1992); Ana Elena Obando Montserrat Sagat, "Meeting with Repression: 2nd Encuentro Lesbico-Feminista de Latinoamérica y el Caribe" *Off Our Backs* (August/September 1990) 2.

⁴⁵Steve Hutton, "East European Gays Hold First Conference" *Xtra!* (10 May 1990); Dave Tuller, "Gay Activism in Eastern Europe" *The Advocate* (18 June 1991).

⁴⁶The organization was founded in 1987 and is based in Amsterdam. Its mandate is to advocate for the repeal of discriminatory legislation worldwide, with a particular focus on the rights of women and girls to control their bodies and freely organise in lesbian associations.

⁴⁷Tielman and de Jonge, *supra* note 39

⁴⁸*Supra* note 24.

⁴⁹*Ibid.*

⁵⁰[1992] CRDD No. 47 (QL).

⁵¹*Ibid.*

⁵²*Supra* text at 5-6 and accompanying notes.

⁵³*Inaudi*, *supra* note 49

⁵⁴*Supra* note 24.

⁵⁵*Ibid.* The same evidence was presented in an American asylum case

man from Pakistan mentioned in the introduction to this paper, the claimant's counsel objected to the characterization of documents submitted from lesbian and gay organisations as carrying little or no weight as trustworthy evidence.⁵⁶ The panel dismissed his complaints, stating that "it will give all documents submitted in evidence the appropriate probative weight."⁵⁷

There is no reasonable justification for dismissing documentation originating from lesbian and gay sources solely on the basis that sexual minorities themselves conducted the investigations into human rights violations. Many organisations, such as international trade unions and church groups pay particular attention to human rights violations against their members and their observations are regularly accepted as evidence. Often, 'interested' human rights groups have the knowledge, expertise, and connections to best document specific kinds of persecution. This is particularly true of sexual minorities who, as extremely marginalized members of society, are often difficult to reach. This was acknowledged by Amnesty International in a letter to lesbian and gay activists in which the human rights organization stated that

As with all human rights documentation, the abuses Amnesty investigates are brought to its attention through a wide range of human rights networks. Our work in this area has developed in cooperation with both international and local gay and lesbian groups who have documented abuses by governments in many countries. The work of gay and lesbian groups has been absolutely crucial, since many mainstream human rights organisations have failed to address the violations gay men and lesbians suffer.⁵⁸

Without the groundbreaking work of lesbians and gay human rights organisations, mainstream human rights

organisations would be facing an even more difficult task in documenting the abuses of which sexual minorities are victims.

In fact, mainstream human rights organisations are now relying on lesbian and gay sources in their own work. Amnesty International's letter cited above was presented to lesbian and gay human rights activists by representatives of the organization at an international gay and lesbian conference.⁵⁹ The objective was to encourage and recruit gay men and lesbians from around the world to bring to the organization's attention violations against sexual minorities.

The evidence submitted by the claimant in the Brazilian case *Re H. (Y.F.)*⁶⁰ regarding the extra-judicial killings of over 600 gay men, transvestites, and lesbians was included in a publication by Amnesty International (USA),⁶¹ a clear indication that the human rights organization found the evidence credible. Moreover, the United States State Department has used documentation provided by the International Gay and Lesbian Human Rights Commission in their annual reports.⁶² In a letter to Canadian lawyer El-Farouk Khaki, Human Rights Watch stated that they consider the work of IGLHRC to be credible and trustworthy.⁶³

New Directions

Criticisms have been directed at the IRB for failing to adequately address documentation problems in claims based on sexual orientation. A Canadian refugee organization, the Canadian Council for Refugees (CCR), recently adopted a policy statement in which it recommends that the IRB "research and make widely available information on the culture and human rights status of gay men and lesbians in each part of the world from which claimants come."⁶⁴ Moreover, the CCR called on

when Dr. Luis Mott, the sociologist who had investigated the murders, testified about his findings. The gay man from Brazil was granted asylum by an immigration judge in that case, who found that "based on the testimony and the documentation submitted...the respondent's fear of persecution...is objectively reasonable." Jin S. Park, "Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians Under U.S. Immigration Policy" (1995) 42 UCLA Law Review 1115 at 1153. A government appeal in this case is still pending.

⁵⁶*Supra* note 1.

⁵⁷*Ibid.*

⁵⁸Letter to ILGA members from Amnesty International, AI Members for Lesbian and Gay Concerns, Steering Committee (28 June 1994) Santa Cruz, California.

⁵⁹Amnesty International members attended the International Lesbian and Gay Association's international conference held in New York in June of 1994.

⁶⁰*Supra* note 24.

⁶¹Amnesty International USA, *Breaking the Silence* (New York, Amnesty International USA, 1994) at 37.

⁶²Julie Dorf, 'International Human Rights: Advocating for Gays and Lesbians,' talk given at the University of Ottawa, Ontario, Canada (15 March 1994).

⁶³Interview with El-Farouk Khaki (May 1995) Toronto.

⁶⁴Canadian Council for Refugees, Working Group on Refugee Protection, "Addressing Claims Based on Sexual Orientation" Policy Statement (26 August 1995).

the IRB to recognize the value and expertise of both the documentation from lesbians and gay human rights groups, and the testimony of their members when they appear before the Board as expert witnesses. Several lawyers have also complained to the IRB about the difficulty in either obtaining documentation, or having it deemed credible and trustworthy by CRDD members.⁶⁵

Several recent developments may impact on the ability of claimants and the IRB to document the objective basis of a claimant's fear of persecution. Both mainstream and gay and lesbian human rights organisations have attempted to uncover some of the most flagrant violators of the human rights of sexual minorities. Several mainstream human rights organisations have now produced their first reports on human rights violations against lesbians and gay men: Amnesty International,⁶⁶ the Committee to Protect Journalists,⁶⁷ the Inter-Church Committee on Human Rights in Latin America,⁶⁸ and Human Rights Watch.⁶⁹ Documentation produced by IGLHRC has also been cited as a reliable and credible source in recent refugee claims. For instance, an IRB panel that granted refugee status to a Russian gay man relied both on reports from Amnesty International and IGLHRC as documentary evidence that gay men are persecuted in Russia.⁷⁰ In another case, involving a lesbian from the Ukraine, the panel used an IGLHRC report on Russia as documentary evidence, stating that while the report "does not deal specifically with the Ukraine, the Panel finds it useful by analogy."⁷¹

⁶⁵See *supra* text at 6.

⁶⁶Amnesty International USA, *supra* note 57; Amnesty International, *Violations of the Human Rights of Homosexuals: Extracts from Amnesty International Action Materials* AI Index: POL 30/01/94 (January 1994); Amnesty International, "Mexico: Asesinatos de gays en Chiapas: continúa la impunidad" AI Index: AMR 41/07/94/s (October 1994).

⁶⁷Committee to Protect Journalists, *Double Jeopardy: Homophobic Attacks on the Press, 1990-1995* (New York: Committee to Protect Journalists, 1995).

⁶⁸ICCHRLA, *supra* note 21.

⁶⁹Human Rights Watch, Free Expression Project, *A Ruling by U.S. Anti-Pornography Activists is Used to Restrict Lesbian and Gay Publications in Canada* (New York: Human Rights Watch, 1994); Human Rights Watch/Helsinki, Letter to the Russian Federation about the harassment of a gay journalist (18 July 1995); Human Rights Watch/Americas, Letter to the Salvadoran government about death threats to AIDS and gay groups (6 July 1995); Human Rights Watch, *Modern Capital of Human Rights? Abuses in the State of Georgia* (New York: Human Rights Watch 1996) at 140-166.

⁷⁰*Re L. (O.V.)* [1995] CRDD No. 4 (QL).

⁷¹CRDD, Decision A94-00766 (26 January 1995).

Moreover, the IRB has taken some steps to overcome the difficulties it has had in gathering information on human rights violations against sexual minorities. The Documentation, Information and Research Branch (DIRB) is responsible for meeting the needs of the IRB in "bringing forth credible and trustworthy information relating to country conditions."⁷² A review of materials produced by DIRB indicates that researchers have often been unable to locate information when requests for information on the issue of sexual orientation have been made by the Convention Refugee Determination Division.⁷³ But the DIRB has now undertaken to produce some of its own materials on sexual orientation issues. Indeed, the division just recently produced its first document specifically on gay men and lesbians, a bibliography and selection of articles on sexual orientation issues in Latin America.⁷⁴ Some general publications have also begun to include references to the status of lesbians and gay men. For instance, a 1995 chronology of events in Iran makes several references to the criminalization of homosexuality and the death penalty which attaches to persons convicted of same-sex relationships.⁷⁵

Documentary evidence in refugee claims based on sexual orientation was an issue addressed in the course of a professional development training session for CRDD members. Indeed, the author of this paper was approached by the IRB to design and present a workshop on sexual orientation and the refugee determination process. The training session was offered to all the regional IRB offices over the course of the last year.⁷⁶ An important section of the presentation dealt with documentary sources for information on human rights violations against sexual minorities. Members received materials listing sources from which they could obtain information, as well as an oral presentation on the diffi-

⁷²Stobo, *supra* note 3 at 387.

⁷³I reviewed responses of DIRB researchers entitled "Information Requests," which represent answers to questions received from CRDD Board members, from January 1992 to July 1995.

⁷⁴Through a contract with the Human Rights Internet, I researched and produced the bibliography and selection of articles which was published by the DIRB in June 1996.

⁷⁵Research Directorate, Documentation, Information and Research Branch, Immigration and Refugee Board, *Question and Answer Series - Iran: Chronology of Events June 1989 - July 1994* (Ottawa, August 1994) at 3 & 18.

⁷⁶The workshops were presented to all the regional offices of the IRB (Ottawa, Toronto, Vancouver, Calgary, Montreal) from May 1995 to January 1996.

culties which exist in attempts to document human rights violations against lesbians and gay men. In fact, the professional development workshop addressed another recommendation made by the Canadian Council for Refugees which called on the Board to provide training for staff and IRB members on issues relating to documentation.⁷⁷ Training the decision-makers on the realities facing lesbian and gay claimants in the area of documentary evidence is certainly a step in the right direction on the part of the IRB. An increased understanding of the human rights work done by both mainstream and lesbian and gay associations in this area will hopefully translate into sound decisions in the hearing room.

While it is now true that developments just mentioned will allow many gay and lesbian refugee claimants to provide some supporting evidence of well-founded fear, the extent to which international human rights organisations are able to uncover worldwide abuses is still limited.⁷⁸ For instance, the authors of ILGA's third world survey on the social and legal status of lesbians and gay men investigated 202 countries. However, they were able to obtain legal data on only 178, and much of the information is incomplete or difficult to corroborate.⁷⁹ Some of the most important sources on which the CRDD relies for information have yet to consistently report on the legal and social status of sexual minorities, most notably the United Nations Commission on Human Rights.

The continued difficulty in documenting human rights violations in some countries indicates that the Board will have to adduce from the claimant's testimony the information it requires to determine the issue of 'well-founded fear.' In fact, so long as the claimant's testimony is "plausible, credible and frank, it may constitute the whole of the evidence of objective risk."⁸⁰ In the case of the gay Pakistani claimant Kureishi, the three-member refugee panel stated that

the panel reasons that this claimant in the circumstances that led to his flight from Pakistan has told

a plausible story which, in the absence of contrary evidence, can be regarded by the panel as trustworthy evidence.⁸¹

This kind of reasoning is well in line with case law. Indeed, the Federal Court of Appeal has stated that when an "applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness."⁸²

Finally, while international organisations like IGLHRC and ILGA are now acknowledged as important sources of information, it is not clear whether the CRDD will give the same credibility to information from small domestic gay and lesbian groups. However, in many cases, the best and most reliable source of documentary evidence is at the local level. This is particularly true given that limited resources mean that international gay and lesbian associations can only investigate and report on abuses in a small number of countries.

Conclusion

The preceding discussion has attempted to demonstrate how lesbians and gay refugee claimants are at a disadvantage when it comes to proving that their fears of persecution are well-founded. The reluctance of mainstream human rights organisations to advocate on behalf of sexual minorities has resulted in a near absence of documentation on human rights abuses. While lesbian and gay associations have attempted to overcome this problem by investigating and reporting on the most egregious violations, their materials have sometimes been regarded with mistrust in refugee hearings. The Immigration and Refugee Board has taken some constructive steps to overcome the problems they have encountered in this area. Most importantly, the Board has shown a willingness to train decision-makers on the specific nature of evidentiary issues in claims based on sexual orientation. These developments are relatively new and the results will only become apparent in future determinations of the claims of lesbian and refugee applicants. But it is clear that the assessment of the objective basis of a gay or lesbian claimant's objective fear will continue to present challenges to both claimants and the CRDD decision-makers.

⁷⁷Canadian Council on Refugees, *supra* note 63.

⁷⁸For example, the Asylum Project of the IGLHRC was recently contacted by counsel for a claimant from Egypt. They were unable to provide information on human rights violations in that country despite having an extensive documentation centre, and a large international network of contacts with lesbians and gay organizations. Other countries have presented similar problems, such as Guatemala, Panama, and some of the former Soviet Republics. Telephone interview with Sydney Levy, Asylum Project Coordinator, IGLHRC (27 April 1996).

⁷⁹Park, *supra* note 54 at 1153 fn 230.

⁸⁰Hathaway, *supra* note 9 at 84.

⁸¹*Re H. (Y.N.)*, *supra* note 1.

⁸²See Hathaway, *supra* note 9 at 84, citing *Ranjit Thind Singh v. Minister of Employment and Immigration*, Federal Court of Appeal Decision a-538-83, November 27, 1983.

