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# Queer Refuge: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities

By ARWEN SWINK\*

## INTRODUCTION

Sexual minorities, including lesbian, gay, bisexual and transgender (LGBT) people, face discrimination and stigma in most societies around the world. This discrimination resembles and is comparable to the forms of discrimination the Special Rapporteur has already recognized as leading to torture in other cases – including gender, race, and national status. . . . Torture is an extreme but widespread means for regulating sexuality and enforcing gender norms.<sup>1</sup>

More than 80 countries around the world have laws criminalizing sexual activity between consenting adults of the same sex.<sup>2</sup> Numerous other countries maintain “morality laws” against “anti-social” or “immoral” behavior which are used by police to arrest and persecute lesbian, gay, bisexual and transgendered (LGBT) people.<sup>3</sup> Physical and sexual abuse, harassment, detention, and extortion by police are common means of

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1. Int’l Gay and Lesbian Human Rights Comm’n, *Sexual Minorities and the Work of the United Nations Special Rapporteur on Torture*, 1-2 (June 5, 2001) [hereinafter *Torture*].

2. Int’l Gay and Lesbian Human Rights Comm’n, *Where Having Sex is a Crime: Criminalization and Decriminalization of Homosexual Acts*, at <[www.iglhrc.org/site/iglhrc/content.php?type=1&id=77](http://www.iglhrc.org/site/iglhrc/content.php?type=1&id=77)> (visited Jan. 8, 2006).

3. *Id.*

enforcing these laws.<sup>4</sup> Additionally, even in the absence of laws criminalizing sexual identity or same-sex sexual activity, social stigma often operates as a factor which legitimates violence and abuse of sexual minorities.<sup>5</sup> In many cases, non-state actors engage in violence towards sexual minorities with the tacit encouragement or participation of the State.<sup>6</sup> In such situations flight may be a victim's only option.

For many LGBT people who have been subjected to or who rightly fear persecution, political asylum may offer hope of protection, but the asylum process is not without its pitfalls. Lack of empathy for individuals perceived as "other" or deviant,<sup>7</sup> failure to distinguish the differing social contexts which confront lesbians, gay men, and trans-identified persons,<sup>8</sup> and the persistent belief that LGBT people "invite" persecution by being "too public"<sup>9</sup> each contribute to the failure of asylum adjudicators to provide adequate protection.<sup>10</sup> This article seeks to explore some of the difficulties the asylum adjudication process may pose for LGBT people seeking refuge from persecution. Specifically, this article addresses the various ways in which asylum adjudicators in Canada, Australia and the United States analyze the conditions faced by members of sexual minorities in their countries of origin. This analysis focuses on the ways in which the asylum process may more effectively address the differing forms of persecution faced by lesbians, gay men, bisexuals and transgendered people, with a focus on the intersection of gender, gender display and sexual orientation.

In order to develop a cogent, realistic evaluation of the likelihood that an individual has a well-founded fear that she will be subject to persecution if returned to her country of origin, asylum adjudicators must develop an understanding of the specific social context experienced by the refugee. In asylum claims based on persecution because of sexual orientation, this understanding requires analysis which integrates the broad human rights situation in the country of origin, the conditions faced by members of

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4. *Torture*, *supra* note 1, at 3-6.

5. *Id.* at 14.

6. *Id.* at 7.

7. Jenni Millbank, *Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia*, 26 MELBOURNE U. L.R. 144, 151 (2002).

8. *Cf. id.* at 158. For example, lesbians are far more likely than gay men to be persecuted by family members or intimate partners, as women are generally more likely than men to experience this type of persecution.

9. *Id.* at 171. See also Christopher N Kendall, *Lesbian and Gay Refugees in Australia: Now That 'Acting Discreetly' Is No Longer an Option, Will Equality Be Forthcoming?*, 15 INT'L. J. REFUGEE LAW 715 (2003).

10. Millbank, *supra* note 7, at 171.

sexual minorities generally in that country, and the specific social context surrounding characteristics such as gender and gender display. The experiences of asylum seekers will vary not only based on their country of origin, but also on their social position as lesbians, as gay men, as transvestites and as transsexuals.

Sexism and homophobia are in no way mutually exclusive; members of sexual minority groups may encounter tremendously different social responses based on the degree to which their gender identity and sexual orientation are determined to violate accepted norms. For example, lesbians may face particular forms of discrimination related to their status as women.<sup>11</sup> In South Africa, a country with a high rate of sexual violence, lesbian women have reported that police refused to investigate their cases upon learning of their sexual orientation.<sup>12</sup> A gendered approach to understanding sexual violence is also evident in discrimination against male rape victims. The Republic of Korea maintains a legal standard under which men (gay or straight) cannot be victims of rape, "since the crime is defined as a forcible sexual act by a 'biological' man upon a 'biological' woman."<sup>13</sup>

By way of further example, trans-identified individuals may be more visible, or viewed as particularly transgressive of social norms, and thus subject to greater discrimination and persecution within a society.<sup>14</sup> The International Gay and Lesbian Human Rights Commission reports that this trend is starkly evident in the medical treatment of Argentinean transvestites.<sup>15</sup> Transvestites are regularly made to wait hours for emergency treatment (even when there are no other patients), sent to male wards, forced to wear male clothing, and subject to sexual abuse while hospitalized.<sup>16</sup> In India, the plight of *hijras*, a community composed of biological intersex persons and transgender men who prefer to call themselves a third gender, is particularly dire.<sup>17</sup> *Hijras* who express their gender identification are refused identity papers and, thus deprived of civil status, are denied treatment in State-run medical institutions and refused

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11. *Id.* at 158.

12. *Torture*, *supra* note 1, at 7.

13. *Id.*

14. *Id.* at 2.

15. *Id.* at 10.

16. *Id.*

17. Aditya Bondyopadhyay, *Statement to the United Nations Commission on Human Rights; State-Supported Oppression and Persecution of Sexual Minorities In India* (April 8, 2002), available at <[www.iglhrc.org/site/iglhrc/section.php?id=5&detail=67](http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=67)>.

access to social service benefits and public housing.<sup>18</sup> In order to receive voting cards, *hijras* must identify as either male or female. Further, no *hijra* has ever held a governmental job, as employment in the public sector is explicitly reserved for either males or females.<sup>19</sup>

## ASYLUM PRECEDENTS FOR MEMBERS OF SEXUAL MINORITIES

International norms for refugee protection are outlined in the 1951 UN Convention and the 1967 Protocol Relating to the Status of Refugees.<sup>20</sup> Under the Convention, the term "refugee" applies to:

[A]ny person who . . . owing to a 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; or who, not having a nationality and being outside the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.<sup>21</sup>

Non-refoulement is the principle which prohibits states which are signatories to the Convention or Protocol from returning a refugee to a country "where his life would be threatened" on account of one of the five protected grounds listed in the refugee definition.<sup>22</sup> Canada,<sup>23</sup> Australia,<sup>24</sup> and the United States<sup>25</sup> are signatories to the Protocol and each draws heavily from the Convention definition for domestic asylum adjudication.

Asylum claims by members of sexual minorities are most often based on membership in a particular social group, although asylum may also be sought on the basis of political opinion or even religion.<sup>26</sup> Canada, Australia and U.S. law each contain precedent stating that sexual

18. *Id.*

19. *Id.*

20. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 N.N.T.S. 137 [hereinafter 1951 Convention]. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 137 [hereinafter 1967 Protocol].

21. 1967 Protocol, art. 1A(2).

22. 1951 Convention, art. 33.

23. Immigration Act, R.S.C. 1985, c. I-2, as amended, s. 2(1) (Can.).

24. Migration Act 1958, AUSTL. C. ACTS § 4(1).

25. The Refugee Act of 1980 has been interpreted to explicitly incorporate the international Convention refugee definition. *E.g.*, *I.N.S. v. Luz Marina Cardoze-Fonesca*, 480 U.S. 421, 436 (1987).

26. Erik D. Ramanathan, *Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence*, 11 GEO. IMMIGR. L.J. 1, 26 (1996).

orientation can form the basis for an asylum grant.<sup>27</sup> A review of these decisions confirms the importance of social group eligibility. In 1993, the Supreme Court of Canada provided a comprehensive definition of the scope of the term “particular social group” in *Canada (Attorney General) v. Ward*.<sup>28</sup> The Court explicitly stated that “individuals persecuted on the basis of sexual orientation” are part of a group “defined by an innate or unchangeable characteristic,” for the purposes of refugee status.<sup>29</sup>

The earliest Australian refugee cases brought by members of sexual minorities dealt primarily with the issue of social group eligibility,<sup>30</sup> and the first published Australian grant of asylum based on sexual orientation was a 1994 grant to an Iranian man.<sup>31</sup> *In re Toboso-Alfonso*, a 1990 Board of Immigration Appeals (BIA) decision, which Attorney General Janet Reno designated as administrative precedent, definitively established that, under U.S. asylum law, “an individual who has been identified as homosexual and persecuted by his or her government for that reason alone may be eligible for relief under the refugee laws on the basis of persecution because of membership in a social group.”<sup>32</sup>

Canada, Australia and the United States thus each allow for the possibility of refugee protection for LGBT people who can establish that they have been persecuted because of their sexual orientation. Attempting an accurate comparison of decisions from the three nations is not, however, without its problems. Notably, the structure of each system is distinct. Whereas the Canadian Immigration Review Board (IRB) conducts a first instance hearing, the Australian Refugee Review Tribunal (RRT) performs a full merits review as a form of appeal from initial decisions of the delegate of the Minister for Immigration and Multicultural Affairs.<sup>33</sup> A U.S. Immigration Judge may be rendering a decision either as a first instance decision-maker (as with defensively-filed asylum claims) or as a court of appeal (as with affirmatively-filed cases which have been denied by the reviewing asylum officer).<sup>34</sup>

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27. *Id.*

28. *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (Can.).

29. Ramanathan, *supra* note 26, at 26.

30. *Id.*

31. Refugee Review Tribunal No. N93/02240 (Jan. 21, 1994) (Austl.).

32. See *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, n.1 (B.I.A., March 12, 1990) (citing Att’y Gen. Order no. 1895-94 (June 19, 1994) available at <http://mother.qrd/www/world/immigration/reno.html>).

33. Millbank, *supra* note 7, at 177.

34. For an excellent overview of the U.S. asylum process, see Robert C. Leitner, *A Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities*, 58 U. MIAMI L. REV. 679 (2004).

In spite of these distinctions, the three systems do have similarities which make them nearly ideal for comparison. Each country uses the Convention definition of refugee,<sup>35</sup> publishes significant numbers of its decisions, and follows a similar decision-making format.<sup>36</sup> Additionally, decisions from Canada, Australia and the United States each contain analysis of the asylum applicant's country of origin. Thus, the primary goal of this article is not to establish broad generalizations about each system's treatment of LGBT asylum seekers. Rather, it is to allow the reader to understand the different ways of approaching the particular issues faced by members of sexual minorities who face persecution.

## THE ROLE OF COUNTRY CONDITIONS ANALYSIS

The ways in which a reviewing tribunal evaluates, or fails to evaluate, the conditions from an applicant's country of origin have a tremendous impact on a claimant's chances of success. Application of legal principles in the asylum context depends partially on the facts of the specific case, but also on the judge's understanding or characterization of the conditions in an asylum seeker's country of origin. An asylum adjudicator's choice of independent sources, assessment of the relative weight of those sources and understanding of the different social contexts faced by gay men, lesbians, bisexuals and transgendered people all weigh heavily in the final analysis of the likelihood that an applicant will face persecution if returned to the country of origin. Of particular significance to individuals seeking asylum is the fact that two asylum judges, making determinations separated by very small periods of time, will often review conditions for a single country in a radically different fashion.

### *A. The Canadian Immigration and Refugee Board*

Canadian decisions tend to reference specific country conditions reports in the footnotes, while the "text of decisions is composed of a narrative of the applicant's experiences and a brief analysis of those experiences to determine whether they meet the refugee definition."<sup>37</sup> Jenni Millbank's 2002 comparative study of over one hundred and twenty seven Canadian asylum cases based on sexual orientation found that

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35. Ramanathan, *supra* note 26, at 3-4.

36. In spite of their similarities, it is important to bear in mind that each of the three systems has certain stylistic differences from the others. The Canadian decisions, for example, tend to be offered in a narrative format whereas the Australian decisions are more formal and legalistic. Millbank, *supra* note 7, at 155.

37. *Id.*

lesbian claimants had a 66 percent success rate, while gay men had a 52 percent success rate.<sup>38</sup> Generally, Canadian decisions appear to focus significant attention on analysis of the specific forms of discrimination faced by LGBT people and on the claimant's specific position within society. A review of three CIRB decisions on claimants from Mexico indicates significant attention to detail, as well as sensitivity to the intersection of gender, gender display and sexual orientation.

In CIRB V99-04735, the evaluation of potential harm faced by the applicant, a gay man, was considered within social, regional and individual contexts.<sup>39</sup> Although this decision resulted in a denial, the reviewing judge carefully considered the applicant's social position and relative vulnerability to harm. The judge first specified which documentary evidence he had found most persuasive,<sup>40</sup> and then went on to analyze the reports as they applied generally to sexual minorities. The judge held that, "[w]hile problems remain, the trend has been consistently improving," and cited documentary evidence that, since 1995, there have been no reports of homosexuals murdered with the complicity or tolerance of the government.<sup>41</sup> On the issue of non-lethal harm, the judge noted that:

In a country such as Mexico, with a population currently approaching one hundred million people, reports of some abuses of some homosexuals in some particular locations does not mean that any male homosexual therefore has a "serious possibility" of persecution because of his sexual orientation.<sup>42</sup>

The judge cited "numerous examples of the continuing improvement in the treatment of sexual minorities in Mexico[,]" including the decriminalization of same-sex sex acts,<sup>43</sup> the repeal of discriminatory laws,<sup>44</sup> the rise in public activism of queer political groups,<sup>45</sup> the

38. *Id.* at 148. It is significant to note, however, that lesbians' claims were significantly underrepresented; only 18 of the 127 cases evaluated were brought by lesbians.

39. Immigration and Refugee Board, No. V99-04735 (May 18, 2001).

40. The judge specified reliance on the IRB's Research Directorate, *Mexico – TREATMENT OF SEXUAL MINORITIES*, and two documents authored by Andrew Reding, *MEXICO – TREATMENT OF HOMOSEXUALS* and *MEXICO: UPDATE ON TREATMENT OF HOMOSEXUALS*. The Board did not provide citations for these documents.

41. IRB Reference No. V99-04735, at 7.

42. *Id.* at 9.

43. *Id.* at 8-9 ("Private sexual acts between consenting adults are not illegal.").

44. *Id.* at 9 ("In December 1998, the national Congress repealed a penal law in the Federal District (which includes most of Mexico City) that had discriminated on the basis of sexual orientation.").

45. *Id.* ("Public homosexual activism such as gay parades and protests are tolerated by the authorities and are increasing in frequency and in the numbers of participants in various

availability of gay publications,<sup>46</sup> and the existence of “numerous homosexual organizations,” gay bars and recreational facilities.<sup>47</sup>

The judge’s findings were notable for the fact that they distinguished the social conditions faced by gay men in Mexico from those faced by other sexual minority groups. The judge found that the “situation in Mexico for sexual minorities, and in particular for male homosexuals,” had improved considerably in the preceding decade.<sup>48</sup> It is significant that the decision also referenced the importance of gender display and gender identity. The judge found that, “transvestites are the group that stands the greatest chance of suffering persecution in Mexico. There was no evidence before us that this claimant is a transvestite, or would be perceived as an effeminate male.”<sup>49</sup> The judge later held that there is “no greater likelihood of a (non-transvestite) homosexual being murdered in Mexico than there would be for a non-homosexual.”<sup>50</sup>

This recognition of the special dangers faced by trans-identified people in Mexico is reiterated in other Canadian cases. In CIRB T98-04159, an asylum case brought by a bisexual transvestite, the Canadian judge grounded the determination of refugee status in a review of documentary evidence, noting the “particular risk for transvestites” in Mexico.<sup>51</sup> The judge found evidence of the persecution of transvestites in Mexico so compelling that she declined to detail the “copious documentary evidence,” citing instead the “numerous examples of the particular targeting of transvestites by the police in Mexico.”<sup>52</sup> The judge referenced both the Department of State Report and comments by Mexico’s first openly gay legislator, Patricia Jimenez, on the virulence of homophobia and on the case of a transvestite assassinated by public works inspectors.<sup>53</sup>

Government protection, or lack thereof, for sexual minorities was also a central issue in CIRB VA0-1624, wherein the judge evaluated the likelihood of harm that would be faced by the claimants, lesbian partners

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cities.”).

46. *Id.* (“Homosexual publications are available for sale in major cities in Mexico.”).

47. *Id.* (“There are numerous homosexual organizations operating in major cities, along with recreational facilities such as bars that target gay consumers. In education, media, and the arts, homosexuals are becoming more prominent participants and more open about their concerns.”).

48. *Id.* at 8.

49. *Id.*

50. *Id.* at 9.

51. Immigration and Refugee Board Reference No. T98-04159 (March 13, 2000).

52. *Id.* at 4.

53. *Id.*

who had been threatened, beaten and harassed by the police officer ex-husband of one partner.<sup>54</sup> In making this assessment, the judge gave detailed consideration to Mexican legal protections for women in general, for lesbians, and for women intimately involved with police officers.<sup>55</sup> Although the persecution suffered by the principal asylum seeker in this case was grounded in the domestic violence perpetrated by her ex-husband, it is clear from the language of the decision that the sexual orientation of the claimant was of significant importance to the determination. The judge found that, “since the claimants have been exposed as lesbians,” and would be “regarded as not conforming to the societal norms as a mother and wife” they would be subject to further risk if returned.<sup>56</sup> The judge relied on the IRB Guidelines on Gender-Related Persecution, holding that even though they do not expressly mention lesbians, “it is obvious that the guidelines would also be applicable to lesbian women, in a clear reading of the language.”<sup>57</sup> Thus, the judge’s determination in this case took specific care with the analysis of the likelihood that the claimant would face future persecution. This analysis includes an evaluation of the claimant’s vulnerability based on her gender (female), her sexual orientation (lesbian), and her gender display (lesbian or nontraditional woman).

While this analysis does not purport to be a comprehensive survey of Canadian asylum jurisprudence, certain trends were evident in the cases reviewed and in the findings of other researchers.<sup>58</sup> The Canadian decisions generally referenced a broad spectrum of sources in developing country conditions analysis. While credibility determinations were undeniably relevant to outcome, the analysis of an applicant’s likelihood of harm based on the specific social space inhabited by the claimant also played a significant role. This aspect of the Canadian decisions indicated a relatively nuanced approach to understanding the intersection of sex, sexual orientation and gender identity and display.

### ***B. The Australian Refugee Review Tribunal***

The Canadian cases stand in stark contrast to those issued by the Australian RRT. Jenni Millbank’s 2002 comparative study of over two hundred and four Australian asylum cases based on sexual orientation

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54. Immigration and Refugee Board Reference No. VA0-01624 (May 14, 2001).

55. *Id.* at 5-6.

56. *Id.* at 6.

57. *Id.* at 7.

58. Most notably in the comprehensive comparative study conducted by Jenni Millbank, *supra* note 7.

found that lesbian claimants had only a 7 percent success rate, while gay men had a 26 percent success rate.<sup>59</sup> Australia's cases were noteworthy for their cookie-cutter recitations of "independent" country evidence.<sup>60</sup>

In many cases concerning applicants from the same country, the entire section on country evidence was reproduced in full from one decision to the next over a period of months or even years. . . . The extent of repetition and reproduction extends to typographical and grammatical errors – evidence that the 'cut and paste' function has been used by decision-makers who are perhaps not even (or not closely) reading the material they are relying upon to establish the 'truth' about country conditions in the applicant's country of origin.<sup>61</sup>

Additionally, a number of the Tribunal's decisions utilized such sources as "Spartacus 98/99" and "CruisingForSex.com," gay men's travel and sex guides, as sources of information for country condition analysis.<sup>62</sup> While the relevance and reliability of these sources is dubious when used in assessments of cases brought by gay men, their applicability to the cases of lesbians and trans-identified people is doubly so.<sup>63</sup>

A review of several recent RRT decisions of LGBT applicants fleeing Iran is particularly illustrative of trends within the Australian system.<sup>64</sup> In a 2001 case, the Tribunal accepted claimant's evidence that he had once been detained, threatened and beaten by Basiji<sup>65</sup> who had then forced him to sign a declaration stating that he was a homosexual.<sup>66</sup> The Tribunal also

59. *Id.* at 148. As with the Canadian cases, lesbians' claims in Australia were significantly underrepresented; only 42 of the 204 cases evaluated were brought by lesbians.

60. Millbank, *supra* note 7, at 155. For an example of this type of analysis compare the "Independent Evidence" portions of Refugee Review Tribunal, No. V97/06971 (Feb. 1, 1999), Refugee Review Tribunal, No. N97/14889 (Mar. 27, 1998), and Refugee Review Tribunal, No. N96/11136 (Oct. 27, 1997).

61. *Id.*

62. *Id.* at 165. See Refugee Review Tribunal, No. N96/11136 (27 Oct. 1997), Refugee Review Tribunal, No. N97/14889 (Mar. 27, 1998), and Refugee Review Tribunal, No. V97/06971 (Feb. 1, 1999).

63. *Id.* at 156. See Refugee Review Tribunal, No. N99/27818 (July 29, 1999).

64. For an in-depth review of this decision and the Australian High Court's subsequent rejection of the 'discretionary option' see Christopher N Kendall, *Lesbian and Gay Refugees in Australia: Now That 'Acting Discreetly' Is No Longer an Option, Will Equality Be Forthcoming?*, 15 INT'L J. REFUGEE LAW 715 (2003).

65. According to the U.S. Department of State, Basiji are paramilitary volunteer forces who act as "vigilantes aligned with extreme conservative members of the leadership." "The regular and the paramilitary security forces both committed numerous, serious human rights abuses." U.S. Department of State, *Country Reports on Human Rights Practices – 2003* (Feb. 25, 2004) at <http://www.state.gov/g/drl/rls/hrrpt/2003/27927.htm>.

66. Refugee Review Tribunal, No. N01/37352 (Apr. 24, 2001).

accepted documentary evidence which demonstrated that, under the Islamic Penal Code which operates in Iran, homosexuality is considered a crime punishable with penalties ranging from flogging (100 lashes) to death.<sup>67</sup> The Tribunal went on to hold, however, that “the evidence indicates that the Iranian authorities do not actively seek out homosexuals and that the risk of prosecution for homosexuality is minimal as long as homosexual activities are carried out discretely.”<sup>68</sup>

Two assumptions are key to the Tribunal’s characterization of the likelihood of harm. First, the Tribunal relies on the premise that members of sexual minorities, unlike other refugees, can, and are expected to, avoid persecution by “acting discretely.”<sup>69</sup> This idea, which implicitly holds LGBT people at least partly responsible for the harms they suffer, has since been repudiated by the High Court of Australia.<sup>70</sup> The second premise underlying the Tribunal’s decision is that there is evidentiary ambiguity on the actual number of prosecutions of homosexuals in Iran, and that this ambiguity suggests that the likelihood of prosecution is slight.<sup>71</sup> This assumption is especially problematic in light of the New Zealand case of *Re GJ*, in which the Refugee Status Appeals Authority found that persecution of homosexuals in Iran had been severe.<sup>72</sup>

Another Australian case evaluating the claims of a lesbian woman fleeing persecution in Iran utilized similar documentary evidence to the case discussed above, but employed a somewhat different analytic strategy and had a starkly different result.<sup>73</sup> Both decisions relied heavily on country conditions evidence from Canada’s Immigration and Refugee Board,<sup>74</sup> Amnesty International<sup>75</sup> and the UNHCR.<sup>76</sup> The claimants in both

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67. *Id.*

68. *Id.*

69. Kendall, *supra* note 64, at 720.

70. Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S [2003] HCA 71 (Dec. 9, 2003).

71. This assumption was present in a number of decisions on claims from LGBT people who had fled Iran, but was not always deemed controlling. Compare Refugee Review Tribunal No. N01/27891 (Oct. 16, 2001) with Refugee Review Tribunal No. V01/12689 (May 24, 2001).

72. *Re GJ*, Refugee Status Authority, Refugee Appeal No. 1312/93, Auckland (Aug. 30, 1995).

73. Refugee Review Tribunal, No. N98/223626 (June 9, 1999).

74. Refugee Review Tribunal, No. N01/37352 (citing Immigration and Refugee Board Canada, *Iran: Update to Responses on the Situation for Homosexuals and on Whether Legal Penalties are Carried out in Practice*, IRN 28636E (Feb. 11, 1998) and *Iran: Information on the Penalty for Engaging in Homosexual Activities Whilst on Active Service in the Military*, IRN24789.E (Aug. 22, 1996)). Refugee Review Tribunal, No. N98/22363 (citing Information and Research Branch Immigration and Refugee Board Ottawa, *Research*

cases testified to having been detained, interrogated and beaten.<sup>77</sup> Both claimants were found to be credible.<sup>78</sup> Additionally, both decisions relied heavily on documentary evidence from Canada's Immigration and Refugee Board,<sup>79</sup> Amnesty International<sup>80</sup> and the UNHCR.<sup>81</sup> The lesbian woman's claim, however, was first viewed within the broad context of Iran's human rights record.<sup>82</sup> The Tribunal then went on to discuss evidence of the treatment of lesbians as a group, distinguished from LGBT people or women more generally.<sup>83</sup> The Tribunal held that,

The independent evidence...suggests that lesbianism and lesbians themselves are condemned in the eyes of the Iranian authorities (and in

*Directorate Documentation: 2.2.2 Sexual Orientation* (June 1994)).

75. Refugee Review Tribunal, No. N01/37352 (citing Amnesty International, *Letter on Treatment of Homosexuals in Iran* (Feb. 3, 1994)). Refugee Review Tribunal, No. N98/22363 (citing Amnesty International, *Human Rights Are Women's Right: Persecution on Grounds of Sexual Orientation* (Mar. 1995)).

76. Refugee Review Tribunal, No. N01/37352 (citing Document Forwarded to the Country Information Service by UNHCR Canberra, Ref AUL/MS/1022, CX46890 (Oct. 27, 1995)). Refugee Review Tribunal, No. N98/22363 (citing UNHCR Documentation Centre, Background Paper on Asylum Seekers from Iran (Sept. 1998)).

77. Refugee Review Tribunal, No. N01/37352. Refugee Review Tribunal N98/22363 ("The applicant was detained, mistreated, interrogated and flogged [she underwent 40 lashes]. She was called a 'dirty lesbian' who's mere presence on earth is a 'source of filth'. She was warned that should she be caught again she would be killed.").

78. Refugee Review Tribunal, No. N01/37352. Refugee Review Tribunal N98/22363 (stating that the applicant's "evidence at hearing was frank, open and plausible.").

79. Refugee Review Tribunal, No. N01/37352 (citing Immigration and Refugee Board Canada, *Iran: Update to Responses on the Situation for Homosexuals and on Whether Legal Penalties are Carried out in Practice*, IRN 28636E (Feb. 11, 1998) and *Iran: Information on the Penalty for Engaging in Homosexual Activities Whilst on Active Service in the Military*, IRN24789.E (Aug. 22, 1996)). Refugee Review Tribunal No. N98/22363 (citing Information and Research Branch Immigration and Refugee Board Ottawa, *Research Directorate Documentation: 2.2.2 Sexual Orientation* (June 1994)).

80. Refugee Review Tribunal, No. N01/37352 (citing Amnesty International, *Letter on Treatment of Homosexuals in Iran* (Feb. 3, 1994)). Refugee Review Tribunal No. N98/22363 (citing Amnesty International, *Human Rights Are Women's Right: Persecution on Grounds of Sexual Orientation* (Mar. 1995)).

81. Refugee Review Tribunal, No. N01/37352 (citing Document Forwarded to the Country Information Service by UNHCR Canberra, Ref AUL/MS/1022, CX46890 (Oct. 27, 1995)). Refugee Review Tribunal No. N98/22363 (citing UNHCR Documentation Centre, Background Paper on Asylum Seekers from Iran (Sept. 1998)).

82. Refugee Review Tribunal, No. N98/22363

Systematic abuses included extrajudicial killings and summary executions; disappearances; widespread use of torture and other degrading treatment; harsh prison conditions; arbitrary arrest and detention; lack of due process; unfair trials; infringement on citizens' privacy; and restrictions of freedom of speech, press, assembly, association, religion, and movement.

83. *Id.* (see paragraph entitled "Homosexuality and Lesbians in Iran").

the eyes of society) purely because of their sexuality. The independent evidence also suggests that if the authorities become aware of a practicing lesbian, she could face harsh treatment including arrest, detention, flogging, imprisonment and at the extreme, the death penalty.<sup>84</sup>

The applicant in this case was deemed to have a credible fear and, consequently, was granted asylum.<sup>85</sup>

These two cases are a striking example of the ways in which an adjudicator's understanding of country conditions affects the outcome of the asylum application. The cases were separated by less than two years, a time which saw no significant change in social attitudes or government policies towards sexual minorities in Iran.<sup>86</sup> Similarly, neither decision was based on credibility or some other extrinsic factor. Given the substantial similarity of the basis for the claims (detention, violent abuse and harassment on account of sexual orientation) gender emerges as the distinguishing factor. Whereas the Tribunal in N01/37352 did not discuss the situations faced by gay men specifically, the Tribunal in N98/22363 focused its analysis on the ways in which *lesbian women* were viewed by Iranian society and government.<sup>87</sup> Thus, although the element of gender is not explicitly stated as being determinative of the issue of likelihood of harm, it is highly likely that it played a significant role. Additionally, the discrepancy between the two cases points to simple fact that different judges may analyze similar circumstances in very different ways.

### C. *The United States Immigration Courts*

The lack of published decisions by U.S. Immigration Judges tends to make an analysis of trends within the system problematic. Review of asylum decisions based on sexual orientation at the Board of Immigration Appeals, which does publish a significant number of decisions, indicates that decisions in the United States display significant variation in terms of the depth of country conditions analysis. Certain BIA decisions reflect detailed consideration of country conditions from sources including expert testimony,<sup>88</sup> documentary films,<sup>89</sup> newspaper articles,<sup>90</sup> and reports from

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84. *Id.*

85. *Id.*

86. *Supra* note 79.

87. *Supra* note 82.

88. *In re* Tenorio, No. A72 093 558 (Immigr. Ct. July 26, 1993).

89. *Matter of* Toboso-Alfonso, 20 I. & N. Dec. 819, 821 (B.I.A. Mar. 12, 1990).

90. *Id.*

nongovernmental organizations, such as Amnesty International.<sup>91</sup> Other BIA opinions suggest that, although credible information on country conditions hostile to members of sexual minorities was submitted for review, the BIA failed to give them serious consideration in its determination of asylum eligibility.<sup>92</sup>

The BIA's trends, both positive and negative, appear to be reflected in Immigration Court level decisions. The San Francisco case of a lesbian woman from Peru<sup>93</sup> exemplifies a particularly nuanced and detail-oriented analysis. In this case, the applicant had not come out as a lesbian while in Peru, but had done so after developing a relationship with another woman while visiting the United States.<sup>94</sup> The Immigration Judge (IJ) described a "strong level of social opprobrium against homosexuals in Peru, as well as a certain level of violence."<sup>95</sup> The IJ noted that "while homosexuality is legal in Peru,"<sup>96</sup> homosexuals are excluded from certain areas of employment<sup>97</sup> and may be fired if their sexual orientation is revealed.<sup>98</sup> This was the case for 117 foreign diplomats relieved of their positions by former President Alberto Fujimori,<sup>99</sup> who also "referred to homosexuality as a type of 'subversion' that the state needed to abolish."<sup>100</sup> The court specifically noted the significance of such anti-gay rhetoric from Peru's highest elected official with regard to respondent's prospects for state protection: "President Fujimori's negative words about homosexuals represented the Peruvian government's antipathy for homosexuals and the lack of protection Respondent can expect if she suffers persecution."<sup>101</sup>

This decision is notable for its comprehensive assessment of the social situation of homosexuals, as a class, within Peru. After describing the hostile economic and political climate, the Immigration Judge went on to discuss the centrality of the Catholic Church in the Peruvian Constitution<sup>102</sup>

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91. *Id.*

92. *Luis Reyes-Reyes v. John Ashcroft*, No. 03-72100, 2004 U.S. App. LEXIS 19156, at 5 (9th Cir. 2004).

93. Decision dated October 10, 2001 (unpublished, on file with author).

94. *Id.* at 6.

95. *Id.* at 7.

96. *Id.*

97. *Id.* (such as the army and police force).

98. *Id.* at 8 ("[G]ays in Peru are routinely bashed, fired, and arbitrarily detained.").

99. *Id.*

100. *Id.* (quoting The International Lesbian and Gay Association, *World Legal Survey*, 2). (Fujimori also referred to the fired diplomats as having "doubtful sexual practices.".)

101. *Id.*

102. *Id.* (quoting U.S. Dept. of State, *1999 Peru Country Reports on Human Rights Practices*, 22 (Feb. 25, 2000)) (The Peruvian Constitution deems the Catholic Church as "an

and the significance of religious antipathy towards gays as it relates to the individual asylum seeker.<sup>103</sup> Specifically, the court noted that the asylum seeker in this case was “a devout Catholic” who regularly attended church while growing up and with her partner while in the United States.<sup>104</sup> The court also discussed other forms of persecution to which homosexuals in Peru have been subject, most notably forced sterilization,<sup>105</sup> violent raids on nightclubs,<sup>106</sup> and uninvestigated attacks by a gang known as “The Fagkillers.”<sup>107</sup>

Perhaps most significantly, the court gives detailed analysis to the intersection of gender and sexual orientation in Peru. The court notes that in Peru, “violence against women, including rape, spousal abuse, and sexual, physical, and mental abuse of women and girls, continues to be a chronic problem.”<sup>108</sup> The court states that official permissiveness towards gender-based violence, combined with widespread homophobia, means that “the homosexuality of women is barely acknowledged.”<sup>109</sup> The court then cites an Amnesty International document regarding official police treatment of lesbians and prostitutes: “Lesbians were beaten up because, however degrading prostitution can be, it is still regarded as normal behavior, whereas lesbianism is seen as too threatening to the status quo.”<sup>110</sup>

## CONCLUSION

An asylum applicant’s reasonable chances for success are dependent upon a reviewing tribunal’s analysis of how the facts of the claimant’s particular case are understood in the context of broader country conditions

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important element in the historical cultural, and moral development” of Peru.).

103. *Id.*

104. *Id.*

105. *Id.* (quoting Agence France Presse, *Homosexuals Tricked Into Sterilization in Peru – Report* (July 5, 1998)).

106. *Id.* at 9 (quoting Amnesty International, *Breaking the Silence: Human Rights Violations Based on Sexual Orientation*, 22-23 (1997))

In Respondent’s hometown of Lima, the police have performed several raids on homosexual nightclubs. The raids resulted in ‘over six hundred people, including gays, lesbians and transsexuals. . .arrested, shoved into police trucks, held in the police stations without charge and reportedly subjected to verbal abuse, humiliation and attempts to solicit bribes.’

107. *Id.*

108. *Id.*

109. *Id.* at 10.

110. *Id.* at 8 (quoting Amnesty International, *Breaking the Silence: Human Rights Violations Based on Sexual Orientation*, 22-23 (1997)).

from which the applicant fled. Country conditions evaluations which generalize about the experiences of sexual minorities over time, within a given country, or without regard to the different social experiences of lesbians as opposed to gay men fail to provide an accurate picture of the social context in question. A system for the adjudication of asylum claims which fails to develop such a picture faces a serious danger of failing to serve its fundamental purpose: the protection of individuals fleeing persecution. The gravity of the harms which may befall individuals who are ill-served by such defects in the asylum process demands that tremendous care is taken to ensure a nuanced understanding of these issues.