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Sexual Orientation, Gender Identity and the Refugee Determination Process in Canada

UPDATED VERSION

of a paper prepared for the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. The paper reviews developments and issues specific to lesbian, gay, bisexual, transgendered and intersex refugees and the Canadian inland refugee determination process.

Immigration and Refugee Board
Refugee Appeal Division
March 2015

Sexual Orientation, Gender Identity and the Refugee Determination Process in Canada

Nicole LaViolette

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Sexual Orientation, Gender Identity and the Refugee Determination Process in Canada*

1. Introduction¹

The human rights situation of sexual minorities² around the world continues to be unsettling. Many countries maintain serious criminal penalties for consensual sex between persons of the same sex, including the death penalty.³ Sexual minorities also are frequent targets of police, community and family violence,⁴ and are often victimized by blackmail and extortion.⁵ In several countries, restrictions have been imposed on the freedoms of expression and association of sexual minorities,⁶ while in others,

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¹ Sections of this paper are based on previously published work by the author. See Nicole LaViolette, “Overcoming Problems with Sexual Minority Refugee Claims: is LGBT Cultural Competency Training the Solution?” in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013) 189 [LaViolette, “Overcoming Problems with Sexual Minority Refugee Claims”]; Nicole LaViolette, “The UNHCR’s Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary” (2010) Int’l J Refugee L 173; Nicole LaViolette, “Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process” (2009) 13:2/3 Int’l JHR 437 [LaViolette, “Independent Documentation”]; Nicole LaViolette, “Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines” (2007) 19:2 Int’l J Refugee L 1 [LaViolette, “Gender-Related Claims”]; Nicole LaViolette, “The Immutable Refugees: Sexual Orientation in *Ward v. Canada*” (1997) 55:1 UT Fac L Rev 1 [LaViolette, “The Immutable Refugees”]; Nicole LaViolette, “Proving a Well-Founded Fear: The Evidentiary Burden in Refugee Claims Based on Sexual Orientation” in Sydney Levy, ed, *Asylum Based on Sexual Orientation; A Resource Guide* (San Francisco: IGLHRC, 1996) [LaViolette, “Proving a Well-Founded Fear”]; Nicole LaViolette, “Sexual Orientation and the Refugee Determination Process: Questioning a Claimant about Their Membership in the Particular Social Group” (San Francisco: IGLHRC, 1996); Russian authorities need to be taking serious measures to protect, not stigmatize, the LGBT community, Nicole LaViolette and Sandra Whitworth, “No Safe Haven: Sexuality as a Universal Human Right and Lesbian and Gay Activism in International Politics” [1994 Winter] *Millennium: Journal of International Studies* 563.

² The expression ‘sexual minority’ is used to refer to people whose minority status is a result of either their sexual orientation, sexual identity, practices with partners of the same sex or their refusal to conform to gendered social roles tied to their biological sex at birth. It also includes individuals who have both male and female physical and sexual characteristics and organs. Thus, the notion of sexual minorities regroups gays, lesbians, bisexuals, transgendered — which includes transsexuals and transvestites — and intersex people.

³ For a survey of laws prohibiting same-sex sexual conduct, see Lucas Paoli Itaborahy & Jingshu Zhu, *State-Sponsored Homophobia - A World Survey of Laws: Criminalisation, Protection and Recognition of Same-Sex Love* (International Lesbian and Gay Association, 2014), online:

<http://old.ilga.org/Statehomophobia/ILGA_SSHR_2014_Eng.pdf>. For examples of anti-homosexuality penal laws, see Human Rights Watch, *Guilty by Association: Human Rights Violations in the Enforcement of Cameroon’s Anti-Homosexuality Law* (New York: Human Rights Watch, 2013), online: HRW <<http://www.hrw.org/reports/2013/03/20/guilty-association>>; Amnesty International, “Zambia Urged to Release Two Men Charged with Same-sex Sexual Conduct”, 8 May 2013, online: Amnesty International <<http://www.amnestyusa.org/news/news-item/zambia-urged-to-release-two-men-charged-with-same-sex-sexual-conduct>>.

⁴ See International Gay and Lesbian Human Rights Commission, *Human Rights Violations on the Basis of Sexual Orientation, Gender Identity, and Homosexuality in the Philippines* (New York: IGLHRC, 2012), online: IGLHRC

<http://www.iglhrc.org/sites/default/files/philippines_report.pdf>; Human Rights Watch, *Fear for Life: Violence against Gay Men and Men Perceived as Gay in Senegal* (New York: Human Rights Watch, 2010), online: HRW <<http://www.hrw.org/reports/2010/11/30/fear-life>>; Human Rights Watch, *They Want Us Exterminated: Murder, Torture, Sexual Orientation and Gender in Iraq* (New York: Human Rights Watch, 2009), online: HRW <<http://www.hrw.org/reports/2009/08/16/they-want-us-exterminated>>; Human Rights Watch, *Forbidden: Institutionalizing Discrimination against Gays and Lesbians in Burundi* (New York: Human Rights Watch, 2009), online: HRW <<http://www.hrw.org/reports/2009/07/30/forbidden-0>>; Human Rights First, *Homophobia: 2007 Hate Crime Survey* (New York: Human Rights First, 2007), online: HRF <<http://www.humanrightsfirst.info/pdf/07601-discrim-hate-crimes-web.pdf>> at 5.

⁵ See International Lesbian and Gay Human Rights Commission, *Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa* (New York: IGLHRC, 2011), online: IGLHRC <<http://www.iglhrc.org/sites/default/files/484-1.pdf>>.

⁶ See Amnesty International, *Freedom Under Threat: Clampdown on Freedoms of Expression, Assembly and Association in Russia* (London: Amnesty International, 2013) at 27-29, 39-41; Human Rights Watch, *Curtailing Criticism: Intimidation and Obstruction of Civil Society in Uganda* (New York:

homosexuality and transexuality are perceived as Western phenomena,⁷ anti-revolutionary behaviours,⁸ crimes against religion,⁹ sexually deviant and immoral behaviours,¹⁰ mental disorders¹¹ or unacceptable challenges to gender-specific roles.¹²

Egregious human rights violations have compelled some lesbian, gay, bisexual, transgender and intersex people (LGBTI) to seek refuge in countries with better human rights protection. In many cases, individuals flee directly to countries where significant progress has been made on LGBTI human rights and where they are able to make claims for asylum pursuant to the 1951 *UN Convention relating to the Status of Refugees* [Convention].¹³ Indeed, several states have extended refugee protection to women and men fleeing persecution based on their sexual orientation or gender identity. In Canada, the first reported sexual orientation claim to be decided dates back to 1991.¹⁴ In April 2002, *The Globe and Mail* reported that “[i]n the past three years, nearly 2,500 people from 75 different countries have sought asylum on the basis of sexual orientation in Canada”.¹⁵ In 2004 alone, 1,351 sexual orientation-based claims were decided in Canada.¹⁶ More recent statistics show that between 1 April 2009 and 30 June 2011, 561 refugee claims based on sexual orientation were finalized before the Refugee Protection Division [RPD]

Human Rights Watch, 2012), online: <<http://www.hrw.org/reports/2012/08/21/curtailing-criticism-0>>. See also “Uganda: Police Close Down Gay Rights Workshop”, (19 June 2012), online: Amnesty International <<http://www.amnesty.org/en/news/uganda-police-close-down-gay-rights-workshop-2012-06-19>>; “Cuba’s First Gay Pride Parade Cancelled”, (26 June 2008), online: The Guardian <<http://www.guardian.co.uk/world/2008/jun/26/cuba>>.

⁷ See Human Rights Watch, *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism* (New York: Human Rights Watch, 2008), online: HRW <<http://www.hrw.org/reports/2008/12/17/alien-legacy>>; Sonia Katyal, “Exporting Identity” (2002) 14 Yale JL & Feminism 97 at 125-32. See also *Re HFP* (8 June 1999), Toronto U98-01680 (CRDD) at para 15 (available on QL); *Re CXS* (30 October 1995), Toronto T94-07573 & T95-02911 (CRDD) (available on QL); *Re UFS* (30 March 1999), Toronto T98-04956, (CRDD) (available on QL); *Re JPR* (25 August 1999), Toronto T99-01313 (CRDD) at para 9 (available on QL); *Re MXJ* (19 July 2006), Toronto TA5-11669 (RPD) at para 8 (available on QL).

⁸ See *Re ULX* (12 March 1998), Toronto T97-02905 (CRDD) at para 2 (available on QL); *Re CYT* (11 June 1998), Toronto V96-03151 (CRDD) at para 2 (available on QL); *Re V (OZ)* (10 June 1993), Montreal M93-04717 (CRDD) (available on QL).

⁹ See Human Rights Watch, *“We are a Buried Generation”: Discrimination and Violence against Sexual Minorities in Iran* (New York: Human Rights Watch, 2010), online: HRW <<http://www.hrw.org/reports/2010/12/15/we-are-buried-generation-0>>. See also *Re CXS*, *supra* note 7; *Re PLZ* (27 April 2000), Toronto T99-11167 (CRDD) at para 12 (available on QL).

¹⁰ See *Re L (MD)* (2 June 1992), Montreal M91-12609 (CRDD) (available on QL); *Re P (EU)* (11 June 1992), Toronto U91-09661 (CRDD) (available on QL); *Re BBY* (20 February 2003), Montreal MA2-06482 (RPD) at para 8 (available on QL).

¹¹ See *Re L (MD)*, *supra* note 10; *Re GJM* (31 May 2002), Toronto TA0-17264 (CRDD) (available on QL). See also Marta Falconi, “Gay Italian Labelled as Disabled Wins Discrimination Case against Gov’t”, *Associated Press* (14 July 2008), online: <http://www.pentictonherald.ca/includes/datafiles/CP_print.php?id=121763&title=Gay%20Italian%20labelled%20as%20disabled%20wins%20discrimination%20case%20against%20gov%E2%80%99t>; “Gay Counselling? Call Rejected”, (6 June 2008), online: BBC News <http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/7439661.stm>; “Homosexuality is a Disease”, (28 June 2008), online: News 24 <http://www.news24.com/News24/World/News/0,2-10-1462_2348827,00.html>.

¹² See LaViolette, “Gender-Related Claims”, *supra* note 1 at 180. See also Human Rights Watch, *They Hunt Us Down for Fun: Discrimination and Police Violence Against Transgender Women in Kuwait* (New York: Human Rights Watch, 2012), online: HRW

<<http://www.hrw.org/reports/2012/01/15/they-hunt-us-down-fun>>; Human Rights Watch, *“We’ll Show You You’re a Woman”: Violence and Discrimination against Black Lesbians and Transgender Men in South Africa* (New York: Human Rights Watch, 2011), online: HRW

<<http://www.hrw.org/reports/2011/12/06/well-show-you-youre-woman>>; Human Rights Watch, *These Everyday Humiliations: Violence Against Lesbians, Bisexual Women, and Transgender Men in Kyrgyzstan* (New York: Human Rights Watch, 2008), online: HRW

<<http://www.hrw.org/reports/2008/10/06/these-everyday-humiliations-0>>.

¹³ *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, Can TS 1969 No 7 (entered into force 22 April 1954) [1951 *Convention*].

¹⁴ *Re R (UW)* (2 January 1991), Toronto T90-02900 (CRDD) (available on QL).

¹⁵ Marina Jimenez, “Gay Refugee Claimants Seeking Haven in Canada”, *The Globe and Mail* (25 April 2004), online: <<http://www.theglobeandmail.com/news/national/gay-refugee-claimants-seeking-haven-in-canada/article1136511/>>.

¹⁶ Sean Rehaag, “Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada” (2008) 53 McGill LJ 70 at 71 [Rehaag, “Patrolling the Borders”].

of the Immigration and Refugee Board of Canada [IRB], with 58 per cent of those claims being granted refugee protection.¹⁷

To be sure, the Convention has provided actual and tangible protection to many individual LGBTI since the early 1990s, more so than any other international human rights instrument. Yet, because of the growing number of asylum claims by lesbian, gay, bisexual, transgender and intersex individuals, there is a need for greater awareness among adjudicators of the specific experiences of LGBTI refugee claimants and of the particular legal questions involved in these cases. There is, indeed, a myriad of legal, procedural and social hurdles facing sexual minority asylum-seekers.

This paper reviews specific legal and attitudinal challenges facing LGBTI refugee claimants. Indeed, the objective is to outline and analyse how gay, lesbian, bisexual and transgender refugee claimants in Canada continue to encounter a specific set of challenges in having the refugee definition applied to their claims.

The emphasis is on the Canadian inland refugee determination process. The paper was first developed to support a Canadian professional training program developed for members of the RPD of the IRB. The purpose of the training was to ensure that Canadian adjudicators are alert to issues relating to sexual orientation and gender identity and that any hearings and interviews with LGBTI claimants proceed in a safe and respectful manner. The discussion therefore focuses chiefly on issues and principles pulled from Canadian case law — primarily, decisions of the Federal Court of Canada, though case law from other jurisdictions is also mentioned. Frequent references are also made to the 2012 *UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity*¹⁸ [UNHCR Guidelines]. The United Nations High Commissioner for Refugees [UNHCR] is responsible for monitoring the application of the Convention by member States.¹⁹ In order to do so, the agency provides interpretations of the legal norms set out in the international refugee protection regime. In 2012, the UNHCR directly addressed the situation of sexual minorities with the release of the UNHCR Guidelines. The instrument is a valuable tool in understanding how to apply the refugee definition to sexual minority claimants.

2. Well-founded fear of persecution

2.1. Persecution v. discrimination

For a claimant to be granted the status of Convention refugee, he or she must establish a well-founded fear of persecution based on one or more of the five enumerated grounds, and the inability to obtain the protection of her country of nationality or habitual residence.²⁰ The notion of persecution is at

¹⁷ Email from Alex Boyd to Nicole LaViolette (20 March 2012) (on file with author).

¹⁸ UN High Commissioner for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (23 October 2012), HCR/GIP/12/01, online: <<http://www.refworld.org/docid/50348afc2.html>> [UNHCR Guidelines]. Guidelines are one of several soft law tools used by the UNHCR to provide persuasive legal interpretations to governments, decision-makers, practitioners, and UNHCR staff carrying out refugee status determination in the field. As such, the Guidelines are a valuable tool in interpreting the Convention definition of a 'refugee' as it applies to sexual minorities. The UNHCR Guidelines replace the UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* (21 November 2008), online: <<http://www.refworld.org/docid/48abd5660.html>>.

¹⁹ 1951 *Convention*, *supra* note 13. The Preamble of the Convention provides that "the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner..."

²⁰ *Ibid* at art 1.A(2).

the heart of the definition of a refugee, and sexual orientation or gender identity refugee claims can often turn on the legitimacy of a claimant's well-founded fear of persecution.

The definition of persecution necessitates that the harm feared be serious and that it be inflicted in a persistent, repetitive or systematic way.²¹ Serious harm includes the denial of the core protection provided by international human rights instruments. In relation to sexual minorities, the UNHCR Guidelines state the following:

Although the main international human rights treaties do not explicitly recognize a right to equality on the basis of sexual orientation and/or gender identity, discrimination on these grounds has been held to be prohibited by international human rights law. For example, the proscribed grounds of 'sex' and 'other status' contained in the non-discrimination clauses of the main international human rights instruments have been accepted as encompassing sexual orientation and gender identity.²²

It is consequently widely accepted today that all people, including LGBTI, are entitled to enjoy fundamental human rights on the basis of equality and non-discrimination.²³

The requirement in refugee law that the harm be serious has led to a distinction between persecution, on one hand, and discrimination, on the other. According to the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention* [Handbook], while discrimination may amount to a violation of human rights, it will not necessarily amount to persecution. Paragraph 54 of the Handbook states:

Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.²⁴

Thus, what distinguishes persecution from discrimination is the degree of seriousness of the harm.

Canadian refugee law adopts this important distinction between discrimination and persecution. At the same time, courts have recognised that discrimination may also rise to the level of persecution. In the case of *Sagharichi v Canada*,²⁵ the Federal Court of Canada stated that incidents of discrimination may very well amount to persecution. Refugee claimants must demonstrate that incidents cumulatively or singly "constitute a serious, systematic and repeated violation of core human rights."²⁶ Discrimination in

²¹ *Sagharichi v Canada (Minister of Employment and Immigration)* (1993), 182 NR 398 at para 2, 42 ACWS (3d) 494 (FCA) [*Sagharichi*]; *Ranjha v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 637 at para 42, 29 Imm LR (3d) 59; *NK v Canada (Solicitor General)*, 107 FTR 25 at para 21, 32 Imm LR (2d) 275.

²² UNHCR Guidelines, *supra* note 18 at para 6.

²³ ICJ, *Yogyakarta Principles - Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, March 2007, online: Refworld <<http://www.unhcr.org/refworld/docid/48244e602.html>>.

²⁴ UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1 January 1992) at para 54, online: Refworld <<http://www.unhcr.org/refworld/docid/3ae6b3314.html>> [UN High Commissioner for Refugees, *Handbook*].

²⁵ *Sagharichi*, *supra* note 21 at para 3.

²⁶ *Kaish v Canada (Minister of Citizenship and Immigration)* (1999), 89 ACWS (3d) 1006 at para 9 (available on QI).

itself does not establish persecution, but it may ground a finding of persecution if the incidents rise to the level of serious harm.

As recognized in the UNHCR Guidelines, “[d]iscrimination is a common element in the experiences of many LGBTI individuals.” For instance, the Federal Court held that the failure by the RPD to determine whether employment discrimination faced by a gay and HIV-positive claimant amounted to persecution was unreasonable, and therefore, a reviewable error.²⁷ In Canada, only a handful of refugee claims based on sexual orientation or gender identity raised the distinction between discrimination and persecution before 1998.²⁸ This situation has since evolved: in the last fifteen years, decision-makers have increasingly evaluated evidence to determine whether a sexual minority claimant would be subjected to persecution or to the less serious harm of discrimination.²⁹

One reason for the increased relevance of the distinction between persecution and discrimination is the fact that in several countries, the social, political and legal situation of sexual minorities has been changing. While some countries continue to seriously repress homosexuality, bisexuality and transexuality, other countries are becoming more accepting of sexual diversity. As Arthur Leonard has suggested in relation to a US case, “the changing conditions for gay people in areas where there had formerly been grounds to support asylum claims” make it more difficult to sustain claims of persecution.³⁰

The impact of this progress is now often at issue in refugee hearings. Contentious cases involve claimants from countries that have emerging sexual minority communities and rights organisations and have adopted progressive legal reforms, such as Mexico and several other Latin American and Eastern European countries. For example, in *Cuesta v Canada*, the RPD described the situation in Colombia in 2003 thus:

I note it is very clear from the documents that there is a continuum of an improving situation for persons of the claimant’s particular sexual orientation. The situation there is not perfect by any means, but it is clear that there have been improvements, starting in 1980 when consensual homosexuality was decriminalized. Regarding the Constitution of 1991, even his counsel described a very liberal Constitution.³¹

Similar conclusions have been drawn in numerous cases, including in a 2004 Brazilian claim where the RPD concluded that “[w]hile the panel accepts that in Brazil, deeply ingrained attitudes against homosexuality continue to exist, there are numerous examples in the documentary evidence that the situation for sexual minorities is improving.”³²

²⁷ *Ballestro Romero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 709 at para 7, 413 FTR 1 [Ballestro].

²⁸ *Re DCJ* (1 December 1995), Montreal M94-04229 & M94-04258 (CRDD) (available on QL); *Re NKO* (1 March 1996), Vancouver V95-01061 (CRDD) (available on QL); *Re UYO* (24 April 1996), Toronto T95-05832, T95-05833, T95-05834 & T95-05835 (CRDD) (available on QL); *Re CLQ* (27 September 1996), Toronto T94-06354 (CRDD) (available on QL); *Re UVG* (23 October 1997), Toronto V96-00745 (CRDD) (available on QL).

²⁹ See LaViolette, “Independent Documentation”, *supra* note 1; *Francis v Canada (Citizenship and Immigration)*, 2012 FC 1141 at paras 52, 59, 222 ACWS (3d) 303 (the Federal Court held that the RPD’s conclusion that the discrimination faced by the Applicant did not amount to persecution was unreasonable).

³⁰ Arthur Leonard, “9th Circuit Rejects Asylum Petition from Gay Ukrainian” *Lesbian/Gay Law Notes* (22 April 2002) at 59.

³¹ *Cuesta v Canada (Minister of Citizenship and Immigration)* (28 November 2003), Vancouver VA3-00908 (RPD) at para 34 (available on QL).

³² *Re NEV* (12 March 2004), Toronto TA3-11061 (RPD) at para 7 (available on QL). After canvassing the situation in Ghana, the RPD decision-maker in *Titus-Glover v Canada (Minister of Citizenship and Immigration)* (19 January 2006), Toronto TA5-06018 (RPD) at para 25 (available on QL) stated that “[t]he overall impression I get is that there is definitely discrimination against homosexuals in Ghana but no persecution.” A similar conclusion was reached in a 2006 case relating to South Korea: “Thus, while it is clear the situation for gays in South Korea is not as good as it is in Canada, I find there is insufficient evidence to show there is systemic and repeated violations of human rights or serious and sustained discrimination and harassment that amounts to persecution of all gays”: *Re JTV* (1 March 2006), Vancouver VA4-

The UNHCR Guidelines rightly suggest that assessing whether the cumulative effect of discrimination rises to the level of persecution is to be made by reference to reliable, relevant and up-to-date country of origin information.³³ As will be examined further on, the fact that independent human rights documentation on the situation of sexual minorities continues to be difficult to obtain for many parts of the world means that assessments of whether a particular country's conditions constitute discrimination rather than persecution may have to be made on little objective evidence. Moreover, some adjudicators may continue to reason, as they did in the early sexual orientation and gender identity claims, that the scarcity or absence of reports evidences a lack of persecution.³⁴ This appears to have been the case in a decision reviewed by the Federal Court, where the RPD had consulted independent country information and concluded that:

If violence against homosexuals was serious and widespread, it would have appeared in the United States' Department of State Report on Human Rights, Amnesty International Reports or the Human Rights Watch World Report. Since violence against homosexuals was not mentioned in any of these three reports, the Board concluded that it was not a serious and widespread problem in Hungary.³⁵

Considering the comparatively recent mainstream attention given to persecution based on sexual orientation and gender identity, and the ongoing challenges in documenting human rights abuses, refugee claims adjudicators should be careful to avoid drawing conclusions that no persecution exists without clear positive evidence.³⁶ Amnesty International warns:

Lesbians and gay men who have experienced torture or ill-treatment may not have access to documented evidence of their personal experiences. Patterns of torture and other abuses facing lesbians and gay men are not well documented in most countries, although some non-governmental organisations have begun to track these abuses.³⁷

Adjudicators must “take into account reasons why reports of persecution may be unavailable.”³⁸

The lack of evidence is a challenge for both the claimant and the decision-maker. For instance, in *Zakka v Canada*,³⁹ the Federal Court stated that an applicant cannot simply rely on the existence of a law proscribing homosexual acts to demonstrate risk. The claimant must produce evidence that similarly situated persons were subjected to arbitrary harassment and detention under the law. This was the conclusion also in *Birsan v Canada*,⁴⁰ where the Federal Court held that “[i]t is certainly not unreasonable to conclude that the mere existence of a law prohibiting homosexuality in public cannot prove, if it is not

02012 (RPD) at para 16 (available on QL). In *JFE (Re)* (16 February 2007), Vancouver VA5-02751 (RPD) at paras 17, 21, the RPD described the incidents that a gay man faced while in Sri Lanka as discrimination insufficient to amount to persecution. However, the RPD further concluded that if the claimant returned to Sri Lanka, he would now confront an accumulation of factors that would rise to the level of persecution.

³³ UNHCR Guidelines, *supra* note 18 at para 17.

³⁴ For a discussion of how this has been an issue in Australian cases, see Ghassan Kasssieh, *From Lives of Fear to Lives of Freedom: A Review of Australian Refugee Decisions on the Basis of Sexual Orientation* (Sydney: Gay & Lesbian Lobby, 2008) at 37.

³⁵ *AJM v Canada (Minister of Citizenship and Immigration)*, 2005 FC 98 at para 9, 137 ACWS (3d) 172.

³⁶ Kasssieh, *supra* note 34 at 38.

³⁷ Amnesty International, *Crimes of Hate, Conspiracy of Silence: Torture and Ill-treatment Based on Sexual Identity* (London: Amnesty International, 2001) at 27, online: <<http://www.amnesty.org/en/library/asset/ACT40/016/2001/en/dom-ACT400162001en.pdf>> [Amnesty International, “Crimes of Hate”].

³⁸ Kasssieh, *supra* note 34 at 37.

³⁹ *Zakka v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1434 at para 11, 143 ACWS (3d) 336.

⁴⁰ *Birsan v Canada (Minister of Citizenship and Immigration)* (1998), 86 ACWS (3d) 400 (available on QL) (FCTD).

enforced, that homosexuals are persecuted.”⁴¹ In *Oviawe v Canada*,⁴² the absence of persuasive evidence regarding the manner and frequency with which section 214 of the Nigerian Criminal Code, which rendered sodomy punishable by up to 14 years’ imprisonment, was enforced resulted in the conclusion that the claimant did not face persecution. In *Inigo Contreras v Canada*,⁴³ the documentary evidence, including the 2004 United States Department of State Report, was far from definitive on the issue of persecution. The evidence suggested the existence of discrimination against homosexuals and acts of persecution, but also pointed to government efforts to fix the situation and to the work of NGOs in trying to improve the treatment of sexual minorities. In *Re JQU*,⁴⁴ the RPD pointed out that previous IRB decisions went both ways in relation to homosexuals from Poland on the issue of discrimination versus persecution. However, in *Muckette v Canada*,⁴⁵ the Federal Court held that the RPD erred in finding that the gay claimant was facing mere discrimination, stating that “the cumulative effects of the incidents tipped into the area of persecution when death threats, which had some degree of reality to them, were made.”⁴⁶

The challenge therefore for decision-makers is to make sure that in weighing the evidence, minor social and legal progress outlined in independent country information is not favoured over more serious reports of homophobic violence and impunity. Moreover, progress on LGBTI human rights can be reversed; countries like Russia, Nigeria and Uganda, for example, have recently adopted measures that will stigmatize, not protect LGBTI individuals, and courts in India and Singapore have upheld laws that criminalize same-sex relations.

One of the problems lies in the type of country information that may be available to the adjudicators. In a 1999 case involving two gay men from Uruguay, the RPD concluded that the situation for homosexuals in Uruguay was not perfect, but constituted discrimination, falling short of persecution.⁴⁷ Yet, the documentary evidence mentioned in the RPD’s reasons focused exclusively on the improved social position of homosexuals. Independent country information, including information from a Uruguayan sexual minority rights group, outlined the existence of some gay groups in the capital city of Montevideo, the holding of a public parade and workshops, including one event where a psychiatrist held an open panel on homophobia at a town council.⁴⁸ However, this type of documentation does not provide useful assessments of the specific human rights situation of sexual minorities in a particular country. If the independent country information focuses on the mere existence of a sexual minority rights organisation, adjudicators may fail to appreciate that this “does not reveal much detail about the conditions for that organisation, the size or influence of the organisation and/or any restrictions on its operations.”⁴⁹ Adjudicators require a diversity of country information that paints a complete picture of the situation for them to be able to understand “the nature of homophobic persecution, which is cemented by a complex interaction between legal, political, social, religious and familial spheres.”⁵⁰ For

⁴¹ *Ibid* at para 4. In *X, Y, Z v Minister voor Immigratie en Asiel*, C-199/12 - C-201/12, European Union: Court of Justice of the European Union, 7 November 2013, available at: <<http://www.refworld.org/docid/527b94b14.html>>, the Court of Justice of the EU held that “the mere existence of legislation criminalising homosexual acts cannot be regarded as an act ... so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution”. The Court added however that “the term of imprisonment which accompanies a legislative provision which ... punishes homosexual acts is capable, in itself of constituting an act of persecution ... provided that it is actually applied in the country of origin which adopted such legislation.” [*X, Y, Z v Minister*].

⁴² *Oviawe v Canada (Minister of Citizenship and Immigration)* 2006 FC 1114 at para 14, 152 ACWS (3d) 128.

⁴³ *Inigo Contreras v Canada (Minister of Citizenship and Immigration)*, 2006 FC 603 at para 12, 148 ACWS (3d) 782.

⁴⁴ *Re JQU* (13 March 2001), Ottawa AA0-00450 (CRDD) at para 3 (available on QL).

⁴⁵ 2008 FC 1388 (available on QL).

⁴⁶ *Ibid* at paras 7-8.

⁴⁷ *Re NWP* (7 January 1999), Toronto T98-04881 & T98-05326 (CRDD) at para 9 (available on QL).

⁴⁸ *Ibid*.

⁴⁹ Kasssieh, *supra* note 34 at 34.

⁵⁰ *Ibid*.

instance, in the Uruguayan case, the absence of penal provisions prohibiting homosexuality was mentioned by the RPD. Such absence, however, does not mean that same-sex conduct is legally condoned, especially in public settings. Many Latin American countries have used laws that penalise offences against morality and decency to repress homosexuality.⁵¹

In sum, there continues to be significant obstacles facing sexual minority claimants in meeting the threshold of persecution rather than discrimination. One of these hurdles is the fact that independent human rights documentation continues to be difficult to obtain for many parts of the world. This specific issue is examined later on in this paper.

2.2. Laws criminalizing homosexual conduct

Decision-makers are increasingly called upon to assess the persecutory impact of laws criminalizing homosexual conduct. According to a 2014 world survey, at least 78 states — approximately 40 per cent of which are United Nations member states — have laws prohibiting same-sex activity between consenting adults.⁵² Laws may specifically prohibit the consensual homosexual conduct of both women and men, “through terms that criminalize ‘homosexual acts’ or other similarly clear terms.”⁵³ For instance, in *Bethany Lanae Smith v Canada*, the Federal Court identified the *Uniform Code of Military Justice* of the United States as the relevant legislation in the case of a lesbian military deserter; at the relevant time, the Code made sexual relations between people of the same sex an offense.⁵⁴ Such laws have been found to violate the international rights to privacy and equality before the law, and their enforcement with terms of imprisonment has been regarded as a disproportionate or discriminatory punishment, and thus persecutory under refugee law.⁵⁵

The UNHCR Guidelines are clear that “even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution.”⁵⁶ Indeed, the mere fact that criminal prohibitions exist — whether enforced or not — can result in LGBTI abstaining from same-sex relationships or applying severe restrictions to their social life and personal identity in order to prevent arrests, extra-legal detention, harassment, extortion or prosecutions.⁵⁷ The UNHCR Guidelines further underline that laws criminalizing homosexual conduct “can promote political rhetoric that can expose LGB individuals to risks of persecutory harm,” or “hinder LGB persons from seeking and obtaining State protection.”⁵⁸ Moreover, the impact on lesbians of laws criminalizing male homosexuality should not be overlooked; “the existence of criminalising provisions against men will create a fearful environment for sexual minorities overall, which includes women.”⁵⁹ Consequently, decision-makers are required to analyse “[t]he legal system in the country concerned, including any relevant legislation, its interpretation, application and actual impact on the applicant,” as well as the “scope, impact and enforcement of laws that criminalize same-sex conduct.”⁶⁰

⁵¹ Sonia Katyal, “Sexuality and Sovereignty: The Global Limits and Possibilities of *Lawrence*” (2006) 14:4 Wm & Mary Bill Rts J 1448.

⁵² See Itaborahy and Zhu, *supra* note 3 at 9.

⁵³ Kassisi, *supra* note 34 at 54.

⁵⁴ 2009 FC 1194 at para 39, [2011] 1 FCR 36.

⁵⁵ On the right to privacy and equality, see *Toonen v Australia*, where the Human Rights Committee held that the International Covenant on Civil and Political Rights prohibits discrimination on the grounds of sexual orientation: CCPR/C/50/D/488/1992, 4 April 1994, online: Refworld <<http://www.unhcr.org/refworld/docid/48298b8d2.html>>. On laws criminalizing homosexual conduct, see *X, Y, Z v Minister*, *supra* note 41 at para 55-56.

⁵⁶ UNHCR Guidelines, *supra* note 18 at para 27.

⁵⁷ See *JFE (Re)*, *supra* note 32 at para 13: the RPD held that the existence of a Sri Lankan law against homosexuality, although “not enforced... appears to have provided the police with a handy blackmail tool.”

⁵⁸ UNHCR Guidelines, *supra* note 18 at para 27.

⁵⁹ Kristen Walker, “Sexuality and Refugee Status in Australia” (2000) 12:2 Intl J Ref L 175 at 198.

⁶⁰ UNHCR Guidelines, *supra* note 18 at para 29.

Rather than focusing on the actual number of prosecutions, what is required is specific information about how criminal sanctions “reinforce persecutory social environments and destroy opportunities for sexual minorities to seek protection from state authorities.”⁶¹

The UNHCR highlights that in countries where homosexual practices neither are criminalized nor enforced, other laws may be directed at suppressing homosexuality, such as sanctions relating to “public morality or public order laws (loitering, for example).”⁶² Indeed, laws that appear to have a general application, for instance laws against adultery or those that criminalize certain sexual acts between consensual partners of any sex or gender, may have disproportionately discriminatory impacts on sexual minorities because they are selectively applied, or the punishment is out of proportion to the objective of the law. The Federal Court held in 2012 that the RPD erred in failing to analyze the claim of a gay claimant from China that the “police arbitrarily use a variety of legal pretexts in order to penalize public displays of homosexuality,” including arresting homosexuals to meet quotas established for prostitution arrests.⁶³ In Turkey, for instance, a traffic regulation containing misdemeanour offenses has been used by police to stop, search and fine or detain transgender women.⁶⁴

2.3. Discretion/Concealment

A contentious issue has surfaced directly or implicitly in the national case law of several States. Some decision-makers have made a distinction between discreet and non-discreet homosexuals, and have suggested that sexual minority refugee claimants could be required to take reasonable steps to avoid persecutory harm by concealing their personal lives or identity.⁶⁵ While several courts have rejected the ‘discretion’ approach,⁶⁶ the issue seems to resurface on occasion.

The UNHCR Guidelines are explicit and clear on this issue: “a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution.”⁶⁷ It is never a condition of protection that a claimant be required to take steps to conceal either their political opinions, religious beliefs, membership in a particular social group or their race or nationality to avoid persecution. According to the UNHCR, “[t]here is no duty to be ‘discreet’ or to take certain steps to avoid persecution, such as living a life of isolation, or refraining from having intimate relationships.”⁶⁸

⁶¹ Kasssieh, *supra* note 34 at 56.

⁶² UNHCR Guidelines, *supra* note 18 at para 29.

⁶³ *Su v Canada (Citizenship and Immigration)*, 2012 FC 554 at para 11 (available on QL) [Su]. See also *Bethany Lanae Smith v Canada (Minister of Citizenship and Immigration)* 2009 FC 1194 at para 86, [2011] 1 FCR 36.

⁶⁴ As a result, transgender women tend to avoid certain areas for fear of being subjected to police abuse under the pretext of this traffic law: Amnesty International, *‘Not an Illness or a Crime’ Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality* (London: Amnesty International, 2011) at 14-15, online: Amnesty International <<http://www.amnesty.org/en/library/asset/EUR44/001/2011/en/aff47406-89e4-43b4-93ed-cbb6fa107637/eur440012011en.pdf>>.

⁶⁵ For example, the distinction made between discreet and non-discreet homosexuals arose in a series of Australian cases where it was accepted that gay and lesbian asylum seekers could avoid persecution by not drawing public attention to their sexual orientation: RRT Reference V96/05496; RRT Reference N97/14489; RRT Reference N98/21362; RRT Reference N98/24718; RRT Reference N98/23955; *Khalili Vabed v Minister for Immigration and Multicultural Affairs*, [2001] FCA 1404; *SAAF v Minister for Immigration and Multicultural Affairs* [2002] FCA 343; *Nezhadian v Minister for Immigration and Multicultural Affairs*, [2001] FCA 1415; *WABR v Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 124.

⁶⁶ A 2003 Australian High Court decision rejected the ‘discretion’ approach in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*, [2003] HCA 71. The Australian decision was followed by the United Kingdom Supreme Court in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, [2010] UKSC 31. More recently, the Court of Justice of the European Union held that sexual orientation is a characteristic so fundamental to one’s identity that one cannot be expected to renounce or conceal it: *X, Y, Z v Minister*, *supra* note 41.

⁶⁷ UNHCR Guidelines, *supra* note 18 at para 31.

⁶⁸ *Ibid* at para 26.

The issue of concealment has surfaced directly or implicitly in some Canadian tribunal decisions,⁶⁹ but generally the requirement of discretion, and the classification of claimants into either ‘discreet homosexuals’ or ‘non-discreet homosexuals’ categories, has not taken a serious hold in Canadian decisions. The Federal Court clearly dismissed such a discretion requirement in *Fosu v Canada*.⁷⁰ The Court set aside a decision which denied refugee status to a Ghanaian gay man, rejecting the RPD’s “finding which requires the claimant to deny or hide the innate characteristic which forms the basis of his claim of persecution.”⁷¹

In fact, being compelled to forsake or conceal one’s sexual orientation and gender identity may in and of itself amount to persecution. In *Sadeghi-Pari v Canada*, the Federal Court was clear that requiring a person to conceal or suppress their sexual orientation amounts to persecution:

The meaning of persecution, as set out in the seminal decisions of *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 and *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, is generally defined as the serious interference with a basic human right. Concluding that persecution would not exist because a gay woman in Iran could live without punishment by hiding her relationship to another woman may be erroneous, as expecting an individual to live in such a manner could be a serious interference with a basic human right, and therefore persecution.⁷²

The UNHCR Guidelines recognize that significant psychological and other harms may result when a person is forced to conceal their sexual orientation or gender identity, and this, in turn, could lead to intolerable predicaments amounting to persecution.⁷³ Essentially, insisting on discretion amounts to requiring refugee claimants to deny fundamental human rights to which they are entitled, like freedom of expression and freedom of association.⁷⁴

2.4. Forms of persecution

The UNHCR Guidelines do a commendable job of canvassing the different forms of persecution that sexual minorities may confront. They highlight the different forms of persecutory harms facing many LGBTI persons, including “[p]hysical, psychological and sexual violence, including rape.”⁷⁵ Lesser forms of violence can include harassment, bullying, ostracism, intimidation and psychological violence, all of which can rise to the level of persecution. Examples of discriminatory measures amounting to persecution are outlined in the UNHCR Guidelines. For instance, the Guidelines recognize that LGBTI may not be able to fully enjoy their human rights, like the right to freedom of expression, association and assembly.⁷⁶ They may be denied access to normally available services such as education, housing, health care and employment — the cumulative effect of which may give rise to a reasonable fear of

⁶⁹ See *Okoli v Canada (Minister of Citizenship and Immigration)*, 2009 FC 332 at paras 18, 34, 36, 79, Imm LR (3d) 253 [*Okoli*]; *Taberi v Canada*, 2001 FCT 886, 107 ACWS (3d) 849 (only gays and lesbians who are very public face a risk of persecution); *Serrano v Canada* (1999), 90 ACWS (3d) 451 (available on QL) (claimant did not fall into groups that risks persecution, such as visible or high profile gay activists); *Lara v Canada* (1999), 86 ACWS (3d) 950, (available on QL); *Lj v Canada* (1996), 64 ACWS (3d) 1202 (available on QL).

⁷⁰ *Fosu v Canada (Citizenship and Immigration)*, 2008 FC 1135, 335 FTR 223 [*Fosu*]. See also *Okoli*, *supra* note 69.

⁷¹ *Fosu*, *supra* note 70 at para 17. See also *Okoli*, *ibid*.

⁷² *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282 at para 29, 37 Imm LR (3d) 150.

⁷³ UNHCR Guidelines, *supra* note 18 at para 33.

⁷⁴ *Ibid* at para 31.

⁷⁵ *Ibid* at para 20. See also *Warner v Canada (Minister of Citizenship and Immigration)* 2011 FC 363 at para 7, 98 Imm LR (3d) 13 (“Repeated physical violence directed against someone because of his sexual orientation can amount to persecution.”)

⁷⁶ UNHCR Guidelines, *supra* note 18 at para 24.

persecution.⁷⁷ The UNHCR also acknowledges that social, cultural and other restrictions can compel sexual minorities to enter into forced heterosexual marriages or relations, or be subjected to forced pregnancies or marital rape, all of which may reach the threshold of persecution.⁷⁸ The UNHCR Guidelines do set aside any suggestion that efforts to change an individual's sexual orientation or gender identity by force or coercion with the intention of "curing" them, "treating" them, or making them conform to gender roles, are anything other than persecution.⁷⁹ Intersex individuals may be particularly vulnerable to coercive surgical treatments aimed at "normalcy."⁸⁰

The persecution of lesbians can be similar to the persecution of gay men in several ways. For instance, in a comparative study of asylum decisions from Canada and Australia, Jenni Millbank found that "sexual assault was a significant and persistent factor in the persecution of both lesbians and gay men."⁸¹ However, a number of authors have identified elements of persecution involving lesbians that are similar to those involving women in general. Shannon Minter states that lesbians, as is the case with other women, are often victims of violence at the hands of family members. They are forced to marry; subjected to psychiatric treatment against their will; deprived of their children; and are victims of discrimination with respect to housing, employment, education and health services.⁸²

The main threat to the safety and survival of many lesbians are not criminal laws or violence perpetrated by agents of the State, but rather social norms based on gender that subordinate women economically and politically, control the sexuality and reproductive freedom of women, and, generally, do not give women full and free access to exercise their fundamental rights.⁸³ In terms of their sexuality, lesbians are viewed as resisting heterosexual imperatives prescribed by all patriarchal societies:

La société patriarcale a imposé aux femmes certaines règles (explicites et implicites) régissant leur sexualité. Perçues comme étant la propriété des hommes, les femmes ne doivent exprimer leur sexualité que dans le cadre d'une relation avec un homme [...] Par conséquent, toute

⁷⁷ *Ibid.*

⁷⁸ *Ibid* at para 23. In *JFE (Re)*, *supra* note 32 at para 5, a gay Sri Lankan claimant testified that his parents, convinced that he was straight, attempted to set up a marriage for him. A Canadian decision, however, concluded that "immigration policies of countries which do not allow for the sponsorship of same-sex marriage partners" do not contravene international human rights standards: *IWP (Re)* (22 July 2010), Toronto TA9-03324 & TA9-03344 (RPDD) (available on QI). The decision further concluded that "at this time same-sex marriage and consequent sponsorship rights are not internationally recognized rights" *ibid* at para 17. Interestingly, the decision was rendered by a member whose appointment to the Refugee Protection Division of the Immigration and Refugee Board was controversial because of previous statements and campaigning against homosexuality and same-sex marriage. See Dale Smith, "Anti-gay Evangelical Appointed to Refugee Board", *Xtra!* (17 March 2009), online: <http://www.xtra.ca/public/National/Antigay_evangelical_appointed_to_refugee_board-6467.aspx>.

⁷⁹ UNHCR Guidelines, *supra* note 18 at para 21. In *Pitcherskaia v INS*, the US Board of Immigration Appeals "found that the Russian militia and psychiatric facilities intended to 'cure' a lesbian refugee claimant, and therefore she did not face persecution: Kristie Bowerman, "Pitcherskaia v INS: The Ninth Circuit Attempts to Cure the Definition of Persecution" (1997) 7 *Law & Sexuality* 101 at 102-03. See also Ryan Goodman, "The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims" (1995) 105 *Yale LJ* 255.

⁸⁰ UNHCR Guidelines, *supra* note 18 at para 21.

⁸¹ Jenni Millbank, "Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation" (2003) 18:1 *Geo Immig LJ* at 77.

⁸² UNHCR Guidelines, *supra* note 18 at paras 23-24, which mention forced marriage, marital rape and denial of custody and visitation rights in relation to children. See also Shannon Minter, "Lesbians and Asylum: Overcoming Barriers to Access" in Sydney Levy, ed, *Asylum Based on Sexual Orientation: A Resource Guide* (San Francisco: International Gay and Lesbian Human Rights Commission and Lambda Legal Defence and Education Fund, 1996) at IB 5-6.

⁸³ Minter, *ibid* at IB 6. An Amnesty International report confirms the following: "[t]he imposition of such penalties for same-sex relations must be viewed in the context of the repression of other forms of consensual sexual behaviour which are seen to transgress strict religious or political codes, such as sexual relations between men and women outside marriage. Where gender discrimination is enshrined in law, women accused of any sexual activity outside marriage are particularly at risk of such penalties": Amnesty International, "Crimes of Hate", *supra* note 37 at 14.

femme qui ne se soumet pas à cette obligation sexuelle est susceptible d'être marginalisée et frappée d'ostracisme.⁸⁴

Jenni Millbank argues that rape is a “sexualized attack upon lesbians” which serves “as a punishment for their sexual and social nonconformity.”⁸⁵ Because lesbianism is largely perceived as an affront to social or cultural norms relating to gender and sexuality, lesbians are particularly vulnerable to different forms of gender persecution designed to punish and to force them to conform to sexist and heterosexist norms.⁸⁶

It must, however, be underlined that gender persecution is a relevant category for all sexual minorities because society tends to associate gender and sexual non-conformity.⁸⁷ Social, political, and legal disapproval of homosexuality is more often a reaction to the non-compliance to gender and social roles than a simple expression of contempt for the sexual practices of homosexuals.⁸⁸ Generally, gender roles are based on a heterosexual orientation. Non-conformance with gender norms by gay men, lesbians, and transgendered persons implies a refusal to behave in ways dictated by their biological sex and social classification.

For example, as Sylvia Law maintains, lesbians and gay men, in their existence and behaviour, “deny the inevitability of heterosexuality.”⁸⁹ James Wilets describes sexual minorities as “gender outlaws.”⁹⁰ He states the following: “[s]exual minorities are also gender outlaws in the sense that their very existence as identifiable minorities is not based upon the sexual acts in which they participate, but rather on their relationship to the spectrum of gender conformity.”⁹¹ According to Wilets, non-conformity to gender and social roles by gay men and lesbians is the basis of persecution and discrimination. Men and women who display homosexual tendencies or adopt gender identities other than those prescribed by their societies have generally been penalized when their activities violate the “norms of male supremacy.”⁹²

Just as with lesbians, gay men and transgender people are victims of abuse because they do not conform to socially constructed gender roles. Shannon Minter explains the problem:

[...] many human rights abuses against gay and transgendered people are also deeply rooted in and expressed through socially imposed gender norms. Like lesbians, many gay and transgendered people are extremely vulnerable to sexual and physical assault in families and communities, with little or no access to meaningful protection from the state.⁹³

Amnesty International, in a report on abuses of sexual minorities, confirms that gay men are often perceived as traitors, having defied masculine privilege by adopting roles viewed as feminine.⁹⁴ In fact, in a number of cases, it is obvious that gay men and transgender people were targeted because they were perceived as having transgressed strict social norms governing the behaviour of women and men. For

⁸⁴ Monique Gauvin, “La discrimination des lesbiennes en milieu de travail: de l’occultation à la prise de parole” in Irène Demczuk, ed, *Des droits à reconnaître: les lesbiennes face à la discrimination* (Montréal: Les éditions du remue-ménage, 1998) at 143.

⁸⁵ Millbank, *supra* note 81 at 77.

⁸⁶ Minter, *supra* note 82 at IB 14.

⁸⁷ Simon Levay & Elisabeth Nonas, *City of Friends: A Portrait of the Gay and Lesbian Community in America* (Cambridge, MA: MIT Press, 1995).

⁸⁸ Sylvia Law, “Homosexuality and the Social Meaning of Gender” (1988) 2 Wis L Rev 187 at 187.

⁸⁹ *Ibid* at 210.

⁹⁰ James D Wilets says: “Gendered violence is frequently the consequence of perceived threats to a male dominated societal system by groups that do not conform to the norms appropriate for the continuation of such a system” in “Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective” (1997) 60 Alta L Rev 989 at 992.

⁹¹ *Ibid* at 1011.

⁹² *Ibid* at 992.

⁹³ Minter, *supra* note 82.

⁹⁴ Amnesty International, “Crimes of Hate”, *supra* note 37 at 6.

example, in a patriarchal society like Mexico, gay men are held in contempt if they are “effeminate.”⁹⁵ To a great extent, those who persecute gays perceive a direct connection between male homosexuality and femininity:

[t]hus homophobia is not only a fear of the idea of having sex with other men, but also a masculine fear of being considered or appearing in any way weak or feminine. Because homosexuals are often perceived as having feminine characteristics and taking on feminine roles, it is not surprising that in the case of homosexuals, as is generally the case with women, sexual assault is a common form of persecution. In fact, a great number of gay claimants state they have been victims of sexual assault or rape.⁹⁶

Another aspect of the intersection of sexual orientation and gender involves the agents of persecution. When a society’s views about gender roles are reflected in violence against women and sexual minorities, this violence is often committed by individuals who do not represent the State.⁹⁷ Violent acts such as rape, assault and torture are employed to pressure both women and sexual minorities to conform to society’s gender roles. In addition, persecution of women and sexual minorities serves not only to pressure for conformity, but also to intimidate by making examples of abused women and sexual minorities.

In spite of the presence of gender elements in claims made by sexual minorities, decision-makers (and claimants themselves) infrequently refer to the UNHCR *Guidelines on Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*⁹⁸ [UNHCR Gender Guidelines] or the Canadian gender guidelines entitled *Women Refugee Claimants Fearing*

⁹⁵ Research Directorate, Immigration and Refugee Board, *Mexico: Treatment of Sexual Minorities* (Ottawa: Immigration and Refugee Board, 1999) at 1.

⁹⁶ *N(LX)(Re)* (9 April 1992), Toronto T91-04459 (CRDD) (available on QL) [*N(LX)(Re)*]; *J(FH)(Re)* (28 April 1993), Calgary C92-00568 (CRDD) (available on QL) [*J(FH)(Re)*]; *H(YN)(Re)* (4 August 1994), Toronto U93-11000 (CRDD) (available on QL) [*H(YN)(Re)*]; *Re SZR* (29 June 1995), Toronto T94-05727 (CRDD) (available on QL) [*Re SZR*]; *Re B(WB)* (30 October 1995), Toronto T95-03779 (CRDD) (available on QL) [*Re B(WB)*]; *Re I(XW)* (28 November 1995), Toronto U94-03700 (CRDD) (available on QL) [*Re I(XW)*]; *Re D(CJ)* (1 December 1995), Montreal M94-04229 & M94-04258, (available on QL) [*Re D(CJ)*]; *Re JYJ* (31 July 1996), Montreal M95-03691 (CRDD) (available on QL) [*Re JYJ*]; *Re CDT* (4 September 1996), Montreal M96-03167 (CRDD) (available on QL) [*Re CDT*]; *VYF (Re)* (10 September 1996), Montreal M96-02939 (CRDD) (available on QL); *Re GEK* (4 November 1996), Montreal M93-10043 (CRDD) (available on QL) [*Re GEK*]; *Re ORC* (17 March 1997), Vancouver V96-00083 (CRDD) (available on QL) [*Re ORC*]; *Re CRH* (14 August 1997), Toronto T95-03078 (CRDD) (available on QL) [*Re CRH*]; *Re BWL* (9 October 1997), Toronto T95-06913 (CRDD) (available on QL) [*Re BWL*]; *Re SEX* (3 November 1997), Toronto T96-05722 (CRDD) (available on QL) [*Re SEX*]; *Re JKD* (9 December 1997), Toronto T96-04267 (CRDD) (available on QL) [*Re JKD*]; *Re TBE* (15 December 1997), Montreal M96-0062 (CRDD) (available on QL) [*Re TBE*]; *Re DEA* (6 January 1998), Toronto U96-05473 (CRDD) (available on QL) [*Re DEA*]; *Re JME* (28 January 1998), Toronto T96-04238 (CRDD) (available on QL) [*Re JME*]; *Re FVY* (30 January 1998), Toronto T97-01239 [1998] CRDD No 20 (available on QL) [*Re FVY*]; *Re UOD* (24 June 1999), Ottawa A98-01243 (CRDD) (available on QL) [*Re UOD*]; *Re YJE* (20 December 1999), Toronto T99-04575 (available on QL) [*Re YJE*]; *Re NPQ* (3 November 1999), Montreal M95-08923 (CRDD) [*Re NPQ*] (available on QL); *Re PJX* (7 June 2000), Toronto T99-07837 (CRDD) (available on QL) [*Re PJX*]; *ITL (Re)* (12 March 2001), Montreal M99-08212 (CRDD) (available on QL); *BYU (Re)* (12 May 2003), Toronto TA1-11950 (CRDD) (available on QL); *Re SCE* (8 April 2004), Toronto TA307587 (RPD) (available on QL) [*Re SCE*]; *Gorria v Canada (Minister of Citizenship and Immigration)* (21 April 2004), Toronto TA3-01040 (RPD) (available on QL); *BTE (Re)* (17 July 2006), Toronto TA5-04262 (RPD) (available on QL); *Campos v Canada* (17 February 2006), Toronto TA4-10820 (RPD) (available on QL); *Jack v Canada (Minister of Citizenship and Immigration)* (1 February 2006), Toronto TA5-06685 (RPD) (available on QL); *RPD File No T48-06796* (6 April 2009), Toronto TA8-06796 (RPD) (available on QL); *RPD File No T48-03943* (21 May 2009), Toronto TA8-03943 (RPD) (available on QL).

⁹⁷ Wilets, *supra* note 90 at 991. See also Suzanne Goldberg, “Symposium—Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation” (1998) 29 Colum HRL Rev 467 at 496, 500. In *Martinez v Canada (Minister of Citizenship and Immigration)* 2011 FC 13 (available on QL) [*Martinez*], the lesbian and transgender claimants testified they were both victims of domestic violence at the hands of male relatives.

⁹⁸ UN Doc HCR/GIP/02/01 (7 May 2002) [UNHCR Gender Guidelines].

*Gender-Related Persecution*⁹⁹ [Canadian Gender Guidelines] when rendering a decision on a claim made by sexual minorities. The importance of establishing a link between gender, sexual orientation and gender identity is, it is suggested, evident. Persecution against sexual minorities is based on the same notions of patriarchy and misogyny as repression against women. It is, therefore, imperative that the intersection of gender, sexual orientation and gender identity be established to reflect the reality, impact and scope of persecution suffered by refugees. A gender analysis recognizing that the repression of women's rights is analogous to the repression of non-conformity to social and sexual roles will undoubtedly improve the protection refugee law offers to both women and sexual minorities. In fact, the UNHCR Guidelines explicitly recommend that the document on sexual orientation and gender identity be read in conjunction with the UNHCR Gender Guidelines.¹⁰⁰

3. Convention grounds

Under Canadian refugee law, persons seeking asylum must satisfy two main legal tests: they must demonstrate a well-founded fear of persecution, and they must substantiate that the persecution they fear is on account of their race, religion, nationality, membership in a particular group or political opinion. The Convention definition of a refugee therefore requires that there be a nexus between the persecution that is feared and the civil or political status of a person (race, religion, nationality, membership in a particular social group or political opinion).

The UNHCR Guidelines acknowledge that refugee protection is most commonly extended to sexual minorities because of the persecution individuals fear they would be subjected to as members of a particular social group.¹⁰¹ In Canada, the Supreme Court decision in *Ward v Canada*¹⁰² confirmed, in *obiter*, that sexual orientation and gender constitute the basis of particular social groups as defined in the Convention.¹⁰³ As the UNHCR Guidelines further suggests, sexual orientation or gender identity cases may also be analysed in relation to other Convention grounds such as political opinion or religion.¹⁰⁴

3.1. Particular social group

The expression 'sexual minority' is used to refer to people whose minority status is a result of their sexual orientation, sexual identity, practices with partners of the same sex, or their refusal to conform to gendered social roles tied to their biological sex at birth. It also includes individuals who have both male and female physical and sexual characteristics and organs. Thus, the notion of sexual minorities regroups gays, lesbians, bisexuals, transgendered — which includes transsexuals and transvestites — and intersex people.

⁹⁹ Canadian Immigration and Refugee Board, *Women Refugee Claimants Fearing Gender-Related Persecution* (Guidelines issued by the Chairperson of the Board in accordance with subsection 65(3) of the *Immigration Act*) (Ottawa: 9 March 1993); *Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Updated version of the Guidelines issued by the Chairperson of the Board in accordance to subsection 65(3) of the *Immigration Act*) (Ottawa: 25 November 1996) [Canadian Gender Guidelines].

¹⁰⁰ UNHCR Guidelines, *supra* note 18 at para 1.

¹⁰¹ *Ibid* at para 40. See also *X, Y, Z v Minister*, *supra* note 41 (the Court of Justice found that asylum applicants who have a same-sex sexual orientation and come from countries where consensual homosexual conduct is criminalized, form a particular social group for the purposes of refugee law).

¹⁰² [1993] 2 SCR 689, rev'g [1990] 2 FC 667, aff'g (1988), 9 Imm LR (2d) 48 [*Ward*].

¹⁰³ *Ibid* at 739.

¹⁰⁴ UNHCR Guidelines, *supra* note 18 at para 40. See *J (FH)(Re)*, *supra* note 96 (claimant also based fear of persecution on political opinion); *Re V (OZ)* (10 June 1993), Montreal M93-04717 (CRDD) (available on QL); *Re E (QR)* (13 October 1993), Toronto T93-02134 (CRDD) (available on QL) (claimant also based fear of persecution on the grounds of political opinion and religion).

In the context of refugee law, LGBTI individuals can be recognized to constitute particular social groups based on sexual orientation, gender or gender identity.

3.1.1. Sexual orientation

As mentioned above, in 1993, the Supreme Court of Canada clarified in *Ward*¹⁰⁵ that sexual orientation can constitute the basis of a claim for membership in a particular social group. Justice LaForest defined social group by identifying three categories of groups.¹⁰⁶ The first category, “groups defined by an innate or unchangeable characteristic,” embraced “individuals fearing persecution on such bases as gender, linguistic background and sexual orientation.”¹⁰⁷

The American Psychological Association [APA] defines sexual orientation as follows:

Sexual orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes. Sexual orientation also refers to a person's sense of identity based on those attractions, related behaviors, and membership in a community of others who share those attractions. Research over several decades has demonstrated that sexual orientation ranges along a continuum, from exclusive attraction to the other sex to exclusive attraction to the same sex. However, sexual orientation is usually discussed in terms of three categories: heterosexual (having emotional, romantic, or sexual attractions to members of the other sex), gay/lesbian (having emotional, romantic, or sexual attractions to members of one's own sex), and bisexual (having emotional, romantic, or sexual attractions to both men and women).¹⁰⁸

The APA also explains that different cultures may use identity labels to describe people who express some of these different attractions. In Canada, the most common labels are lesbians (women attracted to women), gay men (men attracted to men) and bisexual people (men or women attracted to both sexes). However, some people may use different labels or none at all.

In *NKL v Canada*, the Federal Court concluded that the RPD erred when it stated that it had specialized knowledge that “homosexuality is innate.”¹⁰⁹ The RPD had relied on this “specialized knowledge” to conclude that the claimant was not a lesbian, “because she discovered her sexual orientation following a rape, rather than admitting that it was innate.”¹¹⁰ There is in fact no consensus in scientific, psychiatric and social science fields that sexual orientation is innate or fixed very early in life, or the product of social conditions. Indeed, many continue to debate whether sexuality is a “deep-rooted, fixed and intrinsic feature of individuals”¹¹¹ which develops separately from social structures (referred to as the ‘essentialist’ or ‘determinist’ view); or whether it is a product of an individual's social environment, a perspective put forth by advocates of the social construction theory.¹¹² The APA states the following:

¹⁰⁵ *Ward*, *supra* note 102.

¹⁰⁶ The three categories are: (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence (*ibid* at 739).

¹⁰⁷ *Ibid*.

¹⁰⁸ American Psychological Association, “Sexual Orientation and Homosexuality: Answers to Your Questions”, online: APA

<<http://www.apa.org/topics/sexuality/orientation.aspx#>>.

¹⁰⁹ *NKL v Canada (Minister of Citizenship and Immigration)*, 2011 FC 28 at para 18 (available on QL).

¹¹⁰ *Ibid* at para 16.

¹¹¹ Janet E Halley, “Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability” (1994) 46 *Stan L Rev* 503 at 516.

¹¹² Didi Herman, “Are We Family? Lesbian Rights and Women’s Liberation” (1990) 28 *Osgoode Hall LJ* 789 at 812.

There is no consensus among scientists about the exact reasons that an individual develops a heterosexual, bisexual, gay, or lesbian orientation. Although much research has examined the possible genetic, hormonal, developmental, social, and cultural influences on sexual orientation, no findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or factors. Many think that nature and nurture both play complex roles; most people experience little or no sense of choice about their sexual orientation.¹¹³

Regardless of the natural or social causes of homosexuality, the decision to express one's homosexuality or bisexuality by engaging in sexual conduct with persons of the same sex is a voluntary act.¹¹⁴ Many women and men get involved in homosexual relationships after engaging in heterosexual relations for many years, or they may not engaged in an intimate relationship or sexual relations. At any rate, lesbian, gay and bisexuals refugee claimants are extended refugee protection because they are actively persecuted, regardless of the causes of homosexuality.

Sean Rehaag has canvassed the specific problems facing bisexual claimants in the US, Australia and Canada, and identifies trends that suggest bisexuality may be poorly understood by refugee decision-makers.¹¹⁵ For example, the Australian Refugee Tribunal rejected a Pakistani man's claim to be bisexual, concluding that his relationship with another man while in detention was "simply the product of the situation, where only partners of same sex are available, and says nothing about his sexual orientation."¹¹⁶ In relation to sexual orientation, decision-makers should consider whether a claimant is bisexual, rather than only examining the exclusive homosexual or heterosexual orientation of the claimant. For instance, in *Valoczki v Canada*, the Federal Court categorized as an error an omission by the RPD to consider the very real possibility that the claimant was bisexual.¹¹⁷

3.1.2. Gender

'Sex' refers to the biological category to which a person belongs at birth. However, 'gender' is a concept referring to social, cultural and psychological values as well as learned beliefs. Gender refers to the social and cultural experience of being a woman or a man and the power relations between men and women. Thus gender is linked to the hierarchical relationships between men and women and it encompasses the identity, social status and roles and responsibilities of men and women. Feminists in particular have been discussing this distinction since the 1970s, referring to gender as the social dimension of what can be perceived as biological sex.¹¹⁸

¹¹³ American Psychological Association, "Sexual Orientation and Homosexuality", online: APA <<http://www.apa.org/helpcenter/sexual-orientation.aspx>>. For a discussion of this debate as it relates to Canadian refugee law, see LaViolette, "The Immutable Refuges", *supra* note 1.

¹¹⁴ Jin S Park, "Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians Under U.S. Immigration Policy" (1995) 42 UCLA L Rev 1069 at 1132.

¹¹⁵ See Sean Rehaag, "Bisexuals Need Not Apply: a Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia" (2009) 13:2 Int'l JHR 415; Rehaag, "Patrolling the Borders", *supra* note 16.

¹¹⁶ Caro Meldrum, "Refugee Review Tribunal 'Homophobic': Detainee" *Australian Broadcasting Corporation* (18 May 2007), online: ABC News Online <<http://www.abc.net.au/news/newsitems/200705/s1927091.htm>>.

¹¹⁷ 2004 FC 492, 130 ACWS (3d) 360 at para 17. See also *Odetoyinbo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 501 at para 6 (available on QL) ("...the Board's failure to make an explicit determination as to the applicant's bisexuality constitutes a reviewable error and justifies a redetermination of the applicant's claims."); *RPD File No TA8-14208* (6 October 2010), Toronto TA8-14208 (RPD) (available on QL); *Ramon v Canada (Minister of Citizenship and Immigration)*, 2012 FC 314, 9 Imm LR (4th) 198.

¹¹⁸ Kristina Folkelius & Gregor Noll, "Affirmative Exclusion? Sex, Gender, Persecution and the Reformed Swedish Aliens Act" (1998) 10 Int'l J Ref L 607 at 610; Sari Kouvou, "Gender Mainstreaming and International Human Rights" in Doris Buss & Ambreena Manji, eds, *International Law: Modern Feminist Approaches* (Portland, Oregon: Hart, 2005) 237 at 245.

As previously mentioned, the UNHCR states at the outset that the Guidelines “should be read in conjunction with UNHCR’s *Guidelines on Gender-Related Persecution*.”¹¹⁹ In doing so, the UNHCR Guidelines make a direct link to conclusions it reached when it drafted the UNHCR Gender Guidelines: gender is relevant to LGBTI asylum and refugee claims made by both men and women. The UNHCR Gender Guidelines affirm that “refugee claims based on differing sexual orientation contain a gender element.”¹²⁰

Despite the intersection of gender and sexual orientation, this link is still infrequently made in determinations relating to membership in a particular social group. In one 1996 Canadian case, the decision-makers did apply the Canadian Gender Guidelines in a systematic way.¹²¹ In that case, a Venezuelan lesbian had been the victim of violent, cruel and degrading acts at the hands of police. In deciding the claim, the members of the panel considered the connection between gender and sexual orientation:

The claimant's strong self-identity as a lesbian woman places her at greater risk of detection by the authorities. It seems evident to me that a woman who is easily identifiable as a lesbian is more likely to be a target of harassment and abuse by the police. Such a woman is not only challenging the social norm of heterosexuality, she is also transgressing the social mores regarding the role of women in society. In his affidavit, Mr. xxxxxxxxx expresses this fact succinctly:

In machista culture, the woman is subservient to the man in all facets of her existence and in particular to the sexual gratification of the man. As such, women are seen as objects satisfying the needs of men, and therefore subject to the whims and needs of the man. If a woman is also a lesbian she is seen as a danger to the status quo because she has rejected the notion that she is second to a man.¹²²

According to the panel, the Canadian Gender Guidelines offer clear guidance in recognizing that some women can fear persecution “... as a consequence for failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin.”¹²³ Judith Ramirez, who wrote the decision, added: “I therefore find that this claim is based on membership in two particular social groups, women and homosexuals, the two indivisible elements of being a lesbian woman.”¹²⁴ Other sexual minority cases have also since referred to the Canadian Gender Guidelines.¹²⁵

3.1.3. Gender identity

The APA defines the term “transgender” as describing “people whose gender identity (sense of themselves as male or female) or gender expression differs from that usually associated with their birth sex... [b]roadly speaking, anyone whose identity, appearance, or behavior falls outside of conventional gender norms.”¹²⁶ This may lead some to seek ‘gender reassignment,’ which usually involves hormones or

¹¹⁹ UNHCR Guidelines, *supra* note 18 at para 1.

¹²⁰ UNHCR Gender Guidelines, *supra* note 98 at para 16.

¹²¹ *Re CLQ*, *supra* note 28.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ See *Smith v Canada (Citizenship and Immigration)*, 2012 FC 1283 at paras 55-56 (available on QL); *Martinez*, *supra* note 97 at paras 73-75.

¹²⁶ American Psychological Association, “Sexual Orientation and Homosexuality: Answers to Your Questions”, online: APA <<http://www.apa.org/topics/sexuality/transgender.aspx>>.

surgery, to bring their physical characteristics into conformity with their gender identity. Others may simply choose to dress in clothes usually worn by the opposite sex.

The APA describes ‘intersex’ conditions as including atypical developments of physical sex characteristics, including abnormalities of the external genitals, internal reproductive organs, sex chromosomes or sex-related hormones.¹²⁷ Some examples include external genitals that cannot be easily classified as male or female, or inconsistency between the external genitals and the internal reproductive organs.¹²⁸

Transgendered claimants have raised their gender identity as an issue before the RPD at least since 1992. Testimony presented before the RPD demonstrates that the disgust society feels toward those who cannot conform to the stereotypical roles for men and women directly affects transgendered persons.¹²⁹ The UNHCR Guidelines explain that “[t]ransgender individuals are often highly marginalized and their claims may reveal experiences of severe physical, psychological and/or sexual violence.”¹³⁰

The UNHCR Guidelines also describe the type of persecutory harms that may confront intersex individuals:

Intersex persons may be subjected to persecution in ways that relate to their atypical anatomy. They may face discrimination and abuse for having a physical disability or medical condition, or for non-conformity with expected bodily appearances of females and males. Some intersex children are not registered at birth by the authorities, which can result in a range of associated risks and denial of their human rights. In some countries, being intersex can be seen as something evil or part of witchcraft and can result in a whole family being targeted for abuse. Similar to transgender individuals, they may risk being harmed during the transition to their chosen gender because, for example, their identification papers do not indicate their chosen gender.¹³¹

Intersex individuals may be viewed by others as transgender. It is important to understand the distinction between the two groups. A report from the European Commission explains it as follows: “Intersex people differ from trans people as their status is not gender related but instead relates to their biological makeup (genetic, hormonal and physical features) which is neither exclusively male nor exclusively female, but is typical of both at once or not clearly defined as either.”¹³²

In all traditional and patriarchal societies — in which non-conformity to clearly defined gender roles is not tolerated — people who identify as the opposite sex, who habitually wear the clothing or adopt the customs of the opposite sex, or who possess physical attributes of both sexes, have reason to fear persecution. Transgendered and intersex people are indisputably perceived as a threat to rigid gender

¹²⁷ American Psychological Association, “Answers to Your Questions About Individuals With Intersex Conditions”, online: APA <<http://www.apa.org/topics/sexuality/intersex.aspx>>.

¹²⁸ *Ibid.*

¹²⁹ *J(HA) (Re)* (4 July 1994), Vancouver V93-01711 (CRDD) (available on QL); *N(OI) (Re)* (14 August 1995), Toronto T 94-07129 (CRDD) (available on QL) [*N(OI) (Re)*]; *Re UJJ* (25 January 1999), Toronto T94-07963 & T94-07973 (CRDD) (available on QL) [*Re UJJ*] (in this matter, the refugee claims of a transsexual claimant and his mother were heard jointly because the mother’s fear of persecution was founded on the fact that as the parent of a transsexual, she was equally condemned by Lebanese society); *Re FLV* (17 June 1999), Toronto T98-08222 (CRDD) (available on QL) [*Re FLV*]; *EHF (Re)* 28 April 1999, Toronto T98-03955 (CRDD) (available on QL); *Re BDK* (13 March 2000), Toronto T98-04159 (CRDD) (available on QL) [*Re BDK*]; *Re JIC* (23 April 2002), Vancouver VA1-00875 (CRDD) (available on QL) [*Re JIC*]; *RPD File No MA48-4150* (23 June 2011), Montreal MA8-04150 (RPD) (available on QL); *Martinez, supra* note 97.

¹³⁰ UNHCR Guidelines, *supra* note 18 at para 10.

¹³¹ *Ibid.*

¹³² Silvan Agius & Christa Tobler, *Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression* (European Union, European Commission: June 2011) online: Refworld <<http://www.refworld.org/docid/4fdedde32.html>>.

and social norms.¹³³ Yet, it is still the case that the Canadian Gender Guidelines are not consistently taken into consideration.¹³⁴

Some decision-makers have had difficulty distinguishing ‘sexual orientation’ from ‘gender identity,’ which may partially explain the lack of gender-specific analyses in transgender and intersex cases.¹³⁵ The UNHCR Guidelines states that “[t]ransgender is a gender identity, not a sexual orientation and a transgender individual may be heterosexual, gay, lesbian or bisexual.”¹³⁶ For example, a Lebanese claimant testified he was born a female but has dressed and acted like a male since childhood.¹³⁷ Furthermore, he has undergone a mastectomy and hormone treatments to change his biological sex. The RPD considered him to be transsexual, but they suggested that his case fell under ‘sexual orientation’: “I find the claimants’ evidence regarding the claimant’s sexual orientation, as an FTM transsexual who has begun the process of gender reassignment, to be credible.”¹³⁸ In fact, it is not the claimant’s sexual orientation that was raised (he considered himself heterosexual) but rather his gender identity: that is, the fact that he was in the process of changing his biological sex.

It is important to refer to transgender claimants by their chosen name and gender identity. If in any doubt, a claimant should be asked which personal pronoun he or she would like used. In *Martinez v Canada*,¹³⁹ the Federal Court concluded that the RPD mistakenly referred to a transgender man using feminine pronouns and found that he was a “transgender woman.” While not a reviewable error in the circumstances of the case, the Federal Court does state: “It is, of course, unfortunate that the RPD would refer to [the male transgender claimant] with terminology that does not reflect his own self-concept.”¹⁴⁰

3.1.4. Intersection of identity markers

Many identity markers may intersect to create particular vulnerabilities to persecution. As mentioned above, gender is an important element to keep in mind. In many societies, what offends the dominant powers is often the way in which lesbians, gay men, transgendered and intersex people step outside the bounds of established social norms.¹⁴¹ It is not so much their sexual behaviour, though that is often an irritant as well, but more so the fact that sexual minorities challenge dominant gender values.

Other factors may also intersect to create layered vulnerabilities.¹⁴² For example, the complex intersection of sexual orientation, gender, and race was seriously considered in relation to a claim from a

¹³³ For a discussion on the relevance of gender in a transgender refugee claim, see Jason Cox, “Redefining Gender: Hernandez-Montiel v. INS” (2001) 24:1 Hous J Int’l L 187.

¹³⁴ *Re BDK*, *supra* note 129. But see *Martinez*, *supra* note 97 at paras 73-75.

¹³⁵ See e.g. *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1297, 68 Imm LR (3d) 118; *Re JIC*, *supra* note 129; *Re UJJ*, *supra* note 129. But in other cases, the distinction is clearly identified: see *N(OI) (Re)*, *supra* note 129; *Re FLV*, *supra* note 129; *Re BDK*, *supra* note 129.

¹³⁶ UNHCR Guidelines, *supra* note 18 at para 10.

¹³⁷ *Re UJJ*, *supra* note 129.

¹³⁸ *Ibid.*

¹³⁹ *Martinez*, *supra* note 97.

¹⁴⁰ *Ibid* at para 68.

¹⁴¹ “Persecution due to homosexuality is regarded as gender-related as it pertains to the roles which men and women are expected to play in society”: K Landgren, “Gender Related Persecution” in M Ellegaard, ed, *Women and Asylum - A Conference Report on Gender Related Persecution* (Danish Refugee Council, Information & Documentation Department: 1997). See also Law, *supra* note 88.

¹⁴² *Vasallo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 673 at para 2, 409 FTR 315 (claimant stated he had a well-founded fear of persecution based on sexual orientation, race and political opinion); *Erduran v Canada (Minister of Citizenship and Immigration)* 2011 FC 1299 at para 1 (available on QL) (claimant alleged persecution based on his Kurdish ethnicity and his identity as a gay man); *Kadab v Canada (Minister of Citizenship and Immigration)* 2010 FC 1223 at para 3 (available on QL) (claimant feared persecution based on his membership in a particular social group, that of Arab Muslim homosexuals in Israel).

Tatar lesbian from Russia.¹⁴³ In assessing the risk of persecution faced by the claimant, the RPD concluded the following:

[...] it is clear that your additional characteristics of being a lesbian and being Tatar significantly increase your vulnerability to rape and physical attack. They do that in several ways. They marginalize you from society, which marginalizes you economically as well as socially. They also make you, certainly this rape incident is an example, more vulnerable to attack because of being perceived as a lesbian. The fact of being a lesbian, in terms of some rapists, is a reason for attacking you. It is also a reason for receiving even less protection from society.¹⁴⁴

The claimant was granted refugee status on the basis that her sexual orientation, ethnic identity and identity as a woman made her vulnerable to persecution.

Finally, sexual orientation or gender identity may be only one aspect of the persecution faced by people with HIV/AIDS¹⁴⁵ or individuals who engage in specific kinds of sexual behaviour (for example, prostitution or survival sex).

3.2. Establishing membership in the particular social group

Since gay, lesbian, bisexual, transgender and intersex claimants generally assert that they are members of a “particular social group,” one of the legal elements to be satisfied is the claimant’s membership in that group. Assessing the veracity of the claimant’s sexual orientation or gender identity is a very difficult, sensitive and complex task in the context of an administrative or quasi-judicial hearing. In particular, the very private and intimate nature of an individual’s sexual orientation or gender identity poses real challenges for decision-makers, who are nonetheless required to examine the claimants’ personal lives and intimate relationships.

3.2.1. Credible or trustworthy evidence

Sexual minority claimants may face challenges in establishing LGBTI status. Few LGBTI claimants are able to provide conclusive documentary or witness evidence to confirm their membership in the particular social group.¹⁴⁶ Jenni Millbank cites an Australian decision that noted:

[I]t is difficult for applicants to substantiate and for decision-makers to evaluate [claims on sexual orientation]. By their very nature, they involve private issues of self-identity and sexual conduct, and sometimes personal issues for individuals that may be stressful or unresolved. Social, cultural

¹⁴³ *Re MRD* (8 August 1998), Ottawa A98-00268 (CRDD) (available on QL).

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ballestro*, *supra* note 27; *Chalita Gonzalez v Canada (Minister of Citizenship and Immigration)* 2011 FC 1059 (available on QL); *Romero v Canada (Minister of Citizenship and Immigration)* 2012 FC 709.

¹⁴⁶ Barry O’Leary discusses the difficulty of proving sexual identity in the context of UK refugee law: Barry O’Leary, “We Cannot Claim Any Particular Knowledge of the Ways of Homosexuals, Still Less of Iranian Homosexuals: The Particular Problems Facing Those Who Seek Asylum on the Basis of Their Sexual Identity” (2008) 16 *Fem Legal Stud* 87 at 93-94. See also Derek McGhee, “Assessing Homosexuality: Truth, Evidence and the Legal Practices for Determining Refugee Status – The Case of Ioan Vraciu” (2000) 6:1 *Body & Society* 29. Claimants themselves will sometimes provide supporting evidence of their sexual orientation, including asking their partners, families or friends to testify at the refugee hearing; providing photographs or videos of partners or activities in the gay, lesbian, bisexual, or transgender communities; submitting letters or proof of membership in gay, lesbian, bisexual, and transgender organizations; and presenting medical and psychological reports.

and religious attitudes to homosexuality in an applicant's society may exacerbate such problems.¹⁴⁷

Therefore, one element in particular will be most determinative in establishing whether the claimant is a member of the particular social group: the claimant's credibility.

The determination of a claimant's membership in a particular social group will require decision-makers to determine whether they believe the claimant's evidence to that effect. In order to prove their membership, LGBTI must present factual evidence that supports their claim.¹⁴⁸ The claimant bears the onus of proof, and members of the RPD must determine whether the onus has been satisfied.¹⁴⁹ In doing so, members of the RPD will be called upon to assess the credibility of the claimant, other witnesses and the documentary evidence.

The credibility of a claimant's evidence relating to their membership in a particular social group "has to be evaluated in the light of what is generally known about conditions and the laws in the claimant's country of origin, as well as the experiences of similarly situated persons in that country."¹⁵⁰ Therefore, assessing the credibility of a claimant will require having some knowledge and information about the gay, lesbian and transgendered communities in the country of origin, and the legal and social reality of sexual minorities. It is important that decision-makers access reliable and accurate information about sexual minorities in a claimant's country of origin.

Finally, it is important to underline that determinations related to a claimant's membership in a particular social group are to be guided by the same principles and case law applicable to all assessments of credibility, including making clear findings on credibility and providing adequate reasoning.¹⁵¹

3.2.2. Lack of corroborating evidence

The UNHCR Guidelines suggest that a claimant's "own testimony is the primary and often the only source of evidence, especially where persecution is at the hands of family members or the community."¹⁵² As the Federal Court has observed, "the acts and behaviours which establish a claimant's homosexuality are inherently private"¹⁵³ and "there are often inherent difficulties in proving that a refugee claimant has engaged in same-sex sexual activities."¹⁵⁴ In such cases, the Guidelines suggest that "[s]elf-identification as LGBTI person should be taken as an indication of the applicant's sexual orientation and/or gender identity."¹⁵⁵ Indeed, the UNHCR Handbook, affirms that "if the applicant's account appears credible, he [or she] should unless there are good reasons to the contrary, be given the benefit of the doubt."¹⁵⁶

In *A, B and C v Staatssecretaris van Veiligheid en Justitie*¹⁵⁷, the European Union Court of Justice (EUCJ) was asked how adjudicators should assess the credibility of claimants in relation to their sexual

¹⁴⁷ Millbank, *supra* note 81 at 400.

¹⁴⁸ *Zamanibakhsh v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1137 at para 16, 118 ACWS (3d) 272.

¹⁴⁹ *Ibid.*

¹⁵⁰ See Immigration and Refugee Board, Refugee Protection Division, Legal Services, *Assessment of Credibility in Claims for Refugee Protection* (31 January 2004) at para 1.2 [Immigration and Refugee Board, *Assessment*].

¹⁵¹ *Ibid.*

¹⁵² UNHCR Guidelines, *supra* note 18 at para 64.

¹⁵³ *Ogunrinde v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 760 at para 42 (available on QL).

¹⁵⁴ *Gergedava v Canada (Minister of Citizenship and Immigration)*, 2012 FC 957 at para 10 (available on QL).

¹⁵⁵ UNHCR Guidelines, *supra* note 18 at para 63.

¹⁵⁶ UN High Commissioner for Refugees, *Handbook*, *supra* note 24 at para 35.

¹⁵⁷ *A, B and C v Staatssecretaris van Veiligheid en Justitie*, C-148/13 – C150/13, European Union: Court of Justice of the European Union, 7 November 2013, available at: <

orientation. In the joined cases, three refugee claimants were disbelieved with respect to their sexual identity as gay men. The EUCJ held that self-identification of sexual orientation is the starting-point and that an “assessment must take account of the individual situation and personal circumstances of the applicant”¹⁵⁸. Adjudicators must therefore avoid relying on stereotypes as this does not allow them to take account of the individual’s personal circumstances.

In *Maldonado v Canada*,¹⁵⁹ the Federal Court of Appeal stated that when a claimant swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness. This principle was applied in *Sadeghi-Pari v Canada*,¹⁶⁰ where the Federal Court found the following in relation to a sexual orientation claim:

However, a lack of corroborating evidence of one’s sexual orientation, in and of itself, absent negative, rational or plausibility findings related to the issue, would not be enough, in my opinion, to rebut the *Maldonado* principle of truthfulness.¹⁶¹

The facts in *Houshan v Canada*¹⁶² were distinguished from those in *Sadeghi-Pari*. In *Houshan*, the RPD made negative credibility findings in relation to the claimant’s sexual orientation. The Federal Court found that the RPD’s conclusions were not reviewable because they were based on negative, rational plausibility findings that rebutted the *Sadeghi-Pari* presumption of truthfulness.¹⁶³

In sum, in rejecting claimants’ testimonies regarding their sexual orientation or gender identity, members of the RPD must be careful to clearly identify the contradictions, inconsistencies, omissions or implausibility that support a negative conclusion on the issue of membership in the particular social group.

3.2.3. Implausibility

Members of the RPD are “entitled to make reasonable findings based on implausibility, common sense and rationality, and may reject evidence if it is not consistent with the probabilities affecting the case as a whole.”¹⁶⁴ However, members of the RPD must be careful when rendering a decision based on a lack of plausibility. The Federal Court has cautioned that because refugee claimants come from different cultures, actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant’s social, political and personal surroundings.¹⁶⁵

Moreover, when a member of the RPD makes inferences concerning the plausibility of the evidence, there must be a basis in the evidence to support the inferences.¹⁶⁶ The Federal Court has stated that “findings of implausibility are inherently subjective assessments which are largely dependent on the individual Board members’ perceptions of what constitutes rational behaviour.”¹⁶⁷ Therefore, the RPD

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=160244&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=558541> > [A, B and C]

¹⁵⁸ *Ibid.*, para 52, 57.

¹⁵⁹ *Maldonado v Minister of Employment and Immigration* (1980), 31 NR 34, 1 ACWS (2d) 167 (FCA).

¹⁶⁰ 2002 FCA 80, [2002] 3 FCR 565.

¹⁶¹ *Ibid* at 38.

¹⁶² 2010 FC 650 (available on QL).

¹⁶³ *Ibid* at para 20.

¹⁶⁴ Immigration and Refugee Board, *Assessment*, *supra* note 150 at para 2.3.5.

¹⁶⁵ *Ibid* at para 1.1.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Leung v Canada (Minister of Employment and Immigration)*, (1994) 81 FTR 303 at paras 14-16 (available on QL).

decision must identify all of the facts which form the basis of the implausibility conclusions.¹⁶⁸ The Federal Court has also “repeatedly warned that implausibility findings cannot be made on the basis of stereotypical attitudes or projected behavior that is unsupported by the evidence.”¹⁶⁹

In a claim based on sexual orientation, the RPD concluded as implausible the claimant’s statement that his classmates and teachers discovered his homosexuality, given he also testified he lived a much closeted life. The Federal Court stated:

It is obvious that the Applicant’s fellow students did not need a public declaration to label and target him as a homosexual. It appears that the CRDD had trouble believing that the Applicant would be so labelled and targeted because he did not act as the CRDD might expect of a homosexual in Romania. As there is no evidence on the record to establish the content of the profile and behaviour the CRDD expected, I find that the implausibility finding unsupported by evidence and cannot stand.¹⁷⁰

In another case, the Federal Court held that the RPD’s implausibility finding could not be sustained; the Court was of the view the RPD speculated when it concluded that a father’s shame over a daughter’s homosexuality would outweigh his outrage, and it was implausible that the father would have called relatives to tell them his daughter was gay.¹⁷¹ The Federal Court found two reviewable plausibility findings in *Dosmakova v Canada (Citizenship and Immigration)*.¹⁷² In that case, the RPD did not believe the claimant’s sexual orientation because she hadn’t realized her same-sex attractions until she entered into a lesbian relationship in her mid-50s. The RPD held that this was not plausible since “most homosexual people have some realization with respect to their sexual orientation when they begin to explore their sexuality in their teens or early twenties.”¹⁷³ The RPD also found the claimant’s emotional reaction to be implausible. The claimant had described that in entering a lesbian relationship “she felt happiness and sexually satisfied, that she was happy about it and had no regrets.”¹⁷⁴ The RPD concluded that given the homophobia in her country, “it is reasonable to expect that she would express some misgivings with respect to her initial feelings.”¹⁷⁵ The Federal Court overturned the decision, because the plausibility findings were “unsupported by the evidence and [were] patently unreasonable.”¹⁷⁶

3.2.4. Stereotyping

There are no universal characteristics and qualities that typify sexual minorities. The experience of sexual minorities around the world is tremendously diverse and different.¹⁷⁷ This is particularly true of the multinational and multicultural context of the refugee hearing room where stereotypical views of

¹⁶⁸ *Ibid.*

¹⁶⁹ *Dosmakova v Canada (Citizenship and Immigration)*, 2007 FC 1357 at para 12 (available on QL) [*Dosmakova*]. The Federal Court cites the additional cases: *Boteanu v Canada (Minister of Citizenship and Immigration)*, 203 FCT 299, 121 ACWS (3d) 329 [*Boteanu*]; *Slim v Canada (Minister of Citizenship and Immigration)*, 2004 FC 706, 134 ACWS (3d) 293 [*Slim*]; *Herrera v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1233, 142 ACWS (3d) 304 [*Herrera*]; *Kamau v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1245, 142 ACWS (3d) 303.

¹⁷⁰ *Boteanu*, *supra* note 169 at para 7..

¹⁷¹ *Tsyhanko v Canada (Minister of Citizenship and Immigration)*, 2008 FC 819 at paras 16-18 (available on QL).

¹⁷² *Dosmakova*, *supra* note 169.

¹⁷³ UNHCR Guidelines, *supra* note 18 at para 11.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid* at para 13.

¹⁷⁷ See Peter Drucker, ed, *Different Rainbows* (London: Gay Men’s Press, 2000); Gilbert Herdt, *Same Sex Different Cultures* (Boulder, CO: Westview Press, 1997); Stephan Lokosky, ed, *Coming Out: An Anthology of International Gay and Lesbian Writings* (New York: Pantheon Books, 1992); Neil Miller, *Out in the World* (New York: Random House, 1992).

sexual minorities are even more likely to be inaccurate and misleading when applied to a different cultural context. Jenni Millbank, for instance, has documented a troubling trend in Australian case law where decision-makers doubt or disbelieve the sexual identity of refugee applicants when they do not fit “highly stereotyped and westernised notions of ‘gayness’.”¹⁷⁸ Barry O’Leary claims similar problems exist with some UK decision-makers.¹⁷⁹ Cases in the US and Canada have also relied on highly problematic stereotypes.¹⁸⁰

Individuals experience and live their sexual orientation in many different ways, depending on their country of origin, gender, culture, social class, education, religion, family background and socialization. There is no uniform way in which LGBTI recognize and act on their sexual orientation or gender identity. Therefore, answers to decision-makers’ questions about a person’s sexual orientation will widely vary.

Hopefully, the increased visibility of lesbians, gay men and bisexuals in North America has informed most Canadians about some of the realities of the lives of lesbians and gay men living in Canada. Many live discreet or clandestine lives; others share their lives with their family and friends; and a smaller number engage in political and activist work for lesbian and gay rights. Even in Canada, women and men suffer from discrimination, harassment, and even violence because of their sexual orientation. Most important is the fact that every lesbian, gay and bisexual person in Canada experiences and lives their sexual orientation in a wide variety of ways.

While the experience of lesbians and gay men in this country is diverse, it is nothing compared to the tremendously divergent and different experiences of sexual minorities around the world. Human sexuality is strongly influenced by social, cultural, religious, and even political environments. It is also an aspect of human experience that is poorly understood and tremendously repressed in many countries. Moreover, individuals who have a different sexual orientation or gender identification from the majority are invariably among the most marginalised and oppressed groups in any society. Given the diversity of the global context, it is dangerous to make assumptions about the lives of members of a sexual minority. The UNHCR Guidelines underline how important it is to avoid relying on stereotypical perceptions of sexual minorities in determining their membership in the particular social group: “This can be misleading in establishing an applicant’s membership of a particular social group. Not all LGBTI individuals look or behave according to stereotypical notions.”¹⁸¹ The EUCJ has also held that adjudicators must avoid relying on stereotypes as this does not allow them to take account of the individual’s personal circumstances.¹⁸²

The Federal Court has also clearly stated that using stereotypes is inappropriate. In *Dosmakova v Canada*, Justice Dawson observed “that plausibility findings cannot be made on the basis of stereotypical attitudes or projected behaviours that is unsupported by the evidence.”¹⁸³

In a recent case, the Federal Court held that the RPD’s “insistence that an individual needs to go to the gay village to be gay” to be “stereotypical and thus unreasonable.”¹⁸⁴ In yet another recent case, the Federal Court strongly rejected a plausibility finding based on an unacceptable stereotype. The Court held that the RPD was “effectively saying that gay men are promiscuous and that they are incapable of

¹⁷⁸ Millbank, *supra* note 81 at 392.

¹⁷⁹ O’Leary, *supra* note 146 at 89-91.

¹⁸⁰ See *In Re Vega Soto*, discussed in Fadi Hanna, “Punishing Masculinity in Gay Asylum Claims” (2005) 114 Yale LJ 913 and in Stephen Pischl, “Circumventing Shari’a: Common Law Jurisdictions’ Responses to Persecuted Sexual Minorities’ Asylum Claims” (2006) 5 Wash U Global Stud L Rev 425 at 438-39; *Trembliuk v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1264, 126 ACWS (3d) 853 [*Trembliuk*].

¹⁸¹ UNHCR Guidelines, *supra* note 18 at para 49.

¹⁸² *A, B and C*, *supra* note 157 at para 62.

¹⁸³ *Dosmakova*, *supra* note 169.

¹⁸⁴ *Essa v Canada (Citizenship and Immigration)*, 2011 FC 1493 at paras 30-31 (available on QL) [*Essa*].

living in monogamous relationships,” and that “no gay man would choose to live outside of the gay community.”¹⁸⁵ Because of the use of stereotypes, the Federal Court rejected all of the RPD’s credibility findings: “The idea that gay men are invariably promiscuous and incapable of establishing stable relationships is a pejorative characterization and it colours all of the Board’s evidentiary findings, as well as its state protection finding.”¹⁸⁶

In a 2003 judicial review, the Federal Court found that the RPD wrongly relied on stereotypes about gay men in rejecting a Ukrainian teenager’s refugee claim.¹⁸⁷ The Court stated that inferences made by the RPD “were based on stereotypical profiles that simply cannot be assumed to be appropriate to all persons of homosexual orientation . . .”¹⁸⁸ In 2004, the Federal Court of Canada allowed an application for judicial review because the RPD had erred in stating that “it is surprising that the claimant did not have any problems with the authorities even though his appearance and his artistic and occupational activities over many years might have suggested a tendency or orientation other than heterosexual.”¹⁸⁹ In a similar finding, the Federal Court held in a 2005 ruling that the RPD’s requirement that a claimant be effeminate in appearance or behaviour constituted a “thoroughly discredited stereotype which should not have any bearing on the Board’s judgment of the Applicant’s credibility.”¹⁹⁰ In another case, a Colombian woman alleged that “[...] as a result of her physical attributes, including her manner of speaking and walking, physical appearance, and her choice of attire, she is a visible target for cleansing squads and skinhead groups.”¹⁹¹ The RPD was not convinced; the decision reveals stereotypical ideas of how lesbians appear: “The claimant presents as an articulate, professional, well-groomed, and attractive young woman. Based on all these considerations, including the fact that she has yet to be targeted in Colombia as a result of her alleged physical attributes, the panel cannot conclude that the claimant’s sexual orientation would be physically obvious to intolerant and bigoted segments of Colombian society.”¹⁹² Viewing gay men as effeminate or lesbians as masculine reveals prejudicial stereotypes about gay men and lesbians, and a narrow understanding of the construction of masculinity and femininity.

Manifestly, decision-makers should be very cautious about assessing a claimant’s membership in a particular social group based on the perception of the claimant’s physical appearance, mannerisms or manner of dress, or on any expectations of how they are to behave. Such conclusions may constitute stereotyping unless based on a sound evidentiary foundation, such as evidence of how the claimant would be perceived in his or her home country. The Federal Court has stated that determinations of ethnicity cannot be based on the physical appearance of the claimant if such observations are simply based on the decision-maker’s observations of a claimant’s appearance or on stereotypical

¹⁸⁵ *Latsabidze v Canada (Citizenship and Immigration)*, 2012 FC 1429 at paras 2-3 (available on QL).

¹⁸⁶ *Ibid* at para 5 (the Federal Court notes that the RPD member used the same promiscuity stereotypes in another case that was overturned: *Kornienko v Canada (Citizenship and Immigration)*, 2012 FC 1419 (available on QL).

¹⁸⁷ *Trembluk, supra* note 180. But see *Laszlo v Canada (Minister of Citizenship and Immigration)*, 2005 FC 456 at para 10, 44 Imm LR (3d) 91 (the Federal Court concluded that the case is not a situation of stereotyping along the lines of *Trembluk, supra*, but rather one where the applicant failed to establish his homosexuality with credible evidence. The Federal Court concluded that the Board makes a logical plausibility finding that a person belonging to a persecuted minority would be interested in a homosexual support association in his country, the documentation of which he submits as evidence).

¹⁸⁸ *Ibid* at para 8.

¹⁸⁹ *Slim, supra* note 169 at para 3. The Federal Court held that these comments betrayed a stereotypical and prejudicial view of homosexuals “and cannot be used to discredit the applicant’s stated fear of being persecuted by the Lebanese authorities on the basis of his sexual orientation.”

¹⁹⁰ *Herrera, supra* note 169 at para 12.

¹⁹¹ *PWZ (Re)* (7 March 2000), Vancouver V99-00892 (CRDD) (available on QL).

¹⁹² *Ibid*.

assumptions.¹⁹³ It is strongly suggested that the same principle applies to the determination of a claimant's sexual orientation or gender identity.

3.2.5. Appropriate enquiries and difficulties relating to testifying about sexual orientation and gender identity

Homosexuality remains a controversial topic for some Canadians. While the lives of Canadian lesbians and gay men have significantly improved in the last few decades, the levels of discrimination, homophobia and violence remain significant. Debates over the issue of same-sex marriage revealed that many Canadians held strong views against homosexuality.¹⁹⁴ It is important that decision-makers reflect on their own prejudices and assumptions about homosexuality in order for them to be able to fairly assess the credibility of a sexual minority's testimony. The UNHCR Guidelines recommend that targeted training sessions be held to ensure adjudicators and staff possess an awareness of LGBTI issues and that LGBTI claimants are interviewed by officials who are well informed about the distinctive aspects of LGBTI refugee claims.¹⁹⁵ The recurring training conducted by the IRB on sexual orientation and gender identity is certainly among the best practices in this area.¹⁹⁶

Claimants may have difficulties discussing their sexual orientation or gender identity. For refugees around the world, asylum claims based on political opinion, religion, nationality or race are for the most part well-known and established grounds. There is generally no sense of shame or feeling of self-oppression in revealing the kind of information required to found their claim on these grounds. For sexual minorities, sexual orientation and gender identity issues may carry with them a sense of shame, self-hating and embarrassment given the very personal and private nature of the topic, and may be accompanied by fears of losing their life, freedom or livelihood. It is therefore important for decision-makers to keep in mind that it may be very difficult for sexual minorities to speak about their sexual orientation or gender identity and their lives, particularly to state officials. The UNHCR Guidelines concur and state that “[e]xperiences of disapproval and of “being different” or the “other” may result in feelings of shame, stigmatization or isolation.”¹⁹⁷ The Guidelines further suggest that some LGBTI individuals “may be deeply affected by feelings of shame, internalized homophobia and trauma, and their capacity to present their case may be greatly diminished as a consequence. Where the applicant is in the process of coming to terms with his or her identity or fears openly expressing his or her sexual orientation and gender identity, he or she may be reluctant to identify the true extent of the persecution suffered or feared.”¹⁹⁸ Since sexuality is linked to intimate aspects of an individual's personal identity, the EUCJ held that adjudicators should not make adverse findings where it is accepted that disclosure of sexual orientation or identity is legitimately delayed due to the intimate nature of this aspect of human identity.¹⁹⁹

¹⁹³ Immigration and Refugee Board, *Assessment*, *supra* note 150 at 2.3.5; *Gyorgyakab v Canada (Minister of Citizenship and Immigration)* 2005 FC 1119 at paras 15-16 (available on QL).

¹⁹⁴ See Kathryn Blaze Carlson, “The True North LGBT: New Poll Reveals Landscape of Gay Canada” *The National Post* (6 July 2012), online: <<http://news.nationalpost.com/2012/07/06/the-true-north-lgbt-new-poll-reveals-landscape-of-gay-canada/#anchor>>; “Poll Shows Canadians Split over Same-sex Marriage” *CBC News* (5 September 2003), online: <<http://www.cbc.ca/news/canada/story/2003/09/04/samesexpoll030904.html>>.

¹⁹⁵ UNHCR Guidelines, *supra* note 18 at para 60.

¹⁹⁶ For a description of the Canadian training, as well as measures adopted in other jurisdictions and agencies, see LaViolette, “Overcoming Problems with Sexual Minority Refugee Claims”, *supra* note 1.

¹⁹⁷ UNHCR Guidelines, *supra* note 18 at para 63.

¹⁹⁸ *Ibid* at para 59.

¹⁹⁹ *A, B and C*, *supra* note 157 at para 69.

Communication difficulties may be exacerbated by the need to rely on interpreters in the hearing room. The UNHCR Guidelines recognize that “the interpreter must avoid expressing, whether verbally or through body language, any judgement about the applicant’s sexual orientation, gender identity, sexual behaviour or relationship pattern.”²⁰⁰ Indeed, “[i]nterviewers and interpreters who are uncomfortable with diversity of sexual orientation and gender identity may inadvertently display distancing or demeaning body language.”²⁰¹ In a recent case, the Federal Court noted that a translation difficulty was at the heart of an inconsistency finding made by the RPD. In that case, the Federal Court held that the RPD overlooked the testimony of the interpreter that Chinese characters could mean both ‘sodomy’ and ‘prostitution,’ and that one translation, rather than showing a discrepancy, supported the claimant’s version of events.²⁰²

In many countries, repression against sexual minorities is state sponsored or encouraged, so it is difficult for many to imagine that state officials could possibly be anything less than hostile to discussions of homosexuality. Indeed, some individuals believe that to speak frankly about their intimate life and sexual orientation or gender identity would only prejudice their case and exclude them from the refugee protection system. For instance, some gay and lesbian claimants have indicated that concerns about negative repercussions to their coming out explain either delays in applying for refugee protection or omissions in first mentioning sexual orientation as a basis for their fear of persecution.²⁰³ The UNHCR Guidelines properly suggest that:

Adverse judgements should not generally be drawn from someone not having declared their sexual orientation or gender identity at the screening phase or in the early stages of the interview. Due to their often complex nature, claims based on sexual orientation and/or gender identity are generally unsuited to accelerated processing or the application of “safe country of origin” concepts.²⁰⁴

Decision-makers must remember to be sensitive with regard to questioning claimants about current or past relationships (presuming they have been involved in a same-sex relationship) since it involves personal and intimate information that the claimant may be reluctant to discuss, or have difficulty communicating in a quasi-judicial hearing. In some cases, claimants have asked their current partner to testify or submit an affidavit attesting to their relationship.²⁰⁵ It would be inappropriate, however, to expect a couple to be physically demonstrative at a hearing as a way to establish their sexual orientation.²⁰⁶

The EUCJ concluded that questions specifically relating to sexual practices are contrary to the fundamental right to respect for private and family life. Moreover, claimants should not be required to perform homosexual acts or submit evidence of sexual acts in photos or videos. Stating that there is no medical test to prove sexual identity, the EUCJ also rejected the use of tests like phallometry²⁰⁷. The

²⁰⁰ *Ibid* at para 60.

²⁰¹ *Ibid*.

²⁰² *Su*, *supra* note 63 at paras 7-9.

²⁰³ In some cases, claimants concocted false stories rather than based their refugee claims on sexual orientation. See *Re Q(BC)* (4 January 1993), Montreal M92-02751 (CRDD) (available on QL); *J(FH)(Re)*, *supra* note 96.

²⁰⁴ UNHCR Guidelines, *supra* note 18 at para 59. Millbank found that delay in sexuality claims “rarely was a major factor in negative determinations”: Jenni Millbank, “The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21:1 Int’l J Refugee L 1 at 14 [Millbank, “Ring of Truth”].

²⁰⁵ See *Essa*, *supra* note 184 at para 32; *Kazondunge v Canada (Citizenship and Immigration)*, 2012 FC 1310 at para 5 (available on QL).

²⁰⁶ UNHCR Guidelines, *supra* note 18 at para 64.

²⁰⁷ The practice of ‘phallometric testing’ was used in the Czech Republic and it consists in verifying the physical reaction to heterosexual pornographic material of gay men who have filed a claim for asylum on the basis of homosexual orientation.

evidence gathered in these ways infringes human dignity, and does not necessarily have probative value. The court added that “the effect of authorising or accepting such types of evidence would be to incite other applicants to offer the same and would lead, de facto, to requiring applicants to provide such evidence.”²⁰⁸

While the Federal Court held that it is open to the RPD drawing a negative inference from an applicant's inability to clearly describe sexual activities with an alleged lover,²⁰⁹ the UNHCR Guidelines are clear that “[a]pplicants should never be expected or asked to bring in documentary or photographic evidence of intimate acts.”²¹⁰ It is further suggested that asking questions about actual sexual practices can be an improper way to determine a claimant's sexual orientation or gender identity. Such questions can cause embarrassment, shame, humiliation and confusion, which in turn will make a credibility assessment that much harder to make. In fact, the Federal Court has also concluded that decision-makers should not define a claimant's homosexuality by the performance of certain acts.²¹¹

In addition, some lesbians and gay men have been the victims of sexual assault or sexual abuse at the hands of the agents of persecution.²¹² Similar to the sexual assault of women, rape can be used as a tool to torture, humiliate and degrade LGBTI. Questioning surrounding such events should be conducted with the same respect and sensitivity as in the case of sexual assault victims more generally. In a 2012 decision, the Federal Court characterized comments made by the RPD that a claimant “was not particularly young when he was sexually abused at age 12” as “sarcastic and inappropriate.”²¹³

The one aspect of the lives of sexual minorities that is universal is the pervasive societal rejection of their sexual orientation or gender identity. There is no country where LGBTI can grow up free of prejudice, discrimination, persecution or repression. The result is that most LGBTI will struggle with their sexual orientation or gender identity at some point in their lives, and that struggle will often move them away, or place them in opposition of their families, friends, communities and society in general. It is suggested that inquiries into areas that touch upon the claimant's personal experience as LGBTI will provide the strongest basis for assessing the credibility of the claimant on the issue of whether he or she is a member of the particular social group.

But it is important to remember that how people experience sexuality and persecution may differ markedly from one claimant to another, even if they are from the same country. It cannot be stressed enough, however, that there are no true or uniform answers to questions about a claimant's experience of: their sexual orientation or gender identity; the reactions of their family and community; and their interaction with the larger society and the agents of persecution. The objective of questioning a claimant about their membership in a particular social group is to elicit evidence from the claimant that will assist in determining credibility. It is not so much the uniformity or homogeneity of the answers that is important, as answers to these types of questions can differ from one individual to the next. Rather, the fact that the evidence elicited through this questioning will assist in evaluating the consistency and plausibility of the testimony as well as the overall demeanour of the claimant is important.

²⁰⁸ *A, B and C*, supra note 157 at para 66.

²⁰⁹ *Magradze v Canada (Minister of Citizenship and Immigration)*, 2006 FC 20 at para 6 (available on QL) [*Magradze*].

²¹⁰ UNHCR Guidelines, supra note 18 at para 64.

²¹¹ *Magradze*, supra note 209 at para 6.

²¹² *N(LX)(Re)*, supra note 96; *J(FH)(Re)*, supra note 96; *H(YN)(Re)*, supra note 96; *T94-06899* (23 January 1995) (IRB); *Re SZR*, supra note 96; *Re B(WB)*, supra note 96; *Re I(XW)*, supra note 96; *Re D(CJ)*, supra note 96; *Re JJY*, supra note 96; *Re CDT*, supra note 96; *Re VYF*, supra note 96; *Re GEK*, supra note 96; *Re ORC*, supra note 96; *Re CRH*, supra note 96; *Re BWL*, supra note 96; *Re SEX*, supra note 96; *Re JKD*, supra note 96; *Re TBE*, supra note 96; *Re DE A*, supra note 96; *Re JME*, supra note 96; *Re FVY*, supra note 96; *Re UOD*, supra note 96; *Re YJE*, supra note 96; *Re NPQ*, supra note 96; *Re PJX*, supra note 96.

²¹³ *Diallo v Canada (Citizenship and Immigration)*, 2012 FC 562 at para 10 (available on QL) (the court concluded that the RPD's conduct could not be praised or even condoned, but it did not suggest bias or a lack of impartiality).

Jenni Millbank has documented Australian refugee decisions where the questioning to assess the veracity of claims to membership of a group based on sexuality or gender identity was contentious and at times highly inappropriate. For instance, Millbank asserts that:

... in numerous cases it appears from the text of decisions that applicants were questioned principally about matters such as the locations and names of gay nightclubs in Sydney and Melbourne to assess their familiarity with the gay 'scene'. Surely it is an unreasonable expectation of individuals from elsewhere in the world who are attracted to members of the same sex that they should be interested in and attend gay bars and clubs in inner-city locations in Australia as a matter of course upon their relocation here. Yet when applicants responded that they were not familiar with the locations of gay bars, asserted a preference for socialising privately or in other venues or suburbs, or claimed to have gone to mainstream pornography venues for male/male sex, they were disbelieved. (Moreover when applicants did name bars they had attended, some tribunal members took steps such as telephoning the named bars to ask whether the staff remembered them.)²¹⁴

In yet another Australian case, an Iranian refugee claimant was questioned about what was presented as universally known or accepted gay cultural icons, with the expectation the claimant would be familiar with such references to Western popular culture.²¹⁵ As Millbank suggests, decision-makers need to avoid relying on "stereotyped ideas of what it means to be gay, or preconceptions as to what a gay identity necessarily entails."²¹⁶

3.3. Imputing membership in a particular social group

It is important to remember that a claimant does not actually have to be a member of the particular social group. According to *Ward*, it is sufficient that the agents of persecution believe the person to be a member of the particular social group.²¹⁷ The UNHCR Guidelines also rightly refer to the fact that a claimant does not actually have to be a member of the particular social group.²¹⁸

This principle was applied by the Federal Court to claims based on sexual orientation in *Dykon v Canada*.²¹⁹ In that case, the claimant based his claim partly on his fear that he would be persecuted on the grounds of sexual orientation. He told the RPD that he had been raped by two Ukrainian men after they confronted him about speaking Russian in a café.²²⁰ The claimant stated he believed that the two men, who had photographed the assault, had spread rumours about the attack. As a consequence, some people believed him to be gay and subjected his mother and him to harassment. The RPD dismissed his claim based on sexual orientation because "there was no evidence presented that the claimant was in fact a homosexual, only that he was perceived as one by some people."²²¹ The Federal Court Trial Division rejected this finding, stating that the RPD seriously erred when it claimed that the applicant did not suffer persecution because he was not in fact gay. The court stated that "it is totally irrelevant . . .

²¹⁴ Millbank, *supra* note 81 at 400.

²¹⁵ *Ibid* at 401-402.

²¹⁶ *Ibid* at 200.

²¹⁷ *Ward*, *supra* note 102 at 747.

²¹⁸ UNHCR Guidelines, *supra* note 18 at para 39.

²¹⁹ (1994), 87 FTR 98, 25 Imm LR (2d) 193. But see *R.E.A.J. v Canada (Minister of Citizenship and Immigration)*, 2012 FC 209 (the Court found that the primary reason for the claimant being targeted was not for his imputed sexual orientation but rather his refusal to sell drugs at his restaurant).

²²⁰ Michael Battista, "Perception is Reality: Ukrainian Man Granted Refugee Status" *XTRA West* (1 December 1994).

²²¹ 87 FTR 98 at para 3, 25 Imm LR (2d) 193.

whether he was in fact a homosexual or not.”²²² It is the beliefs of the persecutors that are important, and in this case the individuals responsible for the harassment perceived the claimant to be a homosexual.

4. State protection

State protection has been an emerging and recurring issue in sexual orientation and gender identity claims. Increasingly, the outcome of many claims depends on whether the claimant has adduced clear and convincing evidence that state authorities cannot or will not protect sexual minorities.

International refugee law was designed to reinforce protection individuals may receive from their own countries. Absent a complete breakdown of the state apparatuses²²³ or an admission by the state authorities that they are unable to protect the claimant, a claimant must advance clear and convincing evidence of the state’s inability to protect him or her. In addition, courts have held that “where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection.”²²⁴ In Canada, the Federal Court of Appeal has held that the burden of proof is proportional to the degree of democracy within the state in question.²²⁵ The more democratic the state, the more available domestic remedies the claimant must exhaust before claiming refugee protection.

The Federal Court has however also stated that democracy alone does not ensure adequate state protection; the quality of the democratic institutions providing that protection must be considered.²²⁶ With respect to Mexico, for instance, the Federal Court has recognized that “Mexico is a functioning democracy”, but it has also noted that “there are well-documented governance and corruption problems that require decision-makers to engage in a full assessment of the evidence place before them on the issue of state protection.”²²⁷ In *Villicana v Canada*, the Federal Court applied this reasoning to a claim made by a gay man and his family; the claimant testified that “the Mexican police discriminate against homosexuals and, as a result, assistance would not be forthcoming.”²²⁸ The Court concluded that the evidence before the RPD suggested “that all police forces in Mexico are riddled with corruption and are operating outside the law” and the RPD “had an obligation to review it”.²²⁹

Several reasons explain the growing relevance of state protection in sexual orientation and gender identity claims. Availability of state protection has impacted the social, political and legal progress in several countries. Legal reforms include the implementation of specific measures to protect the human rights of sexual minorities, including remedies such as mechanisms for individual complaints to an ombudsman, human rights commissions and measures to counter homophobia within police and state security forces. Decision-makers have therefore begun to examine the extent to which a gay man, lesbian, bisexual or transgender person can seek protection in his or her country of origin rather than obtain refugee protection elsewhere.

²²² *Ibid* at paras 3-4.

²²³ *Zalzali v Canada (Minister of Employment and Immigration)*, [1991] FCR 605 (CA) (available on QL).

²²⁴ *Kadenko v Canada (Minister of Citizenship and Immigration)* (1996), 143 DLR (4th) 532 at para 5, 206 NR 272; *Canada (Minister of Employment and Immigration) v Villafranca* (1992), 99 DLR (4th) 334, 18 Imm LR (2d) 130 (FCA); *Sampayo v Canada (Minister of Citizenship and Immigration)* (5 February 2004), Toronto TA3-17809 (RPD) (available on QL).

²²⁵ *KN v Canada (Minister of Citizenship and Immigration)* (1996), 143 DLR (4th) 532 at para 5, 206 NR 272.

²²⁶ See *Katvaru v Canada (Minister of Citizenship and Immigration)*, 2007 FC 612 at para 21 (available on QL).

²²⁷ *Flores Zepeda v Canada (Citizenship and Immigration)*, 2008 FC 491 at paras 17-20, [2009] 1 FCR 237.

²²⁸ *Villicana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1205 at paras 70-77, 86 Imm LR (3d) 191.

²²⁹ *Ibid* at paras 78-79.

Another reason the question of state protection is increasingly relevant in sexual orientation and gender identity claims is the fact that a significant number of claims identify private violence as the source of the feared persecution. Individuals who are not agents of the state often commit violence against sexual minorities — a fact acknowledged in the UNHCR Guidelines.²³⁰ For instance, Shannon Minter states that lesbians, as is the case with other women, are often victims of violence at the hands of family members. They are forced to marry, subjected to psychiatric treatment against their will, deprived of their children and discriminated against in respect of housing, employment, education and health services.²³¹ Gay male claimants also testify about abuse received at the hands of family members²³² and the family and social pressures that require them to conform to strict gender-based social roles. Some of the gay claimants had been forced into marriages of convenience,²³³ while others claim to have been pressured to have children.²³⁴ In such cases, where the agents of persecution are private individuals, the availability of state protection becomes a key issue to be determined as it is presumed that a claimant could turn to the state for protection from family members or other private persecutors.

To rebut the presumption of state protection, refugee claimants must show clear and convincing evidence that state authorities in their countries of origin are unable or unwilling to protect them. This burden is more difficult for sexual minorities for a number of reasons. First, the existence of laws criminalizing homosexual activity can directly impact the availability of state protection. Penal prohibitions, whether enforced or not, can “reinforce persecutory environments and destroy opportunities for [sexual minorities] to seek protection from state authorities.”²³⁵ The UNHCR Guidelines recognize that the existence of criminal sanctions for homosexuality may hinder access to State protection:

Depending on the situation in the country of origin, laws criminalizing same-sex relations are normally a sign that protection of LGB individuals is not available. Where the country of origin maintains such laws, it would be unreasonable to expect that the applicant first seek State protection against harm based on what is, in the view of the law, a criminal act. In such situations, it should be presumed, in the absence of evidence to the contrary, that the country concerned is unable or unwilling to protect the applicant.²³⁶

²³⁰ UNHCR Guidelines, *supra* note 18 at para 35.

²³¹ Minter, *supra* note 82 at IB/5-6. See also *Re DAK* (24 August 2000), Vancouver V99-01904 (CRDD) at para 23 (available on QL) (where the RPD noted that discrimination against lesbians in Mexico happened “usually only within the realm of private life”).

²³² *Re UJY* (19 February 2003), Toronto TA2-16053 (CRDD) (available on QL); *Perez v Canada (Minister of Citizenship and Immigration)* (3 February 2004), Montreal MA3-05082 (RPD) (available on QL). The situation of a Nigerian claimant shows the extent to which family members may become the agents of persecution: “The claimant’s father and his three brothers confronted the claimant while he was at university, broke the information that they had about his homosexuality, horsewhipped him, and mistreated him, whereupon the father involved the village elders in a ritual and gave his son, the claimant, an ultimatum: either he be married or be gotten rid of by the father”: *Re AMA* (17 April 2000), Toronto T99-06098 (CRDD) at para 4 (available on QL).

²³³ *Re FIN* (9 August 1995), Toronto T95-03152 (CRDD) (available on QL); *Re LUM* (29 May 1996), Toronto U94-03926 (CRDD) (available on QL); *Re LUM*; *Re OPK* (18 April 1996), Toronto U95-04575 (CRDD) (available on QL); *Re GUS* (8 October 1996), Toronto T95-07390 (CRDD) (available on QL); *Re UVG*, *supra* note 28. It is ironic that, in certain cases, a marriage or relationship of convenience is the only possible way to escape persecution: *Re LMD* (2 June 1992), Montreal M91-12609 (CRDD) (available on QL); *Re PEU* (11 June 1992), Toronto U91-09661 (CRDD) (available on QL); *Burgos-Rojas v Canada (MCI)* (1999), 162 FTR 142, 85 ACWS (3d) 648; *ORR (Re)* (26 June 2000), Ottawa A99-00956 (CRDD) (available on QL); *CRN (Re)* (10 February 2001), Toronto T99-14739 (CRDD) (available on QL).

²³⁴ *Re LUM*, *supra* note 233: “Being unmarried and without children would always subject me to ridicule and detection as a homosexual, and therefore, always at risk.” See also *Re CYT*, *supra* note 7; *UFS (Re)*, *supra* note 7; *KVT (Re)* (14 April 1999), Ottawa A98-00492 (CRDD) (available on QL).

²³⁵ Kassisch, *supra* note 34 at 56.

²³⁶ UNHCR Guidelines, *supra* note 18 at 36.

A second, related issue is the fact that sexual minorities have to declare their sexual orientation and gender identity in order to access state protection. The question becomes whether this is realistic or reasonable.²³⁷ Human Rights Watch published a report on homophobic violence in Jamaica in 2014 and their findings on police authorities are summarized as follows:

Cases of police violence toward LGBT people appear to have decreased in the decade since Human Rights Watch documented such violence in our 2004 report, *Hated to Death*. However, the persistence of even isolated cases is of great concern given the police's role as a source of protection. At the root of much police abuse appears to be the same intolerance and homophobia found in Jamaican society more broadly. For example, Human Rights Watch interviewed a foot patrol police officer in Montego Bay who said LGBT people were criminals, and deserved the violence they experienced. A detective corporal from CISOCA, also in Montego Bay, told Human Rights Watch: "Gay men need to just stop being gay.... They are just greedy. I even think that the Police Force Order on Diversity should stop."²³⁸

The report details cases where the police failed to intervene, investigate and arrest perpetrators of homophobic attacks. In other cases, the police were the instigators of violence and abuse towards LGBT individuals. In sum, the cases examined by Human Rights Watch support the conclusion that it would be unreasonable for Jamaican gay men and lesbians to seek state protection.

Third, as previously mentioned, independent country information remains hard to find for many parts of the world, and current information is often general and descriptive — rather than specific and evaluative — about state protection. For example, the 2014 ILGA report *State-Sponsored Homophobia* includes very little analysis of the scope, impact and enforcement of laws that criminalize same-sex conduct and their impact on the availability of state protection.²³⁹ It is difficult to rebut the presumption of state protection when human rights documentation is unavailable or provides little information on attitudes and actual practice. While some cases benefit from extensive and wide-ranging human rights documentation,²⁴⁰ others rely on a relatively small range of sources.

Sexual minorities must be able to access State protection in a genuine and meaningful way. The UNHCR Guidelines states that:

Where the legal and socio-economic situation of LGBTI people is improving in the country of origin, the availability and effectiveness of State protection needs to be carefully assessed based on reliable and up-to-date country of origin information. The reforms need to be more than merely transitional. Where laws criminalizing same-sex conduct have been repealed or other positive measures have been taken, such reforms may not impact in the immediate or foreseeable future as to how society generally regards people with differing sexual orientation and/or gender identity.²⁴¹

²³⁷ *Garcia v Canada (Minister of Citizenship and Immigration)*, 2005 FC 807, 139 ACWS (3d) 1065; *Re UOD* (24 June 1999), Ottawa A98-01243 (CRDD) (available on QL).

²³⁸ Human Rights Watch, *Not Safe at Home: Violence and Discrimination against LGBT people in Jamaica* (New York: Human Rights Watch, 2014) at 10, online: <<http://www.hrw.org/reports/2014/10/22/not-safe-home-0>>.

²³⁹ Itaborahy & Zhu, *supra* note 3.

²⁴⁰ For an extensive review of documentary evidence on state protection, see *Re SCE*, *supra* note 96.

²⁴¹ UNHCR Guidelines, *supra* note 18 at para 37.

In *Melo v Canada*,²⁴² the Federal Court noted that the RPD, in assessing the availability of state protection, only focused on the positive legislative changes that had been made in Brazil. The Court held that this was an error, as the “real life situation” of the claimants had to be examined.²⁴³ It further stated that decision-makers must address “whether the legislative changes have in fact resulted in any meaningful protection” for sexual minorities.²⁴⁴

5. Internal flight/relocation alternative

The concept of “internal relocation alternative,” or “internal flight alternative” (IFA) has become integral to the determination of whether a claimant is a Convention refugee.²⁴⁵ That said, however, the RPD must expressly raise the question at the hearing and the claimant must be afforded the opportunity to address it with evidence and argument.

In assessing whether a refugee’s fear of persecution is well-founded, decision-makers determine whether the claimants can avail themselves of a safe place in the country of origin. The IFA rule essentially involves an analysis of the general situation in the country to determine the risks faced by the claimant in a proposed site of relocation. It also involves a consideration of the individual’s personal circumstances to assess the claimant’s ability to effectively access and integrate into that location.²⁴⁶ Both of these conditions must be satisfied for a finding that the claimant has an IFA. Refugee protection will be denied if a claimant did not exhaust all possibilities of reaching safety in an area within the claimant’s own country before seeking international protection.

IFAs are increasingly being assessed in claims based on sexual orientation and gender identity. Social, political and legal progress is sometimes highly localized in a state; more tolerant destinations may therefore constitute an IFA for gay men, lesbians, bisexuals or transgender persons. In addition, meaningful protection in a different area of the country may indeed be available to a claimant when he or she is being persecuted by non-governmental entities acting independently of any governmental control or support. As mentioned above, private persecution is regularly raised in cases brought forth by members of sexual minorities.

The UNHCR Guidelines recognize the relevance of this issue in relation to sexual minority claims. The Guidelines state that if a country has laws criminalizing same-sex relations and the laws are enforced, “it will normally be assumed that such laws are applicable in the entire territory.”²⁴⁷ As a result, “[w]here the fear of persecution is related to these laws, a consideration of IFA would not be relevant.”²⁴⁸

The UNHCR further urges decision-makers to probe the actual reality of state protection in another location before concluding that an IFA is available to sexual minorities:

Intolerance towards LGBTI individuals tends to exist countrywide in many situations, and therefore an internal flight alternative will often not be available. Relocation is not a relevant alternative if it were to expose the applicant to the original or any new forms of persecution. IFA should not be relied upon where relocation involves (re-)concealment of one’s sexual orientation and/or gender identity to be safe.²⁴⁹

²⁴² 2008 FC 150, 165 ACWS (3d) 335.

²⁴³ *Ibid* at para 6.

²⁴⁴ *Ibid* at para 7.

²⁴⁵ *Rasaratnam v Canada* (MEI), [1992] 1 FCR 706 at para 9 (available on QL).

²⁴⁶ *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FCR 589 at para 14 (available on QL).

²⁴⁷ UNHCR Guidelines, *supra* note 18 at para 53.

²⁴⁸ *Ibid*.

²⁴⁹ *Ibid* at para 54.

The UNHCR also counsels that the presence of “United Nation agencies, non-governmental organizations, civil society, and other non-State actors are not a substitute for State protection.”²⁵⁰

Many of the problems identified previously in the discussion on state protection apply to the viability of an IFA for sexual minorities. For instance, the concern that independent country information does not probe the actual reality of protection is a constant concern in refugee claims based on sexual orientation and gender identity.²⁵¹ The problem with independent country information is in large part due to the fact that an IFA is a highly specific refugee law concept. International and national human rights organizations generally engage in fact-finding in attempts to influence public opinion and international organizations, and to shame and stigmatize abusive governments. They are not primarily concerned with gathering information to meet the specific legal needs of asylum seekers and refugee claimants.

Therefore, human rights reports rarely compare internal locations to determine whether one part of a country is a safer place for minorities or targeted individuals. In their recent report on Turkey, Human Rights Watch provided a comprehensive picture of the discrimination and repression facing sexual minorities.²⁵² However, the report did not compare the status of gay men, lesbians, bisexuals and transgender persons relative to their geographic location within the country. It is therefore unclear how useful the information in the report will be to a refugee claimant trying to counter claims that large cities such as Ankara or Istanbul may constitute IFAs.

Another relevant issue is the emergence of the “country of first arrival” principle and its potentially negative impact on sexual minorities. Increasingly, States are deflecting claimants to safe third countries, arguing that claimants should avail themselves of the protection of the first state through which they travelled when fleeing persecution. Jessica Young has examined the ways in which the safe third country can impact sexual minorities. Young claims that “an individual’s failure to seek refugee status in a safe third country can have a negative impact upon [a decision maker’s] assessment of his or her subjective fear of persecution.”²⁵³ In other words, a decision-maker may find a claimant’s testimony in relation to their subjective fear of persecution less credible if they failed to seek asylum at the first opportunity. Jenni Millbank suggests UK decision-makers are “demonstrably less sensitive than those elsewhere to the prospect that a refugee claimant on the basis of sexual orientation may not be able, or may not feel able, to make their claim in another country en route.”²⁵⁴ LGBTI face particular challenges that need to be considered in relation to this question. As Young argues, “a number of factors relating to the experience of sexual minority claimants, such as a general lack of awareness of their ability to claim refugee status or being “closeted,” may influence whether they seek asylum prior to their arrival” in the country when they eventually make a refugee claim.²⁵⁵

6. *Sur place* claims

²⁵⁰ *Ibid* at para 51.

²⁵¹ In *Orozco Gonzalez v Canada* (16 January 2004), Montreal MA2-08844 (RPD) at paras 16-17, Mexico City was considered a viable IFA on the basis of documentary information that indicated that the capital city had its own annual gay parade; the city government had adopted anti-discrimination legislation; and the police forces had created a preventive policing unit in order to address the issue of homophobia. Yet nothing in the independent country information addressed the actual implementation of the measures adopted by authorities in Mexico City; in fact, it appears that such an assessment was not available. The claimant, who had the burden of proof, could offer no objective evidence to rebut the suggestion that Mexico City was a viable IFA.

²⁵² Human Rights Watch, *We Need a Law for Liberation: Gender, Sexuality, and Human Rights in a Changing Turkey* (New York: Human Rights Watch, 2008).

²⁵³ Jessica Young, *The Alternate Refuge Concept: A Source of Systematic Disadvantage to Sexual Minority Refugee Claimants* (2010) University of New Brunswick Law Journal (forthcoming).

²⁵⁴ Millbank, “Ring of Truth”, *supra* note 204 at 15.

²⁵⁵ Young, *supra* note 253.

Persons who are not refugees when they leave their country, but who becomes refugees at a later date, are refugees *sur place*. The UNHCR Guidelines appropriately points out the relevance of *sur place* claims for some sexual minority claimants. Not all LGBTI applicants may have experienced persecution in the past. Some claimants may not have identified as gay or lesbian before their arrival in the country of refuge, or consciously decided not to act on their sexual orientation or gender identity in their country of origin.²⁵⁶ The fear of persecution may arise while they are in the country of refuge, if they engage in political activism or media work, or if their sexual orientation is exposed by someone else.²⁵⁷ Such a situation would make a claimant a refugee *sur place*. Decision-makers must keep in mind that some sexual minorities who are refugees *sur place* will not have personally experienced persecution, and their knowledge of gay and lesbian activities in their country of origin may be limited.

7. Independent Human Rights Documentation

To meet the requirements of the 1951 Convention definition of refugee, a claimant must present supporting evidence which normally consists of testimony of the claimant and general evidence of a country's human rights record. While a claimant's testimony may constitute the whole of the evidence if it is "plausible, credible and frank,"²⁵⁸ independent country information will often be used to support a claim. For instance, assessing whether the cumulative effect of discrimination rises to the level of persecution is to be made by reference to reliable, relevant and up-to-date country of origin information. Such evidence is typically drawn from governmental, non-governmental, and media reports.

When claims based on sexual orientation and gender identity were first presented in the early 1990s, sexual minorities encountered a specific set of problems in the area of fact-finding.²⁵⁹ First, in many countries, very little information was available on human rights violations against sexual minorities. Governmental and non-governmental organizations were not documenting human rights violations against sexual minorities and thus were not able to provide the independent country information necessary to prove the objective components of the definition of refugee. Second, when available information originated from gay, lesbian, bisexual and transgender organizations, their evidence was sometimes dismissed as biased and unreliable.

The situation has improved as mainstream human right organizations have expanded their mandates to include the investigation of discrimination and persecution against sexual minorities. In addition, documentation from sexual minority rights organizations is increasingly regarded as a credible source of information.²⁶⁰ For instance, the Federal Court recently examined the RPD's preference in a case involving a Nigerian claimant for country condition evidence prepared by the Canadian High Commission over that of a LGBT advocacy group. The Court cautioned against dismissing information provided by advocacy groups:

²⁵⁶ UNHCR Guidelines, *supra* note 18 at 57.

²⁵⁷ *Ibid.* See *Kyambadde v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1307, 337 FTR 93.

²⁵⁸ James Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991).

²⁵⁹ LaViolette, "Proving a Well-Founded Fear", *supra* note 1.

²⁶⁰ But see *Neto v Canada (Minister of Citizenship and Immigration)*, 2007 FC 664, 158 ACWS (3d) 811 (The Federal Court allowed a judicial review application in a case where the RPD accepted as reliable one report from the International Gay and Lesbian Association (ILGA), but rejected a second one from ILGA on the basis that it did not come from a reliable and independent source). See also *Ndokwu v Canada (Minister of Citizenship and Immigration)*, 2013 FC 22 (available on QL) (the RPD held that reports from LGBT groups could not be considered objective and were less credible than an assessment by the Canadian High Commission in Nigeria because "it is written by an objective professional Canadian diplomat resident in Nigeria").

[38] The notion that evidence from a particular advocacy group or, for that matter, any advocacy group is consistently or uniformly less objective than country condition evidence prepared by diplomats, must be examined carefully in light of information from those closest to the situation, including diplomats, themselves, when and where they are privy to first-hand knowledge. This is to ensure that findings be considered as objectively as possible in light of tests of corroboration.

[39] By this means of analysis, evidence which would otherwise not be brought forward would see the light of day for the purpose of analysis, and, not be dismissed out of hand, otherwise, the voice of the ordinarily voiceless, would remain voiceless; however, plausibility and consistency of evidence must not be overlooked in such an exercise; it requires the delicate, intricate and vigilant scrutiny of complete evidence analysis by decision-makers in each and every case.²⁶¹

Nevertheless, while the developments described above increasingly allow LGBTI refugee claimants to provide some supporting evidence of their well-founded fear of persecution or their inability to access State protection, documentary challenges remain to this day.

First, availability of documentation remains a problem. The extent to which mainstream international human rights organizations and sexual minority rights groups are able to uncover worldwide abuses against sexual minorities is still limited. In most countries, stigma continues to attach to issues surrounding sexual orientation and gender identity. This often means that homophobic violence is not documented, making it difficult to investigate the problem. Louise Arbour, then-UN High Commissioner for Human Rights, declared in 2006:

[b]ecause of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented, and goes ultimately unpunished. Rarely does it provoke public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights.²⁶²

Increased activism has also been met with attacks on gay, lesbian, bisexual, and transgender human rights defenders, which seriously impede their ability to document violations. The particular risks faced by human rights defenders working on issues of sexual orientation have been recognized by the Special Representative of the UN Secretary-General on human rights defenders in 2001:

Greater risks are faced by defenders of the rights of certain groups as their work challenges social structures, traditional practices and interpretation of religious precepts that may have been used over long periods of time to condone and justify violation of the human rights of members of such groups. Of special importance will be women's human rights groups and those who are active on issues of sexuality especially sexual orientation and reproductive rights. These groups are often very vulnerable to prejudice, to marginalization and to public repudiation, not only by State forces but other social actors.²⁶³

²⁶¹ *Ibid.*

²⁶² Louise Arbour, "Presentation of the Office of the United Nations High Commissioner for Human Rights, Ms. Louise Arbour to the International Conference on LGBT (Lesbian, Gays, Bisexual and Transgender) Human Rights" (Address, delivered in Montreal, 26 July 2006), online: <<http://www.unhchr.ch/huricane/huricane.nsf/view01/B91AE52651D33F0DC12571BE002F172C?opendocument>>.

²⁶³ United Nations Economic and Social Council, Commission on Human Rights, *Report of the Special Representative of the Secretary-General on*

The UN High Commissioner for Human Rights recognized the problem as well:

I recognize that many LGBT human rights organizations work in extremely difficult circumstances. They are denied freedom of association when the authorities shut them down, or otherwise prevent them from carrying out their work. They are physically attacked when they organize demonstrations to claim their rights. Many have even been killed for daring to speak about sexual orientation. They are denied access to important fora, including at the international level, where they should be able to have their voices heard.²⁶⁴

Increasing the risks are the fact that, according to the *2014 State-Sponsored Homophobia* report, being a gay man or a lesbian risks penal sanctions in 78 countries and the death penalty in seven; moreover, several countries have either passed laws, or parliaments are considering Bills, regarding so-called “homosexual propaganda” laws.²⁶⁵ Serious risks are therefore involved in investigating, documenting, and reporting human rights violations against sexual minorities, especially if researchers are themselves gay, lesbian, bisexual or transgender.

Resource limitations also hinder the ability of human rights groups to investigate and publish reliable, current and comprehensive information. Human rights organizations are not able to produce information about all countries. Moreover, only a fraction of situations, often the most egregious, make it into their documentation. Detailed country reports devoted exclusively to human rights violations against sexual minorities are infrequently released. Moreover, the reports that are produced may not investigate countries from which significant numbers of gay men, lesbians, bisexuals and transgender persons are fleeing. The IRB has dealt with a considerable number of Mexican gay, lesbian, bisexual and transgender claimants,²⁶⁶ yet human rights organizations such as Amnesty International and Human Rights Watch do not have a current, comprehensive report on the human rights conditions for sexual minorities in Mexico. Even NGOs exclusively dedicated to documenting human rights violations against sexual minorities have limited abilities to investigate and publish information. Clearly, significant barriers continue to prevent the documentation of human rights violations against sexual minorities. This in turn translates into a scarcity of information that can be used to support refugee claims.

In addition to the scarcity of objective country documentation, the legal issues considered determinative of a refugee claim have shifted towards more complex issues of fact and law. The inquiry into a claim based on sexual orientation or gender identity has become increasingly layered. Rather than simply assessing the existence of serious human rights violations against sexual minorities, decision-makers are now interested in: (1) determining whether claimants fear discrimination rather than persecution; (2) whether they can access state protection; and (3) the extent to which another internal location can serve as alternative refuge. All three of these issues are linked to objective conditions in the country of origin and therefore require documentation in order to properly evaluate their relevance to a claimant’s case. The absence of independent country information that is sufficiently focused or detailed to meet these new issues often translates into poor assessments in the refugee hearing room.

Human Rights Defenders, UN ECOSOC, 57th Sess, E/CN.4/2001/94 (2001) at 24, online: <[http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/d6c1b351bf405ad3c1256a25005109bc/\\$FILE/G0110638.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/d6c1b351bf405ad3c1256a25005109bc/$FILE/G0110638.pdf)>.

²⁶⁴ Arbour, *supra* note 262.

²⁶⁵ Itaborahy & Zhu, *supra* note 3.

²⁶⁶ Mexico was, until 2009, the largest source of refugee claimants generally in Canada. See Samantha Sarra, “New Hearing for Rejected Mexican”, *Xtra!* (16 April 2008), online:

<http://www.xtra.ca/public/viewstory.aspx?AFF_TYPE=3&STORY_ID=4648&PUB_TEMPLATE_ID=9>.

Given the relative absence of reliable independent country information, decision-makers need to avoid using inappropriate sources as substitutes. Michael Battista, a refugee lawyer in Toronto, sent a letter to the IRB in 2002 to complain about material produced for a hearing of a claimant he was representing.²⁶⁷ According to Battista, the package contained material promoting Mexico's gay tourist and travel industry. This included downloaded information from websites promoting Mexico's gay tourist destinations. Battista claimed that such material was inherently promotional and depicted social conditions in the most palatable light. In addition, the information was unreliable as sources or authors were not identified. Finally, Battista argued that the material was highly prejudicial, as it relied on stereotypical notions of gay men as primarily interested in socializing, parties and sexual activity.²⁶⁸ Dauvergne and Millbank have similarly criticized the Australian Refugee Review Tribunal for relying on the *Spartacus Guide*, a travel guide aimed at gay men, at refugee hearings.²⁶⁹

8. Conclusion

The preceding discussion has attempted to demonstrate how gay, lesbian, bisexual and transgender refugee claimants in Canada continue to encounter a specific set of challenges in having the refugee definition applied to their claims. The 1951 Convention had provided actual and tangible protection to many individual LGBTI, more so than any other international human rights instrument. Some of the issues facing LGBTI refugees have evolved since 1991 when claims based on sexual orientation and gender identity were first introduced in the refugee determination process in Canada. Indeed, many of the legal questions most relevant to claims based on sexual orientation and gender identity have shifted over the last 20 years. Early cases turned on whether a claimant's fear of persecution was well-founded or whether the claimants were able to prove their sexual orientation. While some of those issues continue to be relevant, recent cases have focused on the distinction between persecution and discrimination, the availability of state protection and possible regional contrasts in the treatment of sexual minorities within a country, which in turn create new evidentiary challenges. Taken as a whole, sexual minorities continue to encounter a specific set of problems in having the refugee definition applied to their claims.

²⁶⁷ Letter from Michael Battista to Jean-Guy Fleury, Chairperson, IRB (4 December 2002) (on file with author). See also Joel Dupuis, "Believe the Hype: Refugees Evaluated according to Tourist Info", *Xtra!* (9 January 2003), online: <<http://archives.xtra.ca/Story.aspx?s=14751297>>.

²⁶⁸ *Ibid.*

²⁶⁹ Catherine Dauvergne & Jenni Millbank, "Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers" (2003) 31 *Federal Law Review* 299 at 317-20.