

Canada's Guideline 9: improving SOGIE claims assessment?

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Asylum seekers making claims relating to their sexual orientation and gender identity often face unfair refusal. New guidance from the Immigration and Refugee Board of Canada takes admirable steps towards improving claims assessment, and offers a model for practitioners elsewhere.

The Immigration and Refugee Board of Canada's 'Guideline 9: Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression' (SOGIE Guideline) has been in effect since May 2017. It addresses a number of the recurring concerns about asylum claims based on sexual orientation and gender identity and expression¹ (SOGIE) that have arisen in case law, statutory instruments and guidance around the world.² These concerns, which have been common reasons for refusing SOGIE-based asylum claims in Europe, relate to: qualification as a member of a particular social group for the purposes of the 1951 Refugee Convention; whether applicants can return to live 'discreetly' without risk; whether laws criminalising homosexuality in the applicant's country of origin constitute persecution in themselves; the use of gender and sexual stereotypes to inform asylum decision making; whether sexually explicit evidence is asked for or expected in asylum cases; and late disclosure as the basis for refusal of international protection. These were the subject of Court of Justice of the European Union (CJEU) rulings in 2013 and 2014.³

The Guideline makes many good provisions. Citing a 1993 decision⁴ the Guideline is clear that individuals presenting asylum and migration SOGIE-based claims are "**characterized as a particular social group**". It also recognises that the fears of SOGIE asylum seekers' family members may also warrant consideration under the same Refugee Convention ground, which is welcome, if not particularly new to European audiences.

On the issue of **discretion**, the Guideline asserts that claimants should not be expected

to be "discreet" about their SOGIE in order to avoid persecution. It thereby avoids the line of questioning – as in, for example, UK guidance – about the possibility of living discreetly in the country of origin.⁵

The Guideline is robust on the need to avoid **decision making based on stereotypes**, offering a good range of examples of potential pitfalls, such as making assumptions that SOGIE applicants will participate in LGBTIQ+ culture in Canada. This seems to go beyond the 2014 CJEU decision, which precludes decision making that is based on stereotypes but still leaves room for questions based on them, provided these questions are part of an overall balanced line of questioning.

The Guideline positively acknowledges that instances of **late disclosure** are acceptable and can be justified under certain circumstances. The statement that an individual "may reasonably delay making a claim for refugee protection based on SOGIE" in a number of situations goes further than any other guidance we have seen. Moreover, the Guideline rightly alerts decision makers to the need to consider very carefully any negative weight attached to inconsistencies, including those arising from late disclosure, which may be due to "cultural, psychological or other barriers". The Guideline could have gone further, however, by requiring decision makers to offer asylum claimants the opportunity to clarify any (perceived) inconsistencies or issues affecting their credibility before a decision is issued.

The Guideline furthermore acknowledges that it is unreasonable to expect SOGIE asylum claimants to **approach public authorities** – in their countries of origin – for protection, especially when laws

criminalising non-conforming SOGIE are in place and enforced. The Guideline rightly focuses on the “operational level”, rather than what is enshrined in the statutory framework of the country of origin. Moreover, it gives unprecedented attention to the importance of decision makers accepting *sur place* claims and being sensitive towards the slow processes of self-acceptance many SOGIE asylum seekers experience.

The quality and relevance of **country of origin information (COI)** has been a recurrent theme in asylum studies, particularly in relation to SOGIE individuals.⁶ The Guideline acknowledges the problematic use of COI in these cases by recalling that under-reporting of discriminatory or persecutory practices in countries of origin may reflect local attitudes towards, rather than the absence of, such practices.

However, on the **notion of persecution** the Guideline’s reasoning is disappointingly conservative. It refuses to equate criminalisation of same-sex conduct and other SOGIE-related repressive norms with persecution. Instead, it simply states that “being compelled to conceal one’s SOGIE constitutes a serious interference with fundamental human rights that may therefore amount to persecution”. In this and elsewhere it leaves too much leeway for denial of asylum to people living under repressive and discriminatory legal frameworks. This is at odds with its recognition of the impact of cumulative discrimination elsewhere.

Unexpected additions

In addition to these elements of welcome progress, the Guideline takes other, less expected, steps. Its **approach to terminology** is unusual, with its inclusion of the term “expressions”: sexual orientations and gender identities and expressions. This is a positive development, as the focus is on individuals’ characteristics rather than their overall LGBTIQ+ identities. Decision makers should thereby be encouraged to show more sensitivity to individuals’ range of characteristics and how these intersect. This is in line with the emphasis on intersectionality throughout the Guideline

and makes the exclusion of individuals with particular identities who do not identify as LGBTIQ+ less likely. A further step would be to include sexual characteristics, making the acronym ‘SOGIESC’.

This positive choice of terminology is allied with an equally positive acknowledgment that gender is not binary but instead sits on a spectrum. Interestingly, heterosexual individuals also fall within the scope of these Guidelines where they do not – or do not appear to – conform to socially accepted SOGIE norms. Moreover, the Guideline acknowledges the lack of “standard terminology” **to capture the complexity of understandings of SOGIE** across different cultures and societies, with the aim of averting culturally and socially inappropriate notions and expectations in migration and asylum adjudication procedures. Finally, it directs authorities and interpreters to address individuals respectfully using their chosen name, terminology and pronouns. The Guideline should be praised for its positive language and fluid approach to definitions and identifiers.

Also to be applauded is its consistent reference to how SOGIE **interests with other characteristics**, such as race, ethnicity, religion, faith or belief system, age, disability, health status, social class and education. Moreover, it makes excellent use of intersectionality to highlight that this range of characteristics may affect all aspects of migration and asylum procedures, including individuals’ testimonies, relationships with authorities, and different stakeholders’ notions of persecution.

Crucially, the Guideline hints at the restrictive traditional application of the 1951 Refugee Convention grounds. While decision makers generally expect asylum seekers to lodge their claims on the basis of one particular Refugee Convention ground, the Guideline highlights that SOGIE individuals may reasonably lodge a claim on the basis of a combination of any of the five Convention grounds. In this way, the Guideline moves away from defining individuals on the basis of their SOGIE alone. As we note below,

however, this is somewhat at odds with the Guideline's own term "diverse SOGIE".

The Guideline is to be applauded for recognising that many SOGIE individuals should be **classed as "vulnerable"** to be protected under any provisions that might be applicable; it also rightly alerts officials to the need to adopt additional safeguards for the protection of sensitive information. In an unexpected and groundbreaking move, the Guideline refers explicitly to **SOGIE children** and alerts decision makers to their particular vulnerability. Its reference to the principle of the best interests of the child again reflects the principle of intersectionality – making connections beyond the field of refugee law.

Finally, the Guideline adopts a respectful approach towards SOGIE individuals' **family rights** and acknowledges the difficulties they may face in proving their spousal or conjugal relationships. In highlighting the importance of avoiding preconceived notions about such relationships the Guideline also calls on decision makers to consider the "unique circumstances" that SOGIE individuals face. These circumstances ought to be taken into consideration, it suggests, in the assessment of humanitarian and compassionate grounds in sponsorship appeals.

Shortcomings

In a rather surprising shortfall in relation to **evidentiary standards**, the Guideline simply states that individuals are not "expected (...) [to] establish their SOGIE through the use of sexually explicit photographs, videos or other visual material". This feeble phrasing leaves excessive room for individuals to feel under pressure to submit this sort of evidence to strengthen their cases. The CJEU has gone beyond this, by completely precluding the use of sexualised evidence in SOGIE asylum cases, thus more effectively protecting the dignity of asylum claimants, and it is regrettable the Guideline did not adopt a similar approach. Only the elimination of any scope for using sexualised evidence in asylum and migration procedures will remove the pressure on applicants and their legal representatives to make

use of this possibility as a last, desperate resort to prove their sexual orientation. Despite the merit in using characteristics (SOGIE) rather than identities (LGBTIQ+) as its **terminology**, the Guideline's use of the SOGIE acronym is troubling. The text not only refers to "claims based on SOGIE", but also repeatedly refers to individuals "with diverse SOGIE". "Diverse" in relation to what? The answer would appear to be, in relation to the heterosexual majority. While that difference is undoubtedly the source of the persecution, stigma and discrimination suffered by individuals who claim asylum on the basis of their SOGIE, in using "diverse SOGIE" the Guideline inadvertently reinforces a perceived divide between 'standard' heterosexuality and 'deviant' non-heterosexuality. Referring either to "individuals who claim asylum on the basis of their SOGIE" or, for the sake of linguistic simplicity, "SOGIE asylum seekers" would be greatly preferable. Unfortunate **phrasing** is also used elsewhere. The Guideline refers to forced medical treatments, stating that "[i]ndividuals with diverse SOGIE may be forced to undergo medical treatment including 'corrective sexual violence'" and other non-consensual procedures. This wording implies that these practices are "medical treatments", when in fact they are closer to torture or cruel, inhuman or degrading treatment or punishment, under Article 7 of the 1966 International Covenant on Civil and Political Rights.

Conclusion

We welcome and largely endorse this Guideline. The Guideline responds to asylum seekers' needs and experiences in a number of ways that are absent from most officially approved asylum guidance instruments, covering scenarios such as joint claims, persecution by association, SOGIE minors and the need for additional safeguards to limit public dissemination of sensitive material. While bearing in mind the gap that often exists between guidance and practice, the Canadian Guideline breaks new ground and in many areas provides a model of good practice for other authorities and jurisdictions.

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1. While 'sexual orientation and gender identity (SOGI)' seems to be more commonly used, the Guideline also includes 'expression' (thus leading to the acronym 'SOGIE') to highlight the relevance of the expression of one's sexual orientation and gender identity.

2. <http://bit.ly/IRBGuide9-2017>

3. Joined Cases C-199/12 to C-201/12, X, Y and Z v Minister voor Immigratie en Asiel, 7 November 2013, ECLI:EU:C:2013:720 <http://bit.ly/CJEU-720-2013> and Joined Cases C-148/13 to C-150/13, A, B and C v Staatssecretaris van Veiligheid en Justitie, 2 December 2014, ECLI:EU:C:2014:2406 <http://bit.ly/CJEU-2406-2014>

4. *Canada (Attorney General) v Ward* [1993] 2 S.C.R. 689 <http://bit.ly/Canada-Ward-1997>

5. Home Office (2016) *Asylum Policy instruction Sexual orientation in asylum claims Version 6.0* <http://bit.ly/UKGov-SOGI-6-2016>

6. Lesbian, gay, bisexual, trans, intersex and queer/questioning.

7. European Asylum Support Office (2015) *Researching the situation of lesbian, gay, and bisexual persons (LGB) in countries of origin*, EASO Practical Guides Series <http://bit.ly/EASO-LGB-Guide-2015>



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