

“On what grounds?” LGBT asylum claims in Canada

Sharalyn Jordan and Chris Morrissey

A number of positive developments have occurred over the past two decades to create more robust protection and community support within Canada – but recent legislative changes will jeopardise fairness and justice for LGBT refugee claimants.

“It was the vigilante groups. It was the villagers. It was the uncles. It was the entire system. It was the guy I was working for who would scream in front of his clients: “*kandu*” [“fag” – pejorative term for male homosexual]. It was everywhere...”

Currently, no fewer than 78 countries criminalise same-sex sexual acts or gender-variant behaviour. Many of these laws are the legacy of colonial imposition of the British penal code. Yet legal statutes are only one aspect of homophobic or transphobic persecution. The global terrain of protection and persecution for sexual and gender diversity is complex, shifting and often paradoxical. Brazil hosts the largest Pride Parade in the world yet also has the world’s highest reported rate of homophobic and transphobic murders. While South Africa recognises same-sex marriage, human rights organisations there report ten cases a week of ‘corrective rape’¹ targeting lesbians, most of which are never investigated by police. Within the same country, people’s vulnerability or safety varies considerably based on social class, race, religion, ability to ‘pass’ and social networks.²

In 1992-93, Canada became one of the first countries to officially extend refugee protection to people facing persecution based on sexual orientation or gender identity (SOGI) and its approach has been lauded as a model. Yet simultaneously Canada has been using increasingly stringent measures to screen out potential asylum seekers. New legislation entitled Protecting Canada’s Immigration System Act came into force in December 2012; many of the changes undermine fairness and justice for all refugees, and LGBT asylum seekers face particular challenges.

The routes people take to escape SOGI-based persecution are often complex and prolonged. Intersections of gender, social class and nationality enable and constrain who is able to leave, how people migrate, and options for permanent status. Migration restrictions and the relative obscurity of a refugee claim combine to create situations in which LGBT migrants pursue more apparent, but sometimes irregular, social or economic means of migration. Among SOGI survival migrants now living in Canada, many attempted multiple relocations within their own country or region, spending years living in precarious circumstances. Unlike civil conflicts, people experience sexual orientation or gender identity persecution in relative isolation. To survive stigma and violence, people learn to deny, cover or hide their sexuality or gender identity, and to be ever vigilant. These survival tactics, and other impacts of trauma, do not disappear on departure from the country of origin – and they may undermine people’s ability to access safety and permanent status.

For those who manage to initiate a refugee claim in Canada, one of the first questions

Angela is a young woman from an African country with a ten-year prison sentence for having a same-sex relationship. Her father arranged for her to marry a man twenty years her senior. She confided in her sister that she had a secret relationship with a girlfriend and could not marry this man. The sister told her parents. Angela was locked up and beaten regularly by her father for over a month. Rumours spread around her town. Her church publicly expelled her. When she was allowed out of her home, she was assaulted by a gang of young men and neighbours threw rocks at her. She went into hiding until an uncle arranged to get her out of the country. An agent arranged her travel to Canada, where she was eventually granted asylum.



UNHCR/Gy. Sopronyi

Asylum seekers queuing at the state-operated Reception Centre in Sofia, Bulgaria, 2011.

potential refugees face is: “On what grounds?” Thus, people who have survived through secrecy are forced to ‘out’ themselves to an official. Mzlando, a claimant from East Africa, recounted his experience: “They call you through a window. They tell you ‘Tell me your story. Why are you making a refugee claim?’ And you’re in earshot of people, some of whom are the very countrymen you are trying to get away from. You shout your claim through a bullet-proof glass. It is dehumanising. You are forced to shout before them ‘I want to make a refugee claim because I am a homosexual.’”

Port of entry, screening interviews and refugee hearings all become places of scrutiny where asylum seekers must override stigma, shame and fear in order to access protection. Under these circumstances, incomplete or late disclosure of sexual orientation or gender identity as the cause of persecution is not unusual. In the context of massive changes to Canada’s refugee system, it remains to be seen whether LGBT asylum seekers will be adequately protected. Under the new regime, claimants face extremely tight timelines for preparing themselves and their evidence: 10-15 days for the written basis of a claim, 30-45 days to submit documents and 60 days to the hearing.

To be recognised as a refugee, applicants must convince decision-makers of the genuineness of their sexual orientation or gender identity, their fear of persecution because of this identity, and the lack of protection in their country. Because homophobic and transphobic persecution usually occurs out of the public eye, the possibility of securing

corroborating evidence is limited. SOGI asylum seekers go to great lengths – asking sexual partners to provide letters, recovering old hospital records, and sifting through newspaper stories – to try to make what is hidden visible, or for transgender claimants, the inconsistent, coherent. Because of the challenges of obtaining evidence, a great deal of weight rests ultimately on verbal testimony. Refugee claimants struggle against cultural and language differences, suspicion and the impacts of stigma and trauma to narrate a plausible account.

Applicants are evaluated against expected narratives of refugee flight and Western narratives of LGBT identity and community. Decision-makers rely on their own background knowledge – often based on culturally constrained understandings of sexualities and genders – to assess the credibility of an applicant’s identity claim. Assumptions about sexuality and gender based on Western lesbian, gay, bi and trans ‘coming out’ narratives or ‘gender identity dysphoria’³ diagnosis do not necessarily apply inter-culturally. For example, an expectation that SOGI asylum seekers will seek ties with the local LGBT ‘community’ in Canada is evident in many decisions we have seen. The coming out narrative creates this expectation. Yet sexual orientation or gender identity does not universally provide a sense of collective identity. Even when it does, there are many reasons why LGBT migrants may not seek out the LGBT community in Canada, such as exhausting work schedules, poverty, experience of racist exclusion within LGBT circles, and language gaps. Furthermore,

under the new system applicants simply will not have time to connect with LGBT communities or organisations. Consequently it is probable that even greater weight will rest on verbal testimony. Among some decision-makers, suspicion of fraudulent claims runs high – and there is particular suspicion that people are faking sexual orientation or gender identity claims. As a result, slight inconsistencies or omissions are often interpreted as lack of credibility.

Steps forward, steps back

A combination of training and Federal Court decisions has improved the quality of decisions we see in Canada. Adjudication practices have become more skillful with the training of decision-makers on SOGI claims. The recently published UNHCR guidelines are an excellent step towards enhancing the quality of decision-making on SOGI refugee claims.⁴

In the absence of official sources, informal networks have played a critical role in facilitating access to refugee protection for LGBT forced migrants. Recently, official sources have begun to include information related to sexual orientation and gender identity claims. For example, a resource list provided by government officials at the screening interview now includes local groups for LGBT claimants. Border officers have, on some occasions, pointed out these resources to claimants as a way of signalling openness. The Refugee Board's online guide for refugee claimants now specifically identifies sexual orientation and gender identity as examples of particular social groups.

Canada's guidelines for vulnerable persons were amended in late 2012 to recognise the potential vulnerability of LGBT claimants.⁵ These guidelines allow modifications to procedures for people deemed vulnerable because of age, mental illness or psychological impacts of trauma. The inclusion of LGBT claimants in these guidelines acknowledges that the psychological impacts of homophobic and transphobic trauma can interfere with

people's ability to remember and recount their experiences clearly. Demonstrating claimants' vulnerability and determining the kinds of assistance needed are best done with input from mental health professionals and physicians. However, with recent federal cuts to health service coverage for refugees, many claimants will not have access to assessments, nor to counselling or medication that may help them stabilise enough to testify. In the extremely tight scheduling of hearings it remains to be seen how effectively procedures for vulnerability can be applied.

In Canada's major receiving cities, Montreal, Toronto and Vancouver, recognition and support for LGBT migrants among community organisations have grown over the past decade, addressing exclusion and building better support systems. Very recently, groups have formed in other cities: Halifax, Ottawa, London and Winnipeg. Yet the pace of the new system being introduced will place immense strain on the volunteers, community workers and NGO infrastructure that sustain these support systems.

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1. Rape of a person because of their perceived sexual or gender orientation; the intended consequence of the rape, as seen by the perpetrator, is to 'correct' their orientation – to turn them heterosexual or to make them act more in conformity with gender stereotypes.

2. Jordan, S R (2010) 'Un/Convention(al) Refugees: Contextualizing the accounts of refugees facing homophobic or transphobic persecution', *Refugee* 26, 2, 165-182. <http://pi.library.yorku.ca/ojs/index.php/refuge/article/view/32086>

3. Negative impact on well-being caused when a person feels there is a mismatch between their biological sex and their gender identity.

4. UNHCR (2012) 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 HCR/GIP/12/01 See box on p7.

5. <http://tinyurl.com/IRB-Guideline8>