

Lesbian and Gay Refugee Issues: A Review of Federal Court Jurisprudence

INTRODUCTION

When a refugee claim is denied by the Immigration and Refugee Board, a claimant's lawyer can apply to the Federal Court of Canada for judicial review. This Information Sheet outlines Federal Court jurisprudence over the past ten years addressing refugee decisions for individuals claiming protection against persecution based on the claimant's sexual orientation. Its aim is to provide guidance to adjudicators of lesbian and gay claims to ensure that their decisions avoid or survive judicial review. It also aims to serve as a reference for asylum seekers and counsel in preparing gay and lesbian claims.

Protection on sexual orientation grounds is still a developing area of the law, with jurisprudence beginning in the early 1990s. Decision makers are the frontline of refugee protection and therefore Canada's obligations under international law.

This document does not include jurisprudence addressing persecution based on gender identity or bisexuality. Courts continue to struggle with these areas of protection, which consequently have lines of jurisprudential authority that are far less clear than gay and lesbian claims. These types of claims require a particular and unique set of considerations, which are better addressed independently. Individuals seeking a better understanding of the continued problematization of bisexual asylum decisions are encouraged to consult the academic literature on this subject.¹

SUGGESTED USE OF THIS DOCUMENT

This guide may prove useful in a number of ways, to a number of different stakeholders:

1. Adjudicators may find this document helpful as a primer in the treatment of gay and lesbian refugee protection claims.
2. Counsel and asylum seekers may find it useful to include this guide with gay and lesbian claims, perhaps highlighting relevant sections.
3. Academics, students and policy makers may find this document useful as reference material.
4. Community organizations may use this document to inform the individuals they serve about the rights of gay and lesbian asylum seekers in Canada.

¹ See Rehaag, S. (2008). Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada. *McGill Law Journal*, 53; see also Rehaag, S. (2009). Bisexuals Need Not Apply: a comparative appraisal of refugee law and policy in Canada, the United States, and Australia. *International Journal of Human Rights*, 13(2).

When dealing with lesbian and gay asylum claims, adjudicators and counsel may find it helpful to decentralize the determination of **identity** and foreground the determination of **human rights abuse**. Put simply, the issue is not whether a person is lesbian, gay, bisexual or transgender (LGBT); what matters is whether they fear persecution because of their sexual orientation or gender identity or expression. This is the appropriate inquiry of refugee law. Furthermore, as credibility is consistently challenging in gay and lesbian asylum claims, it is imperative that **sworn testimony be presumed truthful unless there is some reason not to believe it**. Reasons to disbelieve sworn testimony cannot be grounded in stereotypes.

THEMES FROM THE FEDERAL COURT REGARDING GAY AND LESBIAN REFUGEE CLAIMS

The following themes are rooted in Federal Court precedent. They should be borne in mind by members of the Immigration and Refugee Board of Canada (“the Board”) when making determinations, and by counsel when preparing lesbian and gay refugee claims.

- 1. Improper references to stereotypical markers of gay and lesbian identity related to appearance and behaviour continue to plague decisions. Reliance on any notion of how a lesbian or gay person looks or behaves is oppressive, and is rooted in the same misunderstanding that drives anti-LGBT abuse. Furthermore, it is unreliable and has no place in principled legal reasoning.**
 - In *Leke* 2007 FC 848, the Board did not “find that there is anything to be gleaned from the claimant's facial expressions, tone of voice or his physical [sic] that would, in and of themselves create an impression that this claimant was either homosexual or bisexual.” This predicated the Board’s inquiry into the claimant’s credibility. To base such an inquiry on factors that are in no way determinative of sexual orientation is improper, and the Court struck down the decision.
 - In *Herrera* 2005 FC 1233, the Court found that the Board had shown bias and therefore breached principles of natural justice by finding that the Mexican gay male claimant’s lack of “allure éffeminée” (effeminacy) did not support his claim.
 - In *Slim* 2004 FC 706, Pinard J tersely struck down the Board’s entire decision on the basis of stereotyping. The Board cited the Lebanese gay male claimant’s occupation as a hairdresser-turned-dancer as evidence that authorities would have known he was a homosexual earlier than his alleged abuse. Such stereotyping is unacceptable and His Honour ruled it enough to “vitate the whole decision at issue.”
- 2. Involvement with LGBT community organizations often supports claims for protection based on sexual orientation. While such organizations continue to play a vital role in providing support to gay and lesbian individuals, a lack of involvement with or documentation from such organizations is neither necessary nor conclusive.**
 - In *Dayebga* 2013 FC 842, the Board rejected the claim, impugning the claimant’s credibility based on his lack of corroborating evidence regarding his involvement with

- LGBT organizations. The Court ruled such impugment improper. O’Keefe J made clear that sworn testimony must be presumed truthful unless there is some reason not to believe it and struck down the decision.
- In *Lawal* 2008 FC 861, the court upheld the Board’s rejection of the claim from a Nigerian man. The Board did not find the claimant credible, ruling that he “cooked up the story of being a homosexual”. The Board ruled that the claimant had joined EGALE (an LGBT rights organization) solely to bolster his claim, pointing to the claimant’s inability to describe the purpose of the organization. This case makes clear that claimants should ensure they are at least somewhat knowledgeable about the function of LGBT organizations if they intend to rely upon membership as evidence before the Board.
 - In *Leke* 2007 FC 848, Lagace J found the Board’s decision patently unreasonable, in that it dismissed the gay male claimant’s membership in an LGBT community group as evidence of homosexual identity. The analogy given was that owning a library card does not make one literate. While the community centre in question (The 519 in Toronto) undeniably also serves heterosexual and cisgender people, in the context of the entirety of the evidence, the Board’s determination was unreasonable.
 - In *Charles* 2004 FC 1748, Kelen J found the Board was patently unreasonable when it rejected a claim from a Grenadian gay man. The Board doubted the applicant’s sexual orientation because he did not belong to a “homosexual organization” in Canada.
3. **A claimant’s lack of familiarity with LGBT social establishments in Canada should not be taken to undermine their credibility.** In fact, many newcomers avoid the “gay scene” due to discomfort, cultural pressures, religious beliefs or other reasons. Even many Canadian lesbian and gay individuals live their lives completely outside the institutionalized and commoditized “gay community”. Furthermore, many board members themselves lack familiarity with gay and lesbian structures and institutions; they should take care to not allow this lack of knowledge to influence their decisions.
- In *Buwu* 2013 FC 850, Russell J exposed the Board’s lack of familiarity with gay community establishments. The Board determined that the claimant lacked credibility because she claimed to frequent a bar in Toronto that the Board determined was “mostly frequented by gay men and not so much by lesbians” – an assertion based on the Board’s “experience” which proved to be inaccurate. The Board also misspelled the bar’s name.
 - In *Essa* 2011 FC 1493, the Board initially rejected the claim of a Jordanian gay man on the basis of his testimony that he did not go into the “gay village” in Montreal and that he did not attend gay pride. The Board took this as evidence that the claimant was not credible. Boivin J overturned this decision, indicating that a lack of participation in stereotypically gay activities does not erode the credibility of someone claiming protection on sexual orientation grounds. In fact, for someone who has faced persecution on the basis of their sexual orientation, avoiding open expressions of their homosexuality may be entirely reasonable.
4. **Sexual attraction and interaction are complex, dynamic and vary widely with culture, particularly when repression or persecution are present.** It is inappropriate

to make negative inferences of credibility based on a claimant's inability to recount these experiences in a pre-conceived manner. Assumptions about the timing, frequency, manner, or any other aspect of a claimant's romantic or sexual relationships are at best ill-informed and at worst stereotypical. Lesbian and gay relationships and attraction are as varied and unpredictable as those which are heteronormative and gender-conforming, and may occur at any time during one's life. Furthermore, evidence of same-sex relationships is extremely difficult to procure in repressive settings, and should not be solely relied upon in adverse findings of credibility.

- In *Buwu* 2013 FC 850, Russell J dismissed the Board's reliance on lack of documentation from the claimant's previous partners in denying her claim. The claimant had only had one partner.
- In *Dayebga* 2013 FC 842, the Board rejected the claim, impugning the claimant's credibility based on his lack of corroborating evidence regarding his previous relationships. The Court ruled such impugnement improper. O'Keefe J made clear that sworn testimony must be presumed truthful unless there is some reason not to believe it and struck down the decision.
- In *Kornienko* 2012 FC 1419, the Board doubted the claimant's sexual orientation based on the fact that he had not had any sexual or romantic encounters in several years. The Board found that a "truly gay" man would not abstain in this way. Barnes J found this to be "ill informed" and "stereotyping", and struck down the Board's decision.
- In *Kravchenko* 2005 FC 387, Heneghan J found the Board's decision "indefensible" as it "made findings of fact in a perverse or capricious manner". The Board doubted his credibility based on his inability to describe the progression of a particular sexual encounter in a detailed manner.
- In *Charles* 2004 FC 1748, Kelen J found the Board was patently unreasonable when it rejected a claim from a Grenadian gay man because the claimant was unable to recall exact dates or present photographic evidence regarding his past relationships.

5. An individual's heteronormative behavior, including opposite-sex relationships, marriages, and having children, should not undermine a gay or lesbian claim.

Sexuality is fluid. Individuals may use heteronormative behaviour (particularly opposite-sex marriages) to protect themselves or to uphold family and/or social expectations or to fulfill a desire to have children - none of which erode credibility.

- In *Leke* 2007 FC 848, Lagace J found the Board's decision patently unreasonable. The Board doubted that a truly homosexual man would father two children, discounting the double-life many homosexuals are forced to lead in repressive environments.
- In *Santana* 2007 FC 519, the Minister of Citizenship and Immigration Canada overturned the Angolan lesbian claimant's refugee status on the basis that she misrepresented her sexual orientation, because after being granted asylum in Canada, she married and had a child with a man. Harrington J struck down the vacation of her status, indicating that such a subsequent relationship does not indicate misrepresentation. In fact, the claimant testified that she was confused at the time and wanted a child, and that the marriage had since ended.

- In *Eringo* 2006 FC 1488, Blais J struck down the Board's negative decision primarily for failing to mention relevant documentary evidence. However, His Honour also cited the Board's flawed reasoning in undermining the Kenyan gay male claimant's credibility, based on the fact that he realized his sexual orientation later in life after marrying a woman. His Honour indicated that many lesbian or gay people facing persecution may marry in order to hide their sexual orientation and protect themselves from persecution.
6. **Official reports of anti-LGBT abuse and medical reports of resulting injuries are difficult to procure in repressive settings. Travelling with these documents can also be dangerous. The absence of these documents should not infer negative credibility.** Furthermore, gay and lesbian claim documents may initially appear inconsistent, due to the tendency of victims to try to hide their identities, fear of officials, and the obstacles they face in attempting to create official records of abuse. Claimants should be given the opportunity to explain these inconsistencies.
- In *Kornienko* 2012 FC 1419, Barnes J held the Board erred when it inferred negative credibility of the Ukrainian claimant for failing to bring medical documentation upon fleeing his home country. He obtained some documentation from Ukraine after arriving in Canada, and His Honour found this to be reasonable due to the dangers of travelling with such documents.
 - In *Herrera* 2005 FC 1233, the Court found that the claimant was not given the chance to explain inconsistencies in his testimony, indicating a breach of procedural fairness. In this case, the claimant experienced a brutal attack by police, hence his unwillingness and fear to report subsequent attacks to law enforcement.
 - In *Kamau* 2005 FC 1245, Gibson J ruled that the Board erred in finding the Kenyan gay male claimant's testimony not credible. Although the claimant presented documentary evidence of his arrest, conviction and sentence for same-sex relations, which are criminal in Kenya, the Board found this evidence unreliable. The Board mistakenly alleged that a 16-year sentence would entail more documentation than the claimant had presented; the actual sentence imposed upon the claimant was only 16 months.
 - In *Charles* 2004 FC 1748, Kelen J ruled that the Board was patently unreasonable when it rejected a claim from a Grenadian gay man. The Board erred in discounting medical evidence of physical attacks on the basis that the injuries did not prove that the claimant was beaten because he was gay. A claimant's testimony should be presumed reliable absent concrete evidence to the contrary, and there was no other plausible reason for the attack.
7. **Lesbian and gay claimants may fear government officials. As a result, they may be reluctant to state their sexual orientation at various stages in the asylum process, particularly at a Port of Entry. Failure to disclose sexual orientation at a certain point in the asylum process should not ground the rejection of a claim or an adverse finding of credibility, provided that the claimant can explain the failure to disclose.**
- In *Okoli* 2009 FC 332, the Board found the Nigerian gay male claimant not credible due to inconsistencies in his testimony and various claim documents. Mandamin J

- found that these inconsistencies could reasonably be explained by the claimant's memory being affected by severe beatings, his fear of government officials, and incompetent counsel at the beginning stages of his claim. The Board failed to take these factors into account, even though appropriate evidence was provided and the claimant amended his pleadings as soon as was practicable.
- In *Lawal* 2008 FC 861, the court upheld the Board's rejection of the claim from a Nigerian man. The Board did not find the claimant credible, ruling that he "cooked up the story of being a homosexual". To support this finding, the Board pointed to the fact that the claimant did not claim protection based on sexual orientation upon entering Canada and was unable to explain why.
8. **No assumptions should be made about a claimant's "coming out" process, or their level of openness in either their country of origin or Canada.** Some people are open about their gay or lesbian identity. Some choose not to disclose, or fear disclosing their sexual orientation. This should not undermine a claim or erode credibility. A linear trajectory – progressing from hiding, shame and confusion in the country of origin, to full expression, acceptance and a unified identity in Canada – is largely illusory. Individual experiences are far more complex and varied, and perceptions, feelings and attitudes will vary accordingly.
- In *Essa* 2011 FC 1493, the Board took the fact that the claimant was not openly gay once in Montreal as evidence that the claimant was not credible. Boivin J overturned this decision, indicating that the Board improperly ignored expert evidence that there are various stages of openness and expression during the "coming out" process.
 - In *Dosmakova* 2007 FC 1357, Dawson J overturned the Board's decision on numerous grounds. Among these was the Board's doubt over the Kazakhstani claimant's homosexual orientation because she discovered it late in life and did not seem conflicted about it.
 - In *Kamau* 2005 FC 1245, Gibson J ruled that the Board erred in finding the Kenyan gay male claimant's testimony not credible. The Board disbelieved that the claimant would be open about his sexuality in Kenya, which the claimant asserted was very homophobic.
9. **At no point should a decision cite a claimant's ability to hide their sexual orientation, in any context, as a reason to deny a claim.** Such "covering demands" constitute serious interference with a basic human right and are a form of persecution in themselves.
- In *Okoli* 2009 FC 332, the Board indicated that a viable internal flight alternative for the Nigerian gay male claimant would be to live in Lagos City where he would be able to hide his sexual orientation. Mandamin J found this unreasonable, as the Board was supporting a "requirement that the Applicant repress an immutable characteristic".
 - In *Fosu* 2008 FC 1135, Zinn J ruled the Board's decision unreasonable, in that it found the Ghanaian gay male claimant had an internal flight alternative in Accra, a major city where he could live if he was "discreet". His Honour found the decision unreasonable "in arriving at a finding which requires the claimant to deny or hide the innate characteristic which forms the basis of his claim of persecution."

- In *Kravchenko* 2005 FC 387, Heneghan J found the Board’s decision “indefensible” as it “made findings of fact in a perverse or capricious manner”. The Board doubted the Ukrainian gay male claimant’s credibility in his testimony that he could not do a better job of hiding his sexual attraction to another man.
- In *Sadeghi-Pari* 2004 FC 282, the Court struck down the Board’s ruling, indicating that certain findings of implausibility were made in a “perverse and capricious manner”. Notably, Mosley J ruled that the Board used a “monolithic view of Islamic and Iranian culture” in finding that the lesbian claimant would not have had certain freedoms in her home country, which allowed her to have a lesbian relationship. His Honour also indicated that the Board erred in finding that a lesbian could be safe in Iran if she hid her same-sex relationships.

CONCLUSIONS

It may seem that this document provides numerous examples of what to avoid and very little guidance in terms of reliable metrics for lesbian and gay asylum claims. This is because **there are no reliable metrics of sexual orientation**. These decisions tend to hinge upon credibility for precisely this reason. However, preconceived notions and stereotypes should not be allowed to cloud legal reasoning, nor infringe upon or masquerade as credibility findings.

Because of the wide range of expressions and experiences of gay and lesbian individuals, particularly when complicated by repression and persecution, one helpful approach is to decentralize the determination of **identity** and foreground the determination of **human rights abuse**. It matters not whether a person is LGBT or not; what matters is whether they are being persecuted on this basis. Indeed, there are cases of heterosexuals who are targeted for anti-LGBT violence based on the perception of their abusers rather than their actual identity. This foregrounding of abuse over identity may not sit well with adjudicators who rely on the immutability analysis in *Ward v. Canada (Attorney General)* 2002 SCC 17 that sexual orientation is an immutable, unchangeable characteristic. However, the reliance on immutability as a factor in refugee protection has been widely criticized, particularly in sexual orientation claims.² Among other problems, it positions the victims’ inability to change themselves as the root of their abuse, as opposed to the persecutor’s violent choice of action based on their own perception.

It is also incumbent upon adjudicators (who are among the only state officials attributing sexual orientation to individuals and granting or denying rights on this basis) to verse themselves in the academic literature surrounding sexual orientation and gender identity. A deeper understanding of sexual minorities as shaped by culture will equip adjudicators to properly address these claims.

² See LaViolette, N. (1997). The Immutable Refugees: Sexual Orientation in *Canada (A.G.) v. Ward*. *University of Toronto Faculty of Law Review*, 55(1); see also Rehaag, S. (2008). Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada. *McGill Law Journal*, 53.

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