

Refugee Claims Based on Sexual Orientation, Gender Identity, or HIV Status

The President of Uganda, Yoweri Museveni, announced on September 27, 1999 at a workshop for Members of Parliament from countries in east and southern Africa that all homosexuals would be arrested and charged by the Criminal Investigation Department (CID). I and the other board members went into hiding on October 29th when we learned about the President's order...On October 6 at about 10:00 p.m. just after we finished our dinner and were discussing the situation, about eight armed soldiers raided the house...The doors of the main house were open since we knew the gate was locked and we were not expecting a raid. We later learned that there was a government informant in our group. The soldiers used a ladder to go over the high fence that surrounded the house, and they unbolted the gate. The soldiers handcuffed me, covered my face with a black piece of cloth and led me to a Landrover 110 parked outside the gate. I did not know what happened to the others. About 30 minutes later we arrived at our destination and they removed the black cloth, my shoes and my watch. I guessed that I was in the notorious headquarters for the Directorate of Military Intelligence on Kitante road near Fairway Hotel. For over six hours I was interrogated about my sexuality, the organization I led, who my donors are, and who my contacts are both inside and outside the country. A major conducted the interrogation in the presence of two soldiers.

I was slapped twice by the major who thought I was not telling him enough of what he wanted to hear from me. Later that morning around five I was driven in a minibus to Mbuya Military Barracks. When the other inmates learned that I was not a soldier but a gay activist, they tortured me until I bled from my nose since that jail was meant for only soldiers or cases investigated by the army...¹

Canada is a signatory to the United Nations Convention on Refugees and has an obligation to provide asylum to those with a well-founded fear of persecution. The Convention lists five grounds for claiming refugee status. These are incorporated into the Immigration Act. While sexual orientation, gender identity or HIV status ("SOGIHS") are not specifically listed, the fifth ground of "membership in a particular social group" is an open-ended category.

Early refugee cases rejected sexual orientation as a basis for making a refugee claim. The first recorded successful refugee claim based on sexual orientation was the 1992 Immigration and Refugee Board (IRB) decision of Jorge Inaudi that found that sexual orientation could constitute membership in a particular social group. The total number of refugee claims based on SOGIHS is unknown. The IRB only maintains statistics on the number of claims determined based on membership in a particular social group. Since sexual orientation is not a distinctive ground recognized in either the Convention or the *Immigration and Refugee Protection Act*, these refugee claims are included in the open-ended category of "membership in a particular social group". Another impediment to obtaining information is that while the IRB must provide written reasons for negative refugee decisions, the IRB does not have to do so for positive decisions

¹Excerpt from the Personal Information Form filed in VA0-00504 with the Immigration and Refugee Board.

unless requested by the claimant or counsel. Therefore, written reasons for most positive refugee decisions are unavailable.

HIV status may be a ground for claiming refugee status if there is evidence of a well-founded fear of persecution because of HIV status. It may be the only grounds for claiming refugee status or can be claimed in conjunction with other grounds such as sexual orientation or gender identity. If the reason for the claim is determined to be only because the claimant's country is unable to provide adequate health or medical care, then the claim will not be accepted. Protected persons, Convention refugees or a person in similar circumstances are exempt from medical inadmissibility for immigration to Canada due to excessive demand on health or social services.

In the absence of statistics, I can only speak from my own experience in my law practice and from speaking with other Canadian lawyers who represent SOGIHS refugee claimants. Although these refugee claims form a small proportion of the total number of refugee claims made in Canada, I would estimate several thousand persons have claimed refugee status over the last decade. I have observed a significant and steady increase in claims over the last five years.

The source countries for SOGIHS refugee claims in Canada are based on the general knowledge claimants have about the ability to claim refugee status in Canada because of a well-founded fear of persecution based on their situation and their ability to get to Canada. They come from all walks of life and do not share the same level of sophistication. Generally, educated persons with access to the Internet are more aware of the possibility of making a refugee claim in Canada.

Two factors determine the ability of claimants to get to Canada. Firstly, visa restrictions to Canada and secondly, the common border with the USA. Canada imposes visa requirements that prevent many refugees from getting into Canada to make a refugee claim. Visa officers are trained to screen visa applications from potential refugee claimants. Secondly, previously a SOGIHS refugee who was in the USA could show up at a border post with Canada without a visitor visa to Canada and would be eligible to claim refugee status in Canada regardless of what their immigration status was in the USA. Citizens from many Latin American and other countries who were without status in the USA have made refugee claims in Canada. The implementation of the Safe Third Country Agreement signed between Canada and the USA severely impacted this flow of immigration. Now, only persons who are not US citizens or permanent residents in the USA who have a close family member in Canada can make a refugee claim at a land border. It is still possible to make a refugee claim at an immigration office in an airport or ferry terminal if someone has travelled from the USA.

The significance of these factors in determining the source countries of SOGIHS refugee claimants can be illustrated by comparing the number of SOGIHS refugee claimants from Mexico with those from the Peoples Republic of China. Despite the much greater population of the PRC, the much publicized cases of Chinese boat people making refugee claims, and the fact that more citizens of the PRC immigrate to Canada than Mexico, the country that I see the largest number of SOGIHS refugee claims originating from is Mexico, while there has only been a handful of claims over the past decade from the PRC. There is documentary evidence about the persecution of SOGIHSs in both countries. In my opinion, the disparity in number can be explained by the fact that there have been articles in major daily newspapers and magazines about

SOGIHSs claiming refugee status in Mexico and a citizen of Mexico does not require a visa to enter into Canada but a citizen of the People's Republic of China does.

A refugee claimant does not have to have been out as gay or lesbian in their own country or to have previously experienced persecution in order to claim refugee status. The test is forward looking, that is, what would happen on return to one's country. Persecution does not have to be imprisonment, torture, or death. Systematic harassment, if sufficiently serious, could amount to persecution. It is unnecessary to establish government involvement in persecution if the claimant is unable to obtain the protection of the government. If measures of discrimination lead to consequences of a substantially prejudicial nature, such as serious restrictions on the right to earn a livelihood or access to normally available educational facilities, this could amount to persecution.

I have always found it ironic that queer refugee claimants who flee persecution in their own countries and frequently have spent all of their lives trying to hide and deny their sexual orientation must suddenly prove they are queer in the refugee determination process. While there may be isolated cases of claimants fabricating their sexual orientation in a refugee claim, in my opinion this is uncommon. In fact, I have found the opposite to be more common. Even when in a country such as Canada that provides human rights protection on the basis of sexual orientation, queer refugee claimants who fear removal to their country can be so closeted they often do not disclose their sexual orientation until long after they arrive in Canada. I have seen situations where queer refugee claimants chose to rely on a weaker claim on some other grounds such as persecution on the basis of political opinion and have not disclosed their sexual orientation until late in the refugee determination process. If one is going to make up a story, why not claim membership in some dissident political faction than with a minority as universally marginalized and despised as gays and lesbians?

Visibility is frequently a major issue in SOGIHS refugee claims. While queer activists, transvestites and transsexuals generally have little difficulty in establishing they are identifiable, the closeted gay or lesbian has typically faced more of a struggle in convincing the IRB that they face a serious risk of persecution. Perversely, this has the effect of implicitly condoning the marginalization of queers and implies they should stay in the closet in their own countries and not be open about their sexual orientation. A different standard is often applied to queers than to members of religious minorities who are not expected to have to hide their identity.

There are IRB decisions rejecting the evidence of claimants as to the treatment of gays and lesbians in their country as "self serving" because it was provided by a gay or lesbian organization such as the International Gay and Lesbian Human Rights Commission. Until recently, mainstream human rights organizations such as Amnesty International refused to document sexual orientation persecution. Information on the treatment of lesbians and gays in some countries that do not have queer activist organizations is difficult to obtain. Another problem is the IRB's lack of understanding about the dynamics of sexual abuse of gay male claimants by the police and the function that meeting places such as bars or cruising areas have in societies where there is no other way to meet other gays.

Ironically, the leading case on whether sexual orientation constitutes membership in a particular social group² is found in a 1993 Supreme Court of Canada decision where the claimant did not claim to be queer. In *Ward*², the claimant was a former member of the Irish National Liberation Army who alleged he was unable to obtain protection from British authorities. The court analysed what constitutes membership in a particular social group². It reviewed earlier Federal Court and international jurisprudence to define what constitutes membership in a particular social group².

It noted:

²[1993] 2 S.C.R. 689 p. 732.

The meaning assigned to A particular social group@ in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative.* They identify three possible categories:

- I groups defined by an innate or unchangeable characteristic;
- II groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association, and
- III groups associated by a former voluntary status, unalterable due to its historical permanence.

...the first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activist. The third branch is included more for historical intentions, although it is also relevant to the anti-discrimination influences, in one=s past as an immutable part of the person.

*The tests proposed in *Mayers, supra*, *Cheung, supra*, and *Matter of Acosta, supra*, provide a good working rule to achieve this result.

The Federal Court Trial Division has since applied *Ward* in a 1994 case where it concluded that the tribunal erred in concluding the applicant's sexual orientation could not constitute membership in a particular social group.³ The *Ward* decision has not only been followed by the CRDD and courts in Canada, but also in other countries.⁴ In 1999 the Federal Court held that where a CRDD panel has rejected an applicant=s account of events and determined that an applicant whose claim is based on sexual orientation is not credible, the panel still has an obligation to address the issue of whether the applicant has a well-founded fear of persecution based on general persecution based on sexual orientation in the applicant=s country.⁵

Only a small fraction of the millions of persons throughout the world who fear persecution because of SOGIHS are able to physically get to Canada to make a refugee claim. Most are unable to obtain a visa. Visas are usually only given if an applicant can

³See *Pizarro v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 320 (T.D.).

⁴See, [Montiel in US and South African Constitution Court decision] Decision of the British House of Lords in *Islam (A.P.) v. Secretary of State for the Home Department*, [1999] H.L.J. No. 16 (H.L.).

⁵*Burgos-Rojas v. The Minister of Citizenship and Immigration (Federal Court-Trial Division)* IMM-3159-98, January 25, 1999.

show substantial ties with their home country. If a SOGIHS applicant is unmarried, they already have a mark against them in establishing substantial ties.

While a SOGIHS refugee claimant who cannot get to Canada has the option of making a refugee claim at an overseas Canadian visa office, there are formidable barriers to do so. The claimant must be outside of their country of citizenship or habitual residence. The claimant will first have to initiate the claim with locally engaged staff who are not citizens or permanent residents of Canada and may often share the same cultural and religious prejudices against homosexuality as persons in the claimant's country. The claimant must be prepared to wait for a lengthy processing time that could stretch to several years and be able to remain in the country the Canadian visa office is located in. The Canadian visa office will not intercede with the immigration authorities in the country the visa office is located in to assist the claimant in obtaining temporary status while the application is processed. Visa officers do not have the specialized training in refugee determination that the IRB has. To my knowledge, visa officers have no training in determining SOGIHS-based refugee claims. Unlike inland claims that have an oral hearing with the right to counsel, overseas claims are decided by a visa officer interviewing a claimant who is not allowed to have counsel present. While an inland refugee hearing typically takes a half to a full day, an overseas interview is typically less than half an hour.

While CIC compiles no statistics concerning overseas SOGIHS refugee claims, my sense is that when compared with inland SOGIHS refugee claims, they are small in number and the proportion accepted by visa offices is dramatically below that accepted by the IRB for inland SOGIHS refugee claims. This reflects the general situation for all refugee claimants.

A claimant who is refused by a visa office to immigrate to Canada has very limited rights of appeal when compared to inland refugee claimants. The gap has become even wider with the *IRPA*. There is no statutory obligation for visa offices to consider whether a failed refugee claimant is a person in need of protection⁶ as with inland refugee determination. Failed refugee claimants require leave for judicial review in Federal Court. There is no appeal of a refusal decision. Although there were provisions passed by Parliament in the *Immigration and Refugee Protection Act* to allow an appeal of a refusal in the Refugee Protection Division to a Refugee Appeal Division, the federal government has refused to proclaim these provisions. In addition, there is a pre-removal risk assessment (PRRA) (for failed inland refugee claimants conducted by the Canada Border Services Agency).⁶ Both judicial review and PRRA are very narrow remedies and do not, in my opinion, adequately substitute for an effective appeal process.

Canada enjoys an international reputation for the fairness of its inland refugee determination system. This is particularly true in its treatment of SOGIHS based refugee claimants when compared with other countries, including the US. The biggest challenge

⁶ Sections 160 to 174 of the *Immigration and Refugee Protection Regulations*, 2002/06/14 Canada Gazette Part II, Vol. 136, Extra

for those who seek asylum in Canada remains the problem of getting to Canada. Canada, like many other countries, is tightening its borders because of security concerns. While we are closing our borders to prevent refugees from reaching our shores, there should be another option created by the government for SOGIHS persecution cases to be considered in visa offices outside of Canada. A special designated class, such as exists for women refugee claimants, would allow the government to facilitate the entry of persons facing persecution because of SOGIHS into Canada while maintaining effective controls and monitoring. This would be administratively more simple, transparent, and effective than a determination of a refugee claim by a visa officer. It is generally well known what countries are human rights abusers on the basis of SOGIHSs and there could be a list of designated countries that a person could claim status while being in their country of citizenship or residence. Guidelines could be established that would ensure that the class was not being abused by persons who were not members of the class. It would also be possible to enlist the support of queer communities and queer-positive religious groups and others in Canada to provide sponsorships for persons approved overseas in a designated class.

The Canadian government and queer communities and AIDS support organizations in Canada could also play a more active role in improving the situation for persons who are trapped in their own communities and unable to immigrate or claim refugee status. Diplomatic pressure could be exerted on countries like Saudi Arabia who execute persons convicted of engaging in homosexual acts. Those of us in Canada are in a privileged position compared to most of the rest of the world and need to take the lead in ensuring human rights are internationally respected.

Rob Hughes
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