

Evaluation of the SOGIE Refugee Claim and Hearing Process

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Executive Summary

Despite Canada's reputation as an accessible and secure country for refugees, sexual minority or Sexual Orientation and Gender Identity and Expression (SOGIE) refugees face unequal and harsh treatment throughout the claim process. Due to unchecked practices, stereotyping and societal assumptions, SOGIE refugees experience higher levels of risk, barriers, and vulnerability than other refugee claimant classifications. The current lack of institutional knowledge, familiarity, and experience has hindered the ability of the Canadian government to properly respond to the needs of SOGIE refugees. The difficulties faced by SOGIE refugees particularly worsened in 2012 after the Government of Canada passed Bill C-31 *Protecting Canada's Immigration Act* to limit the amount of ineligible refugee claims and reduce system backlogs.¹ The new law resulted in the distortion of the sexual minority refugee claim process, as the Immigrant and Refugee Board of Canada (IRB), the agency that handles and processes refugee claims, left its adjudicators with the responsibility of determining which claims are authentic from those which are not, despite a lack of knowledge of the LGBTI (Lesbian, Gay, Bisexual, Transgender, and Intersex) community. This knowledge deficit quickly developed into irregular hearing practices, including invasive interviews, illogical determination methods, and arbitrary rulings for claimant acceptance. The IRB addressed the various issues surrounding the claim process by releasing guidelines that include reforms and improvements.² The policy brief explores the current state of sexual minority refugee claimants in Canada and Alberta, the modern issues faced by the social group, and analyzes whether the guidelines are sufficient to correct the issues existing within the current claim process.

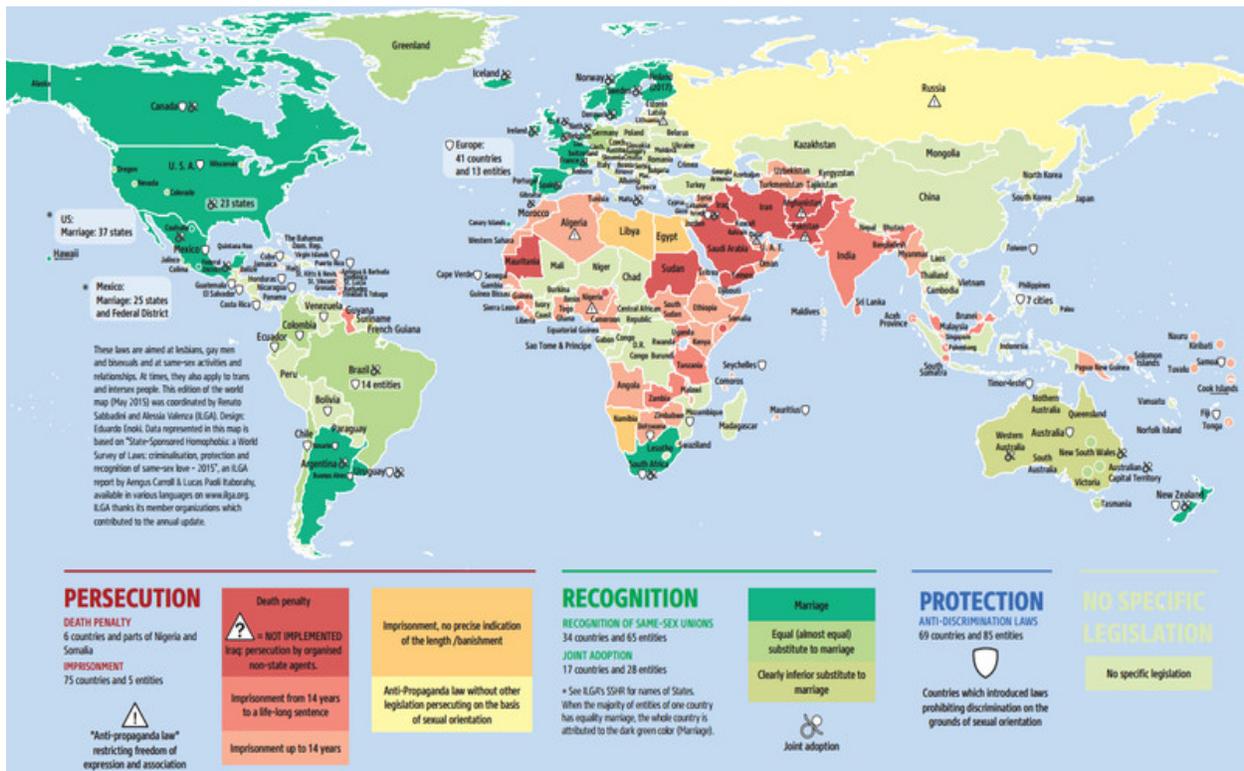
Introduction

In 1991, the Immigration and Refugee Board of Canada (IRB) accepted the first reported sexual orientation refugee.³ By 1994, Canada officially recognized sexual minorities as a classification of refugee status and saw a large increase in the number of sexual minority refugee claims. Between 1999 and 2002, more than 2,500 persecuted individuals arrived in Canada as Sexual Orientation and Gender Identity and Expression (SOGIE) refugees.⁴ Simultaneously, LGBTI (Lesbian, Gay, Bisexual, Transgender, and Intersex) community members experienced their rights and freedoms expand domestically. Since accepting the first sexual minority refugee, the Canadian government has legalized same-sex marriages, provincial governments began providing unbiased access to government benefits and services, and legal courts have developed precedent to promote LGBTI equality.⁵ Canada's

progressive policies and attitudes have contributed to its reputation as a sanctuary that welcomes refugees around the world who are under persecution for their SOGIE status.⁶ Coupled with a record high in the global number of refugees, it is expected that an increasing number of asylum seekers are making claims under the sexual minority classification in Canada.⁷ Currently, refugee claimants are among the most vulnerable individuals in the province of Alberta as there are limited services and resources geared specifically towards them. This lack of support adds an additional layer of barriers and challenges for SOGIE refugee claimants.

International Context

LGBTI rights and freedoms are a controversial and even deadly topic in many countries around the world, and remain the driving force for the SOGIE classification in Canada. Currently, 74 countries or 37% of the United Nations, have declared same-sex physical relations as illegal.⁸ If an individual is identified as a member of the LGBTI community in a hostile country, it may lead to severe public harassment and discrimination when accessing employment, housing, and education.⁹ Several refugees have revealed that family and community members, and not the state, often administer the punishment for same-sex relations.¹⁰ Punishment for association with the LGBTI community includes public shaming, assault, discrimination, imprisonment, and in some cases, execution by firing squad, hanging, or stoning.¹¹ The map below highlights the vast contrast in the response to sexual minorities, ranging from full legal protection to capital punishment.¹²



In some countries, such as Uganda and Indonesia, it is legal to identify as a sexual minority; however, there are laws in place to limit any forms of sexual engagement, physical relationships, or any non-traditional heterosexual or cisgender association.¹³ Individuals may also be criminally charged for contracting an STD such as HIV/AIDS, which is typically associated with the LGBTI community.¹⁴ Association with either the community or its stereotypically associated diseases may also limit an individual's access to employment, social services, and housing.¹⁵ Recently, government authorities in Chechnya arrested more than one hundred men suspected of engaging in illegal sexual acts and relationships.¹⁶ Reports state that those arrested were imprisoned, beaten, tortured, and/or killed.¹⁷ The Chechen case identified the reality that laws are an inadequate safeguard from discrimination, harassment, and violence.

The immense risk under which sexual minorities around the world live under is the reason Canada adopted the SOGIE refugee classification, with the understanding that this unique status category is imperative for sexual minority freedom, expression, and security. Since SOGIE refugees face vulnerability levels beyond those experienced by other refugee classifications, it is essential that Canada improve the hearing and claim process for sexual minorities, and require specific supports to supplement the refugee services provided.

Canadian Context

In 2015, the newly elected federal government introduced renewed support for immigrants, refugees, and sexual minorities, including: funding, representation, support, and ambitious goals to increase the number of refugees welcomed into Canada.¹⁸ The 2017 federal budget proposed that \$3.6 million be allocated towards a three-year plan to establish an LGBTI secretariat within the Privy Council Office to support the federally appointed advisor to the Prime Minister in developing and coordinating government initiatives on sexual minority issues.¹⁹ The advisory position is a significant step in improving sexual minorities representation at the national level, and in developing a diverse cabinet. Further, the position represents a major shift in policy from the previous administration, which passed controversial legislation criticized for distorting the LGBTI refugee claim process. Despite efforts to increase LGBTI awareness, the Canadian government has remained unable to address the damages caused by the established system. Thus, the IRB introduced guidelines to improve practices for the entire claim process; however, the impact of the guidelines is too early to measure as they were released in May 2017.

The importance of maintaining a refugee claim process that is fair and supports the dignity of the individual is becoming increasingly urgent as Canada is faced with rising numbers of refugee claimants, particularly as the United States has shed its status as an ideal landing point for global refugees. The number of refugee claimants accepted in Canada annually has reached new heights; from 2013 to 2016, domestic refugee claimants increased from 10,370 to 23,900, with a growing proportion likely falling under the sexual minority social group classification.²⁰ Between 2013 and 2015, 2,371, or 13% of 18,221 observed asylum claims, were based on sexual orientation.²¹ With increasing levels of refugee claims and the growing importance of recognizing LGBTI rights, it is essential Canada continue to develop its SOGIE claim and hearing process to ensure progress achieved nationally for the LGBTI community does not exclude newcomers.

Alberta Context

Recently, Alberta embraced several social advancements to improve the conditions for the LGBTI community, including: the election of three openly LGBTI MLAs (including a cabinet minister), establishment of multiple support centres, and strong support for pride events.²² The changing Alberta landscape has the potential to leave a positive impact on Alberta, shaping it into an attractive destination for SOGIE claimants. Currently, the province has been experiencing a rise in the number of refugees claiming asylum; between 2013 and 2016, the number of refugee claims increased from 375 to 1,030.²³ Concurrently, settlement agencies such as the Edmonton Mennonite Centre for Newcomers reported increases in the number of sexual minority refugee claimants, specifically gay and transgender identifying refugees.²⁴

Even though provincial refugee claimants have access to services and supports, they are subject to disadvantages in neighbouring provinces, and are among the most vulnerable people in the province of Alberta. A critical barrier for Albertan refugee claimants is that they cannot access support from subsidized legal aid when compiling their refugee claim, and cannot access support until after they submit their claim during the hearing process.²⁵ For claimants that cannot afford a private lawyer, the lack of legal aid before submitting the claim disproportionately affects SOGIE applicants due to the irregular format and lack of precedence for their claim.²⁶ Additionally, during the period of limbo between application and hearing, SOGIE refugee claimants are more likely to experience difficulty finding housing and accessing certain services due to discrimination such as homophobia, the risk of exposure, and requiring distinct social support.²⁷ The lack of social support for SOGIE refugees includes societal resentment for sexual minorities, isolation from disapproving family members, and being ostracized by their cultural communities for identifying as a sexual minority.

The lack of social support is worsened by limited access to psychological support with a familiarity of the SOGIE experience, which is especially significant for SOGIE claimants who are often required to recall traumatic experiences of abuse, violence, torture, or targeted killings.²⁸ An anonymous Albertan psychologist stated the difficulty for therapists to provide support is due to their lack of understanding of the abuse SOGIE claimants face, which attributes to psychological issues being higher and more prevalent among sexual minorities.²⁹ The psychologist further described the invasive format of the hearing process, coupled with recalling traumatic experiences, as a total lack of consciousness towards the mental health of the claimant.³⁰

A portion of SOGIE claimants end up in homeless shelters where they are exposed to more vulnerable situations as sexual minorities.³¹ Provinces such as British Columbia have shelters geared specifically towards refugee and SOGIE claimants to prevent any further mistreatment.³² Lastly, Alberta claimants are not eligible for government issued I.D., and must carry official court documents to access age-restricted services and facilities (bars, restaurants, etc.), further highlighting the ways refugees have their Canadian integration interrupted.³³

Bill C-31 and Interview Process

In 2012, the federal government of Canada passed Bill C-31 *Protecting Canada's Immigration Act*, with the goal of establishing several provisions to reduce the amount of ineligible refugee claims, eliminate back logs, and slow down the inflow of claimants.³⁴ The provisions included new processing steps, additional application forms, intensified interview practices, and shorter time periods before hearings; depending on country of origin.³⁵ Ideally, the added requirements and shorter time frame were designed to deter refugee claimants and reduce the number of applications. However, despite the intentions to limit ineligible refugee claims and reduce the overall inflow, the provisions had an indiscriminately negative impact on SOGIE claimants.³⁶ SOGIE adjudicators adopted stricter positions to limit the number of ineligible claims within the sexual minority classification, which resulted in the adoption of rigorous interview and hearing practices.

The stricter evaluation policies were adopted by adjudicators with no guidance or training, and left adjudicators increasingly reliant on stereotypical forms of evaluation to determine ineligible claims. These stereotypical views included expectations that claimants should be frequenting LGBTI shops, bars and clubs, or social safe places; engaging and building relationships within their sexual minority community; and getting involved in community outreach and supporting events like Pride and HIV/AIDS centres.³⁷ Avoiding these various stereotypical activities and credibility builders may result in the adjudicator questioning the authenticity of the claim and even striking it down as ineligible. Adjudicators also have the tendency to assume that all LGBTI individuals attend LGBTI establishments such as bars and clubs regardless of age, income, or ethnicity.³⁸ In one case, an individual who actively chose to attend general establishments with no preference on sexual expression had their claim considered inconceivable, based on their "ignorance of the gay reality".³⁹ These stereotypes are carried out despite the fact that these activities may not fit with the social reality of a refugee who is concerned about their status, freedom of gender expression, or arrival from a low-income developing nation.⁴⁰

Beyond the controversial decisions and determinations made by adjudicators, there is also the imposing use of language, labels, and insensitivity that are unique to the SOGIE interview process. Claimants are currently subject to graphic questioning in which sexuality is used as a determinate of their LGBTI status.⁴¹ Often, SOGIE claimants are not comfortable with the socio-sexual identity categories of lesbian, gay, bisexual, or others used by IRB members during the hearing process, as these terms are fraught with Euro-American racial, gendered, and class qualities.⁴² The adjudicators also critically consider claimants that have engaged in heterosexual relations in the past and only recently came out with their gender identity.⁴³ Just as adjudicators place Western LGBTI stereotypes on SOGIE claimants, they also place racial stereotypes on claimants according to the assumed race or ethnicity. Claimants that identify as a visible minority can be subject to racism as adjudicators allow societal assumptions to influence their decisions. For example, Afro-Caribbean men are typically associated with macho personalities that are usually overtly homophobic.⁴⁴ However, Caucasian men are stereotypically more likely to identify as a sexual minority and may have an advantage during the claim process.⁴⁵

Further, claim periods are uncertain as hearing dates are constantly delayed and rescheduled. For the past five years there has been a significantly decline in the number of hearings heard on time. In 2013, 75% of hearings were heard on time, but by 2017 that number had dropped to 44%.⁴⁶ The delayed hearings may be attributed to the increase of refugees seeking asylum in Canada, coupled with little to no growth in the IRB or other processing departments.⁴⁷ Varying time periods may also be attributed to the impact of the designated country of origin (DCO) clause, which is another policy intended to limit the number of ineligible refugee claims by restricting entry to all claimants originating from countries with a stable government, laws prohibiting discrimination, and/or the state has the capacity to protect minority groups.⁴⁸ The policy placed an undue hardship on SOGIE claimants with the use of different hearing periods depending on DCO: 45 days from DCO countries, 30 days for inland claims, and 60 days for non-DCO countries.⁴⁹ Contrasting deadlines based on country of origin made it burdensome to prepare an application and build a case, and left sexual minorities at risk of being sent back to their DCO where meeting the basic legal requirement left them vulnerable to abuse, harassment, and possibly death. Several countries around the world have attributed to this issue as they have adopted laws that legalize LGBTI self-identification, but do not actively protect their citizens. Additionally, forms of delays for claim and hearing dates attribute to the rising cost of extended legal council, placing a burden on provinces subsidizing the service.

Guidelines

On May 1, 2017, the IRB released nine guidelines to provide principles for adjudicating and managing refugee claimant cases, and reform-hearing practices used during the refugee claimants' evaluation process.⁵⁰ The guidelines are meant to support decision-makers, address grievances over the current system, and provide justification for government decisions and actions.⁵¹ The last guideline, titled *Guideline 9: Proceedings the IRB Involving Sexual Orientation and Gender Identity and Expression*, is specific to sexual minority refugee claims.⁵² The 12-page document covers terminology, appropriate language, challenges faced by individuals with diverse sexual and gender identities, the importance of protecting sensitive information, principles for assessing credibility, and avoiding stereotyping.⁵³ In cautioning decision-makers to be aware of their own stereotypes, the guidelines warn adjudicators that they should not assume LGBTI community members:⁵⁴

- Have feminized or masculinized appearances or mannerisms;
- Share the same dynamics and characteristics across cultures;
- Have had same-sex sexual experiences or relations;
- Have refrained from heterosexual sexual experiences or having children;
- Would actively participate in LGBTI culture in Canada, including frequenting gay-predominant areas and social establishments or join community groups.

The guidelines aim to correct the hearing practices of adjudicators by establishing principles for assessing evidence of credibility pertaining to SOGIE claimants.⁵⁵ Strategies include allowing claimants to substitute corroborative stories with other forms of evidence as sexual minority refugee claimants have hidden their sexual orientation from family, friends, and community members and do not have anybody to rely upon to prove their story. Adjudicators are also recommended to not question a claimant's sexuality based on their

level of activity within the LGBTI community or relationships with similar identifying individuals. Evidence of heterosexual relationships before arriving in Canada is not to be considered as a factor invalidating a SOGIE claim. The IRB recognizes that not every sexual minority embraces their identity immediately and needs time to discover it. Lastly, adjudicators cannot use vagueness, inconsistencies, or material omissions as grounds for designating a claimant as ineligible. There are various causes to an inconsistent claim, such as fear, trauma, cultural traditions, or psychological scars that may leave refugees unable to properly recollect their story of persecution. The guidelines present a shift in the burden of responsibility from the individual to the system, and places a form of accountability on the IRB and adjudicators.

Analysis

On a national level, the guidelines are a positive step in addressing several of the issues associated with the claim process.⁵⁶ The guidelines recognize the deficiencies of the current claim process and present active steps in addressing questionable practices present in the current system. Although the guidelines were originally released in May 2017, they are too new to determine the impact on the process. There are several areas for reform left incomplete or unaddressed, that may be future areas of reform. Examples include:⁵⁷

- Remove reference letters from the claim process as it has developed into a checklist item and no longer maintains the same value for SOGIE claimants;
- The circumstances in which the claimants arrive in Canada should be irrelevant to the decision process;
- Provide mandatory training for adjudicators;
- Provide training courses for all legal aid lawyers, as some lawyers are not familiar with the SOGIE hearing process;
- Expand the hearing process beyond one adjudicator per case, all claims should have multiple decision makers.

Adopting these reforms may reduce the potential effects of internalized oppression while affirming people's strengths and resiliency, and ensure a successful transition period.⁵⁸ The unique needs of refugee claimants in Alberta would benefit from the support of a comprehensive system of care that ensured access to specific support services to facilitate a successful hearing process. Comparable to other refugees in Alberta, SOGIE claimants would especially benefit from legal guidance, appropriate housing, specifically offered services, and access to mental health practitioners. Through the empowerment of refugee claimants and the encouragement of well-informed adjudicators, negative experiences may be limited and claimants may be protected from further hate and discrimination, potentially developing into a fluid settlement and integration period.

Conclusion

Sexual minority rights, expression, and acceptance are continuously growing and the urgency to provide protection from persecution remains imperative. Canada has built a reputation as a landing place for persecuted populations, but a lack of knowledge and awareness has led to questionable practices when dealing with the relatively new sexual minority classification.

Regarding SOGIE refugee claimants, stereotypical norms were considered during the interview process, pushing individuals into a forced coming out period in which heteronormativity is revealed and adversely affects the claim.⁵⁹ The inter-connections between historical, social, economic, political, structural, cultural, and psychological dimensions of migration and sexuality reveal the complex ways in which the Canadian refugee system organizes and defines the refugee experience of sexual orientation and gender identity.⁶⁰ The entire process further traumatizes refugees coming from violent and anti-gender expression countries to stigma, mistreatment, and re-traumatization not experienced by other refugee classifications. It is difficult for sexual minority refugees to reveal the conditions of their persecution after trying to hide their sexual identity their whole lives, in addition to the frightening reality of providing detailed accounts of their persecution without support from psychologists, family members, or their cultural community.

Even though it is too early to determine the impact of the IRB guidelines, they point out specific issues with the current process and present strategies for positive change. It is crucial for the settlement and integration sector, IRB officials, and the Government of Canada to gain knowledge on the subject and consider the subtle, yet powerful ways in which historical and contemporary processes of racialization continue to inform our dominant assumptions and world views as they relate to migration, sexuality, and gender normativity.⁶¹ Correcting the invasive and unconventional format of the hearing process for SOGIE claimants will allow the process to dispel issues surrounding dishonesty, mistrust, stereotyping, and racism; this would in turn reaffirm Canada's international image as welcoming and supportive to persecuted populations. Adopting these guidelines in addition to the above recommendations will close the service gap between SOGIE refugee claimants and other classifications. Additionally, it will ensure future SOGIE refugee claimants do not face the same mistreatment, and foster a more holistic and welcoming claim process.

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