

Sexual minority refugee determinations in Canada: The experience of bisexual claimants

Immigration and Refugee Board Refugee Protection Division		Commission de l'immigration et du statut de réfugié Section de la protection des réfugiés
RPD File # / No. dossier SPR : CA4-00680/CA4-00733/CA4-00734		
Private Proceeding Huis clos		
Claimant(s)	Demandeur(s) d'asile	
Date(s) of Hearing	Date(s) de l'audience	
Place of Hearing	Lieu de l'audience	
Videoconferencing heard in	Fait par vidéoconférence à	
Date of decision	Date de la décision	
Panel	Tribunal	
Claimant's Counsel	Conseil du demandeur d'asile	
Refugee Protection Officer	Not Attending	
Designated representative		
Minister's Counsel	NIL	

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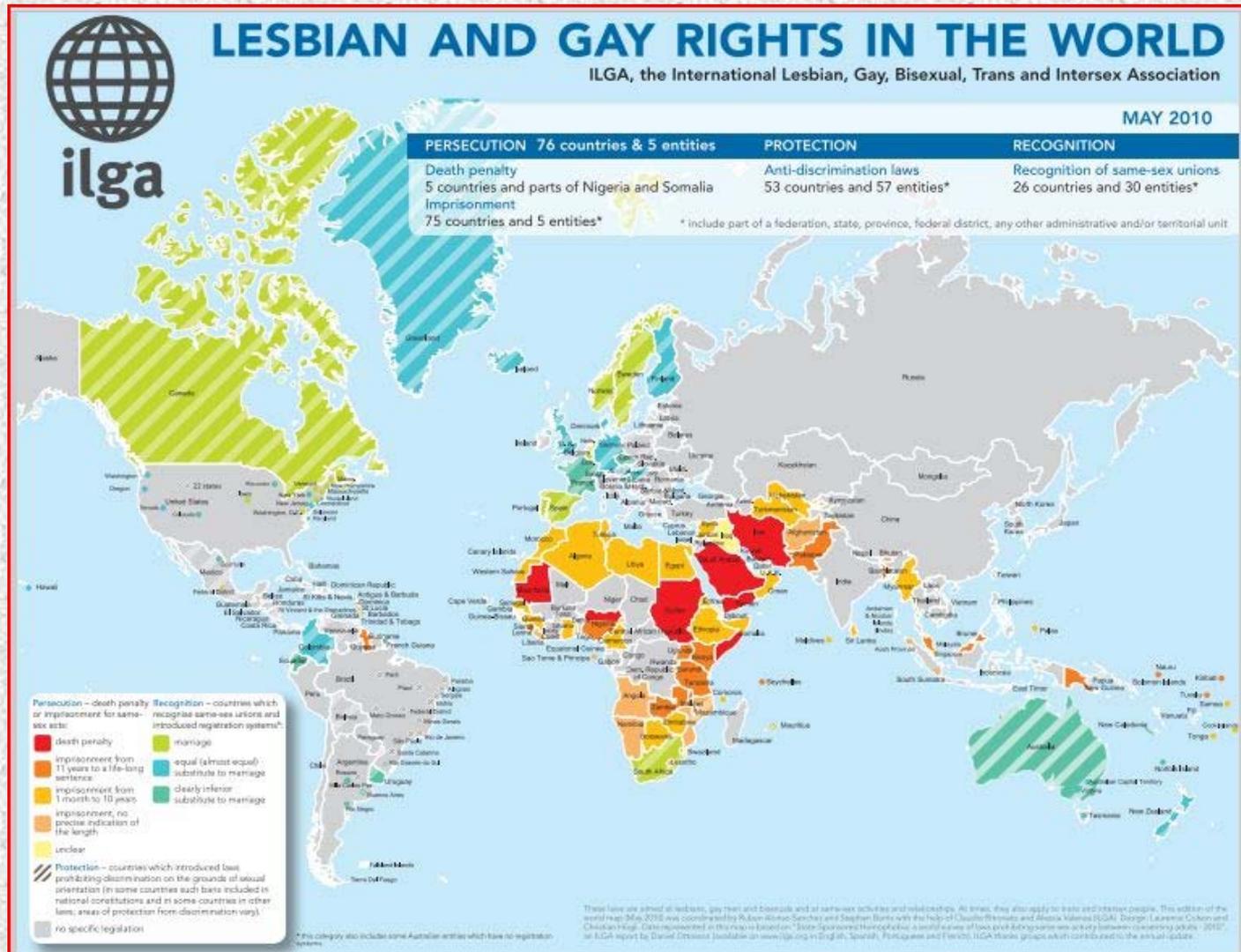
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1. Context



The Refugee Definition:

IRPA, s.96: A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion... is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries...



Re. R. (U.W.) (1991) (IRB)

Factual Scenario

Per E. Rotman:

Homosexuals...form a particular social group. It is their right of conscience or human dignity that these individuals should not be required to change their sexual preference.

Per A. Leistra:

From man's earliest recorded history we find that all human expression fell under, and was directed by laws based on religion... In their teachings they all speak about the fundamental value of the family as a unit in the pyramid of society.

It would be foolhardy to flaunt one's sexual preference in the face of one's country's legally established laws which prohibit expression of open sexual activities and which are judged by their countries' laws to be objectionable.

Laws of general application, set by sovereign states in regard to the conduct of their citizens, precludes the grouping of subjects of those states objecting to such laws, under the definition of "membership in a PSG".



Canada v. Ward (1993)



3 Types of “Particular Social Groups”:

(1) groups defined by an innate or unchangeable characteristic;

(2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and

(3) groups associated by a former voluntary status, unalterable due to its historical permanence.

“The first category would embrace individuals fear persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists.”

IRB (2004-2007) Principal Claimant RPD Decisions		
Type	Number	Grant Rate %
Lesbian	450	55.1
Gay	2,036	52.1
Bisexual	199	30.7
Total at RPD (2004-2007)	56,916	49.4

Prior Studies:

S. Rehaag, "Patrolling the Borders of Sexual Orientation: Bisexual refugee claims in Canada" (2008) 53 McGill Law Journal 59.

S. Rehaag, "Bisexuals Need Not Apply: a comparative appraisal of refugee law and policy in Canada, the United States, and Australia" (2009) 13:2 International Journal of Human Rights 415.

2. The Present Study: Methodology

- **Access to Information Request:** Copies of all IRB refugee decisions where the claimant asserted a fear of persecution on account of their bisexuality (2004-2007).
- **Database Design and Data Entry**
- **Review of Database for Preliminary findings....**
 - (a) **Evidence of Sexual Orientation**
 - (b) **Visibility and Risk**
 - (c) **Western Conceptions of Sexual Orientation**

3 (a) Evidence of Sexual Orientation

The challenge:

- How to assess whether an asserted sexual orientation is genuine?

The tribunal does not have a magical means to identify bisexuals.
(MA3-08210)

What counts as evidence of sexual orientation?

- The determination of bisexual claimants' **credible sexual orientation** appeals to recent **evidence of same-sex behaviour**.

The Board notes that the claimant alleges he has not participated in any homosexual activity in Canada for in excess of one year. (TA5-03780)

The claimant [has not] established his identity as a bi-sexual person. There is evidence that he is heterosexual... The claimant testified he has not had any homosexual relationships in Canada. (TA2-16419)

Here in Canada, he is free to sleep with whatever gender of partner he chooses, and he chooses female, yet in Grenada, where homosexual activity is illegal, he contemplates homosexual activity. I reject the latter statement because of his consistent heterosexual activity for the past twelve years at least, both in Grenada and in Canada. (TA3 – 24241)

What counts as evidence of sexual orientation (cont.)?

- References to **marriage** and/or **children** are often taken as evidence of a non-credible, inauthentic sexual orientation.

The claimant's statement that he fathered a son in 1987 and was divorced in 1994 are troubling and confusing. The claimant's four-year relationship with another woman, following his divorce, creates in my mind even more doubt about his alleged sexual identity. (TA1-25948)

The claimant could not adequately explain why he was toying with her and a possible serious relationship. He could not explain why he spoke about marriage with her, given his homosexual interests. It does not make sense. (VA3-02165)

She says she had a lesbian relationship with XXX but she nevertheless cheated on her and slept with an old male friend who was always after her. She was drunk, according to her testimony, and out of this alleged one night stand she became pregnant. Instead of having an abortion, she went through with it and she wanted to just move on. When a friend did not want her to stay any longer, she went to live with the old male friend's family no less. (TA5-16184)

What counts as evidence of sexual orientation (cont.)?

- Evidence of a **loving** and **committed** opposite sex relationship counts as **evidence of heterosexuality**.

The claimant's stated loving and romantic attraction to XXX over an approximate 6-year period... was reflective of what might reasonably be expected of a heterosexual man, rather than a homosexual man. (TA4-18848)

At the hearing, the claimant testified that he loved his wife and believed in women again, his wife did everything he wanted, and they had a variety of sexual activities, satisfied each other, and lived together as a family. When asked whether he saw himself as a man having a need for sex only with his wife, the claimant answered that it was the case at the moment... The claimant's testimony... supported the panel's conclusion that he did not establish his homosexuality or bisexuality with persuasive evidence. (TA1-28696)

3.(b) Visibility and Risk

The challenge:

- How to assess the likelihood that a claimant could be identified by agents of persecution, and therefore that the claimant is at risk of persecution?

[The claimant] could not define how people could see that he was different from the general population. (MA3-08209)

Using stereotypes to assess visibility

- The IRB frequently relies on **stereotypes** about what they understand homosexuals and lesbians look like to assess whether claimants would be **visible to persecutors**.

Le demandeur est un homme de grandeur moyenne, trapu avec de larges mains. Son apparence generale ne peut laisser croire qu'il est un homosexuel. (MA2-05140)

I note that this claimant is not effeminate, at least in an outward manner. He appeared to be healthy, strong male, and showed no effeminate mannerisms during the hearing. (TA2-10890)

The claimant has adduced no evidence that she has a particularly masculine demeanor. (CA4-00826)

The claimant's apparel or demeanour does not reveal any sexual preference. (TA3-04471)

Problems in evaluating claimant's explanations of visibility

- When claimants explain how they could be identified as members of sexual minorities, sometimes the IRB dismisses those explanations as **vague or speculative**.

[The claimant asserted that he could be identified by] the way he walks and talks... [The claimant] stated that Mexicans normally speak in a spasmodic or staccato... fashion, whereas bisexuals have a more flowing way of speaking... The tribunal is unaware of means to assess such vague identifying features for [the claimant's] alleged sexuality. (MA3-08210)

His live-in girlfriend testified that he was not overly demonstrative in public with his male friends. The claimant testified that a person does not have to be flamboyant because one person might find out and could tell another. The panel finds his testimony to be speculation. (CA5-00025)

Evidence of risk and the invisibility of bisexuality

- Bisexuality is perceived as something that **can be hidden** through heterosexual relationships. Within this logic, **involvement with an opposite-sex partner** is evidence that bisexual applicants will not face risks because they will not be visible to agents of persecution.

An interesting aspect of her testimony is that she states she is bisexual. At the time of the hearing of her claim, she was in a relationship with a man... if she were to return to Saint Lucia today, she would have no problem either with her family member or the society because of her current relationship. (TA2-21136)

The panel finds that, on a balance of probabilities that the police would not come after people who practice bisexuality, particularly if they are discreet in their homosexual relationship. In the case at hand, it would not be unreasonable for the claimant to relocate to get away from his relatives and friends and settle down with his wife and children, if his wife accepts him back. Even otherwise, he could get another wife and continue his bisexual life style discreetly. (TA5-09633)

Differing standards for asking claimants to remain invisible to avoid risk

- Case law prohibits the IRB from requiring gay and lesbian claimants to **hide their sexual orientation** in order to avoid persecution. However, the IRB sometimes adopts **different standards for bisexual claimants**.

There was some discussion whether the claimant could live safely in Pakistan as he had in Canada: that is to say, by marrying a woman and satisfying his need for male partners clandestinely. Counsel remonstrated against this argument. If the claimant claimed to be homosexual and not bisexual, I might have agreed with counsel. As he is self-described as bisexual and not homosexual, I do not. (TA3-23862)

3. (c) Western Conceptions of Sexual Orientation

The Challenge

- Do traditional Western binary understandings of homosexual life narratives apply to bisexuals – particularly bisexuals from non-western settings?

The claimant attempted to downplay his heterosexual life in order to impress me about his homosexual life. (TA5-07252)

Fixed models of sexual orientation and identity formation

- A **model of sexual orientation** as **inborn, immutable**, and usually **biologically** determined, leading to misjudgments of bisexuality on the basis of a fixed narrative of self-discovery

The panel ... asked ... why the claimant was not aware of his attraction for other men after attaining his puberty and why his homosexuality did not manifest until he was nearly thirty-nine years old... (TA5-09633)

Fixed models of sexual orientation and identity formation (cont)

- Expectation of a **linear, progress narrative & detailed chronology** of “**coming out**” in testimony & concordant definition of gay identity leaves no room for a **fluid sense of sexuality** common in other cultural contexts.

[The claimant] identified himself as being bisexual. In his PIF, he relates about his affairs with the two women in Jamaica. He states, "I grew up to love men and women". At the hearing of his claim he stated that there was a point in his life when he was attracted to women. He later changed his testimony stating that he was only attracted to men. He gave no clear explanation for this contradiction. (TA5-10217)

3. Three Preliminary Findings:

(a) Evidence of Sexual Orientation

(b) Visibility and Risk

(c) Western Conceptions of Sexual Orientation

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