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In Search of Protection
Sexual minority women in Canadian refugee determination

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Résumé

Le Canada accepte des demandes d'asile sur la base de l'orientation sexuelle depuis plus de 20 ans. Quoiqu'il en soit, cette recherche permet de douter du fait que les demandes sur la base de l'orientation sexuelle déposées par des femmes soient traitées de façon adéquate. Pour garantir l'accès à la protection des femmes appartenant à des minorités sexuelles, une analyse du risque de persécution fondée sur l'orientation sexuelle doit incorporer des considérations de genre ainsi que divers autres facteurs d'ordre social et culturel. À partir d'une étude de cas de demandes du statut de réfugié déposées par des femmes sur la base de l'orientation sexuelle et rejetées par la Commission de l'immigration et du statut de réfugié entre 2010 et 2013, cette recherche identifie des procédés décisionnels problématiques qui font obstacle au droit d'asile de ces femmes. Les résultats de cette étude révèlent qu'une analyse intersectionnelle, laquelle prend acte des formes variées et multiples de l'oppression dans un contexte social donné, est d'importance cruciale pour une évaluation éclairée et non tronquée des risques de persécution pour les minorités sexuelles féminines. À la lumière de ces résultats, ce mémoire propose qu'une analyse intersectionnelle accompagne une nécessaire formation pour les membres de la Commission de l'immigration et du statut de réfugié du Canada sur des questions particulières à des minorités sexuelles .

Mots-clés : minorités sexuelles, lesbienne, femmes, réfugiés, intersectionnalité, orientation sexuelle, genre, persécution liée au genre, Commission de l'immigration et du statut de réfugiés, Canada.

Abstract

Canada has accepted refugee claims on the basis of sexual orientation for more than 20 years; however, research suggests that claims brought by women on the basis of sexual orientation have not always received fair adjudication. To ensure equitable access to protection for sexual minority women, an analysis of their risk of persecution must incorporate gender and other social and cultural factors that influence their experiences. Based on a case study of claims brought by women on the basis of sexual orientation between 2010 and 2013, which were subsequently rejected by the Canadian Immigration and Refugee board, this research identifies decision making that poses obstacles to sexual minority women's access to refugee protection. The findings from this case study demonstrate that an intersectional analysis, which considers various forms of oppression within a particular social context, is crucial to a complete and informed assessment of the risk of persecution for sexual minority women. In light of these findings, this paper proposes that an intersectional analysis accompany continued training for Immigration and Refugee Board members on issues particular to sexual minorities.

Keywords: sexual minorities, lesbian, women, refugees, intersectionality, sexual orientation, gender, gender-based persecution, Immigration and Refugee Board, Canada.

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List of abbreviations/ Liste d'abréviations

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
DCO	Designated Country of Origin
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFA	Internal Flight Alternative
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
IRB	Immigration and Refugee Board of Canada
LGBT	Lesbian, Gay, Bisexual, Transgender
PIF	Personal Information Form
PTSD	Post Traumatic Stress Disorder
NGO	Non-governmental organization
OHCHR	United Nations Office for the High Commissioner for Human Rights
RPD	Refugee Protection Division
UN	United Nations
UNCAT	United Nations Committee against Torture
UNHCR	United Nations High Commissioner for Refugees
UDHR	Universal Declaration of Human Rights

Français

CEDAW (CEDEF)	Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes
DCO (POD)	Les pays d'origine désignés
HRW	Human Rights Watch
ICCPR (PIDCP)	Pacte international relative aux droits civils et politiques
ICESCR (PIDESC)	Pacte international relatif aux droits économiques, sociaux et culturels
IFA (PRI)	Possibilité de refuge intérieur
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
IRB (CISR)	La commission de l'immigration et du statut de réfugié du Canada
LGBT	Lesbienne, Gai, Bisexuelle, Transgenre
PIF (FRP)	Formulaire de renseignements personnels
PTSD (TSPT)	Trouble de stress post-traumatique
RPD (SPR)	La Section de la protection des réfugiés
UNCAT	Le comité contre la torture
UNHCR	Haut Commissariat des Nations unies pour les réfugiés
UDHR (DUDH)	Déclaration universelle des droits de l'homme

*For my mom, whose love and strength I will
always appreciate. I am so grateful to have had
you as a mother.*

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Introduction

This research paper seeks to identify aspects of RPD decision making, which create obstacles for sexual minority women seeking protection in Canada. Sexual minority women experience persecution in particular ways due to the intersection of their gender with their sexual orientation and other social locations. Sexual and physical violence, forced marriage, forced pregnancy, arrest and arbitrary detainment are among some of the human rights violations that sexual minority women face worldwide. Within the context of refugee determination, the tendency of RPD decision-makers to make generalizations about a common sexual minority experience without consideration of the claimant's gender, risks an incomplete analysis of the risk of persecution and consequently the return of sexual minority women, who are in need of protection, back to dangerous situations in their country of origin.

In 1993, Canada was the first country to introduce guidelines by which gender-based persecution could be assessed; however, LaViolette has demonstrated that claims brought by women on the basis of sexual orientation were not being considered within the context of the Guidelines.¹ More than 20 years after the Guidelines were introduced, Canadian decision-makers still fail to assess sexual orientation-based claims brought by women within the context of gender.

Despite the UNHCR's caution against stereotyping sexual minorities in its Guidelines on sexual orientation-based claims,² scholars continue to identify cases in which decision-makers

¹ Nicole LaViolette, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines" (2007) 19(2) Int J Refugee Law 169.

² UN High Commissioner for Refugees (UNHCR), *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*

still cling to stereotypical expectations and cultural bias in their decision making.³ This failure to appreciate the diverse experience of sexual minorities within the specific context of their countries compromises sexual minority women's access to protection when they are not able to offer enough proof to satisfy the decision-makers' expectations of their sexual identity.

Questionable reasoning behind rejected refugee claims has raised concerns among scholars as to the fairness of Canadian refugee determination and the competency of RPD members.⁴ Investigating the reasoning and justification behind a series of denied refugee claims, this research will respond to a central research question: Is the way in which Canadian refugee adjudicators decide claims on the basis of sexual orientation brought by women reasonable from the perspective of a feminist analysis? In order to respond to this question, rejected IRB claims brought by women on the basis of sexual orientation will be analyzed from an intersectional perspective. Because gender intersects with other identities and social locations, which coexist to shape women's experiences of oppression, an intersectional framework is necessary to facilitate an analysis of the many factors that serve to maintain the oppression and marginalization of women.⁵ Using an intersectional framework to analyze rejected claims, this paper will expose decision making that fails to adequately assess the risk of persecution within the context of gender, sexual orientation and other social and cultural factors.

Convention and/or its 1967 Protocol relating to the Status of Refugees (23 October 2012) HCR/GIP/12/01, online: <http://www.refworld.org/docid/50348afc2.html> [accessed 23 February 2014].

³ Sean Rehaag, "Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada the United States, and Australia" (2009) 13(2) *Intl J Hum Rights* 415; Jenni Millbank, "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia" (2002) *Melb Univ L Rev* 144.

⁴ Cécile Rousseau et al, "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board" (2002) 15(1) *J Refugee Stud* 43.

⁵ "Intersectional Feminist Frameworks: A Primer," Canadian Research Institute for the Advancement of Women (2006), online: CRIAW-ICREF <<http://www.criaw-icref.ca/sites/criaw/files/The%20IFFs-%20An%20Emerging%20Vision.pdf>> [accessed 1 April 2014].

Research structure

This research paper begins with a review and background on the human rights situation of sexual minorities, and sexual minority women in particular, around the world, followed by the international legal context concerning sexual minorities and sexual minority women in particular. Chapter two presents a literature review, which covers issues particular to Canadian refugee determination. Introducing the findings and theories of other scholars, chapter two provides the intellectual background upon which this paper later compares and confirms its case study findings and upon which it evaluates Canada's new refugee reform and its implications on sexual minority women. Chapter three provides an overview of the methodology used in the case study. Outlining the details of 18 refugee claims from a range of countries, chapter four presents the reasoning and justification behind rejected claims brought by women on the basis of sexual orientation. This chapter is divided into two sections: claims rejected on the basis of state protection; and claims rejected on the basis of credibility. Chapter five discusses the results of the case study and its implications and provides recommendations going forward.

The term *sexual minority women* is used throughout this research paper and represents lesbian or bisexual women who may or may not identify as either of these identities. As the majority of claimants in this case study seem to self-identify as lesbian, the term lesbian is also frequently used throughout this research; however, it is not meant in the essentialist sense of the word and therefore it may represent variation in behaviour and identity.

Chapter 1 Background: International Context

1.1 Human rights abuses worldwide

The Stonewall riots of 1969 in New York City marked the beginning of the civil rights movement for sexual minorities in North America. Although the fight for acceptance and equality under the law continues in the West, many of the world's sexual minorities struggle for even the most basic human rights. According to the International Lesbian, Gay, Bisexual, Trans and Intersex Association's (ILGA) 2012 report on State Sponsored Homophobia, there are currently 78 countries in the world that still criminalize same-sex relations, an increase from 76 the previous year.⁶ Africa contains almost half of these countries, with 36, and half of Asian countries still criminalize same-sex relations as well.⁷ In Iran, Saudi Arabia, Yemen, Sudan, Mauritania, Southern Somalia and 12 Northern Nigerian states, homosexuality is punishable by death.⁸

While some countries advance legal rights for sexual minorities, several have recently strengthened existing homophobic laws and passed new ones. ILGA raises particular concern for the recent regression in rights for sexual minorities in Russia, a country which in 1993, decriminalized homosexuality. The Russian government introduced a new bill in 2012 that will penalize "homosexual propaganda" among minors.⁹ Under this law, sexual minorities are

⁶ "State Sponsored Homophobia: A world survey of laws criminalizing same-sex sexual acts between consenting adults," International Lesbian, Gay, Bisexual, Trans and Intersex Association (May 2012), online: ILGA <http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf> [accessed 29 September 2013].

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

equated with pedophiles.¹⁰ Some believe that this legislation has led to an increase in homophobic violence against sexual minorities and LGBT rights groups.¹¹ India similarly took steps backwards in relation to human rights, all the way to colonial times, when in December 2013, the Supreme Court's reinstated a 153-year-old law banning same-sex sexual relations, which had previously been repealed in 2009 by Delhi's High Court.¹² Furthermore, the signing into law of the anti-homosexuality bill by Ugandan president Museveni in February 2014 has attracted significant international attention since its initial introduction in parliament in 2009. Already illegal in Uganda, same-sex acts will be further criminalized with this bill by introducing a life sentence for same-sex sexual acts and "aggravated homosexuality," which applies to "serial offenders."¹³ People who attempt to enter into a same-sex marriage contract also face life imprisonment. As in Russia, the so called "promotion" of homosexuality will be criminalized, which will make it even more dangerous for NGOs concerned with sexual minority rights to operate.¹⁴

Although they are important indicators of the prevalence of homophobia in a given country, laws criminalizing same-sex relations do not account for all forms of homophobic persecution experienced by sexual minorities. As Jenni Millbank and Eddie Bruce-Jones point out, an absence of state protection may be the main form of persecution where there are no laws

¹⁰ "Sochi Games Highlight Homophobic Violence," Human Rights Watch (4 February 2014), online: HRW <<http://www.hrw.org/news/2014/02/03/russia-sochi-games-highlight-homophobic-violence>> [accessed 20 March 2014].

¹¹ *Ibid.*

¹² Jason Burke, "Indian Supreme Court refuses to review ban on gay sex," The Guardian (28 January 2014), online: The Guardian <<http://www.theguardian.com/world/2014/jan/28/india-supreme-court-refuses-review-ban-gay-sex>> [accessed 19 January 2014].

¹³ "President Should Reject Anti-Homosexuality Bill," Human Rights Watch (20 December 2013), online: HRW <<http://www.hrw.org/news/2013/12/20/uganda-president-should-reject-anti-homosexuality-bill>> [accessed 18 January 2014].

¹⁴ *Ibid.*

criminalizing same-sex relations.¹⁵ ILGA's report used Brazil as an example of this situation. Brazil is known as host of the world's biggest pride event and legally recognizes some same-sex relationships as a "family unit." Despite this progress, the Grupo Gay de Bahia, a sexual minority rights group that has been operating since 1980, reported that a sexual minority was murdered every two days in 2011.¹⁶ Similarly, South Africa was the first in the world to introduce anti-discrimination based on sexual orientation in its new constitution in 1996; it was also among the first few countries to legalize same-sex marriage and has various civil society groups dedicated to sexual minority rights.¹⁷ The legal equality afforded to South African sexual minorities, however, is inconsistent with the high rates of violence experienced by the LGBT community. A 2011 Human Rights Watch (HRW) report on black lesbian and transgender men found that 'corrective rape' is a serious and frequent problem, especially in the townships.¹⁸

Furthermore, in countries where same-sex relations are not illegal, victims of persecution based on sexual orientation are often reluctant to go to the police or to try to seek redress. As Navi Pillay, the United Nations High Commissioner for Human Rights, points out, "[l]egal protection, of itself, does not eradicate embedded discriminatory practices."¹⁹ In a report on

¹⁵ Eddie Bruce-Jones & Jenni Millbank, "Refugee Context Considered," in: "State Sponsored Homophobia: A world survey of laws criminalizing same-sex sexual acts between consenting adults" International Lesbian, Gay, Bisexual and Intersex Association (May 2012), online: ILGA <http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf> [accessed 29 September 2013].

¹⁶ *Ibid.* See also Grupo Gay de Bahia, online: <<http://www.ggb.org.br/ggb-ingles.html>> [accessed 29 September 2013].

¹⁷ "We'll Show You You're a Woman: Violence and Discrimination against Black Lesbians and Transgender Men in South Africa," Human Rights Watch (December 2011), online: HRW <<http://www.hrw.org/reports/2011/12/05/we-ll-show-you-you-re-woman>> [accessed 13 June 2012].

¹⁸ *Ibid.*

¹⁹ United Nations Officer of the High Commission for Human Rights, "Ending impunity for homophobic killings," (8 February 2012), online: OHCHR

torture by the United Nations Special Rapporteur on Torture, Sir Nigel Rodley explained the hesitancy of sexual minorities to report their abuse:

[D]iscriminatory attitudes towards members of sexual minorities can mean that they are perceived as less credible by law enforcement agencies or not fully entitled to an equal standard of protection, including protection against violence carried out by non-state agents. Members of sexual minorities, when arrested for other alleged offences or when lodging a complaint of harassment by third parties, have reportedly been subjected to further victimization by the police, including verbal, physical and sexual assault, including rape...²⁰

This situation is a common experience for lesbians in South Africa. Through interviews with lesbians about their experiences with the police, HRW established that very few of the women interviewed had a positive experience. Most of the experiences included some form of secondary victimization or inaction on the part of the police officers. The women interviewed expressed an overall distrust of the police and some expressed the view that reporting crimes against them was a waste of time.²¹ Such impunity and lack of respect for the human rights of LGBT people sends the message that acts of violence against sexual minorities are acceptable.

<<http://www.ohchr.org/EN/NewsEvents/Pages/Endingimpunityforhomophobickillings.aspx>> [accessed 15 October 2012].

²⁰ UN Commission on Human Rights, *Civil and political rights, including the questions of torture and detention : report of the Special Rapporteur, Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2001/62* (27 December 2001), E/CN.4/2002/76, online: <<http://www.refworld.org/docid/3d6ce3c40.html>> [accessed 22 September 2012].

²¹ "We'll Show You You're a Woman: Violence and Discrimination against Black Lesbians and Transgender Men in South Africa," Human Rights Watch (December 2011), at 46-55, online: HRW <<http://www.hrw.org/reports/2011/12/05/we-ll-show-you-you-re-woman>> [accessed 13 June 2012].

Although lesbians are as much a sexual minority as gay men, the fact that they are women separates their experiences from those of gay men. Identifying these differences in experience and the factors contributing to these differences is crucial. ILGA's report shows that sex between women is illegal in 50 countries around the world. This does not include countries in which laws surrounding lesbian relations are unclear.²² State failure to protect, rather than laws criminalizing homosexuality, is commonly the case for women in states where the laws do not explicitly criminalize lesbianism but criminalize sex between men. This does not suggest that lesbians are not persecuted in these countries or that relations between two women are acceptable, but rather points to a failure to acknowledge female sexuality at all. As Shannon Minter points out, lesbians may be less likely prosecuted under criminal laws due to a refusal by most countries "to acknowledge that lesbians exist, even to the extent of refusing to recognize lesbianism by naming it as a crime."²³

Women's sexuality is often controlled directly in the private sphere, although the gender roles that women are expected to live up to are often set out by society, religion and culture. The Special Rapporteur on Violence against Women explains that community is a main source of "restriction" on female sexuality.²⁴ As Millbank points out, "women's experiences of

²² "State Sponsored Homophobia: A world survey of laws criminalizing same-sex sexual acts between consenting adults," International Lesbian, Gay, Bisexual, Trans and Intersex Association (May 2012), online: ILGA <http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf> [accessed 29 September 2013].

²³ Shannon Minter, "Lesbians and Asylum: Overcoming Barriers to Access," Asylum Law, at 5, online: asylumlaw.org <<http://www.asylumlaw.org/docs/sexualminorities/Lesbian%20IssuesPacket.pdf>> [accessed 20 January 2012].

²⁴ United Nations Economic and Social Council, *Report of the Special Rapporteur on Violence against Women in the Community*, E/CN.4/1997/47, para 8, online: <<http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/043c76f98a706362802566b1005e9219?Opendocument>> [accessed 23 September 2012].

persecution based on their sexuality are inextricably tied to the social meaning of gender and to women's location in the private sphere."²⁵

Gender-based persecution is often influenced by multiple factors such as race, class, culture, sexual orientation, etc., which form the basis of discrimination.²⁶ Kimberle Crenshaw applied the term intersectionality to the method of identifying the multiple discriminations of women of colour.²⁷ Crenshaw stressed that the experiences of women and people of colour are not mutually exclusive; rather they are "shaped by other dimensions of their identities..."²⁸ The intersection of racism and sexism, Crenshaw explains, factor into experience in ways which cannot be fully appreciated by considering the race or gender aspects of those experiences separately.²⁹ This is the case when gender intersects with sexual orientation, as it creates "unique vulnerabilities and unique harms that cannot be accounted for fully on the basis of either status in isolation."³⁰ Separate categories for identities, such as sexual orientation, race, gender, etc., are used to create legal categories.³¹ As Grillo points out, multiple oppressions "cannot be dismantled separately because they mutually reinforce each other."³² She cites the mutual reinforcement of sexism and homophobia as an example, whereby sexual minorities

²⁵ Jenni Millbank, "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia" (2002) 26 *Melb Univ L Rev* 144 at 157.

²⁶ "A Fact Sheet on Lesbians, Gender and Human Rights Violations Violence and Abuse of Women," Amnesty International USA, online: <<http://www.amnestyusa.org/sites/default/files/pdfs/lesbianfactsheet.pdf>> [accessed 23 October 2012].

²⁷ Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43 *Stan. L. Rev* 1241.

²⁸ *Ibid* at 1242.

²⁹ *Ibid* at 1244.

³⁰ Shannon Minter, "Lesbians and Asylum: Overcoming Barriers to Access," *Asylum Law*, at 5, online: <http://www.asylumlaw.org/docs/sexualminorities/Lesbian%20IssuesPacket.pdf> [accessed 20 January 2012].

³¹ Nicole LaViolette, "Les identités multiples et le droit des réfugiés: catégories juridiques fixes et rigides?" (2003) 35:3 *Canadian Ethnic Studies* 39.

“pay a heavy price for departing from socialized gender roles.”³³ In such a context, human rights abuses against lesbians must equally take into account gender and its intersection with sexual orientation and other identities. LaViolette asserts that lesbians are not only defying the norm of heterosexuality, they are defying gender roles,³⁴ which are set out by society, religion and culture. The United Nations Special Rapporteur on Violence against women explains that any sexual behaviour outside of the heterosexual or cultural norm is punished through various means, including sexual and physical violence, honour killings, forced marriage, forced pregnancy and psychiatric treatment.³⁵ Although no less punitive or repressive, these forms of persecution are less visible than direct state persecution, as they often take place in the private sphere within the woman’s community and family.³⁶

Lesbians and women in general often experience sexualized violence that serves to maintain male dominant social structures.³⁷ Crawley states that “social and political discipline of women is affected through their sexuality, and through the use of sexual violence as a weapon of political repression.”³⁸ The experience of a lesbian in Zimbabwe who was locked in a room

³² Trina Grillo, “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House” (1995) 10 Berkeley Women’s Law Journal 16 at 27.

³³ Ibid.

³⁴ Nicole LaViolette, “Gender-Related Refugee Claims : Expanding the Scope of the Canadian Guidelines” (2007) 19(2) Int J Refugee Law 169 at 193.

³⁵ United Nations Economic and Social Council (ECOSOC), *Report of the Special Rapporteur on Violence against Women in the Community*, 53rd Sess E/CN.4/1997/47 (1997) at para 8, online: <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/043c76f98a706362802566b1005e9219?Opendocument>> [23 September 2012].

³⁶ Shannon Minter, “Lesbians and Asylum: Overcoming Barriers to Access,” Asylum Law, at 6, online: <http://www.asylumlaw.org/docs/sexualminorities/Lesbian%20IssuesPacket.pdf> [accessed 20 January 2012].

³⁷ Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd ed (Oxford: Oxford University Press, 2007) at 83.

³⁸ Heaven Crawley, “Engendering the State in Refugee Women’s Claims for Asylum” in Suzie M. Jacobs, Ruth Jacobson, and Jen Marchbank, *States of Conflict: Gender, Violence and Resistance*, (London: Zed Books, 2000) at 93.

in her home by her own parents reflects a sexualized form of punishment in the private sphere. “They locked me in a room and brought him every day to rape me so I would fall pregnant and be forced to marry him. They did this to me until I was pregnant...”³⁹

In Iran, lesbians experience the majority of the threats to their safety within their own families. HRW found that many lesbian and bisexual women reported violence, forced marriage and forced hormone treatment in order to ‘cure’ them. Marital rape does not exist under Iranian laws and therefore women, and especially lesbians, who are forced into marriage often experience serious physical and psychological trauma. Women’s refusal to marry can result in the family disowning them and leaving them without financial resources to support themselves.⁴⁰ One lesbian interviewed by HRW spoke of this situation of forced marriage:

There are a lot bisexual women in Iran who are actually lesbians, but they have to be bisexual in order to survive. They have sex with men in order to get by.”⁴¹ An Iranian lesbian, who was forced to marry, was beaten and raped daily by her husband. Once she managed to escape to a friend’s house, her brothers tracked her down to kill her in order to defend the family’s honour.⁴²

While recognizing the private sphere as the primary location for much of the persecution women face is crucial to understanding the unique forms of persecution that take place, it is important to note that lesbians, like gay men, also experience persecution by the state. One

³⁹ “Crimes of hate, conspiracy of silence: Torture and ill-treatment based on sexual identity,” ACT 40/016/2001, Amnesty International, online: <<http://www.amnesty.org/en/library/asset/ACT40/016/2001/en/cd954618-d961-11dd-a057-592cb671dd8b/act400162001ar.pdf>> [accessed 5 October 2012].

⁴⁰ “We Are a Buried Generation,” Human Rights Watch (15 December 2010), online: HRW <http://www.hrw.org/node/94977/section/14#_ftnref214> [accessed 3 October 2012].

⁴¹ *Ibid.*

⁴² *Ibid.*

Iranian woman interviewed by HRW was forced to marry after receiving a penalty for “lesbianism” of 100 lashes. After her neighbours learned of her secret relationship with another woman, she was arrested and tortured until she confessed. She received 180 lashes and two years in prison after refusing to cooperate with the secret police in identifying other lesbians.⁴³

Women in Uganda similarly experience persecution in both the private and public spheres. The case of Prossy Kazooza, a Ugandan lesbian, illustrates this well. Prossy was forced to walk naked to the police station by family members, who found her in bed with her female partner. After being sexually assaulted and beaten in detainment, Prossy was released on a bribe by her family members who wanted to punish her themselves. She managed to flee to the UK.⁴⁴ Florence, who was eventually granted asylum in the UK, first caught the attention of the community as a single woman living alone. Like Prossy, she was forced to strip and walk naked in front of the community after being found with her female lover. The following year she was picked up by police, raped and tortured over a three-day period in detainment until she managed to escape when a drunken guard fell asleep.⁴⁵ As these experiences demonstrate, lesbians experience persecution at both the private and public levels in homophobic societies. Furthermore, the particularity of sexual minority women’s experience is demonstrated by the risk of simply living alone, which, as in the case of Florence above, can attract the attention of society and result in persecution.

⁴³ *Ibid.*

⁴⁴ Andy Braunston, “Prossy Kakooza Wins Latest Fight,” *Guys Without Borders*, (4 July 2008) online: <<http://guyswithoutborders.wordpress.com/2008/07/04/uk-prossy-kakooza-wins-latest-fight/>> [accessed 1 October 2012].

LGBT activists risk their lives fighting for basic human rights, in countries where homophobia is prevalent. Among numerous recent tragedies is the torture and murder of Eric Ohena Lembembe, a prominent sexual minority rights activist in Cameroon, in his home in July 2013.⁴⁶ David Kato, a well-known LGBT rights activist and Advocacy Officer for Sexual Minorities of Uganda, was also murdered in his home in January 2011 after receiving death threats after his name appeared in a local tabloid, along with 100 other names of suspected homosexuals, with the headline “Hang them.”⁴⁷ Quetzalcóatl Leija Herrera, a leading Mexican LGBT activist, was found beaten to death in May 2011⁴⁸. In April 2011, Noxolo Nogwaza, a 24-year-old lesbian and South African human rights activist, was raped, beaten and stabbed to death.⁴⁹

Activists are often subjected to arbitrary arrest and detainment as well. In February of this year, an LGBT workshop in Uganda was raided by police. The raid was led by a Ugandan cabinet minister, who proclaimed the workshop illegal and threatened to use force. Kahsa Jacqueline, a well-known Ugandan LGBT rights activist and winner of the 2011 Martin Ennals Award for Human Rights Defenders, was ordered to be arrested; however, she

⁴⁵ Elizabeth Day, “Why was I born gay in Africa?” The Guardian, (27 March 2011) online: <<http://www.guardian.co.uk/world/2011/mar/27/uganda-gay-lesbian-immigration-asylum>> [accessed 1 October 2012].

⁴⁶ Afua Hirsch, “Cameroon gay rights activist found tortured and killed,” The Guardian (28 July 2013) online: <<http://www.theguardian.com/world/2013/jul/18/cameroon-gay-rights-activist-killed>> [accessed 5 February 2014].

⁴⁷ “Recommendations to the European Union on improving the Human Rights situation for LGBT people and Human Rights defenders working on LGBT issues in Uganda” Amnesty International (2011), online: <<http://www.amnesty.org/en/library/asset/AFR59/001/2011/en/565202e7-46de-4741-a4d8-363aa7549527/afr590012011en.pdf>> [accessed 1 October 2012].

⁴⁸ William Payne, “Gay activist murdered in Mexico,” Daily Xtra (23 June 2011) online: <<http://dailyxtra.com/canada/news/gay-activist-murdered-in-mexico>> [accessed 13 October 2013].

⁴⁹ David Smith, “South Africa gay rights activists warn of homophobic attacks after murder,” The Guardian, (3 May 2011) online: <<http://www.guardian.co.uk/world/2011/may/03/south-africa-homophobic-attacks>> [accessed 1 October 2012].

managed to flee.⁵⁰ In August 2013, 44 members of Gays and Lesbians of Zimbabwe were physically attacked by police at a private gathering and detained without being charged.⁵¹ Louise Arbour, former UN High Commissioner for Human Rights highlighted the danger and difficulties faced by sexual minority activists at a conference on LGBT human rights in 2006:

many LGBT human rights organizations work in extremely difficult circumstances. They are denied freedom of association when the authorities shut them down, or otherwise prevent them from carrying out their work. They are physically attacked when they organize demonstrations to claim their rights. Many have even been killed for daring to speak about sexual orientation. They are denied access to important fora, including at the international level, where they should be able to have their voices heard.⁵²

The special Representative of the UN Secretary-General on human rights defenders has highlighted the risk LGBT activists face as a result of the threat they pose to the structure of society, tradition and religion.⁵³ In contrast to violent and legal backlash in response to sexual

⁵⁰ Karen Veldkamp, "Uganda: Government raid on LGBT-rights workshop," Amnesty International (14 February 2012) online: <<http://www.amnesty.org/en/news/uganda-government-raid-lgbt-rights-workshop-2012-02-14>> [accessed 20 November 2012].

⁵¹ "Zimbabwe: Harare Police Launch Hunt For GALZ Members," Association for Women's Rights in Development (22 August 2012) online: AWID <<http://www.awid.org/Get-Involved/Urgent-Actions3/Zimbabwe-Harare-Police-Launch-Hunt-for-GALZ-Members>> [accessed 5 October 2012].

⁵² UNOHCHR, *Presentation of the office of the United Nations High Commissioner for Human Rights Ms. Louise Arbour to the International Conference on LGBT (Lesbian, Gays, Bisexual and Transgender) Human Rights*, (Montreal: July 2006), online: <<http://www.unhchr.ch/hurricane/hurricane.nsf/0/B91AE52651D33F0DC12571BE002F172C>> [accessed 26 September 2012].

⁵³ "Crimes of hate, conspiracy of silence: Torture and ill-treatment based on sexual identity," ACT 40/016/2001, Amnesty International, online: <<http://www.amnesty.org/en/library/asset/ACT40/016/2001/en/cd954618-d961-11dd-a057-592cb671dd8b/act400162001ar.pdf>> [accessed 5 October 2012].

minority visibility and activism in countries around the world, international law has seen some success in the advancement of sexual minority rights.

1.2 Sexual Minorities under International Law

The United Nations 1948 Universal Declaration of Human Rights (UDHR) was created within the context of the aftermath of mass crimes against humanity during the Second World War—crimes that were carried out against people based on their religion, race, sexual orientation and other characteristics that are now protected under international law. Although the UDHR does not contain any wording prohibiting discrimination based on sexual orientation, Article 2 of the UDHR states that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁵⁴

Human rights, although ‘universal’ were not automatic for sexual minorities under international law. In addition to being excluded from the wording in human rights treaties, sexual minority rights were not legally recognized or established as an identifiable group under international law for some 46 years after the UDHR was adopted. In the 1994 *Toonen v. Australia* case, the UN Human Rights Committee concluded that laws criminalizing same-sex relations violated the non-discrimination provisions of the International Covenant on Civil and Political Rights (ICCPR). Discrimination on the basis of “sex” was interpreted to include sexual orientation by the Human Rights Committee.⁵⁵ Despite lack of specific mention, sexual

⁵⁴ *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), online: <<http://www.unhcr.org/refworld/docid/3ae6b3712c.html>> [accessed 20 January 2012].

⁵⁵ Ignacio Saiz, “Bracketing Sexuality: Human Rights and Sexual Orientation- A Decade of Development and Denial at the UN,” SPW Working Papers, No. 2 (November 2005) at 4, online: <<http://sxpolitics.org/wp-content/uploads/2009/03/workingpaper2.pdf>> [accessed 17 April 2012].

minority rights are also protected under other human rights instruments such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)⁵⁶ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵⁷

Also in 2011, in what HRW called a “landmark step,” the United Nations Human Rights Committee adopted resolution 17/19, expressing concern for violence against sexual minorities and reaffirming the UDHR’s universal rights and principles and their applicability to sexual orientation and gender identity. Although non-binding, it is the first ever resolution dedicated to sexual minority and gender identity rights.⁵⁸

Under international human rights treaties, states are obligated to apply core human rights such as the right to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly, to sexual minorities.⁵⁹ In 2007, the Yogyakarta principles were adopted by a group of human rights experts in order to provide a comprehensive summary of states’ human rights obligations concerning sexual orientation and

⁵⁶ The Committee against Torture considers sexual orientation as one of the prohibited grounds of discrimination under Article 2 of the Convention: International Commission of Jurists (ICJ), *Sexual Orientation, Gender Identity and International Human Rights Law - A Practitioners Guide*, 2009, Practitioners Guide No. 4, at 4.1, online: <<http://www.refworld.org/docid/4a783aed2.html>> [accessed 20 July 2014].

⁵⁷ The Committee on Economic, Social and Cultural Rights confirmed that “Other status” under Article 2.2 of the ICESCR includes sexual orientation and therefore prohibits discrimination on the grounds of sexual orientation in accessing the rights contained within the Covenant: International Commission of Jurists (ICJ), *Sexual Orientation, Gender Identity and International Human Rights Law - A Practitioners Guide*, 2009, Practitioners Guide No. 4, at 4.1, online: <<http://www.refworld.org/docid/4a783aed2.html>> [accessed 20 July 2014].

⁵⁸ “Landmark UN Vote on Sexual Orientation,” Human Rights Watch (17 June 2011), online: HRW <www.hrw.org/news/2011/06/17/landmark-un-vote-sexual-orientation> [accessed 11 October 2012].

⁵⁹ UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and

gender identity. Although they are not binding, the principles affirm human rights principles contained in international human rights instruments.⁶⁰

Although the above rights apply to sexual minorities as a whole, lesbian rights issues must also be considered within the context of women's rights for a more complete picture of sexual minority women's experience. As Amnesty International reports, lesbians are commonly grouped together with gay men in human rights publications without much focus on the particularities of the human rights violations and discrimination they face as a result of their gender.⁶¹ Such experience may also be influenced by other forms of oppression. The intersection of multiple identities such as gender, sexual orientation, ethnicity and others must be considered within the context of women's human rights.⁶² The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the United Nations General Assembly in 1979 to monitor the progress of the development of women's rights around the world. In 1993, the Declaration on the Elimination of Violence against Women was adopted by the United Nations General Assembly, which reinforces the application to women of universal human rights and principles contained in human rights treaties, such as "... equality, security, liberty, integrity and dignity of all human beings."⁶³ Although sexual orientation is not explicitly mentioned, Article 96 of the Beijing Platform for

gender identity (17 November 2011), online: <<http://www.unhcr.org/refworld/docid/4ef092022.html>> [accessed 28 October 2012].

⁶⁰ The Yogyakarta Principles (March 2007), online: <<http://www.yogyakartaprinciples.org/>> [accessed 10 March 2012].

⁶¹ "A Fact Sheet on Lesbians, Gender and Human Rights Violations Violence and Abuse of Women," Amnesty International USA, online: <<http://www.amnestyusa.org/sites/default/files/pdfs/lesbianfactsheet.pdf>> [accessed 23 October 2012].

⁶² Gill Valentine, "Theorizing and Researching Intersectionality: A Challenge for Feminist Geography," *The Professional Geographer* (2007) 59:1 at 11.

Action from the Fourth World Conference on Women in 1995 states that “The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.”⁶⁴ Moreover, in 2010, CEDAW adopted general recommendation No. 28, recognizing the links between discrimination based on gender and sex and other factors such as sexual orientation.⁶⁵ CEDAW also makes explicit mention of discrimination and violence based on sexual orientation to specific countries in its observations and recommendations. For example, during CEDAW’s most recent session, concluding in March 2013, committee observations included concerns about violence against lesbian, bisexual and transgender people by state and non-state actors in Zimbabwe and recommendations were made for anti-discrimination legislation and sensitization towards sexual minority issues.⁶⁶

International criminal law has also played a role in the advancement of women’s rights. Under the Rome Statute of the International Criminal Court, sexual violence, such as rape, can constitute a crime against humanity, war crime and genocide.⁶⁷ Sexual violence, therefore, has been recognized among the gravest crimes under international criminal law. As rape is used

⁶³ *UN General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104*, online: <<http://www.refworld.org/docid/3b00f25d2c.html>> [accessed 18 December 2012].

⁶⁴ Françoise Girard, “Negotiating Sexual Rights and Sexual Orientation at the UN,” *Sexuality Policy Watch*, at 339, online: <http://www.sxpolitics.org/frontlines/book/pdf/capitulo9_united_nations.pdf> [accessed 15 September 2012].

⁶⁵ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 19 October 2010, CEDAW/C/2010/47/GC.2, online: <<http://www.unhcr.org/refworld/docid/4d467ea72.html>> [accessed 20 September 2012].

⁶⁶ UN Committee on the Elimination of Discrimination Against Women (CEDAW), Concluding observations of the Committee on the Elimination of Discrimination against Women, Fifty-First session, February 13th-March 2nd 2012, CEDAW/C/ZWE/CO/2-5, at 6, online: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/414/13/PDF/G1241413.pdf?OpenElement>> [accessed 20 September 2012].

for “intimidation, degradation, humiliation, discrimination, punishment, control or destruction of the person,”⁶⁸ it has similarly been recognized as constituting torture under international law.⁶⁹

Refugee law offers protection from such grave violations of human rights when a connection can be established between the violation and a convention ground. This connection between gender-based persecution and sexual orientation is especially crucial for sexual minority women. International refugee law provides what Deborah Anker refers to as a “remedy” to human rights violations.⁷⁰ Asylum does not only provide protection from human rights abuses; it is a human right in itself. Under Article 14(1) of the 1948 Declaration of Human Rights, “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”⁷¹ Refugee law is dependent on the international human rights framework, as it is both based on human rights principles and requires “contextualized, practical applications of human rights norms.”⁷²

The 1951 Convention Relating to the Status of Refugees was, like the UDHR, motivated by the human rights abuses of the Second World War and was designed to provide protection for

⁶⁷ Barbara Bedont & Katherine Hall Martinez, “Ending Impunity for Gender Crimes under the International Criminal Court,” (1999) 65 *The Brown Journal of World Affairs* 65 at 65-71.

⁶⁸ *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda, 2 September 1998, at para 687 online: <<http://www.unhcr.org/refworld/docid/40278fbb4.html>> [accessed 20 September 2012].

⁶⁹ United Nations Voluntary Fund for Victims of Torture (UNVFVT), “Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies” at 18, online: OHCHR <http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf> [accessed 27 September 2012].

⁷⁰ Deborah E. Anker, “Refugee Law, Gender and the Human Rights Paradigm” (2002) 15 *Harv Hum Rts J* 133 at 135.

⁷¹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), online: <<http://www.unhcr.org/refworld/docid/3ae6b3712c.html>> [accessed 20 January 2012].

those fleeing as a result of the war. The 1967 Protocol Relating to the Status of Refugees removed the limitations of the Convention in order to extend refugee protection to those fleeing abuses in other parts of the world for reasons un-related to the war.⁷³ Under the Convention, a refugee is defined as a person who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁷⁴

As with other human rights instruments, the Convention does not explicitly refer to sexual orientation as one of the grounds for claiming refugee status; however, particular social group has become the accepted grounds for claiming protection based on sexual orientation. Gender-based persecution has also been accepted as grounds for refugee status, despite its exclusion from the enumerated grounds in the Convention. Although sexual minority refugees can claim status under religion as well as political opinion if one of these grounds can be linked directly to their persecution on account of their sexual

⁷²Deborah E. Anker, "Refugee Law, Gender and the Human Rights Paradigm" (2002) 15 Harv Hum Rts J 133 at 138.

⁷³ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, at 267, online: <<http://www.refworld.org/docid/3ae6b3ae4.html>> [accessed 20 January 2012].

⁷⁴ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, at 137, online: <<http://www.unhcr.org/refworld/docid/3be01b964.html>> [accessed 20 January 2012].

orientation, particular social group is the most commonly used ground upon which sexual orientation is claimed.⁷⁵

The development of the particular social group category has happened at the national level, as the *Travaux Préparatoires* of the Convention did not provide insight into what may constitute this category.⁷⁶ Jurisprudence from various countries, therefore, has helped establish the inclusion of women and sexual minorities under particular social group.

In addition to the right to seek asylum in other countries, international law prohibits the return of a person who fears persecution based on one of the Convention grounds. Article 33 of the Convention covers the principle of *non-refoulement*, which states that a country is forbidden to return a refugee, “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁷⁷ *Non-refoulement* has not only been referred to as the “cornerstone of international refugee protection,” but also as *Jus Cogens*, which means that the principle is so fundamental that it cannot be derogated from.⁷⁸ Furthermore, the UN affirms that the principle of *non-refoulement* falls under customary international law, as it is regular state practice and it is viewed by states as

⁷⁵ UN High Commissioner for Refugees, UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 21 November 2008, at paras 29-31, online: <<http://www.unhcr.org/refworld/docid/48abd5660.html>> [accessed 10 May 2012].

⁷⁶ G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996) at 74.

⁷⁷ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, at 137, online: <<http://www.unhcr.org/refworld/docid/3be01b964.html>> [accessed 20 January 2012].

⁷⁸ UN High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, online: <<http://www.unhcr.org/refworld/docid/45f17a1a4.html>> [accessed 15 September 2012].

obligatory under international law.⁷⁹ Customary practice is binding even on non-parties to Convention.

The principle of *non-refoulement* is established under international human rights law as well. It can be found under article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits the return of a person to a country, in which there are “substantial grounds for believing that he would be in danger of being subjected to torture.”⁸⁰ The Human Rights Committee has found that obligations under the ICCPR also involve the principle of *non-refoulement*.⁸¹ *Non-refoulement*, then, is not only a fundamental principle under refugee law, expressed in Article 33 of the Convention, but it is also a fundamental principle under international law, carrying the same status as the prohibition of the most serious crimes, such as genocide. Its fundamental character is highlighted by the serious implications *refoulement* can have on the life of a refugee, most notably degrading treatment, torture or death.

Although refugee protection is a human right under international law, a refugee’s fate depends on the national decision making of the country in which she or he is seeking protection. For this reason, refugee law has been criticized as being too embedded in national laws and lacking in the monitoring of state compliance to the Convention, as the UNHCR is only supervisory.⁸² Within the context of international law, a refugee exists in the intersection between national sovereignty and the international obligation to provide

⁷⁹ *Ibid* at 7.

⁸⁰ *Ibid* at para 18.

⁸¹ *Ibid* at 9.

⁸² Deborah Anker, "Refugee Law, Gender and the Human Rights Paradigm" in Brad Epps, *Passing Lines: Sexuality and Immigration* (Cambridge: Harvard University Press, 2005) at 135.

protection to asylum seekers. Levenex describes this situation as one where the refugee is caught between human rights and a state's sovereign right to control its territory.⁸³

⁸³ Sandra Lavenex, *The Europeanisation of Refugee Policies: Between human rights and internal security*

Chapter 2 – Literature Review: Canadian Context

2.1 Development of sexual orientation based claims in Canada

Canada acceded to the Convention Relating to the Status of Refugees in 1969, adopting the definition of a refugee into national law under Article 96 of the Immigration and Refugee Protection Act.⁸⁴ Particular social group as a ground for claiming refugee status based on sexual orientation was not consistently accepted in early decisions, as RPD members did not all agree on whether or not sexual orientation fit the definition.⁸⁵ An early case involving a gay man from Uruguay reflects this inconsistency as well as the intersection between human rights and a national sovereignty. The RPD member involved in the case was of the opinion that states had the right under international law to prohibit same-sex relations if they conflicted with moral and religious beliefs. In addition, she rejected sexual orientation as a human right based on its exclusion from the UDHR. Another board member in the same case, however, accepted the claimant as a member of a particular social group based on his sexual orientation.⁸⁶ In a 1991 case, the board denied the claim of a gay man from Colombia based on the view that the Convention did not include sexual orientation as a ground for protection.⁸⁷ However, in 1992, Canada was one of the first to countries to recognize sexual orientation as a

(Burlington: Ashgate Publishing Company, 2001) at 8-10.

⁸⁴ *Immigration and Refugee Protection Act*, SC 2001, c.27, online: <<http://laws-lois.justice.gc.ca/eng/acts/I-2.5/FullText.html>> [accessed 25 January 2012].

⁸⁵ Re R. (U.W.), [1991] C.R.D.D. No. 501 (QL) in: Nicole LaViolette, "The Immutable Refugees: Sexual Orientation in Ward v. Canada" 55(1) (1997) U Toronto Fac L Rev 1 at 18.

⁸⁶ Ibid.

⁸⁷ L. Lacroix, "Expulsé du Canada, Nicolas Acevedo a peur de retourner en Colombie" La Presse (31 July 1991) in: Nicole LaViolette, "The Immutable Refugees: Sexual Orientation in Ward v. Canada" 55(1) (1997) U Toronto Fac L Rev 1 at 18.

basis for membership in a particular social group when Jorge Alberto Inaudi, a gay man from Argentina, was granted refugee status.⁸⁸

Inconsistencies about whether or not sexual orientation was a valid ground for refugee status on the basis of membership in a particular social group were finally laid to rest in *Canada (Attorney-General) v. Ward* in 1993. Although not a case involving sexual orientation, the *Ward* case established that sexual orientation falls under the definition of particular social group. Justice La Forest rejected the claim of a former member of the Irish National Liberation Army, a terrorist organization in Northern Ireland, who was claiming refugee status under a particular social group for his role in assisting the escape of hostages. La Forest was of the opinion that to accept such a claim would incorrectly broaden the scope of particular social groups to create a safety net for all those who do not fall under the other grounds of the definition of a refugee. La Forest suggested that the criteria for membership in a particular social group be based on the “general underlying themes of the defense of human rights and anti-discrimination that form the basis for the international refugee protection initiative.”⁸⁹ Following this reasoning, La Forest’s definition included “groups defined by an innate or unchangeable characteristic,” which he applied to both sexual orientation and gender.⁹⁰ While this essentialist defining of sexual orientation has problematic implications, as it narrows

⁸⁸ European Council on Refugees and Exiles, *ELENA Research Paper on Sexual Orientation as a Ground for Recognition of Refugee Status*, 1 June 1997, at 16, online: <<http://www.refworld.org/docid/3decd1fa4.html>> [accessed 30 July 2014].

⁸⁹ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, online: <<http://www.refworld.org/docid/3ae6b673c.html>> [accessed 3 October 2012].

⁹⁰ *Ibid.*

expectations of sexual behaviour and identity, it did provide a progressive interpretation of refugee law by accepting that sexual minorities constitute a particular social group.⁹¹

Cases involving sexual orientation after *Ward* no longer questioned the eligibility of sexual minority claims and whether claims based on sexual orientation fit the definition of a particular social group. *Ward* has since been cited in cases to assert that the eligibility of sexual minorities under particular social group has already been established and was even used to overturn negative decisions made before *Ward*.⁹²

2.2 Canada's Gender Guidelines

For lesbians, the application of the definition of a refugee should involve the consideration of the intersection of sexual orientation and gender. The intersection of multiple identities highlights the danger of determining refugee eligibility through one single oppressive framework. Canada was the first country to introduce gender guidelines for consideration in refugee status determination. 'Women Refugee Claimants Fearing Gender-Related Persecution,' was introduced in 1993 in order to shed light on gender-specific persecution faced by women in the refugee determination process.⁹³ The Guidelines identify women as vulnerable to the same types of persecution common to men such as racial, national, social, religious, and political opinion; however, they further recognize the impact gender may have

⁹¹ Nicole LaViolette, "The Immutable Refugees: Sexual Orientation in *Ward v. Canada*" (1997) 55(1) U Toronto Fac L Rev 1 at 30-35.

⁹² *Pizarro v. Canada* (Minister of Employment and Immigration), [1994] F.C.J. No. 320 (QL) in: Nicole LaViolette, "The Immutable Refugees: Sexual Orientation in *Ward v. Canada*" (1997) 55(1) U Toronto Fac L Rev 1 at 22.

⁹³ Immigration and Refugee Board of Canada, *Compendium of Decisions: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution (Update)*, February 2003, online: <<http://www.refworld.org/docid/4713831e2.html>> [accessed 10 October 2012].

in increasing the vulnerability of women.⁹⁴ Furthermore, the Guidelines recognize the serious implications of a woman's refusal to abide by the social and cultural norms which impose gender roles that subordinate women,⁹⁵ most notably gender-based persecution.

While the Guidelines did help increase the number of successful gender-based claims by increasing awareness and appreciation of the gender issues related to women's claims, LaViolette highlights the need for the Guidelines to broaden the scope of gender to include a more comprehensive and systematic approach to all types of gender-based persecution. She argues that the Guidelines are currently focused too much on the biological sex, i.e. women, rather than on the power relations involved in social hierarchies, which place the feminine in a subordinate position.⁹⁶ Gender-based persecution, as opposed to persecution based on one's sex, results from refusal to comply with the gender roles set out by society, which are specific to one's sex.⁹⁷ Women are, therefore, subjected to gender-based persecution as a result of a hierarchy of power within the framework of patriarchal society rather than simply their biological sex.⁹⁸ Sexual minorities pose a threat to the values and gender norms of the patriarchal system, which provokes gender-based violence, as it is used as a deterrent and as punishment for behaviour outside of the heterosexual norm.⁹⁹ In this context, sexual minority women, on account of the intersection of their sexual orientation and gender, are faced with particular experiences of discrimination and persecution.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Nicole LaViolette, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines", (2007) 19(2) *Int J Refugee Law* 169, at 170-171.

⁹⁷ *Ibid* at 182.

⁹⁸ *Ibid* at 184.

⁹⁹ Jenni Millbank, "Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation" (2003) 18(1) *Geo Immigr LJ* 71 at 77.

Despite the obvious relevance of gender to claims based on sexual orientation, LaViolette found in a 2007 study that the RPD rarely refers to the Guidelines when deciding claims based on sexual orientation.¹⁰⁰ The concern is that a failure to recognize and apply a gendered analysis to claims brought by lesbians may lead to an unfair denial of protection under Canadian refugee law.¹⁰¹ A 1993 decision analyzed by LaViolette, involving two Israeli lesbians demonstrates a failure to consider the intersection of gender and sexual orientation. The two women were detained and harassed after being seen in the park together by police. In a separate incident, one of the women was raped in a park when she and her girlfriend were discovered by a group of youth. She was turned away when she attempted to make a claim with the police because she was a lesbian. The board in this case found that the rape was a serious crime rather than persecution based on sexual orientation. The Board failed to consider the fact that, as lesbians in a park at night, they were particularly vulnerable to attack. LaViolette argues that the Board in this claim overlooked the vulnerability that comes with being a lesbian in addition to being a woman.¹⁰² Millbank explains that rape is used against lesbians as punishment for defying heterosexual and gender norms and this intensifies their vulnerability as lesbians.¹⁰³ As this case demonstrates, the failure to identify and properly assess the intersection between gender and sexual orientation may lead to rejection of lesbian refugees in need of protection.

¹⁰⁰ Nicole LaViolette, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines" (2007) 19(2) *Int J Refugee Law* 169 at 184-187.

¹⁰¹ *Ibid* at 188-189.

¹⁰² *Ibid* at 190-191.

¹⁰³ Jenni Millbank, "Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation" (2003) 18(1) *Geo Immigr LJ* 71, at 77.

Among the few cases in which LaViolette found that the Gender Guidelines were applied is a case involving a Venezuelan lesbian persecuted by the police. In this case, the decision-maker expressly recognized that in being a lesbian, the claimant is challenging both the heterosexual norms and ‘social mores’ of gender roles.¹⁰⁴ In another case, the Board recognized the risk of persecution facing a lesbian couple for failing to conform to the role of mother and wife in Mexican society.¹⁰⁵ The Board similarly demonstrated an understanding of the multiple forms of oppression present in gender-based claims in a case involving a Tartar lesbian from Russia. The particular vulnerability involved in the intersection of race, sexual orientation and gender was recognized and applied in this case.¹⁰⁶ The decision-makers in these claims recognize the way in which gender, sexual orientation and other identities may intensify and create particular vulnerabilities. As such, they demonstrate that sexual orientation alone cannot account for persecution particular to gender; nor can gender alone account for persecution particular to lesbians.¹⁰⁷

Although the IRB was progressive in its adoption of the Guidelines,¹⁰⁸ their application by RPD members is problematic for two reasons. First, studies of IRB cases indicate that the Guidelines are not applied when cases seem *prima facie* to warrant it. Second, while guidelines are not mandatory, decision-makers are expected to “provide a reasoned

¹⁰⁴ C.L.Q. (Re), [1996] CRDD No. 145 (QL) in Nicole LaViolette, “Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines” (2007) 19(2) Int J Refugee Law 169, at 193.

¹⁰⁵ *Ibid* at 194.

¹⁰⁶ M.R.D.(Re) , [1998] CRDD No. 164 (QL) in Nicole LaViolette, “Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines” (2007) 19(2) Int J Refugee Law 169, at 194.

¹⁰⁷ “The Challenges to Successful Lesbian Asylum Claims,” National Center for Lesbian Rights, at 14, online: NCLR < <http://www.nclrights.org/legal-help-resources/resource/the-challenges-to-successful-lesbian-asylum-claims/> > [accessed 3 January 2013].

¹⁰⁸ Nicole LaViolette, “Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines”, (2007) 19(2) International Journal of Refugee Law 169 at 214.

justification for not doing so.”¹⁰⁹ As we will see in chapter four, RPD members not only fail to take the Guidelines into consideration when relevant, but also fail to provide justification for not applying them. Neglect of the Gender Guidelines and the link between gender and sexual orientation results in fixed categories of identities that fail to reflect the reality of the experience of discrimination based on gender, sexual orientation and other identities.¹¹⁰ Such neglect of the Gender Guidelines poses a serious threat to the safety and human rights of these women if denied and sent back to the countries from which they are fleeing.

Also crucial to assessing gender-based claims against sexual minority women is the consideration of cultural factors in a particular society. The Gender Guidelines state that “[t]he social, cultural, traditional and religious norms and the laws affecting women in the claimant’s country of origin ought to be assessed by reference to human rights instruments which provide a framework of international standards for recognizing the protection needs of women.”¹¹¹ The UNHCR’s Guidelines on Gender-Related Persecution states that “[i]t is essential to have...an analysis and up-to-date knowledge of historically, geographically and culturally specific circumstances in the country of origin.”¹¹² Moreover, the UNHCR stresses that culturally inappropriate assumptions must not be relied on when assessing claims based on sexual

¹⁰⁹ <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/index.aspx>>

¹¹⁰ Nicole LaViolette, “Les identités multiples et le droit des réfugiés: catégories juridiques fixes et rigides?” (2003) 35:3 Canadian Ethnic Studies 39.

¹¹¹ Immigration and Refugee Board of Canada, *Compendium of Decisions: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution (Update)*, February 2003, online: <<http://www.refworld.org/docid/4713831e2.html>> [accessed 10 October 2012].

¹¹² UN High Commissioner for Refugees, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, at para 7, online: <<http://www.unhcr.org/refworld/docid/3d36f1c64.html>> [accessed 30 September 2012].

orientation.¹¹³ Refugee status determination in claims based on sexual orientation, therefore, cannot be thorough without taking into consideration the way in which women as sexual minorities are affected by certain cultural, religious, and societal norms. As the claimant's experience of persecution arises within a particular cultural and local circumstance, an awareness and appreciation for how these local norms and circumstances intersect to intensify the claimant's experience of persecution must inform the decision.¹¹⁴

2.3 Canadian refugee determination system

The UNHCR refers to a "well-founded fear" as the "key phrase" in the Convention's definition of a refugee. Determination of refugee status involves a subjective element and an objective element. The claimant's "fear" is referred to as subjective, whereas "well-founded" is considered objective in that it is based on country condition information, on which the subjective fear is based.¹¹⁵ Canadian refugee law has recognized the subjective and objective elements of the definition as 'crucial.'¹¹⁶ As two crucial elements in refugee determination, credibility and country condition analysis will be used below within the context of gender-based persecution.

¹¹³ UN High Commissioner for Refugees (UNHCR), *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*, 23 October 2012, HCR/GIP/12/01, online: <<http://www.refworld.org/docid/50348afc2.html>> [accessed 23 February 2014].

¹¹⁴ Johanna E. Bond, "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations," (2003) 52 *Emory L J* 71 at 103.

¹¹⁵ UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, at para 37, online: <<http://www.unhcr.org/refworld/docid/4f33c8d92.html>> [accessed 10 May 2012].

2.3.1 Credibility assessment

Milbank identifies two decisive elements in refugee determination for claims based on sexual orientation. The first is whether the claimant is in fact gay or lesbian, and the second is whether the claimant is or will in the future be at risk of persecution.¹¹⁷ Lewis argues that for lesbians, persecution in the private sphere may make it more difficult to provide proof of persecution on the basis of their sexual orientation to support a claim.¹¹⁸ Furthermore, it is difficult to provide ‘proof’ of one’s sexual orientation. Witness statements, photos of lovers and letters can be provided; however, in its Guidelines on sexual orientation-based claims, the UNHCR recognizes the reality that not all sexual minorities will be capable of providing material evidence.¹¹⁹ Berg and Millbank found that even when material evidence is provided, some decision-makers have a tendency to disregard it as ‘self-serving’ or ‘staged.’¹²⁰ In this context, there is no guarantee that such documentary evidence will be accepted as proof of one’s sexual orientation even when available and presented to the RPD. Houle points out that a claimant’s testimony is often the only evidence of the events related to a claim for refugee

¹¹⁶ Immigration and Refugee Board of Canada, *Interpretation of the Convention Refugee Definition in the Case Law*, December 31st, 2010, Chapter 5, Well-Founded Fear, online: <<http://www.irb-cisr.gc.ca/eng/brdcom/references/legjur/Pages/Def2010Chap05.aspx#n542>> [accessed 8 May 2012].

¹¹⁷ Jenni Millbank, “Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia” (2002) 26 *Melb Univ L Rev* 144 at 149-150.

¹¹⁸ Rachel Lewis, “The Cultural Politics of Lesbian Asylum: Angela Maccarone’s *Unveiled* (2005) and the Case of the Lesbian Asylum-Seeker” (2010) 12:3-4, *The International Feminist Journal of Politics* 424 at 425.

¹¹⁹ UN High Commissioner for Refugees (UNHCR), *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*, 23 October 2012, HCR/GIP/12/01, at para 64, available at: <http://www.refworld.org/docid/50348afc2.html> [accessed 5 July 2014]

¹²⁰ Laurie Berg & Jenni Millbank, “Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants” (2009) 22(2) *J Refugee Stud* 195 at 197-198.

protection.¹²¹ Moreover, the UNCHR states that “self-identification as LGBTI” should be taken as proof of one’s sexual orientation.¹²² In the absence or lack of sufficient material evidence this UNHCR guideline is important. Credibility assessments, however, can become an obstacle for some sexual minorities seeking refugee protection due to stereotypes and disbelief by the decision-makers and to the perceived inconsistencies in the claimants’ testimonies.

The RPD can find that there is no subjective basis of fear for claims that appear to be lacking in credibility.¹²³ Millbank found that the credibility assessment has ‘increasingly’ formed the basis of negative judgments in which decision-makers do not believe the claimant’s sexual orientation. These rulings have serious implications for sexual minorities, for if their identity is not believed, it can be decided that the claim has no basis and the claimant may be denied protection in Canada.¹²⁴ The three main factors, defined by Millbank and Macklin in assessing credibility are demeanour, consistency and plausibility. These are examined more closely below.¹²⁵

¹²¹ France Houle, “L’évaluation de la crédibilité des témoignages dans un système non-expert : le traitement symptomatique de certains preuves par la Section de protection des réfugiés,” in Patrick Molinari *Dialogues sur la justice: le public, le législateur, les tribunaux et les médias* (Montreal : Les Éditions Thémis, 2003) at 325.

¹²² UN High Commissioner for Refugees (UNHCR), *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*, 23 October 2012, HCR/GIP/12/01, at para 63(i), available at: <http://www.refworld.org/docid/50348afc2.html> [accessed 5 July 2014]

¹²³ Immigration and Refugee Board of Canada, *Assessment of Credibility in Claims for Refugee Protection*, 31 January 2004, at 2.1.4, online: <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/Credib.aspx>> [accessed 12 October 2012].

¹²⁴ Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 *The International Journal of Refugee Law* 1 at 4.

¹²⁵ Audrey Macklin, “Truth and Consequences: Credibility Determination in the Refugee Context,” Conference Paper, International Association of Refugee Law Judges (1998) at 137, online: <<http://refugeestudies.org/UNHCR/97%20->

Demeanour

According to the Canadian Guidelines on credibility, a claimant's demeanour involves the "manner" in which questions are responded to, including facial expressions, tone of voice, physical movements, integrity and intelligence and recollection.¹²⁶ Although the Guidelines recognize that credibility judgments are subjective in part, they suggest that the decision-maker may also base their assessment on 'objective' elements of demeanour such as frankness, spontaneity and hesitancy in the claimant's testimony.¹²⁷ Millbank found that reliance on these 'objective' aspects of credibility was common in Canadian cases and sometimes led to the decision-maker's conclusion that there was a lack of credibility. Millbank questions the ability of decision-makers to differentiate between the so called 'objective' and subjective factors of demeanour,¹²⁸ therefore raising the question of whether objective forms of demeanour even exist.

One of the problems related to assessing demeanour in such a way in cases related to sexual orientation and gender-based persecution, is that there are various psychological factors that affect the way in which a claimant may respond to questions. When asked questions related to sexuality or sexual acts, Millbank found that decision-makers questioned credibility when the claimant's responses were not "free-flowing."¹²⁹ Similarly, Audrey Macklin, former RPD

%20Truth%20and%20Consequences.%20Credibility%20Determination%20in%20Refugee%20Context.%20by%20Audrey%20Macklin.pdf> [accessed 18 December 2012].

¹²⁶ Immigration and Refugee Board of Canada, *Assessment of Credibility in Claims for Refugee Protection*, 31 January 2004, at 2.3.7, online: <<http://www.irb-cisr.gc.ca/eng/brdcom/references/legjur/Pages/credib.aspx#n23>> [accessed 12 October 2012].

¹²⁷ *Ibid.*

¹²⁸ Jenni Millbank, "The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21 *Int J Refugee Law* 1 at 8.

¹²⁹ *Ibid* at 9.

member, states that there is an assumption that the truth is to be told without hesitation.¹³⁰ Reliance on ‘objective’ forms of demeanour such as hesitation and vagueness has led to conclusions that the testimony is false. This raises concerns for claims based on sexual orientation, as the claimants often have feelings of shame and internalized homophobia. Therefore, when asked questions of a personal nature related to sexuality, sexual minority claimants have difficulty answering, and may therefore appear hesitant.¹³¹ The manner in which a claimant tells their story may be further complicated by social, cultural and religious views on homosexuality in the country of origin.¹³² The UNHCR calls for consideration of such reluctance by sexual minorities “to talk about such intimate matters, particularly where his or her sexual orientation would be the cause of shame or taboo in the country of origin...”¹³³

Gender factors may have an impact on demeanour as well. The UNHCR calls for awareness of gender and cultural differences in relation to communication, both verbal and non-verbal. For example, maintaining eye contact, which may be considered a norm by Western standards, should not be relied on when assessing the demeanour of people from other cultures.¹³⁴ Houle points out that misunderstandings due to stereotypes based on “ethnicity, religion, sexual

¹³⁰ Audrey Macklin, “Truth and Consequences: Credibility Determination in the Refugee Context,” Conference Paper, International Association of Refugee Law Judges (1998), at 137, online: <<http://refugeestudies.org/UNHCR/97%20-%20Truth%20and%20Consequences.%20Credibility%20Determination%20in%20Refugee%20Context.%20by%20Audrey%20Macklin.pdf>> [accessed 18 December 2012].

¹³¹ Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 Int J Refugee Law 1 at 8.

¹³² *Ibid.*

¹³³ UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, at para 35, online: <<http://www.unhcr.org/refworld/docid/48abd5660.html>> [accessed 10 May 2012].

¹³⁴ UN High Commissioner for Refugees, *Guidelines on the Protection of Refugee Women*, July 1991, at para 72, online: <<http://www.unhcr.org/refworld/docid/3ae6b3310.html>> [accessed 5 December 2012].

orientation or sex,” are apparent in some decisions where the claimant is found not credible because his or her testimony does not meet the decision-maker’s expectations.¹³⁵

Furthermore, lesbian refugee cases involve a high incidence of sexual violence. Millbank found that 45 per cent of lesbians, as opposed to 24 per cent of gay men, claiming refugee status in Canada experienced sexual violence.¹³⁶ The UNHCR Guidelines on the Protection of Refugee Women calls for the recognition of symptoms caused by Rape Trauma Syndrome, such as “persistent fear, a loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame, a pervasive feeling of loss of control, and memory loss or distortion.”¹³⁷ These factors may have a negative impact on credibility assessments, if misinterpreted without consideration of how gender and culture intersects with sexual orientation.

On the other hand, Millbank found that if claimants’ responses were too casual and the claimant seemed too relaxed, it also raised suspicion.¹³⁸ This situation leads one to question to what extent, if any, a claimant’s demeanour accurately reveals credibility. Macklin maintains that “[e]xamining demeanour for clues to credibility presupposes that we know what truth telling looks like, and that it looks the same on everybody.”¹³⁹ Furthermore, she argues that

¹³⁵ France Houle, “Pitfalls in Relying on Common Law Rules of Evidence for Administrative Tribunals” (2008) at 12, online: <<http://www.aija.org.au/Tribs06/papers/Houle.pdf>> [accessed 25 June 2014].

¹³⁶ Laurie Berg & Jenni Millbank, “Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants” (2009) 22(2) J Refugee Stud 195 at 202.

¹³⁷ UNHCR, *Supra* note 133.

¹³⁸ Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 Int J Refugee Law 1 at 9.

¹³⁹ Audrey Macklin, “Truth and Consequences: Credibility Determination in the Refugee Context,” Conference Paper, International Association of Refugee Law Judges (1998), at 137, online: <<http://refugeestudies.org/UNHCR/97%20-%20Truth%20and%20Consequences.%20Credibility%20Determination%20in%20Refugee%20Context.%20by%20Audrey%20Macklin.pdf>> [accessed 18 December 2012].

“culture, gender, class, education, trauma, nervousness and simple variations among humans can all affect how people express themselves.”¹⁴⁰ As Houle points out, “[a]ssessing the sincerity of a witness is a subjective exercise which can be quite speculative when a decision-maker and a party do not share the same cultural background.”¹⁴¹

Although the Canadian Guidelines on credibility advise against the use of physical appearance to assess demeanour,¹⁴² Millbank found that there are still some decision-makers who do so. Such decisions indicated a tendency, in some cases, to stereotype based on preconceived notions of physical appearance and what sexual minorities are thought to look like. Their conclusions included comments such as “no signs of being gay,” “effeminate voice and manner,” and “looked gay.”¹⁴³ The UNHCR advises against such stereotypes in assessing claims based on sexual orientation.¹⁴⁴ The danger in relying on stereotypes is well demonstrated in a case involving a Columbian lesbian, which was dismissed based on the decision-maker’s view that the claimant’s sexual orientation was not obvious because, in his estimation, she was “an articulate, professional, well-groomed, and attractive young woman.”¹⁴⁵ The decision-maker’s stereotyping of this claimant assumes that lesbians exhibit the negative opposite characteristics of those listed. Millbank raises some important questions

¹⁴⁰ *Ibid* at 138.

¹⁴¹ France Houle, “Pitfalls in Relying on Common Law Rules of Evidence for Administrative Tribunals” (2008) at 11, online: <<http://www.aija.org.au/Tribs06/papers/Houle.pdf>> [accessed 25 June 2014].

¹⁴² Immigration and Refugee Board of Canada, *Assessment of Credibility in Claims for Refugee Protection*, January 31st 2004, at 2.3.7, online: <<http://www.irb-cisr.gc.ca/eng/brdcom/references/legjur/Pages/credib.aspx#n23>> [accessed 12 October 2012].

¹⁴³ Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 *Int J Refugee Law* 1 at 7.

¹⁴⁴ UN High Commissioner for Refugees, UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 21 November 2008, para 35, online: <<http://www.unhcr.org/refworld/docid/48abd5660.html>> [accessed 10 May 2012].

¹⁴⁵ P.W.Z. (Re), [2000] CRDD No.47 (QL) in Nicole LaViolette, “Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines” (2007) 19(2) *Int J Refugee Law* 169 at 192.

in relation to such stereotypes, namely “[w]hat if Colombian lesbians do not look like Canadian lesbians? Or what if most lesbians do not look like lesbians?”¹⁴⁶ The assumption here is that lesbians have a specific appearance – masculine or butch — which is consistent across all cultures, social contexts and personal preferences. These types of assumptions leave little possibility for variation in appearance, whether it is simply a personal preference or influenced by culture. For example, lesbians in homophobic societies may make an extra effort to appear heterosexual in order to not be identified as such and, in some societies, women have no choice but to dress a certain way. Lewis refers to the difficulty lesbians face in relation to their identity in the refugee determination context as a “perpetual double-bind, whereby to avoid persecution in her country of origin, she must conceal her identity, and yet, when she flees, these same efforts at self-preservation severely hinder her asylum plea by making it more difficult to prove she is a lesbian.”¹⁴⁷ Furthermore, LaViolette points out that the decision-maker in the above claim fails to consider the particular social and cultural implications of particular behaviours and appearances on women, which may be inconsistent with gender norms and put them at risk of being identified and targeted as a lesbian.¹⁴⁸ In failing to consider the larger implications of gender norms within a particular society, decision-makers may miss out on the real factors that pose the threat of persecution. Understanding the social and cultural attitudes of the country of origin is thus important to ensuring a fair and accurate adjudication of sexual orientation-based claims.

¹⁴⁶ Jenni Millbank, “Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation” (2003) 18(1) *Geo Immigr LJ* 71 at 103.

¹⁴⁷ Rachel Lewis, “The Cultural Politics of Lesbian Asylum: Angela Maccarone’s Unveiled (2005) and the Case of the Lesbian Asylum-Seeker” (2010) 12:3-4, *The International Feminist Journal of Politics* 424 at 434

¹⁴⁸ Nicole LaViolette, “Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines” (2007) 19(2) *Int J Refugee Law* 169 at 192.

Consistency

According to the IRB, inconsistency in the claimant's testimony is an acceptable basis for negative credibility findings.¹⁴⁹ Internal inconsistency is based on contradictions and omissions of information related to the claimant's experience of persecution, whereas external inconsistency refers to contradictions in testimony based on country information.¹⁵⁰ Millbank found that there is a significant focus on internal consistency, which refers to contradictions in testimonies given in hearings, initial interviews and written statements.¹⁵¹ One of the problems in focusing on such inconsistencies is that the traumatic experiences and internalized homophobia common to sexual minority claimants may have a significant impact on the claimant's memory of events related to persecution.¹⁵² The UNHCR resettlement handbook shows that rates of post-traumatic stress range from 39 to 100 per cent in refugees as opposed to one per cent in the general population.¹⁵³ Clinical studies have shown that post-traumatic stress can have a negative effect on memory, making it difficult for claimants to remember traumatic events over time as well as remembering details that are "peripheral" rather than "core" to the persecution.¹⁵⁴ For sexual minority claimants who have experienced traumatic events as a result of their sexual orientation, PTSD may involve a range of mental health

¹⁴⁹ Immigration and Refugee Board of Canada, *Assessment of Credibility in Claims for Refugee Protection*, 31 January 2004, online: <<http://www.unhcr.org/refworld/docid/4638af792.html>> [accessed 12 October 2012].

¹⁵⁰ Jenni Millbank, "The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21 *Int J Refugee Law* 1 at 11.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ UN High Commissioner for Refugees, *Refugee Resettlement. An International Handbook to Guide Reception and Integration*, September 2002, Chapter 3.1, at 233, online: <<http://www.unhcr.org/refworld/docid/405189284.html>> [accessed 10 May 2012].

¹⁵⁴ Jenni Millbank, "The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21 *Int J Refugee Law* 1 at 12.

issues including dissociation, anxiety, amnesia and intense shame.¹⁵⁵ In the context of refugee determination, in which decision-makers make judgments based on consistency and coherency, Shidlo explains that sexual minorities may be disadvantaged by difficulties in telling their stories due to fragmented memories of traumatic events, which may not translate into coherent a “verbal narrative.”¹⁵⁶ Moreover, as PTSD involves the re-experiencing of the trauma experienced, some claimants may avoid thinking or talking about such experiences.¹⁵⁷ These psychological consequences of trauma are especially relevant to lesbian claimants, as they tend to experience high rates of sexual violence and therefore may suffer from Rape Trauma Syndrome, which can affect memory and/or cause distortion.¹⁵⁸ Millbank suggests that there be less focus on establishing the truth based on the consistency of relatively minor details of the persecution, especially considering passage of time and the traumatic nature of most claims based on sexual orientation.¹⁵⁹ The UNHCR’s Gender Guidelines state that “it is unnecessary to establish the precise details of the act of rape or sexual assault itself...”¹⁶⁰

As with assessing demeanour, internalized homophobia, as seen above, may include feelings of shame and embarrassment, and can affect the way in which a claimant expresses her sexuality and recounts her experience. The Federal Court of Canada has stated that the RPD can draw negative conclusions related to credibility where the claimant does not describe their

¹⁵⁵ Ariel Shidlo & Joanne Ahola, “Mental health challenges of LGBT forced migrants” (2013) 42 *Forced Migration Review* at 9, online: RefWorld <<http://www.refworld.org/pdfid/517eab7f4.pdf>> [accessed 10 July 2014].

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ UN High Commissioner for Refugees, *Guidelines on the Protection of Refugee Women*, July 1991, at para 72, online: <<http://www.unhcr.org/refworld/docid/3ae6b3310.html>> [accessed 5 December 2012].

¹⁵⁹ Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations”, (2009) 21 *Int J Refugee Law* 1 at 13.

¹⁶⁰ UN High Commissioner for Refugees, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the*

sexual experiences in a clear manner.¹⁶¹ LaViolette argues that such personal questioning can cause “embarrassment, shame, humiliation and confusion,” and therefore impacts the way in which the claimant expresses herself.¹⁶² The Canadian Gender Guidelines suggest that “women from societies where the preservation of one’s virginity or marital dignity is the cultural norm may be reluctant to disclose their experiences of sexual violence in order to keep their ‘shame’ to themselves and not dishonour their family or community.”¹⁶³ Such cultural norms may make women reluctant to speak of sexuality in general, which is likely intensified by the shame related to their sexual orientation. Rather than explicit questions about sexual acts, LaViolette proposes an inquiry into the claimant’s personal experience as a sexual minority, as all sexual minorities have experienced rejection at some level, whether in the family or society. This will provide a more accurate picture, from which to assess credibility as opposed to questioning the claimant about sexual acts.¹⁶⁴

Millbank suggests that decision-makers view sexual orientation as fixed and therefore previous relationships with people of the opposite sex are seen as inconsistent with the

Status of Refugees, 7 May 2002, HCR/GIP/02/01, at para 36(xi), online:

<<http://www.unhcr.org/refworld/docid/3d36f1c64.html>> [accessed 30 September 2012].

¹⁶¹ Nicole LaViolette, “Sexual Orientation, Gender Identity and the Refugee Determination Process” (1 March 2010) at 22, online: Academia.edu

<http://www.academia.edu/3431684/Sexual_Orientation_Gender_Identity_and_the_Refugee_Determination_Process_in_Canada> [accessed 25 October 2012].

¹⁶² *Ibid.*

¹⁶³ Immigration and Refugee Board of Canada, *Compendium of Decisions: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution (Update)*, February 2003, at 66, online:

<<http://www.refworld.org/docid/4713831e2.html>> [accessed 10 October 2012].

¹⁶⁴ Nicole LaViolette, “Sexual Orientation, Gender Identity and the Refugee Determination Process” (1 March 2010) at 22, online: Academia.edu

<http://www.academia.edu/3431684/Sexual_Orientation_Gender_Identity_and_the_Refugee_Determination_Process_in_Canada> [accessed 25 October 2012].

claimant's alleged sexual identity.¹⁶⁵ In a 2006 case involving a gay man from Nigeria, the decision-maker found that the man was not gay due to the fact that he was the father of two children.¹⁶⁶ The main problem with such findings is that they ignore the pressure in certain countries for gay and lesbian sexual minorities to live straight lives for their own safety.¹⁶⁷ Similarly, Rehaag found that bisexuals had a hard time proving their sexual orientation because of previous heterosexual relationships. In a case involving an Iranian bisexual woman, the decision-maker found that the claimant's intention to marry a man reflected that of a heterosexual woman.¹⁶⁸ In another case, the decision-maker found a woman not be bisexual as she had been living with her boyfriend.¹⁶⁹ Such judgments clearly lack an understanding of sexuality in general and sexual orientation in particular. It is especially difficult to understand a negative credibility assessment based on a bisexual-identified person's relationships with the opposite sex, when the very nature of bisexuality involves relations with both sexes.

Stereotyping of sexual minorities is also an issue in consistency assessments. In a case involving a young bisexual woman, the decision-maker found it to be inconsistent that the claimant had not engaged in sexual activity since her arrival in Canada. The reasoning behind this decision was that it was not believable that someone who has been sexually active with

¹⁶⁵ Jenni Millbank, "The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21 Int'l J Refugee L 1 at 15.

¹⁶⁶ *Leke v. Canada* [2007] FCJ No. 1108 (26 July 2007), at para. 20 in Jenni Millbank, "The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21 Int'l J Refugee L 1 at 16.

¹⁶⁷ Laurie Berg & Jenni Millbank, "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants" (2009) 22(2) J Refugee Stud 195 at 200.

¹⁶⁸ *K.O.C. (Re)* [2003] RPDD No. 420 in Sean Rehaag, "Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada the United States, and Australia" (2009) 13(2) Int'l J HR 415 at 14.

¹⁶⁹ *Gyorgyjakab v. Canada (Minister of Citizenship and Immigration)* [2004] RPDD No. 698 in Sean Rehaag, "Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada the United States, and Australia" (2009) 13(2) Intl J Hum Rights 415 at 14.

two females and one male since the age of 14 would be “living a celibate life now.”¹⁷⁰ Rehaag argues that this decision reflects the stereotype of bisexuals as promiscuous. The decision-maker denied the claimant’s self-identification on the basis that she was not currently sexually active, which did not fit his personal view of bisexuality.¹⁷¹ Furthermore, Rehaag found that decision-makers had a tendency to reject claims of those who did not fit what he calls the “homo/hetero binary,” therefore rejecting claimants that did not resemble their own expectations of bisexuals.¹⁷² Millbank refers to this tendency of decision-makers to rely on stereotypes as their “failure to see the other,” in which decision-makers project their own “self onto other,” when listening to claimant’s experiences.¹⁷³ Berg and Millbank suggest that the Western view of homosexual sexuality as “linear,” in which one moves from “denial or confusion to ‘coming out’ as a self-actualized lesbian or gay man,” lead to Western cultural expectations in claims involving sexual orientation.¹⁷⁴ Moreover, Lewis refers to the presumption in refugee determination on the basis of sexual orientation of “straight until proven otherwise,” whereby lesbians are judged according to “Euro-American stereotypes” and personal prejudices of the decision-maker about the appearance and lives of lesbians.¹⁷⁵ This Western projection of what is considered to be typical of sexual minorities is dangerous, as it involves the risk of a refugee being sent back into a situation of persecution when their experience does not meet the narrow expectations of the decision-maker. LaViolette argues

¹⁷⁰ TA6-12910 (18 July 2007) in Sean Rehaag, “Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada the United States, and Australia” (2009) 13(2) Int’l J HR 415 at 13.

¹⁷¹ *Ibid.*

¹⁷² *Ibid* at 16.

¹⁷³ Jenni Millbank, “Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia” (2002) 26 Melb Univ L Rev 144 at 150.

¹⁷⁴ Laurie Berg & Jenni Millbank, “Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants” (2009) 22(2) J Refugee Stud 195 at 206.

that “[h]uman sexuality is strongly influenced by social, cultural, religious, and even political environments,”¹⁷⁶ which highlights the importance of considering cultural differences rather than basing decisions solely on one’s own cultural assumptions.

Plausibility

Plausibility is the part of the credibility assessment that considers the testimony of the claimant based on probability, ‘common sense’ and ‘rationality.’¹⁷⁷ Although the Canadian credibility Guidelines caution against using speculation in plausibility findings, Millbank found various cases in which speculation was relied upon. In a case in which the claimant’s husband showed up at her work drunk and revealed her as a lesbian, the decision-maker found it implausible that anyone would believe him since he was drunk.¹⁷⁸ Similarly, in another case, a negative credibility finding was made by the RPD based on the view that a father wouldn’t call relatives to tell them his daughter is a lesbian because the shame would have outweighed the outrage. The Federal Court found that this conclusion relied on speculation.¹⁷⁹ Millbank

¹⁷⁵ Rachel Lewis, “The Cultural Politics of Lesbian Asylum: Angela Maccarone’s Unveiled (2005) and the Case of the Lesbian Asylum-Seeker” (2010) 12:3-4, *The International Feminist Journal of Politics* 424 at 430.

¹⁷⁶ Nicole LaViolette, “Sexual Orientation, Gender Identity and the Refugee Determination Process” (1 March 2010) online: Academia.edu <http://www.academia.edu/3431684/Sexual_Orientation_Gender_Identity_and_the_Refugee_Determination_Process_in_Canada> [accessed 25 October 2012].

¹⁷⁷ Immigration and Refugee Board of Canada, *Assessment of Credibility in Claims for Refugee Protection*, 31 January 2004, at 2.3.4, online: <<http://www.unhcr.org/refworld/docid/4638af792.html>> [accessed 12 October 2012].

¹⁷⁸ Re PTF [2000] CRDD No. 117 (11 May 2000) at para 5 in Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 *Int’l J Refugee L* 1 at 17.

¹⁷⁹ *Tsyhanko v. Canada* (Minister of Citizenship and Immigration) [2008] FCJ No. 1023 (QL) in Nicole LaViolette, “Sexual Orientation, Gender Identity and the Refugee Determination Process” (1 March 2010) at 16-18, online: Academia.edu <http://www.academia.edu/3431684/Sexual_Orientation_Gender_Identity_and_the_Refugee_Determination_Process_in_Canada> [accessed 25 October 2012].

argues that one of the problems with plausibility is that it can be based on assumptions of likelihood,¹⁸⁰ as demonstrated in the above cases.

The credibility Guidelines instruct that plausibility findings be based on evidence;¹⁸¹ however, cases involving sexual orientation, as previously discussed, are often lacking in corroborating evidence. Instead, as with assessments of demeanour and consistency, Millbank found that plausibility conclusions are based on “broad over-generalizations or stereotypes of gay culture or ‘lifestyle.’”¹⁸² Jordan notes the assumption among decision-makers that sexual minority claimants will “seek ties” in Canada with the gay or lesbian community.¹⁸³ For example, in some cases, claimants were expected to know names and locations of gay bars, implying that if one is really gay or lesbian they would attend these places. In other cases, it was assumed that sexual minorities should be up to date on the political and legal situation in their countries relating to the LGBT community, suggesting that being a sexual minority presupposes that one is also politically engaged in LGBT issues.¹⁸⁴ In *Laszlo v. Canada*, there was a negative credibility finding based on the fact that the claimant was unaware of a certain LGBT organization in the country of origin. The reasoning was also upheld by the Federal Court.¹⁸⁵ In another case that came under judicial review by the Federal Court, the RPD found it

¹⁸⁰ Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 Int’l J Refugee L 1 at 17.

¹⁸¹ Immigration and Refugee Board of Canada, *Supra* note 159.

¹⁸² Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 Int’l J Refugee L 1 at 17.

¹⁸³ Sharalyn Jordan & Chris Morrissey, “‘On what grounds?’ LGBT asylum claims in Canada” in Marion Couldrey & Maurice Herson, eds, *Sexual Orientation and Gender Identity and the Protection of Forced Migrants* (2013) 42 *Forced Migration Review* 13 at 14, online: Refworld <<http://www.refworld.org/pdfid/517eab7f4.pdf>> [accessed 21 July 2013].

¹⁸⁴ *Ibid* at 19.

¹⁸⁵ *Laszlo v. Canada* [2005] FCJ No. 561 (6 April 2005) at para. 10 in Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 Int’l J Refugee L 1 at 19.

implausible that a woman in her fifties had just had her first lesbian relationship. This conclusion was based on the view that most people discover their sexuality earlier in life.¹⁸⁶ The Canadian Guidelines on credibility caution that “[a]ctions which might appear implausible if judged by Canadian standards might be plausible when considered within the context of the claimant’s social and cultural background.”¹⁸⁷ Such broad generalizations about the lives of sexual minorities demonstrate a failure on the part of some adjudicators to fully appreciate the gender and cultural factors that may constrain sexual minorities.

Millbank found that, in many cases, plausibility was based simply on assumptions as to “motivations or state of mind, which extended far beyond what was knowable.”¹⁸⁸ For example, a Ukrainian lesbian’s testimony, in which she shared her feelings for her female friend in public at a graduation dance, was found by the decision-maker to be implausible based on the Ukraine’s highly homophobic atmosphere at the time.¹⁸⁹ Millbank argues that according to this reasoning, based on the idea that one wouldn’t express their feelings for someone of the same sex or risk being ‘outed’ in a homophobic environment, all claims based on sexual orientation would be implausible.¹⁹⁰ In a case involving similar reasoning, namely that a lesbian wouldn’t take certain risks, a claim by an Iranian lesbian, was found implausible because the decision-maker was of the view that a woman living on her own and engaging in a long-term lesbian relationship was inconsistent with Iranian traditional values. After review by

¹⁸⁶ *Dosmakova v. Canada* [2007] FCJ No. 1742 (5 December 2007) at para. 13 in Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 Int’l J Refugee L 1 at 20.

¹⁸⁷ Immigration and Refugee Board of Canada, *Assessment of Credibility in Claims for Refugee Protection*, 31 January 2004, at 2.3.2, online: <<http://www.unhcr.org/refworld/docid/4638af792.html>> [accessed 10 October 2013].

¹⁸⁸ Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 Int’l J Refugee L 1 at 20.

the Federal Court, however, it was found that the RPD neglected to apply a broader gender analysis to the case, by relying solely on sexual orientation, thereby failing to recognize the broader gender implications of a woman living alone in Tehran.¹⁹¹ What may seem plausible to Canadian decision-makers may not reflect the reality of the experiences of sexual minority women from other cultures and nationalities.

Although necessary in establishing a sexual minority as a member of a particular social group with a well-founded fear of persecution, credibility assessments can pose a serious threat to the lives of lesbians in need of protection when based on stereotypes and Western expectations that neglect to analyze the situation within the context of gender and cultural differences. While it is established in both Canadian and international refugee law that stereotypes should not form the basis of decisions for claims based on sexual orientation,¹⁹² the above cases reveal that they persist. LaViolette argues that “[h]uman sexuality is strongly influenced by social, cultural, religious, and even political environments. Given the diversity of the global context, it is dangerous to make assumptions about the lives of members of a sexual minority.”¹⁹³ In the case of lesbians, gender roles and expectations influenced by society, culture and religion, can influence the way a woman dresses and acts. Furthermore, gender

¹⁸⁹ TA5-12778 [2006] CanLII 61444 (IRB) (28 October 2006) in *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ Nicole LaViolette, “Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines” (2007) 19(2) *Int J Refugee Law* 169 at 193.

¹⁹² UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, para 36, online: <<http://www.unhcr.org/refworld/docid/48abd5660.html>>[accessed 10 May 2012]; see also *Francis Ojo Ogunrinde v. Canada* (Minister of Public Safety and Emergency Preparedness; Minister of Citizenship and Immigration), 2012 FC 760, Canada: Federal Court, 15 June 2012, online: <<http://www.unhcr.org/refworld/docid/5007ef452.html>>

¹⁹³ Nicole LaViolette, “Sexual Orientation, Gender Identity and the Refugee Determination Process” (1 March 2010) at 21, online: *Academia.edu*

norms may also influence how a woman is perceived by her culture or society if she doesn't meet expectations of dress code and behaviour.¹⁹⁴ Lesbians may or may not reflect these norms in appearance, as people vary. In Audrey Macklin's words, "it is dangerous at best, and misleading at worst, to rely on a uniform set of cues demonstrative of credibility, or lack thereof."¹⁹⁵ This seems to reflect the view that an accurate assessment of credibility is difficult when so many factors, such as trauma, cultural taboos and norms have an impact on the claimant, their experiences and their testimony. This difficulty in establishing credibility, when assessing lesbian refugee claims in a cross-cultural context, highlights the need for a consideration of gender in relation to sexual orientation in the country in question.

2.3.2 Country Documentation

Human rights documentation on the conditions for sexual minorities in their country of origin is assessed by adjudicators to determine whether a claimant's fear is well-founded. This is the so-called objective aspect of refugee determination. Canada was the first country to produce its own reports on human rights conditions for particular countries.¹⁹⁶ The Research Directorate was established with the main objectives of making country information needed to decide a particular case available to decision-makers; and to make updated information on

<http://www.academia.edu/3431684/Sexual_Orientation_Gender_Identity_and_the_Refugee_Determination_Process_in_Canada> [accessed 25 October 2012].

¹⁹⁴ Nicole LaViolette, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines" (2007) 19(2) Int'l J Refugee L 169 at 192.

¹⁹⁵ Audrey Macklin, "Truth and Consequences: Credibility Determination in the Refugee Context," Conference Paper, International Association of Refugee Law Judges (1998), at 138, online: <<http://refugeestudies.org/UNHCR/97%20-%20Truth%20and%20Consequences.%20Credibility%20Determination%20in%20Refugee%20Context.%20by%20Audrey%20Macklin.pdf>> [accessed 18 December 2012].

¹⁹⁶ Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: an Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13(2-3) Int'l J HR 437 at 438.

human rights in a particular country available to the public.¹⁹⁷ In order to gather specific information related to a claim, decision-makers can submit a request for information on a particular issue relevant to a particular country.¹⁹⁸ Although Canada has its own research division, external sources are relied on in order to document and analyze abuses against sexual minorities in the refugee determination process. Such sources include reports from the US State Department, UN Reports, and reports from NGO's such as Human Rights Watch and Amnesty International.¹⁹⁹

Through a study of claims by sexual minorities between 1991 and 2008, LaViolette found that the adequacy of human rights documentation is a concern.²⁰⁰ Some of the challenges identified by LaViolette are the continuing inability of organizations to document abuses in some countries and the limited information in others. Such limitations are due to a range of factors, from the practice of labelling charges of homosexuality under other charges, to limited resources, legal constraints, lack of support from other human rights groups and violent attacks directed towards human rights groups that advocate for LGBT rights.²⁰¹ As most governments do not report on abuses against sexual minorities, such limitations on human rights organizations make it difficult to keep information current and comprehensive.²⁰² Lack of specific information or out of date information can present an obstacle to refugee protection

¹⁹⁷ France Houle, "L'évaluation de la crédibilité des témoignages dans un système non-expert : le traitement symptomatique de certains preuves par la Section de protection des réfugiés," in Patrick Molinari *Dialogues sur la justice: le public, le législateur, les tribunaux et les médias* (Montreal : Les Éditions Thémis, 2003) at 363-364.

¹⁹⁸ *Ibid* at 364.

¹⁹⁹ France Houle, "The Use of Official Notice in a Refugee Determination Process" (1993) 34 *Les Cahiers de Droit* 573 at 577.

²⁰⁰ *Ibid* at 441.

²⁰¹ *Ibid* at 447-448; See also "Together, Apart: Organizing around Sexual Orientation and Gender Identity Worldwide," Human Rights Watch (May 2009) online: <<http://www.hrw.org/sites/default/files/reports/lgbt0509web.pdf>> [accessed 20 January 2013].

²⁰² *Ibid* at 448.

when this information is considered more credible than a claimant's story. Houle points out the tendency of RPD decision-makers to use country documentation to contradict a claimant's testimony, without good reason to doubt such the testimony.²⁰³ This practice, as Houle explains, is a result of the view of decision-makers that such documentary evidence is more objective and, therefore, that more weight should be given to such evidence over a claimant's testimony.²⁰⁴

Scholars seem to agree that country documentation does not always provide the information needed to determine whether a claimant faces persecution. In Macklin's experience as an RPD decision-maker, country documentation and human rights reports "usually paint a canvas with broad, crude brush strokes," and therefore rarely constitute sufficient information to support a claimant's testimony.²⁰⁵ LaViolette argues that country documentation is "general and descriptive" rather than "specific and evaluative."²⁰⁶ Similarly, Houle asserts that the information contained within country documentation is general information "from which deductions on the reliability of the specific facts told by the claimant in her testimony can hardly be made."²⁰⁷ An overly broad picture of human rights situations causes concern for

²⁰³ France Houle, "Pitfalls in Relying on Common Law Rules of Evidence for Administrative Tribunals" (2008) at 3, online: <<http://www.aija.org.au/Tribs06/papers/Houle.pdf>> [accessed 25 June 2014].

²⁰⁴ France Houle, "L'évaluation de la crédibilité des témoignages dans un système non-expert : le traitement symptomatique de certains preuves par la Section de protection des réfugiés," in Patrick Molinari *Dialogues sur la justice: le public, le législateur, les tribunaux et les médias* (Montreal : Les Éditions Thémis, 2003) at 366.

²⁰⁴ Ibid at 364.

²⁰⁵ Audrey Macklin, "Truth and Consequences: Credibility Determination in the Refugee Context," Conference Paper, International Association of Refugee Law Judges (1998) at 137, online: <<http://refugeestudies.org/UNHCR/97%20-%20Truth%20and%20Consequences.%20Credibility%20Determination%20in%20Refugee%20Context.%20by%20Audrey%20Macklin.pdf>> [accessed 18 December 2012].

²⁰⁶ Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: an Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13(2-3) Int'l J HR 437 at 325.

²⁰⁷ France Houle, "Pitfalls in Relying on Common Law Rules of Evidence for Administrative Tribunals" (2008) at 11, online: <<http://www.aija.org.au/Tribs06/papers/Houle.pdf>> [accessed 25 June 2014].

sexual minorities. Kassisieh highlights the importance of a complete picture of human rights in a country. A comprehensive look at human rights issues should include an intersection of the various forces at play, such as legal, political, social, religion and familial. Such factors influence the direct involvement of a given state in the persecution or the availability of protection.²⁰⁸

Broad human rights documentation is especially troubling for lesbians due to their often differing experience of persecution than that of gay men. Human rights documentation, some of which group gay men and lesbians into a single category and focus solely on sexual orientation, neglects the influencing factors of gender, which make lesbians vulnerable to persecution on account of both gender and sexual orientation.²⁰⁹ Such grouping also fails to present other influencing factors such as ethnicity and economic status. For lesbian claimants, therefore, a complete picture requires an analysis of gender and other intersecting identities and social locations. Swink emphasizes the importance of a country condition analysis specific to lesbian experience, for a complete and “nuanced understanding” of their unique situation.²¹⁰ Furthermore, because much of women’s experience of persecution takes place in the private sphere, it is even more challenging to document the full extent of the persecution at the hands of private actors.²¹¹ Much of the abuse experienced by lesbians is committed by family

²⁰⁸ Ghassan Kassisieh, “From Lives of Fear to Lives of Freedom: A review of Australian refugee decisions on the basis of sexual orientation” (2008) Gay & Lesbian Rights Lobby at 34, online: <http://glrl.org.au/images/stories/from_lives_of_fear_to_lives_of_freedom.pdf> [accessed 20 December 2012].

²⁰⁹ “A Fact Sheet on Lesbians, Gender and Human Rights Violations Violence and Abuse of Women,” Amnesty International USA, online: <<http://www.amnestyusa.org/sites/default/files/pdfs/lesbianfactsheet.pdf>> [accessed 23 October 2012].

²¹⁰ Arwen Swink, “Queer Refugee: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities” (2006) 29 *Hastings Int’l & Comp L Rev* 251 at 266.

²¹¹ Nicole LaViolette, “Independent Human Rights Documentation and Sexual Minorities: an Ongoing Challenge for the Canadian Refugee Determination Process” (2009) 13(2-3) *Int’l J HR* 437, at 448.

members or members of the community, which makes the violence less visible and often under-reported, making documentation difficult.²¹² LaViolette argues that the lack of proper documentation has resulted in the rejection of claims based on the conclusion that the risk of persecution does not exist.²¹³ This situation may disadvantage lesbian claimants, as decision-makers may erroneously conclude that there is no risk of persecution in countries where, human rights violations against women actually hide under the veil of the private sphere.

LaViolette identifies a relatively recent trend in sexual or gender identity cases, where decision-makers use country documentation to distinguish between persecution and discrimination in sexual orientation cases.²¹⁴ Although persecution is not universally defined, the UNHCR differentiates persecution from discrimination based on whether the discrimination amounts to serious restrictions on rights to earn livelihood, practice religion or access education. Furthermore, if the discrimination is cumulative, it may amount to persecution.²¹⁵ The IRB has also recognized that discrimination must be considered cumulatively when there is more than one incident.²¹⁶ Discrimination, therefore, must reach a level of seriousness and/or frequency in order to be considered persecution.

²¹² "The Challenges to Successful Lesbian Asylum Claims," National Center for Lesbian Rights at 7, online: <http://www.nclrights.org/site/DocServer/challenges_lesbian_asylum_cases.pdf> [accessed 3 January 2013].

²¹³ Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: an Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13(2-3) Int'l J HR 437 at 448.

²¹⁴ *Ibid* at 450.

²¹⁵ UN High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3 at para 54-55, online: <<http://www.unhcr.org/refworld/docid/4f33c8d92.html>> [accessed 10 May 2012].

²¹⁶ Immigration and Refugee Board of Canada, *Interpretation of the Refugee Definition in the Case Law*, Legal Services, 31 December 2010, at 3.1.2, online: <<http://www.irb-cisr.gc.ca/eng/brdcom/references/legjur/Pages/Def2010.aspx#>> [accessed 8 May 2012].

LaViolette explains that this recent shift in focus is a result of recent social and legal progress in some countries for sexual minorities. However, she found that decision-makers have a tendency to focus only on the progress when determining whether the claimant is at risk of discrimination or persecution.²¹⁷ In the case of Brazil, where there has been minor legal and social progress, decision-makers concluded that Brazilian sexual minorities experience discrimination as opposed to persecution.²¹⁸ And yet, despite hosting the largest pride parade in the world, Brazil still has some of the highest rates of homophobic violence.²¹⁹ The limited progress made by sexual minorities in Brazil, then, is in fact misleading. Similarly, the public assembly of LGBT groups in Uruguay led the decision-maker to conclude that discrimination, not persecution, is a concern for sexual minorities. However the existence and assembly of LGBT groups does not reflect an absence of persecution for sexual minorities.²²⁰ As LaViolette points out, these types of assumptions do not consider how the operations or existence of such groups are restricted in society.²²¹ For example, there is considerable LGBT organizing in Uganda and such organizations have even handed out brochures in support of LGBT rights in public at a conference;²²² however, it is well-known that sexual minorities in

²¹⁷ Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: an Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13(2-3) Int'l J HR 437 at 451.

²¹⁸ *Ibid* at 453.

²¹⁹ "Together, Apart: Organizing around Sexual Orientation and Gender Identity Worldwide," Human Rights Watch (May 2009) at 34, online: <<http://www.hrw.org/sites/default/files/reports/lgbt0509web.pdf>> [accessed 20 January 2013].

²²⁰ Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: an Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13(2-3) Int'l J HR 437 at 453.

²²¹ *Ibid*.

²²² Glenna Gordon, "Being Gay in Uganda: One Couple's Story" (8 March, 2010), Time, online: <<http://www.time.com/time/world/article/0,8599,1969667,00.html>> [accessed 15 April 2011].

Uganda are the target of serious state and social repression.²²³ The situation in Uganda demonstrates that the existence of LGBT groups and their public activism does not reflect the level of persecution in a country and it does not correlate with one's freedom to live openly as a sexual minority without fear of persecution. On the contrary, an increase in social movements and social progress often causes a backlash from society against sexual minorities because their heightened visibility is seen as a threat to social and moral values. Regarding the social and legal progress related to sexual minorities around the world, Scott Long, former director of the Lesbian, Gay, Bisexual, and Transgender Rights Program at Human Rights Watch, warns that "visibility breeds violence, and there is a pressing need for new support and protection."²²⁴ The reinforcement and adoption of homophobic laws in countries all over the world raises the question of whether progress and more visibility of sexual minority rights internationally are leading to backlash by national governments against sexual minorities. Such laws in turn encourage violence at the hands of private citizens. It is therefore a dangerous trend for decision-makers to equate social progress with social liberties. It does not always translate into freedom from persecution.

The question of state protection is important. Where criminal laws against same-sex relations do not exist, the claimant must prove that the state is unwilling to provide protection.²²⁵ As seen above, rather than reflect a state's tolerance of lesbians, an absence of overt

²²³ "President Should Reject Anti-Homosexuality Bill," Human Rights Watch (20 December 2013), online: HRW <<http://www.hrw.org/news/2013/12/20/uganda-president-should-reject-anti-homosexuality-bill>> [accessed 18 January 2014].

²²⁴ "LGBT Rights Movement: Progress and Visibility Breed Backlash," Human Rights Watch (11 June 2009) online: <<http://www.hrw.org/news/2009/06/11/lgbt-rights-movement-progress-and-visibility-breed-backlash>> [accessed 20 January 2013].

²²⁵ Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: an Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13(2-3) Int'l J HR 437 at 452.

criminalization of lesbian relations may actually point to reluctance on behalf of the state to acknowledge female sexuality in any form. Such an omission speaks to a repressive attitude towards women and female sexuality and especially toward sexuality outside of the heterosexual norm. Female sexuality is overlooked at the state level because there is an implicit assumption that it is controlled within the private sphere and does not warrant state protection.²²⁶ And yet, it is precisely because the persecution takes place at the hands of private individuals, such as family and community members, that the question of state protection is especially important for lesbian claimants. Decision-makers assume that the female victim should be able to seek protection from her abusers. Where the claimant did not go to the police, she must prove that the state is unwilling to provide protection.²²⁷ The problem with reporting abuses to the police; however, is that it requires revealing one's sexual orientation.²²⁸ In a homophobic environment, even where laws against same-sex relations do not exist, or do exist, but are not enforced, approaching the authorities can open the victim up to further trauma and even more abuse. As seen above, lesbian victims of homophobic violence in South Africa are unlikely to report their abuses to the police for fear of further victimization and because of their failure to act on her behalf.²²⁹ Similarly, the OHCHR reports that, in Jamaica, where the law declares sex between men as illegal, lesbians who are victims of corrective rape and other abuses at the hands of family members and the community, tend not to report violence to authorities for fear of further attacks by their

²²⁶ "The Challenges to Successful Lesbian Asylum Claims," National Center for Lesbian Rights at 9, online: <http://www.nclrights.org/wpcontent/uploads/2013/04/Resources_Challenges_Lesbian_Asylum_Claims.pdf> [accessed 3 January 2013].

²²⁷ Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: an Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13(2-3) Int'l J HR 437 at 454-455.

²²⁸ *Ibid.*

²²⁹ HRW, *Supra* note 21.

families or police.²³⁰ Such a situation suggests that sexual minority women are not safe anywhere, in neither the public nor the private sphere, once they have threatened cultural norms of female sexuality.

The concept in refugee law of Internal Flight Alternative (IFA) proposes a possibility for claimants to seek refuge elsewhere in their country of origin rather than internationally. The IRB defines two criteria that must be satisfied in order for an IFA to be found: 1) “on a balance of probabilities ... there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists;” and 2) “conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for him to seek refuge there.”²³¹ The IRB clarifies that in the case of sexual orientation, an IFA is not an option if the claimant has to hide their sexual orientation in order to avoid problems.²³² IFA is relevant in sexual orientation cases where there may be more social progress in relation to sexual minorities in another area of the country. However, as IFA is considered in terms of state protection, many of the same problems with country documentation exist. Decision-makers may conclude that an IFA is available based on social progress, without considering whether such progress is actually implemented and whether it is effective in reality.²³³ LaViolette argues that this failure to assess the reality of protection is an ongoing concern in cases based on sexual

²³⁰ United Nations Human Rights Committee, “human Rights Violations of Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Jamaica: A Shadow Report,” October 2011, online: <www2.ohchr.org/English/bodies/hrc/docs/ngos/LGBT_Jamaica103.pdf> [accessed 2 January 2012].

²³¹ Immigration and Refugee Board of Canada, *Interpretation of the Refugee Definition in the Case Law*, Legal Services, 31 December 2010, at 8.1, online: <<http://www.irb-cisr.gc.ca/Eng/brdcom/references/legjur/Pages/Def2010Chap08.aspx>> [accessed 8 May 2012].

²³² *Ibid* at 8.5.1.

orientation.²³⁴ Furthermore, human rights documentation generally does not address whether certain areas of a country are safer than others for sexual minorities.²³⁵ The decision-maker therefore risks making an uninformed decision based on insufficient country documentation.

When assessing whether or not an IFA is available for a lesbian claimant, it is important to apply a gender analysis within the context of the social and cultural environment of the country of origin. Of importance is the way in which single women, without family or men, would be viewed by the new community in which the claimant relocates in the country of origin if an IFA were to exist.²³⁶ Lesbian women from Uganda and Jamaica interviewed by Asylum Aid spoke of the suspicion they would face if relocated, as single women who reject advances by men. This would likely lead to the suspicion that they are lesbian, exposing them to further victimization. In many countries it is not socially acceptable for women to live on their own, without the support of men or family. These social and cultural restrictions placed on women raises the question of whether IFA is a realistic option or if it puts women at further risk, when it comes to claims based on sexuality and gender-based persecution.²³⁷

Furthermore, in many countries women cannot survive economically without men. This economic vulnerability intersects with vulnerability as a single woman, which increases the risk of persecution.²³⁸ A Jamaican lesbian argued that it is impossible to get hired if a woman

²³³ Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: an Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13(2-3) Int'l J HR 437 at 460.

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ Claire Bennet, "Relocation, Relocation: the impact of internal relocation on women asylum seekers," Asylum Aid (November 2008) at 27, online: <www.asylumaid.org.uk/data/files/publications/89/Relocation_Relocation_research_report.pdf> [accessed 5 January 2013].

²³⁷ *Ibid* at 68.

²³⁸ *Ibid.*

is suspected of being a lesbian and, if she is employed, and found out, she will lose her job or clients.²³⁹ For claims involving gender-based persecution, the risk of relocating through an IFA could amount to further persecution on account of gender and sexual orientation.

Although important in providing objective evidence of persecution in refugee determination, country documentation cannot always adequately provide a clear and comprehensive picture of the persecution experienced by lesbians, which is not often visible. Therefore, decision-makers' reliance on the information provided in country documentation to fully support testimony, can impede, rather than support, their claim and place lesbians in need of protection and at risk of being sent back to persecution.

2.4 Refugee reform

Canada's new refugee reform threatens to present further challenges to sexual minority women seeking protection in Canada. The reform introduced by the Canadian Conservative government reflects criticism that states, while being signatories to the 1951 Convention, limit access to their refugee systems by introducing policies that violate the principle of *non-refoulement* and make it difficult to attain the right to seek asylum.²⁴⁰ Bill C-31 proposed changes to Canada's refugee system that threatens to make it harder for refugees to secure protection in Canada. The reform, titled *Protecting Canada's Immigration System Act* came into effect December 15th, 2012. As the name suggests, the act is more concerned with the perceived need to 'protect' Canada's immigration system than the people it was designed to protect in theory – people fleeing from persecution. Minister of Citizenship, Immigration and

²³⁹ *Ibid* at 69.

²⁴⁰ Jean Allain, "The *jus cogens* Nature of *non-refoulement*" (2001) 13(4) Int'l J Refugee 533 at 533-534.

Multiculturalism Jason Kenney has expressed the view that the new bill will help protect Canada's system against those whom he sees as threatening to "abuse our generosity and seek to take unfair advantage of our country."²⁴¹ While the introduction of a Refugee Appeal Division under the reform reflects progress, other aspects of the reform such as shorter timelines and designated safe countries, pose particular problems for sexual minority women.

Shortened timelines

Shorter timelines introduced under the reform increase the risk of important information being left out of the refugee claims. Under the reform, the written information of a claim must be completed within 15 days when making a claim upon entry to Canada, followed by the hearing within 60 days.²⁴² The previous time limit for submission of written information was 28 days.²⁴³ Rainbow Refugee argues that even this previous timeline of 28 days was a challenge for claimants to make contact with a refugee lawyer experienced in claims based on sexual orientation.²⁴⁴

Sexual minorities often have to rely on family and community members who may have already rejected them on the basis of sexual orientation, to track down supporting evidence such as letters, lovers, medical and police reports to corroborate their sexual orientation and narrative of persecution. In such a situation, shortened timelines are unrealistic and will likely

²⁴¹Edward C. Corrigan, "Bill C-31: Reforming Canada's Refugee System or Destroying It?," Dissident Voice (14 April 2012), online: <<http://dissidentvoice.org/2012/04/bill-c-31-reforming-canadas-refugee-system-or-destroying-it/>> [accessed 5 July 2012].

²⁴² Immigration and Refugee Protection Regulations, SOR/2002-227, s 159.9(1); 159.8(2), online: <<http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-227/page-69.html#docCont>> [accessed 4 July 2014].

²⁴³ Refugee Protection Division Rules, SOR/2002-228, r6, online: <<https://www.canlii.org/en/ca/laws/regu/sor-2002-228/latest/sor-2002-228.html>> [accessed 4 July 2014].

put sexual minority claimants at a disadvantage and leave them unprepared.²⁴⁵ In addition to gathering documents and other evidence from the country of origin, a sexual minority may need more time to open up and reveal their sexual orientation and experience of persecution due to the intimate nature of this element of their claim and to stigmatization in the country of origin. PTSD, which will be discussed below in the context of credibility assessment, can affect the claimant's memory and the coherence of their story.²⁴⁶ As lesbian claimants experience a high rate of sexual violence, they may be especially disadvantaged by shorter timelines.

Safe countries

The reform gives the Minister of Citizenship and Immigration the authority to designate countries of origin as safe under the Immigration and Refugee Protection Act. According to the government, these designated countries are not a significant source of refugees.²⁴⁷ Two tests are used to determine designation of a country. The first test is quantitative and is based on combined rates of rejected, withdrawn and abandoned claims. A combined rate of 75% or higher of rejected, withdrawn or abandoned asylum claims or a combined rate of 60% of withdrawn and abandoned asylum claims meet the quantitative threshold for designation as DCO. These quantitative tests apply only to countries which have "at least 30 finalized claims

²⁴⁴ "Short timelines are unfair—and not necessarily more efficient," Rainbow Refugee Canada, online: <<http://rainbowrefugeecanada.wordpress.com/opposing-bill-c-31/short-timelines-are-unfair-and-not-necessarily-more-efficient/>> [accessed 9 June 2012].

²⁴⁵ "Short timelines are unfair—and not necessarily more efficient," Rainbow Refugee Canada, online: <<http://rainbowrefugeecanada.wordpress.com/opposing-bill-c-31/short-timelines-are-unfair-and-not-necessarily-more-efficient/>> [accessed 9 June 2012].

²⁴⁶ Sharalyn Jordan & Christine Morrissey, "Refugee Protection at Risk: Impact of Bill C-31 on Refugees Facing Persecution related to Sexual Orientation or Gender Identity," Rainbow Refugee, Submission to Senate Committee on Social Affairs, Science and Technology (19 June 2012) at 8 (copy on email).

in any consecutive 12-month period in the three years preceding designation.”²⁴⁸ In the case that there is less than 30 finalized claims within the 12-month period, a qualitative text will be used to verify if a country should be designated as DCO. This qualitative test will consider basic democratic rights and freedoms, the existence of an independent judiciary and the existence of civil society organizations.²⁴⁹ There are currently 37 countries on the DCO list.²⁵⁰ For sexual minority women, the designation of safe countries is concerning. Rehaag argues that designation of safe countries will disadvantage claimants who fear persecution based on gender and sexual orientation, as the designation of safe countries does not take into consideration the specific vulnerabilities of such groups, which may make a country dangerous for them, while being safe for the general population.²⁵¹ This will be especially problematic for lesbians in cases where country information is lacking or not specific to their experiences. HRW raises concerns with the concept of “safe country of origin,” as it is not realistic to make a “blanket determination” that a country is safe for all of its inhabitants.²⁵² Designation of countries as safe raises concerns that cases will not be judged on the merits, as they will already be considered to be “non-refugee producing.”²⁵³ Liew argues that this will result in an even greater onus on DCO claimants, especially sexual minorities, to prove a lack

²⁴⁷ *Immigration and Refugee Protection Act*, SC 2001, c.27, art. 109.1, online: <<http://laws-lois.justice.gc.ca/eng/acts/l-2.5/>> [accessed 6 July 2014].

²⁴⁸ “Backgrounder – Designated Countries of Origin,” Citizenship and Immigration Canada, available at: <http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-11-30.asp> [Accessed 30 January 2013].

²⁴⁹ *Ibid.*

²⁵⁰ Government of Canada, Citizenship and Immigration Canada, “Designated Countries of Origin,” available at <<http://www.cic.gc.ca/english/refugees/reform-safe.asp>> [accessed 30 January 2013].

²⁵¹ Sean Rehaag, “Changes to Canada’s Refugee Laws likely to Negatively Impact Women and Minorities,” The Institute for Feminist Legal Studies Osgoode, online: <<http://ifls.osgoode.yorku.ca/2012/02/changes-to-canadas-refugee-laws-likely-to-negatively-impact-women-and-minorities/>> [accessed 20 November 2012].

²⁵² “Letter to Canadian MP’s on C-31 Law,” Human Rights Watch (16 March 2012), online: <www.hrw.org/news/2012/03/16/letter-canadian-mps-c-31-law> [accessed 20 November 2012].

of effective state protection.²⁵⁴ In highlighting the importance of judging a case on its merits, Liew cites the *Smith v. Canada* case, which upon judicial review by the Federal Court, it was found that the RPD erred in its finding that an American lesbian and member of the US Army had access to state protection.²⁵⁵ Moreover, although DCO claimants have access to the determination system, they will face an even further expedited claim process of 30 days for inland claims and 45 for claims made upon entry to Canada.²⁵⁶ The UNHCR warns that “[d]ue to their often complex nature, claims based on sexual orientation and/or gender identity are generally unsuited to accelerated processing or the application of “safe country or origin” concepts.”²⁵⁷ Furthermore, DCO claimants do not have access to the Refugee Appeal Division implemented under the reform and must wait 36 months after a decision from the RPD to access a pre-removal risk assessment.²⁵⁸ Finally, DCO claimants cannot apply for a work permit until their claim is approved or until 180 days after their claim for refugee status.²⁵⁹

²⁵³ Jamie Chai Yun Liew, “Beyond Country of Origin: *Smith v. Canada* and Refugees from Unexpected Places” (2011) 23(2) Canadian Journal of Women and the Law 686 at 696.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ Gouvernement du Canada, Citoyenneté et immigration Canada, *Document d’information – Aperçu de nouveau système d’octroi de l’asile du Canada*, online: <<http://www.cic.gc.ca/francais/ministere/media/documents-info/2012/2012-06-29c.asp>> [accessed 7 July 2014].

²⁵⁷ UN High Commissioner for Refugees (UNHCR), *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*, 23 October 2012, HCR/GIP/12/01, online: <<http://www.refworld.org/docid/50348afc2.html>> [accessed 23 February 2014].

²⁵⁸ Gouvernement du Canada, Citoyenneté et immigration Canada, *Document d’information – Aperçu de nouveau système d’octroi de l’asile du Canada*, online: <<http://www.cic.gc.ca/francais/ministere/media/documents-info/2012/2012-06-29c.asp>> [accessed 7 July 2014].

²⁵⁹ Gouvernement du Canada, Citoyenneté et immigration Canada, *Document d’information – Pays d’origine désignés*, online: <<http://www.cic.gc.ca/francais/ministere/media/documents-info/2012/2012-11-30.asp>> [accessed 7 July 2014].

With such restrictions and without adequate time to prepare and access to appeal, sexual minority claimants from a DCO are seriously disadvantaged.

Such measures go against the values of human rights, which underline refugee law, by limiting fair access to protection and justice for sexual minority women facing persecution. Furthermore, the reform threatens to add additional barriers to the already challenging task facing sexual minority women in providing proof of their sexual orientation and their risk of persecution.

Chapter 3 - Methodology

The central question in this research is whether the way in which Canadian refugee adjudicators decide claims on the basis of sexual orientation brought by women is reasonable from the perspective of a feminist analysis. In responding to this question it was necessary to identify issues and challenges particular to sexual minority women in Canadian refugee determination. As such, this research involves a case study of negative decisions on the basis of sexual orientation brought by women.

The case study sample consists of 55 rejected claims between 2010 and 2013, which were obtained from the Immigration and Refugee Board of Canada through the Access to Information Act. This case study consists of two separate categories according to the basis of rejection:

- 1) Rejected on the basis of state protection;
- 2) Rejected on the basis of credibility.

A total of 17 claims were selected and presented in the results section of this paper, based on their relevance to the key concerns involving sexual minority women raised in the literature review. Claims rejected on the basis of credibility made up the majority of the claims obtained from the IRB. A total of 12 claims, which are analyzed and presented in the results section, were denied on the basis of credibility. The remaining five claims, which are discussed in the results section, were rejected on the basis of state protection. Of these 17 claims, one claim rejected on the basis of credibility was sent for judicial review by the Federal Court. The

findings of this judicial review related to the case are also presented in the results section with the related claim.

Claims denied for reasons of state protection involved the decision-maker's view that state protection was available or that the claimant hadn't made adequate attempts to access such state protection within her country of origin before applying for refugee status in Canada. These claims are presented and analyzed by claim and by country. As the justification for rejecting these five claims is based solely or predominantly on state protection, an analysis of each claimant's particular country of origin and how gender and sexual orientation intersect within the context of persecution is provided in the analysis. Country documentation reviewed by decision-makers and cited in the written decisions is used in this analysis.

The second category of analysis in the case study includes rejected claims on the basis of credibility, i.e., when decision-makers determine that the claimant's story lacks credibility. The presentation of this category provides a representative overview of the patterns of reasoning decision-makers use in assessing credibility and this section is therefore organized by prominent themes relevant to assessing credibility rather than by claim or by country. Particular themes by which decision-makers judge a claimant's credibility are common to most of the claims reviewed, therefore presenting them as such both avoids repetition and provides a clearer representation of issues related to decision making in the credibility assessment.

This case study resembles similar research carried out by LaViolette and Millbank in analyzing claims based on sexual orientation determined by the RPD;²⁶⁰ however, in analyzing claims between 2010 and 2013, this study focuses on decisions not previously analyzed in their research, as much of it takes place before 2010. This present case analysis does however confirm and expand on trends relevant to sexual minority women highlighted in previous research and literature. Furthermore, this research differs most significantly in its focus on women.

As the marginalization of women's experiences within the context of human rights is at the center of this research, a critical feminist approach was best suited to this research and provides a framework by which to identify decision-making that was incomplete in its analysis of the risk of persecution faced by sexual minority women. Feminist critique of international law, developed by scholars such as Hilary Charlesworth, is committed to challenging the oppression of women and their exclusion from the international legal system.²⁶¹ In refugee law, this exclusion can be observed in refugee status decisions that fail to recognize the particularities of gender-based persecution of sexual minority women. Feminist legal scholars have highlighted the importance of recognizing that there is no common experience of women.²⁶² Charlesworth advises that "[a]nalysis of our discipline means confronting the

²⁶⁰ Jenni Millbank, "The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21 Int'l J Refugee L 1; Nicole LaViolette, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines" (2007) 19(2) Int J Refugee Law 169.

²⁶¹ Hilary Charlesworth, "Feminist Critiques of International Law and Their Critics" (1995) 13(1) Third World Legal Stud 1 at 12.

²⁶² Hilary Charlesworth, "Alienating Oscar? Feminist Analysis of International Law" (1993) 25 Studies in Transnational Legal Policy 1 at 3; Johanna E. Bond, "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations" (2003) 52 Emory LJ 71 at 141.

inevitable tension between universal theories and local experience.”²⁶³ Intersectionality presents a solution to this tension. Bond proposes a restructuring of international human rights systems which incorporate an intersectional approach to analyzing human rights violations.²⁶⁴ Intersectional analysis addresses the conflict between universal rights and the individual experiences of women within the context of their particular countries, of which Charlesworth speaks. An intersectional analysis considers differing systems of oppression that form experience in a particular social context, rather than assuming a common experience. Bond explains that in facilitating a more nuanced understanding and analysis, universal rights will be more accessible.²⁶⁵ Analysis of these multiple forms of oppression in refugee determination is particularly relevant to sexual minority women, as their experiences of persecution are formed by their intersecting identities, which challenge the restrictive heterosexual and gender-based norms maintained by patriarchy. As such, intersectionality largely informs the conceptual framework and the analysis of this research and case study.

Furthermore, as it is equally important for decision-makers to understand sexual identity when assessing claims based on sexual orientation, particular attention is paid to decision-making that reveals unrealistic expectations of lesbian identity. In order to properly assess the intersection of gender with sexual orientation, decision-makers must be sensitized to issues particular to sexual minority women.

²⁶³ Hilary Charlesworth, “Alienating Oscar? Feminist Analysis of International Law” (1993) 25 *Studies in Transnational Legal Policy* 1 at 4.

²⁶⁴ Johanna E. Bond, “International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations” (2003) 52 *Emory LJ* 71 at 137.

²⁶⁵ *Ibid* at 156.

Limitations

This research is limited by its relatively small sample size and short time period from 2010 to 2013. Furthermore, no positive written decisions were available between 2010 and 2013 for this study, as the written decisions of positive claims are not required to be published to the same extent that negative decisions are.²⁶⁶ As a result, this case study is one-sided in that only the reasoning behind negative refugee claims is analyzed. The lack of positive claims limits the ability to compare and contrast the reasoning used in positive claims based on sexual orientation brought by women. As such, this research is not a comprehensive study; rather its purpose is to identify some problematic trends with the purpose of reflecting on areas in which refugee protection for sexual minority women in Canada might be improved. A larger sample size over a longer period of time, which analyzes both positive and negative decisions, would offer a more complete and representative picture of refugee determination involving sexual minority women. Moreover, an analysis of the hearing transcripts of the claims in this case study would have offered more insight into the details of the claim and evidence involved.

²⁶⁶ Immigration and Refugee Protection Act, SC 2001, c 27, art. 169(d), online: <<http://canlii.ca/t/j0wt>> [accessed 12 July 2014].

Chapter 4 – Results: Case Study

4.1 Claims rejected on the basis of state protection

A refugee, according to the Convention's definition, is unable or unwilling to avail his or herself of the protection of their country of origin, or to return there due to his or her fear of persecution.²⁶⁷ As persecution by non-state actors is common for sexual minorities, the willingness or ability of authorities to offer protection is an important factor in refugee determination on the basis of sexual orientation.²⁶⁸ It is up to the claimant to rebut the presumption of state protection through "clear and convincing" evidence that state protection is not available.²⁶⁹ Country documentation is important in providing such evidence. The way in which decision-makers interpret country documentation will determine whether a refugee receives the protection she is seeking or whether she is sent back to a country where she may face persecution. Moreover, the availability of comprehensive and up to date country information plays an important role in providing evidence of persecution and the availability of state protection. For lesbians, consideration of the implications of gender on their risk of persecution and access to protection is an important issue in the determination of refugee status.

²⁶⁷ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, art. 1A(2), online: <<http://www.unhcr.org/refworld/docid/3be01b964.html>> [accessed 20 January 2012].

²⁶⁸ Sabine Jansen & Thomas Spijkerboer, *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, Vrije Universiteit Amsterdam, September 2011, at 27 online: Refwold <<http://www.refworld.org/docid/4ebba7852.html>> [accessed 31 July 2014]

²⁶⁹ Immigration and Refugee Board of Canada, Legal References, *State Protection*, at para 6.1.5, online: <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef06.aspx#n617>> [accessed 18 July 2014].

Claim 1 – Russia

The claimant is a Russian citizen who applied for protection in Canada on account of her sexual orientation. The claimant testified that she fears persecution by Skinheads in Russia due to her sexual orientation as a lesbian as well as her appearance as an ethnic minority with Asian features. As a Muslim, she is also member of a religious minority group. The claim was rejected by the RPD on basis that the claimant did not provide sufficient evidence to prove that she would not be able to obtain state protection in Russia.²⁷⁰ The decision-maker in this case fails to consider the way in which the claimant's multiple identities contribute to her risk of persecution and diminish her access to effective state protection.

The country documentation referred to by the decision-maker confirms that skinheads and nationalists do indeed carry out violent xenophobic and homophobic attacks, including killings. The decision-maker, however, refers to the arrests of some skinhead ringleaders for racially motivated crimes and concludes that there is no evidence that the claimant would not be able to obtain state protection. Human rights groups have criticized the sentences for these particular racially motivated crimes as insufficient,²⁷¹ which casts doubt on the effectiveness of state protection for victims of racially motivated crimes.

Concluding that the claimant has access to state protection as a sexual minority, the decision-maker refers to reported police efforts in investigating certain homophobic crimes. For example, the decision-maker refers to the arrest of two youth for murdering a man they

²⁷⁰ TA8-00756 (2010) RPD.

²⁷¹ TA8-00756 (2010) RPD at para 6.

perceived to be gay; however, there was no update in the case at year's end.²⁷² The decision-maker also refers to events surrounding Moscow Pride in 2006, during which LGBT activist Alexey Davydov was severely beaten. Although police arrested the attackers, they also arrested Davydov and detained all those involved, both victims and perpetrators, at the same police station. No charges are reported to have been filed for the attack.²⁷³ The decision-maker relies on these reported efforts by Russian police to prosecute perpetrators of hate crimes to support his view that state protection is available to the claimant; however, these reports seem to be incomplete as they do not indicate whether prosecution actually took place. According to a US Department of State country report reviewed by the decision-maker in this claim, a 2007 gay rights demonstration was met with violence by counter-demonstrators. Russian security forces reportedly failed to protect demonstrators, while arresting approximately 25 gay rights activists.²⁷⁴ These examples of police inaction at Moscow Pride and LGBT rights demonstrations suggest that meaningful state protection is not a reality for sexual minorities in Russia.

The decision-maker in this case asserts that the mayor of Moscow and a human rights commissioner's failure to support the pride parade does not necessarily indicate a lack of state protection or well-founded fear of persecution;²⁷⁵ however, the country documentation cited in this claim refers to various attempts by the political actors to repress sexual minorities. In addition to bans on gay pride celebrations and expressed opposition by Russia's human rights

²⁷² United States (US), Department of State, "Russia," Country Reports on Human Rights Practices for 2008, 25 February 2009, online: <<http://www.state.gov/j/drl/rls/hrrpt/2008/eur/119101.htm>> [accessed 11 July 2014].

²⁷³ United States (US), 25 February 2009, Department of State, "Russia," Country Reports on Human Rights Practices for 2008 in TA8-00756 (2010) RPD.

²⁷⁴ United States (US), Department of State, "Russia," Country Reports on Human Rights Practices for 2008, 25 February 2009, online: <<http://www.state.gov/j/drl/rls/hrrpt/2008/eur/119101.htm>> [accessed 11 July 2014].

ombudsman as well as religious leaders, Moscow's Mayor's office is reported have a program aimed especially at counteracting gay rights advocacy. Such measures include prevention of rallies, launch of a media campaign and taking legal measures.²⁷⁶ Religious leaders have gone as far as inciting hatred. Russia's top Muslim cleric is reported to have "called on believers to 'bash' gays if they take to the street..."²⁷⁷

Although the decision-maker states that he has considered the Guidelines on gender-based persecution, the intersection between gender, sexuality and ethnicity is not evident in his analysis of the claimant's access to state protection. The country documentation, as the decision-maker notes, refers mainly to gay men and does not specify issues particular to lesbians in Russia.²⁷⁸ While it is true that there is no mention in any of the country documentation referred to by the decision-maker of lesbians in Russia, the UNHCR affirms that a lack of reference to persecution in country documentation in claims based on sexual orientation does not necessarily indicate the absence of persecution.²⁷⁹

There is, however, a significant amount of information in the country reports referred to by the decision maker on violence against women in Russia. Although illegal, rape by a spouse or an acquaintance is not seen as a problem by society or law enforcement, and women are not

²⁷⁵ TA8-00756 (2010) RPD.

²⁷⁶ Immigration and Refugee Board of Canada, Research Program, Responses to Information Requests, RUS102353.E, 5 March 2007, online: <<http://www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=450998>> [accessed 11 July 2014].

²⁷⁷ Ibid.

²⁷⁸ TA8-00756 (2010) RPD at para 6.

²⁷⁹ UN High Commissioner for Refugees (UNHCR), *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*, 23 October 2012, HCR/GIP/12/01, at para 66, available at: <<http://www.refworld.org/docid/50348afc2.html>> [accessed 17 July 2014].

encouraged to report such violence.²⁸⁰ The existence of widespread violence against women coupled with xenophobic and homophobic violence, which are met with indifference by society and police, suggests that there is a strong possibility that the claimant, as an ethnic minority and lesbian, would not have access to meaningful state protection.

In a previous claim, analyzed by LaViolette, the RPD decision-maker recognizes both the claimant's heightened risk of persecution as well as her decreased access to state protection based on her multiple identities as a lesbian, woman of Tartar ethnicity in Russia.²⁸¹ The decision-maker in this case, failed to consider how the claimant's minority ethnicity, a target for violence and discrimination, coupled with her defiance of gender roles and heterosexual norms, may intensify her risk of persecution and limit her access to effective state protection in Russia. The UNHCR's Guidelines relating to sexual orientation and gender identity clarify that "[s]tate protection would normally neither be considered available nor effective, for instance, where the police fail to respond to requests for protection or the authorities refuse to investigate, prosecute or punish (non-State) perpetrators of violence against LGBTI individuals with due diligence."²⁸²

Police inaction and homophobia, along with the government's public display of homophobia strongly suggest for a lack of state protection for sexual minorities in Russia. By relying on several reported instances of police pursuing perpetrators of hate crimes, and by disregarding

²⁸⁰ United States (US), Department of State, "Russia," Country Reports on Human Rights Practices for 2008, 25 February 2009, online: <<http://www.state.gov/j/drl/rls/hrrpt/2008/eur/119101.htm>> [accessed 11 July 2014].

²⁸¹ M.R.D. (Re), [1998] CRDD No. 164 (QL) in Nicole LaViolette, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines" (2007) 19(2) Int J Refugee Law 169 at 194.

²⁸² UN High Commissioner for Refugees (UNHCR), *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*, 23 October

the homophobia within the Russian government and police forces, the decision-maker has put the claimant at risk of being persecuted without a realistic chance at attaining state protection.

Claim 2 - Jamaica

The claimant is a lesbian from Jamaica who was discovered with her girlfriend by her half brother. After running outside to publicly declare what he had found, the claimant and her girlfriend were attacked, leaving her girlfriend badly injured. Although the claimant escaped the attack, she began receiving threats from her girlfriend's family. The claimant fled to Canada, and in 2008, applied for refugee protection. Her claim was denied by the RPD on the grounds that she failed to present sufficient objective grounds for her subjective fear of persecution. The decision-maker based his rejection of her claim on two main reasons, namely that

1. Jamaica is a constitutional parliamentary democracy with generally effective control of its citizens;
2. The claimant failed to seek state protection in Jamaica before seeking refugee status in Canada.²⁸³

The decision and justification provided by the decision-maker in this claim fails to fully appreciate, and even disregards, the social context that women, and lesbians in particular, face in Jamaica. Furthermore, it lacks insight into and fails to appreciate the ways in which gender

2012, HCR/GIP/12/01, at para 36, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>> [accessed 14 July 2014].

²⁸³ TA8-14907 (2010) RPD.

and sexual orientation in Jamaica intersect to impact persecution against lesbians and their resulting inability to obtain state protection.

Although the decision-maker doesn't question the claimant's self identification as a lesbian, he rejects the claim based on his view that the claimant did not provide "clear or convincing evidence the state is either unwilling or unable to provide her with adequate protection."²⁸⁴

The decision-maker notes that Jamaica is a constitutional parliamentary democracy, with generally effective control of its citizens. He refers to country documentation, which notes and documents that homophobic violence, including sexual and other physical attacks on lesbians, is a problem in Jamaica. However, the decision-maker focuses on a few reported instances of police efforts in prosecuting homophobic murders, despite documentation that the police force reflects the general population's homophobic attitude. For example, he refers to a 2007 incident in which the police tried to intervene in a homophobic mob attack.²⁸⁵ However, in country documentation also reviewed by the decision-maker, the police themselves are reported to have incited a homophobic mob attack in 2004, in which a gay man was 'hacked' to death by a mob of people after the police assaulted him because they perceived him to be gay.²⁸⁶

The decision-maker refers to other cases in which the police supposedly investigated homophobic murders. The tendency of some decision-makers to give more weight to progress

²⁸⁴ Ibid at para 17.

²⁸⁵ TA8-14907 (2010) at para 6.

²⁸⁶ Immigration and Refugee Board of Canada, Research Program, Responses to Information Requests, JAM101933.E, 22 February 2007, online: <<http://www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=450935>> [accessed 13 July 2014].

over reports of persecution has been identified by LaViolette.²⁸⁷ Furthermore, the decision-maker doesn't doubt the existence of widespread homophobia and homophobic violence in Jamaica; however, he is of the view that state protection is available to sexual minorities. According to the decision-maker, the few examples of police intervention and efforts to investigate crimes against sexual minorities provide evidence of a "developing awareness and some progress at alleviating the plight of sexual minorities in Jamaica."²⁸⁸ Therefore, it appears that the decision-maker concluded that despite the claimant's subjective fear, state protection was available. According to the UNHCR's Guidelines on sexual orientation and gender identity, a country can be said to be a persecutory environment for sexual minorities where there is a general homophobic atmosphere, the government publicly denounces same-sex relations through homophobic rhetoric, sexual minorities are harassed by community members, and the media promotes homophobia.²⁸⁹ This description depicts what has been documented of Jamaican society by human rights organizations. Country information reviewed in this claim reports that politicians use "antigay slogans and rhetoric," sexual minorities "face violence and discrimination on a daily basis," and popular musicians promote homophobic violence in their lyrics, encouraging the "shooting, burning, rape, stoning and drowning..." of gays and lesbians.²⁹⁰

²⁸⁷ Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: an Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13(2-3) Int'l J HR 437. at 451.

²⁸⁸ TA8-14907 (2010) RPD at para 7.

²⁸⁹ UN High Commissioner for Refugees (UNHCR), *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, at para 21, online: <<http://www.refworld.org/docid/48abd5660.html>> [accessed 10 May 2012].

²⁹⁰ Immigration and Refugee Board of Canada, Research Program, Responses to Information Requests, JAM101933.E, 22 February 2007, online: <<http://www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=450935>> [accessed 13 July 2014].

Moreover, the decision-maker is of the opinion that “the claimant did not give the state an opportunity to hear her concerns and intervene accordingly,”²⁹¹ despite numerous clear references in multiple sources of country information reviewed in this claim, to police inaction in cases of homophobic violence.²⁹² Furthermore, country information also documents that sexual minorities are reluctant to report homophobic crimes to the police due to fear of being victimized because of their sexual orientation.²⁹³

Women and girls face a high rate of sexual violence in Jamaica, which is also met with inadequate police and legal action. Women are reluctant to report crimes to the police, as they are generally not believed,²⁹⁴ or are subjected to sexual harassment by the police themselves. Such incidents are thought to be under-reported due to lack of legal remedy.²⁹⁵ Furthermore, legal inequalities, such as giving less weight to women’s testimonies undermine their access to justice even when they do seek it.²⁹⁶ For lesbians, gender-based violence is even more compounded by their sexual orientation. The country documentation before the decision-maker in this claim reports that lesbians in Jamaica face a heightened risk of discrimination and that many lesbians have been beaten, threatened and subjected to sexual violence “to be taught a lesson.”²⁹⁷

²⁹¹ *Ibid* at para 17.

²⁹² United Kingdom: Home Office, *Country of Origin Information Report - Jamaica*, 18 August 2008, available at: <<http://www.refworld.org/docid/48aeca192.html>> [accessed 13 July 2014]; also see Immigration and Refugee Board of Canada, Research Program, Responses to Information Requests, JAM101933.E, 22 February 2007, online: <<http://www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=450935>> [accessed 13 July 2014].

²⁹³ United Kingdom: Home Office, *Country of Origin Information Report - Jamaica*, 18 August 2008, at para 21.23, available at: <<http://www.refworld.org/docid/48aeca192.html>> [accessed 13 July 2014].

²⁹⁴ *Ibid* at para 23.22.

²⁹⁵ *Ibid* at para 23.27.

²⁹⁶ *Ibid*.

²⁹⁷ *Ibid* at para 21.35.

Lesbians are even less likely to report sexual violence. Their reasons for failing to report such violence are the same as those of other female victims, but they have an additional reason for failing to report violence – their sexual orientation. Inaction on behalf of the police, along with the very real possibility of being re-victimized by the police, makes state protection in Jamaica an unlikely option for lesbians.

The decision-maker in this case does not give proper weight to the evidence pointing to the lack of state protection for lesbians in Jamaica. Furthermore, he fails to consider the intersection of gender and sexual orientation in his analysis. Although he does refer to the general situation of lesbians when he acknowledges reports of lesbians experiencing sexual and other physical violence, he fails to acknowledge the widespread problem of violence and sexual violence against women in general in Jamaica. Gender-based violence, as discussed above, is met with inaction on behalf of the police and, compared to male victims of violence, women experience difficulties accessing justice. The Canadian Guidelines on gender-related persecution specifically address the issue of lack of police response as an indication of both legally and socially accepted violence against women.²⁹⁸ As such, adequate state protection for lesbians in Jamaica is unlikely.

Claim 3 - Namibia

The claimant is a Namibian lesbian who made a claim for refugee status in 2008. The claimant testified that upon learning of her sexual orientation, her father beat her, locked her in a room for three days and disowned her. Her family then tried to force her to marry an older man with four wives. The claimant also faced harassment and attacks on the street by community

members on account of her sexual orientation. This woman's claim was rejected based on the view that state protection is available in Namibia.²⁹⁹

The claimant stated that she did not approach the police out of fear of disclosing her sexual orientation, which could provoke further victimization, such as rape by members of the police. The claimant was also of the view that the police would not act on her complaint. While acknowledging homophobic remarks made publicly by the president and other government officials, the widespread problem of domestic violence and reports that the police are "not very effective," the decision-maker concluded that "no reason emerges from the country documentation which would tend to show that a person in the position of the claimant should not at least try to talk to the authorities..."³⁰⁰ Furthermore, as noted in an article cited in the decision, President Nujoma is quoted to have publicly stated in a speech addressing gays and lesbians that "[p]olice must arrest, imprison and deport homosexuals and lesbians found in Namibia."³⁰¹ According to the Canadian Guidelines on gender-based persecution, failure to seek state protection should not lead to a rejected claim where there is objective reason supporting a claimant's decision to not approach authorities.³⁰² The excessive force, corruption and impunity, noted in the country documentation reviewed by the decision-

²⁹⁸ Audrey Macklin, "Refugee Women and the Imperative of Categories" (1995) 17 Hum Rts Q 213.

²⁹⁹ VA8-01008 (2010) RPD.

³⁰⁰ VA8-01008 (2010) RPD at para 9.

³⁰¹ Ibid at para 5; "Nujoma's "gay purges" cause international outrage," 22 March 2001, online: afrol.com <http://afrol.com/News2001/nam009_gay_purges2.htm> [accessed 10 September 2011].

³⁰² Immigration and Refugee Board of Canada, *Guidelines Issued by the Chairperson Pursuant to Section 65(4) of the Immigration Act: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution*, 13 November 1996, No. 4, C.2, online: <<http://www.refworld.org/docid/3ae6b31c98.html>> [accessed 10 October 2012].

maker,³⁰³ coupled with the homophobic attitudes of the president and other public officials present a clear and objective reason to avoid reporting homophobic crimes as a lesbian.

Even more troubling is the acknowledgment by the decision-maker of reports of sex workers being required to provide sexual favors to the police, while highlighting the fact that there are no reports of “rape” by the police.³⁰⁴ While being *required* to provide sexual favors may not be considered rape by the decision-maker, it is coerced sex at best and clearly supports the claimant’s fear of further victimization by the police, especially as a lesbian. The decision-maker does not take into consideration the claimant’s increased vulnerability, as a woman, in disclosing her sexual orientation to the police.

The claim was rejected based on the claimant’s failure to rebut the presumption of state protection. The decision-maker found that although the situation for sexual minorities is “mixed,” the judiciary offers the best support for women in Namibia.³⁰⁵ The country information reviewed in this decision lacks information specific to lesbian experience in Namibia and whether the judiciary is effective or not in offering support not only to women in general, but to lesbians in particular. In addition to homophobic remarks by government officials, including the President, as well as criminalization of same-sex relations, the country documentation cited in this claim indicates that the police do not always respond to victims of domestic violence, and that sometimes victims of such violence are blamed.³⁰⁶ Such a

³⁰³ United States Department of State, *2008 Country Reports on Human Rights Practices - Namibia*, 25 February 2009, available at: <http://www.refworld.org/docid/49a8f16bc.html> [accessed 15 July 2014].

³⁰⁴ VA8-01008 (2010) RPD at para 16.

³⁰⁵ *Ibid* at para 18.

³⁰⁶ Immigration and Refugee Board of Canada, Research Program, Responses to Information Requests, NAM102440.E, 9 May 2007, online: <www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=451192> [accessed 14 July 2014].

situation suggests that as a woman and a lesbian, the claimant would not have been taken seriously by the police and as a sexual minority, she would have unlikely been afforded protection by the judiciary. The country information used in the case lacked the specific information necessary to make an informed decision on the future of this claimant. A lack of specific country documentation particular to lesbians risks an interpretation by decision-makers that state protection is available, when it may not be.

Claim 4 – Colombia

The claimants are a lesbian couple from Colombia who applied for refugee protection in 2008. At 17 years old, the first claimant was abducted and raped by three men, including a taxi driver. The men, who were aware that she was a lesbian, told her they would teach her about real men. Prior to this incident, the claimant had been continuously harassed at school and in her community. Before fleeing to the United States to live with her brother, the claimant confined herself to her home for more than three months out of fear for her safety. After being threatened and told to leave the country, the second claimant fled to the United States where she met the first claimant.³⁰⁷

The decision-maker based the rejection of this claim on two findings:

1. The risk to the claimants is one of discrimination rather than persecution; and
2. State protection is available in Colombia in the form of an IFA.

The decision-maker's analysis of the risk of persecution focuses solely on sexual orientation and although she states that she considered this claim in the context of the Canadian Gender

³⁰⁷ TA8-00465/TA8-00501 (2010) RPD.

Guidelines, it is apparent that the impact of gender on sexual orientation did not factor into the analysis. In reference to the first claimant's rape, the decision-maker finds that it was an isolated incident rather than persecution.³⁰⁸ Country documentation reviewed by the decision-maker in this claim reveals that Colombia has a high rate of violence against women, including sexual violence and harassment.³⁰⁹ According to the same country report, "[a]lthough women enjoy the same legal rights as men, discrimination against women persisted."³¹⁰ In failing to consider the situation for women in Colombia and apply a gendered analysis, the decision-maker also fails to consider how, as a lesbian, the claimant's risk of gender-based persecution is intensified. Furthermore, the country documentation, to which the decision-maker refers, addresses sexual minorities in general in Colombia and does not refer specifically to lesbian experience.³¹¹ In this sense, the decision-maker bases her analysis of the claimant's risk of persecution only on sexual orientation in general, again disregarding the implication of gender on women's experiences as sexual minorities.

Stating that "[q]uite often the silence of documents about persecution of a specific social group can indicate that its members do not face a serious risk of persecution,"³¹² the decision-maker interprets a lack of country documentation on the persecution of sexual minorities in Colombia as evidence that there is no serious risk of persecution for this group. The UNHCR's Guidelines regarding sexual orientation and gender identity state that a lack of information in claim based on sexual orientation "should not automatically lead to the conclusion that the

³⁰⁸ *Ibid* at para 12.

³⁰⁹ United States (US), Department of State, "Colombia," Country Reports on Human Rights Practices for 2008, 25 February 2009, online:<<http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119153.htm>> [accessed 16 July 2014].

³¹⁰ *Ibid*.

³¹¹ *Ibid*.

applicant's claim is unfounded or that there is no persecution of LGBTI individuals in that country."³¹³ Furthermore, the Guidelines specify that information on persecution may be especially limited for bisexual, lesbian, and transgender and intersex people in particular.³¹⁴ LaViolette has also noted this tendency for decision-makers to interpret a lack of country documentation on the situation of sexual minorities as a lack of persecution. In the case of lesbians, persecution may be less visible and less reported because much of the persecution suffered by women takes place in the private sphere.³¹⁵

The decision-maker focuses on documentation highlighting legal progress made for LGBT rights in Colombia. While there is no denying that there has been legal progress for sexual minorities in Colombia, LaViolette notes that country documentation does not necessarily address the success of such measures in reality.³¹⁶ As the UNHCR's Guidelines relating to sexual orientation and gender identity state, "[a] de facto, not merely de jure, change is required and an analysis of the circumstances of each particular case is essential."³¹⁷ Failing to assess whether legislation is effectively implemented and simply assuming that progressive

³¹² TA8-00465/TA8-00501 (2010) RPD at para 22.

³¹³ UN High Commissioner for Refugees (UNHCR), *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*, 23 October 2012, HCR/GIP/12/01, at para 66, available at: <<http://www.refworld.org/docid/50348afc2.html>> [accessed 17 July 2014].

³¹⁴ *Ibid.*

³¹⁵ Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: an Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13(2-3) *Int'l J HR* 437 at 448.

³¹⁶ *Ibid* at 460.

³¹⁷ UN High Commissioner for Refugees (UNHCR), *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*, 23 October 2012, HCR/GIP/12/01, at para 37, available at: <<http://www.refworld.org/docid/50348afc2.html>> [accessed 17 July 2014].

laws actually protect lesbians in reality represents an unsatisfactory analysis of whether a country or an IFA is safe.

In focusing on the legal progress made in Colombia for sexual minorities, the decision-maker concludes that the claimants face discrimination rather than persecution. Furthermore, she finds that “even if the concept of cumulative grounds is taken into consideration, the claimants’ experiences do not rise to the level of persecution.”³¹⁸ The “experiences” referred to by the decision-maker include the continuous discrimination, harassment and a rape experienced by the first claimant. The UNHCR’s Guidelines relating to sexual orientation and gender identity state that “[p]hysical, psychological and sexual violence, including rape, would generally meet the threshold level required to establish persecution.”³¹⁹

The decision-maker reinforces her rejection of this claim with her finding that if the claimants did in fact face persecution in their region of the country, an IFA would be available for them in Bogota. She backs up this finding with country documentation, noting the numerous support options for sexual minorities in Bogota, its significant gay community and its annual gay pride.³²⁰ Again, there is no mention as to what a lesbian’s experience might be in Bogota. Bogota may be a safer place for gay men, but there is no evidence to suggest that this would be so for lesbians, especially considering the widespread problem of violence against women in Columbia. Furthermore, the UNHCR states that the “decision maker bears the burden of

³¹⁸ TA8-00465/TA8-00501 (2010) RPD at para 18.

³¹⁹ UN High Commissioner for Refugees (UNHCR), *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*, 23 October 2012, HCR/GIP/12/01, at para 20, available at: <<http://www.refworld.org/docid/50348afc2.html>> [accessed 17 July 2014].

³²⁰ *Ibid* at para 23.

proof of establishing that an analysis of relocation is relevant to the particular case, including identifying the proposed place of relocation and collecting country of origin information about it.”³²¹ As seen above, where there is information lacking about lesbians, it should not be concluded automatically that no persecution exists or in this case, that lesbians would be any safer in Bogota. Such an assumption by decision-makers can result in the denial of protection to a refugee who may face persecution upon return to her country of origin.

Claim 5 - Mexico

The claimant, a lesbian from Mexico, applied for refugee protection in Canada in 2009 after being raped and beaten by her uncle who saw her kissing her girlfriend. The uncle revealed her sexual orientation to the community and continued to sexually assault her. The claimant tried relocating to various family members’ homes; however, her uncle made violent threats to family members and threatened to kill the claimant. The decision-maker is satisfied with the claimant’s identity as a lesbian; however, she rejected the claim based on her view that an IFA is available within Mexico.³²²

The decision-maker bases her finding that an IFA is available in Mexico City on country information that refers to Mexico’s increasing advancements in the area of LGBT rights. These include the removal of discriminatory language based on sexual orientation, laws aimed at eradicating discrimination based on sexual orientation and the legalization of gay marriage and adoption in 2010. She also refers to gay pride celebrations and protests which were

³²¹ UN High Commissioner for Refugees (UNHCR), *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*, 23 October

conducted with relative success. In the decision-maker's opinion the above factors indicate a "thriving and active culture accepting of gays and lesbians in Mexico City..."³²³ The decision-maker is of the opinion that the claimant would be able to secure state protection in Mexico City, as country documentation notes Mexico City's relative advancement in comparison to other areas of the country, as well as the existence of organizations for recourse for sexual orientation-based discrimination.³²⁴ In contrast to these advancements, the decision-maker acknowledges that there is also reference in the country documentation to a general homophobic attitude throughout Mexican society, ongoing discrimination and human rights violations despite this legal progress.³²⁵ For example, in the country documentation reviewed by the decision-maker it is stated that sexual minorities in Mexico still "face a serious threat of violence," including hate crimes and abuse by authorities.³²⁶ Furthermore, IGLHRC and other human rights organizations expressed concern over the closing down of the sexual diversity program of the Mexican government's department responsible for investigating discrimination (CONAPRED), suggesting that Mexico took a "step backwards," in the fight for sexual minority rights.³²⁷

In reference to the availability of state protection in Mexico City, a reported 11 per cent of sexual minorities were victims of threats, extortion or detention by police on account of their

2012, HCR/GIP/12/01, at para 55, available at: <<http://www.refworld.org/docid/50348afc2.html>> [accessed 17 July 2014].

³²² VA9-04646 (2011) RPD.

³²³ *Ibid* at para 12.

³²⁴ *Ibid* at para 18.

³²⁵ *Ibid* at para 10.

³²⁶ International Gay and Lesbian Human Rights Commission (IGLHRC), "The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in MEXICO: A Shadow Report" (March 2010) at 4, online: IGLHRC <<https://iglhrc.org/sites/default/files/556-1.pdf>> [accessed 15 December 2013].

³²⁷ *Ibid* at 6.

sexual orientation.³²⁸ Furthermore, although Mexico City does have hate crime legislation, country documentation used in this claim suggests that such crimes are labelled as “crimes of passion,” and the homophobic element is therefore dismissed.³²⁹

While the above information is important in the assessment of the availability of state protection for sexual minorities in a general sense in Mexico City, it does not relate specifically to lesbian experience. The decision-maker bases her decision solely on sexual orientation, without considering how the claimant’s gender may influence both her risk of persecution and access to state protection in Mexico City. There is a wealth of country information on the problem of violence against women in Mexico. Much of this information has been collected in the IRB’s National Documentation Packages. In failing to consider the situation for women and the prevalence of gender-based violence in Mexico in relation to sexual orientation, the decision-maker’s finding of Mexico City as an IFA does not seem to be informed.

Furthermore, some scholars have raised concerns about the comprehensiveness and relevancy of country information to claims based on sexual orientation, especially in relation to lesbian claimants. For example, in 2006 the IRB concluded that a 2005 case finding Mexico City as a viable IFA was “persuasive” in relation to claims from Mexico.³³⁰ Members are encouraged to look to and follow the reasoning in persuasive decisions in the “interest of consistency and

³²⁸ Ibid at 11.

³²⁹ Ibid at 9.

³³⁰ Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: an Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13(2-3) Int'l J HR 437 at 461.

effective decision making.”³³¹ However, in 2007, decision-makers in two different claims found that Mexico City is not a viable IFA for sexual minorities.³³² In the first claim from 2007, the decision-maker found that despite the legal progress, state protection was not adequate for sexual minorities. Furthermore, as the claimant was persecuted in Mexico City, the decision-maker found that an IFA was not an option.³³³ The decision-maker in the second claim from 2007 found that there was no IFA available in Mexico City, as country documentation reported that most homophobic crimes are committed there.³³⁴ In 2008, the Deputy Chairperson of the Refugee Protection Division of the IRB reversed the finding of the 2005 claim that Mexico City, as a viable IFA, was persuasive for claims from Mexico.³³⁵ This reversal of persuasiveness was made the same year the claimant in this case study fled to Canada to seek protection. As LaViolette argues, these series of events, including the decision-maker’s findings in this claim, reflect that country documentation, claiming that a certain country is safe, is not always reliable.³³⁶ This series of events also reflect uncertainty and uninformed decision-making on behalf of the RPD. The UNHCR asserts that “[w]here the legal and socio-economic situation of LGBTI people is improving in the country of origin, the availability and effectiveness of State protection needs to be carefully assessed based on

³³¹ Immigration and Refugee Board of Canada, Legal and Policy References, Policy Making, *Persuasive Decisions*, online: <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/persuas/Pages/index.aspx>> [accessed 17 July 2014].

³³² Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: an Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13(2-3) Int'l J HR 437 at 461.

³³³ H.W.X. (Re), [2007] R.P.D.D. No. 4 in "Mexico: Country Report for use in refugee claims based on persecution relating to sexual orientation and gender identity" University of Toronto International Human Rights Program (2 November 2011) at para 7, online: <http://ihrp.law.utoronto.ca/utfl_file/count/documents/SOGI/Mexico%20-%20SOGI%20Country%20Report%202011,%20Final%20Copy.pdf> [accessed 13 December 2013].

³³⁴ H.K.T. (Re), [2007] R.P.D.D. No. 28 in *Ibid* at para 8.

³³⁵ IRB, *Notice of Revocation of Persuasive Decisions* in Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: an Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13(2-3) Int'l J HR 437 at 461.

³³⁶ *Ibid* at 460.

reliable and up-to-date country of origin information.”³³⁷ The decision-maker’s finding of an IFA for the claimant is even more questionable in this case, as the country information she consulted does not address the particular forms of persecution lesbians face on account of the intersection of their gender and sexuality within a patriarchal and homophobic country.

Claims rejected on the basis of state protection seem to encounter two main problems, namely that much of the country information lacks the specific information on lesbians necessary to make an informed decision that will greatly impact someone’s life; and that decision-makers seem to give more weight to reports of progress than reports of persecution in interpreting whether state protection is available.

4.2 Claims rejected on the basis of credibility

Of the claims reviewed in this case study, credibility was the main reason women’s claims on the basis of sexual orientation were rejected. A claimant’s testimony is central to the claim for refugee protection. In the context of cultural difference and sexuality outside of the heterosexual norm, expectations of the claimant and their experiences reveal stereotypes, cultural biases and a disregard for issues particular to sexual minorities on behalf of RPD decision-makers.

³³⁷ UN High Commissioner for Refugees (UNHCR), *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*, 23 October 2012, HCR/GIP/12/01, at para 37, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>> [accessed 31 July 2014].

Evidence

According to the UNHCR, testimony is the main and, often, only evidence available to decision-makers when assessing credibility. Material evidence capable of supporting sexual orientation claims is often limited.³³⁸ In such a situation, the UNHCR's benefit of the doubt principle is especially important when determining sexual minority claims. This UNHCR principle clearly states that a claimant, "...unless there are good reasons to the contrary, be given the benefit of the doubt."³³⁹ Nonetheless, material evidence, proving sexual orientation, was frequently an obstacle in the credibility assessment of claims.

When claimants did manage to provide material evidence of their sexual orientation, some decision-makers considered it to be either self-serving or insufficient and gave it little weight. A claimant from Namibia, who fears corrective rape in the community as well as physical abuse by her father, was found by the decision-maker not to be credible based solely on a lack of sufficient evidence to prove that she is a lesbian. The claimant testified to having two former same-sex partners, one in Namibia and one who had also applied for refugee protection in Canada and was successful. She did not provide letters from either partner, as she is not in touch with either of them. She also wanted to protect her former partner who is still in Namibia.³⁴⁰ The claimant did provide a letter from her half-brother, testifying to her sexuality, but the decision-maker gave little weight to this letter, as he was of the view that it lacked

³³⁸ UN High Commissioner for Refugees (UNHCR), *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008 at para 35, online: <<http://www.refworld.org/docid/48abd5660.html>> [accessed 10 May 2012].

³³⁹ UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, HCR/IP/4/Eng/REV.1, at para 196, online: <<http://www.refworld.org/docid/3ae6b3314.html>> [accessed 20 January 2012].

³⁴⁰ TBO-13442 (2012) RPD at para 7.

objectivity given the closeness of his relationship to the claimant.³⁴¹ The claimant also provided a letter from an LGBT centre; however, as it only confirmed her membership and involvement in the centre and not her sexual orientation, it was given no weight by the decision-maker.³⁴² A similar conclusion was found to be an error by the Federal Court in *Leke v Canada*. The Court asserted that “it was patently unreasonable for the Board to dismiss the applicant’s membership in the 519 Church Street Community Centre as proof of his membership in an organization that serves minorities like him in and near the City’s Gay Village. As such, the Board erred by its disregard or misapprehension of the evidence before it.”³⁴³ Although the claimant also produced photographs, they too were dismissed. According to the decision-maker the photographs “show the claimant in situations and with people the claimant wanted to portray specifically in her refugee proceeding.”³⁴⁴ In other words, the photos were viewed by the decision-maker as having been staged for the purpose of her claim.

Another claimant from Namibia, who also fears persecution by her father and others in Namibian society, was similarly found to be lacking in credibility by the same decision-maker, who determined that there was lack of evidence to back up the claim. Although the claimant provided a letter from her former partner as well as her gay roommates, these were not seen as sufficient for the decision-maker, who questioned the claimant as to why these people were not present as witnesses. The claimant, who was not represented by counsel, explained that she did not know this was necessary.³⁴⁵ The decision-maker did not accept the letter from the claimant’s former partner, who was granted refugee status on the basis of her sexual

³⁴¹ *Ibid* at 11.

³⁴² *Ibid* at para 10.

³⁴³ 2007 FC 848 at paras 29-33.

³⁴⁴ *Ibid* at para 12.

orientation. He did not believe they were in a relationship, but are rather close friends. He gave no weight to this letter as, in his view, it lacks independence.³⁴⁶ The decision-maker seems to be using speculation rather than giving the claimant the benefit of the doubt in the absence of reasons to prove otherwise. Furthermore, the letter from the claimant's former partner, who is still in Namibia, was rejected by the decision-maker with the view that it lacks reliable security features and is not a sworn declaration or affidavit. He makes this finding despite admitting that an affidavit or sworn declaration would be difficult for a sexual minority to obtain in Namibia.³⁴⁷

As with the previous claim, this decision-maker found that the photographs provided by the claimant only "depict [her] in situations, places and with persons [she] thought would enhance [her] chances of success on the claim."³⁴⁸ While decision-makers tend to put emphasis on sworn affidavits as acceptable evidence for letters attesting to the claimant's sexual orientation, it is unclear what would be an acceptable portrayal in photos to satisfy decision-makers that one is a lesbian. In a different claim, another decision-maker found that a photo provided by a claimant was not persuasive as to the sexual orientation of the claimant, as both women in the photo were "fully clothed and apparently in public."³⁴⁹ According to this statement, claimants should not be wearing clothing and should be in a private home for the photo to indicate sexual orientation.

The decision-maker in the above claims seemed to have based his negative credibility findings solely on lack of sufficient evidence, without providing other reasons. On one hand, according

³⁴⁵ TB1-09949 (2012) RPD at paras 14-16.

³⁴⁶ *Ibid* at paras 18-19.

³⁴⁷ *Ibid* at para 20.

to these findings, providing material evidence didn't appear to be very helpful. On the other hand, a lack of material evidence seemed to present an obstacle in the claims reviewed in this case study. The reasoning in these decisions, whereby negative credibility findings are based on both the absence and presence of evidence, seem to conflict with the UNHCR Guidelines, which state that

[s]elf-identification as LGBT should be taken as an indication of the individual's sexual orientation. While some applicants will be able to provide proof of their LGBT status, for instance through witness statements, photographs or other documentary evidence, they do not need to document activities in the country of origin indicating their different sexual orientation or gender identity.³⁵⁰

According to the UNHCR, then, unless there is good reason, a lack of evidence from country of origin attesting to the claimant's sexual orientation should not be used to undermine credibility. Moreover, Canadian jurisprudence has also supported the UNHCR's view on this. The Maldonado principle refers to the presumption of truth, absent reasons to doubt truthfulness, when a claimant swears to the truth of his or her allegations.³⁵¹ In *Sadegh-Pari v. Canada*, the decision-maker found that "a lack of corroborating evidence of one's sexual orientation, in and of itself, absent negative, rational or plausibility findings related to this

³⁴⁸ *Ibid* at para 22.

³⁴⁹ TB2-00464 (2013) RPD at para 17.

³⁵⁰ UN High Commissioner for Refugees (UNHCR), *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008 at para 35, online: <<http://www.refworld.org/docid/48abd5660.html>> [accessed 10 May 2012].

³⁵¹ *Maldonado v Minister of Employment and Immigration* (1980), 31 NR 34,1 ACWS (2d) 167 (FCA) in Nicole LaViolette, "Sexual Orientation, Gender Identity and the Refugee Determination Process" (1 March 2010) at 22, online: Academia.edu <http://www.academia.edu/3431684/Sexual_Orientation_Gender_Identity_and_the_Refugee_Determination_Process_in_Canada> [accessed 25 October 2012].

issue, would not be enough, in my opinion, to rebut the *Maldonado* principle of truthfulness.”³⁵² Nonetheless, there seems to be an expectation that material evidence be provided, even when it is viewed as insufficient. Given the *Maldonado* principle of truthfulness and the UNHCR’s principle of the benefit of doubt, such a situation is not only unjust; it puts the claimant in a precarious and dangerous situation.

Delay

Inconsistency in delaying claims and revealing persecution

Some decision-makers considered the claimant’s failure to apply for refugee protection upon arrival in Canada as inconsistent with a well-founded fear of persecution in the country of origin. For instance, a lesbian from Tanzania revealed her sexual orientation to her parents over the phone, while studying in Canada. Due to her family’s negative reaction, she decided not to return home and applied for refugee protection.³⁵³ The decision-maker doubted the claimant’s credibility because she failed to apply for refugee protection upon her first arrival in Canada, as she knew at this time that same-sex relations are illegal in Tanzania.³⁵⁴ Furthermore, he does not accept her explanation that she was not comfortable revealing this information, as she was unsure of the attitudes towards lesbians in Canada. The decision-maker challenges her explanation based on her advanced level of education, which in his opinion attests to a “certain level of sophistication.”³⁵⁵ In his view, sophistication would take precedence over any feelings of discomfort in revealing one’s sexual orientation, which may

³⁵² 2002 FCA 80, [2002] 3 FCR 565 in *Ibid*.

³⁵³ TB2-00565 (2012) RPD at para 7.

³⁵⁴ *Ibid* at para 8.

³⁵⁵ *Ibid*.

stem from internalized homophobia and/or the claimant's national, cultural, or religious background.

Sur place claims allow for a claim to be made after arrival in cases where a situation may have changed in the country of origin since the claimant's departure. The UNHCR explains that "[t]his may be the case where the applicant has "come out" after arrival in the country of asylum."³⁵⁶ Considering that the claimant came out to her parents while still in Canada, and that her disclosure was met with hostility, in a country where being a lesbian is illegal, it is not unreasonable that she only applied for protection a few months after arriving, rather than immediately upon arrival. The decision-maker does not consider *sur place* claims, which reflect the claimant's situation. Instead, he finds that such a delay does not support a well-founded fear of persecution.

A significant reason for delay in claims based on sexual orientation can be the result of a reluctance to reveal one's sexual orientation due to feelings related to internalized homophobia, such as shame.³⁵⁷ The UNHCR explains that "[w]here the applicant is in the process of coming to terms with his or her identity or fears openly expressing his or her sexual orientation and gender identity, he or she may be reluctant to identify the true extent of the persecution suffered or feared."³⁵⁸ While revealing one's sexual orientation can be difficult to

³⁵⁶ UN High Commissioner for Refugees (UNHCR), *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*, 23 October 2012, HCR/GIP/12/01 at para 39, online: <<http://www.refworld.org/docid/50348afc2.html>> [accessed 23 February 2014].

³⁵⁷ Jessica Young, "The Alternate Refuge Concept: A Source of Systematic Disadvantage to Sexual Minority Refugee Claimants" (2009) 60 UNB LJ 294 at 307.

³⁵⁸ UN High Commissioner for Refugees (UNHCR), *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*

sexual minorities anywhere, speaking about one's identity and experience would be understandably greater when the person is from a society where there is more stigma and discrimination attached to being LGBT.³⁵⁹ Shidlo suggests that traumatic events experienced by sexual minority claimants related to their sexual orientation may slow down or freeze their coming out process, leading to delays in seeking protection or disclosing their sexual orientation right away in the process.³⁶⁰ Moreover, Lewis explains that the difficulty in revealing one's sexual orientation for the purposes of refugee protection is especially difficult in situations where a claimant's life has depended on keeping her sexual orientation concealed.³⁶¹

A lesbian claimant, who fled Namibia to avoid a forced marriage to a man believed to be HIV positive, explained that she was nervous upon her arrival and unable to articulate her orientation. Furthermore, she was also told that she could give additional information later on. Although her counsel reminds the decision-maker that reluctance to reveal sexual orientation is reasonable behaviour in this context, the decision-maker, while acknowledging that reluctance to reveal sexual orientation is possible, was of the opinion that due to her level of "sophistication" and circumstances, she would have mentioned her sexual orientation as a reason for claiming refugee status.³⁶² Again, psychological factors and circumstances particular to sexual minority refugees, which are referred to in the UNHCR's Guidelines on

1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01 at para 59, online: <<http://www.refworld.org/docid/50348afc2.html>> [accessed 23 February 2014].

³⁵⁹ Jessica Young, "The Alternate Refuge Concept: A Source of Systematic Disadvantage to Sexual Minority Refugee Claimants" (2009) 60 UNB LJ 294 at 307.

³⁶⁰ Ariel Shidlo & Joanne Ahola, "Mental health challenges of LGBT forced migrants" (2013) 42 *Forced Migration Review* at 10, online: RefWorld <<http://www.refworld.org/pdfid/517eab7f4.pdf>> [accessed 10 July 2014].

³⁶¹ Rachel Lewis, "The Cultural Politics of Lesbian Asylum: Angela Maccarone's Unveiled (2005) and the Case of the Lesbian Asylum-Seeker" (2010) 12:3-4, *The International Feminist Journal of Politics* 424 at 429.

sexual orientation-based claims,³⁶³ are disregarded and instead attributed to a claimant's level of "sophistication."

Another claimant, whose initial claim was based on the risk of forced marriage if sent back to Kuwait, revealed her sexual orientation to her counsel later in the process. The counsel explained to the decision-maker that due to the claimant's cultural background, revealing oneself as a lesbian may be difficult. The decision-maker, despite the claimant's confirmation that she was adjusting to the new culture and felt hesitant to reveal her sexual orientation, found her delay indicative of a lack of subjective fear.³⁶⁴

While Millbank found in her study of sexual orientation-based claims that delay was not generally the determining factor in negative credibility claims,³⁶⁵ this case study found that it can, nonetheless, be a factor in creating doubt in the decision-makers' mind regarding the claimants' credibility in relation to their sexual orientation. Furthermore, nervousness and unease about revealing sexual orientation were not regarded by decision-makers as valid explanations of delay. Such disregard reveals a lack of understanding and sensitivity on behalf of decision-makers about the stigma attached to sexual orientation and the way in which it can affect one's expression and ability to reveal oneself as a lesbian. Moreover, the UNHCR's Guidelines on sexual orientation-based claims confirm that negative findings should not be

³⁶² TB1-08565 (2012) RPD at para 9.

³⁶³ UN High Commissioner for Refugees (UNHCR), *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*, 23 October 2012, HCR/GIP/12/01, at para 59, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>> [accessed 31 July 2014].

³⁶⁴ TB1-08940 (2012) RPD at para 20.

³⁶⁵ Jenni Millbank, "The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21 Int'l J Refugee L 1 at 14.

based on the claimant's failure to disclose their sexual orientation in the initial stages of the refugee claim process.³⁶⁶

Difficulty in revealing sexual violence, which is particularly common to lesbians, has also been noted as a factor for delay in women's claims for refugee protection.³⁶⁷ A bisexual claimant from Chile, who experienced several incidents of discrimination and physical assault, was kidnapped by three men, beaten and raped. The claimant's failure to mention the rape in her PIF and initial interview led the decision-maker to conclude that this omission is core to her claim and he therefore makes a negative credibility finding.³⁶⁸ A gender analysis on behalf of the decision-maker might have explained the claimant's late disclosure of her experience of rape. The Canadian Gender Guidelines refer to the reluctance of women to disclose sexual violence as part of their experience.³⁶⁹ The UNHCR explains that such reluctance may be due to trauma or feelings of shame related to sexual violence.³⁷⁰ In explaining the difficulty associated with disclosing rape, one refugee lawyer states that "time and time again I see clients just before we go to court and they disclose to me about the sexual violence and

³⁶⁶ UN High Commissioner for Refugees (UNHCR), *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*, 23 October 2012, HCR/GIP/12/01 at para 59, online: <<http://www.refworld.org/docid/50348afc2.html>> [accessed 23 February 2014].

³⁶⁷ Sophia Ceneda & Clare Palmer, "'Lip Service' or implementation? The Home Office Gender Guidance and women's asylum claims in the UK," *Asylum Aid* (March 2006) at 84, online: <http://www.asylumaid.org.uk/wp-content/uploads/2013/02/Lip_Service_or_Implementation.pdf> [accessed 15 January 2014].

³⁶⁸ MA8-13547 (2010) RPD at para 16.

³⁶⁹ Immigration and Refugee Board of Canada, *Guidelines Issued by the Chairperson Pursuant to Section 65(4) of the Immigration Act: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution*, 13 November 1996, No. 4, C.2 at D., online: <<http://www.refworld.org/docid/3ae6b31c98.html>> [accessed 10 October 2012].

³⁷⁰ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01 at para 35, online: <<http://www.refworld.org/docid/3d36f1c64.html>> [accessed 30 September 2012].

they've never told anyone before... perhaps they've had men representing them, perhaps nobody's asked them...and of course you don't say it, it's very hard to say the words... 'I was raped.'"³⁷¹ Overlooking the effects that sexual violence may have on the claimant's willingness to disclose her experience in the refugee determination process indicates that the decision-maker member, despite mentioning the Guidelines, did not apply a gendered-analysis. The omission of rape from the claimant's initial interview and PIF in this case was simply dismissed as implausible,³⁷² without consideration of the nature of the persecution and the difficulty in disclosing such an experience.

Given that sexual orientation and sexual violence are each identified as highly personal and difficult to disclose in the process of refugee determination, disclosing both experiences may further intensify the tendency to hold back or fully disclose. Avoidance has been identified as a common reaction to having to recount incidents involving trauma, especially in cultures where social stigmas related to sexual violence exist.³⁷³ The intersection of gender and sexual orientation, therefore, may increase the likelihood that a claimant may hesitate to disclose the full extent of her experience. In these circumstances, a gendered analysis is highly important to ensure that sexual minority women have fair access to refugee protection.

Simplistic understanding of sexual minorities

Inconsistencies in identity and behaviour

³⁷¹ *Supra* note 324 at 84.

³⁷² MA8-13547 (2010) RPD at para 17.

³⁷³ Atlani and Rousseau 2000 in Cécile Rousseau et al, "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board (2002) 15(1) J Refugee Stud 43 at 48.

Jordan suggests that decision-makers rely on their personal understandings of sexuality in the assessment of whether the claimant is credible in claiming to be gay or lesbian.³⁷⁴ A superficial and rigid understanding of sexuality was revealed in one decision-maker's strict distinction between the terms bisexual and lesbian. Millbank and Rehaag found in their studies on refugee claims based on sexual orientation that there is an expectation on behalf of some decision makers that sexual orientation is fixed and unchanging and any other variation from an expressed identity is seen as inconsistent and therefore found not credible.³⁷⁵

A woman who faced forced marriage to her cousin as a result of her family's discovery of her sexual orientation fled to Canada from Namibia in 2010 for refugee protection. She explained that she was not attracted to women prior to her first lesbian experience and referred to herself as a lesbian in her PIF, stating that "[s]ince last year I became a lesbian. To be a lesbian in our culture is not allowed."³⁷⁶ Pregnant at the time of her hearing, the claimant referred to herself as bisexual, as she dated a man, the father of her child, for a few months after arriving in Canada. The decision-maker points out that in her PIF she did not refer to herself as bisexual, but rather a lesbian. When questioned about the change in terminology the claimant responded "I am a lesbian. But I now date both men and women."³⁷⁷ The decision-maker finds the claimant's explanation unreasonable and finds it "reasonable to assume that the claimant

³⁷⁴ Sharalyn Jordan & Chris Morrissey, "On what grounds?' LGBT asylum claims in Canada" in Marion Couldrey & Maurice Herson, eds, *Sexual Orientation and Gender Identity and the Protection of Forced Migrants* (2013) 42 *Forced Migration Review* 13 at 14, online: Refworld <<http://www.refworld.org/pdfid/517eab7f4.pdf>> [accessed 21 July 2013].

³⁷⁵ Jenni Millbank, "The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21 *Int'l J Refugee L* 1, at 16; Sean Rehaag, "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada" (2008) 53 *McGill LJ* 53 at 74.

³⁷⁶ TB0-14021 (2012) RPD at para 27.

³⁷⁷ *Ibid* at para 28.

would indicate in her allegations that she is bisexual and not a lesbian.”³⁷⁸ The decision-maker views this as a major inconsistency that casts doubt over the credibility of all of the evidence and the claimant’s testimony as a whole. The decision-maker, in searching for a fixed identity from the claimant, not only seems to expect a linear Western model of realizing one’s sexual orientation,³⁷⁹ but he also misses the central aspect of the claimant’s fear of persecution, namely that she is in danger because of her family’s and her community’s perception of her as a lesbian. Whether she identifies as a lesbian, bisexual or both, what remains is that she is applying for refugee protection based on her sexuality, which defies heterosexual and gender norms.

The decision-maker in a different claim similarly asserted that “[t]he claimant variously refers to herself in her PIF as a lesbian and as a bisexual. She cannot be both.”³⁸⁰ He further rejected her identity as a sexual minority with his view that as a woman presently married to a man, “she now ostensibly would appear as a heterosexual.”³⁸¹ Such a simplistic and rigid understanding of sexuality was cautioned against when the Federal Court of Canada reviewed a decision in which refugee status was revoked from a woman who married a man after having previously made a successful claim based on her sexual orientation as a lesbian. In quashing the decision, the court recognized the complexity of human sexuality and argued that the

³⁷⁸ *Ibid* at para 29.

³⁷⁹ Staged theory of sexual identity development in Laurie Berg & Jenni Millbank, “Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants” (2009) 22(2) J Refugee Stud 195 at 207.

³⁸⁰ MA8-13547 (2010) RPD at para 14.

³⁸¹ *Ibid*.

claimant's later marriage to a man does not mean that her claim was false at the time it was made.³⁸²

Restrictive views of sexuality in the Canadian refugee determination process highlight the potential problems inherent in the *Ward* decision's classification of sexual orientation as innate and unchangeable. LaViolette pointed out that viewing sexual orientation as immutable leads to the expectation of decision-makers for claimants to "assert" a fixed identity.³⁸³ As a result, there is a focus on an essentialist view of sexual identity, which leaves no room for flexibility in sexual behaviour. Katya raises the question of whether assertion of a fixed sexual identity is culturally specific to the West, whereas some cultures consider same-sex relations in terms of the act, rather than the identity.³⁸⁴ The outcome, as sometimes seen in refugee determination, is reflected in Katya's view that "instead of liberating sexual minorities, the use of identity based frameworks may paradoxically exclude them from protection."³⁸⁵ While the terms bisexual and lesbian do carry specific meanings to some, they are simply labels, under which actual sexual behaviour may be more flexible in reality. Lack of complex understanding of sexual minorities within the context of refugee law risks *refoulement* back to persecution.

³⁸² *Santana v. Canada* [2007] FCJ No. 700 (15 May 2007), at paras. 8 and 9 in Jenni Millbank, "The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21 Int'l J Refugee L 1 at 16.

³⁸³ Nicole LaViolette, "The Immutable Refugees: Sexual Orientation in *Ward v. Canada*" (1997) 55(1) U Toronto Fac L Rev 1 at 35.

³⁸⁴ Sonia Katyal, "Intersectional International Human Rights" (2004) 5 Geo J Gender & L 857 at 863-864.

Interpretation of demeanour based on stereotypes

Although demeanour was not commonly referred to as a prominent factor in negative credibility findings in this study of more recent claims, stereotypical expectations of lesbian characteristics were present in some rejected claims.

Expressing disbelief that the claimant, a Syrian woman who fled to escape a forced marriage in Kuwait, is a lesbian, one decision-maker remarked that “[h]er demeanour and appearance, in the panel’s observation, did not indicate that she is gay.”³⁸⁶ The decision-maker goes on to acknowledge that demeanour and appearance are not “conclusive or reliable” in proving one’s sexual orientation; however, again mentions that the claimant’s self-identification as a lesbian is “not corroborated by her demeanour or appearance...”³⁸⁷ According to the Canadian Guidelines on credibility, demeanour relates to “the manner in which the witness replies to questions, his or her facial expressions, tone of voice, physical movements, general integrity and intelligence, and powers of recollection.”³⁸⁸ None of these factors take on forms that are more specific to lesbians than any other person. Furthermore, the Canadian Guidelines state that “in assessing demeanour, the decision-maker ought not to form impressions based on the physical appearance...”³⁸⁹ The UNHCR also advises against the use of stereotypical images of sexual minorities in determining refugee status³⁹⁰ and states that self-identification as LGBT

³⁸⁵ *Ibid* at 865.

³⁸⁶ TB1-08940 (2012) RPD at para 8.

³⁸⁷ *Ibid*.

³⁸⁸ Immigration and Refugee Board of Canada, *Assessment of Credibility in Claims for Refugee Protection*, 31 January 2004, at 2.3.7, online: <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/Credib.aspx#n23>> [accessed 12 October 2012].

³⁸⁹ *Ibid*.

³⁹⁰ UN High Commissioner for Refugees (UNHCR), *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, at para 36, online: <<http://www.refworld.org/docid/48abd5660.html>> [accessed 10 May 2012].

should be sufficient to indicate one's sexual orientation.³⁹¹ The decision-maker's comments as to the claimant's demeanour and appearance in this case reflect a pre-conceived notion of a specific set of lesbian characteristics. Such stereotypes are especially precarious when applied in the refugee context, which involves a diversity of cultural, religious and political backgrounds³⁹² and risk of refolement and persecution.

Although the decision-maker claims that his decision is not based on the claimant's appearance, the mere mentioning of her demeanour and appearance as other than what he would expect of a lesbian, raises significant concerns as to the influence such a bias had on the his rejection of the claim. In her research, Millbank has found that decision-makers continue to refer to physical appearance.³⁹³ Although she found that most decision-makers referred to appearance in confirming sexual orientation, she raises the point that there is also the strong possibility that decision-makers make the same judgments on appearance to support their disbelief of a claimant's sexual orientation without admitting so in their written decisions.³⁹⁴ The decision-maker's blatant reference to appearance in the above claim makes a strong case for the very real possibility that decision-makers may be influenced by appearance, despite their awareness of the Guidelines' warnings against relying on it. Furthermore, Jordan found that sexual minority refugees face pressure to conform to Western stereotypes. A lesbian claimant interviewed by Jordan in her research on refugee experience in the Canadian refugee

³⁹¹ *Ibid* at para 35.

³⁹² Nicole LaViolette, "Sexual Orientation, Gender Identity and the Refugee Determination Process in Canada" (1 March 2010) at 24, online: Academia.edu <http://www.academia.edu/3431684/Sexual_Orientation_Gender_Identity_and_the_Refugee_Determination_Process_in_Canada> [accessed 25 October 2012].

³⁹³ Jenni Millbank, "The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21 Int'l J Refugee L 1 at 7.

³⁹⁴ *Ibid*.

determination system, was encouraged by her lawyer to appear more masculine in order to increase the chances of her claim being accepted.³⁹⁵ Although decision-makers are cautioned about relying on stereotypes to assess sexual identity, expectations based on personal knowledge and culture still seem to factor into some decision.

Determining plausibility based on stereotypes

A lesbian from Zimbabwe, who testified she was physically attacked by members of her family, after revealing her sexual orientation while on vacation from her studies in Canada, was not believed to be a lesbian by the decision-maker, as she did not seem to fit his expectations of a lesbian. Her inability to provide the names of lesbian hangouts and her attendance at a bar that is “mostly frequented by gay men and not so much by lesbians,” was found not to be credible by the decision-maker.³⁹⁶ This finding may reflect the expectation of the decision-maker that sexual minorities will automatically become engaged in the LGBT community, which includes attending gay and lesbian bars. The UNHCR warns against making assumptions such as these, as “[l]ack of engagement with other members of the LGBTI community in the country of asylum or failure to join LGBTI groups there may be explained by economic factors, geographic location, language and/or cultural barriers, lack of such opportunities, personal choices or a fear of exposure.”³⁹⁷ Sexual minorities are as diverse in their personal preferences, cultural backgrounds and life circumstances as heterosexuals,

³⁹⁵ Sharalyn R. Jordan, “Un/Convention(al) Refugees: Contextualizing the Accounts of Refugees Facing Homophobic or Transphobic Persecution” (2009) 26:2 *Refuge* 165 at 174.

³⁹⁶ TB2-00090 (2012) RPD at para 11.

³⁹⁷ UN High Commissioner for Refugees (UNHCR), *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*, 23 October 2012, HCR/GIP/12/01, at viii, online: <<http://www.refworld.org/docid/50348afc2.html>> [accessed 23 February 2014].

therefore assumptions about community involvement specific to one's sexual identity are deceptive and misleading.

The decision-maker in this case concludes that “[t]he claimant has not convinced me, on a balance of probabilities, that she is leading the life or has led the lifestyle of a lesbian while she has been here in Canada, through any corroborative evidence, which leads me to conclude that she does not meet the profile of the lifestyle she professes to be.”³⁹⁸ Such a statement reveals a reliance on a preconceived notion of a “lesbian lifestyle” and that there is a specific “profile” that one must meet in order to satisfy the expectations of what a lesbian is or should be. In the context of refugee determination, stereotypes and assumptions that may lead to negative credibility findings have a serious implication on the lives of sexual minorities. Upon judicial review of this case there was no reference to the stereotypes of how lesbians live their lives used by the decision-maker in this case, however it was found that the “RPD demonstrated a complete lack of awareness of the procedural fairness issues involved.”³⁹⁹ Not only was it found that the decision-maker relied on his own personal knowledge in stating that the bar that the claimant claimed to frequent is frequented by gay men rather than lesbians, the judge also found that this was, in fact, false as the claimant submitted a print-out from the bar's website that described it as primarily a “lesbian bar where everyone is welcome.”⁴⁰⁰ Furthermore, the judge found that “the RPD never asked the Applicant to list the lesbian establishments whose names she is accused of not knowing in order to support a

³⁹⁸ TB2-00090 (2012) RPD at para 17.

³⁹⁹ 2013 FC 850 at para 49, online: <<http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/62499/index.do?r=AAAAAQAHbGVzYmlhbgAAAAAB>> [accessed 23 June 2014].

⁴⁰⁰ 2013 FC 850 at para 22, online: <<http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/62499/index.do?r=AAAAAQAHbGVzYmlhbgAAAAAB>> [accessed 23 June 2014].

finding on no credibility.”⁴⁰¹ The decision was referred to by the judge as “blatantly unfair and unreasonable” and returned for reconsideration by a new RPD member.⁴⁰²

Some decision-makers similarly assumed that if a claimant is indeed a member of a sexual minority, they will be aware of the political issues related to sexual minorities in their country.⁴⁰³ A lesbian claimant from Ukraine was questioned by the decision-maker as to her knowledge of LGBT organizations in Ukraine. While acknowledging the Federal Courts warnings against using knowledge of political matters to determine credibility in refugee determination, the decision-maker makes a generalization that the claimant, as a lesbian and educated person, would be aware of such organizations. He therefore insists that it is “reasonable for [him] to infer that the claimant knew of LGBT organizations but chose to say she did not know.”⁴⁰⁴ Not all sexual minorities, out or not, will align themselves politically or even familiarize themselves with LGBT causes. Berg and Millbank explain that this sort of view “improperly collapses the personal and political aspects of individual identity.”⁴⁰⁵ Such an interpretation seems to be based on what the decision-maker believes is reasonable based on his own preconceived understandings of sexual minorities. Expectations on behalf of decision-makers about how sexual minorities appear, act, live their lives, and about the knowledge they should possess about the LGBT community, put sexual minority refugees in

⁴⁰¹ 2013 FC 850 at para 46, online: <<http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/62499/index.do?r=AAAAAQAHbGVzYmlhbgAAAAAB>> [accessed 23 June 2014].

⁴⁰² *Ibid* at 49.

⁴⁰³ Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 *Int’l J Refugee L* 1 at 19.

⁴⁰⁴ TB2-01727 (2013) RPD at paras 18-19.

⁴⁰⁵ Laurie Berg & Jenni Millbank, “Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants” (2009) 22(2) *J Refugee Stud* 195 at 211.

danger of having their sexual identity doubted and being sent back to persecution when they do not fit the profile being sought by the decision-maker.

Assessing plausibility through speculation

In assessing the plausibility of a claimant's testimony, decision-makers seemed to use speculation to decide whether a claimant was credible. In her research of claims based on sexual orientation, Millbank found that assessments of plausibility were "no more than a process of projection or inference, including inference about applicants' motivations or state of mind, which extended far beyond what was knowable."⁴⁰⁶

After being physically attacked with her girlfriend in 2003, one claimant testified that she was told by the police that they would open a case, investigate and find the attackers. The decision-maker does not believe that the police would "promise," as the claimant stated, to open a case when she did not know her attackers and therefore could not give a proper description. When challenged by the decision-maker on her use of the word "promised," the claimant stated that the police stated they would "try" to find the attackers. When asked why she didn't use the word "try" before, the claimant explained that she does not remember the exact wording as it was a long time ago. The claimant clarified that the impression she had at the time was that there was intention on behalf of the police to find the attackers. The decision-maker rejects her explanation, stating that "it makes no sense to me that the police would provide assurances with the very limited information she provided..."⁴⁰⁷ What *makes no sense* to the decision-maker is merely speculation. He cannot know why the police told the claimant this based on

⁴⁰⁶ Jenni Millbank, "The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21 Int'l J Refugee L 1 at 20.

what makes sense in his world and his personal experience of life. Millbank draws attention to this contrast between the claimant's experience and the decision-maker's own knowledge and cultural lens.⁴⁰⁸

Furthermore, the passage of time, Millbank found, can impact the ability to recall details, especially when there is trauma involved.⁴⁰⁹ While "promise" and "try" may indeed carry different meanings, the claimant portrayed the intent of the police upon her first report of the incident, which was to find the attackers. Nonetheless, the decision-maker found "on a balance of probabilities that the claimant wishes to mislead the decision-maker into believing that the police officer promised to find the assailants, when he did not know she was a lesbian, but later became violent towards her upon finding out that she is a lesbian."⁴¹⁰ The claimant testified that she was yelled at by the police and told to withdraw her complaint, as she did not have any rights as a lesbian. The decision-maker states in response that "I do not believe the claimant that the police conducted himself in that manner."⁴¹¹ The decision-maker goes on to accuse the claimant of using the fact that Ukrainian police have been known to be abusive towards sexual minorities in 'bolstering' her claim. To support this theory, he cites country information which documents discriminatory and abusive treatment on behalf of Ukrainian law enforcement against sexual minorities and concludes that the country information cited "shows that the behaviour of some police officers is very unbecoming which, on a balance of probabilities, is what the claimant is building her case on, which undermines her

⁴⁰⁷ TB2-01727 (2013) RPD at para 12.

⁴⁰⁸ Jenni Millbank, "The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21 Int'l J Refugee L 1 at 31.

⁴⁰⁹ *Ibid* at 12.

⁴¹⁰ TB2-01727 (2013) RPD at para 11.

⁴¹¹ *Ibid* at para 13.

credibility.”⁴¹² Some specialists have insisted that plausibility determinations be based on objective facts in order to assess whether testimonies are truthful.⁴¹³ Objective facts in this situation would be the country documentation, which is consistent with the claimant’s testimony and suggests that the Ukrainian police have a tendency to discriminate and be abusive towards sexual minorities. On the contrary, the decision-maker chose to speculate that the claimant was using this information falsely to succeed in her claim. The decision-maker’s reading of the situation, which could reasonably be read in the client’s favour, is clearly biased against the claimant. Kagan suggests that although the benefit of the doubt principle applies to credible testimony, “negative credibility findings should not be based on unsubstantiated suspicions that claimants’ testimonies are self-serving.”⁴¹⁴ Furthermore, the claimant’s response that she does not remember signing any documents at the police station because she was stressed due to the police officer yelling at her, was viewed as unreasonable by the decision-maker. He speculates that she would have remembered if she signed something.⁴¹⁵ He, therefore, doubts her explanation on her own state of mind at the time, again based on speculation.

With regards to the second attack, in which two men assaulted and threatened to rape the claimant and her girlfriend, the decision-maker doubts her story due to the medical report which states that the claimant was assaulted by “an unidentified person.”⁴¹⁶ Not only does the decision-maker doubt the veracity of the claimant’s version of the second attack, but he also

⁴¹² *Ibid* at para 14-15.

⁴¹³ Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 *Int’l J Refugee L* 1 at 22.

⁴¹⁴ Michael Kagan, “Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations” (2003) 17 *Georgetown Law Journal* 367 at 372.

⁴¹⁵ TB2-01727 (2013) RPD at para 17.

speculates as to what may have actually happened. In the decision-maker's view, the claimant might have been assaulted by her girlfriend, rather than two men, as she stated her girlfriend and her started to fight more often before breaking up. Furthermore, according to the decision-maker, the fact that the claimant started dating a man after her relationship her girlfriend ended is consistent with the end of "an abusive lesbian relationship."⁴¹⁷ In his disbelief of the claimant's testimony, the decision-maker insists that decision-makers "have a right to use their common sense in determining whether a story stands up, is true or is simply improbable."⁴¹⁸ Common sense is not the same for everyone, which is what makes judging plausibility highly subjective and problematic. Houle suggests that when assessing credibility decision-makers often fail to state "good reasons" for their findings, which cannot simply be based on "mere speculation or on a minute examination of every fact..."⁴¹⁹ Coffey suggests that in such an environment, negative credibility findings do not meet the UNHCR's benefit of the doubt principle.⁴²⁰

In a claim in which a pregnant claimant was physically attacked by her boyfriend after he found out about her sexual relationship with a woman, the decision-maker found it implausible that the police did not compile a report and follow up "on a domestic incident involving a pregnant woman."⁴²¹ The decision-maker comes to this conclusion despite his own acknowledgement that the country documentation on Saint Lucia, the claimant's country of

⁴¹⁶ *Ibid* at para 21.

⁴¹⁷ *Ibid*.

⁴¹⁸ *Ibid*.

⁴¹⁹ France Houle, "Pitfalls in Relying on Common Law Rules of Evidence for Administrative Tribunals" (2008) at 8, online: <<http://www.aija.org.au/Tribs06/papers/Houle.pdf>> [accessed 25 June 2014].

⁴²⁰ Guy Coffey, "The Credibility of Credibility Evidence at the Refugee Review Tribunal" (2003) 15 Int'l J Refugee L 377 at 391.

⁴²¹ TB2-06510 (2013) RPD at para 50.

origin, reveals the existence of homophobic violence and laws, as well as the difficulty faced by sexual minorities in accessing state protection.⁴²² In judging it unlikely that the police would not have responded to a pregnant woman's complaint of domestic violence, the decision-maker fails to consider the claimant's particular experience, which is shaped by the intersection between her gender and sexual orientation. He disregards the particular vulnerability of the claimant as a lesbian and how her experience would differ from that of a heterosexual woman in a homophobic society where homophobic laws are enforced. Kagan suggests that a finding of implausibility should be based on objective facts, such as country of origin information.⁴²³ In this claim, analyzing the country information within the context of both the claimant's gender and sexual orientation would have required more consideration of all the social factors involved on behalf of the decision-maker.

The rulings in the above mentioned cases illustrate the need for an informed and sensitive adjudicator in sexual orientation-based refugee claims by women. Contrary to the decision-making apparent in the claims discussed above, credibility assessments considered against the complex intersection of the social, political, cultural and gender forces that profoundly influence the experiences of sexual minority women, is necessary to ensure a more accurate and fair decision than those formed out of stereotypes, cultural biases and speculation.

⁴²² *Ibid* at para 49.

Chapter 5 - Discussion

The purpose of this paper was to explore denied IRB claims brought by women on the basis of sexual orientation. Analyzing the reasoning behind such decisions, this paper identifies potential issues that may limit access to protection in Canada for sexual minority women. The study reveals two general reasons for denying women's refugee claims on the basis of sexual orientation: 1) those rejected on the basis of credibility; and 2) those rejected on the basis of state protection. Key among the concerns identified in this study is a general lack of gender analysis in the decision-making process. The decision-making consistently demonstrates a disregard for the way in which gender influences both the claimant's experience of persecution as a sexual minority woman and the cultural and psychological implications of those experiences. Finally, the decisions in question also reveal an apparent lack of understanding of sexual minority women in general. In their reasoning and justification, the decision-makers clearly demonstrate essentialist views of sexual identity and behaviour, unavoidably leading to findings based on stereotypical expectations and generalizations. Coupled with the recent Canadian refugee reforms, these biases, if not addressed, will put sexual minority women at a disadvantage, which in turn may result in violation of the Convention and its central principle of *non-refoulement*.

State protection

A common concern across all of the claims from various countries, rejected on the basis of state protection, was a tendency on behalf of the decision-makers to analyze persecution and

⁴²³ Michael Kagan, "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations" (2003) 17 Geo LJ 367 at 390.

the availability of state protection from the perspective of sexual orientation alone. The failure to reflect on the ways in which gender and sexual orientation act together to shape the claimant's experience of persecution risks a decision that is both uninformed and one-sided. In her research on the RPD's application of Canada's Gender Guidelines, LaViolette similarly found that, apart from a handful of cases, RPD decision-makers tended not to refer to the Canadian Gender Guidelines when determining cases brought by lesbians.⁴²⁴ While the decision-makers in the claims reviewed for this case study frequently mention having considered the Guidelines in their written decisions, it is obvious in their reasoning that a gender analysis was not applied. The Federal Court has asserted that although the Guidelines are not binding on the RPD, they "must nonetheless apply the principles enshrined in them in a meaningful way."⁴²⁵ A meaningful application of the Guidelines involves the assessment of a claimant's testimony "while being alert and sensitive to her gender, the social, cultural, economic and religious norms of her community."⁴²⁶ As the Court states, "[i]t is not sufficient for the RPD to simply say that the Gender Guidelines were applied and then fail to demonstrate how they were applied."⁴²⁷ This discrepancy between mentioning the Guidelines and actually applying a gender analysis suggests, at best, a lack of understanding of the Gender Guidelines and their purpose and, at worst, a lack of understanding for the intersection of gender and sexual orientation on the claimant's risk of persecution.

Scholars and human rights groups have identified a tendency for decision-makers and country information to group together the experience of sexual minority women with that of the more

⁴²⁴ Nicole LaViolette, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines" (2007) 19(2) *Int J Refugee Law* 169 at 187.

⁴²⁵ 2014 FC 663 at para 18.

⁴²⁶ *Ibid* at para 9.

dominant male gay experience.⁴²⁸ This generalizing of a common sexual minority experience was apparent in country information to which the decision-makers refer in the claims reviewed in this case study. The absence of country information specific to sexual minority women, in turn, leads to conclusions that there was no significant risk of persecution for lesbians or that state protection was available. This reveals both a problem with the way decision-makers are interpreting country information as well the limited content of the country information itself.

As in LaViolette's research on country documentation for claims based on sexual orientation,⁴²⁹ this case study similarly found that decision-makers in this case study reflect a tendency to put significant emphasis on the legal progress documented in country information. Disregarding whether such legislation has in fact been implemented effectively, the decision-makers conclude that state protection was available. Such an assumption not only disregards whether policies are effective in reality, but it also disregards whether they are effective for sexual minority women in particular. The analysis on Mexico and Columbia in this case study demonstrates that these countries have widespread gender-based violence. In such an environment, legal advancements for sexual minorities in these countries, and their implementation and effectiveness, should be measured with particular attention to lesbians.

⁴²⁷ Ibid.

⁴²⁸ "A Fact Sheet on Lesbians, Gender and Human Rights Violations: Violence and Abuse of Women," Amnesty International USA, online: <<http://www.amnestyusa.org/sites/default/files/pdfs/lesbianfactsheet.pdf>> [accessed 23 October 2012]; See also Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: an Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13(2-3) Int'l J HR 437 at 448.

Credibility

The credibility assessments in this case study revealed the tendency of decision-makers to doubt the claimant's sexual identity. Their disbelief was largely due to subjective factors such as cultural biases, a lack of understanding of lesbian identity, sexual behaviour and a failure to recognize the implications of the intersection of gender and sexual orientation.

The failure of the decision-maker to see "the other," what Millbank describes as both sexual and cultural otherness,⁴³⁰ resulted in negative credibility determinations when claimant's did not live up to decision-maker's expectations of lesbian identity. Stereotypes of lesbian appearance, demeanour, lifestyle and knowledge of lesbian hangouts and sexual minority rights organizations formed some decision-makers' expectations of lesbians. Cultural bias was also apparent in decision-makers' expectations of sexual behaviour, which reflected essentialist views of sexual identity as fixed. Katya attributes such rigid notions to Western culture.⁴³¹ Lack of understanding of sexual minority women was further demonstrated in the decision-makers' disregard for psychological issues related to the stigma of lesbian identity. This was especially apparent when a claimant delayed their claim due to reluctance to reveal their sexual orientation to Canadian authorities.

Material evidence proved to be a no-win situation for claimants, which confirmed Berg and Millbank's findings that evidence is usually regarded as self-serving.⁴³² Whether or not these

⁴²⁹ Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: an Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13(2-3) Int'l J HR 437 at 451.

⁴³⁰ Jenni Millbank, "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia" (2002) 26 Melb Univ L Rev 144 at 145.

⁴³¹ Sonia Katyal, "Intersectional International Human Rights" (2004) 5 Geo J Gender & L 857 at 863-864.

⁴³² Laurie Berg & Jenni Millbank, "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants" (2009) 22(2) J Refugee Stud 195 at 197-198.

women provided evidence, the decision-makers overwhelmingly judged that there was either a lack of corroborating evidence or that the evidence provided was insufficient. This situation reveals the difficulty of proving one's sexual orientation beyond self-identification, especially when a decision-maker's expectation of how a lesbian should physically appear and behave is not met. Furthermore, expecting a lesbian to have a stereotypical masculine appearance, demonstrates an ignorance of the implications of women defying gender norms of appearance in certain cultural contexts,⁴³³ not to mention personal preference. Such essentialist notions not only disregard the reality of some lesbians, but they also ignore the influence of culture and gender norms in shaping behaviour and experience.

Failure to consider both sexual orientation and gender was also apparent in the assessment of credibility. Speculating that a police officer would not have reacted in a certain way or would not have refused to take action in a given situation, the decision-makers fail to recognize the ways in which gender and sexual orientation intersect in a homophobic society to influence police perception, their treatment of the complaint and their treatment of the claimant. Millbank refers to speculation as the contrast between the claimant's experience and the decision-maker's own cultural lens.⁴³⁴ In such a situation the decision-maker makes judgments according to his or her own social location and experience of life, rather than considering the forms of oppression that influence the claimant's experience. Furthermore, the failure to consider the psychological factors behind a delay in disclosing rape, demonstrates a lack of understanding of gender-based violence, despite references in Canada's Gender Guidelines to

⁴³³ Jenni Millbank, "Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation" (2003) 18(1) *Geo Immigr LJ* 71 at 103.

⁴³⁴ Jenni Millbank, "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21 *Int'l J Refugee L* 1 at 31.

such reluctance as being attributable to the trauma and shame associated with sexual violence.⁴³⁵

Implications of refugee reform

Coupled with the problems identified above, the recent reforms to the Canadian refugee system will make it difficult for sexual minority women going forward, limiting and hindering their ability to establish credible claims and access to fair adjudication. Of significant concern is the designation of safe countries, under which Mexico is listed. The unreliability of country information presented in this case study, regarding whether or not Mexico is safe for sexual minority women, reflects the danger of labelling countries safe without considering the issue of safety within the context of particular groups. With the new refugee reform, Mexican lesbians will be further disadvantaged by an accelerated process and with no access to appeal should the claim be denied. Shorter timelines for all refugees, which are even shorter for DCOs will make evidence gathering even more difficult and sexual minority women will have less time to open up about their sexual orientation and/or the sexual violence they have experienced.

Reforms to Canada's refugee determination system have brought some positive changes as well. Within the diverse context of different backgrounds, identities and social locations involved in refugee law, scholars have stressed the importance of decision-makers' expertise and experience in the field of refugee law or related fields such as human rights law and for

⁴³⁵ Immigration and Refugee Board of Canada, *Guidelines Issued by the Chairperson Pursuant to Section 65(4) of the Immigration Act: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution*, 13 November 1996, No. 4, C.2 at D.1, online: <<http://www.refworld.org/docid/3ae6b31c98.html>> [accessed 10 October 2012].

their experience in different cultural settings.⁴³⁶ The IRB's previous process of appointment by the Federal Cabinet provoked criticism, as appointments were political as opposed to being based on qualifications suited to the role of refugee decision-maker.⁴³⁷ As Houle and Crépeau argue "[a] specific competence previously acquired during a professional or volunteer experience is essential, and without it the value of the whole decision-making process is put into question."⁴³⁸ Experience in human rights or refugee law, as well as experience working with diverse communities and exposure to different cultural perspectives is now reflected in the IRB's preferred qualifications for RPD decision-makers, who are now recruited through the public service.⁴³⁹

Looking forward

The reasoning behind decisions in this case study reveal that some RPD decision-makers still fail to apply a gendered analysis. The implications of failing to apply an adequate gender analysis are serious, as they involve the possible *refoulement* of a refugee back to persecution, an action that is forbidden under international and customary international law.⁴⁴⁰

This research has made clear that the ability to identify and consider factors relevant to a sexual minority woman's experience and her risk of persecution within the context of a

⁴³⁶ Cécile Rousseau et al, "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board (2002) 15(1) J Refugee Stud 43 at 66.

⁴³⁷ Ibid at 45.

⁴³⁸ François Crépeau & France Houle, "The Security of Refugees and the Abilities of IRB Members: the Inappropriate Silence of Bill C-11," Memorandum for the Minister of Citizenship and Immigration (12 March 2001) at 4, online:

<http://www.cerium.ca/IMG/pdf/The_security_of_refugees_and_the_abilities_of_the_IRB_members_the_inappropriate_silence_of_bill_C-11.pdf> [accessed 25 March 2014].

⁴³⁹ Immigration and Refugee Board of Canada, News, *Recruitment of Members for the Refugee Protection Division*, online: <<http://www.irb-cisr.gc.ca/Eng/NewsNouv/NewNou/2009/Pages/nov.aspx>> [accessed 20 July 2014].

particular country requires an intersectional framework. Bond proposes a restructuring of human rights organizations to facilitate an intersectional analysis. Such restructuring would involve an institutionalized structure through which human rights violations would be analyzed with an awareness and consideration of intersecting systems of oppression.⁴⁴¹ As she explains, “[i]ntersectional analysis encourages a human rights remedy that encompasses all forms of subordination simultaneously rather than a partially effective remedy that focuses on only one form of human rights abuse.”⁴⁴²

Incorporation of an intersectional framework is especially relevant to refugee law, as an analysis that is not intersectional and considers only one system of oppression can result in *refoulement*. As was demonstrated in this research, fair determination of refugee status for sexual minority women involves consideration of sexual orientation, gender and other relevant social locations. Furthermore, it is important that the intersection of these forces analyzed within the social and cultural context of the claimant’s country of origin, as these factors influence the intersection of identities and social locations.⁴⁴³ As LaViolette’s findings and this case study demonstrates, most decision-makers are not making the connection between gender and sexual orientation.⁴⁴⁴ This suggests that at present, decision-makers do not understand intersectionality and its significance in assessing persecution.

⁴⁴⁰ UNHCR, *Supra* note 71.

⁴⁴¹ Johanna E. Bond, “International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations” (2003) 52 *Emory LJ* 71 at 137.

⁴⁴² *Ibid* at 124.

⁴⁴³ *Ibid* at 103.

⁴⁴⁴ Nicole LaViolette, “Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines” (2007) 19(2) *Int J Refugee Law* 169 at 187.

In order to promote fair decisions on the basis of sexual orientation, LaViolette has prepared a training manual specifically for the IRB on issues particular to sexual minority refugees, as well as lesbian refugees in particular.⁴⁴⁵ Furthermore, LaViolette has proposed LGBT cultural competency training, which would build on decision-makers' abilities to better understand sexual minorities and the political and social circumstances they may find themselves in, rather than making assessments based on stereotypes or lack of knowledge.⁴⁴⁶ In this sense, training, along with guidelines such as the UNHCR's Guidelines on sexual orientation,⁴⁴⁷ is important in sensitizing decision-makers to sexual minority issues. Jordan suggests that the several training sessions for the IRB on sexual orientation-based claims has helped to reduce stereotyping by decision-makers in refugee determination.⁴⁴⁸ LaViolette points out, however, that training is "not a cure-all solution," as it cannot address systemic issues that limit fair refugee determinations.⁴⁴⁹ Furthermore, Houle and Crépeau also advise, "[t]he abilities required in such a [complex] context cannot be acquired 'on the fly' or by continued training, notwithstanding its quality."⁴⁵⁰ Therefore, although training is helpful, it must be accompanied

⁴⁴⁵ Nicole LaViolette, "Sexual Orientation, Gender Identity and the Refugee Determination Process in Canada" (7 June 2013) online: Social Science Research Network <http://www.academia.edu/3431684/Sexual_Orientation_Gender_Identity_and_the_Refugee_Determination_Process_in_Canada> [accessed 20 July 2014].

⁴⁴⁶ Nicole LaViolette, "Overcoming Problems with Sexual Minority Refugee Claims: Is LGBT Cultural Competency Training the Solution?" at 20, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2122573> [accessed 20 July 2014].

⁴⁴⁷ UN High Commissioner for Refugees (UNHCR), *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*, 23 October 2012, HCR/GIP/12/01, online: <<http://www.refworld.org/docid/50348afc2.html>> [accessed 23 February 2014].

⁴⁴⁸ Sharalyn R. Jordan, "Un/Convention(al) Refugees: Contextualizing the Accounts of Refugees Facing Homophobic or Transphobic Persecution" (2009) 26:2 *Refugee* 165 at 174.

⁴⁴⁹ Nicole LaViolette, "Overcoming Problems with Sexual Minority Refugee Claims: Is LGBT Cultural Competency Training the Solution?" at 20, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2122573> [accessed 20 July 2014].

⁴⁵⁰ François Crépeau & France Houle, "The Security of Refugees and the Abilities of IRB Members: the Inappropriate Silence of Bill C-11," Memorandum for the Minister of Citizenship and Immigration (12 March

by other qualifications suited to such a complex and diverse area of law. As such, an interdisciplinary approach is well suited to refugee law in understanding how to interpret and apply the law from various scientific perspectives and according to a particular context. Lewis suggests that decision-makers in refugee determination “must become more aware of critical theories of sexuality in order to adequately account for the complexities of lesbian lives and lesbian agency.”⁴⁵¹ In order to achieve this she suggests “greater interaction between immigration law and policy and academic scholarship on sexuality.”⁴⁵²

For sexual minority women, intersectionality is key to recognizing various forms of oppression and should inform the framework through which decision-makers analyze claims based on sexual orientation. An intersectional framework, coupled with continued training on LGBT issues would help ensure that members are better qualified to make decisions that have serious implications on the lives of refugees.

Limitations

Because positive written decisions are not as frequently provided or available, the scope and analysis of this case study is limited to negative decisions of women’s claims based on sexual orientation. A compare and contrast of the reasoning behind positive decisions with that of the negative decisions would be useful in identifying inconsistencies in decision-making and provide more insight into the particular problems or discrepancies to be addressed through an international framework and training process.

2001) at 4, online:
<http://www.cerium.ca/IMG/pdf/The_security_of_refugees_and_the_abilities_of_the_IRB_members_the_inappropriate_silence_of_bill_C-11.pdf> [accessed 25 March 2014].

The discrepancy in rejection and acceptance rates among RPD decision-makers, or “the luck of the draw,”⁴⁵³ as some say, reflects the presence of inconsistency in Canadian refugee determination. This further raises the question of the quality of decision-making of some RPD members raised in this study. In research compiled by Rehaag, several members granted refugee status to less than ten per cent of claimants. The most extreme was one member’s zero per cent acceptance rate from 2008 to 2010 inclusive and another member’s acceptance rate of 35 out of 35 claims heard in one year.⁴⁵⁴ These numbers are indicative of significant inconsistencies in determining refugee claims. A review of all written reasoning for positive decisions would help identify the problematic decision-making behind such inconsistencies, which this paper has attempted to do within the context of a limited sample of recent negative decisions. Fortunately, there is now a new requirement for most positive decisions to be written, which will allow for more comprehensive research on decisions and variations in acceptance rates in the future.⁴⁵⁵

⁴⁵¹ Rachel Lewis, “The Cultural Politics of Lesbian Asylum: Angela Maccarone’s Unveiled (2005) and the Case of the Lesbian Asylum-Seeker” (2010) 12:3-4, *The International Feminist Journal of Politics* 424 at 438.

⁴⁵² *Ibid.*

⁴⁵³ Nicolas Keung, “Getting asylum the luck of the draw?” *The Star* (4 March, 2011) online: *The Star* <http://www.thestar.com/news/investigations/2011/03/04/getting_asylum_the_luck_of_the_draw.html> [accessed 10 September 2013]; For the complete study see Rehaag, Sean, “Judicial Review of Refugee Determinations: The Luck of the Draw?” (2012) 38 *Queen's LJ* 1.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ Immigration and Refugee Board of Canada, *Regulatory Impact Analysis Statement, Written Reasons for RPD Positive Decisions*, online: <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/ActRegLoi/Pages/RiasReir.aspx>> [accessed 15 March 2013].

Conclusion

This research paper has demonstrated that the particular experiences of sexual minority women demand an analysis that takes into account the various types of oppression that influence the risk of persecution. Although women also experience persecution similar to that of men in the public sphere, women's location in the private sphere and the control exercised over her sexuality, particularizes her experience of persecution. Within the context of gender hierarchy, the subordination of women makes them particularly vulnerable to punishment for violating both heterosexual and gender norms.

Decisions in this case study, assessed on the basis of sexual orientation, without consideration of how gender intersects with sexual identity, resulted in conclusions that lesbian claimants had access to state protection in their country of origin or that parts of their testimony were not credible. Other decisions revealed cultural biases and generalizations about sexual minority women, demonstrating a significant lack of understanding of sexual identity and behaviour outside heterosexual norms. In such cases, when stereotypical expectations of a lesbian were not met, the decision-maker found the claimant's assertion of lesbian identity was not credible.

At present, the way in which some Canadian refugee adjudicators decide refugee claims on the basis of sexual orientation brought by women is not reasonable from the perspective of a feminist analysis. The failure to incorporate the Gender Guidelines indicates that decision-makers do not understand intersectionality as it relates to sexual minority women. Preconceived notions of a specific lesbian profile similarly reveals decision-making based in one's own cultural biases and ignorance of particular cultural contexts and their implications on gender and sexual identity.

The lack of understanding of sexual identity and the intersection of gender and sexual orientation revealed in this research indicates that some RPD decision-makers do not possess the understanding necessary to determine whether sexual minority women, in particular, are at risk of persecution in their country of origin. The ability to assess the persecution of sexual minority women within such a diverse context demands an understanding of the intersectionality of sexual identity and, specifically, lesbian identity. As such, this research proposes that intersectionality provide the framework by which refugee claims on the basis of sexual orientation are assessed. An intersectional framework would allow for a better appreciation for and consideration of the ways in which various forms of oppression influence the experience and persecution of sexual minority women within the particular context of her country of origin. Although sexual minority refugee claims have similar success rates to refugee claims on other grounds,⁴⁵⁶ the inadequacies identified in this research have serious implications for those sexual minority women whose cases are not analyzed within a framework which considers the intersection of gender and sexual orientation. Such a situation puts sexual minority women at risk of *refoulement* and, in turn, put Canada at risk of violating its international obligations. Furthermore, within the context of Canada's new refugee reform, sexual minority women will face additional obstacles, further compromising their access to justice.

Universal human rights envision access to justice without discrimination; however, for marginalized parts of society this is not always the case. As Jean-François Laé argues, society's perception of suffering is selective. It depends on whether the issue in question

⁴⁵⁶ Sean Rehaag, "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada" (2008) 53 McGill LJ 53 at 61.

concerns society as a whole and whether society as a whole is able to identify with it.⁴⁵⁷ Marginalization creates a situation in which society and decision-makers are literally unable to see the ‘other,’⁴⁵⁸ and so sexual minorities are at risk of being denied access to justice when society in general cannot identify with their differences and their particular experiences. It is important that decision-makers in the field of refugee law understand the diversity of experiences and persecution of refugees in order to interpret and apply the law equitably and redress the inherent inequities that exist to maintain marginalization.

⁴⁵⁷ Jean-François Laé, *L'instance de la plainte, une histoire politique et juridique de la souffrance* (Paris : Descartes et C^e, 1996).

⁴⁵⁸ Millbank uses the term “other” in referring to the sexual and cultural otherness of refugees, which involves experiences that the decision-maker has difficult imagining. In turn, this puts refugee credibility at risk of not being believed by the decision-maker; See Jenni Millbank, “Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia” (2002) 26 Melb Univ L Rev 144.

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