

Overcoming marginalization: LGBTQ2* refugees claimants

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by David Matas

Refugee claimants, asylum seekers, are among the most marginalized people in the world. And so are LGBTQ* persons. When we combine the two, we have intersectionality, the marginalized of the marginalized.

As a volunteer, I have been engaged in advocacy work on a wide range of issues. My day to day professional work has been a lot more specialized. For more or less all my professional career, I have, for the most part, been representing refugee claimants, attempting to help them achieve protection in Canada.

Because of that work, I can testify from personal experience that, while achieving protection for most refugees is a challenge, working on refugee claims based on sexual orientation, gender identity and expression has been particularly difficult.

Refugee claimants making claims based on sexual orientation, gender identity and expression typically come from countries that criminalize or suppress non-conforming sexual orientations, sexual behaviours, or gender identities or expressions. The primary issue in these claims is not so much whether a person with a non-conforming sexual orientation would be persecuted. That is typically easily established. The primary issue is rather credibility. Does the claimant have the non-conforming sexual orientation the claimant asserts?

In theory, there is a legal presumption that testimony given under oath is true. The presumption is rebuttable, but unless it is rebutted, the presumption holds sway.

However, in practice, many Board members who decide refugee protection claims are

sceptical. Their primary concern is not so much protection as the desire not to be tricked or fooled. Their attitude to sworn testimony is not so much, despite what the law says, "I accept it", but rather "prove it".

For most other types of claims, it would be uncommon for the claim to be based on activities or opinions which were private only. That would be true of political opinion. It would also be true for religion or ethnic origin.

For sexual orientation, privacy is the norm. Sexual activity is, except in unusual situations, private.

Persons who make refugee protection claims based on sexual orientation are caught in a Catch 22. To protect themselves in the country of origin, they must do everything possible to hide their orientation. They must avoid documentation and pictures. They must limit as much as possible the persons who know about their orientation. Typically, the knowledge is limited to their partners, who engage in the same efforts to hide their activities as the claimants.

Once such persons arrive in Canada and attempt to establish their claims, they must, in contrast, as best they can, provide witnesses and documents. They must do everything possible to corroborate their claims. Yet, for sexual orientation claims, these witnesses and documents are often not forthcoming, because of the very nature of the claims.

The Chair of the Immigration and Refugee Board, albeit belatedly, only this May 1, has produced Guidelines for proceedings before the Board involving sexual orientation and gender identity and expression. Chair Board guidelines are not binding on Board members. But Board members are expected to follow guidelines, unless compelling or exceptional reasons exist to depart from them. If they do so, the member must explain in his or her

reasoning why the guidelines are not being followed.

These guidelines are not so much a guide to what is being done now as an indication of the faults which need to be corrected. If you want to know what is wrong with the way the Board treats claims based on sexual orientation, all you have to do is read the Guidelines as saying "Stop doing this". Although these are early days for the Guidelines, my experience is that the warnings they give have yet to be fully heeded.

One guideline notes that an individual's testimony may, in some cases, be the only evidence of their sexual orientation. In the case of *Ogunrinde*, the Federal Court wrote:

"[42] the acts and behaviours which establish a claimant's homosexuality are inherently private. When evaluating claims based on sexual orientation, officers must be mindful of the inherent difficulties in proving that a claimant has engaged in any particular sexual activities."

Ogunrinde v. Canada, 2012 FC 760

The Guidelines note that corroborating evidence from family or friends may not be available in cases involving sexual orientation because, for instance, an individual has concealed their sexual orientation because of perceived stigma or risk of harm. Another example is that is not always reasonable to expect an individual to have sought medical treatment following an assault where they have been forced to conceal their sexual orientation.

Often, for refugee protection claims in other areas, there is a great focus on detail and a need to avoid vagueness. However, for claims based on sexual orientation, it is not expected that an individual establish their sexual orientation through explicit detail of their sexual activities. The Guidelines actively discourage Board members from engaging in intrusive questions. While this is of course right, it also increases the difficulty in establishing the claims because the detail available in other types of claims is not available here.

Inconsistencies are normally an indication of lack of credibility. But not so much here. Claimants whose claims are based on sexual orientation may be reluctant, at least in initial interviews to officials at the port of entry, to disclose their sexual orientation. Cultural and psychological barriers may explain this reluctance. These barriers should be taken into account but sometimes are not.

Stereotypes plague this field. Board members have difficulty dealing with bisexuality, often seeing an inconsistency where a person engages in both conforming and non-conforming sexual behaviour. Again the Guidelines warn against this difficulty. But the effect of the warning to date remains to be seen.

Because of the intrusiveness of asking questions related directly to the activity which generated the claim and the need to avoid it, claims based on sexual orientation tend to focus on irrelevancies. This is a general problem for refugee claims, but it is even more acute for claims based on sexual orientation.

Claiming refugee protection requires establishing a well-founded fear of persecution. Attacks on credibility take two forms. Either it is alleged that the asylum seeker is not afraid. Or, even if the asylum seeker is afraid, the evidence presented in support of that fear is fabricated.

There is a tendency to focus on the first ground of credibility because, if it is accepted that the claimant is genuinely afraid, there has to be some reason why the claimant is genuinely afraid. The most plausible explanation for the fear is the explanation the claimant gives.

Credibility tests become test of intention. The challenge to credibility is that the claimant is not really afraid, that the motivation lies elsewhere. But what could that motivation be?

Why would anyone leave their home to come to a culturally different, linguistically foreign, far-away place, often at a moment's notice, abandoning or liquidating all their possessions, leaving behind everyone they know, their jobs, their assets, their friends, their families? For the sceptical, the answer is easy - immigration. The sceptical suspect that those not in fear want to come to get better jobs, to improve their style of life, or to reunite with families in Canada. And they use the refugee system to do so.

All the seemingly irrelevant attacks on credibility have this in common. They are irrelevant to the question of a well-founded fear of persecution. They are relevant to the question, "does the claimant want to immigrate to Canada?"

The refugee claims procedure becomes an immigration intention procedure. Using a refugee claims procedure as an interrogation about immigration intention poses a number of problems. It blindsides the claimants, who think they are there to tell about their claims, not to talk about their immigration intentions. It ignores the possibility of dual purpose, that a person could both have a well-founded fear of persecution and a desire to immigrate.

There is a flaw in the fundamental premise of this sort of attack on credibility. A desire to immigrate is consistent with a refugee claim. A desire to immigrate may corroborate a refugee claim. One reason for wanting to immigrate is a well-founded fear of persecution.

In a sense, once the claimant loses, it may not matter how the loss occurs. In another sense, it may matter very much. Because adverse credibility determinations are the most difficult decisions to have overturned on review, the claimant would want to avoid, above all else, a refusal grounded on credibility. Once the claimant is disbelieved, there is a tendency, in any case, to disbelieve anyone else and anything else brought in support of the claim. In claims based on sexual orientation, often letters of support from the Rainbow Resource Centre or other like organizations are ignored or put to one side because the claimant is

found not credible.

One can see here the particular problem of claims based on sexual orientation. Because these claims are particularly vulnerable to adverse credibility determinations, they are also, in case of negative decisions, particularly hard to overturn on appeal or review. Appeal and review jurisdictions typically defer to first instance jurisdictions on credibility determinations on the basis that the first instance jurisdiction has heard and seen the claimant; the appeal and review jurisdictions have not.

There is no simple solution to the plight of claimants whose claims are based on sexual orientation. The Guidelines are helpful. But like everywhere else, there needs to be more awareness of the problems that this population faces than there now is.

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