

Persecution, Protection and Immutable Identity: Contextualising Asylum Claims Based on Sexual Orientation in Canada and Finland

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In many countries around the world, homosexuality continues to be labelled a mental disease, penalized as a crime by the law, condemned as a sin by religious institutions, and even punishable by torture and execution by state authorities and non-state actors. Stemming from such abhorrent levels of widespread persecution and the continued development of sexual orientation rights-based legislation in the West, refugee claims based on sexual orientation have begun to rise in such states as Canada and Finland which recognize sexual minorities in their respective asylum policies. While there is no country in the world where sexual minorities are entirely free from harassment and oppression, thousands of these 'gendered' claims have been filed with the belief that such nations are sanctums of hope and freedom. Although both countries have had historically different immigration experiences, this comparative study aims to provide an illustrative overview of such identity-based national asylum policies and practices in both Canada and Finland.

Introduction

Refugees are people “with an identity, a past, a history, a cultural heritage. They are people who have been forced out of their countries by political turmoil, ethnic wars, religious, social and gender persecution.” (Lacroix, 2004: 147). According to the United Nations High Commissioner for Refugees (UNHCR) (2007: 2) statistics, by the end of 2007, a total of 67

million people were estimated to be refugees and internally displaced persons. More specifically, in that same year, a total of 647 200 individual applications for asylum or refugee status were submitted to governments and UNHCR offices in 154 countries worldwide. (UNHCR, 2007: 13).

Over the past decade, both the capacity and diversity of refugee claims based on the grounds of belonging to a ‘particular social group’ (PSG), one of the five recognized areas of persecution as recognized in the 1951 Geneva Convention Relating to the Status of Refugees (Geneva Convention), have dramatically increased in the ‘developed’ world. These social group cases have been pushing the boundaries of refugee policy in many signatory states, “raising issues such as domestic abuse, coercive family planning policies, female genital mutilation, discrimination against the disabled and homosexuality.” (Aleinikoff, 2001: 264) Despite this increase in refugee claims relating to this basis for application, questions have been raised regarding the effectiveness of this open-ended category, most specifically relating to those claims based on sexual orientation.

Each and every day throughout the world, lesbian, gay, bisexual, and transgendered (LGBT) and heterosexual people face harassment, discrimination, physical and sexual abuse, arbitrary arrest and detention, imprisonment, and the ultimate penalty – death – simply because of their actual or perceived sexual orientation or gender identity. It is for such basic and often horrific violations of human rights that sexual minorities seek asylum in a number of ‘Western’ states.

On October 10, 1968 Finland ratified both the 1951 Geneva Convention and the 1967 Protocol Relating to the Status of Refugees (Protocol), while Canada followed course a year later on June 4, 1969. (UNHCR, 2008: 2) As signatory countries of the Geneva Con-

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vention, both states have an international obligation to provide asylum to those with a ‘well-founded’ fear of persecution. As such, in adherence to Article 1 of the Convention, according to Canada’s Immigration and Refugee Protection Act (IRPA) and Finland’s Aliens Act, a ‘Convention refugee’ is defined as a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion and who cannot obtain the protection of his or her country of nationality or habitual residence. (IRPA, 2001: sec. 96; Aliens Act, 2007: sec. 87).

As bilingual, northern parliamentary democratic states, Canada and Finland share much in common, including the international promotion of global security, environmental protection and social policy. While these two nations find similarities in certain structural aspects, each has experienced immigration in a unique way. It is for these reasons why the analysis of Canada and Finland has been selected in the examination of this relatively small, yet equally significant, sub-section of the PSG category in the international asylum system. Within the coming years, both countries will face a large demographic shift as their populations continue to age, leaving immigration to fill the economic void. By contextualising these complex, multilayered claims it is hoped that this study will foster continued research into this group of, what I would describe as, invisible migrants.

As such, Part I of this paper will provide global, Canadian and Finnish contextual backgrounds on the issue while Part II will include an analysis of conflicting global developments impacting LGBT asylum claims. It is important to note that this area of policy research is relatively limited, is a growing area of research, and as such, some of the findings will be reflective of this. Before moving forward, it is important to take note of the terminology used within this report. Throughout this research, the representative terms of “sexual minorities,” “gays,” and “homosexuals” are used interchangeably as they are most common in international human rights discourse. While each group faces different forms of discrimination, whether through the public or private spheres, its roots lie in that fact that the existence of each of these groups challenge traditionally defined gender roles and are essentially “gender outlaws.” (Wilets, 2006: 6).

I. Background

Global Persecution

The International Lesbian and Gay Association (ILGA) which tracks intolerance around the world, recognizes that sexual relations between women is illegal in 51 nations, while sex between men is illegal in 76. (Graham, 2006). While one cannot deny that clear progress has been made over the past decade in such countries as South Africa, where the government was the first to explicitly include the barring of discrimination based on sexual orientation in their Constitution (1996), the human rights situation for sexual minorities around the world remains bleak. Claims for Convention refugee status based on sexual orientation under the PSG category “emerged at the beginning of the 1980s and still represent a small part of the total claims under ‘membership of a particular social group’ as a whole ... [and are] growing exponentially.” (ECRE, 1997: 2). However, claims made to signatory countries of the Geneva Convention must not be confused as safe havens – only safer – as “[t]here is no country where a gay man or lesbian can grow up free of discrimination, persecution or repression.” (LaViolette, 2004: 5).

In order to put this issue into perspective it is important to understand the extent to which opposing countries will go to victimize homosexuals. In many countries, homosexuality is labelled a mental disease, penalized as a crime by the law, condemned as a sin by religious institutions, and subjected to torture and execution by the authorities and non-state actors. For instance, in the mid-1990s an exiled gay-rights group, ‘Homan,’ estimated that 4 000 homosexuals had been executed by the Iranian government alone, since 1979. (Graham, 2006) Iran remains one of nine recognized countries which continue to sentence homosexuals with the death penalty along with Afghanistan, Mauritania, Nigeria, Pakistan, Saudi Arabia, Sudan, United Arab Emirates and Yemen. (ILGA, 2005: 31) Interestingly enough, each of these nine countries have either signed or ratified both the UN Convention against Torture and Inhuman Treatment and the UN Covenant on Civil and Political Rights, yet the international community applies little pressure while the persecution and literal extermination of innocent LGBT people continues to this day. It is clearly understandable from this level of abhorrent discrimination

and ignorance of international human rights law why refugee claims based on sexual orientation continue to rise in countries like Canada and Finland.

Canadian Context

Canada is a country built on immigration. In fact, more than 200 different ethnic origins were reported in the 2006 national census, with eleven ethnic origins surpassing over one million people. (Statistics Canada, 2008). In 2006, it was estimated that there were over five million visible minorities living in the country – totalling approximately 16,2 % of the total national population. (Statistics Canada, 2008).

Although Canada ratified both the 1951 Geneva Convention and the 1967 Protocol in 1969 it was not until 1976 that gay men and lesbians were allowed to even immigrate to the country, prior to which point they were considered “members of an inadmissible class.” (Fisher, 1998: 129). However, less than two decades later, in 1992, Canada was one of the first countries in the world to interpret the UN Convention to allow refugee claims to be made based on sexual orientation, recognizing the extreme human rights violations against sexual minorities around the world. (Graham, 2006). Canada has been one of the global pioneers in ensuring the protection and equality of sexual minorities within its borders. For instance, in 2005 Canada became the fourth country worldwide to legalize same-sex marriage across the country.

At the same time, Canada holds an “international reputation for the fairness of its inland refugee determination system,” one that is particularly true in its treatment of sexual orientation-based refugee claims when compared with other countries. (Hughes, 2007: 6) However, this was not always the case. Prior to 1952, homosexuals were ignored by immigration policy and from 1952 to 1976, Canada’s immigration policies were “blatantly homophobic and stigmatized gay men and lesbians.” (Fisher, 1998: 129).

The introduction of the *Canadian Charter of Rights and Freedoms* (1982) proved to be a momentous occasion for sexual minorities across the country, as sexual minorities had gained constitutional grounds to challenge the status quo. In December 1991, the national lobby group called the Lesbian and Gay Immigration Task Force (“LEGIT”) was formed to advocate for the recognition of same-sex partner claims for immigration

under the grounds of family reunification. (LaViolette, 2004: 974). Soon after, individual Canadians began to file many claims before the courts, demonstrating that this concern would not disappear. Such cases helped to draw greater attention to further discriminatory ‘errors’ in Canadian immigration and refugee policy.

Refugee claims based on sexual orientation began to be received in Canada in the early 1990s. The Immigration and Refugee Board’s (IRB) first written decisions on claims based on sexual orientation began in 1991. In the 1991 case, Nicolas Acevedo, a homosexual Columbian male, was denied his request to stay in Canada because the “enumerated grounds of persecution in the Convention, including ‘particular social group,’ [did] not specifically include homosexuals.” (LaViolette, 1997: 18). Acevedo’s claim was denounced by immigration officials on humanitarian and compassionate grounds, stating that the Convention did not extend protection to homosexuals. (ibid.). One year later, the first recorded successful LGBT refugee claim was the IRB decision on a gay Argentinean man, Jorge Inaudi. In this case both panel members believed that homosexuals in Argentina formed a particular social group for the purposes of identifying refugee status and one member stated that if she accepts “that homosexuality is an immutable characteristic, that alone, in [her] opinion, suffices to place homosexuals in a particular social group.” (ibid, 16).

While some Board members were beginning to recognize the idea that homosexuality was beyond the control of the individual, to support the claims of membership of a PSG, this process remained unwritten, highly subjective and ambiguous. While some felt that homosexuality should not be recognized as a basis for being granted asylum (including IRB panel members), relying on religious and moral considerations, others including gay advocacy groups advocated for a collective set of clear and written guidelines to ensure continued support of such claims. This divide can be clearly illustrated in a 1991 case involving a gay male from Uruguay. While one panel member qualified the claimant’s sexual orientation as “a person’s right of conscience and human dignity,” the other rejected this approach on a number of grounds including the moral and historic rationale that the failure of the Universal Declaration of Human Rights to mention sexual orientation was “evidence that homosexuality should not be afforded protection as a fundamental human right.” (ibid, 17). This conflicting

public stance was increasingly becoming a reoccurring issue that demanded a solution.

Ironically enough, in Canada, the precedent-setting decision involved in shaping this seemingly implicit policy can be found in the 1993 Supreme Court of Canada decision, where the claimant was not a homosexual, in the case of *Canada (Attorney General) v. Ward*. (Aleinikoff, 2001: 268). The claimant, Patrick Francis Ward, was a former member of the Irish National Liberation Army (INLA) who feared that the INLA would persecute him for assisting with the escape of an INLA hostage. (Daley & Kelley, 2000: 150) Ward's claim for asylum was based on his political opinion and on his membership in a PSG. While the court found that the INLA was not a PSG within the meaning of the Convention's definition, the ruling judge, Justice La Forest, took an interpretive approach and revealed a ground-breaking standard of 'tests' which is still used by the courts, by Citizenship and Immigration and by the IRB today. His approach explicitly identified sexual orientation within the definition of a PSG. Therefore, this decision made by Justice La Forest would set precedent for all future sexual minority refugee claims made in Canada. However, it is argued that this policy remains ambiguous today due to a lack of understanding of homosexuality by decision-makers. More specifically, "the decision-makers' understanding of what homosexuality is, and how it is and ought to be expressed, is therefore vital in the decision-making process." (Millbank, 2002: 145).

Once here in Canada, sexual minority claimants must now first prove that they are indeed homosexual and that they cannot return home due to a fear of persecution. It is important to note that out of a total of 40,408 refugee claims decided at the IRB in 2004, 1 351 claims were made on the basis of sexual orientation. (Rehaag, 2008: 11–12) While only filling approximately 3.3 per cent of the total number of applications received in Canada (2004), according to Rehaag (*ibid.*) the actual grant rate for sexual minority claimants exceeds the average grant rate for all refugee claims overall.

The full implementation of this implicit policy comes when immigration officers and IRB members adhere to assessing claims through Justice La Forest's 1993 definition of a PSG. Therefore, another essential piece to the implementation of this policy has been in the proper training of claimant assessors. Accord-

ing to Stéphane Malépart (2008), a Senior Communications Advisor for the IRB, "[a]ll members receive proper training in order to make sure their decisions comply with the Immigration and Refugee Protection Act." The training manual, prepared by Professor Nicole LaViolette (2004: 1), begins by stating that "[a]ssessing the veracity of the claimant's homosexuality is a very difficult, sensitive and complex task" which "poses real challenges for decision-makers who are nonetheless required to engage with claimants about their personal lives and relationships." This training manual is comprehensive in scope in that it covers stereotyping, the diversity of the lives of sexual minorities, difficulties faced by refugees when testifying about their sexuality, and legal issues.

Finnish context

Until quite recently, Finland has historically been a country of emigration rather than immigration. Since the beginning of the 1990s the foreign-born population in Finland has increased rapidly due to the collapse of the Soviet Union and the repatriation of Ingrians and other ethnic Finns. (Koivukangas, 2003: 2). With that said, however, Finland remains largely homogeneous with the proportion of foreign citizens accounting for no more than 1,9 % of the total population, the lowest among EU Member States – a figure drastically different than experienced in Canada. (*ibid.*) The small number of foreigners living in Finland is, for obvious reasons, also directly linked to the country's asylum policies and has been highly debated in recent years. For instance, in 2002, Sweden's Prime Minister criticised what he described as Finland's "harsh attitudes towards refugees." (Horsti, 2007: 150) Finland's Minister of the Interior replied that the 'Finnish language, weather conditions and the few numbers of ethnic communities' were reasons why Finland received less asylum applications than other Scandinavian and EU countries. (*ibid.*) Interestingly however, according to Arno Tanner (2006: 35), "Finland is the only EU country in which asylum seeking has increased in recent years."

Finnish migration policy has been closely linked to its history and peripheral location and has also traditionally been rather restrictive due to its geopolitical location between Russia and the rest of Western Europe. (Triandafyllidou, 2007: 109) However, Fin-

land's historically restrictive immigration and refugee policies are gradually changing in order to improve the position of immigrants and refugees in Finnish society and to reap the economic benefits of a necessary stimulation in its population growth. Not only are the country's immigration laws changing to increase the recognition of immigrants, but its human rights policies have also begun to change, including the increased recognition of sexual minorities in recent years.

While homosexuality was decriminalized in Finland in 1971, it was not until 1995 that discrimination on the basis of sexual orientation was prohibited in the penal code. (Pakkanen, 2008: 1) In 2001, the law on registered partnerships gave same-sex couples nearly the same partnership rights as couples of the opposite sex. (ibid.). Finally, in 2004, the new Equality Act entered into force, improving the lives of LGB people's protection against discrimination in Finnish society and was revised a year later to protect transgendered individuals. (ibid.).

Similar to Canada, Finland does in fact recognize sexual orientation as one of the possible grounds for asylum in the PSG category. According to Scheinin & Makkonen (2008: 16), "the preparatory works – which are of major importance in the interpretation of statutory laws in Finland – to the [Aliens] Act expressly specify that persecution on the grounds of sexual orientation is to be considered persecution on the grounds of 'membership in a particular social group' within the meaning of section 87 of the Aliens Act." Sexual minority claims that do not meet the requirements for granting asylum as set out in section 87, but face persecution in their home country or national residence, may alternatively be issued a residence permit on the basis of a 'need for protection' – a form of subsidiary protection. (ibid.) Further, family members, including LGBT partners, of persons who have been granted asylum or subsidiary protection are, upon application, also issued a residence permit. (ibid.).

It is important to note that research into such asylum claims in Finnish society is a very difficult matter with limited information available to the public. For instance, the Finnish Immigration Service (FIS) does not keep statistics on what grounds an asylum claim has been made or on what ground the decision is given (Koskela, 2008). Therefore it is not possible to give any figures on sexual orientation as a ground for asylum application. According to Riitta Koskela (2008), Senior Adviser in the Asylum Unit of the FIS, next

year the Service will begin to "use a new electronic case management system, in which there is a possibility to register the grounds an applicant has made and the grounds the decision is given." Therefore, the FIS will be able to provide greater insight into these asylum cases and provide improved statistics on these claims and asylum cases more generally. Furthermore, asylum case law information is primarily not made available to the public. All asylum applications and decisions are classified as confidential information primarily because there are so few asylum decisions in Finland, that "the risk of identifying the person is too big." (Koskela, 2008).

While very little refugee case law is available in Finland, it appears that around the same time that Canada started to recognize LGBT asylum, Finland did as well. For instance, in 1993 the Supreme Court overturned the Ministry of Interior's decision to deport Kostja Goncharev, a Russian male homosexual, by granting him 'de facto' refugee status on humanitarian grounds. (ECRE, 1997: 8) By 2003, according to Katja Luopajarvi (2003: 47), complete asylum had not been granted on the basis of homosexuality, yet prior decisions of the Directorate of Immigration imply that the death penalty for these minorities is a "disproportionately severe and discriminatorily enforced punishment." From this study, it is not overtly clear whether asylum claims based on sexual orientation in Finland have been successfully granted full refugee status or if such cases have only received subsidiary protection.

II. A shifting tide

While the above evidence indicates that, although to differing degrees, both Canada and Finland officially recognize LGBT asylum claims it is important to analyse the number of conflicting global developments impacting these claims. While it is beyond the scope of this paper to comprehensively examine each development, the following section will briefly consider a number of both national and international obstacles and supports that affect these claims in both countries, as well as others.

To begin, due to the continued levels of global persecution, in 1995 the UNHCR determined that LGBT individuals did comprise a 'particular social group' and therefore could be granted refugee status on that basis under the terms of the Geneva Con-

vention where they experienced a well-founded fear of persecution. (Amnesty International, 2001: 26). However, the Convention is intended to act as ‘legal interpretive guidance’ for signatory states, leaving the interpretation and implementation of such new developments to the Convention in the actual control of individual states.

Another supporting initiative that is beginning to take root is the identification of the required sensitivity involved in such claims or other highly sensitive claims. For instance, Finland’s Directorate of Immigration issued guidelines in 2001 concerning interviewing minor asylum seekers which include a section concerning domestic violence and sexual abuse. (Luopajarvi, 2003: 37) This is a positive step forward yet it is unclear on whether the same degree of sensitivity is expressed when interviewing LGBT asylum claimants in Finland at this time.

The persecution on account of one’s sexual orientation was eventually included in the UNHCR’s Gender Guidelines due to the gendered element of these claims. For instance, persecution could be experienced for homosexual behaviour according to the UNHCR “just as it would for refusing to wear the veil by women in some societies.” (UNHCR, 2002: 5) Later, in 2004, the EU adopted a Council Directive to be implemented in 2006, regarding a set of common criteria governing the conditions by which refugee status is granted in EU Member States. This Directive will prove highly relevant to the processing of asylum claims based on sexual orientation within the EU and new Member States as it includes reference to sexual orientation claims (although somewhat ambiguously). (ILGA, 2005: 3).

On March 26, 2007, the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity were launched by a group of human rights experts in an attempt to obligate States to “respect, protect and fulfil the human rights of all persons regardless of their sexual orientation or gender identity.” (O’Flaherty & Fisher, 2008: 207). Since their launch, these Principles have received considerable attention and have fuelled the ongoing international LGBT equality movement along with the UN’s Economic and Social Council’s July 2008 decision to grant consultative status to two non-governmental organisations that work on sexual orientation and gender identity – demonstrating a sig-

nificant victory in the ongoing struggle for inclusion at the UN. (IGLHRC, 2008).

With that said, there also remain a number of ongoing and newfound obstacles to the success rates of many of these claims. For instance, the actual practice of Member States or even more broadly, signatories of the Geneva Convention, is not uniform – leading to many inconsistencies across the system. While the EU Directive mentioned above strengthens LGBT asylum claims it can be said to simultaneously weaken them. For instance, the limits are realized in cases in which “sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law or the Member States.” (El-Enany, 2007: 9) More specifically, according to El-Enany (2007: 10), this reflects the limits of refugee law in that it cannot develop further than the rights and freedoms of the host society itself.

Another impediment to EU claims comes from the fact that some Member States consider some countries ‘safe countries of origin’ (i.e. Benin, Ghana, India, Mauritius, Senegal and Tanzania) leading to the fast-tracking of claims and the return of the asylum seekers – despite the fact that such ‘safe’ countries continue to have blatantly homophobic legislation in force. (De Schutter, 2008:84). Similarly, “safe third country” agreements are adhered to in EU Member States and, as of 2004, between Canada and the United States. These agreements were created as a means of streamlining regional immigration systems and host country ‘shopping’ by asylum seekers. Interestingly, it is difficult to get into the asylum process in Finland as there are not many direct flights to the country from ‘third countries,’ meaning that many arrivals come through other EU countries and are rejected in an accelerated procedure (Aberg, 1999: 30). Not all Member States adhere to common standards of protection either and according to De Schutter (2008: 84), in eight EU countries the inclusion of protection on the basis of sexual orientation is not explicit in their legislation.

Another challenge is derived from the fact that “the majority of refugee decision makers are not gay or lesbian, and there are certain heterosexual biases that prevent someone from truly being able to evaluate whether or not someone is gay or lesbian.” (Graham, 2006). This heteronormative approach, although largely indeterminable, is highly discriminatory as it relies on prejudicial stereotypes about gays and lesbians to

determine the validity of one's claim. This was demonstrated when the Federal Court of Canada held in a 2005 ruling that the IRB's requirement that a claimant be effeminate in appearance or behaviour constituted a 'thoroughly discredited stereotype which should not have any bearing on the Board's judgment of the applicant's credibility.'" (LaViolette, 2007: 197).

There has also been further critique towards the ambiguity of the assessment process of these claims. While proving one's sexuality is difficult, it often comes down to the decision-maker's intuition. (Graham, 2006). Vancouver-based immigration lawyer, Robert Hughes (2008), notes that one of the major problems associated with this policy is the lack of consistency in the analysis and, similar to LaViolette, calls for the need of written guidelines to avoid incongruence and confusion. Perhaps most important to this discussion, according to Amnesty International (2001: 27), many refugees and their legal representatives are not aware that the option of filing an asylum claim on the grounds of sexual orientation is available to them.

Conclusion

The questions relating to sexual minorities and gender-related persecution and refugee status have received an increasing amount of attention from academics, select national governments, international organisations and a number of supranational authorities (i.e. UN). However, due to the ongoing human rights abuses made against sexual minorities worldwide, research within this area must continue to grow and as a collective, these same bodies must continue to search for lasting, durable solutions.

This study has aimed at articulating a contextual interpretation of LGBT asylum claims by analysing how far state practice in Canada and Finland has gone to ensure that their roles have been adhered to as signatories of the Geneva Convention. Canada is *known internationally for having one of the fairest refugee determination systems, including a remarkable reputation involving refugee claims based on sexual orientation.* (Graham, 2006) This research has illustrated that while Canada must establish clearer, more equitable guidelines for assessing a refugee claim based on sexual orientation, overall the country has upheld its signatory duty to the international community to protect asylum-seekers who face a well-founded fear

of persecution. While in Finland's case, it remains difficult to determine any noteworthy claims surrounding the success rate of the national policy to recognise LGBT asylum claims due to the fact that this data is not publicly accessible and immigration seemingly plays a much smaller role in Finland's national affairs. Nonetheless, the fact that Finland continues to grant refuge to LGBT asylum seekers and formally recognises this, is in itself, indicative of the country's position in international affairs as a human rights advocate.

Regardless of individual, religious, cultural or governmental beliefs on homosexuality and gender identity, one thing remains clear; as signatory countries of the Geneva Convention, both Canada and Finland (along with all other signatories) have an obligation to uphold their binding role to the international community and a duty to those fleeing persecution in their home state. We cannot allow our confusion or ignorance of sexual minorities to permit the continued persecution of these vulnerable groups. If we turn the other way, we are no greater than the persecutors.

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