

**Canadian Appellate Level Decisions
Dealing with Refugee Claims Based on Sexual
Orientation and Gender Identity –
Listed According to the Definition of a Convention
Refugee**

April 2015



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INTRODUCTION

In Canada, refugee claims are heard by the Immigration and Refugee Board of Canada (IRB). The IRB is Canada's largest independent administrative tribunal. It is responsible for making decisions on immigration and refugee matters in accordance with the law. It is the Refugee Protection Division (RPD) of the IRB that hears and decides the refugee protection claims presented by thousands of claimants who come to Canada annually.

If the RPD accepts a refugee claim, the claimant receives the status of “protected person,” and they can stay in Canada and apply to become a permanent resident of Canada.

If a claim is rejected, a claimant may have to leave Canada. The claimant may however, where the law permits, request that the decision of the RPD be appealed or judicially reviewed. Indeed, a failed refugee claimant may be able to appeal to the Refugee Appeal Division (RAD) of the IRB. Launched on December 15, 2012, the RAD considers appeals against decisions of the RPD to allow or reject claims for refugee protection. The RAD provides for a *de novo* appeal on a question of law; fact, or mixed law and fact. On appeal, the RAD makes one of the following decisions: (1) it can confirm the RPD decision; (2) it can set aside the decision and substitute a decision that should have been made; and (3) it can refer the matter back to the RPD.

It may also be possible, under Canada’s immigration and refugee law, for a failed claimant to ask the Federal Court of Canada to review decisions of the RPD and the RAD related to refugee protection. This is called a judicial review and it is a more limited review than the *de novo* appeal to the RAD of the IRB. The Court can agree with the original decision or return the case to the RPD to be reheard.

Finally, some decisions of the Federal Court of Canada can be appealed to the Federal Court of Appeal, and further to the Supreme Court of Canada.

This compilation of Canadian appellate level decisions covers the period from 1993 to 2015 and contains two appeals from the RAD of the IRB; a significant number of judicial reviews from the Federal Court; and finally, one case from the Supreme Court of Canada.

Decisions were selected if they identified principles of law which are settled and illustrated how those principles were applied to particular situations. Indeed, cases were selected if they set out a legal principle rather than decisions that were simply decided on the particular facts of the refugee claim.

Canadian Appellate Level Decisions Dealing with Refugee Claims Based on Sexual Orientation and Gender Identity – Listed According to the Definition of a Convention Refugee

1. Convention Refugee Definition

a. Persecution

i. Establishing a Well-Founded Fear of Being Persecuted

Polyakov v Canada (Minister of Citizenship and Immigration) [1996] FCJ No 300, 61 ACWS (3d) 350.

The claimant, a homosexual man from Moldova, claimed refugee status based on his sexual orientation and his Russian ethnic background. The Federal Court found that the claimant did not have a well-founded fear based on the evidence that the claimant was willingly prepared to return to Moldova. The claimant must establish a well-founded fear of persecution set out in the definition of a convention refugee.

Decision – DISMISSED

Burgos-Rojas v Canada (Minister of Citizenship and Immigration), [1999] FCJ No 88, 85 ACWS (3d) 884.

The claimant was a homosexual man from Chile, and, as such, the Federal Court held that the adjudicator should have assessed whether his sexual orientation alone put him at risk of persecution should he return there. There was ample documentary evidence to support the claimant's allegations that, in Chile, gay men are persecuted and in some cases incarcerated.

Decision: ALLOWED

Voyvodov v Canada (Minister of Citizenship and Immigration) (1999), 175 FTR 299, 91 ACWS (3d) 636.

A homosexual couple from Bulgaria both claimed refugee status and their separate claims were heard simultaneously. Both men were attacked by skinheads while returning home from a night club, were hospitalized and reported the incident to the police. The police did not investigate because of their sexual orientation. One gay man had been the victim of previous assaults and the adjudicator found it incomprehensible that he would be showing affection to his partner given his previous abuse and hostility in the community. The Federal Court concluded that is unreasonable to find one claimant unable to establish fear of persecution based on only one incident while questioning the credibility of the other claimant for staying in the country after suffering multiple attacks.

Decision: ALLOWED

Su v Canada (Minister of Citizenship and Immigration), 2012 FC 554, 218 ACWS (3d) 635.

The claimant, a homosexual man from China, was arrested after being seen kissing his partner in a park. He was charged with prostitution then detained and tortured by police. The evidence showed that the Chinese authorities had a quota to meet for sexual crimes and were targeting homosexuals. The claimant was put on probation and feared persecution if he were to return to the authorities in China. The adjudicator did not find the claimant credible regarding his interactions with police. The

Federal Court held that the adjudicator erred in failing to analyze the claim of a gay claimant from China that the “police arbitrarily use a variety of legal pretexts in order to penalize public displays of homosexuality,” including arresting homosexuals to meet quotas established for prostitution arrests. Decision: ALLOWED

ii. Establishing a Well-Founded Fear of Being Persecuted / Subjective Fear

Kurtkapan v Canada (Minister of Citizenship and Immigration), 2002 FC 1114, 24 Imm LR (3d) 163.

The claimant, a homosexual man from Turkey, came out to his family as a teenager and was forced to marry, which ended shortly in divorce. He made refugee claims in both England and the Netherlands, both of which were denied. After being deported back to Turkey, the claimant was detained by the police, finger printed, given an identification number and was made to report weekly to the station where he was forced to pay money. The adjudicator rejected his claim due to a lack of subjective fear of persecution. They found it implausible that he would return to Turkey after being denied refugee status from two countries. The Federal Court found the adjudicator’s decision to be unreasonable as the claimant return to Turkey was obviously involuntary.

Decision: ALLOWED

Meyer v Canada (Minister of Citizenship and Immigration), 2003 FC 878, 124 ACWS (3d) 766.

The claimant, a homosexual man from Israel was harassed and beaten at a local dance club as a teenager for embracing other men. He filed his complaints with the police twice; however no action was taken nor was anyone apprehended for the assaults. During his military training he was beaten, tortured and received death threats on numerous occasions on account of his sexual orientation. The Federal Court supported the conclusion that the claimant’s delay in leaving Israel and in claiming refugee status in Canada was not compatible with a subjective fear of persecution.

Decision: DISMISSED

Espinosa v Canada (Minister of Citizenship and Immigration), 2003 FC 1324, 127 ACWS (3d) 329.

The claimant, a homosexual man from Mexico delayed claiming refugee status for over a year with no reasonable explanation. The adjudicator determined that despite the claimants fear of imprisonment, torture and death in Mexico he had no persuasive reason for not filing a claim sooner, therefore there did not appear to be a subjective fear of persecution. The Federal Court found it reasonable to conclude that an inexplicable delay in making a claim is related to the existence of a subjective fear of persecution, an essential element in a refugee claim.

Decision: DISMISSED

Herrera v Canada (Minister of Citizenship and Immigration), 2006 FC 1272, 157 ACWS (3d) 1022.

The claimant, a homosexual man from Mexico was the victim of numerous physical attacks by colleagues and police over many years. He had moved to different regions but would fall victim to assault and harassment based upon his sexual orientation. The claimant did not file his refugee claim within a reasonable amount of time upon his arrival to Canada and could not explain the delay. The Federal Court confirmed that finding of a lack of subjective fear in and of itself warrants dismissal of

a refugee claim, because both elements of the alleged fear of persecution, subjective and objective, must be met in order to fall within the definition of a refugee.

Decision: DISMISSED

Nezhalskyi v Canada (Minister of Citizenship and Immigration) 2015 FC 299.

The claimant, a citizen of Ukraine, sought protection as a refugee on the ground of his sexual orientation. The adjudicator found that the claimant was not credible. The adjudicator drew a negative inference with respect to the claimant's subjective fear because he did not make a refugee claim at the earliest opportunity, when he was in the USA in the summer of 2010, and he then returned to the Ukraine. The adjudicator also found that the claimant's delay in leaving the Ukraine after the second attack cast doubt upon his subjective fear. The Federal Court confirmed that a delay in making a refugee claim is a relevant consideration that the adjudicator may take into account in assessing both a claimant's credibility and his subjective fear. However, in this case it was unreasonable for the adjudicator to expect the claimant to make a claim for asylum in the USA. The claimant explained, under oath, that he was very young at the time (aged 20), that he was not aware that he could claim refugee status in the USA, and that he did not fear for his life because he had not yet been attacked or beaten in the Ukraine. This is a plausible explanation for the claimant's failure to claim asylum in the USA, and the Board did not provide a reasonable explanation for rejecting it.

Decision – ALLOWED

iii. Persecution vs Discrimination

Serrano v Canada (Minister of Citizenship and Immigration), [1999] FCJ No 1203, 90 ACWS (3d) 451.

The claimant was a homosexual man from Colombia and claimed that he had a well-founded fear of persecution based upon his sexual orientation. The adjudicator found that although homophobia is prevalent in Colombian culture and can result in discrimination, they found that serious acts of abuse occurred only to "the most visible of homosexuals". The adjudicator found that the claimant was not of this group and even though he suffered abuse in his community he did not leave for some time. The Federal Court concluded that even though there is discrimination of homosexuality in Colombia, the claimant did not show that he was at serious risk of persecution.

Decision: DISMISSED

Canada (Minister of Citizenship and Immigration) v Balogh, 2001 FC 1210, 17 Imm LR (3d) 78.

The respondent in this case, a homosexual man from Hungary was beaten and detained by the police on numerous occasions as a result of him being with his male partner in public. The Federal Court found that the adjudicator was required to consider whether the respondent's sexual orientation would amount to a reasonable probability of persecution. By determining the respondent would only face discrimination upon his return, the adjudicator had decided the respondent did not meet the definition of a Convention refugee therefore his refugee should have been denied.

Decision: ALLOWED (for the Minister)

Varga v Canada (Minister of Citizenship and Immigration), 2001 FC 508, 105 ACWS (3d) 1121.

The claimants were a homosexual couple and citizens of Hungary. They had been attacked on numerous occasions and had gone to the authorities only to be told that the police could not protect

them all the time. After another attack, a passing police officer stated that they “gotten what they deserved.” The adjudicator concluded that although the claimants were credible, the attacks against them did not constitute persecution but discrimination. The Federal Court disagreed with the adjudicator’s findings that the attacks did constitute discrimination and not persecution. However since the decision was based on the availability of state protection, the application for review was denied. The Federal Court concluded that even though the state was complicit in one instance, this did not show clear evidence of a total lack of state protection.

Decision: DISMISSED

Egeresi v Canada (Minister of Citizenship and Immigration), 2003 FC 1133, 125 ACWS (3d) 1047.

The claimant, a homosexual man from Hungary was denied refugee status on the basis that he would only face discrimination if he were to return to his country of origin. The Federal Court found that the claimant had shown that the cumulative acts of harassment constituted persecution and that the adjudicator did not properly address the issue.

Decision: ALLOWED

Szabados v Canada (Minister of Citizenship and Immigration), 2004 FC 719, [2004] FCJ No 903 (QL).

The claimant a homosexual man from Hungary was forced from his home, lost his job, was beaten and received death threats from people in his neighbourhood. After moving to another town to live with his grandmother, the local authorities pressured her to kick him out as he looked “gay” and would be the victim of another attack. The adjudicator, after analyzing the documentary evidence concerning the frequency and likelihood of persecution, found that there was no objective fear of persecution. The Federal Court confirmed the decision, finding that the documentary evidence established that homosexuals are indeed subject to discrimination in Hungary but are not persecuted.

Decision: DISMISSED

Vanderli v Canada (Minister of Citizenship and Immigration), 2005 FC 559, 139 ACWS (3d) 156.

The claimant, a homosexual man from Brazil was detained by police after seen kissing his partner. He was also abandoned and threatened by his family and faced harassment at his place of employment and university. The Federal Court found that the experiences of the claimant did not amount to persecution but discrimination.

Decision: DISMISSED

Lopez v Canada (Minister of Citizenship and Immigration), 2006 FC 1156, 151 ACWS (3d) 678.

The claimant, a homosexual man from Mexico was attacked, robbed and detained by police. The claimant moved to another area where he was attacked and had his nose broken. The claimant reported the first incident involving the police but did not report the attack that followed. The Federal Court found that the claimant did not demonstrate that the harassment amounted to persecution as it must be demonstrated that the attacks constitute a serious and repeated violation of his human rights.

Decision: DISMISSED

Muckette v Canada 2008 FC 1388 (QL).

The claimant was a citizen of Saint Vincent and the Grenadines whose refugee claim was based upon the persecution he experienced as a gay man in his home country. The Federal Court held that the adjudicator erred in finding that the gay claimant was facing mere discrimination, stating that “the cumulative effects of the incidents tipped into the area of persecution when death threats, which had some degree of reality to them, were made.”

Decision: ALLOWED

Ramirez v Canada (Minister of Citizenship and Immigration), 2008 FC 466, 168 ACWS (3d) 1040.

The claimants were a gay couple from Mexico. They had received numerous threats from colleagues, neighbors and the police over many years. Most recently the couple received death threats by police after leaving a gay bar. Their car had been shot and they feared that it was the police who were responsible. The couple also feared kidnapping and extortion as their parents were demanded money in exchange for their safety. All incidents were filed with the Attorney General’s office upon which the police requested a bribe in order to investigate. The Federal Court found that cumulative harassment which could potentially be understood as persecution must be examined by the adjudicator.

Decision: ALLOWED

Ballestro Romero v Canada (Minister of Citizenship and Immigration), 2012 FC 709.

The claimant was from Venezuela and he alleged fear of persecution based on his sexual orientation and HIV status. The Federal Court held that the failure by the adjudicator to determine whether employment discrimination faced by a gay and HIV-positive claimant amounted to persecution was unreasonable, and therefore, a reviewable error.

Decision: ALLOWED

iv. Laws Criminalizing Same Sex Relations

Tchernilevski v Canada (Minister of Citizenship and Immigration) (1995), 30 Imm LR (2d) 67, 56 ACWS (3d) 377.

The claimant was active politically in his native Moldova and a recognized figure in the media. He kept his sexuality a secret as he was married. After entering politics, the claimant received threats to expose his sexuality. He feared persecution under the Moldovan penal code which made homosexuality an illegal act. The Federal Court concluded that the evidence showed the penal code which criminalized homosexuality was no longer being enforced and was actually slated for repeal. The sole existence of a law criminalizing homosexuality does not rise to the level of persecution.

Decision: DISMISSED

Birsan v Canada (Minister of Citizenship and Immigration) [1998] FCJ No 1861, 86 ACWS (3d) 400.

The claimant was a homosexual man from Romania who claimed to have a well-founded fear of persecution. The adjudicator relied on documentary evidence stating that no Romanian prisons were holding anyone who was charged under the relatively new Romanian law which criminalizes only homosexual acts that take place in public. The Federal Court found the mere of existence of laws prohibiting homosexuality in public does not prove that homosexuals are persecuted.

Decision – DISMISSED

Birsan v Canada (Minister of Citizenship and Immigration) (1998), 86 ACWS (3d) 400 (available on QL) (FCTD).

The claimant sought refugee status against Romania, alleging that he had a well-founded fear of persecution for reasons of membership in a particular social group, homosexuals. The adjudicator was of the opinion that the claimant was not a Convention refugee, holding that he did not have an objective fear of persecution. The Federal Court agreed and held that “[i]t is certainly not unreasonable to conclude that the mere existence of a law prohibiting homosexuality in public cannot prove, if it is not enforced, that homosexuals are persecuted.”

Decision: DISMISSED

Peiris v Canada (Minister of Citizenship and Immigration), 2004 FC 1251, 134 ACWS (3d) 137.

The claimant, a homosexual man from Sri Lanka was forced out of his home after coming out to his family. He founded an association that aimed to educate others about homosexuality. The group was the target of an attack where members were beaten and threatened. After reporting the incident, the police threatened to imprison the claimant and its members with Sri-Lankan anti-sodomy laws. The adjudicator found that the claimant’s family rejection and police harassment due to his “lifestyle choice” did not amount to persecution. The Federal Court found there to be a direct link between the police persecution and the claimant’s sexual orientation. Even though the state law banning sodomy was rarely enforced, evidence showed that authorities often used it to blackmail homosexuals.

Decision: ALLOWED

Zakka v Canada (Minister of Citizenship and Immigration), 2005 FC 1434, 143 ACWS (3d) 336.

The claimant arrived in Canada from Nigeria and claimed protection based on a fear of persecution by reason of his sexual orientation. He claimed to fear his family, his relatives and the villagers of his home town, who could track him down and kill him in Lagos. The Federal Court stated that a claimant cannot simply rely on the existence of a law proscribing homosexual acts to demonstrate risk. The claimant must produce evidence that similarly situated persons were subjected to arbitrary harassment and detention under the law.

Decision: DISMISSED

Oviawe v Canada (Minister of Citizenship and Immigration) 2006 FC 1114, 152 ACWS (3d) 128.

The Federal Court held that the absence of persuasive evidence regarding the manner and frequency with which section 214 of the Nigerian Criminal Code, which rendered sodomy punishable by up to 14 years’ imprisonment, supported the conclusion that the claimant did not face persecution.

Decision: DISMISSED

v. Concealment of Sexual Orientation or Gender Identity (Discretion Requirement)

Sadeghi-Pari v Canada (Minister of Citizenship and Immigration), 2004 FC 282, 37 Imm LR (3d) 150.

The Federal Court held that being compelled to forsake or conceal one's sexual orientation and gender identity may in and of itself amount to persecution. The Federal Court was clear that requiring a person to conceal or suppress their sexual orientation amounts to persecution: "Concluding that persecution would not exist because a gay woman in Iran could live without punishment by hiding her relationship to another woman may be erroneous, as expecting an individual to live in such a manner could be a serious interference with a basic human right, and therefore persecution."

Decision: ALLOWED

Fosu v Canada (Minister of Citizenship and Immigration), 2008 FC 1135, 172 ACWS (3d) 1018.

The Federal Court set aside a decision which denied refugee status to a Ghanaian gay man, rejecting the adjudicator's "finding which requires the claimant to deny or hide the innate characteristic which forms the basis of his claim of persecution." The Federal Court concluded that it is not reasonable to require the claimant to remain in hiding or conceal his true identity as to avoid detection by those would harm him.

Decision: ALLOWED

Okoli v Canada (Minister of Citizenship and Immigration), 2009 FC 332, 79 Imm LR (3d) 253.

The claimant, a homosexual man from Nigeria, was a market trader who suffered death threats, physical attacks and expulsion from his traders association. The adjudicator found that if the claimant was to practice discretion with respect to his sexual orientation, Lagos would be a viable IFA. The Federal Court confirmed, as it has done repeatedly in other cases, that such decisions are erroneous as they require an individual to repress an immutable characteristic.

Decision: ALLOWED

b. The Causal Link ("for reasons of")
i. Membership in a Particular Groups (MPSG)
1. Sexual Orientation and MPSG

Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689.

The Supreme Court of Canada decision in *Ward* confirms that gender and sexual orientation are immutable personal characteristics, and are factors by which a 'particular social group' can be delineated for the purposes of Canadian refugee law. The facts in *Ward* do not revolve around a gay or lesbian claimant. Rather the case involved a member of the Irish National Liberation Army (INLA) who, after helping two hostages escape, was sentenced to death by the terrorist organization. He fled to Canada, and sought refugee status based on his fear of persecution for membership in a particular social group. In the course of deciding whether the INLA could be considered a 'particular social group', the Supreme Court of Canada set forth a definition of the concept that, at the same time, resolved in Canadian refugee law that sexual minorities can found a fear of persecution on their membership in a 'particular social group'.

Pizarro v Canada (Minister of Employment and Immigration) (1994), 75 FTR 120, 46 ACWS (3d) 733.

The claimant a homosexual man from Argentina was denied refugee status as the adjudicator did not consider homosexuals to be members of a particular social group and therefore did not find the

claimant to be a convention refugee. The Federal Court disagreed, citing a leading Canadian Supreme Court decision (*Canada (Attorney General) v. Ward*) which defined particular social groups as having an innate or unchangeable characteristic. Such a definition encompasses individuals fearing persecution based on gender, linguistic background and sexual orientation.
Decision: ALLOWED

2. Gender Identity and MSPG

Hernandez v Canada (Minister of Citizenship and Immigration), 2007 FC 1297, 68 Imm LR (3d) 118.

The adjudicator failed to address a Mexican claimant's risk of persecution as a cross dresser/transgender individual, The Federal Court held that there was ample evidence before the adjudicator to alert them to the fact that the claimant's identity was not only a homosexual man, but also a cross-dresser and transgender individual. In failing to assess the state's ability to adequately protect homosexual individuals that are cross-dressers and transgendered, the adjudicator erred.
Decision: ALLOWED

Martinez v Canada (Minister of Citizenship and Immigration) 2011 FC 13.

The Federal Court concluded that the adjudicator mistakenly referred to a Mexican transgender man using feminine pronouns and found that he was a "transgender woman." While not a reviewable error in the circumstances of the case, the Federal Court does state: "It is, of course, unfortunate that the [adjudicator] would refer to [the male transgender claimant] with terminology that does not reflect his own self-concept."
Decision – DISMISSED

3. Bisexuality and MSPG

Valoczki v Canada , 2004 FC 492, 130 ACWS (3d) 360.

The claimant feared returning to Hungary because her former common law husband had repeatedly assaulted her after he discovered that she had entered into a relationship with another woman. The adjudicator concluded that the claimant was not a lesbian and no longer involved in a same sex relationship. The Federal Court concluded that the adjudicator committed an error by omitting to consider the very real possibility that the claimant was bisexual. The Federal Court was however satisfied that the adjudicator's conclusion that adequate state protection was available in Hungary to abused women and to gays and lesbians should not be disturbed.
Decision – DISMISSED

Santana v Canada (Minister of Citizenship and Immigration) 2007 FC 519.

The claimant was granted refugee status on the basis of her sexual orientation. She had submitted that she was a lesbian and that her personal history was tainted by persecution, rape and other ill treatment suffered in her native Angola and in Portugal where she lived for a few years. The Minister's argued that the claimant misrepresented her sexual orientation, and that once in Canada, she became involved in a romantic relationship with a man, which led to marriage, that a child was born of this union and that her attempts to sponsor him failed. While the claimant admitted to all of these allegations, she reaffirmed the truthfulness of her previous submissions and the documents on

which her refugee claim in Canada was based. She alleged that she had been in conflict, confused and unhappy, as she wanted a child and had attempted to change her sexual orientation on that very basis. Following this experience, the marriage failed, she realized that a man could not satisfy her sexual needs and she is currently in a homosexual relationship. The Federal Court struck down the vacation of her refugee status, indicating that such a subsequent relationship does not indicate misrepresentation.

Decision: ALLOWED

Odetoyinbo v Canada (Minister of Citizenship and Immigration), 2009 FC 501 (QL).

The claimant's claim was based on his alleged bisexuality. Since homosexuality is illegal in Nigeria, the claimant feared persecution because of his sexual orientation. The Federal Court held that the adjudicator's failure to make an explicit determination as to the claimant's bisexuality constituted a reviewable error and justified a redetermination of the claimant's case.

Decision: ALLOWED

4. Reliance on Stereotypes

Tremblink v Canada (Minister of Citizenship and Immigration), 2003 FC 1264, 126 ACWS (3d) 853.

The claimant was a 19 year old from the Ukraine who had been beaten and hospitalized on numerous occasions on account of his sexual orientation. He had received death threats, was abducted and raped, all of which was reported to the police who did not respond to his complaints. The adjudicator did not find it plausible that the claimant would want to stay with a Catholic priest while in Canada, nor attended a Catholic High School if he were indeed gay. The Federal Court found the adjudicator applied a stereotypical view of the life-style and preoccupations of homosexuals. The inferences that were based on stereotypes were not reasonable and therefore the negative credibility finding could not be upheld.

Decision: ALLOWED

Charles v Canada (Minister of Citizenship and Immigration), 2004 FC 1748, 136 ACWS (3d) 117.

The claimant, a homosexual man from Grenada was severely beaten by his step-father on numerous occasions on account of his sexuality. After moving to another area, he was found and beaten again by his step-father. The incidents were reported to police who did not assist. The adjudicator did not find the claimant to be a homosexual. The Federal Court found it unreasonable to expect the claimant to remember exact dates of his homosexual relationships, to belong to a homosexual organisation in Canada, or to produce corroborative evidence of homosexual relationships such as letters or photos in order to establish his sexuality.

Decision: ALLOWED

Slim v Canada (Minister of Citizenship and Immigration), 2004 FC 706, 134 ACWS (3d) 293.

The claimant, a homosexual man from Lebanon was a hairdresser and a dancer with an internationally renowned group. His application was denied based on an issue of credibility. The adjudicator found it hard to believe that the Lebanese authorities would not have caused him problems considering his "appearance and occupational activities" that would have suggested he was

a homosexual. The Federal Court found that such a stereotypical consideration cannot be used to discredit the claimants stated fear of being persecuted by the authorities based on sexual orientation.
Decision: ALLOWED

Herrera v Canada (Minister of Citizenship and Immigration), 2005 FC 1233, 142 ACWS (3d) 304.

The claimant, a homosexual from Mexico was fired from his job and beaten by co-workers on account of his homosexuality. He and his partner were attacked by police after being seen holding hands. The adjudicator did not believe the claimant to be gay, in particular stating that he did not have an “allure efféminée” (effeminacy). The Federal Court found that such a stereotype should have no bearing on the adjudicator’s judgement of the claimant’s credibility. The Federal Court went on to say that homosexuals are subject to extensive prejudice of which effeminate stereotypes are a part and it is unreasonable and ignorant to rely on such a stereotype when determining the credibility of a claimant.

Decision: ALLOWED

Kamau v Canada (Minister of Citizenship and Immigration), 2005 FC 1245, 142 ACWS (3d) 303.

The claimant, a homosexual man from Kenya, came out as a gay man when he was 20 and he met his partner in a nightclub. Fearing the homophobic sentiment of Kenyan society, he had a secret relationship with his partner for 10 years until he was found out and both men were arrested. While in prison they faced brutal attacks. The adjudicator did not believe the claimant to be gay as it doubted the claimant would be seen with his partner in a nightclub in such a homophobic society. The Federal Court determined that defining credibility based upon a general inappropriate stereotype of the behavior of homosexuals was a reviewable error.

Decision: ALLOWED

Kravchenko v Canada (Minister of Citizenship and Immigration), 2005 FC 387, 44 Imm LR (3d) 88.

The claimant from the Ukraine was unable to hide his relationship with another man and feared the dangers of living in a homophobic society. The adjudicator did not find the claimant to be a homosexual and therefore not a Convention refugee. The adjudicator found it unreasonable that the claimant would choose to be gay knowing the issues that it would cause or the fact that he could not hide his relationship. The Federal Court found that the adjudicator applied stereotypical profiles of homosexuality that cannot be assumed to be appropriate. The conclusions of the adjudicator reflect an uninformed view of male homosexuality and the Federal Court has criticized such stereotypes in assessing Convention refugee claims.

Decision: ALLOWED

Eringo v Canada (Minister of Citizenship and Immigration), 2006 FC 1488, 157 ACWS (3d) 813.

The claimant, a man from Kenya was 23 when he discovered that he was a homosexual. He had been married in order to conceal his sexual orientation as homosexuality was viewed with hostility and criminalized in Kenya. The adjudicator did not believe that the claimant could discover his sexuality at an age beyond adolescence and ignored the documentary evidence that it is common in Kenya for gay men to marry women in order to hide their sexuality. The Federal Court found that the adjudicator applied broad stereotypes of homosexuality in order to discredit the claimant and ignored documentary evidence that supported his claim.

Decision: ALLOWED

Leke v Canada (Minister of Citizenship and Immigration), 2007 FC 848, 159 ACWS (3d) 866.

The claimant, a homosexual man from Nigeria, had a wife with whom he had two children. He was also an ordained Christian pastor but had relationships with other men. The claimant was caught by his landlord with another man and was beaten. His male partner was arrested. The claimant fled to Canada where he settled in a predominantly gay district of Toronto and joined a community center which serves members of the LGBTI community in the city. The adjudicator did not find the claimant to be a homosexual as he had children and there was nothing in his voice, facial expressions or his physical demeanor that would create an impression that he was gay. The adjudicator also ignored documentary evidence that it is common for homosexuals to lead double lives in Nigeria in order to conceal their sexual orientation. The Federal Court found that the misapplication of facts and the reliance on homosexual stereotypes were errors that warranted allowing the application.

Decision: ALLOWED

Dosmakova v Canada (Minister of Citizenship and Immigration), 2007 FC 1357, 168 ACWS (3d) 367.

The claimant, a fifty-six-year old woman from Kazakhstan, began an affair with another woman while married. She feared reprisal from the negative attitudes towards homosexuality and the law against such relationships. The adjudicator found it implausible that the claimant was a lesbian as “most homosexual people have some realization with respect to their sexual orientation when they begin to explore their sexuality in their teens or early twenties...” The Federal Court determined that such an implausibility finding cannot be made on the basis of stereotypical attitudes about gay men and lesbians.

Decision: ALLOWED

Shameti v Canada (Minister of Citizenship and Immigration), 2008 FC 665, 168 ACWS (3d) 603.

The claimant, a homosexual man from Albania was not believed to be a gay man by the adjudicator and therefore was not a member of a particular social group. The adjudicator concluded that in order for a person to establish their homosexuality as a basis for their claim, it is necessary for that person to have engaged in homosexual acts. The Federal Court found that the basis of the decision was based upon erroneous beliefs about the conduct of gay men.

Decision: ALLOWED

N.K.L. v Canada (Minister of Citizenship and Immigration), 2011 FC 28, 2011 CarswellNat 732.

The claimant, a woman from Cameroon was raped at age 17 and stated this incident led to her sexual orientation as a lesbian. The adjudicator did not believe the claimant was a lesbian because she discovered her sexual orientation following a sexual assault, rather than admitting it was innate. The Federal Court concluded that such a conclusion was neither verifiable nor quantifiable. The Federal Court stated that the adjudicator erred when it stated that it had specialized knowledge that “homosexuality is innate.” There is in fact no consensus in scientific, psychiatric and social science fields that sexual orientation is innate or fixed very early in life, or the product of social conditions. The adjudicator’s position on the innate nature of homosexuality directly affected the entire assessment of the claimant’s credibility and therefore her claim, and thus could not stand.

Decision: ALLOWED

Essa v Canada (Minister of Citizenship and Immigration), 2011 FC 1493, 3 Imm LR (4th) 162.

The claimant, a homosexual man from Jordan, was seen with his lover by his uncle who threatened to have the claimant killed. The claimant went into hiding and fled the country. The adjudicator did not believe him to be gay, and therefore concluded he was not a convention refugee. Their decision was based on the claimant not going to the gay district of Montreal, a lack of knowledge of the gay clubs and keeping his sexuality private while in Canada. The Federal Court found that such stereotypical opinions are not reasonable and therefore cannot be used to refute the claimant's sexuality.

Decision: ALLOWED

Latsabidze v Canada (Minister of Citizenship and Immigration), 2012 FC 1429, 224 ACWS (3d) 435.

The claimant, a homosexual man from Georgia had been persecuted on account of his sexual orientation. The adjudicator did not believe that the claimant to be a homosexual as he was not involved in the gay community in Toronto and did not believe that the claimant would want to stay in a monogamous relationship with his partner who was still in Georgia. The Federal Court found the belief that gay men are promiscuous and incapable of having monogamous relationships are unacceptable stereotypes. The Federal Court concluded that plausibility findings cannot be made on the basis of stereotypical attitudes or projected behaviours that are not supported by evidence.

Decision: ALLOWED

Kornienko v Canada (Minister of Citizenship and Immigration) 2012 FC 1419

The adjudicator rejected the claim because the claimant from Ukraine was not believed to be a gay man: he had not had any sexual or romantic encounters in several years.. The Federal Court took issue with the adjudicator's belief that gay men are promiscuous and that anyone who is not sexually active is unlikely to be "truly gay". The Federal Court concluded that this was a form of stereotyping that clearly constitutes a reviewable error. It goes to the heart of the adjudicator's credibility finding and dictates that the adjudicator's decision be set aside.

Decision: ALLOWED

5. Imputed Membership in a Particular Social Group

Dykon v Canada (Minister of Employment and Immigration) (1994), 25 Imm LR (2d) 193, 50 ACWS (3d) 1085.

The claimant, a citizen of Ukraine, sought refugee status based on the fear of persecution because he was perceived to be a homosexual. The claimant was sexually assaulted by another man and because of this incident was perceived to be a homosexual. His mother had received threats of extortion as a result of this perception. The Federal Court concluded that there was persecution against the claimant based on his imputed homosexuality. The Federal Court stated that "it is totally irrelevant ... whether he was in fact a homosexual or not." It is the beliefs of the persecutors that are important, and in this case the individuals responsible for the harassment perceived the claimant to be a homosexual.

Decision: ALLOWED

Afolabi v Canada (Minister of Citizenship and Immigration), 2006 FC 468, 147 ACWS (3d) 486.

The claimant, a young man from Lagos, Nigeria lived with his uncle after the death of his father at age 16. He was sexually abused by his uncle and fled the country. The claimant feared going back to Nigeria as his uncle had spread rumours that he was a homosexual and he feared that if he filed charges against him he would be arrested under the Nigerian law which prohibits homosexual acts. The Federal Court concluded that the claimant, even if he was perceived to be a homosexual, would not be at risk of state persecution because the documentary evidence shows that law is rarely enforced. The Federal Court also found that the claimant had a viable IFA in the southern region of Nigeria where he would not be persecuted.

Decision: DISMISSED

R.E.A.J. v Canada (Minister of Citizenship and Immigration), 2012 FC 209, 215 ACWS (3d) 476.

The claimant, a citizen from El Salvador, owned a popular restaurant that was known to be frequented by homosexuals. He was asked by a local gang to sell drugs to which he refused. They threatened him with violence and accused him of being a gay because homosexuals went to his restaurant. The Federal Court found that the primary reason for the claimant being targeted was not for his perceived sexual orientation but rather his ownership of the restaurant and potential to sell drugs. The claimant was a victim of criminality, not persecution due to an imputed membership of a particular social group.

Decision: DISMISSED

Corneille v Canada (Minister of Citizenship and Immigration) 2014 FC 901.

The claimant was an 8 year old citizen from St Lucia. He claimed refugee protection, testifying that he was verbally and physically assaulted in St Lucia because his mother is a lesbian. The adjudicator dismissed the child's claim mainly because it did not believe his mother's evidence about her sexual orientation. The Federal Court held that the adjudicator failed to consider the child's evidence. The Federal Court also found that the adjudicator failed to address the possibility that the child's mother may be perceived to be a lesbian (or bisexual) and that, in an overtly homophobic country such as St Lucia, the child may suffer adverse consequences as a result. The Court held that there was some evidence supporting that possibility which the adjudicator dismissed without adequate explanation.

Decision – ALLOWED

ii. Political Opinion

Hernandez v Canada (Minister of Citizenship and Immigration), 2003 FC 182, 228 FTR 253.

The claimant, a transvestite, homosexual man from Mexico was an outspoken advocate for LGBTI rights and critic of police brutality towards sexual minorities. The claimant was harassed by police, and was told by his brother, a police officer, that his name was put on a list of people that were known to have disappeared. The adjudicator rejected his claim on the basis that he was merely harassed by authorities and did not show a well-founded fear of persecution. The Federal Court disagreed and found that the claimant would be at a greater risk of persecution based upon his political activism and being a sexual minority.

Decision: ALLOWED

c. State Protection

Szorenyi v Canada (Minister of Citizenship and Immigration), 2003 FC 1382, 127 ACWS (3d) 737.

The claimant, a homosexual man from Hungary, was beaten on numerous occasions and when he reported a specific incident to the police they did not pursue an investigation as there were no witnesses. The claimant did not report a subsequent attack as he believed it would not be of any use as other homosexuals he knew did not receive state protection and his experience with police did not amount to any protection. The Federal Court found that the claimant must provide clear and convincing proof that the state is not able to provide protection. The claimant's argument that other homosexuals did not receive protection was not sufficient and by only seeking protection once did not confirm the inability of the state to protect him.

Decision: DISMISSED

Carrillo v Canada (Minister of Citizenship and Immigration), 2004 FC 944, 132 ACWS (3d) 555.

The claimant, a lesbian from Costa Rica, faced persecution from certain members of the local police force. The Federal Court found that it must be objectively unreasonable for the claimant to seek state protection. If local authorities are harassing an individual, it is objectively reasonable to expect the claimant to seek protection from a state agency. If the documentary evidence shows that such state protection would not be possible then such an expectation would not be required. In this case, the documentary evidence showed that there are effective legal remedies for the claimant and that state protection was adequate.

Decision: DISMISSED

Franklyn v Canada (Minister of Citizenship and Immigration), 2005 FC 1249, 142 ACWS (3d) 308.

The claimant, a lesbian from St. Vincent and the Grenadines, was subject to abuse by her ex-boyfriend on account of her relationships with other women. The police would not assist after numerous complaints and the claimant feared inadequate state protection, considering that her ex-boyfriend's uncle was a sergeant in the police force. The Federal Court found that it was not objectively reasonable that the claimant seek further protection after having been ignored previously.

Decision: ALLOWED

Inigo Contreras v Canada (Minister of Citizenship and Immigration), 2006 FC 603, 148 ACWS (3d) 782.

The adjudicator accepted the claimant's identity, and his assertions of being homosexual and HIV positive. However, the claim was denied on the basis that he failed to establish a lack of state protection. No evidence was presented that the police actually harassed him or that state protection was not available, as it was never sought. The Federal Court agreed that the documentary evidence, including the *2004 United States Department of State Report*, was far from definitive on the issue of persecution. The evidence suggested the existence of discrimination against homosexuals and acts of persecution, but also pointed to government efforts to fix the situation and to the work of NGOs in trying to improve the treatment of sexual minorities.

Decision: DISMISSED

Guinez v Canada (Minister of Citizenship and Immigration), 2006 FC 211, 146 ACWS (3d) 318.

The claimant, a homosexual man from Chile, was a lieutenant in the Chilean army. His sexual orientation was discovered and as a result was beaten by two colleagues and forced to resign. He suffered further threats from the same colleagues. The adjudicator found that, if the former colleagues attempted to harm him again, he would receive police protection from the police. The Federal Court held that this conclusion was not reasonable as the adjudicator had accepted that the Chilean police abused their authority and had a homophobic attitude towards homosexuals with whom they were in contact. Further, no precise evidence was cited as to whether the steps taken by the government to improve homosexual protection had been successful.

Decision: ALLOWED

Castro et al v Canada (Minister of Citizenship and Immigration), 2006 FC 332, 2006 CarswellNat 627.

The claimants were a homosexual couple from Costa Rica. In upholding the denial of their claim on the basis of the availability of state protection, the Federal Court noted that it was not the responsibility of the adjudicator to prove that the state would respond to specific threats. Rather, it was the claimants who bore the burden of rebutting the presumption of state protection. Secondly, the level of protection demanded by the claimants was simply unattainable. The claimants were in effect, asserting that they should have been able to go to the police one time, report the litany of wrongs and receive a «guarantee» that each and every wrong would be stopped and prevented. While both claimants experienced abuse which might have made it difficult for them to approach the police or pursue other avenues of redress available, they were not excused from the obligation to do so.

Decision: DISMISSED

Jack v Canada (Minister of Citizenship and Immigration), 2007 FC 93, 155 ACWS (3d) 159.

The claimant, a citizen of Grenada, was sexually assaulted and sexually extorted by a neighbour after fleeing an abusive step-father as a teenager. The claimant was harassed and beaten on account of his perceived relationship with his abuser. The claimant did not seek assistance from the police as he knew another perceived homosexual who was a victim of violence and did not receive police assistance. The Federal Court found the claimant could rely on the experience of a similarly situated individual to determine whether state protection was available or not.

Decision: ALLOWED

Neto v Canada (Minister of Citizenship and Immigration), 2007 FC 664, 158 ACWS (3d) 811.

The claimant, a homosexual man from Brazil, suffered abuse from his grandfather and police on account of his sexual orientation. The adjudicator accepted that state authorities were involved in the persecution of homosexuals but determined that state protection was still available. The Federal Court found such a contradiction to be unreasonable. The Federal Court stated that although Brazil is making efforts to combat homophobia, consideration must be given to whether these actions have translated into meaningful protection.

Decision: ALLOWED

Soberanis v Canada (Minister of Citizenship and Immigration), 2007 FC 985, 160 ACWS (3d) 861.

The claimant, a homosexual man from Mexico faced abuse and harassment in his home town. He had moved to another city where he had a relationship with a political advisor. He exposed

corruption within the political party and as a result was abducted, raped and tortured. The police only laughed and insulted the claimant when he sought assistance. The Federal Court concluded that the claimant made reasonable attempts to seek state protection from local authorities. A failure of state officials at the local level does not necessarily imply a failure of state protection. However the adjudicator must consider such evidence based upon the claimant's experiences.

Decision: ALLOWED

Melo v Canada (Minister of Citizenship and Immigration), 2008 FC 150, 165 ACWS (3d) 335.

The claimants, a homosexual couple from Brazil, were victims of threats, violence and mistreatment for many years. The Federal Court noted that the adjudicator, in assessing the availability of state protection, only focused on the positive legislative changes that had been made in Brazil. The Federal Court held that this was an error, as the "real life situation" of the claimants had to be examined. It further stated that decision-makers must address "whether the legislative changes have in fact resulted in any meaningful protection" for sexual minorities.

Decision: ALLOWED

Ramirez v Canada (Minister of Citizenship and Immigration), 2008 FC 466, 168 ACWS (3d) 1040.

The claimants were a gay couple from Mexico. They had received numerous threats from colleagues, neighbors and the police over many years. Most recently the couple received death threats by police after leaving a gay bar. Their car had been shot and they feared that it was the police who were responsible. The couple also feared kidnapping and extortion as their parents were demanded money in exchange for their safety. All incidents were filed with the Attorney General's office upon which the police requested a bribe in order to investigate. The Federal Court found that cumulative harassment which could potentially be understood as persecution must be examined by the adjudicator. Also, if efforts were made to seek assistance from authorities but no action was taken, the adjudicator must explain why further action would be needed if previous efforts were ineffective. The analysis of state protection must take into account the personal experience and efforts of the claimants.

Decision: ALLOWED

Smith v Canada (Minister of Citizenship and Immigration), 2009 FC 1194, 86 Imm LR (3d) 114.

The claimant, a lesbian from the US, was a mechanic in the US military. She received numerous threats and harassment from her colleagues and did not reach out to her superiors for fear of reprisal. A homosexual serviceman was beaten to death at the same base where she was stationed. She attempted to be discharged by disclosing her sexual orientation but was denied. She deserted and still received further threats. She feared persecution as a result of the military law that would be applied to her based upon desertion. The Federal Court found that given the specific nature of the claimant's situation, her attempt to be discharged was adequate in seeking state protection as the hierarchical nature of the military did not allow her to seek help from a higher ranking official. The experience of the claimant was consistent with documentary evidence that indicated military officials were complacent or participated in harassment and abuse directed at homosexual service members which demonstrated a lack of state protection.

Decision: ALLOWED

Villicana v Canada (Minister of Citizenship and Immigration), 2009 FC 1205, 86 Imm LR (3d) 191.

The Federal Court stated that democracy alone does not ensure adequate state protection; the quality of the democratic institutions providing that protection must be considered. In this case, where claim was made by a Mexican gay man and his family, the claimant testified that “the Mexican police discriminate against homosexuals and, as a result, assistance would not be forthcoming.” The Federal Court concluded that the evidence before the adjudicator suggested “that all police forces in Mexico are riddled with corruption and are operating outside the law” and the adjudicator had an obligation to review it.

Decision: ALLOWED

Kadah v Canada (Minister of Citizenship and Immigration), 2010 FC 1233, 195 ACWS (3d) 1109.

The claimant, a homosexual Arab Palestinian man living in Israel, was subject to multiple physical attacks by his family and received numerous threats on account of his sexuality. He had moved several times in an attempt to flee the abuse. The claimant sought assistance from police after a fight but was told not to bother them. The Federal Court determined where the state is a functioning democracy, the claimant must have exhausted all courses of action available to him. A single incident of refusal of assistance is insufficient to negate the presumption of state protection. However, a review of inadequate state protection of similar situated individuals can be addressed. The Federal Court found the documentary evidence showed that Israeli police violence towards both Arab Palestinians and homosexuals was extensive and should have been considered by the adjudicator.

Decision: ALLOWED

Varadi v Canada (Minister of Citizenship and Immigration), 2013 FC 407, 227 ACWS (3d) 842.

The claimant, a Roma citizen and lesbian from Hungary, suffered abuse from her husband and harassment from the community. The claimant made numerous attempts to seek protection from authorities but they refused to help. She was threatened, sexually assaulted and attacked at her workplace. The adjudicator found the abuse amounted only to discrimination and that the claimant still had the option to approach the Police Complaints Commission. The Federal Court found that since the claimant had gone to police on numerous occasions, it was not reasonable to expect her to address the Police Complaints Commission given her previous experiences. The adequacy of state protection cannot be taken for granted because a country is a democracy and is taking efforts to protect citizens. The evidence demonstrated that the state initiatives have not addressed the claimant’s circumstances and therefore state protection was not available to her.

Decision: ALLOWED

Galogaza v Canada (Minister of Citizenship and Immigration) 2015 FC 407.

The claimant, a citizen of Croatia, claimed refugee protection based on his fear of persecution due to his Serbian ethnicity and his sexual orientation. The adjudicator found that adequate, albeit not perfect, state protection was available, and rejected his claim. The Federal Court held that the adjudicator unduly emphasized Croatia’s efforts to improve the situation faced by minorities and downplayed its failure to achieve concrete results. Further, the adjudicator imposed an obligation on the claimant to seek out state protection which, in his circumstances, is not legally required. There is no absolute requirement to approach state authorities for protection. The claimant feared openly disclosing his sexual orientation because it could well have led to further persecution, not protection. The evidence shows that most homosexuals in Croatia choose, out of fear, not to disclose their

sexual orientation or to report the violence to which they are subjected. On the evidence, therefore, the claimant's fear was not unreasonable.

Decision – ALLOWED

Banda v Canada (Minister of Citizenship and Immigration) 2015 FC 474.

The claimant was a citizen of the Slovak Republic and of Roma ethnicity. He arrived in Canada with his same-sex partner and claimed refugee status based on his ethnicity and sexual orientation. The adjudicator found that the Slovak Republic is a functioning democracy, and that there was adequate state protection for victims of crime. The Federal Court disagreed and held that the state protection analysis “is deficient because [the adjudicator] looks to efforts and not results.” According to the Federal Court, the adjudicator fails “to address whether there actually is state protection available on the ground for gay Roma”.

Decision – ALLOWED

d. International Flight or Relocation Alternative

Gomez v Canada (Minister of Citizenship and Immigration) (1998), 150 FTR 156, 81 ACWS (3d) 130.

The claimant was a homosexual man from Puerto Vallarta, Mexico, who had established a well-founded fear of persecution in that city as he had been detained and brutalized by the police. The adjudicator found that the claimant had an internal flight alternative (IFA) in other major cities within Mexico. The Federal Court concluded that the adjudicator must consider the specific circumstances of the claimant as well as the country conditions when establishing the availability of an IFA.

Decision – ALLOWED

Garcia v Canada (Minister of Citizenship and Immigration), 2005 FC 807, 138 ACWS (3d) 1065.

The claimant, a homosexual man from Mexico, had been a victim of verbal and sexual violence at the hands of police in Ruiz and was a victim of police extortion in Puerto Vallarta. The adjudicator found there to be an IFA in Mexico City. The Federal Court found that evidence showing violence towards gays and lesbians in a potential IFA (Mexico City) must be examined and explained by the adjudicator and not simply ignored.

Decision: ALLOWED

Parrales v Canada (Minister of Citizenship and Immigration), 2006 FC 504, 54 Imm LR (3d) 120.

The claimant, a lesbian from Mexico, suffered severe abuse from police in Querétaro to the point where she required reconstructive surgery. She reported the incidents to the Human Rights Commission but did not receive assistance. The claimant moved to two other cities where she continued to fall victim to both physical and sexual abuse by both police and civilians. Her experiences led to severe psychological trauma to which she sought therapy. Her claim was denied on account of an IFA in Mexico City. For an IFA to be viable there must be no serious threat of persecution and it is reasonable for the claimant to seek refuge there upon consideration of all circumstances. Although the claimant would not be persecuted in Mexico City, the Federal Court concluded that her personal circumstances and previous experiences could not be ignored by the adjudicator and must be considered when establishing an IFA.

Decision: ALLOWED

De La Rosa v Canada (Minister of Citizenship and Immigration), 2008 FC 83, 164 ACWS (3d) 497.

The claimant, a homosexual man from Mexico, was beaten and stabbed by an ex-lover. When he tried to hide in another city, his attacker attempted to find him. The police did not assist the claimant. The adjudicator concluded that an IFA was available to the claimant. The Federal Court stated that the burden of proof to establish that there is no viable IFA rests on the claimant.
Decision: DISMISSED

Okoli v Canada (Minister of Citizenship and Immigration), 2009 FC 332, 79 Imm LR (3d) 253.

The claimant, a homosexual man from Nigeria, was a market trader who suffered death threats, physical attacks and expulsion from his traders association. The adjudicator found that if the claimant was to practice discretion with respect to his sexual orientation, Lagos would be a viable IFA. The Federal Court confirmed, as it has done repeatedly in other cases, that such decisions are erroneous as they require an individual to repress an immutable characteristic.
Decision: ALLOWED

Su v Canada (Minister of Citizenship and Immigration), 2012 FC 554, 218 ACWS (3d) 635.

The claimant, a homosexual man from China, was arrested after being seen kissing his partner in a park. He was charged with prostitution then detained and tortured by police. The evidence showed that the Chinese authorities had a quota to meet for sexual crimes and were targeting homosexuals. The claimant was put on probation and feared persecution if he were to return to the authorities in China. The Federal Court found that the authorities were using legal pretexts in order to penalize public displays of homosexuality. The adjudicator did not find the claimant credible regarding his interactions with police and concluded that he had an IFA in Shanghai. The Federal Court found that an IFA is not viable if the claimant must face persecution in order to obtain permission to travel to the IFA.
Decision: ALLOWED

e. Safe Third Countries

Martinez v Canada (Minister of Citizenship and Immigration), 2003 FC 1005, 126 ACWS (3d) 107.

The claimant, a lesbian from Mexico, claimed to have a well-founded fear of persecution based on her sexual orientation. The Federal Court found that since the claimant had an IFA, that she did not claim refugee status in a safe third country while traveling in Europe, and that the documentary evidence suggested strong support systems in Mexico for homosexuals, she did not meet the definition of a Convention Refugee.
Decision: DISMISSED

Cuesta v Canada (Minister of Citizenship and Immigration), 2005 FC 5, 136 ACWS (3d) 898.

The claimant, a homosexual man from Colombia, although not having suffered persecution himself, insisted he was at greater risk because he was now living openly with another man. The Federal Court found that since the claimant did not seek asylum in other countries he visited prior to

coming to Canada (Italy, Spain, UK and Mexico), nor did he fear returning to Colombia (he visited twice since arriving in Canada), the claimant did not have an objective fear of persecution.

Decision: DISMISSED

Romero v Canada (Minister of Citizenship and Immigration), 2005 FC 1705, 144 ACWS (3d) 1086.

The claimant, a bi-sexual woman from Panama, had a relationship with a female classmate in high school. She was shunned by her family, friends and her church. She went to Costa Rica for four years for university to avoid harassment. Upon her return, she started a relationship with the same female classmate. Her partner's father, an influential figure in Panama, threatened to kill the claimant and attack her parents. The Federal Court found that Costa Rica was not a practical safe third country as the claimant was not seeking refugee status at that time. The events that led the claimant to seek refugee status did occur until years after her return from the safe third country.

Decision: ALLOWED

Herrera v Canada (Minister of Citizenship and Immigration), 2007 FC 979, 161 ACWS (3d) 469.

The claimant, a homosexual man from El Salvador, was in a relationship with a gang member. After discovering the relationship, the gang killed the claimant's partner then beat and sexually assaulted the claimant. The claimant fled the United States where he was granted Protective Status and lived for five years. The Federal Court found that the claimant's extended stay in the US and his failure to disclose that information was sufficient to reject his refugee claim. A lengthy stay in a safe third country without making a refugee claim indicates a lack of subjective fear of persecution.

Decision: DISMISSED

f. *Sur Place* Claims

Kyambadde v Canada (Minister of Citizenship and Immigration), 2008 FC 1307, 337 FTR 93.

The claimant, a homosexual man from Uganda, was married with children but had a 20 year relationship with a man. They were attacked while together and the claimant fled the country after leaving the hospital. The claimant submitted that a *sur place* claim should have been considered since he was a gay activist in Canada and he will be at risk if forced to return to Uganda where homosexuals are vilified and sexual rights activists are subject to harassment. The adjudicator did not find the claimant to be credible therefore did not examine a *sur place* claim. The Federal Court defined a refugee *sur place* as a person who is not a refugee when he left his country of origin but becomes a refugee at a later date, which can arise from changes within his country or due to an action of the individual while outside his country of origin.

Decision: DISMISSED

2. Procedural Issues in the Adjudication of LGBTI Claims

a. Credibility and Establishing the Claimant's Sexual Orientation or Gender Identity

Boteanu v Canada (Minister of Citizenship and Immigration), 2003 FC 299, 121 ACWS (3d) 329.

A homosexual man from Romania, the claimant had been subject to verbal and physical by police, had his property vandalized and was the victim of harassment at his university on account of his

sexual orientation. He had been detained and threatened to be charged with homosexual behavior under the Romanian Criminal Code. After receiving other threats, he had made attempts to seek state protection but to no avail. The adjudicator found his testimony to be implausible as he “did not act as the CRDD (adjudicator) might expect of a homosexual in Romania.” The Federal Court found that since there was no evidence to establish what exact behaviour that the adjudicator expected, the implausibility finding was not reasonable. Although the authorities no longer lay charges against homosexuals, the mistreatment of sexual minorities is still serious and systemic.
Decision: ALLOWED

Tremblink v Canada (Minister of Citizenship and Immigration), 2003 FC 1264, 126 ACWS (3d) 853.

A 19 year old from the Ukraine, the claimant was a homosexual man who had been beaten and hospitalized on numerous occasions on account of his sexual orientation. He had received death threats, was abducted and raped all of which was reported to the police who did not respond. The adjudicator did not find it plausible that the claimant would want to stay with a Catholic priest while in Canada, nor attended a Catholic High School if he were indeed gay. The Federal Court found the adjudicator applied a stereotypical view of the life-style and preoccupations of homosexuals. The inferences that were based on stereotypes were not reasonable and therefore the negative credibility finding could not be upheld.

Decision: ALLOWED

Charles v Canada (Minister of Citizenship and Immigration), 2004 FC 1748, 136 ACWS (3d) 117.

The claimant, a homosexual man from Grenada, was severely beaten by his step-father on numerous occasions on account of his sexuality. After moving to another area, he was found and beaten again by his step-father. The incidents were reported to police who did not assist. The adjudicator did not find the claimant to be a homosexual. The Federal Court found it unreasonable to expect the claimant to remember exact dates of his homosexual relationships, to belong to a homosexual organisation in Canada, or to produce corroborative evidence of homosexual relationships such as letters or photos in order to establish his sexuality.

Decision: ALLOWED

Herrera v Canada (Minister of Citizenship and Immigration), 2005 FC 1233, 142 ACWS (3d) 304.

The claimant, a homosexual from Mexico was fired from his job and beaten by co-workers on account of his homosexuality and he and his partner were attacked by police after being seen holding hands. The adjudicator did not believe the claimant to be gay, in particular stating that he did not have an “allure efféminée” (effeminacy). The Federal Court found that such a stereotype should have no bearing on the adjudicator’s judgement of the claimant’s credibility. The Federal Court went on to say that homosexuals are subject to extensive prejudice of which effeminate stereotypes are a part and it is unreasonable and ignorant to rely on such a stereotype when determining the credibility of a claimant.

Decision: ALLOWED

Kamau v Canada (Minister of Citizenship and Immigration), 2005 FC 1245, 142 ACWS (3d) 303.

The claimant, a homosexual man from Kenya, came out as a gay man when he was 20 and he met his partner in a nightclub. Fearing the homophobic sentiment of Kenyan society he had a secret

relationship with his partner for 10 years until he was found out and both men were arrested. While in prison they faced brutal attacks. The adjudicator did not believe the claimant to be gay as it doubted the claimant would be seen with his partner in a nightclub in such a homophobic society. The Federal Court determined that defining credibility based upon a general stereotype of the behavior of homosexuals was not appropriate.

Decision: ALLOWED

Magradze v Canada (Minister of Citizenship and Immigration), 2006 FC 20, 145 ACWS (3d) 899.

The claimant, a homosexual man from Georgia, feared persecution by reason of his sexual orientation. His claim was rejected as the adjudicator did not believe him to be a gay man. The Federal Court held that it is open to the adjudicator to draw a negative inference from a claimant's inability to clearly describe sexual activities with an alleged lover. However, the Federal Court also concluded that decision-makers should not define a claimant's homosexuality by the performance of certain acts.

Decision: DISMISSED

Dosmakova v Canada (Minister of Citizenship and Immigration), 2007 FC 1357, 168 ACWS (3d) 367.

The claimant, a fifty-six-year old woman from Kazakhstan, began an affair with another woman while married. She feared reprisal from the negative attitudes towards homosexuality and the law against such relationships. The adjudicator found it implausible that the claimant was a lesbian as "most homosexual people have some realization with respect to their sexual orientation when they begin to explore their sexuality in their teens or early twenties..." The Federal Court determined that such implausibility findings cannot be made on the basis of stereotypical attitudes.

Decision: ALLOWED

Shameti v Canada (Minister of Citizenship and Immigration), 2008 FC 665, 168 ACWS (3d) 603.

The claimant, a homosexual man from Albania, was not believed to be a gay man by the adjudicator and therefore was not a member of a particular social group. The adjudicator concluded that in order for a person to establish their homosexuality as a basis for their claim, it is necessary for that person to have engaged in homosexual acts. The Federal Court found that the basis of the decision was based upon erroneous beliefs about the conduct of gay men.

Decision: ALLOWED

N.K.L. v Canada (Minister of Citizenship and Immigration), 2011 FC 28, 2011 CarswellNat 732.

The claimant, a woman from Cameroon, was raped at age 17 and stated this incident led to her sexual orientation. The adjudicator did not believe the claimant was a lesbian because she discovered her sexual orientation following a sexual assault, rather than admitting it was innate. The Federal Court concluded that such a conclusion was neither verifiable nor quantifiable. The Federal Court stated that the adjudicator erred when it stated that it had specialized knowledge that "homosexuality is innate." There is in fact no consensus in scientific, psychiatric and social science fields that sexual orientation is innate or fixed very early in life, or the product of social conditions. The adjudicator's position on the innate nature of homosexuality directly affected the entire assessment of the claimant's credibility and therefore her claim, and thus could not stand.

Decision: ALLOWED

Essa v Canada (Minister of Citizenship and Immigration), 2011 FC 1493, 3 Imm LR (4th) 162.

The claimant, a homosexual man from Jordan, was seen with his lover by his uncle who threatened to have the claimant killed. The claimant went into hiding and fled the country. The adjudicator did not believe him to be gay, therefore concluded he was not a convention refugee. Their decision was based on the claimant not going to the gay district of Montreal, a lack of knowledge of the gay clubs and keeping his sexuality private while in Canada. The Federal Court found that such stereotypical opinions are not reasonable and therefore cannot be used to refute the claimant's sexuality.

Decision: ALLOWED

Latsabidze v Canada (Minister of Citizenship and Immigration), 2012 FC 1429, 224 ACWS (3d) 435.

The claimant, a homosexual man from Georgia, had been persecuted on account of his sexual orientation. The adjudicator did not believe that the claimant to be a homosexual as he was not involved in the gay community in Toronto and did not believe that the claimant would want to stay in a monogamous relationship with his partner who was still in Georgia. The Federal Court found that the views that gay men are promiscuous and incapable of having monogamous relationships are unacceptable stereotypes. The Federal Court concluded that plausibility findings cannot be made on the basis of stereotypical attitudes or projected behaviours that are not supported by evidence.

Decision: ALLOWED

Buvu v. Canada (Citizenship and Immigration) 2013 FC 850.

The claimant was a citizen of Zimbabwe who claimed refugee protection on the basis of her sexual orientation. In considering the testimony and the evidence of the claimant, the Federal Court held that the adjudicator relied upon and made findings based upon so-called personal and extrinsic knowledge of sexual minorities, and of gay and lesbian establishments and groups that was never put to the claimant. This is procedurally unfair and cannot support a finding of no credibility. The adjudicator's attitude to the facts of the claimant's testimony was considered cavalier and demonstrated a complete lack of awareness of the procedural fairness issues involved. The Federal Court characterized the decision as "an embarrassment to our refugee process." Overall, Court held that "the whole decision is unfair, unsafe and unreasonable and must be returned for reconsideration by a differently constituted RPD."

Decision: ALLOWED

Strugar v Canada (Minister of Citizenship and Immigration) 2013 FC 880.

The claimant family members are all Croatian citizens who sought refugee protection on the basis that the wife and mother is a lesbian. Her husband knew that she was a lesbian when he married her; however, they agreed to raise children together and to have separate sexual relationships. The marriage would allow them to have a family, and would provide a cover for the wife's homosexuality. In rejecting the claim for refugee protection, the adjudicator failed to make any clear finding as to whether or not the claimant was lesbian. The Federal Court held that although there was no explicit statement that the adjudicator found the claimant to be a lesbian, the adjudicator did consider whether a lesbian sexual orientation would put her personally at risk in Croatia and found that state protection was available and adequate.

Decision – DISMISSED

X (Re), Immigration and Refugee Board of Canada (Refugee Appeal Division), 2014 CarswellNat 4305, 2014 CanLII 64257.

The claimant, a homosexual man from Algeria, had tried to hide his sexual orientation but was often victim of threats, insults and attacks. When he arrived in Canada he started a relationship with a man who also acted as a witness at his refugee hearing. The adjudicator had issue with inconsistencies in the claimant's testimony pertaining to past persecution and found the claimant not be a homosexual. Furthermore, the adjudicators did accept the witness's testimony as it was "self-serving". The Refugee Appeal Division of the Immigration and Refugee Board of Canada found the adjudicator did not take into account that the claimant had to conceal his homosexuality while in Algeria to avoid persecution and did not consider the consequences if the claimant was forced to return. The adjudicator must consider all the evidence pertaining to the sexuality of the claimant, including the statements given by the witness which corroborated the claimant's sexual orientation, and such statements cannot be dismissed as self-serving.

Decision: ALLOWED

X (Re) Immigration and Refugee Board of Canada (Refugee Appeal Division), 2014 CarswellNat 855, 2014 CanLII 15015.

The claimant, a homosexual man from Nigeria, suffered mistreatment and threats from his father. He was punished under Sharia law for his sexuality and his partner was killed in 2012. The adjudicator found inconsistencies in the claimant's testimony and did not find him credible with respect to his sexual orientation. They also did not attach any value to a letter from a homosexual support organization corroborating his sexual identity. The Refugee Appeal Division (RAD) of the Immigration and Refugee Board established that if there are doubts as to the credibility of the claimant's testimony, corroborative evidence can be reasonably demanded. The sworn testimony of the claimant creates a presumption of truthfulness and should have been accepted by the adjudicator. To further support his claim, evidence which specifically stated that the claimant wanted to live peacefully as a gay man was provided and should have been given more weight in determining the credibility of the claimant's sexuality. The RAD confirmed that it is possible for the claimant to have inaccuracies in relation to past allegations without compromising the truthfulness of his sexual orientation. The RAD concluded further that it is possible for a claimant to have hidden their sexuality to avoid persecution and therefore a claim could be founded on the assessment of the consequences the person would have to face upon returning to their country.

Decision: ALLOWED

b. Implausibility Findings

Boteanu v Canada (Minister of Citizenship and Immigration), 2003 FCT 299, 121 ACWS (3d) 329.

In a claim based on sexual orientation, the adjudicator concluded as implausible the claimant's statement that his classmates and teachers discovered his homosexuality, given he also testified he lived a much closeted life. The Federal Court rejected this conclusion, stating that it is obvious that the claimant's fellow students did not need a public declaration to label and target him as a homosexual. The Federal Court held that the implausibility finding was unsupported by evidence and could not stand.

Decision: ALLOWED

Dosmakova v Canada (Citizenship and Immigration), 2007 FC 1357 at para 12 (QL).

The adjudicator did not believe the claimant's sexual orientation because she hadn't realized her same-sex attractions until she entered into a lesbian relationship in her mid-50s. The adjudicator held that this was not plausible since "most homosexual people have some realization with respect to their sexual orientation when they begin to explore their sexuality in their teens or early twenties." The adjudicator also found the claimant's emotional reaction to be implausible. The claimant had described that in entering a lesbian relationship "she felt happiness and sexually satisfied, that she was happy about it and had no regrets." The adjudicator concluded that given the homophobia in her country, "it is reasonable to expect that she would express some misgivings with respect to her initial feelings." The Federal Court overturned the decision, because the plausibility findings were "unsupported by the evidence and [were] patently unreasonable."

Decision: ALLOWED

Tsybanko v Canada (Minister of Citizenship and Immigration), 2008 FC 819 (QL).

The claimant was a Ukrainian citizen who claimed a fear of persecution by reason of her lesbian sexual orientation. The claimant testified that her father called her relatives and told them she is gay. The adjudicator found it implausible the father would call his relatives to spread his shame. The Federal Court held that the adjudicator's implausibility finding could not be sustained. The adjudicator offered no evidence to support its implausibility findings. The Federal Court was of the view the adjudicator speculated when they concluded that a father's shame over a daughter's homosexuality would outweigh his outrage, and it was implausible that the father would have called relatives to tell them his daughter was gay.

Decision: ALLOWED

Strugar v Canada (Minister of Citizenship and Immigration) 2013 FC 880.

The claimant family members are all Croatian citizens who sought refugee protection on the basis that the wife and mother is a lesbian. Her husband knew that she was a lesbian when he married her; however, they agreed to raise children together and to have separate sexual relationships. The marriage would allow them to have a family, and would provide a cover for the wife's homosexuality. The adjudicator found that the wife's credibility had been undermined primarily because it found her explanation as to how she met other lesbian women in coffee shops to be implausible and because the act of risking a passionate kiss near a public bus stop in the middle of the day was inconsistent with her testimony that she was careful to hide her sexual orientation. The Federal Court cautioned against making credibility findings supported merely by the fact that the trier of fact found the evidence to be implausible without any explanation or analysis to explain why that was found to be so. In this case, the adjudicator failed to provide any factual or legal analysis underlying its view as to implausibility. But the Federal Court upheld the conclusion that state protection was available and adequate.

Decision – DISMISSED

Ockhuizen v Canada (Minister of Citizenship and Immigration) 2014 2014 FC 401.

The claimant was from Botswana. The adjudicator did not believe that the claimant had been subjected to the threat of a forced marriage, that she had been raped, or that she is in fact a lesbian

and her claim was rejected. The Federal Court cautioned that plausibility findings should be made “only in the clearest of cases”. This is because plausibility findings “can be influenced by cultural assumptions or misunderstandings”, with the result that such findings “must be based on clear evidence, as well as a clear rationalization process supporting the [adjudicator]’s inferences, and should refer to relevant evidence which could potentially refute such conclusions”. The adjudicator failed to identify any evidence with respect to marriage customs in Botswana that would support its finding as to the implausibility of the delay in arranging a marriage ceremony.

Decision – ALLOWED

c. Evidentiary Matters
i. Lack of Corroborating Evidence

Sadeghi-Pari v Canada, 2002 FCA 80, [2002] 3 FCR 565.

The Federal Court confirmed the principle that when a claimant swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness. In relation to the sexual orientation claim presented by the Iranian claimant, the Federal Court further specified that a lack of corroborating evidence of one’s sexual orientation, in and of itself, absent negative, rational or plausibility findings related to the issue, would not be enough to rebut the principle of truthfulness.

Decision: ALLOWED

Lawal v. Canada (Minister of Citizenship and Immigration) 2008 FC 861.

The claimant was a citizen of Nigeria who believed he would be persecuted in his country as a result of his membership in a particular social group, namely Nigerian gay males. The adjudicator concluded that the claimant had joined EGALE, a Canadian lesbian, gay, bisexual and transgender rights group, only in an attempt to bolster his claim. The adjudicator’s finding was based on the claimant’s inability to describe the purpose of the organization or the benefits of membership despite having a letter from EGALE. The Federal Court held that the adjudicator had found that the claimant had “simply joined EGALE in an attempt to bolster his claim,” and that this finding was open to the adjudicator to make based on the evidence before it.

Decision: DISMISSED

Houshan v Canada 2010 FC 650 (QL).

A citizen of Syria claimed a fear of persecution because of his sexual orientation as a homosexual male. The adjudicator made negative credibility findings in relation to the claimant’s sexual orientation. The Federal Court held that the adjudicator was entitled to find a serious contradiction in the claimant’s alleged wish to live an openly gay life in Canada and the lack of evidence that he was living an openly gay lifestyle as he had claimed he wanted to do, despite having been in Canada for several years. This finding was also supported by the adjudicator’s finding that it was implausible that he would have had no contact with his former partner or any supporting evidence of his troubles in Syria. The Federal Court found that the adjudicator’s conclusions were not reviewable because they were based on negative, rational plausibility findings that rebutted the presumption of truthfulness.

Decision: DISMISSED

Gergedava v Canada (Minister of Citizenship and Immigration), 2012 FC 957 (QL).

A citizen of Georgia sought refugee protection in Canada claiming to fear persecution because of his sexual orientation. The adjudicator did not believe that the claimant was involved in two same sex relationships in part on his failure to produce any objective documentary evidence. The adjudicator Board also did not accept evidence by a former employer and landlady in Canada that he was gay, based on lack of documentary evidence. The Federal Court held that the adjudicator's finding on lack of documentary evidence was unreasonable. The Federal Court held that the acts and behaviours which establish a claimant's homosexuality are inherently private, and as a result, there are often inherent difficulties in proving that a refugee claimant has engaged in same sex sexual activities.

Decision: ALLOWED

Gergedava v Canada (Minister of Citizenship and Immigration), 2012 FC 957 (QL).

A citizen of Georgia sought refugee protection in Canada claiming to fear persecution because of his sexual orientation. The adjudicator did not believe that the claimant was involved in two same sex relationships in part on his failure to produce any objective documentary evidence. The adjudicator Board also did not accept evidence by a former employer and landlady in Canada that he was gay, based on lack of documentary evidence. The Federal Court held that the adjudicator's finding on lack of documentary evidence was unreasonable. The Federal Court held that the acts and behaviours which establish a claimant's homosexuality are inherently private, and as a result, there are often inherent difficulties in proving that a refugee claimant has engaged in same sex sexual activities.

Decision: ALLOWED

Dayebga v. Canada (Citizenship and Immigration) 2013 FC 842.

A man from Cameroon claimed refugee protection based his fear of persecution for being gay. The adjudicator held that he had not established central elements of his claim, including his sexual orientation. The claimant had testified that he was involved in the gay, lesbian and transgender movement, but could not provide any documents to establish this fact. The reasons do not disclose any credibility concern other than those concerns relating to the failure to produce evidence. The Federal Court held that in the absence of credibility concerns or any doubts about the claimant's story other than those pertaining to documentary evidence, it was an error for the adjudicator to reject the claim solely on the basis of a lack of corroborative evidence.

Decision: ALLOWED

Nezhbalskyi v Canada (Minister of Citizenship and Immigration) 2015 FC 299.

The claimant, a citizen of Ukraine, sought protection as a refugee on the ground of his sexual orientation. The adjudicator found that the claimant was not credible. The adjudicator drew a negative inference from the claimant's failure to adduce sufficient corroborative evidence of his relationships with two of his former partners. The Federal Court held that it is settled law that a refugee claimant's testimony is presumed to be true unless there is a valid reason to doubt its truthfulness. In addition, "a lack of corroborating evidence of one's sexual orientation, in and of itself, absent negative, rational credibility or plausibility findings related to that issue" is not enough to rebut the principle of truthfulness. In this case, the adjudicator did not articulate any other reason

for doubting the claimant's homosexuality, nor did the adjudicator cite any inconsistencies or implausibilities in the other evidence that was provided to establish the claimant's sexual orientation. This included several photographs, affidavits, and letters from the claimant's mother and former Canadian boyfriend. The Federal Court further held it was not open to the adjudicator to make a negative finding of credibility based on the claimant's failure to produce his former Canadian boyfriend as a witness. The Federal Court held that the is the presumption of truth cannot be rebutted through negative inferences.

Decision – ALLOWED

ii. Country of Origin Information

Neto v Canada (Minister of Citizenship and Immigration), 2007 FC 664, 158 ACWS (3d) 811.

The Federal Court allowed a judicial review application in a case where the adjudicator accepted as reliable one report from the International Gay and Lesbian Association (ILGA), but rejected a second one from ILGA on the basis that it did not come from a reliable and independent source.

Decision: ALLOWED

Ndokwu v Canada (Minister of Citizenship and Immigration), 2013 FC 22 (available on QL)

The adjudicator held that reports from lesbian, gay, bisexual and transgender (LGBT) groups could not be considered objective and were less credible than an assessment by the Canadian High Commission in Nigeria because “it is written by an objective professional Canadian diplomat resident in Nigeria”. The Federal Court cautioned against dismissing information provided by LGBT advocacy groups: “The notion that evidence from a particular advocacy group or, for that matter, any advocacy group is consistently or uniformly less objective than country condition evidence prepared by diplomats, must be examined carefully in light of information from those closest to the situation, including diplomats, themselves, when and where they are privy to first-hand knowledge. This is to ensure that findings be considered as objectively as possible in light of tests of corroboration.”

Decision: DISMISSED

Ockhuizen v Canada (Minister of Citizenship and Immigration) 2014 2014 FC 401.

The claimant was from Botswana. The adjudicator did not believe that the claimant had been subjected to the threat of a forced marriage, that she had been raped, or that she is in fact a lesbian and her claim was rejected. The Federal Court concluded that while the adjudicator had regard to country condition information that indicated that laws against rape are enforced in Botswana, the adjudicator failed to consider whether this would still be the case where the victim was a lesbian. This was a real concern, in light of the country condition information that indicates that homosexuality is illegal in Botswana, is considered taboo, and is viewed by the Courts in that country as “an offence to public morality”.

Decision – ALLOWED

d. Discriminatory Procedures and Questioning

Diallo v Canada (Citizenship and Immigration), 2012 FC 562 (QL)

The claimant was a citizen of Guinea and he feared persecution because of his sexual orientation. The adjudicator rejected his claim on the basis that there was a lack of reliable evidence. The claimant submitted that the adjudicator was sarcastic and hostile, and prevented counsel from presenting evidence in the claimant's favour. The Federal Court did characterized comments made by the adjudicator that the claimant "was not particularly young when he was sexually abused at age 12" as "sarcastic and inappropriate." The Federal Court concluded that while the adjudicator's conduct could not be praised or even condoned, it did not suggest bias or a lack of impartiality. The adjudicator did however misconstrue and overlook some important evidence.
Decision: ALLOWED

Buwu v. Canada (Citizenship and Immigration) 2013 FC 850.

The claimant was a citizen of Zimbabwe who claimed refugee protection on the basis of her sexual orientation. In considering the testimony and the evidence of the claimant, the Federal Court held that the adjudicator relied upon and made findings based upon so-called personal and extrinsic knowledge of sexual minorities, and of gay and lesbian establishments and groups that was never put to the claimant. This is procedurally unfair and cannot support a finding of no credibility. The adjudicator's attitude to the facts of the claimant's testimony was considered cavalier and demonstrated a complete lack of awareness of the procedural fairness issues involved. The Federal Court characterized the decision as "an embarrassment to our refugee process." Overall, Court held that "the whole decision is unfair, unsafe and unreasonable and must be returned for reconsideration by a differently constituted RPD."
Decision: ALLOWED

e. Delay in Revealing Sexual Orientation

Sobbesedgh v Canada (Minister of Citizenship and Immigration), 2003 FC 570, 122 ACWS (3d) 1100.

The claimant, a homosexual man from Iran originally claimed refugee status based upon his membership of the Mujahedeen (a terrorist group according to the Canadian government), his religion (a Sunni Muslim) and at a later date his sexual orientation. He did not disclose upon entry that he was gay, on account that his lawyer knew his uncle and the claimant feared reprisal. The adjudicator did not accept his testimony, stating that it would be implausible for an educated and well-traveled person such as the claimant to believe that confidential information would be revealed and to adopt a false story. The Federal Court disagreed and found that based on the testimony and evidence produced by the claimant he was being truthful about his sexual orientation and therefore could be defined as a convention refugee.
Decision: ALLOWED

Meyer v Canada (Minister of Citizenship and Immigration), 2003 FC 878, 124 ACWS (3d) 766.

The claimant, a homosexual man from Israel was harassed and beaten at a local dance club as a teenager for embracing other men. He filed his complaints with the police twice, however no action was taken nor was anyone apprehended for the assaults. During his military training he was beaten, tortured and received death threats on numerous occasions on account of his sexual orientation. The Federal Court supported the conclusion that the claimant's delay in leaving Israel and in claiming refugee status in Canada was not compatible with a subjective fear of persecution.
Decision: DISMISSED

Espinosa v Canada (Minister of Citizenship and Immigration), 2003 FC 1324, 127 ACWS (3d) 329.

The claimant, a homosexual man from Mexico delayed claiming refugee status for over a year with no reasonable explanation. The adjudicator determined that despite the claimants fear of imprisonment, torture and death in Mexico he had no persuasive reason for not filing a claim sooner, therefore there did not appear to be a subjective fear of persecution. The Federal Court found it reasonable to conclude that an inexplicable delay in making a claim is related to the existence of a subjective fear of persecution, an essential element in a refugee claim.

Decision: DISMISSED

Herrera v Canada (Minister of Citizenship and Immigration), 2006 FC 1272, 157 ACWS (3d) 1022.

The claimant, a homosexual man from Mexico was the victim of numerous physical attacks by colleagues and police over many years. He had moved to different regions but would fall victim to assault and harassment based upon his sexual orientation. The claimant did not file his refugee claim within a reasonable amount of time upon his arrival to Canada and could not explain the delay. The Federal Court confirmed that finding of a lack of subjective fear in and of itself warrants dismissal of a refugee claim, because both elements of the alleged fear of persecution, subjective and objective, must be met in order to fall within the definition of a refugee.

Decision: DISMISSED

Lawal v. Canada (Minister of Citizenship and Immigration) 2008 FC 861.

The claimant was a citizen of Nigeria who believed he would be persecuted in his country as a result of his membership in a particular social group, namely Nigerian gay males. The Federal Court upheld the adjudicator's rejection of the claim. The adjudicator did not find the claimant credible, ruling that he "cooked up the story of being a homosexual". To support this finding, the adjudicator pointed to the fact that the claimant did not claim protection based on sexual orientation upon entering Canada and was unable to explain why.

Decision: DISMISSED

Nezhalskyi v Canada (Minister of Citizenship and Immigration) 2015 FC 299.

The claimant, a citizen of Ukraine, sought protection as a refugee on the ground of his sexual orientation. The adjudicator found that the claimant was not credible. The adjudicator drew a negative inference with respect to the claimant's subjective fear because he did not make a refugee claim at the earliest opportunity, when he was in the USA in the summer of 2010, and he then returned to the Ukraine. The adjudicator also found that the claimant's delay in leaving the Ukraine after the second attack cast doubt upon his subjective fear. The Federal Court confirmed that a delay in making a refugee claim is a relevant consideration that the adjudicator may take into account in assessing both a claimant's credibility and his subjective fear. However, in this case it was unreasonable for the adjudicator to expect the claimant to make a claim for asylum in the USA. The claimant explained, under oath, that he was very young at the time (aged 20), that he was not aware that he could claim refugee status in the USA, and that he did not fear for his life because he had not yet been attacked or beaten in the Ukraine. This is a plausible explanation for the claimant's failure to claim asylum in the USA, and the Board did not provide a reasonable explanation for rejecting it.

Decision – ALLOWED

f. Interpretation

Su v Canada (Minister of Citizenship and Immigration), 2012 FC 554, 218 ACWS (3d) 635.

The claimant, a homosexual man from China, was arrested after being seen kissing his partner in a park. He was charged with prostitution then detained and tortured by police. The evidence showed that the Chinese authorities had a quota to meet for sexual crimes and were targeting homosexuals. The adjudicator did not find the claimant credible regarding his interactions with police. The Federal Court noted that a translation difficulty was at the heart of an inconsistency finding made by the adjudicator who overlooked the testimony of the interpreter that Chinese characters could mean both 'sodomy' and 'prostitution,' and that one translation, rather than showing a discrepancy, supported the claimant's version of events.

Decision: ALLOWED