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Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression

Effective date: May 1, 2017

Guidelines issued by the Chairperson pursuant to paragraph 159(1)(h) of the *Immigration and Refugee Protection Act*

This Chairperson's Guideline is dedicated to the late Nicole LaViolette, Professor, Faculty of Law, University of Ottawa, whose work informed and inspired the development of the Guideline.

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1. Introduction

1.1 The purpose of this Guideline is to promote greater understanding of cases involving sexual orientation and gender identity and expression (SOGIE) and the harm individuals may face due to their non-conformity with socially accepted SOGIE norms. This Guideline addresses the particular challenges individuals with diverse SOGIE may face in presenting their cases before the Immigration and Refugee Board of Canada (IRB) and establishes guiding principles for decision-makers in adjudicating cases involving SOGIE.

1.2 This Guideline applies to all four divisions of the IRB, namely, the Immigration Division (ID), the Immigration Appeal Division (IAD), the Refugee Protection Division (RPD), and the Refugee Appeal Division (RAD).

1.3 This Guideline applies to decision-makers and other IRB personnel who are

involved in the processing or adjudication of cases before the Board.

1.4 This Guideline provides guidance on the following themes:

i. Understanding the unique challenges faced by individuals with diverse SOGIE in presenting evidence pertaining to SOGIE;
ii. Using appropriate terminology and language in both proceedings and reasons for decision when referring to individuals with diverse SOGIE;
iii. Protecting sensitive information in reasons for decision;
iv. Avoiding stereotyping and inappropriate assumptions when making findings of fact;
v. Assessing credibility; and
vi. Increasing awareness of circumstances unique to individuals with diverse SOGIE that may affect findings of fact and findings of mixed fact and law in each of the four divisions.

2. Terminology

2.1 This Guideline refers to **individuals with diverse sexual orientations and gender identities and expressions (SOGIE)**, who are individuals with, or who are perceived to have, a sexual orientation or gender identity or expression that does not conform to socially accepted norms. Such individuals include, but are not limited to, lesbians, gay men, and bisexual, trans, intersex and queer individuals. This Guideline also refers to cisgender individuals and/or heterosexual individuals who may not conform, or who may not appear to conform, to socially accepted SOGIE norms.

2.2 **Gender**: Gender refers to the characteristics, attitudes and behaviours that are socially or culturally associated with a person's sex. The categories and specific characteristics associated with gender may vary culturally. An individual's gender includes gender identity and expression, both of which can be fluid and flexible. An individual's gender identity and expression may or may not conform to the socially accepted gender norms of their culture.

2.3 **Sex**: Sex is a status assigned at birth based on biological markers of sex, including reproductive and sexual anatomy and chromosomes. Sex is typically designated as male or female. Sex can also refer to **intersex**.

2.4 The IRB recognizes that gender identity and gender expression are distinct, but interrelated, concepts.

Gender identity: Each person's internal and individual understanding of their gender. It is their sense of being a woman, a man, both, neither, or being anywhere along the gender spectrum. A person's gender identity may be the same as, or different from, their birth-assigned sex. A person's understanding of their gender may change.

Gender expression: How a person expresses or presents themselves in ways that may be associated with gender, including how a person is perceived in relation to gender. This can include behaviour and outward appearance such as dress, hair, makeup, body language, mannerisms, gait, and voice. A person's chosen name and pronoun are also common ways of communicating gender. How a person expresses their gender may change.

2.5 **Sexual orientation:** A person's physical, romantic and/or emotional attraction to, and/or intimate relations with, individuals of a different gender, the same gender, no gender, or more than one gender. A person's understanding of their sexual orientation may change.

2.6 There is no standard terminology that adequately captures the diversity within and between the evolving concepts of sexual orientation and gender identity and expression across cultures and societies.

2.7 While the following concepts are commonly used, this acronym and list are not exhaustive and may change over time. Persons appearing in proceedings before the IRB may not be familiar with or identify with these concepts. Individuals may self-identify with concepts other than those listed below.

2.8 **LGBTIQ+:** An acronym that combines concepts of sexual orientation, gender identity and expression, and intersex, and that refers to, but is not limited to, lesbians; gay men; and bisexual, trans, intersex and queer individuals:

- **Lesbian:** An individual who identifies as a woman and whose physical, romantic and/or emotional attraction is primarily to other individuals who identify as women.
- **Gay man:** An individual who identifies as a man and whose physical, romantic and/or emotional attraction is primarily to other individuals who identify as men. Some women use gay to describe their same-sex attraction.
- **Bisexual:** An individual who is physically, romantically and/or emotionally attracted to more than one gender. Some bisexual individuals may also identify as **pansexual**; these are individuals who may feel physical, romantic and/or emotional attraction to people of any gender or sex.
- **Trans:** An umbrella concept that refers to any individual whose gender identity or gender expression differs from the sex they were assigned at birth. This concept includes, but is not limited to: individuals who have made bodily

changes using surgical, medical or other means, or who plan to make bodily changes to align their sex characteristics with their gender identity; individuals whose gender identity does not align with their sex assigned at birth but who have no wish to change their physiology; people who identify as having multiple genders or as not having a gender; individuals whose gender identity changes from time to time; or people with any other gender identity that is not in line with socially accepted norms of expected behaviours based on gender. Gender identity is different from sexual orientation, and a trans individual may be heterosexual, gay, lesbian, bisexual, or asexual.

- **Intersex:** A concept that refers to individuals whose physical sex characteristics, such as their reproductive or sexual anatomy or chromosome patterns, do not conform with typical notions of female or male sex. These patterns may become apparent at birth, may develop later (i.e. at puberty or in adulthood), or may remain unrecognized.
- **Queer:** An umbrella concept that refers to a person whose SOGIE does not conform to socially accepted SOGIE norms, and may include individuals who are lesbian, gay, bisexual, trans or intersex.

2.9 **Cisgender:** An individual whose gender identity aligns with the sex they were assigned at birth.

3. Understanding the challenges faced by individuals with diverse SOGIE in establishing their SOGIE

3.1 Depending on factors such as race, ethnicity, religion, faith or belief system, age, disability, health status, social class and education, individuals with diverse SOGIE recognize and act on their SOGIE differently. [1] An individual's self-awareness and self-acceptance of their SOGIE may present as a gradual or non-linear process. There is no standard set of criteria that can be relied upon to establish an individual's identification as an individual with diverse SOGIE.

3.2 An individual's testimony may be the only evidence of their SOGIE where, in a given case, corroborative or additional evidence is not reasonably available.

3.3 Many individuals with diverse SOGIE conceal their SOGIE in their country of reference out of mistrust or fear of repercussion by state and non-state actors, or due to previous experiences of stigmatization and violence. These circumstances may manifest themselves as an individual being reluctant to discuss, or having difficulty

discussing, their SOGIE with a decision-maker based on a fear or general mistrust of authority figures, particularly where intolerance or punishment of individuals with diverse SOGIE are sanctioned by state officials in an individual's country of reference.

3.4 Individuals with diverse SOGIE who have been in immigration detention while in Canada may face additional challenges due to the particular difficulties individuals with diverse SOGIE may face in detention.

3.5 The intersection of SOGIE with additional marginalization factors such as race, ethnicity, religion, faith or belief system, age, disability, health status, social class and education may create both an increased risk of harm as well as distinct and specific risks of harm. The intersection of these factors, which are non-exhaustive, may impact an individual's access to state protection or an internal flight alternative (IFA).

3.6 Individuals with diverse SOGIE may face a heightened risk of experiencing mental health challenges, often stemming from a history of social isolation, mistreatment and lack of social support in their countries of reference. [2] Individuals with diverse SOGIE may experience internalized homophobia, sexual stigma or oppression. They may also have depression, post-traumatic stress disorder relating to past physical or sexual violence, anxiety, suicidal tendencies, dissociation, decreased capacity for trust, and other trauma based on their SOGIE. [3] These issues may manifest themselves in a variety of ways and can have an impact on an individual's ability to testify in a proceeding before the IRB. [4]

3.7 Some individuals with diverse SOGIE may be particularly vulnerable due to mental health issues or traumatic circumstances experienced because of their SOGIE. To help enable an individual to present their case before the IRB, the need for procedural accommodations may arise, pursuant to the Chairperson's *Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB*. [5] Accommodations under Guideline 8 should be considered by the decision-maker, whether requested by a party or on the decision-maker's own initiative, wherever it is appropriate to do so.

3.8 Country condition information on the treatment of individuals with diverse SOGIE in some countries can be limited or even non-existent. [6] This under-reporting may be more pronounced for individuals who face marginalization and a further risk of under-reporting due to the intersection of race, ethnicity, religion, faith or belief system, age, disability, health status, social class and education.

3.9 In some circumstances, individuals with diverse SOGIE may be part of joint claims or appeals that inhibit their ability to disclose their sexual orientation or gender identity or expression. When a decision-maker becomes aware that the individual wishes to assert an independent claim or appeal based on sexual orientation or gender identity or expression, the claims or appeals should, where appropriate, be separated.

3.10 In some circumstances, a designated representative other than a parent or guardian may need to be appointed for a minor with diverse SOGIE.

4. Use of appropriate language

4.1 All participants in proceedings before the IRB have a responsibility to be respectful toward other participants. Part of this responsibility includes the use of appropriate language by all participants. Appropriate language is defined as language that reflects that person's self-identification and avoids negative connotations. Individuals should be addressed and referred to by their chosen name, terminology, and pronouns. Decision-makers should address any issues about a participant's conduct in a proceeding, including tone and demeanour, or any misunderstandings about the use of appropriate language, as soon as they arise. [7]

4.2 Terminology used to refer to individuals with diverse SOGIE may have negative connotations, and the use of this terminology may create difficulties for the person concerned during the proceeding. It is important for participants to be aware of, and sensitive to, the cultural nuances in terminology employed in the proceeding.

4.3 In addition to providing objective and impartial interpretation services, interpreters have a responsibility to be respectful of all hearing room participants. This includes using the chosen terminology, names, or pronouns requested by the individual concerned. Decision-makers should address any misunderstandings about the use of appropriate language and terminology, or the interpreters' expected conduct, as soon as they arise.

5. Protection of sensitive information

5.1 While proceedings before the RPD and the RAD are private, proceedings at the ID and the IAD are generally public, [8] and sensitive information concerning an individual's SOGIE could be accessed by the public. Additionally, even though proceedings before

the RPD and the RAD are private, if a case is before the Federal Court for judicial review, the information in the Federal Court file pertaining to the case becomes publicly accessible.

5.2 As a result, additional safeguards for the protection of sensitive information may be considered, upon request by the parties or on the initiative of a decision-maker, to limit public dissemination of this information. Decision-makers may, pursuant to section 166 of the *Immigration and Refugee Protection Act*, order that particularly sensitive information be treated as confidential where the factors under section 166 have been met. In such cases, a decision-maker may make a confidentiality order to further protect the information in question. [9]

5.3 Additionally, in drafting reasons for decision, decision-makers should, wherever possible, avoid the use of personal identifiers or sensitive information that is not necessary to explain the reasoning in the decision. [10]

6. Avoiding stereotyping when making findings of fact

6.1 Decision-makers should not rely on stereotypes or inappropriate assumptions in adjudicating cases involving SOGIE as they derogate from the essential human dignity [11] of an individual. Examples of stereotypes that should not be relied on in adjudicating cases involving SOGIE include, but are not limited to, the following:

- Individuals with diverse SOGIE have feminized or masculinized appearances or mannerisms; [12]
- Individuals with diverse SOGIE do not participate in cultural or religious customs or traditions; [13]
- Romantic or sexual relationships share the same dynamics and characteristics across cultures; [14]
- An individual knew they were an individual with diverse SOGIE at a young age, or became sexually active at a young age; [15]
- Trans individuals will seek to have surgical or physiological treatment if they have access to that treatment;
- Individuals with diverse SOGIE are promiscuous or sexually active and do not engage in exclusive relationships; [16]
- Individuals with diverse SOGIE have had same-sex sexual experiences or relations; [17]
- Individuals with diverse SOGIE would not have had heterosexual sexual experiences or relations; [18]

- Individuals with diverse SOGIE would not voluntarily enter a heterosexual marriage or have children; [19]
- An individual's SOGIE can be determined by an individual's occupation; [20] and
- Individuals with diverse SOGIE would actively participate in LGBTIQ+ culture in Canada, including frequenting LGBTIQ+-predominant areas and social establishments, or be involved in community organizations and groups. [21]

7. Establishing principles for assessing credibility and evidence pertaining to SOGIE

7.1 While an individual's experiences and behaviours related to their SOGIE may be expressed in both the private and public spheres, an individual's testimony may, in some cases, be the only evidence of their SOGIE. [22]

7.2 Corroborative evidence

7.2.1 Corroborating evidence from family or friends may not be available in cases involving SOGIE. [23] An example of when this type of corroboration may not be available is when an individual has concealed their SOGIE because of perceived stigma or risk of harm. [24]

7.2.2 Similarly, medical evidence that serves to corroborate an individual's account may not be available in cases involving SOGIE. An example is that it is not always reasonable to expect an individual to have sought medical treatment following an assault where they have been forced to conceal their SOGIE. Where this evidence is available, it can be presented by the individual for the decision-maker to consider.

7.2.3 An individual with diverse SOGIE may not have participated in LGBTIQ+ culture, organizations or events in their country of reference, nor do so once in Canada. However, evidence of such participation may be presented by the individual for the decision-maker to consider. [25]

7.2.4 It is not expected that an individual establish their SOGIE through the use of sexually explicit photographs, videos or other visual material. [26]

7.3 Questioning an individual

7.3.1 Questioning an individual about their SOGIE can feel intrusive and may be difficult for the individual concerned. Questioning should be done in a sensitive, non-confrontational manner. Open-ended questions should be employed where appropriate.

7.4 Inconsistencies

7.4.1 Cases involving individuals with diverse SOGIE are no different from other cases before the IRB in that decision-makers may draw a negative inference from material inconsistencies or contradictions in the evidence that have no reasonable explanations. [27] Decision-makers should examine whether there are cultural, psychological or other barriers that may reasonably explain the inconsistency. For instance, it may be difficult for an individual who has concealed their SOGIE to disclose and discuss it with government authorities at a port of entry, which may give rise to an inconsistency between information from the port-of-entry interview and testimony at a hearing. [28] Decision-makers also need to be careful that the inconsistencies are not based on stereotypes or inappropriate assumptions. [29]

7.5 Implausibility findings

7.5.1 Implausibility findings must not be based on stereotypes. For example, it may be plausible that an individual with diverse SOGIE has engaged in heterosexual encounters. [30] It may also be plausible that an individual with diverse SOGIE has engaged in activity that might put them at risk in their country of reference. [31]

7.6 Vagueness

7.6.1 Testimony about same-sex relationships that is vague and lacking in detail may support a negative credibility inference; [32] however, decision-makers should examine whether there are cultural, psychological or other barriers that may explain the manner in which the testimony is delivered. When making a vagueness finding in a case involving an individual with diverse SOGIE, a decision-maker must, as in other cases, provide specific reasons to support a finding that the testimony is not comprehensive or fulsome. [33]

7.7 Material omissions

7.7.1 Omissions from testimony of significant events or details relating to the life of an individual with diverse SOGIE may, as in other cases, support a negative credibility assessment if there is no reasonable explanation for the omission. [34] Decision-makers should examine whether there are cultural, psychological or other barriers that may reasonably explain the omission.

8. Persons appearing in proceedings before the Refugee Protection Division and the Refugee Appeal Division

8.1 This Guideline addresses the following issues that decision-makers face when determining claims based on SOGIE:

1. To what extent can an individual with, or who is perceived to have, diverse SOGIE successfully rely on any one, or a combination, of the five enumerated grounds of the Convention refugee definition?
2. Is the type of treatment to which an individual with, or who is perceived to have, diverse SOGIE may be subjected a serious interference with a basic human right, such that it gives rise to a well-founded fear of persecution in the particular circumstances of a case?
3. What particular issues are raised for an individual with, or who is perceived to have, diverse SOGIE when seeking state protection or an IFA?

8.2 Convention ground: membership in a particular social group

8.2.1 In *Ward*, the Supreme Court of Canada recognized that sexual orientation can be characterized as a particular social group. [35] This extends to gender identity and expression.

8.3 Perceived or imputed SOGIE

8.3.1 Individuals may be subjected to persecution by reason of their perceived or imputed SOGIE. [36] Examples may include:

- Individuals who do not fit stereotypical appearances or conform to socially accepted SOGIE norms may be perceived as individuals with diverse SOGIE when they are not;
- Those advocating for, or reporting on, SOGIE rights may be perceived to be individuals with diverse SOGIE; and
- Individuals who provide support for individuals with diverse SOGIE—for example, partners who remain with individuals with diverse SOGIE through, for instance, gender reassignment surgeries—may be perceived to be individuals with diverse SOGIE.

8.3.2 The fear of family members of an individual who is, or is perceived to be, an individual with diverse SOGIE may also have a nexus to the Convention ground of membership in the particular social group of the family. [37]

8.4 Other Convention grounds

8.4.1 The fears of individuals with diverse SOGIE may also have a nexus to one or more of the other Convention grounds—namely race, religion, nationality or political opinion—in addition to membership in a particular social group. Examples may include:

- **Political opinion:** In addition to their status as an individual with diverse SOGIE, political activism by an individual to promote SOGIE rights may put that individual at increased risk of persecution; [38]
- **Religion:** An individual may face persecution based on religion if their SOGIE is viewed as diverging from the teachings of that particular religion; [39] or
- **Race or Ethnicity:** Individuals with diverse SOGIE may face persecution based on race or ethnicity if they belong to a particular ethnic group that is targeted in their country of reference. [40]

8.4.2 Where an individual with diverse SOGIE has a claim that is not based on their SOGIE, this Guideline is nonetheless applicable in evaluating credibility and in assessing the availability of state protection or an IFA.

8.5 Establishing a well-founded fear of persecution

8.5.1 Concealment of SOGIE as persecution

8.5.1.1 It is well established in law that being compelled to conceal one's SOGIE constitutes a serious interference with fundamental human rights that may therefore amount to persecution, and a claimant cannot be expected to conceal their SOGIE as a way to avoid persecution in their country of reference. [41]

8.5.2 Intersectionality

8.5.2.1 Some individuals with diverse SOGIE may face differential risk due to additional factors such as race, ethnicity, religion, faith or belief system, age, disability, health status, social class and education. Where appropriate, these intersectional factors should be considered when determining whether an individual has established a well-founded fear of persecution.

8.5.2.2 Individuals with diverse SOGIE may face additional risks because of their gender, including domestic violence, forced marriage, sexual trafficking, honour crimes, as well as discrimination with respect to housing, employment, education, health and social services.

8.5.2.3 Decision-makers need to be mindful of the overlap or complementing relationship that gender, sexual orientation, and gender identity and expression share, and consequently may need to consider the application of both this Guideline and the Chairperson's *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* [42] where appropriate. For instance, a lesbian may be vulnerable to risk as a woman and as a lesbian. Similarly, a trans or intersex individual may be vulnerable to risk as a woman and as a trans or intersex individual. [43]

8.5.3 Bisexual individuals

8.5.3.1 Bisexual individuals may face risks of mistreatment similar to those faced by gay men or lesbians. [44] However, bisexual individuals may also face specific types of discrimination or mistreatment.

8.5.4 Trans and intersex individuals

8.5.4.1 Trans and intersex individuals may be particularly vulnerable to systemic discrimination and acts of violence due to their non-conformity with socially accepted norms of gender presentation. Trans and intersex individuals may face additional risks because of the lack of legal recognition of their gender identity or status in many countries.

8.5.4.2 Trans and intersex individuals may face elevated risks of physical and sexual violence and may experience discrimination in employment, access to health care and medical treatment, and receipt of social services.

8.5.4.3 Trans and intersex individuals may, in particular, be at risk while in detention, for instance, due to the placement of such individuals in solitary confinement or in a single-sex inmate population that does not correspond to the gender with which they identify.

8.5.4.4 Gender-related inconsistencies may be found in the personal identity documents of trans or intersex individuals, and caution should be exercised before drawing negative inferences from discrepancies in gender identification documents involving trans or intersex individuals.

8.5.5 Minors

8.5.5.1 A minor who identifies as an individual with diverse SOGIE may be particularly vulnerable to harm. An intersex minor may face an elevated risk of harm. Examples of harm that may amount to persecution for a minor with diverse SOGIE include sexual and physical violence; forced medical procedures such as surgery, hormonal therapy, or sexual orientation conversion interventions; or forced confinement. Examples of discriminatory treatment experienced by a minor with diverse SOGIE that may cumulatively amount to persecution in the particular circumstances of a case include sustained family rejection, social ostracism, denial of education, expulsion from school, harassment in school and bullying.

8.5.5.2 Decision-makers may need to consider the application of the Chairperson's *Guideline 3: Child Refugee Claimants—Procedural and Evidentiary Issues* [45] in a case involving a minor with diverse SOGIE.

8.5.6 Criminal laws and laws of general application

8.5.6.1 The existence of laws that criminalize or suppress non-conforming sexual orientations, sexual behaviours, or gender identities or expressions may be indicative that a claimant has a well-founded fear of persecution if the laws are enforced. [46] Further, even if such laws are not enforced, their existence may create a climate of impunity for perpetrators of violence and contribute to societal discrimination against individuals with diverse SOGIE as they may reinforce negative societal attitudes against this population. [47] The existence of such laws, even though unenforced, may also be used by state actors and private individuals to threaten individuals with diverse SOGIE. [48]

8.5.6.2 Where legislation exists that criminalizes same-sex sexual activity between men, this will likely mean that such legislation applies to same-sex sexual activity between women or other individuals with diverse SOGIE.

8.5.6.3 The existence of laws of general application that are used to target individuals with diverse SOGIE are important to consider. Even where same-sex relations or sexual or gender non-conforming behaviours are not criminalized, laws of general application, such as public morality or public order laws, that are selectively applied and enforced against individuals with diverse SOGIE in a discriminatory manner may amount to persecution in the particular circumstances of a case. [49]

8.5.6.4 Individuals with diverse SOGIE may have a well-founded fear of persecution in their country of reference even if they have not been personally targeted in the past. An individual's profile may be sufficient to demonstrate a well-founded fear of persecution in their country of reference given conditions that may include discriminatory laws or an atmosphere of intolerance and repression.

8.5.7 Absence of legislation

8.5.7.1 The absence of laws that criminalize or discriminate against individuals with diverse SOGIE in a country does not signify a lack of discrimination in that country, nor does it indicate that state protection is available.

8.5.7.2 The absence of laws allowing same-sex marriage or spousal economic benefits does not, on its own, amount to a serious violation of a fundamental human right that would constitute persecution. [50]

8.5.8 Forced medical treatment

8.5.8.1 Individuals with diverse SOGIE may be forced to undergo medical treatment including "corrective" sexual violence, non-consensual medical and scientific experimentation, forced sex-reassignment or "corrective" surgery, forced traditional cleansing rituals or religious exorcisms, forced institutionalization, forced psychotherapy, forced electroshock therapy, and forced drug injection and hormonal therapy. [51] Such treatment violates an individual's security of the person and is persecutory.

8.5.9 Cumulative discrimination amounting to persecution

8.5.9.1 Individuals with diverse SOGIE may also face instances of harassment or discrimination that cumulatively amount to a well-founded fear of persecution. [52] The following non-exhaustive scenarios could, on a cumulative basis, constitute persecution in the particular circumstances of a case:

- Restrictions on access to employment; [53]
- Restrictions on access to education;
- Restrictions on access to health care; [54]
- Restrictions on access to housing; [55]
- Restrictions on access to social services;
- Reliance on sex work where the individual has been denied reasonable access to other means of financial support; [56]
- Being the target of repeated acts of intimidation;
- Systematic harassment from police; or
- Military hazing. [57]

8.5.10 Country condition information

8.5.10.1 Reliable, relevant and up-to-date country condition information on individuals with diverse SOGIE in some countries can be scarce, incomplete or general in nature. [58] A lack of available information may be more pronounced for certain individuals. For example, country condition information about the situation of individuals with diverse SOGIE in a given country may focus on gay men and may not include specific information about, for instance, lesbians, trans or intersex individuals. [59] A lack of information may be further exacerbated for certain individuals with diverse SOGIE who are, for example, racial minorities or persons with disabilities.

8.5.10.2 This lack of information may not be indicative of a lack of persecution or a lack of problems within the country of reference. A scarcity of reporting on the situation of individuals with diverse SOGIE in a country may be due to the stigmatization or illegality of these individuals in that country. [60] In such cases, decision-makers may wish to consider the circumstances in the country of reference that may have informed the absence of documentation of the treatment of individuals with diverse SOGIE, including fear of reporting abuses to authorities by individuals, stigmatization or marginalization of individuals in the country of reference resulting in under-reporting, the lack of a free press, or the non-existence of non-governmental support organizations operating in the country.

8.5.11 Delay

8.5.11.1 An individual with diverse SOGIE may reasonably delay making a claim for refugee protection based on SOGIE out of a fear of reprisal for themselves or family members. A reasonable delay may also arise out of an individual's reluctance to reveal their SOGIE to a spouse or other family member, or in their realizing or accepting their SOGIE.

8.5.12 *Sur place* claims

8.5.12.1 An individual with diverse SOGIE may develop a well-founded fear of persecution after leaving their country of reference. *Sur place* claims can arise in situations where there is a change in an individual's SOGIE, such as when an individual realizes that they are an individual with diverse SOGIE, or accepts themselves as such, after leaving their country of reference. An example of such a situation may be a claimant who was a minor at the time they exited their country of reference who may only realize their SOGIE later on. *Sur place* claims can also be based on a change of circumstances in the claimant's country of reference or a change in the claimant's activity since leaving their country of reference, such as deciding to express their SOGIE publicly in their country of refuge or becoming politically involved in SOGIE issues in that country. In such cases, claimants may not have personally experienced persecution based on their SOGIE in their country of reference. [61]

8.6 State protection

8.6.1 As in all cases, in considering whether state protection is available to an individual with diverse SOGIE, decision-makers must focus on the personal circumstances of the claimant, in conjunction with a fact-based analysis of the operational adequacy and effectiveness of state protection in the country of reference. [62]

8.6.2 When examining the personal circumstances of a claimant, it is important to consider that individuals with diverse SOGIE may face differential protection or uneven access to state protection based on additional factors including their race, ethnicity, religion, faith or belief system, age, disability, health status, social class and education.

8.6.3 Where individuals with diverse SOGIE do not disclose their SOGIE or report incidents of violence out of fear of further reprisal from the state or non-state actors, it may be unreasonable for an individual with diverse SOGIE to approach the state for protection. [63]

8.6.4 The existence of laws criminalizing non-conforming sexual orientations, sexual behaviours, or gender identities or expressions and the enforcement of these laws by the state may be evidence that state protection is inadequate. [64] Even if irregularly enforced, the criminalization of the existence or behaviours of individuals with diverse SOGIE may create a climate of impunity for perpetrators of violence and normalize acts of blackmail, sexual abuse, violence, and extortion by state and non-state actors.

8.6.5 The decriminalization of same-sex relations or sexual or gender non-conforming behaviours, or the introduction of a new law, program or other government action [65] designed to improve the situation of individuals with diverse SOGIE in a country, need to be carefully assessed to determine whether state protection is adequate at the operational level. In these cases, decision-makers need to examine the degree of actual implementation, the effectiveness, and the durability of these legislative or other improvements in light of how state actors and general society continue to treat individuals with diverse SOGIE. [66]

8.6.6 Evidence about the availability of state protection for individuals with diverse SOGIE in some countries can be scarce or non-existent. This scarcity may be due to the stigmatization of individuals with diverse SOGIE in a given country and a consequent under-reporting or fear of reporting abuses to authorities by individuals, all of which may indicate a lack of state protection. In such cases, decision-makers may wish to consider the circumstances in the country of reference that may have informed the absence of documentation on the availability of state protection for individuals with diverse SOGIE, including the lack of a free press, or the non-existence of non-governmental support organizations operating in the country.

8.7 Internal flight alternative (IFA)

8.7.1 It is well-established in law that an IFA is not viable if an individual with diverse SOGIE must conceal their SOGIE in order to live in that location. [67]

8.7.2 The following non-exhaustive factors may impact whether a proposed IFA is reasonable for an individual with diverse SOGIE in the particular circumstances of a case:

- The ability to secure employment; [68]
- The ability to secure housing;
- Access to medical treatment, including access to treatment for individuals with HIV, [69] as well as treatment related to the transition process for trans individuals, or medical treatment to delay puberty for minors who have not yet decided on transitioning;

- Equal access to social services; and
- The existence of family or social support networks for those whose age, physical or mental health, or other intersectional factors indicate such a need. [70]

9. Persons appearing in proceedings before the Immigration Division

9.1 In the application of the non-exhaustive factors in Section 248 of the *Immigration and Refugee Protection Regulations* (IRPR), consideration should be given by the ID to the particular challenges faced by individuals with diverse SOGIE.

9.2 The LGBTIQ+ community, and organizations that support it, may be considered in evaluating the existence of strong ties to a community in Canada under Section 245(g) of the IRPR.

9.3 When the ID decides to order the release of an individual with diverse SOGIE following a detention review, the ID may consider any particular challenges raised related to the individual's SOGIE in setting terms and conditions of release.

10. Persons appearing in proceedings before the Immigration Appeal Division

10.1 Ascertaining the genuineness of a spousal or conjugal relationship in a sponsorship appeal may be difficult in situations where the sponsor, foreign national, or both identify as individuals with diverse SOGIE and are from a country that criminalizes, stigmatizes or does not recognize same-sex relationships. [71] The sponsor, foreign national, or both may not be able to display their relationship in public or disclose the relationship to their friends and family members. It can therefore be disproportionally difficult to corroborate the relationship with the indicators commonly used to evaluate a genuine spousal or conjugal relationship. These indicators include shared shelter, personal behaviours, social activities, economic support and the societal perception of the couple. [72]

10.2 Relationships involving individuals with diverse SOGIE may not evolve along the same trajectory as non-SOGIE relationships; therefore, preconceived notions about how partners should behave with one another, or with their friends and family, should be avoided when evaluating the genuineness of the relationship. For example, a person in a relationship with a trans or intersex partner may decide not to disclose the

gender identity of the partner to friends and family. As set out under section 6, decision-makers are to avoid relying on stereotypes regarding individuals with diverse SOGIE or drawing comparisons with non-SOGIE individuals.

10.3 Individuals with diverse SOGIE may face unique circumstances that ought to be taken into consideration when assessing humanitarian and compassionate grounds in sponsorship appeals. Generally, the IAD will measure the compassionate and humanitarian aspects of an individual's case in relation to the legal obstacles to admissibility. For example, an individual with diverse SOGIE who is sponsoring a parent may be fearful of visiting that parent if the country is intolerant of individuals with diverse SOGIE. In such a case, it will be a particular hardship to the sponsor if the parents are inadmissible and the sponsor cannot visit them. Similarly, an individual with diverse SOGIE who is being sponsored may be living in isolation, and the emotional support and security that can be provided by the sponsor is an important factor to consider.

10.4 In exercising their ability to grant discretionary relief on humanitarian and compassionate grounds in a removal order appeal, decision-makers should take into account the particular hardship that an individual with diverse SOGIE might face if they are removed from Canada. [73] Indicators of hardship may include concealment to avoid harm, harassment, ostracism from the family and community, and discrimination in access to social services and employment opportunities. Consideration should also be given to particular vulnerabilities due to intersectionality and mental health. Additionally, community ties, family support and establishment in Canada may be difficult to establish where the individual is isolated from their family and community or faces challenges by reason of their SOGIE. These considerations would apply as well in a Minister's appeal from an ID decision not to issue a removal order against an individual with diverse SOGIE.

10.5 In exercising their ability to grant discretionary relief on humanitarian and compassionate grounds in a residency obligation appeal, decision-makers should take into account the particular hardship that an appellant with diverse SOGIE might face in their country. Indicators of hardship may include concealment to avoid harm, harassment, ostracism from the family and community, and discrimination in access to social services and employment opportunities. Consideration should also be given to particular vulnerabilities due to intersectionality and mental health.

10.6 In exercising their discretion to consider humanitarian and compassionate grounds in a removal order appeal involving a misrepresentation pertaining to the identity of an individual with diverse SOGIE, decision-makers should also take into account the

particular circumstances that gave rise to the misrepresentation, including conditions in the individual's country of reference such as the existence of laws permitting a change of gender at the time of the misrepresentation. [74]

10.7 In all appeals, the best interests of a child with diverse SOGIE, or who is the child of an appellant or applicant with diverse SOGIE, is a factor to consider.

11. Enquiries

For more information, please contact:

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Approval:
signed Mario Dion
Chairperson

Notes

1 LaViolette, Nicole. *Sexual Orientation, Gender Identity, and the Refugee Determination Process in Canada*. Ottawa: University of Ottawa, 2013, p. (page) 24.

2 Hall, Sarah, and Rohan Sajnani. "Mental Health Challenges for LGBT Asylum Seekers in Canada." *Envisioning Global LGBT Human Rights*. January 2015, pp. (page) 2–3.

3 Reading, Romy and Lisa R. Rubin. "Advocacy and Empowerment: Group Therapy of LGBT Asylum Seekers." *Traumatology* 17.2 (2011): pp. (page) 87, 90. See also Hall and Sajnani, *supra* note 2. See also UK Home Office. *Asylum Policy instruction: Sexual orientation in asylum claims*. 6th. version. UK: UK Home Office, 2016, p. (page) 14.

4 Hersh, Nicholas. "Challenges to Assessing Same-Sex Relationships under Refugee Law in Canada." *McGill Law Journal* 60.3 (2015): pp. (page) 545 –548.

5 Immigration and Refugee Board of Canada (IRB). Chairperson's *Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB*. 2012.

6 In *A.B. v. (versus) Canada*, 2009 FC 640 (CanLII) at paras. (paragraphs) 19 –23, the Court noted that the reason there were no reports on the enforcement of laws criminalizing same-sex acts could be because no one is open about same-sex encounters.

7 In *Martinez v. (versus) Canada*, 2011 FC 13 (CanLII) at para. (paragraph) 68, the Court noted that it was unfortunate the Refugee Protection Division (RPD) referred to the claimant by terminology that did not reflect his own self-concept, but the slip did not reflect a misunderstanding of who he is or the risks he faced.

8 Subsection 166(c.1) of the *Immigration and Refugee Protection Act* (IRPA) provides that Immigration Division proceedings involving refugee protection claimants are conducted in private.

9 Subsections 166(c) and (c.1) of the IRPA.

10 *Code of Conduct for Members of the Immigration and Refugee Board of Canada*, atpara. (paragraph) 31: "Members have a responsibility to consider the privacy interests of individuals in the conduct of proceedings and the writing of decisions, ensuring that decisions contain only the personal information that is necessary to explain the reasoning of the decision."

11 In *Law v. (versus) Canada (Minister of Employment and Immigration)*, [1999] S.C.R. 497, Iacobucci J., writing for a unanimous Court, described the purpose of s. 15(1) at para. (paragraph) 51 as follows: "[t]o prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration."

12 In *Herrera v. (versus) Canada (Minister of Citizenship and Immigration)*, 2005 FC 1233 (CanLII), the Federal Court confirmed it is an erroneous stereotype to expect a gay man to exhibit effeminate mannerisms or characteristics. Similarly, in *Lekaj v. (versus) Canada (Minister of Citizenship and Immigration)*,2006 FC 909 (CanLII) at para. (paragraph) 17, the Federal Court confirmed that the application of stereotypical considerations regarding a claimant's appearance and mannerisms is not a proper basis upon which to impugn their credibility.

13 In *Trembliuk v. (versus) Canada (Minister of Citizenship and Immigration)*, 2003 FC 1264 (CanLII), the Federal Court ruled that it was a stereotypical view of the lifestyle and preoccupations of homosexual persons to assume that a gay claimant who had been raised Catholic would dissociate himself from the Roman Catholic Church and from Roman Catholic schools when he arrived in Canada. See also IAD TB2-14128 at paras. (paragraphs) 51–52, where, in assessing the genuineness of a conjugal relationship, the Immigration Appeal Division (IAD) allowed for the fact that the sponsor was not yet comfortable disclosing to his parents that his partner was trans. See also UK Home Office 2016, *supra* note 3 at p. 35. See also UK Lesbian & Gay Immigration Group. *Missing the Mark: Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims*. UK: UK Lesbian & Gay Immigration Group, September 2013, p. 16.

14 According to Nicholas Hersh, *supra* note 4 at pp. 552–60, culturally defined values like love and commitment manifest themselves differently across cultures in terms of sexual orientation and relationship development.

15 In *Dosmakova v. (versus) Canada (Minister of Citizenship and Immigration)*, 2007 FC 1357 (CanLII) at paras. (paragraphs) 11–12, the Court held that it was unreasonable for the RPD to rely on stereotypical attitudes about individuals with diverse SOGIE in making credibility findings, including that an individual would realize their sexual orientation at a young age (in their teens or early twenties). In the circumstances of the case, the claimant realized that she was a lesbian only when she began a relationship with a woman later in life, after she had been married. Similarly, in *Eringo v. (versus) Canada (Minister of Citizenship and Immigration)*, 2006 FC 1488 (CanLII) at para. (paragraph) 11, the Court confirmed that it is an unacceptable stereotype to assume that an individual with diverse SOGIE would realize their sexual orientation during their adolescence. In the circumstances of the case, the claimant realized he was gay only when he was 23.

16 In *Latsabidze v. (versus) Canada (Citizenship and Immigration)*, 2012 FC 1429 (CanLII) at paras. (paragraphs) 2–5, the Court ruled that it is an unacceptable stereotype to presume that gay men are promiscuous and are incapable of being in monogamous, stable relationships. See also *Kornienko v. (versus) Canada (Citizenship and Immigration)*, 2012 FC 1419 (CanLII) at para. (paragraph) 3.

17 *Shameti v. (versus) Canada (Citizenship and Immigration)*, 2008 FC 665 (CanLII) at para. (paragraph) 3. See also UK Home Office 2016, *supra* note 3 at p. 25, and UK Lesbian & Gay Immigration Group, *supra* note 13 at pp. 18–19.

18 In *X (Re)*, 2013 CanLII 91131 (RAD) at para. (paragraph) 37, the Refugee Appeal Division (RAD) held that the RPD erred by not considering that an individual was bisexual and not simply gay or heterosexual, and that it was reasonable that the individual may have had both homosexual and heterosexual relationships. See also IAD TB3-03790 at paras. (paragraphs) 15-18, where the IAD similarly noted that it was likely that the individual was bisexual and therefore not unreasonable for him to have engaged in a heterosexual relationship. See also UK Home Office 2016, *supra* note 3 at p. 25.

19 Individuals with diverse SOGIE may do so due to societal pressure, family pressure, stigma, prejudice, or to avoid suspicion of having a non-heterosexual orientation. In *Eringo*, *supra* note 15 at paras. (paragraphs) 11–12, the Court confirmed that it is an unacceptable stereotype to assume that an individual with diverse SOGIE could not enter into a heterosexual marriage without being forced to do so. In *X (Re)*, 2016 CanLII 39702 (RAD), the RAD held that it was unreasonable for the RPD to have drawn a negative inference from the fact that an individual with diverse SOGIE had a heterosexual relationship and a child from that relationship.

20 *Slim v. (versus) Canada (Minister of Citizenship and Immigration)*, 2004 FC 706 (CanLII) at para. (paragraph) 5.

21 In *Essa v. (versus) Canada (Citizenship and Immigration)*, 2011 FC 1493 (CanLII), the Court held that it was unreasonable for the RPD to draw a negative inference from the claimant's behaviour of not frequenting gay establishments. In *X (Re)*,2014 CanLII 94267 (RAD) at para. (paragraph) 28, the RAD confirmed that the assumption that a gay man would openly participate in LGBT groups or organizations, or frequent gay clubs, was an unacceptable stereotype. See also *X (Re)*, 2014 CanLII 95940 (RAD) at para. (paragraph) 35, and *X (Re)*, 2013 CanLII 91548 (RAD) at paras. (paragraphs) 37–39.

22 In *Ogunrinde v. (versus) Canada*, 2012 FC 760 (CanLII) at para. (paragraph) 42, the Court noted that the acts and behaviours which establish a claimant's homosexuality are inherently private, and that when evaluating claims based on sexual orientation, one must be mindful of the inherent difficulties in proving that a claimant has engaged in any particular sexual activity.

23 In *Murugesu v. (versus) M.C.I.*, 2016 FC 819 (CanLII), the Court upheld a RAD decision in which a negative inference was drawn from the failure of the appellant to adduce evidence from two former partners, one of whom was in Canada, at the appeal. No reasonable explanation was offered. Similarly, in *Irivbogbe v. (versus) Canada (Citizenship and Immigration)*, 2016 FC 710 (CanLII), the failure to bring a partner as a corroborative witness supported a negative inference. Also in *Aluyi v. (versus) Canada (Minister of Citizenship and Immigration)*, 2006 FC 1028 (CanLII), the Court noted that when a claimant's testimony contains many lies, corroboration may be needed to establish sexual orientation. However, in *Nezhalskyi v. (versus) Canada (Citizenship and Immigration)*, 2015 FC 299 (CanLII), the claimant's testimony was consistent and the Court held that a negative inference should not have been drawn from the fact that a boyfriend who resided in the city where the hearing took place did not testify.

24 In *Buwu v. (versus) Canada (Citizenship and Immigration)*, 2013 FC 850 (CanLII) at para. (paragraph) 47, the claimant explained she did not file letters or affidavits from any former partners as she had only one real relationship in high school and it was a secret. The Court held that it was wrong for the RPD to make a negative credibility finding based on the lack of corroborative evidence.

25 However, in *Irivbogbe*, *supra* note 23, the claimant did not join any LGBTIQ+ groups for two years after his arrival in Canada and joined only one month after he made his claim for refugee protection. A negative inference in the particular circumstances of this case was held to be reasonable.

26 UK Home Office 2016, *supra* note 3 at p. 28. See also UNHCR. *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.* 2012, para. (paragraph) 64.

27 In *Smith v. (versus) Canada (Citizenship and Immigration)*, 420 FTR 256 (CanLII) at paras. (paragraphs) 24–32, significant inconsistencies emerged between the Personal Information Form, a first hearing and the *de novo* hearing. The Court held that it was appropriate in the particular circumstances of this case to draw a negative inference from these inconsistencies.

28 In *Gabila v. (versus) Canada (Citizenship and Immigration)*, 2016 FC 574 (CanLII) at paras. (paragraphs) 31–32, the Court noted that it was understandable that the applicant had substituted a lie for the truth at the port of entry as he had hidden his sexual orientation in his home country and was fearful of disclosing his sexual orientation to authorities upon his arrival in Canada.

29 In *Kamau v. (versus) Canada (Citizenship and Immigration)*, 2016 FC 413 (CanLII) at paras. (paragraphs) 54–55, the RPD identified an inconsistency in regard to how the applicant described his former partner. The applicant described him as "bisexual" in his Basis of Claim Form (BOC Form), but as "gay with straight tendencies" in his oral testimony. The Court found this to be a meaningless distinction in the context of fluid sexual orientation. Similarly, in *Ngarah v. (versus) Canada*, 2005 FC 1525 (CanLII) at paras. (paragraphs) 29–30, the Court found that the Board failed to appreciate the distinction between people suspecting and therefore "coming to know" about a person's sexual orientation and active disclosure when it impugned the claimant's credibility by finding that he gave conflicting evidence in respect to when people came to know about his sexual orientation and when he told his father.

30 In *Rudoy v. (versus) Canada (Citizenship and Immigration)*, 2015 FC 1051 (CanLII), the applicant testified that he had a heterosexual encounter as a teenager in an effort to change his sexual orientation but did not "totally realize" he was gay until four years later.

31 In *Strugar v. (versus) Canada (Citizenship and Immigration)*, 2013 FC 880 (CanLII) at para. (paragraph) 5, the Court found that it is not inconsistent that the claimant would risk kissing her lover in a parked car near a bus stop when she stated she was careful to hide her sexual orientation. It is also not implausible that someone would keep a same-sex relationship private but that nonetheless, fellow students would find out about the relationship; *Boteanu v. (versus) Canada (Minister of Citizenship and Immigration)*, 2003 FCT 299 (CanLII) at paras. (paragraphs) 6–8. See also UK Lesbian & Gay Immigration Group, *supra* note 13 at p. 21. See also Jansen, Sabine, and Thomas Spijkerboer. *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe.* Vrije Universiteit Amsterdam. September 2011, p. 60.

32 Hesitancy, evasiveness and lack of knowledge about basic details about a long-term sexual partner may undermine credibility (*X (Re)*, 2014 CanLII 96279 (RAD)).

33 In *Kamau*, *supra* note 29 at paras. (paragraphs) 59–60, the RPD did not find the applicant convincing about his same-sex relationship because he did not provide basic details about the relationship in his BOC Form, and the details he provided at the hearing were not convincing because they were not provided in a comprehensive and fulsome manner. The RPD also found that he was hesitant and evasive in the way that he described his relationships with women. However, when the Federal Court examined the RPD transcripts, it found that a comparison of the applicant's testimony about his same-sex relationship and the female relationship showed no apparent difference or discernable vagueness.

34 In *X (Re)*, 2015 CanLII 52150 (RAD), the RAD found that a significant incident at a hotel relating to the discovery of the person's sexual orientation was omitted from the appellant's BOC Form without a reasonable explanation.

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

36 *Amaya Jerez v. (versus) Canada (Citizenship and Immigration)*, 2012 FC 209 (CanLII) at para. (paragraph) 24. See also *Dykon v. (versus) Canada*, [1994] 87 F.T.R. 98, 25 Imm. L.R. (2d) 193.

37 *Corneille v. (versus) Canada (Minister of Citizenship and Immigration)*, 2014 FC 901 (CanLII).

38 In *Hernandez v. (versus) Canada (Minister of Citizenship and Immigration)*, 2003 FCT 182 (CanLII), the Federal Court held that a claimant, who was a trans male from Mexico, would be at a greater risk of persecution based on his political activism and his being an individual with diverse SOGIE.

39 UNHCR, *supra* note 26 at para. (paragraph) 42.

40 UK Home Office 2016, *supra* note 3 at p. 10.

41 *Sadeghi-Pari v. (versus) Canada (Minister of Citizenship and Immigration)*, 2004 FC 282 (CanLII) at para. (paragraph) 29. See *V.S. v. (versus) Canada (Citizenship and Immigration)*, 2015 FC 1150 (CanLII) at para. (paragraph) 12, and *Wafa v. (versus) Canada (Citizenship and Immigration)*, 2015 FC 1153 (CanLII) at para. (paragraph) 22. See also UNHCR, *supra* note 26 at para. (paragraph) 31. See also International Commission of Jurists (ICJ). *Refugee Status Claims Based on Sexual Orientation and Gender Identity: A Practitioners' Guide*. Geneva: ICJ, 2016, pp. 84–101, citing EU and UK case law, including *X, Y and Z v. (versus) Minister voor Immigratie en Asiel*, 2013 C.J.E.U. 720, and *HJ (Iran) and HT (Cameroon) v. (versus) Secretary of State for the Home Department*,2010 U.K.S.C. 31.

42 IRB. Chairperson's *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*. 1996.

43 UK Home Office 2016, *supra* note 3 at p. 8, and UK Home Office, *Asylum Policy instruction: Gender identity issues in the asylum claim*. UK: UK Home Office, 2011, p. 2.

44 UNHCR, *supra* note 26 at p. 4. See also *X (Re)* 2013 CanLII 91131 (RAD) at paras. (paragraphs) 37, 42, 43.

45 IRB. Chairperson's *Guideline 3: Child Refugee Claimants—Procedural and Evidentiary Issues*. 1996.

46 *Sebastiao v. (versus) Canada (Minister of Citizenship and Immigration)*, 2016 FC 803 (CanLII) at paras. (paragraphs) 33–34.

47 UNHCR, *supra* note 26 at para. (paragraph) 27. See also *A.B.*, *supra* note 6 at paras. (paragraphs) 17–18.

48 In *Peiris v. (versus) Canada (Minister of Citizenship and Immigration)*, 2004 FC 1251 (CanLII) at para. (paragraph) 21, the Court found that police in Sri Lanka have used the existence of legislation criminalizing non-conforming sexual activity to blackmail gay men, even though the legislation is not enforced in the country.

49 See *Su v. (versus) Canada (Citizenship and Immigration)*, 2012 FC 554 (CanLII). See also UNHCR, *supra* note 26 at para. (paragraph) 29 and ICJ, *supra* note 41 at p. 139. In *Sebastiao, supra* note 46, the Court held that it was reasonable for the RAD to have concluded that the existence of a law of general application (in this case, a public morality law) did not give rise to a well-founded fear of persecution in the particular circumstances of the case as there was no evidence of the actual enforcement of this law against individuals.

50 *X (Re)*, 2010 CanLII 59588 at paras. (paragraphs) 9-19.

51 UNHCR, *supra* note 26 at para. (paragraph) 21. See also ICJ, *supra* note 41 at pp. 123–128.

52 *Egeresi v. (versus) Canada (Minister of Citizenship and Immigration)*, 2003 FC 1133 (CanLII).

53 *Ballestro Romero v. (versus) Canada (Citizenship and Immigration)*, 2012 FC 709 (CanLII). See also UNHCR, *supra* note 26 at para. (paragraph) 25.

54 ICJ, *supra* note 41 at p. 125. See also UNHCR,*supra* note 26 at para. (paragraph) 24.

55 UNHCR, *supra* note 26 at para. (paragraph) 24.

56 Ibid. at para. (paragraph) 25.

57 *Smith c. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1194 (CanLII).

58 European Asylum Support Office. *Researching the situation of lesbian, gay, and bisexual persons (LGB) in countries of origin*. 2015, p. 10. See also *A.B.*, *supra* note 6 at paras. (paragraphs) 19, 23.

59 UK Home Office 2011, *supra* note 43 at p. 11; UK Lesbian & Gay Immigration Group, *supra* note 13 at p. 27.

60 *Martinez*, *supra* note 7.

61 LaViolette, *supra* note 1 at p. 34.

62 *Kovacs v. (versus) Canada (Citizenship and Immigration)*, 2010 FC 1003 (CanLII); *Buri v. (versus) Canada (Citizenship and Immigration)*, 2014 FC 45 (CanLII).

63 *Galogaza v. (versus) Canada (Citizenship and Immigration)*, 2015 FC 407 (CanLII) at para. (paragraph) 14. See also *Melo v. (versus) Canada (Citizenship and Immigration)*, 2008 FC 150 (CanLII).

64 See *A.B.*, *supra* note 6, where there was no evidence that laws criminalizing homosexual acts were enforced.

65 Examples of government action may include the enactment of general anti-discrimination legislation, the enactment of legislation allowing same-sex marriage, anti-discrimination training to police or security forces, public information campaigns, and public statements.

66 *A.B.*, *supra* note 7.

67 *Okoli v. (versus) Canada (Minister of Citizenship and Immigration)*, 2009 FC 332 (CanLII).

68 *Rodriguez Diaz v. (versus) Canada (Minister of Citizenship and Immigration)*, 2008 FC 1243 (CanLII).

69 In *Leon v. (versus) Canada (Citizenship and Immigration)*, 2014 FC 406 (CanLII), the Court held that an internal flight alternative (IFA) analysis must address access to health care for HIV positive persons.

70 In *Rodriguez Diaz*, *supra* note 68, the Court considered the potential to experience ostracism from friends and family in the IFA.

71 *Leroux v. (versus) Canada (Citizenship and Immigration)*, 2007 FC 403 (CanLII) at para. (paragraph) 30. See also *Morel v. (versus) Canada (Citizenship and Immigration*), 2011 CanLII 94560 (IAD) at paras. (paragraphs) 28 and 38.

72 *M. v. H.*, [1999] 2 S.C.R. 3.

73 In *Namwo v. (versus) Canada (Public Safety and Emergency Preparedness)*, 2016 CanLII 74021 (IAD) at paras. (paragraphs) 72–75, the IAD held that it would cause the appellant, a trans woman, undue hardship to be returned to her country of reference as she would more than likely face the same marginalization and risk as when she left, including discrimination in access to employment and being ostracized from family members.

74 Ibid. at paras. (paragraphs) 56–59. The IAD found that, in the particular circumstances of the case, which involved a trans woman who had obtained false identity documents to change her gender from male to female, the seriousness of the appellant's misrepresentation as to identity was "mitigated by her underlying motive for changing her identity, which was not to gain an immigration advantage, but rather to express her gender identity"; (para. (paragraph) 59).

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