

# The ABCs of Guideline 9: Proceedings before the IRB involving Sexual Orientation and Gender Identity and Expression (SOGIE)

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# OUTLINE


- Brief overview of challenges for SOGIE newcomers
- Diversity of SOGIE identities
- Diversity of SOGIE experiences before and after arriving in Canada
- Expectations of evidence

# Challenges for SOGIE immigrants and refugees

- Growing up in a heteronormative society
- Mental health issues that often remain untreated even upon reaching a country of asylum (PTSD, internalized homophobia)
- SOGIE claimants tend to distrust people in positions of authority
- SOGIE newcomers rarely benefit from the support of their ethno-cultural communities
- Claimants' SOGIE may greatly differ from Western notions of LGBTQ lifestyles
- Credibility determination is complex and sensitive as it entails an assessment of claimants' private and embedded feelings.



**Para 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.**



Clients may not use terms like “LGBT”, “gay” or even “homosexual” to self-identify because...

...there is a gap between the initial realization of same-sex attractions and associating those attractions with an identity

- *Even though I heard homosexuality was haram, I did not actually understand what was meant by homosexual behavior when I was young. When I was XX years old, my friend's XXXX used to sleep with me....After that experience, I went to my friend's house to have relations with my friend's XXXX...I was feeling happy and comfortable with this experience for about XX months. But then, people started to make comments about my mannerisms and appearance... I started feeling that what I was doing with my friend's XXXX was wrong, so after about XX months, I just stopped going to see him... As I got older, around XX or XX years old, I became more aware of what XXX people thought of these guys that see other men, like what I was doing at XX years old.*

# ...they are unfamiliar or uncomfortable with those terms

- Odu was born in Lagos, Nigeria....He remembered looking at boys in high school, and “I liked what I saw,” but he wasn’t sure if this was normal, although he did ‘do some things’ with a friend. ...When I asked him if he knew of any organizations or support groups ...in the country, he shook his head saying, “No, because I was so scared. I didn’t want anyone to know. I was like, really in denial. No one knew what I was doing...I kept this a secret from [every]one.” - David A.B. Murray, *Real Queer? Sexual Orientation and Gender Identity Refugees in the Canadian Refugee Apparatus* (London: Rowman & Littlefield International Ltd, 2016) at pp 26-27

- *I told XXXX why I’m here in Canada and why I escaped from my country, XXXX. I have felt comfortable telling XXXX my story because I know he is like me. He has been very supportive, telling me that if I have this feeling of wanting men, then in Canada, people will help me, not hurt me like in XXXX.*

.....they don't use terms like "gay" or "homosexual" in the ways that we understand them

- In *Ndowku v Canada (Minister of Citizenship and Immigration)*, the Federal Court agreed that the Board should disbelieve that the claimant had a same-sex partner in Nigeria named Kenneth. After the claimant testified that his "girlfriend" told him of his father's death, his counsel asked him to clarify whether he was referring to his "gay friend or girlfriend"; the claimant responded the latter. In the southern region of Nigeria, some individuals may refer to their partners as *kawa* (girlfriend) rather than *aboki* (male friend), so the claimant in *Ndowku* may have been using the word "girlfriend" to describe Kenneth.
  - *Ndowku v Canada (Minister of Citizenship and Immigration)*, 2013 FC 22, FCJ No 40 (QL) at para 35.
  - Steven Pierce, "Identity Performance and Secrecy: Gendered Life and the "Modern" in Northern Nigeria" (2007) 33:3 *Feminist Studies* 539 at 547.



# ...they may simply choose not to identify within the LGBTIQ paradigm

- *I now understand that I am attracted to men, but I am still trying to figure out what sexual identity marker works for me. I have talked about this issue with XXXX and have done some research. The word that I use to describe myself at this moment is 'polysexual.' To me, this means to be attracted to different genders but not everyone. It's not like 'bisexual' because bisexual means to be attracted to males and females, but polysexual covers a broader spectrum of genders. I see myself having a relationship with other men or transgender women.*

# Ask your client to describe their identity, experiences and feelings surrounding their SOGIE.

How would you describe your gender or sexuality?

Is it ok if I use the word 'gay' to describe you and people like you in your country, or do you prefer another word?

When did you realize that you were maybe different from other people?

How did you notice these differences?

What gender pronouns do you use to describe yourself?



# Guideline at Para 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. 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.

# The Staged-Identity Model, first developed by Australian psychologist Viviane Cass in 1979

- **Stage one: Identity Confusion**
  - aware for the first time that homosexuality may define his or her thoughts, feelings, or behaviors
- **Stage two: Identity Comparison**
  - begin addressing their feelings of otherness and social alienation
- **Stage three: Identity Tolerance**
  - individuals will select certain other gays and lesbians to fulfill social, emotional, and sexual desires
- **Stage four: Identity Acceptance**
  - seek more opportunities to be in contact with other sexual minorities
- **Stage five: Identity Pride**
  - feel comfortable enough to reveal identity to others
- **Stage six: Identity Synthesis**
  - overcome societal stigmatization of non-heterosexual intimacy
  - integrate their private and public sexual aspects of self



# *Menaj v Canada (Minister of Citizenship and Immigration), 2008 FC 611*

- The Board appears to have applied, for lack of a better term, the North American perspective to assessing the Applicant's behaviour when the Board speaks of going to a "gay club" and engaging in "sexual relations with any man." Indeed, the Board member does not take into consideration the differences how homosexuality is viewed in Albania as opposed to Canada - para 17

# *Houshan v Canada (Citizenship and Immigration)*, 2010 FC 650

- [I]n short, there was no evidence that he was living in an openly gay lifestyle as he had claimed he wanted to do in his PIF, despite having been in Canada for several years. This was a serious contradiction and given the deference owed to the Board on findings of fact, this was sufficient to justify the Board's negative credibility finding. Given the applicant's statements, I do not find that the Board imposed any stereotypical views of gay lifestyle on the applicant. - at para 17; see also *Magradze v Canada (Minister of Citizenship and Immigration)*, 2006 FC 20 at para 6, where the Federal Court found it reasonable that the Board concluded it was implausible that the claimant would not "take more active steps to pursue his lifestyle" once in Canada.

# Linguistic, cultural and religious differences

*It has been difficult going to social places to meet other homosexual men in Ottawa. My culture is so different from Canadians. For example, I had never heard the word “gay,” I had never heard it until I came to Canada. The English I speak is different from Canadian English.*


# Financial barriers and work obligations

*XXXX also coordinates a monthly newcomers group for lesbian, gay, bisexual, and transgender newcomers. At first, I was reluctant to go to it, but XXX assured me that the sessions were confidential. At the beginning, I was tense, but once other people started talking, I felt more comfortable although I did not want to speak at the meeting. I have not gone to another meeting since then because I am busy working at XXX and XXX. I work night shifts so I have to miss the meetings.*



# Other personal characteristics

- *I attended the pride parade in XXXX. It was nice to see people being so happy about their sexuality. I did not stay very long because it was a loud event. The only uncomfortable moment was when I was going home and saw these Jesus freaks, but I just passed by them.*



**Tip:** Ask your clients what type of life they would like to live, what efforts they have made to realize that life, and the barriers and challenges they are facing.

- *For me, I want to live a life in Canada where I am free to be who I am. I want to focus on my studies and make friends without worrying about what people will say about me.*
- *I am not sure yet what life I would like to have right now. I now understand that Canada is a safe country for all types of people but sometimes, I still feel like I am in XXXX. For now, I am just focusing on work and my refugee claim. I think once the refugee claim is over and I know I won't be deported from Canada, I can think more about the future.*




## IRB Guideline para 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.**


Clients may have limited knowledge of the culture or living conditions for SOGIE individuals in their countries of nationality because SOGIE is so taboo.

*I understood more that it was unacceptable to be gay in XXXX, and that gay people have the freedom to be who they are in Canada. But, I still did not know exactly what the consequences were if anyone was found out to be gay because I still didn't know of any gay people in my village and I had never heard or personally known of any gay people in XXXX. At that point, I still never had a boyfriend. I knew that I couldn't have a boyfriend, or if I wanted to hold his hand, or kiss him, it would be unacceptable.*



Claimants may not know or are not interested in participating in LGBTIQ+ events, groups, and organizations in Canada.

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- **Tip:** Explain to your clients that LGBTIQ+ groups and events exist in Canada. Ask them if they have ever joined or are interested in joining. However, do not encourage your clients to attend these LGBTIQ+ groups or events simply to bolster their case. The timing of participation is a relevant consideration in determining credibility.

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- **7.6.1 Testimony about same-sex relationships that is vague and lacking in detail may support a negative credibility inference; 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.**




## *Kyambadde v Canada (Citizenship and Immigration), 2008 FC 1307*

In a 2008 RPD case, the adjudicator raised plausibility concerns regarding the applicant's relationship with his gay lover in Uganda. The claimant testified that their relationship lasted from 1987 until 2006, when a group of men assaulted them after they were discovered being intimate on a beach. Since the assault, the applicant stated that he had only tried to phone his partner once, in order to see if he was alive. The analysis states that "he was fearful that his calls might be used to track 'me down.'" The Board found the gay applicant's personal story dubious because once in Canada, where he was safe, he did not persist in trying to locate his partner.



- I am not at all convinced that the basic human emotions of love and compassion for another are widely different in Canada than in Uganda. In my view, it is reasonable for the Board to question whether this 20 year relationship existed when the applicant showed so little concern for his lover. The applicant's evidence was that he made only one attempt to contact his lover of 20 years after a beating that had left him unconscious. In those circumstances it is possible that Godfrey was severely injured or dead, yet the applicant made no efforts to find out his condition or even whether his long term lover was alive. I find that this lack of concern raises serious issues as to the credibility of the applicant and the Board's finding that there was no such relationship was reasonable.
- *Kyambadde v Canada (Citizenship and Immigration)*, 2008 FC 1307 at para 10.




**Tip:** Ask your clients about their past and current same-sex relationships. Focus on open-ended questions to allow clients to describe their relationships in their own words. Include any cultural context when necessary.

- *Even when XXXX and I began a relationship, we did not think to call ourselves boyfriends or partners or lovers, even in secret. The idea of two men in a relationship does not exist in XXXX society. We seemed like good friends. We worked together, we did everything together, we cooked, we ate, and we would sleep over at each other's place once in a while. We were sad about having this relationship because XXXX people would not understand or accept it.*




# IRB Guideline paras 7.1;7.2.1

- **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.**
- **7.2.1 Corroborating evidence from family or friends may not be available in cases involving SOGIE. 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**



**Tip:** Explain the reasons why your clients have or have not divulged their SOGIE to close friends, family members, or others.

- *Although my family is well educated and has an understanding of Western culture, I could not tell them I am gay. In XXXX, gay people are considered criminals and the media says that gay people go to hell. My mother is semi-Westernized and is not very religious, but she does strictly follow the customs, traditions, and values that most XXXX do. I am too afraid to lose my parents' support, especially my mother's, by telling them I'm gay.*
- *In XXXX, when XXXX and I still lived together in Toronto, I told him that I was gay. I felt that I had no choice because he had been grilling me about why I was not talking to my family. He was worried about me and told me that if it was a problem with school, we would be able to fix it. Furthermore, he had been supporting me financially for so long, so I felt I owed him an explanation.*



**Tip:** If they have divulged their SOGIE to friends, family members, or partners, explain why they have not been contacted or have not agreed to testify or provide a letter of support.

- *I am still friends with XXX but I think the stress of my refugee claim has affected our friendship. I asked him to be a witness for my refugee claim but he got very upset about it. XXXX is a refugee himself and I don't think he wants to go through the stress of a refugee interview like he had to go through to resettle in Canada.*
- Remember that it may be dangerous for supportive individuals abroad to testify by phone or provide a sworn letter of support.



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