

A comprehensive review of appellate decisions relating to refugee claims based on sexual orientation and gender identity

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1. Introduction

Since the early 1990s, sexual orientation and gender identity have been recognized as constituting the basis of a 'particular social group' for the purposes of refugee protection under the 1951 Refugee Convention. Since that time, there has been a significant increase in the number of lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals fleeing persecution and claiming refugee status on the basis of sexual orientation and gender identity. Yet LGBTI refugee claimants continue to face a particular set of challenges in securing refugee protection. In order to illustrate the issues that arise in LGBTI refugee claims, this project focusses on appellate level decisions, first in Canada by the Federal Court, and additionally by appellate courts in other countries. Relevant case law is reviewed, selected, and summarized to outline the binding legal principles and procedures that govern the refugee determination process for LGBTI refugees. The case summaries are organized by subject matter in relation to the UN Convention on Refugees so readers can easily access the appeal cases that touch upon specific issues. Once completed, the case summaries will serve as a tool to guide refugee advocates, lawyers and decision-makers in dealing with refugee claims based on sexual orientation and gender identity.

2. Methodology

Identification of pertinent case law through a systematic search of legal databases using keywords that corresponded with a Convention refugee definition. Each pertinent case was then summarized and categorized according to the Convention refugee subject matter.

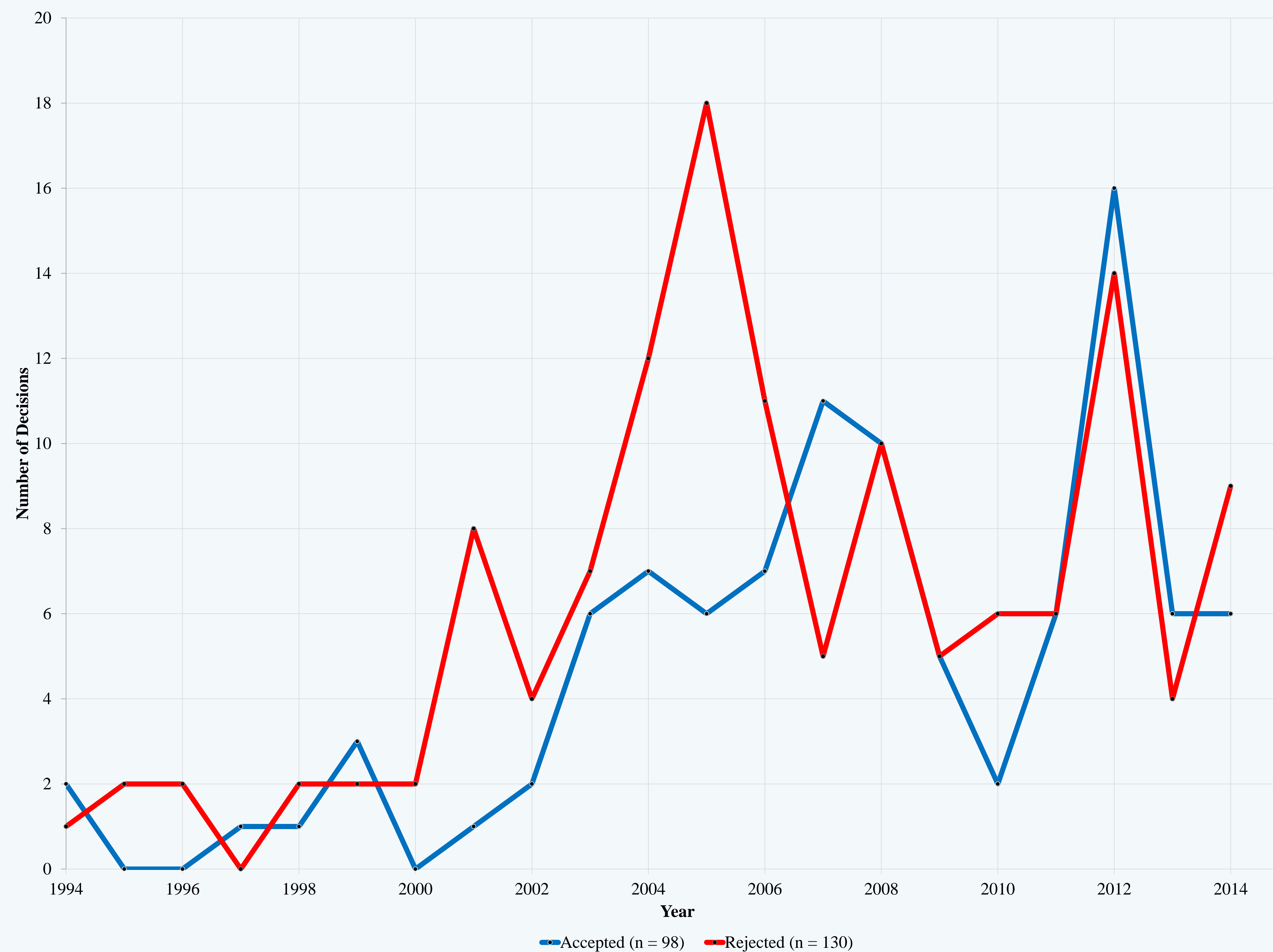
"lgbti" + "refugee" + "IFA"

in westlaw canada
in lexis nexis



3. Results

A Sample of Canadian Federal Court Reviews of LGBTI Refugee Decisions (1994 - 2014)



Barriers to adjudication of LGBTI claims

- (1) Credibility
 - Use of stereotyped and Westernized notions of sexual orientation that do not apply to claimants from different cultures
- (2) Evidentiary issues
 - Lack of human rights documentation on persecution of LGBTI individuals
- (3) State protection and concealment
 - Failure to seek protection – in many countries claimants often conceal their sexuality or fear persecution from the state
- (4) Adjudicator prejudice
 - Adjudicators may be homophobic or have negative perceptions of LGBTI individuals

Challenges in fulfilling elements of the Convention refugee definition

- (1) Membership in a 'particular social group'
 - Disbelief in claimant's sexual orientation or gender identity
- (2) Persecution required, not discrimination
 - More sympathetic when homosexuality is illegal in country of origin
 - Less sympathetic when country of origin is working towards respect for LGBTI individuals
- (3) Internal Flight Alternative
 - The claimant must demonstrate they have taken all reasonable measures to seek safety within their own country

4. Conclusion

Through a systematic review of case law dating back to 1994 until present day, this project has generated a comprehensive review of appellate decisions relating to refugee claims based on sexual orientation and gender identity. This project highlights the unique and complicated challenges that LGBTI refugee claimants face at the different levels of their refugee status determination process. More specifically, how their claims are evaluated and decided at the appellate level. The collection of case law will be used as training material and as an additional resource for refugee professional, adjudicators and organizations serving refugees. By analyzing and reviewing how appellate level decisions are made in LGBTI refugee cases, this project will improve the knowledge of refugee professionals on asylum issues related to sexual orientation and gender identity. Although appellate level decisions have demonstrated an evolution in how LGBTI claims are decided barriers still remain to LGBTI refugees in fulfilling the substantive elements required to be considered a Convention refugee.



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Literature cited

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Further information

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For more information on the Organization for Refuge, Asylum and Migration's (ORAM) training program in collaboration with the United Nations High Commission for Refugees (UNHCR), please visit: <http://www.oraminternational.org/>