

# RAINBOW REFUGEES

## *An Analysis of Access to Justice Issues Faced by LGBTQ+ Refugee Claimants*

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## ABSTRACT

Access to justice in Canada is difficult for many vulnerable refugee communities. To become a refugee in Canada, the legal threshold for convention refugees<sup>1</sup> under the *Immigration and Refugee Protection Act*<sup>2</sup> must be met. The ground for making a refugee claim in Canada is to seek refuge outside their country of origin based on their claim of a well-founded fear for their life and safety due to race, nationality, religious beliefs, political beliefs, or membership in a particular social group.<sup>3</sup> One community that is at particular risk is the LGBTQ+ community. In many countries, being part of the LGBTQ+ community is criminalized, and in some places is still punishable by death. In this article, the focus will be on how LGBTQ+ refugees are treated when they make a refugee claim in Canada.<sup>4</sup> Rainbow Refugees are extremely vulnerable refugee claimants because they are subjected to mistreatment, discrimination, and hardship in their countries of origin due to lack of being accepted; for example, although the homosexual community enjoys broad acceptance in North America, the European Union, and much of Latin America, they face widespread rejection in predominantly Muslim nations, parts of Africa and Asia, as well as in Russia, and opinion on their acceptance is divided in Israel, Poland, and Bolivia.<sup>5</sup> Once Rainbow Refugees apply for refugee status, either from inside or outside Canada, they are extremely vulnerable while waiting for their hearing before the Immigration and Refugee Board of Canada. While they are awaiting their hearings, they might be lodged in precarious living situations in Canada or they might be in danger in a transit country and unable to get support and services. Issues that Rainbow Refugees often struggle with are understanding the law and also being able to afford a lawyer to help them, because hiring a lawyer is expensive and is often not an option for them. Rainbow Refugees also struggle to find housing and employment. Many of them continuously struggle with discrimination from communities and society, and they tend to suffer from cultural dissonance, which is the experience of confusion felt by people adapting to a new cultural

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1 *Infra* note 2, s 96.

2 SC 2001, c 27 as amended [IRPA].

3 IRPA, s 96(a).

4 In this article, LGBTQ+ refugee claimants and LGBTQ+ refugees will be referred to as “Rainbow Refugees.”

5 Pew Research Center, “The Global Divide on Homosexuality” (4 June 2013), online: <<https://www.pewresearch.org/global/2013/06/04/the-global-divide-on-homosexuality>>.

environment.<sup>6</sup> Solutions are required to help this community while they await the outcome of refugee hearings. For example, there is the need to have legal aid clinics that are LGBTQ+ friendly. This can make a huge difference. As well, the creation of simple and multi-language guides for this group on procedures for how to properly make a refugee claim would be extremely helpful. Because paralegals, with their access to justice perspective, can be excellent advocates for Rainbow Refugees, adding refugee law to the scope of paralegal practice would be a significant benefit. This, of course, will require proper education and training for paralegals so that they become competent enough to handle complex refugee cases.

## I. INTRODUCTION

Canada's refugee policy states that it is open to LGBTQ+ communities. For instance, the Canadian government financially supports the Rainbow Refugee Society—an organization that works with sponsorship agreement holders to sponsor Rainbow Refugees.<sup>7</sup>

To understand the journey of LGBTQ+ refugee claimants, it is important to analyze the refugee determination process in Canada. According to the United Nations' *1951 Convention Relating to the Status of Refugees*, a *refugee* is an individual who cannot live or return to their country of birth or citizenship due to well-founded fear for their life and safety.<sup>8</sup>

If applying from inside Canada, once an applicant submits a refugee claim, they need to provide enough evidence to substantiate their claim. In some cases, the IRCC case officer can make a finding that the basis of their claim is satisfactory and so some refugee claimants can get refugee status without a hearing. This requires the submission of a thorough Basis of Claim Form that contains enough details and a proper chronology of the events that led the applicant to make a refugee claim. It is important to note that not every claim with clear details and logical chronology will be accepted without an

6 Caroline Sarojini Hart & Arathi Sriprakash, "Understanding Cultural Dissonance and the Development of Social Identities" (2018) 27:1 Intl Studies Sociology Education 1-3, online: <[https://www.researchgate.net/publication/323990718\\_Understanding\\_cultural\\_dissonance\\_and\\_the\\_development\\_of\\_social\\_identities](https://www.researchgate.net/publication/323990718_Understanding_cultural_dissonance_and_the_development_of_social_identities)>.

7 Immigration, Refugees and Citizenship Canada, "LGBTQI+ Refugees" (14 July 2023), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/canada-role/2slgbtqi-plus.html>>. The footnote to this webpage says: Note: We use the term "2SLGBTQI+" when referring to the community within Canada, reflecting First Nations' use of the term "two-spirit." When referring to international issues, including refugees, we use "LGBTQI+."

8 *1951 Convention Relating to the Status of Refugees*, at art 1A, online: *United Nations* <<https://www.unhcr.org/uk/about-unhcr/who-we-are/1951-refugee-convention>>.

interview or a hearing. In most cases, refugee claims are heard before the Immigration and Refugee Board (IRB) in a hearing before an adjudicator, during which the individual is required to prove their claim for refugee status on the basis of the grounds enumerated in section 96 of the IRPA.

If the refugee claim is accepted, and after the convention refugee (as they are called once their refugee claim is accepted) has spent a period of time residing in Canada, they can apply for permanent residency. If the refugee claim is not accepted, the rejected refugee claimant can appeal the decision or leave Canada.

Even after getting convention refugee status, many refugees continue to struggle with finances, housing, access to good legal advice, and cultural adaptation. These struggles put the refugees in a precarious position in society. For LGBTQ+ refugee claimants, their applications are often based on fear for their life or safety due to their sexual orientation, gender identity, and gender expression. In many countries in the world, being LGBTQ+ is criminalized and, in some countries, it is even punishable by death. The consequences for many LGBTQ+ persons can be devastating. There are countries where members of the LGBTQ+ community identify as heterosexual or cisgender for safety, but if it becomes known that they are not heterosexual or cisgender they will be considered criminals who can receive sentences such as imprisonment, torture, or even execution.

The plight of LGBTQ+ Rainbow Refugees needs to be addressed and analyzed so as to understand what access to justice barriers there are and how to overcome them.

Rainbow Refugees are a very vulnerable group of newcomers because they come from countries with few, if any, protections and LGBTQ+ rights. Not only are they leaving their country of origin, they also suffer discrimination in the processing of their immigration cases and for the duration of their settlement in Canada. They encounter lack of access to justice in obtaining housing, getting employment, and seeking legal representation. Often, they are not able to get any of these issues solved because they face discrimination and bias. Rainbow Refugees also face double or triple discrimination; for example, if they come from Asian or African countries, they face racial discrimination as well. This intersectionality results in severe marginalization.

For Rainbow Refugees, difficulties with cultural adaptation and cultural dissonance are also important further barriers to take into account.

It will be argued that the vulnerability of this newcomer group is the result of structural and systemic flaws in Canadian refugee policy and process. By analyzing the system, and its effect on the lives of Rainbow Refugees, approaches to create change can be discovered, and implementation of those changes can be made. It is also essential, however, to conduct research and analysis to determine the effectiveness of the changes prior to taking action.

## II. APPLICABLE LAW

The main provisions of the IRPA outline the requirements for refugee claimants to Canada.

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.<sup>9</sup>

Rainbow Refugees can use a few different options to apply to come and stay in Canada. One is to apply to be a *convention refugee*, where a person's claim is based on a fear of persecution in their own country due to their religion, nationality, race, political views, or membership in a social group.<sup>10</sup> Another option is to apply as a *person in need of protection*, a claim under which the person must prove that they would be subjected to torture or cruel and unusual treatment or punishment if they were returned to their country of origin.<sup>11</sup>

There are technical legal differences between these options. First, section 96 requires a lower standard of proof (reasonable chance of persecution)

<sup>9</sup> IRPA, ss 96-97.

<sup>10</sup> IRPA, s 96.

<sup>11</sup> IRPA, s 97.

versus section 97 (balance of probabilities). Second, section 96 is an objective and subjective test whereas section 97 is an objective test.<sup>12</sup> For section 96, the subjective component is the question of the fact of whether the claimant actually has, in their mind, a subjective fear of persecution; and the objective component is the factual inquiry as to whether there exists an objective basis for that fear.<sup>13</sup> For section 97, the test is entirely objective; it is a forward-looking evaluation that asks not whether the claimant has a subjective fear, but whether they would face an ongoing or prospective risk of torture or cruel and unusual treatment or punishment upon return to their home country.<sup>14</sup>

A claimant that bases their claim on their sexual orientation or gender identity or expression is considered to be a convention refugee with membership in a social group.

To be determined a convention refugee, the claimant needs to prove why they have a well-founded and reasonable fear of persecution in their country of birth or citizenship. They cannot simply use the general violation of their rights in their former country as the basis of their claim. For example, being homosexual in some countries can be punishable by death. This inhumane law, however, cannot be used as the basis for the claim of a gay man who is seeking refuge in Canada. Otherwise, this would make all the homosexuals living in that country automatically eligible for refugee status. For that reason, claimants must show, in their claim, threats of persecution against them as an individual.

Another condition to becoming a convention refugee is that the person must be physically outside Canada. The individual needs to be part of a referral or sponsorship program such as the Office of the United Nations High Commissioner for Refugees (UNHCR). Once they submit their application, an officer of the UNHCR must determine their eligibility. Once their claim is processed, it will be determined whether there is well-founded fear of persecution upon their return to their native country.

If the claimant has already faced persecution, then they may provide any form of proof such as pictures, court documents, or any other evidence to support their claim. The UNHCR officers understand that physical evidence

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12 Jamie Chai Yun Liew & Donald Galloway, *Immigration Law*, 2nd ed (Toronto: Irwin Law, 2012), at ch 10.

13 Immigration and Refugee Board of Canada, "Interpretation of Convention Refugee and Person in Need of Protection in the Case Law" (31 December 2020), at ch 5, online: <<https://irb.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef05.aspx>>.

14 Immigration and Refugee Board of Canada, "Interpretation of Convention Refugee and Person in Need of Protection in the Case Law" (31 December 2020), at ch 14, online: <<https://irb.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef14.aspx>>.

may not always be available in these cases. Most countries that persecute individuals do not provide any documentation or leave any trace of mistreatment.

Upon acceptance, these individuals will land in Canada and can start a new life. However, they will face many other obstacles that will be discussed further.<sup>15</sup>

The other option for refugees is to be a person in need of protection. Rainbow Refugees can also fall into this class. A person in need of protection is an individual who is inside Canada and who, upon return to their country of birth or citizenship, would face death, torture, or cruel punishment, and therefore has a need to be protected in Canada.

For example, a homosexual Iranian student who is in Canada on a student visa may be eligible to be a person in need of protection. Hypothetically, if they had posted a picture of themselves participating in Pride on Instagram, and this picture was eventually seen by an authority figure in Iran and the student's family in Iran then got threats from the government, this student could become a person in need of protection by submitting a refugee claim and, upon acceptance, gain refugee status in Canada.

For those using this option, a refugee hearing may be held. This will give the claimant a chance to present their case before a member of the IRB. Nevertheless, many claimants come up against obstacles in reaching access to justice with regard to appointing a representative as well as struggles with self-representation.

### III. GLOBAL CATEGORIES AND DEFINITIONS

To understand the social and legal obstacles faced by LGBTQ+ refugee claimants, it is important to understand their status in the world.

In ten countries, being part of the LGBTQ+ community is not only criminalized, but it is also punishable by death. Some of these countries include Saudi Arabia, Iran, Afghanistan, and Somalia.<sup>16</sup>

LGBTQ+ persons from these countries live in constant fear and danger from the repercussions from the government and/or authorities in their countries of origin. These individuals have no choice but to live their life in secret,

15 Immigration, Refugees and Citizenship Canada, "Convention Refugees Abroad Class—Conditions" (25 February 2013), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/refugee-protection/resettlement/admissibility/convention.html>>.

16 Max Bearak & Darla Cameron, "Here Are the 10 Countries Where Homosexuality May Be Punished by Death" (16 June 2016), online: <<https://www.washingtonpost.com/news/worldviews/wp/2016/06/13/here-are-the-10-countries-where-homosexuality-may-be-punished-by-death-2/>>.

which can be very difficult and risky. For example, if a gay man in Afghanistan is discovered to be homosexual, he can be sentenced to death and executed.

It is important to note that it is not only the government that is not accepting of these individuals, but also many people in society. For the most part, homophobia is part of the culture and sometimes these individuals can be tortured or even killed by their own families. These types of killings are very similar to so-called honour killings. This means that many LGBTQ+ individuals never learn to be themselves and embrace their identities. They purposely act heterosexual and cisgender, and are afraid to be who they truly are.

In many other countries, such as Uzbekistan, Morocco, and Libya, being part of the LGBTQ+ community is criminalized, which means it can result in imprisonment or mandatory, so-called conversion treatments.

The LGBTQ+ communities in these countries are constantly suffering from hate crimes and violence. Many individuals are in serious need of therapy due to bearing years of trauma.<sup>17</sup>

There are many different reasons behind this negative cultural attitude toward LGBTQ+ individuals in some, though not all countries in the Middle East and some parts of Africa. In these cases, the negative attitude is significantly aimed at homosexuals. As an example, being a transsexual in Iran is completely legal. The issues in this part of the world with homosexuality stem from religious, cultural, and political roots. Most Middle Eastern countries are Islamic-based. Some follow Sharia Law and have implemented it in their legal systems.

Even if a Middle Eastern legal system is more secular, the majority of the country's population are Muslims. To understand the perception of homosexuals in Islam, the best place to look is in the *Quran*. Verse 16 of the An-Nisa Sura can be translated as follows:

And those two of you who commit it (the shameful act), torture them both.<sup>18</sup>

The previous verses—specifically, verse 15—of the same Sura refers to acts of extramarital sex and infidelity between a man and a woman.<sup>19</sup> However, verse 16 uses male pronouns for the “two people” to whom it is referring, thus making the verse about a homosexual act.

The view of the *Quran* on homosexuals has never been supportive, but the reasons behind that are outside the scope of this paper. Yet, it is important to

17 Department of Justice Canada, “Serious Legal Problems Faced by Lesbian, Gay, Bisexual, and Other Sexual-Minority People in Western Canada: A Qualitative Study” (15 December 2021), online: <<https://www.justice.gc.ca/eng/rp-pr/jr/lgbtq/index.html>>.

18 *Quran*, An-Nisa 4:16.

19 *Quran*, An-Nisa 4:15.

know and comprehend the Islam-influenced culture of the Middle East for a better understanding of the legal status of its LGBTQ+ citizens.

Examples of Middle Eastern treatment of and thoughts about LGBTQ+ individuals can be seen in events such as the time when thousands of copies of Baghdadi poet Abu Nuwas's poetry book about gay love and desire were burned in Egypt, and in the embarrassing moment when Mahmoud Ahmadijad—that is, the former Iranian president—mentioned before students of Columbia University that there are no homosexuals in Iran.

The pattern here is that the Middle Eastern governments play an important role in the negative portrayal of the LGBTQ+ individuals, especially homosexuals.

This makes it difficult to truly determine the number of supportive individuals in those countries—individuals who, regardless of their gender and sexual orientation, recognize and accept LGBTQ+ individuals.

One reason that Middle Eastern governments are very much against homosexuality is due to their affiliating it with the Western culture. LGBTQ+ individuals had a long battle for rights and freedoms in the West and, in many countries, they won. The recognition and acceptance of these individuals by Western governments is what Middle Eastern governments refuse to copy. In this way, they imagine Middle Eastern culture as being safe from any Western influences.

Through these examples, one can understand the difficulty of being an LGBTQ+ individual in the Middle East and any other unsupportive country.<sup>20</sup>

## IV. RAINBOW REFUGEES: BARRIERS AND STRUGGLES

### A. DISCRIMINATION AND DANGER

When LGBTQ+ individuals who have been suppressed start to seek asylum in other countries, they face further discrimination and danger. If these individuals are found by their governments when trying to illegally exit their countries, they can end up behind bars or even dead. The mental and physical trauma which these asylum seekers have to endure is beyond most people's understanding.

For example, *Time Magazine* has an article about Ukrainian migrants who belong to the LGBTQ+ community who, in the process of fleeing the

20 AL, "How Homosexuality Became a Crime in the Middle East" (6 June 2018), online: <<https://www.economist.com/open-future/2018/06/06/how-homosexuality-became-a-crime-in-the-middle-east>>.

Russo-Ukrainian War, have had to move to Eastern European countries that have cracked down on LGBTQ+ rights.<sup>21</sup>

Once a Rainbow Refugee arrives in Canada, or another country of destination, and starts a claim, they may have trouble proving their claims because of a lack of tangible evidence (unless they were already accepted as a convention refugee). This is another obstacle in access to justice for these individuals.<sup>22</sup> Many LGBTQ+ claimants do not have physical proof of what happened to them or who they claim to be. Their only chance to prove their eligibility as a refugee comes from the story of their claim and how they represent themselves in front of the members of the IRB.

## B. CULTURAL DISSONANCE

Due to their cultural limitations and backgrounds, many LGBTQ+ individuals from countries that do not support them cannot openly be themselves and share their stories. In trying to prove that they are part of the LGBTQ+ community, many of them have great struggles due to cultural dissonance. For example, an Iranian lesbian woman who always lived in the shadows may find it difficult to go to gay bars in Toronto and find new friends. If she could be comfortable socializing like that, then she might have pictures or witnesses to support her claim. However, unfortunately, due to her fears, upbringing, and lifestyle, she may not be comfortable or confident enough to explore the LGBTQ+ community in Toronto.

It is important for IRB members and the IRB to understand the cultural dissonance phenomenon when considering and deciding on the claims of Rainbow Refugees. It is important to consider that many of these individuals—especially claimants of colour—struggle with expressing themselves due to years of living with fear and shame. These individuals do not share the common experiences of LGBTQ+ individuals who grew up and lived in supportive countries and were able to express themselves freely. This is why cultural dissonance occurs when these individuals are exposed to a new culture. Even though many of them may cherish and appreciate the ability to express themselves freely, they may not feel comfortable enough to do so.

Often, IRB members rely on their impressions of a claimant during the hearing as one of the ways to determine the claimant's credibility. How sincere, honest, and expressive one is can have a significant influence on the

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21 Madeleine Carlisle, "After Fleeing Ukraine, LGBTQ Refugees Search for Safety in Countries Hostile to Their Rights" (10 March 2022), online: *Time Magazine* <<https://time.com/6156672/lgbtq-ukraine-refugees-russia>>.

22 United Nations, "LGBTQ+ Refugees Background Guide Challenge Topic #4 for Model United Nations Refugee Challenge" (2022), online: <<https://www.unhcr.org/media/39785>>.

decision made by IRB members. It is important for the members to be aware of the cultural dissonance that Rainbow Refugees may be experiencing and to not associate a lack of behavioural expression on the part of these individuals with dishonesty. Part of this cultural dissonance is also caused by language barriers that Rainbow Refugees experience.

### C. LANGUAGE BARRIERS

The issue of language barriers affects most refugees, including Rainbow Refugees. For one thing, not all refugees necessarily have a chance to learn English in their country of origin. Further, most of their time and money is not directed toward education, but toward finding ways to illegally exit their country of residence and arrive in Canada safe and sound. Also, immigration is a difficult process for most individuals, but for refugees it is sometimes a deeply traumatizing experience. These are a couple of the reasons why many of these individuals do not get a chance to take English classes in preparation for their immigration journey.

Considering that starting a refugee claim can be complicated even for an English-speaking person without a legal background, it is without doubt even more difficult for refugees who do not speak English well or at all.

The Law Society of Ontario's current position is that a licensed paralegal is not knowledgeable or capable enough to commence a refugee claim on behalf of a refugee claimant. If a paralegal is not considered by their professional body to be competent enough to start a refugee claim, then it is all the more difficult for someone with little or no knowledge of English. Many refugee claimants do not have the financial means to hire a lawyer.

Legal fees are, for the most part, expensive and many refugees cannot even afford payment plans. On the IRB's website there is a "Claimant's Guide" section<sup>23</sup> that has a plethora of useful and thorough information. However, this Guide is not accessible or easy to understand for individuals with low facility in English or legal understanding.

As part of achieving access to justice, claimants need to properly understand the procedure when starting a claim. They should not be forced to rely on hiring a representative—especially when hiring one is very costly. This process can be an obstacle in their access to justice.

A partial solution to this problem would be to make simplified guides available in multiple languages. If the IRB can provide guides like this and make them easily accessible, many claimants would have a better understanding of the procedure and a better chances of succeeding in their claims.

23 Immigration and Refugee Board of Canada, "Claimant's Guide" (2018), online: <<https://irb.gc.ca/en/refugee-claims/Pages/ClaDemGuide.aspx>>.

Sometimes, in different communities, there are volunteers that help newcomers with language barriers. When it comes to Rainbow Refugees, many of them do not have the opportunity to seek help from their communities. This is because many of the communities in which they live are not very accepting of LGBTQ+ individuals, as previously discussed. This is a key difference between refugee claimants with LGBTQ+-based claims and claimants with religious or political claims. Since the LGBTQ+ community remains unaccepted in many cultures and communities, even in Canada, Rainbow Refugees are extremely vulnerable and access to justice for them is in need of further improvement.

#### D. EMPLOYMENT AND HOUSING

To increase access to justice for Rainbow Refugees, it is important to understand and analyze their most common obstacles. Upon a thorough analysis of the issues they face, possible solutions can be suggested and eventually implemented in society as well as the legal system. These individuals struggle not only with language barriers, cultural adaptation, mental health trauma, and legal issues, but they also have difficulty finding employment and housing, as explored below.

While it is true that larger Canadian companies and corporations recently started supporting and practising diversity in their hiring systems, most refugees do not qualify for jobs in these companies. They have to seek employment in smaller businesses and companies where hiring systems are controlled by individuals rather than a team.

Many Rainbow Refugees continue to face discrimination and not obtain employment due to their gender identity, gender expression, and sexual orientation. Upon interviewing a few of these individuals who gained refugee status in Canada between 2020 and 2022, first-hand information regarding the discrimination against them in their places of employment was obtained. In one of the interviews, a Rainbow Refugee stated that he was let go from his waiter position at a local restaurant after the owner of the business found out that he was in a homosexual relationship with one of his co-workers. The relationship was kept private and carried on only outside the workplace. Meanwhile, the same owner that fired this individual had allowed a heterosexual couple to work in that same workplace for many years.

Similar types of issues have been observed with regard to housing. Most refugees can only afford single rooms or basement apartments. To find a home, they are dealing with landlords who may discriminate against them, especially if the refugee applicants are from the LGBTQ+ community. In another interview, a non-binary refugee stated that upon their refusal to

choose “male” or “female” as their gender on the rental application provided by a landlord, their application was immediately refused. The landlord did not check any further information, such as their income documents.

It is unfortunate that discrimination against these individuals still exists in society, even in 2023. The reason these individuals are highly vulnerable is because they belong to two different groups that have been subjected to hardship, lack of access to justice, and discrimination for years: they are both refugees and members of the LGBTQ+ community.<sup>24</sup>

## E. LACK OF LEGAL ASSISTANCE AND COMMUNITY SUPPORT

As mentioned before, simplified guides and informational documents about immigration, refugee claims, employment, and housing, as well as in other pertinent areas, could be provided in a variety of languages. In LGBTQ+ community centres there should be a focus on providing legal guidance services in a variety of languages so that these individuals will have better chances of attaining access to justice when it’s needed. It is not difficult to find bilingual legal professionals in our diverse society.

The real issue, however, is the government budget set for aiding these individuals. After the COVID-19 pandemic, many in-person legal services were discontinued or turned to online access only. As an example, the Landlord and Tenant Board had an office that individuals were able to physically walk into where they could obtain different forms, file complaints, and receive free legal consultation. This walk-in office was fully closed down after the pandemic. Surely, there was a budget to maintain the office, pay the staff, and have on-site lawyers to provide legal information. The budget for this, and other legal services that were shut down after the pandemic, should have remained, and should have been spent on further improvement of access to justice.

The problem with government budgeting is usually not about lack of funds, but about what the funds are spent on. There should be budget consideration for on-site legal consultations that can be located in community centres. For example, in an LGBTQ+ community centre, a room could be rented out a few times a week where two legal professionals from different fields of law could provide free legal consultation to Rainbow Refugees. This would help individuals who have immigration issues or are facing discrimination—they could obtain useful information and discover their rights.

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24 *Ibid.*

## F. THE REFUGEE CLAIM PROCESS AND IRB HEARING EXPERIENCE

As mentioned above, when an individual present in Canada seeks refugee status, they apply to become either a convention refugee (under section 96 of the IRPA) or a person in need of protection (under section 97 of the IRPA). Once they initiate their claim, they will usually be provided with a date for a refugee hearing. At the hearing, they will be given a chance to discuss the basis of their claim and provide evidence before a member of the IRB. Nevertheless, many of these individuals cannot afford representation and therefore do not have enough legal understanding of the evidence that they need to provide to succeed.

An IRB member mostly relies on a claimant's personal story and credibility as a witness; thus, how the claimant presents themselves at the hearing is a crucial part of their case. But since (as described previously) the culture of a Rainbow Refugee may significantly vary from a Canadian LGBTQ+ individual who was raised in a somewhat supportive family and education system, IRB members need to keep the context of their background in mind when observing their behaviour and expressions.

There is no doubt that when Rainbow Refugees start living in Canada, just like other newcomers, they experience culture shock and isolation. Most of them never truly belonged to the societies from which they came. They had no place within the culture of their ethnic background. They grew up feeling isolated, confused, and nonconformist. After their immigration to Canada, they were faced with a new culture that, for the most part, celebrates the LGBTQ+ community. Even though they may have always idealized such a lifestyle, they may still find it difficult to undergo change and adapt to a new culture. This cultural dissonance often results in them limiting their behavioural expressions. They may feel more comfortable in leaning toward expressing their biologically-assigned gender, since they always had to do so in their country of origin. This should not be an indication that the individual is not gender non-binary, but rather that the individual had to live a certain way to function in society and they cannot simply change overnight.

From an IRB member's perspective, it may be difficult to determine the credibility of a refugee applicant who bases their claim on gender identity and expression. There is a concern that the individual could be an imposter who is trying to take advantage of the immigration system, and this makes legal decision-making very difficult.

But if Rainbow Refugees could obtain legal consultation about their cases before their hearings were held, they could find alternative ways to prove their credibility. And legal aid clinics could provide consultations on refugee hearing procedure to these individuals that would help them feel more comfortable

about their upcoming hearings. Clinics could also help these individuals by providing legal representation to handle the technical legal argument side for them.

Many Rainbow Refugees continue to suffer a fear of being themselves, even in Canada. They find it difficult to connect with people outside their ethnic group due to language barriers and cultural differences. Many hide their sexual orientation and gender identity or expression from their own ethnic groups and communities because they fear discrimination. Any of these reasons can lead a Rainbow Refugee to not be able to openly express their true selves.

Cultural dissonance and cultural discrimination are two very real issues with which Rainbow Refugees have to deal. One way to help with these issues is by raising awareness within the community of legal professionals and at the IRB. Once the concepts of cultural dissonance and cultural discrimination are considered during the refugee decision-making process, access to justice for Rainbow Refugees in the immigration system will be increased.

## G. PARALEGALS' LIMITED SCOPE OF PRACTICE

There is a lot of misunderstanding and confusion around the scope of paralegals' practice in immigration matters. Paralegals are not allowed to initiate claims for refugee claimants. It is true that paralegals are allowed to be advocates for refugees at the IRB, since this government body is a "board" and since it is within the paralegal scope of practice to advocate before a board. However, when initiating a refugee claim, the claim is submitted to Immigration, Refugees and Citizenship Canada (IRCC). Paralegals are not allowed to submit applications to the IRCC. Their scope of practice allows them to provide advocacy services only before the IRB.<sup>25</sup> This limitation forces most Rainbow Refugees to either hire a lawyer for their claim or, if they cannot afford one, remain self-represented.

There is also evidence that many refugees do not trust paralegals with their claims. The IRB asked a group of respondents to comment on representation of refugees before the Board, based on their personal experiences. The collected data showed that 86 percent of these respondents believed that refugees do need legal help and representation to build their cases and have a successful hearing. Within this percentage, 62 percent believed that only a lawyer could do an adequate job of representing them. Only 29 percent believed that a trained paralegal, working under the supervision of a lawyer, would be able to handle some of the preparation of their case. These numbers provide

25 Law Society of Ontario, "Notice to the Profession: Important Information Regarding Paralegals Providing Legal Services Under the Immigration and Refugee Protection Act" (1 February 2023), online: <<https://lso.ca/news-events/news/latest-news-2023/notice-to-the-profession-important-information-re>>.

a general perspective on how paralegals are viewed in the immigration and refugee world.<sup>26</sup>

Refugee cases can be complex and, for that reason, some believe that a licensed paralegal would not be able to handle the case. On the other hand, paralegals are already involved with vulnerable people in society, and the fees that they charge are also more affordable than those of lawyers. If representing refugees in all aspects of the immigration procedure could be added to paralegals' scope of practice, it would be a huge step toward increasing access to justice for LGBTQ+ refugees and other convention refugees.

By prohibiting paralegals from commencing refugee claims, and only permitting them to provide advocacy services before the IRB, most refugee cases will remain with lawyers or self-represented litigants. Many paralegals do not feel comfortable continuing on a case that was initiated by another individual and building on their work. Many refugees may also not be comfortable with having multiple representatives with different legal backgrounds working on their cases. If initiating, drafting, and representing a refugee claim were added to paralegals' scope of practice, a new path would be opened up in access to justice for Rainbow Refugees.<sup>27</sup>

In order to realize this outcome, there is no doubt that further education and training will be required for paralegals in the immigration and refugee law fields. But if paralegals can be provided with adequate training and education, their ability and competence in handling complex refugee cases will increase. This is definitely a realistic approach to providing access to justice to these vulnerable individuals.

Refugee claimants have usually experienced much hardship and difficulty in their journeys. Many of them struggle with financial, psychological, and discrimination-related issues, and this makes it more difficult for them to be able to hire a lawyer.

Unless their case is extremely complex, a refugee may simply need a representative to help them fill out their application and sort out their Basis of Claim. Paralegals are capable of completing these types of procedures. Paralegals are already allowed to advocate for refugees, so they might as well be able to start claims and build cases.

Many refugees will be able to afford paralegals. Also, paralegals have more experience in dealing with clients that struggle financially. They have the potential to be competent advocates for refugees upon the implementation of a proper educational system.

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26 Department of Justice Canada, "Representation for Immigrants and Refugee Claimants" (2 February 2023), s 3.2, online: <[https://www.justice.gc.ca/eng/rp-pr/other-autre/ir/rr03\\_la16-rr03\\_a16/p32.html](https://www.justice.gc.ca/eng/rp-pr/other-autre/ir/rr03_la16-rr03_a16/p32.html)>.

27 *Ibid.*

The first step toward expanding paralegals' scope of practice to include commencing refugee claims would be to convince the Law Society of Ontario that with the proper education and training, paralegals would be able to adequately represent refugees. Paralegals have been trying to expand their scope of practice for a long time now. The majority of people cannot afford lawyers. Therefore, for matters such as family law, or refugee and human rights issues, an affordable representative can make a big difference.

Legal issues that are common within the majority of society should not remain exclusively in lawyers' scope of practice. If lawyers were as affordable as paralegals, access to justice might have been possible for more individuals with common legal issues. However, the fees that lawyers charge are too high for most families to afford, let alone individuals. Given the Law Society of Ontario's commitment to access to justice, more realistic approaches should be taken to implement that access. This can become possible if refugee law is added to paralegals' scope of practice.

The Law Society of Ontario has a direct say in the content of educational courses on offer in paralegal education programs throughout Ontario. There is currently no mandatory immigration and refugee course for paralegals to take, since their scope of practice in this field is minimal. A mandatory immigration and refugee law course should be implemented in education programs for paralegals. Its focus should be on the *Immigration and Refugee Act*, particularly on the sections regarding the law related to refugee claims.

As part of the practical aspect of a course, a fairly complex moot refugee claim could be practised. The final assignment of the course could be a hypothetical refugee hearing, which would be a great way to practise advocacy before the IRB.

The design of the proposed immigration and refugee law course would be analogous to a landlord and tenant law course. There could be individual parts that cover the filing process, applications, related laws, precedents, and hearings.

However, the course should also encompass issues related to human rights, the struggles of the marginalized, and Canada's immigration history. Paralegal students should become aware of the cultural, social, and legal issues faced by refugees. Refugees are vulnerable individuals who are uniquely subject to discrimination and racism. If paralegals are given permission to work on refugee claims, they should have proper knowledge as to the vulnerability of this group. This can only be achieved upon proper understanding and knowledge of refugee law and history, as well as precedent cases.

Another course that is missing from the mandatory courses for paralegals is one on human rights, with a special focus on LGBTQ+ rights. Even though general information about human rights is taught in courses related

to Tribunals Ontario, a course with more precise information, history, and current issues on human rights in Canada is needed.

A course like this would provide a great deal of information about refugees and other marginalized and vulnerable groups in society. There are courses such as the Charter of Rights and Freedoms in the Paralegal Studies Bachelor Degree program at Humber College that focus on cases with human rights issues, but this course focuses mainly on Charter rights.

The rights, legal struggles, and access to justice issues of the LGBTQ+ community seem to be missing from paralegals' education. This absence leads to paralegals and other legal professionals having a lack of knowledge and awareness about the important rights and legal issues of the LGBTQ+ community.

It is time for the legal community to accept the LGBTQ+ as a community worth studying because they have struggled with discrimination and a lack of rights for many years, and continue to struggle with a lack of access to justice in society. For example, respect for individuals' pronouns is a recent matter that is expected to be acknowledged and understood by paralegals and other legal professionals. However, many in the legal profession have never received education about the importance of using correct pronouns or on other matters that have arisen through the work of LGBTQ+ advocates.

Upon the implementation of the addition of refugee law to the scope of paralegal practice, paralegals will become competent to represent Rainbow Refugees. The LGBTQ+ community lacked rights for many years, and this resulted in severe injustice in our society. It is important to know the history of LGBTQ+ people in Canadian law. Unfortunately, there is minimal material on LGBTQ+ issues in paralegal education. It is time for the legal community to recognize this group as vulnerable and deserving of true access to justice.

## V. CONCLUSION

Individuals who are both part of the LGBTQ+ community and refugee claimants are extremely vulnerable. They have faced massive hardships, many barriers, excessive trauma, and frequent discrimination throughout their lives and this only gets worse when they are forced to migrate from their countries of origin. To improve access to justice for Rainbow Refugees, a number of things need to be done, and a few of them are listed here:

1. *Legal aid services should be provided in a variety of languages.*
2. *Cultural awareness among legal professionals and IRB members should be increased so that they will have a better understanding of the cultural dissonance that LGBTQ+ individuals experience.*

3. *Help needs to be provided in the preparation and representation of Rainbow Refugees' legal cases, including in the area of affordability of lawyers' fees.* Considering that these individuals are usually struggling financially due to their immigration journey and difficulty in finding employment, it is unrealistic to expect them to be able to hire lawyers for representation.
4. *Paralegals' scope of practice needs to be expanded so that they become licensed to help refugees in all aspects of their cases.* Even though paralegals are allowed to provide advocacy for these individuals, realistically, most will not work on a case that was already built by a lawyer. This limitation in paralegals' scope of practice also does an injustice to Rainbow Refugees in that it makes access to justice harder for these vulnerable individuals to attain. Paralegals have been advocates for individuals with common legal issues for many years. They charge less and deal with injustice brought upon individuals on a daily basis, whether this injustice is caused by the system itself or another more powerful individual. It would be sensible to enable paralegals to add refugee law to their scope of practice. To make this possible, important changes should be made to the education system for paralegals. If paralegals have adequate knowledge about and training in refugee law, along with LGBTQ+ rights and legal issues, they can become competent representatives for Rainbow Refugees as well as other convention refugees. Access to justice for refugees is beyond important since it involves the life and safety of a human being. If a refugee is not able to represent themselves well enough to convince the IRB member that their case is valid, they will be deported back to their country of origin. This could possibly result in harsh mistreatment or even death for these vulnerable individuals. Therefore, it is vital to make access to justice possible for Rainbow Refugees by providing legal aid services, raising awareness about their plight, and allowing paralegals to fully represent them in their cases.

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