

## Safe spaces for dykes in danger? Refugee law's production of vulnerable lesbians

### Introduction

This chapter examines how refugee law's requirement of an essentialised vulnerability from women applying for asylum on the grounds of sexuality persecution, serves to reinforce transnational power structures of patriarchy and racial oppression. I argue that refugee law relies on and reproduces a discourse in which space and identity are represented as essential, static and separable from each other – so the claimant must prove that she is and always has been a “real and vulnerable lesbian” across multiple and very different spaces. Examining case law from Britain, Canada and Australia, I argue that the criteria used to test the identity of these applicants produces an ideal vulnerable lesbian subject that reinforces rather than challenges normative boundaries of the nation-state. Refugee law requires women seeking asylum on the basis of sexuality persecution to perform their identities in a way that shows they are ‘in place’ (Cresswell 1996: 4) among the receiving state's good gay and lesbian citizenry. Being in place is defined by the courts largely through participation in the pink economy and involvement in normative intimate relationships (Binnie 1997), and in opposition to an implicitly sexually deviant, racialised other - the ‘monster-terrorist-fag’ (Puar and Rai 2002: 118) who threatens the state from both inside and outside the territorial and normative borders of the nation-state. As well as proving that she is in place among the receiving state's lesbian citizenry, the asylum-seeker must also prove that her home state is a dangerously homophobic place where she will be always and everywhere unsafe. This normative requirement to prove her vulnerability *out there* not only reinforces the imperial topography (Katz 2001: 1215) of nations-states as the bounded, internally uniform building blocks of an artificially equal global landscape, but also has the effect of reinforcing racialised notions of western states as culturally and politically modern and superior, and non-western states as primitive and uncivilized (Puar and Rai 2002:118; Grewal 2005: 158). The production of an essential and vulnerable lesbian subject, who can be rescued by western states through the mechanism of international law, contributes to a broader liberal discourse that resounds with neocolonial sentiment (see Kapur 2005).

I use Australia, Canada and Britain as the jurisdictions to trace how the transnational application of refugee law to specific groups of women is used as a tool of exclusion and regulation at a scale that includes but also exceeds the purview of the state (Hyndman 2004: 319). Mapping out patterns of power and oppression along lines of race, gender, sexuality and other axes of social and political meaning brings into view alliances and schisms that are overlooked when the nation-state is conceived of as the naturalized scale and primary subject of international law and politics. As argued by Hyndman, ‘redefining scale changes the geometry of social and political power’ (Hyndman 2004: 316). Australia, Canada and Britain are socio-economically located in the global north, but they are geographically dispersed in distant corners of the world. They each have a common law system, and as wealthy liberal democracies with a predominantly Anglo-European (or “western”) culture and population, mainstream media and political discourses often represent these nations as major receiving states for refugees - as states who bear the burden of migrants out of the global south (see Castles and Miller 2009). This representation occurs despite the fact that the overwhelming majority of the world’s refugees are received by the global south (states defined as “developing” by the United Nations (United Nations 2010)). As will be discussed below, there is a significant and consistent gender discrepancy in applications made on the grounds of sexuality in all three states – lesbian asylum-seekers seem either absent or invisible. By exploring this particular absence and invisibility, this chapter engages in a kind of un-mapping that seeks to bring into view particular unseen connections between refugee law and the complex spaces in which it is lived (Razack 2002: 1-20; Pearson 2008: 491). As part of this un-mapping, I use the term ‘queer’ to refer to any non-normative sexuality (Jagose 1996: 72-101) and “gay” and “lesbian” to refer to the categories used by courts, tribunals and interest groups to refer to people who have same-sex relationships. My use of this terminology is an acknowledgement of the narrowness of legal identity categories and of the reality that not all queer women define themselves as “lesbian”, but might so do strategically when engaging with law.

After first outlining my approach and looking briefly at the current state of refugee law for sexuality-based claims in Australia, Canada and Britain, I discuss cases to examine how refugee law, as applied in each state, produces an ideal vulnerable lesbian subject and a racialised, static landscape around her. The commercial, “gay”

standards used to test the authenticity of the asylum-seeker's lesbian identity in the Australian Refugee Review Tribunal case of *N04/48953* (25 January 2005) and the Canadian Immigration and Refugee Board case of *X(Re)* 2008 CanLII 83550 are contrasted with the approach in the British Court of Appeal case of *Krasniqi v Secretary for the Home Department* 2006 (D) 120 (Apr), in which the applicant's sexuality was almost entirely erased by the court in favour of her identity as a vulnerable woman. In the final section, I analyze a number of cases in which asylum was refused because the court found an "internal flight alternative" for the applicant in her home country. Looking in particular at the Canadian Federal Court case of *Franklyn v Canada (Minister of Citizenship and Immigration)* 2005 FC 1249 (2005), I argue that the internal flight alternative is another means by which law is used to produce an essential vulnerability in lesbian refugees by treating their identity as unconnected to their spatial context.

Approaching these cases in this way allows for an interrogation of the politics of refugee law, gender and sexuality beyond the court and tribunal cases. For while the relations that construct the vulnerable lesbian asylum seeker of course include those of patriarchy and homophobia, they include also those of colonialism, imperialism, capitalism and the other relational features of today's global political economy. So instead of asking how the law might be reformed so that a higher number of "vulnerable lesbians" might be afforded refugee status in wealthy, liberal states of the west, we might ask how the western receiving state is implicated in the situations that have led these women to flee their home states in the first place. Does the reception of individual refugees relieve the receiving state of its responsibility to less prosperous areas of the world? Or does refugee law act as a tokenistic gesture, the emphasized charity that masks the state's much broader responsibility for the relations that constructed a vulnerable lesbian identity? These are some of the questions that come to the fore when we stop taking for granted the categories with which refugee law operates.

### **Placing the cases: The bigger picture of gender, sexuality and refugee law**

Reading the cases through the lens of critical geography, race and gender theory shifts the focus of analysis from the individual subject of refugee law, and onto the broader relations, networks and spaces that surround her and through which she moves

(FitzGerald 2010). This reading challenges the picture generally painted by western governments, media and liberal NGOs - a picture of “foreign” gays and lesbians fleeing vaguely defined but implicitly racialised “repressive regimes” to find sanctuary in tolerant, liberal, western states that open their borders as something of a charitable act of “human rights protection” (see Keenan 2010; Miles 2010). Such representations exist, in part, because of the very structure of refugee law, which demands a unitary, discrete subject who can travel outside her home country, file a claim for asylum and prove her identity. The *Convention Relating to the Status of Refugees 1951* was drawn up in the post-World War 2 era as part of a suite of new international legal instruments based on liberal notions of human rights and equality (Fitzpatrick 1996: 231). As part of this new world order, the United Nations system of world governance obliges state signatories to the Convention to provide protection for individual subjects who have successfully fled their home state, and are unable or unwilling to return due to a ‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’ (Article 1 as amended by the 1967 Protocol). As the cases reviewed below will demonstrate, refugee determination revolves around the claimant’s identity and where she does and does not belong. Political questions around relationships and responsibilities between states, and between place and identity more broadly are removed from the equation. By turning to critical geography, race and gender theory, I am widening the lens of analysis beyond the individual subject to bring those questions into view.

The question at the centre of my analysis is how refugee law produces particular spaces and identities that most queer women fleeing state-tolerated persecution fail to fit into, and what broader political purposes are served by this production. Critical legal geographer Nick Blomley argues that western modes of seeing – in which the world is presented as set before and logically prior to a disembodied viewer – are implicated in the production of a ‘geography of violence’, in which law’s violence is encoded in material landscapes (2003: 123). This western mode of seeing is one that assumes that particular legal grids of understanding are super-imposable on any space. Applying this analysis to refugee law, the Refugee Convention quite explicitly proclaims its universal application across the world map. Yet in reality, some areas of the world influence refugee law more heavily than others, and the effects of refugee

law are also uneven (United Nations 2010). From this critical legal geography perspective, speaking about a “lesbian” or a “lesbian refugee” subject does not make sense outside the particular spatial context in which that subject is located (see Binnie 2004). There is no “global lesbian” and for refugee law to state that there is, is for it to take part in a western mode of seeing that is implicated in the production of a geography of violence – a mode of seeing, understanding and reproducing the world as already set out according to particular, culturally specific categories that purport to be universal (Sparke 2004; Coleman 2008). As argued by Michael Keith and Steve Pile (1996) identity categories and politics have implicit spatial frames of reference—so the category “lesbian” might make sense *here*, but be an alien concept *there*. Keith and Pile (1996) argue that identities should be understood as always contingent and incomplete processes that are constituted, in part, by the spaces of representation in which they are articulated. So refugee law does not simply discover and declare pre-existing “lesbians”, but produces those identities by demanding that they be represented in particular ways. Refugee law is in turn continually (re)constituted by the claimants who come before it, performing whatever identity they need to in order to migrate from one place to another - thus law, space and identity are relational and cannot be considered in isolation from one another.

As critical legal scholars note, the refugee is a figure that reinforces the *a priori* notions of territorially-grounded state sovereignty, and the state citizen as the proper subject of political life (see Soguk 1999; Tuitt 2004). The requirement of Article 1 of the Convention that the asylum-seeker must have moved outside the borders of her home state, allows the receiving state to make a decision regarding a foreign citizen without violating the territorial integrity of the home state. Indeed, as pointed out by Tuitt (2004), each refugee decision gives the receiving state the opportunity to re-perform and re-assert its own borders, thereby reaffirming the nation-state system of organizing the world. Against this spatial background of discrete, bordered sending and receiving states, the refugee subject is defined by both her vulnerable, victim status (in fearing persecution in its home state and needing to flee), and by her agency (in successfully traveling across nation-state borders). By operating through a legal category into which asylum-seekers will either fit or not, the refugee system encourages a hierarchy of vulnerability and a discourse of genuine / bogus, worthy / unworthy migrants in need. This focus on the asylum-seeking subject, and whether or

not her fear is well-founded, distracts attention away from broader political questions of why particular subjects need to move outside their home states, and of the violence of state borders more generally. As Helton and Jacobs note, Convention refugees actually constitute only a small part of an estimated 175 million international migrants, many of whom are forced to move by a variety of disasters, including armed conflict, persecution, and poverty (Helton and Jacobs 2006: 3). So while states, media and non-government organizations focus on refugees, forced displacement that does not fall into the refugee category but which nonetheless involves massive trauma and uprooting, continues to become significantly greater and more complex (Helton and Jacobs 2006: 4). Refugee law thus must be understood in the context of a much larger problem of people being forced to move from their homes, and of international legal and political responses failing to address that problem.

### **Lesbian asylum-seekers: invisibility and absence**

The provision of asylum for Asian, Arab and other non-European queers was no doubt not what the original framers had in mind when they drew up the Refugee Convention, which was aimed at providing protection for those in the communist east who might seek asylum in the western bloc (Fitzpatrick 1996: 249). However the political map of the world has changed since 1951 and today the majority of asylum-seekers both originate in and move to the ex-colonial states of the global south – well outside the implicitly Anglo-American and European parameters originally envisaged (United Nations 2010). It is also now an accepted tenet of refugee law that sexual orientation and gender identity can constitute a ‘particular social group’ within the meaning of the Convention.<sup>1</sup> Accordingly, individuals who leave their home states because they have a well-founded fear of sexuality-based persecution should not, according to international law, be forced to return there.<sup>2</sup> While not formally

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<sup>1</sup> In the Australian context, this was first judicially confirmed in *Applicant A v MIEA* (1997) 190 CLR 225; in the Canadian context in *Ward v Attorney-General (Canada)* (1993) 2 SCR 689; in the United Kingdom in *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah, R v Immigration Appeal Tribunal and Another, Ex Parte Shah* [1999] UKHL 20, [1999] 2 AC 629, [1999] 2 All ER 545; and the United Nations High Commissioner for Refugees have had the policy that “persons facing attack, inhumane treatment, or serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognised as refugees” since 1996, see Kristen L Walker, 'Sexuality and Refugee Status in Australia' (2000) 12(2) International Journal of Refugee Law.

<sup>2</sup> Article 1A (2) of the *Convention Relating to the Status of Refugees* 189 UNTS 150 (entered into force 22 April 1954) defines a refugee as any person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is

enshrined in law, refugee decision-making bodies now also recognize that women asylum-seekers face particular difficulties in the refugee determination procedure (Anker 2001). Guidelines for the determination of women's refugee claims exist for all three of the receiving states being examined in this chapter (LaViolette 2007). While there has been research published on the legal position of queer asylum seekers, and the particular difficulties they face in the refugee determination process (see Walker 2000; Stychin 2007), as well as research on the problems facing women claiming refugee status (see Greatbatch 1989; Johnsson 1989), there has as yet been little academic attention paid to the particular issues arising when women make refugee claims on the basis of sexuality.

The most striking characteristic of sexuality-based refugee claims made by women is that there are very few of them. In Jenni Millbank's study of over 300 decisions on sexuality from Canada and Australia between 1994 and 2000, '14% of the Canadian and 21% of the Australian claims were brought by women' (Millbank 2003: 74). My search through decisions in Australia, Canada and Britain between 2000 and 2010 yielded similarly disproportionate results – out of a pool of several hundred sexuality-based decisions across the three jurisdictions, only 81 involved women claimants.<sup>3</sup> Considering approximately half of the world's refugees are women (Spijkerboer 2000), the imbalance begs the question: why they are so under-represented among claims made on the grounds of sexuality persecution? Queer and feminist scholars have pointed out the general invisibility of queer women subjects in the legal arena (Lacey 1998; Millbank 2003). Sarah Lamb (2009) argues that the invisibility of transgender and lesbian bodies in the legal domain may be an effect of particular modes of legal rationality that actively render queer bodies and sexualities unknowable and unthinkable. In the refugee context, there is also a historical legal presumption that queer bodies and sexualities are undeserving of protection (see McGhee 2000; Millbank 2003; Millbank 2005). This feeling was clearly articulated in the line of reasoning in Australia and Britain that queer asylum seekers, who could

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outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it"; Article 33 (1) states "No contracting state shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

<sup>3</sup> This search was conducted in July 2010.

avoid persecution by being “discrete” about their sexuality, did not qualify for refugee status. This line of reasoning was overturned by the High Court of Australia in 2003,<sup>4</sup> by the Canadian Federal Court in 2004<sup>5</sup> and by the British Supreme Court in 2010<sup>6</sup> - in each instance, the court held that the need to be discrete about your sexuality could itself amount to persecution. It has been suggested that the gender disparity in sexuality-based refugee claims might be because women are less likely to engage in ‘public sex’ than gay men, meaning that they are also less likely to be persecuted because of their sexuality (Millbank 2003: 73). While each of these arguments provides some explanation for the absence or invisibility of queer women asylum-seekers, what drives my interest are the socio-spatial processes that work in refugee law to produce an ideal vulnerable lesbian subject, an identity into which very few queer women asylum-seekers actually fit but which serves other political purposes.

### **Producing the vulnerable lesbian subject**

The overturning of the discretion requirement in refugee determination was widely heralded as an enormous victory for gay and lesbian asylum-seekers, and indeed for gays and lesbians in general (ILGA 2010; Keenan 2010). It is unsurprising that each key case overturning the discretion requirement in Australia, Canada and Britain (footnoted above) involved men rather than women applicants. The end of the discretion requirement means that those claiming asylum on the grounds of sexuality no longer have to hide their sexuality in their home country to avoid persecution. However, not having to hide your sexuality does not impact on claimants whose sexuality is invisible to the courts anyway, which as the cases discussed below reveal, is the situation for most queer women asylum-seekers. In the British context,<sup>7</sup> Lord Rodger uses what he admits is ‘a trivial example from the western context’ to illustrate the rationale behind the overturning of the discretion requirement - namely that ‘just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates’ (paragraph 78). The judge states

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<sup>4</sup> *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

<sup>5</sup> *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)* 2004 FC 282.

<sup>6</sup> *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31.

<sup>7</sup> *Ibid.*



that ‘the same must apply in other societies’, suggesting that he has some awareness that there are differences between ‘gay cultures’ here and there. The question remains however as to what the lesbian equivalent of Kylie concerts and coloured cocktails would be – while there is an identifiable (if highly problematic) “gay identity” based on participation in public, commercial activities aimed at gay men, there is no such identifiable ‘lesbian identity’ that the courts can ask women to prove. Instead, the courts use criteria adapted from what they use to test the identity of gay men. As will be explored below, the courts require “real lesbians” to either be participants in the pink economy and publicly perform their sexuality like gay men, or alternatively to have be a caring, and maternal woman whose sexuality is a secondary part of her identity.

For a woman applicant to prove her sexuality, she must give details such as when she first thought she was a lesbian, all of the intimate relationships and feelings she has had with and for other women, how she managed to hide those feelings and relationships and what happened to her as a consequence if she did not manage, along with anything else that the decision-maker hearing the case thinks is relevant to authenticating her identity as a real lesbian. In the Australian Refugee Review Tribunal case of *N04/48953* (25 January 2005), this involved asking a Mongolian woman to give names and addresses of “gay locations” in both Mongolia and Australia, and to disclose whether she had yet acquired a local woman lover in Sydney. The tribunal then asserted that conditions for gays and lesbians in Mongolia had been improving in recent years, citing as authority the *Spartacus Guide*, a commercial travel guide aimed at western gay men planning holidays abroad. The use of the *Spartacus* guide as a tool in assessing the authenticity of a Mongolian woman’s lesbian identity is a good example of refugee law’s imposition of a wildly inappropriate grid of understanding – the implicit spatial frame of reference for the court’s gay and lesbian identity category is the plump pink dollar districts of gay (and to a lesser extent, lesbian) Sydney, where “gay locations” are indeed clearly recite-able by name and address, where it is feasible to find a “local lover” once you move to the area, and where the choice of holiday destinations abroad is on people’s lists of concerns. The grid of understanding being used to frame lesbian identity here is one in which subjects have the capital and the desire to spend time and money on commercial recreational activities targeted at local gay and lesbian consumers. This

grid is not super-imposable on asylum-seekers, who are by definition coming from a radically different context – one in which they needed to hide their sexuality to survive, and in which many suffered deeply traumatic experiences when they were open about their sexuality. It is particularly inappropriate for women, as even in regard to the local pink dollar market, it is men rather than women who tend to form the majority of the clientele.

In the Canadian case of *X(Re) 2008 CanLII 83550*, a Russian woman applying for asylum on the basis that she feared returning home because of her lesbian sexuality used receipts from the Toronto gay village in an attempt to prove her lesbianism. The Immigration and Refugee Board noted that only some of the receipts were for transactions paid by debit and or credit card, and that only some ‘had an air-miles card number on them’. When the applicant could not show any of her own credit or debit cards, and when the air-miles card on the receipt was different from her own, the board found that her inability to show with certainty that the payments were made directly by her meant that she did not make any of the payments herself, and that ‘on a balance of probabilities’, the receipts were collected only to embellish her claim. The applicant lost her refugee claim on the basis that she could not prove her true lesbian identity. She had also provided photos of what the board described as ‘several young women ... just frolicking and having fun’, and ‘in one photo the claimant is kissing another female’ but that ‘on the balance of probabilities’ this was not enough to prove the applicant was a lesbian – or at least, it was not enough to prove that she was a lesbian who was vulnerable to persecution in the way refugee law requires. Also taken into account was that although she joined a local community centre with programs aimed at the gay and lesbian community, she did not join as soon as she entered Canada, which the board decided also detracted from her lesbian credentials. Extrapolating from the court’s decision, to successfully prove she was a vulnerable lesbian, this applicant would have needed to have credit and / or debit cards in her name, and have used them instead of cash to make multiple purchases - presumably at sex shops in the gay village; she would have needed to show photos of doing something more sexually explicit than kissing another woman, and she would have been able to prove that she immediately joined her local community centre and perhaps other public organizations aimed at the gay and lesbian community when she first entered the country. This “ideal lesbian refugee” would have needed to not only

be confident with speaking English and dealing with public and private services in her new, foreign environment, but would also have an excellent credit record and an assertive, gregarious personality such that she would have not only found a lover but been publicly affectionate or sexual with her and been willing to be photographed doing so.

These cases show that the “ideal lesbian refugee” must prove that she is vulnerable to sexuality persecution in the receiving state because she performs her sexuality publicly. These requirements are demanded of her in the receiving state on the assumption that if she shows her vulnerability *here* then she must have also been vulnerable *there*. Apart from the obvious problems with assuming that asylum-seekers will be financially able to make “gay purchases” and culturally able to make social and community connections as soon as they arrive, the requirement that these women perform their sexuality in this commercial, public way also ignores the reality that the asylum-seeking subject has by definition come from a space in which it was unsafe for her to publicly show her sexuality. Her vulnerability to persecution if she is open about her sexuality in her home state is the reason that she is seeking asylum in the receiving state, yet she is required to overtly perform an open vulnerability to persecution in the receiving state once she arrives.

The British case of *Krasniqi*<sup>8</sup> paints a slightly different picture of the law’s ideal vulnerable lesbian. In this case, the Court of Appeal upheld the decision to allow an Albanian woman from Kosovo who was living in a same sex partnership to be granted asylum on the basis of article 8 of the European Convention on Human Rights (right to privacy and family life). Krasniqi was living in a relationship with another woman asylum seeker from Kosovo, and they were raising the second woman’s child together. In this case, the court took into account that because of the heavy social and gendered expectations for appropriate behaviour for Kosovar women, they would live either with their parents or their husbands rather than with each other. The court noted that Krasniqi had been ‘bigamously married off’ at the age of 15 to an older man who was violent towards her. Krasniqi’s history and role as a caring woman was a much more stereotypical notion of feminine vulnerability than was required of the ideal

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<sup>8</sup> *K v Secretary of State for the Home Department* 2006 (D) 120 (Apr) All England Reporter (Court of Appeal, Civil Division) 10 April 2006.

lesbian refugee in the cases reviewed above. The striking element of this judgment though is that the relationship between the Krasniqi and her partner is almost completely desexualised – their identities as lesbians are ignored, and they are instead depicted as caring women in a family relationship. Indeed, considering that there is a 30-year age gap between the women, anyone reading the judgment might assume that they were in a platonic mother-daughter relationship, except for two instances where the court somewhat bashfully acknowledges the sexual nature of their relationship. First, the court says that ‘the characterisation of such a household for article 8 purposes remains problematical’, and it follows this with a footnote stating ‘see most recently *Secretary of State for Work and Pensions v M* [2006] UKHL 11’, which is a case about non-custodial parents in homosexual relationships paying more in child maintenance than their heterosexual counterparts. Second, the court summarizes the adjudicator’s findings about their relationship that, ‘while it had a sexual component ... that is not the central force’, but that rather, ‘their relationship is an exclusive and enduring one’ in which ‘a family life’ exists. Thus, the court accepted a model of lesbian identity that was desexualized, discrete to the point of being invisible, and normative in terms of both relationship models (of a long-term, committed couple) and gender roles (women as vulnerable victims of a non-British patriarchy and as primary carers).

*Krasniqi* was an unusual decision because the applicant had her claim for asylum on the grounds of sexuality accepted, but it is clear from reading the decision that it was accepted because of her identity as a vulnerable woman rather than as a lesbian who did not belong. The court’s erasure of Krasniqi’s sexuality actually worked in her favour – considering her lifestyle as a mother and a partner in a long-term relationship, it would likely have been impossible for her to provide requisite proof that she was an ideal vulnerable lesbian. However, she could prove that she was a vulnerable woman instead, one who just happened to be in a relationship with another woman.

In most cases however, the court’s refusal and / or inability to recognise the applicant’s sexuality leads to the failure of the refugee claim. As well as the cases of *N04/48953* and *X(Re)* reviewed above, in which the court found that there was not enough evidence to prove that the applicants were genuine lesbians, there are many

cases in which decision-makers found that regardless of whether or not the women before them were in fact genuine lesbians, they did not have a well-founded fear of persecution because no one would ever know that they were lesbians anyway.<sup>9</sup> They could not prove their vulnerability fit with the legally mandated version of what being a vulnerable lesbian entails. In an Australian case, the decision-maker proclaimed that ‘the applicant has not satisfied the tribunal that she is homosexual, let alone that anyone around her knows about it, or cares to think about it, or would harm her for it’.<sup>10</sup> In a number of cases, the decision-maker concluded that lesbians in the sending state could not be a group that are vulnerable to persecution because of the lack of public, court-admissible information about ‘lesbians’ in the sending state.<sup>11</sup> These cases demonstrate that for women claiming asylum on the grounds of sexuality, the end of the requirement that they be discrete about their sexuality is somewhat irrelevant because the courts tend to ignore lesbian sexuality anyway. The case law suggests that unless they prove their vulnerability in the receiving state by, for example, being super-butche, making regular grandiose (preferably credit-based) purchases at their local sex store or taking a lead role in community lesbian activities, then the courts are unlikely to recognize them as worthy of protection in the refugee system. A somewhat blurry picture thus emerges of the ideal vulnerable lesbian refugee, arriving in wealthy liberal democracies. What is clear is that she is required to fit within a singular scalar narrative of vulnerability across multiple, divergent spaces – either that of the western lesbian or that of the foreign woman.

### **Producing static places**

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<sup>9</sup> See for example *FF Iran [2004] UKIAT 00191* 2004 (Immigration Appeal Tribunal) 13 July 2004; *JD Zimbabwe [2004] UKIAT 00259* 2004 (Immigration Appeal Tribunal); *N04/49108 (21 July 2004)* 2004 (Refugee Review Tribunal) 21 July 2004; *Gyorgyjakab v Canada (Minister of Citizenship and Immigration) 2005 FC 1119* 2005 CanLII (Federal Court (Canada)); *060531993 [2006] RRTA 141 (28 September 2006)* 2006 (Refugee Review Tribunal) 28 September 2006. *N04/49108 (21 July 2004)* (Refugee Review Tribunal); *Blanco v Canada (Minister for Citizenship and Immigration) 2001 FCT 727* 2001 (Federal Court (Canada)) 28 June 2001.

<sup>10</sup> *N04/49108 (21 July 2004)* 2004 (Refugee Review Tribunal) 21 July 2004.

<sup>11</sup> See for example *Amare v Secretary of State for the Home Department [2005] EWCA Civ 1600* 2005 All England Official Transcripts (Court of Appeal (Civil Division)) 20 December 2005. *FF Iran [2004] UKIAT 00191* 2004 (Immigration Appeal Tribunal) 13 July 2004; *JD Zimbabwe [2004] UKIAT 00259* (Immigration Appeal Tribunal); *DM Serbia and Montenegro [2004] UKIAT 0028* (Immigration Appeal Tribunal); *071261665 [2007] RRTA (12 June 2007)* 2007 (Refugee Review Tribunal) 12 June 2007; *Brahmbatt v Minister for Immigration & Multicultural Affairs*; *Patel v Minister for Immigration & Multicultural Affairs [2000] FCA 1686*.

As well as producing a vulnerable lesbian identity, refugee decisions produce a particular landscape - spaces in which some belong and others do not. The way that the courts test a woman's identity is indicative of refugee law's approach of treating space and identity as separate, singular and unrelated realms of fact to be proved or disproved – in *N04/48953* (the Australian Refugee Review Tribunal case involving the Mongolian woman discussed above) for example, the use of the *Spartacus* guide, together with the requirement of detailed evidence of the woman's sexuality stretching from her first and most intimate sexual feelings and experiences through to her attendance at 'gay locations' in the country in which she is seeking asylum, require of her a single, fixed identity across multiple and very varied spaces. This approach ignores the reality of the necessity for these women to perform fluid queer identity in a homophobic world. Eve Sedgwick (1990) observes that the need to step in and out of the closet on a regular basis, and to sometimes occupy a liminal space between is central to the everyday experiences of large segments of society. Treating space and identity as discrete and unconnected reinforces the idea of the state as a coherent, uniform space that subjects either belong to or do not. As Hyndman (2004) argues, 'international borders can serve to naturalize difference, refuse political alliances, and obscure commonalities between discrete spaces and linked oppression' (310). Many of the legal decisions cited in this chapter took note of the sending states' attempts to prevent the type of homophobic and gender-based persecution being claimed. For example, in one case the court stated that 'the Hungarian government has made serious efforts to offer protection to gays and lesbians,' and to women living with domestic violence, and that the applicant's failure to approach the police when her ex-husband and his friends allegedly violently beat her new partner and killed her cat, weakened her claim.<sup>12</sup> Consistent with feminist critiques of the state and law as a masculine institution (see Charlesworth and Chinkin 1991), what emerges from these cases is how the state upholds sexual mores which exclude and disbelieve women who do not adhere to a particular type of heterosexual femininity. In refugee law, the state will accept only queer women who are vulnerable either because they are openly, commercially lesbian or because they are foreign women in need. Through the mechanism of refugee law, receiving states use the displacement of these women (both in terms of their gender and sexuality roles and in terms of their physical

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<sup>12</sup> *Valoczki v Canada (Minister of Citizenship and Immigration) 2004 FC 492* 2004 (Federal Court (Canada)) 1 April 2004.

location) to reassert national borders, both territorially and in terms of what kinds of sexual and gender difference they will allow within these borders.

Another way that the refugee decisions produce artificially static landscapes of belonging and exclusion is through the ‘internal flight alternative’ (IFA). The rationale of the IFA is to refuse an asylum claim when, regardless of whether or not the woman was accepted as a real lesbian, the receiving state can return her to her home state on the basis that she could avoid persecution by moving to another part of her home state. The courts use the IFA as a basis for rejecting claims in all three of the states analyzed in this chapter, though the test is most clearly articulated in the Canadian courts and tribunals. In the Canadian context, the test regarding an IFA was first articulated in two cases from the early 1990s.<sup>13</sup> The first requires the decision-maker to be satisfied on the balance of probabilities that there is no serious possibility of the claimant being persecuted in the proposed IFA. Second, the condition in the proposed IFA must be such that it would not be unreasonable, considering “all the circumstances”, including the claimant’s personal circumstances, for the claimant to seek refuge there.<sup>14</sup> What “all the circumstances” includes, however, differs with each decision-maker. Indeed, it might be argued that “all the circumstances” is something that a decision-maker meeting a foreign, purportedly queer woman for the first time, and in a highly artificial and formal environment, is never going to be able to take into account (see Millbank 2003). The use of the IFA is a means by which the courts construct the lesbian refugee as vulnerable *everywhere* in her home state (implicitly intimating that she will reciprocally be safe from homophobic violence everywhere in the receiving state). Of the cases analyzed for this chapter, there were only three in which having accepted that the woman was ‘a real lesbian’, an IFA was considered by the court or tribunal but rejected as unreasonable in “all the circumstances”.

One of the cases in which the courts rejected an IFA involved a Mongolian lesbian whose parents had denounced her, who had a long history of harassment because of her sexuality, and whose partner had been raped in front of her. When she went to the

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<sup>13</sup> *Rasaratnam v Canada (Minister of Employment and Immigration)* [1992] 1 FC 706 (C.A.) and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* [1994] 1 F.C. 589 (C.A.).

<sup>14</sup> re-articulated in *Parrales v Canada (Minister of Citizenship and Immigration)* 2006 FC 504 2006 (Federal Court (Canada)) 21 April 2006.

police she was met with hostility.<sup>15</sup> Having accepted her evidence as credible, and having taken into account extensive evidence from sources such as Mongolian lesbian websites, news articles, United Kingdom Home Office information, Canadian Immigration and Refugee Board information and non-government organization reports, the tribunal concluded that ‘the applicant would not be able to avoid the serious harm she fears by relocating elsewhere within Mongolia. Indeed the situation outside the capital city is likely to be even less favourable to her’.<sup>16</sup> Another case involved a Mexican woman who had been repeatedly and violently assaulted by police because of her sexuality, and who had already moved cities in her home country in an attempt to escape the persecution.<sup>17</sup> The Immigration and Refugee Board had found that, being a ‘well-educated ... capable, resourceful young woman ... it would not be unreasonably harsh in all the circumstances for her to move’ to Mexico City, and, therefore, the courts refused her refugee claim because of the availability of an IFA. On appeal this decision was reversed – the Federal Court finding that considering her history of police abuse, it was unreasonable to require her to relocate to Mexico City.<sup>18</sup> Finally, in a decision involving a lesbian from Saint Vincent and the Grenadines, a small multi-island state in the Caribbean, whose ex-boyfriend had repeatedly and severely beaten her, an whom she still feared. She claimed that the police would not protect her from this man.<sup>19</sup> The Immigration and Refugee Board found that the woman had an internal flight alternative of seeking refuge in the smaller islands of the Grenadines, which are separated from the main island of Saint Vincent by some 20 kilometres of open water accessible by boat or aeroplane. While the applicant told the board that her ex-boyfriend would resort to island hopping to seek her out, the board held that this part of her evidence was not credible.<sup>20</sup> On appeal, the Federal Court overruled the IFA decision, stating that ‘it defies logic to believe that an island separated only by a few kilometres of open water from Saint Vincent and easily accessibly by ferry or plane could provide a safe haven to the applicant’; further, that ‘the board should have known that these island are

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<sup>15</sup> 061020474 [2007] RRTA 25 (7 February 2007) 2007 (Refugee Review Tribunal) 7 February 2007.

<sup>16</sup> Ibid.

<sup>17</sup> *Parrales v Canada (Minister of Citizenship and Immigration)* 2006 FC 504 2006 (Federal Court (Canada)) 21 April 2006.

<sup>18</sup> Ibid.

<sup>19</sup> *Franklyn v Canada (Minister of Citizenship and Immigration)* 2005 FC 1249 2005 (Federal Court (Canada)) 13 September 2005.

<sup>20</sup> Ibid.



sparsely populated and geographically very small, and that it would be relatively easy to find somebody for whoever is bent on doing so', and finally that 'the applicant did not need to adduce evidence in this regard.'<sup>21</sup>

In each of the three cases above, "all the circumstances" included a meaningful consideration of the spaces to which the woman would be returning if she were to move to a different part of her home state. So in the first case the court recognised that small towns in Mongolia, despite being removed from the specific history of violence (including its perpetrators) from which the woman was seeking refuge, were not going to provide a space free from the threat of further homophobic violence. In the second case the court recognised that Mexico City is not big enough to provide refuge to a Mexican lesbian, repeatedly assaulted by police because of her sexuality. And in the third case the courts recognised that 20 kilometres of open water is not enough to protect a woman from a crazed ex-boyfriend, angered by her sexuality and on a mission to harm her, which the Saint Vincent and Grenadines police would not intervene to stop. Thus in each of the three cases where the law considered and rejected an IFA, there was a recognition that the areas of land and sea enclosed by state borders is a complex space, and that the ability of any space to provide refuge differs depending on the history and identity of the subject seeking refuge.

By contrast, in the far more common situation where an IFA was considered and found to exist for the applicant, "all the circumstances" amounted to not much at all, with the IFA often tagged onto the end of the decision almost as a trump card, to win out over any possible doubts over whether the applicant should or should not be granted refugee status. An example of this use of an IFA is in a case involving a Mexican woman who feared persecution by her ex-fiance and her female lover's husband, who was a powerful official in Mexico City.<sup>22</sup> She claimed to have fled to Canada after being threatened with harm to both herself and her family if she did not leave Mexico. The board rejected her claim on the basis that she lacked credibility and that at any rate, she had an alternative flight alternative because her lover's husband worked in the office of the Mayor of Mexico City, and, it was reasoned, his

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<sup>21</sup> Ibid.

<sup>22</sup> *Avila Saldivar v Canada (Minister of Citizenship and Immigration)* 2005 FC 492 2005 (Federal Court (Canada)).

reach would not extend beyond Mexico City. After briefly reviewing the board's credibility findings and deciding that they were not patently unreasonable (the standard required for their overturn on appeal), the Federal Court re-affirmed that:

[f]inally, the board's conclusion about the availability of an IFA is conclusive. It is eminently reasonable to assume that an aide to the Mayor of Mexico City would not have any reach outside Mexico City, however powerful he may be in the city and however corrupt the Mexican administration of police and justice may be. The applicant produced no evidence to negate that assumption. (*Avila Saldivar v Canada* 2005, FC 492)

Thus, the applicant's persecution is proclaimed to exist within the borders of Mexico City only, because the person she was most afraid of lived and worked there, and it was assumed that any fear the applicant had outside the borders of Mexico City was not well-founded. This assumption fails to take into account a world of circumstances. Considering the applicant gave evidence that her primary persecutor was indeed a government official whose jealous homophobic rage at the applicant's relationship with his wife led him to demand that she leave the country, it could also be argued that it is eminently reasonable that he would attempt to harm her no matter where in Mexico she lived. Also, considering his threat was against both the applicant and her family, it might have been thought relevant to take into consideration where in Mexico her family live – if it is outside the capital then it would be clear that the threat was not limited to Mexico City. Nor was it taken into consideration that the stated corruption of the Mexican administration of police and justice might mean that it is quite feasible for a powerful official in one city to influence officials in another through corrupt means. By analyzing Mexico City as a place essentially unconnected to the rest of Mexico, the court thus found that the applicant was not vulnerable enough to qualify for refugee status.

While the above example decided on an IFA to 'any city outside the capital', most decisions finding that an IFA existed for the queer woman asylum seeker directed her *towards* the bright lights of the capital city of her home state. Decision-makers

recommended women move to Mexico City,<sup>23</sup> Harare,<sup>24</sup> Bogota,<sup>25</sup> Bangkok<sup>26</sup> and Beirut.<sup>27</sup> In some cases, these cities were explicitly stated to be ‘more sophisticated and more tolerant,’<sup>28</sup> and with ‘a significant homosexual community’,<sup>29</sup> underlining the assumption that the capital city is the natural place for a queer woman to be. There are several problems with this assumption. One is that it is based on a very western narrative of coming out and being queer – the story of the sexual deviant from the country who migrates to the city, where there are gay bars, sex shops and support groups. While sociological research confirms the city is a place where many adult queers in wealthy liberal countries find their homes (Weston 1995), there is no evidence that this applies across all cultures – sexualized identities and residential mobility does not operate identically across all cultures and places. Second, there is the problematic assumption that capital cities have more “homosexual culture” than rural towns. While this may well be true in some respects, it rests on a very public definition of “homosexual culture”, and one that is more likely to be welcoming to gay men with a disposable income than to queer women from outside the city who may not have a disposable income (Duggan 2002; Taylor 2007).

Regardless of the outcome of the decision, the very operation of refugee law in the context of sexuality superficially confirms the western state’s status as the place of modernity, cultural tolerance and political superiority, and that of the country of origin’s primitiveness, homophobia and general inferiority (Keenan 2010; Miles 2010). In reality, the sexual difference that successful sexuality-based refugee claims allows is very limited – think of the Spartacus guide example and the specific type of homosexuality you need to perform to be recognised by the law. In Jasbir Puar’s terms, it is only *homonormative* applicants whose claims succeed (Puar 2007).

Developing the idea of homonormativity and homonationalism, Puar (2007) argues in the US context that liberal politics have accepted certain queer subjects, but only in a

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<sup>23</sup> *Blanco v Canada (Minister for Citizenship and Immigration) 2001 FCT 727 2001* (Federal Court (Canada)) 28 June 2001; *Martinez v Canada (Minister of Citizenship and Immigration) 2003 FC 1005 2003* (Federal Court (Canada)) 28 August 2003.

<sup>24</sup> *JD Zimbabwe* [2004] UKIAT 00259 2004 (Immigration Appeal Tribunal).

<sup>25</sup> *N98/22074* (1 March 2000) (Refugee Review Tribunal).

<sup>26</sup> *N02/44760* (23 May 2003) (Refugee Review Tribunal).

<sup>27</sup> *N01/37673* (15 November 2002) (Refugee Review Tribunal).

<sup>28</sup> *Ibid.*

<sup>29</sup> *N98/22074* (1 March 2000) 2000 (Refugee Review Tribunal).

very particular and assimilationist way, and in a way that depends on and further produces the figure of the implicitly sexually deviant, racialised other (Puar 2007). Thus, the happy white gay and lesbian couples from picket fence suburbs who can marry and adopt children stand in stark opposition to the monster-terrorist-fag whose perversity revolts all good national subjects, straight or queer. Applying this model to the refugee context, it can be seen from the cases reviewed in this chapter that the masculine, white, middle class criteria which western states impose on all those seeking asylum on the basis of sexuality, means that only those who fit into a narrow homonormativity are actually allowed through the borders of the nation. Indeed as the cases discussed have shown, refugee law applied to queer women from non-western states produces an essentialised vulnerable subject that fails to fit the reality of most applicants. This vulnerable subject is based on stereotyped ideas about either western pink dollar gays and lesbians or foreign women in need, and while its production does provide a positive outcome for a handful of individual asylum-seeking subjects, on a broader scale, it also reinforces hierarchies of race, gender and sexuality and colonial landscapes of 'good' and 'bad' states. It thus directs attention away from more difficult questions about how those hierarchies and landscapes might be un-mapped, and how new landscapes of belonging might be envisaged and worked towards.

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