

Immigration and Refugee
Board of Canada

Refugee Protection Division



Commission de l'immigration
et du statut de réfugié du Canada

Section de la protection des réfugiés

RPD File / Dossier de la SPR : XXXXXX

XXXXXX / XXXXXX / XXXXXX

UCI / IUC: XXXXXX

XXXXXX / XXXXXX / XXXXXX

Private Proceeding / Huis Clos

Reasons and Decision – Motifs et décision

Claimant(s) XXXXXX **Demandeur(e)(s) d'asile**
XXXXXX
XXXXXX
XXXXXX

Date(s) of hearing March 24, 2023 **Date(s) de l'audience**

Place of hearing Heard by Virtual Hearing **Lieu de l'audience**

Date of decision and reasons March 28, 2023 **Date de la décision et des motifs**

Panel Graham Zilm **Tribunal**

Counsel for the claimant(s) Simrit Birdi **Conseil(s) du (de la/des) demandeur(e)(s) d'asile**

Designated representative XXXXXX **Représentant(e) désigné(e)**

Counsel for the Minister N/A **Conseil du (de la) ministre**

REASONS FOR DECISION

[1] XXXXXX (the “principal claimant”, or “PC”), his wife XXXXXX (“associate claimant 1” or “AC1”), their adult son XXXXXX (“associate claimant 2” or “AC2”), and their minor son XXXXXX (the “minor claimant” or “MC”) allege that they are citizens of Malawi and claim protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act* (the “Act”).¹

[2] I have reviewed and applied the Chairperson’s *Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* (“Guideline 3”),² *Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution*³ (“Guideline 4”), and *Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics*⁴ (“Guideline 9”) in this decision.

ALLEGATIONS

[3] The claimants collectively allege a serious possibility of persecution on account of the PC’s sexual orientation as a bisexual man.

[4] The PC alleges that he has faced an attempt at forcible conversion of his sexual orientation at the hands of his family, as well as violent homophobic attacks in 2009, 2011 and 2019. AC1 alleges that she has faced a homophobic attack in 2013, as well as discrimination in accessing health services and ostracism from her family. Neither AC2 nor the MC allege any specific incidents of persecution or discrimination in the past—I note that the eldest of the

¹ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

² Immigration and Refugee Board of Canada (IRB) Chairperson’s *Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues*. Ottawa, Canada, September 1996.

³ Immigration and Refugee Board of Canada (IRB) Chairperson’s *Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution*, Ottawa, Canada, IRB Chairperson’s *Guideline 4*, 2012.

⁴ *Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics*, Ottawa, Canada, May 1, 2017. Revised December 2021.

children left Malawi at around age 11—they both allege they would face a forward-facing risk of persecution on account of their father’s sexual orientation.

DETERMINATION

[5] I find that the claimants are Convention refugees and I accept their claims.

ANALYSIS

Identity

[6] I find that the identity and Malawian nationality of the claimants is established on a balance of probabilities by copies of their Malawi passports at Exhibit 1.

Credibility

[7] When claimants swear to tell the truth it creates a presumption that their evidence is true, unless there is reason to doubt their credibility. The claimants spoke in clear, straightforward manners and there were no relevant inconsistencies in their evidence or between their testimony and the other evidence before the Board.

Delay in claim, Failure to claim and reavailment

[8] The PC first left Malawi for Ireland in 2011, and was subsequently joined by AC1 in 2012, and then by AC2 and the MC in 2013. In 2014, the PC moved to Canada to attend Bible college, with the other claimants joining him a few months thereafter. The PC hoped that by studying a counseling degree along with theology might help him better understand his sexual orientation in the context of his faith. He initially planned to return to Malawi following his graduation.

[9] In April 2019 the PC traveled back to Malawi to make arrangements for his family’s intended move. While he was in the country a man drove his car into the PC’s while he was

sitting in his vehicle. The man told the PC he was “not going to allow gay people make Malawi like Sodom and Gomorrah.”

[10] After returning to Canada in May 2019, the PC and the other claimants tried to remain in Canada by making a permanent residency application. The application was rejected in 2020 due to errors in the application. The claimants made a second application for permanent residence around March 2020; this application was still pending at the time of the hearing.

[11] The claimants sought protection in April 2021. The PC explained at the hearing that he did not seek protection earlier because of his mother, and her disapproval over his sexual orientation. After she died in July 2020, the PC sought counseling. Through this counseling he came to realize that, in his words:

It was the right thing to seek protection because my life is in danger and it is the right thing to do. Because my mother had passed and she was not in the picture anymore. That's why I decided to seek protection.

[12] Generally speaking, a delay in claiming protection may be inconsistent with an alleged subjective fear, an essential component of a claim under section 96 of the *Act*. The PC first left Malawi in 2011, having suffered two violent attacks. He did not seek protection in Ireland during his time there. He resided in Canada from 2014 to 2019. Moreover, he returned to Malawi in 2019 with the intention of taking up residence there once more; he was dissuaded from doing so by a subsequent attack.

[13] I do not find that any of these actions on the part of the PC serve to undermine the existence of a subjective fear or his overall credibility. With respect to delay specifically, the *Guideline 9* states:

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

[14] The PC explained that he did not seek protection earlier on account of his mother's lack of acceptance of his sexual orientation. I found the claimant's explanation to be credible and reasonable. He appeared to express deep and genuine emotion in discussing his mother, and his concerns about her lack of acceptance.

[15] Accordingly, I find that the claimants' failure to seek protection in Ireland, and their failure to seek protection in Canada earlier do not undermine the existence of a subjective fear on their part or their overall credibility.

Corroborating evidence and credibility conclusion

[16] The claimants provided corroborating evidence in support of their claim at Exhibits 4 and 5. In particular, I note that the claimants provided the following:

- A letter dated August 23, 2022 from the Centre for Human Rights and Rehabilitation ("CHRR") in Lilongwe, Malawi.⁵ The letter describes the organization as "one of the leading local human rights nongovernmental organizations in Malawi that works to promote human rights, including the rights of vulnerable and marginalized groups such as the LGBTQ+ community." The PC explained that he made himself known to this organization in 2008, and kept them updated about his circumstances by phone following the attacks in 2009 and 2011. The letter corroborates a number of details of the claimants' allegations.
- A letter dated 2011 from the Blantyre, Malawi police station.⁶ The letter states the PC was attacked by some unknown persons, who accused him and his grandmother of practicing witchcraft. The PC explained that he suffered the attack in Mzuzu, but was advised by someone at the CHRR to travel to Blantyre, his hometown, and report the attack and seek medical attention there. The PC said he needed to report the attack to the police in order to receive medical attention, and that he came up with the

⁵ Exhibit 4, p. 29.

⁶ Exhibit 4, p. 33.

witchcraft allegations as a cover story because his sexual orientation is criminalized in Malawi.

- Photographs of the PC's scars and other marks at Exhibit 5. I asked the PC about a number of the photographs, namely at Exhibit 5 pages 1 through 4. The claimant explained what injury the marks/scars showed. He stated that the scars all came from a variety of wounds he suffered during the attack of 2011. For example, he noted that a burn scar on his right forearm was from boiling water; he stated that his attackers had taken a kettle of water from a nearby tea stall and threw the water in the direction of his face, which the PC was protecting with his arms.

[17] I have no reason to doubt the genuineness of the above, or of any of the remaining evidence provided by the claimants. Much of the claimants' corroborating evidence is both relevant and probative. In particular, I find that the claimants' evidence corroborates the allegations that the PC is a bisexual man and that he has faced a number of homophobic attacks in Malawi.

[18] I accept the totality of the claimants' allegations on a balance of probabilities. In particular, I find that the PC is a bisexual man who has endured three violent attacks. I also find that AC1 has also faced a homophobic attack at her grocery store on account of her husband's sexual orientation. I find that the claimants' all have a subjective fear of persecution.

Nexus

[19] I find that there is a nexus between the harm alleged by the PC and the Convention ground of membership in a particular social group on account of his sexual orientation, as a bisexual man.

[20] I also find that there is a nexus between the harm alleged by AC1, AC2 and the MC and the Convention ground of membership in a particular social group, namely as family members—be it spouse or children—of a bisexual man.

Well-Founded Fear of Persecution

[21] I find that the evidence before me in the National Documentation Package (“NDP”) for Malawi establishes that the claimants’ subjective fear is objectively well-founded. Accordingly, I find that the claimants face a well-founded fear of persecution.

[22] The United States 2021 Department of State Report for Malawi notes that the law does not prevent discrimination against LGBTQI+ persons and that they face discrimination in hiring and harassment.⁷ Freedom House notes that the political parties do not advocate for rights of the LGBT+ community and that members of this community are subject to both legal and societal discrimination.⁸

[23] There are several provisions in the Malawi *Penal Code* which criminalize same sex conduct or relationships, punishable by corporal punishment or terms of imprisonment upwards of 14 years.⁹

[24] On the issue of same-sex marriage, Outright Action International, in its report date March 16, 2016 states that:

The Marriage, Divorce and Family Relations Bill (the “Bill”) came into force in Malawi on April 17, 2015. The background to the Bill explicitly states that the scheme of law in Malawi presupposes heterosexual union and that, for purposes of marriage, sex is regarded as that determined at birth, in order to avoid potential problems caused by transsexuals or persons who have undergone sex-changing surgery later in life from marrying a person who, prior to that sex-changing surgery, was of the same sex as them.

Section 14 of the Bill sets out the essential elements of marriage as being between “two persons of the opposite sex,” thereby disregarding the possibility of a union between people of the same sex. Further, Section 55 states that “A person who knowingly and wilfully (sic) celebrates or purports to celebrate a

⁷ National Documentation Package, Malawi, 31 May 2022, tab 2.1: Malawi. Country Reports on Human Rights Practices for 2021. United States. Department of State. 12 April 2022.

⁸ National Documentation Package, Malawi, 31 May 2022, tab 2.3: Malawi. Freedom in the World 2021. Freedom House. 2021.

⁹ National Documentation Package, Malawi, 31 May 2022, tab 6.1: Malawi. Our Identities Under Arrest: A global overview on the enforcement of laws criminalizing consensual same-sex sexual acts between adults and diverse gender expressions. International Lesbian, Gay, Bisexual, Trans and Intersex Association. Kellyn Botha. 15 December 2021.

marriage when he or she is not competent under this Act to do so commits an offence and is liable on conviction to a fine of K100,000 and to imprisonment for five years,” creating the potential for abuse if such Section is enforced against same sex couples who attempt to celebrate their relationship in a manner that is similar to marriage.¹⁰

[25] As per Human Rights Watch:

LGBT individuals and human rights defenders in Malawi told Human Rights Watch that because of the pervasive homophobia and transphobia and the criminalization of same-sex conduct, they live in constant fear of abuse because of their real or perceived sexual orientation and gender identity. The abuse takes many forms, including intimidation, beatings by members of the public and some police officers, arbitrary arrests and detention, lack of access to justice, and discrimination in healthcare settings.¹¹

[26] The objective evidence shows that SOGIESC persons in Malawi face a serious possibility of persecution which may take a wide array of forms from discrimination in employment to lengthy imprisonment and cruel and unusual treatment or punishment.

[27] I am mindful that there is no clear information in the NDP as to the treatment of family members of SOGIESC persons in Malawi; NDP 6.3 indicates that often family members are participants in the active persecution of SOGIESC persons in Malawi.¹² I note, however, that AC1 suffered attacks from strangers and ostracism from her family as a result of her husband’s sexual orientation. I have also considered *Guideline 9* which notes:

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

[28] I find that the evidence shows that the claimants face a serious possibility of persecution in Malawi. Their fears of persecution are well-founded.

¹⁰ National Documentation Package, Malawi, 31 May 2022, tab 6.2: Malawi. A Survey of Laws Impacting the Human Rights of Lesbian, Gay, Bisexual and Transgender Persons in Selected Southern African Countries. Outright Action International. 16 March 2016.

¹¹ National Documentation Package, Malawi, 31 May 2022, tab 6.3: “Let Posterity Judge”: Violence and Discrimination against LGBT people in Malawi. Human Rights Watch. Wendy Isaack. 26 October 2018.

¹² National Documentation Package, Malawi, 31 May 2022, tab 6.3: “Let Posterity Judge”: Violence and Discrimination against LGBT people in Malawi. Human Rights Watch. Wendy Isaack. 26 October 2018.

State Protection and Internal Flight Alternative

[29] I find that state protection would not be reasonably forthcoming to the claimants. As noted above there are laws prohibiting homosexuality which apply throughout the country. The country condition documents indicate that a high level of discrimination against SOGIESC persons throughout Malawi, and that there are no legal protections for them against such discrimination. Therefore, I find that the presumption of state protection has been rebutted and based on the country condition documents, there is no adequate state protection for the claimants in Malawi.

[30] Likewise, I find that there is no viable internal flight alternative available to the claimant in Malawi. The laws prohibiting same sex conduct apply uniformly throughout the country. There is no place in that country where the claimants can live and be safe. I find that the claimants will face a serious possibility of persecution throughout Malawi.

CONCLUSION

[31] I find that XXXXXX, XXXXXX, XXXXXX and XXXXXX are Convention refugees.

[32] I accept their claims.

(signed) Graham Zilm

March 28, 2023

Certified True Copy
Copie Conforme

CC
IRB Representative
Représentant de la CISR