

The Difficulties of U.S. Asylum Claims Based on Sexual Orientation

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Since 1998, the United States has processed an average of 46,000 asylum applications each year, according to estimates from the United Nations High Commissioner for Refugees. Winning asylum in this country, however, is not an easy task. On average, only 62 percent of these applications have been successful.

Asylum claims based on persecution related to a lesbian, gay, bisexual, or transgender (LGBT) individual's sexual orientation are particularly difficult to file, argue, and win – even with substantial evidence of persecution and ill-treatment.

In the United States, asylum on the basis of sexual orientation was first granted to an individual in 1994. The number of LGBT asylum claims has increased slowly but steadily since then.

This trend is paralleled to different degrees in other countries that grant asylum to LGBT applicants, including Australia, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, New Zealand, Thailand, and the United Kingdom.

LGBT asylum trends in the United States are closely linked with the domestic political, social, and legal climate surrounding gays and lesbians. Though the climate has become more accepting of gays and lesbians, some states and localities still ban homosexual conduct. This situation, combined with difficulties in proving LGBT identity and other factors, makes sexual orientation asylum claims especially challenging.

Historical Background

Lesbian, gay, bisexual, and transgender individuals have been subject to long-standing and stringent restrictions against entry into the United States. In fact, they were prohibited from entering the country altogether under the Immigration and Nationality Act of 1917, which excluded the "mentally or

physically defective."

The Immigration and Nationality Act of 1952 contained similar language, barring the entry of "aliens afflicted with psychopathic personality, epilepsy, or mental defect," a category that, as confirmed by the U.S. Public Health Service, included LGBT immigrants.

A 1965 amendment contained more explicit language, excluding "sexually deviant" foreign nationals from the United States. This "sexually deviant" ban was overturned when Congress passed the Immigration Act of 1990.

Remaining Obstacles

The lifting of the ban in 1990, though a significant development, has not alleviated many of the *additional* difficulties that LGBT asylum applicants face in the United States.

These individuals have been persecuted in their countries specifically because of their sexual orientation. They have suffered police brutality, communal violence, corrective "treatments," and other forms of abuse. Some were victims of laws imposing extreme penalties – years of imprisonment, and even death – for homosexuality.

Still, most LGBT asylum claims are difficult to win. The success of these claims is limited by the following:

- (1) the focus on homosexual identity – not homosexual conduct – in U.S. laws
- (2) the inapplicability of the usual tests for asylum eligibility in this context
- (3) varying definitions of persecution
- (4) inadequate legal precedent and discriminatory attitudes in U.S. courts

Conduct versus Identity: *Bowers* and *Lawrence* Cases

The form that U.S. sexual-orientation asylum takes today is largely shaped by American constitutional and statutory law relating to the rights of same-sex couples.

The first U.S. sexual-orientation asylum cases (after 1994) were adjudicated in the context of the Supreme Court's landmark 1986 case, *Bowers v. Hardwick*, which upheld an antisodomy law in Georgia and set back efforts to strengthen the rights of same-sex couples.

In the years that followed, judges in U.S. federal courts used *Bowers* to defend similar and equally discriminatory laws in other states that governed sexual conduct.

A significant change came with the Supreme Court's decision in *Lawrence v. Texas*, in 2003, in which a Texas law against sodomy was declared unconstitutional, thereby reversing the court's earlier decision in

Bowers.

In the *Lawrence* opinion, the court argued that the Constitution did not permit an individual to be deprived of liberty, and, in turn, the privacy to engage in consensual sexual behavior, without due process. That is, it did not permit states to regulate sexual conduct.

However, the opinion was narrowly written and included a number of caveats. The expected domino effect – the knocking down of one discriminatory statute after another – did not materialize, as it had with civil-rights cases in the past.

In fact, other state courts used *Lawrence* broadly to permit just such regulation of sexual conduct. A series of cases followed that ignored the thrust of the *Lawrence* opinion.

Favoring Asylum Claims Based on Identity, Not Conduct

Although discrimination against sexual *conduct* is thus endorsed, the United States does not criminalize sexual *identity*. This difference is largely paralleled in the context of asylum, in which claims based on discrimination against sexual conduct are shaky.

Since the United States itself has laws that make homosexual conduct illegal, it becomes difficult for asylum applicants to argue they would receive adequate protection here from similar laws in their home countries. Therefore, immigration courts favor claims founded on persecution based on sexual identity.

In the 1994 decision in *Matter of Toboso-Alfonso*, which then Attorney General Janet Reno declared precedent for LGBT asylum cases, the Board of Immigration Appeals (BIA) stated that the petitioner was not persecuted "in response to specific conduct on his part (e.g., for engaging in homosexual acts); [but] rather... simply from his status as a homosexual." In other words, the persecution tied to his sexual identity made him eligible for asylum in the United States.

In one of the asylum petitions to follow this precedent-setting case, the Eighth Circuit Court of Appeals denied the claim of Botswanan citizen Mareko Molathwa in 2004, arguing among other things that "homosexual conduct is criminal in Botswana, as it is in some jurisdictions within the United States."

Eligibility for Asylum: Membership of a Particular Social Group

In U.S. and international law, an individual becomes eligible for asylum when he or she can exhibit a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."

According to the precedent set by *Matter of Toboso-Alfonso*, LGBT asylum applicants fall under the rubric of "membership of a particular social group." That is, immigration judges look for evidence that the petitioner falls within this category.

This task is not straightforward. The protection has a wide scope and unclear definition. In response, U.S. courts have developed three tests to help determine whether applicants are members of a particular social

group:

(1) the *immutability* rule (the characteristics defining an applicant's membership in a particular social group cannot be changeable)

(2) the *association* rule (courts look for association with other individuals who belong to this social group and share the characteristic that is the basis of the asylum application)

(3) the *recognizability* rule (individuals in the social group in question must possess characteristics recognizable to others)

Why Tests of Membership Do Not Apply to Sexual Identity

Acting in line with constitutional and statutory law governing same-sex couples, immigration judges and officers focus on ascertaining the applicant's sexual identity as they decide whether he or she is a member in a particular social group.

For this process, immigration judges usually employ the associational and recognizability tests. To conduct the tests, judges or immigration officers ask if the petitioner associated with other individuals with whom he or she shared certain fundamental characteristics, and whether their persecutors would have recognized these characteristics.

Judges look for material proof of sexual identity in asylum applicants' answers. Proof may entail subscriptions to gay or lesbian publications, membership in relevant organizations, or an effeminate or masculine appearance that indicates homosexual identity.

This method of gauging the applicant's eligibility for asylum is deeply flawed for several reasons.

First, material proof of sexual identity is frequently unavailable. In the home countries of most applicants, sexual identity and related social relationships and associational status are not easily established. With severe penalties – even death – in place for homosexuality, and facing social ostracism and community violence, many LGBT applicants conceal their sexual identity in their countries of origin.

For these same reasons, gay or lesbian organizations are not easily formed in these countries, and it is challenging for homosexuals to establish public social ties with one another. Therefore, acquiring material proof to present in answer to the recognizability and associational tests is difficult, and sometimes impossible.

Many applicants also continue to hide their sexual identity in the United States for fear that they may face similar persecution here, rendering the collection of the requisite proof, once again, difficult.

Upon hearing the 2002 case of a gay Iranian man, immigration judge Bruce Barrett said, "Now what the court really needs is to show this person is a practicing homosexual in the United States. And the same problem he had in Iran, he has with this gentleman he's living with: closet homosexuals. I don't have any

proof."

Second, by focusing primarily on obtaining material proof of association and recognizability, immigration authorities sometimes do not use the immutability rule.

BIA's 2004 decision in *Matter of Soto Vega* highlights this applicant tension. Noting that the petitioner was not recognizable as a gay man, the government argued that he would be able to reside safely in Mexico if he concealed his homosexual identity.

However, this runs counter to the language on immutability in the 1985 decision *Matter of Acosta*. This decision about a Salvadoran taxi driver was not based on sexual orientation but rather on the petitioner's membership in a cooperative of taxi drivers that antigovernment guerillas targeted.

Matter of Acosta set forth the standards on what constitutes "membership of a particular social group." The decision notes that such membership is determined by "a characteristic so fundamental to identity that they should not be required to change."

It is also possible that some judges have not used the immutability rule because they do not believe that homosexuality is an innate and unchangeable characteristic.

A 2008 Inspector General report revealed that Department of Justice officials had vetted immigration officials for their views on homosexuality and same-sex marriage before appointing them to their posts.

Third, the focus on material proof of sexual identity can hinder immigration authorities' assessment of the applicant's fear of persecution. They hope to use material evidence to decide whether the applicant is a member of a particular social group. However, the lack of evidence – which results from a forced concealment of sexual identity – can itself be considered proof, as it is in Australian asylum law, of a "well-founded fear of persecution."

As a result, judges are faced with a paradox: answers to the associational and recognizability tests may allow them to ascertain the applicant's sexual identity, but that focus could mean missing distinct signs of persecution.

Fourth, the courts often look for proof that fits American conceptions of sexual identity. In denying Jorge Soto Vega's asylum claim, an immigration judge stated, "I don't see anything in his appearance, his dress, his manner, his demeanor, his gestures, his voice, or anything of that nature that remotely approached some of the stereotypical things that society assesses to gays, whether those are legitimate or not."

However, many of the communities that LGBT applicants seek to leave do not apply these conceptions and their outward expression. In one asylum case, for instance, only one partner in a homosexual couple satisfied this test for identity. Homosexual couples in his home country are defined by heterosexual norms, and only the "female" partner is considered homosexual.

In another example, an immigration officer rejected the asylum claim of an Iranian man (who asked for his name to be withheld as he was interviewed for a law journal article) because the applicant was "not feminine in any way" and therefore could not be gay. The immigration court then argued that the man should be able to return to Iran since he was able to conceal his homosexual identity.

The Iranian petitioner's claim was successful only upon the reopening of the circuit court case, when he submitted a number of affidavits attesting to his engagement in activities that were in line with American conceptions: his membership in LGBT groups, his subscriptions to gay magazines, and his participation in gay pride events.

Fifth, the courts seek proof of sexual identity but do not include evidence related to sexual conduct because of the previously discussed U.S. domestic laws. This emphasis on identity becomes problematic when applicants are from cultures in which homosexuality is defined primarily as the act of engaging in sexual activity with someone of the same sex.

Identity-centric terms like "gay," "homosexual," or even "sexual orientation" are, as a result, ill-suited to describing the LGBT population in these countries.

Instead, a number of governments (like that of India) and NGOs in those countries are known to use terms like "men who have sex with men" (MSM), defining the group based on their conduct, not identity. Conduct-based concepts are difficult to define in a U.S. asylum system that espouses a narrow understanding of sexual identity.

Varying Definitions of Persecution

A review of asylum cases in the past two decades reveals particular difficulties that LGBT asylum applicants have in proving their "well-founded fear of persecution" if returned to their countries of origin. Though these factors affect all asylum petitions, they make LGBT asylum cases especially difficult.

Some judges have argued that discriminatory laws and treatment, if they do not intend to punish the applicant, do not constitute "persecution." For example, Alla Pitcherskaia, a Russian lesbian, had been forced to undergo electroshock therapy as part of "corrective" treatment. BIA denied her claim, arguing that the Russian authorities did not intend to harm or punish her.

The appeals court reversed the decision in 1997, upholding the 1996 *Kasinga* decision's argument that "subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution." The court put forward what it considered an objective definition of persecution: "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive." And it observed that the persecutor's belief in his own good intentions did not "make it any less painful to the victim."

The courts have also attempted a narrow reading of torture. In the lead-up to the 2004 circuit court decision in *Reyes-Reyes v. Ashcroft*, for instance, BIA maintained that the applicant did not face torture, as it was not inflicted by the government or forces acting on its behalf.

The circuit court reversed the decision, however, arguing that the government's tacit acceptance of such treatment by other parties was equally egregious and qualified the petitioner for asylum.

Other Factors: Legal Precedent and Discriminatory Attitudes

Without a substantial and consistent body of case law to turn to, immigration judges are hard-pressed to develop a comprehensive understanding or appropriate rules for determining an LGBT asylum applicant's claim.

Although the success rates of sexual-orientation-based asylum claims have improved since the first cases were argued, immigration officers and judges are still known to consider their homophobic or discriminatory beliefs in deciding the eligibility of LGBT applicants. Legal practitioners have observed that the success of their case hangs almost entirely upon the attitude – accepting or resilient – of the adjudicator.

This level of inconsistency, compounded by the sheer dearth of cases to consult, has set hurdles for immigration lawyers seeking to identify the trends and factors they think are critical to making their applicants' cases.

Looking Ahead

In the coming months, a Ugandan lesbian, Olivia Nabulwala, and an Indonesian gay man, Zulkifly Kadri, await important decisions. In both cases, the circuit courts remanded their asylum claims to BIA for reconsideration.

In Nabulwala's case, the eighth circuit has asked BIA to reexamine the Ugandan government's inability or unwillingness to protect the petitioner from persecution. In Kadri's case, the first circuit has asked BIA to assess the applicant's claim against a standard for economic persecution established by a previous case. (Kadri claims that his employment was terminated on the basis of his sexual orientation.)

LGBT asylum applicants will continue to face difficulties in getting their claims approved so long as U.S. constitutional and statutory laws relating to same-sex couples and sexual conduct remain static.

In the long term, there is a need to review procedures for resettling LGBT refugees into the United States from abroad. At present, it is more difficult to receive refugee status on the basis of sexual orientation than it is to apply for asylum on those grounds from within the United States.

In the short term, advocates for asylum seekers hope to fix the problem of stereotyping LGBT asylum applicants. In April 2007, the Department of Justice (DOJ) instituted a new hiring process for immigration and BIA judges that does not allow the agency to vet their political and social views. DOJ has also increased the training that these judges receive on asylum.

Advocates recommend that training include courses on sexual orientation and identity. This would give the judges a more multidimensional understanding of sexual identity and could mean that they apply the

tests for group membership more thoughtfully.

Though diversity training is unlikely to fix discriminatory attitudes, limited precedent, and faulty definitions of persecution and torture, it could move the LGBT asylum process away from determining whether the applicant is "gay enough" to receive asylum.

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