

LGBTI and HIV-Related Asylum and Refugee Issues

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Historic Moment in LGBTI Protection

- Secretary Kerry, announcing the appointment of Randy Berry as the Department of State's first-ever Special Envoy for the Human Rights of LGBTI Persons, February 2015:
 - “Defending and promoting the human rights of LGBT persons is at the core of our commitment to advancing human rights globally – the heart and conscience of our diplomacy.”
- Berry recapping his first year on the job, April 2016:
 - “[T]here is at once an emerging consensus worldwide that LGBTI persons should enjoy the same human rights as everyone else, and yet, there remain persistent levels of violence and discrimination ... Given this ongoing violence and discrimination, it’s no surprise that LGBTI individuals are fleeing their homes and their countries to avoid imprisonment, harassment, persecution, and at times, an almost certain death.”



Terminology

(See USCIS Guidance at pp. 12–13)

- Sexual Orientation
 - A person’s emotional and sexual attraction to others, often based on the gender to whom they are attracted: straight, lesbian, gay, bisexual
- Gender Identity
 - The internal, deeply felt sense of being male, female, something else, or in-between
- Gender Expression
 - Characteristics and behaviors such as outward appearance, dress, mannerisms, speech patters, or interactions socially perceived as masculine or feminine



Membership in a Particular Social Group (PSG)

- *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1994) – Cuban gay man
- *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997) – Russian lesbian
- *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005) – “all alien homosexuals are members of a ‘particular social group’”
- *Morales v. Gonzales*, 472 F.3d 689 (9th Cir. 2007) – transgender identity
- *Avendano-Hernandez, v. Lynch*, 800 F.3d 1072 (9th Cir. 2015) – transgender women as distinct from gay men
- *Amanfi v. Ashcroft*, 328 F.3d 719 (3rd Cir. 2003) – imputed sexual orientation
- David Martin, 1996 legacy INS memo stating that HIV can found membership in a PSG – available at <http://www.immigrationequality.org/wp-content/uploads/2011/07/HIV-asylum-memo.pdf>
- USCIS Guidance on LGBTI claims (2011) – “sexual minorities”



Proving Sexual Orientation

(See USCIS Guidance at pp. 44–46)

- Adjudicator cannot rely on stereotypes of “looking gay”
 - *Shahinaj v. Gonzales*, 481 F.3d 1027 (8th Cir. 2007)
- “Coming out” story
- Corroboration by partner, ex-partner, family member, friend, mental health professional
 - *Eke v. Mukasey*, 512 F.3d 372, 381 (7th Cir. 2008) – applicant should supply extrinsic evidence such as “letters, affidavits, photographs, or other forms of corroborative evidence; or establish that such evidence was not reasonably available to him.”
- Membership in LGBTI groups (helpful but not required)



Do's for Proving Sexual Orientation, Gender Identity, or Intersex Status

- Do ask applicant when they first realized they were LGBTI
- Do ask applicant whether they had any relationships/sexual encounters in their country; if yes, describe how these relationships/encounters came about
- Do ask applicant whether they knew other LGBTI people there
- Do ask applicant how LGBTI people find each other in their country
- Do ask whether they have come out to their family, why or why not, what their family's reaction was, etc.
- Do ask how others may learn that they are LGBTI



Don'ts for Proving Sexual Orientation, Gender Identity, or Intersex Status

- Don't ask questions that are explicitly sexual or anatomical
- Don't view sexual orientation as a "choice" or "lifestyle"
- Don't use the term "homosexual" unless applicants do so
- Don't assume that all LGBTI people live or participate in a particular "gay lifestyle"
- Don't assume that if someone does not "look gay" to you, that people in their country will not be able to tell they're LGBTI (*i.e.*, cultural norms vary greatly)
- Don't assume that applicants can remain safe by being "discreet" in their home country



Hypothetical #1

- You are reviewing the I-589 of a gay man from a country with “anti-buggery” laws on the books. Though it is not clear from country of origin information that these laws are enforced, there is ample evidence of community violence against LGBTI people in his country.
- His declaration contains information about having a partner in his home country for three years prior to coming to the U.S. His partner is still there.
- What kinds of proof might you expect regarding the applicant’s sexual orientation? What might prevent him from having corroborating evidence?



Special Concerns for Lesbian Cases

- Significantly less common; often less visible; more likely to be married
 - Victoria Neilson, “Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims,” 16 STAN. L. & POL’Y REV. 417, 426 (2005)
- More likely to experience private harm
 - *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997) – forced psychiatric treatment
 - *Nabulwala v. Gonzales*, 481 F.3d 1115 (8th Cir. 2007) – “corrective” rape
- Overlap with gender-based claims
 - *Matter of S-A-*, 22 I. & N. 1328 (BIA 2000)



Special Concerns for Bisexual Cases

- Bisexuality is real!
- Bisexual people have the capacity for romantic or sexual attraction towards men and women – but they cannot “choose” whom they feel attracted to
- Fact-specific analysis
 - Even if applicants are in opposite-sex relationships, they may fear harm based on ongoing perception as gay or lesbian
 - Claims may thus involve actual and imputed orientation



Transgender Issues

- Gender identity and sexual orientation are distinct
 - Recap: Gender identity concerns a person's inner feelings about self; sexual orientation concerns the objects of a person's attraction
 - Trans people can thus identify as straight, bisexual, or lesbian/gay
- A transgender person is assigned one gender at birth but later realizes that they do not identify with that gender
- Most (but not all) trans people consider themselves to be male or female (*i.e.*, “transgender” is usually not a gender)
 - BUT: In some cultures (*e.g.*, some parts of India), being transgender may be considered a third gender



Transgender Terminology

- Preferred terms:
 - transgender person
 - assigned the [fe]male gender at birth
- Non-preferred terms:
 - “he/she”
 - transsexual or transvestite
 - transgenders or transgendered
 - pre- or post-op[erative]
 - born [fe]male, anatomically [fe]male, biologically [fe]male
- Individuals assigned the male gender at birth who self-identify as female may be called trans[gender] women, and vice versa



Transition

- The process whereby a person begins to live in the gender that feels appropriate to the transgender person is called “transition”
 - Generally involves dressing in the chosen gender
 - May or may not involve medical interventions
 - May or may not involve changing legal documents and legal name
- Not everyone’s transition takes the same form; no necessary progression from one “step” to the “next”



Transgender Do's

- If unclear from the documents, ask applicants for their chosen name and/or pronoun – and then use it
- Do ask when applicants first realized they were transgender
 - Bear in mind that many (but not all) trans people may identify as gay or lesbian before they come to realize that they are transgender
- Do ask when they began to transition or whether they plan to do so



Transgender Don'ts

- Don't assume that the applicant wants or will have surgery
 - Transition is different for everyone
 - Trans men especially are unlikely to have genital (sex reassignment) surgery
- Don't impose your opinion of the applicant's gender on how you address them
- Don't assume that trans persons who "pass" well won't have problems in their countries
- Don't assume that a transgender person who uses different terminology is not trans (*i.e.*, a trans woman may simply refer to herself as a woman)



USCIS Transgender Guidance

- Affirmative Asylum Procedures Manual at pp. 43–44
(<http://www.uscis.gov/sites/default/files/files/nativedocuments/AsylumProceduresManual2013.pdf>)
 - Follow an applicant’s self-identification (*i.e.*, don’t question their gender identity) unless strong evidence indicates otherwise
 - Gender identity doesn’t enter the picture unless it’s part of the claim
- Gender marker on documents issued by USCIS may reflect the applicant’s gender identity (rather than sex assigned at birth) if corroborated by:
 - Amended documents (*e.g.*, birth certificate, passport, court order) **OR**
 - Medical certification from an MD who reviewed medical documents or evaluated the applicant and can certify that the applicant has had appropriate medical treatment for gender transition; no requirement of sex reassignment surgery (or any other specific medical procedure.)



Hypothetical #2

- What's wrong with this case summary provided to a supervisor?

I conducted an interview with a 24-year-old pre-operative transsexual. He was born male but now claims to be female. He looked completely male other than his clothes and had never seen a doctor about his condition. He claimed he's not gay even though he described having sexual encounters with men.



Hypothetical #2

- This is better!

I conducted an interview with a 24-year-old transgender woman. She has not taken any medical steps to transition and seemed unaware of what such steps might be. She identifies as a heterosexual woman and has had relationships with men in the past, so may also have an imputed sexual orientation claim.



Intersex Persons

- Intersex persons have reproductive or sexual anatomy, and/or chromosomal patterns, that don't seem to fit typical definitions of male or female
 - An estimated 1 in 2000 babies is born intersex
- Distinct from gender identity and sexual orientation
- Cases may present similarly to transgender cases or may be very different
- Causes may be genetic, hormonal, or environmental
- May be subject to forced treatment and/or violence



Intersex Treatment / Proof

- Medical professionals often intervene and “choose” one gender at birth
 - Experts now encourage delaying surgery as long as is healthy, and ideally involving the child in the decision
 - Nonconsensual surgery, or prohibition of treatment, may be forms of persecution
- It is common for people to discover they are intersex at puberty or when trying to reproduce
- In the absence of medical proof, credible and consistent testimony is also acceptable



Evolving Intersex Terminology

- Follow intersex person's lead
 - “Condition”
 - “Trait”
 - “DSD” (Disorders/Differences of Sexual Development)
- Try to avoid
 - “Sex-normalizing” or “corrective” surgery
 - “Hermaphrodite” or “pseudohermaphrodisism”



Imputed LGBTI Identity

- Possible PSG: “Men from Ghana imputed to be gay”
 - *Amanfi v. Ashcroft*, 328 F.3d 719 (3rd Cir. 2003)
- Remember, the focus is on persecutor’s motive and applicant’s experience – irrespective of the applicant’s self-identification (which may or may not align with the persecutor’s perception)



Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS)

- HIV is transmitted primarily through sexual contact – but also through blood transfusions, hypodermic needles, pregnancy, delivery, or breastfeeding
- HIV infection may, depending on access to medical care, environment, and personal immunity, develop into AIDS (a stage of HIV infection)
- AIDS is marked by a CD4 count below 200 (normal range is 500–1200), or by the presence of one or more opportunistic illnesses



HIV Do's

- Do prefer “person living with HIV” to “HIV-positive”
- Do ask about the state of the applicant’s health
- Do ask about the applicant’s current treatment regimen and its availability in their home country
- Do ask whether persons living with HIV are assumed to be LGBTI in the home country
- Do ask about any problems experienced by the applicant or by other people living with HIV in the applicant’s home country (and how the applicant knows about these problems)



HIV Don'ts

- Don't ask how the applicant contracted HIV, unless he or she raises the issue (*e.g.*, if a woman indicates that she believes she contracted HIV when she was raped by a policeman)
- Don't ask about current sexual practices
- Don't ask about who is paying for medical treatment



Persecution

(See USCIS Guidance at pp. 20–24)

- Violation of fundamental rights
- Physical violence
 - Rape and sexual violence
 - Beatings, torture, and inhumane treatment
 - Forced medical treatment
- Psychological/emotional violence
 - Forced psychiatric treatment or other efforts to “cure” sexual orientation perceived as deviant
 - Forced marriage
 - Unwillingly staying “closeted”
- Criminal penalties (prosecution vs. persecution)
- Gender-based mistreatment (multiple PSGs)



Persecution

- State actors
 - Enforcement of sodomy or other homophobic laws (*e.g.*, Mauritanian death penalty)
 - Police violence, detentions or arrest (often in/outside gay bars or parks)
 - Selective enforcement of laws (*e.g.*, Egyptian debauchery laws)
 - Non-enforcement of laws, but impossible for applicant to seek protection because harm is coming from the authorities themselves



Persecution

- Non-state actors
 - Community member / mob violence
 - Family violence
 - Rape and sexual violence (including childhood abuse)
 - Forced marriage
 - Psychiatric “treatment” or religious exorcism
 - Severe economic deprivation

AND...



Persecution

...AND

- Government unable or unwilling to protect.
 - *Ornelas Chavez v. Gonzalez*, 458 F.3d 1052 (9th Cir. 2006) – attempting to report harm by private actors to the police was not a requirement for a finding that the government was unwilling or unable to protect the applicant
 - *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000) – futile for a liberal Moroccan woman to seek police protection from her father
 - Think about cumulative situation and likelihood of future persecution
 - Think about effects of anti-sodomy laws, even if not commonly enforced



Special Considerations for Refugee Adjudications

- Applicant much less likely to have corroborating documents (and not legally required under Real ID Act)
- Fewer written materials means greater burden on Officer to elicit detailed testimony
- Applicant may never have lived in a Western or developed country, so may be less likely to use common U.S. terminology
- Applicant may have greater fear of interpreter, and/or interpreter may be less comfortable with LGBTI issues



Humanitarian Asylum

- Where past persecution makes the applicant eligible for asylum, but the presumption of a well-founded fear of future persecution is rebutted, you generally decline to exercise discretion to grant asylum

BUT

- You can still exercise discretion to grant if
 - there are compelling reasons for the applicant to be unwilling/unable to return to the country because of the severity of the past persecution, **OR**
 - there is a reasonable possibility of other serious harm upon removal to the country in question



Humanitarian Asylum

- Citations
 - 8 C.F.R. § 1208.13(b)(1)(ii)(A) or (B)
 - *Matter of L-S-*, 25 I&N Dec. 705, 710 (BIA 2012)
- Types of harm in LGBTI cases that could lead to a grant of “humanitarian asylum”
 - Rape and sexual violence as past persecution
 - Possible family separation or lack of family recognition
 - Possible “serious harm” if applicant is living with HIV or unable to continue transgender-related medical care



Nexus

(See USCIS Guidance at pp. 18–19)

- Applicant must establish that the feared harm is “on account of” one of the five protected grounds
- Nexus analysis looks at persecutor’s perception and motivation
- “Imputed” protected ground means the persecutor believes that the applicant to have the characteristic, whether or not they actually possess this characteristic
 - If applicant establishes harm based on persecutor’s belief that they possess the protected characteristic, it may be unnecessary to inquire extensively about actual sexual orientation or gender identity



Nexus

- What did the persecutor say?
- Where did harm take place?
- Perception of persecutor vs. experience of victim
 - *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997) –
applicant experienced “curative” psychiatric
treatment as harm



Hypothetical #3

- An applicant tells you that she is a lesbian and is afraid to return to her home country because of her sexual orientation. She had a relationship in her country with her female college roommate. Her I-589 says that she is afraid to return because she and her girlfriend were on a park bench when they were surrounded by skinheads who beat them, stole their wallets, and threatened to rape them.
- What questions would you ask to see if there was a nexus between the applicant's sexual orientation and the harm?



Plausibility

- LGBTI claims not initially put forth
- Opposite-sex marriage
 - In home country: possible explanations related to fear
 - In U.S.: possible explanations related to cultural or personal expectations
- Difficulty articulating LGBTI identity
 - Consider cultural and linguistic differences
 - Be sensitive to internalized homo-/bi-/transphobia
 - Appreciate differing reactions to danger: out and proud, vs. staying closeted



One Year Filing Deadline (Asylum Only)

(See USCIS Guidance at p. 48)

- LGBTI people frequently miss the filing deadline because they are not aware that their sexual orientation or gender identity is a ground for asylum
 - Ignorance without more is not an exception
 - Because of particular difficulties for LGBTI people, be especially sensitive to one-year issues and potential exceptions



Filing Deadline Exceptions

- “Changed Circumstances”
 - Conceptually, the applicant didn’t have a strong claim when they arrived, but something has changed to make them fear (or have a greater fear) of returning now
- “Extraordinary Circumstances”
 - Conceptually, although the applicant may have had a claim upon arrival, something prevented them from filing



Changed Circumstances

(USCIS Guidance, pp. 61-63)

- Changed country conditions
- “Coming out” as LGBTI
 - To self
 - To others: voluntarily or involuntarily (being “outed”)
- Recent steps in gender transitioning
- Recent HIV diagnosis
- Not in USCIS Guidance: Recent marriage to same-sex partner
 - Still possible exception post-DOMA: end of discrimination in the U.S. didn’t end persecution abroad



Extraordinary Circumstances

(USCIS Guidance, pp. 63-65)

- HIV status-related medical issues
- PTSD or other mental health issues
 - LGBTI people frequently experience sexual abuse and sexual violence
 - Difficulty coming out or coming to terms with LGBTI identity
- Severe family or community opposition or isolation

- Possibility of combining two exceptions (e.g., recent HIV diagnosis, leading to severe depression)



Hypothetical #4

- A transgender woman living with HIV has applied for asylum. She last entered the US in January 2007. From her physical appearance, she seems to have had some medical treatment as part of her transition. Her I-589 indicates years of sexual abuse and rapes, first by an uncle and then as an adult in her country's capital.
- What questions would you ask to elicit possible one-year exceptions?



Filing Within a “Reasonable Period” After an Exception Is Triggered

- Not an automatic one-year “grace period” to apply after the exception is triggered
- Factual analysis – consider the applicant’s:
 - Education
 - Language ability
 - Isolation from family/LGBTI community
 - Mental health issues
 - Economic circumstances (e.g., homelessness)
 - Immigration application history



LGBT Claims Post-DOMA

- Asylum applications
 - Spouses can be dependents
 - Spouses can be primary applicant and dependent
 - Spouses can be interviewed together
- Refugee applications
 - Spouse can accompany refugee to U.S.
 - Remaining problem with inability to marry in most refugee/asylum-producing countries



Country Conditions

(See USCIS Guidance at pp. 43–44)

- State Department Reports
 - Often contain little information on LGBTI/HIV issues
- Countries with seemingly contradictory information
 - Countries with well-attended gay rights marches but high rates of violence
 - Countries on the verge of marriage equality, but whose governments are unable to control vigilante violence (including social cleansing)



Country Conditions: Further Research

- Immigration Equality maintains links to precedential LGBTI asylum decisions: <http://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/asylum-decisions/>
- The International Lesbian and Gay Association website (www.ilga.org) contains a legal survey in which Officers can search legal codes and country conditions
- Human Rights Watch (www.hrw.org) also has an LGBT division and an HIV division
- EOIR Country Conditions Materials (including sexual orientation information):
<https://www.justice.gov/eoir/country/country-listings>



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