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# A PARTICULAR SOCIAL GROUP: THE INADEQUACY OF U.S. ASYLUM LAWS FOR TRANSGENDER CLAIMANTS

*by Marnie Leonard\**

## INTRODUCTION

The right to seek asylum has long been recognized as a fundamental human right in international law.<sup>1</sup> The United States affirmed its intention to uphold this right by ratifying the 1967 United Nations Protocol Relating to the Status of Refugees and by passing its domestic legislation in the form of the Refugee Act of 1980.<sup>2</sup> Despite these commitments, the United States continues to fail a key group of asylum seekers—those seeking asylum based on their gender identity.

Gender identity is not an enumerated basis upon which to seek asylum in either the 1951 Refugee Convention or the Refugee Act of 1980.<sup>3</sup> As a result, anyone seeking asylum on the basis of gender identity

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<sup>1</sup> Convention relating to the Status of Refugees, 189 U.N.T.S. 150 (1951) [hereafter the 1951 Refugee Convention].

<sup>2</sup> See, e.g., Refugee Act of 1980, 8 U.S.C. § 96-212 (1980) [hereinafter Refugee Act of 1980].

<sup>3</sup> See 1951 Refugee Convention, *supra* note 1; Refugee Act of 1980, *supra* note 2.

must do so under the catch-all category of “membership in a particular social group.”<sup>4</sup> The U.S. government’s lack of guidance on interpreting this category provides immigration judges significant discretion in ruling on transgender claimants’ cases, thus leaving these applicants at particular risk of immigration judges denying their applications due to outright bias. Transgender asylum seekers face unique challenges, but the U.S. government often conflates the experiences of some LGBTQ+ asylum seekers with others.<sup>5</sup> To protect transgender people’s right to seek asylum in the United States, it is essential that immigration judges and asylum officers deciding their cases<sup>6</sup> have a better understanding of basic gender identity concepts so that they are unable to deny applications based on implicit or explicit bias.<sup>7</sup> To accomplish this, the United States must amend the Refugee Act of 1980 to include gender identity as a basis for seeking asylum. Additionally, the Department of Justice (DOJ) must issue guidance on interpreting the “particular social group” category for transgender applicants,

<sup>4</sup> U.S. DEP’T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGR. SERVS., *Well-founded Fear* (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/Well\\_Founded\\_Fear\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Well_Founded_Fear_LP_RAIO.pdf)

<sup>5</sup> See generally Connor Cory, *The LGBTQ Asylum Seeker: Social Groups and Authentic Queer Identities*, 20 GEO. J. GENDER & L. 577 (2019) (discussing the limitations of the particular social group umbrella for the LGBTQ+ community as a whole).

<sup>6</sup> Immigration judges preside over formal hearings in which they decide, among other things, whether to grant claimants asylum status. Their decisions are final unless appealed. See U.S. DEP’T OF JUST., IMMIGRATION JUDGE (providing a job description for immigration judges), <https://www.justice.gov/legal-careers/job/immigration-judge-7> (last visited Apr. 17, 2022). Asylum officers conduct initial interviews with asylum claimants when they arrive in the United States and determine applicants’ eligibility to apply for asylum. See U.S. CITIZENSHIP & IMMIGR. SERVS., THE AFFIRMATIVE ASYLUM PROCESS, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process> (last visited Apr. 12, 2022) (describing the process of applying for asylum).

<sup>7</sup> When an individual is aware of their prejudice toward a particular group, that is explicit bias; implicit bias occurs when someone has subconsciously developed prejudice towards a particular group. See U.S. DEP’T OF JUST., UNDERSTANDING BIAS: A RESOURCE GUIDE 2–3, <https://www.justice.gov/file/1437326/download> (last visited Apr. 17, 2022) (training Department of Justice employees to avoid bias policing).

which includes information on the unique challenges that transgender people face throughout the asylum process. This article provides a background on gender-based asylum in the United States, an analysis of U.S. asylum law as it pertains to gender identity-based claims and proposes policy recommendations that would help ensure that transgender asylum seekers in the United States are protected from persecution and discrimination that international law affords them.

## I. BACKGROUND

In 2015, the Ninth Circuit Court of Appeals heard Edin Avendano-Hernandez's asylum case.<sup>8</sup> Avendano-Hernandez, a transgender Mexican woman, applied for asylum after her family, the Mexican police, and the Mexican military sexually abused her because of her gender identity and perceived sexual orientation.<sup>9</sup> Despite Avendano-Hernandez's application explicitly stating that she is a transgender woman, her immigration judge referred to her using male pronouns.<sup>10</sup> While the Board of Immigration Appeals (BIA) referred to her using female pronouns, it found her ineligible for withholding from removal on the basis that Mexico had recently passed laws aimed at protecting gay people.<sup>11</sup> Until the Ninth Circuit heard Avendano-Hernandez's case, U.S. courts tended to consider gender nonconformity to be a by-product of sexual orientation and, thus, decided transgender claimants' cases using precedent set by gay and lesbian claimants.<sup>12</sup> This forced lawyers to make sexual orientation-based arguments for their transgender clients because that was the basis that judges historically understood. These arguments served to create a cycle in which there was no gender identity precedent to follow because lawyers were making sexual orientation-based arguments.<sup>13</sup> When it became clear that U.S. immigration courts would no longer con-

sistently find that identifying as gay was dangerous in Mexico, Avendano-Hernandez's lawyers had to argue that the persecution transgender people face in Mexico is distinct from the persecution faced by people identifying as gay or lesbian.<sup>14</sup> The United States Court of Appeals for the Ninth Circuit found that the immigration judge and the BIA had perpetuated the same misconceptions about gender identity that Avendano-Hernandez experienced in Mexico, and it remanded the BIA's denial of her withholding from removal claim.<sup>15</sup> This Ninth Circuit decision set the first precedent for evaluating gender identity-based claims as distinct from sexual orientation-based claims under U.S. immigration law.<sup>16</sup>

However, for Alejandra Barrera, a transgender Salvadoran woman, the decision in *Avendano-Hernandez* did little to ensure her protection under U.S. asylum law. Although the holding in *Avendano-Hernandez* was a significant step forward, it is not binding precedent outside the Ninth Circuit. Barrera requested asylum for the sexual abuse she experienced in her home country by presenting herself at the U.S. border in 2017.<sup>17</sup> The immigration judge in Barrera's case denied her asylum claim because of chronological discrepancies between testimony she gave at a hearing in 2018 and her initial asylum interview in 2017.<sup>18</sup> The immigration judge said this made her claims of past persecution and fear of future persecution in El Salvador not credible, and the BIA affirmed.<sup>19</sup> These denials may have been, at least in part, the result of "bias and rank incompetence."<sup>20</sup> Barrera appealed her case, and in 2020, her petition for review to the

<sup>8</sup> *Avendano-Hernandez v. Lynch*, 800 F.3d 1075 (9th Cir. 2015).

<sup>9</sup> *Id.* at 1075.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Stefan Vogler, *Determining Transgender: Adjudicating Gender Identity in U.S. Asylum Law*, 33 GENDER & SOC'Y 439, 440 (2019).

<sup>13</sup> *Id.*

<sup>14</sup> *Avendano-Hernandez*, 800 F.3d at 1091.

<sup>15</sup> *Id.* at 1075, 1082.

<sup>16</sup> Vogler, *supra* note 12, at 440.

<sup>17</sup> Murat Oztaskin, *The Harrowing, Two-Year Detention of a Transgender Asylum Seeker*, NEW YORKER (Oct. 31, 2019), <https://www.newyorker.com/news/dispatch/the-harrowing-two-year-detention-of-a-transgender-asylum-seeker>.

<sup>18</sup> *Barrera v. Barr*, 798 F. App'x 312 (10th Cir. 2020) (granting Barrera's petition for review and remanding the case to the BIA to clarify its finding that Barrera did not have evidence of a well-founded fear of future persecution).

<sup>19</sup> *Id.* at 313.

<sup>20</sup> Oztaskin, *supra* note 17.

Tenth Circuit Court of Appeals was granted.<sup>21</sup> She is currently still awaiting the Tenth Circuit's decision, but if her claim is denied, the U.S. Immigration and Customs Enforcement (ICE) could deport Barrera to El Salvador, a country known to be particularly dangerous for transgender women, and where she is a known transgender activist.<sup>22</sup> Barrera's experience demonstrates that as long as immigration judges and asylum officers lack an understanding of the unique challenges transgender people face, they will continue to deny transgender claimants' applications and risk sending them back to countries in which they are very likely to face significant persecution.

## II. ANALYSIS

The Refugee Act of 1980 offers protection to those facing persecution due to their race, nationality, religion, political opinion, or membership in a particular social group (PSG category).<sup>23</sup> Claimants must show they experienced persecution in their home country based on one of those categories, and that they have a well-founded fear of future persecution.<sup>24</sup> For transgender claimants, this essentially means they must prove their membership to the "transgender" social group and, therefore, prove their gender identity to the decisionmaker of their case.<sup>25</sup>

In 2008, the BIA set forth a precedent requiring that PSG category claimants be "socially distinct," meaning the society from which a claimant seeks asylum must meaningfully differentiate "individuals who have the shared characteristic from individuals who do not have it."<sup>26</sup> This precedent has exacerbated the issue of

immigration courts conflating sexuality and gender, as many cultures do not distinguish between gay and gender nonconforming people, so lawyers have been even more likely to make sexuality-based arguments for transgender claimants.<sup>27</sup>

Additionally, there is a one-year application filing deadline for all asylum seekers.<sup>28</sup> This provides an additional challenge for transgender claimants because many cannot safely begin their physical transition—a process that often takes years to complete<sup>29</sup>—until they arrive in the United States. Many transgender people facing discrimination and violence in their home countries choose to wait to transition until they reach the United States because visibly not conforming to gender norms would put their safety at even higher risk.<sup>30</sup> These transition timelines can also be challenging because immigration courts have tended to require that a claimant has consistently identified as transgender throughout their life.<sup>31</sup> It can be difficult to prove this before the filing deadline passes if the claimant has not begun transitioning. Between 2014 and 2016, three transgender claimants were denied asylum either completely or in part because

<sup>21</sup> *Barrera*, 798 F. App'x at 324.

<sup>22</sup> Robert Stribley, *No Transit: The Criminal Treatment of Transgender Asylum Seekers in the United States*, OPEN-GLOBALRIGHTS (Jan. 8, 2021), <https://www.openglobalrights.org/no-transit-the-criminal-treatment-of-transgender-asylum-seekers-in-the-us/>.

<sup>23</sup> Refugee Act of 1980, *supra* note 2, § 201(a)(42).

<sup>24</sup> *Id.*

<sup>25</sup> Vogler, *supra* note 12, at 441.

<sup>26</sup> U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGR. SERVS., GENDER-RELATED CLAIMS 31–32 (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/Gender\\_Related\\_Claims\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Gender_Related_Claims_LP_RAIO.pdf).

<sup>27</sup> Vogler, *supra* note 12, at 440 (explaining that many cultures have a "heteronormative understanding of lifestyle" that lumps anything that doesn't conform into a "gay, not normal" category).

<sup>28</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., LESSON PLAN OVERVIEW 4 (2013), [https://www.uscis.gov/sites/default/files/document/lesson-plans/One\\_Year\\_Filing\\_Deadline\\_Asylum\\_Lesson\\_Plan.pdf](https://www.uscis.gov/sites/default/files/document/lesson-plans/One_Year_Filing_Deadline_Asylum_Lesson_Plan.pdf).

<sup>29</sup> *Transition Roadmap*, U. CAL. S.F. GENDER AFFIRMING HEALTH PROGRAM (last visited Apr. 17, 2022), <https://transcare.ucsf.edu/transition-roadmap>.

<sup>30</sup> Vogler, *supra* note 12, at 448.

<sup>31</sup> *Id.* at 451.

they did not come out and physically transition as soon as they realized they were trans.<sup>32</sup> There is also no guidance for the judges deciding the credibility of someone's account of their gender identity and the persecution they faced.<sup>33</sup>

Bias also plays a role when judges are given the discretion to decide a transgender claimant's credibility. The collective understanding of gender identity and gender nonconformity in the United States has rapidly progressed over the last ten years, but transgender people still face significant discrimination in the United States.<sup>34</sup> This ongoing discrimination indicates that transgender asylum claimants may face a higher risk of having their claims denied due to a decisionmaker's bias than other asylum seekers. In *Avendano-Hernandez's* case, for example, the immigration judge that initially tried her case refused to use she/her pronouns and continued to misgender her throughout her hearing.<sup>35</sup> In the *Jeune*, *Talipov*, and *Moiseev* cases in which immigration judges denied the claimants asylum status, the judges promulgated misconceptions about the transitioning process for transgender

<sup>32</sup> *Jeune v. United States Att'y Gen.*, 810 F.3d 792, 799 (11th Cir. 2016) (denying claimant's petition for review because they initially sought asylum as a gay man before transitioning, and the court said their transgender identity was not new information and should have been presented earlier); *Talipov v. Holder*, 591 F. App'x 4, 8 (2d Cir. 2014) (denying claimant's request to reopen her case because she "relies on evidence that [she] only recently began hormone therapy, started using makeup, started wearing women's clothes, and began living openly as a male-to-female transgender person. These events may have been recent, but . . . [she] could at any time have assumed a woman's habit and presentation"); *Moiseev v. Lynch*, 630 F. App'x 725, 726 (9th Cir. 2016) (denying claimant's petition for review because her argument that her mental health issues prevented her from initially basing her asylum claim on her transgender identity was not sufficient to equitably toll the filing deadline).

<sup>33</sup> Vogler, *supra* note 12, at 452.

<sup>34</sup> Rebecca Dent, *Transgender Rights: Progress and Setbacks*, U. CHI. LIBR., <https://www.lib.uchicago.edu/about/news/transgender-rights-progress-and-setbacks/> (explaining that between 2020 and 2021 U.S. state legislatures passed or proposed a record number of laws that negatively impact transgender people) (last visited Apr. 12, 2021).

<sup>35</sup> *Avendano-Hernandez*, 800 F.3d at 1075.

individuals, especially those seeking asylum from environments in which it was not safe to transition. These cases demonstrate that many immigration judges harbor significant bias toward transgender persons, and they lack an understanding of gender identity and the transitioning process.<sup>36</sup> Heightened legal protections that would ensure the safety and fair treatment of transgender claimants.

### III. POLICY RECOMMENDATIONS

To comply with its international obligations under the 1951 Refugee Convention and to ensure transgender persons are afforded their right to seek asylum under U.S. law, the U.S. Congress must amend the Refugee Act of 1980, and the DOJ and DHS must issue agency guidance for immigration judges on interpreting the PSG category. This guidance should include information on the unique challenges transgender asylum claimants face in their country of origin, and the metrics judges should use to determine transgender claimants' credibility. A congressional amendment to the Refugee Act of 1980 and DOJ guidance for judges would eliminate the conflation of gender identity with sexual orientation when making legal arguments or analyzing claims. To promote more consistent decisions from immigration judges and asylum officers, the DOJ and the DHS should issue guidance on the unique challenges that gender-nonconforming people face throughout the asylum process, such as the inability to begin transitioning in their countries of origin, the fluidity of gender identity, and the effects of confusing gender with sexuality. More direction from the DOJ and DHS would not prevent all bias that transgender claimants face in the process of seeking asylum in the United States, but it would make it clear when an immigration judge is overstepping their authority. This guidance would also give immigration judges less discretion to insert their own biases.

For example, the DOJ and DHS could look to the guidance issued by Canada's Immigration and Refugee Board (IRB) in 2017. This guidance explained how Canadian immigration officers should screen

<sup>36</sup> *Jeune*, 810 F.3d at 799; *Talipov*, 591 F. App'x at 8; *Moiseev*, 630 F. App'x at 725.

LGBTQ+ claimants to ensure their fair treatment under the law.<sup>37</sup> In particular, the IRB guidance addresses how transgender people face unique challenges as asylum claimants and should not be conflated with other LGBTQ+ asylum seekers.<sup>38</sup>

Several other countries have enacted legislation making gender and sexual orientation an explicit basis for seeking asylum to which the United States could look to as examples. Sweden's Aliens Act allows asylum claims on "grounds of . . . gender, sexual orientation, or other membership of a particular social group."<sup>39</sup> Portugal similarly includes gender as a basis for seeking asylum, and the text of the law states that gender identity can fall under its PSG category.<sup>40</sup> Spain, France, the Netherlands, and South Africa also refer to gender as a basis for seeking asylum.<sup>41</sup> By including

<sup>37</sup> Press Release, Immigr. & Refugee Bd. of Canada, Immigration and Refugee Board of Canada Announces New Guideline on Proceedings Involving Sexual Orientation and Gender Identity and Expression (May 1, 2017), [https://www.canada.ca/en/immigration-refugee/news/2017/05/immigration\\_and\\_refugeeboardofcanadaannouncesnewguidelineonproce.html](https://www.canada.ca/en/immigration-refugee/news/2017/05/immigration_and_refugeeboardofcanadaannouncesnewguidelineonproce.html).

<sup>38</sup> IMMIG. & REFUGEE BD. OF CANADA, GUIDELINE 9: PROCEEDINGS BEFORE THE IRB INVOLVING SEXUAL ORIENTATION, GENDER IDENTITY AND EXPRESSION, AND SEX CHARACTERISTICS §§ 8.5.2.2, 8.5.4, <https://www.irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx> (last revised Dec. 17, 2021) (explaining that transgender individuals may be particularly at risk for discrimination and violence because of their non-conformity to socially accepted norms and may be more vulnerable to risks because of a lack of legal recognition of their identity in many countries).

<sup>39</sup> ch. 4 UTLÄNNINGSLAG (Svensk författnings-samling [SFS] 2005:716), [https://www.government.se/contentassets/784b3d7be3a54a0185f284bbb2683055/aliens-act-2005\\_716.pdf](https://www.government.se/contentassets/784b3d7be3a54a0185f284bbb2683055/aliens-act-2005_716.pdf) (Swed.).

<sup>40</sup> Lei de Asilo n. °26/2014 de 5 de maio [Asylum Act no. 26/2014 of 5 May], [https://www.sef.pt/en/Documents/LeideAsilo\(Lei26\\_2014\)EN.pdf](https://www.sef.pt/en/Documents/LeideAsilo(Lei26_2014)EN.pdf) (Port.).

<sup>41</sup> See TAHIRIH JUSTICE CENTER, ASYLUM/REFUGEE LAWS THAT PROTECT THOSE FLEEING GENDER-BASED PERSECUTION 2–3 (2021), <https://www.tahirih.org/wp-content/uploads/2021/03/Appendix-1-List-of-other-countries-with-gender-listed-in-asylum-laws.pdf>; see also Vítor Lopes Andrade, *The British and South African Approaches to Asylum Based on Sexual Orientation and Gender Identity*, 28 REV. INTERDISCIP. MOBIL. HUM. 79, 82 (2020) (comparing the approaches to gender identity-based asylum in the UK and South Africa and analyzing the prevailing idea that the Global North takes in refugees while the Global South exports them).

gender identity as a basis for seeking asylum in the Refugee Act of 1980 and following these countries' examples by issuing guidance regarding gender identity in asylum claims, the United States could drastically reduce immigration judges' ability to issue decisions based on biases or misunderstandings of gender identity concepts and ensure greater protections for transgender claimants.

## CONCLUSION

U.S. asylum law leaves transgender claimants particularly at risk of having to return to their home countries and face persecution. U.S. law also leaves too much room for discretion by asylum decisionmakers, who are individuals that may be biased or lack understanding of gender identity issues. Transgender people are particularly vulnerable to persecution because of their often-public nonconformity with binary gender roles and expression. It is, therefore, imperative that laws and policies provide an explicit basis upon which transgender claimants can seek asylum in the United States. It is also important that U.S. immigration officials are given guidance on adjudicating their applications. The United States can ensure that transgender people's right to seek asylum from persecution is protected and that transgender asylum seekers are given equal treatment under the law by amending the Refugee Act of 1980 to include gender identity as a basis for seeking asylum and issuing administrative guidance to immigration judges about gender identity concepts. This guidance could also include the challenges transgender asylum claimants face. These solutions would be the best way for the United States to ensure that transgender people's right to seek asylum from persecution is protected and that transgender asylum seekers are given equal treatment under the law.