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Opening the Doors of Immigration: Sexual Orientation and Asylum in the United States

by Tracy J. Davis*

Immigration law is emerging as one of the few areas of U.S. law that protects the rights of sexual minorities. U.S. courts and legislatures are often reluctant to recognize the rights of homosexuals in areas such as marriage and employment. Fortunately, immigration law has not waited for the rest of domestic law to recognize the human rights of homosexuals, the persecution they face, and the legitimacy of their need and right for protection against such oppression. Nonetheless, in spite of advances in U.S. immigration law, homosexual asylum applicants continue to face significant hurdles when seeking safe haven in the United States.

Historical Treatment of Homosexuals in U.S. Immigration Law

Despite recent progress in the recognition of sexual minorities' rights, U.S. immigration law has a long history of unfavorable treatment toward homosexual immigrants. The Immigration Act of 1917 excluded individuals from entering the United States who were found "mentally defective" or who had a "constitutional psychopathic inferiority." A similar Public Health Service definition of homosexuals was used simultaneously by the Immigration and Naturalization Service (INS) to reinforce the language of the Immigration Act of 1917 and effectively ban all homosexual immigrants who disclosed their sexual minority status. This ban continued with the enactment of the 1952 Immigration and Nationality Act (INA), which prohibited "aliens afflicted with a psychopathic personality, epilepsy, or a mental defect" from entry into the United States. Although the INA did not specifically address the question of whether the term "psychopathic personality" included homosexuality, Congress's intent became clear with the passage of a 1965 amendment to the INA that added "sexual deviation" as a medical ground for denying prospective immigrants entry into the United States. These discriminatory laws remained in place until the U.S. Congress passed the Immigration Act of 1990, which withdrew the phrase "sexual deviation" from the INA so that it could no longer be used as a basis for barring U.S. entry to homosexuals.

Toboso-Alfonso: Groundbreaking Asylum Jurisprudence

One of the most prominent cases in the area of immigration law and sexual orientation is the case of *In re Toboso-Alfonso*. Toboso-Alfonso is a gay Cuban who arrived in the United States in June 1980. Before arriving, he endured harassment and abuse by the Cuban government and police officials, including numerous interrogations and medical examinations, on the basis of his sexual orientation. The government's actions were not in response to specific conduct of Toboso-Alfonso (e.g. engaging in homosexual acts); rather, they resulted simply from his status as a homosexual. The chief of police presented Toboso-Alfonso with an ultimatum: either serve four years in the penitentiary, or leave Cuba. Toboso-Alfonso chose the latter and applied for asylum in the United States. The asylum hearings included Toboso-Alfonso's testimony about his persecution, as well as evidence of the forced labor camps, torture, and imprisonment other gays were subjected to in Cuba. In deciding Toboso-Alfonso's case in 1990, the Board of Immigration Appeals (BIA) upheld a lower

court's decision to deny asylum because Toboso-Alfonso had an unrelated U.S. criminal conviction. Recognizing the need to protect homosexuals as a social group, however, the court allowed Toboso-Alfonso to remain in the United States through "withholding of deportation," the domestic codification of *non-refoulement* at the time.

The Expansion of Immigration Law under *Toboso-Alfonso*

Several years after the *Toboso-Alfonso* decision, the case of another asylum applicant, Ariel Da Silva, also known as Jose Garcia, was widely publicized and spurred the U.S. government to develop further its policy regarding homosexual asylum applicants. In July 1994, almost ten years after *Toboso-Alfonso* made his original request for asylum, U.S. Attorney General Janet Reno released Order 1895-94 (Order), which made *Toboso-Alfonso* binding precedent for INS officials making future immigration and asylum decisions. The Order stated that "an individual who has been identified as homosexual and persecuted by his or her government for that reason alone may be eligible for relief under the refugee laws on the basis of persecution because of membership in a social group."

The growing number of successful homosexual asylum applicants also testifies to the impact of *Toboso-Alfonso* on U.S. immigration law. The International Gay and Lesbian Human Rights Commission (IGLHRC) reported in 1996 that the number of successful asylum applications in the United States due to sexual orientation-based persecution has increased. As of 1996, the United States had granted asylum to such applicants from Brazil (6), Columbia (6), Pakistan (6), Iran (5), Russia (5), El Salvador (4), Mexico (3), Eritrea (2), Guatemala (2), Romania (2), Venezuela (2), Albania (1), Ethiopia (1), Chile (1), China (1), Honduras (1), Hong Kong (1), Jordan (1), Lebanon (1), Mauritania (1), Peru (1), Singapore (1), Togo (1), Turkey (1), and Yemen (1).

Continuing Challenges for Gay and Lesbian Asylum Applicants

The standards that *Toboso-Alfonso* used to determine whether to grant asylum stem from the 1980 Refugee Act. Specifically, this act adopted the definition of "refugee" established in the 1954 UN Convention Relating to the Status of Refugees and the 1967 UN Protocol Relating to the Status of Refugees. The INA states that a refugee is someone who is unwilling or unable to return to her home country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." This definition touches on the two major hurdles faced by an asylum applicant: (1) the applicant must prove a basis for asylum under one of the five grounds outlined in the statute (race, religion, nationality, membership in a particular social group, or political opinion); and (2) the applicant must prove past persecution or a well-founded fear of future persecution. These standards pose particular problems for homosexual asylum applicants.

Homosexuality as a Defined "Particular Social Group."

One of the most influential definitions of "particular social group," as used in *Toboso-Alfonso*, comes from the 1995 BIA decision *Matter of Acosta*. This case concerned the asylum

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application of a Salvadoran man who feared persecution by guerillas for his membership in a taxi-cab cooperative "engaged in the transportation industry of El Salvador . . ." *Acosta* defined "social group" as a group of persons who either (1) share a "common, immutable characteristic" or (2) share a characteristic that is "so fundamental to one's identity or conscience that it ought not be required to be changed."

Although adopting *Acosta's* first definition of "particular social group" is effective for many homosexual asylum applicants, it uses a narrow definition of sexuality that many gay activists and theorists oppose. By assuming that homosexuality is immutable and permanent, a fact not scientifically proven, this interpretation of U.S. immigration law prevents homosexual asylum seekers in the United States from defining their sexuality as entirely or partially chosen. As a result, individuals who might define themselves this way are prevented from utilizing U.S. asylum protection. In addition, the second definition in *Acosta* of "particular social group" may require the asylum applicant to prove that sexual orientation is "fundamental to [his own] identity." For many homosexual asylum applicants, a self-declaration regarding their sexual orientation may be psychologically and emotionally traumatic, resulting in a deterrent effect that may dissuade potential applicants from applying for asylum in the United States.

Inconsistency in Interpreting "Particular Social Group."

An additional challenge in proving this definition is that the sharp divide in U.S. courts regarding what constitutes a "particular social group" unnecessarily complicates an already difficult asylum application process for many homosexual applicants. For example, the First (*Gebremichael v. INS*), Third (*Fatin v. INS*), and Seventh (*Lwin v. INS*) Circuit Courts of Appeal define "particular social group" in a way that mirrors closely the court's definition in *Acosta*. The Eighth (*Safaie v. INS*) and Ninth Circuits (*Sanchez-Trujillo v. INS*) have adopted, however, a higher standard of proof by construing "particular social group" to require a "voluntary associational relationship" among its members. Finally, the Second Circuit (*Gomez v. INS*) has adopted a variation on the definition of "particular social group" that includes external perceptions, immutability, and voluntary association. Homosexual asylum applicants may, therefore, also be required to prove a voluntary association as a necessary prerequisite for establishing persecution based on membership in a social group. The incorporation of such restrictions into U.S. asylum law, however, goes against the very purpose for which these laws were established.

Fear of Persecution for Homosexual Asylum Applicants.

The second hurdle homosexual applicants face is establishing persecution or a well-founded fear of persecution. Immigration courts look to the applicant to offer both "subjectively genuine" and "objectively reasonable" components as evidence of such persecution. The subjective component rests on the applicant's ability to illustrate through testimony that a genuine fear of persecution exists if returned. This component can be particularly difficult for gays to prove for two specific reasons. First, it requires a homosexual applicant to disclose information to a government agent, who is often the source of abuse in their home countries. Second, as a basis for feared

persecution, the applicant is required somehow to prove her sexual orientation.

The objective component requires the applicant to show a reasonable fear of future persecution through credible, direct, and specific evidence. This evidentiary requirement is usually met by producing documentation of country conditions that show a pattern or practice of persecuting the particular social group to which the applicant belongs. Although courts do not consider evidence of social ostracism in itself to meet this requirement, courts consider acts such as torture, rape, detention, unfair arrest, unwanted medical or psychiatric treatment, and pervasive discrimination towards homosexuals. This documentation, however, must include evidence of either the government's participation in the persecution of homosexuals or the government's unwillingness or inability to control persecution of homosexuals when performed by private actors.

Satisfying the objective component is a difficult process for many homosexual applicants, who must raise issues regarding government action or inaction that they fearfully hid in the past. This requirement also assumes that governments, independent agencies, and human rights groups document persecutions of homosexuals on a regular basis and thus are able to provide the evidence regarding country conditions that is necessary to prove the objective component. In addition, asylum applicants may experience great trauma and conflict because often the only way they can establish a legitimate fear of persecution is by portraying citizens of their own countries, or even members of their own families, as their persecutors.

Although homosexuals continue to face great difficulty in meeting the strict standards for obtaining asylum, the developments in U.S. immigration law during this decade demonstrate growing recognition for their human rights.

Conclusion

Although homosexuals continue to face great difficulty in meeting the strict standards for obtaining asylum, the developments in U.S. immigration law during this decade demonstrate growing recognition for their human rights. A 1997

assessment by the IGLHRC estimates that the United States accepted over 100 asylum applications based on sexual orientation-based persecution since 1994. Such asylum advancements for homosexuals are not limited to the United States; ten other countries (Austria, Australia, Denmark, Germany, Canada, Finland, the Netherlands, New Zealand, and Sweden) also accept asylum applications stemming from sexual orientation. In addition, the impact of *Toboso-Alfonso* is not only limited to homosexual asylum applicants. Transgender persons seeking asylum due to persecution based on their sexuality also have been granted asylum based on the *Toboso-Alfonso* standards. Similarly, although HIV infected persons are still statutorily banned from entering the United States, some have obtained waivers to overcome the statutory bar and have utilized *Toboso-Alfonso* to receive asylum based on persecution due to stereotypes about their sexual orientation. Persecution based on sexuality and perceptions of sexual orientation, therefore, can manifest itself in many different ways. The necessity for U.S. immigration law to recognize these persecutions is crucial for asylum law to continue to be an effective mechanism for achieving human rights. ☐

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