

**GUIDANCE FOR ADJUDICATION OF LESBIAN, GAY, BISEXUAL,
TRANSGENDERED AND HIV ASYLUM CLAIMS
MATERIALS COMPILED BY IMMIGRATION EQUALITY¹**

LEGAL BACKGROUND

In 1994, former Attorney General Janet Reno designated the BIA case Toboso-Alfonso 20 I&N Dec. 819 (BIA 1990) as a precedent decision. The Toboso-Alfonso case granted withholding of deportation to a gay man from Cuba, recognizing that the applicant's gay sexual orientation fell within the definition of "membership in a particular orientation." Although there were some successful asylum applications based on sexual orientation before this case was designated as precedent, the Toboso-Alfonso decision increased awareness of persecution of individuals on account of sexual orientation and bound INS asylum officers and immigration attorneys to the decision's holding that sexual orientation could form the basis of a particular social group.

Membership in a Particular Social Group

Lesbian, gay, bisexual, transgender (LGBT) and HIV positive individuals may be eligible for political asylum based on their membership in a particular social group.

Membership in a particular social group is not defined in the Immigration and Nationality Act ("INA") or in the regulations, but the BIA has offered guidance. In Matter of Acosta 19 I&N Dec. 211 (BIA 1985), the BIA defined persecution based on membership in a particular social group as, "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic, i.e., a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed."

In Hernandez-Montiel v. INS, 225 F.3d. 1084 (9th Cir. 2000) the Ninth Circuit Court of Appeals found that "gay men with female sexual identities in Mexico constitute a 'particular social group.'" Though not binding, in a case reported at 78 No. 3 Interpreter Release 233, January 15, 2001, an Immigration Judge granted asylum to a woman from India based on her HIV status. See page 8 below.

¹In early 2004, the Lesbian and Gay Immigration Rights Task Force (LGIRTF) officially changed its name to Immigration Equality, to better encompass our vision of immigration equality for all lesbian, gay, bisexual, transgender, and HIV positive immigrants.

DEFINITIONS

What is Sexual Orientation?

Sexual orientation is defined as the enduring erotic, affectional, or romantic attraction to individuals of a particular sex. Sexual orientation is a fundamental aspect of identity.

The term “gay” is used to mean men who are attracted to men. The term “lesbian” is used to mean women who are attracted to women, although homosexual women also sometimes use the term “gay” to describe themselves. The term “heterosexual” or “straight” is used to mean men or women who are attracted to the opposite sex. And the term “bisexual” is used to mean men or women who are attracted to both sexes.

For more information about sexual orientation, see <http://www.apa.org/pubinfo/answers.html> on the American Psychological Association website.

Can’t LGBT applicants choose another “lifestyle”?

Sexual orientation is not a “lifestyle.” Sometimes people refer to lesbians and gay men as having an “alternate lifestyle.” In fact, the lifestyles of gay people are as varied as the lifestyles of non-gay people. What time you wake up, whether you like to stay out late at night, dine at fancy restaurants or eat dinner at home with your kids — and many other aspects of one’s lifestyle — do not depend on sexual orientation.

Can’t LGBT applicants choose to live a heterosexual life?

Sexual orientation is not a “choice.” Most experts agree that sexual orientation — whether heterosexual, lesbian or gay — is set in place early in life and is highly resistant to change. In fact, the American Psychological Association has condemned as unethical (as well as ineffective) efforts to “convert” gay people to being heterosexual.

Likewise, being gay is not a pathology or sickness. Over twenty years ago, the American Psychological Association revised its Diagnostic and Statistical Manual (DSM) to remove any references to homosexuality as a pathology. Sexual orientation, it has been established repeatedly, is unrelated to a person’s ability to perform in or contribute to society.

What does it mean to be Transgender?

A “transgender” identity can be defined as a gender identity or expression that differs from conventional expectations of masculinity or femininity. Some transgender people dress in the clothes of the opposite gender, others undergo medical treatment, which may include taking hormones and/or having surgery to alter their gender characteristics.

Transgender is a gender identity, not a sexual orientation. Thus, like any other man or woman, a

transgender person may have a heterosexual, bisexual or homosexual sexual orientation. For example, an individual who is born anatomically male but has a female gender identity may undergo hormone therapy and/or surgery to become anatomically female. As a woman, she may feel attracted to men and consider herself heterosexual. Growing up anatomically male and feeling attracted to men, she may have been perceived by others as homosexual, even if this may not have been her own experience of her sexuality.

For more information about transgender identity see <http://www.ntac.org/resources/faq.html> on the National Transgender Advocacy Coalition website.

What does it mean to be HIV positive?

A person is HIV positive when s/he has been exposed to the Human Immunodeficiency Virus (HIV) and developed anti-bodies to the virus. Once a person has tested positive for HIV, s/he will always test positive for HIV, regardless of her/his health.

AIDS, or Acquired Immunodeficiency Syndrome, is the medical term used for people with the HIV virus who have either experienced certain opportunistic infections (such as PCP pneumonia or Kaposi's Sarcoma), or whose T-cells (infection fighting blood cells) have dropped below 200.

Not everyone who is HIV positive has AIDS, but everyone who has AIDS is HIV positive. HIV is transmitted through the transfer of bodily fluids from an infected individual to an uninfected individual. People are primarily infected with HIV through sexual contact which involves the exchange of bodily fluids; from sharing intravenous drug paraphernalia; during childbirth and breast-feeding; and from receiving contaminated blood transfusions. There is no risk of HIV transmission from casual contact, such as shaking hands or sharing a drinking glass.

For more information about HIV see <http://www.gmhc.org/health/basics.html> on the Gay Men's Health Crisis website.

INTERVIEWING TECHNIQUES – SOME BASICS

What if I don't believe that applicants should be granted asylum based on their sexual orientation, gender identity or HIV status?

If you do not believe you can fairly evaluate the applicant's claim, you should immediately alert a supervisor and ask that the case be reassigned to another officer who is capable of fairly adjudicating the case.

What is the best way to refer to the applicant? Gay? Homosexual?

The best advice is to use the same terminology that the applicant uses himself/herself. Many gay and lesbian people don't like the term "homosexual" which has historically been used in a medical context to describe being gay or lesbian as a pathology. Some applicants may come from cultures where there is no word for homosexuality. The most important thing is to understand what a difficult topic this may be for the applicant to discuss and to be respectful in discussing his/her sexual orientation.

Example: An Egyptian applicant continually referred to his sexual orientation as "my condition" or "my problem," when preparing for his asylum interview, his attorney told him that he should explicitly use the term "gay" or "homosexual" so the interviewer would know what he was talking about. The client (who planned to use an interpreter) informed his attorney that the only word for homosexual in his language was a terrible curse word that he felt uncomfortable even using in front of the interpreter.

How do I tell if the applicant is really LGBT?

Determining the credibility of an asylum applicant's claimed identity is material when conducting an asylum adjudication. It may be more difficult to determine an applicant's sexual orientation than it would be to determine whether an applicant holds a particular political opinion or religious affiliation because there may not be obvious corroborating evidence (such as proof of membership in a particular political party or proof of membership in a particular church.)

As in any other area of asylum law, the asylum officer must make a decision based on the applicant's credibility. As the applicant describes what s/he felt when s/he was "coming out" – that is coming to terms with her/his sexual orientation – when s/he had her/his first relationship, when s/he suffered the harm that forced her/him to flee her/his country, the officer will decide whether or not the testimony is credible.

In some instances an applicant may be able to obtain corroborating evidence, such as proof that the applicant was/is involved in an LGBT rights organization or support group, or a corroborating affidavit from a partner or family member attesting to the applicant's sexual identity. This can be helpful for the officer but the officer should also realize that this type of corroborating documentation may not be available.

If a person is transgender, s/he may have medical evidence initiating hormone procedures or other medical treatments such as surgery. Many transgender applicants, however, will not have had any medical treatments, especially if they have recently arrived from developing countries where it would not be possible to obtain medical treatment to assist with the physiological transition from one gender to another.

So wouldn't the easiest way to figure out someone's sexual orientation be to ask them about their sexual practices?

The applicant's specific sexual practices are not relevant to her/his claim for asylum. Asking questions about "what s/he does in bed" would create an intrusive atmosphere that may make it difficult for the applicant to answer questions about the actual basis of her/his asylum claim.

More material to the asylum adjudication is whether the applicant possesses (or is perceived by her/his persecutor to possess) an immutable characteristic or one that is so fundamental to her/his identity that s/he should not be required to change it. Determining whether the persecutor's perception that the applicant possesses this immutable characteristic motivates the persecutor to harm the applicant is also material to the applicant's asylum claim.

But what if the applicant doesn't "look gay"?

It is important to keep in mind that many LGBT people do not conform to stereotypes we may have about them. Thus, it would be improper to conclude that an applicant is not a gay male because he appears "masculine" or that an applicant is not a lesbian because she appears "feminine." It is also important to keep in mind that different cultures may read different characteristics differently, so that a man who may not "appear gay" to an American may be obviously gay to a person from his own country.

It is also important to remember that sexual orientation is a fundamental part of a person's identity, thus it is not appropriate to conclude that an applicant should just "not flaunt" their sexual orientation. Concluding that an LGBT person can hide her/his identity would be analogous to concluding that a person could just stop practicing her/his religion to avoid persecution or could stop protesting against the government to avoid persecution.

Is it appropriate to require medical proof of HIV status if that is the basis of the applicant's claim?

Yes, most HIV positive applicants who are using their sero-positive status as a basis of their claim will attach proof of their HIV status. Free HIV testing is available throughout the United States and the applicant should be instructed to seeking testing and treatment. HIV test sites can be located through the CDC sponsored website <http://www.hivtest.org/>.

TYPES OF PERSECUTION FACED BY LGBT APPLICANTS

What kinds of persecution do LGBT people face from government actors?

In many countries homosexuality is illegal and, if discovered by the authorities, a lesbian or gay man may be arrested or imprisoned based upon her or his sexual orientation. In some countries, authorities target homosexuals and entrap them by pretending to set up dates on the internet and

then arresting the individual once it is clear that s/he is homosexual.

In many other countries, there may not be actual laws prohibiting homosexuality, but authorities may still persecute people because of their sexual orientation. Thus many asylum applicants have been arrested, detained, beaten, sexually assaulted, and/or forced to pay bribes by police or army officials because of their sexual orientation.

Example: D., a gay man from Uzbekistan made a date with a man he met over the internet. The two met in a café and later returned to the apartment of D.'s date. Shortly after arriving in the apartment, the police raided the apartment and D. was threatened with arrest. He only escaped by bribing the police with money. He later realized that his "date" had colluded with the police to entrap him and that his "date" knew his full name and telephone number. Shortly thereafter, D. began receiving threatening phone calls at home, demanding more money. D. knew that it would be fruitless to make a complaint to the police since it was the police themselves who were blackmailing him.

What kind of persecution to LGBT people face from non-government actors?

Many LGBT people suffer harm at the hands of non-governmental actors whom the government cannot or will not control. For example, an applicant may have been the victim of repeated "gay bashings" that the police never investigated. Other applicants may have been threatened by neighbors or had their property vandalized. Others may have been repeatedly fired from jobs and found it impossible to engage in any form of employment once their sexual orientation became known. Many LGBT people are disowned by their families if their sexual orientation becomes known. In many countries it is virtually impossible for an unmarried person to find housing outside of her/his family home.

As with any asylum claim where the applicant claims either past persecution by or a well founded fear of future persecution by non-government actors, you will have to determine whether the government of the applicant's country of citizenship or, if stateless, the government of his or her country of last habitual residence, is unwilling or unable to control the actions of the non-governmental actor. You can make this determination from the applicant's own testimony. For example, often applicants will testify that they tried to report an incident to the police, and the police called them a homophobic name and laughed about the incident. You can also make this determination through corroborating evidence about conditions in the country for LGBT nationals.

Decisions that do not specifically address issues of sexual orientation can provide guidance for evaluating a government's willingness to protect an applicant from a non-governmental persecutor. In Matter of S- A-, Interim Dec. 3433 (BIA 2000), the BIA recognized ongoing, physical, and psychological abuse inflicted upon a young Moroccan woman by her strict Muslim father to be persecution. In S-A- the applicant's mother had attempted to seek protection for her daughter from the police, but the police ignored the complaints. The BIA also found, based on country condition reports, that the applicant would not have received any protection by the

government from her father's beatings and abuse and therefore granted her application for asylum.

For more information on issues relating to the government's willingness to protect an applicant from a non-governmental persecutor, see AOBTC lesson plan "Asylum Eligibility I: Definition of a Refugee".

Example: O. is a gay man from Nigeria. O.'s family found him in his room, in a romantic position with his boyfriend. His family was distraught and performed a ritual cleansing ceremony on O. which included a scar-ification technique in which they cut lines in a circle around his throat to protect him from the evil of homosexuality in the future. His family thought that this ritual had "cured" him but was horrified several years later when O.'s brother learned that O. was again romantically involved with a man. O.'s brother brought a mob of neighbors to the apartment that O. shared with his partner, and the mob beat his partner to death. O. escaped out the window and hid from his family for two weeks until he was able to secure travel documents to leave the country. O. did not seek police protection from his family because he feared the police would imprison him or torture him if they learned that he was gay.

Are there any issues particular to lesbian claims to be aware of?

Lesbians are, obviously, also women, and in many parts of the world, it is unusual for women to live their lives in the public sphere. Thus persecution faced by lesbians may be more subtle than that encountered by gay men because they may be less visible. Lesbians may be particularly vulnerable to rape by attackers who wish to punish them for their sexual identity.

It is important to note, however, that while rape can certainly constitute persecution, the applicant must still establish that the rape is "on account of" her/his membership in a particular social group or on account of another protected characteristic. Thus in Gomez vs. INS, 947 F.2d 660 (2nd Cir.1991), the Second Circuit upheld the BIA's denial of an asylum application by a woman from El Salvador who had been raped by guerrillas. The Court found that the guerillas had raped many women without any motivation beyond that of common criminals who commit rape and thus the rape was not "on account of" Gomez's membership in any protected category or group.

It is therefore critical when interviewing the applicant to gain a full understanding of why s/he feels s/he was attacked, and to bring out anything that the assailant may have said. Even if the attacker does not specifically make homophobic statements during an attack, the applicant may believe that the attacker knew her/his sexual orientation because s/he was targeted in a neighborhood, in a park, in a club, etc. that is known to be an LGBT gathering place.

Example: M. is a lesbian from Venezuela. Although M. never "flaunted" her homosexuality, she felt more comfortable wearing pants and blouses than dresses, which are more commonly worn by women in Venezuela. M. was fired from several jobs when her sexual orientation became known. On one occasion, she was returning in the early morning from a movie she had seen with her girlfriend. Their car broke down on a deserted road. After waiting for over half

an hour, a national guard jeep arrived and the two guardsmen offered the women assistance. With no other alternative in sight, the women got into the jeep with the guardsmen, expecting to be given a ride home. Instead, the men began asking them personal questions about their marital status and whether they had children. The guardsmen took the women to a remote field where they took turns raping the applicant, telling her that they would show her “what a real man” feels like. The guardsmen left the two in the field and it took them several hours to walk home. M. fled the country shortly thereafter, feeling especially afraid because her car was never returned to her and all of her identity documents were in the car, leaving her open to future attacks or blackmail from the guardsmen.

Are there any issues in cases by transgender applicants to be aware of?

As with lesbians, transgender individuals are particularly susceptible to rape. Because transgender people disturb societal behavioral norms, they are often punished through sexual violence.

Bear in mind, that even if the applicant identifies as heterosexual, it is common for “effeminate men” or “masculine women” to be perceived by others as homosexual. Thus a transgender applicant may have suffered persecution in the past, or fear future persecution because others will assume s/he is homosexual and persecute her or him on that basis as well as her/his gender identity.

Are there any issues in cases by HIV positive applicants to be aware of?

For an applicant to win an asylum case based solely on being HIV positive, s/he must establish that s/he was persecuted or fears future persecution based on her/his HIV status.

In one case [Name Withheld], which was reported at 78 No. 3 Interpreter Release 233, January 15, 2001, an Immigration Judge granted asylum to an HIV positive applicant from India. The Immigration Judge identified the applicant as being a member of the particular social group of “married women in India who have contracted HIV, who fear that their families will disown them or force them to get a divorce, and who wish to or need to be employed.” The Judge found that the standard for persecution had been met because the Indian Supreme Court had prohibited people with AIDS from marrying and HIV positive Indian nationals who violated the law had been imprisoned. The Judge also recognized that Indian nationals faced extreme stigmatization and job loss because of their HIV status.

It is also important to bear in mind that an applicant may be persecuted based on perceived identity. Thus, an applicant who is known to be HIV positive may suffer persecution based on a perception that s/he is homosexual, whether or not this is true.

INTERVIEWING TECHNIQUES

What is the best way to make an LGBT applicant feel comfortable so that s/he will present her/his story completely to the officer?

It is important to remember that discussing one's sexual orientation and romantic attachments is by nature a very personal matter. Again, it's a good idea to use the same language that the applicant used in her/his application. If s/he is comfortable with the term "gay," or "lesbian," use that term. If s/he described herself/himself as "homosexual," use that term.

LGIRTF has heard from some applicants that the Officer asked questions which implied that homosexuality was a "condition," or something which could be changed or hidden. If an officer has strongly held beliefs that homosexuality or bisexuality is "wrong," and should not be the basis for asylum, s/he should talk to her/his supervisor about having a different officer take the case. Sometimes officers who are not open to LGBT asylum claims make it impossible for the applicant to feel comfortable to relate the details of her/his claim.

What if the applicant wants to have his/her partner present?

It is common for asylum applicants to want to have family members or significant others present. Retelling traumatic events is, obviously, a very stressful experience and having a significant other present can help provide support for the applicant and calm him/her during the interview.

What if the applicant's testimony makes the officer uncomfortable?

The heart of an asylum applicant's claim is often a traumatic experience (or experiences) that s/he endured. Often with sexual orientation based asylum claims, the persecution takes the form of sexual assault or sexual abuse.

LGIRTF has heard from some applicants that when they were describing sexual abuse by the police, the Officer kept trying to switch the subject, to something more comfortable like employment discrimination. Difficult as tales of sexual assault may be to hear, it's even more difficult for the applicant to recount what has happened to him/her. This information may be very important to determining whether or not the applicant suffered persecution. Also, if the applicant perceives that the Officer does not want to hear the more uncomfortable aspects of her/his story, s/he may leave out other important details about the abuse s/he suffered in her/his country.

Are there other resources available for interview techniques on sensitive issues?

The same interview techniques that Officers utilize for other types of sensitive issues are applicable in LGBT cases. For example, an officer should ask open, non-judgmental questions that help the applicant explain her/his story.

The gender guidelines as well as AOBTC lesson plans including Interviewing Part I, III, IV, and V, provide useful information for Asylum Officers. They point out that applicants may have difficulty speaking about past experiences that are humiliating or culturally unacceptable. Following those guidelines, interviewers should begin interviews with questions that do not deal with sensitive matters and should move on to issues such as sexual abuse and violence only well into the interview.

How can an Officer determine whether the applicant really is lesbian, gay, bisexual or transgender?

Again, Officers have a great deal of training in assessing credibility and can put the same skills to use in assessing an LGBT claim as they do in determining, for example, whether a person is sincere in his religious beliefs or whether a person really belongs to a particular tribal group.

If an Officer is having difficulties assessing the credibility of an applicant who claims to be LGBT, it may be helpful to ask the applicant some of the following questions.

- ❖ When did you first realize you were gay?
- ❖ Did you tell anyone?
- ❖ Why/why not?
- ❖ If yes, when?
- ❖ What was their reaction?
- ❖ Have you met any other gay people?
- ❖ Where?
- ❖ Does your family know you're gay?
- ❖ If yes, what was their reaction when you told them?
- ❖ Are you involved in any gay organizations here?

If the applicant was aware that he or she was gay while in the country of origin, ask about his or her experiences there and his or her awareness of the lives of gay people there.

Although an applicant's testimony about his/her sexual orientation should be sufficient if it is credible, an applicant may also provide affidavits from friends that s/he held herself/himself out to the public as a lesbian woman, gay man, bisexual individual or transgender individual. The applicant may have photos from a gay pride parade or other gay event. The applicant may submit a letter or affidavit from a family member, but it is important to remember that many LGBT applicants are afraid to reveal their sexual identity to their families, or have been cast out from the family once their identity became known.

THE HARD CASES

What if the applicant was married in his country?

Some applicants may have gotten married in their own countries and/or have children there. This fact alone does not mean that the applicant is not gay. Many applicants describe enormous social pressure to marry and can be literally forced into a marriage by their family or society. Other applicants, while grappling with their sexual identity, have tried to lead a heterosexual life and “fit in” within their society.

Even in the United States, it is not uncommon for lesbians or gay men to marry people of the opposite sex in an effort to conform to the societal norm. While some lesbians and gay men may feel that they have always known their sexual orientation, many others do not come to terms with their sexual identity until much later in life.

What if there are gay organizations in the applicant’s country?

Just because gay organizations exist doesn’t mean that LGBT people are not persecuted in the country. For example, Christian churches exist in Egypt, but Christians there are denied many fundamental rights.

What if there appear to be legal protections for LGBT people in a country’s laws?

Some countries with laws that state that their citizens and nationals are guaranteed religious, political or other freedoms do not enforce these laws or allow citizens and nationals these freedoms in practice. Similarly some countries have anti-discrimination laws that seemingly protect LGBT nationals on the books, but in reality the laws are not enforced or are openly flaunted.

Example: Ecuador is the only country in the Western Hemisphere that has a provision in its constitution explicitly forbidding discrimination on the basis of sexual orientation. Nevertheless, Amnesty International issued a report in April 2002 outlining severe abuse suffered by lesbian, gay, bisexual and transgender people, both directly at the hands of the police and through the government’s failure to investigate claimed abuses by non-government actors.

What if the applicant was not “out” in her/his country?

Ironically, sometimes applicants will have greater difficulties proving their cases if they come from extremely repressive countries. In countries where the persecution of sexual minorities is greatest, applicants may be forced to go to greater lengths to hide their identities in order to survive. Thus they may not have suffered past persecution at the hands of the government or non-government actors because they had to hide a fundamental part of their identity. In these cases, the Officer will have to make a decision based on whether the applicant has a well-founded fear of future persecution. This determination should be made based on the applicant’s

testimony of what s/he fears if forced to return to her/his country as well as country condition reports on the treatment of LGBT people in the applicant's country of origin and it should be made in accordance with asylum law on establishing a well-founded fear of persecution.

Example: M. always felt different from his peers growing up in Iran, but it was not until he attended college in the United States, that he felt comfortable "coming out" as a gay man. After living life openly in the U.S., and having his first boyfriend here, he began to feel terrified at the prospect of returning to Iran after he graduated. M. came from a strict Muslim family and knew he would be disowned if they learned of his sexual orientation. M. also knew, both from his experience growing up in Iran and from research he had done since coming to the U.S., that homosexuality was punishable by lashings or death. M. applied for asylum in the U.S. based on his fear of future persecution in Iran.

What if the applicant doesn't clearly identify with the words "gay, lesbian, or homosexual"?

While Americans are accustomed to reading and hearing about gay, lesbian, homosexual, bisexual, and transgender issues in the news, these terms may be largely unfamiliar to applicants from other cultures. Some countries do not even have words for different sexual orientations other than homophobic slurs. The fact that an applicant may be uncomfortable with these terms may be a result of her/his own ingrained homophobia from growing up in a country where such terms were the equivalent of vile curses.

What if the applicant doesn't know much about gay issues?

Many applicants may be isolated from the larger "gay community" upon arrival in the U.S. Many applicants make their first connections in the U.S. with other immigrants from their own countries, and, for the same reasons they fled their countries, they do not want people within their immigrant communities to know their sexual orientation.

The Officer should focus the interview on the applicant's own experiences and make a determination of the applicant's credibility based on her/his testimony of her/his experiences.

What if the claim is based on an experience which the applicant considers persecution but which the person who performed the action did not intend as persecution?

The adjudicator should focus on how the actions were experienced by the applicant, not on the subjective intent of the persecutor. In Pitcherskaia vs. INS, 118 F.3d 641 (9th Cir. 1997), the Ninth Circuit found the applicant statutorily eligible for asylum and remanded to the BIA for further adjudication. Pitcherskaia was a Russian citizen whose claim was based on being lesbian. While in Russia, she had been regularly, involuntarily "treated" and involuntarily confined in a psychiatric institution in an effort to "cure" her of her homosexuality. This "treatment" included electroshock treatment and sedative drugs. The court found that even if a persecutor believes the harm he is inflicting is "good for" his victim, this intent does not make it

any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution.

Thus, while statements that the persecutor makes may be relevant to determining whether s/he is harming the applicant “on account of” a protected characteristic, the persecutor’s expressed non-punitive intention does not remove the infliction of harm from the realm of persecution.

Are there any one-year filing deadline issues that are specific to LGBT applicants?

Many LGBT applicants miss the one-year filing deadline for asylum because they did not know that it was possible to apply for asylum based on their sexual orientation or gender identity. While applicants from countries with repressive governments may have an awareness that they could seek asylum in the United States or elsewhere based on their political beliefs or religion, many foreign nationals (and, indeed, many U.S. immigration attorneys) are not aware that sexual orientation or transgender identity might qualify them for asylum. This problem may be compounded for LGBT aliens who come to the U.S. and immediately take up residence in an immigrant community with people from their own country. Furthermore, the alien may seek advice from an attorney from his/her own country and feel uncomfortable revealing his/her sexual orientation to the attorney. However, lack of knowledge of the one-year deadline or of the ability to apply for asylum at all, is not in general considered a legally acceptable exception to the deadline.

It is important for the adjudicator to think about the particular circumstances of the applicant when applying the one-year deadline. Some applicants may only have “come out” or realized their sexual identity after living in the U.S. for a period of several years. This may qualify them for a “changed circumstances” exception to the one-year filing deadline.

Similarly, a transgender applicant may have lived in the U.S. for several years before beginning to “transition” from one gender to the other. After undergoing medical interventions to permanently change her/his appearance s/he may be more afraid than ever before to return to her/his country.

Are there any one-year filing deadline issues that are specific to HIV positive applicants?

Many HIV positive asylum applicants do not learn their HIV status until they are in the United States. Some applicants will be diagnosed after a catastrophic illness requiring hospitalization. Others will take advantage of anonymous or confidential test sites in the U.S. that may not have been available in their own countries.

A recent diagnosis of HIV may qualify an applicant for a “changed circumstances” exception to the one-year filing deadline, if the applicant can demonstrate fear of future persecution on account of his/her HIV status.

Coping with the illness itself might also qualify an applicant for an “exceptional circumstances” exception to the deadline. For example, the applicant may have been too physically ill to focus on his/her immigration case. Many people living with HIV also suffer from periods of depression. Depending on the facts of a particular case, severe depression can also constitute an exception to the deadline.

How should an Officer adjudicate an asylum application by a bisexual applicant?

There is no easy answer to this question. The Officer will have to decide on a case-by-case basis whether the applicant has suffered past persecution based on her/his sexual orientation and/or whether the applicant is likely to suffer future persecution.

If the applicant has been romantically involved with both men and women in the past, and suffered persecution at the hands of her/his government as a result, the fact that s/he has had some relationships with the opposite sex should not prevent a finding of asylum. On the other hand, if the applicant has had relationships with members of both sexes but has not suffered past persecution, and is currently married to a person of the opposite sex, the applicant may not have a well-founded fear of future persecution.

It is also important to keep in mind that in countries where homosexuals are severely stigmatized, an applicant may feel more comfortable referring to him/herself as “bisexual” than “homosexual” even if he or she does not feel attracted to the opposite sex. This may be a way for the applicant to cope with internalized homophobia.

What if the applicant does not seem to want to share her/his story with the Officer?

Remember that for anyone in any setting, talking about something as private as sexual orientation is very difficult. This difficulty may be compounded by the applicant’s fear of authority. It may be impossible for the applicant to imagine telling a government official about her/his sexual orientation if s/he has been assaulted by government officials in the past. Officers should be sensitive to the difficulty of this subject matter and should not automatically conclude that an applicant lacks credibility because s/he is shy about discussing sexual orientation.

It may also be especially difficult for the applicant to discuss very intimate details of her/his life if there is an interpreter present. Remember, some languages do not have neutral or positive terms for sexual minorities. LGIRTF has heard applicants refer to their sexual orientation as “my problem” or “my issue,” because these are the terms they had used in their own countries.

What corroborating evidence can an Officer expect for LGBT or HIV-based asylum claims?

As with other types of asylum claims, corroborating evidence can be extremely helpful to an Officer in judging an applicant’s credibility. If, for example, an applicant was beaten because he or she was gay and required dental surgery as a result, the applicant should make every effort to

obtain the dental records from her/his country, and if the applicant cannot do so, s/he should explain to the Officer why s/he was unable to get them.

It is important to remember that it may not be possible for applicants to obtain corroborating documentation from within their countries because their families may have rejected them as a result of their sexual orientation. If they were known to be LGBT in their countries, it may also be too dangerous for former partners or friends to try to obtain documentation and risk being “outed” themselves.

Where can an Officer get country conditions documentation on LGBT and HIV-based asylum claims?

It is often more difficult to obtain country conditions information on LGBT issues than on other issues for which people seek asylum (like political opinion, race, or religion.) State Department and human rights organization reports may be silent on the treatment of LGBT people in the country. Officers should not conclude that if these issues are not mentioned that there are no problems. Many organizations that report on human rights issues lack contacts within the local LGBT communities to even know what LGBT individuals experience in their countries.

Often the countries where homosexuality is most taboo have the least country conditions information available. For many countries, particularly those with conservative, religious governments, there is literally no mention of the existence of LGBT citizens in any media.

Useful resources in gathering information for Officers may be the International Gay and Lesbian Human Rights Commission (www.iglhrc.org), LGIRTF (www.lgirtf.org), and the Out Front program at Amnesty International (www.amnestyusa.org/outfront). The International Lesbian and Gay Association (www.ilga.org) website 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.

Andrew Reding, who has prepared reports for legacy INS in the past on country conditions for sexual minorities, recently completed a lengthy study on the treatment of LGBT people in the Americas. The study is available online at <http://www.worldpolicy.org/globalrights/gayindex.html>.

What is the most important thing to remember when adjudicating an LGBT or HIV claim?

Remember that the applicant is talking about very personal, private issues that it may be extremely difficult for her/him to discuss. As with any other asylum applications, the adjudicator should try to make the applicant feel comfortable so that s/he will tell her/his story fully and the claim can be fairly evaluated.

There is no magic formula as to how to address an applicant about very personal, private issues. This may be the first time the applicant is sharing her/his story with anyone, and it is likely to be

the first time s/he is telling a government official about her/his sexual orientation, gender identity or HIV status.

Trust your instincts, if a question feels particularly uncomfortable for you to ask, it will probably make the applicant feel uncomfortable too. Try to elicit the applicant's story and future fears through open-ended questions that will allow her/him to tell her/his story in her/his own words.

If you're confused by LGBT and HIV issues, analogize to other types of cases with which you are more familiar, such as cases based on religious or political persecution.

EXAMPLES OF INTERVIEWING TECHNIQUES

Bad Technique – Homosexual vs. Bisexual

Q. Why are you seeking asylum?

A. In my country they kill people like me.

Q. What do you mean, "people like you"?

A. You know, homosexuals.

Q. Homosexuals? Now, I'm looking at your application and it says here that you're bisexual.

A. Yeah.

Q. Well, which is it? Are you homosexual or bisexual?

A. Yeah.

Q. "Yeah?" Are you attracted to men, or to women, or to both?

While it can be frustrating to ask a question which is not answered to your satisfaction, remember that the applicant may not understand the difference between terms that are commonly used in the U.S. He may know that his sexuality is not considered "normal" in his country and thus be fearful to discuss it openly with a U.S. government official. Making the applicant defensive at the beginning of the interview is unlikely to result in a productive interview. It's better to focus on the applicant's fear and then try to determine whether the fear meets the legal definition for asylum. If the applicant's life was threatened by the police because they caught him in a romantic posture with another man, it may not even be necessary to determine whether he may also be attracted to women, to establish that he suffered past persecution on account of his perceived homosexuality.

Good Technique – Homosexual vs. Bisexual

Q. Why are you seeking asylum?

A. In my country they kill people like me.

Q. Can you explain what you mean by “people like you”?

A. You know, homosexuals.

Q. Okay, so you’re afraid to go back because you’re homosexual. Can you explain a little more about your fear of going back?

Many LGBT people from different countries may be less familiar with the categories we use to define sexuality than we are. Before creating an environment that will make it difficult for the applicant to open up, consider whether you need this information now. At the beginning of the interview, it is more important to create an environment where the applicant feels comfortable speaking to you. You can always come back to the question of why he called himself “bisexual” on the application form later in the interview.

Bad Technique – Lesbian

Q. Why are you seeking asylum?

A. As a lesbian, I believe that my life would be in danger if I had to return to my country.

Q. Why are homosexuals in danger in your country?

It is best to follow the applicant’s lead with terminology. If she calls herself a “lesbian,” she may perceive your use of the term “homosexual” as derogatory and this may make it more difficult for her to be open about her sexuality.

Good Technique – Lesbian

Q. Why are you seeking asylum?

A. As a lesbian, I believe that my life would be in danger if I had to return to my country.

Q. Why are lesbians in danger in your country?

Using the same definitions as the applicant is an easy way for the Officer to make the interview environment more comfortable for the applicant. It is also easier for the Officer to follow the

lead of the applicant than to have to decide what is the most “politically correct” terminology to use.

Bad Technique – Transgender

Q. Why are you seeking asylum?

A. People in my country never accepted me because of the way I am.

Q. What do you mean, “the way you are”?

A. Well, I’ve always been different like this. Like people think I look like a girl, but I’m a guy.

Q. So, um, what are you?

A. Well, really, I don’t understand myself.

Q. But you still have male genitals, right. I mean you haven’t had any surgery or anything like that, right?

A. No, I haven’t had surgery.

Q. So, you’re a male who looks effeminate.

A. I guess you could say that.

Here the officer has put words into the applicant’s mouth that s/he may not feel comfortable with because the officer is trying to define things in a way that seems comfortable to him/her.

Q. Are you homosexual?

Gender identity and sexual orientation are two different issues. A transgender applicant may also be gay, lesbian, or bisexual, but that is not necessarily the case. It is also important to remember that even if the applicant is heterosexual, s/he may be perceived as homosexual because s/he doesn’t fit the societal norms for her/his gender.

Good Technique – Transgender

Again, rather than having an uncomfortably personal conversation at the outset, it may work better to focus the conversation back on the reason that the applicant is seeking asylum. For example:

Q. Why are you seeking asylum?

A. People in my country never accepted me because of the way I am.

Q. And when you say that people didn't accept you, can you explain what kind of problems you had in your country?

By focusing on the problems the applicant experienced, you can delve into the reason for the asylum case, and acknowledge that the applicant believes s/he has experienced problems, thus making it easier for her/him to open up to you. If you later have questions about whether or not the applicant fits into a "particular social group" category, you can return to identity issues later.

Or, if you want to focus on the gender identity up front, be mindful of what a difficult thing this is for the applicant to discuss. If you feel uncomfortable asking questions about gender identity, just imagine how much more difficult it is for the applicant to answer such questions.

Q. Why are you seeking asylum?

A. People in my country never accepted me because of the way I am.

Q. What do you mean, "the way you are"?

A. Well, I've always been different like this. Like people think I look like a girl, but I'm a guy.

Q. And how do you think of yourself?

A. I really don't know. I feel like I should have been born the other way.

Q. And how do you think people perceived you in your country?

A. Well, I dress more like a girl, but people in my village know I wasn't born a girl.

There is no magic formula about how to discuss difficult issues like gender identity. The important thing is to be respectful and to try to have a conversation using terms and concepts that the applicant is more comfortable with.

Bad Technique – HIV

Q. Why are you seeking asylum?

A. I'm afraid, if I go back to my country, I'm going to die.

Q. Why do you think that?

A. I'm HIV positive and if I go home, well, I just know I'll die.

Q. Well, we're all going to die.

Even if this is an attempt at levity, trying to make light of a person's fear of hastened death is not going to make the environment more conducive to an open interview and instead may lead to the applicant becoming defensive or hostile.

A. Right, how many pills do you have to take a day to stay alive?

Q. So, tell me why you think you're going to die.

A. Like I said, I'm on the triple combination cocktail in the U.S. In my country, they've barely got aspirin. I've already had PCP pneumonia here. If I go back I'm going to be dead in a month.

Q. So, your fear is just that in your country, you don't have the state of the art medical treatment that we have in the U.S.?

Even if the Officer believes that lack of available medical treatment does not meet the legal definition of "persecution" so as to merit a grant of asylum, the Officer should still be respectful of the applicant's very real fear that s/he may die quickly if returned to her/his country if there is not good medical treatment available in her/his country.

Good Technique – HIV

Q. Why are you seeking asylum?

A. I'm afraid, if I go back to my country, I'm going to die.

Q. Why do you think that?

A. I'm HIV positive and if I go home, well, I just know I'll die.

Can you explain that for me a little more? What do you mean when you say, "I just know I'll die"? (The Asylum Officer may then want to follow up with questions regarding how HIV people are treated in his or her country, whether those of a particular religion, political opinion, tribe, or race who have HIV are treated differently than others.)

Here the Officer is respectful and gives the applicant an opportunity to explain the basis of her/his claim in her/his own words.

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