

Asylum *Ad Absurdum*

Gay, Gender, HIV groups pass through loophole

by James S. Robb

The stated goal of U.S. refugee policy since the Refugee Act of 1980 has been to provide shelter to foreigners fleeing their countries because of discrimination based on their race, religion, nationality, or political views.

Over the years, America has provided a haven to many thousands of people who have had real reason to fear that they would be harmed if forced to return to their country of origin. Perhaps they were human rights activists, or practitioners of a banned religious sect, or a member of a persecuted tribe. Whatever their circumstances, they looked to the U.S. as their last hope. Because we were careful to guard the integrity of the refugee system, Americans generally supported the admitting of refugees.

Today, however, the legitimacy of the refugee/asylum concept is being undermined by a legal loophole that the immigration lobby, expansive-minded immigration judges, and the current administration have used to dramatically increase the types of persons granted asylum.

Instead of a being restricted to a few basic categories widely supported by the American public (such as persons fleeing Communist regimes) successful asylum-seekers now include such groups as:

- Homosexuals claiming governmental or societal persecution
- HIV/AIDS sufferers hoping to gain access to American health care
- Feminists or upper-class educated women from male-dominated societies

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- Chinese nationals objecting to their government's one-child-family policy
- Practitioners of transcendental meditation.

The Immigration and Nationality Act lists as acceptable grounds for granting refugee status those persons who are fleeing or have fled from their country because of a "well-founded fear of persecution on account of race, religion, nationality, *membership in a particular social group*, or political opinion" (italics added).¹

This language was adopted in 1980, following precisely the language used in the 1951 Geneva Convention on Refugees. The Geneva Convention language was crafted primarily to resettle the large numbers of refugees created by World War II. The clause about membership in a "particular social group" was a part of the Convention language, but it did not apply to U.S. policy until Congress

decided to adopt the international standards in 1980.

While granting asylum on the basis of race, religion, and political views has been common for 50 years, the vague language about "particular social group" has only been exploited more recently. This catch-all has allowed the immigration establishment to bring in numerous new, much less plausible groups during the last decade.

The Stakes

By using the "particular social group" loophole to expand the scope of refugee and asylum practices, the U.S. loses in at least three ways:

1. the number of persons with potentially defensible claims for asylum in the U.S. increases enormously,
2. the burden of proof for individuals desiring asylum to use the "particular social group" language has been lowered, and
3. groups the American people might not choose to shelter gain access to our shores.

Politically correct "cultural asylum" is undermining confidence in America's refugee policies. The key to a solution is action by the U.S. Congress to define more carefully what constitutes cause for granting asylum.

GAY ASYLUM

Until very recently, homosexuals not only failed to qualify as refugees, they were actually banned from immigrating to or even visiting the United States. The Bush administration only dropped that provision in 1991.² A further provision banning visits or immigration by persons infected with the HIV virus was only partially waived for last summer's Olympic Games in Atlanta.

Several years earlier, however, a chain of events had begun which would not only eventually make homosexuals eligible for immigration, but also extend them refugee status.

A Cuban Felon Blazes the Trail

In 1985, a Cuban man seeking asylum in the U.S., Fidel Toboso-Alfonso, had his day in court in front of Immigration Judge Robert Brown of Houston. After coming to this country in the massive Mariel Boat Lift of 1980, he was now facing immediate deportation because of felonies he had committed here. In the five years since the Mariel Boat Lift he had already been convicted of burglary and cocaine possession. Like so many other criminal immigrants he only requested asylum when his crimes caught up with him.

His asylum claim was based on this: being a gay man in his native Cuba made him a member of a "particular social group," and the Cuban government had persecuted him because he was a member of that group.

The INS urged the immigration judge to deny the grant of asylum. But the judge listened to Toboso-Alfonso's story of how police regularly brought him in for questioning, and how they posted signs on his door announcing he was a homosexual. Further, the Cuban asserted, the police told him he must leave the country in the Mariel Boat Lift, lest they place him in prison for four years.

Convinced by this sad but entirely uncorroborated story, the judge agreed that Toboso-Alfonso did belong to a "particular social group" — Cuban gays. While declining to formally grant the Cuban asylum, he did set aside the man's deportation order based on his claims of persecution. The felon could remain in the U.S.

The Immigration and Naturalization Service was appalled by this decision and appealed to the Board of Immigration Appeals (BIA). The INS insisted that "socially deviated behavior, i.e. homosexual activity is not a basis for finding a social group within the

contemplation of the [refugee] act."

Yet five years later, when the BIA finally issued its opinion, a 3-2 majority agreed that Judge Brown was right in blocking the deportation. The board did not certify the case as a precedent; that is, the Toboso-Alfonso case did not have to be seen as a precedent by immigration judges looking at similar situations.

Theoretically, the Marielito was just a lucky individual profiting from an anomalous ruling. But the sequence of events soon disproved that idea.

In 1992, Bill Clinton was elected president, and the gay-rights lobby revved up into overdrive, believing they could now press claims for equity in various fields, including asylum. In 1993, for

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example, the Lesbian and Gay Immigration and Asylum Rights Task Force was organized.³ It immediately began lobbying for a formalized acceptance of the gay asylum concept. Its other primary agenda was to get the government to grant gay persons the right to bring in their partners from outside the U.S. in the same way that husbands and wives are now.⁴

A Homosexual Flees — From What?

Then in July 1993, Immigration Judge Philip Leadbetter granted asylum to a Brazilian, Marcelo Tenório, a 30 year-old house painter. Tenório, an open homosexual, claimed he had been stabbed and beaten up outside a gay bar in Rio De Janeiro in 1989. He had to flee for his life, he claimed, since homosexuals were often murdered by individuals in that *macho* culture. A gay rights activist backed up Tenório's testimony stating that 1,200 gays had been slain in Brazil since 1980.

No one even claimed that the Brazilian *government* had any role in persecuting gay men there. There are no laws against homosexual activity. Quite the contrary — the Brazilian

homosexual sub-culture is known throughout the world for the flaunting of its sexuality. Transvestites are an accepted, indeed popular, part of the annual Carnival.

Furthermore, of the 38 recorded murders of homosexuals in Rio during the first half of 1993, reported a prominent gay rights group, most of the killers turned out to be homosexual prostitutes who murdered their male clients in order to rob them. Brazilian officials and journalists also disputed the legitimacy of the case.

“There is no conspiracy or evidence that could indicate an organized practice,” stated an article in the Brazilian newsweekly *Veja*. “In the hands of the noisy American pink lobby, Tenório’s cause became a festival of demagoguery — and of Brazil-bashing.”⁵

The gay asylum cause continued to grow after Tenório won his asylum case. Clinton had promised to work for gay rights in his 1992 presidential campaign, and the changes he brought eventually worked their way down to the Immigration and Naturalization Service.

Sheltering an AIDS Activist

In March, 1994, the INS for the first time granted asylum to an alien based on claims of persecution of homosexuals. This was a landmark decision since the previous grants were made by immigration judges rather than the INS itself.

The case revolved around Jose Garcia, a Mexican national living in the U.S. for 12 years, who told the INS he could not return to his homeland for fear of ill-treatment. His uncorroborated story spoke of being taunted by fellow Mexicans, falsely arrested and sometimes raped by police.

Garcia said he feared retaliation if sent home, because he had been an outspoken AIDS activist in San Francisco. A spokeswoman for the Mexican Consul General’s office in San Francisco disputed Garcia’s claim. “We respect the rights of anyone without consideration of sexual orientation,” said Daphne Roemer. She asked why Garcia had not approached her office with his concerns.⁶

The gay rights lobby pressed their advantage with the administration. So far, none of the gay asylum cases had been declared “precedent” for future cases. Theoretically, gay asylum was not yet official policy, though it was edging closer and closer.

A prominent gay magazine, *Out*, reported in May,

1994, that the INS’s Resource Information Center, which monitors human rights in other countries, was chiefly relying on the International Gay and Lesbian Human Rights Commission for its information on how homosexuals were treated in other societies. *Out* also claimed that hundreds of homosexuals were pressing their requests for gay asylum in the immigration courts.⁷

In the meantime, Rep. Barney Frank, the openly gay congressman from Massachusetts, had written Attorney General Janet Reno in 1993, urging her to use her discretionary authority to declare the long-closed Toboso case precedent for all future cases involving claims of persecution of homosexuals. Frank said he was acting on a request by the International Gay and Lesbian Human Rights Commission.⁸

The Attorney General Declares...

On June 16, 1994, Reno complied, stating in the memo attached to her Attorney General’s order, “The [Toboso] case holds 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....”⁹

Toboso might have been able to meet that test, but what of Garcia, to whom the INS had already granted asylum? He claimed he was badly treated by police in a single city. Does that constitute the kind of systematic, country-wide repression needed to meet the standard of government persecution?

Troubling Questions Raised

There are several troubling aspects to the Gay Asylum issue:

- How far will the concept of “government persecution” be taken? Although it is true that some governments do not obey their own laws, very, very few countries in the world outlaw homosexuality. Certainly Mexico does not.
- Who is to say who is a homosexual? There are no tests, no exams that prove sexual orientation or practice. Virtually anyone can make the claim, and who can prove otherwise?
- How low will we take the burden of proof? Now we have a protected class of persons, homosexuals, who do not have to prove their homosexuality, and who can make claims of governmental persecution even while the nation does not outlaw homosexuality.
- If we cannot really know with certainty which

asylum-seekers are truly homosexuals, presumably neither can people in the home countries. Why could the alien not return and blend in?

- The numbers involved are staggering. Homosexual advocacy groups regularly claim that 10 percent of the world's population is gay — 600 million people! Even accepting much lower (and more believable) numbers, couldn't America soon be deluged with persons demanding Gay Asylum? While the number of applicants for asylum that can be finally approved in any one year is limited to 10,000, the number that can be paroled into the country for an indefinite stay is not.
- Finally, who asked Americans whether they wanted to offer permanent shelter to this group of individuals? After all, homosexuality is far from universally accepted in the U.S. Could turning the asylum program into an avenue for gay immigration heighten social tensions here?

AIDS ASYLUM

Under U.S. law, HIV carriers and, by extension, AIDS sufferers, are barred from entering the country. This provision was passed in 1993 after President Clinton made his ill-fated attempt to open the U.S. military to practicing homosexuals.

Section 212(a) of the Immigration and Nationality Act states that one category of "excludable aliens who are ineligible to receive visas and who shall be excluded from admission to the United States" are persons who have been determined to have "a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome..."¹⁰

This seems clear enough. So how is it that immigration judges have begun not only to let HIV/AIDS carriers in, but to actually grant them asylum based on having HIV? And has the INS given its tacit approval to the practice?

In other words, is it possible that the immigration apparatus is granting amnesty to persons *specifically barred from the U.S. by Congress*? Not only that — is it possible the INS is sheltering these

persons for the very reason Congress decided to exclude them? This hardly sounds legal, but until exposed in *The Washington Times* last fall, it was happening.

The matter became prominent in late 1995 when the Presidential Advisory Council on HIV/AIDS, a White House political creation, asked the administration to declare HIV-positive individuals a "particular social group" for purposes of immigration. Buttressed with the proposed new social group classification, the council indicated that the INS should then issue deportation waivers for HIV/AIDS individuals.

Thus, if AIDS sufferers could be reclassified as refugees, asylum law would overrule the anti-contagious disease language. In other words, asylum trumps public health, and the will of Congress is ignored.

The administration's initial response to the task force's request was mostly positive. While stating that it was the INS's job to judge the cases of HIV carriers, like all others, on their individual merit, the White House did accept the particular social group argument in principle. Further, the administration noted, "humanitarian factors, such as an applicant's affliction with a serious medical condition, would generally weigh in the applicant's favor."¹¹

Then, in October, 1995, an immigration judge in New York granted asylum to a man from Togo, West Africa, who carried HIV. The 30 year-old computer engineer entered the U.S. in April, 1991, learning two years later he had AIDS. The INS moved to deport him but he claimed his medical status made asylum necessary. There was insufficient medicine in Togo to treat him, he said. Moreover, he and his family would be made to feel ashamed if his community learned the truth. The judge accepted this reasoning. In what appears to be a politically motivated move, the INS decided not to appeal the ruling. In essence, the precedent was set.¹²

Congressman Lamar Smith, the Texas Congressman who chairs the House Judiciary subcommittee on immigration, was outraged by the turn of events. "Congress never intended to allow

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admission of individuals simply because they have HIV," he told *The Washington Times*.

"This is a dangerous precedent that could make the United States the destination of choice for thousands of individuals from around the world with AIDS," he stated.¹³

Scariest still, the government is now not only

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allowing in HIV carriers, it has decided to pay for all their medical bills. The immigration bill recently signed into law originally banned the government from paying the medical bills of immigrants with AIDS. But the White House threatened to veto the entire bill unless that provision was removed, so congressional leaders relented.

It is presently the administration's policy to pay for immigrants' AIDS medical bills. Senator Alan Simpson said on the Senate floor that it costs the taxpayer \$119,000 each year to treat just one AIDS patient. A final twist: under the Americans with Disabilities Act, having AIDS potentially qualifies a person as "disabled." This, in turn, means one can get disability payments and health coverage from Social Security.

However, after the national press picked up this story from *The Washington Times*, the White House swiftly began back-pedaling. With the president's re-election bid just around the corner, a White House official stated, "We're not changing policy at all... We have a strict policy that's been enforced since 1993 that does not allow anyone with HIV to enter the country."¹⁴

Yet INS spokesman Brian Jordan insisted in October that the White House had instructed his agency to add HIV to its list of possible reasons to grant asylum status. "The White House has the last say," said Jordan. The anonymous White House official who spoke to *The Washington Times* insisted, however, that HIV carriers could only be issued a *waiver* rather than being granted actual

asylum. The difference is significant, since holders of waivers cannot gain permanent residency.

In any case, Rep. Smith noted that the INS has not appealed the case of the AIDS patient granted asylum by the New York judge. He suspects the White House may have pressured the agency to let the precedent stand.¹⁵

GENDER ASYLUM

Less well-documented, but possibly with even greater impact upon U.S. asylum procedures, is the new frontier of Gender Asylum. This landscape — like all frontiers — is confusing and often contradictory.

The thinking behind Gender Asylum is that certain groups of women in some nations are so uniformly repressed that they actually constitute a "particular social group." Being declared a member of a "particular social group" satisfies one essential condition for asylum. The other is demonstration that the asylum-seeker is persecuted *because of membership in the group*.

As stated by the Board of Immigration Appeals:

"Persecution on account of membership in a particular social group" encompasses persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties... (emphasis added).¹⁶

Determining which group of individuals make up a "particular social group" is tough enough, as will be demonstrated. But once a group is recognized, an applicant for asylum must prove that she has been "grievously harmed" personally because of her group affiliation through sexual abuse, beatings, jail time, etc.

Which Women Should Be Protected?

Probably the first decision involving Gender Asylum was handed down in 1985 by Judge Steven Breyer, now a Supreme Court justice. Judge Breyer accepted the arguments of a Ghanaian woman that she was a member of three particular social groups: *educated and professional women*, family with ties to a deposed regime, and other political ties of her own. Ms. Ananeh-Firempong claimed she might well face death if returned to Ghana, and Breyer

agreed.¹⁷

As cases of women requesting asylum based on gender considerations mounted during the 1980s and 1990s, the INS felt it must respond with more complete guidelines. So on March 26, 1995, the agency's Office of International Affairs issued a long and complex set of guidelines for asylum officers to use in interviews with aliens seeking asylum. The sorts of abuse that the guidelines discuss as *possible* forms of persecution are: "sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence, and forced abortion."¹⁸

This admittedly shocking list of examples includes three distinct kinds of repressions. First, actions which involve at least some governmental coercion and/or gross negligence (slavery, forced abortion). Second, actions which are administered by ethnic or tribal groups (genital mutilation). Third, misdeeds which are highly subjective and are mostly family disagreements (forced marriage, domestic violence).

All told, hundreds of millions — perhaps billions — of people fall into these categories. Freedom House reports that about three-quarters of the world population lives under conditions that are "not free" or "partially free."

In the Gray Areas

The INS guidelines are clear that sexual violence and other of the acts described above do not necessarily constitute "persecution." For example, if a woman was gang-raped by government soldiers, as happened in the case of a Haitian asylum-seeker, the act would not be considered persecution if it were carried out at random. That is, any women might have gotten the same treatment.

But in this particular case, the soldiers made it clear that they were raping her as punishment for her political views. Thus, the woman was recognized as a member of a particular social group (Haitian women with outspoken criticisms of the Haitian government), and as someone who had suffered "grievous harm" as a result. This case was declared a "precedent" by the BIA in 1993.¹⁹

Not only are some of the punishments meted out to women peculiar to them, the *causes* given for that persecution may be gender-related. The INS guidelines mention "marrying outside of an arranged marriage, wearing lipstick or failing to comply with other cultural or religious norms" as possible triggers for persecution.²⁰

Gender Asylum is so vague a concept that it is not surprising that some of the resulting decisions seem contradictory. Some practices, like alleged forced sterilizations in China, are not considered persecutory by INS because they involve governmental policies applied to an entire population.

This policy has been decried as hypocritical and wrong-headed by the pro-life community. If wearing lipstick can be considered a protected right, why not

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a women's fertility? The Clinton administration has responded to the criticism by refusing asylum but granting a number of Chinese women "parole," a kind of suspended animation in the system where the applicant may remain in the U.S., usually indefinitely.

Opposing Social Custom

On the other hand, in the case of *Fatin v. INS*, the Third Circuit Court of Appeals considered whether Iranian women forced to wear the veil and live by other fundamentalist Moslem rules were being persecuted. Ms. Fatin told the court that her failure to comply with these rules could, under Iranian law, result in "74 lashes, a year's imprisonment and, in many cases, brutal rapes and death."²¹

The court ruled that such treatment did indeed constitute persecution *if* two conditions were met: (1) the woman involved was so opposed to the veil, etc., that she could not comply without compromising her "deepest beliefs," and (2) she was willing to take the consequences of disobeying the Iranian law. The applicant, however, failed to convince the court she would indeed reject Islamic law at all costs, and was not granted asylum.

Although the widening of Gender Asylum protections leaves the *potential* for a major expansion in the number of asylees, the INS says

this has not happened — yet. When it issued guidelines on how to handle Gender Asylum in May, 1995, the INS Office of International Affairs instructed staff to report all Gender-related and Gender-based asylum cases for tabulation.

As of September 27, 1996, only 75 gender cases had been reported²² — a tiny number next to the 197,729 applying for asylum in 1995 alone.²³

A POSSIBLE SOLUTION

The “immigration judges” aren’t part of the judicial arm of government — they work for the executive branch. Presumably, they follow laws passed by the Congress. It is not for them to sew new law out of whole cloth in the manner of the federal bench.

So while it is true that the immigration judges, the Board of Immigration Appeals, and the INS itself seem set on inflating the categories of groups who qualify as legitimate refugees, Congress can stop this trend cold. Only Congress can declare who is to be admitted to the United States. If it has delegated that power to the president or the INS, it can always be taken back. In order to restore the integrity of our asylum policy, Congress must undertake the task.

Here’s one way:

The basic problem is that the term “particular social group” has been applied much too cavalierly by the immigration apparatus. Congress should wipe out all present categories of “particular social group” accepted as refugees. Instead, hearings should be held for Congress to decide which groups ought to be covered. Perhaps once a year, the immigration sub-committees should review the list and add to and subtract from it.

I suggest amending Section 101(a)(42) of the Immigration and Nationality Act²⁴ by striking every instance where the phrase “particular social group” occurs, and substitute “particular social group as defined by Congress.” Persons granted asylum — or even “parole” — should be charged against an overall immigration ceiling.

If Americans want to become a haven for AIDS patients the world over, fine. But let the people’s representatives decide — not some unelected bureaucracy. **TSC**

NOTES

¹ This language is found in section 101(a) (42) of the Immigration and Nationality Act.

² Masha Gessen, *OUT*, May 1994, p.76.

³ The task force operates under the auspices of Lambda Legal Defense and Education Fund and the Center for International Lesbian and Gay Associations. For an overview of their agenda in their own words, see the World Wide Web site located at <<http://www.verstek.com/stonewall/handouts/LGIART.html>>

⁴ It seems doubtful the Clinton administration will back this measure, since the president signed the law outlawing homosexual marriages.

⁵ James Brooke, “In Live-And-Let-Live-Land, Gay People Are Slain,” *The New York Times*, August 12, 1993.

⁶ Jennifer Warren, “Asylum OKd on Basis of Homosexuality Immigration,” *Los Angeles Times*, March 25, 1994.

⁷ *OUT*, *ibid.*

⁸ Bob Hohler, “US Says Those Persecuted As Gays Can Get Asylum,” *Boston Globe*, June 18, 1994, National/Foreign section, p.3.

⁹ Janet Reno, Memorandum for Mary Maguire, Acting Chair, Board of Immigration Appeals, June 16, 1994.

¹⁰ Added to INA by §2007(a) of the National Institutes of Health Revitalization Act of 1993.

¹¹ Presidential Advisory Council on HIV/AIDS, *Progress Report*, July 8, 1996, p.35.

¹² *73 Interpreter Releases*, 901, July 8, 1996.

¹³ Ruth Larson, *Washington Times*, October 3, 1996, A1.

¹⁴ Ruth Larson, “White House Waffles on HIV Asylum Policy,” *The Washington Times*, October 22, 1996.

¹⁵ *Ibid.*

¹⁶ Phyllis Coven, Memorandum: “Considerations For Asylum Officers Adjudicating Asylum Claims From Women,” Office of International Affairs, INS, May 26, 1995.

¹⁷ *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985).

¹⁸ *Ibid.*, p.9.

¹⁹ *Matter of Krome*, BIA, May 25, 1993.

²⁰ Phyllis Coven, INS guidelines, p.4.

²¹ *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993).

²² Statement of the Office of International Affairs, INS, September 27, 1996.

²³ Center for Immigration Studies.

²⁴ 8 USC 1101(a)(42).