



# Humanitarian Diplomacy

## The U.S. Asylum System's Role in Protecting Global LGBT Rights

---

By Sharita Gruberg and Rachel West     June 2015

Center for American Progress



# Humanitarian Diplomacy

The U.S. Asylum System's Role in Protecting  
Global LGBT Rights

---

By Sharita Gruberg and Rachel West     June 2015

# Contents

- 1 Introduction and summary**
- 7 The global state of LGBT rights**
- 13 Characteristics and outcomes of affirmative asylum cases**
- 18 Defensive asylum cases**
- 20 Findings**
- 31 Recommendations**
- 33 Conclusion**
- 34 Appendix**
- 37 About the authors and acknowledgments**
- 38 Endnotes**

# Introduction and summary

Nearly a decade before the U.S. Supreme Court ruled that U.S. laws which criminalize “homosexual conduct” are unconstitutional in the 2003 case *Lawrence v. Texas*, a gay Cuban man won protection in the United States from the persecution he faced in his native land because of his sexual orientation. It was the first time that persecution based on sexual orientation was established as valid grounds for asylum in the United States.<sup>1</sup>

In 1980, U.S. immigration law still excluded lesbian, gay, bisexual, and transgender, or LGBT, people from entering the country under a prohibition on what was termed “sexual deviation.”<sup>2</sup> Despite this ban, Fidel Armando Toboso-Alfonso came to the United States that year as part of the infamous Mariel boatlift, seeking protection from the violence and police harassment he faced in Cuba.<sup>3</sup> Beginning in 1967, the Cuban government maintained a file on Toboso-Alfonso, listing him as a “homosexual,” a criminal offense in Cuba at the time. Every two or three months for 13 years, he received a notice—which referred to him as “Fidel Armando Toboso, a homosexual”—to appear for a hearing. Each hearing involved an invasive physical examination and questions from Cuban officials about his sex life and partners. Frequently, he was detained for days after these hearings without being charged, subjected to verbal and physical abuse, and once sent to a forced labor camp for 60 days.<sup>4</sup>

Finally, Toboso-Alfonso was given two options—leave Cuba or spend four years in prison. He chose to leave and in 1980, upon arriving in the United States along with more than 124,000 Cuban refugees, was granted parole, or temporary permission to remain in the country.<sup>5</sup> However, his temporary permission to stay was lifted in 1985 after a criminal conviction. He then applied for asylum. Although the judge found that he met the definition of a refugee and that he was more likely than not to be persecuted if he returned to Cuba, Toboso-Alfonso was granted the lesser protection of withholding of removal because of his conviction, instead of

asylum. This meant that he could be deported to a country other than Cuba and had to pay a fee to work in the United States. (see Glossary)<sup>6</sup> The Immigration and Naturalization Service, or INS, appealed the judge's decision, arguing that "socially deviated behavior, i.e. homosexual activity is not a basis for finding a social group [grounds for asylum] within the contemplation of the [Immigration and Nationality Act]."<sup>7</sup> It further argued that recognizing gay men in Cuba as a particular social group eligible for asylum "would be tantamount to awarding discretionary relief to those involved in behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well."<sup>8</sup> In response, the Board of Immigration Appeals, or BIA, distinguished between criminal conduct and status. The BIA, in the decision *Matter of Toboso-Alfonso*, determined that it was not the applicant's criminal conduct that caused the Cuban government to target him but simply "his having the status of being a homosexual," and it affirmed the judge's decision.<sup>9</sup> Eight months later, President George H.W. Bush signed the Immigration and Nationality Act of 1990 into law, finally lifting the ban on LGBT people immigrating to the United States and opening the door for them to enter the country lawfully.<sup>10</sup>

While the United States and other countries have made great strides in recognizing the rights of LGBT people in the 25 years since the ban on LGBT immigration was lifted—and since the *Toboso-Alfonso* decision that people fleeing persecution based on their sexual orientation could be eligible for asylum—the LGBT community continues to face widespread persecution around the world, making the United States' role as a safe haven critical for the safety and well-being of LGBT people worldwide. But recognizing the right of LGBT people to access the U.S. asylum system is only the first step. More must be done to ensure that this right can be exercised meaningfully.

## Former Rep. Barney Frank (D-MA) and LGBT asylum

The battle to recognize sexual orientation as grounds for asylum unfortunately did not end with the BIA's decision in *Toboso-Alfonso*. In 1994, then-U.S. Attorney General Janet Reno gave the case precedential status, for the first time requiring all asylum adjudicators to recognize persecution based on sexual orientation as grounds for asylum.<sup>11</sup> She did so with a push from former Rep. Barney Frank (D-MA), who sat on the House Judiciary Committee at the time and wanted to use his position to eliminate the exclusion of LGBT people from the U.S. immigration system. Rep. Frank recently spoke to the Center for American Progress about his role in securing protections for LGBT people fleeing persecution. What follows is an excerpt from that conversation:<sup>12</sup>

"I had been determined when I got to Washington to get rid of the anti-gay exclusion from the immigration bill. My first year, I got put on [the] judiciary subcommittee on immigration to work on the overhaul that led to the first amnesty sanctions trade-off. I agreed to be part of the coalition to pass that bill in return for them letting me take the lead in rewriting the exclusions, which were not just gay people but even more of a problem, ideological. We finally worked that out, so by 1990 when Bush signed the bill, we got rid of the anti-gay exclusion. That was the prerequisite to asylum.

"I knew about asylum because all through the [19]80s I'd hear from people who were persecuted, and we tried to find some way for them to stay. Once that happened, I tried to get asylum on our list, but the next important issue for us was gays in the military.

"When [former President Bill] Clinton was frustrated in his effort to get gays in the military in '93 and we got stuck with 'Don't Ask Don't Tell,' I saw my opportunity. I then said to him, 'You have people critical of you over gays in military.' I believe that was unfair, I believe he tried his hardest."

Continuing his discussion with President Clinton, Rep. Frank recalled saying the following:

"But it does seem to me you have interest in showing there are things you can do to help gay people. I had three [issues] on my list. The most important was getting rid of the Eisenhower executive order saying we [LGBT people] were all security risks, which he did.

"The second was the asylum issue. And I asked him [President Clinton] to do that. The way to do that was through the attorney general declaring that case [*Toboso-Alfonso*] to be precedential. There was a little back and forth over it. Janet [Reno] was not initially convinced that she had the legal authority but I, frankly, kept up the heat with the president, and that's how it happened. It was explicitly done by [President] Clinton after the failure of the effort to get gays in military in part because he recognized the importance of showing he was not only pro-LGBT but capable of doing some real things.

"The third one was a letter reaffirming that sexual orientation could not be a factor in federal hiring. Getting both sexual orientation and gender identity explicitly added to the list for which you could get asylum by naming that case as precedential was something I specifically lobbied [President Clinton] to do, with the leverage being that it was important to enact some pro-gay policies after the failure of the military ban. When he did it, a very anti-immigrant group called FAIR [Federation for American Immigration Reform] announced it would lead to a tremendous influx of people pretending to be gay. That was just another one of a number of stupid predictions by anti-gay people that never came true."

In the 25 years since the *Toboso-Alfonso* decision, the U.S. government has recognized the right of LGBT people fleeing persecution in their home countries to seek protection in the United States. While much has been done to recognize the right of these individuals to access U.S. protection, there is little information available to determine how effective these measures have been, since the government does not collect sexual orientation and gender identity data in the asylum system. Recognizing the particular difficulties that LGBT asylum seekers have accessing protection in the United States, the U.S. Citizenship and Immigration Services, or USCIS, began to train asylum officers on adjudicating LGBT asylum claims in 2012.<sup>13</sup> However, without collecting data on LGBT asylum claims, there is no way of knowing how many LGBT people seek protection in the United States, where they come from, the outcomes of their cases, or if officer training is effective.

To help answer these questions, CAP enlisted the help of Immigration Equality—a pro bono legal service provider for LGBT and HIV-positive immigrants—and Human Rights First—an international human rights organization based in New York; Washington, D.C.; and Houston that, in addition to its international advocacy, also provides pro bono legal representation to asylum seekers. Both organizations provided access to their data about LGBT asylum seekers, along with insight into how well the United States is protecting LGBT people fleeing persecution.

Briefly, the data from Immigration Equality and Human Rights First show the following:

- LGBT people seeking asylum are more likely to win their claims if they apply affirmatively—that is, if they apply when they are not already in a removal proceeding—rather than defensively, where asylum seekers are in a removal proceeding and must prove that they should not be deported.
- Transgender people seeking asylum do not apply affirmatively as frequently as nontransgender asylum seekers do.
- Detention hurts LGBT applicants' chances of being granted asylum.
- LGBT asylum seekers are disproportionately affected by the one-year filing deadline.

In light of the extreme violence and persecution inflicted by state actors and citizens in many countries, the United States must ensure that LGBT people are not denied lifesaving protections such as asylum by factors unrelated to the merits of their claims.

## Glossary

**Affirmative asylum process:** Available to people seeking protection from persecution who are inside the United States or are seeking to enter the United States and not in removal proceedings. The application must be filed within one year of arriving in the United States, unless eligibility for an exception can be shown. An asylum officer interviews applicants and decides whether they are eligible for asylum, whether they meet the definition of a refugee, whether they are barred from being granted asylum, or whether to refer their case to an immigration judge.<sup>14</sup>

**Asylum:** A form of protection available to people who meet the definition of a refugee and who are either already in the United States or seeking to enter the United States at a port of entry.

**Relief under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or CAT:** A form of relief available to people who demonstrate that it is more likely than not that they will be tortured if deported to their country of origin. Torture “must be an extreme form of cruel and inhuman punishment” that “must cause severe pain or suffering.”<sup>15</sup> Unlike asylum and withholding of removal, there are no bars to eligibility for relief under this form of protection.<sup>16</sup>

**Defensive asylum process:** Available to people in removal proceedings who request asylum as a defense against deportation. An immigration judge hears the case in a courtroom-like proceeding, with individuals and their attorneys—if they have one—making the case for asylum and a U.S. government attorney making the case for deportation. The immigration judge decides whether the individual is eligible for asylum or another form of relief.<sup>17</sup>

**Particular social group:** Group of people who share a common, immutable characteristic that the members of the group cannot or should not be required to change.<sup>18</sup>

**Persecution:** Refers to a degree of harm that the asylum applicant previously experienced or fears. The term is not defined by law, but the BIA has found that persecution can consist of objectively serious harm or suffering that is inflicted because of an actual or perceived characteristic of the victim, regardless of whether the persecutor intends the victim to experience the harm as harm. Harm includes physical harm or the threat of physical harm, as well as “the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.”<sup>19</sup> A finding of past persecution motivated by one of five things—an applicant’s race, religion, nationality, membership in a particular social group, or political opinion—carries a presumption of future persecution. The persecution must be by a government entity, or the government must be unable or unwilling to control the persecutor.<sup>20</sup>

**Refugees:** People outside their country of origin who are unable or unwilling to return home and are unable or unwilling to avail themselves of the protection of their 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. Under U.S. law, asylum seekers are people seeking protection from within the United States, while refugees were screened outside the United States and referred for resettlement here.<sup>21</sup>

**Removal proceedings:** Also known as deportation proceedings, this term refers to an administrative proceeding to determine whether individuals can be removed from the United States under immigration law. An immigration judge conducts such proceedings.<sup>22</sup>



**Pro se:** Individuals advocating on behalf of themselves—without an attorney—in legal procedures.<sup>23</sup>

**Withholding of removal:** A form of relief available to people who can prove a more likely than not—51 percent or greater—chance of persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion if deported to their country of origin. Unlike asylum, there is no path to a green card or citizenship for

people granted withholding of removal, and they must pay an annual fee to work in the United States. The government retains the right to deport these people to a country other than their country of origin. People who are ineligible for asylum may be eligible for withholding of removal because there is no one-year filing deadline for withholding of removal; it is not discretionary, as a judge must grant it if someone proves eligibility; and some crimes that disqualify a grant of asylum do not disqualify a grant of withholding of removal.<sup>24</sup>

# The global state of LGBT rights

Today, at least 76 countries have laws that criminalize and harass people on the basis of their sexual orientation or gender identity and expression.<sup>25</sup> In much of the world, the penalty for being LGBT can be extremely harsh, from prison to even death in Iran, Mauritania, Sudan, Saudi Arabia, Yemen, and parts of Nigeria and Somalia.<sup>26</sup> Likewise, although it is unclear whether these laws are actually being implemented, Brunei, Iraq, Pakistan, and Qatar have legal codes that stipulate the death penalty for “homosexual acts.”<sup>27</sup> In addition to anti-sodomy laws, which in many cases are remnants of colonial occupation, a growing number of countries are strengthening old laws and passing new ones that target LGBT people.

2013 saw a rise in new and renewed laws criminalizing LGBT people, beginning with the Supreme Court of India reinstating a colonial-era law that criminalizes consensual same-sex relations.<sup>28</sup> Nigeria further criminalized consensual same-sex relations and instituted restrictions on the rights to free association, expression, and assembly for LGBT people.<sup>29</sup> In Uganda, the Anti-Homosexuality Act—previously known as the “Kill the Gays” bill because of an earlier version’s use of the death penalty as punishment for “homosexual activity”—was passed in 2013 and signed into law in February 2014.<sup>30</sup> Consensual same-sex relations were already illegal in Uganda, but this law further penalized them by punishing “aggravated homosexuality” with life imprisonment. Uganda’s Constitutional Court later annulled the law on a technicality in August 2014, but members of the parliament wrote a new bill shortly after. At the time of this report’s publication, however, it had not yet been introduced.<sup>31</sup>

In addition to laws criminalizing consensual same-sex relations, there has been a rise in what are known as “homosexual propaganda” laws, which prevent promoting equal rights for LGBT people under the guise of child protection.<sup>32</sup> In 2013, Russia passed a law banning “propaganda of non-traditional sexual relationships” to minors, in effect targeting LGBT people. Lithuania passed a similar law in 2014, with similar anti-propaganda laws being proposed in Belarus, Kyrgyzstan, Latvia, Moldova, Nigeria, Tanzania, Uganda, and Ukraine.<sup>33</sup> A recent Human Rights Watch report on the Russian law’s one-year anniversary found that the law’s passage has led to an increase in violence against and harassment of LGBT people.<sup>34</sup>

Persecution of LGBT people is not limited to laws that explicitly criminalize their identities. LGBT people, and those perceived to be LGBT, are subjected to the denial of basic rights, arbitrary imprisonment, rape, physical violence, discrimination, and even targeted for killings around the world.<sup>35</sup> Although rarely prosecuted, consensual same-sex relations between adult males has been illegal in Jamaica since 1864.<sup>36</sup> Despite the irregular enforcement of these laws, they have resulted in LGBT people in Jamaica being at increased risk of violence; these people also do not report such incidents to the police out of fear of unresponsiveness or mistreatment.<sup>37</sup> These fears are not without merit, as the 2011 report of the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, or U.N. Special Rapporteur, included a 2004 case from Jamaica in which a man was stabbed and stoned to death after police urged onlookers to attack him for being gay.<sup>38</sup>

Moreover, the persecution of LGBT people is not limited by geography, nor do laws protecting their rights ensure safety. Even though same-sex relations are not criminalized in Mexico—marriage for same-sex couples is even legal in some parts of the country—the U.N. Special Rapporteur found 555 recorded homicides of LGBT people in Mexico from 2005 to March 2013.<sup>39</sup> These murders were committed with impunity—in some cases, they were committed with the complicity of authorities. In many instances, victims’ bodies showed signs of torture and mutilation.<sup>40</sup> In Honduras, where “homosexual acts” were decriminalized in 1899, 31 LGBT people were murdered during an 18-month period from June 2009 through January 2011.<sup>41</sup> Among those killed was a 23-year-old transgender woman beaten and burned until her remains were virtually unrecognizable.<sup>42</sup> These incidents show that LGBT people flee not only because of explicit laws punishing them for who they are but also a culture of discrimination and persecution in which the government is unable or unwilling to provide protection.

### Advancements in international protections for LGBT people

While some countries are making conditions worse for their LGBT citizens, the United States and the United Nations have responded to persecution and discrimination against LGBT people by unequivocally stating, in the words of then-Secretary of State Hillary Clinton, that “... gay rights are human rights.”<sup>43</sup> In March 2011, the U.N. Human Rights Council issued a statement calling for an end to criminalization and violence against people because of their sexual orientation or gender identity. A few months later, it passed a resolution that expressed grave concern about acts of violence and discrimination against LGBT

people.<sup>44</sup> Later that year, on the 63rd anniversary of the Universal Declaration of Human Rights, Secretary Clinton addressed the U.N. General Assembly and called for a global consensus that “recognizes the human rights of LGBT citizens everywhere.”<sup>45</sup> At home, this policy took the form of a directive from President Barack Obama to all federal agencies—“International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons”—which included instructions for the State, Homeland Security, and Justice departments to enhance efforts to protect vulnerable LGBT refugees and asylum seekers.<sup>46</sup> In the United States, refugees are resettled from overseas, while asylum seekers apply from within the country.<sup>47</sup>

In the 20 years since sexual orientation was first recognized as a particular social group eligible for asylum in the United States, U.S. asylum laws, as well as international refugee frameworks for protecting LGBT people fleeing persecution, have become well established. Furthermore, a growing recognition of the dangers that LGBT people face in much of the world and an acknowledgment of the particular needs of LGBT people seeking protection has led to the creation of improved U.N. guidance on the 1951 Refugee Convention and/or the 1967 Protocol Relating to the Status of Refugees.<sup>48</sup> These are the key treaties outlining the rights of refugees and the responsibilities of nations that provide asylum to them.

In 2008, the Office of the U.N. High Commissioner for Refugees, or UNHCR, issued its first “Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity,” clarifying that sexual orientation and gender identity are both included within “membership of a particular social group.”<sup>49</sup> In 2012, it issued legal guidance to governments, legal practitioners, adjudicators, and UNHCR staff on adjudicating claims to refugee status based on sexual orientation and/or gender identity.<sup>50</sup> Also in 2012, after a two-year collaborative process between Immigration Equality and the U.S. Citizenship and Immigration Services, USCIS introduced a training course for refugee and asylum officers on adjudicating lesbian, gay, bisexual, transgender, and intersex, or LGBTI, refugee and asylum claims in order to improve the handling of these cases.<sup>51</sup> Unfortunately, no such training exists for U.S. immigration judges.

The growing recognition of the particular protection needs of LGBT people fleeing persecution comes as the number of people forcibly displaced around the globe is at its highest point since World War II, at more than 50 million people worldwide, including 16.7 million people who meet the definition of a refugee.<sup>52</sup> However, since neither USCIS nor the Department of Justice collects data on sex-

ual orientation or gender identity in the asylum system, there is no way to know how many LGBT people seek protection in the United States annually, how many are granted asylum, and whether USCIS' training module has had any impact on LGBT asylum adjudications. The data presented below, culled from the records of Immigration Equality and Human Rights First, hopefully will clarify the picture and begin to fill in existing knowledge gaps.

## Data sources and methodology

### Immigration Equality<sup>53</sup>

For 20 years, Immigration Equality has provided pro bono legal assistance to LGBT and HIV-positive immigrants. Data obtained from Immigration Equality for this report include 793 asylum cases closed from 2010 through 2014. These data include the year the case was closed; whether the case was affirmative, defensive, or referred to an immigration judge; the applicant's country of origin and gender or transgender status; whether the applicant was detained; and the verdict of the case. The verdict was unknown for 263 cases. Unknown verdicts could be the result of a number of different factors, including another attorney taking the case or the client ceasing contact with the Immigration Equality offices. These missing data were not included in any analysis of grant rates. The focus was on adjudications by asylum officers and immigration judges, so cases appealed to a higher court were also eliminated. Of the remaining cases with a known final verdict, 372 were affirmative, 103 were defensive, and 35 were referred to an immigration judge. Sixty were for people in detention awaiting their hearing.

### Human Rights First<sup>54</sup>

Human Rights First provided data on its one-year filing deadline cases to help shed light on how the deadline affects LGBT people seeking protection.

The goal of looking at this organization's cases was to get some sense of what is happening in asylum cases for LGBT individuals. While the government separates asylum seekers by the five grounds for asylum, it does not disaggregate the "particular social group" category, which can include gang members, female genital mutilation victims, LGBT people, and others. Human Rights First's information helps fill this void. One particular question explored was whether the 2012 USCIS training had any noticeable effect on case outcomes. Since most asylum seekers are not represented by counsel—and even fewer are represented by attorneys whose sole area of expertise is LGBT asylum or even asylum more generally—these findings are not representative. This is why it is so critical for the government to collect sexual orientation and gender identity data in its asylum program and to disaggregate and publish it.

## Methodology

In the sections that follow, a descriptive overview of the LGBT asylum seekers in these two datasets is provided—what countries they hail from, what share is transgender, and what share is granted asylum—to help characterize case outcomes. In addition, outcomes are compared across various groups of interest—including transgender vs. nontransgender cases and detainees vs. nondetainees—using statistical comparisons of means, or averages, called two-sample t-tests. This allows testing of whether the differences observed in the samples are statistically significant—that is, whether they are likely to reflect underlying differences between groups that exist in the larger population, rather than simply being due to random chance. Such tests may be of particular interest if differences across groups are hypothesized to be due to differential treatment in the court system. As is conventional, a difference is characterized as statistically significant if the associated t-test yields a confidence level of 5 percent or greater, meaning that the probability of observing that difference merely due to random chance is 1 in 20 or less.

As discussed below, relatively few of the statistical comparisons performed for this report meet conventional levels of

statistical significance, even when differences in the groups' averages are relatively large. This does not necessarily imply that differences between groups do not exist in the underlying populations; rather, this failure may instead be a consequence of the limitations of the data, particularly of the relatively small size of the data samples. For example, there are relatively few transgender asylum seekers in the dataset, as well as many individuals whose gender identity was not recorded; this makes statistical comparisons difficult. The size of the differences observed in certain outcomes, such as grant rates for transgender vs. nontransgender asylum seekers, is highly suggestive of differential treatment. But due to limited sample size, as well as to a nontrivial number of missing data points, a high degree of certainty in some of the observed trends cannot be claimed.

Such limitations underscore the need for stronger and more widespread data collection procedures. Given a larger sample size, researchers could determine with a greater degree of confidence whether true differences in outcomes underlie the differences observed in the data and could characterize the severity of these differences. Greater amounts of and better-quality information could confirm or refute some of the suggestive trends discussed below.

## Countries that LGBT people are fleeing

During the time period analyzed in this report, Immigration Equality handled cases from all over the world; however, the cases are not equally distributed across countries. Overall, Jamaica consistently had the highest number of people seeking protection in the United States each year. Russia had the second-highest number in 2010 and 2011 but was in third place from 2012 through 2014, replaced by Mexico in 2012 and 2014 and by Honduras in 2013.

These data suggest that both longstanding issues of persecution against LGBT people—such as in the case of Jamaica—and more recent trends toward further

criminalization of LGBT people—such as in the cases of Russia, Russian-influenced countries, Uganda, and Nigeria—contribute to an increase in LGBT people seeking protection in the United States.

Although the arrivals of women and children from Central America have dominated recent headlines, particularly in summer 2013, Immigration Equality data show a rise in LGBT cases from Honduras, El Salvador, and Guatemala during that time period as well. Between 2011 and 2012, there was also a rise in cases from LGBT asylum seekers from Egypt and Syria, coinciding with the Arab Spring. The observed data trend of increases in asylum applications from LGBT people coinciding with larger issues of conflict and instability around the globe suggests that persecution based on sexual orientation and gender identity may not always be isolated from larger conflicts.

# Characteristics and outcomes of affirmative asylum cases

Asylum seekers who are not in removal proceedings may file what is called an affirmative asylum application.<sup>55</sup> In these cases, individuals can only apply for asylum from within the United States, and the application must be filed within one year of U.S. arrival. Rather than being decided by an immigration judge, affirmative asylum applications are initially decided by an asylum officer who interviews applicants about their asylum applications. And while an attorney is allowed to represent applicants, the government does not provide attorneys in immigration proceedings, even for indigent people seeking protection.

After conducting the initial interview, the asylum officer is responsible for deciding whether the individual is eligible to apply for asylum; whether the applicant meets the definition of a refugee under the Immigration and Nationality Act; and whether the applicant is barred from receiving asylum under the act.<sup>56</sup> Asylum is a discretionary form of relief, and asylum officers can either grant meritorious cases; deny asylum if the applicant is in the United States lawfully but found ineligible under one of the statutory bars to asylum; or, if the officer is unable to approve the application, refer the case to an immigration judge for further review.<sup>57</sup> It should be noted that asylum officers are required by law to “receive special training in international human rights law, non-adversarial interview techniques, and other relevant national and international refugee laws and principles.”<sup>58</sup>

In 2012, the U.S. Citizenship and Immigration Services introduced a training module on adjudicating asylum claims made by LGBT people as part of its comprehensive five-week training program for all new asylum officers.<sup>59</sup> Prior to the USCIS training, asylum officers received no specific training on adjudicating claims of persecution based on sexual orientation or gender identity. Recognizing that the asylum process requires LGBT applicants to discuss sensitive and private details of their lives with government officials, the training not only covers the legal standards used in adjudicating claims but also seeks to educate asylum officers on particular challenges that LGBT people may face when presenting their claims and to increase sensitivity around these issues.<sup>60</sup>

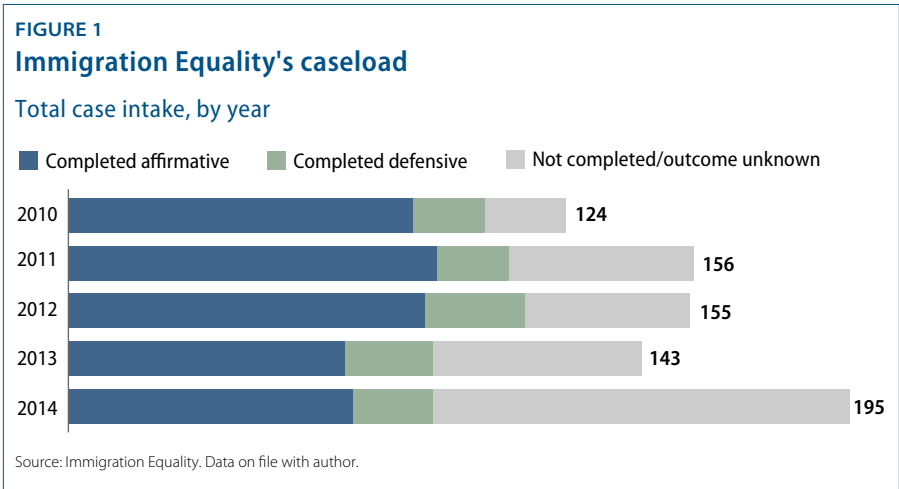


For example, someone who claims he was persecuted because he is gay must prove that he is in fact gay. This can be very difficult for someone who has been forced to hide his sexual orientation for his entire life and who may not conform to biases held by the asylum officer of what a gay man looks and acts like. Or, as in a case currently pending before the 9th U.S. Circuit Court of Appeals, judges may not be able to distinguish between sexual orientation and gender identity and may incorrectly assume a transgender woman in Mexico would not face persecution based on her gender identity because marriage for same-sex couples is legal in certain parts of Mexico.<sup>61</sup> Unlike for sexual orientation, there is not yet a precedential case establishing persecution on account of gender identity as a particular social group eligible for asylum.

---

### Analysis of Immigration Equality's affirmative cases

The majority of cases that Immigration Equality handles are affirmative. Including only those Immigration Equality cases with a known outcome, there were 372 affirmative cases adjudicated by an asylum officer between 2010 and 2014. Immigration Equality completed 86 affirmative cases in 2010, 92 in 2011, 89 in 2012, 69 in 2013, and 71 in 2014.



## Case outcomes

Completed affirmative applications were granted asylum an average of 99 percent of the time. While this represents an often lifesaving outcome for the LGBT individuals in this dataset, it is important to note that these cases likely are not representative of all LGBT affirmative asylum applicants, as Immigration Equality selects which cases it chooses to represent and provides excellent counsel to clients.<sup>62</sup> Additionally, by definition, affirmative applicants do not face the same obstacles that defensive applicants face, including the facts that they are not in detention, are not in removal proceedings, and their claim is not being disputed by a government attorney. Nationally, asylum grant rates are rising for affirmative asylum claims, but the national average of 46 percent in 2014<sup>63</sup> is much lower than the Immigration Equality grant rate noted above.

Looking at affirmative applications by gender identity, a smaller proportion of transgender asylum seekers apply affirmatively, 69.8 percent, compared with 75.85 percent for nontransgender asylum seekers, though this difference is not statistically significant and possibly due to the relatively small number of transgender immigrants—53—included in this dataset. However, existing data also suggest that transgender people may be less likely to affirmatively apply for asylum. Discrimination and harassment, including from law enforcement, may contribute to transgender asylum seekers being more reluctant than lesbian, gay, and bisexual asylum seekers to seek protection from the government.<sup>64</sup> One result of the widespread discrimination faced by transgender people, particularly transgender people of color, is a lack of access to legal information and not even knowing that asylum is an available form of relief for people persecuted because of their gender identity.<sup>65</sup>

**FIGURE 2**

**Countries of origin: Affirmative**

Top 10 countries of origin for completed affirmative asylum cases, by number of cases

2010	2011	2012	2013	2014
Jamaica	Jamaica	Jamaica	Jamaica	Jamaica
Russia	Russia	Russia	Honduras	Mexico
Grenada	Peru	Mauritania	Russia	Russia
Mexico	Egypt	Honduras	Ukraine	Guyana
Paraguay	Honduras	Belize	Dominican Republic	Macedonia
Uzbekistan	Mexico	Croatia	Guatemala	Ukraine
Venezuela	Trinidad and Tobago	Ivory Coast	Nigeria	Honduras
El Salvador	Brazil	Egypt	Pakistan	India
Ghana	China	Ecuador	Trinidad and Tobago	Malaysia
Kenya	Colombia	El Salvador	Turkey	Uganda

Source: Immigration Equality. Data on file with author.

Referred cases

When an asylum officer does not deny an asylum application but feels that he or she cannot make a final determination and the applicant no longer has legal status to remain in the United States, the case is referred to an immigration judge. For Immigration Equality’s cases, 8.6 percent of affirmative cases were referred to an immigration judge, compared with an observed rate of 25 percent to 30 percent for all affirmative cases.<sup>66</sup> Immigration Equality’s referred cases were granted asylum in 91.4 percent of these cases. Combining asylum grants and grants of withholding of removal, 94.3 percent of Immigration Equality’s referred cases between 2010 and 2014 resulted in a positive outcome—being granted asylum, withholding of removal, or protection under the Convention against Torture.

The U.S. Executive Office for Immigration Review’s, or EOIR’s, annual report on immigration statistics shows that affirmative cases referred to immigration judges were granted asylum 75 percent of the time in fiscal year 2014.<sup>67</sup> Immigration courts tend to have low grant rates, only granting asylum in 28 percent of defensive cases that same year, so this is not a population of adjudicators traditionally disposed to granting asylum.<sup>68</sup>

This high rate of approvals for referred cases relative to the approval rate in the general population indicates that asylum officers may be referring cases that should be receiving grants. For LGBT people seeking protection, the complexity of their cases may be the reason why asylum officers are referring cases, rather than granting meritorious claims at the outset. This is problematic, since referrals take longer to adjudicate and use more resources. Not only does an asylum officer have to hear the case, but an immigration judge must hear it as well, contributing to the immigration court's enormous backlog.

# Defensive asylum cases

Asylum claims made by individuals already in removal proceedings who express a fear of removal due to persecution are known as defensive applications. This type of application also includes people apprehended by immigration officers within 100 miles of the U.S. border or at a port of entry who are subject to expedited removal and who express fear of persecution if deported when apprehended. Unlike affirmative cases, asylum seekers in defensive proceedings must prove why they should not be deported, and they are subject to cross-examination from government attorneys who argue in favor of their deportation.<sup>69</sup>

---

## Analysis of Immigration Equality's defensive cases

Immigration Equality represents fewer people in defensive proceedings than in affirmative claims. It had a total of 103 defensive cases for the years examined: 18 defensive cases in 2010; 18 in 2011; 25 in 2012; 22 in 2013; and 20 in 2014. A total of 60 of the individuals in these cases were detained.

## Case outcomes

Analyzing the total sample of cases, success rates in defensive cases are much lower than in affirmative cases. Unlike Immigration Equality's affirmative applications, where asylum is granted 99 percent of the time, defensive claims are granted asylum 66 percent of the time. However, 24 percent of defensive asylum applicants are granted lesser forms of relief, such as withholding of removal or protection under the Convention against Torture. Withholding of removal and CAT require a higher standard of proof of future persecution than asylum; a judge found a total of 90 percent of the defensive claims eligible for relief from removal.

Transgender asylum seekers are more likely than nontransgender applicants to apply for asylum defensively, with 26 percent of Immigration Equality’s transgender applicants applying defensively, compared with 20 percent of nontransgender applicants. As described above, factors such as discrimination, a lack of access to legal resources and information about their right to apply for asylum, and higher rates of interactions with law enforcement can explain the larger proportion of transgender asylum seekers who apply defensively.<sup>70</sup> Again, these findings are not statistically significant because of the small sample size. However, statistically significant differences may be found in a larger sample size, underscoring the need for the U.S. government to gather these data.

**FIGURE 3**  
**Countries of origin: Defensive**

Top countries of origin for completed defensive asylum cases, by number of cases

2010	2011	2012	2013	2014
Ghana	Colombia	Jamaica	Ecuador	Honduras
Jamaica	Ecuador	El Salvador	Colombia	El Salvador
Afghanistan	El Salvador	Mexico	El Salvador	Guyana
	Mexico		Guyana	Ghana
				Guatemala

Source: Immigration Equality. Data on file with author.

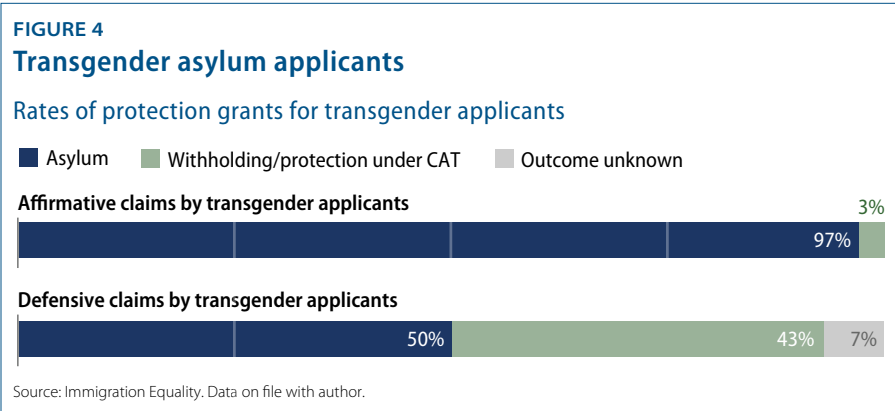
# Findings

## LGBT people seeking asylum are more likely to win their claims if they are applying affirmatively rather than defensively

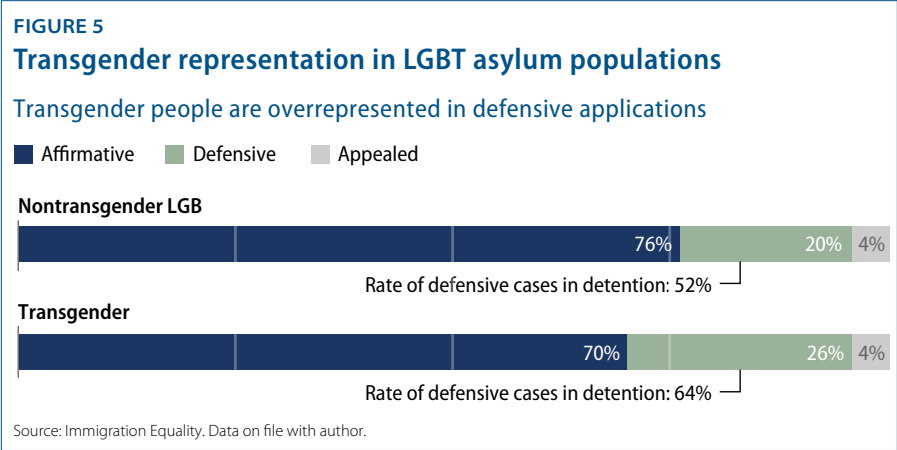
While 99 percent of Immigration Equality’s affirmative cases were granted asylum, only 66 percent of its defensive cases were granted asylum. Since 24.3 percent of defensive claims were granted another form of relief from deportation, it appears that many LGBT people seeking protection have legitimate claims, but there are significant barriers to applying within one year of arriving. These include a lack of access to legal information about their right to apply for asylum; a fear of coming out to a government official after a lifetime spent hiding their sexual orientation or gender identity; and/or criminal convictions that limit their access to the full protection afforded by being granted asylum.

## Transgender people do not apply affirmatively as frequently as nontransgender people do

For transgender asylum seekers, whether they applied affirmatively or defensively made an enormous difference in terms of whether the applicant was granted relief, since applicants are half as likely to win asylum if they are in removal proceedings. Ninety-seven percent of Immigration Equality’s affirmative transgender applications were granted asylum, compared with only 50 percent in defensive cases.



Transgender applicants also are more likely to be granted withholding of removal or protection under the Convention against Torture than nontransgender applicants. While 24 percent of the defensive claims were granted withholding of removal or protection under CAT, the rate for transgender applicants was nearly twice that at 43 percent. The burden of proof for withholding of removal and CAT protection is higher than that for asylum, suggesting that transgender applicants in this sample had a high likelihood of facing persecution if deported, but through either failing to file their applications within one year of arriving in the United States or a criminal conviction, they were ineligible for the full protection of asylum. Furthermore, the discrimination and police profiling faced by transgender applicants not only appears to make them less likely to apply affirmatively but also means they are less likely to receive asylum and all of the benefits that come with it.<sup>71</sup> Instead, although they have a clear need for protection, many are eligible only for lesser forms of relief that leave them in limbo.



Detention hurts LGBT applicants' chances of being granted asylum

The data from Immigration Equality show that detention has a statistically significant impact on asylum case outcomes for LGBT people seeking protection. Asylum seekers were 11.5 percent more likely to succeed in their claims if they were not detained. Only 45 percent of detained cases were granted asylum, and 28.39 percent were granted lesser forms of protection. A greater proportion of Immigration Equality's transgender clients seeking asylum were detained than were nontransgender LGB clients. A full 64.3 percent of transgender asylum seekers in defensive proceedings were detained, compared with 52 percent of nontransgender LGB asylum seekers. For 20 percent of Immigration Equality's detained cases,



it was impossible to determine whether applicants were transgender because no gender identity was listed, so these cases were not included in this analysis. A larger sample size is needed to definitively determine whether transgender asylum seekers are detained at higher rates than nontransgender asylum seekers.

---

## LGBT asylum seekers are disproportionately affected by the 1-year deadline

Immigration Equality did not have data on how the one-year filing deadline affects its clients, so Human Rights First provided these data, which included both LGBT and non-LGBT clients. Among cases represented by Human Rights First, it is clear that LGBT asylum seekers are disproportionately affected by the one-year filing deadline. While LGBT asylum seekers represent 11 percent of the organization's open cases, they account for 20 percent of its open cases with filing deadline issues.

For people who have spent their lives hiding their identity from government officials in order to survive, it is unsurprising that they would need more than one year to be able to disclose their sexual orientation or gender identity to a government official, particularly if they are recovering from trauma caused by the persecution they faced.<sup>72</sup> Another reason why LGBT people may be disproportionately affected by the one-year deadline is that they may not know that persecution based on sexual orientation and gender identity is grounds for asylum. A lack of access to legal resources and information also could account for this disparity, though the degree to which LGBT asylum seekers have access to this information is presently unknown. A Human Rights First report found that many asylum seekers with well-founded fears of persecution were denied asylum simply for failing to meet the deadline.<sup>73</sup>

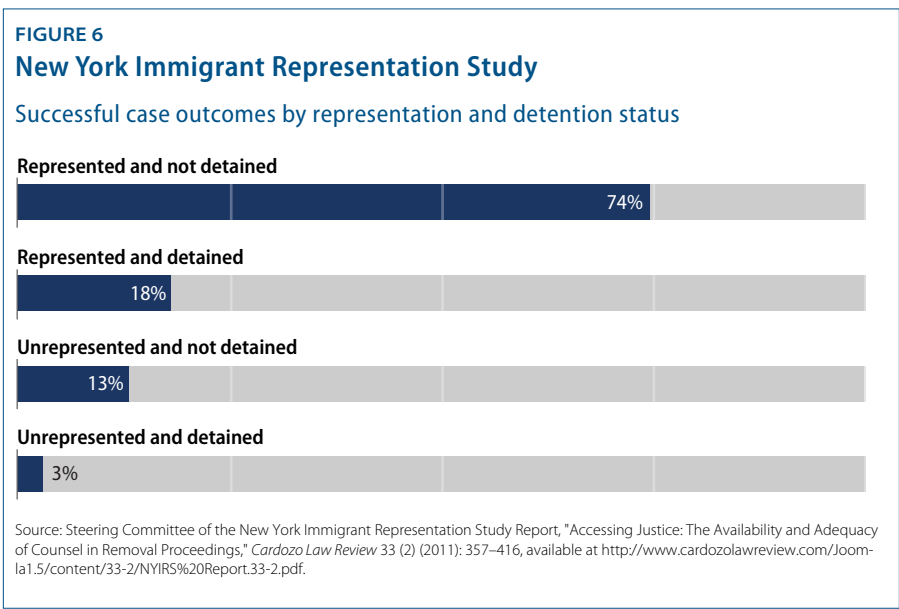
---

## Overarching issues

### Counsel is key

The outcome of an immigration case can have an enormous impact on an individual's life. This is particularly true in asylum cases, where deportation can be practically a death sentence. A two-year study of immigration proceedings in New York City—the New York Immigrant Representation Study, conducted by a group convened by Judge Robert A. Katzmann of the U.S. 2nd Circuit Court

of Appeals and the Vera Institute of Justice in 2010—found that the two most important variables affecting a successful case outcome—being granted relief from deportation or having a case terminated—were having an attorney and not being detained. Immigrants with lawyers are nearly six times more likely to have a successful case outcome than those not represented by counsel.<sup>74</sup> Considering that asylum applicants must establish credibility and provide evidence to prove their claim, a difficult task for individuals not familiar with the law and who frequently are forced to flee their home countries quickly without time to gather evidence to support their claim—something exacerbated for LGBT applicants, who must prove the identity they were forced to hide—the enormous difference that competent counsel makes is not surprising. In the New York study, 74 percent of cases in which people were represented by counsel and not detained resulted in a successful case outcome. This dropped to 18 percent for people represented by counsel but in detention. Those without a lawyer fared even worse: 13 percent who were not detained had successful outcomes, while only 3 percent who were detained and did not have a lawyer had successful outcomes.<sup>75</sup>



Access to counsel is particularly critical in asylum proceedings. According to data maintained by the Transactional Records Access Clearinghouse at Syracuse University on immigration court cases from FY 2009 to FY 2014, 89 percent of all asylum seekers not represented by an attorney in removal proceedings are denied asylum.<sup>76</sup> For affirmative asylum applicants, the grant rate is 19 percent higher for asylum seekers represented by counsel.<sup>77</sup> The New York study found that 50 percent of cases before immigration courts were represented by counsel during at

least one point in the proceedings, but this does not address the quality or consistency of counsel received, a factor that can also make a significant difference.<sup>78</sup>

While the right to counsel that is explicitly stated in the Sixth Amendment to the Constitution only applies to criminal prosecutions—immigration proceedings are civil—courts have recognized a right to counsel for immigrants in removal proceedings, though not necessarily at the government’s expense. The American Bar Association, or ABA, has come out in support of the due process right to counsel for all people in removal proceedings, as well as referral to pro bono or appointed counsel for indigent individuals eligible for immigration relief. The ABA also advocates overturning the requirement that representation in removal proceedings is “at no expense to the government” and favors allowing judges to appoint counsel at the government’s expense in a limited number of situations.<sup>79</sup>

---

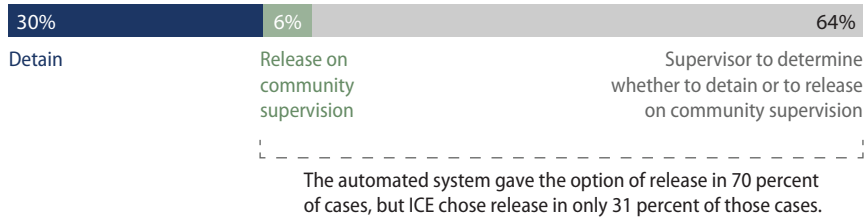
## Detention hurts LGBT people’s ability to win asylum

As shown in the New York Immigrant Representation Study, the second important factor that determines case outcomes after representation by counsel is the seeker’s detention status.<sup>80</sup> Individuals represented by counsel but detained are 25 percent less likely to have a successful case outcome than those not detained and represented by counsel. Even among those not represented by counsel, individuals who are not in detention are 10 times more likely to have a successful outcome than those in detention.

Moreover, in its 2015 report, the Office of the U.N. High Commissioner for Human Rights found that it is not just other countries where LGBT people face abuse. According to the report, “LGBT people in [U.S.] detention have been subject to cruel, dehumanizing treatment.” Specifically, it found “[s]ixteen gay and transgender individuals in the United States [who] were allegedly subjected to solitary confinement, torture and ill-treatment, including sexual assault, while in detention in immigration facilities.”<sup>81</sup> Unfortunately, an earlier CAP column revealed that even though Immigration and Customs Enforcement’s, or ICE’s, own intake process recommends release or provides it as an option 70 percent of the time for LGBT immigrants, it elects to detain them 68 percent of the time. LGBT people are not only at higher risk of physical and sexual abuse in detention; these data show that being detained also has a negative effect on their ability to win asylum cases.<sup>82</sup>

**FIGURE 7**  
**LGBT immigrants are often detained unnecessarily**

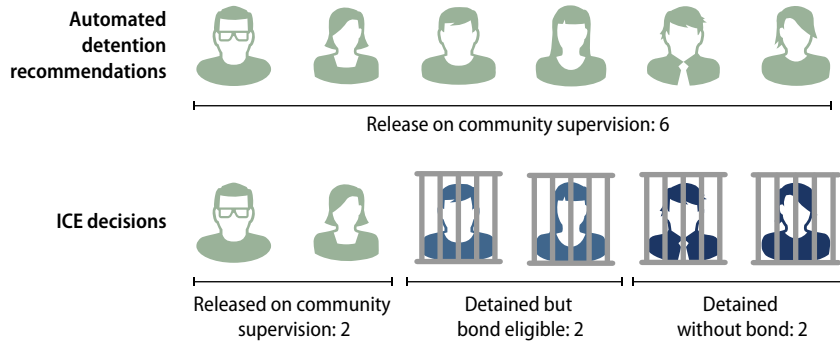
**Automated detention recommendations**



**ICE's actual detention decisions**



ICE elects to detain two-thirds of the LGBT immigrants who were recommended for release by the automated system



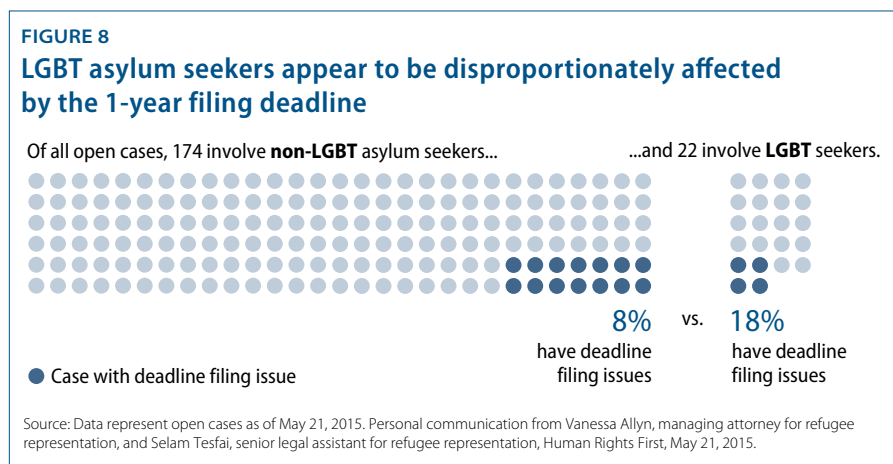
Source: Author's calculations from documents on file with author. Documents were accessed through a March 13, 2015, Freedom of Information Act request to U.S. Immigration and Customs Enforcement.

The 1-year filing deadline disproportionately affects LGBT people seeking protection

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act, or IIRIRA, introduced a new requirement for asylum applications to be filed within one year of the applicant's arrival in the United States, with the rationale of preventing fraudulent asylum claims.<sup>83</sup> As a result of this rule, eligible asylum seekers are denied protection from persecution simply for failing to file the correct paperwork within one year of arriving in the United States, even though they still may be at risk in their home country. The rule includes an exception for "changed

conditions, which materially affect the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay in filing the application.”<sup>84</sup> Courts have found that HIV diagnosis or the process of coming out can qualify as changed circumstances, but the arbitrary deadline has proven harmful to eligible asylum seekers unable to access protection because they missed the deadline, with a disproportionate impact on LGBT applicants.<sup>85</sup>

A report from the National Immigrant Justice Center and Human Rights First found that one in five asylum applications were filed after the one-year deadline.<sup>86</sup> People fleeing persecution who do not meet the deadline and are not eligible for an exception must meet a higher—and much harder to establish—burden of proof to qualify for withholding of removal or otherwise face deportation; they need to prove an at least 51 percent likelihood of future persecution if they are returned to their country of origin.<sup>87</sup>



Two transgender women represented by Human Rights First missed the filing deadline by years—one by five years and the other by 10 years—because it took them that long to overcome their fear of coming out as transgender to government officials after a lifetime of persecution by police in their home countries. During the time that they were too afraid to come out of the shadows and seek protection, they struggled to survive in the United States as undocumented transgender women. They faced difficulty in securing employment and were also victims of domestic violence, but their fear of law enforcement prevented them from reporting the abuse to authorities.

Eventually, they found the strength to find legal counsel and to try to better their situation by seeking protected status. Unfortunately, by that time, even though the situation in their home countries remained unchanged, they were barred from receiving asylum because they had missed the one-year deadline and did not qualify for an exception to the deadline. A Human Rights First report found that 17 percent of its new clients had not filed for asylum within a year and that many with well-founded fears of persecution did not qualify for an exception to the rule.<sup>88</sup>

Due to the arbitrary nature of the deadline and its harmful effects on people seeking protection in the United States, there is a growing recognition of the need to eliminate the deadline in order to ensure that people with a well-founded fear of persecution are not subject to deportation, which can in some cases be a death sentence for LGBT asylum seekers. In 2013, Sen. Patrick Leahy (D-VT) and Rep. Zoe Lofgren (D-CA) introduced the Refugee Protection Act, which sought to eliminate the one-year filing deadline.<sup>89</sup> The legislation was incorporated into the immigration reform bill that passed the Senate in 2013, but unfortunately, the House of Representatives failed to take action on immigration reform.

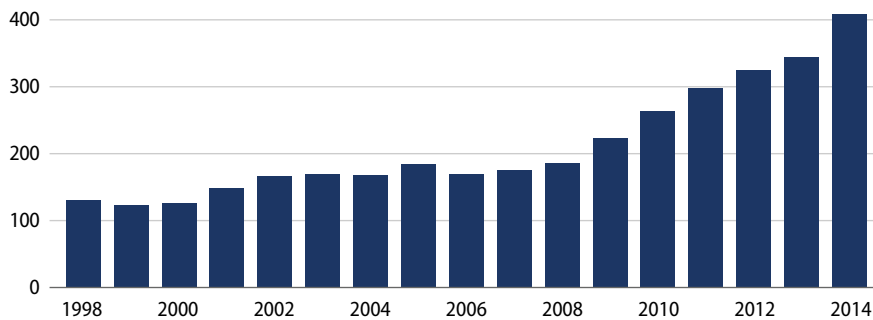
---

## The immigration court backlog threatens the due process rights of asylum seekers

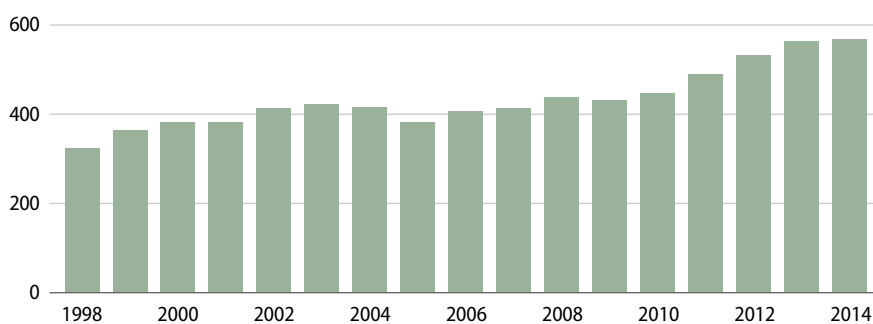
UNHCR estimates that there are more refugees in the world needing protection today than at any time since World War II.<sup>90</sup> This increased need for protection is not only seen in the increase in refugees needing resettlement through UNHCR, but it has also resulted in an increase in people seeking protection inside the United States, with the number of affirmative applications received by the U.S. Citizenship and Immigration Services increasing as well. USCIS received approximately 45,000 affirmative applications in 2013, many more than in past years, when the agency received between 28,000 and 30,000 applications.<sup>91</sup> Increased applications, prioritization of detained cases, loss of funding under USCIS' fee structure, and a staffing shortage all created an enormous backlog of cases, from 6,940 cases waiting to be adjudicated in May 2010 to 82,175 cases as of March 2015.<sup>92</sup> The Immigration and Nationality Act requires an asylum seeker to be interviewed within 45 days of filing an application and for a decision within 180 days "in the absence of exceptional circumstances."<sup>93</sup> Currently, applicants can wait more than two years for an interview.<sup>94</sup>

**FIGURE 9**  
**Backlog of cases and processing times in immigration courts,**  
**FY 1998–2014**

Number of cases in Executive Office for Immigration Review backlog (in thousands)



Average number of days for an immigration case to process



Note: FY 2014 data are through August 2014.

Source: TRAC Immigration, "Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts," available at [http://trac.syr.edu/phptools/immigration/court\\_backlog](http://trac.syr.edu/phptools/immigration/court_backlog) (last accessed October 2014).

Unlike resettled refugees, asylum applicants are not eligible for government financial assistance or benefits while their cases are pending. While they can receive work authorization 180 days after applying for asylum, the backlog increases the amount of time they are unable to access assistance.<sup>95</sup> Ruth Dickey, an immigration attorney in Washington, D.C., described the backlog’s impact on her clients to the authors, “Because of homophobia, my LGBT clients cannot access housing, job leads, or informal lending from their immigrant communities. It is much harder for LGBT people to survive for 180 days post-application before they are eligible for employment authorization. Waiting years for an interview or hearing—and sometimes even longer for a final decision—is incredibly anxiety-inducing for them.”<sup>96</sup> This backlog also threatens the integrity of the asylum system, opening it up to abuse through frivolous claims and depriving asylum seekers of having their cases fairly adjudicated in a timely manner, leaving their status in limbo.

Another reason for the affirmative asylum case backlog is that USCIS asylum officers are tasked with conducting credible fear screenings in expedited removal cases, the number of which have expanded exponentially with the use of expedited removal.<sup>97</sup> IIRIRA created the process of expedited removal, which for the first time allowed immigration agents to deport summarily immigrants who lack proper documents, commit fraud, or willfully misrepresent facts. A decision of deportation by an immigration agent can be done without any judicial review of refugees who arrive at a port of entry or who are already in the United States but cannot prove that they have been physically present in the country for two continuous years, unless they indicate an intention to apply for asylum or express a fear of return.<sup>98</sup> The burden on asylum seekers in expedited removal is enormous, particularly for people unfamiliar with the existence of asylum or unaware that they could qualify for protection. Furthermore, LGBT people are unlikely to tell a Border Patrol officer that they are LGBT when they are intercepted, since questioning often happens in a holding cell with no privacy and in front of the very countrymen and women who they are afraid will persecute them. In instances where fear is expressed, an asylum officer conducts a credible fear interview, or CFI, to determine if the individual has a significant possibility of establishing eligibility for asylum. If credible fear is found, asylum seekers are entitled to have their cases reviewed by an immigration judge.<sup>99</sup>

IIRIRA requires asylum seekers to be detained pending a final determination of credible fear or, if credible fear is not found, until the individual is deported.<sup>100</sup> In order to avoid wait times of several months in detention, the USCIS Asylum Division has redirected asylum officers to prompt CFIs and to hire additional staff; however, this has not been enough to keep up with caseloads. Credible fear receipts increased more than 100 percent from FY 2009 to FY 2011 and nearly another 100 percent from FY 2011 to FY 2014.<sup>101</sup> The astronomical rise in credible fear receipts can be attributed to a combination of the increased use of expedited removals and growing numbers of people seeking protection from violence and persecution.<sup>102</sup>

The situation is no better for defensive cases. While there has been a fourfold increase in resources for Border Patrol, detention, and removal—from \$4.5 billion in 2002 to \$18 billion in 2013—resources for immigration judges have stagnated, resulting in unprecedented backlogs of cases.<sup>103</sup> The number of Border Patrol officers doubled, while only 23 more immigration judges are on the bench today than in 2003, a 10.5 percent increase.<sup>104</sup> With the increased caseloads and not enough judges and staff to process them, the current average wait time for a case to go before an immigration judge is 598 days.<sup>105</sup>



FIGURE 10

### Funding for immigration enforcement versus immigration courts, FY 2003 versus FY 2014

ICE and Customs and Border Protection, or CBP, combined funding compared with Executive Office for Immigration Review funding

2003



2014



Source: Executive Office for Immigration Review, *Budget Request At a Glance* (U.S. Department of Justice, FY 2009–2015); U.S. Department of Justice, *Budget and Performance Summary, Administrative Review and Appeals (ARA)* (FY 2005–2008); U.S. Department of Homeland Security, *Budget-in-Brief* (FY 2004–2015).

### Border personnel versus immigration judges, FY 2004–2014

CBP agents and immigration judges per fiscal year

2004



2006



2008



2010



2012



2014



Source: Customs and Border Protection, *Border Patrol Agent Staffing by Fiscal Year* (Oct. 1st through Sept. 30th) (U.S. Department of Homeland Security), available at <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%20Staffing%20Statistics%201992-2013.pdf> (last accessed October 2014); personal communication from Executive Office for Immigration Review's Office of Legislative and Public Affairs, U.S. Department of Justice, October 7, 2014.

# Recommendations

The United States must take the following steps to make sure that LGBT asylum seekers are not denied protection because of factors that are unrelated to the merits of their claims:

- **The U.S. Citizenship and Immigration Services and the Executive Office for Immigration Review should collect, disaggregate, and publish data on sexual orientation and gender identity in asylum claims.** Because Immigration Equality and Human Rights First provided data on their LGBT clients, the picture concerning asylum claims made by LGBT applicants and the outcome of those cases is clearer. However, the data provided represent a small segment of LGBT asylum seekers. There is still no accurate measure of how many LGBT people seek protection in the United States every year or what happens to people seeking protection without counsel. Further, the rate of representation for LGBT people compared with non-LGBT asylum seekers is unknown. Given what is known about the tremendous impact that representation has on case outcomes, it is critical to have data on all LGBT asylum applicants, including pro se LGBT applicants, to ensure that they are able to access protections and to help increase the understanding of how the global climate of LGBT rights affects LGBT people seeking protection in the United States.
- **More resources must be allocated toward adjudicating asylum claims to keep up with rising enforcement appropriations.** The enormous backlogs in affirmative asylum and defensive cases continue to grow exponentially. Greater resources are needed to ensure that cases are adjudicated in a fair and timely manner. More immigration judges and staff should be hired, as well as more asylum officers. Congress should appropriate the funds necessary to ensure that as immigration laws are enforced, the due process rights of immigrants are protected.

- **Promote access to free legal counsel for indigent asylum seekers and counsel for all asylum seekers.** While this analysis was limited to people with counsel, studies show that the high grant rates in this dataset are consistent with having competent counsel. Not only does providing counsel ensure the protection of due process rights, but the New York Immigrant Representation Study showed it is also key in ensuring that cases are quickly and fairly adjudicated. This helps address backlog issues.<sup>106</sup>
- **Increase training for immigration officers and judges on LGBT asylum issues.** The current training for asylum officers is an enormous step forward, but more is needed. Immigration judges do not have similar training, nor do Border Patrol agents who conduct initial credible fear screenings in expedited removals.
- **End the one-year filing deadline.** The one-year deadline prevents people with legitimate asylum claims from getting full protections. It also disproportionately affects LGBT immigrants. The U.S. asylum system has numerous safeguards in place to prevent fraud. An arbitrary administrative filing deadline is not necessary; it harms asylum seekers and increases caseloads for immigration judges when an asylum officer could adjudicate the claim instead.
- **End the widespread use of immigration detention.** In addition to being represented by counsel, not being detained makes an enormous difference in whether LGBT people seeking protection are able to win asylum. Unfortunately, despite a 2009 memorandum prioritizing release for asylum seekers who passed their credible fear interviews, they frequently remain in detention or must pay bond amounts upward of \$5,000 in order to be released.<sup>107</sup> Not only does detention further traumatize people who have often already been subject to arbitrary detention for who they are, it is expensive, unnecessary, and can arbitrarily result in a legitimate asylum seeker being deported back to unsafe conditions or even to their death. Community-based alternatives to detention are effective, particularly because it is in the interest of an asylum seeker to attend court dates.<sup>108</sup>

# Conclusion

As President Obama noted in his memorandum on “International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons,” the United States’ asylum and refugee programs are a key component of efforts to advance the rights of LGBT people worldwide, providing a safe haven for those fleeing persecution.<sup>109</sup> Unfortunately, there is currently no way to definitively know how well our protection systems are meeting these people’s needs.

This report’s analysis of LGBT asylum cases shows that the discrimination LGBT people face in other aspects of life—such as housing, education, and employment—also affects their ability to win lifesaving asylum protections, making access to counsel for this population critical.<sup>110</sup> LGBT asylum applicants’ chances of winning are hurt by arbitrary factors unrelated to their protection claims. They are disproportionately affected by the one-year filing deadline for asylum applications and are less likely to win asylum when they are detained, an extreme and often traumatizing restriction on their liberty to which they are often unnecessarily subjected. Furthermore, a lack of access to legal information combined with the myriad ways that transgender people are discriminated against suggest that transgender people fleeing persecution are less likely to apply affirmatively for asylum and more likely to qualify for insufficient protections that leave them in legal limbo. However, a larger dataset is needed to conclusively prove differential treatment.

The United States’ desire to provide safety to LGBT people fleeing persecution is commendable, but in order to comprehensively assess the adequacy of existing efforts to protect LGBT asylum seekers—as well as identify remaining gaps—the government must collect sexual orientation and gender identity data and use this information to ensure a just and equitable asylum system that meets America’s moral and treaty obligations.

# Appendix

---

## Asylum law

In the aftermath of World War II, the United Nations established international standards and principles to protect the rights of refugees, or people unwilling or unable to return to their country of origin owing to a well-founded fear of being persecuted on account of one of five protected grounds.<sup>111</sup> The United States signed these standards, known as the 1951 Convention relating to the Status of Refugees and the United Nation's 1967 Protocol relating to the Status of Refugees, in 1968. In 1980, Congress amended the Immigration and Nationality Act to allow individuals in the United States who otherwise met the definition of a refugee to be granted asylum.<sup>112</sup> Unfortunately, LGBT people were barred from entering the United States legally until 1990.<sup>113</sup>

Under the definition of a refugee, there are five grounds that refugee status can be based on: race, religion, nationality, membership in a particular social group, or political opinion. While membership in a particular social group is not defined in U.S. law, over the years, courts have interpreted this term as a group of people who share a common, immutable characteristic that the members of the group cannot or should not be required to change.<sup>114</sup> The *Matter of Toboso-Alfonso* opened the door for people persecuted on account of their sexual orientation to be eligible for asylum by establishing that a gay Cuban man was a member in the particular social group of “homosexuals.”<sup>115</sup> While the current U.S. attorney general has not yet designated a case establishing persecution based on gender identity as grounds for asylum—as former Attorney General Janet Reno did with *Toboso-Alfonso*—the 9th U.S. Circuit Court of Appeals found that “gay men in Mexico with female sexual identities” comprised a particular social group.<sup>116</sup>

In addition to establishing membership in a particular social group, applicants for asylum must prove that they were persecuted on account of this status or have a well-founded fear of persecution in the future. Persecution is not defined in the Immigration and Nationality Act, but courts have construed this to mean that “a

threat to life or freedom” on account of one of the five protected grounds “is always persecution.”<sup>117</sup> The Supreme Court held in *INS v. Cardoza-Fonseca* that even a 1 in 10 chance of facing future persecution is sufficient to find a well-founded fear of persecution.<sup>118</sup> While persecution is traditionally considered to require intent to harm, for gay and lesbian asylum seekers, attempts to “cure homosexuality” through electroshock therapy have been found to be a form of persecution.<sup>119</sup>

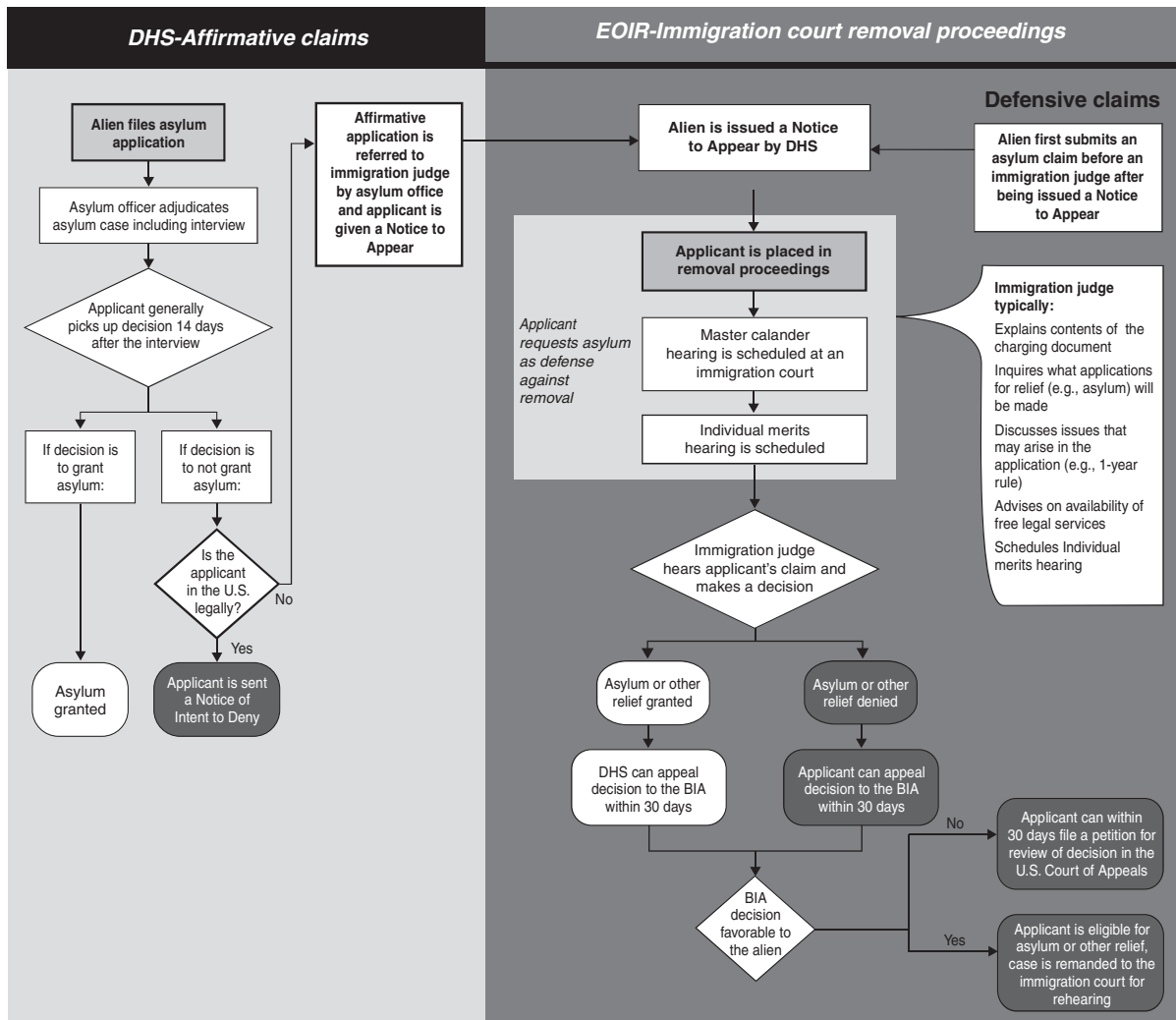
The persecution must be based on one of the five protected grounds, and the government must have inflicted it—or been unable or unwilling to prevent the persecution.<sup>120</sup> In the case of LGBT people seeking asylum, applicants must prove that the persecution is on account of their sexual orientation or gender identity. This includes proving that individuals are LGBT to a government official, either an immigration judge or an asylum officer. This can be an incredibly difficult process for people who were forced to conceal their identity for years in order to survive. The 11th U.S. Circuit Court of Appeals case *Mockeviciene v. Attorney General* illustrates the difficulty that LGBT asylum seekers have proving their sexual orientation, especially when the only evidence they can provide is testimony from themselves and witnesses.<sup>121</sup> In the *Mockeviciene* case, an immigration judge did not find Ingrida Mockeviciene credible. The judge did not believe Mockeviciene was a lesbian because, as he wrote, “although [Mockeviciene] had been in the United States for four years she had not yet had a lesbian partner” and had “no documents to establish that she [was] a lesbian.” She also had not joined any groups during her four years in the United States that engaged in “lesbian activities.” The judge also based his adverse credibility determination on her demeanor, presumably the fact that she did not conduct herself in a manner consistent with stereotypes about how lesbians behave.

Applicants who fail to file within one year and who are ineligible for an exception to the deadline or have been convicted of certain crimes are ineligible for asylum.<sup>122</sup> They may be eligible for withholding of removal if they are able to meet all of the criteria for asylum and demonstrate a 51 percent or greater likelihood of persecution if deported. This is much higher than the 10 percent likelihood of future persecution necessary for asylum.<sup>123</sup> Unlike with asylum, withholding of removal does not come with benefits such as eventual eligibility for a green card or the ability to sponsor relatives or a spouse for immigration. It simply prevents deportation. The judge in *Matter of Toboso-Alfonso* denied the applicant’s asylum claim because of his U.S. criminal record but did grant withholding of removal, recognizing the “clear probability of persecution” on account of his sexual orientation if he were deported to Cuba.<sup>124</sup>

The Convention against Torture is another form of available relief. Like withholding of removal, applicants must meet a heightened standard to qualify, but CAT prohibits removal to a country where people would face torture, regardless of past criminal convictions. However, they can face indefinite detention in the United States if they are found to be a threat to the community.

## The asylum process:

Figure 1: Steps in the Immigration Proceedings Process



Source: GAO analysis of USCIS and EOIR data.

---

## About the authors

**Sharita Gruberg** is a Senior Policy Analyst for the LGBT Research and Communications Project at the Center for American Progress. She has extensive experience working in immigration advocacy, law, and policy, as well as experience providing direct service to immigration detainees, refugees, and asylum seekers.

Gruberg earned her law degree from the Georgetown University Law Center, where she was a public interest law scholar and the writing program director for the *Georgetown Journal on Poverty Law & Policy*, and she also received the Refugees and Humanitarian Emergencies Certificate from the Institute for the Study of International Migration. She holds a bachelor's degree in political science and women's studies from the University of North Carolina at Chapel Hill.

**Rachel West** is a Senior Policy Analyst with the Poverty to Prosperity Program at the Center. Previously, she was an economic policy researcher at the Institute for Research on Labor and Employment at the University of California, Berkeley, where her work focused on minimum wage policy and public assistance programs. West began her career as an economist at the U.S. Department of Transportation in Cambridge, Massachusetts, and worked as a fiscal policy intern at the Economic Policy Institute in Washington, D.C.

West holds a master's degree in public policy from the University of California, Berkeley, Goldman School of Public Policy. She received a bachelor's degree in economics and physics from Mount Holyoke College in 2008.

---

## Acknowledgments

The authors would like to thank Immigration Equality and Human Rights First for their cooperation in the research of this report by providing access to their data and their issue area expertise; former Rep. Barney Frank for taking the time to be interviewed about the history of LGBT asylum protections; and Laura E. Durso, the Director of CAP's LGBT Research and Communications Project, and Philip E. Wolgin, Associate Director for CAP's Immigration Policy team, for their helpful edits and guidance.



---

## Endnotes

- 1 *Lawrence v. Texas*, 539 U.S. 558 (2003); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990); Attorney General Order No. 1895-94 (June 19, 1994). Transgender identity has not yet been established as a particular social group in a precedential case, but the 9th U.S. Circuit Court of Appeals recognized “gay men with female sexual identities” as a social group in *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).
- 2 *Immigration and Nationality Act of 1965*, Public Law 236, 89th Cong., 1st sess. (October 3, 1965), 915, available at <http://library.uwb.edu/guides/usimmigration/79%20stat%20911.pdf>.
- 3 The Mariel boatlift refers to a mass migration of 125,000 Cuban asylum seekers who entered the United States over six months in 1980. They were allowed to enter under the attorney general’s parole authority, a temporary permission to be present in the United States. See Ruth Ellen Wasem, “Cuban Migration to the United States: Policy and Trends” (Washington: Congressional Research Service, 2009), available at <https://www.fas.org/sgp/crs/row/R40566.pdf>.
- 4 *Matter of Toboso-Alfonso*.
- 5 See Ruth Ellen Wasem, “Cuban Migration to the United States: Policy and Trends”; *Matter of Toboso-Alfonso*.
- 6 *Ibid.*
- 7 *Ibid.*
- 8 *Ibid.*
- 9 *Ibid.*
- 10 The American Presidency Project, “George Bush: Statement on Signing the Immigration Act of 1990,” available at <http://www.presidency.ucsb.edu/ws/index.php?pid=19117> (last accessed June 2015).
- 11 Precedent decisions are administrative decisions made by the Administrative Appeals Office, the Board of Immigration Appeals, or the attorney general. These decisions are legally binding in all proceedings involving the same issue or issues. See U.S. Department of Homeland Security, “Precedent Decisions,” available at <http://www.uscis.gov/laws/precedent-decisions> (last accessed June 2015).
- 12 Rep. Barney Frank, interview with author, Washington, D.C., May 27, 2015.
- 13 Chris Johnson, “U.S. Issues New Guidance for LGBT Asylum Claims,” *Washington Blade*, January 26, 2012, available at <http://www.washingtonblade.com/2012/01/26/u-s-issues-new-guidance-for-lgbt-asylum-claims/>; U.S. Citizenship and Immigration Services, *RAIO Combined Training Course Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims* (U.S. Department of Homeland Security, 2011), available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf>.
- 14 U.S. Citizenship and Immigration Services, “The Affirmative Asylum Process,” available at <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process> (last accessed June 2015).
- 15 *In re J-E-*, 23 I & N Dec. 291, 302 (BIA 2002).
- 16 Executive Office for Immigration Review, *Fact Sheet: Asylum and Withholding of Removal Relief Convention Against Torture Protections* (U.S. Department of Justice, 2009), available at <http://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCAT-Protections.pdf>.
- 17 U.S. Citizenship and Immigration Services, “Obtaining Asylum in the United States,” available at <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> (last accessed June 2015).
- 18 *Matter of Acosta*, 19 I & N Dec. 211, 233 (BIA 1985).
- 19 U.S. Citizenship and Immigration Services, *Asylum Eligibility Part 1: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution* (U.S. Department of Homeland Security, 2009), available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBT%20Lesson%20Plans/Definition-Refugee-Persecution-Eligibility-31aug10.pdf>.
- 20 *Ibid.*
- 21 8 USC 1101 (a)(42).
- 22 8 USC 1229a.
- 23 See *Rivera v. Florida Department of Corrections*, 526 U.S. 135 (1999).
- 24 8 CFR 208.16.
- 25 High Commissioner’s report to the Human Rights Council on discrimination and violence against individuals based on their sexual orientation and gender identity (May 2015) - A/HRC/29/23.
- 26 Lucas Paoli Itaborahy and Jingshu Zhu, “State-Sponsored Homophobia: A World Survey of Laws: Criminalisation, protection, and recognition of same-sex love” (Geneva: International Lesbian, Gay, Bisexual, Trans and Intersex Association, 2014), available at [http://old.ilga.org/Statehomophobia/ILGA\\_SSHR\\_2014\\_Eng.pdf](http://old.ilga.org/Statehomophobia/ILGA_SSHR_2014_Eng.pdf); *ibid.*
- 27 *Ibid.*
- 28 Dhananjay Mahapatra, “Supreme Court makes homosexuality a crime again,” *The Times of India*, December 12, 2013, available at <http://timesofindia.indiatimes.com/india/Supreme-Court-makes-homosexuality-a-crime-again/articleshow/27230690.cms>; U.S. Department of State, *India 2013 Human Rights Report*, available at <http://www.state.gov/documents/organization/220604.pdf> (last accessed June 2015).
- 29 U.S. Department of State, *Nigeria 2013 Human Rights Report*, available at <http://www.state.gov/documents/organization/220358.pdf> (last accessed June 2015).
- 30 Itaborahy and Zhu, “State-Sponsored Homophobia”; Hayes Brown, “Uganda Passes New Version Of ‘Kill The Gays’ Bill,” *ThinkProgress*, December 20, 2013, available at <http://thinkprogress.org/security/2013/12/20/3093931/uganda-passes-kill-gays-anti-homosexuality/>.

- 31 BBC News, "Uganda court annuls anti-homosexuality law," August 1, 2014, available at <http://www.bbc.com/news/world-africa-28605400>; Saskia Houltuin, "Gay Ugandans face new threat from anti-homosexuality law," *The Guardian*, January 6, 2015, available at <http://www.theguardian.com/world/2015/jan/06/sp-gay-ugandans-face-new-threat-from-anti-homosexuality-law>.
- 32 Human Rights Watch, "Russia: Anti-LGBT Law a Tool for Discrimination," June 30, 2014, available at <http://www.hrw.org/news/2014/06/29/russia-anti-lgbt-law-tool-discrimination>.
- 33 The Council for Global Equality, "The Facts on LGBT Rights in Russia," available at <http://www.globalequality.org/newsroom/latest-news/1-in-the-news/186-the-facts-on-lgbt-rights-in-russia> (last accessed June 2015); Office of the U.N. High Commissioner for Human Rights, "High Commissioner's report to the Human Rights Council on discrimination and violence against individuals based on their sexual orientation and gender identity" (2015), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E).
- 34 Human Rights Watch, "Russia: Anti-LGBT Law a Tool for Discrimination."
- 35 U.N. Commission on Human Rights, "Report of the United Nations High Commissioner for Human Rights on Discriminatory Laws and Practices and Acts of Violence against Individuals based on their Sexual Orientation and Gender Identity" (2011), available at <http://www.unhcr.org/refworld/docid/4ef092022.html>.
- 36 Human Rights Watch, "Not Safe at Home: Public Attitudes towards Homosexuality" (2014), available at <http://www.hrw.org/node/129881/section/7>.
- 37 Ibid.
- 38 U.N. Commission on Human Rights, "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions" (2005), E/CN.4/2005/7/Add.1, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/131/17/PDF/G0513117.pdf?OpenElement>.
- 39 U.N. Commission on Human Rights, "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum - Mission to Mexico" (2014), A/HRC/26/36/Add.1, available at [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A\\_HRC\\_26\\_36\\_Add.1\\_ENG.DOC](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A_HRC_26_36_Add.1_ENG.DOC).
- 40 Ibid.
- 41 U.N. Commission on Human Rights, "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum - Summary of information, including individual cases, transmitted to Governments and replies received" (2011), A/HRC/17/28/Add.1, available at <http://www.ohchr.org/Documents/Issues/Executions/A-HRC-17-28-Add1.pdf>.
- 42 Ibid.
- 43 HuffPost Gay Voices, "Hillary Clinton on Gay Rights Abroad: Secretary Of State Delivers Historic LGBT Speech In Geneva," December 6, 2011, available at [http://www.huffingtonpost.com/2011/12/06/hillary-clinton-gay-rights-speech-geneva\\_n\\_1132392.html?ref=mostpopular](http://www.huffingtonpost.com/2011/12/06/hillary-clinton-gay-rights-speech-geneva_n_1132392.html?ref=mostpopular).
- 44 U.N. Human Rights Council, "Human Rights Council Resolution – Human Rights, Sexual Orientation and Gender Identity (adopted 17 June 2011)," available at <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx> (last accessed June 2015).
- 45 HuffPost Gay Voices, "Hillary Clinton On Gay Rights Abroad."
- 46 "Sec. 2. Protecting Vulnerable LGBT Refugees and Asylum Seekers. Those LGBT persons who seek refuge from violence and persecution face daunting challenges. In order to improve protection for LGBT refugees and asylum seekers at all stages of displacement, the Departments of State and Homeland Security shall enhance their ongoing efforts to ensure that LGBT refugees and asylum seekers have equal access to protection and assistance, particularly in countries of first asylum. In addition, the Departments of State, Justice, and Homeland Security shall ensure appropriate training is in place so that relevant Federal Government personnel and key partners can effectively address the protection of LGBT refugees and asylum seekers, including by providing to them adequate assistance and ensuring that the Federal Government has the ability to identify and expedite resettlement of highly vulnerable persons with urgent protection needs." See The White House, "Presidential Memorandum – International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons," Press release, December 6, 2011, available at <https://www.whitehouse.gov/the-press-office/2011/12/06/presidential-memorandum-international-initiatives-advance-human-rights-l>.
- 47 U.S. Citizenship and Immigration Services, "Refugees & Asylum," available at <http://www.uscis.gov/humanitarian/refugees-asylum> (last accessed June 2015).
- 48 U.N. General Assembly, "Convention Relating to the Status of Refugees," *United Nations, Treaty Series* 189 (1951): 137, available at <http://www.refworld.org/docid/3be01b964.html>.
- 49 Office of the U.N. High Commissioner for Refugees, "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity" (2008), available at <http://www.refworld.org/docid/48abd5660.html>; U.N. General Assembly, "Protocol Relating to the Status of Refugees," *United Nations, Treaty Series* 606 (1967): 267, available at <http://www.refworld.org/docid/3ae6b3ae4.html>.
- 50 Office of the U.N. High Commissioner for Refugees, "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity" (2002).
- 51 Johnson, "U.S. Issues New Guidance for LGBT Asylum Claims"; Citizenship and Immigration Services, *RAIO Combined Training Course Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims*.
- 52 Office of the U.N. High Commissioner for Refugees, "World Refugee Day: Global forced displacement tops 50 million for first time in post-World War II era," June 20, 2014, available at <http://www.unhcr.org/53a155bc6.html>.
- 53 Immigration Equality. Data on file with author.
- 54 Human Rights First. Data on file with author.
- 55 U.S. Department of Homeland Security, "The Affirmative Asylum Process," available at <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process> (last accessed June 2015).

- 56 "Definition of refugee 1101(a)(42)(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that 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; bars to asylum 208(b) (2) (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States; (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States; (v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182 (a)(3)(B)(i) of this title or section 1227 (a) (4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182 (a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or (vi) the alien was firmly resettled in another country prior to arriving in the United States." See 8 USC §1101-1189.
- 57 U.S. Citizenship and Immigration Services, "Obtaining Asylum in the United States."
- 58 8 CFR §208.1(b).
- 59 U.S. Citizenship and Immigration Services, "Asylum Division Training Programs," available at <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs>.
- 60 U.S. Citizenship and Immigration Services, *Refugee, Asylum, and International Operations Directorate (RAIO): RAIO Directorate – Officer Training* (U.S. Department of Homeland Security, 2011), available at <http://www.uscis.gov/sites/default/files/USCIS/About%20US/ Directorates%20and%20Program%20Offices/RAIO/ lgbtir-guidance-for-adjudicating-lesbian-gay-bisexual-and-intersex-claims.pdf>.
- 61 Victoria Bekiempis, "Court Cases Could Change the Fate of Trans Immigrants," *Newsweek*, March 14, 2015, available at <http://www.newsweek.com/court-case-could-change-fate-trans-immigrants-us-312269>.
- 62 Public releases of asylum data during USCIS stakeholder engagements show a rising asylum grant rate, from 37 percent in 2011 to 46 percent in 2014. See U.S. Citizenship and Immigration Services, "Notes from Previous Engagements," available at <http://www.uscis.gov/outreach/notes-previous-engagements> (last accessed June 2015).
- 63 Ibid.
- 64 Jaime M. Grant and others, "Injustice at Every Turn: A Report of the National Transgender Discrimination Survey" (Washington: National Center for Transgender Equality, 2011), available at [http://www.thetaskforce.org/static\\_html/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf).
- 65 Ibid.
- 66 Public releases of asylum data during USCIS stakeholder engagements. See U.S. Citizenship and Immigration Services, "Notes from Previous Engagements."
- 67 Executive Office for Immigration Review, *FY 2014 Statistics Yearbook* (U.S. Department of Justice, 2015), available at <http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf>.
- 68 Ibid.
- 69 For more on the evidentiary hurdles that LGBT asylum seekers face, see Heather Scavone, "Queer Evidence: The Peculiar Evidentiary Burden Faced By Asylum Applicants With Cases Based On Sexual Orientation and Identity," *Elon Law Review* 5 (389) (2013): 389–413, available at [http://www.elon.edu/docs/e-web/law/law\\_review/Issues/Elon\\_Law\\_Review\\_V5\\_No2\\_Scavone.pdf](http://www.elon.edu/docs/e-web/law/law_review/Issues/Elon_Law_Review_V5_No2_Scavone.pdf).
- 70 National Coalition of Anti-Violence Programs, "Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2014" (2015), available at [http://www.avp.org/storage/documents/Reports/2014\\_HV\\_Report-Final.pdf](http://www.avp.org/storage/documents/Reports/2014_HV_Report-Final.pdf).
- 71 Executive Office for Immigration Review, *Fact Sheet: Asylum and Withholding of Removal Relief Convention Against Torture Protections*.
- 72 Victoria Neilson and Aaron Morris, "The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal," *New York City Law Review* 8 (233) (2005): 233–282, available at <http://www.immigrationequality.org/wp-content/uploads/2011/08/Published-version-pdf-CNY106-3.pdf>.
- 73 Human Rights First, "The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency" (2010), available at <https://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf>.
- 74 Steering Committee of the New York Immigrant Representation Study Report, "Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings," *Cardozo Law Review* 33 (2) (2011): 357, available at <http://www.cardozolawreview.com/Joomla1.5/content/33-2/NYIRS%20Report.33-2.pdf>.
- 75 Ibid.
- 76 TRACImmigration, "Judge Chris A. Brisack," available at <http://trac.syr.edu/immigration/reports/judgereports/00067HOU/index.html> (last accessed June 2015).
- 77 Andrew Schoenholtz, Philip Schrag, and Jaya Ramji-Nogales, *Lives in the Balance* (New York: New York University Press, 2014).
- 78 Steering Committee of the New York Immigrant Representation Study Report, "Accessing Justice."
- 79 American Bar Association, "Immigrants' Right to Counsel" (2006), available at [http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/immigration/pp\\_rightcoun.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/immigration/pp_rightcoun.authcheckdam.pdf).
- 80 Steering Committee of the New York Immigrant Representation Study Report, "Accessing Justice."
- 81 U.N. Commission on Human Rights, "Report of the United Nations High Commissioner for Human Rights on Discriminatory Laws and Practices and Acts of Violence against Individuals based on their Sexual Orientation and Gender Identity" (2015), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E).

- 82 Sharita Gruberg, "No Way Out: Congress' Bed Quota Traps LGBT Immigrants in Detention," Center for American Progress, May 14, 2015, available at <https://www.americanprogress.org/issues/lgbt/news/2015/05/14/111832/no-way-out-congress-bed-quota-traps-lgbt-immigrants-in-detention/>.
- 83 *Omnibus Consolidated Appropriations Act of 1996*, Public Law 208, 104th Cong., 2d sess. (September 30, 1996), available at <http://www.gpo.gov/fdsys/pkg/PLAW-104publ208/pdf/PLAW-104publ208.pdf>.
- 84 8 C.F.R. §208.4(a)(4) and (5).
- 85 Unpublished Board of Immigration Appeals decision finding that HIV diagnosis constitutes a changed circumstance. See Executive Office for Immigration Review, *Decision of the Board of Immigration Appeals: On Behalf of Respondent Keren Zwick, Esquire* (U.S. Department of Justice, 2012), available at <http://immigrantjustice.org/sites/immigrantjustice.org/files/Redacted%20BIA%20Decision%20-%20Mexico%20%201YR%20-%20IJ%20Grant%20DHS%20Appeal%20-%2012%2018%202012.pdf>; Neilson and Morris, "The Gay Bar."
- 86 National Immigrant Justice Center, Human Rights First, and Penn State Law, "The One-Year Asylum Deadline and the BIA: No Protection, No Process" (2010), available at <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/1YD%20report%20FULL%202010%2010%2020%20FINAL.pdf>.
- 87 *INS v. Stevic*, 467 U.S. 407, 416 (1984).
- 88 Human Rights First, "The Asylum Filing Deadline."
- 89 *Refugee Protection Act S. 645*, 113 Cong. 1 sess. (Library of Congress, 2013-2014), available at <https://www.congress.gov/bill/113th-congress/senate-bill/645>.
- 90 Office of the U.N. High Commissioner for Refugees, "World Refugee Day: Global Forced Displacement Tops 50 Million For First Time in Post-World War II Era," June 20, 2014, available at <http://www.unhcr.org/53a155bc6.html>.
- 91 Public releases of asylum data during USCIS stakeholder engagements. See U.S. Citizenship and Immigration Services, *Questions and Answers: USCIS Asylum Division Quarterly Stakeholder Meeting, July 31, 2013* (U.S. Department of Homeland Security, 2013), available at <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2013/QA-AsylumQuarterly-7-31-2013.doc>; Cheri Attix, "The Affirmative Asylum Backlog Explained" (Washington: American Immigration Lawyers Association, 2014), available at [https://www.immigrantjustice.org/sites/immigrantjustice.org/files/ALLA\\_Explana-tion%20of%20the%20Affirmative%20Asylum%20Backlog\\_4.2.14.pdf](https://www.immigrantjustice.org/sites/immigrantjustice.org/files/ALLA_Explana-tion%20of%20the%20Affirmative%20Asylum%20Backlog_4.2.14.pdf).
- 92 John Marzulli, "Asylum-seeking immigrants file class-action suit against federal government over interview backlog," *NY Daily News*, July 4, 2014, available at <http://www.nydailynews.com/news/national/asylum-seeking-immigrants-sue-feds-backlog-article-1.1854548>. CAP analysis of Asylum Division Quarterly Stakeholder Meeting notes. See U.S. Citizenship and Immigration Services, "Notes from Previous Engagements." Additionally, the shift of funding for the Asylum Division from fees to congressional appropriations has resulted in USCIS lacking the capacity to meet the needs of an increased number of people seeking protection. Until 2012, the Asylum Division was funded through fees like the rest of USCIS. That year, it went from being fee funded to seeking appropriations from Congress but was only funded for half a year and has not received additional congressional appropriations since then. The Asylum Division uses reserve fee funding for its operations, but this is not enough to meet the increased demand. See Attix, "The Affirmative Asylum Backlog Explained."
- 93 8 USC 1158(d)(5)(a).
- 94 Marzulli, "Asylum-seeking immigrants file class-action suit against federal government over interview backlog."
- 95 Executive Office for Immigration Review and U.S. Citizenship and Immigration Services, *The 180-Day Asylum EAD Clock Notice* (U.S. Department of Justice and U.S. Department of Homeland Security, 2013), available at [http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum\\_Clock\\_Joint\\_Notice.pdf](http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum_Clock_Joint_Notice.pdf).
- 96 Personal communication from Ruth Dickey, immigration attorney, June 12, 2015, on file with author.
- 97 Immigration Policy Center, "Removal Without Recourse: The Growth of Summary Deportations from the United States," April 28, 2014, available at <http://www.immigrationpolicy.org/just-facts/removal-without-recourse-growth-summary-deportations-united-states>.
- 98 *Omnibus Consolidated Appropriations Act of 1996*.
- 99 *Immigration and Nationality Act*, 8 USC 1225(b)(1)(B)(5) (2004).
- 100 *Omnibus Consolidated Appropriations Act of 1996*.
- 101 Public releases of asylum data during USCIS stakeholder engagements. See U.S. Citizenship and Immigration Services, *Questions and Answers: USCIS Asylum Division Quarterly Stakeholder Meeting, November 30, 2011* (U.S. Department of Homeland Security, 2011), available at [http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/November%202011/Asylum\\_Quarterly\\_ Stakeholder\\_Meeting\\_11-30-11.pdf](http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/November%202011/Asylum_Quarterly_ Stakeholder_Meeting_11-30-11.pdf); U.S. Citizenship and Immigration Services, *Asylum Applications Filed by Nationals of Syria* (U.S. Department of Homeland Security, 2014), available at <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/AdditionalStatisticRequest-April2014AsylumStakeholderEngagement.pdf>.
- 102 Immigration Policy Center, "Removal Without Recourse"; Human Rights First, "Key Statistics and Findings on Asylum Protection Requests at the U.S.–Mexico Border" (2014), available at <http://www.humanrights-first.org/sites/default/files/Key-Findings-Asylum-US-Mexico-Border.pdf>.
- 103 Human Rights First, "How to Protect Refugees and Prevent Abuse at the Border: Blueprint for U.S. Government Policy" (2014); Marshall Fitz and Philip E. Wolgin, "Enforcement Overdrive Has Overloaded the Immigration Courts," Center for American Progress, November 18, 2014, available at <https://www.americanprogress.org/issues/immigration/news/2014/11/18/101098/enforcement-overdrive-has-overloaded-the-immigration-courts/>.
- 104 *Ibid.*
- 105 TRAC Immigration, "Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts," available at [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/) (last accessed June 2014).
- 106 Steering Committee of the New York Immigrant Representation Study Report, "Accessing Justice."
- 107 U.S. Immigration and Customs Enforcement, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* (U.S. Department of Homeland Security, 2009), available at [http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole\\_of\\_arriving\\_alien\\_found\\_credible\\_fear.pdf](http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf); Gruberg, "No Way Out."

- 108 Vera Institute of Justice, "The Appearance Assistance Program: Attaining Compliance with Immigration Laws Through Community Supervision" (1998), available at <http://www.vera.org/sites/default/files/resources/downloads/aap.pdf>; National Immigrant Justice Center, "NIJC Testimony Submitted to the U.S. House Judiciary Committee Hearing on the Credible Fear Interview and Asylum Parole Processes: Statement of Mary Meg McCarthy," December 12, 2013, available at <http://immigrantjustice.org/nijc-testimony-submitted-us-house-judiciary-committee-hearing-credible-fear-interview-and-asylum-par>.
- 109 The White House, "Presidential Memorandum – International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons."
- 110 Sarah McBride and others, "We the People: Why Congress and U.S. States Must Pass Comprehensive LGBT Nondiscrimination Protections" (Washington: Center for American Progress, 2014), available at <https://www.americanprogress.org/issues/lgbt/report/2014/12/10/102804/we-the-people/>.
- 111 Office of the U.N. High Commissioner for Refugees, "Convention and Protocol Relating to the Status of Refugees" (1967).
- 112 *Refugee Act of 1980*, Public Law 212, 96th Cong., 2d sess. (March 17, 1980), available at <http://www.gpo.gov/fdsys/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf>. A refugee is defined as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that 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." See INA §101(a)(42)(A), 8 USC §1101(a)(42)(A).
- 113 Sharita Gruberg, "On the 50th Anniversary of the Immigration and Nationality Act, Changes Are Needed to Protect LGBT Immigrants," Center for American Progress, March 23, 2015, available at <https://www.americanprogress.org/issues/lgbt/news/2015/03/23/109534/on-the-50th-anniversary-of-the-immigration-and-nationality-act-changes-are-needed-to-protect-lgbt-immigrants/>.
- 114 *Matter of Acosta*, 19 I & N Dec. 211, 233 (BIA 1985); office of the U.N. High Commissioner for Refugees, "Refugee Protection in International Law: Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status" (2011), available at <http://www.unhcr.org/3d58e13b4.html>.
- 115 *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990). Reaffirmed in *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005), which held that "all alien homosexuals are members of a 'particular social group.'"
- 116 *Hernandez-Montiel v. INS*, 225 F.3d 1088 (9th Cir. 2000). This was reaffirmed in *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004). The 10th U.S. Circuit Court of Appeals found that a Salvadorian male-to-female transgender person had a "viable persecution claim" in *N-A-M v. Holder*, 587 F.3d 1052 (10th Cir. 2009).
- 117 *Matter of Laipenieks*, 18 I&N Dec. 433, 457 (BIA 1983).
- 118 *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).
- 119 *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).
- 120 *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).
- 121 *Mockeviciene v. U.S. Att'y Gen.*, 237 F.App'x 569, 572 (11th Cir. 2007).
- 122 INA 208 (b)(2)(A)(ii).
- 123 *INS v. Stevic*, 467 U.S. 407 (1984).
- 124 *Matter of Toboso-Alfonso*.

---

## Our Mission

The Center for American Progress is an independent, nonpartisan policy institute that is dedicated to improving the lives of all Americans, through bold, progressive ideas, as well as strong leadership and concerted action. Our aim is not just to change the conversation, but to change the country.

## Our Values

As progressives, we believe America should be a land of boundless opportunity, where people can climb the ladder of economic mobility. We believe we owe it to future generations to protect the planet and promote peace and shared global prosperity.

And we believe an effective government can earn the trust of the American people, champion the common good over narrow self-interest, and harness the strength of our diversity.

## Our Approach

We develop new policy ideas, challenge the media to cover the issues that truly matter, and shape the national debate. With policy teams in major issue areas, American Progress can think creatively at the cross-section of traditional boundaries to develop ideas for policymakers that lead to real change. By employing an extensive communications and outreach effort that we adapt to a rapidly changing media landscape, we move our ideas aggressively in the national policy debate.

