



Humanitarian Diplomacy

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

By Sharita Gruberg and Rachel West June 2015

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.¹

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.”² 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.³ 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.⁴

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.⁵ 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)⁶ 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]."⁷ 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."⁸ 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.⁹ 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.¹⁰

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.¹¹ 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:¹²

"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 2012.¹³ 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.¹⁴

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.”¹⁵ Unlike asylum and withholding of removal, there are no bars to eligibility for relief under this form of protection.¹⁶

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.¹⁷

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.¹⁸

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.”¹⁹ 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.²⁰

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.²¹

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.²²

Pro se: Individuals advocating on behalf of themselves—without an attorney—in legal procedures.²³

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.²⁴

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