

CONTENTIOUS ENTRY: LGBTQ REFUGE AND ASYLUM

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Abstract

LGBTQ refugees and asylum seekers form a particularly vulnerable group. They face threats in their countries of origin and barriers to entering Western countries that accept refugees and grant asylum. Some of these barriers come via the individuals tasked with determining who is allowed to enter or remain in the country and others in the limited help they receive from family, community, and LGBTQ groups and organizations. This article explores the problems with processes such as adjudication and suggests there are ways to improve the treatment of LGBTQ individuals throughout the resettlement process.

In December, 2015, Northwestern University's Center for Forced Migration Studies sponsored a forum entitled "The United States Refugee Resettlement Program: A Global Model for Successful Humanitarian Response?" The panel discussion exhibited a complex interplay of hope and despair, pride and shame. For instance, T. Alexander Aleinikoff, outgoing U.N. Deputy High Commissioner for Refugees, boasted that the United States has the largest resettlement program in the world. Robert Carey, director for the U.S.'s Office of Refugee Resettlement (ORR), noted that the Obama administration had increased the number of refugees it would accept (Aleinikoff & Carey, 2015). At the same time, Aleinikoff conceded that the extensive vetting process for refugees is slow and painstaking, precluding any agile response to crisis; Ngoan Lee, the Illinois State Refugee Coordinator, bemoaned the lack of funds for better assisting refugees in their initial months of resettlement (Aleinikoff & Lee, 2015).

Within this context, the particular issue of LGBTQ individuals seeking refuge or asylum in the United States remains a substantive problem. It is illegal to be LGBTQ in at least 76 countries, and 10 of those either have the death penalty for related offenses or a history of extrajudicial killings (Bieksa et al., 2012). In spite of this, attempting

to garner asylum in the United States is likely to bring undue delays, cumbersome and potentially re-traumatizing deliberations, and, too often, unjust outcomes. Protecting sexual minorities from state-sanctioned or state-ignored violence is generally slow and inconsistent.

Gaining asylum requires an individual demonstrate a well-founded fear of persecution in their country of origin (United Nations High Commissioner for Refugees, 2008). Persecution for LGBTQ individuals can emerge from cultural norms or government laws against homosexuality. When the 1951 United Nations Convention Relating to the Status of Refugees established guidelines and categories for qualification, it created the designation “particular social group” in an attempt to address persecution of individuals belonging to a group not explicitly included in the Convention’s other categories. In 1990, following the ten-year asylum fight of Fidel Armando Toboso-Alfonso, a gay Cuban man targeted extensively by the Castro regime, U.S. immigration law began to consider LGBTQ such a “particular social group” (Gruberg & West, 2015). In 1994 U.S. Attorney General, Janet Reno, required that immigration judges recognize sexual minority status as established grounds for granting asylum (Gruberg & West, 2015).

ADJUDICATION AND ACCOMPANYING PROBLEMS

Despite UN conventions and U.S. law, sexual minorities still face an adjudication process for asylum status that is fraught with barriers. Refugees are selected and vetted in their home countries and flown to the United States to be resettled. Then, they are offered short-term services. Asylum seekers, on the other hand, arrive in the United States on their own and plea either affirmatively or defensively for refugee status. According to attorney Neil Grungras, founder of the Organization for Refugee, Asylum, and Migration, they are not eligible for the government resources refugees receive and generally rely on family or community support (N. Grungras, personal communication, October 25, 2013). LGBTQ asylum seekers tend to lack this support. Often they are fleeing violently disapproving family members and fear compatriots’ homophobia (N. Grungras, personal communication, October 25, 2013). Thus, LGBTQ people often enter asylum adjudication suffering from duress and isolation (Gruberg & West, 2015).

In order to achieve a positive status determination based on sexual minority status, the asylum seeker must prove that he/she is indeed LGBTQ and has a well-founded fear of persecution in the country of origin due to this (Morgan, 2006). As Beiksa and others (2012) point out, in sexual minority cases, the credibility of the asylum-seeker is especially

difficult to ascertain. Unlike claims based on political opinion, religion, nationality, and race, these cases rely mainly on the subject’s testimony (Beiksa et al., 2012, p. 197). If an individual has had to conceal his/her identity, even witness testimonials may be difficult to secure (Beiksa et al., 2012, p. 198). In determining the threat posed by the country of origin, adjudicators draw on evidence such as hate crime reports and the existence of LGBTQ-related organizations (Swink, 2006).

In the United States, asylum applicants are required to submit applications within a year of arriving; LGBTQ applicants are believed to be even more hampered by this demand than others. The gathering of evidence (including supplemental testimony) takes additional time and the difficulty of “coming out” so publicly exacts a toll (Gruberg & West, 2015). The centrality of the personal narrative creates considerable pressure for both the claimant and adjudicator. The claimant must elaborate on life details that have often been sources of shame, danger, and uncertainty (Morgan, 2006) and yet the testimony, often the sole evidence, must be convincing. The adjudicator is tasked with making a weighty decision with little to go on outside that testimony (Beiksa et al., 2012). One can imagine how two independently acting adjudicators might assess the same case and arrive at remarkably different conclusions (Swink, 2006).

As Sridharan (2008) shows, there are three principles that adjudicators use for guiding their decisions in LGBTQ asylum cases: immutability, recognizability, and association. The first refers to the idea that the characteristic that defines an individual as a member of a particular social group cannot be changed or should not be required to be changed. Unfortunately, the immutability requirement gets elided when a judge decides that an applicant is not recognizably gay and therefore can presumably return to his/her country of origin and live discreetly and safely (Sridharan, 2008).

Courts have ruled that the notion that LGBTQ individuals can be denied asylum on the premise that they can conceal their identities runs counter to the 1951 Convention. Status determinations are supposed to be based on identity, not behavior; yet some judges return to behavior to argue that homosexual behavior can be altered or concealed (Sridharan, 2008). How can one account for these discrepancies between Convention rule and individual judgments? While immigration judges and officers are screened for their views on homosexuality, the ideas of immutability and what an individual can rightfully be expected to compromise in order to be secure remain ungoverned (Kahn, 2012).

The principle of recognizability is therefore problematic for several reasons. First, it allows for notions of gayness that are cultured, classed, and essentializing (Murray, 2014). The operating assumption is that

claimants from around the world should demonstrate authenticity through mannerisms, attitudes, and preoccupations associated with gay, white, middle-class men in the West (Murray, 2014). Second, recognizability often presumes a definitive boundary between heterosexuality and homosexuality. The enforcement of such boundaries leads to cases in which a lesbian claimant can be rejected for asylum because she has children or has had relationships with men (National Center for Lesbian Rights, 2015). Finally, recognizability both demands that asylum seekers emphatically articulate gayness and adeptly conceal it (Heller, 2009). LGBTQ individuals living in countries that persecute sexual minorities may well have become experts at covering or passing as needed for self-preservation, but may not have experience conforming to an essentialist logic of expressive openness.

On the one hand, the fear of fraudulence on the part of asylum seekers creates a greater desire for a straightforward and reliable means of determining legitimacy in LGBTQ claims (Murray, 2014). This fear results in greater suspicion on the part of some adjudicators and judges when claimants fail to demonstrate the expected, or even required, markers of group belonging (e.g. knowledge of gay bars and parades, public associations) (Sridharan, 2008). Take for example, Mohammad, an Iranian who was seeking asylum as a gay man but who had long learned the necessities of discretion. In Iran he had been self-aware as a gay man for a decade when a guard with whom he had been intimate told his family (Morgan, 2006, p. 144). Both the guard and his family threatened Mohammad's life (p. 145). After reaching the United States, however, he was denied asylum because he showed no signs of femininity and kept his relationship with his live-in boyfriend secret from his boyfriend's relatives (p. 146). It was only after he obtained affidavits from LGBTQ organizations that his status was "visible" enough to warrant, on his second appeal, the granting of asylum (p. 146-147). On the other hand, the principles of assessment that emphasize identifying stereotypical gay traits seem very much to invite rather than prevent fraudulence. An example of this can be found in the allegations that Nigerians are training asylum seekers to act gay in order to attain asylum (Murray, 2014).

REFORMING THE PROCESS

Reformation of the adjudication process might begin with a more nuanced consideration of each applicant's narrative. Tailored competency training could go a long way towards ensuring that adjudicators appreciate the nuances of a LGBTQ individual's conflicted path to seeking asylum. Adjudicators could be allowed to retain sufficient discretion while the

determination process is standardized enough so that officers do not veer into unreasonable lines of inquiry skewed towards rejection. In addition, there is the need for an understanding of inchoate LGBTQ identity.

As Middlekoop (2013) shows, some asylum applicants may not disclose their sexuality upon arriving in the United States because they are in an early phase of accepting their identity and may lack even the language to discuss it. For some, internalized homophobia acts as a formidable barrier to self-acceptance and articulating same sex desire (p. 155). A relatively "late" articulation tends to raise suspicions for adjudicators, but individuals should be offered the opportunity to alter their claims for asylum or initiate new (p. 162). Again, this can be done without compromising rigor in the determination process. Professional witnesses, such as psychologists and social workers, can play a larger role in communicating to officers the particular psychological challenges of migrating from a severely homophobic culture to one that is more accepting.

While the application process, once LGBTQ asylum seekers are in the United States, should be slowed down when it is necessary to accommodate the preparation of their legal claims, the process of recognizing LGBTQ refugees abroad and bringing them to resettling countries can be expedited. In many cases, individuals spend conflict-ridden months or years in transit countries that house them (on a temporary basis) while they seek resettlement through the United Nations High Commission for Refugees (La Violette, 2013). In response to this, Heartland Alliance International (HAI) initiated a project, led by HAI Lebanon Country Director Marya Abdul Rahman, to provide social services to LGBTQ Syrians residing temporarily in Lebanon (M. Abdul Rahman, personal correspondence, December 8, 2015). Likewise, Helsinki Citizens Assembly has made a commendable effort to monitor and report on the conditions of Iranian gay men and transgender women who are temporarily in Turkey, where they are often plagued by police abuse, attacks from homophobic locals, and difficulty with housing and employment (Helsinki Citizens Assembly & the Organization for Refugee, Asylum & Migration, 2009).

While many migrants spend time in the compromised conditions of first asylum, others spend agonizing months and years in detention centers in the United States after having been apprehended at the border (Gruberg, 2013). The exact number is unknown because U.S. Customs and Immigration Enforcement (ICE) does not collect data on sexual orientation. However, Heartland Alliance's National Immigrant Justice Center has documented abuses of LGBTQ asylum seekers in Department of Homeland Security (DHS) holding centers across the country (Gruberg, 2013).

As Gruberg (2013) shows, transgender women seem to be the most frequently mistreated in these settings, as some facilities, such as Krome Service Processing Center in Miami, “resolve” issues of abuse perpetrated by fellow detainees by placing them in solitary confinement (p. 6). Though it is beyond the scope of this paper to detail this system as well as the particular struggles of transgender asylum seekers, it is important to note detainment as an area in need of advocacy effort, including the extreme vulnerability of transgender detainees. Prior to 1996, only individuals considered a flight risk or a threat to national security were detained (p. 3). Currently, ICE operates under a mandate from Congress to fill 34,000 beds in 250 facilities across the country, regardless of the particularities of individual cases (p. 3). There are viable alternatives to detention that are less costly and more humane (p. 16). Just as the adjudication process can be re-traumatizing for this population, living like a prisoner upon arriving in a presumed haven is likely be re-traumatizing, even without the sexual abuse and other kinds of abuse that some detainees face (p. 6).

CONCLUSION

Though systems operated by government bureaucracies are generally reputed to be inflexible in the face of human nuance and slow in the face of exigent need, the stakes are particularly high for LGBTQ migrants. Death or a life of harassment and isolation could be the result of a failed asylum claim, and the protracted process of adjudication in the United States serves to exacerbate symptoms of trauma and estrangement. Beyond the reform of the system processing LGBTQ asylum claims, community centers, particularly in urban centers like New York City and Chicago, have the capacity to create programming aimed at integrating LGBTQ asylum seekers. More robust and inclusive social services could mitigate the current lack of state services. At the same time, there are meaningful ways in which agencies serving refugees and asylum seekers can prioritize addressing the needs of this population so that re-traumatization and social isolation are minimized. Both groups have a role to play in advocating for the U.S. government’s prioritization of LGBTQ individuals living in hostile environments during the process of refugee selection, as well as in reforming adjudication so that it is sensitive to the tough transitions endured during the application process.

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