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Sexual Orientation Asylum Petitions: Challenges in Forensic Psychosocial Immigration Evaluations

Sample Report

- For a sample report email me: **marksilver1@cs.com**

- Put the words: “Sexual Orientation sample” in the subject line to eliminate spam with your information and I will send it back as an attachment

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- **The Arranged Marriage: My Kalpa.** (2016).

- Highly recommended book. A full narrative of a spousal abuse case

Types of Cases Evaluated

- VAWA
- Deportation / Removal
- Waivers
- Asylum
- U Visas
- Detention
- Adam Walsh Act
- Motions to Re-Open & Appeals
- Criminal Mitigation in Immigration Cases
- Competency Evaluations

Seminar Outline

- Definitions
- Developmental Considerations
- Harm Categories
- Mental Health Issues
- Challenges of Psycho-Social Evaluations

Sexual Orientation Asylum Claims: Somewhat Unique

- not simply persecution in client's country of origin, but also in a particular community and/or family
- victims experience pathological development of identity and self-concept
- persecution is often systemic and affects the victim in every aspect of his life

Definition

- In order to be eligible for asylum, an applicant must meet the definition of refugee in the Immigration and Nationality Act (INA). The INA defines refugee 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 habitually resided, and who 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." INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005)

Definition Con't

The elements for an asylum claim based on sexual orientation are a well-founded fear of persecution based on past persecution or risk of persecution in the future if returned to the country of origin because of his membership in a particular social group. The persecutor must be the government or a group or individual(s) that the government is unwilling or unable to control.

Proof

- The applicant bears the burden of proof of establishing that she falls under this definition of refugee. INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A) (2005)

- The applicant is required to testify under oath regarding the truth of her application in order to meet this burden of proof. *Matter of Fefe*, 20 I&N Dec. 166, 118 (BIA 1989).

- The Board of Immigration Appeals "not only encourage[s], but require[s] the introduction of corroborative testimonial and documentary evidence, where available." *Matter of S-A-,* 22 I&N Dec. 1328, 1332 (BIA 2000).

- Testimony, however, can be sufficient to sustain the applicant's burden of proof if the testimony is credible. *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987)

Identity Formation & Development

- when the individual experiences ridicule and abuses by family developing a healthy and normal sexual identity becomes almost impossible
- identity formation often begins with confusion and through comparison with one's peers tolerance for one's identity slowly emerges such that the individual can feel good about his sexuality
- identity confusion becomes a pathway to lifelong self-doubt and fear rather than a doorway towards maturity in adulthood
- if greater self-understanding and self-awareness does not emerge pathology often follows in the form of low self-esteem and poor self-concept, which can cause lifelong psychological strife
- in societies where homosexuality is considered deviant by law and social norms, healthy homosexual development is impossible
- this is especially true where the individual has noted that older homosexuals have suffered fewer opportunities in the community due to discrimination

Early Same Sex Encounters

- At this point the person becomes even more aware of atypical interests, particularly if they become sexually aroused in the context of same-sex activities, such as physical education at school – and sexual experimentation with peers is quite common during this period.
- The individual becomes aware that such feelings are uncommon and viewed negatively by society
- May even encounter a sense of imminent danger for the first time.
- Even if the individual does not pursue same-sex encounters prejudiced peers often pick up on nuanced behavioral cues
- The individual may judge himself quite harshly, assume that his feelings are deviant, and berate himself with shame for sexual thoughts and fantasies. Such fantasies can rarely be easily eliminated such that the shame only grows in silence

Secretive Connection -> Paranoia

sexual activity for homosexuals in persecutory societies must be secretive and undertaken with considerable caution.

Even when individuals are careful it is not unusual for couples who are intimately connected to brush one another, hold hands, or extend a warm touch, yet any of these can be indications to onlookers about homosexual activity.

All this makes the person quite guarded, such that some people develop a latent Paranoid Personality Disorder, such that the person develops a pervasive distrust and suspiciousness of others' motives and almost everything is interpreted as potentially malevolent

Bisexuality

Clients may present with both homosexual and heterosexual experiences. This need not undermine the client's underlying petition or claims of persecution and the mental health professional should be diligent in presenting a psychosocial history for the reader regarding the client's sexual development, intimacy explorations, and interpersonal pathways.

Outlets for Anxiety in Places of Persecution

The homosexual youth develops strategies to psychologically and physically defend himself from “deviant” thoughts and feelings:

- He may attempt to deny his homosexuality outright or even abuse others by joining with peers who target vulnerable homosexual adolescents
- He may become socially isolated and protect himself by minimal interaction with peers, or finding a safe place in which to create a private domain
- Destructive and self-injurious behavior, such as drug use, impulsive conduct, promiscuous behavior, petty criminal behavior, truancy, and antisocial conduct
- Goal oriented approach and strive towards athletic or academic perfectionism using the exacting nature of these endeavors

Outlets for Anxiety in Non-Persecutory Areas

- may avoid his sexual identity altogether by avoiding school dances, parties, and similar social settings so as not to put himself in the position of having to feel uncomfortable or appear awkward or different.
- Others may seek mental health professionals, however the person may seek to refrain from topics concerning homosexual thoughts and feelings, and concentrate on feelings of depression and anxiety avoiding sexuality altogether
- Others may date or even marry opposite sex partners to avoid gossip, perhaps hoping to be “cured,” or simply to satisfy a deep-seated need to fit in to family and community
- Others believe that remaining celibate will somehow address such personal issues and others turn to spirituality and even religious institutions with the hope of eliminating sexual thoughts.

Community Support

- A sense of community is vital for normal healthy growth, development, and psychological well-being.

- It is often the case that the father in such homes is totally unaccepting while the mother may adopt a more benign approach and provide a modicum of solace to the child allowing him to understand that while his behaviors are deemed wrong he is still loved as a son.

Types of Harm

- physical harm – borrow broadly from VAWA cases
- coercive medical or psychological treatment
- unfair prosecution or disproportionate punishment for a criminal offense
- severe discrimination and economic persecution, and
- severe criminal extortion or robbery.

Serious Physical Harm

- The most recognized form of persecution is the infliction of serious physical harm including confinement, kidnapping, torture, and beatings. *Ndom v. Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004)(two detentions without formal charges for a combined total of 25 days in a dark crowded cell where he was shackled in cuffs preventing him from straightening his legs and forcing him to urinate on his clothes constitute persecution); *Prasad v. INS*, 47 F.3d 336, 339 (9th Cir. 1995) (detention and physical torture); *Tarubac v. INS*, 182 F.3d 1114, 1118 (9th Cir. 1999)(being kidnapped, beaten, held without food, and threatened is persecution); *In Re V-T-S*, 21 I. & N. Dec. 792 (BIA 1997)(kidnapping)

- Rape, sexual assault and other forms of gender-based violence are also persecution. *Lopez Galarza v. INS*, 99 F.3d 954, 958 (9th Cir. 1996)(rape or sexual assault); *Abay v. Ashcroft*, 368 F.3d 634, 641-41 (6th Cir. 2004)(mother and daughter share a well-founded fear of persecution when the daughter is under the threat of female genital mutilation); *In Re S-A-,* 22 I. & N. Dec. 1328 (BIA 2000)(domestic abuse inflicted on a daughter by her father)

Physical Harm Con't

- The rape and beating of a gay person on account of his sexual identity constitutes persecution. Many LGBT individuals have been raped or sexually assaulted as "punishment" for their sexual orientation or for violating traditional gender boundaries. In the case of *Hernandez-Montiel*, the Ninth Circuit found that there was persecution when a "gay man with a female sexual identity" was detained, stripsearched, sexually assaulted, and raped by police officers on more than one occasion and sexually assaulted and attacked by a group of men. *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

Threats of Harm

- Threats of violence will generally not be sufficient to establish past persecution unless the threats themselves cause significant harm. “Threats standing alone…constitute persecution in only a small category of cases and only when the threats are so menacing as to cause significant actual suffering or harm.” *Li v. AG of US,* 400 F.3d 157, 164 (3d Cir. 2005), quoting *Lim v. INS,* 224 F.3d 929, 936 (9th Cir. 2000).

- Threats will be more likely to establish future persecution if the applicant can demonstrate that the group who is making the threats has the will and ability to carry them out. *Marcos v. Gonzales*, 410 F.3d 1112 (9th Cir. 2005)(finds well-founded fear of persecution substantiated when applicant had previously received death threats from the New People’s Army (NPA) in Philippines for his work in the Civilian Home Defense Forces of the Philippine military. The State Department Country Report, by recognizing the danger posed by the NPA, served to support the existence of a well-founded fear of persecution)

Coercive Medical and Psychological Treatment

Pitcherskaia, a lesbian from Russia, was arrested and imprisoned on several occasions for protesting violence and discrimination against gays and lesbians. The militia threatened her with forced institutionalization and required her to attend therapy sessions. She was prescribed sedative medication which she successfully refused. In addition, an ex-girlfriend of hers was institutionalized against her will and was subjected to electric shock treatment and other treatments meant to 'cure' her of her sexual orientation. The Ninth Circuit ruled that it is not necessary for the persecutor to intend harm in order for unwanted medical or psychological treatment to amount to persecution as long as the victim experiences the treatment as harmful. *Pitcherskaia v. INS*, 118 F.3d 641, 647 (9th Cir. 1997). *Id*. at 647.

Invidious Prosecution or Disproportionate Punishment for a Criminal Offense

- Since *Lawrence v. Texas*, private consensual same-sex activity can not be prohibited by law in the United States. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). This ruling helps demonstrate that sodomy laws in other countries are in violation of rights explicitly recognized by the United States.
- Vs. Cultural or Religious-Cultural Offense

Economic Persecution

- Cumulative discrimination that is increasing in severity will have a higher chance of being considered persecution.
- Employment, education, interviewing
- Threatening to disclose one's sexual orientation to a hostile community may constitute persecution if the applicant can put forth evidence that makes it reasonable to believe that the extortion was at least partially based on the fact that the individual is gay or imputed to be gay. See *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999)
- Crime alone will most likely not reach the level of persecution. If, however, the applicant can demonstrate that the robbery or assault was motivated by a protected characteristic and police failed to provide protection, it may constitute persecution. *Surita v. INS*, 95 F.3d 814 (9th Cir. 1996)(the repeated robbery of an Ethnic Indian citizen of Fiji and repeated threats of rape if she reported the robberies, in addition to the fact that the police refused to help her stop the robberies, amounts to past persecution on account of race)

Harm to Group

- An applicant can demonstrate a well-founded fear of persecution by showing that there is a pattern or practice in her country of persecution based on sexual orientation. 8 C.F.R.. § 1208.13(b)(2)(iii).

- Persecution against a specific group must be systemic, pervasive, or organized in order to amount to a pattern or practice sufficient for establishing a fear of future persecution. *Ngure v. Ashcroft*, 367 F.3d 975, 991 (8th Cir. 2004); *Lie v. Ashcroft*, 396 F.3d 530, 537 (3d Cir. 2005); *In Re A-—,* 23 I. & N. Dec. 737 (BIA 2005)

Individualized Fear of Future Persecution

An individual who has not suffered persecution can nevertheless demonstrate a well-founded fear. In *Matter of Mogharrabi*, the BIA set forth the following four elements which an applicant for asylum must show in order to establish a well-founded fear of persecution:

- the applicant possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort;
- the persecutor is already aware, or could become aware, that the applicant possesses this belief or characteristic;
- the persecutor has the capability of punishing the applicant; and
- the persecutor has the inclination to punish the applicant. Matter of Mogharrabi, 19 I&N Dec. at 446; INS v. Elias-Zacarias, 112 U.S. 812 (1992).

Karouni v. Gonzales is a significant precedential case for sexual-orientation based asylum claims because it is based only on a finding of a well-founded fear of future persecution. Karouni, a gay man with AIDS from Lebanon, had satisfied the requirements for both a subjective and objective fear based on future persecution by providing evidence that Hizballah militants frequently persecuted homosexuals, that his cousin was killed on the basis of his sexual orientation, and that his gay identity had been disclosed to the police by gay men who were beaten by authorities. *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005).

Threats of Harm:
Broad Consideration of Harm

- "Threatened death or serious injury, or a *threat* to the physical integrity" of the person serves as a basis for the diagnosis of Posttraumatic Stress Disorder.

- Asylum cases tend to focus on "active harm" such as physical and sexual abuses, and less emphasis is placed on "passive harm" (emotional, and verbal abuses), which may include controlling or manipulative behaviors and those things that induce the victim to feel fear, anxiety, and isolation
- Threats to others
- Consider harm broadly like in U visa cases

ANY OTHER HARMS

- UNDERSTAND HARMS BROADLY SIMILAR TO U-VISA CASES AND VAWA PETITIONS

Coercion, control, manipulation, limits, etc

Mental Health Issues

- PTSD
- Depression
- Feelings of Worthlessness
- Suicidality
- Borderline Personality Disorder
- Body Dysmorphic Disorder
- Psychosis

Posttraumatic Stress Disorder

- A. The person has been exposed to a traumatic event in which both of the following were present:
- (1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others (2) the person's response involved intense fear, helplessness, or horror.

- B. The traumatic event is persistently reexperienced in one (or more) of the following ways:

- C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness

- D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:

Depression

- depressed mood nearly every day, as indicated by subjective feelings of sadness and emptiness and crying
- hopelessness / helplessness
- low energy
- anhedonia (crucial)
- low self-esteem
- psychomotor retardation / agitation
- fatigue or loss of energy
- poor or erratic appetite
- significant difficulty staying or falling asleep / nightmares
- diminished ability to think or concentrate, or indecisiveness
- Suicidality : overwhelming psychological pain and helplessness feeling of despair (passive and active)

Feelings of Worthlessness

- Feelings of worthlessness or excessive or inappropriate guilt (which may be delusional)

- Victims of abuse often feel shame, humiliation, and self-blame for having become intimately involved with an abuser.

- She or he is made to feel worthless and unloved yet remained helpless and trapped in a dangerous environment

Suicidality

- Suicidality may be either active or passive. Active suicidality occurs when the person has a plan to end her own life, such as by the ingestion of medications. Active suicidality most often is characterized by deep psychological pain or despair and a hopeless belief that nothing in the person's life can improve in any meaningful way.

- Passive suicidality concerns thoughts of death or dying and may include the person stating that they wonder what it would be like never having to wake up so that their pain would vanish. Passive suicidality is usually more ideational, while active suicidality is often accompanied by a thought out plan that may or may not be realistic or even coherent.

- Helpless feelings of despair / deep psychological pain

Borderline Personality Disorder

- Frantic efforts to avoid real or imagined abandonment
- A pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation
- Identity disturbance, such as a significant and persistent unstable self-image or sense of self
- Impulsivity in at least two areas that are potentially self-damaging (e.g., spending, sex, substance abuse, reckless driving, binge eating)
- Recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior
- Emotional instability due to significant reactivity of mood (e.g., intense episodic dysphoria, irritability, or anxiety usually lasting a few hours
- Chronic feelings of emptiness
- Inappropriate, intense anger or difficulty controlling anger (e.g., frequent displays of temper, constant anger, recurrent physical fights)
- Transient, stress-related paranoid thoughts or severe dissociative symptoms

Body Dysmorphic Disorder

Imagined appearance defect with markedly excessive concern.

This is particularly crucial where homosexual discrimination in the family and community necessarily deems the young homosexual's behaviors and person, as deviant, ugly, and unwanted.

Psychosis

- Adaptive paranoia - for self-protection (PPD)
- False perceptions, such as auditory hallucinations, in which the individual may hear his name being called and when he turns around no one is there. This is undoubtedly rooted in hypersensitivity to the real or perceived dangers of the surrounding environment and should be inquired about during the evaluation

Challenges of Psychosocial Evaluations

Psychosocial History

Psychosocial histories should be garnered with consideration for the client's family of origin and community regardless of the case. This has a dual purpose:

- First, the individual may have experienced physical and emotional abuse even in his family of origin and, second, it helps to normalize the process.

- Second, it is my experience that persecution tends to be systemic in nature and the psychosocial history will uncover persecution in unsuspected areas.

- Moreover, beginning solely with the persecution tends to reinforce the pathology of his personal experience. It can be quite helpful to begin with pleasant memories from childhood when the individual may still have enjoyed love and care in his family of origin and even in his community.

Failure to Seek Mental Health Assistance

- ignorance
- shame
- lack of financial resources
- fear of authority or government workers
- feelings of depression and anxiety that prohibit the individual from accessing proper healthcare even during periods of acute danger
- torture survivors may feel that people who did not experience what they did simply would not understand or believe the experiences.
- When the homosexual applicant prepares for the asylum process, it may be the first time that he has spoken about his experiences
- Anathema
- Stigma

Narrative Inconsistencies

Discrepancies in memory occur whenever one repeats a narrative, even about something that can be objectively understood and proven.

It is often the case that uncertainty and self-doubt serve as the defining characteristics of such clients. Thus the person is forced to recount his life of abuses uncertainty and self-doubt about personal experiences results.

No Cycle of Abuse

- Patterns may not exist (ie, spousal abuse cases)
- Abusers may act without reason
- Arbitrary / Capricious
- Blind hatred / Psychopathy
- Idiosyncratic
- Cultural
- Absence of pattern leads to greater psychological harm NOT less

One-Year Filing

- Explain that the trauma is long term
- Identify functioning after relocating
- Lack of trust / resources
- Lack of security, safety, stability and personal vulnerability
- Discussed in FGM lecture

Clinical vs. Courtroom Setting

- the kind of material elicited during a clinical forensic session can almost never be reproduced in the courtroom setting

- the clinical setting is one in which the client feels trust and safety and issues are discussed in a generally uncritical manner

- the courtroom setting is necessarily adversarial, oppositional, and at times hostile and even threatening

Internal versus External Evidence

- The subjective component requires that the applicant demonstrates a genuine fear of persecution. *Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004). *Berrotera-Melendez v. INS*, 955 F.2d 1251, 1256 (9th Cir. 1992)
- The claim is so idiosyncratically personal and painful that speaking openly about such experiences can be emotionally overwhelming and, in any other context, obscene
- Persons who have mastered repression and concealment are now asked to open a fantastically personal aspect of their thoughts, feelings, and behaviors and they become exposed to the same ridicule and humiliation that against which they tried to protect against in their country of origin

Internal versus External Evidence con't

- Internal issues are best explicated through a mental health evaluation by someone familiar with psychodynamics (unconscious motivations), family systems theory, and the developmental turmoil that many homosexuals experience in oppressive families or communities.

- Ultimately, it is the very subjective nature of this evidence that can be quite powerful and reflect the inner persecution that the client has experienced – and focus on internal anguish due to societal persecution and family oppression

- It may be necessary to vividly describe the homosexual's sexual experiences.

Professional Expression to Replace Self Expression

- Personal expression can be replaced by professional expression ensuring that the thoughts, feelings, behaviors, and experiences of the client are fully expressed with the factual underpinnings

- there may be a significant trove of valuable information that can be mined by an evaluation elucidating the individual's personal and community history

Intellectual & Educational Limitations

- Clients may have low education, illiterate, or mental health limitations that help explain the reason for the client's poor self-advocacy

- In such cases clients must be permitted to relate their story in a manner consistent with their level of ability and comfort

Functioning Over Narrative

- It may be useful to look at the individual's functioning in his country of origin, as a means to gain insight into the client's daily life. Persecution may come in the form of prohibitions in various arenas, including academic, employment, social, and other community related harms

- In general, mental health is often conceptualized as healthy functioning and demonstrating how the client's functioning is markedly different from others in his community, through restrictions or other self-imposed prohibitions, can yield significant insight for adjudicator

Parallel Histories

- If possible, close family members and friends either from the client's country of origin or current community can provide personal narratives when the client's own narrative is weak or the client is too overwhelmed or unable to speak on his own behalf

- This is especially true for family members or friends who have enjoyed parallel successful petitions

- Sadly, when the petitioner's claim involves homosexual persecution the client almost inevitably refuses to allow family members or even friends to participate in the evaluation, given the personal nature of the issues and the shame encountered

Over & Under Exaggeration

- Client's may over exaggerate narratives in an effort to bolster a weak claim and under exaggerate a narrative because he fears the truth is simply too terrible to relate or to be believed

- Correcting for one or both will make the narrative clearer, particularly as extraneous material tends to denigrate the underlying narrative of the petitioner's claim

Lack of Detail

- Collapsed Memories -

- Most clear memories -

1. Outrageous: an occurrence that is exceptionally out of the ordinary (rape).
2. Qualified: qualified by the shame or guilt that the client feels
3. Impossible to forget: retaining a scar due to violence

THANK YOU !