

## IMMIGRATION EQUALITY

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## Asylum Decisions

Until recently, there was very little precedent in the area of LGBT and HIV-based asylum law. Since 2003, the number of precedential LGBT asylum cases has more than tripled. Not surprisingly, the Ninth Circuit has continued to expand asylum, withholding and CAT protections for LGBT individuals, but other Circuits have taken much narrower views of what constitutes persecution in this context.

Below is a case chart which combines all precedential and non-precedential decision from federal court which is current through May 2010. This chart combines the work of Holland & Knight intern Nedra Adams, and students at the University of Washington School of Law, Meena Jagannath, Roxanna Rezai and Tobias Damm-Luhr under the supervision of professor Thomas Cobb. Thanks also to former Immigration Equality intern, Jessica Jenkins, for her contributions to the chart. Further thanks to Melanie Schaschl, Charlotte Melbinger, Maki Takahashi, and Scott Levi of the University of Pennsylvania Law School for their 2012 update.

Remember, every asylum application is unique and very dependent on the specific facts of the case, so, just because another applicant won (or lost) from a particular country does not mean that another applicant from the same country will have the same outcome.

[LGBT/HIV PRECEDENTIAL AND NON-PRECEDENTIAL ASYLUM TABLE — CURRENT THROUGH OCTOBER 2012](#) (pdf)

Below you will find links to all of the precedential cases which do exist. If you know of other cases which you think we should include here, please let us know.

We would also like to expand this area of the website to include unpublished (redacted) BIA and Immigration Court decisions to aid practitioners in thinking of creative arguments in their cases.

### U.S. ASYLUM LAW — PRECEDENTIAL LGBT/HIV DECISIONS

[Matter of Toboso-Alfonso 20 I&N Dec. 819 \(BIA 1994\)](#) (pdf) — (B.I.A. 1990) — the original case, decided in 1990 and designated as precedent in 1994, which established sexual orientation as “membership in a particular social group” and paved the way for asylum based on sexual orientation. Toboso-Alfonso was a gay man from Cuba who suffered various abuses at the hands of his government, including being forced to participate in a labor camp.

[Pitcherskaia v. INS, 118 F.3d 641 \(9th Cir. 1997\)](#) (pdf) — finding that even if the abuser does not intend harm to the victim, if the victim experiences the abuse as harm, this can rise to the level of persecution. In this case, the applicant was a lesbian from Russia who, among other abuses, had been forced to undergo electroshock therapy to “cure” her of her homosexuality

[Hernandez-Montiel v. INS, 225 F.3d 1088 \(9th Cir. 2000\)](#) (pdf) — finding that a gay man with a female sexual identity who suffered persecution in Mexico, largely because he was effeminate, qualified for asylum.

[Amanfi v. Ashcroft, 328 F.3d 719 \(3rd Cir. 2003\)](#) (pdf) — finding that it is possible to proceed with an asylum claim based on persecution on account of imputed membership in a particular social group, in this case sexual orientation, even if the applicant is not actually gay. In this case the applicant, a man from Ghana who feared he would be ritually sacrificed, engaged in a homosexual act with another man, knowing that this would lead to his being spared the sacrifice. After he was spared, however, he was mistreated because the authorities believed he was gay. The Court recognized his imputed membership in a particular social group and remanded the case for further investigation on his claim of persecution.

[Gebremaria v. Ashcroft 378 F.3d 734 \(8th Cir. 2004\)](#) (pdf) — motion to reopen based on feared persecution by HIV-positive Ethiopian woman denied because she knew of her HIV-positive status at the time of the original hearing and did not raise the issue.

[Reyes-Reyes v. Ashcroft, 384 F.3d 782 \(9th Cir. 2004\)](#) (pdf) — reaffirming that a “gay man with a

female sexual identity” belongs to a particular social group, and finding that if a government willfully turns a blind eye to severe physical abuse inflicted by non-government actors this can rise to the level of government acquiescence in torture so as to qualify for relief under the Convention Against Torture treaty. In this case Reyes-Reyes was a gay man with a female sexual identity from El Salvador who had been kidnapped, beaten and raped by non-government actors because of his sexual orientation. The Court remanded for further proceedings on his CAT and withholding claims.

**Molathwa v. Ashcroft, 390 F.3d 551 (8th Cir. 2004)** (pdf) — holding that the federal court lacked jurisdiction to review his claimed exception to the one year filing deadline for asylum and that Molathwa had failed to demonstrate that it was more likely than not that he would be persecuted because of his gay sexual orientation in his native Botswana.

**Galicja v. Ashcroft, 396 F.3d 446 (1st Cir. 2005)** (pdf) — denying a gay Guatemalan man's petition for review because he failed to show government involvement or lack of protection from past mistreatment he suffered by his neighbors

**Karouni v. Gonzales, 399 F.3d 1163** (pdf) (9th Cir. 2005) (pdf) — holding unequivocally that “all alien homosexuals are members of a ‘particular social group’” and finding that Karouni, a gay HIV positive man from Lebanon, had established a well founded fear of future persecution.

**Boer-Sedano v. Gonzales, 418 F.3d 1082 (9th Cir. 2005)** (pdf) — holding that a gay Mexican man with AIDS who was sexually and physically abused by a Mexican police officer was statutorily eligible for asylum. The case also contains good language about the applicant's HIV status making internal relocation within Mexico impossible, as well as good language that return trips to the home country alone do not render an applicant ineligible for asylum.

**Salkeld v. Gonzales, 420 F.3d 804 (8th Cir. 2005)** (pdf) — holding that gay man from Peru who did not personally suffer past persecution and who did not meet a one year filing deadline exception, failed to prove a clear probability of future persecution and therefore did not meet the standard for withholding of removal. The Court found it significant that Salkeld himself had never experienced physical violence, there are no laws against homosexuality in Peru, and there are some regions in Peru which are relatively safer for gay people than others.

**Kimumwe v. Gonzales, 431 F.3d 319 (8th Cir. 2005)** (pdf) — terrible decision (with good dissent) holding that a gay man from Zimbabwe had not established past persecution although, among other things, he was jailed without charges for two months after having sex with another man at college. The Court found that he was jailed because of sexual misconduct, not homosexual identity. The Court also found that in spite of Mugabe's statements that homosexuals have no rights, and Zimbabwe's poor record on human rights, that Kimumwe had failed to prove a fear of future persecution.

**Ornelas Chavez v. Gonzalez, 458 F.3d 1052 (9th Cir. 2006)** (pdf) — withholding of Removal and Convention against Torture decision remanding the case of a transgender woman from Mexico who suffered abuse from family and coworkers, because the Immigration Judge applied an impermissibly strict legal standard to both claims. The circuit court found that reporting past abuse to police was not a requirement for withholding of removal, and that the legal standard for CAT relief was not that the abuse was sanctioned by government official but that it occurred by their “consent or acquiescence” or “willful blindness.”

**Joaquin-Porras v. Gonzales, 435 F.3d 172 (2d. Cir. 2006)** (pdf) — terrible decision finding that in spite of the clear regulatory language that the one year filing deadline is calculated from the last date of entry, this applicant who applied within one year of entering the U.S. after receiving advance parole was untimely. Worse still, the 2nd Circuit upholds the immigration judge's holding that Joaquin-Porras, a gay man from Costa Rica, did not suffer past persecution when he was raped by a police officer, but rather suffered a random act of violence by a corrupt officer and that an incident during his last visit to Costa Rica during which he was detained by the police and forced to pay a bribe did not rise to the level of persecution. This case serves as a cautionary tale that bad facts make bad law. Joaquin-Porras had obtained advance parole through a fraudulent marriage which may have predisposed the courts against him, and State Department reports for Costa Rica show it to be a more tolerant country than others in Latin America.

**Morales v. Gonzalez, 472 F.3d 689 (9th Cir. 2007)** (pdf) — Asylum decision remanding the case of a transgender woman from Mexico whose case had been denied because the IJ improperly found her misdemeanor conviction to be a crime of moral turpitude rendering her ineligible for asylum or withholding of removal. The Circuit Court found that the IJ erred in denying her Convention against Torture claim by ignoring “willful blindness” on the part of government officials, and found that suffering sexual assault in prison under the watch of prison guards met the legal standard for CAT relief.

**Nabulwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007)** (pdf) — good decision from the 8th Circuit, noting that the government's unwillingness or inability to control a private actor may apply in a lesbian asylum case. The Court also reprimands the BIA for erroneously making a finding of fact on that issue, and remands.

**Shahinaj v. Gonzales, 481 F.3d 1027 (8th Cir. 2007)** (pdf) — another good decision from the 8th Circuit finding that an Immigration Judge's findings that a gay applicant from Albania was not credible because his mannerisms and speech did not indicate that he was homosexual, and because he had not

reported instances of abuse to the authorities or an LGBT rights organization, were clearly erroneous and tainted the entire decision. The case was remanded with an advisement that it should be referred to a different immigration judge.

**[Lavira v. Att'y Gen of U.S., 478 F.3d 158 \(3d. Cir. 2007\)](#)** (pdf) — good Convention against Torture decision finding that an HIV-positive, pro-Aristide, double amputee who would face imprisonment under atrocious conditions in Haiti had proven that it was more likely than not that he would face torture because of his specific, severe circumstances. (Note this case may no longer be good law.)

**[Moab v. Gonzales, 500 F.3d 656 \(7th Cir. 2007\)](#)** (pdf) — good asylum decision remanding the case of a gay man from Liberia whose application had been denied because the judge and BIA found that his claim had become “increasingly egregious.” Court found it reasonable that he would not disclose sexual orientation at airport credible fear interview and remanded for further proceedings.

**[Jean-Pierre v. US Attorney General, 500 F.3d 1315 \(11th Cir. 2007\)](#)** (pdf) — Good Convention against Torture decision finding that an HIV-positive man who faced imprisonment in Haiti had proven that he would be singled out for abuse amounting to torture by prison guards because of his AIDS-related mental illness.

**[Ixtlilco-Morales v. Keisler, 507 F.3d 651 \(8th Cir. 2007\)](#)** (pdf) — Denying asylum to a gay man from Mexico because the abuse he suffered at the hands of his family as a child did not rise to the level of past persecution and his age was a changed circumstance rebutting his fear of future persecution. The circuit court also upheld the BIA's finding that attacks against gay men and HIV-positive individuals in Mexico were not widespread enough to constitute a well-founded fear of persecution.

**[Eke v. Mukasey, 512 F.3d 372 \(7th Cir. 2008\)](#)** (pdf) — withholding of removal case denying claim by Nigerian man who claims to be gay. Denial is based on applicant's credibility — he made contradictory statements about fathering children and being married and in no way corroborated his homosexuality. Good dicta however, accepting IJ's acknowledgement that there is a pattern and practice of persecution against gay people.

**[Bosede v. Mukasey, 512 F.3d 946 \(7th Cir. 2008\)](#)** (pdf) — Withholding of Removal decision remanding the case of an HIV-positive man from Nigeria who faced imprisonment and torture if deported due to his drug convictions in the United States and HIV status. The circuit court remanded the case to a different Immigration Judge, finding that the IJ in this case “cared little about the evidence” that the petitioner would be imprisoned and be tortured and had suggested that petitioner bribe Nigerian officials to get out of jail.

**[Bromfield v. Mukasey, 543 F.3d 1071 \(9th Cir. 2008\)](#)** (pdf) — good case finding that there is a pattern and practice of persecution against homosexuals in Jamaica. The court remanded the case to determine whether the persecution meets the heightened standard for withholding of removal. This is the only published gay case to find a pattern and practice of persecution against gay people.

**[Kadri v. Mukasey, 543 F.3d 16 \(1st Cir. 2008\)](#)** (pdf) — good case remanding the asylum claim by a gay Indonesian man for the BIA to articulate the standard for economic persecution. Kadri had been unable to make a living as a medical doctor and the IJ had granted asylum, the BIA reversed without having explained what standard it used.

**[Ali v. Mukasey, 529 F.3d 478 \(2nd Cir. 2008\)](#)** (pdf) — good decision which remanded a decision due to a judge's reliance on offensive homosexual stereotypes. When a gay Guyanese man made a CAT claim based upon his status as a criminal deportee and homosexual, the lower court immigration judge stated that “violent dangerous criminals and feminine contemptible homosexuals are not usually considered to be the same people” as a basis of proving that evidence for one status contradicted evidence for the other and therefore weakened his claim. This was only one of several homosexual stereotypes that the judge relied upon, resulting in his review being determined to be so grounded in bias or hostility such that it could not be granted meaningful review.

**[Razkane v. Holder, 562 F.3d 1283 \(10th Cir. 2009\)](#)** (pdf) — good decision which reversed and remanded a decision that relied on gay stereotypes in order to prove that a Moroccan man did not appear gay enough for persecution to occur. The lower court immigration judge relied on the fact that a gay Moroccan man did not appear to adhere to homosexual stereotypes as the basis on which it denied him withholding of removal. This court reversed the case, stating that the stereotyping prevented meaningful review of the case.

**[Manani v. Filip F.3d, 2009 U.S. App. LEXIS 1980 \(8th Cir. 2009\)](#)** (pdf) — denial of asylum to HIV-positive Kenyan woman is upheld. Manani entered the U.S. in October 2001, was diagnosed with HIV in January 2003 and filed for asylum in May 2004. Although the Chicago asylum office found that there was a “changed circumstance” it also found that the 16 month delay in filing after her HIV diagnosis was not a “reasonable period of time.” The BIA upheld and the 8th Circuit found that it lacked jurisdiction to review the one year issue since there was not a constitutional or question of law raised. The federal court upheld the IJ and BIA's findings that she did not meet the higher withholding standard because “has not shown a clear probability that the Kenyan government, or private actors that the Kenyan government is unable or unwilling to control, would deliberately deprive her of access to life-saving medical care. Nor has Manani shown that any inadequacies in Kenya's health care system result from an effort to persecute persons diagnosed with HIV.” The silver lining in the case is that it

implicitly accepts HIV as a particular social group and accepts an HIV diagnosis as a changed circumstance.

**Martinez v. Holder, 557 F.3d 1059 (9th Cir. 2009)** (pdf) — a bad decision which found that an asylum applicant from Guatemala who initially made a false claim based on political opinion was not credible in the sexual orientation-based claim he subsequently put forth. He added his sexual orientation-based claim very soon after homosexuality was first acknowledged as a valid basis for asylum. The effect of the majority basically establishes that an initial lie renders any supplemental claim not credible. There was also a good dissent about fear of sexuality-based persecution possibly being the reason why one pursuing asylum based on one's sexuality would initially withhold that information from immigration officials.

**Pangilinan v Holder, 568 F.3d 708 (2009) (9th Cir. 2009)** (pdf) — a good case that protected an immigrant representing herself pro se in asylum and Convention Against Torture claims. The case remanded an immigration judge's case because a Filipino transsexual woman representing herself pro se had her right to due process violated when she was simply asked if she had "anything to add in support of [her] claim" instead of being probed about the details and facts of her case. She was not given the chance to describe the past persecution she faced as a transgender person as support for her asylum and CAT claims. Since many immigrants representing themselves pro se lack a comprehensive knowledge about immigration law, and their failure to do so can result in removal, immigration judges have a duty to inquire about all the relevant facts.

**N-A-M v. Holder, 587 F.3d 1052 (10th Cir. 2009)** — decision affirming denial of withholding of removal to a Salvadorian male-to-female transsexual. The Immigration Judge determined that she had a "viable persecution claim," but denied her application for withholding of removal because she had been convicted a "particularly serious crime" as defined in 8 U.S.C. §1231 (felony menacing). On appeal to the BIA, N-A-M argued that (1) felony menacing is not a "particularly serious offense" under §1231 because (a) it is not an aggravated felony, and (b) §1231 requires a separate "danger to the community assessment"; and (2) she was denied due process of law when the IJ considered evidence outside the record of conviction. The BIA affirmed. The 10th Circuit affirmed the BIA's decision, stating that the BIA's interpretation of "particularly serious crime" was reasonable and that N-A-M had suffered no denial of due process. One judge filed a concurrence regarding, among others, the term "particularly serious offense" being a "fickle standard."

**Eneh v. Holder, 601 F.3d 943 (9th Cir. 2010)** (pdf) — A good Convention Against Torture ("CAT") decision involving an application for deferral of removal under CAT by a Nigerian man living with AIDS. Lawrence Eneh, a parolee from Nigeria, was convicted of a federal offense, sentenced to 36 months imprisonment, and placed in removal proceedings. Eneh testified that he would be imprisoned upon return and intentionally deprived of necessary medications while in prison as a form of punishment for having AIDS. The sole issue on appeal to the Ninth Circuit was whether the BIA erred in denying Eneh deferral of removal under CAT. The Ninth Circuit vacated and remanded the BIA's decision, stating that both the IJ and the BIA had failed to acknowledge and analyze testimony and documentary evidence that Eneh would be individually and intentionally targeted for mistreatment because of his HIV status and associated medical problems.

**Ayala v. U.S. Attorney General, 605 F.3d 941, (11th Cir. 2010)** — A good decision in which the 11th Circuit Court of Appeals vacated the BIA's decision because it had failed to give reasoned consideration to an asylum application. Ayala was a Venezuelan gay, HIV-positive applicant for asylum, withholding of removal, and CAT relief in removal proceedings. He had experienced discrimination, threats, harm and mistreatment by co-workers, neighbors, radical Chavez supporters, and police. The IJ found that Ayala did not experience past persecution because, among others, the Venezuelan government did not motivate or acquiesce in the actions of Ayala's neighbors, co-workers, or those of the radical Chavez supporters, and the actions of the police officers were not motivated by prejudice towards gay men or toward him individually. The IJ also found that Ayala had no well-founded fear of future persecution, since he had failed to relocate to another part of the county, and since conditions for gay people had improved since Hugo Chavez came to power. The BIA affirmed the IJ's decision. On appeal, the 11th Circuit determined that the BIA and the IJ failed to give reasoned consideration to Ayala's application. For this reason it vacated the BIA's decision and remanded to the BIA for further proceedings.

**Aguilar-Mejia v. Holder, 616 F.3d 699 (7th Cir. 2010)** — decision finds that it was not error for Immigration Judge and BIA to not consider the possibility of individualized harm to an HIV-positive asylum seeker who also advanced an imputed gay male claim. The Court acknowledged that in the past it has found error when lower courts did not consider a "pattern and practice" of persecution claim, even if that was not raised by the applicant. However, here, where the applicant advanced only a pattern and practice claim and specifically stated that there was no individualized harm claim, the Court found no error in the Immigration Judge's failure to consider individualized harm. The asylum seeker had citizenship in Mexico, Guatemala and Colombia. There is good dicta from the Court asking the government to consider humanitarian relief because of the applicant's advanced AIDS-related illnesses.

**Todorovic v. U.S. Atty. Gen., 621 F.3d 1318 (11th Cir. 2010)** — good decision remanding the case of a gay Serbian man after the immigration judge had relied on improper stereotyping.

[Castro-Martinez v. Holder](#), 641 F.3d 1103 (9th Cir. 2011) — terrible decision denying asylum to gay, HIV-positive Mexican man, in part because he never reported childhood sexual abuse to authorities.

The decision also held that, on the record before the immigration judge, the respondent did not establish a pattern and practice of persecution. After a petitioner for rehearing en banc, the decision was re-issued in late 2011, and some language regarding reporting requirements for children were softened, but the result remains the same.

[Lopez-Amador v. Holder](#), 649 F.3d 880 (8th Cir. 2011) — affirmed denial of asylum claim by Venezuelan lesbian. Ridicule by police in park did not amount to persecution, other harm she alleged to have suffered based on political opinion (being in a crowd that was shot at and going through government vehicle check points) was not found to be targeting her specifically. Motion to reopen based on worsening conditions for lesbians was also denied, in part because documents focused on worsening conditions for transgender people not lesbians.

[Omondi v. Holder](#) 674 F.3d 793, 797 (8th Cir. 2012) —The crux of the case was that Omondi, a citizen of Kenya, and his then-boyfriend Kamau had been imprisoned and mistreated by guards (including being forced to perform sexual acts.) After a prior appeal, the case was heard by a second immigration judge. The IJ required corroboration from Omondi of this central incident. Kamau submitted a letter corroborating the relationship and detention by the police, but not discussing the beating or sexual abuse. The IJ denied the application and the BIA upheld this because of the lack of corroboration. The 8<sup>th</sup> Circuit remanded, finding that while it was reasonable for the IJ, after a case-by-case analysis, to require this corroboration, there were so many deficiencies in the transcription of the record (236 “indiscernible”) that respondent was not able to appeal the IJ’s decision regarding respondent’s explanation of why Kamau was no longer available to provide further corroboration.

[Desai v. Attorney Gen. of U.S.](#), 695 F.3d 267, 268 (3d Cir. 2012). this case concerns an HIV-positive man from India’s claim under the Convention against Torture. However, there are not legal issues in the appeal which go to the substance of his claim; the appeal only concerns the post-departure bar on a sua sponte motion to re-open and the Third Circuit upheld the BIA’s decision that it lacked jurisdiction to consider this motion.

[Neri-Garcia v. Holder](#), 696 F.3d 1003, 1006 (10th Cir. 2012), decision denies case for withholding of removal or Convention against Torture relief of gay man from Mexico who was statutorily ineligible for asylum. Although the applicant was found to be credible and established past persecution (mostly from thirty years prior), the Court upheld the immigration court and BIA’s findings that DHS rebutted the presumption of future persecution based on improving conditions in Mexico. This appears to be another unfortunate case where the primary evidence in the record was the DOS report on human rights abuses and where there was no expert testimony proffered, so no way to address the issue of current country conditions and the presumption of future persecution.

[Matter of M-H-](#), 26 I. & N. Dec. 46 (BIA 2012), case denying asylum, withholding and CAT relief to a gay man from Pakistan who feared removal, in part, based on his sexual orientation. The Immigration Judge denied asylum and withholding of removal but granted withholding under CAT. On appeal, the sole legal issue was whether, within the Third Circuit, a foreign national can be found to have been convicted of a “particularly serious crime” if the crime was a misdemeanor under state law and not a felony. The BIA concluded that it could be a PSC and remanded to the immigration court for further proceedings.

[Vrljicak v. Holder](#), 700 F.3d 1060 (7th Cir. 2012), this decision upholds the denial of an asylum application by a gay man from Serbia. His appeal was based solely on a challenge to the regulations governing the “extraordinary circumstances” exception to the one year filing deadline, which was denied because the Court found that even if he succeeded in his challenge to the term “reasonable period of time” the outcome in his case would not have been different. In any event, there is little guidance to glean from this case because there are so few facts. The BIA decision on appeal, however, did find that he was entitled to withholding of removal.

[R.K.N. v. Holder](#), 701 F.3d 535 (8th Cir. 2012) — this is a case involving an HIV-positive claimant from Kenya. He had been found not credible on an unrelated claim, and he argued that the BIA had not adequately addressed his HIV claim. However, on appeal, the Court found that the BIA had also addressed his lack of credibility on this issue as well and the appeal was denied.