Lesbian Gay Bisexual Transgender Advisory Committee
Minutes of the November 15, 2010 Meeting

Committee Members Present: Commissioner Cecilia Chung, Alex Baty, Bart Broome, Corrin Buchanan, Ruby Cymrot-Wu, Samer Danfoura, Mark Dunlop, Allison Laureano, Amos Lim, Joseph Peralta, Bianca Polovina, Poonam, Fayez Rajani, Ray Rudolph, Lindasusan Ulrich, Vaughn Villaverde, and Amy Whelan.

Committee Members Absent: Elizabeth Labedz, Mark Murphy, Donna Sachet, and Mark Snyder.

Staff Present: Nadia Babella, Erin Jones-Le (intern), and Domenic Viterbo.

Guests Present: Jeffrey Martins (panelist), Shawn Matloob (panelist), Kim Seelinger (panelist), Leah Price, Eric Sharp, Eileen Sam, Leena Kamat, Tyler Zee, Jenny Drummond, Joshua Smith, Martin Steinman, Valerie Ly, Roy Roberts, Rostam, and Nathan Fox.

1. Call to Order and Roll Call

At 5:40pm, Commissioner Chung welcomed everyone. She explained where our meetings are usually held, talked about the application process for new committee members, and reviewed tonight’s agenda. Nadia Babella called the roll.

2. Public Comment for Items Not on the Agenda

Joshua Smith, of San Francisco Pride, but not in official capacity, said he appreciated Commissioner Chung work and the work of the Advisory Committee in holding this meeting. He hopes to find a way through Pride to help support these issues. Rostam with Bibi talked about working with asylees and his interest in the panel and learning to find ways to work together.

3. Out for Asylum: A Panel Discussion on the Challenges and Obstacles Faced by LGBT Asylum Seekers in the US (Discussion Item)

Moderator: Advisory Committee Member Fayez Rajani

Mr. Rajani said that the Advisory Committee started the work group this year to address LGBT asylum issues. Because San Francisco is a destination point for so many seeking refuge from persecution, the group felt this is a human rights issue to delve into. The goals are to educate
and disseminate information about asylum adjudication, immigration courts, biases and stereotypes, and obstacles. The invited panelists will discuss US and international processes. Mr. Rajani discussed a recent 11th Circuit decision that highlights the stereotyping that adjudicators employ when making their decisions. *Todorovic v. U.S. Attorney General* (11th Cir 2010). The case was about a Serbian gentleman. The immigration judge denied his claim based on a finding that he was not credible or believable. The immigration judge’s language included that, “it is clear that the gentleman is not overtly homosexual.” Immigration judge said he was not to be believed because he was not overtly gay or effeminate. This case could be a stepping stone in the right direction – Immigration judge’s decision was vacated and remanded, as the 11th Circuit recognized that the immigration judge’s bias was not relevant in determining the applicant’s credibility. Mr. Fayaz introduced the three panelists: Kim Thuy Seelinger, Jeffrey Martins and Shawn Matloob.

**Kim Thuy Seelinger** is the Director of the Sexual Violence & Accountability Project. Prior to joining the Human Rights Center, Seelinger was a staff attorney and clinical teaching fellow at the Center for Gender and Refugee Studies at UC Hastings College of the Law, where she co-taught the Refugee and Human Rights Clinic and represented numerous asylum seekers fleeing gender-based violence. Before that, she worked as a Yale-China Association Legal Education Fellow in southwest China and as immigration staff attorney with the Lutheran Family & Community Services in New York City. Seelinger has published and presented extensively on refugee law, gender-based violence, persecution based on sexual orientation, and the intersection between health and human rights. Her primary fieldwork experiences have focused on Uganda, Vietnam, and Haiti. Seelinger graduated from NYU School of Law and serves on the board of the Southeast Asia Resource Action Center (SEARAC).

Ms. Seelinger began with some key definitions. The Refugee Convention says that a refugee is someone who has a well-founded fear of persecution on account of one of the following categories 1) race 2) religion 3) nationality 4) political opinion or 5) particular social group, and who is unwilling or unable to return. So, persecution based on gender, sexual orientation, or gender identity is not specifically listed. A person has to show that they belong to a “particular social group.”

An asylee or a refugee has to show that the harm amounts to persecution by state actor or by someone the state can’t or won’t control. Persecution can be physical (i.e. rape, beating) or non-physical (i.e. verbal abuse, isolation, psychological abuse, attempts to “cure” people of sexual orientation).

Also, there needs to be a “nexus” a connection between actor’s motivation for the harm and a characteristic of the person being harmed. The ground for which LGBT claims is that the persecution is because of their membership in “a particular social group” because sexual orientation or gender identity is not specifically mentioned.

At the international law level, there are 2 approaches to defining what constitutes *particular social group*:
1) **Protected Characteristics Approach** – a person belongs to a group because they possess an immutable characteristic; something that is so fundamental to identity that a person cannot change it or should not be required to change it, or

2) **Social Perception Approach** – society perceives that a group is a group because of a common characteristic.

The UN High Commissioner for Refugees (UNHCR – monitoring and interpreting body for the Refugee Convention) says that a particular social group is a group that shares or is perceived to share a common immutable/fundamental characteristic other than the fact of persecution. If the persecution is not done by a government actor, then you have to show that the government couldn’t or wouldn’t protect applicant.

Jeffrey Martins is a private attorney in San Francisco focusing largely on asylee and refugee issues. He has spoken on national conferences and at local immigration organizations regarding asylum law and practice. Prior to opening his own office, Mr. Martins serves as an Asylum Officer at the San Francisco Asylum Office where he adjudicated over 3,000 applications for asylum and refugee status in the US and worked as an Acting Supervisor. He also traveled to Croatia, Serbia, Russia to interview refugees. During the Kosovo war, Mr. Martins worked in refugee camps in Macedonia interviewing ethnic Albanian Muslims who had fled ethnic cleansing. While overseas, he worked closely with the United Nations High Commission for Refugees, the US Department of State, International Organization for Migration, and many other nongovernmental organizations.

Mr. Martins discussed the US law has come to define the concept of membership in a particular social group. The first attempt to define the concept was a in 1985 BIA (Board of Immigration Appeals) decision, called Matter of Acosta. The BIA said that particular social group is a group of persons, all of whom share a common characteristic that is immutable or fundamental to existence. This became law in US for many years. As it relates to LGBT applicants, the first important decision was in 1990 the Toboso-Alfonso decision. The case provided no real analysis about whether sexual orientation qualified as a particular social group. The BIA never stated that sex orientation was not a particular social group, so it assumed that sexual orientation was a particular social group. So as long as an applicant can establish a well-founded fear based on sexual orientation, they can be awarded asylum.

US courts had a hard time with deciding what a particular social group is because of domestic violence asylum cases and gang related asylum cases. Courts were afraid that if they decided that granted victims of domestic violence constitute a particular social group, then we would have floodgate of applicants. Also there were people who were feeling gangs who were former gang members. At the same time, a growing sensitivity to gender-specific persecution, such as female genital mutilation was emerging. In 1996, in Matter of Kasinga, a case from Togo, the court found a way to allow for asylum. Bush administration never passed gender guidelines, as was anticipated. The government particularly concerned about former gang members coming,
so they needed new analytical framework to deny gang-related asylum. This evolved into new particular social group requirement of “social visibility.

In 2006, in *Matter of C-A*, the BIA said social visibility could be used as a factor for granting/denying asylum. This is most problematic with sexual orientation and gender identity because it is something that can’t see. You are not always “visible” as an LGBT person. Federal Courts’ (which have jurisdiction over BIA) response to social visibility test is mixed. The 7th Circuit has been most critical of social visibility test. The 9th Circuit (includes CA) has hinted a lean toward social perception test. Another requirement that has emerged is the particularity requirement: for a group to be a group, it must have boundaries that define who is in/out. This is particularly an issue for bisexual applicants, whose sexual orientation is perceived to fall in between the two groups.

The problem that was created with all these tests and new analyses is that it loosened the reins for immigration judge to find/not find credibility based on personal stereotypes of what an LGBT person should act or be like and to erroneously apply the “social visibility” test to judge appearance of being LGB or T, even though it has long been established that sexual orientation is a protected “membership in a particular social group.”

**Shawn Matloob** is a solo practitioner in San Francisco and has practiced U.S. immigration and nationality law with an emphasis on family immigration and asylum since 1999. He currently serves on American Immigration Lawyers Association (AILA) NorCal's Advisory Council as Co-Liaison to San Francisco Citizenship & Immigration Services and on Jewish Community Relations Council and in the past served as AILA NorCal Liaison to San Francisco Immigration Court and Asylum Office. He is a volunteer mentor attorney on asylum issues to AILA and non-immigration attorneys and Boalt law students. He has spoken at immigration organizations regarding asylum law and practice. He came to the U.S. as a refugee from Iran and obtained his J.D. with International Law concentration from UC Hastings and B.A. in Political Science and Near Eastern Studies from UC Berkeley.

Mr. Matloob discussed the 1-year bar and other obstacles to asylum. The 1-Year Bar was enacted by Congress in 1997 and currently poses the greatest challenge to LGBT asylum. It states that asylum applicants must apply for asylum within one year of their last entry into the US. Many LGBT immigrants are not aware that they can apply for asylum because of the persecution they encountered because of their sexual orientation or gender identity. Unfortunately, ignorance of the law is not an exception to the one year bar.

Exceptions that relate to LGBT applicants fall under 2 categories: 1) changed circumstances to the applicant or the applicant’s country and 2) Extraordinary circumstances which prohibited applicant from applying within the one-year.

1) **Changed Circumstances** examples which apply to LGBT community may include:
• Coming out (Issue: varying degrees of coming out – when is a person ready and able to apply for asylum?)
• Starting a same-sex relationship
• Transgender transition
• HIV-positive Status

2) Extraordinary Circumstances examples which apply may include:
• Extreme isolation (i.e. come to this country, don’t get support in ethnic community, so may not be ready to apply for asylum)
• Extreme anxiety and psychological impact because of past persecution
• Anxiety/psychiatric impact of being LGBT in an oppressive society

Once experience a changed or extraordinary circumstance, must apply for asylum within a reasonable period. Most adjudicators (including San Francisco office) use 6 months.

Filing Procedures - Most applicants file affirmatively, which means once they forwarded an application to local asylum office, which schedules an asylum interview within a couple months. They have a right to bring an attorney and an interpreter, but they are not provided for you. If the application is not approved, the asylum office does not have jurisdiction to deny. Instead, the case is referred to immigration judge to do a de novo review of application.

Those who are already before an immigration court file defensively. In this case, you only get one shot to win, instead of two. You have a right to an attorney at own expense. You have to use the interpreters provided by courts, which are provided for free. If immigration judge denies asylum, you have 30 days to appeal decision. If judge grants asylum, DHS has option of appealing it. Decisions of BIA can be appealed to Circuit Court. California is in the 9th Circuit.

Challenges include immigration adjudicators inserting personal bias. The 11th circuit case discussed earlier was the 4th case in a line of cases from various circuits that addressed the potential implication arising from immigration judges’ personal opinions. In each case, BIA affirmed decisions, but Circuit court reversed, and the Circuit court demanded that case be assigned to a different immigration judge if remanded.

Another challenge is mixed country conditions. In some countries, LGBT treatment is improving; however, this doesn’t mean persecution doesn’t still exist. One example of this issue is a case from Argentina. San Francisco immigration judge said, “Argentina has made some changes in the way they view gay people in last several years.” The judge also said Argentineans have
more liberal views in terms of gay rights, and Buenos Aires is one of the most accepting areas. The BIA reversed – said while record indicates advances, does not sufficiently establish that conditions have changed sufficiently enough. They cited culture of machismo, police corruption/brutality/impunity that remained a problem. The case was sent back to immigration judge to grant asylum. Mixed country conditions is also an issue which LGBT asylum applicants from Mexico encounter.

**Further Comments from Panel:**

Ms. Seelinger commented that if adjudicators are using country conditions and doing a simple search, often the top of search (i.e. Google) reveals a recent situation of acceptance. She also pointed out that there are certain cases where don't need well-founded fear of future persecution if past experience is so terrible. This is humanitarian asylum. Also, once past persecution established, burden shifted to government. The adjudicator may try to show person can be relocated somewhere else in the country.

Ms. Seelinger stated that Dusty Aruajo, National Asylum Partnership on Sexual Minorities, is the gatekeeper for LGBT and HIV country conditions archive from around the world and that she always included his country condition packets when representing an applicant. [http://www.immigrantjustice.org/resourcespolicy/napso/napsmtest.html](http://www.immigrantjustice.org/resourcespolicy/napso/napsmtest.html)

**Mr. Rajani asked Questions on behalf of the LGBTAC:**

What strategies should we use to present our cases as we enter courts and detention centers to educate on cultural sensitivity?

Mr. Martins stated that lack of country conditions is a problem; in some communities there is no information as a result of oppression. He suggested to try to give officer/courts as much info as possible about reports of all persecution in that country.

Ms. Seelinger stated that psychological evaluations are key to presenting the effect of past harm. She encourages clients to open up playing field really wide in terms of expressing the harm they have experienced, because people dismiss day to day persecution and only give examples of more extreme persecution. Mr. Matloub commented that medical evaluations are important for those with physical injuries.

How do you prepare clients for court?
Mr. Martins conducts mock interviews, although you can't prepare client for stress/anxiety, and how it will impact their answers. There is a high risk of messing up and not being found credible just because someone is nervous. Mr. Martins warns applicant that there is no privacy. Mr. Matloub stated that attorneys can object to questions if too personal/harmful.

Ms. Seelinger suggested to ask your client if they have a preference for male or female officer. This can be very important for clients who have experienced persecution at hands of government officials. For example, a gay man who experienced harm at hands of a male government official may prefer a female officer.

Mr. Martins remarked that Senator Patrick Leahy has proposed the Refugee Protection Act to eliminate the 1-year filing deadline and that it bears support because many applicants with legitimate asylum cases are denied on this technicality.

**Audience Questions:**

What if a person wants to travel after granted asylum?

Mr. Matloub answered that they can apply for refugee travel document, then can travel. Ms. Seelinger warned that they should not be visiting country of persecution, though there are ways of doing it in certain circumstances (i.e. parent dying).

What resources are available for applicants who can't afford a private attorney?

Dave Rorick from the Lawyers Committee for Civil Rights has run an excellent pro bono asylum program for years. [http://www.lccr.com/immigration_direct_services_asylum.shtml](http://www.lccr.com/immigration_direct_services_asylum.shtml)

In addition Ms. Seelinger refers applicants to the Aids Legal Referral Panel and the East Bay Sanctuary Covenant. Ms. Seelinger asked if there is a way the Commission can compile and distribute an information list. Commissioner Chung replied that this is something we have been considering.

Dusty Araujo brought up the difficulties faced by LGBT applicants in detention. He stated that the difficulties covered in this discussion are further amplified for applicants in detention because of lack of communication they have with outside world and lack of access to attorneys and resources.

Is it easier to get asylum from certain countries?
Mr. Matloob answered that it is easier for LGBT applicants from Muslim countries, given that country conditions. Mr. Martins clarified that there may be an exception with cases from Indonesia. Mr. Martins stated there’s a wide range of countries that are granted including cases from Russia, Latin America, Eastern Europe, and Asian countries, such as China.

Is there a pool of competent psychologists/psychiatrists? What about clients who feel demonized by psychiatrists because in past were sent to psychiatrist to be “cured”?

Ms. Seelinger answered that the Bay area has dearth of access to psychiatric services for asylum seekers and that you have to go through national networks of doctors, like Physicians for Human Rights. Psychiatrist Dr. Stuart Lustig at UCSF and many of his psychiatric fellows have been a great help in this area. Mr. Matloub added that Survivors International is another organization that provides this service.

Ms. Seelinger stated that demonization is a legitimate concern and that both attorney and psychiatrist need to earn client’s trust in order for the client to tell their story in first place. Another key issue is the need for a good interpreter – someone who will not interfere in the process, but whom the client trusts.

Nadia Babella concluded the panel and stated that the workgroup has contacted the local asylum office to provide LGBT cultural competency training and that they have been receptive and are working together on developing a training. She also stated that the workgroup hopes to offer seminal training to detention centers and immigration judges.

4. Old/New Business – None

5. Announcements

Samer Danfoura announced that the LGBT Advisory Committee end of year celebration party will be held on December 14 at 5pm. Come and celebrate the Committee’s excellent work. All are invited. There will be a musical performance by LGBTAC member Donna Sachet and there will be light food and beverages.

Commissioner Chung encouraged people to apply to be members of the LBGT Advisory Committee; the only requirements are that applicants must be a SF resident and a members of the LGBT community or an ally.

6. Adjournment

Cecilia concluded the meeting at 7:33pm.