U.S. Department of Justice
Executive Office for Immigration Review *https://www.justice.gov/eoir/immigration-law-advisor*

Immigration Law Advisor

February 2024 **A Legal Publication of the Executive Office for Immigration Review** *Vol. 14 No. 1*

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Sexual Orientation and Gender Identity Claims in Asylum and Withholding of Removal

By Patricia Allen

As the Immigration Law Advisor (ILA) embarks on 2024, this article reflects on the evolution of the law relating to asylum and withholding of removal applications based on lesbian, gay, bisexual, transgender, and queer (LGBTQ) claims. The last time the ILA addressed a similar topic was more than 15 years ago, when Immigration Judge Dorothy A. Harbeck and Ellen L. Buckwalter reviewed the case law on asylum and withholding of removal claims based on sexual orientation.[1] This article will provide an update on the case law relating to sexual orientation and gender identity claims.

Sexual Orientation Recognized as a Particular Social Group

In March of 1990, the Board of Immigration Appeals (Board) issued its landmark decision, *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990), holding that a gay man could obtain fear-based relief based on his membership in a particular social group. The applicant in this case was a 40-year-old native and citizen of Cuba who entered the U.S. as part of the Mariel boatlift in 1980.[2] On account of his gay sexual orientation, the Cuban government gave him a choice between 4 years imprisonment and joining the mass emigration for the U.S. leaving from the port in Mariel.[3] The applicant chose the latter and joined more than 125,000 others fleeing the country to arrive in Florida over the next 5 months.[4] This group included many forced out by governmentally

sanctioned acts of repudiation aimed at dissidents and others otherwise deemed by the government as socially undesirable.[5]

Five years after the applicant entered the U.S., his parole was terminated, and he was placed in exclusion proceedings.[6] The Immigration Judge denied the applicant's application for asylum in the exercise of discretion in light of his criminal record in the U.S. but granted his application for withholding of deportation, finding that his life or freedom would be threatened in Cuba on account of his membership in a particular social group.[7]

The Board affirmed the Immigration's Judge's decision and held that the respondent's "status" as being gay, rather than his actual sexual conduct, was the reason for the harm he suffered and that this status served as a basis for his membership in a particular social group.[8] The Board's holding addressed the then-Immigration and Naturalization Service's (INS) argument that the Immigration and Nationality Act (Act) did not contemplate that a particular social group could be comprised of persons who engaged in "behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well."[9] This antiquated language used by the then-INS was consistent with the Act as it existed at the time this case was argued and decided. The Act still identified "sexual deviation" as one of the grounds to exclude gay persons from receiving a visa and being admitted into the U.S.[10] Thus, in light of the Act's bar on specific conduct, the Board focused its holding solely instead on the "status" of the respondent as gay and noted that the INS did not challenge the Immigration Judge's finding that it was an "immutable" characteristic.[11] Eight months after the Board issued *Matter of Toboso-Alfonso* as an unpublished decision, Congress removed "sexual deviation" as a bar to immigration and in doing so, lifted the ban on gay and lesbian immigrants after almost 40 years of exclusion on account of sexual orientation.[12] Three and a half years later, in 1994, Attorney General Janet Reno designated *Matter of Toboso-Alfonso* as precedent, paving the way for future asylum and withholding of removal claims based on this ground.[13]

Ten years later, the Ninth Circuit in *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005), found support in the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), to reject the distinction between the status of being gay and gay sexual conduct. The Ninth Circuit found that regardless of whether the respondent's claim was based on his status or his conduct, both qualified as persecution on account of his membership in a particular social group of gay individuals. The court also dismissed the argument that one could avoid persecution by not engaging in gay sexual conduct, because to so abstain would impermissibly require the respondent "to change a fundamental aspect of his human identity".[14] The Board recently withdrew from this distinction between status and conduct in *Matter of C-G-T-*, 28 I&N Dec. 740, 745-46 & n.7 (BIA 2023), citing *Karouni* and *Lawrence*. *Matter of C-G-T-* also clarified that "when considering future harm, adjudicators should not expect a respondent to hide his or her sexual orientation if removed to his or her native country."[15]

Avoiding Stereotypes

Immigration Judge Harbeck and Ms. Buckwalter's ILA article provided an overview of circuit court holdings prohibiting adjudicators from using stereotypes in their determinations and discussed cases from the Second, Seventh, and Eighth Circuits. Since 2008, circuit courts have continued to caution against the inappropriate use of stereotypes. For example, in 2009, the Tenth Circuit in *Razkane v. Holder*, 562 F.3d 1283 (10th Cir. 2009), reversed and remanded a decision that relied on gay stereotypes. The court found that

> the IJ relied on his own views of what would identify an individual as a homosexual rather than any evidence presented. Specifically, the IJ found

> there was nothing in Razkane's appearance that would designate him as being gay because he did not "dress in an effeminate manner or affect any effeminate mannerisms."[16]

This case cited to the Second Circuit holding in *Ali v. Mukasey*, 529 F.3d 478, 492 (2d Cir. 2008), that the Immigration Judge improperly "operate[d] from the unfounded assumption that Ali would not be perceived as a gay man unless he consciously did something explicitly 'homosexual.'" The Tenth Circuit also cited to the Eighth Circuit in *Shahinaj v. Gonzales*, 481 F.3d 1027, 1029 (8th Cir. 2007), which reversed the denial of asylum and withholding of removal due to "the IJ's personal and improper opinion [that] Shahinaj did not dress or speak like or exhibit the mannerisms of a homosexual."

In 2010, the Eleventh Circuit in *Todorovic v. U.S. Attorney General*, 621 F.3d 1318 (11th Cir. 2010), overturned an adverse credibility finding based on an Immigration Judge's stereotyping of gay men. The Eleventh Circuit vacated and remanded the case for "a new factual hearing, free of any impermissible stereotyping or ungrounded assumptions about how gay men are supposed to look or act."[17]

Even more recently, circuit court judges have criticized Immigration Judges' reliance on stereotypes when adjudicating a noncitizen's application for fear-based relief. In 2016, the Seventh Circuit upheld, in *Fuller v. Lynch*, 833 F.3d 866, 871 (7th Cir. 2016), the agency's denial of a noncitizen's application for relief under the Convention Against Torture based on the Immigration Judge's factual finding that the noncitizen was not bisexual. Judge Posner, however, dissented from the majority's conclusion, asserting that "the immigration judge does not know the meaning of *bisexual*" where her "conclusion [was] premised on the fact that [the male applicant] had sexual relations with women (including a marriage)."[18] In 2020, the Third Circuit in *Doe v. Attorney General of the United States*, 956 F.3d 135 (3d Cir. 2020), vacated the agency's denial of a gay man's application for asylum. The court cautioned the Immigration Judge "to exercise greater sensitivity when processing [the noncitizen's] application" and observed that the Immigration Judge's questions "intended to establish or test [the noncitizen's] self-identification as a gay man . . . were off base and inappropriate."[19]

As discussed above, the reliance on LGBTQ stereotypes may jeopardize the fair resolution of asylum claims. Stereotypes can also intertwine with the particular social group's social distinction, née social visibility, analysis. As one observer noted, "In some cases, the same group may be both socially invisible and hypervisible as a stereotypical object."[20]

While circuit courts have emphasized that Immigration Judges should avoid the use of stereotypes in adjudicating a respondent's asylum claim, it is equally important to recognize that stereotypes about LGBTQ individuals in the respondent's country of origin may affect a respondent's ability to satisfy the requirements for asylum. A society's stereotypical view of gay individuals will affect who is perceived as a member of a proposed group based on sexual orientation. For example, in *Velasquez-Banegas v. Lynch*, 846 F.3d 258 (7th Cir. 2017), the Seventh Circuit faulted the Immigration Judge for not sufficiently considering the evidence that the respondent—who was not gay—would be perceived as gay in Honduras because he was a middle-aged bachelor and was HIV positive.

As the Ninth Circuit recognized in *Antonio v. Garland*, 58 F.4th 1067, 1076 (9th Cir. 2023), neither it nor the Board had yet "explicitly recognized perceived or imputed sexual orientation as a cognizable social group." In this case, the respondent claimed that her persecutors in Guatemala tortured her "'for dressing up as a man' . . . because they believed 'dressing up as a man means that [she is] a lesbian' and sets 'a bad example for the children' in the village."[21] The Ninth Circuit held that the "IJ erred in construing Antonio's

proposed social group as 'manner of dress' when it was in fact 'women in Guatemala who are perceived to be lesbian.'"[22] It stated that, "Antonio's manner of dress was one reason her community associated her with the relevant proposed social group, not the basis of the group itself. Thus, the agency failed to conduct its particular social group analysis with respect to the correct group—women perceived to be lesbians."[23] The Ninth Circuit remanded the case to the Board to determine whether women in Guatemala perceived to be lesbian constitute a particular social group and if so, whether the respondent's persecution was on account of her membership in that group.[24]

Distinguishing between LGBTQ Claims

An adjudicator's accurate understanding of an LGBTQ respondent's circumstances is vital to the proper adjudication of the respondent's asylum claim. Circuit courts and the Board have generally recognized that a person's sexual orientation and gender identity are immutable, as they are "so fundamental to one's identity that a person should not be required to abandon them."[25] A queer applicant may present a claim based on a fluid sexual orientation or gender identity. Hypothetical circumstances behind such claims could include, for example: "a bisexual cisgender[26] woman married to a man; a gender queer person who alternates between gender pronouns and expressions; a cisgender man married to a transgender woman and identifies as heterosexual; or a transgender man who previously identified as a lesbian but now identifies as a gay man."[27]

The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), recently recognized the importance of understanding and distinguishing between the different fear-based claims raised by LGBTQ individuals in the agency's Affirmative Asylum Procedures Manual (AAPM),[28] which provides USCIS Asylum Offices detailed procedures involved in the affirmative asylum application process. This version of the AAPM instructs the Asylum Officer that "[i]n analyzing an applicant's claim for asylum, asylum officers must understand the differences between sex, gender, and sexual orientation."[29] It defined the terminology commonly used in asylum applications brought on account of being LGBTI,[30]—which the AAPM defines as those "individuals who identify as lesbian, gay, bisexual, transgender, intersex, or other diverse gender identities and sexual orientations"[31]—as follows:

> Sex: A biological categorization determined by reproductive, anatomical, and genetic characteristics, generally defined as male, female, and intersex.
> Gender: A social construct generally based on the societal roles expected of individuals based primarily on their sex. As a social construct, gender varies from society to society and can change over time.
> Gender Identity: A person's innermost concept of self as male, female, a blend of both, or nonbinary - how people perceive themselves and what they call themselves. One's gender identity may conform with or differ from their sex assigned at birth. This identity is not necessarily visible to others.
> Gender Expression/Presentation: How a person represents or expresses gender identity to themself and others - through appearance, dress, mannerisms, speech patterns, social interactions, name, and other characteristics and behaviors.
> Sexual Orientation: A person's attraction to people of the same or another sex (and sometimes to both/all sexes or to no one). Sexual orientation is distinct from gender identity.[32]

This example of how DHS defines the terms illustrates the complexity and overlapping nature of LGBTQ claims.

The importance of the adjudicator's understanding of each respondent's unique circumstances is illustrated by the Ninth Circuit's decision in *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015). The Ninth Circuit highlighted that while the "relationship between gender identity and sexual orientation is complex, and sometimes overlapping, the two identities are distinct."[33] *Avendano-Hernandez* demonstrates the difficulties transgender applicants may encounter in presenting their argument to support their claim based on gender identity. In this case, the respondent claimed persecution on account of being a transgender woman in Mexico. The Board found that the respondent had failed to show a future likelihood of torture in light of Mexico's laws that protect gay and lesbian persons. The Ninth Circuit found that the Board had "mistakenly assumed that these laws would also benefit [the respondent], who faces unique challenges as a transgender woman" and remanded the case back to the agency to consider the "unique identities and vulnerabilities of transgender individuals . . . [when] evaluating a transgender applicant's [claim]."[34]

"[W]ithout an accurate understanding of the situation faced by transgender . . . people, asylum adjudicators may regard transgender persons as opportunistic cisgender 'cross-dressers' without serious protection needs.[35] This is illustrated by the seminal case, *Hernandez-Montiel v. INS*,[36] where the Ninth Circuit held that gay men with female sexual identities in Mexico comprise a particular social group. The Ninth Circuit clarified that "[the applicant] is not simply a transvestite 'who dresses in clothing of the opposite sex for psychological reasons.' Rather, [the applicant] manifests his sexual orientation by adopting gendered traits characteristically associated with women."[37] Notable here is although the Ninth Circuit clarified that "[t]his case is about sexual identity, not fashion," the court found that it "need not consider . . . whether transsexuals[38] constitute a particular social group" despite the applicant's assertion that he may alternatively "be considered a transsexual."[39] This is notable because it reflects how claims that may seem to overlap are actually distinct. The proposed particular social group of transsexuals does not refer to sexual orientation, which is an element central to the particular social group found by the court.

Conclusion

This article presented an update on the circuit law related to asylum and withholding of removal applications based on sexual orientation and gender identity. As illustrated above, adjudicators must be careful in determining the particular social group of respondents raising LGBTQ claims, understanding that claims based on sexual orientation and gender identity may be complex and overlapping, and that one's membership in a particular social group may be fluid but nonetheless fundamental such that they should not be required to hide or change their membership. Moreover, as emphasized in the circuit court case law, adjudicators should be careful not to rely on stereotypes when determining how an LGBTQ person may act or present. As Immigration Judge Harbeck and Ms. Buckwalter recognized in their 2008 article, the foregoing is a discussion of a developing area of the law, thus, "it is reasonable to expect more case law, and more commentary from observers, in the coming years."[40] This article touched on a variety of subtopics affecting LGBTQ-based claims in removal proceedings that could easily be expanded upon in subsequent articles published in the ILA. Happy New Year!

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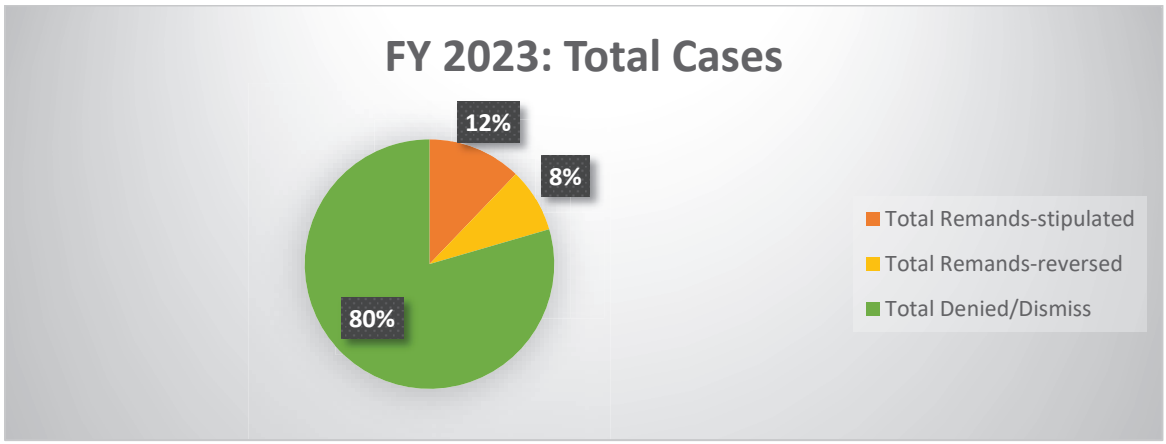
(cont'd on p. 10 (endnotes))

Federal Court Activity

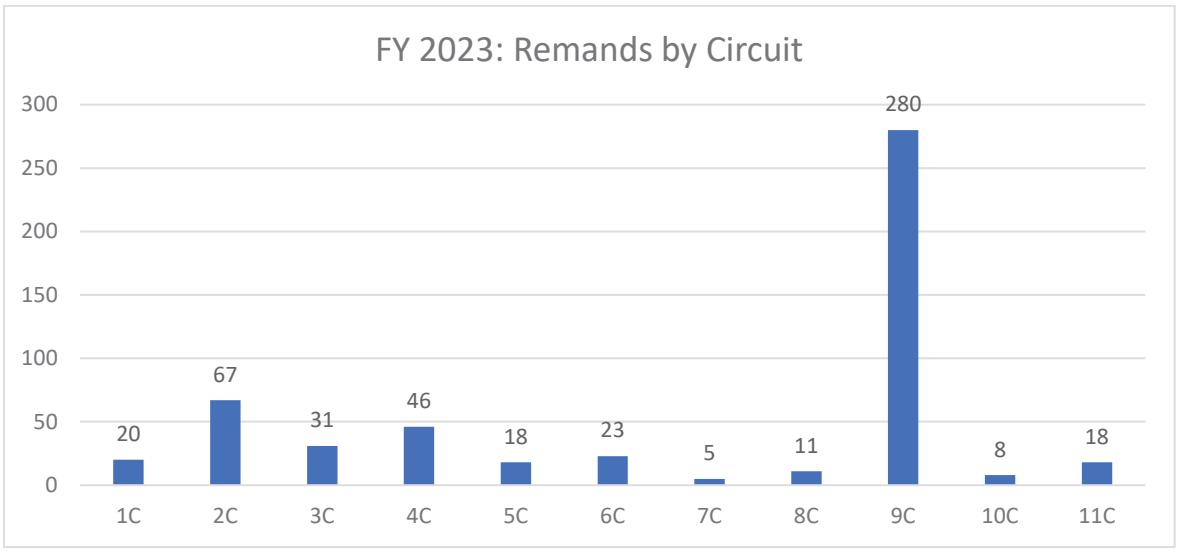
CIRCUIT COURT DECISIONS FOR FISCAL YEAR 2023

by Rosaly Kozbelt, Acting Federal Court Remand Coordinator

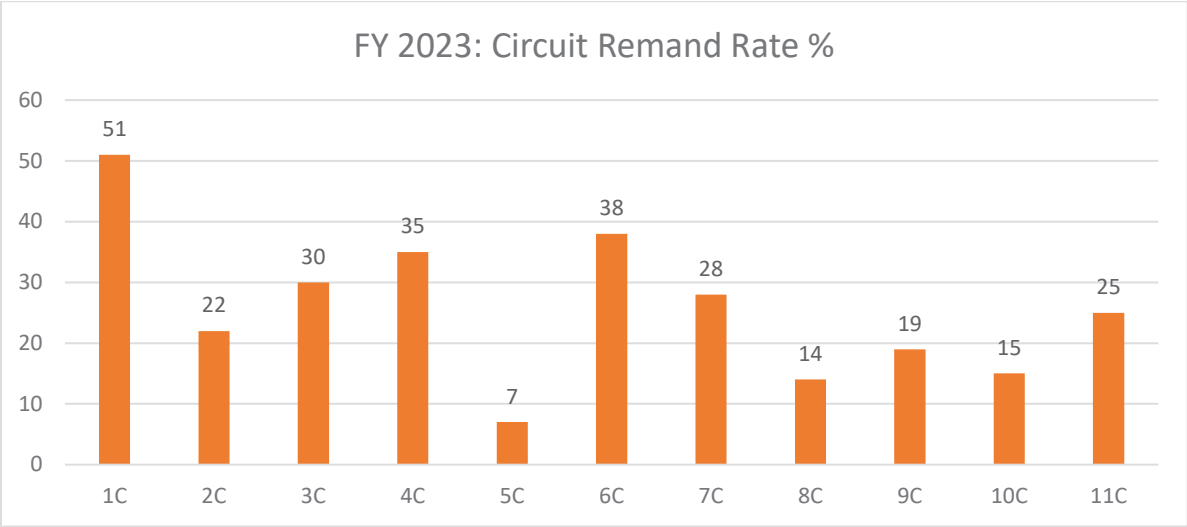
During the period of October 2022 through September 2023, or Fiscal Year 2023, the United States courts of appeal issued 2573 decisions involving petitions for review of Board decisions. The courts dismissed or denied petitions for review in 2045 cases, and they reversed or remanded 528 cases. The average number of remands was 44 per month, and the overall remand rate was 20%. Of these remanded cases, 8% were remanded by the circuit court directly, and 12% were "stipulated" remands, in which the government (represented by the Office of Immigration Litigation) requested the remand before briefing or arguments, usually unopposed, and it was granted by the court.



The Second and Ninth Circuits issued the most remands, but the combination of remands from every circuit except the Ninth was still fewer than the Ninth Circuit alone.



However, as the Ninth Circuit reviews so many Board cases, this was not actually the circuit with the highest remand rate. That distinction belongs to the First Circuit, which remanded just over 50% of the cases reviewed.



Supreme Court Action

Activity Impacting Immigration Law – Second Half 2023

The Court granted certiorari in *Relentless, Inc v. Department of Commerce* (No. 22-1219) to consider the question of whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency. This case will be argued in tandem with *Loper Bright Enterprises v. Raimondo* (No. 22-451).

On November 28, 2023, the **Court heard argument** in *Wilkinson v. Garland* (No. 22-666) on whether an agency determination that a given set of established facts does not rise to the statutory standard of "exceptional and extremely unusual hardship" is a mixed question of law and fact reviewable by the circuit court or whether this determination is an unreviewable discretionary judgment.

Circuit Court Sampling – Second Half 2023

Decisions that Shaped the Field of Immigration Law

Bazile v. Garland, 76 F.4th 5 (1st Cir. 2023)
Venue – The First Circuit agreed with the Board's holding in *Matter of Garcia*, 28 I&N Dec. 693 (BIA 2023), and concluded that the case was properly before it because, although the Immigration Judge was located in Texas, the notice to appear designated the Boston Immigration Court as the hearing location and neither party moved to change venue.

United States v. Minter, 80 F.4th 406 (2d Cir. 2023)
Criminal – The Second Circuit concluded that New York's definition of cocaine is categorically broader than the Federal definition because the Federal definition of cocaine is expressly limited to only optical and geometric isomers and New York's definition is not limited to certain types of isomers.

Avila v. Attorney General, 82 F.4th 250 (3d Cir. 2023)
Criminal – The Third Circuit applied *Chevron* deference to the Board's decision in *Matter of S. Wong*, 28 I&N Dec. 518 (BIA 2022), and concluded that a New Jersey disorderly person offense is a conviction for immigration purposes.

Lazo-Gavidia v. Garland, 73 F.4th 244 (4th Cir. 2023)
In absentia – Disagreeing with the Eleventh and Fifth Circuits, the Fourth Circuit held that a noncitizen whose notice to appear did not contain the date and time of his or her hearing cannot be ordered removed in absentia after failing to appear despite having failed to notify immigration authorities of his or her change of address. This decision is consistent with the Third Circuit's decision in *Madrid-Mancia v. Attorney General of the United States*, 72 F.4th 508 (3d Cir. 2023), issued approximately 2 weeks earlier.

Cela v. Garland, 75 F4th 355 (4th Cir. 2023)
Asylum adjustment – Agreeing with the Board's decision in *Matter of T-C-A-*, 28 I&N Dec. 472 (BIA 2022), the Fourth Circuit concluded that a noncitizen whose asylum status has been terminated is not eligible to apply for adjustment of status under section 209(b) of the INA, 8 U.S.C. § 1159(b). In doing so, it disagreed with the Fifth Circuit.

Munoz-De Zelaya v. Garland, 80 F.4th 689 (5th Cir. 2023)
Asylum – The Fifth Circuit concluded that the respondent's proposed particular social group of "Salvadoran business owners" does not satisfy the immutability requirement because employment, including business ownership, can be changed and is not fundamental to an individual's identity or conscience.

Kolov v. Garland, 78 F.4th 911 (6th Cir. 2023)
Appellate review – Unlike recent decisions in the Second and Fifth Circuits, the Sixth Circuit held that it has jurisdiction to review the Board's dismissal of a petitioner's appeal of the denial of withholding of removal in withholding-only proceedings following a reinstated removal order.

United States v. Lung'aho, 72 F.4th 845 (8th Cir. 2023)
Criminal – In concluding that arson under 18 U.S.C. § 844(f)(1) is not a crime of violence, the Eighth Circuit held that a mental state of "malice" cannot form the basis of a crime of violence.

Fonseca-Fonseca v. Garland, 76 F.4th 1176 (9th Cir. 2023)
Motion to reopen – The Ninth Circuit held that in denying the respondent's motion based on his failure to establish prima facie eligibility for the requested relief, the Board erred in applying the "would likely change" standard from *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992), which applies to discretionary denials, rather than the "reasonable likelihood" standard from *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996).

Velázquez v. Garland, 82 F.4th 909 (10th Cir. 2023)
Voluntary Departure – Disagreeing with the Ninth Circuit, the Tenth Circuit held that the 60-day period for voluntary departure is calculated based on calendar days and is not extended if the 60th day falls

on a weekend or holiday. Thus, a motion to reopen filed on the next available business day will not be deemed filed within the 60-day period.

Ruiz v. U.S. Attorney General, 73 F.4th 852 (11th Cir. 2023)
VAWA Cancellation – The Eleventh Circuit held that an applicant for special rule cancellation of removal for battered spouses can establish "extreme cruelty" based on mental and emotional abuse without any physical harm.

BIA Precedent Decisions – Second Half of 2023

In ***Matter of M-R-M-S-***, 28 I&N Dec. 757 (BIA 2023), the Board held that if a persecutor is **targeting** members of a certain **family** as a **means** of achieving some **other ultimate goal** unrelated to the protected ground, family membership is **incidental or subordinate** to that other ultimate goal and therefore **not one central reason** for the harm.

In ***Matter of Brathwaite***, 28 I&N Dec. 751 (BIA 2023), the Board held that because an **appeal under section 460.30** of the **New York** Criminal Procedure Law is classified as a direct appeal, a respondent with a pending appeal under this section does **not** have a **final conviction** for immigration purposes.

In ***Matter of Cabrera-Fernandez***, 28 I&N Dec. 747 (BIA 2023), the Board held that release on **conditional parole under INA § 236(a)(2)(B)** is legally distinct from release on humanitarian parole under INA § 212(d)(5)(A), and that applicants for admission who have been released on conditional parole have **not been "inspected and admitted or paroled"** and are not eligible to adjust status under the Cuban Refugee Adjustment Act.

In ***Matter of C-G-T-***, 28 I&N Dec. 740 (BIA 2023), the Board held that determining whether the government is or was **unable or unwilling** to protect the respondent from harm is a **fact-specific inquiry** based on consideration of all evidence and that the respondent's **failure to report** harm is **not necessarily fatal** to a claim of persecution if reporting private abuse to government authorities would have been **futile or dangerous**. The Board further held that when considering future harm, adjudicators should **not** expect a respondent to **hide** his or her **sexual orientation**.

In ***Matter of J-G-R-***, 28 I&N Dec. 733 (BIA 2023), the Board held that the regulations implementing the Convention Against Torture cover torturous conduct committed by a public official who is **"acting in an official capacity,"** meaning **acting under color of law**. The Board explained that the key consideration in determining if an official's torturous conduct was undertaken "in an official capacity" is whether the official was **able to engage in the conduct because of his or her government position**, or whether the official could have done so without connection to the government.

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[1] Dorothy A. Harbeck & Ellen L. Buckwalter, *Asking and Telling: Identity and Persecution in Sexual Orientation Asylum Claims*, IMMIGR. L. ADVISOR, Sept. 2008, at 1.
[2] *Matter of Toboso-Alfonso*, 20 I&N Dec. at 820.
[3] *Id*. at 823.
[4] Karen Juanita Carrillo, *The Mariel Boatlift: How Cold War Politics Drove Thousands of Cubans to Florida in 1980*, HISTORY CHANNEL (Aug. 9, 2023), https://www.history.com/news/mariel-boatlift-castro-carter-cold-war.
[5] *Id*.
[6] *Matter of Toboso-Alfonso*, 20 I&N Dec. at 820.
[7] *Id.* at 822.
[8] *Id*.
[9] *Id*. The dissenting opinion noted that the Supreme Court of the United States had, at the time, held that state criminal sodomy laws do not violate the fundamental rights of gay men. *Id*. at 825 (Vacca, dissenting) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003)).
[10] Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (amending the Immigration and Nationality Act).
[11] *Matter of Toboso-Alfonso*, 20 I&N Dec. at 822.
[12] Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978, 5067–75. Gay and lesbian individuals were first excluded from the U.S. in 1952 under the Act's exclusion for "psychopathic personality." *Matter of S-*, 8 I&N Dec. 409, 412-15 (BIA 1959).
[13] Att'y Gen. Order No. 1895-94 (June 19, 1994).
[14] *Karouni*, 399 F.3d at 1173.
[15] *Matter of C-G-T-*, 28 I&N Dec. at 745-46.
[16] *Razkane*, 562 F.3d at 1288.
[17] *Todorovic*, 621 F.3d at 1327.
[18] *Fuller*, 833 F.3d at 874 (Posner, J., dissenting).
[19] *Doe,* 956 F.3d at 155 n.10.
[20] Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 73 (2008).
[21] *Antonio*, 58 F.4th at 1071.
[22] *Id.* at 1076.
[23] *Id*.
[24] It bears mentioning at this point in the article, where we discuss the adjudicator's perception of LGBTQ persons, that only a few published cases address asylum and withholding of removal law as applied to claims brought on account of being a lesbian or perceived lesbian. *See, e.g.*, *Pitcherskaia v. INS*, 118 F.3d 641, 646-48 (9th Cir. 1997) (holding that the agency erred in requiring a respondent who faced harm on account of being a lesbian to prove that the persecutors intended to harm or punish her). The published case law related to sexual orientation predominantly consists of claims brought on account of being a gay man.
[25] *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005), *vacated*, 547 U.S. 1613 (2006); *accord Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 785 & n.1 (9th Cir. 2004); *see also Doe*, 956 F.3d at 142 (recognizing the lesbian, gay, bisexual, transgender, and intersex community in Ghana as a particular social group); *Cece v. Holder*, 733 F.3d 662, 669 (7th Cir. 2013) (recognizing sexual orientation as an immutable or fundamental characteristic); *Matter of C-G-T-*, 28 I&N Dec. at 745 ("Sexual orientation, like other protected grounds, is 'a characteristic that either is beyond the power of an individual to change or is so fundamental to individual

identity or conscience that it ought not be required to be changed.'" (quoting *Matter of Acosta*, 19 I&N Dec. 211, 212 (BIA 1985))).

[26] Cisgender is a term that describes a person whose gender identity aligns with the sex assigned to them at birth.

[27] Connor Cory, *The LGBTQ Asylum Seeker: Particular Social Groups and Authentic Queer Identities*, 20 GEO. J. GENDER & L. 577, 593 (2019) (endnote added).

[28] Affirmative Asylum Procedures Manual (AAPM), available at https://www.aila.org/library/uscis-releases-affirmative-asylum-procedures. This document was released due to a Freedom of Information Act lawsuit brought by the Louise Trauma Center. Although not dated, the document was likely created in 2023 because it references sources as late as June 8, 2023.

[29] *Id.* at 100.

[30] LGBTQI includes intersex individuals, a population not covered in this article due to space limitations.

[31] AAPM at 100.

[32] *Id*.

[33] *Avendano-Hernandez*, 800 F.3d at 1081.

[34] *Id*. at 1080, 1082.

[35] DIV. OF INT'L PROT.-GENEVA, UNITED NATIONS HIGH COMM'N REFUGEES, LGBTIQ+ PERSONS IN FORCED DISPLACEMENT AND STATELESSNESS: PROTECTION AND SOLUTIONS—DISCUSSION PAPER 6 (2021), https://www.refworld.org/docid/611e16944.html.

[36] 225 F.3d at 1094.

[37] *Id.* at 1096 (citation omitted).

[38] GLAAD defines "transsexual" as an "older term that originated in the medical and psychological communities. As the gay and lesbian community rejected homosexual and replaced it with gay and lesbian, the transgender community rejected transsexual and replaced it with transgender. Some people within the trans community may still call themselves transsexual." *See GLAAD Media Reference Guide*, *11th Ed.*, GLAAD, https://glaad.org/reference/trans-terms/ (last visited Feb. 6, 2024).

[39] *Hernandez-Montiel*, 225 F.3d at 1095 n.7, 1096 (endnote added).

[40] Harbeck & Buckwalter, *supra* note 1, at 18.