

## RECENT DEVELOPMENT

### THE CHANGING TIDE OF IMMIGRATION LAW: EQUALITY FOR ALL?

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Among democratic states, individuals are generally free to leave their resident country; however, states are under no obligation to accept aliens, unless otherwise mandated by a treaty. If a state exercises its sovereign power to admit an alien into its territory, it is free to create the terms and conditions for such entry.<sup>1</sup> In the United States, the power to regulate immigration rests in the hands of Congress. The United States Supreme Court has stated that "over no conceivable subject is the legislative power of Congress more complete" than it is over the admission of aliens.<sup>2</sup> Over the years, the execution of this power has resulted in discriminatory immigration practices. Consequently, the United States' immigration policy has been a far cry from George Washington's vision of the United States being 'an asylum to the oppressed and the needy of the earth.'<sup>3</sup>

In the tradition that brought so many of their ancestors to the United States, persecuted homosexuals have renounced life-long ties to their countries of origin and sought better lives in the United States.<sup>4</sup> Amidst

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<sup>1</sup> Jorge L. Carro, *From Constitutional Psychopathic Inferiority to AIDS: What is in the Future for Homosexual Aliens?*, 7 YALE L. & POL'Y REV. 201, 206 (1989). States may protect themselves from undesirable aliens by excluding certain classes of individuals from their countries. Aliens may be excluded for health, political, national security, or economic reasons.

<sup>2</sup> *Oceanic Steam Navigation Company v. Nevada N. Stranahan*, 214 U.S. 320, 339 (1909). The Court further stated that "the authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject." *Id.* at 340.

<sup>3</sup> T. ALENIKOFF AND D. MARTIN, IMMIGRATION PROCESS AND POLICY, 19 (1985).

<sup>4</sup> Jin S. Park, *Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians Under U.S. Immigration Policy*, 42 UCLA L. REV. 1115, 1117 (1995). "Faced with harsh treatment from their government and society, gay men and lesbians often attempt to escape discrimination, intolerance, and life-threatening violence rampant in their native countries. Frequently, their survival depends on finding refuge . . . in foreign nations that provide asylum protection to those who receive no protection from their own government." *Id.*

steps by the federal government to restrict immigration, a growing number of gays and lesbians are applying for - and winning - political asylum because of persecution based on their sexual orientation.<sup>5</sup> In the past two years, more than sixty homosexuals, as well as a few bisexuals and transgendered people, have proven to the satisfaction of immigration officials and judges that they have a "well-founded fear of persecution" in their homelands.<sup>6</sup> However, not all asylum claims have been successful. Such is the case of Alla Pitcherskaia.

## I. FACTUAL BACKGROUND

The political asylum case of Alla Pitcherskaia was argued before the U.S. Court of Appeals for the Ninth Circuit on December 11, 1996.<sup>7</sup> Alla is a 35 year old Russian lesbian who entered the United States on March 22, 1992 with authorization to remain for six months.<sup>8</sup> She is currently working as a travel agent in San Francisco, California.<sup>9</sup> Alla is seeking asylum because she fears persecution if sent back to her homeland. She says that she would suffer forced psychiatric institutionalization, including electro-shock therapy, to "cure" her of her sexual orientation."<sup>10</sup>

Alla Pitcherskaia originally came under police surveillance because of her father's anticommunist activities.<sup>11</sup> Alla joined a lesbian youth group in

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<sup>5</sup> David Tuller, *Lesbians, Gays Seek Asylum from Persecution Abroad*, THE SAN FRANCISCO CHRONICLE, Jan. 13, 1997, at A1.

<sup>6</sup> *Id.* The applicants have come from all corners of the globe, including the former Soviet Union, Eastern Europe, Central and South America, and Southeast Asia.

<sup>7</sup> *Pitcherskaia v. Immigration and Naturalization Service*, 118 F.3d 641, 643 (9th Cir. 1997).

<sup>8</sup> *Id.*

<sup>9</sup> Carol Ness, *Court to Decide if Russian Lesbian Must Be Deported; She Fears Return to Persecution, But U.S. Argues That Things Have Changed*, S.F. EXAM., Dec. 11, 1996, at A1.

<sup>10</sup> William Branigin, *Gays' Cases Help to Expand Immigration Rights; More Than 60 Homosexuals Claiming Persecution Have Been Granted Asylum in U.S.*, WASH. POST, Dec. 17, 1996, at A1.

<sup>11</sup> *Pitcherskaia*, 118 F.3d at 644. Alla's father was a political dissident. His antigovernment activities led to numerous arrests and imprisonment during Alla's childhood until 1972 when he died in prison. On Alla's first application for asylum, she stated that she feared persecution on account of her own and her father's anti-Communist political opinions. *Id.* at 643.

Russia in 1979 and was first arrested by the militia in 1980.<sup>12</sup> They charged her with the crime of "hooliganism" and detained her for fifteen days due to her protests against a former school director's beating of a gay friend.<sup>13</sup> In the following years, she was arrested and detained three times because of her homosexuality.<sup>14</sup> Likewise, she was required to attend psychiatric counseling sessions while her former lover was institutionalized and given electroshock, with which Alla was also threatened.<sup>15</sup> In striving to win gay civil rights, Alla suffered beatings and hardships for her work with homosexual organizations.<sup>16</sup> In addition, Alla was "kidnapped and faced repeated extortion (attempts)" by Russian organized crime figures who target homosexuals due to their vulnerability, and the police denied her protection.<sup>17</sup> Thus, in March, 1992, Alla fled to the United States and applied for political asylum, claiming fear of persecution if she were returned home.<sup>18</sup>

The U.S. Government argued that Alla Pitcherskaia should be deported, as her case does not meet the standards for asylum and her fears are unfounded.<sup>19</sup> Justice Department lawyer Stephen Funk said there was no electroshock therapy nor did they carry out the threat to institutionalize her.<sup>20</sup> Funk also stated that her arrests for homosexual activity stopped in 1983, and the laws banning such activity have hence been repealed.<sup>21</sup> The Government further contends that times have changed for gays in Russia in the years since Pitcherskaia left.<sup>22</sup>

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<sup>12</sup> Gonzales, *Gays and Political Asylum* (National Public Radio broadcast, Dec. 23, 1996); Pitcherskaia, 118 F.3d at 644. Alla was only eighteen years old when she was arrested.

<sup>13</sup> Pitcherskaia, 118 F.3d at 644. The criminal charge of "hooliganism" was used in Russia to arrest and detain persons (for 10-15 days without trial) for a variety of reasons, particularly political ones. *Id.* at 644, n.2.

<sup>14</sup> Gonzales, *supra* note 12.

<sup>15</sup> *Fearing Persecution, Russian Lesbian Seeks Asylum in U.S.*, CHICAGO TRIBUNE, Dec. 12, 1996, at 2.

<sup>16</sup> Ness, *supra* note 9.

<sup>17</sup> *Id.* (quoting Alla's attorney Suzanne Goldberg).

<sup>18</sup> Gonzales, *supra* note 12. While Alla has been in the United States, she has received two "Demands for Appearance" from the militia that were delivered at her mother's residence. Pitcherskaia, 118 F.3d at 645.

<sup>19</sup> Associated Press, *Russian Lesbian Seeks Asylum*, NEWSDAY, Dec. 12, 1996, at A41.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Ness, *supra* note 9.

After hearing testimony and reviewing evidence, the Immigration Judge denied Alla's application.<sup>23</sup> The Immigration Judge found that, "based upon the entire record . . . and after consideration of the arguments of counsel," Pitcherskaia had not established that she was eligible for asylum nor withholding of deportation.<sup>24</sup> Subsequently, Alla's appeal to the Board of Immigration Appeals (BIA) was also denied, despite showings of detention, abuse, and psychotropic treatment suffered while in Russia.<sup>25</sup> The BIA majority stated that Alla had not been persecuted because the militia and psychiatric treatments were intended to "cure" her, rather than to punish her; thus, their actions did not constitute "persecution within the meaning of the Act."<sup>26</sup> The BIA majority also concluded that the former Soviet Union had since changed socially and politically, making it unlikely that Alla would be "subject to psychiatric treatment with persecutory intent upon [her] return to the present-day Russia."<sup>27</sup>

An appeal from the BIA's denial of asylum was made by Alla to the Ninth Circuit Court of Appeals. It was the first time that a federal appeals court heard an asylum case based on sexual orientation.<sup>28</sup>

## II. LEGAL BACKGROUND

The passage of the Immigration Act of 1990 heralded a new era for homosexuals coming to America.<sup>29</sup> For homosexual refugees, the Act of 1990 opened the previously locked door to America. Historically, the Immigration Act of 1917 had provided a method for the exclusion of homosexuals that was practiced until the passage of the Act of 1990.<sup>30</sup> Under the 1917 Act, an individual would be denied entry if certified by an examining physician as being "mentally defective" or afflicted with a

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<sup>23</sup> Pitcherskaia, 118 F.3d at 643-645.

<sup>24</sup> *Id.* at 645.

<sup>25</sup> Gonzales, *supra* note 12 (quoting Alla's attorney, Suzanne Goldberg, of the Lambda Legal Defense and Educational Fund).

<sup>26</sup> Pitcherskaia, *supra* note 7, at 645.

<sup>27</sup> *Id.*

<sup>28</sup> Ness, *supra* note 9.

<sup>29</sup> Immigration Act of 1990, Pub. L. No. 101-64d9, 104 Stat. 4978 (1990) (amending scattered sections of 8 U.S.C.); McGoldrick, *United States Immigration Policy and Sexual Orientation: Is Asylum for Homosexuals a Possibility?* 8 GEO. IMMIGR. L.J. 201 (1994).

<sup>30</sup> McGoldrick, *id.* at 202.

“constitutional psychopathic inferiority.”<sup>31</sup> Thus, for years after passage of the 1917 Act, homosexuals were banned from entering the United States under this provision, because they were classified as mentally defective or psychopathic inferiors by the Public Health Service.<sup>32</sup>

This exclusionary practice was first challenged in 1961. In *Quiroz v. Neelly*, a Mexican lesbian was ordered deported from the United States as being afflicted with a psychopathic personality under § 212(a)(4) of the Immigration and Nationality Act of 1952.<sup>33</sup> The court looked to legislative history for the clear meaning to be given to “psychopathic personality.”<sup>34</sup> A report of the Senate Committee on the Judiciary was cited, stating “the provisions for the exclusion of aliens afflicted with psychopathic personality which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals.”<sup>35</sup> Thus, the court held that the Congress intended to include homosexuals in the phrase “psychopathic personality” and that intent was controlling.<sup>36</sup>

One year later, in *Fleuti v. Rosenberg*, the Ninth Circuit found that the statutory term “psychopathic personality” did not convey sufficiently definite warnings that homosexuality was included therein.<sup>37</sup> Therefore, the court held that the term was unconstitutionally vague, thus making the statute void for vagueness.<sup>38</sup> The Ninth Circuit’s ruling prompted immediate action by Congress. In 1965, Congress further clarified its intent to exclude homosexuals by adding the term “sexual deviation” to the list of reasons for exclusion.<sup>39</sup> Furthermore, in *Boutilier v. INS*, the United States Supreme Court ruled that the term “sexual deviation” was not unconstitutionally vague.<sup>40</sup> This decision, in conjunction with the 1965 amendment, left no

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<sup>31</sup> The Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, sec. 3, 39 Stat. 874, 875 (1917) (repealed by the Immigration and Nationality Act, 82-414, ch. 477, sec. 403(13), 66 Stat. 279 (1952)).

<sup>32</sup> Park, *supra* note 4, at 1118.

<sup>33</sup> *Quiroz v. Neelly*, 291 F.2d 906, 907(5th Cir. 1961).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (citing S.Rep. No. 1137, 82d Cong. 2d Sess. (1952)).

<sup>36</sup> *Id.*

<sup>37</sup> *Fleuti v. Rosenberg*, 302 F.2d 652, 658 (9th Cir. 1962).

<sup>38</sup> *Id.*

<sup>39</sup> Park, *supra* note 4, at 1118-1119.

<sup>40</sup> *Boutilier v. INS*, 387 U.S. 118 (1967). The Court also reaffirmed Congress’s plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.

doubt that the United States' borders were closed to homosexuals.<sup>41</sup>

After *Boutilier v. INS*, it seemed that only an act of Congress could bring relief to homosexuals seeking admission to the United States.<sup>42</sup> However, things began to look better in 1973 when the American Psychiatric Association removed homosexuality from its list of psychopathologies.<sup>43</sup> In 1979, the Surgeon General of the United States ordered his personnel not to issue Class A certificates excluding aliens solely because those aliens were suspected of being homosexual.<sup>44</sup>

In response to these policy changes, the INS developed a new procedure whereby an arriving alien was no longer questioned about sexual orientation and was allowed to enter the country conditionally under parole status.<sup>45</sup> Thus, an alien was admitted unless he volunteered the information that he was homosexual or a third party arriving simultaneously identified the alien as a homosexual. However, in *Hill v. U.S. INS*, the Ninth Circuit Court of Appeals held that the INS may not exclude self-declared homosexual aliens without medical certification of psychopathic personality, sexual deviation, or mental defect.<sup>46</sup> The court found support for the required medical certification "of all aliens excluded on medical grounds apparent on the face of the statute, corroborated by legislative history, and supported by an unbroken string of administrative and judicial decisions."<sup>47</sup>

The exclusion of homosexual aliens remained in force until 1990, when the entire section in which this category appeared was finally eliminated by the Immigration Act of 1990.<sup>48</sup> When President Bush signed the 1990 Act, it marked "the closing of a shameful chapter in United States history."<sup>49</sup> The Act of 1990 "repealed many of the exclusionary provisions of the Immigration and Nationality Act (INA)", including the provision against

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<sup>41</sup> Carro, *supra* note 1, at 212.

<sup>42</sup> McGoldrick, *supra* note 29, at 203.

<sup>43</sup> *Id.* (citing Carro, *supra* note 1, at 213 n.80).

<sup>44</sup> Carro, *supra* note 1, at 212-213. The Class A medical certificate evidenced a definite diagnosis as opposed to an inconclusive one.

<sup>45</sup> Carro, *supra* note 1, at 213. See also 8 U.S.C. § 1182(d)(5) (1976 and Supp. V 1981).

<sup>46</sup> *Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983).

<sup>47</sup> *Id.* at 1480.

<sup>48</sup> Park, *supra* note 4, at 1119.

<sup>49</sup> Robert Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C. R. -C.L. L. REV. 439 (1994).

homosexuals.<sup>50</sup> Not only did the Act of 1990 open the door for homosexual refugees, but it also offered the novel possibility of attaining political asylum in the United States. Since asylees and refugees must first be admissible as immigrants, the repeal of the INA's exclusion of homosexuals granted them the opportunity to apply for asylum under the Refugee Act of 1980.<sup>51</sup>

### III. HISTORICAL PRINCIPLES OF ASYLUM

In order to attain asylum in the United States, an alien must first meet the definition of "refugee" in the Immigration and Nationality Act §101(a)(42).<sup>52</sup> The term "refugee" is defined as

any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and 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 . . .<sup>53</sup>

Since the INA definition of "refugee" does not specifically include homosexuals, those seeking political asylum have to appeal to one of the definition's listed categories.

In recent years, the asylum inquiry has focused on exploring how and in what circumstances an applicant's past or feared future persecution could be said to be "on account of" one of the enumerated grounds, particularly the political opinion and social group grounds.<sup>54</sup> Soon after the passage of the

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<sup>50</sup> *Id.* at 439. As amended by the 1990 Act, section 212 revamps the former nineteen health-related categories into five new ones. The relevant section, 212(a)(1)(A)(ii), lists anyone with a "physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others" as excludable. See 8 U.S.C. § 1182(a)(1990).

<sup>51</sup> *Id.* at 469.

<sup>52</sup> Brian F. Henes, *The Origin and Consequences of Recognizing Homosexuals as a "Particular Social Group" for Refugee Purposes*, 8 TEMP. INT'L & COMP. L.J. 377 (1994).

<sup>53</sup> 8 U.S.C. § 1101(a)(42) (1996).

<sup>54</sup> Terry J. Helbush, *New Developments in Asylum 1996*, 964 PLI/Corp 59 (1996). Furthermore, several recent decisions of the Board of Immigration Appeals mark a retreat from its narrow former decisions limiting asylum.

1990 Act, three gay and lesbian aliens presented asylum petitions claiming that they were eligible as members of a social group subject to persecution, namely, the social group of gay men and lesbians.<sup>55</sup>

In July 1993, a Brazilian homosexual, Marcelo Tenorio, was granted asylum because homosexuals were a persecuted social group in Brazil.<sup>56</sup> His claim cited evidence that "anti-gay groups appear to be prevalent in Brazilian society and continue to commit violence against homosexuals, with little official investigation and few criminal charges being brought against the perpetrators."<sup>57</sup> Although this decision is not legally binding on other judges, it is still a landmark decision in that it is the first time an immigration judge granted asylum to a homosexual who feared persecution on the basis of his sexual orientation.<sup>58</sup>

Another victory came on March 24, 1994, when the INS granted asylum to a Mexican gay man because he was a member of a persecuted social group.<sup>59</sup> Jose Garcia told immigration authorities that he was harassed and beaten by the Mexican police.<sup>60</sup> This INS decision coupled with the *Tenorio* decision provided increased hope for homosexual refugees and led the way for a radical change in U.S. immigration policy.<sup>61</sup>

In June, 1994, Attorney General Janet Reno issued a directive to U.S. immigration boards to adopt as precedent *In re Toboso-Alfonso*.<sup>62</sup> This 1990 Board of Immigration Appeals decision recognized that homosexual aliens could qualify as a social group and establish persecution on account

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<sup>55</sup> Park, *supra* note 4, at 1119. This article's subject case of Alla Pitcherskaia was one of the petitioning aliens. Also, claims were brought by A.T (an Iranian gay man who fears persecution or death upon returning to his country) and Jacob Rivas (a Nicaraguan gay man with AIDS who fears he will be persecuted in his home country based on being gay and on having AIDS).

<sup>56</sup> Henes, *supra* note 52, at 377.

<sup>57</sup> *In re the Matter of Marcelo Tenorio*, File No. A72 093 558 (U.S. Dep't of Justice, Executive Office for Immigration Review, Immigration Court, San Francisco 1993). See David Tuller, *Gay Brazilian Claims Persecution - Wins U.S. Asylum*, S.F. CHRON., July 29, 1993, at A13.

<sup>58</sup> Henes, *supra* note 52, at 377-378.

<sup>59</sup> Jenifer Warren, *Asylum Ok'd on Basis of Homosexuality*, L.A. TIMES, Mar. 25, 1994, at A3.

<sup>60</sup> *Id.*

<sup>61</sup> Henes, *supra* note 52, at 397.

<sup>62</sup> Att'y Gen. Order No. 1895-94, dated June 19, 1994. See also Park, *supra* note 4, at 1120.



of their membership in that group as required for asylum.<sup>63</sup> Although Attorney General Reno's directive is useful and authoritative for immigration boards, it does not bind federal district and circuit courts that have their own definitions of a social group.<sup>64</sup> However, since that year, the number of applicants claiming asylum on the basis of sexual orientation has risen, and asylum has been granted administratively to a number of applicants from a variety of countries.<sup>65</sup>

One successful claim was that of Sergey Fedetov, and it illustrates a new frontier of asylum law.<sup>66</sup> Fedetov is a young Russian homosexual who came to America in December of 1995 because he "had heard that homosexuals lived freely without beatings [there]."<sup>67</sup> In a six-page affidavit, Fedetov recounted police calling him a "homosexual or . . . always in disparaging terms" and then being detained, beaten, and blackmailed.<sup>68</sup> Official documentation of the conditions was provided in two recent State Department advisories on gays in Russia, one of which said lesbians were frequently placed in psychiatric hospitals and drugged in an attempt to change their sexual orientation.<sup>69</sup> The other reported that despite decriminalization of homosexual conduct in 1993, homosexuals were still subject to discrimination and police surveillance.<sup>70</sup> Consequently, Fedetov was granted asylum by the Immigration Judge.<sup>71</sup>

Thus, as homosexuals appear to have made substantial progress in refugee law, the denial of Alla Pitcherskaia's claim is rather perplexing.

#### IV. ANALYSIS: ALLA PITCHERSKAIA'S CLAIM

Alla Pitcherskaia is seeking asylum from persecution for her activism in support of gay rights (her political opinion), and her status as a lesbian (her

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<sup>63</sup> *Matter of Toboso-Alfonso*, Int. Dec. (BIA March 12, 1990) 3222, 1990 WL 547189 (B.I.A.). This case involved a homosexual Cuban refugee, Fidel Armando Toboso-Alfonso.

<sup>64</sup> Park, *supra* note 4, at 1121.

<sup>65</sup> *Id.* Multiple applications have been granted to applicants from Colombia, Iran, Eritrea, Brazil, Pakistan, Russia, Nicaragua, Guatemala and El Salvador and single applications from quite a few other countries.

<sup>66</sup> Bettina Boxall, *Barriers to Asylum for Gays are Falling*, LOS ANGELES TIMES, May 24, 1996, at A1.

<sup>67</sup> *Id.* Fedetov wrote in an affidavit to an immigration judge that "I knew I could not survive as an Armenian gay in Yochkar-Ola." *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

social group).<sup>72</sup> In considering Alla's asylum claim, the Ninth Circuit addressed the issue of "whether Section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) requires an alien to prove that her persecutor harbored a subjective intent to harm or punish."<sup>73</sup> In its holding, the Ninth Circuit found error in the definition of persecution as applied by the BIA majority.<sup>74</sup> Consequently, it reversed the BIA's order denying asylum and withholding of deportation and remanded Alla's claim to the BIA for reconsideration consistent with its opinion.<sup>75</sup> However, the Ninth Circuit did not reach Alla's other claims; thus, whether she established the requisite components for her asylum claim will be determined on remand.<sup>76</sup>

## V. GROUNDS FOR ASYLUM

Asylum applicants must show "persecution" on account of one or more of five grounds: (1) race, (2) religion, (3) nationality, (4) political opinion, or (5) membership in a particular social group.<sup>77</sup> Therefore, it is essential that Alla's claim fall within at least one of these enumerated categories.

Since most persecution of homosexuals seems to focus simply upon their status, their most promising basis for invoking asylum would be as members of a particular social group. However, tension exists as to the interpretation of social group as used in the Immigration Act. In *Sanchez-Trujillo v. INS*, the Ninth Circuit was faced with deciding whether "young, urban, working class (Salvadoran) males who had never served in the military or otherwise expressed support for the government" constituted a particular social group.<sup>78</sup> In rejecting the applicant's argument, the Ninth Circuit held:

We may agree that the "social group" category is a flexible one which extends broadly to encompass many groups who do not otherwise fall within the other categories of race, nationality, religion, or political opinion. Still the

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<sup>72</sup> Carolyn Patty Blum, *Horde of One: Alla Pitcherskaiadeservesasylum—notxenophobic discrimination*, RECORDER, Jan. 29, 1997, at 4.

<sup>73</sup> Pitcherskaia, 118 F.3d at 643.

<sup>74</sup> *Id.* at 648.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> 8 U.S.C.A. §1101 (a)(42)(A); Foss, *supra* note 49, at 469-470.

<sup>78</sup> *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

scope of the term cannot be without some outer limit . . . the phrase “particular social group” implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.<sup>79</sup>

This interpretation of “social group” may seem rather narrow, but a strong argument may be made that homosexuals meet its standards. Gays and lesbians have a “common impulse or interest” and are often “closely affiliated with each other.” Also, homosexuals share a “characteristic that is fundamental to their identity,” which affects them, their relationships, and their lives to some extent. Thus, homosexuals clearly meet the criteria of the Ninth Circuit’s test.

Furthermore, in *Matter of Toboso*, the Board of Immigration Appeals directly held that homosexuals are a “particular social group” under the INA.<sup>80</sup> Also, Congress has recognized homosexuals as being a social group. In the Hate Crimes Statutes, Congress condemned status-based maltreatment of homosexuals, and the Act requests that states monitor bias-motivated assaults against them on the same basis as attacks based on race, nationality, and other categories.<sup>81</sup> Thus, in light of judicial interpretations and Congressional policy, the BIA should find lesbians and gay men as constituting a “particular social group” under the INA.

However, if the BIA decides to the contrary, Alla may also have grounds for claiming persecution based on “political opinion.” The INS would not likely consider homosexuality to be a political opinion for asylum purposes, nor would it be construed that way by the courts. Nevertheless, for some lesbians and gays who are persecuted in other countries, the political opinion option may be appropriate, especially if they were activists or public figures.<sup>82</sup> While in Russia, Alla was a longtime gay rights activist which led to “recurring harassment, arrest, interrogation, beatings and threats by the

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<sup>79</sup> *Id.* at 1576.

<sup>80</sup> *Matter of Toboso*, *supra* note 63.

<sup>81</sup> Pub. L. No. 101-275, 104 Stat. 140 (1990).

<sup>82</sup> Foss, *supra* note 49, at 470.

police.”<sup>83</sup> Therefore, a persecution claim based on political opinion grounds could be successful for Alla Pitcherskaia.

The BIA should find that Alla Pitcherskaia’s claim falls in at least one of the INA’s enumerated categories. Her claim should be successful on grounds of political opinion or membership in a particular social group; however, this is only half the battle. The BIA must also find that Alla’s claim was based on a “well-founded fear” of persecution as required by the INA and consistent with the Ninth Circuit’s definition.

## VI. PROOF OF PERSECUTION

The INA defines a “refugee” as someone who wishes not to return to her home country because of “persecution” or a “well-founded fear of persecution.”<sup>84</sup> Thus, Alla Pitcherskaia must show that the oppression from which she is trying to escape amounts to “persecution” as defined by the INA. Unlike the establishment of status as a “refugee,” proving persecution focuses more on the qualities and characteristics of the persecutor and the circumstances surrounding the persecution.<sup>85</sup>

In Alla’s claim, the alleged persecutor is the government acting primarily through the police. Alla alleged that she was beaten, detained, and threatened with institutionalization and shock-therapy because of her sexual orientation. Such acts of police-sanctioned violence against gays and lesbians manifests official persecution of homosexuals, but it must be corroborated by sufficient evidence. In any case, courts have repeatedly held that oppression by agents of the state, such as police, is sufficient to establish persecution.<sup>86</sup>

In considering Alla’s claim, “the BIA found that since the psychiatric community in Russia had the benign motive of attempting to cure homosexuals of their sexual orientation, their actions against Pitcherskaia could not properly be termed persecution.”<sup>87</sup> However, the Ninth Circuit held that the BIA majority had erred in requiring Pitcherskaia to prove intent to harm or punish as an element of persecution.<sup>88</sup> The court stated that neither the

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<sup>83</sup> Blum, *supra* note 72.

<sup>84</sup> Park, *supra* note 4, at 1137.

<sup>85</sup> *Id.* at 1136.

<sup>86</sup> *Id.* at 1142. See also *Guevara Flores v. INS*, 786 F.2d 1242, 1250 (5th Cir. 1986).

<sup>87</sup> Blum, *supra* note 72.

<sup>88</sup> *Pitcherskaia*, 118 F.3d at 646.

Supreme Court nor the Ninth Circuit had interpreted the Act as requiring the alien to prove that her persecutor acted out of a desire to punish or inflict harm.<sup>89</sup>

The Ninth Circuit reasoned that "the definition of persecution is objective, in that it turns not on the subjective intent of the persecutor but rather on what a reasonable person would deem 'offensive.'" <sup>90</sup> However, after prescribing the appropriate standard for persecution, the Ninth Circuit did not reach the issue of whether or not Alla's claim had established the requisite subjective and objective components.<sup>91</sup> Thus, this determination will be made by the BIA when it reconsiders Alla's asylum claim.

The BIA should find that the Russian government's use of its laws and enforcement powers in violation of Alla's due process rights constitutes persecution as interpreted by the Ninth Circuit. Being beaten and threatened with electroshock therapy constitutes an infliction of "suffering or harm" and would definitely be considered "offensive." Furthermore, the Ninth Circuit has held that prosecution for homosexual activity can amount to persecution if it is excessive or arbitrary, discriminatory in application, or lacking in due process.<sup>92</sup> Alla suffered repeated arrests by the police and physical violence while she lived in Russia, showing she was denied due process by being punished without judicial proceedings.<sup>93</sup>

Once an asylum applicant establishes that the harassment and abuse he/she faces rise to the level of persecution, she must also show that the fear of persecution is "well-founded."<sup>94</sup> Fortunately, judicial guidelines exist for the meaning of "well-founded fear" because the United States Supreme Court has reviewed this question authoritatively in *INS v. Cardoza-Fonseca*.<sup>95</sup> The Supreme Court requires that "(1) the alien have a subjective fear, and (2) that this fear have enough of a basis that it can be considered well-founded."<sup>96</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 647.

<sup>91</sup> *Id.* at 648.

<sup>92</sup> *Ramirez Rivas v. INS*, 899 F.2d 864, 868 (9th Cir. 1990); *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988); *Park*, *supra* note 4, at 1142.

<sup>93</sup> *Park*, *supra* note 4, at 1146. See also J. Craig Fong, *Any Port in a Storm: Lambda's Lesbian & Gay Asylum Cases*, LAMBDA UPDATE, Spring 1993, at 4.

<sup>94</sup> *Park*, *supra* note 4, at 1148-49.

<sup>95</sup> *Id.* at 1149. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

<sup>96</sup> *Id.* at 1149-50 and note 203. The Supreme Court formulation is far more liberal than the "reasonable person" test insisted upon by the BIA. *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd* 480 U.S. 421 (1987).

The asylum applicant's "subjective state of mind," viewed in light of objective circumstances the applicant encountered, can be established by the applicant's "credible testimony stating a genuine fear of persecution."<sup>97</sup> Thus, unless the immigration judge or BIA questions one's credibility, the applicant's testimony will be assumed believable and will satisfy the "genuine fear" threshold of *Cardoza-Fonseca*.<sup>98</sup> Therefore, in light of the past persecution suffered while in Russia, Alla's personal testimony should be found genuine as to her fear of forced institutionalization and further abuse upon returning to her homeland. Thus, Alla's testimony clearly shows a subjective fear and satisfies the first prong of the test.

The difficulty in proving Alla's claim of a "well-founded fear" arises in the "objective basis" prong of the *Cardozo-Fonseca* test. Once an alien establishes past persecution, it is presumed that a well-founded fear of persecution exists.<sup>99</sup> However, where the conditions of the country have significantly changed, this presumption may be rebutted.<sup>100</sup> The State argued that since the dissolution of the Soviet state and conversion to a more democratic regime in Russia, gay men and lesbians are no longer the subjects of systematic persecution by either the state or any extra-legal group.<sup>101</sup> Nevertheless, Alla's attorney stated that while Russia may have repealed its ban on sex between men in 1993, many gays have been arrested since then under a broad law against hooliganism.<sup>102</sup> Her attorney also cited a 1992 poll showing that one-third of all Russians thought gay people should be liquidated, and another third though they should be isolated.<sup>103</sup> Thus, BIA should look further than the mere "holding of elections or the developing institutions of civil society" to decide if persecution exists.<sup>104</sup> The focus should not be whether Russia is no longer totalitarian, but whether homosexuals are exposed to systematic persecution. If gays are subject to such treatment, the well-founded fear requirement of the asylum claim should be satisfied.

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<sup>97</sup> Park, *supra* note 4, at 1150; *Cuadras v. INS*, 910 F.2d 567, 571 (9th Cir. 1990); see *Valle-Zometa*, 1990 WL 208725, at 3 (discussing the danger of injecting objectivity in determining the alien's state of mind).

<sup>98</sup> *Cuadras*, 910 F.2d at 571; *Valle-Zometa*, 1990 WL 208725, at 4.

<sup>99</sup> *Pitcherskaia*, 118 F.3d at 646.

<sup>100</sup> *Id.*

<sup>101</sup> Blum, *supra* note 72.

<sup>102</sup> Ness, *supra* note 9.

<sup>103</sup> *Id.*

<sup>104</sup> Blum, *supra* note 72.

## CONCLUSION

The Ninth Circuit's deliberation of Alla's claim marks the first time a federal appeals court has reviewed an asylum claim based on sexual orientation. Alla Pitcherskaia's story demonstrates a distinct pattern of discrimination and persecution which continued until she fled Russia in 1992. Alla's persecution was based on her status as a homosexual and her political activities in furthering the rights of homosexuals. Thus, the Board of Immigration Appeals should find that her claim is valid under political opinion or membership in a particular group.

As evidenced by the BIA's ruling in Alla's case, her claim may face its strongest opposition in proving a "well-founded fear of persecution." Although a minimal amount of evidence has been presented showing political change in Russia, it is not enough to deny her asylum. The fact that Alla was beaten, threatened, and detained when she lived in Russia raises a strong presumption of a "well-founded fear of persecution." In viewing the subjective fear in light of the objective facts, the BIA should find that Alla's claim establishes the required level of fear and persecution.

The issues presented in Pitcherskaia's case could have significant ramifications for general refugee law and for the individual asylum claims of homosexuals. The past century has been marked with substantial steps taken by the United States toward equal treatment of homosexual aliens. Some people argue for a very limited interpretation of the categories in the Immigration Act, thereby refusing asylum to any homosexual. This should not be the issue, instead the government should focus on the persecution aspect of a homosexual alien's claim.

Alla Pitcherskaia's claim would by no means expand the law; it only seeks a strict and fair application of current policy to members of a group already recognized by the BIA as within the law's protection. Therefore, the BIA should grant political asylum to Alla Pitcherskaia thus giving her the protection she is deprived of in Russia.

