HIV-Based Persecution in Asylum and Immigration Decisions

By Victoria Neilson

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Since 1987 the United States has sent a clear message to foreign nationals: if you are HIV-positive, keep out. The Immigration and Nationality Act (INA) labels HIV "a communicable disease of public health significance," rendering those living with HIV/AIDS "inadmissible." Applicants for temporary visas who self-disclose their sero-positive status or applicants for permanent residence who test positive for HIV during a required medical examination therefore will be prevented from entering the United States or obtaining legal permanent residence unless they meet the stringent requirements for an HIV waiver.

Paradoxically, at the same time that the United States enforces one of the world's most restrictive HIV immigration policies, in some limited circumstances a foreign national's HIV-positive status can actually create the basis for an application for immigration. One form of relief that may be available is asylum, which may be granted if a foreign national can demonstrate a well-founded fear of persecution in his or her home country on account of race, religion, nationality, membership in a particular social group, or political opinion. The Board of Immigration Appeals (BIA) has defined social group membership as "that [which] the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." (*Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).) Since no cure exists for HIV, it is a status that cannot be changed and may form the basis for an asylum claim.

The greatest difficulty in proving such a claim is demonstrating that the person will suffer "persecution" in his or her home country. Although the term is not defined explicitly in the INA, case law has created a working standard that defines persecution as harm that has been inflicted on a person directly by the government or by private people who the government is unable or unwilling to control. Examples of recognized harm include death, torture, beatings, severe discrimination, and complete economic deprivation. Generally, limited discrimination or economic hardship does not rise to the level of persecution.

Winning an asylum case based on HIV status requires proving that the harm the person would suffer would amount to persecution as opposed to hardship. Proving merely that state-of-the-art medical treatment is unavailable because a home country is economically underdeveloped will rarely be recognized as persecution. Rather, the asylum applicant must prove government animus or willfulness.

Although no precedential asylum decision has granted relief to a person based solely on HIV status, one case was reported in *Interpreter Releases* in which an immigration judge granted asylum to an HIV-positive woman from India. *(Ostracism, Lack of Medical Care Support HIV-Positive Alien's Asylum Quest, IJ Rules*, 78 No. 3 INTERREL 233 (Jan. 15, 2001).) In finding that the woman warranted asylum, the judge relied on the Indian Supreme Court's recent decision prohibiting HIV-positive people from marrying and providing potential criminal penalties for those who disobeyed the law. Since the woman was married and HIV-positive, the judge found that she could face imprisonment if she was forced to return to India.

Another unpublished decision also granted relief to an HIV-positive person, again based largely on the likelihood of imprisonment if he were removed to his native Haiti. In *Matter of W–* (on file with the author; the name has been redacted to protect the applicant's confidentiality), New York's Legal Aid Society, with pro bono assistance, won relief under the Convention against Torture (CAT) for this Haitian national with full-blown AIDS. The U.S. government was seeking to deport W–, a long-time permanent resident, because he had several serious criminal convictions. The convictions disqualified him from asylum eligibility. However, under CAT, if foreign nationals can meet the high standard of proving that, more likely than not, they will face torture from their governments if deported, they will be allowed to remain in the United States. In this case, the immigration judge found that the Haitian government would imprison W– indefinitely upon his deportation there because of his criminal record. Citing the overcrowded, unsanitary conditions in Haitian prisons, the judge found that imprisonment would essentially be a death sentence for W–, and that he therefore qualified for CAT relief.

Protection of HIV-positive people under U.S. immigration law is still relatively uncharted. Although there have been no precedential decisions in this area, unpublished decisions have granted relief. When representing HIV-positive foreign nationals, one must keep these forms of humanitarian assistance in mind as possible avenues of relief because the ability to remain in the United States may often mean the difference between life and death.

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