

Date: July 1, 2008

Subject: **Extent and type of persecution suffered by LGBTI/PLWHA in Fiji and Russia and asylum petitions based on such persecution in the United States**

I. QUESTIONS PRESENTED

- A.** Is the treatment of lesbian, gay, bisexual, and transgender individuals (LGBTI) and people living with HIV/AIDS (PLWHA) in Fiji sufficiently severe to prove “persecution” as required for a successful petition for asylum under United States law?
- B.** Is the treatment of LGBTIs and PLWHA in Russia sufficiently severe to prove “persecution” as required for a successful petition for asylum under United States law?

II. SHORT ANSWERS

A. Probably, no. There is little evidence that treatment of LGBTIs and PLWHA in Fiji has been a significant problem in the past. Moreover, the government has taken steps to increase tolerance within recent years. Even if the applicant did face persecution in the past, these improved conditions are likely a significant factor in concluding that the applicant does not have a well-founded fear of persecution if returned to Fiji. Such finding counsels in favor of a denial of asylum.

Evidence is lacking that systemic discrimination and persecution has been a serious issue in Fiji in years past. Furthermore, the government has made inroads in attempting to curtail any discrimination and persecution of LGBTIs and PLWHA that does exist. Fiji’s High Court overturned the conviction of two gay men for violating the sodomy laws and has confirmed that men engaging in consensual sexual activity will no longer be arrested, the police commissioner has publicly stated that homosexuality is not an offense, and the U.S. Department of State has found that there is neither systemic discrimination of homosexuals or persons living with HIV/AIDS nor known cases of violence directed at such individuals. However, the law prohibiting sodomy technically remains on the books and the U.S. Department of State has acknowledged the existence of some societal discrimination. Nevertheless, such mistreatment falls short of the “persecution or a well-founded fear of persecution” requirement for asylum under U.S. law. As a result, an individual seeking asylum from Fiji based on fear of persecution for being LGBTI/PLWHA will likely be denied asylum in the United States.

B. Probably, yes. The treatment of LGBTIs and PLWHA in Russia continues to be a significant problem. LGBTIs and PLWHA face discrimination and violence, receive little to no police protection, and are commonly unable to secure jobs or medical care.

The level of discrimination against LGBTIs and PLWHA in Russia will likely be sufficient to sustain a finding of “persecution or a well-founded fear of persecution” in a petition for asylum. Gay individuals face discrimination and violence and receive no police protection. LGBTIs and PLWHA have little access to healthcare, employment, and education due to social ignorance and discrimination. Many politicians are openly antigay and introduce legislation that increases animosity towards the gay people. Finally, Russian society commonly discriminates against the gay community. These factors suggest that LGBTIs and PLWHA have a legitimate fear of harm if they are forced to return to Russia. An asylum claim based on persecution is therefore likely to be successful.

III. LEGAL ANALYSIS

A. Overview of United States Asylum Law

An individual already in the United States can secure asylum if he or she meets the definition of “refugee.” *See* Immigration Equality, *Winning Asylum, Withholding and CAT Cases Based on Sexual Orientation, Transgender Identity and/or HIV-Positive Status 1* (2006), http://www.immigrationequality.org/uploadedfiles/manual_complete.pdf [“Immigration Equality”]. A refugee is an individual who is “unable or unwilling to return” to the country of his or her nationality or the country in which he or she last resided “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.” 8 U.S.C.S. § 1101(a)(42)(A) (2008) (emphasis added). The most difficult aspect of winning an asylum claim based on HIV/AIDS is demonstrating that the applicant will suffer persecution if returned to his or her home country. *See* Victoria Neilson, *HIV-Based Persecution in Asylum and Immigration Decisions*, *Human Rights Magazine*, Fall 2004, at 8-9, *available at* <http://www.abanet.org/irr/hr/fall04/persecution.htm> [hereinafter Neilson, *HIV-Based Persecution*]. There are two components under the requirement of a “well-founded fear of persecution”: the subjective component and the objective component. *See Civil v. INS*, 140 F.3d 52, 59 (1998). The subjective component requires that the applicant’s fear is genuine. *See id.* The objective component

requires “facts that would support a reasonable fear that the petitioner faces persecution.” *See id.* The applicant must demonstrate a “reasonable probability” that he or she will suffer persecution resulting from one of the statutorily enumerated grounds. *See id.* This threshold, however, does not require that the applicant prove persecution is more likely than not. *See id.*

Although “persecution” is not defined explicitly, case law has generally defined it 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.” *See Neilson, HIV-Based Persecution*, at 8-9. Examples of harm that courts have recognized include beatings, torture, death, severe discrimination, and complete economic deprivation. *See id.* Discrimination that exists to a limited extent or mere economic hardship are insufficient. *See id.* Furthermore, the harm must be a result of government hostility or willfulness, not isolated actions of private individuals. *See id.* at 8-9. Police are the prototypical government actors. *See Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (2005).

Bocova v. Gonzales is illustrative of violence that is too limited to qualify as persecution. *Bocova v. Gonzales*, 412 F.3d 257 (2005). In that case, the petitioner, an Albanian man who was a member of the Albanian Democratic Party (ADP), filed for asylum based on fear of persecution due to his political affiliation. *See id.* at 261. The petitioner pointed to two incidents on which he based his claim of past persecution. *See id.* The first incident occurred at an ADP demonstration, where the Albanian police arrested the petitioner, held him without charges, interrogated and beat him, and threatened him with death if he did not renounce the ADP. *See id.* He was later released and continued his support of the party. *See id.* Two years later, the police again arrested the petitioner at another political rally. *See id.* The police beat him with chains attached to plastic pipes and again threatened him with death if he did not end his involvement with the ADP. *See id.* The police hit him until he lost consciousness and then took him to the hospital. *See id.* He sustained injuries that made him unable to work for two days. *See id.* The petitioner stayed in Albania for another two months and continued his involvement with the ADP. *See id.* He then left Albania and went to Greece. *See id.* A couple months later, the Albanian police came to the home of his parents looking for him. *See id.* Worried about his safety due to the close proximity of Greece to Albania, the petitioner made his way to the United States, where he sought asylum. *See id.* The court found that this mistreatment fell short of that required to

establish past persecution. *See id.* at 263. It acknowledged that the beatings were serious, but explained that because the two incidents occurred twenty-five months apart, they were too sporadic to constitute systemic persecution. *See id.* Such limited violence, though serious, was insufficient to satisfy the standard required under United States asylum law. *See id.*

For purposes of asylum, “*all* alien homosexuals are members of a ‘particular social group.’” *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (2005) (emphasis in original). In *Karouni*, a gay man with AIDS who was a Shi’ite Muslim applied for asylum based on fear of persecution if returned to Lebanon. *See id.* at 1166. Under Islamic law, enforced by the Islamic paramilitary organization Hizballah in the applicant’s region of the country, homosexuality is punishable by death. *See id.* at 1167. Furthermore, the Lebanese government vehemently condemns homosexuality and acts to curb it by arresting gay men. *See id.* Even the applicant’s family, who did not know their son was homosexual, agreed that being gay is a crime that deserves strong punishment. *See id.* The applicant had been interrogated in his apartment about being homosexual by armed militia men, who later arrested, beat, and likely killed the man with whom he was involved. *See id.* at 1168. Out of fear of further persecution, he avoided his apartment for a couple months and started pretending he was straight by dating women. *See id.* He was also unable to seek treatment for his AIDS for fear of persecution, as the disease is seen as a stamp of homosexuality in Lebanon. *See id.* at 1169. People who are found to have AIDS are put under house arrest and receive no treatment. *See id.* Because “life was intolerable,” the applicant finally fled to the United States. *See id.* at 1168. While in the United States, he found out that at least three of his homosexual friends in Lebanon had been detained, beaten, and even killed because they were gay. *See id.* at 1168. Because the applicant was “outed” as being gay by another man who had been arrested and interrogated, he feared he would suffer the same fate if returned to Lebanon. *See id.* at 1168-69. The court therefore found that the applicant easily proved a well-founded fear of persecution, as “even a ten per-cent chance of persecution may establish a well-founded fear.” *See id.* at 1178 (quoting *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001)). However, this is not the universally accepted standard for establishing a well-founded fear of persecution for purposes of asylum. *See Ins v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *see also* CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, 3-33 IMMIGRATION LAW AND PROCEDURE § 33.04 (2008).

The Supreme Court has offered guidance on the issue, but has yet to fashion a concrete standard. See *Cardoza-Fonseca*, 480 U.S. at 448; see also CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, 3-33 IMMIGRATION LAW AND PROCEDURE § 33.04 (2008). It has held that the “well-founded fear of persecution” standard is more generous than the “clear probability” standard and that “[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.” *Cardoza-Fonseca*, 480 U.S. at 448. However, it also explained that there is “obviously some ambiguity in a term like ‘well-founded fear’ which can only be given concrete meaning through a process of case-by-case adjudication.” See *id.* Nevertheless, the Court did quote in dicta a commentator who explained that a fear of persecution is well-founded if “every tenth adult male person is either put to death or sent to some remote labor camp” in the applicant’s country of origin. *Id.* at 431.

The circuit courts have applied the Supreme Court’s framework in varying ways. The First, Third, and Sixth Circuits have held that fear of persecution “can be well-founded even ‘when there is a less than 50% chance of the occurrence taking place,’” but have not explicitly subscribed to the “every tenth adult” standard the Court expressed in dicta. *Abdille v. Ashcroft*, 242 F.3d 477, 495 (3d Cir. 2001); see *Ipina v. INS*, 868 F.2d 511, 515 (1st Cir. 1989); *Perkovic v. INS*, 33 F.3d 615, 621 (6th Cir.1994). In the Second Circuit, a “fear may be well-founded even if there is only a slight, though discernible, chance of persecution.” *Koudriachova v. Gonzales*, 490 F.3d 255, 260 (2d Cir. 2007). The Fourth and Fifth Circuits have recognized that “an individual can demonstrate such a fear by showing that a reasonable person in like circumstances would fear persecution.” *Yong Hao Chen v. United States INS*, 195 F.3d 198, 203 (4th Cir. 1999); see *Guevara Flores v. Immigration & Naturalization Service*, 786 F.2d 1242, 1249 (5th Cir. 1986). The Seventh Circuit has avoided the use of percentages, instead describing the inquiry as “contextual and the showing [a]s one of a ‘reasonable possibility.’” *Ahmed v. Gonzales*, 467 F.3d 669, 674 (7th Cir. 2006). The Eighth Circuit has fully applied the framework enunciated by the Supreme Court, accepting that a fear is well-founded even where the chance of persecution is less than 50% and “where every tenth adult male person in an applicant’s country of origin is either put to death or sent to some remote labor camp.” *Kipkemboi v. Gonzales*, 211 Fed. Appx. 530, 532 (8th Cir. 2007). Finally, the Tenth and Eleventh Circuits have held that “‘a 10% chance of being shot, tortured, or otherwise persecuted’ is enough to show a well-founded fear of persecution.” *Basnet v. Gonzales*, 168

Fed. Appx. 278, 282 (10th Cir. 2006); see *Sierra-Espita v. United States AG*, 210 Fed. Appx. 821, 823 (11th Cir. 2006).

In a claim for asylum, improvement in conditions in the country at issue may be a significant factor in concluding that an applicant does not have a well-founded fear of persecution. See *In re E--- P*, 21 I. & N. Dec. 860, 863 (1997). Where an applicant successfully establishes past persecution, he or she is presumed to have a well-founded fear of future persecution. See *Pitcherskaia v. INS*, 118 F.3d 641, 646 (1997). However, the government may show by a preponderance of the evidence that circumstances in the country from which the applicant seeks asylum have changed to the extent that the applicant's fear of future persecution is no longer well-founded. See *In re N- M- A-*, 22 I. & N. Dec. 312, 317 (1998). In evaluating the conditions of an applicant's home country, courts often rely heavily on U.S. State Department human rights reports. See *Immigration Equality*, at 1. However, even where conditions have improved, if the applicant can demonstrate sufficiently compelling reasons for fearing persecution if returned to the country from which he or she seeks asylum, the court may nevertheless grant the applicant's petition. See *id.*

In *In re E--- P*, a 35-year-old Haitian woman applied for asylum fearing persecution on account of her church membership. See *In re E--- P*, 21 I. & N. Dec. at 861. The applicant testified that the Haitian military watched the church and shot at members who were leaving the premises. See *id.* She further testified that the military had murdered her uncle and two cousins in their home for their involvement in the church and the activism for the president it supported. See *id.* The applicant also submitted several articles and reports on the conditions in Haiti. See *id.* at 861-62. While the court found the applicant's testimony credible, it concluded that she had not met her burden in establishing she was eligible for asylum. See *id.* at 862. Along with finding that the applicant's testimony established an insufficient link between herself and the past persecution against the church and her relatives, the court explained that "the change in government [in Haiti] and increasing stability . . . militates against a finding that the applicant has a well-founded fear of persecution." See *id.* American forces had intervened in Haiti and prompted vast and continuing improvements in the human rights situation as well as a new, democratically elected president. See *id.* at 863. The court recognized that Haiti remained a troubled country, but because the applicant's claim was based on persecution by

military forces that were being dismantled, the court found that she failed to prove a reasonable fear of future persecution. *See id.* at 863-64. It therefore denied her application for asylum. *See id.* The court did note, however, that a supporter of the past president could conceivably establish a well-founded fear based on that status if the supporter presented facts as to why he or she would face persecution despite changes in the government. *See id.* at 863 n.2.

No precedential decision has granted an applicant asylum based solely on the applicant's HIV/AIDS status. *See Neilson, HIV-Based Persecution*, at 8-9. However, unpublished decisions have granted such relief. *See id.* Furthermore, courts have considered an applicant's HIV/AIDS status in conjunction with the applicant's membership in a particular social group. *See, e.g., Boer-Sedano v. Gonzales*, 418 F.3d 1082 (2005) (granting applicant's asylum petition based both on applicant's status as Mexican homosexual male and difficulties in obtaining AIDS treatment in his home country). An applicant would therefore be well advised to include in his or her asylum petition any hardships associated with obtaining HIV/AIDS treatment in the applicant's home country, as such difficulty may counsel in favor of granting asylum. *See Neilson, HIV-Based Persecution*, at 8-9.

For example, in *Boer-Sedano*, the court addressed a petition for asylum filed by a homosexual Mexican man living with AIDS. *See Boer-Sedano*, 418 F.3d at 1085. The applicant's claim rested on interactions with a high-ranking police officer as well as the applicant's inability to receive the AIDS treatment he needed in Mexico. *See id.* at 1086-87. The police officer detained the applicant for being gay on nine separate occasions over a three-month period, forcing the applicant to perform oral sex on him and, on one occasion, putting a loaded gun to his head. *See id.* at 1086. Over the course of the applicant's treatment for AIDS he had become resistant to many medications, necessitating recourse to new drugs. *See id.* at 1087. These drugs were not available in Mexico. *See id.* Furthermore, even if they were, the applicant could not afford them, as his status as a homosexual man with AIDS meant nobody would give him a job. *See id.* The court found that the applicant established past persecution and was therefore presumed to have a well-founded fear of future persecution. *See id.* at 1089. Because

country reports¹ for Mexico indicated that persecution of homosexuals remained a problem, there was no change in country conditions with which the government could successfully rebut this presumption. *See id.* at 1089-90. Furthermore, there existed a likelihood of serious harm to the applicant's health if he was forced to return to Mexico, where he could not obtain the AIDS drugs he needed for treatment. *See id.* at 1090-91. The confluence of these factors led the court to hold that the applicant was statutorily eligible for asylum. *See id.* at 1092.

The term "transgender" generally describes "individuals who feel a discord between their gender identity and their anatomical sex." Victoria Neilson, *Uncharted Territory: Choosing an Effective Approach In Transgender-Based Asylum Claims*, 32 FORDHAM URB. L.J. 265, 266 (2005). Such individuals are, of course, not necessarily homosexual, so many do not fall under *Karouni*. There has not yet been a precedential decision establishing transgender individuals as a particular social group for the purposes of asylum law. *See id.* at 274. Unpublished decisions, however, have granted relief. *See id.* Therefore, if a transgender individual faces persecution in his or her home country, the individual should include such facts in his or her petition, as it may be a viable basis on which a court could grant asylum.

B. The Treatment of LGBTIs and PLWHA in Fiji is Likely Not Sufficiently Severe to Support an Asylum Claim Based on Persecution

There is little evidence of systemic discrimination against LGBTIs or PLWHA in Fiji, either past or present. *See* U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100520.htm> [hereinafter COUNTRY REPORTS – FIJI]; *see also* R. Germov, Refugee Review Tribunal 696-21 (May 26, 1994), available at [http://www.asylumlaw.org/docs/sexualminorities/Fiji%201%20SO%20\[94-99\].pdf](http://www.asylumlaw.org/docs/sexualminorities/Fiji%201%20SO%20[94-99].pdf). The Fijian constitution prohibits discrimination based on "race, ethnic origin, [color], place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability." *See* Fiji Const. ch. 4, § 38, available at <http://aceproject.org/ero-en/regions/pacific/FJ/Fiji%20Constitution%201998.pdf>; *see*

¹ The U.S. Department of State compiles country reports on human rights practices for 193 countries from around the globe. These reports are an excellent resource for insight into the social conditions that exist in these countries. The reports are available online at <http://www.state.gov/g/drl/rls/hrrpt/2007>.

also COUNTRY REPORTS – FIJI. Furthermore, discrimination that may have existed in the past has been curtailed by recent political developments.

While male homosexuality is technically illegal in Fiji, doubt exists as to whether such laws are enforced.² See AsylumLaw.org, Sexual Minorities and HIV Status, http://www.asylumlaw.org/legal_tools/index.cfm?category=336&countryID=233 (last visited June 26, 2008). Section 175 of the Penal Code punishes “carnal knowledge against the order of nature” and has a maximum penalty of imprisonment for 14 years. Laws of Fiji, Penal Code (1985), available at http://www.itc.gov.fj/lawnet/fiji_act/penal_code.html. Section 176 makes illegal “attempts to carnal knowledge against the order of nature and indecent assaults” and carries a maximum penalty of seven years’ imprisonment. *Id.* Section 177 forbids acts of “gross indecency” between males, whether in private or in public, and has a maximum penalty of five years’ imprisonment. *Id.* Each of these sections includes a provision for corporal punishment. *See id.* Unfortunately, Fiji does not maintain accurate crime statistics and those that do exist do not indicate the circumstances surrounding the offense or the sentence imposed. *See* R. Mathlin, Refugee Review Tribunal 695-8 (May 26, 1994), available at [http://www.asylumlaw.org/docs/sexualminorities/Fiji%201%20SO%20\[94-99\].pdf](http://www.asylumlaw.org/docs/sexualminorities/Fiji%201%20SO%20[94-99].pdf). Evidence suggests, however, that laws against homosexuality are not strictly enforced. *See id.*

Following the arrest of a man who picked up eight other men and photographed and videotaped them engaged in sexual acts, a magistrate was quoted as saying that “while a 1964 law held that all sexual relations between males were illegal in Fiji, attitudes have evolved since then.” *See id.* at 695-8 to -9. The police commissioner has publicly stated that prosecuting adults engaging in consensual homosexual acts is a “waste of public resources” and that “being gay is not an offence.” *See* IMMIGRATION AND REFUGEE BOARD OF CANADA, FIJI: TREATMENT OF HOMOSEXUALS BY SOCIETY AND GOVERNMENT AUTHORITIES; RECOURSE AND PROTECTION AVAILABLE TO HOMOSEXUALS WHO HAVE BEEN SUBJECT TO ILL TREATMENT (2007), available at <http://www.unhcr.org/refworld/docid/469cd69b44.html> [hereinafter IMMIGRATION AND REFUGEE BOARD]; *see also* Katherine Knowles, *Fijian High Commission Confirms; No More Arrests for Consensual Gay Sex in Fiji*, PINK NEWS, July 11, 2006, available at

² Female homosexuality is not mentioned in the law.

<http://www.pinknews.co.uk/news/articles/2005-1948.html>. Furthermore, in April 2004 two men were convicted and sentenced to two years in prison for homosexual conduct and taking nude photographs of each other. *See* IMMIGRATION AND REFUGEE BOARD. In 2005, however, the men successfully appealed their case and were acquitted. *See id.* The High Court judge held that consenting men are free to practice homosexual conduct in private and that the penal code provisions prohibiting such conduct would no longer be enforced. *See id.*; *see also* Katherine Knowles, *Fijian High Commission Confirms; No More Arrests for Consensual Gay Sex in Fiji*, PINK NEWS, July 11, 2006, *available at* <http://www.pinknews.co.uk/news/articles/2005-1948.html>. There are, however, organizations that encourage the government to take a less tolerant stance.

The Methodist Church in Fiji is actively antigay and exerts pressure on the government to enforce the laws against homosexuality. *See* IMMIGRATION AND REFUGEE BOARD. However, the government has resisted this pressure. *See id.* The Church has pushed the government to remove the protections for gay people from the Fijian constitution, which the government refused to do. *See id.* The Church also organized a protest rally in response to the aforementioned ruling by the High Court. *See id.* When it requested permission to hold a second rally, the government denied its application. *See id.* While the Methodist Church has maintained its position, even going as far as issuing a release saying that gay people should be killed, popular support appears limited. *See id.*

Evidence suggests that homosexuality is generally accepted in Fijian society. *See* R. Mathlin, Refugee Review Tribunal 695-8 to -9 (May 26, 1994), *available at* [http://www.asylumlaw.org/docs/sexualminorities/Fiji%201%20SO%20\[94-99\].pdf](http://www.asylumlaw.org/docs/sexualminorities/Fiji%201%20SO%20[94-99].pdf). The Fiji Times prints articles about events held by the “gay community” and many people appear to be unaware that homosexuality is still technically illegal. *See id.* at 695-9. While just like in most any other country there are incidents of social discrimination against LGBTIs and PLWHA, there is no evidence of systemic discrimination or human rights abuses. *See* COUNTRY REPORTS – FIJI; *see also* R. Mathlin, Refugee Review Tribunal 695-9 (May 26, 1994), *available at* [http://www.asylumlaw.org/docs/sexualminorities/Fiji%201%20SO%20\[94-99\].pdf](http://www.asylumlaw.org/docs/sexualminorities/Fiji%201%20SO%20[94-99].pdf). There were no known cases of violence directed at LGBTIs or PLWHA. *See* COUNTRY REPORTS – FIJI.

The situation in Fiji appears to fall short of what is required for a successful asylum petition based on persecution. There is little evidence to suggest that treatment of LGBTIs and PLWHA has been so bad as to support a claim of persecution or well-founded fear of future persecution. Even if an applicant were to prove that they had been persecuted for being LGBTI or PLWHA in the past, the recent developments in the Fijian government would mitigate in favor of denying asylum. Isolated incidents of social discrimination and the actions of the Methodist Church, which the government has acted to limit, are almost certainly insufficient, especially since these harms are not the product of government hostility or willfulness. While applicants may still demonstrate compelling reasons for not returning to Fiji because of the severity of past persecution, such claims are highly fact specific and must be reviewed on a case-by-case basis. In general, then, it seems that a petition for asylum from Fiji based on persecution for being LGBTI and PLWHA is unlikely to succeed.

While the United States does not keep data on asylum applications concerning LGBTIs and PLWHA, we have submitted a request to the Department of State for the statistics they are able to provide. We expect a response within approximately the next 20 days. These statistics should provide further insight into the likelihood of a successful asylum petition based on persecution for being LGBTI/PLWHA in Fiji.

C. Persecution of LGBTIs and PLWHA in Russia is Likely Sufficiently Severe to Support a Petition for Asylum

The persecution of LGBTIs and PLWHA has and continues to be a significant problem in Russia. Although homosexuality is not illegal, LGBTIs face widespread discrimination and violence while receiving little protection from the government. *See* U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2008), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2007/100581.htm> [hereinafter COUNTRY REPORTS – RUSSIA]. Politicians regularly inveigh against homosexuality. *See* Human Rights Watch and the European Region of the International Lesbian and Gay Association, “We Have the Upper Hand”: Freedom of Assembly in Russia and the Human Rights of Lesbian, Gay, Bisexual, and Transgender People, June 2007, at 2, *available at* <http://hrw.org/backgrounder/lgbt/moscow0607/moscow0607web.pdf>; *see also* COUNTRY

REPORTS – RUSSIA. Finally, high levels of ignorance and intolerance mean LGBTIs and PLWHA are frequently unable to secure jobs or medical care. *See* COUNTRY REPORTS – RUSSIA.

On May 27, 2007, antigay demonstrators attacked LGBTI activists at a peaceful gay pride demonstration. *See* COUNTRY REPORTS – RUSSIA. Riot police stood by and watched as skinheads, nationalists, and adherents to the Russian Orthodox religion beat the activists. *See id.* In April 2006, hundreds of protestors attacked a lesbian, gay, bisexual, and transgender “open party” in Moscow, throwing eggs, rocks, and bottles at participants. *See id.* That same night, around 100 protestors did the same outside of a gay nightclub. *See id.* Police took no action and refused to investigate. *See id.*

Many politicians encourage persecution against LGBTIs and PLWHA. While homosexual conduct is still not technically prohibited, some argue that its legal status is maintained largely to appease the European Union. *See* Camilla Roubleva, *Gay Russia Today*, THE GULLY, May 13, 2004, available at http://www.thegully.com/essays/russia/040513_gay_lesbian_russia.html. Politicians frequently include homosexuality among the “domestic and foreign abominations” plaguing Russia. *See* Human Rights Watch and the European Region of the International Lesbian and Gay Association, “We Have the Upper Hand”: Freedom of Assembly in Russia and the Human Rights of Lesbian, Gay, Bisexual, and Transgender People, June 2007, at 12-13, available at <http://hrw.org/backgrounder/lgbt/moscow0607/moscow0607web.pdf>. In 2005, a parliamentary deputy proposed a bill prohibiting anyone involved in “propaganda for homosexuality” from holding a teaching position and enjoying other rights in public life. *See id.* The propaganda at issue included any public speech or publicly displayed work having to do with homosexuality. *See id.* The bill failed, but found the support of more than one-fifth of the 450-member Duma, the lower house of the Russian parliament. In 2007, a Duma deputy introduced a bill that sought to re-criminalize homosexual conduct. *See id.* The provisions of the bill included penalties reminiscent of those imposed in the Stalinist era. *See id.* The same deputy encouraged violence against participants in a gay pride demonstration in Moscow in 2006. *See id.* In April 2006, the Moscow city Duma criticized foreign organizations that fight HIV/AIDS for “encouraging pedophilia, prostitution, and drug use among teenagers.” *Id.* A similar attitude is common across much of Russian society.

Russian society widely perceives homosexuals as “mentally ill, perverted pedophiles.” *See* Camilla Roubleva, *Russian Lesbians Rising*, THE GULLY, May 13, 2004, *available at* http://www.thegully.com/essays/russia/040513_lesbian_ru_intervie.html. While homophobia exists in the big cities, it is worse in more rural areas, where it is “dangerous just to be homosexual.” *See id.* Although federal law prohibits discrimination against individuals with HIV/AIDS, it is frequently not enforced. *See* COUNTRY REPORTS – RUSSIA; *see also* Country Progress Report of the Russian Federation on the Implementation of the Declaration of Commitment to HIV/AIDS 21 (2008), *available at* http://data.unaids.org/pub/Report/2008/russia_2008_country_progress_report_en.pdf. Male homosexuals are refused work because of their sexual orientation. *See* COUNTRY REPORTS – RUSSIA. PLWHA face alienation from their families and are unable to find jobs or receive medical treatment. *See id.* Medical practitioners limit treatment to or completely refuse to accept gay patients as a result of prejudice and lack of information. *See id.*

In 2006 and 2007, the federal government and various NGOs launched projects focusing on treatment of and education about HIV/AIDS. *See* Country Progress Report of the Russian Federation on the Implementation of the Declaration of Commitment to HIV/AIDS 21-25 (2008), *available at* http://data.unaids.org/pub/Report/2008/russia_2008_country_progress_report_en.pdf. These programs have reached a significant number of people and have reportedly been effective at increasing levels of testing for HIV/AIDS, but their impact on increasing tolerance toward LGBTIs and PLWHA is unclear. *See id.* Data show that the general population still has relatively low levels of information about the disease and continues to engage in high risk behaviors even after the campaigns. *See id.* Furthermore, the Country Report on Human Rights Practices in Russia indicates that the gay community still suffers discrimination and lack of access to healthcare. *See* COUNTRY REPORTS – RUSSIA.

The treatment of LGBTIs and PLWHA in Russia is likely sufficiently severe to support a valid claim for asylum based on persecution. As a group, homosexuals are widely discriminated against, both by the government and by individuals the government refuses to control. Furthermore, homosexuals living with HIV/AIDS are unable to receive treatment because of their limited or complete lack of access to healthcare. There therefore seems to be a “reasonable probability” that an LGBTI/PLWHA will suffer harm amounting to persecution if forced to return to Russia.

Again, the United States does not keep data on asylum applications concerning LGBTIs and PLWHA. However, we have submitted a request to the Department of State for the statistics they are able to provide. These statistics will hopefully shed additional light on the chances of filing a successful asylum claim based on persecution for being an LGBTI/PLWHA in Russia.

IV. CONCLUSION

To successfully petition for asylum, the applicant must prove that he or she is “unable or unwilling” to return to his or her home country because of persecution or a well-founded fear of persecution on account of his or her “race, religion, nationality, *membership in a particular social group*, or political opinion.” 8 U.S.C.S. § 1101(a)(42)(A) (2008) (emphasis added). For purposes of asylum, “*all* alien homosexuals are members of a ‘particular social group.’” *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (2005) (emphasis in original). Although there is no precedential case in which HIV/AIDS or an individual’s transgender identity was the sole criterion on which the court granted relief, unpublished cases exist. Furthermore, courts hearing asylum claims have considered an applicant’s HIV/AIDS status and whether the applicant has access to treatment in his or her home country alongside other factors in making their decisions. The key to a claim based on LGBTI/PLWHA status is usually proving persecution.

A petition for asylum based on persecution for being LGBTI/PLWHA in Fiji will probably be unsuccessful. Little evidence of systemic persecution of LGBTIs or PLWHA exists. Furthermore, political developments in Fiji have increased tolerance in recent years. Although homosexual acts technically remain illegal, the High Court has held that such provisions will no longer be enforced. Therefore, even if an applicant were to successfully prove past persecution, the government would likely rebut the presumption that the applicant has a reasonable fear of future persecution if returned to Fiji. Although an applicant may still secure asylum if he or she is able to prove his or her fear of persecution remains reasonable despite changed circumstances, such claims are highly fact specific.

Widespread persecution of LGBTIs and PLWHA exists in Russia. Politicians have condemned homosexuality as an abomination and introduced bills attempting to make it illegal and severely punished. Furthermore, police have done little, if anything, to protect LGBTIs from violence at the

hands of antigay protestors. Finally, discrimination against LGBTIs and PLWHA is pervasive in Russian society. This discrimination prevents them from being able to secure jobs or healthcare. Although both government and non-government actors have introduced HIV/AIDS education programs, there is little evidence that these programs have increased tolerance. The confluence of these factors suggests that an asylum claim based on persecution for being LGBTI/PLWHA in Russia will likely be successful.

BRR

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