

Asylum Case Further Defines Proof of Persecution for Gay Man

Bethany Graham, MD
Resident in Psychiatry

Richard Martinez, MD, MH
Robert D. Miller Professor of Forensic Psychiatry
Director, Forensic Psychiatry Fellowship

Department of Psychiatry
University of Colorado Denver Medical School
Colorado Office of Behavioral Health
Denver, CO

In *Bringas-Rodrigue v. Sessions*, 850 F.3d 1051 (9th Cir. 2017), the Ninth Circuit Court of Appeals held that Mr. Carlos Alberto Bringas-Rodriguez (Bringas), a gay man who is a native and citizen of Mexico, had met the evidentiary standards for establishing past persecution and compelled the conclusion that Mr. Bringas had been subjected to past persecution that the Mexican government was unable or unwilling to control.

Facts of the Case

Mr. Bringas was abused by his father, an uncle, cousins, and a neighbor while living in Mexico. They all perceived him to be gay or to have effeminate characteristics. His uncle, cousins, and neighbor never called him by his name, instead they referred to him as “fag, fucking faggot, queer” and they “laughed about it” (*Bringas-Rodriguez*, p 1056). Mr. Bringas fled Mexico in 2004 to escape his abusers. He entered the United States without inspection and lived in both Kansas and Colorado. In August 2010, he pleaded guilty to attempted contribution to the delinquency of a minor in Colorado. He spent ninety days in jail, and during that time, he attempted suicide and was hospitalized. This suicide attempt precipitated his telling a doctor and then his mother about his childhood abuse.

The Department of Homeland Security (DHS) issued a Notice to Appear in August 2010. Mr. Bringas applied for asylum, withholding of removal, and Convention Against Torture (CAT) protection in 2011. He stated that he had been unaware that the U.S. government could protect him and found out about this protection when he spoke with a U.S. Customs and Immigration (ICE) officer in 2010. In his asylum application, Mr. Bringas described the sexual abuse he endured in Mexico and explained

that he feared he would be persecuted if he returned to Mexico because he is gay, as well as that the Mexican police would not protect him. Mr. Bringas testified about his gay friends’ experiences with the Mexican police in Veracruz. He said that his friends went to the police to report that they had been raped, the officers ignored their reports and “laug[ed] on [sic] their faces” (*Bringas-Rodriguez*, p 1057). He submitted 2009 and 2010 Department of State Country Reports for Mexico and several newspaper articles that documented violence against gay and lesbian individuals.

Both the Immigration Judge (IJ) and the Board of Immigration Appeals (BIA) recognized the serious abuse that Mr. Bringas had experienced as a child. However, Mr. Bringas did not demonstrate that the “abuse was inflicted by government actors or that the government was unwilling or unable to control his abusers” (*Bringas-Rodriguez*, p 1057). The BIA rejected Mr. Bringas’s argument that he had a well-founded fear of future persecution because he had failed to show a pattern of persecution of gay men in Mexico because “the record . . . d[id] not demonstrate widespread brutality against homosexuals or that there [was]any criminalization of homosexual conduct in Mexico” (*Bringas-Rodriguez*, p 1057). The BIA concluded that Mr. Bringas failed to show that Mexico was unable or unwilling to control private individuals who perpetuated violence against homosexual persons. The BIA rejected Mr. Bringas’s withholding of removal and CAT claims, and he appealed.

Ruling and Reasoning

A panel of the Ninth Circuit denied Mr. Bringas’s petition for review, but he was then granted a rehearing *en banc*. The court first reviewed the evolution of U.S. Refugee Law, and pointed out that the Attorney General can grant asylum to applicants in the United States who meet the definition of “refugee.” Under 8 U.S.C. § 1101(a)(42)(A) and 8 U.S.C. § 1158 (b)(1), a “refugee” is someone who is unable or unwilling to return to his home country because of a well-founded fear of future persecution” (*Navas v. INS*, 217 F.3d 646, 654 (9th Cir. 2000)) because of race, religion, nationality, membership in a particular social group, or political views. The applicant can demonstrate the “well-founded fear” of future persecution by either proving previous persecution or by

demonstrating that he has a genuine and objectively reasonable fear of future persecution.

The Ninth Circuit Court of Appeals addressed several important points that led to a remand of the case for further proceedings. First, the IJ and BIA failed to take into account Mr. Bringas's "plausible, unrefuted testimony that the Mexican police laughed at his gay friends who had attempted to report rape and other abuse" (*Bringas-Rodriguez*, p 1055–1056), and therefore his claims of refugee status and fear of persecution based on past persecution by nongovernmental actors were credible. The court acknowledged that his persecution was in part caused by his sexual orientation and membership in a social group. There was no evidence in the record that Mr. Bringas's abusers were motivated by anything other than his sexual orientation. Mr. Bringas's evidence of oral and written testimony was sufficient to document official and private persecution of individuals on account of their sexual orientation.

The court agreed with Mr. Bringas's claim that reporting to police as a condition to qualify for refugee status was futile and dangerous and should not be required as a standard of proof for past persecution. In *Rahimzadeh v. Holder*, 613 F.3d 916 (9th Cir. 2010), the court had that the "absence of a report to police does not reveal anything about a government's ability or willingness to control private attackers; instead, it leaves a gap in proof about how the government would respond if asked, which the petitioner may attempt to fill by other methods" (*Rahimzadeh*, p 922). This gap could be filled by demonstrating that a country's laws or customs deprive the petitioner of any meaningful recourse to governmental protection, by describing prior interactions with authorities, by showing that others have made reports of similar incidents to no avail, by establishing that private persecution is widespread and well-known but not controlled by the government, or by convincingly establishing that reporting would have been futile or would have subjected the applicant to further abuse.

Finally, the fact that Mexico as a nation had made changes to reduce discrimination against homosexual persons, including the legalization of same-sex marriage in Mexico City did not preclude recognition that persecution at the regional and local levels could still support the claim that the government was unable or unwilling to control such persecution. In earlier decisions, the Ninth Circuit had established that the unable-or-unwilling standard did not require that this standard be applied countrywide, but it was sufficient to identify a local or regional inability or unwillingness in the home country. In addition, the claim could include persecutors who were nongovernment actors and unorganized groups.

Discussion

This case highlights important considerations with which forensic experts involved in asylum evaluations should be familiar. The court established that sexual orientation or identity could verify membership in a particular social group. They affirmed that persecution can come from nongovernment actors and can create eligibility for asylum protection. Country reports, oral testimony, and news articles documenting official and private persecution of individuals on the basis of their sexual orientation satisfies the evidentiary standards for establishing past persecution, and the court further elaborated on the unable-or-unwilling standard that is necessary for asylum status. In cases involving children who are sexually abused, it is clear that actual reporting of abuse is not a requisite for judging the genuineness or credibility of the claim.

Despite the fact that Mexico has made advances in their official protection of homosexual individuals, there can be justification to grant asylum based on regional or local practices that have not progressed to the idealized standards of the national government. Just as there are genuine attempts to address drug cartel violence in Mexico by the national government, there are clearly striking regional differences in the success of such efforts.

Disclosures of financial or other potential conflicts of interest: None.