

course, a state may pass legislation that affords the individual more rights to privacy. Thus, HIPAA provides a floor for the protection of health information and privacy may be even more tightly controlled, depending on the rules of the state in which a psychiatrist practices.

If a patient who is involved in a legal matter gives consent to release mental health records, there may be harmful or irrelevant information in the record, and so the treating psychiatrist may be required to determine the minimum necessary information to include. If the records are ordered by the court, then the psychiatrist may be relieved of this gate-keeping role, which can become problematic when the treating psychiatrist is asked to release records from a forensic hospital and a dual agency arises. This point is where the *in camera* review process or “gate-keeping” role of the judge, highlighted in this case, becomes a potential safeguard against inappropriate and indiscriminate use of sensitive and confidential health information.

This discussion highlights two critical but often overlooked facts regarding privilege and confidentiality in a legal matter:

Treating psychiatrists are required to release confidential information only when it is court-ordered. An attorney-issued subpoena is not a court order. When a patient authorizes consent, HIPAA grants permission for, but does not require, disclosure.

When information is to be released, privilege limits the scope of information to that which is material and relevant to the specific matter at hand in the legal proceeding.

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Mental Health Considerations for Asylum

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Mental Illness, Availability of Psychiatric Medication, and Need for Psychiatric Medication May Be Considerations in Decisions About Whether to Grant Asylum

In *Kholyavskiy v. Mukasey*, 540 F.3d 555 (7th Cir. 2008), the U.S. Court of Appeals for the Seventh Circuit reviewed the decisions of the immigration judge (IJ) and Board of Immigration Appeals (BIA), both of whom denied Mr. Kholyavskiy’s request for asylum. In reviewing these decisions, the appeals court considered several matters related to mental health presented by Mr. Kholyavskiy.

Facts of the Case

Mr. Kholyavskiy, a native of the Soviet Union, was subjected to humiliation and physical abuse as a child because of his religion. When he started school, he was required to identify himself as Jewish every three months. Other children called him “kike.” They urinated on him repeatedly. They pulled down his pants, exposing his genitals, and taunted him for being circumcised. He reported incidents of physical abuse, including a broken arm and a serious dog bite that required a series of forty rabies shots. Mr. Kholyavskiy’s family received telephone calls threatening a pogrom. The family found Stars of David scratched into their mailbox.

In 1992, Mr. Kholyavskiy’s family was granted refugee status in the United States. He was 15 years old at the time. He suffered severe social anxiety, panic attacks, and depression. Soon after, he began to have trouble with the law, which resulted in commencement of removal proceedings in May 2001. Although Mr. Kholyavskiy had been in mental health treatment for several years, he did not begin to benefit from medication until 2003. He took Paxil and Klonopin, which allowed him some functional recovery. Over the course of the proceedings, Mr. Kholyavskiy required hospitalization after an acute psychotic breakdown.

At his hearing before the IJ in 2005, Mr. Kholyavskiy petitioned for asylum. He presented evidence that he had undergone past persecution and had reason to fear future persecution. His treating psychiatrist testified that Mr. Kholyavskiy would suffer serious harm upon returning to Russia, including inability to obtain his medication, psychotic breakdown because of separation from his family, and an inability to take care of himself.

The IJ found that Mr. Kholyavskiy’s prior harassment did not rise to the level of persecution defined

in 8 U.S.C. § 1158. The judge ruled that he did not have an objectively reasonable fear of future persecution based on being part of any particular social group. The IJ excluded his mental illness for consideration, reasoning that unlike one's tribal affiliation, which is immutable, mental illness can be treated with medication. The judge argued that the family could mail him medications and arrange for his care in Russia. Mr. Kholyavskiy appealed to the BIA, who after twice reviewing the case affirmed the decision of the IJ. Mr. Kholyavskiy challenged several aspects of the case on appeal.

Ruling

The Seventh Circuit Court of Appeals ruled that the BIA had not applied the correct legal standard in its analysis of Mr. Kholyavskiy's claim of past persecution and claim for humanitarian relief. The court remanded the case to the BIA for review on these issues, but upheld the BIA's determination that his claim of future persecution was not based on substantial evidence.

Reasoning

The Seventh Circuit reviewed statutory rules regarding determination of refugee status for asylum. The immigrant must show past persecution or a well-founded fear of future persecution. Persecution entails punishment or infliction of harm administered because of "race, religion, nationality, group membership, or political opinion." The harm must rise above mere harassment.

The court disagreed with the IJ's and BIA's dismissal of Mr. Kholyavskiy's evidence of past persecution. They argued that being forced to be naked has been a salient point in other proceedings regarding torture. The court found that the dog bite and subsequent treatment for rabies was a serious physical injury with lasting physical scars. They viewed these incidents in the context of pervasive harassment of his family because of their religion. They concluded the BIA had not considered the "cumulative significance" of these events and had not considered the impact in light of his age. They remanded the issue of persecution for a comprehensive review by the BIA.

The court disagreed in part with the BIA's analysis of Mr. Kholyavskiy's mental illness as it pertained to fear of future persecution. It found evidence in the treating psychiatrist's testimony that Mr. Kholyavskiy's mental health symptoms were only partially treated with medication and that he re-

mained "comfortable but disabled." As such, his mental illness was an enduring characteristic that could be the basis for being part of a protected social group. The court affirmed, however, that Mr. Kholyavskiy had not presented sufficient evidence that the mentally ill are in fact currently persecuted in Russia. The court considered documents that described a trend toward stigmatization in Russia.

Regarding Mr. Kholyavskiy's concern about future persecution on the basis of his religion, the court affirmed that the available information did not provide a sufficient proof for an objective fear of persecution due to his status as a Jewish person returning from the United States.

The court considered the question of humanitarian asylum. As codified at 8 C.F.R. § 1208, an IJ may grant asylum to an immigrant who has established past persecution and can show he will suffer serious harm if removed to the country of origin. Future persecution need not be proven. The court ruled that, on the basis of his mental illness, Mr. Kholyavskiy would be likely to suffer serious harm upon removal to Russia. The court dismissed the IJ's argument that medications could be mailed to Mr. Kholyavskiy, noting that his psychiatrist could not safely supervise his medications from abroad. The court also pointed to evidence presented by his psychiatrist that without his medications Mr. Kholyavskiy's mental health symptoms would recur and he would be incapable of taking care of himself.

Discussion

In asylum cases, claims of past persecution are scrutinized by IJs who typically require proof of severe physical abuse sanctioned by the government of origin. The ruling in *Kholyavskiy v. Mukasey* is important because the court of appeals explored the psychological aspects of Mr. Kholyavskiy's prior abuse in its determination of past persecution. The court found that forced nudity constitutes a severe violation of privacy. The court highlighted the age at which these incidents occurred, recognizing that childhood sexual abuse can have long-lasting effects. This ruling has implications for forensic psychiatrists who evaluate immigrants applying for asylum. Careful consideration should be given to past physical, emotional, and sexual abuse and the psychological impact on the individual.

Also interesting in this case was the discussion of whether mental illness meets the definition of a "par-

ticular social group” for the determination of refugee status. Prior rulings have found that mental illness has not met the criteria of “a collection of people closely affiliated with each other, who are actuated by some common impulse or interest” (*Raffington v. I.N.S.*, 340 F.3d 720 (8th Cir. 2003), quoting *Safaie v. I.N.S.*, 25 F.3d 636, 640 (8th Cir. 1994)). In *Kholyavskiy v. Mukasey*, the court considered psychiatric evidence that his mental illness was refractory to treatment and most likely permanent. The permanence of such a mental disability would appear to be a first step in meeting the definition of a social group. Other relevant factors would be visibility and persecution of the group. The analysis did not proceed in this case because the court found that he had not presented sufficient evidence that Russia persecutes the mentally ill. Going forward, important factors for consideration in psychiatric evaluations for asylum include prognosis, outward signs of a disorder, and evidence of persecution in the country of origin.

The consideration of serious harm in determining humanitarian asylum in this case is an important precedent. The Court of Appeals for the Third Circuit has cited *Kholyavskiy v. Mukasey* in its recent remand of a case in which serious harm upon removal was a consideration (*Sheriff v. Attorney General U.S.*, 587 F.3d 584 (3d Cir. 2009)). The Third Circuit pointed out that *Kholyavskiy v. Mukasey* is one of the only cases that has discussed what constitutes serious harm under humanitarian asylum law. Factors considered in the case included access to medication, access to mental health treatment, and the impact that these would have on functioning. This case is important to forensic psychiatrists, as it establishes the importance of mental health concerns in asylum proceedings. Forensic evaluations should describe the predicted impact of removal on the mental health of potential deportees.

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Competence to Waive Miranda Rights

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Competency to Stand Trial Concerns Do Not Require Hearings *Sua Sponte* on Competence to Waive *Miranda* Rights

The United States Court of Appeals for the Ninth Circuit decided the case of *Cox v. Del Papa*, 542 F.3d 669 (9th Cir. 2008) on September 4, 2008. At issue was whether the Constitution requires that a trial court conduct a *sua sponte* examination of a criminal defendant’s competence to waive *Miranda* rights when questions about the defendant’s competence to stand trial have been raised.

Facts of the Case

In March 1990, Steve Cox stopped in Las Vegas, Nevada, to repair his truck during a cross-country trip. He became involved with Carita Wilson. Ms. Wilson’s body was later found in Mr. Cox’s hotel room. She had a telephone cord wrapped around her wrist and a towel around her throat. Arizona Highway Patrol officers arrested Mr. Cox and read him his *Miranda* rights from a department-issued card. Mr. Cox acknowledged that he understood the *Miranda* warning. When asked if he knew why he was being arrested, Mr. Cox stated he “was framed, that it was self-defense. . .the girl had come to him with fangs and fingernails and that he only choked her around the neck long enough to subdue her” (*Cox*, p 672). Mr. Cox continued to talk “a lot” for the next 10 minutes. He was booked into the county jail.

One week later, North Las Vegas detectives interviewed Mr. Cox in Arizona. They advised him of his rights, and he chose not to talk with them. The detectives returned to Arizona with a warrant to drive him back to Nevada. Before departure, his *Miranda* rights were again read to him. He again acknowledged that he understood the rights. During the drive to Las Vegas, he spontaneously spoke. Among other things, he described details about how and why he had restrained Ms. Wilson with a towel at the time of her death. Nevada prosecutors charged him with first-degree murder.

The trial judge held a competency hearing after two psychiatrists opined that Mr. Cox was competent to stand trial and two others opined that he was not. The judge found him incompetent to stand trial, and he was transferred to a mental health facility. His trial began one year later, after his competency had been restored. The jury found him guilty of first-degree murder and sentenced him to life in prison without the possibility of parole. Following his filing