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Overcoming the United States' Policy on the Exclusion of HIV-Positive Noncitizens: How asylum cases are beginning to open previously locked doors

Amy Vaughn

Abstract: In 1987, the United States Congress enacted a policy that prohibited HIV-positive noncitizens from entering the United States for both temporary visits and immigration. Nearly two decades later, the policy still stands, making the United States one of only a handful of countries that still enforces such an exclusionary policy. Several international health organizations, including the World Health Organization, have condemned the HIV ban as "irrational and without public health justification" (Goldberg 1998). In 1993, the U.S. Department of Health and Human Services attempted to remove HIV from the exclusion list based on the fact that it is not transmitted by casual contact, but failed due to public outcry. Despite overwhelming evidence against the rationale behind the ban, the United States government still considers HIV a "communicable disease of public health significance" (Goldberg 1998). The United States' policy on the exclusion of HIV-positive noncitizens is not only discriminatory and unjustified, but it is also a violation of international human rights. This paper examines the ban in its entirety with special attention given to some exceptions to the ban, one of which is the acquisition of asylum. The act of seeking asylum based on HIV-positive status, whether due to one's membership in a persecuted social group or one's political opinion, is beginning to gain support in the immigration courts. It is because of the granting of HIV-based asylum that the United States' exclusion policy is no longer the obstacle that it once was.

Introduction

The United States' policy on the exclusion of HIV-positive noncitizens began in 1987 when Congress enacted a measure barring people infected with HIV, which was at that time considered a

“dangerous contagious disease,” from entering the U.S. or establishing legal permanent residence. This ban reflected the public’s intense fear of HIV and AIDS during the mid-1980s, as well as economic concerns that HIV-positive immigrants would put undue strain on health care resources (Rubenstein et al. 1996). This ban has been criticized by both domestic and international health organizations and is considered an “infringement of human rights” by the United Nations Guidelines on HIV/AIDS and Human Rights (IGLHRC 2004). Although there are some exceptions to the policy, they are both limiting and unreliable. The purpose of this paper is to address why this policy violates international human rights and to show how asylum cases are becoming a new avenue of entrance for HIV-positive noncitizens.

Historical Overview of Exclusion Policy: It is true that most countries do impose some kinds of restrictions on the immigration of HIV-positive noncitizens. Most, however, do not apply to temporary visits. The United States is one of only a handful of countries that imposes a total ban on the entrance of HIV-positive noncitizens within its borders.¹ The U.S. ban was enacted in an effort to hinder the spread of HIV/AIDS and protect public health. It was also enacted for the fear that allowing HIV-positive noncitizens to immigrate to the United States would increase health care costs for American taxpayers (Rubenstein et al. 1996 and Stempniak 1999).

HIV/AIDS Misconceptions and Stigma: This policy is a direct reflection of attitudes towards HIV/AIDS in the U.S. during 1980s. There were many questions as to what the disease was, how it was transmitted, and who was at risk. In the early 1980s, when HIV/AIDS was just beginning to be recognized by the health community as a possible threat to public health, the disease was mostly found within larger cities’ gay communities. The disease was also prevalent among injection drug users and their sexual partners as well as Haitian immigrants in New York City (Shilts 1987). It has been argued that because the disease only appeared to be afflicting individuals of society with a more questionable moral character, that it was low on the priority list of U.S. health officials and therefore received minimal funding for research and treatment (Shilts 1987). It was not until health officials learned that HIV/AIDS could be spread by blood transfusions in the mid-1980s that the disease started to get the attention it deserved.

¹ Other countries include: Armenia, Brunei, China, Fiji, Iraq, Korea (South), Moldavia, the Russian Federation, and Saudi Arabia. (AIDSNET 2005)

When it was learned that the general population could also be at risk of contracting this mysterious disease, the U.S. government decided to direct funds towards research and education in an effort to combat the spread of HIV/AIDS (Shilts 1987).

HIV/AIDS has long been intertwined with discrimination and stigmatization in the United States and throughout the world. People afflicted with the disease are believed to be of low moral character and are often associated with homosexuality, prostitution, and drug use (Shilts 1987). Although great strides have been made in the effort to educate people about the facts of HIV/AIDS and the realities of how it is transmitted and how one can become exposed to the disease, many people continue to harbor false beliefs and stereotypes associated with HIV/AIDS. The United States' policy on the exclusion of HIV-positive noncitizens only helps to perpetuate these negative stereotypes and further discriminates against foreign nationals, implying that they are more likely than U.S. citizens to spread HIV to others.

Exclusion Policy Becomes Law: United States law currently states that all noncitizens with HIV are to be excluded from immigration because they have a “communicable disease of public health significance” (Stempniak 1999). Historically, the United States has always excluded all noncitizens that were inflicted with a “dangerous contagious disease.” Later, Congress directed the Department of Health and Human Services (HHS) to develop a list of dangerous contagious diseases (Stempniak 1999). HHS originally did not include HIV infection on this list and as a result, Congress enacted the Helms Amendment, which statutorily included HIV infection as a “dangerous contagious disease” (Stempniak 1999). Because HIV infection was now defined as a dangerous contagious disease, it became a basis for exclusion from immigration under United States law (Stempniak 1999).

This ban made worldwide news in 1989 when Hans Paul Verhoff, a Dutch man living with AIDS, was denied entry into the U.S. to speak at an AIDS conference in San Francisco (AIDSNET 2005). The ban was also the cause of the massive boycott of the 6th International Conference on AIDS in San Francisco in 1990 (AIDSNET 2005). Because of this boycott and general protests from human rights groups concerned with the United States' exclusion policy, Representative Barry Frank and Senator Alan Simpson introduced a bill which changed the infectious disease category from “dangerous contagious disease” to the present “communicable disease of public health significance” (Stempniak 1999). By changing the general category of excludable diseases, the Act avoided the exclusion of HIV-positive noncitizens under the Helms Amendment. Because the

Helms Amendment only defined HIV infection as a “dangerous contagious disease” and the new Act gave the HHS the authority to determine which diseases were a “communicable disease of public health significance,” if the HHS did not determine HIV infection to be a “communicable disease of public health significance,” HIV-positive noncitizens would not be excluded (Stempniak 1999).

In 1990, the HHS attempted to remove HIV from the exclusion list because it is not transmitted by casual contact, through the air, or through common vehicles such as food or water, and because it does not place the general population at risk (Goldberg 1998). During his 1992 presidential campaign, President Clinton promised to eliminate any policy of excluding persons infected with HIV², but a public backlash prevented the removal of HIV from the exclusion list (Stempniak 1999). In February 1993, the Senate passed an amendment to the National Institute of Health Reauthorization Bill that would put the exclusion policy on HIV-positive noncitizens into law³ (Act Up 2006). In May 1993, Congress approved legislation codifying the exclusion of HIV-positive noncitizens, which President Clinton signed into law despite his campaign promises to the contrary (Goldberg 1998).

Part of the reason the 1993 legislation was signed into law was because it did provide for some positive changes in the policy. The new law granted the U.S. Attorney General the discretion to offer exclusion waivers to HIV-positive noncitizens under certain circumstances. It also made discrimination and persecution based on HIV status grounds for which asylum could be considered (IGLHRC 2004). With this, Congress recognized that certain situations could occur in which a person who escaped persecution in his or her home country would likely face a situation of renewed persecution if they repatriated (IGLHRC 2004). Because of this, the exclusion policy could not apply to HIV-positive noncitizens who were seeking asylum in the United States.

While these changes in policy were occurring in Washington, there was an urgent situation developing in the Caribbean nation of Haiti. Because of the exclusion policy, HIV-positive Haitian refugees who tried to immigrate to the U.S. following the September 1991

² The 2004 democratic presidential candidate John Kerry also promised to lift the U.S. exclusion policy in case of his election. (AIDSNET 2005)

³ This amendment became known as the Nichols Amendment because the chief sponsor was Senator Don Nichols of Oklahoma. (Act Up 2006)

military ouster of Jean-Bertrand Aristide found themselves caught in political limbo (Act Up 2006). Hundreds of HIV-positive Haitians were among the tens of thousands who flooded into the U.S. following the coup. Immigration officials ruled that these Haitians had valid claims for political asylum and should not be repatriated. However, the U.S. exclusion policy prevented their entrance to the U.S. and they were detained for more than 18 months at the U.S. Naval Base at Guantanamo Bay, Cuba (Act Up 2006). The issue was resolved in 1993 when a federal judge ruled that the U.S. must release the HIV-positive Haitian refugees into the U.S. because they had a legitimate fear of persecution if they returned to Haiti. The U.S. government finally agreed to process their applications based on “humanitarian grounds” (Act Up 2006).

Today, most experts agree that the exclusion policy is unlikely to change in the near future. This is especially true given the tightening of immigration restrictions in the wake of the September 11, 2001 terrorist attacks on the United States. As of 2004, contrary to medical opinion, the U.S. government considered HIV contagious and a threat to public health, as much as severe acute respiratory syndrome (SARS), tuberculosis, and leprosy (IGLHRC 2004). It is also significant that the policy can only be lifted by an act of Congress. Since the power to regulate immigration is a plenary power of Congress and is afforded little judicial review, Congress is effectively given the sole ability to determine the United States’ immigration policy (Stempniak 1999).

The United States’ Rationale behind the Exclusion Policy

Threat to Public Health: The rationale of the United States’ policy on the exclusion of HIV-positive noncitizens rests on two key grounds. The key ground of inadmissibility for HIV-positive noncitizens is the threat to public health. Since the U.S. government has determined that HIV is a “communicable disease of public health significance,” no HIV-positive noncitizen may enter the United States without a waiver (Goldberg 1998). Since 1987, the U.S. government has mandated HIV testing of all applicants for immigrant visas, refugee status, legalization, and adjustment of status (Goldberg 1998). Although those seeking nonimmigrant visas, such as visitors’ visas, are not subject to mandatory testing, the government has been permitted to administer a test if it suspects that a nonimmigrant is infected (Goldberg 1998).

Threat of Public Charge: The second ground of inadmissibility for HIV-positive noncitizens is the threat of becoming a public charge. The U.S. government falsely assumes that all noncitizens that are HIV-

positive will eventually become dependent on government subsistence either because they will not be able to afford medical treatment or will become too ill to work and support themselves (Rubenstein et al. 1996 and Stempniak 1999).

Rationale behind the Exclusion Policy Falls Short

There is little evidence to support the rationale that admitting HIV-positive noncitizens to the U.S. would generate a threat to the public health. First of all, the U.S. Department of Health and Human Services has stated, on the record, that HIV should not be considered a “disease of public health significance” (IGLHRC 2004). “Because HIV disease itself is not casually contagious, infected immigrants do not pose a risk to American citizens; accordingly, HIV infection does not support a public health argument for excluding visitors or immigrants” (Rubenstein et al. 1996: 316). Second, the rationale behind the policy is discriminatory towards noncitizens in that it implies that they are somehow less responsible in taking precautions to prevent the spread of HIV through, for example, sexual transmission than are U.S. citizens (IGLHRC 2004). Finally, evidence shows that the ban hasn’t prevented the spread of HIV/AIDS in the United States.

Policy does not Stop the Spread of HIV/AIDS: The World Health Organization has identified North America as already having a significant number of HIV-positive individuals (Stempniak 1999). “When a country already has a large number of HIV-positive individuals, restrictions on HIV-positive noncitizens only reduce and do not eliminate HIV-positive entrants” (Stempniak 1999: 127). Since the spread of HIV/AIDS will most likely depend on the behaviors of the already infected residents, a country’s resources are better spent in educating both its own citizens and immigrating noncitizens to change behaviors which most likely lead to the spread of HIV/AIDS (Stempniak 1999). It is also important to note that the costs associated with testing noncitizens for HIV/AIDS far outweigh any small amount of prevention of the spread of HIV that the United States’ HIV exclusion policy was designed to achieve.

Furthermore, the United States currently only tests noncitizens who are seeking immigrant or refugee status for HIV. This means that the majority of admitted noncitizens, who are admitted on non-immigrant visas, are not tested.

More than a million people in the United States are infected with HIV. In contrast, only one in one thousand aliens

applying for admission that are tested actually has HIV, and they can only spread the disease through certain high-risk behaviors. It is very unlikely that the United States' exclusionary policy would ever reduce the spread of HIV to its citizens, and funds could be more efficiently allocated to educational programs focused on HIV prevention instead of testing potential immigrants for HIV [Stempniak 1999: 128].

Thus, the United States HIV exclusion policy does not prevent the spread of HIV/AIDS from even the majority of noncitizens that enter the US (Stempniak 1999).

Threat of Public Charge is Discriminatory: The threat of a public charge argument is usually more difficult for HIV-positive noncitizens to overcome. Since most immigrants, not just those who are HIV-positive, are unable to acquire U.S. health insurance before entering the U.S., they will not always be able to prove that they will not eventually become a public charge (Rubenstein et al. 1996). This ban does is it deters persons who are living with HIV/AIDS and are already in the U.S. without documentation to disclose their HIV status (IGLHRC 2004). The ban may prevent them from seeking and receiving health care because they fear deportation. However, postponing care will only increase the burden on the state if and when the virus progresses, thus costing the state more. Many state health care clinics indicate that HIV-positive noncitizens do not seek treatment until they are in the advanced stages of HIV/AIDS (IGLHRC 2004). This argument is flawed because it is blatantly discriminatory towards people with HIV because other health conditions that could be as costly, if not more so than HIV, such as heart disease, diabetes, and cancer, are typically not grounds for inadmissibility.

U.S. Exclusion Policy Violates International Human Rights

Opponents of the United States' exclusion policy argue that it is in violation of several different aspects of international human rights law. By today's standards, international law is said to consist of "that body of law that governs countries and that cannot be lawfully changed or ignored by individual countries" (Jarvis et al. 1991:294). Thus, international law is the law to which countries must conform their policies, practices, and domestic laws. But this is often not the case, especially when it comes to the United States. Since there is a lack of enforcement and because of the limitations of the existing international courts, there has been an on-going attempt to persuade domestic courts

to enforce international law rights (Jarvis et al. 1991). For the most part, this attempt has been unsuccessful. When faced with an argument based on international law, domestic courts have typically taken the position that international law is subordinate to domestic law (Jarvis et al. 1991). Nevertheless, international law is still binding for those countries that have signed and ratified international treaties and they have been recognized by domestic courts in the past.

It has been argued that the United States' policy on the exclusion of HIV-positive noncitizens violates the right to freedom of movement between nations established by the Universal Declaration of Human Rights (UDHR) (Stempniak 1999). Activists for human rights assert that the U.S. HIV exclusion policy encourages discrimination against HIV and AIDS patients in the United States and prevents noncitizens from seeking medical care within the U.S. This practice thus violates an individual's right to freedom of movement between states guaranteed by the UDHR (Stempniak 1999). However, UDHR is not a binding law for the United States, so the argument against the exclusion policy can not be made on UDHR violation alone.

One should consider the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by the United States. Like the UDHR, the ICCPR also recognizes the right to freedom of movement between nations. Equally important is that when U.S. policy excludes a particular group without justification, it violates the right to freedom from discrimination, which is also addressed by the ICCPR (Jarvis et al. 1991).

Finally, opponents of the US exclusion policy also argue that the policy violates the World Health Organization (WHO) guidelines of the United Nations. WHO specifically opposes restrictions on immigration imposed as a part of the global strategy to combat the spread of HIV/AIDS. While the International Health Regulations are binding on all member nations of the UN, the WHO has decided to frame their HIV/AIDS prevention policies in the form of suggestions to those member nations, instead of enforcing the regulations (Stempniak 1999). Nevertheless, the United States' HIV exclusion policy clearly violates international human rights and international policies which are theoretically binding to the United States.

Exceptions to the Exclusion Policy

As previously mentioned, the 1993 legislation granted the U.S. Attorney General the discretion to offer exclusion waivers to HIV-positive noncitizens under certain circumstances. These HIV waivers do give some noncitizens a way around the exclusion policy but the

process one must go through to obtain a waiver is not easy, as the law is very specific about who does and does not qualify for these waivers.

HIV Waivers for Nonimmigrants: If an individual applies for a nonimmigrant visa, they may qualify for the HIV waiver if they plan to stay in the U.S. for 30 days or less and can show that they are currently asymptomatic, able to cover their medical bills if they become sick in the U.S., and do not pose a threat to public health in the U.S. These conditions are normally met if they have proof of travel insurance for any medical costs and a letter from their physician indicating that they are currently asymptomatic, aware of how HIV is transmitted, and have agreed not to engage in any kind of risky behavior while in the U.S. (Lambda Legal 2005). They may also qualify for an HIV waiver if they are planning to visit the U.S. for a designated event such as an AIDS conference or the Gay Games⁴, an Olympics style event for gay, lesbian, and transgendered athletes (Lambda Legal 2005).

But HIV waivers for those applying for nonimmigrant visas are not without problems. It can never be guaranteed that a waiver will be granted, the waivers take three months or longer to obtain, people are forced to disclose personal health information, and the person's passport is endorsed to show that this person may not enter the U.S. without the waiver, which must be renegotiated for each entry (AIDSNET 2005). This can cause further HIV disclosure issues on entering other countries, where immigration officers may want to know why the passport holder is barred from the U.S. Depending on the country, this could be a serious issue for some HIV-positive travelers.

Most HIV-positive nonimmigrants that come into the U.S. do not go through the process of obtaining a waiver because of the reasons previously listed. Since the U.S. does not mandate HIV testing of nonimmigrants, many HIV-positive noncitizens simply do not answer truthfully on the I94-W forms to the question, "are you afflicted with a communicable disease of public health significance?" (AIDSNET 2005). This is dangerous because U.S. customs officials can still search suspected individual's luggage for HIV medication or force anyone who appears symptomatic to take an HIV test. If someone is found to be HIV-positive but failed to disclose it on the I94-W form, the individual will most likely be permanently barred from entering the U.S. (AIDSNET 2005).

⁴ The 2006 Gay Games were held in Chicago during the month of July. The U.S. government has granted noncitizen athletes and spectators of the event a 20 day HIV waiver (Chibbaro 2006).

HIV Waivers for Immigrants: All HIV-positive noncitizens who apply for immigration or legal permanent status will be denied unless they have an HIV waiver (Lambda Legal 2005). HIV waivers for people wanting to immigrate to the U.S. or establish legal permanent residence status are available only for applicants with specific established family relationships with U.S. citizens or permanent residents (Lambda Legal 2005). One can apply for an HIV Waiver if they are the legally married husband or wife⁵ or the unmarried son or daughter, of a U.S. citizen or permanent resident. One can also apply if they are the parent of a U.S. citizen or permanent resident. Eligibility for HIV waivers are not extended to noncitizens who have employers wanting to sponsor them for immigrant status or for green card lottery winners unless they also have one of the previously mentioned family relationships (Lambda Legal 2005).

To obtain a waiver, one must also file a special application with the signatures of their treating physician and the local or state health officer to show that the danger to the public health of the U.S. created by their admission is minimal. Generally, a letter from their treating physician is needed, stating that their health is stable and that they have received counseling about how HIV is spread. They must also show that the possibility of the spread of HIV created by their admission is minimal. Generally, a sworn statement is needed, in which they must acknowledge that they have received counseling, understand how HIV is spread, and they agree not to engage in high-risk behavior. Finally, they must show that no U.S. government agency will incur an expense because of their admission, without its consent. Generally, one must have proof that they have private health insurance that will cover the cost of their HIV treatment (Lambda Legal 2005).

Although all applicants for legal permanent residence, regardless of whether they have HIV or not, must show that they can support themselves without government assistance, applicants with HIV face extra scrutiny when trying to convince the United States Citizens and Immigration Services that they can support themselves (Lambda Legal 2005).

Exceptions to the HIV Waiver Qualifications: There are some special exceptions to the qualification process in obtaining an HIV waiver. In the 1994 Violence Against Women Act (VAWA), Congress created

⁵ Unlike other nations such as Canada and Australia, the United States does not recognize same sex marriages and therefore same sex couples are not included within the specific family relationship required in order to obtain an HIV waiver for immigration (AIDSNET 2005).

two ways immigrant survivors of domestic violence can gain lawful permanent residence status without their abusers' help. Those who can show they were battered or subjected to extreme cruelty by a U.S. citizen or lawful permanent resident spouse or parent may petition on their own, or ask an immigration judge to grant them a special kind of cancellation of removal (Pendleton 2004). HIV-positive approved VAWA applicants will need an HIV waiver to gain lawful permanent residence, but, unlike most other types of applicants, they do not need a U.S. citizen or lawful permanent resident spouse, parent, or child, to obtain an HIV waiver (Pendleton 2004).

Abandoned, neglected, and abused HIV-positive noncitizen children are also given special protection. Some of these children may be able to obtain lawful permanent residence through an immigration status known as Special Immigrant Juvenile Status (SIJS). HIV-positive children who qualify for SIJS do not need a qualifying relative to apply for an HIV waiver and may apply based on humanitarian grounds, family unity, or when it is otherwise in the public interest (Pendleton 2004).

Victims of trafficking and other related crimes may also be exempt from some of the HIV waiver requirements. The Victims of Trafficking and Violence Prevention Act of 2000 created the new T and U visas. The T visa is for those who have been subjected to sex or labor trafficking. The U visa is for other victims of such designated crimes. Both visas provide eligible immigrants with permanent residence and have waivers of most inadmissibility grounds, including health-related grounds such as HIV/AIDS (Pendleton 2004). This is especially important for victims of sex-related crimes since they are at greater risk for contracting HIV.

Claiming Asylum as an Exception to the Exclusion Policy

If a non-citizen does not qualify for an HIV waiver, they may be able to enter the U.S. under one last option; asylum. In order for someone to claim asylum in the U.S. they must prove that they are unable or unwilling to return to their home country due to past persecution or a well-founded fear of future persecution due to their HIV status (Lambda Legal 2005). Also, in order to claim asylum, an individual must be physically present in the U.S. or at an airport or border crossing and applications for asylum must be filed within one year of last entry into the U.S. or he/she must show an extraordinary reason for missing the deadline. A possible reason for missing the deadline may be that someone has just learned that they are HIV-

positive and fear returning to their home country as a result (Lambda Legal 2005).

A non-citizen can also claim asylum on more than one ground at the same time, for example, fear of persecution because one is homosexual and also because they are HIV-positive. There are five different bases on which someone can claim asylum, they are: race, religion, nationality, membership in a particular social group, and political opinion. Those applying for asylum must be prepared to show that in their home country, people with HIV are targeted as a group and subject to persecution or that because of their political opinions, such as activism for HIV/AIDS rights, makes them a target of persecution (Lambda Legal 2005).

Most applications for asylum made by HIV-positive noncitizens for admission to the U.S. have been pled on the basis of being a member of a persecuted social group. To be granted asylum on these terms an individual must show the presence of a “common characteristic” that is either “immutable” or so “fundamental to identity” that it would be unfair to ask people to change the characteristic. An individual must also prove a “well-founded fear of persecution” and harmful intent on the part of the government of the home country or a group within the home country that the government is unwilling to control toward the asylum seeker due to the “common characteristic” claimed by the asylum seeker (Stempniak 1999). For these cases, someone’s HIV-positive status would be the common characteristic.

Persons who are HIV-positive have a common characteristic that is immutable because no cure for HIV/AIDS presently exists. Court cases have also ruled that HIV-positive status can be fundamental to someone’s identity because of the tendency for HIV-positive individuals to form voluntary associations for support and political action for anti-discrimination rights (Stempniak 1999). Although the United Nations High Commissioner for Refugees (UNHCR) does not formally recognize HIV-positive status as constituting a particular social group, it does recognize HIV-based discrimination and persecution (UNHCR 1996). Also, recall that the 1993 legislation to the exclusion policy did make discrimination and persecution based on HIV status grounds for which asylum could be considered (IGLHRC 2004).

Proving Persecution and Demonstrating Connections: It is crucial that people have a solid understanding of what constitutes persecution and that they know how to show the connection between the acts of persecution, either past or anticipated, and the political opinion or

social group for which they are being persecuted. The term “persecution” has not been explicitly defined by the Immigration and Nationality Act (INA), but 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” (Neilson 2004). Examples of recognized persecution include death, torture, beatings, severe discrimination, and complete economic deprivation. Generally, limited discrimination or economic hardship does not qualify as persecution. When trying to acquire asylum based on HIV-positive status, an individual must prove that the harm they would endure would amount to persecution as opposed to hardship (Neilson 2004). For example, proving that state-of-the-art medical treatment is unavailable because the home country is economically underdeveloped will rarely be recognized as persecution for an HIV-positive individual (Neilson 2004).

When showing connections between these acts of persecution and an individual’s political opinion or membership within a particular social group, it is important that the asylum seeker be specific:

Applicants often show they have been or will be persecuted and that their opinion or group is generally disfavored, but fail to show that *the reason* they are persecuted *is because* of their opinion or social group. For instance, if police continually harass a young man with HIV/AIDS, the applicant must show that they do this because they think or know he is HIV positive [Pendleton 2004: 32].

If an individual can prove that an abuser said things pertaining to the victim’s HIV-positive status during situations of harassment, it could help to prove their case. In reality, this can be a very difficult thing to prove and many asylum applications are denied because of the inability to directly correlate and prove harassment or persecution with a particular social group.

Inadmissibility versus Deportation: Before examining individual cases, it is important to discuss the difference of someone’s HIV-positive status being grounds for inadmissibility as opposed to deportation. HIV is not a ground for deportability, but it is a ground for inadmissibility. The Department of Homeland Security (DHS) can remove someone from the U.S. for HIV only if the person entered the U.S. without government permission. DHS cannot deport people for being HIV-positive if they entered on visas or now have lawful

permanent residence (Pendleton 2004). In other words, HIV-positive noncitizens that entered the U.S. without a proper HIV-waiver are living in the U.S. unlawfully, and it could be deemed that they were inadmissible to the U.S. from the beginning. These people could then be subject to deportation.

Cases: Asylum Based on Social Group

In all actuality, there have been very few cases of asylum argued solely on HIV status and even fewer published cases. As was stated earlier, most of these cases are argued on the basis of being a member of a persecuted social group. Although unpublished decisions of the DHS carry no precedential weight and the DHS has issued a statement that they will only consider HIV-positive noncitizens as members of a persecuted social group on an individual basis, the fact that several noncitizens have recently been both considered for and granted asylum status suggests that the DHS is willing to define HIV-positive noncitizens as members of a persecuted social group under some circumstances (Stempniak 1999).

Lebanese National: It is typical, when one looks at asylum cases that cite HIV-positive status as grounds for asylum, that there are also other grounds being claimed in order to strengthen the asylum seeker's case. This was true in the case of Nasser Mustapha Karouni, a native of Lebanon fighting deportation from the United States back to his home country. He testified that he feared that he would be persecuted if he was sent back to Lebanon because he was a homosexual, suffering from AIDS and was a Shi'ite Muslim (AIDS Policy & Law 2005b). After having his case for asylum denied by the District Court, Karouni appealed and the 9th U.S. Circuit Court of Appeals reversed it on March 7, 2005. The appeals court said evidence established that Karouni had a well-founded fear of future persecution where the record demonstrated that Hezbollah militants and certain factions of the Lebanese and local governments were a credible threat to homosexuals. Since he had already been "outed" as a gay man in Lebanon, and his infection with HIV would make it extremely difficult for him to avoid his would-be persecutors if returned to Lebanon, he was determined to have a credible case (AIDS Policy & Law 2005b). In this case, sexual orientation and religion were argued in addition to HIV-positive status, strengthening the case.

Indian National: Another case, resting more on HIV-positive status, was that of a woman who was a native and citizen of India. She had

entered the U.S. on a visitor's visa in 1999 and began participating in an HIV-related study at the National Institute of Health (NIH). She later applied for asylum on the basis of her HIV status and was found credible during the interview, but the asylum officer concluded that she had failed to establish past persecution or a well-founded fear of future persecution (Interpreter Releases 2001). At a subsequent hearing, she claimed that the legal and medical systems in India would not accommodate her as a person infected with HIV, and that societal taboos in India regarding HIV would rise to the level of persecution. The INS countered that a lack of medical care that meets U.S. standards and the possibility of social ostracism do not rise to the level of persecution (Interpreter Releases 2001).

In making his decision, the immigration judge took into account a 1998 decision by the Supreme Court of India prohibiting people with AIDS from marrying and characterizing AIDS as "the product of undisciplined sexual impulse" (Interpreter Releases 2001). The immigration judge was able to determine that she was a member of a persecuted social group: "married women in India who have contracted HIV, who fear that their families will disown them or force them to get a divorce, and who wish to be or need to be employed" (Interpreter Releases 2001). In doing this, the judge pointed to the decision of the Supreme Court of India as evidence that persons afflicted with HIV are seen, in Indian society, as "persons sharing [a] characteristic warranting of suppression" (Interpreter Releases 2001). The judge also determined that she would face persecution if forced to return to India because she would be forced to divorce her husband. Taking all of this into account, the judge concluded that "punishment for being married, refusal to render medical aid, firing or refusing to hire a person, and forcing someone to leave their community or state due to their HIV-positive status, when viewed cumulatively, amounts to persecution" (Interpreter Releases 2001).

Cases such as these are always determined on an individual basis. It is very unlikely that someone will be granted asylum simply because they are HIV-positive and come from a country with a history of HIV based persecution. One must have a strong case and ample proof of past or future persecution.

Persecution against HIV-positive persons is common in several countries around the world. Most cases of persecution stem from tolerated discrimination and stigmatization of people living with HIV. A lack of knowledge and understanding of the disease is often the cause of discrimination and stigmatization. Countries such as the previously mentioned India, as well as Bangladesh, the Dominican

Republic, Haiti, Jamaica, and China, all have well-documented cases of discrimination and stigmatization that could be considered persecution.

Cases: Asylum Based on Political Opinion

Claiming asylum based on political opinion has often been a popular choice for asylum seekers in the U.S. depending on their country of origin. As there are very few documented cases of asylum granted on membership in a persecuted social group, there are even fewer cases of HIV-positive noncitizens seeking asylum based on HIV/AIDS political activism. Although few cases currently exist, it is safe to bet that the more people begin to demand basic human rights from their governments, the more likely cases of persecution based on HIV/AIDS activism will surface.

Ugandan National: One case that falls within the category of persecution based on HIV/AIDS political activism is that of Ugandan citizen Grace Susan Nanyange. Ms. Nanyange applied for asylum in the U.S. claiming that she was detained and raped in Uganda because she supported an opposition presidential candidate. She believed the detention and rape was also due to the fact that she worked with a controversial AIDS relief organization (AIDS Policy & Law 2005a). Nanyange said that her support of an opposition candidate led Ugandan official to accuse her of being a rebel collaborator, which in Uganda is equal to a death sentence. In July 2001, when Nanyange returned from an HIV-prevention conference in Buenos Aires, Argentina, a military official arrested her and took her to the chief directorate of military intelligence for interrogation. There she was raped and beaten by two men who later told her that they were HIV-positive. After she was released she obtained a visitor's visa and took a night flight to Florida where she eventually overstayed her visa, because she believed she would be killed if she returned to Uganda (AIDS Policy & Law 2005a). Initially Nanyange's case for asylum was denied because the immigration judge found that her testimony was not credible. Nanyange appealed the decision and the 7th U.S. Circuit Court of Appeals said, "because it found that the IJ's [immigration judge's] credibility determination was not supported by specific and cogent reasons, it granted Nanyange's petition for review" (AIDS Policy & Law 2005a). At the time of this writing, there are no known updates of this case.

Activism in China: There are many reports from China of persecution due to HIV/AIDS political activism (HRW 2003, HRW 2005).

Although none of these reports have been cited in an asylum case in the United States, they are an example of what to look for in future cases. One well known incident of human rights violations associated with HIV in China is that of the infections of as many as half a million people in the rural Chinese province of Henan. In this case, tens of thousands of poor Chinese farmers became infected with HIV by selling their blood to profit-making, blood-collecting agencies (Chan 2001).

In 1993, the Henan provincial health council decided to establish blood collection networks among the rural communities in order to buy blood from the rural peasants and then sell it to biomedical companies. They estimated that they would be able to make “millions” from this newly established industry (Chan 2001). Over subsequent years, at least 200 legal blood stations and an unknown number of illegal stations were set up under this official policy. The operators were generally government bodies, such as hospitals, or private entrepreneurs connected with government officials (Chan 2001). Although there was plenty of information existing internationally as to how HIV/AIDS was transmitted, the methods employed in the blood stations were anything but safe. Health officials often collected blood at one time from a number of donors who shared the same blood type. Afterward, the blood was pooled and the components needed for medical use were separated. The blood was then divided up and “re-infused” into the original donors (Chan 2001). This dangerous procedure exposed people to the blood of six to twelve other donors every time they donated at the stations. This exposed them to a number of diseases including hepatitis and HIV (Chan 2001). It is apparent that health officials became aware of the infections by means of these procedures in 1996 but it was not until 1998, however, that the central government in Beijing banned the practice. By this time hundreds of thousands of people from Henan province were infected with HIV (Chan 2001).

Since this happened, there has been an outcry in Henan province from those people afflicted by the government’s carelessness. These people with HIV/AIDS who are left untreated by the authorities face death sentences because of the gross negligence of the Chinese government. In protest, people exposed to HIV and their supporters have formed advocacy organizations and are demanding that the government provide them with medical treatment (HRW 2006). The Chinese government has responded by imposing house arrest on potential petitioners to the National People’s Congress: “more than 20 Chinese civil society organizations reported that numerous people living with HIV/AIDS in Henan were put under house arrest to keep

them from bringing their petitions to the Congress, which opened in Beijing on March 5, 2006” (HRW 2006). In the 23 cases documented, people have been confined to their homes and monitored around the clock by police outside their doors (HRW 2006).

On a positive note, in April 2006, Hu Jia, a noted AIDS activist in China, was released after spending 41 days in captivity. He has publicly criticized the Chinese authorities over their treatment of people with AIDS and has been detained on numerous past occasions for peaceful human rights activities (OUTfront Team 2006). His release is a step in the right direction for HIV/AIDS advocacy in China, but the position of people like him is still a very dangerous one to be in and there is likely to be more cases of persecution based on HIV/AIDS activism in China and around the world before there is less.

Using Asylum Cases to Undermine the Exclusion Policy

Because of the nature of the United States’ policy on the exclusion of HIV-positive noncitizens, it is essential that asylum cases be evaluated and cited in order to prove the illegitimacy of the policy. Since only an act of Congress can revoke this policy, another avenue must be taken for HIV-positive noncitizens seeking immigrant status in the United States. It is quite apparent that asylum cases are the only currently feasible alternative in getting around the United States’ HIV exclusionary policy.

Intersectionality Theory: Stempniak argues that the lack of political power of HIV-positive noncitizens can be explained by the intersectionality theory: “the Intersectionality theory describes the intersecting of multiple marginalized identities within a particular group, and theorizes that persons subject to intersecting discrimination contend with negative stereotypes associated with each of the intersecting groups to which they belong” (1999:132). People in these situations often lack a strong, political voice and cannot easily influence political change. HIV-positive noncitizens are members of many intersecting groups. First of all, they are foreigners or “outsiders,” a group that has historically been blamed for the United States’ own problems. Second, HIV-positive noncitizens are often of a particular nationality or racial group that has been previously discriminated against in the U.S. Third, American society commonly associates HIV with homosexuality, which has a long history of persecution in the United States. While it is true that some HIV-positive noncitizens are homosexual, they do not necessarily constitute the majority. Fourthly, some HIV-positive noncitizens may belong to a

gender group that is often discriminated against. Finally, HIV-positive noncitizens must face a world that still buys into false stereotypes that consider all HIV-positive people to be of low moral character, one that is still held by many Americans (Stempniak 1999).

Negative Attitudes: The negative attitudes that Americans harbor towards immigrants and persons living with HIV are the reason why legislation like the HIV exclusion policy is able to remain on the American law books. Since the enactment of the policy, there have been few attempts made to remove it and those that were made, were quickly “defeated due to the overwhelming majority of the American people, key political figures, and the media who oppose its removal” (Stempniak 1999: 133). Much of the resistance comes from the argument that allowing HIV-positive noncitizens in the country would increase health care costs for American taxpayers. This same argument that keeps HIV-positive noncitizens from obtaining an HIV waiver does nothing to keep other noncitizens with chronic diseases from entering the U.S. despite large health care costs. At the same time this policy favors rich HIV-positive noncitizens while discriminating against those who are poor. Powerful political figures will do nothing about this policy unless the American people demand it: “historically, it was the attitude of the American public that determined United States immigration policy. Continuing today, the attitude of the American public, the media and political leaders is very influential in perpetuating the continuation of excluding all immigrants who test positive for HIV” (Stempniak 1999: 135).

Conclusion

There are many different facets to the United States’ policy on the exclusion of HIV-positive noncitizens. First and foremost, the policy violates international human rights. Second, exceptions to the policy challenge the policy’s legitimacy. Third, HIV-based asylum has been granted by the Department of Homeland Security in the past and every successful case adds support to future cases. Finally, in order for the exclusion policy to be overturned, the American public must be in support of it. This will only happen with a change in attitudes towards both immigrants and persons living with HIV. Until these changes in attitudes occur, asylum will be the only avenue of entrance for HIV-positive noncitizens. Some cases will be successfully argued, others will not. More importantly, any case that aids in the delegitimization of the U.S. exclusion policy will be a step in the right direction. This is a step in the direction of upholding human rights.

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