Center for Immigration Studies

Backgrounder

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Homosexuals and Immigration

Developments in the United States and Abroad

By James R. Edwards, Jr.

Homosexual activists, seeking acceptance in society, are pressuring governments around the world for such rights as marriage, immigration sponsorship of same-sex partners, and asylum on the grounds of persecution as members of a distinct social group. In fact, they have succeeded at securing a number of these sorts of official recognition and approval. Supporters view these new policies as societal progress. Opponents view them as postmodern societal decline.

A look at the situation shows:

- The United States and 13 other countries grant homosexuals political asylum because of fear of persecution in their home nation on the basis of membership in a "particular social group," in this case homosexuals.
- Immigration sponsorship of one's same-sex partner, on equal basis with married, opposite-sex couples is allowed in 10 countries.
- No country yet allows homosexual marriage, although several grant official recognition of "domestic partnerships." The parliament of the Netherlands has passed legislation calling for homosexual marriage.
- The United States bans federal recognition of homosexual marriage through the 1996 Defense of Marriage Act, which precludes spousal immigration sponsorship of homosexual partners, even if they were to gain official marital status in another country in the future.
- The 1990 Immigration Act removed homosexuality as a ground for exclusion from immigrating to the United States.
- Several United Nations organizations are vigorously pushing for official recognition of homosexuals, with clear immigration-related implications, including expanding the definition of human rights to include homosexuals.

For at least a decade, homosexual advocacy groups have made immigration one of the fronts on which they fight for their agenda. The public relations battles they wage use the strategy of reshaping society to recognize same-sex relationships, adopting the rhetoric of the civil rights movement, and the tactic of alleging discrimination equivalent to that against blacks under Jim Crow laws or apartheid.

Exclusion

Until fairly recently, most societies, cultures, legal systems, and the world's leading religions have viewed homosexuality as aberrant behavior. It comes as no surprise, then, that until only the most recent times, homosexuality has been grounds for exclusion of a prospective immigrant in most nations.

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Exclusion is the prevention from entry of someone actually outside the United States or who is treated as being outside the United States for purposes of certain provisions of immigration law. The Immigration and Nationality Act was amended in 1965 to specifically exclude from receiving a visa and from admission into the United States "[a]liens afflicted with . . . sexual deviation . . ." (INA Sec. 212(a)(4)). This was considered to include homosexuals.

In practice, however, this was rarely enforced. In fact, around 1979, the U.S. Public Health Service (the source for regulations involving health issues) said it would no longer certify homosexuality as a disease, thus ending the practice of denying visas to homosexuals who are not otherwise excludable on health, criminal, security, or other grounds. Revisions in the 1990 Immigration Act formalized the change.

Asylum

Fourteen countries have granted homosexuals political asylum as members of "a particular social group" (see below). The United Nations High Commissioner for Refugees has decreed that its policy now is to consider homosexuals persecuted for their sexual orientation as "refugees."

The first U.S. case of asylum being granted based on a claim of persecution of homosexuality came in 1989. Fidel Armando Toboso-Alfonso, a Cuban, claimed persecution because of membership in a social group, homosexuals. A U.S. immigration judge granted him asylum on that basis and the Board of Immigration Appeals upheld the decision in 1990.

In 1994, Attorney General Janet Reno cited that decision as a legal precedent (see below). Thus, homosexuals seeking asylum because of alleged persecution or fear of persecution on account of their homosexuality were to be considered members of a particular social group under the laws governing asylum determinations. The attorney general's determination has bound immigration and asylum officials to follow this precedent.

Suspension of Deportation

Once in a country, aliens may be deported for any number of reasons. These reasons may include overstaying the terms of a temporary visa, committing a crime, or becoming dependent upon government welfare programs for a prolonged period (that is, becoming a public charge). In certain cases, those ordered deported may be allowed to appeal the decision and have the deportation order suspended. Suspension of deportation usually requires

Countries That Have Granted Asylum Based On Homosexuality

Austria
Australia
Belgium
Canada
Denmark
Finland
Germany
Ireland
Netherlands
New Zealand
Norway
Sweden
United Kingdom
United States

Reno's *Toboso* Announcement

In a memorandum announcing the designation of the *Toboso* case as a precedent, Attorney General Reno stated:

> "The case holds that an individual who has been identified as homosexual and persecuted by his or her government for that reason alone may be eligible for relief under the refugee laws on the basis of persecution because of membership in a particular social group."
>
> "I have examined the case and conclude that it represents an appropriate application of the law to the facts as described in the opinion. I understand that there are now several cases involving similar issues before immigration judges, and believe that the publication of this decision will provide useful guidance to immigration judges and to the Immigration and Naturalization Service in evaluating such claims."

the alien to show that his or her removal would cause the alien or a resident family member "extreme hardship."

The 1990 removal of homosexuality as grounds for exclusion from U.S. immigration law helped open up the opportunity in the United States for homosexuals ordered deported to appeal on the basis of a same-sex relationship. While U.S. law specifies hardship on one's "spouse, parent, or child," (INA Sec. 244(a)), some immigration judges now read homosexual relationships as the legal equivalent of "spouse." Such relationships, though lacking the necessary blood or marital connection, now pass for grounds for suspending a deportation order, entitling a homosexual immigrant the privilege of remaining in the United States.

According to the Lesbian and Gay Immigration Rights Task Force, "The anecdotal evidence suggests that judges *are willing to find that separation of a gay or lesbian couple constitutes extreme hardship* and will grant gays or lesbians suspension of deportation, if they can prove that they would endure this hardship if deported" (emphasis in original). The task force cites a Mexican lesbian who gained suspension of deportation from a Los Angeles immigration judge and a gay Filipino-Chinese man granted suspension by a San Francisco immigration judge. Both deportees argued extreme hardship should they be separated from their U.S. partners. In the latter case, the man and his U.S. citizen partner had registered with the San Francisco Marriage Recorder's Office in May 1996 as "domestic partners."

The legal counterpart to suspension of deportation has gained same-sex couples in the United Kingdom the possibility of beating a deportation order on the grounds of their relationship. The British activist Stonewall Immigration Group said it won 16 cases for homosexuals as of Fall 1996. In a case decided in August 1996, a Moroccan man won a reversal of an order of deportation on the basis of his 13-year relationship with a British citizen. The Immigration Appeals Adjudicator reversed the order, finding "a stable homosexual relationship" and "compassionate grounds within the provisions of [the law]" to do so.

Same-sex Relationships and Family Immigration

While most countries allow the immigration of bona fide family members (those related by blood or marriage) for relatives of their citizens or permanent residents, 10 nations recognize homosexual relationships for purposes of immigrant sponsorship (see below). Because these relationships legally are akin to common-law mar-

The 1980 Refugee Act Definition of a Refugee

"The term 'refugee' means ... any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country 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 ...."

Countries That Grant Homosexuals Quasi-familial Immigration Rights

Australia
Belgium
Canada
Denmark
Netherlands
New Zealand
Norway
South Africa
Sweden
United Kingdom

riage (which is illegal in many U.S. states), they do not bestow upon the parties to the relationship all of the benefits and obligations usually associated with marriage.

To date, marriage is uniformly reserved worldwide for heterosexual couples. This stems from what is traditionally the core function of marriage — procreation. The Netherlands, however, may be the first nation to grant legal recognition to homosexual couples through marriage. Its national legislature has passed legislation to that effect, and a commission is studying the matter.

All of the countries that grant immigration privileges to homosexual couples, except Canada, require that one of the partners be a citizen or permanent resident of the country before sponsoring the other partner for immigration. To sponsor someone in this manner, the applicants must prove that their quasi-marital relationship exists. Proof may be required in terms of showing they have lived together, generally from two to four years at a minimum. For example, the United Kingdom grants immigration sponsorship privileges to unmarried couples, homosexual or heterosexual, if they have been living together for at least four years "in a relationship akin to marriage," they are not legally able to marry in the United Kingdom, they intend to live together permanently, and one of them is present and settled in the United Kingdom. The United Kingdom's immigration minister enacted this policy as a "concession outside the immigration rules" in October 1997.

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Canada has adopted the most open immigration policy with regard to homosexuals in a monogamous relationship. Neither party to the relationship has to be a Canadian citizen or permanent resident. If one partner can qualify for "landed immigrant," or permanent resident, status, his or her same-sex partner may seek consideration of the relationship and thus to immigrate on humanitarian and compassionate grounds. Such recognition is a matter of administrative discretion, not a matter of law. Canadian officers are instructed, "The separation of common-law or same sex partners who reside together in a genuine conjugal-like relationship is grounds for [humanitarian and compassionate] consideration." They evaluate the relationship to determine that it is more substantial than a sham for the purpose of immigration fraud, and consider the "level of interdependency."

The Canadian government has proposed amending its immigration law to expand the definition of "spouse" to include same-sex and common-law relationships. This change would codify what has been recognized administratively since 1994, in the name of "reflect[ing] new social realities." The recommendation would establish a third tier of "family" relationships beyond the conventional nuclear family, fiances, and parents: "persons whose closeness is defined by the very willingness of a sponsor to undertake the responsibility for supporting and maintaining them in Canada," a report by the Legislative Review Advisory Group said.

To gain the immigration right, the founders of the Canadian Lesbian and Gay Immigration Task Force (LEGIT) sued the Canadian government in 1992, claiming discrimination. The government settled the case by ordering that one of the plaintiffs receive landed immigrant status. In response to further lobbying efforts, the government issued a directive in June 1994 telling Canadian visa officers to grant homosexuals immigration visas on humanitarian and compassionate grounds.

Australia handles same-sex partners' immigration somewhat differently from the United Kingdom and Canada. In 1995, Australia created a new visa class for the "interdependent partner." Interdependent visas first came through regulations in 1991. An "interdependent" relationship with an Australian citizen, permanent resident, or certain New Zealand citizens may gain a couple (homosexual or heterosexual) an immigration visa. An "interdependent" relationship is defined as "genuine and ongoing" between two persons over 18 years old. Generally they have been in the relationship for the 12 months preceding application and "have a mutual commitment to a shared life to the exclusion of any spouse relationships or any other interdependent relationships."

New Zealand's family immigration policy grants residence to those "living in a genuine and stable de facto relationship" for at least two years with a New Zealand citizen or resident. A de facto partnership includes both heterosexual and homosexual relationships of this nonmarital nature. The legal status of homosexual couples remains mixed in New Zealand. In 1997, New Zealand's Court of Appeal refused to grant homosexual couples marriage licenses. However, the parliament may consider whether to treat all domestic partnerships equally with regard to immigration, inheritance, property, and adoption of children. The High Court already has held a lesbian liable for child support relating to a dispute with a former partner.

South African activists have gained immigration sponsorship rights for same-sex couples through a lawsuit. The Cape High Court in February 1999 ruled that same-sex partners of South African citizens must be treated the same for immigration purposes as married couples where one spouse is South African and the other is of foreign nationality. The National Coalition for Gay and Lesbian Equality argued that the Aliens Control Act was discriminatory toward gay, lesbian, bisexual, and transgendered persons, and thus unconstitutional. The high court agreed, writing that the law "cannot be justified on the grounds of fairness. It discriminates in favour of certain forms of life partnership to the exclusion of all others and thus operates to perpetuate patterns of discriminatory stereotyping and prejudice" (National Coalition for Gay and Lesbian Equality et al. v. Minister of Home Affairs et al.). The court ordered that the law be changed accordingly within a year.

Official Recognition of Homosexual Couples

The movement toward official recognition of homosexual relationships continues beyond allowing family sponsorship based on de facto same-sex relationships between two persons. An Argentine court last year ruled that the same social benefits, such as welfare payments and a pension following a partner's death, extend to a homosexual couple in the same "evident, stable, and permanent" living arrangement as a legally married or common-law heterosexual couple. This decision marked that country's first official recognition of this sort of relationship. The continuation of that kind of policy may be expected to lead eventually to immigration sponsorship benefits for homosexuals there.

Another form of official recognition that does not yet extend immigration rights is the "registered partnership." Six countries provide official status for same-sex couples within their nations: Denmark, Greenland, Iceland, the Netherlands, Norway, and Sweden. Because registered partnerships are not legally equal to marriage and are not recognized by other countries, this status does not gain a couple immigration rights. In 1989, Denmark enacted a Registered Partnership Act, which provides most of the rights and responsibilities of marriage, but with certain exceptions. The law requires that at least one partner be a Danish national.

While registered partnerships do not receive recognition outside each country that allows such arrangements, Denmark extended its registered partnership law to apply in Greenland. Similarly, Denmark, Norway, and Sweden agreed in 1995 to a treaty that granted reciprocity of recognition of these partnerships. It bears noting that Sweden, which already had a domestic partnership provision to accommodate cohabiting heterosexuals, enacted its registered partnership law specifically for homosexual couples.

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Homosexual Marriage and the Defense of Marriage Act

One of the hottest battles is over marriage rights. Homosexuals have been pushing for the right to legal marriage for same-sex couples. The battlegrounds have been state legislatures, the courts, and Congress. Activists argue that couples of the same sex face discrimination because state laws allow marriage only between a man and a woman, denying same-sex partners from enjoying such benefits as assumption of the spouse's pension, joint adoption, the ability to make medical decisions on the partner's behalf, and, of course, immigration.

Ground zero in the struggle for same-sex marriage in the United States is Hawaii. In 1990, three homosexual couples applied for marriage licenses in Hawaii, were denied, and sued the state. The plaintiffs fought all the way to the state supreme court, which ruled in 1993 that homosexual marriages must be allowed unless the state showed a compelling state interest, and the case was remanded to a lower court. The state legislature in 1994 passed a law that defines marriage as between one woman and one man. In 1997, state legislators passed a broad law granting "reciprocal beneficiaries," which includes homosexual couples, an array of benefits and rights under the law. Furthermore, more than two thirds of Hawaii voters ratified a state constitutional amendment in 1998 that lets legislators again limit marriage to heterosexual couples. The homosexual marriage case, Baehr v. Anderson, remains before the Hawaii Supreme Court, which ordered additional briefs to be filed.

Activists argue that the latest state constitutional amendment is not self-executing and that it merely empowers the legislature to withhold a marriage license. They claim homosexuals could still take advantage of the rights and benefits of marriage under a different name. Their strategy is to pursue those rights and benefits through the state supreme court. Already, under the 1997 state law, homosexual couples gained such rights as hospital visitation, probate, and property transfers.

The Lesbian and Gay Immigration Rights Task Force wants the United States to establish an immigration category especially for homosexual partners.

Concerned that Hawaii is headed toward legalization of homosexual marriage, 28 states have passed laws to ban such unions and Alaskan voters ratified a state constitutional amendment similar to these laws in other states. The popular action in Alaska, as that in Hawaii, deserves mention because in that state, too, a lawsuit seeking to force homosexual marriage through the courts is on appeal to the state supreme court. A third case proceeds in Vermont. The Hawaii plaintiffs' lawyer laid out the strategy for the Honolulu Star-Bulletin, which reported: "If the Vermont high court rules in favor of homosexual unions, a gay couple from Hawaii could go to Vermont to get married and return to Hawaii and demand recognition of the marriage under a constitutional provision that requires states to recognize each other's statutes and legal bonds . . . ."

Seeking to short-circuit that litigation strategy, the U.S. Congress in 1996 passed the Defense of Marriage Act (DOMA). This federal law contains two main provisions. First, DOMA reserves the right of each state not to recognize or be bound by any other state's official recognition of same-sex marriage, or any rights or claims proceeding from a homosexual marriage in another state. Second, it defines the terms "marriage" and "spouse" under federal law to refer only to a legal union between one man and one woman. DOMA rests on the part of the "Full Faith and Credit" clause of the U.S. Constitution (Article IV, Section 1) that grants Congress the power to prescribe the manner and effect of the acts ("the public acts, records, and judicial proceedings") of every state.

The American Civil Liberties Union supports a departure from the traditional definition of marriage and favors recognizing same-sex unions. It, along with such groups as the Lambda Legal Defense and Education Fund, argues that DOMA is unconstitutional, violating the Fifth Amendment's "Due Process" clause, as well as the "Full Faith and Credit" clause. The ACLU's argument for expansion of marriage rights rests on the assertion of "discrimination" by seeking to equate sexual preference with race and gender; its legal strategy is to win homosexual marriage rights in one state, then challenge the constitutionality of DOMA.

All of this ties back to immigration. "A Tale of Two Countries," an anecdote of the immigration plight of a binational homosexual couple, says: "Unlike [several other countries], the United States has no provision for allowing foreign partners of its citizens to immigrate on the basis of their relationship. Of course, the United States allows foreign spouses married to their own citizens to legally immigrate. This blatant discrimination in immigration law in 'the land of the free' is abominable."

In 1992, two leading activist groups formed the Lesbian and Gay Immigration Rights Task Force. Its mission is to address what it views as inequities toward homosexuals in immigration law. It has taken up the causes of "family reunification" for homosexual partners, homosexual asylum, and the virtual ban on visas for HIV-positive immigrants. The task force organized a protest earlier this year in front of the New York City office of the U.S. Immigration and Naturalization Service, chanting, "Love knows no borders." A spokesperson told the Associated Press that the group wants the United States to establish an immigration category especially for homosexual partners.

The European Union and the United Nations

The possibility of achieving rights through international agreements and bodies is not lost on homosexual activists. The same argument is advanced in these venues as in individual nations – discrimination and equal rights. The Britain-based Stonewall Immigration Group, for instance, has called for a continental lobbying campaign to push for homosexual immigration rights within the nations that are party to the European Economic Community Treaty.

Their strategy rests upon a provision of the treaty that calls for "the abolition, as between member states, of obstacles to freedom of movement" of the nationals of member states. They also argue for European

Community states to treat homosexual partners as family members for purposes of international movement, based on another provision of the treaty.

The argument that treating homosexual couples differently from heterosexual couples amounts to a violation of human rights has also had success. A British immigration appellate judge in 1996 reversed the deportation order of a foreign national who sought to stay in England with his partner. The judge included in his opinion the contention that the ordered deportation might violate the European Convention on Human Rights.

Founded in 1989, Stonewall says it has "played a fundamental part in forcing this change" in growing public acceptance of homosexuality as a legitimate lifestyle. One of the group's key causes, validity for same-sex unions, says: "The right to form a 'family of choice' is one of the most fundamental human rights. We must begin the process of reshaping society to recognise same-sex relationships. Whether it be parenting or immigration, pensions or inheritance, we must set our claim for full citizenship." The strategy seems to be working.

A prominent proponent of the view that homosexuality is a human right is the United Nations High Commissioner for Human Rights, Mary Robinson, former President of Ireland. She met with a delegation from the International Lesbian and Gay Association in Geneva, Switzerland, in October 1998 to discuss advancing homosexual rights as human rights. Robinson has appointed a liaison for homosexual groups, asked for ILGA material with which to train U.N. employees in gay awareness, and asked ILGA to supply a report on international human rights abuses against homosexuals with which to lobby the United Nations for further advancement of the homosexual agenda. According to Canadian Journalist Tom McFeely, Robinson is "one of the most prominent members of the cadre of key U.N. officials who are lobbying vigorously for the inclusion of homosexuality as part of the corpus of universal, internationally recognized human rights."

The United Nations has helped advance the homosexual political agenda, including as it relates to immigration. The U.N. High Commission for Refugees has declared that homosexuals comprise a particular social group within the international definition of refugee and various U.N. conferences have included language accepting of homosexuality in many of its reports in recent years. For example, phrases such as "various forms of the family" have replaced references to "the family," and the definition of "gender" has been expanded to include, besides men and women, homosexuals, bisexuals, and the transgendered. In fact, a 1992 document of the U.N. International Year of the Family Secretariat formally recognized same-sex unions as a legitimate form of the family.

Conclusion

The homosexual agenda is being advanced, generally and with respect to immigration policy, along the lines of a strategy laid out in *After the Ball: How America Will Conquer Its Fear and Hatred of Gays in the '90s* which calls for the portrayal of homosexuals as victims. Regardless of one's view of homosexuality, one must acknowledge that its advocates have achieved a significant degree of success in a fairly short time.

The extension of a variety of immigration rights to same-sex couples is having a profound cultural impact on Western society. A discussion of the cultural impact of this expansion of immigration rights lies beyond the scope of this report. It remains to be seen how the public in each affected nation responds to the expansion of homosexual rights, especially in light of how those rights may be achieved — through legislative action or judicial or administrative fiat.