

REDACTED AND MODIFIED TO PROTECT PRIVACY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Y.S.,
Petitioner-Appellant

v.

ALBERTO GONZALES, Attorney General of the United States,
Respondent-Appellee

On Appeal from the
Board of Immigration Appeals
No. [REDACTED]

BRIEF OF *AMICUS CURIAE*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
IN SUPPORT OF PETITIONER-APPELLANT Y.S.
AND SEEKING REVERSAL OF DECISION OF
BOARD OF IMMIGRATION APPEALS

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I. INTEREST OF AMICUS CURIAE

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal” or “*Amicus*”) is the oldest and largest nonprofit legal organization advocating for the full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work. Since 1973, Lambda Legal has appeared as counsel or *amicus curiae* in hundreds of cases in state and federal courts on behalf of lesbians and gay men who have suffered discrimination because of their sexual orientation.

Throughout its history, Lambda Legal has maintained a longstanding interest in immigration and asylum matters. For example, in *Soto Vega v. Gonzales*, 2006 WL 1518945 (9th Cir. 2006) (unpublished), Lambda Legal represents a gay man from Mexico whose denial of asylum was reversed by the Ninth Circuit. In *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), Lambda Legal supported as *amicus curiae* a Mexican gay man whose denial of asylum was reversed by the Ninth Circuit and remanded with specific instructions to grant asylum. In *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997), Lambda Legal represented a Russian lesbian who sought asylum after Moscow police threatened her with involuntary hospitalization and electroshock therapy to “cure” her same-sex sexual orientation. The Court of Appeals held that this constituted persecution and reversed a Board of Immigration Appeals order denying asylum and the

withholding of deportation. Pursuant to Federal Rule of Appellate Procedure 29, Lambda Legal offers its expertise as *amicus curiae* regarding the challenges gay men and lesbians face in accepting and disclosing their sexual orientation to others in order to assist this Court in considering and resolving critical issues in this case.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

“I was in denial – right now, I’m a man, gay man. I have a lover. I have a gay life, an open gay life ... It wasn’t easy for me. It was really hard to accept I’m gay.”

(Transcript of Hearing In Deportation Proceedings, U.S. Department of Justice Immigration Court, *Matter of Y.S.*, November 25, 2002 (hereinafter “Trans.”) 31: 16-20.)

With these candid statements, Respondent/Appellant Y.S. (“Y.S.”)¹ began his 2002 immigration trial testimony about what was then an eight-year committed, loving relationship with another man, a same-sex relationship that that they now have shared with one another for 12 years. Born in [REDACTED] on the West Bank, and living in the United States since [DATE REDACTED], Y.S. spoke openly about the lengthy, challenging process it was for him to accept his sexual orientation. Y.S.’s difficulty accepting that he is gay is a common experience for

¹ To protect the privacy of Y.S. and his partner, Lambda Legal has redacted and modified a small amount of the information in this brief, including the full names of Y.S. and his partner, some significant dates and Y.S.’s city of birth.

many lesbians and gay men as they first begin to grapple with their feelings of attraction to people of the same sex and their identity as gay people.

Authoritative sociological and psychological research² establishes that accepting that one is gay or lesbian often is a prolonged process fraught with denial and shame, particularly amid pervasive societal stigma and discrimination. The intersection of sexual orientation, ethnicity, and religion can complicate the process further, particularly for individuals like Y.S. who were raised under cultural and religious precepts that treat gay men and lesbians as aberrant and abhorrent. Beyond the challenges of self-acceptance, disclosing one's gay sexual orientation to other people and institutions, particularly governmental institutions, poses a daunting challenge that may seem insurmountable for a significant period of time.

The Immigration Judge ("IJ") and the Board of Immigration Appeals ("BIA") erred on a number of grounds in their disposition of Y.S.'s case, including the improper designation of Jordan as the country of removal and the failure to consider ample evidence in the record of persecutory country conditions for gay people in both Y.S.'s country of origin and Jordan. Y.S.'s brief addresses these issues at length, and *Amicus* accordingly will limit the discussion in this brief to the

² For the Court's convenience, *Amicus* attaches excerpts from secondary sources cited within this brief that are not readily available in the public domain as exhibits to its concurrently filed

IJ's critical, erroneous conclusion that Y.S.'s lengthier coming out process reflected adversely on his credibility about being a member of the particular social group of gay men. The IJ ignored Y.S.'s corroborated testimony that he failed to reveal his sexual orientation in his initial asylum application because he was in denial, ashamed, and shy, conjecturing instead that Y.S. should have been "fully aware" of his sexual orientation much earlier. The IJ concluded that, because Y.S. took two to three years to come to terms with his sexuality, instead of instantly embracing and revealing it as a matter of public record to the government, Y.S. was not credible regarding the timing of his awareness of his sexual orientation.

The IJ carried this determination to the inexplicable conclusion that Y.S. had not demonstrated his membership in the particular social group of gay people – effectively ruling that a man in a committed, monogamous, intimate relationship with another man for then eight (and now twelve) years, with whom he has exchanged dozens of amorous cards, and with whom he has joined several gay social groups and participated in shows at gay events, *has not established that he is gay*. Regardless of the Court's ruling on the other grounds for appeal raised in Y.S.'s brief, the IJ's error on this central issue alone is sufficient to warrant, at a minimum, a remand for re-hearing.

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Y.S. was born on [DATE REDACTED] in [REDACTED] on the West Bank of the Palestinian Occupied Territories. (Trans. 42: 16-23.) Y.S. entered the United States on [DATE REDACTED] at the age of [REDACTED] on a non-immigrant visa. (Trans. 44: 12-14.) Y.S. met a neighbor shortly thereafter, and married her nine months later on [DATE REDACTED]. (Trans. 58: 1-2.) Y.S.’s marriage ultimately failed approximately a year and a half after it began. (Trans. 60: 21-23.) When asked about consummating his marriage with his wife, Y.S. testified in 2002, “This is what started the problem. I couldn’t do it right. This was there was [*sic*] something wrong with me. I was thinking I’m sick.” (Trans. 59: 19-21.)

In 1993, after Y.S. and his wife failed to appear for a required immigration interview, Y.S. received an Order to Show Cause asserting his deportability. (Trans. 15: 11-12.) Y.S. timely filed his first application for asylum, withholding of removal, and voluntary departure in early 1994, based on a fear of persecution because of his political beliefs and activities. (Trans. 20: 4-16.) On July 7, 1994, Y.S. testified at a trial regarding the grounds for asylum and withholding of removal raised in his initial asylum application. The IJ denied Y.S.’s requests for asylum and withholding of removal, but granted him 90 days voluntary departure.

(Trans. 15: 12-13.) Y.S. timely appealed the IJ’s decision, though the appeal thereafter was denied by the BIA on July 30, 1999.

Following the July 7, 1994 trial before the IJ, Y.S. met his current partner – the first person with whom Y.S. had a same-sex relationship – on July 22, 1994.

(Trans. 64: 3-13.) Y.S. and his partner, D.S. (“D.S.”), forged a loving, committed relationship and began sharing a home around the time of Thanksgiving of 1994.

(Trans. 33: 10-15.) Over the many years of their committed relationship with one another, Y.S. and D.S. exchanged dozens of loving, romantic cards on holidays and their anniversaries. Y.S. gave D.S. one such affectionate card on December 25, 2001, bearing the message,

You’re the man I adore, the partner I can share everything with,
the friend who understands me so well, the lover who captures my
heart...I’m the luckiest man in the world – because I have you.
Merry Christmas with all my love.

(Appellate Record (“A.R.”) 00230.) Another card exchanged between the couple for Valentine’s Day read,

I’ve found so much real happiness in having you to love, it means so
much to share the hopes and plans we’re dreaming of...That’s why I
hope our special day is as happy as can be, for in your special, tender
way, you’ve brought such joy to me.

(A.R. 00234.)

Reaching this stage of self-acceptance, however, involved a years-long, painful struggle for Y.S. He testified at his trial that, “It wasn’t easy for me. It

was really hard to accept I'm gay. It took me from '94 to '97 until I went out from the closet." (Trans., 31: 19-20.) Y.S. did not even *begin* talking about his sexual orientation until mid-1994, and D.S. testified that it took two to three years after that point for Y.S. to become "comfortable with himself." (Trans. 87:22 - 88:4; 78:22 - 79:1.) Prior to that time, D.S. said that Y.S. was very "hesitant," "shy," and "reserved" about his identity and about becoming involved in gay social activities. (Trans., 78: 11-15.) Consistent with this testimony, Y.S. explained during trial that he did not mention his sexual orientation during his initial asylum application because, "I was ashamed. I was shy. I was in denial." (Trans., 62: 21.)

On October 26, 1999, Y.S. successfully moved to re-open his asylum application on grounds of changed country conditions, after the West Bank transitioned from Israeli to Palestinian Authority control, and after Y.S. had become aware and begun to accept that he is gay. The government did not oppose Y.S.'s motion, which was granted by the BIA on May 11, 2001. (Trans. 15: 16-18.) On November 25, 2002, Y.S. testified at trial about his fear of returning to the West Bank as a gay man, stating that he believes,

I'd be questioned, or tortured, killed, and according to the [Shariah law], I homosexual [*sic*] then being thrown from the heights or put in the hole, no food, nothing until you die, or throw by stones [*sic*] and this is what I believe is going to happen to me.

(Trans., 40: 18-22.)

On November 17, 2003, the IJ denied Y.S.'s requests for asylum, withholding of removal, relief under the Convention against Torture, and voluntary departure. The IJ found that Y.S.'s testimony "was generally credible as [Y.S.] was candid and forthcoming in most of his responses." (Decision and Order of the Immigration Judge, November 17, 2003 ("IJ Dec.") p. 11.) The single "significant exception," in the IJ's words, to Y.S.'s overarching credibility was, in the IJ's view, the timing of Y.S.'s awareness of his sexual orientation. (*Id.*)

The IJ found it "difficult to believe that [Y.S.] was not fully aware of his sexual identity at the time he filed for asylum in 1994," based on "the circumstances surrounding his initial placement in deportation proceedings in 1993." (IJ Dec. p. 11.) The IJ premised this determination on Y.S.'s difficulty consummating his marriage, which led to its failure in 1992, and on Y.S.'s nascent sense at the time that he looked at men differently than women. (*Id.*) The IJ also cited testimony by Y.S. and his partner that the two of them met and began discussing Y.S.'s sexual orientation in mid-1994. Based on these factors, the IJ stated that Y.S. should have been sufficiently aware of his sexual orientation to include it in his initial application. (IJ Dec. p. 11-12.) The IJ, however, also went on, in a leap of illogic, to conclude that Y.S. "failed to prove the genuineness of his recognition of his sexual orientation" and accordingly that, in the IJ's mind, Y.S. had not "established that he is a genuine member of a particular social group,

namely a homosexual.” (IJ Dec. p. 12.) The BIA upheld the IJ’s decision with a *per curiam* ruling on September 9, 2005, affirming the IJ’s decision based on the reasons set forth therein.

This brief will demonstrate that the IJ’s adverse credibility determination, and the IJ’s concomitant ruling that Y.S. is not a member of the particular social group of gay people, constitutes reversible error. An adverse credibility determination must be supported by substantial evidence to be affirmed. Here, however, the IJ’s credibility determination was unsupported by *any* evidence in the record. In fact, Y.S.’s consistent, corroborated testimony at trial overwhelmingly compels the contrary conclusion – that Y.S. is in fact a gay man, who struggled for several years to accept that part of his identity. The IJ’s error in this regard was pivotal rather than harmless because it was an essential premise to the IJ’s conclusion that Y.S. had failed to make the showing required for a grant of asylum or withholding of removal. Had the IJ not erred in making this selective adverse credibility determination, the IJ would had to have reached a different ruling based on Y.S.’s actual membership in the protected social group of gay people. At minimum, a reversal and remand accordingly is warranted in this appeal.

IV. ARGUMENT

A. **But For The IJ's Erroneous Credibility Determination, Y.S. Could Have Made the Showing of Membership In A Particular Social Group Necessary for a Grant of Asylum or Withholding of Removal.**

To be eligible for a grant of asylum, a petitioner must demonstrate that he qualifies as a refugee based on past persecution or a well-founded fear of future persecution because of “‘race, religion, nationality, membership in a particular social group, or political opinion.’” *Yan Fang Zhang v. Gonzales*, 452 F.3d 167, 171 (2nd Cir. 2006) (citations omitted); *Wangchuck v. Dep’t of Homeland Sec.*, 448 F.3d 524, 529-529 (2nd Cir. 2006) (same); 8 U.S.C. § 1101(a)(42)(A). To qualify for withholding of removal, a petitioner must satisfy a higher bar by establishing that, “if he were removed to his home country (or other designated country), it is more likely than not that his ‘life or freedom would be threatened’ on account of one of the five protected grounds listed above.” *Li Zu Guan v. INS*, 453 F.3d 129, 135 (2nd Cir. 2006) *citing* 8 U.S.C. § 1231(b)(3)(A); *Paul v. Gonzales*, 444 F.3d 148, 156 (2nd Cir. 2006) (same); *see also* 8 C.F.R. § 1208.16(b) (“The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion.”).

The courts have recognized for over fifteen years that gay men and lesbians constitute a particular social group within the meaning of the Immigration and Nationality Act (“INA”). *See Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822-823 (BIA 1990); *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 177 (2nd Cir. 2006) (recounting IJ’s holding that a same-sex sexual orientation “can be a qualifying factor for asylum based on ‘persecution on account of his membership in a particular social group’”) (citation omitted); *Maldonado v. Attorney General*, 2006 U.S. App. LEXIS 18010, *8 (3rd Cir. July 18, 2006) (“homosexuality can be the basis for an asylum claim based on membership in ‘a particular social group.’”); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (“we affirm that all alien homosexuals are members of a ‘particular social group’”); *Molathwa v. Ashcroft*, 390 F.3d 551, 554 (8th Cir. 2004) (“We will assume ... homosexuals are a particular social group eligible for relief.”).

Y.S.’s eligibility for asylum and withholding of removal as a member of a particular social group rests upon a showing that he is gay – an inquiry in which the IJ’s erroneous credibility determination was central. Credibility is a threshold consideration that is “entitled to significant weight” and “can be sufficient to meet the burden of establishing persecution.” *Matter of O-D*, 21 I. & N. Dec. 1079, 1081 (BIA 1998). *See also Diallo v. INS*, 232 F.3d 279, 287 (2nd Cir. 2006) (“It is ‘well established’ that the BIA attaches ‘significant weight to the credibility of an

asylum applicant.’’) (citation omitted); *Chun v. INS*, 40 F.3d 76, 79 (5th Cir. 1994) (without credible evidence, the BIA has no basis upon which to grant asylum or withhold deportation). In this instance, the IJ’s credibility determination that Y.S. had not established he was a “genuine” member of the particular social group of gay men (IJ Dec. p. 12) went to the heart of Y.S.’s request for asylum and withholding of removal.

Adverse credibility determinations “merit deference [only] so long as they are supported by substantial evidence in the record.” *Li Hua Lin v. United States DOJ*, 453 F.3d 99, 106 (2nd Cir. 2006); *see also Guo-Le Huang v. Gonzales*, 453 F.3d 142, 146 (2nd Cir. 2006) (“Our standard of review – whether the findings are supported by substantial evidence – is well established”). The IJ’s credibility determination in the instance case, however, is unsupported by any evidence, let alone *substantial* evidence. Nothing in the record suggests that Y.S. is anything other than what he professed to be during trial – a gay man who struggled for several years to accept and publicly admit his sexual orientation. The unfounded nature of the IJ’s conclusion is even more starkly apparent when contrasted with the authoritative research discussed below, which explains the long struggle many gay people experience before being able to accept and disclose to others their sexual orientation and the reasonableness of delay in doing so, given the existence of widespread societal bias, discrimination and violence.

B. Pervasive Societal Stigma Can Make Accepting One’s Gay or Lesbian Sexual Orientation A Lengthy And Difficult Process, Often Compounded By Feelings of Denial And Shame.

Recognizing, accepting and revealing to others that one is a gay man or a lesbian is a process frequently referred to as “coming out.”³ Coming out is made necessary for gay men and lesbians in the context of a society that often equates normal sexuality with heterosexuality, and that presumes that all individuals are heterosexual unless there is evidence to the contrary.⁴ Because societal assumptions of heterosexuality exist within a framework of pervasive discrimination against gay men and lesbians, coming out can be a daily, unending process during which otherwise routine self-disclosures can place one at heightened risk for discrimination, retaliation, and even violence.⁵ Given these dynamics, it is only reasonable that Y.S. took several years to come to terms with his sexual orientation.

³ Paula C. Rust, *Psychological Perspectives on Lesbian, Gay, and Bisexual Experiences* 227 (Linda D. Garnets & Douglas C. Kimmel eds., Columbia University Press) (2d ed. 2003) (Dec. ¶ 10, Ex. 1).

⁴ Gregory M. Herek, *Out in Force, Sexual Orientation and the Military* 202 (Gregory M. Herek, J. Jobe & R. Carney eds., Chicago: University of Chicago Press.) (1996) (hereinafter, “G. M. Herek, *Out in Force*”) (Dec. ¶ 11, Ex. 2); *see also* Adrienne Rich, *Blood, Bread, and Poetry* 26-27, 57-58 (W.W. Norton & Co.) (1986) (Dec. ¶ 12, Ex. 3).

⁵ Jack Drescher, M.D., *The Closet: Psychological Issues of Being In and Coming Out*, 21 *Psychiatric Times*, Issue 12 (Oct. 2004) (hereinafter, “J. Drescher, *The Closet: Psychological Issues of Being In and Coming Out*”) (Dec. ¶ 13, Ex. 4); G. M. Herek, *Out in Force* 200 (Dec. ¶ 11, Ex. 2); *see also* Jonathan J. Mohr & Ruth E. Fassinger, *Self-Acceptance and Self-Disclosure of Sexual Orientation in Lesbian, Gay, and Bisexual Adults: An Attachment Perspective* 482, 50 *J. Counseling Psychol.* (2003) (Dec. ¶ 14, Ex. 5).

1. Gay Men and Lesbians Are Affected by the Pervasive Societal Discrimination against them, and Often Cope with Widespread Hostility by Initially Denying and Hiding their Sexual Orientation.

Accepting that one is gay or lesbian can be difficult in the best of circumstances, and often is agonizing in the face of the entrenched societal prejudice directed at gay people. That lesbians and gay men sometimes face extreme antipathy should be beyond dispute. As Justice Brennan has noted, it is undeniable that gay people have been subjected to “pernicious and sustained hostility” and “immediate and severe opprobrium” based on widespread and deep-seated prejudice against them. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.). *See also Hernandez-Montiel*, 225 F.3d at 1094 (finding that gay men in Mexico “are singled out for persecution”); Charity Crouse, *Out and Down and Living in Israel*, *The Gay & Lesbian Review* 24 (2003) (hereinafter, “C. Crouse, *Out and Down and Living in Israel*”) (citing conclusion of expert with Israel’s largest gay and lesbian organization that most gay Palestinian refugees in Israel have fled in fear for their lives after experiencing extreme familial violence, often sanctioned by the Palestinian Authority) (Dec. ¶ 27, Ex. 18). And, indeed, the disproportionate level of violence and harassment directed towards gay people is well-documented.⁶

⁶ *See, e.g.*, Gregory M. Herek et al., *Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 948, 67 (6) *J. Consulting and Clinical Psychol.* (1999) (Dec.

In addition to violent hate crimes, widespread employment discrimination against lesbians and gay men has been confirmed by dozens of studies over the past fifteen years.⁷ At present, gay people receive no federal statutory protection against sexual orientation in employment, and only a minority of states provide such protections.⁸ Moreover, while societal attitudes in some parts of this country are improving, substantial numbers of Americans still believe that same-sex sexual intimacy is not acceptable and should not be legal.⁹ In Y.S.'s native West Bank, pervasive societal condemnation of gay people is even more virulent.¹⁰

In the face of these persistent societal biases that devalue gay men, lesbians and their relationships, for most people accepting one's sexuality involves a complicated process of transforming a negative, stigmatized identity into an

¶ 15, Ex. 6); see also Federal Bureau of Investigation, *Hate Crime Statistics 2004* (2004), available at <http://www.fbi.gov/ucr/hc2004/section1.htm> (last visited Aug. 24, 2006).

⁷ See, e.g., Kaiser Family Found., Chartpack, *Inside Out-A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation*, Chart 4 (2001), available at <http://www.kff.org/kaiserpolls/upload/New-Surveys-on-Experiences-of-Lesbians-Gays-and-Bisexuals-and-the-Public-s-Views-Related-to-Sexual-Orientation-Chart-Pack.pdf> (last visited Aug. 17, 2006); see also John C. Gonsiorek, *Homosexual Issues in the Workplace*, 243, 244-45 (Diamant L, ed., Taylor & Francis) (1993) (Dec. ¶ 16, Ex. 7).

⁸ See, e.g., Connecticut (Conn. Stat. § 46a-81c); New York (N.Y. CLS Exec. Law 296); Vermont (21 V.S.A. § 495).

⁹ Frank Newport, *American Attitudes Toward Homosexuality Continue to Become More Tolerant*, Gallup News Service (Jun. 4, 2001), available at <http://www.sodomylaws.org/usa/usnews32.htm> (last visited Aug. 18, 2006).

¹⁰ Kathleen Peratis, *For Gay Palestinians, Tel Aviv Is Mecca; Only Human* 11, *The Forward* (Feb. 24, 2006).

acceptable one.¹¹ Typically, the earlier stages of this process “are fraught with confusion and despair, marked by low self-acceptance and low self-esteem” as the individual struggles with the realization that they are somehow different and that it is a despised difference.¹²

These difficulties often are exacerbated by gay men and lesbians’ internalization of the societal animosity directed toward them, sometimes called “internalized homophobia.”¹³ The internalizing of society’s negative attitudes can cause significant psychological distress, often involving feelings of denial and shame.¹⁴ Those who are still coming to terms with their being a minority in terms of their sexual orientation may be even more acutely affected by this experience, both because they lack a strongly developed identity to help increase their psychological resilience and coping skills, and because they lack adequate social

¹¹ Linda D. Garnets and Douglas C. Kimmel, *Psychological Perspectives On Lesbian, Gay and Bisexual Experiences* 217 (Linda D. Garnets & Douglas C. Kimmel eds., Columbia University Press) (2d ed. 2003) (Dec. ¶ 17, Ex. 8).

¹² Christopher J. Rowen & James P. Malcolm, *Correlates of Internalized Homophobia and Homosexual Identity Formation in a Sample of Gay Men* 78, 43 *J. Homosexuality*, The Haworth Press, Inc. (2002) (Dec. ¶ 18, Ex. 9).

¹³ David M. Huebner et al., *The Impact of Internalized Homophobia on HIV Preventive Interventions* 328, 30 *Am. J. Community Psychol.* (Jun. 2002) (Dec. ¶ 19, Ex. 10).

¹⁴ Dawn M. Szymanski et al., “*Psychosocial Correlates of Internalized Homophobia in Lesbians*” 27-29, 34 *Measurement and Evaluation in Counseling and Development* (Apr. 2001) (Dec. ¶ 20, Ex. 11); *see also* G. M. Herek, *Out in Force* (Dec. ¶ 11, Ex. 2).

support from others who will affirm their identity.¹⁵ When asked why he did not raise his sexual orientation with the IJ in his earlier asylum proceeding, Y.S. testified about grappling with precisely these issues, stating that he was “ashamed,” “shy,” and “in denial.” (Trans., 62: 15-21.)

Gay people who are just beginning to struggle with these issues often cannot acknowledge to themselves, let alone to others, their attraction to people of the same sex.¹⁶ To protect themselves from the stigma and discrimination directed towards gay people, many individuals selectively hide their identity throughout adulthood.¹⁷ That this often-difficult process of coming out may take place over many years is very common and eminently reasonable in light of the very real risks of ostracism, discrimination, and violence gay people face when they are recognized as being gay.

2. Gay Men and Lesbians Who Are Castigated by Members of their Own Racial and Religious Communities Face Additional Vulnerabilities Related to Accepting and Sharing their Sexual Orientation.

The profound sense of fear and vulnerability that can accompany accepting being gay can be even more deeply-rooted among individuals like Y.S. who were

¹⁵ Gregory M. Herek, *Stigma, Prejudice & Violence Against Lesbians & Gay Men* 75 (Homosexuality: Research Implications For Public Policy, Sage Press) (1991) (Dec. ¶ 21, Ex. 12).

¹⁶ J. Drescher, “*The Closet: Psychological Issues of Being In and Coming Out*” 21 (Dec. ¶ 13, Ex. 4).

¹⁷ *Id.*

raised with cultural and religious beliefs which regard gay men as anathema.¹⁸ Gay men and lesbians who are members of a racial or ethnic minority face the additional challenge of negotiating the beliefs regarding a gay sexual orientation of both their mainstream and minority cultures.¹⁹ Racial minorities may rely on their families as an important source of support in challenging negative ethnic stereotypes, but family members often may be the most direct and painful source of negative stereotypes about gay men and lesbians.²⁰ Anti-gay prejudice by family members frequently leaves gay men and lesbians feeling isolated, alienated and estranged from their family, depriving them not only of an important source of support for their sexual orientation, but also for their racial identity.²¹ As a result, individuals who are both gay and a member of an ethnic minority may risk alienating themselves from the racial group that provides a critical buffer against

¹⁸ See, e.g., Isiaah Crawford et al., *The Influence of Dual-Identity Development on the Psychosocial Functioning of African-American Gay and Bisexual Men* 179-189, 39 J. of Sex Research (Aug. 2002) (Dec. ¶ 22, Ex. 13); see also Christian Grov et al., *Race, Ethnicity, Gender, and Generational Factors Associated With the Coming-Out Process Among Gay, Lesbian, and Bisexual Individuals* 115-21, 43 J. of Sex Research (May 2006) (citation omitted) (Dec. ¶ 23, Ex. 14).

¹⁹ American Psychological Association, *Committee on Lesbian, Gay, and Bisexual Concerns Joint Task Force on Guidelines for Psychotherapy with Lesbian, Gay, and Bisexual Clients* (2000), available at <http://www.apa.org/pi/lgbcc/guidelines.html#10> (last visited Aug. 18, 2006).

²⁰ Beverly Greene, *Psychological Perspectives On Lesbian, Gay and Bisexual Experiences* 382 (Linda D. Garnets & Douglas C. Kimmel eds., Columbia University Press) (2d ed. 2003) (Dec. ¶ 24, Ex. 15).

²¹ *Id.* at 382-83.

larger societal racial biases, while struggling to find role models encapsulating valid memberships in both gay and racial minority communities.²²

Beyond ethnicity and racial identity, religious ideology often profoundly influences societal views of sexual orientation. Being raised with fundamentalist religious beliefs condemning gay men and lesbians can greatly hinder the later process of accepting one's sexual orientation.²³ In fact, the ridicule, harassment, discrimination, and physical violence visited on gay men and lesbians by those who insist their views are supported by religious teachings can have a devastating psychological effect.²⁴

Y.S. testified that, in the Muslim society in which he was raised, being gay “is not acceptable at all” (Trans., 66: 6-7), but rather is viewed within his culture and religion as a sin (Trans. 36:23 - 37:2) for which he would be questioned, tortured, killed by being thrown from the top of a building, bludgeoned to death by thrown stones, or starved to death (Trans. 39: 2- 6; 40: 18-22). Consistent with this virulent religious and cultural proscription against being gay, Y.S. had never engaged in same-sex sexual intimacy while living in the West Bank (Trans., 33: 7-

²² Bernie Sue Newman & Peter Gerard Muzzonigro, *The Effects of Traditional Family Values on the Coming Out Process of Gay Male Adolescents* 216-17, 28 Adolescence (Spring 1993) (Dec. ¶ 25, Ex. 16).

²³ Kristin A. Hancock, *Education, Research, and Practice in Lesbian, Gay, Bisexual and Transgendered Psychology, A Resource Manual* 94 (Beverly Greene & Gladys L. Croom eds., 5 Psychological Perspectives on Lesbian and Gay Issues, Sage Publications, Inc.) (2000) (hereinafter, “K.A. Hancock, *Education, Research and Practice Manual*”) (Dec. ¶ 26, Ex. 17).

9; 47: 13-21), had no exposure to same-sex relationships there (Trans., 32:22 - 33:1), and did not even understand the concept when a Jewish friend disclosed being gay (Trans., 48: 11-13).

Y.S.'s testimony of widespread cultural and religious stigma is well supported by scores of accounts detailing the infliction of torture and gruesome killings on West Bank gay men under Palestinian Authority governance. These accounts have reported extreme violence against gay men by vigilante family members and the Palestinian police alike, including burning with cigarettes and hot irons, stabbings, beating with clubs, anal rape with bottles, hanging by one's hands, mutilation of genitals, and public killings of gay men.²⁵ Such reports confirm the ample evidence of country conditions in the West Bank that Y.S. entered into the record at trial. (A.R. at 346-436.)

Y.S. testified that the extraordinarily difficult process of self-acceptance that individuals struggle through over time, particularly as they try to reconcile fundamentalist religious and cultural ideologies with their new-found recognition of who they are, played a critical role in his delayed disclosure of his sexual orientation on his asylum application. The IJ's stance on the timing of Y.S.'s disclosure makes a patently unfair conclusion in that it does little more than punish Y.S. for the shame and denial he experienced. Y.S.'s uncontradicted testimony,

²⁴ *Id.* at pp. 94-95.

which was wholly consistent with the well-established dynamics discussed above, reveals that the IJ's conclusion was both inappropriately punitive, and failed to meet the required legal standard for such determinations, as discussed below.

C. The IJ's Adverse Credibility Determination Not Only Contravenes The Authoritative Psychosocial Literature, But Is Based On Speculation And Lacks Any Nexus To Y.S.'s Clearly Demonstrated Membership In The Particular Social Group of Gay Men.

Where, as here, a case “rises and falls purely on an IJ's credibility finding, courts have been particularly concerned that the decision-maker carefully detail the reasoning leading to the adverse finding.” *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2nd Cir. 2003). An IJ's adverse credibility finding must be supported by specific and cogent reasons which bear a legitimate nexus to the adverse credibility finding. *Majidi v. Gonzales*, 430 F.3d 77, 81 (2nd Cir. 2005); *Kanacevic v. INS*, 448 F.3d 129, 136 (2nd Cir. 2006) (same). Adverse credibility determinations will be vacated if based on flawed reasoning, such as speculation or conjecture. *Lin v. Gonzales*, 445 F.3d 127, 132 (2nd Cir. 2006). Review of a credibility determination “is meant to ensure that credibility findings are based upon neither a misstatement of the facts in the record nor bald speculation or caprice.” *Zhou Yun Zhang v. INS*, 386 F.3d 66, 74 (2nd Cir. 2004); *see also Ke Zhen Zhao v. United States DOJ*, 265 F.3d 83, 93 (2nd Cir. 2001) (a credibility determination can be

²⁵ C. Crouse, *Out and Down and Living in Israel* (Dec. ¶ 27, Ex. 18).

reversed where the BIA has acted in an arbitrary or capricious manner). An examination of the evidence in the record illustrates that the IJ's adverse credibility finding suffers from each of these infirmities.

1. The IJ Provided No Cogent Reasons to Support his Adverse Credibility Determination.

Despite finding Y.S. "generally credible," the IJ concluded that Y.S. was not credible on what the IJ referred to as the "key issue" of the timing of Y.S.'s awareness of his gay sexual orientation (IJ Dec. p. 11). Consistent with the dynamics discussed above relating to coming out, Y.S. testified that he did not raise his sexual orientation in his prior asylum proceeding because he was "completely" in denial, "shy," and "ashamed." (Trans. 62: 15-21; 63: 8-11.) The IJ did not refer to any evidence or testimony inconsistent with Y.S.'s explanation, but rather disregarded Y.S.'s testimony and speculated instead that Y.S. must have been "fully aware" that he was gay at the time he filed for asylum (IJ Dec. p. 11).

The IJ's capricious disregard of Y.S.'s credible testimony about his resistance to self-acceptance and disclosure is precisely the type of conjecture that the Second Circuit has "come to regard as analytic error[]." *Li Hua Lin*, 453 F.3d at 105. As the *Lin* Court elaborated,

Such errors include, for example, "a misstatement of the facts in the record [or] bald speculation or caprice," *Zhou Yun Zhang v. INS*, 386 F.3d 66, 74 (2nd Cir. 2004); unreasonable demands for corroborative evidence where the applicant is otherwise credible, *see Jin Shui Qiu v. Ashcroft*, 329 F.3d 140, 153-54 (2nd Cir. 2003); *Diallo v. INS*, 232 F.3d 279, 285-90 (2nd Cir.

2000); overreliance on airport interviews and accounts thereof that do not bear indicia of reliability, *see Ramsameachire v. Ashcroft*, 357 F.3d 169, 180-81 (2nd Cir. 2004) (discussing why some airport interviews are more reliable than others); and reliance on inconsistencies that are not dramatic and self-evident and were never brought to an alien's attention, *see Ming Shi Xue v. BIA*, 439 F.3d 111, 118 (2nd Cir. 2006).

Id. at 105-06. Here, without providing any specific, cogent reason, the IJ simply speculated about Y.S.'s self-awareness, and relied on a concern about the timing of Y.S.'s coming out that was never brought to Y.S.'s attention at the trial. In so doing, the IJ inappropriately disregarded Y.S.'s internally consistent and amply corroborated testimony that he did not begin to speak of his sexual orientation until mid-1994, and that it took two to three full years before he resolved his feelings of "denial" and "shame" (Trans. 31: 16-25; 62: 15-21; 78: 20-25).

The IJ's determination not only lacks the necessary foundation in sound reasoning, but also overlooks the daunting dilemmas some gay asylum applicants face when revealing information on asylum applications that are public record. Gay and lesbian asylum applicants may have good reason to fear that a revelation of their sexual orientation to the United States government could jeopardize their safety should such information become known to the government of a country to which they later may be removed. Such fears only underscore the problematic nature of the IJ's adverse credibility determination based on Y.S.'s failure to embrace his sexual orientation unhesitatingly and immediately to announce it to the United States government in his initial asylum application.

Gay asylum petitioners' forebodings about disclosure may radiate beyond the disclosure of information to a governmental regime, and may encompass fears regarding discovery by one's family as well. Disclosure of a same-sex sexual orientation to one's family can be one of the most stressful and painful experiences involved in coming out, even outside the context of fundamentalist societal and religious beliefs condemning gay men and lesbians. Coming out can precipitate a crisis within the family,²⁶ placing gay men and lesbians at risk of physical ejection from the home, emotional rejection, and family violence.²⁷ Some experience the added terror of violent repercussions against their family should their sexual orientation become more widely known.

The Ninth Circuit recently reviewed the testimony of an asylum applicant that illustrates how acute and understandable these fears may be, particularly in the context of an asylum application.

According to [the petitioner] Karouni, he decided not to tell the rest of his family that he is gay because, in addition to their belief that homosexuality is a crime, he wishes to protect them from being ostracized.... As Karouni stated in his asylum application, ["if someone outside the family learned of my homosexuality, then my

²⁶ K.A. Hancock, *Education, Research, and Practice Manual* 110 (Dec. ¶ 26, Ex. 17).

²⁷ Susan Saltzburg, *Learning That an Adolescent Child Is Gay or Lesbian: The Parent Experience* 109, 49 *Social Work* (Jan. 2004) (Dec. ¶ 28, Ex. 19); *see also* Rob Woronoff et al., Lambda Legal Defense and Education Fund, Inc., *Out of the Margins, A Report on Regional Listening Forums Highlighting the Experiences of Lesbian, Gay, Bisexual, Transgender and Questioning Youth in Care* 34, available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/693.pdf (last visited Aug. 24, 2006).

family might be socially ostracized, discriminated against by fundamentalists and the government and any remaining protection or status due to their position in society would be lost.[’’]

Karouni v. Gonzales, 399 F.3d at 1167, n. 5. Consistent with these dynamics, Y.S. testified that he has “never” discussed his sexual orientation with his family because,

They are Muslim. They practice the Muslim religion. They know about Muslim law. They know this want to affect me [*sic*], and plus it will affect them, especially if I go there and I don’t know what’s going to happen to them. I don’t know what’s going to happen to me, so homosexual [*sic*] in my society is not acceptable at all.

(Trans., 66: 2-7.) That gay asylum applicants such as Y.S. may struggle with internal resistance to accepting and disclosing their sexual orientation, in the face of these very real and serious concerns, emphasizes the fundamentally unsound nature of the IJ’s conclusion.

2. The Reasons Provided by the IJ for his Conclusion Have No Nexus to the IJ’s Adverse Credibility Finding.

For an adverse credibility determination to be upheld, the fact finder’s specific, cogent reasons for such a determination must bear a *legitimate nexus* to the finding. *Diallo v. Gonzales*, 445 F.3d 624, 629 (2nd Cir. 2006), *citing Singh v. BIA*, 438 F.3d 145, 147 (2nd Cir. 2006) (*per curiam*) (emphasis added). The IJ’s credibility determination bears no such nexus to his ultimate conclusion that Y.S.’s application must be denied because he has not demonstrated membership in the particular social class of gay men and lesbians. Regardless of any concerns the IJ

may have had with Y.S.'s equivocation about accepting his sexual orientation and revealing it to the government, and probably to his family, the IJ failed to explain how a lengthy coming out process nullifies the gay sexual orientation that Y.S. clearly proclaimed and definitively established during the proceedings.

Y.S. testified that accepting his identity as a gay man has made him so happy that he smiles all the time (Trans. 31: 16-20; 38:25 - 39:1), that he is openly gay at work (Trans. 37: 16-25), that he participates in gay social groups (Trans. 33:24 - 34:17; 35: 6-8; 65: 2-10, 16-20), and that he hopes to spend the rest of his life with his committed, loving, same-sex partner (Trans. 42: 10; 64: 1-15). Y.S.'s partner corroborated Y.S.'s testimony, testifying that they are in a "lifetime partnership, long term loving relationship." (Trans. 77: 6.) No reasonable doubt can exist that Y.S. is, in fact, a gay man.

The well-established authority recognizing gay men and lesbians as a "particular social group" within the meaning of the INA includes no requirement that gay men accept and announce their sexual orientation within a limited window of time to "qualify" as gay men, and to be entitled to request asylum on the grounds that they are likely to face persecution if removed to their country of origin. *See Matter of Toboso-Alfonso*, 20 I. & N. Dec. at 822-823; *Hernandez-Montiel*, 225 F.3d at 1087.

Perplexingly, the IJ ruled that, despite the extensive and uncontradicted evidence of Y.S.’s gay sexual orientation, *Y.S. had not proven* his identity as a gay man but had proven at most that he is a “transvestite” – a class the IJ erroneously concluded is not entitled to asylum protection under the INA. (IJ Dec. p. 13.) In fact, even were that accurately to describe Y.S., gay men with female sexual identities *are* recognized as a “particular social group” under the INA. *See Hernandez-Montiel*, 225 F.3d at 1094 (“we conclude that the appropriate ‘particular social group’ in this case is composed of gay men with female sexual identities”).

V. CONCLUSION

Despite the consistent, corroborated evidence of Y.S.’s long-term relationship with another man, marked by the affectionate cards and photos from shared trips typical of many long-term, loving relationships, the IJ erroneously concluded that Y.S. “failed to prove the genuineness of his recognition of his sexual orientation.” (IJ Dec. p. 12.) In fact, the internal inconsistencies in the IJ’s opinion make this conclusion all the more enigmatic. Notwithstanding the IJ’s tenuous conclusion regarding Y.S.’s lack of credibility about his sexual orientation, the IJ expressly acknowledged Y.S.’s gay sexual orientation in at least two instances (*i.e.*, “...the Court finds it difficult to believe that the Respondent was not fully aware of his sexual identity at the time he filed for asylum in 1994” (IJ Dec.

p.11); “Therefore, the Court believes that the Respondent was sufficiently aware of his sexual orientation in 1994 that he should have included it in his initial application” (IJ Dec. p. 12)).

The IJ’s refusal to acknowledge the very sexual orientation that he claims Y.S. was “fully aware” of in 1994 strongly suggests that the IJ’s decision was motivated by bias against Y.S. for failing to come out earlier. The IJ’s adverse credibility determination, made in the face of an overwhelming showing and in the absence of a scintilla of contradictory evidence, accordingly should be reversed as improper conjecture and this matter remanded back to the BIA for further proceedings based on the inescapable conclusion that Y.S. indeed is gay.

Respectfully submitted this 31st day of August, 2006.

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