Matter of J-A-[1]

The Hopes and Fears of All the Years: An LGBT Experience with the One-Year Bar to Asylum: A Chink in the Armor of the Gay Bar to Asylum

By Jan Pederson* and Michelle Kobler**

Immigration Judge: John Bryant, Arlington Immigration Court, Executive Office for Immigration Review, United States Department of Justice
Assistant Chief Counsel for ICE: Molly Henle
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When J-A-, a gay teenager from Bolivia, stepped off the plane in New York City, on a cold December day in 2001, he joined the generations of immigrants who have come to this country seeking refuge from persecution.

The story of America is the story of the exile, the infidel, the refugee; his forbearers paved the streets he walked and forged the horizon he contemplated

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[1] *Matter of J-A-* (Arlington Immigration Court, April 27, 2012)

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that cold night in December 2001.

However, from the time he set foot on American soil, an ill-understood one-year filing deadline threatened to slam the golden door shut and send him back to certain death in a country which had subjected him to inhumane torture and degradation.

Immigration Judge John Bryant of the Arlington Immigration Court, in a landmark decision on April 27, 2012, ended J-A-'s suffering by granting him political asylum, finding extraordinary circumstances present to waive the one-year bar, and excuse his ten year filing delay. *Matter of J-A-*, A201-262-234 (Arlington Immigration Court, April 27, 2012).

A Tortured Past

J-A- had endured rapes, sexual assaults, beatings, and other types of torture in Bolivia because of his sexual orientation. He testified that "when I was 7- or 8-years old, I knew that I had different mannerisms and interests from most boys my age," J-A- wrote in his application for asylum. "For example, I gestured with my hand a lot when I spoke and I liked fashion and playing with girls. I also realized then that I was attracted to other boys."

From an early age, J-A- suffered cruel remarks from his father, siblings, and classmates, who would call him *maricon* (faggot) and *perrita* (little bitch) and subject him to savage beatings.

"When I came home from middle school with bruises, black eyes, and bloody noses, my mother used to cry with me," he recalled. "But my father told me that I deserved the abuse and that it would make me become a man."

After a particularly savage beating at the hands of his father, J-A- called the police, but they refused to help and their presence only made his father beat him more. "I never called the police again because I knew it was useless," he wrote.

Starting at age 16, J-A- was called upon to complete his pre-military service. The drill sergeant at boot camp antagonized him for his perceived feminine mannerisms. "You're not going to make it; look how fragile this girl is," he would say. All of the trainees had to exercise naked, but the sergeant would have J-A-continue the drills in front of the recruits long after the others were ordered to get dressed.

Shortly after the training began, a superior officer took notice of J-A-. On one Saturday afternoon, he called J-A- into his office. The officer attacked the boy and forced him to perform oral sex on him, then threatened to kill him if he told anyone.

During the evenings, the other army academy students made him sleep on the ground without a blanket. On one occasion, one of the students beat him unconscious. Several days later, a few of the students started sexually assaulting him, and he suffered violent rapes every day thereafter.

“People in the camp started calling me the ‘army tramp’ because everyone knew that I was being sexually assaulted regularly,” J-A- remembered.

In 2001, just before his 18th birthday, J-A- finished his military training and obtained a tourist visa to visit family members in the United States.

“Despite feeling hostility and prejudice [from my family members in the U.S.], I felt free and happy for the first time in my life,” he wrote. “Nobody beat me up or called me bad names or sexually assaulted me in the U.S.”

After six months, J-A- returned to Bolivia for fear of overstaying his visa. He did not know at the time that the U.S. offered asylum to sexual minorities like him.

Upon his return to Bolivia, J-A- learned that his former brother-in-law in the U.S. had relayed home that he was gay and that they had seen him on a street with several gay clubs in Washington, D.C. His father confronted him saying, “Faggot blood doesn’t run in my family,” and then he beat him.

Over the next few months, family members berated him with taunts such as, “You will suffer in hell for the choice that you made to be gay.”

Even worse, a few days after returning to Bolivia, the army officer who had first sexually assaulted J-A- abducted him off the street. He forced J-A- to perform oral sex on him and told him that he could “blow his brains out” and no one would care. He ordered J-A- to report to the base on weekends for further abuse. He threatened J-A- with death should he ever try to leave the country again.

J-A-‘s only confidant, a closeted gay cousin, convinced him to return to the U.S. Three years later, his cousin would be murdered in Bolivia for being gay.

Living on Borrowed Time

J-A- returned to the U.S. in late 2001 to live once again with his homophobic sister and exist in the virulently homophobic Bolivian immigrant community. Despite feeling freer and safer in the United States, J-A- was not comfortable in public because he feared deportation and the homophobia of the Bolivian immigrant community in which he was embedded. So he laid low and tried to forget what had happened to him.

“For the many years I have lived in the U.S. I tried not to think about my terrible past,” he recalled. “For the longest time, I lived as if I had no memory of the past,

as if my prior life were a blank screen."

In 2008, this dark past caught up with J-A-. Surrounded by strangers at a beachfront party, he became depressed and attempted suicide by ingesting sleeping pills. When he woke up in the hospital, doctors urged him to seek mental health services.

However, it wasn't until 2011, almost ten years after his initial arrival, that J-A- approached an LGBT rights organization in Washington, D.C., which referred him to the Whitman Walkter Clinic, a multi-service organization in Washington, D.C. Sensing his desperation, they immediately referred him to a gay-friendly mental health therapist in D.C. who diagnosed him with severe and ongoing post-traumatic stress disorder. These sessions were the first time that he was able to speak at-length about his suffering. He was elated to learn that U.S immigration law did indeed protect people like him. After a few sessions, his therapist then referred him to an immigration lawyer, who filed the affirmative asylum application within approximately two months of J-A- seeing a therapist.

J-A-'s experience with the Arlington Asylum Office further traumatized him. Instead of offering compassion, the immigration officer at his asylum interview was more interested in knowing how many times J-A- had engaged in consensual homosexual sex since arriving in the United States. The interview continued despite J-A- having to excuse himself three times during the interview to go to the men's room to vomit. This line of questioning is never acceptable and is tantamount to asking a rape victim how many times she had consenxual sex since being raped. Indeed, The Asylum Officers Handbook, amended on December 28, 2011, specifically prohibits such inquires by advising officers that "[t]he *applicant's specific sexual practices are not relevant to the claim for asylum or refugee status*. Therefore, *asking questions about 'what he or she does in bed' is never appropriate*. If the applicant begins to volunteer such information, you should politely tell him or her that you do not need to hear these intimidate details in order to fairly evaluate the claim."[2] Then, in September 2011, he received bad news: the Asylum Office ordered him to appear for a removal hearing despite the fact that they accepted his underlying claim. Although the technical language is that the Arlington Asylum Office referred J-A- to an Immigration Judge for a hearing in removal proceeding; such sugar coated language masks the reality – that banishment from the United States lurks.

Although he was a *bona fide* survivor of horrific torture and violence based on his sexual orientation, J-A- had missed the one-year filing deadline and would therefore face being sent back to Bolivia, exiled from his home of ten years to what he knew would be certain persecution.

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[2] USCIS, RAIO Directorate – Officer Training, *Combined Training Course: Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims,* December 28, 2011, p. 34. (emphasis added)

Homosexuality and the Immigration and Nationality Act

Given the eugenic backdrop of the U.S. immigration laws and the prevailing attitudes towards LGBT persons throughout most of U.S. history, it is not surprising that U.S. immigration law has historically been homophobic.

Since 1917, the U.S. law has treated homosexual immigrants with discrimination and exclusion. The Immigration Act of 1917 refused to admit individuals who were "mentally defective" or "demonstrated constitutional psychopathic inferiority" to the United States. At the time, the United States considered homosexual behavior to fall within both these categories. The Immigration and Naturalization Service (INS) refused to allow any immigrant who admitted to engaging in "sexually deviant" homosexual behavior, entry into the United States.[3] This discrimination was continued with the 1952 Immigration and Nationality Act ("INA"), which explicitly prohibited "aliens afflicted with a psychopathic personality, epilepsy, or mental defect" from entry into the United States.[4] At the time of the law's enactment, Congress specifically included the phrase 'psychopathic personality' to include homosexuals, as the Judiciary Committee Report on the bill states: "The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill *is sufficiently broad to provide for the exclusion of homosexuals and sex perverts*. This change in nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates."[5] The Public Health Service also issued a report which recommended that the term "psychopathic personality" be used to "specify such types of pathologic behavior as homosexuality or sexual perversion." In 1965, Congress passed an amendment to the INA that defined "sexual deviation" as a sufficient medical basis to refuse prospective immigrants access to the United States.[6]

The implementation of these discriminatory laws were upheld by the judiciary. In 1967, the Supreme Court upheld the deportation of Canadian national Clive Michael Boutilier after he admitted in a citizenship interview that he had been arrested for sodomy. The U.S. Supreme Court affirmed that "psychopathic personality" as used by Congress "intended to exclude homosexuals from entry into the United States"[7] and, was a bar to immigration.[8]

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[3] 1917 Immigration Act; H.R. 10384; Pub. L. 301, 39 Stat. 874, 64t Cong., Feb. 5, 1917.

[4] 1952 Immigration and Nationality Act; H.R. 13342; Pub. L. 414, 182 Stat. 66, 82d Cong., June 27, 1952.

[5] S. Rep. No. 1137, 82d Cong., 2d Sess., p. 9.

[6] Davis, T., Opening the Doors of Immigration: Sexual Orientation and Asylum in the United States, 6 Hum. Rts Brief. 18 (1999).

[7] Boutilier v. INS, 387 U.S. 118, 119 (1967).

Justice Tom C. Clark's majority decision in *Boutilier v. INS*, 387 U.S. 118 (1967), held that "Congress has plenary power to make rules for the admission of aliens and do exclude those who possess those characteristics which Congress has forbidden.", thus putting the imprimatur of the Supreme Court on the exclusion of homosexuals.

In 1990, Congress finally removed "sexual deviance" from the list of bars to admission in the *Immigration and Nationality Act*.[9] In the same year, the Board of Immigration Appeals upheld an immigration judge's decision that an asylum applicant's prior persecution on the basis of his homosexuality *did constitute* membership in a "particular social group" and the Attorney General designated *Matter of Toboso-Alfonso,* 20 I&N Dec. 819 (BIA, 1990) as a precedent decision in 1994. Mr. Toboso-Alfonso, a Cuban native, applied for asylum based on the persecution he suffered at the hands of government officials in Cuba, based on his homosexuality. In their finding, the Board of Immigration Appeals agreed that sexuality *was* an *immutable characteristic* which constitutes membership in a particular social group. The Board also upheld the Immigration Judge's decision to grant the Cuban native withholding of removal.

Since then, lesbian and gay individuals have been able to seek asylum based on their "membership in a particular social group."

The "Gay Bar" to Immigration?

The history of U.S. immigration law since 1917 has been staunchly biased against homosexuals. Despite the removal of "sexual deviance" from the Immigration and Nationality Act of 1990, the United States continued policies which disproportionately impacted the homosexual population. In 1987, the Helms Amendment to the Supplemental Appropriations Act was passed by Congress, and added HIV to list of dangerous contagious diseases which prohibit entry by any afflicted nonimmigrants and immigrants to the United States.[10] This travel ban was enshrined as a ground of inadmissibility under INA 212 (a) as a communicable disease of public health significance and resulted in the denial of nonimmigrant and immigrant visas to all infected people. A waiver was available; however the waiver process was lengthy and complex. In order to obtain a waiver, the applicant had to demonstrate to the Department of Homeland Security that the danger to U.S. public health by his/her admission to U.S. was minimal, that the possibility of spread of the disease by his/her admission to the

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[8] Bogatin, M., Immigration and Nationality Act and the Exclusion of Homosexuals: *Boutilier v INS* Revisited, 5 Immigr. & Nat'lity L. Rev. 95 (1981-1982).

[9] Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978, 101st Con., Nov. 29, 1990.

[10] Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, §§ 518, 101 Stat. 391, 475 (1987).

U.S. was minimal, and that the government will not incur costs due to the medical condition. This policy of the Centers for Disease Control clearly disproportionately impacted the LGBTI community, and was only dismantled on June 24, 2010 when the Centers for Disease Control when CDC amended its regulations at 42 CFR §34.2 to eliminate HIV infection from the list of communicable diseases and to prohibit testing for HIV during the medical exam process for refugees and immigrants.

However, those infected with HIV may still be found inadmissible to the United States as likely to become a public charge under §212(a)(4) of the Immigration and Nationality Act of 1952, as amended if they cannot demonstrate the availability of funds to pay for required medication and treatment.

Despite this newfound acceptance, a subsequent change in U.S. refugee law cast a shadow on the hopes and dreams of many LGBT immigrants.

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act passed by Congress included a statutory one-year bar that requires asylum applicants to apply for asylum within one year of arriving in the United States, except if circumstances in the country change in the interim or if extraordinary circumstances prevent the applicant from meeting the one-year filing deadline and the asylum application is filed within a reasonable period of time thereafter.[11]

The statute, was enacted as a measure to prevent fraudulent asylum claims, but it has had the unintended effect of excluding legitimate asylum seekers from the asylum process.

A 2010 article in the *William & Mary Law Review*, "Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum,"[12] estimates that, since April 1998, the Department of Homeland Security has rejected more than 15,000 asylum applications solely because of the one-year filing deadline.

This policy has a profound effect on LGBT immigrants because many are isolated within a homophobic immigrant community or, like J-A-, have had traumatic experiences that they cannot bear to relive in an asylum interview.

Victoria Neilson and Aaron Morris write in a February 2006 article for the *New York City Law Review* that, "For LGBT applicants, in addition to the potential mental health effects of the trauma they suffered in their own countries, they may find it difficult or impossible to come to terms with their sexual orientation or

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[11] 8 U.S.C. § 1158(a)(2)(D)

[12] Schrag, P., Schoenholtz, A., Ramji-Nogales, J., & Dombach, J., *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 Wm. & Mary L. Rev. 3, 651 (Nov. 2010).

gender identity until after they have lived in the United States and undergone counseling for a substantial period of time."[13]

Because international law bans deportation or removal of persons to countries where they would face persecution or death, Immigration Judges may grant "withholding of removal" to legitimate asylum applicants who are time-barred from an asylum grant or barred for other circumstances, including (but not limited to) firm resettlement in third country, conviction of particularly serious crimes, or any other discretionary reason. The United Nations Convention Against Torture, which the United States has ratified, recognizes the "equal and inalienable rights of all members of the human family." Correspondingly, the relevant statute states that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[14]

In order to be eligible for withholding, an applicant must demonstrate that it is "more likely than not" they would be persecuted in their home country, and there is no requirement an applicant apply for asylum within one-year of their most recent entry. This is a significantly higher standard than the "well-founded fear" required for asylum. The standard of proof for asylum is a well-founded fear of persecution, quantified as a 10% chance of persecution, while the standard of proof for withholding of removal is a 51% chance of persecution.[15] Thus, per force, if the persecution standard for withholding of removal is met, the standard for an asylum grant is met. Thus, the misapplied one year bar has prevented many LGBT asylum applicants from a grant of asylum.

In addition, while "withholding" does grant employment authorization and a right to indefinite stay in the United States, it does not provide a pathway to permanent residence or citizenship. As withholding of removal is country specific and only bars withholding to the specified country of persecution, the Department of Homeland Security may remove the applicant to another country which will accept the applicant. The fact that, in practice, this rarely happens does not comfort the asylum applicant, and their healing process if often stalled with the ever-present anxiety of deportation.

The Legal Argument

Following his asylum interview at the Arlington Asylum Office of the United States Citizenship Immigration Services on August 29, 2011, J-A-, was placed in

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[13] Neilson, V. & Morris, A., *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y. City L. Rev. 233, 271 (Feb. 3, 2006).
[14] INA § 241(b)(3)(A).
[15] 8 U.S.C. § 1231(b)(3)

removal proceedings before Judge John Bryant of the Arlington Immigration Court, based on his failure to meet the one-year filing deadline or demonstrate changed country conditions or extraordinary circumstances which warranted an exception in the judgment of the Director of the Asylum Office.

Because J-A- had been in the United States for nearly a decade before applying for asylum, he clearly failed to meet the one-year filing deadline which requires that an asylum applicant file the asylum application within one year of the most recent entry into the United States or demonstrate changed and/or extraordinary circumstances. Consequently, because J-A- had clearly failed to meet the one-year filing deadline, the primary legal issue in this case was whether J-A- met one of the *exceptions* to the one-year filing deadline, specifically, whether his case demonstrated changed or extraordinary circumstances, and that he had filed his asylum claim within a reasonable time period given the circumstances.

The one-year bar was imposed by Congress as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and is codified in the Immigration and Nationality Act (INA) § 208(a)(2)(B) and 8 USC § 1158(a)(2)(B).The statute provides an exception to the one-year filing deadline "if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application."[16]. In defining what merits an "extraordinary circumstance", the USCIS regulations provide at 8 C.F.R. § 1208.4(a)(5) a non-exclusive illustrative list of circumstances which include "[s]erious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past during the one year period after arrival;…" qualifies as an extraordinary circumstance which warrants an exception to the one-year filing deadline. 8 C.F.R. § 1208.4(a)(5)(i).

In *Matter of Y-C-*, a precedent decision, the Board of Immigration Appeals ("BIA") set forth a three-prong test to determine whether an "extraordinary circumstance" to the one-year filing deadline has been established. Specifically, the applicant must demonstrate: (i) the existence of an extraordinary circumstance; (ii) the extraordinary circumstances directly relate to the failure to file an application within the one-year period; and (iii) the application was filed in a reasonable time given the circumstances. In *Matter of Y-C-,* the Board found that an unaccompanied minor could be exempted from the one-year filing deadline because of his age. [17]

[16] INA §208(a)(2)(D), 8 USC §1158 (a)(2)(D)
[17] 23 I.&N. Dec. 286, 288 (BIA 2002).

In order to prove J-A- met this exception, Washington, D.C., attorneys Jan Pederson and Michelle Kobler, argued that Mr. A suffered such horrific, traumatic, and severe physical and emotional abuse at a young age that he developed a severe form of chronic Post-Traumatic Stress Disorder ("PTSD"), and this mental disability constituted an ongoing "extraordinary circumstance" which exempted J-A- from the one year filing deadline. The attorneys also argued that the one-year filing deadline should only have applied from the moment when J-A- began to seek consistent and professional psychological therapy for his existing mental trauma.

Furthermore, the attorneys argued that untreated and ongoing PTSD stemming from J-A-'s sexual trauma prevented him from feeling comfortable discussing the facts of his case with an asylum officer for almost ten years. Indeed, after finally finding the compassionate mental health treatment that he needed, he promptly filed an asylum application.

Given those circumstances, Pederson and Kobler asserted J-A- applied for asylum within a "reasonable period." Although the statue and regulation do not directly define what constitutes a "reasonable period", the Ninth Circuit has held that the finding of a changed or extraordinary circumstance justifies a filing delay "to the extent necessary to allow the alien a reasonable amount of time to submit the application." *Taslimi v. Holder*, 590 F.3d 981, 986 (9th Cir., 2010) (citing 65 Fed. Reg. 76121-01 at 76124 (Dec. 6, 2000)).

Correspondingly, Attorneys Pederson and Kobler argued that J-A-'s substantial prior abuse and violent harm resulted in PTSD, which was a serious, ongoing, mental disability that warranted an exception to the one-year filing deadline. Furthermore, Attorneys Pederson and Kobler argued that J-A-'s prolonged and continuing PTSD was so severe, that his 10-year delay in filing was a reasonable time period, given the circumstances. Given that J-A- applied for asylum within a few short months of finally receiving psychiatric treatment from mental health professionals, this is a reasonable time period given his multiple mental disabilities, including depression, anxiety, disassociative disorder and PTSD.

Additionally, they also argued that J-A- was a legal minor upon his most recent entry to the United States. The term "extraordinary circumstance" can also be construed to "events or factors directly related to the failure to meet the 1-year deadline … those circumstances may include … legal disability (e.g. the applicant was an unaccompanied minor or suffered from mental impairment) during the 1-year period after arrival" 8 C.F.R. § 1208.4(a)(5)(ii). The BIA agreed in *Matter of Y-C-*, that a minor may be excused for failure to file an asylum application prior to the one-year filing deadline. 28 I&N Dec. 286, 288 (BIA 2002). Thus, based on the totality of the circumstances of J-A's young age, and his prolonged emotional and mental trauma, J-A-'s attorneys argued he qualified for political asylum.

However, overcoming governmental skepticism at PTSD arguments was a challenge. To prove this disability, J-A-'s attorneys asked his treating therapist and an expert forensic psychologist to testify at the hearing.

To establish the extent and existence of his disability, J-A-'s treating therapist stated that he feared, "forcing J-A- to recount his abusive history in a stressful courtroom environment only serves to perpetuate and increase his distress and anxiety." This view point was affirmed by the expert forensic psychologist, Dr. Arthur Blecher, who testified that "[I]t's hard for him to into agencies where there's going to be somebody in uniform or an authority figure. He is so deeply ashamed and conflicted about his homosexuality."

The Government's Response

At the trial, ICE counsel Molly Henle argued that J-A-'s failure to apply for asylum stemmed primarily from the fact that he did not know he was eligible, which is not a recognized exception to the one-year filing deadline. She also questioned the PTSD diagnosis in part, asserting that, because J-A- was able to perform in society in many platforms, including holding down a job in a family member's small business, maintaining a brief relationship with another man, and previously receiving psychiatric treatment in 2008 after a suicide attempt, he was not suffering from severe PTSD. Due to this high-functioning ability, the government asserted J-A- should have been able to overcome his anxiety to the point where he could have applied for asylum.

This argument is common in cases where PTSD is invoked as a reason why the applicant did not meet the one year filing deadline. Karen Musalo and Marcelle Rice write in "Implementation of the One-Year Bar to Asylum" that "[a]djudicators commonly misunderstand or ignore the phenomena of 'avoidance symptoms' typically experienced by trauma victims who suffer from PTSD. … [s]ome adjudicators conclude that if PTSD did not prevent an applicant from worshiping, giving birth, marrying, working or studying in her first year after arrival, then it cannot have delayed the application for asylum." However, this unfortunate misunderstanding ignores the 'avoidance' effect, where PTSD-victims seek to avoid recounting events which caused previous trauma.

On cross examination, J-A-'s psychiatric witnesses responded that government prosecutors fundamentally misunderstood how PTSD might affect J-A's ability to function in the workplace.

Dr. Arthur Blecher, renowned in the field of PTSD, testified that "[I]n Mr. A's case, if the job enables him to be out in public with people around, he's not going to have any trouble. If the job required him to be, say, enclosed in a room with an authority figure, he probably wouldn't be able to function."

The expert also pointed out that the asylum process was particularly prone to trigger PTSD-related symptoms because it forced the applicant to relive his torture. In J-A-'s case, the prospect of experiencing a panic attack or other similar symptoms produced avoidance behavior that prevented him from talking to an authority figure about his situation until he received professional counseling.

Finally, Attorneys Pederson and Kobler also argued that given the previously discussed circumstances, J-A- applied for asylum within a "reasonable period". In *Taslimi*[18], an Iran native and citizen entered the United States on a visitors visa. Ten-years after first entering the United States, Taslimi began attending prayer services, and converted from Islam to Christianity. Seven months after her religious conversion, and nearly eleven years after her initial entry to the United States as a visitor, Taslimi applied for asylum. In her application, Taslimi stated her religious conversion was a "changed circumstance", and that she would be persecuted in Iran based on her Christian beliefs. The immigration judge granted Taslimi withholding of removal, based on her fear of future persecution, but denied her asylum by finding that Taslimi failed to apply for asylum within a reasonable period of time. Taslimi then petitioned the Ninth Circuit to review her case. The Ninth Circuit ultimately found that Taslimi's delay was reasonable, stating that "we hold that substantial evidence does not support the IJ's determination that the delay between Taslimi's conversion ceremony and her filing of her application for asylum was unreasonable."[19] The Ninth Circuit generally found that her situation warranted withholding of removal, and remanded her case to the Board of Immigration Appeals to determine whether Taslimi merits a favorable grant of asylum, purely based on discretionary grounds.

In the same vein, both attorneys argued that the ten-year filing delay in J-A-'s case was based on an extraordinary circumstance. Both attorneys argued that the ongoing nature of PTSD made it impossible for J-A- to apply for asylum until he sought professional mental health treatment from a therapist. Upon doing so, J-A- applied for asylum almost immediately, a reasonable time period given the nature of his extraordinary circumstance.

In his own words, J-A- said that he "tried to forget about what happened, and I just didn't want people to know about my past," he said at the trial. "Sometimes, right now, when I hear my voice, I cannot [imagine] the real person that was there…I just don't want to have nightmares or flashbacks." Given the nature of his abuse and the asylum process, it is not unreasonable for J-A- to have taken so much time to apply for asylum.

Justice Delayed, but Not Denied

[18] Taslimi v. Holder, 590 F.3d 981, 994 (9th Cir., 2010).
[19] Id.

In her closing argument, attorney Jan Pederson pointed out that the legislative intent in enacting the one-year filing procedural bar to asylum had been to deter fraud and not to punish worthy survivors of horrific abuse and persecution.

“It was totally a fraud consideration,” she argued. “Conservative supporters of this legislation indicated that they would be sure that legacy INS would ensure that people know of the one-year bar by giving them notice upon arrival at the airports in the United States of the one-year right to file for asylum.”

“Of course, I don’t think anybody I’ve ever heard of has been given notice of the one-year filing deadline so, in fact, the Government is violative of the Congressional intent of the bar,” Pederson opined.

Prior to the enactment of the 1996 law, the government perceived that foreign nationals were abusing the asylum process by filing fraud-based claims simply to obtain temporary employment benefits.[20]

Rep. Bill McCollum (R-FL), asserted that, "the Immigration Service would be required to tell people who came in that they could apply for asylum and this is how long it would take. Well it may not be in the legislation but it's certainly going to be in the report language and I think the Immigration Service is going to do that."[21]

Ms. Pederson also made a final plea to end J-A-‘s suffering by granting him a safe haven from persecution in the United States.

“This is the last chance Mr. A has to make his plea, and this court has his life in their hands,” she said. “The court is his last hope for justice and the hope that he may eventually have the doors unlocked from the prison and dungeon in which he has existed and be able to live a normal and safe life in America, free from his internal and external demons.”

After a few tense moments, Judge John Bryant looked out into the rows of supporters and friends and pronounced the words that J-A- had been waiting to hear for almost ten years: “The court will find in its judgment that the extraordinary circumstance, a standard that the regulation sets forth, has been met.”

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[20] Neilson, V., Morris, A., *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal,* 8 N.Y. City L. Rev. 233, 251 (2005).

[21] Comments of Rep. McCollum on Pork (America's Talking Television Broadcast), Nov. 15, 1995, cited in Khandwala, et al, “The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law,” *Imigration Briefings*, August 2005

“Clearly, at the age of 17, I think he was still in his minority chronologically,” Judge Bryant elaborated. “That’s indisputable. Also, the fact of his ability after his experiences in Bolivia that were horrific and barbaric, to which no human should be subjected.”

“Second of all,” Judge Bryant stated, “the Court will find that his severe mental disability, which has been set forth both in documentary evidence and testamentary evidence of the two mental health practitioners, clearly established that his capability of proceeding in a way that would oblige him to fulfill the filing requirement within the one-year period of time is just – he was not capable of that.”

Finally, Judge Bryant agreed with Attorney Pederson’s interpretation of the one-year filing deadline. “I don’t think that Congress intended to disenfranchise the Respondent, who is performing because of a passage of time which the Court will recognize is far longer than many other cases. But the fact is that once he was in a clinically safe and protective environment, and was then instructed as to his capability of applying, the respondent proceeded with dispatch and made an application before the Court.”

Judge Bryant found that J-A- had a severe mental disability that prevented him from filing his application for ten years and that Congress did not intend to disenfranchise legitimate asylees such as Mr. J-A-.

“And, if you’ll permit me my patriotic jingoism, six years from now you’ll be eligible to become a citizen of the greatest republic the world has ever known, the United States of America. The court wishes you a long and happy life.”

The decision was met with applause, and a visible weight seemed to lift from J-A-‘s shoulders. The government waived appeal, cementing J-A-‘s status as an asylee.

A Brighter Future

J-A-‘s story is a sad tale, but also one of hope and promise as he begins his new life in the United States. Unfortunately, so many refugees like him will never have the chance to make this country their permanent home.

The one-year filing deadline, also known to immigration attorneys as the “one year bar to justice,” persists as a stain on the reputation of this immigrant nation.

Through this arbitrary rule, asylum offices and immigration courts continue to prioritize narrow-minded bureaucracy over the welfare and security of real-life human beings. The author’s hope is that J-A-‘s story will encourage other asylum bona find applicants to challenge the erection of the one year bar and

that other Immigration Judges, and the BIA will follow the jurisprudence Judge Bryant exemplified in this decision.

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Redacted filings and the immigration judge decision are available upon request to michelle@usvisainfo.com