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HIV Afflicted Haitians: New Hope When Seeking Asylum

Lynda L. Ford*

I. INTRODUCTION

There is new hope for HIV-positive Haitians who seek asylum in the United States. Historically, these asylum seekers have been limited in the arguments they could advance in order to avoid deportation.¹ Recently, however, a team of lawyers used a new and innovative defense and prevailed in Miami-Dade County Immigration Court.² This successfully presented defense will be referred to as a "reverse" religious persecution argument.

Usually, religious persecution cases involve aliens who are persecuted for beliefs that are unpopular in their home countries causing them to seek asylum in the United States.³ The instant case "reversed" the nature of the claim because the affected alien ("Mr. C-J") is not affiliated with a religion that is subject to persecution in Haiti. Rather, he would have been persecuted by Haitian citizens because of the superstitions and fears promulgated by the voodoo religion towards those afflicted with HIV.⁴ Although there is an argument that this case can be understood as

* Juris Doctor Candidate, May 2005, University of Miami School of Law. I would like to acknowledge the Center for Ethics and Public Service, specifically the Community Health Rights Education group, University of Miami School of Law, for providing me the opportunity to work on this case. I would like to thank Troy Elder, the supervising attorney on the case for giving me the confidence to present this case before the immigration judge. I also would like to thank my wonderful partner in this case, Jennifer Ellis. There are not enough words to thank Dr. Paul Farmer for making the difference with his invaluable testimony regarding this defense. Additionally, I would like to thank Professor Mario Barnes for his insight regarding the writing of this comment. Thanks and love to my family for their support and their belief in me throughout my law school experience. They made this possible.

1. Immigrants infected with a contagious disease, specifically HIV, are excluded from immigrant status as a result of the public health exclusion of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(1)(A)(i) (2004).

2. In Re C-J, No. A72-560-459 (U.S. Dept. of Justice, Exec. Office for Immigration Review, Sept. 1, 2004) (pending publication) [hereinafter "C-J"].

3. See generally, Eric T. Johnson, *Religious Persecution: A Viable Basis for Seeking Refugee Status in the United States?*, 1996 BYU L. REV. 757 (1996). Examples cited in this article regarding religious persecution range from Muslim immigrants from Iran fearing harm because of conversion to Christianity to Jews who were forced to flee Nazi Germany.

4. See generally PAUL FARMER, AIDS AND ACCUSATION: HAITI AND THE GEOGRAPHY OF BLAME (1992).

advancing a defense based on cultural practices, generalized cultural defenses have not been typically successful within the immigration context.⁵ Additionally, these culturally pervasive superstitions stem substantially from the religious practice of voodoo.⁶ Thus, focusing on religion seemed a better strategy than a broader argument revolving around the cultural import of superstition, notwithstanding the fact that religious persecution is an infrequently granted basis for obtaining refugee status in the United States.⁷

Significantly, the immigration judge's decision, in addition to accepting the "reverse" religious persecution arguments, recognized factors which have been posited as relevant in this type of asylum claim by many immigration lawyers and commentators.⁸ These factors include the lack of adequate medical care in Haiti⁹ for those afflicted with HIV and consideration of the humanitarian consequences of not granting the claim.¹⁰ While immigration judges have traditionally been reluctant to use their power of discretion to award asylum for humanitarian reasons,¹¹ this innovative defense of reverse religious persecution gives judges the "teeth" necessary to award asylum to those in need. This decision could initiate a positive change for HIV afflicted Haitians seeking

5. Cultural defenses brought in immigration courts resemble those brought in criminal courts. See e.g., Dana C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1095-1112 (1994). While some courts in the criminal context appear willing to rule that one's behavior can be justified based upon the culture in which one was raised, within the immigration context, courts do not readily accept cultural defenses which allege harm stemming from cultural practices in one's home country. This policy results in aliens being forced back to their home countries even where they face the possibility of rape or torture. See generally Sunny Kim, *Gender-Related Persecution: A Legal Analysis of Gender Bias in Asylum Law*, 2 AM. U. J. GENDER SOC. POL'Y & LAW 107 (1994).

6. See FARMER, AIDS AND ACCUSATION: HAITI AND THE GEOGRAPHY OF BLAME *supra* note 4; Nick Caistor, *Haiti's AIDS and Voodoo Challenge*, BBC NEWS - WORLD EDITION (Nov. 20, 2003), at <http://news.bbc.co.uk/2/hi/americas/3280749.stm> (last visited Jan. 24, 2005) (fighting AIDS in Haiti has meant confronting traditional beliefs in magic).

7. Johnson, *supra* note 3, at 757-58.

8. See generally Lyn G. Shoop, *Health Based Exclusion Grounds in United States Immigration Policy: Homosexuals, HIV Infection and the Medical Examination of Aliens*, 9 J. CONTEMP. HEALTH L. & POL'Y 521 (1993).

9. Lack of medical care is not in and of itself a defense against deportation, as it is not listed among the reasons to grant a waiver for health-related exclusion grounds. See Shoop, *supra* note 8, at 533; accord Faith Pendleton, *The United States Exclusion of HIV-Positive Aliens: Realities and Illusions*, 18 SUFFOLK TRANSNAT'L L. REV. 269, 278 (1995).

10. See Shoop, *supra* note 8 and accompanying text.

11. *Id.* at 533-34.

asylum in this country.¹²

An optimistic view of this decision sees practitioners using the logic supporting the "reverse" religious persecution claim to create defenses for asylum seekers who may experience other types of prejudices in their home countries. Additionally, the fact that this immigration judge utilized his discretion regarding humanitarian issues and adhered to the proper standard of "well-founded fear of persecution"¹³ bodes well for all types of asylum cases. This case, however, is particularly important not only to HIV-infected Haitians currently residing within the borders of the United States, but also to those who are seeking entrance into the United States, as Haitians have historically received unfavorable treatment under U.S. immigration policy.¹⁴

Section II of this article discusses the history of extreme prejudice Haitian refugees¹⁵ have traditionally endured in United States courts when seeking asylum. Section III examines various defenses, both political and cultural, that immigrants have employed when attempting to secure asylum in this country. As a method of exploring the development and applicability of defenses premised upon cultural behaviors within the immigration context, Section III of this article also examines the tactics employed by the legal team that successfully argued for asylum on behalf of Mr. C-J, the HIV-positive Haitian immigrant. After presenting

12. This decision, handed down by the Immigration Court in Miami, Florida, is unpublished. Once published in the Interpreter Releases by the legal team for the applicant, this decision will have persuasive authority that other immigration judges may heed for future decisions in similar cases. It also is important to note that the Department of Homeland Security did not file an appeal.

13. Under the Refugee Act of 1980, ("Refugee Act") one falls into the category of a refugee if he or she is "[a]ny person . . . who is unable or unwilling . . . to avail himself or herself of the protection of [his or her home 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" 8 U.S.C. § 1101(a)(42)(A) (1982). For further explanation, refer to Part II(B)(i), *infra*.

14. See Malissia Lennox, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687 (1993). This article examines the fact that Haitians are excluded from the United States without an examination of their asylum status. Historically, through successive presidencies, including that of Democrat William J. Clinton, Haitians have faced accelerated deportation proceedings, have been placed in prison-like detention facilities for months, and have faced interdiction at sea. The refugees who are intercepted at sea are not even allowed to set foot on U.S. soil, and thus are not entitled to procedures to determine whether or not they qualify for asylum. Thus, a Haitian's best chance of gaining asylum is if he is currently within U.S. borders having escaped both interdiction and detention.

15. The prejudice toward Haitian refugees occurs irrespective of HIV status, inasmuch as non-HIV Haitians are also discriminated against.

the defense used in the case, Section III analyzes whether the result might allow for future applications of innovative strategies and defenses within different immigration proceedings, or whether the decision will be limited to its facts.

This article concludes by suggesting that the defense advanced by this case could allow practitioners to break down the barriers presented to immigrants seeking asylum. For Haitians with HIV, in particular, the decision represents an avenue to gain asylum that has never been available before.

II. NO SAFE HAVEN FOR HAITIANS AFFLICTED WITH HIV

A. *Options For Haitians Under Existing Statutes*

For decades, Haitians seeking asylum in the United States have faced severe prejudice at the hands of government officials.¹⁶ More often than not, Haitians have either been prohibited from entering the United States¹⁷ or repatriated after cursory immigration proceedings within U.S. borders.¹⁸ In those immigration proceedings, Haitians historically have been denied the permanent resident status generally awarded to refugees from other countries.¹⁹ In fact, a recent news report indicates that disdain for Haitian refugees is not limited to the United States but exists throughout the Western Hemisphere.²⁰

In 1998, however, Congress passed the Haitian Refugee Immigration Fairness Act of 1998 ("HRIFA" or "Act").²¹ HRIFA allowed Haitian immigrants, and illegal aliens who had a continuous presence "in the United States since December 1995 to adjust

16. Lennox, *supra* note 14, at 699-700.

17. Joyce A. Hughes & Linda R. Crane, *Haitians: Seeking Refuge in the United States*, 7 GEO. IMMIGR. L.J. 747-48 (1993).

18. *Id.*

19. *Id.* at 779-781. This article points out that Cuban refugees were given permanent resident status during the Mariel Boatlift, while Haitians fleeing the Papa Doc regime were merely given refugee status instead of permanent resident status. See also Cheryl Little, *Intergroup Coalitions and Immigration Politics: The Haitian Experience in Florida*, 53 U. MIAMI L. REV. 717 (1998) (articulating that refugees fleeing from Communist regimes such as China and the former Soviet Union have not faced the kind of discrimination from the Immigration and Naturalization Service ("INS") that Haitians have).

20. See Joe Mozingo, *Migrants' Torment*, MIAMI HERALD, Jan. 23, 2005, at 1A, available at 2005 WL 56509568.

21. Haitian Refugee Immigrant Fairness Act of 1998 ("HRIFA"), Pub. Law 105-277 § 902, 112 Stat. 2681-538 (Oct. 21, 1998) (codified as amended at 8 U.S.C. § 1255 (2005)).

their status to that of lawful permanent residents.”²² This law was passed as the result of the outcry against the inhumane treatment Haitian refugees faced in coming to the United States.²³ To this effect, the purpose of the law was to recognize the plight of Haitians, fleeing horrific conditions in their home country as a result of political unrest and violence, by allowing them to remain in the United States permanently.²⁴ Eligible Haitians²⁵ had until March 31, 2000, to file their applications.²⁶

HRIFA represented relief for a sizeable number of Haitian nationals at that time. There was a problem with the Act, however, affecting some Haitians who otherwise fulfilled all of the criteria. Applicants under the Act remained subject to some inadmissibility provisions that were in effect before HRIFA, codified as a part of the Immigration and Nationality Act (“INA”).²⁷

When a person seeks “immigrant or refugee status, she or he must take an HIV test as part of the overall medical screening process.”²⁸ Therefore, any Haitian who applied under HRIFA had to submit to HIV testing in compliance with this standard.²⁹ The significance of this requirement is that the INA provides that all aliens with HIV are excluded from immigration³⁰ because they have “a ‘communicable disease of public health significance.’”³¹

22. Shayna S. Cook, *The Exclusion of HIV-Positive Immigrants Under the Nicaraguan Adjustment and Central American Relief Act and the Haitian Refugee Immigration Fairness Act*, 99 MICH. L. REV. 452, 454 (2000). For a simplified explanation of how HRIFA operated, see U.S. Dept. of Justice, Immigration and Naturalization Service, *Haitian Refugee Immigration Fairness Act*, available at <http://uscis.gov/graphics/publicaffairs/questsans/hrifaqa.htm> (last visited Jan. 24, 2005).

23. See generally Cook, *supra* note 22.

24. See *id.* at 454. This Act significantly allowed permanent resident status despite the fact the Immigration and Nationality Act (“INA”) considers applicants inadmissible if they entered the United States illegally, or could possibly become public charges. *Id.* at 455.

25. Several of the criteria Haitians had to meet, as specified in § 902(b) of HRIFA, include any Haitian national who: “1) filed for asylum before December 31, 1995; 2) was paroled into the United States prior to December 31, 1995, after having been identified as having a credible fear of persecution, or paroled for emergent reasons or reasons deemed strictly in the public interest; or 3) was a child [unmarried and under 21] at the time of arrival and on December 31, 1995” See Haitian Refugee Immigrant Fairness Act of 1998 (“HRIFA”), Pub. Law 105-277, § 902(b), 112 Stat. 2681-538 (Oct. 21, 1998) (codified as amended at 8 U.S.C. § 1255 (2005)).

26. *Id.*

27. See Immigration and Nationality Act, Pub. Law. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

28. Pendleton, *supra* note 9, at 277; see also 8 U.S.C. § 1201(d) (2005).

29. Cook, *supra* note 22, at 455.

30. See 8 U.S.C. § 1182(a)(1)(A)(i) (2004); see also Pendleton, *supra* note 9, at 276.

31. Pendleton, *supra* note 9, at 276; see also 8 U.S.C. § 1182(a)(1)(A)(i) (2004). The

Although HIV-positive status is a basis for exclusion, there are two medical waivers available within the language of the INA.³² The first of these waivers allows an HIV-positive immigrant to remain if he or she has a qualifying familial relationship with someone living in the United States who is either a U.S. citizen or a lawful permanent resident.³³ The second waiver gives the Attorney General discretion to waive the exclusion of immigrants for humanitarian purposes, to "assure family unity, or when it is otherwise in the public interest."³⁴ If a Haitian immigrant with HIV applied under HRIFA, however, he or she would not have been able to apply for the humanitarian waiver available to others.³⁵ The terms of the Act only allowed for the first waiver.³⁶ Thus, if a HRIFA applicant tested HIV positive and did not have an immediate family member in the United States, who was either a citizen or a lawful permanent resident, deportation was extremely likely. Additionally, although the humanitarian waiver has been available for certain other immigrants, courts have rarely utilized their discretion to grant this waiver.³⁷ Hence, the

legislative purpose for the exclusion of those with HIV and other contagious diseases is ostensibly to prevent the spread of the disease to the American population. See 139 CONG. REC. S1697 (1993). Congress enacted the "Helms Amendment" which statutorily included HIV within the designation of the traditional contagious diseases listed in 8 U.S.C. § 1182(a)(1)(A)(i). See 42 C.F.R. § 34.2(b)(4) (1987) (as amended by 52 Fed. Reg. 21532 (1987)); 42 C.F.R. § 34.2(b) (1994) (*cited in Pendelton, supra* note 9, at 276 nn.35-36).

32. Cook, *supra* note 22, at 453.

33. 8 U.S.C. § 1182(g), states, in pertinent part, that:

The Attorney General may waive the application of —

(1) subsection (a)(1)(A)(i) in the case of any alien who —

(A) is the spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa, or

(B) has a son or daughter who is a United States citizen, or an alien lawfully admitted for permanent residence, or an alien who has been issued an immigrant visa

8 U.S.C. § 1182(g) (1994 & Supp. IV 1999).

34. Shoop, *supra* note 8, at 533; see also 8 U.S.C. § 1157(c)(3) (2002). This section reads, "[T]he Attorney General may waive [the public health exclusion] with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." *Id.*

35. Cook, *supra* note 20, at 455.

36. *Id.*

37. See 8 U.S.C. § 1182(g) (1994 & Supp. IV 1999). "The Attorney General can grant a waiver . . . at his or her discretion . . . [,] [h]owever, . . . [this] discretionary [power] . . . will not be [implemented] unless the applicant can establish that: 1) the danger to the public health of the United States created by the alien's admission to

current status of the law does not bode well for Haitians whose tenuous procedural status is underscored by the extreme prejudice and hostility they have traditionally faced in this country.

B. *The Option of Asylum*

Currently, a last avenue for a Haitian immigrant with HIV exists in the form of an application for asylum once he or she is in either deportation (exclusion) proceedings.³⁸ Asylum is particularly attractive to immigrants because it is universal, and "an alien cannot be deported while [holding] valid asylum status."³⁹ Additionally, once asylum has been granted, an immigrant may apply for "legal permanent resident ("LPR") status."⁴⁰

i. Obtaining Refugee Status

The first step necessary to be considered for asylum is that the alien must be deemed a refugee. Therefore, to qualify for asylum, Haitians must assert that they qualify for refugee status. Under the Refugee Act of 1980, ("Refugee Act")⁴¹ one falls into the category of a refugee if he or she is "[a]ny person who is . . . unable or unwilling to avail himself or herself of the protection of [his or her home country] because of persecution or a well-founded fear of

the U.S. is minimal; 2) the possibility of the spread of the infection created by the alien's admission to the U.S. is minimal; and 3) there will be no cost incurred by any level of government agency of the United States without the prior consent of that agency." Danna Delgado Stempniak, *Seeking Asylum Status for HIV-Positive Aliens Based on Membership in a Persecuted Social Group: An Alternative to Overturning the United States' Exclusion of HIV-Positive Aliens from Immigration*, 24 S. ILL. U. L. J. 121, 124, 124 n.24 (1999). The individual must not be seen as having the potential to "become a public charge in order for [him or her] to be admitted . . . [under the] waiver." *Id.* For most Haitians seeking refuge, this would be an impossible task.

38. HIV positive immigrants have little to no political power in the United States. There is almost no hope of removing the HIV-positive exclusion in immigration law. See Stempniak, *supra* note 37, at 121-22. Congress has the power to regulate immigration and "[t]he judiciary has described that power . . . as 'plenary,' 'almost exclusive' and subject to the most 'minimal judicial review.'" Pendleton, *supra* note 9, at 288; see also *Cabasug v. Immigration & Naturalization Serv.*, 847 F.2d 1321, 1327 (9th Cir. 1988). Thus, without political clout to fight at the law making level, immigrants are given no voice to combat America's prejudice against those with HIV who are trying to gain admittance to or remain in the United States. Application for asylum remains the only avenue for these individuals.

39. Inna Nazarova, *Alienating "Human" From "Right:." U.S. and U.K. Non-Compliance with Asylum Obligations Under International Human Rights Law*, 25 FORDHAM INT'L L.J. 1335, 1378 (2002).

40. *Id.*

41. Refugee Act of 1980, 8 U.S.C. § 1101(a)(42)(A) (1982).

persecution on account of race, religion, nationality, membership in a particular social group or political opinion."⁴²

Outside of the claim of "reverse" religion persecution, which is the focus of this article, HIV-positive applicants have theoretically been capable of seeking asylum predicated upon persecution as members of a particular social group.⁴³

In order to be granted asylum based on membership in a persecuted social group, the applicant must demonstrate: "1) the presence of a 'common characteristic'⁴⁴ that 2) is either 'immutable'⁴⁵ or so 'fundamental to identity' as to make it unfair to ask people to change the characteristic,⁴⁶ 3) a 'well founded fear of persecution,'⁴⁷ and 4) harmful intent on the part of the government of the home country or group within the home country that the government is unwilling to control, toward the alien due to the 'common characteristic' claimed by the alien."⁴⁸

ii. Common Characteristics, Fundamental to Identity

HIV-positive immigrants have a "common characteristic," which is immutable, since there is no cure for HIV/AIDS.⁴⁹ Additionally, the requirement that the common characteristic be a fundamental part of one's identity is met because HIV-positive people tend "to form voluntary associations for support," medical information updates, and "political action for anti-discrimination rights."⁵⁰

The Department of Homeland Security ("DHS")⁵¹ articulated that while it could not expand on the statutory definition of "persecuted social group" to include HIV-positive individuals, it would

42. Stempniak, *supra* note 37, at 128-29.

43. *Id.* at 129.

44. *Id.* (citing *Sanchez-Trujillo v. Immigration & Naturalization Serv.*, 801 F.2d 1571, 1577 (9th Cir. 1996)).

45. *Id.* (citing *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985)).

46. *Id.* (citing *Sanchez-Trujillo*, 801 F.2d at 1576).

47. *Id.* (citing Arthur Helton, *30th Annual Immigration and Naturalization Institute Criteria and Procedures for Refugee Protection in the United States*, 1021 PLI/CORP 243, 247 (1997)).

48. *Id.* (citing Peter Margulies, *Asylum, Intersectionality and AIDS: Women with HIV as a Persecuted Social Group*, 8 GEO. IMMIGR. L.J. 521, 548-52 (1994) (citing T. ALEXANDER ALEINIKOFF, *The Meaning of "Persecution" in U.S. Asylum Law*, in *REFUGEE POLICY: CANADA & THE UNITED STATES* 292 (Howard Adelman ed., 1991))).

49. *Id.* (citing Margulies, *Asylum, Intersectionality and AIDS: Women with HIV as a Persecuted Social Group*, *supra* note 48, at 548).

50. *Id.* (citing *Sanchez-Trujillo*, 801 F.2d at 1577).

51. The Department of Homeland Security was formerly the Immigration Naturalization Service, and is referred to as such in older articles.

decide the claims on an individual "case-by-case basis."⁵² The DHS, however, has additional criteria which must be applied to determine whether HIV-positive asylum seekers are members of a persecuted social group: "1) If the practice of a home country is to treat all HIV-positive persons as a group; 2) If persecution exists in the home country for the HIV-positive persons; and 3) If the motive of the government of the home country is to seek to harm the person because of membership in that group."⁵³

iii. A Well Founded Fear of Persecution

Once established as a member of a particular social group, the applicant must show a well-founded fear of persecution.⁵⁴ There are competing ideas concerning an objective versus a subjective standard for determining a well-founded fear. The government tries to keep the subjective element out of the equation and would impose two requirements: 1) that the asylum seeker's testimony is corroborated; and 2) "proof that persecution is more probable than not if the asylum-seeker is forced to return" to his or her native country.⁵⁵ This clear probability standard often obstructs the attainment of refugee status because it requires the presentation of specific, objective facts, which usually show the likelihood of experiencing physical violence.⁵⁶

Squarely in the corner of the subjective standard, however, is *INS v. Cardoza-Fonseca*.⁵⁷ In this case, the Supreme Court articulated the "well-founded fear standard" more liberally, "requir[ing] only a showing of a good reason to fear persecution."⁵⁸ The Court further stated that, "the Refugee Act⁵⁹ d[oes] not require an asylum applicant to prove that it was more probable than not that []he would be persecuted if []he returned to h[is] country of origin."⁶⁰ "[T]he Court held that even a ten-percent chance of perse-

52. Stempniak, *supra* note 37, at 131.

53. *Id.* Two caveats exist when a refugee is attempting to establish himself as a member of a persecuted social group: 1) a lack of adequate medical care in his country of nationality does not rise to persecution of the particular social group; and 2) mere social ostracism does not rise to the level of persecution of the social group.

54. Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3, 5 (2000).

55. *Id.*

56. Anthony Asuncion, *INS v. Cardoza-Fonseca: Establishment of a More Liberal Asylum Standard*, 37 AM. U. L. REV. 915, 918 (1988).

57. 480 U.S. 421 (1987).

58. Asuncion, *supra* note 56, at 918-19.

59. See Refugee Act of 1980, 8 U.S.C. § 1101(a)(42)(A) (1982).

60. Margulies, *Democratic Transitions and the Future of Asylum Law*, *supra* note 54, at 14.

cution would constitute a 'reasonable possibility' of persecution within the meaning of the statute" – from the applicant's perspective.⁶¹

iv. Persecution and Changed Conditions

In some cases, there is an additional requirement that one prove the fear of persecution is unaffected by changed country conditions.⁶² If an applicant has not been the direct target of past persecution in his homeland, he carries "the burden of proof . . . to show he will be persecuted in the future."⁶³ Therefore, his burden will include demonstrating "that country conditions have not changed in a manner material to his asylum claim."⁶⁴ Conversely, if the applicant has demonstrated past persecution, the government must then prove a change in country conditions.⁶⁵ Unfortunately, the trend in proceedings is that the asylum-seeker must prove changed conditions with more specificity and certainty than the government does, thus narrowing the significance of the subjective standard.⁶⁶

Taken together, the burdensome requirements of proving group membership, the more arduous objective standards of persecution, and the conditions of one's home country, have severely decreased the likelihood of gaining asylum based upon membership in a persecuted social group. Advancing this claim alone would not likely have produced a victory in the case of Mr. C-J.

III. HAITI – A UNIQUE CULTURE BRINGS ABOUT A UNIQUE DEFENSE

A. *The "Reverse" Religious Persecution Defense*

i. The Legal Predicament of HIV Positive Haitians Calls for a New Defense

Today, it appears that Haitians in the United States are in the same traditional predicament. Since the time for filing for HRIFA expired in 2000, one can only surmise that HIV-negative Haitians will face the old prejudices,⁶⁷ keeping them from success-

61. *Id.*

62. *Id.* at 18.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. See generally Lennox, *supra* note 14. This article discusses the fact that the history of racism in this country plagues the Haitian people, particularly because of

fully petitioning for asylum even in the face of the most recent bloody coup.⁶⁸ For Haitians with HIV, the option of asylum is quite narrow due to the rigidity of previously discussed immigration criteria and as a result of both specific societal prejudice and a general governmental reluctance to grant asylum to any applicant based on humanitarian reasons.⁶⁹

Under these circumstances, Mr. C-J's legal team recently puzzled over how to advance a novel asylum claim similar to arguments which had been previously denied.⁷⁰ Mr. C-J is a Haitian national who has resided in the United States since 1992. He suffered an injury to his foot while working in the fruit fields of Immokalee, Florida.⁷¹ Due to lack of medical care and attention, the foot became gangrenous and he subsequently suffered a partial amputation.⁷² It was at this time Mr. C-J learned he was HIV-positive.⁷³

Mr. C-J ultimately applied for permanent legal resident sta-

the slave practice that linked the United States and Haiti. Thus, the arrival of Haitians into the United States has always been subject to disapproval. The U.S. government has justified its policies on non-racial grounds by stating that Haitians are economic, not political refugees. The United States takes the position that Haitians are fleeing for purely economic reasons, and as such, do not qualify for refugee status. Additionally, Haitians are not escaping a Communist regime. Despite the bloody political history, in much of which the United States has aided, the United States does not welcome the oppressed from Haiti in the manner it has welcomed the oppressed from communist regimes.

68. A violent coup took place in February 2004, overthrowing Jean Bertrand Aristide. Since that time, lawlessness and violence have ensued with seemingly no real direction towards an organized peaceful government.

69. The problems with seeking asylum in the United States are neither confined to Haitians nor to those afflicted with HIV/AIDS. Women have traditionally been denied protection because the persecution they suffer in their native countries does not fit into any of the categories: "race, religion, nationality, membership in a social group, or political opinion." Kim, *supra* note 5, at 109.

After the attacks on the World Trade Center and the Pentagon on September 11, 2001, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA Patriot Act"). Nazarova, *supra* note 36, at 1386. This legislation did not meet favor with human rights and civil liberty organizations. *Id.* Besides making entry into the United States for all aliens, the USA Patriot Act essentially broadened the class of people that could be removed on terrorism grounds and broadened the meaning of terrorist activity. *Id.* at 1387.

While the 1990 Immigration Act finally "removed the explicit reference to homosexuality from the specific exclusion grounds," homosexuals still face extreme prejudice in asylum proceedings. Shoop, *supra* note 8, at 539.

70. See *C-J*, No. A72-560-459 (Sept. 1, 2004).

71. *Id.*

72. *Id.*

73. *Id.*

tus under HRIFA,⁷⁴ and properly disclosed his HIV-positive status.⁷⁵ This status rendered him immediately deportable from the United States.⁷⁶ As this gentleman had no immediate family residing in the United States who are either citizens or legal permanent residents, he did not qualify for the medical waiver available under HRIFA.⁷⁷

Based on his HIV-positive status, Mr. C-J sought asylum as a member of a persecuted social group.⁷⁸ Unfortunately, he did not have many factors in his favor that traditionally convince immigration courts to grant asylum: no political affiliations that would place him in danger, nor any specific instances of violence towards him while in Haiti. He was further disadvantaged by the fact that the partial amputation of his foot rendered it almost impossible for him to work as a laborer. His inability to work made him essentially a public charge to the state, which created a major obstacle to a discretionary grant of asylum.⁷⁹

In light of all of these unfavorable factors, and with the understanding that Haitians wield very little social capital in American society, the legal team came up with a creative argument. Using a "reverse" religious persecution argument, the team focused not only on his HIV status as a member of a particular social group, but on Haiti's unique religious practice of voodoo.

ii. The Mechanics of the "Reverse" Religious Persecution Defense

Voodoo is a constitutionally recognized religion in Haiti.⁸⁰ Roughly "[t]wo-thirds of Haiti's eight million people are [reported]

74. The client met all of the criteria to apply for HRIFA: he had maintained a continuous presence in the United States since 1995 and had applied for asylum before 1995, which placed him in one of the five eligible classes of people who could apply.

75. The application process for HRIFA required that a refugee disclose his HIV status. See San Francisco AIDS Foundation & National Immigration Project of the National Lawyers Guild, *HIV/AIDS and Immigrants: A Manual for Service Providers* 18-22 (2004 ed.), available at http://www.nationalimmigrationproject.org/HIV/2004HIVManual/HIVpdfno_brwn.pdf.

76. See 8 U.S.C. § 1182(a)(1)(A)(i) (2004).

77. See 8 U.S.C. 1157(c)(3) (2002); See also *supra* text accompanying note 33.

78. Persecution must fall into one of five categories: "race, religion, nationality, membership in a social group, or political opinion." Kim, *supra* note 5, at 109; Stempniak, *supra* note 37, at 128-29.

79. Stempniak, *supra* note 37, at 124.

80. Paisley Dodds, Associated Press, *Haitians Drum Up voodoo Spectacular* (Apr. 11, 2004), available at <http://www.heritagekonpa.com/Haiti%20archives/Haitian%20voodoo%20show.asp> (last visited Feb. 13, 2005).

to practice voodoo.”⁸¹ The theory behind the “reverse” religious persecution argument is that, as a social group, those infected with HIV are especially persecuted by a Haitian population marked by religious superstitions and suspicions concerning this disease.⁸² This defense works because it fits the DHS’s criteria that HIV-positive persons must be treated as a distinct group in their home country, that persecution exists for these people, and since voodoo is a governmentally recognized religion, the government may be implicated in condoning the mistreatment of this social group.⁸³

Interestingly, the United States infrequently grants asylum based on religious persecution despite this country’s own history of protecting religious freedom.⁸⁴ As with all asylum cases, a person seeking it on the grounds of religious persecution must show that he is without his country’s protection and he has a well-founded fear of persecution because of a religious belief and/or practice.⁸⁵ Thus it may be contended that even if a government holds itself out as trying to prevent bad acts on the part of the part of its people, but is unable to do so, persons fleeing that country on account of that persecution will be considered refugees.⁸⁶

As discussed in Section II(B), *infra*, it is the second requirement, that one have a well-founded fear of persecution, which is typically the dominant and narrow focus for U.S. courts in an asylum hearing.⁸⁷ Usually, the alien is required to demonstrate that due to the membership, that either he, she, or a close relative is personally imperiled.⁸⁸ Though the proffered defense was not classically within the ambit of religious persecution doctrine, this avenue seemed to present a significant opportunity to claim specific persecution of a person with HIV by members of a particular religion, as opposed to styling a broader claim based on cultural behavioral practices in Haiti.

81. *Id.*

82. See Caistor, *supra* note 6; See also Carol J. Williams, *An Epidemic Built on Ignorance: Haiti’s AIDS Crisis Rages On, Fueled by Superstition and Prejudice. Political Divisions Limit Access to Lifesaving Medications*, LOS ANGELES TIMES (Jan. 29, 2004), available at <http://www.aegis.com/news/lt/2004/LT040111.html> (discussing the discrimination towards HIV-positive individuals in the workforce, as well as patients being denied treatment in hospitals because of their HIV-positive status).

83. Stempniak, *supra* note 37, at 131.

84. Johnson, *supra* note 3, at 758.

85. *Id.* at 760.

86. *Id.*

87. *Id.*

88. *Id.* at 763.

Based on this approach, for Mr. C-J as an HIV-infected Haitian, the team crafted a multi-faceted defense alleging that he was eligible for two of the five categories for asylum – as a member of a persecuted social group and as a person subject to a type of religious persecution. The combination of two categories proved very difficult for the court to ignore.

Perhaps because of the many interlocking aspects of this defense, important peripheral issues were brought to the court's attention.⁸⁹ These issues included reference to the lack of adequate medical care which is truly at crisis level in Haiti. Additionally, evidence was introduced on social ostracism, which did not alone rise to the level of conduct our government would deem persecution, but still would be devastating to the Haitian national.⁹⁰

iii. Substantive Evidence from the Case of Mr. C-J

Significantly, the legal team enlisted the assistance of Dr. Paul Farmer,⁹¹ who has written books regarding the plight of those with HIV/AIDS in Haiti,⁹² and is an invaluable source of information on this subject.⁹³ With regard to AIDS-related sorcery accusations, he indicated that many Haitian nationals believe that sickness can be "sent" from an infected person to another.⁹⁴

89. See *C-J*, No. A72-560-459 (Sept. 1, 2004).

90. See generally Roosevelt Jean-Francois, Centre for Communication on AIDS (CECOSIDA), *The Right to Life for People Living with HIV/AIDS in Haiti*, PANOS INST. (July 2002), available at <http://www.panosinst.org/productions/haitibriefings/h-06-e.php> (last visited Jan. 24, 2005) (discussing the socio-economic trauma and overwhelming discrimination towards those who are HIV-positive even within the family).

91. Paul Farmer, M.D., Ph.D., Maude and Lillian Presley Professor of Medical Anthropology, Department of Social Medicine, Harvard Medical School. Dr. Farmer is both a medical doctor as well as an anthropologist. He specializes in both infectious diseases and is chief of the division of social medicine and health inequalities at the Brigham and Women's Hospital in Boston, Massachusetts. He is also the medical director of a hospital, the *Clinique Bon Sauveur* in rural Haiti. Dr. Farmer is the founding director of Partners in Health which is an international charity organization that provides direct health care services and undertakes research and advocacy activities on behalf of those who are sick and living in poverty.

92. See generally FARMER, *AIDS AND ACCUSATION: HAITI AND THE GEOGRAPHY OF BLAME*, *supra* note 4; PAUL FARMER, *INFECTIONS AND INEQUALITIES: THE MODERN PLAGUES* (1999).

93. Dr. Farmer testified on behalf of the client in *In Re C-J*, No. A72-560-459 (Sept. 1, 2004). His testimony was invaluable, as it educated the judge on the truly horrific conditions in Haiti and the plight of those affected by HIV/AIDS.

94. See FARMER, *AIDS AND ACCUSATION: HAITI AND THE GEOGRAPHY OF BLAME*, *supra* note 4, at 199, 204 (suggesting that in Haiti, where resources are scarce and competition for material goods is high, there is a socialization of envy; those afflicted with AIDS are thus seen to have "sent" the illness onto another because of jealousy).

Identifying the “sorcerer” who sent the illness to others is paramount, and consultations with voodoo priests or priestesses are conducted in order to track down the sender.⁹⁵

Another deeply rooted suspicion exists within Haitian nationals concerning the disease and its origins in the United States.⁹⁶ Haitians harbor discrimination towards Haitian nationals who return to the country from America who are infected with HIV due to the belief that the United States sent AIDS to Haitians (and upon Haiti) in order to enslave the population.⁹⁷

Even with Dr. Farmer’s research, it was vital that the information be presented to the court in a way that established the client’s well-founded fear of future persecution. Though the Supreme Court in *INS v. Cardoza-Fonseca*⁹⁸ set an arguably subjective standard inasmuch that even a miniscule chance of persecution would constitute a well-founded fear, in practice the refugee must satisfy a more compelling notion of what it means to be persecuted. As discussed earlier, mere social ostracism is not enough.⁹⁹

Though there is no precisely articulated standard, most courts seek concrete examples when determining what constitutes persecution, such as actual instances of physical violence. Moreover, there has been a push from the U.S. government to require corroborative objective evidence.¹⁰⁰ Immigration courts commonly expect written evidence from other countries regarding conditions.¹⁰¹ In certain situations, this type of evidence is nearly unobtainable.

In addition to corroboration, the government seems to require the existence of a relationship between a testifying witness and the country at issue. Therefore, the government will not be satisfied by general accounts of what happens to members of a certain social group. Rather, the DHS wants to hear that either the refugee, or the witness delivering the corroborating evidence, has

95. See FARMER, INFECTIONS AND INEQUALITIES, *supra* note 92, at 158-83.

96. See FARMER, AIDS AND ACCUSATION: HAITI AND THE GEOGRAPHY OF BLAME, *supra* note 4, at 208-28.

97. *Id.* at 229-243.

98. See *Cardoza-Fonseca*, 480 U.S. 421 (1987).

99. See generally Stempniak, *supra* note 37; see also *supra* text accompanying note 53.

100. See Margulies, *Asylum, Intersectionality, and AIDS: Women with HIV as a Persecuted Social Group*, *supra* note 48, at 548-52.

101. Telephone Interview with Troy Elder, Clinical Assistant Professor of Law and Supervising Attorney at Florida International University, in Miami, FL (Apr. 7, 2005).

some personal knowledge of the event described. For someone such as Mr. C-J, this would typically be very difficult since he has been in the United States for nearly twelve years.¹⁰²

To rebut the propriety of this requirement, the legal team drew the court's attention to the decision in *In re Mogharrabi*.¹⁰³ That case held "an asylum applicant's uncorroborated testimony can support [the claim] if the testimony is, 'believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear.'"¹⁰⁴ If the asylum seeker's uncorroborated testimony is the basis for the claim, his success likely hinges upon what the judge will accept as "sufficiently detailed" evidence.

In accordance with the holding in *In re Mogharrabi*, Dr. Farmer testified to the poor conditions in Haiti and the recent violence and lawlessness due to the coup.¹⁰⁵ He further testified that even though he runs a clinic in Haiti, Mr. C-J's drug resistant HIV could not be treated there since the country does not have adequate medication and treatment for patients with that type of HIV/AIDS.¹⁰⁶

The judge in the case listened intently and asked questions in order to educate himself.¹⁰⁷ This is particularly significant because the conditions mentioned thus far have traditionally been considered peripheral and not an adequate basis to justify asylum on their own.

In addition to the claim that Mr. C-J was a member of a persecuted social group, the novel thrust of the defense was that because of the prevalence of voodoo, Mr. C-J had a well-founded fear of persecution due to superstition and sorcery.¹⁰⁸ Dr. Farmer testified that he knew the population was incredibly fearful of and discriminatory towards those afflicted with HIV/AIDS.¹⁰⁹ Although the population that recognizes voodoo is vast, even those who do not practice the religion seem to subscribe to the superstitions that accompany it.¹¹⁰ Therefore, it is likely that someone

102. See *C-J*, No. A72-560-459 (Sept. 1, 2004).

103. *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

104. Margulies, *Democratic Transitions and the Future of Asylum Law*, *supra* note 55, at 15 (citing *Mogharrabi*, 19 I. & N. Dec. at 445).

105. See *C-J*, No. A72-560-459 (Sept. 1, 2004).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

afflicted with HIV/AIDS will be subject to the same treatment from a non-voodoo practitioner as from an active voodoo practitioner.¹¹¹

The DHS questioned Dr. Farmer repeatedly about whether he actually knew or could recount any specific instance first hand.¹¹² Additionally, the government suggested that threat of actual physical violence was necessary to support a claim of "persecution" that would place the refugee in reasonable fear.¹¹³ In response to the government's questions, Dr. Farmer referred to an instance of a young man in Saint-Marc, Haiti, who had openly declared himself to be infected with the AIDS virus.¹¹⁴ The villagers booed and avoided the young man within his own neighborhood, with their behavior culminating in a near lynching.¹¹⁵

Previous cases indicated that this story would be the type of specific example a refugee could use to establish the existence of a well-founded fear of persecution. The attorney for DHS, however, pressed Dr. Farmer about the incident.¹¹⁶ The attorney wanted to know whether Dr. Farmer had actually witnessed the attack on the young man.¹¹⁷ He testified he had not, but he did meet the young man in question at an AIDS conference having already heard of the incident shortly after it occurred.¹¹⁸ Dr. Farmer was pressed about what, if any, violence he had actually witnessed against someone with HIV/AIDS.¹¹⁹ The tenor of the questions indicated that if he had witnessed anything less than outright physical violence this would not be considered to rise to the level of "persecution" for which the courts typically look.

In Haiti, to lose family support is also considered a type of persecution. Dr. Farmer further elaborated on the importance of family support in a very impoverished socio-economic structure.¹²⁰ He testified that to be cast from one's family, especially in Mr. C-J's case, where he is incapable of working to support himself, Mr. C-J would end up on the streets and die within weeks.¹²¹

All of the government's questioning indicated that demon-

111. *Id.*

112. *Id.*

113. *Id.*

114. See Jean-Francois, *supra* note 90.

115. *Id.*

116. See C-J, No. A72-560-459 (Sept. 1, 2004).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

strating a well-founded fear of persecution means meeting more than a subjective ten-percent standard.¹²² The questioning indicated that though the standard is a "reasonable fear," the government and court expect to hear about "actual fear" as supported by known instances of violence. Faced with such a steep requirement, unless he or she has suffered past persecution, most commonly in the form of physical violence, the average refugee does not stand much chance of establishing the standard of fear the courts constructively require.

Given the U.S. government's rigorous standard, the defense needed to tie Mr. C-J's fear of persecution to Haiti's condition of existing voodoo practices and superstitions to fulfill all of the elements required for the grant of asylum. Therefore, using persecution from a religious group as a tool helped attain asylum where other factors like ostracism and violence are likely but alone not sufficient for a favorable finding. Additionally, the generally poor conditions of Haiti, and the instability of the government are not harmful solely to sufferers of HIV/AIDS, and as such, one cannot argue that those conditions present a unique harm to members of that particular social group.

After listening to and questioning Dr. Farmer himself, the judge granted asylum status to Mr. C-J. The judge orally declared that due to the practice of sorcery fostering an overall suspicious nature that surrounds the practice of voodoo, the religion fostered discrimination against those with HIV that rose to the level of persecution.¹²³ He further ruled that the client had met his burden of demonstrating a well-founded fear of persecution.¹²⁴

Beyond acknowledging the validity of the "reverse" religious defense, the judge also stated a humanitarian basis for his decision. He articulated that given the deplorable conditions in Haiti, both due to poverty and the recent coup, he could not, in good conscience, send a man back who would be cast out of his family and possibly his village.¹²⁵ Such a decision would result in Mr. C-J dying a heinous death on the streets.¹²⁶ Further, the judge also recognized the lack of medical care available to the applicant as a consideration for his final ruling.¹²⁷

122. Margulies, *Democratic Transitions and the Future of Asylum Law*, *supra* note 54, at 14.

123. *See C-J*, No. A72-560-459 (Sept. 1, 2004).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

B. Future Implications Stemming From This Decision

i. Help for HIV-Positive Haitians and Other HIV-Positive Nationals Who Are Persecuted Due to Religious Beliefs about HIV Status

This ruling is quite a victory for HIV-positive Haitians who have previously had few viable arguments for remaining in the United States. While opinions in immigration proceedings are not binding, once published, they are persuasive to other judges, as well as setting precedent within that particular judge's chambers. This "reverse" religious persecution defense could signal a change in the scope of evidence that may be introduced to prove asylum claims.

Haitians, especially those afflicted with HIV, and other individuals may benefit from this decision. Certainly, any HIV-positive asylum seeker from a country where religion supports persecution and ostracism could make a similar claim.

ii. Women Facing Religiously Motivated Persecution

More generally, women and homosexuals comprise two groups of asylum seekers who might also benefit from this decision. Specifically, women who have faced atrocities in their home countries such as rape and genital mutilation have been denied asylum based on more generally styled cultural defenses.¹²⁸ Because the status of being female does not fall into one of the five enumerated categories: "race, religion, nationality, membership in a particular social group, or political opinion,"¹²⁹ typically, these women were denied refugee status and subsequent asylum. The category of political opinion has been most frequently employed on behalf of women. Courts, however, have consistently denied asylum to women, despite evidence of violence towards them based upon their political beliefs or the beliefs of their families.¹³⁰

Recently, there have been efforts to style women's asylum cases in two ways: 1) women as the victims of political persecution; or 2) women as members of a particular social group. A Guatemalan woman who fled to the United States after enduring extreme physical violence at the hands of her husband has waited for ten years for a grant of political asylum because Guatemalan

128. Kim, *supra* note 5, at 108; see also *supra* text accompanying note 5.

129. *Id.* at 109.

130. *Id.* at 119-20.

officials would not act on her behalf.¹³¹ Though Acting Attorney General John Ashcroft intervened in the case two years ago, he sent it back to the Board of Immigration Appeals.¹³²

Ashcroft wants the Justice and Homeland Security Departments to create rules that will encompass asylum claims for domestic abuse.¹³³ Although a painfully slow process, this could be a real breakthrough for women as victims of abuse. As an alternative to recognizing women as victims of political persecution, perhaps the courts will one day recognize abuse victims as members of particular social group. When this happens, cultural defenses using the rationale of a "reverse" religious defense could be employed.

Breaking another traditionally tough barrier, courts have recently allowed women, fleeing their home countries in order to escape female genital mutilation, to demonstrate a well-founded fear of persecution as members of a particular social group.¹³⁴ While this is encouraging, the U.S. courts still seem to be reluctant to grant asylum to this class of women as well. This could be because of the judicial fear, also articulated with respect to women in domestic violence situations, that once grant of asylum of this nature is allowed there will be a floodgate of applicants.¹³⁵ The second possible reason is that because claims of this nature are sensitive and embarrassing to the young women involved, petitioners may have difficulty discussing their cases in front of the court. Thus the court easily dismisses the claim for lack of a well-founded fear of persecution.¹³⁶

Given the nature of *In re C-J*, however, a practitioner could represent a woman in a gender-related persecution claim by tying together the general deplorable treatment of women in a particular culture with a claim that an extremist religious sect within the country advocates the type of violent subordination at issue.

Given the recent willingness to allow the few claims under

131. Frank Davies, *Ashcroft Won't Decide Battered Wife Case*, MIAMI HERALD, Jan. 22, 2005, at 5A.

132. *Id.*

133. *Id.*

134. Eva N. Juncker, *A Juxtaposition of U.S. Asylum Grants to Women Fleeing Female Genital Mutilation and to Gays and Lesbians Fleeing Physical Harm: The Need to Promulgate an INS Regulation for Women Fleeing Female Genital Mutilation*, 4 J. INT'L LEGAL STUD. 253, 258 (1998); see also Layli Miller Bashir, *Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law*, 4 AM. U. J. GENDER SOC. POL'Y & L. 415, 447-48 (1996).

135. Bashir, *supra* note 133, at 452.

136. *Id.* at 452-53.

more general principles, the courts can now more realistically entertain claims of women from countries where genital mutilation is religiously motivated. Therefore, the ability to align cultural claims that are based on religious practice in the home country with a defense that outlines other forms of cruelty steeped in religious practices may further open up asylum to many women who are not able to articulate a well-founded fear of persecution.

iii. Homosexuals Who Are Subject to Religiously Motivated Persecution

With the escalation of HIV infection, homosexuals have been discriminated against in asylum cases.¹³⁷ Like women, homosexuals have traditionally been denied the protection of all of the five categories necessary to be declared a refugee.¹³⁸ Unlike women in general, however, homosexuals, as a class, have been granted the status of being a member of a particular social group.¹³⁹

If a homosexual is HIV-positive, a case for asylum appears to mirror that traditionally experienced by an infected Haitian. There appears to be little hope of remaining in the United States since exclusion based on the communicable disease is almost assured. Worse still, court decisions appear to reflect the sentiment that because discrimination against homosexuals and AIDS is so widespread in many cultures, the standard to prove a reasonable fear of persecution is extremely high. The decisions seem to suggest that these people will be shunned anywhere, including the United States; so why grant asylum?

A recent newspaper article demonstrates that individuals afflicted with AIDS in South Africa¹⁴⁰ are shunned in much the same way as Haitians with AIDS. Since stigma concerning AIDS is widespread, and the effect of being shunned by family who could help support the sick individual in a poorer country is tantamount to a horrific death sentence, a court could read *In re C-J* in its broadest sense and incorporate the humanitarian aspects of the decision based on the culture's tendency to shun HIV positive individuals. Although the instant decision should be pushed to its

137. See Shoop, *supra* note 8, at 521-22. The nexus between HIV/AIDS and homosexuals sparked a policy excluding homosexuals in the interest of preventing the spread of HIV.

138. *Id.*

139. *Id.*

140. Craig Timberg, *In S. Africa, Stigma Magnifies Pain of AIDS; Many Still See Disease as Fatal, Shameful*, WASH. POST, Jan. 14, 2005, at A14, available at 2005 WL 56293623.

broadest possible holding, since many countries shun those with HIV/AIDS, whether homosexual or not, it may have been critical that the legal team for Mr. C-J linked the rejection to voodoo in order to prevail.

Therefore, it may be vital when litigating a case where a homosexual is seeking asylum¹⁴¹ to investigate if the individual is from a country that is particularly religious or is dominated by an unyielding religious attitude to best present the "reverse" religious argument, in addition to the cultural tendency to discriminate against that particular social group. This would help demonstrate the well-founded fear of persecution, even if that individual had not suffered violence first hand for merely being homosexual.

The above examples involving women and homosexuals are just two instances where the victorious defense from *In re C-J* could be employed elsewhere. The examples, however, do not represent the only types of claims possible. Given the result in the case, there may be many populations to whom the theory applies. Or, in the alternative, the possibility may even exist for other cagey legal teams to "reverse" others of the enumerated categories which provide the basis for asylum.

No matter what the claim is, however, for any defense dealing with asylum under any of these conditions, it is highly recommended that an expert be present in court to help educate the judge, or at the very least, lend an objective voice to the proceeding. Dr. Farmer's presence at Mr. C-J's hearing proved invaluable, and perhaps indispensable.

IV. CONCLUSION

The defense used in *In re C-J* is an innovative use of a religious persecution argument because of its "reversed" nature. Typically, people seek asylum for religious purposes because they practice a particular religion that is not condoned or tolerated within their native land. In this case, the client was being religiously persecuted, not because of his beliefs, but because of how the voodoo religion promotes suspicion and fear of those afflicted with HIV in Haiti.

Practitioners should use the logic which supports the "reverse" religious persecution claim to create defenses for asylum seekers who may experience other types of prejudices in their

141. This applies whether or not an individual seeking asylum is HIV-positive.

home countries. Additionally, the fact that the immigration judge utilized his discretion regarding humanitarian issues and adhered to the proper standard of “well-founded fear of persecution” as set forth by the Supreme Court, bodes well for all types of asylum cases in the future.