



Closing Arguments

By Professor Stacy Caplow

A Safe Harbor for Transgender Immigrants

The Law School's immigration clinic works to expand granting of asylum

» Growing up in a Central Asian republic of the former Soviet Union, Karla (then known as Karl)* didn't identify herself as transgender. She may have felt confused and rebellious at a young age, but she didn't have the knowledge or vocabulary to express her gender dysphoria. Even when she left her native country, she had no idea that her story would eventually become one of the new wave of cases for transgender asylum seekers in the U.S. legal system. Yet, remarkably, that is what has happened over the past six years—thanks to her bravery, the hard work of students and faculty at Brooklyn Law School, and growing societal acceptance of transgender equality in the United States.

In 2009, Karla became our client at the Law School's immigration clinic, the Safe Harbor Project. Although she later described a horrific childhood because of her effeminacy and recalled being punished for wearing girls' clothing, she didn't initially disclose any of that painful, private information. At the time, she presented herself as a man and said she was applying for asylum out of fear of persecution because of her political activities against the totalitarian regime in her home country.

After her case dragged on in Immigration Court for almost two years, her application for asylum was denied. She filed an administrative appeal and waited a year for the Board of Immigration Appeals (BIA) to act. Denial was affirmed.

In 2012, Karla disclosed her transgender identity and began the process of transitioning from male to female. We believed that she now had another basis for seeking asylum in the United States. We tried to persuade the BIA to reopen her case because LGBTQ individuals were fundamentally unsafe in her native country, a notoriously homophobic dictatorship that ranks among the worst human rights abusers in the world. Evidence showed that being transgender there is seen as a form of gross sexual deviance and remains underground; no organized support groups or transgender rights organizations exist. Any openness about her gender identity would place her in danger of social ostracism, physical harm, and even prison. But our motion was denied again because Karla had not raised these grounds for relief earlier. The Second Circuit Court of Appeals affirmed that decision a year later, saying that her claim “[s]hows only the recent expression by him of his unchanged psychological self-perception” and that “[h]e could at any time have assumed a woman's habit and presentation.”

This gross oversimplification ignored the reality of Karla's past—her inexperience, her confusion, and her suffering—and the grave risks she would have faced by identifying as female earlier in her life, including during the 15 months she spent in detention in a U.S. county jail for men. Emerging as a transgender individual is a slow, complex, and often traumatic process that takes a great deal of courage, time, and support, as well as a safe environment.

Over the next two years, Karla continued her emergence as a woman—physically, psychologically, and socially. She has undergone medically monitored hormone therapy. She now has long blond hair, has a female shape, wears makeup and nail polish, and has a boyfriend. She has legally changed her name and the gender marker on her documentation, including her state ID card.

Earlier this year, as Karla was facing a final order of removal, we once again asked the BIA to reopen Karla's case, given her total transformation and identification as a woman, which we presented as an “exceptional circumstance” warranting this rarely granted form of relief. To our amazement, after years of disappointment and frustration, the tide turned. Persuaded by Karla's appearance, her psychological state, her name change, and the incontrovertible evidence of the mistreatment of transgendered persons in her native country, the BIA granted our motion and remanded her case to Immigration Court for a hearing.

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This case is an opportunity for the New York Immigration Courts to recognize the plight of transgender individuals and allow them to live in safety, free from the threat of violence or persecution. After years of disappointing setbacks, Karla now has a real chance to prove her eligibility for asylum. But understandably, she still worries that the immigration judge will not grant her application. The path remains uncertain, but hopeful. In September, for example, the Ninth Circuit ordered relief for three transgender women from Mexico, finding that the BIA had conflated gender identity with sexual orientation and erroneously concluded that the passage of same-sex marriage laws in Mexico demonstrated a commitment to protecting the rights of transgender people. In the Fifth Circuit, the government recently consented to remand the case of another transgender Mexican woman.

As attitudes change and adjudicators become more informed, we're hopeful that Karla will receive the protection she deserves. Her win would be a victory for everyone committed to civil rights and to this country's expanding recognition of transgender equality. ■

Stacy Caplow is the associate dean of professional legal education and a professor of law at Brooklyn Law School. In addition, she teaches several criminal law and immigration law courses. She also codirects the Safe Harbor Project, the Law School's immigration clinic, which represented the client featured in this article.

**The client's name has been changed to protect privacy.*