

**ASYLUM, WITHHOLDING OF
REMOVAL, AND CONVENTION
AGAINST TORTURE**

JUDGE JEFFREY L. ROMIG

ASYLUM, WITHHOLDING OF REMOVAL, AND CONVENTION AGAINST TORTURE

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Objectives:

After this session, you should be able to:

1. Explain both the theory and practice of asylum law.
2. Outline the sources of asylum law as well as the background and development of the "refugee" definition.
3. Distinguish between the various burdens of proof for asylum and related applications.
4. Incorporate significant and recent U.S. Circuit Court and BIA precedent decisions into your decision-making process.
5. Apply the provisions of the REAL ID Act of 2005 as it relates to asylum.
6. Assess actual case scenarios and problem-solve as to best solutions.

I. Background and Sources of Law

- A. Refugee Act of 1980
- B. Federal Circuit Court and U.S. Supreme Court decisions
- C. BIA precedent decisions
- D. Regulations at 8 C.F.R. §§ 1208.1 to 1208.31
- E. UNHCR Handbook

What is a "refugee?"

INA § 101(a)(42)(A)—defines a refugee as any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded

particular social group, or political opinion.

INA § 101(a)(42)(B)—defines a refugee as “a person who has been forced to abort a pregnancy or to undergo involuntary sterilization , or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion . . .”

Supersedes Matter of Chang, 20 I&N Dec. 38 (BIA 1989)

What is “persecution?”

Matter of Acosta, 19 I&N Dec. 211, 223 (BIA 1985), defines persecution as: “harm or suffering . . . inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.”

What is not “persecution?”

—discrimination—Fisher v. INS, 79 F.3d 955 (9th Cir. 1996)

—fear of general conditions of violence—Martinez-Romero v. INS, 692 F.2d 595 (9th Cir. 1982)

—fear of military recruitment—Matter of Vigil, 19 I&N Dec.572 (BIA 1988)

—economic deprivation—Kovac v. INS, 407 F.2d 102 (9th Cir. 1969)

—unsettled—gender-based claims, domestic violence victims, and “honor killing” victims

proposed rule to provide guidance on domestic violence victims as potential members of a “particular social group”— 65 Fed. Reg. 76,588 (December 7, 2000)

Matter of R-A-, 22 I&N Dec. 906 (BIA 1999; AG 2001)—“NOTE”, DHS supports a grant of asylum in this case, as reported in Gao v. Gonzales,

440 F.3d 62, 68 n.3 (2nd Cir. 2006)

Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1994) (homosexuality)

Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996) (FGM)

Matter of A-K-, 24 I&N Dec. 275 (BIA 2007) (parent cannot qualify for asylum based on threat of FGM to a daughter; withholding of removal is not derivative to spouse or child.)

Matter of A-T-, 24 I&N Dec. 296 (BIA 2007) (FGM is a type of harm that can only be inflicted once, and its infliction necessarily constitutes a fundamental change in circumstances such that the applicant does not have a presumption of a clear probability of future persecution.)

Matter of S-A-K- and H-A-H-, 24 I&N Dec. 464 (BIA 2008) (FGM victim remains eligible for asylum based upon humanitarian considerations.)

II. Burden of Proof

Asylum standard is "more generous" than withholding of removal standard—INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)

Reasonable person standard—Matter of Mogharrabi, 19 I&N Dec. 328 (BIA 1987)

Nexus requirement—Persecution must be "on account of" victim's political opinion, not the persecutor's—INS v. Elias-Zacarias, 502 U.S. 478 (1992)

Does the harm feared or experienced "rise to the level" of persecution—actual harm required to establish past persecution—threats of harm, brief period of detention, usually will not suffice.

An IJ must make a specific finding as to whether an applicant has Established "past persecution"—Matter of D-I-M-, 24 I&N Dec. 448 (BIA 2008)

Once past persecution is established, applicant has a presumption Of a well-founded fear—8 C.F.R. § 1208.13(b)(1)

DHS bears burden of proving changed conditions or safe relocation

8 C.F.R. § 1208.13(b)(1)(ii)

Asylum can be granted on humanitarian basis where there is no possibility of future persecution—Matter of Chen, 20 I&N Dec. 16 (BIA 1989)

Proving a well-founded fear

10% chance from Cardoza-Fonseca

"Pattern or practice"—

8 C.F.R. § 1208.13(b)(2)(iii)(A)

"Disfavored group"—Sael v. Ashcroft, 386 F.3d 922 (9th Cir. 2004)

Countrywide fear—Matter of C-A-L-, 21 I&N Dec. 754 (BIA 1997)

Can be based on applicant's testimony alone, if credible- 8 C.F.R. § 1208.13(a)

Identity of the applicant—Matter of O-D-, 19 I&N Dec. 1079, 1081 (BIA 1998)(asylum seeker has "the burden of establishing identity, nationality, and citizenship")

One-year issue for Asylum—INA § 208(a)(2)(B)

Applicant must show by clear and convincing evidence that he applied for asylum within year of arrival, or establish an exception:

Entry date may be contested

Changed conditions—in home country or based on activities in U.S.

Extraordinary circumstances—unaccompanied minor, ineffective assistance of counsel (or notario), serious illness or mental or physical disability Matter of Y-C-, 23 I&N Dec. 286 (BIA 2002)

Firm resettlement—8 C.F.R. § 1208.15(a)—Who has burden of proving? See

Makadji v. Gonzales, 470 F.3d 450 (2d Cir. 2006)

Persecutor, terrorist, and aggravated felony bars--INA § 208(a)(2)(A) and (B)

Safe Third Country Agreement--8 C.F.R. § 1240.11(g)--Canada

Asylum as discretionary relief--Matter of Pula, 19 I&N Dec. 467 (BIA 1987)

Withholding of removal under section 241(b)(3)--Mandatory relief

Clear probability standard--INS v. Stevic, 467 U.S. 407 (1984)--"more likely than not"--51% chance

But "past persecution" still creates presumption of future persecution --8 C.F.R. § 1208.16(b)(1)

Particularly serious crime--drug-trafficking is presumed "particularly serious"--Matter of Y-L-, A-G-, and R-S-R-, 23 I&N Dec. 270 (AG 2002)

An IJ must enter an order of removal where withholding is granted but asylum is denied--Matter of I-S- and C-S-, 24 I&N Dec. 432 (BIA 2008)

Convention Against Torture--can be temporary relief, unlike § 241(b)(3)

An alien cannot establish a likelihood of torture by stringing together a series of Suppositions--Matter of J-F-F, 23 I&N Dec. 912 (A.G. 2006)

Torture defined at--8 C.F.R. § 1208.18(a)(1)

"Lawful sanctions" not included (death penalty)

Inadequate prison conditions not tantamount to torture--Matter of J-E-, 23 I&N Dec. 291 (BIA 2002)

Acquiescence requirement

"Wilfull blindness" standard--Khouzam v. Ashcroft, 361 F.3d 161 (2d Cir.

2004)

Deferral of removal—8 C.F.R. § 1208.17—continued detention possible following grant of app.

III. THE REAL ID Act of 2005¹

A. Purpose and Effective Dates

1. Protecting national security and amendments to asylum and terrorism provisions of INA

2. Matter of S-B-, 24 I&N Dec. 42 (BIA 2006)(asylum applications filed on or after May 11, 2005, are subject to the REAL ID Act, whether filed with DHS asylum officer or Immigration Court)

B. Substantive Changes to Asylum and Withholding of Removal

1. Nexus as "at least one central reason" for fear of persecution—INA § 208(b)(1)(B)(i); Matter of J-B-N- & S-M-, 24 I&N Dec. 208 (BIA 2007)

a. Case law endorsed by Congress—

INS v. Elias-Zacarias, 502 U.S. 478 (BIA 1992)

Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997)

Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988)

Girma v. INS, 283 F.3d 664 (5th Cir. 2002)

Ambartsoumian v. Ashcroft, 388 F.3d 95 (3rd Cir. 2004)

Useinovic v. INS, 313 F.3d 1025 (7th Cir. 2002)

b. Case law disapproved—

Borja v. INS, 175 F.3d 732 (9th Cir. 1999)

¹Cited as Pub.L.No. 109-13, Div. B, 119 Stat.231 (2005).

Briones v. INS, 175 F.3d 727 (9th Cir. 1999)
Singh v. Ilchert, 63 F.3d 1501 (9th Cir. 1995)
Blanco-Lopez v. INS, 858 F.2d 531 (9th Cir. 1988)
Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985)

2. Credibility determination—new “totality of the circumstances” standard—
INA § 208(b)(1)(B)(iii); Matter of J-Y-C-, 24 I&N Dec. 260 (BIA 2007)

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

a. Inconsistencies need not “go to the heart of” applicant's claim

b. Case law endorsed

Mendoza-Manimbao v. Ashcroft, 329 F.3d 655 (9th Cir. 2003)
Quintanilla v. INS, 767 F.2d 1387 (9th Cir. 1985)

c. Case law disapproved (implicitly)

Osorio v. INS, 99 F.3d 928, 931 (9th Cir. 1996) (“minor

inconsistencies" do not provide basis for adverse credibility finding)

3. Corroboration standard—INA § 208(b)(1)(B)(ii)

a. IJ may request corroboration in determining if burden of proof sustained

b. Corroborating evidence must be provided or its absence reasonably explained for applicant to meet burden of proof

c. Case law endorsed

INS v. Elias-Zacarias, 502 U.S. 478 (BIA 1992)
Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997)

d. Case law disapproved (implicitly)

Lahda v. INS, 215 F.3d 889 (9th Cir. 2000) (where an asylum applicant's testimony is found credible, he need not submit corroborative evidence in order to establish eligibility for asylum)