The Green Card

Welcome to the Newsletter of the FBA's Immigration Law Section

Betty Stevens, Chair

Quote of the Month

Modern English, especially written English, is full of bad habits which spread by imitation and which can be avoided if one is willing to take the necessary trouble. If one gets rid of these habits one can think more clearly, and to think clearly is a necessary first step toward political regeneration: so that the fight against bad English is not frivolous and is not the exclusive concern of professional writers.

--- George Orwell, 'Politics and the English Language'

Message from the Editor

As of this issue, I am the new Editor of The Green Card. In Judge Lawrence O. Burman, I replace not just a previous Editor, but a venerated institution—a founding father who helped to shape today's ILS as we know it. I am now counting on the sustained, enthusiastic contributions from all of our members; for only together can we hope to fill those great but now vacant shoes of the past. The Green Card will continue to run membership news and announcements, general FBA information, and substantive contributions from our members. Unfortunately, as of this issue, we have lost the long-standing permission to re-print articles from EOIR's Immigration Law Advisor. I feel more than assured we can make up for it with contributions from members, starting with this month's "Cut to the Chase", our newest regular column. "Quotas" seem on everyone's mind as this year begins, and so, upon request, we have reprinted several thoughts on the issue—but note well that these are opinion columns that do not necessarily reflect the views of ILS as an organization. Finally, in member news, we have solicited the outgoing thoughts of Judge Charles Pazar, as he exits the Memphis bench, and enters the brave new world of retirement. I hope that all of you will enjoy the issue, and please accept my "welcome aboard" as we all embark on The Green Card, 2.0.

In This Issue

The First Circuit on Why All Evidence Must be Considered

By Hon. Jeffery Chase

In *Aguilar-Escoto v. Sessions*, No. 16-1090 (1st Cir. Oct. 27, 2017), the U.S. Court of Appeals for the First Circuit vacated the BIA's erroneous decision affirming an immigration judge's denial of withholding of removal. The circuit court employed an interesting approach that lawyers and judges may wish to examine.

In *Aguilar-Escoto*, the Board upheld the immigration judge's adverse credibility finding. However, the petitioner also provided significant documentary evidence. Although the IJ had considered and disposed of such evidence, the Board did not address it. On appeal, the First Circuit adopted the view of the Eleventh Circuit in holding that "an adverse credibility determination does not alleviate the BIA's duty to consider other evidence…" The court concluded that remand was required "irrespective of the supportability of the adverse credibility finding" in order for the Board to consider the previously neglected evidence. However, the court reached such conclusion in an unusual way.

Although the IJ had correctly noted that the application was for withholding of removal, the Board carelessly stated that the petitioner "failed to meet her burden of proof for asylum." As those of us who practice in this field all know, asylum and withholding have different burdens of proof. As the Board is fond of saying in its decisions, if the respondent did not meet her burden of proof for asylum, "it follows that she has not satisfied the more stringent burden that applies to withholding of removal." The Board used similar boilerplate in this case.

However, the circuit court here stated that in one way, the burden for asylum "may be more exacting." The court noted that asylum has a subjective and objective component: an applicant must establish both a genuine subjective fear, and then must show that such fear is objectively reasonable. Although withholding of removal requires a much greater probability of harm (more than 50 percent, as opposed to the 10 percent needed for asylum), the court observed that the focus is entirely on the objective; i.e. there is no inquiry into the applicant's own subjective fear. In other words, asylum applicants must first convince the adjudicator that they are genuinely afraid of being persecuted, and must then provide enough objective evidence to show that such fear is reasonable. Withholding applicants must show through objective evidence that there is a greater than 50 percent chance that they will suffer persecution; their own fear is irrelevant to the inquiry. The reason for this distinction is that asylum requires one to meet the statutory definition of "refugee," which involves a "well-founded fear of persecution." Withholding of removal does not incorporate the refugee definition, but rather prohibits removal to a country where the Attorney General decides that the individual's freedom would be threatened on account of a protected ground. Thus, in asylum, the adjudicator is reviewing the reasonableness of the applicant's own fear; in withholding of removal, the A.G. is the one determining the threat to safety.

The First Circuit explains the importance of this distinction: an adverse credibility finding impacts the genuineness of the applicant's subjective fear. However, it does not impact the independent objective evidence regarding the likelihood of the applicant suffering harm if returned to her country. The court noted that in mistakenly thinking it was affirming a denial of asylum based on adverse credibility, the Board then added common boilerplate language that, since the applicant did not meet the lower burden required for asylum, it follows that she did not meet withholding's higher burden. But the court said that logic only applies where the subjective fear element is satisfied, but the claim was denied due to a failure to provide sufficient objective evidence to support such fear. Here, as the adverse credibility finding precluded the petitioner from establishing a genuine subjective fear of persecution, the withholding of removal application required a separate inquiry as to whether the independent objective evidence was sufficient to establish the likelihood of persecution. The record was therefore remanded for such inquiry.

To illustrate by way of example, let's say an applicant applies for asylum and withholding based on her Christian religion. The applicant claims to be afraid to return to her country because she received multiple threatening phone calls and letters referencing her religion. The applicant also submits news articles and human rights reports detailing violent attacks on Christians in her hometown. Now, let's assume that the immigration judge believes that the respondent is in fact a practicing Christian. However, the IJ concludes that the claimed threats lack credibility. Asylum requires the applicant to first demonstrate a genuine subjective fear of persecution. The respondent testified that her fear was based on the threats. Under the First Circuit's holding, if the IJ finds that the threats didn't actually occur, the IJ can determine that the respondent did not establish a genuine fear of persecution.

However, what if the reports and articles believably establish that Christians run a high risk of being persecuted on account of their religion? The IJ did believe that the respondent was in fact a practicing Christian. According to the First Circuit, the IJ therefore just can't dispose of the withholding claim by stating that the respondent didn't meet the lower burden of proof for asylum, so therefore couldn't have met the higher burden for withholding. The IJ would instead have to apply a separate analysis as to whether the articles and reports independently establish that it is more likely than not the respondent would be persecuted on

account of her religion if removed to her country. If so, the respondent is entitled to withholding of removal (which is a non-discretionary form of relief).

Both immigration practitioners and government adjudicators should take note, and approach their arguments and drafting of decisions accordingly. As an aside, the nuances and degree of analysis that the circuit court's decision requires of adjudicators underscores the danger of the Department of Justice's stated intent to impose case completion quotas on immigration judges. As my good friend and fellow blogger Paul Schmidt recently wrote on the topic (and as this case clearly illustrates), immigration judges are not piece workers, and fair court decisions are not widgets (well said, Paul!).

IJs, Tiered Review, and Completion Quotas: Why IJs Should Not Be Judged on Numbers

EOIR recently announced its intent to subject immigration judges to tiered performance reviews. Most notably, EOIR plans to impose case completion quotas on the individual judges. The American Bar Association, American Immigration Lawyers Association (AILA) and the National Association of Immigration Judges (NAIJ) were among the many organizations to express their strong objection to the proposal.

Immigration judges have always been exempt from the tiered reviews that other Department of Justice attorneys undergo each year. The Office of the Chief Immigration Judge deserves credit for understanding that it is not possible to impose any type of review criteria without impeding on judges' neutrality and independence. To begin with, how many cases should a judge complete in a given period of time? Are the judges with the most completions affording due process to the respondents? Are they identifying all of the issues, spending enough time reviewing the records, and giving proper consideration and analysis to the facts and the law? Do their decisions provide sufficient detail for meaningful review? Are those at the other end of the scale completing less cases because they are working less hard, or to the contrary, because they are delving deeper into the issues and crafting more detailed and sophisticated decisions? Or is it because they are granting more continuances out of a sense of fairness to the parties, or to allow further development of the record in order to allow for a more informed decision? And regardless of the reasons, might they be prejudicing some respondents by delaying their day in court? How would management turn all of these factors into an objective grade?

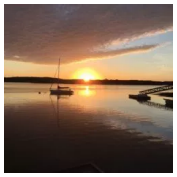
In terms of completion quotas, all cases are not equal. A respondent who has no relief and simply wants to depart can have his or her case completed in minutes, whereas a respondent seeking relief in New York will presently be scheduled for a merits hearing in the Spring of 2020, at which time the lengthy testimony of multiple witnesses, disputes over the admissibility of evidence, the need to wait for DHS to adjudicate pending petitions for relief, etc. might result in months or even years of additional continuances. Decisions in some cases are delivered orally in just a few sentences; others require 25 written pages. Yet all count the same in EOIR's completion ledger.

I am pretty certain that the move for tiered review is not coming from the Office of the Chief Immigration Judge, but from higher up - either the new Acting Director of EOIR, or Main Justice. Even under more liberal administrations, the Department of Justice never really understood the IJs, who are the only judges within a predominantly enforcement-minded department. The need for neutrality and fairness is further lost on the present Attorney General, who has made his anti-immigrant agenda clear. IJs are in an interesting position: they represent the Attorney General (i.e. are acting as the AG's surrogates, where the statute delegates authority to make determinations or grant relief to the AG). Yet in spite of such posture, IJs often reach decisions that are at odds with the AG's own views. For example, does Jeff Sessions, who last month issued a memo allowing discrimination against LGBTQ individuals under the guise of protecting the discriminators' "religious liberty," approve of his immigration judges granting asylum claims based on sexual orientation or sexual identity? In light of Sessions' recent charges of widespread asylum fraud, does he agree with his judges' high asylum grant rates?

It is probably this tension that provides the impetus for the Department's present proposal. The tiered criteria and completion quotas are likely designed to pressure judges with more liberal approaches into issuing more removal orders. They would also provide the department with a basis to take punitive action against judges who resist such pressures. Given the high percentage of immigration judges who are retirement eligible, the department might be counting on judges targeted under the new review criteria to simply retire, allowing them to be replaced with more enforcement-minded jurists.

It should be noted that the changes are at this point proposals. The immigration judge corps is represented by a very effective union. As the present leadership within the Office of the Chief Immigration Judge is fair minded, there is hope that reason will prevail. However, in a worst-case scenario in which the plan is implemented, what should immigration judges do?

Having worked both as an IJ and a BIA staff attorney subjected to both quotas and tiered review, I can state that there are big differences. BIA staff attorneys draft decisions that Board members then have to approve, whereas immigration judges are in complete control of the case outcome. Furthermore, unlike BIA attorneys who are dealing with records of completed decisions, immigration judges are conducting proceedings in which the protection of due process must be safeguarded above all, as the Chief Immigration Judge pointed out in her July 31, 2017 memo on continuances. Circuit courts are not going to excuse due process violations because immigration judges have to meet



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Musings on Events in U.S. Immigration Court, Immigration Law, Sports, and Other Random Topics by Retired United States Immigration Judge (Arlington, Virginia) and former Chairman of the Board of Immigration Appeals Paul Wickham Schmidt. To see my complete professional bio, just click on the link below.

Practical Tips For Presenting An Asylum Case In Immigration Court (Rev. Feb. 2017)

PRACTICAL TIPS FOR PRESENTING AN ASYLUM CASE IN IMMIGRATION COURT

(Rev. Feb. 2017)

by

Paul Wickham Schmidt[1]

Retired U.S. Immigration Judge

Arlington, Virginia

First, read a good book. All winning asylum theories are found in Chapter 1208 of Title 8 of the *Code of Federal Regulations*. Shift the burden of proof to the DHS. Win your case without showing a current fear of persecution. Read and master 8 C.F.R. § 1208.13, and then use this powerful tool to build your client's case. *See also Essohou v. Gonzales,* 471 F.3d 518 (4th Cir. 2006) (hiding is not a "reasonably available internal relocation alternative" that rebuts the presumption of future persecution); *Haoua v. Gonzales*, 472

F.3d 227 (4th Cir. 2007) (an IJ's under-calculation of risk of harm impairs internal relocation analysis).

Second, get real. The REAL ID Act, P.L. 109-13, 119 Stat. 231 (2005), deals with credibility and burden of proof issues in asylum cases and applies to applications "made" on or after May 11, 2005. See *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006) (noting that an application is "made" when *initially* filed either with the Asylum Office or the IJ); *Matter of M-A-F-*, 26 I&N Dec. 651 (BIA 2015) (filing date of *later* I-589 controls where it raises new protected grounds or significant new facts). Read the REAL ID Act (as incorporated into the I&N Act) and decide how it can help you and how you can respond to DHS arguments.

Third, know one when you see one. The one-year filing requirement of INA

- 208(a)(2)(B) bars asylum in some cases. Your burden of proof on the one-year filing issue is very high: "clear and convincing evidence." Judicial review is limited. There are exceptions, however, to the one-year bar. Read the statute and the regulations at 8 C.F.R. § 1208.4 to find out how the filing requirement works and what arguments might be made to preserve a late asylum application. Remember that the one-year requirement does *not* apply to withholding of removal or Convention Against Torture applications.

Fourth, play to tell the truth. Particularly in light of the REAL ID Act, credibility is the key to most asylum cases. Read *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998), enter the world of credibility determinations, and see why the Immigration Judge is so important. It's all about *deference*.

Fifth, don't believe everything you read. Don't get fooled by the hype that credible testimony is enough to get the brass ring. Read *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997)

and *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007) to find out what it *really* takes to win an asylum case in most Immigration Courts.

Sixth, paper your case. Thorough documentation can be your friend. Read *Camara v. Ashcroft*, 378 F.3d 361 (4th Cir. 2004) and *Zuh v. Mukasey*, 547 F.3d 504 (4th Cir. 2008) to discover how the power of independent documentary evidence can overcome even a sustainable adverse credibility finding. *But see Gandziami-Mickhou v. Gonzales*, 445 F.3d 351 (4th Cir. 2006) (affidavits from friends and family are not the independent evidence that *Camara* contemplates).

Seventh, read your paper. Read *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998) and see how presenting false documentation to the Immigration Court can sink your ship. You and your client are *responsible* for all the documentation you present in your case. Make sure you know exactly what is in your documentation package and precisely how it got there.

Eighth, pile it on. Can cumulative events put you over the top on past persecution? You bet! Read *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998), *reaffirmed in Matter of L-K-*, 23 I&N Dec. 677, 683 (BIA 2004), and see how one family's misfortune may be your good fortune.

Ninth, don't get caught by the devil. The devil is in the details. If you don't find him or her, DHS counsel certainly will, and you will *burn*. DHS counsel handle more asylum cases in a year than most private attorneys do in a lifetime. Be prepared or beware. The EOIR Virtual Law Library on the Internet at http://www.usdoj.gov/eoir/ is an excellent resource for the latest BIA precedents and administrative developments. You would also be wise to contact the Assistant Chief Counsel *in advance* of any merits hearing to discuss ways of narrowing the issues and possible "Plan Bs."

Tenth, know your geography. Not all Immigration Courts and Circuit Courts of Appeals are located on the West Coast. The BIA certainly is not. You must know and deal with the law in the jurisdiction where your case actually is located, not in the one you might *wish* it were located.

Eleventh, get physical. In defining persecution, the Fourth Circuit has emphasized "the infliction or threat of death, torture, or injury to one's person or freedom." *Niang v. Gonzales*, 492 F.3d 505 (4th Cir. 2007). Read *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007) for tips on how, and how not, to present asylum claims involving harm to family members, and *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011), *Mirisawo v. Holder,* 599 F.3d 391 (4th Cir. 2010) and *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007) for tips on how to present cases involving threats and nonphysical forms of suffering or harm.

Twelfth, practice, practice, practice. The *Immigration Court Practice Manual*, available online at http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm, became effective July 1, 2008, and replaced all prior local rules. All filings with the Immigration Court must comply with the deadlines and formats established in this *Practice Manual.*

Thirteenth, it's always wise to have "Plan B." Asylum litigation has many variables and opportunities for a claim to "go south." Therefore, it is prudent to have a "Plan B" (alternative) in mind. Among the "Plan Bs" that came up in Arlington during my tenure were: prosecutorial discretion ("PD"), Special Rule Cancellation of Removal ("NACARA"), Temporary Protected Status ("TPS"), non-Lawful Permanent Resident Cancellation of rRemoval ("EOIR 42-B"), Deferred Action for Childhood Arrivals ("DACA"), Special Immigrant Juvenile ("SIJ") status, I-130 petition with a "stateside waiver" ("I-601A"), "Wilberforce Act" special processing for unaccompanied children ("UACs"), T nonimmigrant status (for certain human trafficking victims), and U nonimmigrant status (for certain victims of crime). *But see*, "Pointer Fourteen," below.

Fourteenth, hope for the best, but prepare for the worst. As some have said "there's a new Sheriff in town," and he's announced a "maximum immigration enforcement "program targeting *anyone* who has had *any* run-in with the law, *whether convicted or*

not. So, you can expect more arrests, more detention (some perhaps in far-away, inconvenient locations), more bond hearings, more credible and reasonable fear reviews, more pressure to move cases even faster, and an even higher stress level in Immigration Court. The "Plan Bs" involving discretion on the part of the Assistant Chief Counsel, like PD, DACA, and stateside processing, and even waiving appeal from grants of relief, are likely to disappear in the near future, if they have not already. In many cases, litigating up through the BIA and into the Article III Federal Courts (where the judges are, of course, bound to follow the law but not necessarily to accept the President's or the Attorney General's interpretation of it) might become your best, and perhaps only, "Plan B."

(02-19-17)

[1]These are my views, and they do not represent the official position of anyone. I thank and recognize pro bono and "low bono" attorneys, past, present and future, for giving unselfishly of their time and expertise.

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In this issue...

Tackling Fraud Without Trampling Due Process: A Procedural Framework for Considering Document Similarities in Immigration Proceedings

By Roberta Oluwaseun Roberts

Introduction

The Board of Immigration Appeals has long emphasized that "no decision should ever rest, or even give the slightest appearance of resting, upon generalizations derived from evaluations of the actions of members of any group of aliens. Every adjudication must be on a case-by-case basis." *Matter of Blas*, 15 I&N Dec. 626, 628 (BIA 1974). But what if counsel for the Department of Homeland Security ("DHS") or the Immigration Judge notices significant similarities between the documents submitted in an applicant's proceedings and the proceedings of another applicant with a similar claim? How can officers of the court raise these types of concerns about possible indications of fraud without compromising confidentiality or the due process rights of the applicant? In 2007, the United States Court of Appeals for the Second Circuit encouraged the Board to provide a framework for addressing inter-proceeding similarities and provide "expert guidance as to the most appropriate way to avoid mistaken findings of falsity, and yet identify instances of fraud." *Mei Chai Ye v. U.S. Dep't of Justice*, 489 F.3d 517, 524 (2d Cir. 2007). The Board provided this guidance in a 2015 decision, *Matter of R-K-K-*, 26 I&N Dec. 658 (BIA 2015), which has thus far been cited approvingly in published and unpublished decisions by two circuit courts of appeals. *See, e.g.*, *Wang v. Lynch*, 824 F.3d 587, 591–92 (6th Cir. 2016); *Zhang v. Lynch*, 652 F. App'x 23, 24 (2d Cir. 2016).

This article analyzes the procedural framework articulated by the Board in *Matter of R-K-K-* for considering document similarities in immigration proceedings. First, the article will briefly discuss the need for such a framework. Second, the article will provide examples of what

may—or may not—constitute each step that must be met in the three-step framework. Finally, the article will discuss due process and confidentiality concerns that arise when considering inter-proceeding similarities in making credibility determinations.

Matter of R-K-K- Procedural Framework

A procedural framework for considering inter-proceeding similarities in making adverse credibility determinations in immigration proceedings was needed for a variety of reasons, such as the particular "dangers" unique to considering inter-proceeding similarities that require a reviewing court to use "an especially cautious eye." *See Mei Chai Ye*, 489 F.3d at 524 ("In light of these dangers, it is clear that inter-proceeding cases call for caution."); *Matter of R-K-K-*, 26 I&N Dec. at 661 ("we must also review such determinations with 'an especially cautious eye'") (quoting *Mei Chai Ye*, 489 F.3d at 520). The danger: "innocent similarities may be mistakenly interpreted as evidence of falsity." *Matter of R-K-K-*, 26 I&N Dec. at 661.

The Second Circuit noted that it is "problematic" to "assume that one asylum applicant is responsible for, or even aware of, the striking similarities that appear in an unrelated applicant's submissions" because there are many possibilities for the similarities where one, or both, applicants are blameless. *Mei Chai Ye*, 489 F.3d at 519–20. It could be:

> (1) that both applicants have inserted truthful information into a similar standardized template; (2) that the different applicants employed the same scrivener, who wrote up both stories in his own rigid style; (3) that "the other" applicant plagiarized the truthful statements of the petitioner; or (4) that the similarities resulted, not from the original documents themselves, but rather from inaccurate or formulaic translations—which unaffiliated applicants would not be in a position to discover or contest.

Id. at 520.

Keeping in mind these concerns, *Matter of R-K-K-* sought to provide courts with a uniform procedure to identify fraud and address inter-proceeding similarities while maintaining fairness in proceedings. *See* 26 I&N Dec. at 661 (stating that the Board's framework "will permit Immigration Judges to draw reasonable inferences of falsity from inter-proceeding similarities while establishing procedural safeguards to protect faultless applicants"). In developing a procedural framework to do just that, the Board looked to the Second Circuit's reasoning in *Mei Chai Ye*.[1] In *Mei Chai Ye*, the Immigration Judge noticed and annotated 23 "strikingly similar" portions of affidavits in that Chinese asylum case and the affidavit submitted by another Chinese asylum applicant represented by the same attorney. 489 F.3d at 520–21. The Second Circuit concluded that the adverse credibility determination was proper because the Immigration Judge "rigorously complied" with the notice requirements of *Ming Shi Xue v. Bd. of Immigration Appeals*, 439 F.3d 111, 125 (2d Cir. 2006) by:

> (1) notifying [the applicant] of the similarities, and providing her with copies of his annotations; (2) openly and exhaustively expressing to [the applicant] his concerns about the inter-proceeding similarities; (3) granting [the applicant] several opportunities to comment on those similarities; and (4) inviting [the applicant] to offer evidence of plagiarism, inaccurate translations, or any other possible innocent explanation.

Mei Chai Ye, 489 F.3d at 525.

In *Matter of R-K-K-*, the applicant's asylum application and accompanying declaration were substantially similar to an asylum application filed by his brother, who was granted asylum in 2009. *See* 26 I&N Dec. at 659, 663. "To preserve the fairness of the proceedings," the Board adopted a "three-part framework for Immigration Judges to use when relying on inter-proceeding similarities as part of an adverse credibility determination." *Id.* at 661. First, the Immigration Judge should provide "meaningful notice of the similarities that are considered to be significant." *Id.* Second, the Immigration Judge should provide "a reasonable opportunity to explain the similarities." *Id.* Third, "the Immigration Judge should consider the totality of the circumstances in making a credibility determination." *Id.* Furthermore, the Board explained that "[e]ach of these steps must be done on the record in a manner that will allow the Board and any reviewing court to ensure that the procedures have been followed." *Id.*

Identifying Similarities and Providing Meaningful Notice

To meet the first step of the procedural framework, the Immigration Judge should identify the similarities between the documents or other evidence under consideration and notify the applicant of the similarities that require an explanation.[2] *Matter of R-K-K-*, 26 I&N Dec. at 661. Case law provides examples of evidentiary characteristics that may indicate suspicious similarities, including "a substantial number of instances where the same or remarkably similar language is used to describe the same kind of incident or encounter;" ancillary material in two statements that "wouldn't necessarily have to be mentioned but [was] mentioned;" the use of distinct language or peculiar factual circumstances without reasonable explanation; and usage of the same formatting, typeface, headings, etc. *Id.* at 661–62; *see also Zhang*, 652 F. App'x at 24 (observing that similar information was presented in the same order in both statements).

Whatever the identified similarities in question, an Immigration Judge could provide meaningful notice by providing the applicant with annotated copies of the documents under scrutiny and clearly identifying all the similarities on the record. *Matter of R-K-K-*, 26 I&N Dec. at 661. "Identifying all the similarities clearly on the record will make it easier for the Immigration Judge to ascertain the extent and nature of similarities in the case and will facilitate any appellate review of the credibility finding." *Id.* The importance of providing notice was demonstrated in *Kourouma v. Holder*, 588 F.3d 234, 242 (4th Cir. 2009), where the Fourth Circuit found that the adjudicator's statement that "[t]he documents speak for themselves" was not sufficiently meaningful notice to sustain an adverse credibility finding based on inter-proceeding similarities. Instead, many circuit courts have held that an Immigration Judge must state "specific, cogent reasons" for adverse credibility findings. *See id.* at 242–43 (citing *Camara v. Ashcroft*, 378 F.3d 361, 367 (4th Cir. 2004)); *Shrestha v. Holder*, 590 F.3d 1034, 1043–44 (9th Cir. 2010).

An Immigration Judge's identification and provision of specific, cogent examples and explanation of significant document similarities would give an applicant meaningful notice of the similarities in question and fulfill the first step in the procedural framework for considering inter-proceeding similarities. Repetition may also serve as a procedural safeguard and help fulfill the notice requirement of the *R-K-K-* framework. *See Dehonzai v. Holder*, 650 F.3d 1, 9 (1st. Cir. 2011) (finding that "at various times during the hearings the [Immigration Judge] explicitly stated that [the applicant's] credibility was in doubt, giving [him] more than fair warning of the need to buttress his case").

Opportunity to Explain Similarities

The Board in *Matter of R-K-K-* noted that there may be cases where an applicant could provide a reasonable explanation for inter-proceeding similarities. 26 I&N Dec. at 662 ("We can envision scenarios in which an applicant will offer a reasonable explanation or credible evidence to dispel doubts about the authenticity or reliability of the initial evidence."). To help determine whether an explanation is reasonable, the Board noted that an Immigration Judge should consider the following possibilities:

> (a) whether there is a meaningful likelihood that [the inter-proceeding similarities] resulted from mere coincidence, (b) whether it is plausible that different asylum applicants inserted truthful information into a standardized template or, for illiteracy reasons, conveyed it to a scrivener tied to an unchanging style; (c) whether the same translator converted valid accounts into a peculiarly similar story; and (d) whether there is a likelihood that the petitioner was an innocent "plagiaree."

Id. (quoting *Mei Chai Ye*, 489 F.3d at 526–27) (alteration in original). Although applicants must be granted an opportunity to provide an explanation for inter-proceeding similarities, an Immigration Judge is not required to accept as true any explanation an applicant provides. *See Matter of L-A-C-*, 26 I&N Dec. 516, 526 (BIA 2015) (citing *Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011)).

The Immigration Judge in *Matter of R-K-K-* asked the applicant to explain several items of concern, including why the applicant and his brother's experiences were so similar, "why identical language was used by each brother to explain what happened and how those events made them feel, [and] why each declaration had the same syntax and spelling irregularities." 26 I&N Dec. at 664. The applicant's explanation was that he and his brother were "brought up in similar ways and experienced

mistreatment in a similar place," and that they used the same transcriber, "who may have inserted his own flair for words and syntax." *Id.* The Immigration Judge did not find these explanations persuasive based on other record evidence.

Similarly, in *Mei Chai Ye*, the Immigration Judge identified 23 places in which the applicants' affidavits were grammatically or structurally identical and afforded the applicant several opportunities to explain the similarities. 489 F.3d at 521–23. The applicant's attorney argued that the similarities might have arisen from the Chinese Government's use of similar methods to enforce its coercive family planning policies, but the Immigration Judge found this reasoning insufficient to explain the striking linguistic similarities. *Id.* at 521. In another case, the Sixth Circuit addressed an applicant's argument that because thousands of Chinese people suffer religious persecution it is reasonable to expect their asylum applications to be similar. However, the Sixth Circuit noted that there is an "important distinction [] between applications that are very similar and applications that are identical in many respects." *Wang*, 824 F.3d at 592 (adopting the *R-K-K-* framework).

In addition to considering possible innocent explanations for inter-proceeding similarities, an Immigration Judge may also continue a hearing to allow the applicant opportunity to obtain evidence. *Matter of R-K-K-*, 26 I&N Dec. at 662; *see also Nyama v. Ashcroft*, 357 F.3d 812, 816–17(8th Cir. 2004) (finding that the applicant was not unfairly "ambushed" by admissions of asylum applications from other proceedings where the Immigration Judge had "generously" allowed the applicant a 6-month continuance before admitting the applications to the record after allowing for objections). In *Matter of R-K-K-*, the Immigration Judge granted the applicant approximately 3 months to locate the transcriber and present his testimony or a statement describing the preparation of the application. However, Immigration Judges are not required to provide applicants with lengthy continuances. *See generally Matter of Villarreal-Zuniga*, 23 I&N Dec. 886, 891 (BIA 2006).

As stated in *Mei Chai Ye*, if an applicant does not take advantage of the opportunity to explain remarkable inter-proceedings similarities, it may become reasonable for the Immigration Judge to draw a negative inference with respect to the credibility of an applicant's asylum claim. 489 F.3d at 525.

Considering the Totality of the Circumstances

To fulfill the third step of the *R-K-K-* procedural framework, an Immigration Judge should look at all relevant factors and consider the totality of the circumstances when making an adverse credibility determination, rather than focus on only one aspect of the inter-proceeding similarities. *See Matter of R-K-K-*, 26 I&N Dec. at 662. Consideration of the totality of the circumstances requires an individualized approach as the relevant factors present may differ from case to case. In the Board's analysis of the Immigration Judge's credibility determination in *Matter of R-K-K-*, the Board detailed many factors the Immigration Judge assessed in considering the totality of the circumstances. These factors included: (1) the numerous similarities in the inter-proceeding applications; (2) "the conflicting accounts of how the respondent's application was prepared and his brother's incredible explanation for the inconsistency;" (3) the absence of testimony or other additional evidence from the transcriber; (4) a thorough analysis of the applicant's explanations for the similarities and the Immigration Judge's outlined reasons for finding the explanations to be unpersuasive; and (5) the lack of any other persuasive evidence to establish that the applicant's claim was credible. *Id.* at 665–66.

As illustrated by the Immigration Judge's consideration of a variety of factors, each of the previous two steps of the procedural framework operate in concert to fulfill the third step of considering the totality of the circumstances. The identification of similarities and the applicant's explanations for these similarities are factors that contribute to the totality of the circumstances analysis, demonstrating the comprehensive nature of *R-K-K-*'s procedural framework. While *Matter of R-K-K-*'s procedural framework has been discussed, the issues of due process and confidentiality concerns remain. The second section of the article discusses these issues and how *Matter of R-K-K-* addresses (or does not address) these concerns.

Due Process and Confidentiality Concerns When Taking Notice of Inter-Proceeding Similarities

The Board in *Matter of R-K-K-* and circuit courts of appeals in other cases stressed the importance of procedural safeguards, such as providing an applicant with notice that inter-proceeding similarities have been identified, time for the applicant to prepare a response, and an opportunity to

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Reviewing the jury instructions for a criminal trial involving section 203, the Board observed that to convict the State must prove, and the jury must find, that the accused committed an unlawful and malicious act that resulted in another person's body part being removed, disabled, or disfigured. In this case, the parties and the Board agreed that section 203 requires the requisite use of force. The Board additionally noted that mayhem must be committed maliciously, which, under California law means, that the proscribed conduct was "deliberate and intentional," a mens rea that is greater than "reckless." Further, the Board reasoned that the use of "force" is inherent in removing, disabling, or disfiguring another person's body part; the Board concluded that the force necessary to cause such "great bodily injury" is violent. Because section 203 requires the deliberate and intentional use of violent force causing great bodily injury, the Board concluded that a violation of the statute is categorically a crime of violence under 18 U.S.C. § 16(a), and renders the respondent removable under section 237(a)(2)(A)(iii) of the Act for sustaining a conviction for an aggravated felony as defined in section 101(a)(43)(F) of the Act.

Tackling Fraud Without Trampling Due Process: *continued*

explain the identified similarities. *See Matter of R-K-K-*, 26 I&N Dec. at 660–61. These procedural safeguards stem from constitutional due process requirements in all proceedings, including immigration proceedings. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) (stating that due process is required in immigration proceedings). *Matter of R-K-K-* also explicitly states that taking notice of inter-proceeding similarities must comply with the confidentiality requirements pursuant to 8 C.F.R. § 1208.6. 26 I&N Dec. at 661 n.3. This section of the article explores the due process and confidentiality concerns of taking administrative notice of inter-proceeding similarities and relying on judicial experience in identifying significant similarities.

Administrative Notice

Agencies may take official or administrative notice, similar to judicial notice, of extra-record facts. *See Gebremichael v. INS*, 10 F.3d 28, 37 (1st Cir. 1993). Pursuant to 8 C.F.R. § 1003.1(d)(3)(iv), the Board can take administrative notice of "commonly known facts such as current events or the contents of official documents." Although there is no such provision that specifically applies to Immigration Judges, "the Board and circuit courts have recognized Immigration Judges' ability to take administrative notice of certain types of evidence." *See* Robyn Brown and Vivian Carballo, "Beyond the Record: Administrative Notice and the Opportunity To Respond," *Immigration Law Advisor*, Vol. 9, No. 8, at 2 (Sept. 2015). In addition to commonly known facts, Immigration Judges can take administrative notice of matters relating to the administrative agency's expertise or "specialized experience in a subject matter area." *Vasha v. Gonzales*, 410 F.3d 863, 874 n.5 (6th Cir. 2005) (quoting *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994)). The Tenth Circuit in *de la Llana-Castellon* highlighted that a driving factor necessitating administrative notice is the "repetitive nature of many administrative proceedings." 16 F.3d at 1096. Multiple circuit courts have also held that adjudicators may draw reasonable inferences from administratively noticed evidence that "comport with common sense." *See Kapcia v. INS*, 944 F.2d 702, 705 (10th Cir. 1991) (quoting *Kaczmarczyk v. INS*, 933 F.2d 588, 594 (7th Cir. 1991)). As such, "[t]he appropriate scope of notice is broader in administrative proceedings than in trials, especially jury trials." *Castillo-Villagra v. INS*, 972 F.2d 1017, 1026 (9th Cir. 1992) (citing *Banks v. Schweiker*, 654 F.2d 637 (9th Cir. 1981)).

Judicial Experience

Judicial experience has been described as the expertise an Immigration Judge may develop through "repetitive examination of particular documents" or familiarity with practices of "certain foreign regions" gained through the course of presiding over hearings for cases with similar claims and documentary evidence. *See Lin v. Gonzales*, 434 F.3d 1158, 1163 (9th Cir. 2006). However, reliance upon judicial experience to determine evidentiary value does not give Immigration Judges *carte blanche* to use their experience as a sole basis for determining the credibility or weight of evidence. *See, e.g.*, *Matter of Gomez-Gomez*, 23 I&N Dec. 522, 525 & n.2 (BIA 2002) (stating it is "unclear" whether an Immigration Judge's administrative notice of the former Immigration and Naturalization Service's regional practice of releasing without bond adults accompanying juveniles, as well as her own awareness of false claims of parentage, "would be deemed the type of 'commonly acknowledged' fact about which administrative notice may legitimately

be taken"). Rather, it is acceptable for an Immigration Judge to combine his or her own judicial experience with "obvious warning signs of forgery" to the determination of how much weight to give a particular piece of evidence. *Id.* at 1164; *see also Vatyan v. Mukasey*, 508 F.3d 1179, 1185 n.4 (9th Cir. 2007).

As alluded to in *Gomez-Gomez*, an Immigration Judge should not make decisions based upon stereotypes, but instead must analyze each matter on a case-by-case basis. *See Matter of Blas*, 15 I&N Dec. at 628. Thus, Immigration Judges may want to be cautious in their reliance on judicial experience to justify taking administrative notice of extra-record evidence when the Judge's experience is based solely on hearing similar claims from a certain geographic region. An alien's constitutional due process rights could be violated when administrative notice is taken of disputed facts or when such notice adversely affects an alien's claim. As such, aliens must be given a "meaningful opportunity to be heard" in removal proceedings. *See, e.g.*, *Kaczmarczyk*, 933 F.2d at 595 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976)).

Comporting with Due Process

Fifth Amendment due process rights apply to aliens in removal proceedings, albeit in a more limited capacity than in criminal proceedings. *See Reno,* 507 U.S. at 306; *Kheireddine v. Gonzales*, 427 F.3d 80, 87 n.4 (1st Cir. 2005) ("We acknowledge that generally the due process requirements for immigration proceedings are lower than those for criminal proceedings."). Due process requirements for immigration proceedings include providing notice and a meaningful opportunity to respond to evidence submitted by the Government or to "potentially dispositive administratively noticed facts." *See, e.g., Burger v. Gonzales*, 498 F.3d 131, 134 (2d Cir. 2007) (internal quotation marks omitted); *see also Kaczmarczyk*, 933 F.2d at 595 (citing *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976)). "The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him *and the opportunity to meet it.*'" *Mathews,* 424 U.S. at 348 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171–72, (1950) (Frankfurter, J., concurring)) (emphasis added).

The Federal Rules of Evidence, while certainly helpful guidance, are not binding in immigration proceedings, and Immigration Judges have broad discretion to admit and consider relevant and probative evidence. *Matter of D-R-*, 25 I&N Dec. at 458; *see also* section 240(b)(1) of the Act, 8 U.S.C. § 1229a(b)(1). In immigration proceedings, the "sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair." *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995) (citing *Trias–Hernandez v. INS*, 528 F.2d 366, 369 (9th Cir. 1975)). Pursuant to 8 C.F.R. § 1240.7(a), the Immigration Judge "may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial." These statements, including those involving hearsay, nonetheless, must be probative and fundamentally fair so as to comport with due process. *Anim v. Mukasey*, 535 F.3d 243, 257 (4th Cir. 2008) ("Although hearsay is admissible in immigration proceedings, highly unreliable hearsay might raise due process problems.") (internal quotation marks and alteration omitted); *see also Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980).

The steps in *Matter of R-K-K-* requiring the Immigration Judge to provide an applicant with meaningful notice and an opportunity to respond together satisfy due process. An Immigration Judge's identification and articulation of significant similarities on the record and explanation of why these similarities raise concern provide an applicant with meaningful notice of the case against him. *Matter of R-K-K-* also provides examples of giving applicants opportunities to respond, object, and explain their case. These examples include granting continuances, reopening the record, and allowing applicants to submit additional evidence or present additional witnesses to explain or refute similarities. Each of the three steps in *Matter of R-K-K-*—providing meaningful notice, affording the applicant an opportunity to respond, and using the totality of the circumstances to make a credibility determination—ensures the admission and consideration of inter-proceeding similarities is fundamentally fair.

While precedent establishes that taking notice of inter-proceeding similarities comports with due process, it remains an unanswered question whether admitting documents from another proceeding without a confidentiality waiver complies with confidentiality concerns.

Confidentiality Concerns

While *Matter of R-K-K-* addressed the aforementioned due process concerns, it did not flesh out the confidentiality issues that may arise when taking notice of similarities between asylum applications without a confidentiality waiver. *See Matter of R-K-K-*, 26 I&N Dec. at 663 n.4 ("We do not address what procedural protections are sufficient to offer an adequate opportunity to explain similarities between asylum applications absent a confidentiality waiver."). The Board in *Matter of R-K-K-* was not required to address this issue because the applicant's brother waived his confidentiality protections. *Id.* The brother's unredacted declaration was part of the record so the parties and the Immigration Judge were able to fully compare the two documents. *Id.* With respect to confidentiality and asylum applications, 8 C.F.R. § 1208.6(a) provides:

> Information contained in or pertaining to any asylum application, records pertaining to any credible fear determination conducted pursuant to § 1208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 1208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General.

However, the confidentiality regulation is not concerned about disclosures to an Immigration Judge or DHS officials. *See* 8 C.F.R. § 1208.6(c)(1)(i). It appears the primary concern of 8 C.F.R. § 1208.6 is that public disclosure of certain information provided in an asylum application may make its way back to the applicant's persecutor and consequently subject the applicant, or his or her family members, to persecution or harm.[3] Indeed, the instructions for Form I-589, Application for Asylum and for Withholding of Removal, cite the confidentiality regulations contained at 8 C.F.R. §§ 208.6 and 1208.6 (which apply to DHS and the Executive Office for Immigration Review, respectively). Another issue with respect to disclosure of asylum application information to third parties, albeit more rare in its occurrence, is the potential for public disclosure to create a new claim of relief for the applicant that did not exist absent the disclosure. *Id.*

Breaches of Confidentiality

Although courts and agencies have recognized that a violation of the confidentiality regulations could be cause for a new asylum claim, the regulations do not provide a remedy for breach of confidentiality.[4] According to a legacy Immigration and Naturalization Service ("INS") memorandum,

> a breach occurs when information is disclosed to a third party and the disclosure is significant enough that it allows the third party to connect the identity of the applicant to: (1) the fact that the applicant is seeking asylum; (2) specific facts or allegations pertaining to the individual asylum claim in the application; or (3) facts or allegations that are sufficient to give rise to a reasonable inference that the person is seeking asylum.[5]

A breach of the confidentiality regulations does not result in automatic reversal of a removal order. Instead, some courts have found that if a breach occurs, the court must determine "whether the disclosure gives rise to a new claim of asylum for the applicant that is independent of the original claim." *See* McGreal (Sept.–Oct. 2008) at 6 (citing *Corovic v. Mukasey*, 519 F.3d 90, 96 (2d Cir. 2008)); *Averianova v. Mukasey*, 509 F.3d 890, 899–900 (8th Cir. 2007); *Abdel-Rahman v. Gonzales*, 493 F.3d 444, 453 (4th Cir. 2007); *Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 263 (2d Cir. 2006)). Then, the burden would be on the applicant to "submit additional evidence to establish the new claim of asylum." *See* McGreal (Sept.–Oct. 2008) at 7 (citing *Ghasemimehr v. Gonzales*, 427 F.3d 1160, 1161–63 (8th Cir. 2005)).

Notwithstanding the burden on the applicant to prove a new claim arising from a confidentiality breach, Immigration Judges may want to be cautious in admitting unredacted documents from one proceeding into another. While the confidentiality regulation allows the Attorney General "limitless discretion to disclose information in asylum files to third parties," this limitless discretion does not extend to "any other government official." Memorandum from Bo Cooper, Gen. Counsel, INS, to Jeffrey Weiss, Dir. of Int'l Affairs, INS, Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information 3 (June 21,

2001) (copy on file with author). Notably, the U.S. Court of Appeals for the Federal Circuit upheld a Merit Systems Protection Board ("MSPB") conclusion that a breach of 8 C.F.R. § 208.6 "was a firing offense irrespective of whether that breach was harmless." *See Lin*, 459 F.3d at 267 n.8 (citing *Lewis v. Dep't of Justice*, 34 F. App'x 774, 776 (Fed. Cir. 2002)). In *Lewis*, an asylum officer posted on an online forum that he had granted asylum to a famous athlete. Although the athlete did not hide that he had been granted asylum, the MSPB and the Federal Circuit found this disclosure of his asylum status without his written permission a breach of the regulation. *Lewis*, 34 F. App'x at 776 (stating that the regulation "makes no exception permitting 'harmless' disclosure of information relating to asylum applications or disclosure relating to applicants who did not hide the fact that they had been granted asylum"). Thus, Immigration Judges and other government officials should consider that unauthorized disclosure of asylum application information to third parties may carry consequences even if the disclosure may ultimately be deemed harmless.

A more subtle example of a confidentiality breach is a U.S. immigration official providing an asylum applicant's government with an unredacted document that is typically associated with an asylum claim. *See, e.g.*, *Lin*, 459 F.3d at 262 (finding a confidentiality breach where a consular officer asked the Chinese government to authenticate the asylum applicant's certificate of release from prison, which contained identifying information such as the applicant's name, prisoner number, and former residence); *Anim*, 535 F.3d at 254–56 (finding a confidentiality breach where an investigator asked the Cameroonian government to authenticate a copy of a summons identifying the applicant as a member of the Cameroon government).

A review of the aforementioned case law demonstrates that confidentiality violations most often involve disclosure of information to the general public or to government officials in the applicant's home country. Case law does not discuss confidentiality violations in the context of disclosure to an applicant accused of plagiarism or fraud. Interestingly, the Board and circuit courts did not address confidentiality concerns in pre-*R-K-K-* cases where unredacted asylum applications from other proceedings were admitted into the record seemingly without confidentiality waivers. *See generally* Jonathan Calkins and Elizabeth Donnelly, "Trust, but Verify: Document Similarities and Credibility Findings in Immigration Proceedings," *Immigration Law Advisor*, Vol. 5, No. 3, at 15 (Mar. 2011) (citing *Nyama*, 357 F.3d at 816; *Kourouma*, 588 F.3d at 242).

Avoiding Confidentiality Breaches

Formal mechanisms for Immigration Judges to admit asylum application information from other proceedings are also not clearly defined. Protective orders, which bar disclosure of certain information and which can be enforced if violated, ensure that Immigration Judges, the Board, and applicants "have full access to all unclassified sensitive information that is introduced in an immigration hearing, while preserving the Government's interest in protecting such information from general disclosure." Executive Office for Immigration Review, *Protective Orders & the Sealing of Records in Immigration Proceedings*, OPPM 09-02 (Feb. 9, 2009), *available at* https://perma.cc/AY6W-8KGY. Nevertheless, Immigration Judges may issue protective orders in immigration proceedings only if such disclosure would harm national security or law enforcement interests of the United States. *See id.* ("The regulation applies only to sensitive law enforcement or national security information (*e.g.*, grand jury information or names of confidential witnesses) which is not classified, but the disclosure of which could nonetheless jeopardize investigations or harm national security."); *see also* 8 C.F.R. § 1003.46. Thus, unless the inter-proceeding similarities are related to sensitive law enforcement or national security information, there does not seem to be a mechanism for an Immigration Judge to issue a protective order to allow an applicant and his or her attorney to view unredacted asylum applications of applicants who did not waive their confidentiality protections without a possible violation of the confidentiality regulations.

If issuing a protective order is not an option, then redaction of identifying information in applications and documents from other proceedings may address the confidentiality concerns of 8 C.F.R. § 1208.6. For example, the Immigration Judge in *Mei Chai Ye* instructed DHS to submit redacted versions of two similar affidavits before admitting them into evidence. *See* 489 F.3d at 521. It thus appears that an applicant may effectively and meaningfully respond to inter-proceeding similarities with redacted materials, but this is another unresolved area of the law that may develop further as circumstances arise.

Conclusion

While the three-step procedural framework in *Matter of R-K-K-* endeavors to tackle fraud without trampling due process, additional steps may be needed to preserve fairness and protect confidentiality absent express waiver in asylum proceedings. An additional area of tackling fraud in cases where inter-proceeding similarities are present involves determining what steps an Immigration Judge should take when inter-proceeding similarities may not be the fault of the applicant. Nevertheless, the *R-K-K-* framework has provided Immigration Judges with a solid guide for undertaking an analysis of inter-proceeding similarities.

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1. The Board noted it was "not aware of any circuit court that had rejected the Second Circuit's approach." *Matter of R-K-K-*, 26 I&N Dec. at 660 n.2; *see also Nadeem v. Holder*, 599 F.3d 869, 873 (8th Cir. 2010) (citing *Mei Chai Ye*, 489 F.3d at 521); *Dehonzai v. Holder*, 650 F.3d 1, 13–15 (1st Cir. 2011) (Thompson, J., dissenting) (same).

2. Identifying inter-proceeding similarities should be done in a manner consistent with confidentiality requirements pursuant to 8 C.F.R. § 1208.6. *Matter of R-K-K-*, 26 I&N Dec. at 661 n.3.

3. USCIS Fact Sheet: *Federal Regulation Protecting the Confidentiality of Asylum Applicants* (Oct. 18, 2012), available at https://perma.cc/Y3A6-3F4A.

4. *See* Christopher McGreal, *Asylum Confidentiality: Disclosure of Asylum-Related Information to Unauthorized Third Parties*, Immigration Litigation Bulletin, Vol. 12, Nos. 9-10, at 6 (Sept.-Oct. 2008) (citing 8 C.F.R. §§ 208.6, 1208.6), *available at* https://perma.cc/RC4J-4DGM.

5. *Lyashchynska v. U.S. Atty. Gen.*, 676 F.3d 962, 970 (11th Cir. 2012) (citing Memorandum from Bo Cooper, Gen. Counsel, INS, to Jeffrey Weiss, Dir. of Int'l Affairs, INS, Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information 7 (June 21, 2001)).

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Finding Firm Ground: Exploring the Limits of Adverse Credibility

by Alexandra Fleszar

Many courts have weighed in on the multi-faceted issue of credibility decisions in asylum cases.[1] Over 10 years ago, Congress enacted the REAL ID Act of 2005, amending the Immigration and Nationality Act "in order to 'creat[e] . . . a uniform standard for credibility' determinations." *Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 165 (2d Cir. 2008) (alteration in original) (quoting H.R. Rep. 109-72, at 167 (2005)); *see* section 208(b)(1)(B)(iii) of the Act, 8 U.S.C. § 1158(b)(1)(B)(iii) (setting forth the credibility standard for asylum applications following the enactment of the REAL ID Act). In the intervening 12 years, the Board of Immigration Appeals and the Federal circuit courts of appeals have had the opportunity to delve into the contours of what renders an applicant's testimonial evidence incredible and also types and degrees of evidence upon which these decisions may be based. Assuming the reader's familiarity with the general standards established by and for the REAL ID Act, this article will explore specific credibility issues, including evidentiary standards and constitutional and statutory requirements regarding corroboration, notice, and the right to present evidence.[2]

Inconsistencies and the Doctrine of *Falsus in Uno*

With the abrupt change in credibility determination requirements and introduction of the seemingly wide-open field that the REAL ID Act produced for these determinations, courts have struggled with defining the floor of what might be impermissible criteria for an adverse credibility determination. *See*, *e.g.*, *Singh v. Holder*, 699 F.3d 321, 332 n.13 (4th Cir. 2012) (addressing the issue of "how small an inconsistency is sufficient to justify an adverse credibility finding"). Though all circuits explicitly state that an inconsistency need bear no relation to the alien's claim to support an adverse credibility decision, jurisprudence reveals that there exists some tension between this principle and the reality of how cases are analyzed. Some circuits recognize that just a single inconsistency

could render an alien's testimony incredible. *See Qin Wen Zheng v. Gonzales*, 500 F.3d 143, 147 (2d Cir. 2007); *see also Marikasi v. Lynch*, 840 F.3d 281, 287 n.1 (6th Cir. 2016); *Castañeda-Castillo v. Gonzales*, 488 F.3d 17, 23 n.6 (1st Cir. 2007) (en banc). Others espouse that something more than a trivial variance must exist despite the REAL ID Act's broadened standards. *See*, *e.g.*, *Kadia v. Gonzales*, 501 F.3d 817, 822 (7th Cir. 2007) (noting that under the REAL ID Act, which was not applied in the case, inaccuracies and falsehoods must be weighed under a totality of the circumstances analysis and an Immigration Judge "cannot discredit otherwise persuasive testimony because of a misspelling in the asylum application"); *see also Singh*, 699 F.3d at 332 n.13 (recognizing circuit court disagreement over the level of inconsistency required for an adverse credibility determination).

In exploring the lower bounds of REAL ID Act standards, several circuits have recognized the potential application of the legal doctrine of *falsus in uno*, *falsus in omnibus* (*"falsus in uno* doctrine" or "the doctrine"), or "false in one thing, false in everything."[3] The *falsus in uno* doctrine is a discretionary legal principle that allows a fact-finder to disbelieve the entirety of a witness' testimony based on the witness' falsehood in one aspect of testimony. *Enying Li v. Holder*, 738 F.3d 1160, 1163 (9th Cir. 2013).[4] With the passage of the REAL ID Act, the *falsus in uno* doctrine has seen a renaissance in certain circuits. The First, Second, and Ninth Circuits have held, either before or after the REAL ID Act's passage, that the principle of *falsus in uno*, *falsus in omnibus* is fair game in credibility determinations, though to varying degrees. *Wen Feng Liu v. Holder*, 714 F.3d 56, 61 (1st Cir. 2013); *Enying Li*, 738 F.3d at 1163–67; *Castañeda-Castillo*, 488 F.3d at 23 & n.6 (explicitly relying on the *falsus in uno* doctrine to describe a well-reasoned explanation of adverse credibility and recognizing that the REAL ID Act entitles fact-finders to draw inferences under the doctrine); *Siewe v. Gonzales*, 480 F.3d 160, 170-71 (2d Cir. 2007). The Ninth Circuit has interpreted the doctrine to apply to discredit the entirety of the witness' testimony only where the witness provided a "*material* and *conscious* falsehood in one aspect of testimony." *Enying Li*, 738 F.3d at 1163. In *Enying Li*, the Ninth Circuit explained that "[t]he maxim *falsus in uno*, *falsus in omnibus* should not be applied when the truthfulness of the witness has no bearing on the claim, as is the case when the claim is based on provable fact such as having two children or an undisputed ethnic classification." *Id.* at 1167.

Prior to passage of the REAL ID Act, the Second Circuit also recognized several limitations or exceptions to *falsus in uno, falsus in omnibus* as a maxim when assessing credibility, sorting the limitations into five categories. *Siewe*, 480 F.3d at 170–71. First, the Second Circuit found that the presentation of some piece of false evidence does not negate the assessment of evidence that is independently corroborated. *Id*. at 170. Second, fraudulent documents created to escape persecution may tend to support an alien's allegations. *Id*. Third, the *Siewe* court noted that false evidence wholly ancillary to the alien's claim may be insufficient to discount the remaining uncorroborated material as false, though not necessarily. *Id.* at 170–71. Fourth, "[a] false statement made during an airport interview, depending on the circumstances, may not be a sufficient ground for invoking *falsus in uno*," as the *Siewe* court recognized that initial airport interviews may be perceived as threatening by aliens fleeing from their governments. *Id.* at 171. Finally, the Second Circuit concluded that where an alien does not know, or has no reason to know, that submitted evidence is false, an Immigration Judge may not rely on the *falsus in uno* doctrine. *Id*. The court stated that these five circumstances could render inappropriate an Immigration Judge's reliance on the doctrine where an alien submitted false evidence. *Id.*

The First Circuit, on the other hand, has thus far consistently upheld the application of the *falsus in uno* doctrine, seemingly without qualification. *See Quezada-Caraballo v. Lynch*, 841 F.3d 32, 33 (1st Cir. 2016); *Weng Feng Lui,* 714 F.3d at 61; *Castañeda-Castillo*, 488 F.3d at 23 & n.6. In *Weng Feng Lui*, the First Circuit upheld the denial of a Chinese applicant's claim for religious asylum based on his lack of credibility regarding his wife's forced abortion. 714 F.3d at 61. The court explicitly held that the REAL ID Act provided the Immigration Judge with the discretion to doubt the applicant's newly raised Falun Gong claim where he lacked credibility in describing the events surroundings his wife's forced abortion. The First Circuit has observed that the *falsus in uno* doctrine did not become available to fact-finders based on *any* inconsistency until passage of the REAL ID Act. *Castañeda-Castillo*, 488 F.3d at 23 n.6. But the *Weng Feng Lui* court noted that the REAL ID Act actually confirmed a fact-finder's ability to apply the doctrine, as Immigration Judges could previously rely on it where an inconsistency went to a central aspect of an applicant's claim. 714 F.3d at 61.

However, there is a circuit split regarding whether the doctrine applies in the context of the REAL ID Act. In contrast to the First, Second, and Ninth Circuits, the Seventh Circuit has expressed a disinclination to apply the *falsus in uno* doctrine even given the broadened standards provided by the REAL ID Act. *See Kadia*, 501 F.3d at 821. The Seventh Circuit reads the REAL ID Act clause referring to the "totality of the circumstances" to provide for an analytical floor that prevents an Immigration Judge from discrediting the entirety of a witness' testimony based on any single perceived inconsistency or implausibility. *Id.* at 821–22 (expressing doubt as to the revival of the *falsus in uno* doctrine based on passage of the REAL ID Act). Though *Kadia* itself was not decided under REAL ID Act standards, the court stated in apparent reference to the REAL ID Act that "the mistakes that witnesses make in all innocence must be distinguished from slips that, *whether or not they go to the core of the witness's testimony*, show that the witness is a liar." *Id.* at 822 (emphasis added).

There is a further circuit split regarding whether the Board, in addition to Immigration Judges, may also use the *falsus in uno* doctrine in making credibility determinations regarding evidence presented to the Board. The Second Circuit defers to the Board to adopt the *falsus in uno* doctrine as applied by the Immigration Judge below when evaluating evidence supporting a motion to reopen. *See Qin Wen Zheng*, 500 F.3d at 147. In *Qin Wen Zheng*, the Board denied the respondent's second motion to reopen based on his failure to establish a change in country conditions, which in turn was based on the Board's refusal to credit new supporting evidence. *Id.* at 146–47. The Second Circuit relied on its decision in *Siewe* in holding that a single false document or instance of false testimony could support an adverse credibility finding. *Id.* at 147. The *Qin Wen Zheng* court determined that the Board appropriately relied on the Immigration Judge's unchallenged adverse credibility finding in declining to credit evidence supporting the motion to reopen. *Id*.

The Ninth Circuit explicitly rejected the Second Circuit's holding. *Shouchen Yang v. Lynch*, 822 F.3d 504, 508–09 (9th Cir. 2016). In *Shouchen Yang*, the Ninth Circuit held that the doctrine is not available to the Board when considering motions to reopen removal proceedings. After the applicant was denied relief based on an adverse credibility finding, he moved to reopen proceedings based on new evidence of his alleged conversion to Christianity and recent related persecution against his wife in China. The Board denied the applicant's motion, finding that he had not demonstrated why the Board should accept the statements in support of his motion as credible after an adverse credibility finding by the Immigration Judge. Recognizing a long line of precedent holding that credibility determinations in motions to reopen are inappropriate, the *Shouchen Yang* court held that the Board must credit evidence supporting a motion to reopen unless the evidence is "inherently unbelievable." *Id.* at 508 (quoting *Tadevosyan v. Holder*, 743 F.3d 1250, 1256 (9th Cir. 2014)). The Ninth Circuit held that only a fact-finder, rather than an appellate, judicial body is in a position to decide when a witness is lying versus when he or she is telling the truth. *Id.* The court noted that rendering a finding on the Board's own evaluation of the credibility of new evidence, when based on a prior decision by a fact-finding body, is in tension with the Board's "limited and deferential role" as a reviewing body, especially given that the Board does not have the ability to observe the witness' demeanor, candor, or other indicia of reliability. *Id*.

Despite the seeming rise of "wide-open" credibility decisions under the REAL ID Act and the corresponding doctrine of *falsus in uno*, *falsus in omnibus*, some circuits' limitations on the use of this discretionary adjudicative tool indicate that not all inconsistencies, implausibilities, or omissions are treated equally in credibility determinations. Though the Second Circuit has not taken the opportunity, post-REAL ID Act, to assess the validity of the limitations to the doctrine that were first identified in *Siewe*, jurisprudence in several circuits suggests that the application of at least one such limitation survives: caution against reliance on omissions from airport interviews as the basis for adverse credibility decisions, despite the discretion afforded to Immigration Judges under the REAL ID Act.

Omissions and Adverse Credibility: Is All Evidence Created Equal?

In the wake of the REAL ID Act, some courts have treated inconsistencies and omissions in the same manner. *See Xiu Xia Lin*, 534 F.3d at 166 n.3 ("An inconsistency and an omission are, for these purposes, functionally equivalent."). Omissions, however, can present trickier credibility considerations than inconsistencies depending on the evidentiary source.

Precedent from the Board and several circuits cautions that courts should use care in basing an adverse credibility determination on seeming "omissions" that result from elaboration of an asylum claim when information may not have been previously fully developed in statements, affidavits, or applications. These cases recognize that, despite the REAL ID Act's discretionary standard, initial interviews may be insufficiently rigorous and may not be reliable sources upon which to soundly base credibility decisions.[5]

Prior to the REAL ID Act, several circuit courts called into question the use of airport statements in finding adverse credibility based on omissions in such statements. *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004) ("The airport interview is an inherently limited forum for the alien to express the fear that will provide the basis for his or her asylum claim, and the [Board] must be cognizant of the interview's limitations when using its substance against an asylum applicant."); *Senathirajah v. INS*, 157 F.3d 210, 221 (3d Cir. 1998) ("We do not operate under any rule that prevents an asylum applicant from elaborating upon the circumstances underlying an asylum claim when given the opportunity to take the witness stand."); *Balasubramanrim v. INS*, 143 F.3d 157, 164 (3d Cir. 1998) ("That there were some inconsistencies between the airport statement and Balasubramanrim's testimony before the [I]mmigration [J]udge is not sufficient, standing alone, to support the Board's finding that Balasubramanrim was not credible."). Following passage of the REAL ID Act, several circuits have also concluded that omissions made during airport interviews are less reliable evidentiary sources upon which to base adverse credibility decisions. *See Qing Hua Lin v. Holder*, 736 F.3d 343, 352–53 (4th Cir. 2013) (noting that the circumstances under which airport interviews take place "caution against basing an adverse credibility determination solely on inconsistencies and, especially, omissions that arise out of statements made in such environments"); *Joseph v. Holder*, 600 F.3d 1235, 1243 (9th Cir. 2010) (affirming precedent devaluing the reliability of airport interviews post-passage of the REAL ID Act, but in a procedurally pre-REAL ID case); *Tang v. U.S. Att'y. Gen.*, 578 F.3d 1270, 1279 (11th Cir. 2009); *Moab v. Gonzales*, 500 F.3d 656, 660–61 (7th Cir. 2007).

In *Moab v. Gonzales*, the Seventh Circuit reversed an adverse credibility decision based on the applicant's elaboration of his claim for asylum where the Board concluded that his claims of persecution between his airport statement and testimony became "more egregious." 500 F.3d at 660–62. During the airport interview, the applicant described fear of returning to Liberia based on a familial land dispute and an ongoing civil war; at the time of testimony before the Immigration Court, he added that he also feared return based on his sexual orientation and described new acts of persecution based on this protected ground. *Id*. at 660–61. The Seventh Circuit concluded that the additional harms that the applicant described during testimony were reasonably withheld during an initial airport interview for fear of government mistreatment. *Id*.

In so holding, the *Moab* court approved of several factors used in considering the reliability of airport interviews that were first described by the Second Circuit in *Ramsameachire v. Ashcroft*, 357 F.3d 169, 180 (2d Cir. 2004). *See Moab*, 500 F.3d at 661. There, the Second Circuit stated that:

> First, a record of the interview that merely summarizes or paraphrases the alien's statements is inherently less reliable than a verbatim account or transcript. Second, similarly less reliable are interviews in which the questions asked are not designed to "elicit the details of an asylum claim," or the INS officer fails to ask follow-up questions that would aid the alien in developing his or her account. Third, an interview may be deemed less reliable if the alien appears to have been reluctant to reveal information to INS officials because of prior interrogation sessions or other coercive experiences in his or her home country. Finally, if the alien's answers to the questions posed suggest that the alien did not understand English or the translations provided by the interpreter, the alien's statements should be considered less reliable.

Ramsameachire, 357 F.3d at 180-81 (citations omitted) (concluding that, given the deliberate nature in which an airport interview was conducted, the applicant's inconsistent statements supported an adverse credibility determination). In reversing the Board's adverse credibility decision, the *Moab* court cited the shortened nature of the initial interview, evidence demonstrating potential translation issues during the airport interview, and the alien's reasonable fear of further persecution from

continued on page 10

administratively close or recalendar proceedings is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits. The Board concluded that administrative closure, requested by the Department of Homeland Security ("DHS"), was inappropriate in this case where the respondent is applying for asylum.

While the Board recognized the Immigration Judge's concerns regarding administrative efficiency and limited court resources, it noted that such matters are secondary to a party's interest in having a case resolved on the merits, particularly because *Avetisyan* does not include court resources among the factors to consider in evaluating whether administrative closure is appropriate. In disagreeing with the Immigration Judge that the matter does not present an "actual case[] in dispute," the Board stated that the respondent has a right to a hearing on the merits of his claim, assuming that his asylum application was properly filed and that he is eligible for that relief. Moreover, the Board noted the fact that the DHS sought administrative closure in this case is not dispositive of whether the respondent's case is actually in dispute because, in considering administrative closure, an Immigration Judge cannot review whether an alien falls within the enforcement priorities of the DHS, which has exclusive jurisdiction over matters of prosecutorial discretion, or whether an alien will actually be removed from the United States.

After noting that the respondent's case presented a clear public interest in the finality of immigration proceedings, the Board concluded that recalendaring of the respondent's proceedings is appropriate because the respondent had provided a persuasive reason for his case to proceed and be resolved on the merits. Accordingly, the Board sustained the respondent's appeal, vacated the Immigration Judge's decision, and reinstated the removal proceedings.

Finding Firm Ground: *continued*

government authorities upon entering the United States. 500 F.3d at 661–62.

Similarly, the Eleventh Circuit in *Tang v. U.S. Att'y Gen.* also reversed an adverse credibility decision where the Immigration Judge relied in part on the alien's omission of her Christian faith during her airport interview. 578 F.3d at 1279. The *Tang* court noted that "if an alien's statements during an airport interview are less detailed than the alien's later testimony, the [Immigration Judge] should not focus exclusively on airport interview omissions, rather than contradictions, when determining whether the alien is credible." *Id.* As in *Moab*, the Eleventh Circuit explicitly relied on the pre-REAL ID Act cases of *Ramsameachire* and *Balasubramanrim* in a post-REAL ID Act case to hold that an Immigration Judge should consider an alien's lack of representation and potential fear of official questioning where he or she may have been subject to prior abuse. *Id.*

The Fourth Circuit's treatment of airport interviews in the post-REAL ID Act context initially appears to call into question whether the "heart of the claim" test is entirely dead, or whether the decreased reliance on omissions or inconsistencies from airport interviews may, in a way, revive this doctrine. In *Qing Hua Lin v. Holder*, the Fourth Circuit expressed its concern regarding the Board's reliance on airport interviews, stating that

> Most so-called "airport interviews" are brief affairs given in the hours immediately following long and often dangerous journeys into the United States. These circumstances caution against basing an adverse credibility determination solely on inconsistencies and, especially, omissions that arise out of statements made in such environments. As evidenced by the questions asked of Lin, the purpose of these interviews is to collect general identification and background information about the alien. The interviews are not part of the formal asylum process, and are conducted without legal representation and before most aliens are aware of the elements necessary to support a claim for asylum. Requiring precise evidentiary detail in such circumstances ignores the reality of the interview process and places an unduly onerous burden on an alien who later seeks asylum.

736 F.3d at 352–53 (citation omitted). The court went on to explicitly agree with several other circuits regarding concerns over the Board's reliance on statements made in airport interviews for adverse credibility decisions. *Id.* at 353 (citing *Moab*, 500 F.3d at 660–61; *Ramsameachire*, 357 F.3d at 179; *Joseph*, 600 F.3d at 1243; *Zubeda v. Ashcroft*, 333 F.3d 463, 477 (3d Cir. 2003)).

However, in finding that the applicant's airport omissions were sufficient to support an adverse credibility

finding, the *Qing Hua Lin* court found that it was the degree of the alien's omission that rendered her testimony incredible. The court stated that the applicant's omission of her forced abortion during the airport interview "is not a minor evidentiary detail whose absence can be overlooked, *it is the very core of her claim*." *Qing Hua Lin*, 736 F.3d at 353–54 (emphasis added). The dicta in *Qing Hua Lin* appears to suggest that the heart of the claim test may not be as dead as was once thought. *See id.*

At the very least, the criteria the *Ramsameachire* court developed to assess the reliability of airport interviews in credibility determinations remains applicable in at least some circuits' post-REAL ID Act cases, and may help to establish at least a partial floor for what is sufficiently substantial evidence on which to base an adverse credibility decision. *See Moab*, 500 F.3d at 661–62; *Tang*, 578 F.3d at 1279; *Qing Hua Lin*, 736 F.3d at 352–53. Thus, when evidence suggests an omission during an airport interview, adjudicators should take care to evaluate the reliability of the interview as an initial matter.

Due Process: Corroboration, Notice and the Opportunity to Respond, and the Right to Present Evidence

Adverse credibility determinations are generally fatal to asylum claims—however, an alien may still succeed where evidence corroborates a claim of persecution and credibility that is in doubt. Section 208(b)(1)(B)(iii) of the Act; *Qing Hua Lin*, 736 F.3d at 351–54; *see also Singh*, 699 F.3d at 331–32. When a case reaches issues of corroboration, it becomes easy to muddy the waters of credibility, where conflation of an alien's initial burden to present credible testimony and the ancillary burden to corroborate testimony can frequently occur. *See Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011). Though testimonial credibility and corroborative evidence are intimately tied, it is important to maintain the statutory delineation that allows aliens to meet the burden of proof with credible, uncorroborated testimony alone. *See* section 208(b)(1)(B)(ii) of the Act; 8 C.F.R. § 1208.13(a).

What types and degrees of corroborative evidence suffice to allay credibility concerns varies throughout the circuits; though the Board has relied on certain factors indicating a lack of corroboration, other circuit courts have called into question that reliance. *Compare Matter of J-Y-C-*, 24 I&N Dec. 260, 265 n.6 (BIA 2007) (discrediting an applicant's late proffer of a corroborating letter because the letter lacked any letterhead or authenticating details), *with Marynenka v. Holder*, 592 F.3d 594, 601 (4th Cir. 2010) (finding that relying on the lack of letterhead without any other evidence calling into question the legitimacy of the letter was insufficient for finding a failure in corroboration), *and Tabaku v. Gonzales*, 425 F.3d 417, 421–22 (7th Cir. 2005) (concluding that an inconsistency in newspaper articles alone is an insufficient basis to support an adverse credibility decision). The Fourth Circuit, for example, holds that corroborating evidence must be objective; thus, letters and affidavits from family and friends are insufficient for corroboration as they are evidence offered from interested parties. *Qing Hua Lin*, 736 F.3d at 351–52, 354.

Where a trier of fact determines that the applicant has not met his or her burden through testimony alone, corroborative evidence must be provided unless the evidence is unavailable and cannot reasonably be obtained. *Matter of J-Y-C-*, 24 I&N Dec. at 263 (citing REAL ID Act § 101(a)(3) (codified at section 208(b)(1)(B)(iii) of the Act)). This statutory phrase begs the question of when such evidence can or should be presented and to what extent aliens are entitled to know in advance of the need for corroboration. *See Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015). After all, the statute indicates that credible testimony may be sufficient by itself for an applicant to meet his or her burden. Section 208(b)(1)(B)(ii) of the Act. The issue thus arises as to whether an applicant would know their testimony or evidence is insufficient or incredible prior to receiving a decision. *See Ren*, 648 F.3d at 1091. These questions have become tied to the issue of whether an alien has received due process in the adjudicative process.[6] *Id.* at 1092–93 (discussing the due process concerns posed by demanding corroborating evidence on the day of the individual's merits hearing).

Following passage of the REAL ID Act, courts began to see due process challenges to adverse credibility decisions where Immigration Judges did not give advance notice about credibility concerns nor further opportunity to present corroborative evidence. *See Darinchuluun v. Lynch*, 804 F.3d 1208, 1216 (7th Cir. 2015); *Qing Hua Lin*, 736 F.3d at 353–54. Courts have frequently confronted the two issues of notice and the opportunity to present evidence, with varying outcomes.[7] Except for in the Ninth Circuit, and somewhat in the Second Circuit, there is no

requirement of notice of an inconsistency or the need for corroboration to satisfy due process, regardless of the degree of inconsistency, prior to basing a denial of relief on the inconsistencies or lack of evidence. *See Jin Ju Zhao v. Holder*, 322 F. App'x 437, 440 (6th Cir. 2009) ("We note that the prophylactic rule adopted by the Second Circuit in *Ming Shi Xue*—requiring an Immigration Judge to give notice of putative contradictions that are not self-evident before he or she may rely on them—has not been adopted in any other circuit."); *Sankoh v. Mukasey*, 539 F.3d 456, 469–70 (7th Cir. 2008) (also citing *Ming Shi Xue v. Bd. of Immigration Appeals*, 439 F.3d 111, 118 (2d Cir. 2006)).

The Second Circuit draws the line of whether an alien must be confronted with inconsistencies based on the degree of the inconsistency. In *Majidi v. Gonzales*, 430 F.3d 77, 81 (2d Cir. 2005), the Second Circuit held that Immigration Judges may rely on inconsistent testimony and evidence without first bringing the inconsistencies to the alien's attention. In *Ming Shi Xue*, however, the court held that notice was required where the inconsistency was not "dramatic." The court held that because the alleged inconsistencies were not so dramatic as to be self-evident, and since neither the Immigration Judge nor the government had identified the alleged inconsistencies prior to the Immigration Judge's reliance on them in the ruling, the alien was deprived of the opportunity to address and explain the contradictions, in contravention of basic principles of law. *Id*.

Therefore, under current Second Circuit precedent, where inconsistencies are "sufficiently conspicuous and central to an applicant's claim as to be self-evident," they need not be brought to the applicant's attention. *Id.* at 114; *see also Zhi Wei Pang v. Bureau of Citizenship and Immigration Servs.*, 448 F.3d 102, 109–10 (2d Cir. 2006). Where an inconsistency is not self-evident, however, an Immigration Judge may not rely on it to support an adverse credibility determination without first bringing the perceived discrepancy to the applicant's attention, providing him or her with notice and the opportunity to reconcile the differences in evidence. *Zhi Wei Pang*, 448 F.3d at 114–15 (Raggi, J., concurring).

The Ninth Circuit addressed the issues of notice and due process in the context of both credibility and the need for corroboration. *See Ren*, 648 F.3d at 1079. In *Ren*, the Ninth Circuit bifurcated the issues of the alien's credibility from that of corroborative evidence. The Immigration Judge in *Ren* denied the applicant asylum in the first instance based on the applicant's lack of credibility and, in the alternative, denied relief based on a lack of corroboration for the claim. *Id*. at 1083. The Immigration Judge had provided the applicant with notice of what corroborative evidence would be necessary to support his claim, as well as a 5-month continuance in order to produce the evidence at the next hearing. *Id.* at 1090.

Though the Ninth Circuit found that the inconsistencies noted were not sufficient to support an adverse credibility determination, the court affirmed the alternative denial based on lack of corroboration. *Id.* at 1094. The Ninth Circuit held that the applicant had failed to meet his burden of establishing his claim and had been afforded due process by way of notice and an opportunity to respond. *Id*. at 1093. In interpreting the REAL ID Act, the Ninth Circuit found that the statute requires that an alien be notified of the need for corroborative evidence and what specific evidence would suffice, and the alien must also be given an opportunity to provide the corroboration or explain why he or she cannot do so. *Id.* at 1092–93. Though not addressing the issue directly, the *Ren* court noted that the canon of constitutional avoidance required this outcome because demanding corroboration prior to notifying the alien would raise significant Fifth Amendment due process concerns. *Id*. Because the applicant had been provided notice of both the need for corroboration and what evidence would suffice, as well as a 5-month continuance to procure the evidence, the court held that due process was satisfied and the alternative denial was based on sufficiently substantial evidence. *Id*. at 1093–94.

As *Ren* recognized, the second facet of due process is whether the alien was provided the opportunity to present evidence. *Id*. at 1093. In *Qing Hua Lin*, though faced with a due process claim, the Fourth Circuit found that the alien received a full and fair hearing where the Immigration Judge set an additional deadline and held an additional hearing to allow new evidence to be presented and fully examined, as well as to allow the applicant to explain her prior statements. 736 F.3d at 354–55. Though finding that due process is satisfied under these conditions, the court did not address the issue of whether a new hearing *must* be provided in order to comply with due process standards under the REAL ID Act's provisions. The Board has since addressed that issue.

In *Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015), the Board addressed the statutory question of whether an alien was required to receive advance notice of the need to present corroborative evidence and a subsequent opportunity to present such evidence. Ultimately, finding that they were not bound by Ninth Circuit precedent in a case arising in the Fifth Circuit, the Board held that the REAL ID Act does not require advance notice of the need for specific corroborating evidence, nor does the statute provide for an automatic continuance to allow an alien to obtain the corroborating evidence following notice. *Id.* at 523–24. However, the Board did hold that where an alien has not provided reasonably available corroborating evidence, the Immigration Judge should first consider the explanations for the absence of evidence and determine whether good cause exists to continue the proceedings to allow the alien to obtain such evidence. *Id.* at 527.

Conclusion

"Anyone who has ever tried a case or presided as a judge at a trial knows that witnesses are prone to fudge, to fumble, to misspeak, to misstate, to exaggerate. If any such pratfall warranted disbelieving a witness's entire testimony, few trials would get all the way to judgment." *Kadia*, 501 F.3d at 821. A first reading of the REAL ID Act following its enactment in 2005 may have presented the reader with the impression of a bottomless credibility standard, allowing adjudicators free reign to rely on any inconsistency, missing piece of evidence, or discrepancy, no matter how minute. In the intervening 12 years, judicial interpretation has demonstrated that there remains a floor to credibility standards, bounded by evidentiary requirements and the desire to avoid triviality. Circuit court decisions regarding the law in many of these areas will likely continue to develop these standards in the years to come, providing adjudicators and litigants alike a more solid ground upon which to address credibility and corroboration.

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[1] *See*, *e.g.*, *Ren v. Holder*, 648 F.3d 1079, 1084–85 (9th Cir. 2011); *Rivas-Mira v. Holder*, 556 F.3d 1, 5–6 (1st Cir. 2009); *Kadia v. Gonzales*, 501 F.3d 817, 819–22 (7th Cir. 2007); *Siewe v. Gonzales*, 480 F.3d 160, 170–71 (2d Cir. 2007).

[2] The REAL ID Act amended the Immigration and Nationality Act to provide as follows:

> 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.

REAL ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3), 119 Stat. 231, 303 (codified at section 208(b)(1)(B)(iii) of the Act, 8 U.S.C. § 1158(b)(1)(B)(iii)). The changes also afford the presumption of credibility for applicants on appeal where no adverse credibility decision is explicitly made. *Matter of J-Y-C-*, 24 I&N Dec. 260, 262 (BIA 2007) (citing section 208(b)(1)(B)(iii) of the Act). The statute provides that an applicant's testimony may be sufficient to sustain the burden of proof without corroboration where the testimony is sufficiently credible, persuasive, and probative of facts sufficient to meet the applicant's burden. *Id.* at 263. However, if the trier of fact determines that corroborative evidence should be produced, it must be provided unless the evidence is unavailable and cannot reasonably be obtained. *Id.*

[3] *See Castañeda-Castillo*, 488 F.3d at 23 n.6. *But see Kadia*, 501 F.3d at 821–22.

[4] Prior to passage of the REAL ID Act, the doctrine had been all but ruled out by most circuit courts of appeals as inapplicable to credibility determinations, given that only inconsistencies or implausibilities related to the heart of the matter could predicate an adverse credibility decision. *See Kadia*, 501 F.3d at 821.

5 *See, e.g.*, *Qing Hua Lin v. Holder*, 736 F.3d 343, 352–53 (4th Cir. 2013); *Tang v. U.S. Att'y Gen.*, 578 F.3d 1270, 1279 (11th Cir. 2009); *see also Yan Liu v. Holder*, 640 F.3d 918, 925–26 (9th Cir. 2011) (pre-REAL ID Act); *cf. Matter of J-Y-C-*, 24 I&N Dec. 260, 264 (BIA 2007) (finding in pre-REAL ID Act context that inconsistencies between airport interview and testimony supported an adverse credibility finding, but noting that the alien did not argue that the airport interview was unreliable and did not attempt to explain inconsistencies).

[6] Aliens are entitled to due process of law in deportation proceedings. *Demore v. Kim*, 538 U.S. 510, 523 (2003) (citation omitted); *Zadvydas v. Davis*, 533 U.S. 678, 693–94 (2001) (citation omitted). An applicant's due process rights are violated when an applicant does not receive a full and fair hearing on her claims. *Qing Hua Lin*, 736

F.3d at 354–55; *see also Dia v. Ashcroft*, 353 F.3d 228, 239 (3d Cir. 2003); *Nazarova v. INS*, 171 F.3d 478, 482–83 (7th Cir. 1999).

[7] The issue of notice of an alien's inconsistencies or omissions arose as an issue even prior to the REAL ID Act. *Soto-Olarte v. Holder*, 555 F.3d 1089, 1092 (9th Cir. 2009) (procedurally pre-REAL ID case); *Sankoh v. Mukasey*, 539 F.3d 456 (7th Cir. 2008) (same); *Zhi Wei Pang v. Bureau of Citizenship & Immigration Servs*, 448 F.3d 102 (2d Cir. 2006) (same); *Majidi v. Gonzales*, 430 F.3d 77, 81 (2d Cir. 2005) (same). Though almost all circuits held that notice and an opportunity to respond to alleged inconsistencies or insufficient corroboration was not required prior to making an adverse credibility finding, two circuits held that some degree of notice was required under the REAL ID Act. *See, e.g.*, *Ren*, 648 F.3d at 1090.

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The Quality That Makes Something Worthy of Belief: REAL ID Credibility Standards and the Parameters of Plausibility Findings

by Michele D. Frangella

Introduction

Black's Law Dictionary defines credibility as "[t]he quality that makes something . . . worthy of belief." *Black's Law Dictionary* 423 (9th ed. 2009). Credibility determinations turn on particular indicia of truthfulness, including the internal and external consistency of an applicant's account, demeanor, candor, responsiveness to questioning, and now with the amendments of the REAL ID Act of 2005, Division B of Pub. L. No. 109-13, 119 Stat. 302 ("REAL ID Act"), the "inherent plausibility of the applicant's or witness's account." Section 208(b)(1)(B)(iii) of the Act, 8 U.S.C. § 1158(b)(1)(B)(iii). In drafting these amendments, Congress intended to create a "uniform standard for credibility." H.R. Rep. No. 109-72, at 167 (2005) (Conf. Rep.), *reprinted in* 2005 U.S.C.C.A.N. 240, 292, 2005 WL 1848528. Although an adverse credibility determination may be based on any one of the enumerated factors, such a determination must be reasonable and premised upon "the individual circumstances of the specific witness and/or applicant." *Id.* Congress intended for triers of fact to utilize "commonsense standards" when ferreting out truthful accounts from fraudulent ones. *Id.*

Adjudicators should be guided by common sense and reasonableness in examining the "inherent plausibility" of an applicant's account. An account may be plausible when it is "seemingly or apparently valid, likely, or acceptable." *Webster's II New Riverside University Dictionary* 901 (1994). Reviewing courts are likely to uphold an adverse credibility determination based upon the inherent implausibility of an applicant's account where the trier of fact bases such a determination on permissible inferences, rather than prohibited speculation. This article examines the differences between credibility and plausibility and the imprecise boundary between reasonable inferences and speculation in plausibility findings.

Credibility vs. Plausibility

Although often used interchangeably, credibility and plausibility are not synonymous. A credibility finding is a determination regarding the overall truthfulness of an applicant or witness. Such a determination must be based on any or all of the eight enumerated components in the REAL ID Act or "any other relevant factor" that an Immigration Judge or asylum officer finds illuminating. Section 208(b)(1)(B)(iii) of the Act. The "inherent plausibility" of an account is but one of many factors upon which a credibility determination may be made. A trier of fact may find that only certain aspects of an applicant's or witness's account are implausible. By contrast, an adjudicator must find an applicant or witness to be either credible or not credible, but not both. *Id.*

A court may find that some of an applicant's factual claims with regard to the time, date, or sequence of events are implausible. In *Teng v. Gonzales*, 516 F.3d 12 (1st Cir. 2008), the Immigration Judge questioned the respondent's assertion that he went into hiding in a Cambodian temple in March 1997 on account of his recent political activity but felt safe enough to emerge from the temple and go to work at the government post office until May 1997. He also felt safe enough to travel to and from the country in July 1997 using his Cambodian passport. The First Circuit upheld the Immigration Judge's adverse credibility finding, noting the "oddity of Teng's core story as to on and off concealments." *Id*. at 17. The implausibility of the alien's narrative, coupled with other inconsistencies on the record, supported the adverse credibility finding.

An Immigration Judge or asylum officer may also find that the nature of a respondent's claim based on a protected ground is inherently implausible. For example, in *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007), the Board of Immigration Appeals examined an Immigration Judge's opinion as to the inherent plausibility of a respondent's entire claim based upon religious persecution. The respondent, a native of China, arrived in the United States in August 2005. Upon arrival, he indicated that he had suffered past persecution in China on account of his Christian faith. During the interview at the airport, the respondent was unable to identify the principle book of Christian teachings (the Bible), despite testifying that a friend gave him a Bible and instructed him to read it. The Immigration Judge found that the respondent's inability to name the Bible as a text of Christian teachings cast serious doubt on the substance of the respondent's Christian faith. For this reason, the Immigration Judge considered the respondent's claim that he had been persecuted on account of such faith inherently implausible. The Board upheld the Immigration Judge's adverse credibility determination, noting, however, that it was based not only on the implausibility of the entire claim, but also on other discrepancies in the record, the demeanor of the respondent while testifying, and the lack of corroborating evidence.

Similarly, in *Ying Li v. BCIS*, 529 F.3d 79 (2d Cir. 2008), the alien sought refugee protection based on her fear of religious persecution in China for promoting Falun Gong. The Immigration Judge found that it was implausible that a student would promote Falun Gong at school to the point where she would fear persecution because of it, but that she herself was not a practicing member. *Id*. at 82. The Immigration Judge further found it implausible that the respondent openly met with a Falun Gong leader, but neither individual was ever arrested, and that the respondent was able to depart China using her own passport despite widespread claims of persecution of Falun Gong members. In upholding the Immigration Judge's decision, the Second Circuit held that while possible explanations could exist, the "overall implausibility" of the alien's claim supported the Immigration Judge's finding.

The inherent implausibility of an applicant's account may also relate to how a persecutor would act in a given situation. In *Mamana v. Gonzales*, 436 F.3d 966, 967 (8th Cir. 2006), the alien stated that he was a rank-and-file member of the Union Forces for Change, an opposition group in Togo. During his removal proceedings, he testified that on two separate occasions, representatives of the Prime Minister contacted him and asked him to give a public speech in support of the Government. He testified that he then went into hiding until his flight to the United States. The Immigration Judge found the respondent's claims to be inherently implausible because there was no support in the record to suggest that the respondent, a man with no "public reputation," would be contacted by the Government to play a pivotal role in the election process. *Id*. The Eighth Circuit upheld the Immigration Judge's determination, finding that no reasonable adjudicator would be compelled to find to the contrary, particularly in the absence of corroborating evidence. *Id*. at 968-69.

Objective Plausibility

In *Chen v. BIA*, 435 F.3d 141 (2d Cir. 2006), the Second Circuit recognized the difficulty in creating clearly demarcated lines between accounts that are plausible and those that are not. The court noted that "[t]he point at which a finding that testimony is implausible ceases to be sustainable as reasonable and, instead, is justifiably labeled 'speculation,' in the absence of an IJ's adequate explanation, cannot be located with precision." *Id*. at 145. Struggling with the seemingly subjective nature of these determinations, reviewing courts have emphasized the importance of providing objective reasoning that is valid, cogent, and specific when making an adverse credibility determination based on the inherent plausibility of an account. *See generally Tewabe v. Gonzales*, 446 F.3d 533, 538 (4th Cir. 2006); *Dia v. Ashcroft*, 353 F.3d 228, 250 (3d Cir. 2003).

Reasoning is valid, cogent, and specific when it is based on permissible inferences. Permissible inferences are those which are drawn from and tethered to a properly developed record. *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989) (stating that a full examination of an applicant is "essential"). In *Li v. Mukasey*, 529 F.3d 141 (2d Cir. 2008), the alien claimed that she was persecuted in China on account of being a practitioner of Falun Gong. Although the Immigration Judge found the respondent's testimony to be "extremely vague and general," neither the court nor counsel for the Government elicited further testimony from the respondent to fill in the factual gaps. The Second Circuit held that vague testimony alone cannot support an adverse credibility finding unless an attempt is made to solicit further detail from the applicant.

Similarly, in *Musollari v. Mukasey*, 545 F.3d 505 (7th Cir. 2008), the alien claimed that as an election observer in Albania in 2000, he was targeted for persecution because of his political activities. The Immigration Judge concluded that the respondent's account was implausible based in part on the fact that, in the Judge's experience, approximately 90 percent of Albanian asylum seekers claim to have been election observers. Addressing this portion of the Immigration Judge's conclusion, the Seventh Circuit stated that "[t]he IJ was entitled, based on his experience adjudicating these claims, to question Musollari further on the details of his appointment and service as an election observer—and should have done so—but this in itself is an insufficient ground on which to rest an adverse credibility finding." *Id*. at 509; *cf. Debab v. INS*, 163 F.3d 21, 26 (1st Cir. 1998) (rejecting the argument that the Immigration Judge erred by not inquiring regarding gaps in the alien's case).

Plausibility findings should be grounded in inferences informed by country conditions and other contextual factors. In *Banks v. Gonzales*, 453 F.3d 449, 454 (7th Cir. 2006), the Seventh Circuit compared the necessity of country-specific information in immigration proceedings with the importance of medical evidence in Social Security disability claims. The court concluded that such evidence would provide the appropriate benchmark against which an Immigration Judge may evaluate the plausibility of an applicant's claim. Although in *Banks*, the Seventh Circuit criticized the Department of State reports as being too generalized, the Board recently held that Department of State reports on country conditions are "highly probative evidence and are usually the best source of information on conditions in foreign nations." *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 213 (BIA 2010). Evidence on country conditions may also include testimony or affidavits from expert witnesses and reports authored by international nongovernmental organizations.

Speculation and Conjecture

A reviewing court must determine if an Immigration Judge's credibility determination is supported by substantial evidence. *Tang v. Att'y Gen. of U.S.*, 578 F.3d 1270, 1276-77 (11th Cir. 2009) (stating that post-REAL ID Act reversal of credibility determinations come under the substantial evidence standard). The Immigration Judge's determination will remain conclusive unless any reasonable adjudicator would be compelled to conclude otherwise. Section 242(b)(4)(B) of the Act, 8 U.S.C. § 1252(b)(4)(B). Although this standard affords great deference to an Immigration Judge's credibility determination, it is not unassailable, and deference will not be afforded to those determinations based upon speculation or conjecture. *See, e.g.*, *Toure v. Att'y Gen. of U.S.*, 443 F.3d 310, 316, 327 (3d Cir. 2006) (vacating the Immigration Judge's implausibility finding where it was "based on nothing more than speculation and conjecture"). Speculation is defined as "[t]he act or practice of theorizing about matters over which there is no certain knowledge." *Blacks Law Dictionary*, *supra*, at 529. Personal beliefs or perceived common knowledge regarding how a person or particular people should act, dress, or appear in public exemplifies the sort of unfounded speculation reviewing courts have criticized.

continued on page 9

For example, claims regarding the perception of homosexuals in foreign countries have been susceptible to impermissible conjecture. In 2008, the Second Circuit examined the claim of an alien who claimed he feared return to Guyana because of his homosexuality. *Ali v. Mukasey*, 529 F.3d 478 (2d Cir. 2008). In drawing an adverse credibility determination, the Immigration Judge found it implausible that the respondent would be perceived as a homosexual in Guyana. He stated that unless the respondent was walking down the street with a boyfriend, he would be unlikely to "demonstrate" his homosexuality. *Id.* at 492. The Immigration Judge further stated that "it's not clear that [he] will, in fact, be likely to form a strong or close homosexual relationship whether in Guyana or the United States," thereby decreasing the likelihood that his homosexuality would be noticed. *Id.* In overturning the Immigration Judge's decision, the Second Circuit explicitly stated that this "impermissible reliance on preconceived assumptions about homosexuality" could not form the basis for a proper credibility determination. *Id.*

In *Razkane v. Holder*, 562 F.3d 1283 (10th Cir. 2009), the Tenth Circuit reviewed the propriety of an Immigration Judge's credibility determination with regard to an alien's fear of persecution in Morocco based on his homosexuality. During the removal proceedings, repeated questions were asked as to whether or not the respondent "looked gay," culminating in a finding that he did not warrant protection because his "appearance does not have anything about it that would designate [him] as being gay. [He] does not dress in an effeminate manner or affect any effeminate mannerisms." *Id.* at 1286. The Tenth Circuit rejected the Immigration Judge's findings, stating that they were premised on the Judge's own views about how a gay person should appear and behave. This credibility finding impermissibly "elevated stereotypical assumptions" to the plane of evidence and, being "unhinged" from the legal requirements regarding credibility determinations set forth in the Act, precluded meaningful review by the court. *Id.* at 1288.

Similarly, the Ninth Circuit reviewed the claim of a Millenist who said that she had been persecuted because of her religious beliefs. *Cosa v. Mukasey*, 543 F.3d 1006 (9th Cir. 2008). In this case, the Immigration Judge found that the respondent's "severe" clothing, hair style and mannerisms did not "emote that type of lifestyle or approach that most attracted [her] into this religion." *Id.* at 1068. In rejecting this credibility determination, the Ninth Circuit found that the "IJ's conjectural view of how a Millenist should act and think" is not evidence upon which a valid credibility determination may be made. *Id.*

Conclusion

The "inherent plausibility" of an applicant's or witness's account is just one of the indicia of credibility set forth in the REAL ID Act of 2005. The Act provides that reasonableness and common sense must serve as the goal posts for credibility determinations. However, reasonableness and common sense do not provide license for triers of fact to supplant their "a priori" world views for evidence in the record. *Banks*, 453 F.3d at 453. In examining the propriety of a credibility determination based on the inherent plausibility of an account, reviewing courts apply a deferential standard of review. That deference notwithstanding, plausibility findings are most likely to withstand appellate review when they are based upon a fully developed record containing contextual evidence on country conditions.

Michele D. Frangella is a Judicial Law Clerk at the Boston Immigration Court.

Files: A 997 – Cleveland, OH
A 923
A 998

Date: AUG 23 2016

In re: I M E G

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Brian J. Hoffman, Esquire

ON BEHALF OF DHS: Jeremy Santoro
Assistant Chief Counsel

APPLICATIONS: Asylum; withholding of removal; Convention Against Torture

The respondents, natives and citizens of Honduras, appeal from the decision of the Immigration Judge, dated November 19, 2015, which denied the lead respondent's[1] applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). Sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act (Act), 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A); 8 C.F.R. §§ 1208.16(c)-1208.18. The appeal will be sustained in part, and remanded for further proceedings and the entry of new decision.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent argues that the Immigration Judge erred in finding that she was not a member of a particular social group of women who are unable to leave a relationship (Resp. Br. at 7-10). The respondent also argues that she established past persecution on account of her membership in a particular social group, that she is entitled to a presumption that she has a well-founded fear of future persecution, and that the Department of Homeland Security (DHS) did not rebut the presumption of a well-founded fear of persecution (Resp. Br. at 10-11). The respondent asserts that the Immigration Judge should have considered her eligibility for humanitarian asylum and did not sufficiently consider her claim for protection under the CAT (Resp. Br. at 12-13).

[1] The lead respondent (A 997) is the mother of the two children and co-respondents (A 923) and (A 998). The co-respondents are derivative beneficiaries of their mother's asylum claim. Hereinafter, any reference to "the respondent" is to the lead respondent.

We uphold the Immigration Judge's determination that the past harm the respondent suffered from her former abuser over an extended period of time rises to the level of past persecution (I.J. at 16). The Immigration Judge found that the respondent testified credibly about the past harm she suffered at the hands of her former abuser between 1991 and 2001 (I.J. at 4). The respondent testified that her relationship with . (Mr. O) began when he raped her and she became pregnant in 1991. She told Mr. O of her pregnancy and moved to his residence where, over the next 10 years, he abused her, threatened to kill her if she tried to leave him or called the police, and raped her multiple times (I.J. at 4; Tr. at 23-27). Under these circumstances, we agree with the Immigration Judge that the respondent met her burden of proof to demonstrate that she suffered past persecution. *See Haider v. Holder*, 595 F.3d 276, 287 (6th Cir. 2010); *Matter of O-Z- & I-Z-*, 22 I & N Dec. 23, 25-26 (BIA 1998).

Furthermore, we find that the respondent has demonstrated that she suffered past persecution on account of her membership in a particular social group (I.J. at 15; Tr. at 23-32, 40-49). In order to qualify for asylum, "the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." Section 208(b)(1)(B)(i) of the Act; *Matter of C-T-L-*, 25 I&N Dec. 341, 343 (BIA 2010). We agree with the respondent's appellate argument that her proposed group of "Honduran women unable to leave a domestic relationship" is a cognizable particular social group under the Act (Resp. Br. at 7-10; I.J. at 15). *See Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014) (holding that depending on the facts and evidence in an individual case, victims of domestic violence can establish membership in a particular social group that forms the basis of a claim for asylum).

The evidence establishes that the respondent was "unable to leave" the relationship with Mr. O for 10 years. The respondent testified that she tried to leave Mr. O many times during the 10 years that she resided with him, but he would force her to return by threatening to kill her or taking their child away and at one point, he did take their child (I.J. at 4, Tr. at 26-31). On one occasion, Mr. O threatened to kill the respondent at gun point and he threatened to have his cousin, a known murderer, target her if she tried to leave or report her abuse to the police (I.J. at 4; Tr. at 31).

Under the circumstances of this case, we find it appropriate to remand the record to the Immigration Judge to more fully consider the question of whether the respondent established that the government of Honduras was unable or unwilling to assist her during the period of abuse. *See Pilica v. Ashcroft*, 388 F.3d 941, 950 (6th Cir. 2004) ("persecution [i]s the infliction of harm or suffering by the government, or persons the government is unwilling or unable to control"). The respondent argues that the police in Honduras were unable or unwilling to control her former abuser between 1991 and 2001 (Resp. Br. at 7-10). The respondent testified that she was able to regain custody of her son by an order of a local judge, but she was forced to return to her abuser as a result of his continued threats and her fear that he would kill her if she reported the abuse to the police (I.J. at 4; Tr. at 26-32, 48-49). On remand, the parties may provide additional evidence and arguments supporting their contentions regarding whether the police were unable or unwilling to protect her from her abuser during the relevant period.

If the respondent establishes that the Honduran government was unable or unwilling to control her abuser during the 10-year period of abuse, she is entitled to a rebuttable presumption that she has a well-founded fear of future persecution. *See* 8 C.F.R. § 1208.13(b)(1); *Bi Xia Qu v. Holder*, 618 F.3d 602, 606 (6th Cir. 2010). However, we agree with the Immigration Judge's alternate finding that, assuming past persecution, the resulting presumption of a well-founded fear of persecution is rebutted by the evidence demonstrating that the respondent was able to live apart from her former abuser for 13 years in Honduras (I.J. at 16; Tr. at 48). Specifically, the respondent left her abusive relationship with Mr. O in 2001, she began a relationship with J V in 2002, she and Mr. V had two children together before they separated in 2012, and she moved to an apartment in Copan (I.J. at 16; Tr. at 52-53). In 2008, Mr. O threatened her during a single phone call, but that was only contact with him since she left him in 2001 (I.J. at 4; Tr. at 27-28, 44-46). The respondent resided in Honduras until 2014 without any problems with her former abuser (I.J. at 17; Tr. at 52-53).

However, where the government rebuts the presumption of a well-founded fear, the respondent should still have an opportunity to present a claim for humanitarian asylum. *See* 8 C.F.R. §§ 1208.13(b)(1)(iii)(A), (B); *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012). Therefore, we will remand the record for further evaluation of the issue of unable or unwilling in the context of past persecution; if this element is established, the respondent should have the opportunity to establish that she is eligible for a humanitarian grant of asylum.

Regarding the respondent's independent claim of a well-founded fear of persecution, we agree with the Immigration Judge that the respondent did not demonstrate that she has a well-founded fear of future persecution from her former abuser with whom she had no direct contact between 2001 and 2014 (I.J. at 17; Tr. at 44-46). We accordingly uphold the Immigration Judge's finding that on this matter.[2]

We therefore will remand the record for the issues discussed above. On remand, the parties should be given the opportunity to update the evidentiary record. Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings consistent with the foregoing opinion.

Ellen Reibowitz
FOR THE BOARD

[2] The respondent did not challenge the Immigration Judge's finding that the proposed particular social group of women lacking effective male protection is not a cognizable particular social group (I.J. at 16). Therefore, the issue is waived on appeal. *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n. 2 (BIA 2012) (when respondent fails to substantively appeal issue addressed in Immigration Judge decision that issue is waived before Board).

Files: [redacted] 221 – Fort Snelling, MN
[redacted]

Date:

APR 26 2018

In re: L[redacted] M[redacted]-R[redacted]
[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Susan M. Roberts, Esquire

ON BEHALF OF DHS: Kenneth R. Knapp
Assistant Chief Counsel

APPLICATION: Asylum

The Department of Homeland Security (DHS) appeals from an Immigration Judge's decision, dated April 4, 2017, granting the respondents' applications for asylum. *See* section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158. The appeal will be dismissed, and the record remanded to the Immigration Judge for any necessary background and security investigations.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondents, brothers and natives and citizens of Guatemala, were sexually abused by an uncle in Guatemala as young children (IJ at 1-3; Tr. at 44-45, 49, 63, 66). The Immigration Judge found that the respondents were credible as to this abuse, had established past persecution on account of a protected ground, but that DHS rebutted the presumption of a well-founded fear of future persecution by showing a fundamental change of circumstances because the respondents are now 20 and 17 years old and their abuser left the family home many years ago (IJ at 1, 5-12; Tr. at 42, 63-64). However, the Immigration Judge granted humanitarian asylum based on "other serious harm" (IJ at 13-14).

On appeal, the DHS challenges the Immigration Judge's determination that the respondents' persecution was on account of their membership in a cognizable particular social group and that they merited a grant of humanitarian asylum (DHS's Br. at 1-7). For the reasons that follow, we will dismiss the appeal.

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Upon our de novo review, we agree with the Immigration Judge that the particular social group identified as "children unable to leave their domestic relationships" is cognizable (IJ at 8-10).[1] The Immigration Judge concluded that the particular social group has the requisite immutability, particularity, and social distinction (IJ at 9-10). *See Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014) (holding that an applicant seeking asylum based on his or her membership in a "particular social group" must demonstrate that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question); *Matter of W-G-R-*, 26 I&N Dec. 208, 212-18 (BIA 2014) (same), *aff'd in part and vacated and remanded in part on other grounds by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016).

Age is a characteristic that individuals cannot change, and domestically abused children are "particularly vulnerable and fragile" and have a "greatly diminished" ability to leave the domestic relationship (IJ at 9). *See Matter of S-E-G-*, 24 I&N Dec. 579, 583-84 (BIA 2008) (acknowledging that "mutability of age is not within one's control, and that if an individual has been persecuted in the past on account of an age-described particular social group . . . a claim for asylum may still be cognizable"). Further, country conditions evidence shows that Guatemalan society offers protection to victims of child abuse and recognizes "children unable to leave their domestic relationships" as a discrete class and distinct social group (IJ at 9-10; Exhs. 6A at 18-19, 10A at 104, 200). *See Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014) (holding that depending on the facts and evidence in an individual case, "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable particular social group).

We also conclude that the Immigration Judge did not clearly err in finding that the respondents were persecuted on account of their membership in this particular social group, given her not clearly erroneous findings that sexual assault and violence towards children is prevalent and underreported in Guatemalan society (IJ at 10; Exh. 10A at 103-04, 200). *See Matter of W-G-R-*, 26 I&N Dec. at 223 ("An applicant's burden includes demonstrating the existence of a cognizable particular social group, his membership in that particular social group, and a risk of persecution *on account of* his membership in the specified particular social group.").

The DHS also argues that a grant of humanitarian asylum is unwarranted because the record does not support a finding that the respondents would suffer "other serious harm" in Guatemala (DHS's Br. at 7-8). An asylum applicant who has established past persecution but no longer has a well-founded fear of persecution may warrant a discretionary grant of humanitarian asylum based on a "reasonable possibility that he or she may suffer other serious harm" upon removal to his country. *See* 8 C.F.R. § 1208.13(b)(1)(iii)(B); *Matter of L-S-*, 25 I&N Dec. 705, 710 (BIA 2012). "Other serious harm" may be unrelated to the applicant's past harm and need not be inflicted on account of a protected ground, but the "harm must be so serious that it equals the severity of persecution." *Matter of L-S-*, 25 I&N Dec. at 714.

[1] Because we are upholding the Immigration Judge's conclusion that this particular social group is cognizable, we do not need to address the other proposed particular social group raised by the respondents on appeal (Respondents' Br. at 4-7).

The Immigration Judge considered current conditions in Guatemala, including that Guatemala has one of the highest murder rates in the world, that "gangs occupy and control large portions of Guatemala," and that gang violence is countrywide and has been increasing over the past few years (IJ at 13; Exhs. 6A at 2, 46-47, 102, 10A at 29, 100, 11A at 3). The Immigration Judge noted the respondents' and their grandfather's testimony that four members of their family have been killed by gangs in Guatemala, the grandfather was hit in the head with a machete by gang members, and gang members threatened to kill L[redacted] after his friend was seen talking to a gang member's girlfriend (IJ at 2-4, 13-14; Tr. at 50-53, 56-61, 68-69, 71, 77-82, 89-90). Considering the country conditions evidence and the respondents' "personal and family experience with gang violence," the Immigration Judge concluded that the respondents established a "reasonable possibility" that they may suffer "other serious harm" upon removal to Guatemala (IJ at 14). The arguments presented on appeal by the DHS do not convince of us of clear error in the Immigration Judge's factual findings or any legal error.

Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD