Asylum Law & Procedure I

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FBA Immigration Conference
Austin, TX 2019





ROADMAP FOR TODAY'S DISCUSSION

- Who is a refugee?
- Past persecution vs. well-founded fear of persecution
- The five protected grounds and nexus
 - Particular social groups
- Government vs. non-state actors
- Statutory bars to asylum
- Meeting the burden of proof
- Related forms of relief
 - Withholding of Removal under INA § 241(b)(3)
 - Protection under the Convention Against Torture

WHO IS A REFUGEE?

ASYLUM ELIGIBILITY UNDER INA § 208

- Physically present in the U.S.
- Qualifies as a "refugee" under INA § 101(a)(42)
- No statutory bars apply
- Merits a favorable exercise of discretion

DEFINITION OF REFUGEE UNDER INA § 101(A)(42)

- Person outside his or her country of nationality or country of last habitual residence
- Unable or unwilling to return and avail oneself of the protection of that country
- Well-founded fear of persecution
- On account of 1 of 5 protected grounds
- Government actor or group government is unable or unwilling to control

OUTSIDE COUNTRY OF NATIONALITY OR LAST HABITUAL RESIDENCE

Nationality

- Citizenship
- State of permanent allegiance
- Dual citizenship

Last habitual residence

- Stateless = not considered a national by any State
- Place of general abode
- Principal, actual dwelling place in fact



Unwilling

- Applicant's fear of return
- Refusal of own government's protection

Unable

- Country prevented from extending protection
- Protection ineffective

DEFINITION OF PERSECUTION

• The "threat to the life or freedom of, or the infliction of suffering of harm upon, those who differ in a way regarded as offensive."

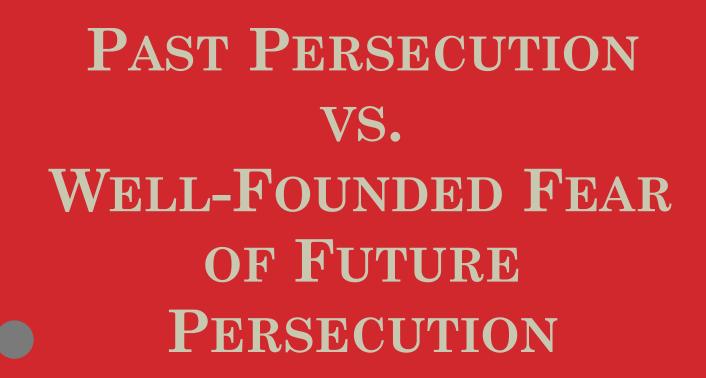
• Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985)

WHAT HARM RISES TO THE LEVEL OF PERSECUTION?

- Human rights violations
- Certain Physical Harm
 - Systematic
 - Severity, duration, and frequency
- Certain Non-physical Harm
- No requirement of serious injuries
- No set number of incidents
- Based on how individual experiences the treatment

WHAT HARM DOES NOT RISE TO THE LEVEL OF PERSECUTION?

- Isolated incidents of harm
- Threats usually must be accompanied by more
- Psychological harm usually must be severe
- Harm to family members or third parties must relate back to the applicant
- Economic harm must be severe and deliberately imposed
- Arrests and detention must be severe
 - Legitimate prosecution is not persecution
- Harassment and Discrimination usually not enough



PAST PERSECUTION OR WELL-FOUNDED FEAR OF FUTURE PERSECUTION

- Past Persecution OR Well-Founded Fear
 - Past persecution sufficient in and of itself
- A showing of past persecution → rebuttable presumption of well-founded fear
 - Matter of Chen, 20 I&N Dec. 16 (BIA 1989)
- How can DHS rebut?
 - Fundamental change in conditions
 - Reasonable relocation option
- Humanitarian asylum
 - Severity of past persecution
 - Reasonable possibility of other serious harm

Well-Founded Fear of Future Persecution

- \circ Reasonable possibility -8 C.F.R. § 208.13(b)(2)(i)(B)
 - Even a 10% chance
 - o INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)
- Subjective and objective components
 - Subjectively genuine
 - o Candid, credible, sincere testimony of genuine fear
 - Objectively reasonable
 - Credible, direct, and specific evidence supporting a reasonable fear

Matter of Mogharrabi Test

- Must show "a reasonable person in his circumstances would fear persecution."
 - Matter of Mogharrabi, 19 I&N Dec. 439, 445 (BIA 1987)
- 4-Part Test
 - Possession
 - Awareness
 - Capability
 - Inclination

OTHER CONSIDERATIONS FOR WELL-FOUNDED FEAR

- Specific threat of harm against the applicant?
- Time spent in country post-persecution?
- Return to the country of past or feared persecution?
- Pattern or practice?
- Family or friends safe?
- Refugee sur place?



"ON ACCOUNT OF" A PROTECTED GROUND

- Race
- Religion
- Nationality
- Membership in a Particular Social Group
- Political Opinion

MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

- What constitutes a particular social group?
 - Not defined in the INA or Regulations
 - Defined by Case Law
 - BIA standard
 - o Circuit Court split
 - Determined on a case-by-case basis

MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

- People who share a "common immutable characteristic" *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985).
 - o Immutable → cannot change, should not be required to change
- o BIA's new 3-part test $Matter\ of\ M\text{-}E\text{-}V\text{-}G\text{-},\ 26\ \text{I\&N}\ \text{Dec.}\ 227\ (\text{BIA}\ 2014);\ Matter\ of\ W\text{-}G\text{-}R\text{-},\ 26\ \text{I\&N}\ \text{Dec.}\ 208\ (\text{BIA}\ 2014)$
 - (1) Common, immutable characteristic

PLUS:

- (2) Socially distinct
- (3) Sufficiently particular

MEMBERSHIP IN A PARTICULAR SOCIAL GROUP — RECENT CASE LAW

- *Matter of W-Y-C-& H-O-B-* (BIA 2018)
 - Held: PSG must be articulated and presented before IJ
- *Matter of M-A-C-O-* (BIA 2018)
 - Held: Held IJ has the initial jurisdiction over UAC who turned 18 before filing asylum application

MEMBERSHIP IN A PARTICULAR SOCIAL GROUP – RECENT CASE LAW

- *Matter of A-B-* (AG 2018)
 - Held: *Matter of A-R-C-G-* vacated for BIA's failure to properly analyze PSG (due to DHS concession)
 - Dicta: asylum claim based on non-state actor's action is not generally cognizable; almost complete helplessness of the government must be shown; a detailed fact-based case-by-case analysis is required
 - Footnote: *Matter of L-E-A-* questioned (now before AG)
- Grace v. Whitaker (USDC 2018)(injunction)
 - In the context of Expedited Proceedings, USCIS must not solely rely on *Matter of A-B-* to deny CFI/RFI
 - EOIR General Counsel memo IJ must not affirm negative CFI/RFI finding based solely on *Matter of A-B-*

DEMONSTRATING NEXUS

3-STEP NEXUS TEST

- 3-Step Test for Showing Nexus to a Protected Ground:
 - (1) Identify the specific characteristic that falls within one of the 5 protected grounds
 - (2) Demonstrate the applicant embodies that characteristic
 - (3) Establish that the past or feared persecution is "on account of" that characteristic

DEMONSTRATING "ON ACCOUNT OF"

- Not required to prove exact motive of persecutor
 - Some evidence, either direct or circumstantial
- Protected ground must be "at least one central reason" REAL ID Act of 2005
 - May be a mixed motive
 - But protected ground cannot be "incidental, tangential, superficial, or subordinate to another reason for harm"
 - o Matter of J-B-N- & S-M-, 24 I&N Dec. 208. 214 (BIA 2007)
- Must examine persecutor's views of the applicant and any evidence of those views

GOVERNMENT VS. NON-STATE ACTORS

GOVERNMENT ACTOR

- Political leaders
- Military
- Paramilitary units or other civilian forces controlled by the government
 - E.g. Morality police in Iran
- Intelligence and security forces
- Police or law enforcement

GROUP THE GOVERNMENT IS UNABLE OR UNWILLING TO CONTROL

- Government cannot or has not prevented the persecution
 - Has not taken reasonable steps to provide meaningful protection
- Unwilling
 - Condones the private behavior
 - Unwilling to intervene
- Unable
 - Completely helpless to protect the victim
- Important considerations:
 - Did the applicant have access to protection?
 - Did the applicant seek government assistance?
 - Would seeking protection have been futile or dangerous?

STATUTORY BARS TO ASYLUM

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- Persecutors of others INA § 208(b)(2)(A)(i)
- Particularly serious crimes INA § 208(b)(2)(A)(ii)
- o Serious nonpolitical crime − INA § 208(b)(2)(A)(iii)
- Danger to U.S. security INA § 208(b)(2)(A)(iv)
- Terrorist-related activity or material support to designated terrorist groups INA § 208(b)(2)(A)(v)

STATUTORY BARS TO ASYLUM

- Firm resettlement 8 CFR §§ 208.15; 1208.15
 - Entered with or received an offer of permanent resident status or citizenship
 - Not firmly resettled if conditions significantly restricted by the authority of the country
- Safe third country INA § 208(a)(2)(A)
 - Where life or freedom would not be threatened
 - Where access to full and fair procedures for determining asylum eligibility
 - Recent developments with U.S./Canada Safe Third Country Agreement

STATUTORY BARS TO ASYLUM

- Previously denied asylum INA § 208(a)(2)(C)
 - Unless changed circumstances that materially affect the applicant's eligibility for asylum
 - Does not apply to asylum office denials, only final orders of removal

STATUTORY BARS TO ASYLUM ONE-YEAR FILING DEADLINE

- One-Year Filing Deadline INA § 208(a)(2)(D)
- Exceptions 8 CFR §§ 208.4(a)(4)-(5); 1208.4(a)(4)-(5)
 - Changed circumstances that materially affect eligibility for asylum
 - Extraordinary circumstances relating to the delay in filing the application
- 3 Prong Test for Exceptions:
 - Existence of changed or extraordinary circumstances
 - Material to asylum eligibility or directly related to delay in filing
 - Application filed within a reasonable time of the circumstances

ONE-YEAR FILING DEADLINE

- Mendez-Rojas v. Johnson (W.D. Wash 2018)
- Held: (1) DHS's failure to provide adequate notice of the one-year deadline violates the INA, the APA, and class members' due process rights under the Fifth Amendment; (2) DHS failure to provide a uniform mechanism through which class members can timely file their asylum applications also violates the INA and the APA.
- Defendants have appealed the decision to the Ninth Circuit.
- Parties entered into a joint interim agreement to allow certain asylum seekers to file asylum application

ASYLUM IS DISCRETIONARY

- Discretionary denials are rare
 - Generally require "egregious negative activity by the applicant"
- Totality of the circumstances
 - Balancing positive and negative equities
- Matter of Pula, 19 I&N Dec. 467, 474 (BIA 1987)
 - "The danger of persecution should generally outweigh all but the most egregious of adverse factors."
- Positive Discretionary Factors

IMMIGRATION BENEFITS OF ASYLUM

- Permitted to remain in the United States
- Eligible to work
- Eligible to travel
 - Refugee Travel Document
- May confer asylee status on immediate family members
 - Spouses
 - Unmarried children under age 21
- Eligible to apply for LPR
 - After physical presence as asylee for one year
- Eligible to apply for naturalization after requisite period as an LPR
 - Refugee to Permanent Resident to Naturalization
 - Asylee to Permanent Resident to Naturalization



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Mark Shmueli

Interviewing Client

- Draft your series of questions before the interview:
- Was there past harm to individual or anyone close to them. (family, close social/religious/political allies.
- If so, by whom?
- why do you think that this person threatened/harmed [the individual close to your client]?

CLIENT INTERVIEW QUESTIONS (CONT)

- Why do you feel that you would be at risk from [persecutor]?
- If you were sent to your country how would the [persecutor] identify you?
- Why would they identify you?
- Why would they want to harm you?

CLIENT INTERVIEW QUESTIONS (LAST)

- Do you believe in the practices/ideas of [person/entity] you fear
- Have you gone to the police?
- What do you think would happen if you did [if they did not go]

WHY THESE QUESTIONS AND WHAT TO SHOW..

- After Matter of A-B 27 I&N 316 (A.G. 2018) need to steer away from "private actor/extortion/simple crime" determination.
- Show that it's social group's persecution is nationwide / systemic and the gov't does not protect.
- Need to specifically articulate PSG at time of application in some courts.

MATTER OF A-B AFTER GRACE V. WHITAKER (D.D.C DEC. 19, 2018)

- Rejects USCIS Memorandum extending A-B to Credible Fear Interviews
- Credible and Reasonable Fear Adjudicators must dismiss enhanced standard that applicant show that gov't condoned "private actions" or at the least demonstrated complete helplessness in aiding the victim.

DEMONSTRATING EVIDENCE

- Anticipate little from State Department Human Rights Reports but use other DOS and government Sources (DOS travel advisories, Other agencies)
- Use that to your advantage as you are not constrained by DOS with lack of human rights reports
- Without Official US Gov't analysis other reports should be more heavily weighted.

EXPERT OPINIONS ACADEMIC/MEDICAL

- Work closely with the expert and offer them to testify.
- If needed telephonically.
- Remember, often people are persecuted when they did not affirmatively take a risk and are in increased danger if they return either because they are more visible (because of an action to alert authorities for example)
- Or identify more with the reason they fear persecution (visibility/politicization for example)

PRACTICE POINTERS

- Listen to your Client and also ask specific questions.
- Find, know and define human rights and other country conditions reports.
- Use the lack of interest of the DOS in Human Rights to your advantage
- Know the Controlling Caselaw in your Circuit
- Understand as best you can your client's fears and what is really happening on the ground in his/her country.

THE ART AND SCIENCE OF STORY TELLING

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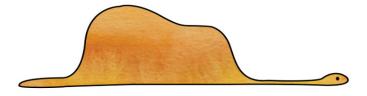
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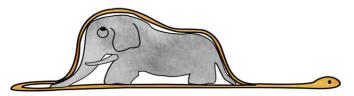
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EYES OF THE BEHOLDER



"My drawing was not a picture of a hat."
It was a picture of a boa constrictor digesting an elephant."



WHY IS THIS IMPORTANT?

- 1. Affidavit or story is the basis of all other corroborating documentation
- 2. Affects preparation of the witnesses and choice of witnesses
- 3. Solidifies what happened as memory changes with time and events are recalled differently with age and experience (perceptions change)
- 4. Details are the art and create an empathy with the reader or hearer of the story and make alive
- 5. Identify with the character on universal themes
- 6. Makes a complex multi-facetted case fit into one of the 5 "on accounts of" and understandable to the listener
- 7. Spark emotions and help us feel and tap into those emotions (show vulnerability)
- 8. Makes the individual UNIQUE and not just the same as everyone else

WHAT ARE THE ELEMENTS OF A GOOD STORY

(HAMILTON LYRICS by Lin Manuel Miranda)

1. "IN THE ROOM WHERE IT HAPPENS"

(Aaron Burr discussing the gentleman dinner bargain made by Madison, Jefferson and Hamilton)

"No one else was in the room where it happened," *Hamilton's* Aaron Burr, sings. "No one really knows how the game is played/ The art of the trade/ How the sausage gets made/ We just assume that it happens."

Know your Judge and his background on cases
Know your jurisdiction law (Circuit and US
District Court)
Discuss ahead with OPLA attorney
Know your audience

2. "I AM INIMITABLE/ I AM AN ORIGINAL"

Every client has a story to tell that is different from any other client

Show how individual client is unique
What makes this case different?
FACTS which to include and which NOT to
include
CREDIBILITY / reasonableness

3. "IMMIGRANTS, WE GET THE JOB DONE"

Good works in the community

Employment back home

Employment in the US and how this helps others

Family ties

Clean criminal record

Helping others

CORROBORATION UNDER REAL ID ACT

4. "What comes next?" "Do you know how hard it is to lead?"

Give examples of what respondent did
Show any titles or leadership positions
held in community or in group
Show why more in danger if known
Chronology
Characterization
DEMEANOR
NEXUS
CREDIBILITY

5. "WAIT FOR IT" "I AM THE ONE THING IN LIFE I CAN CONTROL"

- Use the "I" pronoun, not we
- Explain what happened
- Show causation and nexus to one of the five "on account of"
- Demeanor
- Credibility

6. "I'LL RISE ABOVE MY STATION, ORGANIZE YOUR INFORMATION..."

- Use names for events that happened and places
- Give roadmap in pre- briefing
- Chronology of facts
- Don't overpad or use details that don't help or distract the story
- LEGAL THEORY

7. "RIGHT HAND MAN"—"DYING IS EASY, YOUNG MAN. LIVING IS HARDER"

- Show what suffered- if past persecution could be humanitarian asylum
- Don't exaggerate
- Don't be repetitive
- Don't use superlatives (like never, or always, or beat and beat and beat me)
- Show that respondent has nobility of character
- Understanding the TRAUMA using psychological reports
- SCAR evaluations
- CORROBORATION
- Past Persecution or WFFP

8. "GUNS AND SHIPS" – "IF WE MANAGE TO GET THIS RIGHT.../ THE WORLD WILL NEVER BE THE SAME..."

- Changes in life
- Changes in COUNTRY CONDITIONS
- Develop facts so that Resettlement doesn't trap them on questions
- Dreams
- Preparing for a GRANT
- Corroboration

9. "TOMORROW THERE'LL BE MORE OF US" "WHAT 'D I MISS?"

- Checklist and review of each document
- · FOIA
- CONSISTENCY
- CORROBORATION
- CREDIBILITY
- Articulate PSG (not too narrow or broad)

10. "TAKE A BREAK"

- Don't cram all into one session
- Look at case from a new perspective
- Discuss complex issue of credibility or legal issue on PSG with colleague at work
- CONSISTENCY

11. "Non- Stop"- " Why do you assume you're the smartest in the room? Soon that attitude may be your doom"

- Be humble
- Don't over prepare the client need some impulsivity
- Client to sound fluid, unrehearsed and not parrot-like

12. "Who Lives, Who Dies, Who Tells Your Story" "And when my time is up, HAVE I DONE ENOUGH?"

- Corroboration with family affiants (Gandziami proof)
- Corroboration of school or employment records
- Corroboration of any news articles
- Leaders in the community to support with affidavits or as witnesses
- Never leave practice to chance (different applicants need different approaches and practice time)

13. "MY SHOT" "I'M NOT THROWING AWAY MY SHOT"

- Make every point count
- Show how facts fit current law
- This is your client's life and future
- Fulfil a dream!

14. "ONE LAST TIME" – "...AND THEN WE'LL TEACH THEM HOW TO SAY GOODBYE"

- Not a therapy session
- Get to the point and keep it clear and simple
- Don't give boilerplate answers
- Don't make sweeping generalizations
- DISCRETION



IMMIGRATION LAW CONFERENCE

May 17–18, 2019 AT&T Conference Center • Austin, TX

QUESTIONS?

