



Federal Bar  
Association

# IMMIGRATION LAW CONFERENCE

May 17–18, 2019

AT&T Conference Center • Austin, TX

## Asylum Law and Procedure II

MODERATOR: REGINA GERMAIN

PRESENTERS:

ALEXANDRA RIBE

SARAH BAZZI

MARC SEGUINOT



Federal Bar  
Association

# Alexandra Ribe

---

# Humanitarian Asylum

AN ASYLUM-SEEKER WHO HAS ONLY ESTABLISHED PAST PERSECUTION MAY WARRANT A DISCRETIONARY GRANT OF HUMANITARIAN ASYLUM BASED ON:

- “COMPELLING REASONS ARISING FOR BEING UNWILLING OR UNABLE TO RETURN TO THE COUNTRY ARISING OUT OF THE SEVERITY OF THE PAST PERSECUTION” OR

---

- THERE IS A “REASONABLE POSSIBILITY THAT HE MAY SUFFER OTHER SERIOUS HARM, UPON REMOVAL TO HIS COUNTRY.” 8 CFR § 1208.13(B)(1)(III)

# Humanitarian asylum (severity of past persecution)

*Matter of Chen* – respondent's father was a Christian minister during the Cultural Revolution in China. He was locked away for 6 months at age 8, was beaten, interrogated, and deprived of food, and then sent to rural villages for reeducation where he was harshly treated. BIA found that while the conditions in China changed, human rights are still sometimes violated and there was little religious freedom and given his genuine fear and the degree of past persecution, asylum was granted

*Matter of S-A-K- and H-A-H-*, 24 I & N Dec. 464 (BIA 2008) – respondents who suffered FGM and continue to suffer side effects

*Ordonez-Quino v. Holder*, 760 F.3d 80 (1st Cir. 2014) – Respondent was indigenous Mayan and during the war the Guatemalan military destroyed his home, killed his family, and dropped bombs near him. First circuit remanded, finding that severity of harm could be enough for humanitarian asylum

- \*don't forget to argue that persecution to children makes it even more severe

*I-M-E-G-*, A XXX-XXX-997 (BIA Aug. 23, 2016)

-DV case remanded for consideration of humanitarian asylum even though the abuse happened a decade before client fled her country

# Humanitarian asylum (other serious harm)

---

In determining whether an applicant has established a “reasonable possibility” of “other serious harm,” adjudicators should focus on current conditions that could severely affect the applicant, such as civil strife and extreme economic deprivation, as well as on the potential for new physical or psychological harm that the applicant might suffer. Harm doesn’t have to be on account of a protected ground but must be as severe as persecution. *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012).

In an unpublished Board decision, the Board found that the respondents had established eligibility for humanitarian asylum because they were subjected to sexual and physical abuse as children and face “other serious harm” as adults due to the rampant gang violence in Guatemala. *Matter of L-M-R*, AXXX XXX 221 (BIA April 26, 2016)

# Withholding of Removal

---

To qualify for withholding of removal, “an alien [must] demonstrate that the alien’s life or freedom would be threatened for a reason” related to one of the protected grounds. 8 U.S.C. § 1231(b)(3)(C)

An applicant has the burden of demonstrating that it is more likely than not that they will face persecution on account of a protected ground if returned to his country of origin. *INS v. Stevic*, 467 U.S. 407 (1984)

# Nexus standard for withholding?

---

Withholding of removal says “a reason” while asylum says the protected ground “was or will be at least one central reason.” 8 U.S.C. § 1158(b)(1)(B)(i)

- *Matter of C-T-L*, 25 I & N Dec. 341 (BIA 2010) - Despite the disparate language in the two provisions, the “one central reason” nexus standard should be read to apply to both asylum and withholding of removal applicants
- *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017) – held that nexus to the protected ground for withholding of removal needs to be “a reason” not a “central reason” which is for asylum

# Circuit Decisions after *Matter of C-T-L-* and *Barajas-Romero*

---

*Hercules-Torres v. Whitaker*, 2018 WL 6264812 (4th Cir. 2018) – Did not “engage in the debate over whether the Ninth Circuit decision is correct about the BIA precedent in *Matter of C-T-L-*” because found in that case that the protected ground was not a motivating factor for the persecution

*Jimenez-Becerril v. Sessions*, 724 Fed. Appx. 475 (7th Cir. 2018) – “Jimenez-Becerril’s membership was not even “a reason” for his persecution. It is thus unnecessary for us to grapple with his legal challenge to the “one central reason” test.

*Garcia-Moctezuma v. Sessions*, 879 F.3d 863 (8th Cir. 2018) – Eighth Circuit applied waiver doctrine to find that respondent had waived the issue of the nexus standard for withholding by not raising it below – did not take up the legal issue



# Convention Against Torture definition

---

Burden is to show that “it is more likely than not that he or she would be tortured” in the country of removal. 8 C.F.R. § 1208.16(c)(2)

Torture is defined as (1) “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” in a manner that is (2) “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” 8 C.F.R. § 1208.18(a)(1).

Public officials acquiesce to torture when, “prior to the activity constituting torture, [they] have awareness of such activity and thereafter breach [their] legal responsibility to intervene to prevent such activity.” 8 C.F.R. § 1208.18(a)(7).

- Public officials breach their responsibility to intervene when they engage in “willful blindness” or “turn a blind eye to torture.” *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 245 (4th Cir. 2013) (quoting *Ontunez–Tursios v. Ashcroft*, 303 F.3d 341, 355 (5th Cir. 2002))

# What qualifies as government acquiescence?

---

- Police not responding to a report or refusing to assist can be government acquiescence - ex., *Zelaya v. Holder*, 668 F.3d 159 (4<sup>th</sup> Cir. 2012); *Cabrera Vasquez v. Barr*, --- F.3d ----2019 WL 1271476 (4th 2019)
- Government corruption can be government acquiescence –
  - *WGA v. Sessions*, 900 F.3d 957 (7<sup>th</sup> Cir. 2018) – extensive record shows corruption, judges’ refusal to protect witnesses, police’s fear of reprisal from gangs, and evidence that gangs continue to operate from within prisons
  - *De La Rosa v. Holder*, 598 F.3d 103 (2d Cir. 2010) – if a government is corrupt and, as a whole, incapable of preventing torture, the fact that some officials take action to prevent torture is not inconsistent with government acquiescence to torture

# How to prove your client will be tortured?

---

Cannot string together a series of suppositions - *Matter of J-F-F-*, 23 I & N Dec. 912 (A.G. 2006)

BUT, torture must be considered in the aggregate, particularly where there are potentially several sources of harm

- “CAT claims must be considered in terms of the aggregate risk of torture from all sources, and not as separate, divisible CAT claims.” *Quijada-Aguilar v. Lynch*, 799 F.3d 1303, 1308 (9th Cir. 2015)
- “[a] proper application of the regulations ... merely requires [the applicant] to establish that it is more likely than not that he faces torture ... when the two entities are considered together”—in other words, when “the cumulative probability of torture by the two entities exceeds 50%.”, *Kamara v. Attorney General* 420 F.3d 202, 213–14 (3d Cir. 2005)
- where the CAT applicant feared that he would be tortured based on several factors, including “his religion, his ethnicity, the duration of his residence in the United States, and his drug-related convictions,” that “the evidence of record, when considered in the aggregate, supports the respondent’s contention that he would more likely than not be tortured upon his return to Iran” *Matter of G-A-*, 23 I. & N. Dec. 366, 366, 368 (BIA 2002) (en banc)

# Tattoos

---

*Rodriguez Arias v. Whitaker*, 915 F.3d 968 (4th Cir. 2019) – respondent had gang tattoos. Remanded because the IJ and BIA did not consider the country evidence showing Salvadorian’s hostile behavior toward suspected gang members, the vigilante violence, or government’s willingness to turn a blind eye to extreme violence between rival gangs

*Cole v. Holder*, 659 F.3d 762 (9th Cir. 2011) – “the BIA did not consider the aggregate risk that Cole would face from police, death squads, and gangs if returned to Honduras. Cole need not prove that each group, treated individually, would more likely than not torture him. Rather, he must establish that, taking into account all possible sources of torture, he is more likely than not to be tortured, by or with the consent or acquiescence of the government, if returned to Honduras.”

- BUT SEE *Andrade v. Lynch*, 798 F.3d 1242 (9<sup>th</sup> Cir. 2015) – respondent had tattoos, but they were not gang-related and had not shown the requisite probability of torture – all tattoos are not equal!

# Sarah Bazzi

---

# The 4 C's

---

Classification

Corroboration

Credibility

Country Conditions

# Classification

---

Where does the case fit in asylum law?

Why was this particular person targeted from persecution?

Anything other than PSG

How will you convince the immigration judge?

Brief

- Respect the IJ's time

Prepare for appeal

# Cases

---

W-Y-C-& H-O-B-, 27 I&N Dec. 189 (BIA 2018) ID 3912

(1) An applicant seeking asylum or withholding of removal based on membership in a particular social group must clearly indicate on the record before the Immigration Judge the exact delineation of any proposed particular social group.

(2) The Board of Immigration Appeals generally will not address a newly articulated particular social group that was not advanced before the Immigration Judge.



# Credibility

---

The burden is on the applicant/respondent

“The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, ***but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.***” §208(b)(1)(B)(ii)

“Credibility determination. Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.” INA §208(b)(1)(B)(iii)

# Credibility

---

Start with the asylum application –

Make sure complete and accurate i.e., did the client stay with a relative in hiding while preparing to come to the U.S.? Why is there only one foreign address?

Use documents for client's birthdate, children, and marriages, etc.

Fill in the narrative boxes with enough detail.

Does it need to be amended before trial or interview with marriages/births/etc.? You may be curtailing I-730 relief.

Are there reasons your client's testimony is not consistent? Trauma-related reasons, illiteracy/functional illiteracy leading to difficulty calculating dates, intellectual disability, etc.?

The trial attorney uses the asylum application, credible fear determination, declarations, police reports, etc. for cross examination. Attorneys need to make sure they and the client have reviewed these.

FOIA asylum officer notes – USCIS

Border encounters – CBP FOIA

READ the CFI to clients

Overcoming border interviews that state no fear:

Matter of J-C-H-F-, 27 I&N Dec. 211 (BIA 2018) When deciding whether to consider a border or airport interview in making a credibility determination, an Immigration Judge should assess the accuracy and reliability of the interview based on the totality of the circumstances, rather than relying on any one factor among a list or mandated set of inquiries.

Conditions in the hielera: Where was the interview taken? What did the officer say?

# Country Conditions

---

Alternate sources to the Department of State Country Reports

Immigration and Refugee Board of Canada

Private attorneys – CGRS

Amnesty International

Human Rights Watch

Congressional Reports

News sources

President Trump?

Educate yourself: HOW does one make a police report in X country?

How to overcome the so-called “private actor” problem?

Insight Crime – collusion between the government and gangs?

Grace v. Whitaker as a guide

# Marc Seguinot

---

# NON-PSG GROUNDS FOR CLAIMING ASYLUM

---

RACE

NATIONALITY

RELIGION

POLITICAL

# EXAMPLES of NON PSG Persecuted Groups

---

## **RACE: INDIGENOUS GROUPS**

**MEXICO –** MAYAN, AXTECA, ZAPOTEC, TZOTZIL  
(MAYAN GROUP)

**GUATEMALA -** QUICHE

**BOLIVIA -** AYMARA, GUAYAROS, CHRISTIANS  
(POSSIBLY IN THE FUTURE)

**HONDURAS -** GARIFUNA

## **BLACK PEOPLE OF AFRICAN DESCENT**

**ETHIOPIA –** AMHARA, OROMO

# RELIGIOUS GROUPS

---

**Bahai**

**Shia**

**Christians**

**Jehovah's Witnesses**

**Seventh-Day Adventists**

**Evangelists**

**Rohingya (Muslim minority group in Myanmar)**

**Falun Gong**

# POLITICAL GROUPS

---

**FMLN**

**ARENA**

**OTHERS**



# *THREE PRINCIPLES TO GUIDE ANALYSIS OF NONPSG CLAIMS*

---

## **PRINCIPAL I: KNOW THE COUNTRY**

GET THE BEST, TIMELY, COUNTRY-SPECIFIC INFORMATION POSSIBLE.

**SOURCES:** Country Reports, Religious Reports, Refworld, Internet

# PRINCIPAL II: DEFINE THE PERSECUTION

---

PERSECUTION is defined as serious threats or infliction of physical, psychological, or economic harm by one's own government (or by groups whom one's government is either unwilling or unable to control; eg. guerillas, opposing tribes or ethnic groups, organized vigilantes, and members of organized terrorist groups).

So, for example, in race, political and religious based claims, the harm could be severe threats, including death threats, and severe harassment of certain indigenous groups, threats to certain groups by physical attacks, denying them entry into universities and government offices, preventing them from voting, from obtaining jobs, even marrying outside of the arranged marriage scenario.

---

## TYPES OF PERSECUTION

**physical violence:** beating, assault, handcuffing, rape or sexual abuse, female genital mutilation, electric shocks, invasive physical examinations, forced abortion or sterilization, forced labor.

**torture:** a severe human rights violation which may involve physical violence, deliberate infliction of mental harm, prolonged unlawful detention, rape and sexual violence, and so on

**other violations of human rights:** for example, genocide or slavery

**threats of harm:** particularly if the threatened harm is serious, caused emotional or psychological damage, or are credible, for example because the persecutor has already inflicted harm on the person or his or her family or others similarly situated

**unlawful detention:** punishment for a regular crime is not persecution, but if the person is detained without due process or formal charges or for discriminatory or political reasons, this may rise to the level of persecution, particularly if the detention was combined with mistreatment

**infliction of mental, emotional, or psychological harm:** this can include intimidation, surveillance, interference with privacy, long-term threats, or being forced to engage in conduct that is not physically painful or harmful but is abhorrent to the person's deepest beliefs

**substantial economic discrimination or harm:** for example, deliberate deprivation of food, housing, employment, or other life essentials, or ransacking, destruction, or confiscation of property

**other discrimination or harassment:** for example, passport denial, pressure to become an informer, or restrictions on access to education; also, some applicants may need to show a combination of actions against them if none by themselves was serious to fit traditional understandings of persecution.

# PRINCIPAL III: FOCUS ON PERSECUTOR'S SUBJECTIVE BELIEF IN PERCEIVED RACE, POLITICAL OPINION, OR RELIGION EVEN IF THEY ARE MISTAKEN.

---

**Proving that the persecution is “on account of” a protected ground.**

**(Includes brief discussion of NEXUS: “on account of” relating to nonpsg groups)**

Literally a connection between the persecution and one of the protected grounds.

Establish that the protected ground(s) was or will be at least one central reason for persecuting the applicant.” INA § 208(b)(1)(B)(i); *Shaikh v. Holder*, 702 F.3d 897 (7th Cir. 2012).

# HIGHLIGHT THE FOLLOWING:

---

DIRECT evidence that reveals the persecutor's motives and objections to the protected ground. E.g. may mention that he is beating you because of your religious beliefs, or threatening you because your applicant may be a political opponent.

CIRCUMSTANTIAL evidence For example, “[i]f political opposition is the reason an individual refuses to cooperate with a guerilla group, and that individual is persecuted for his refusal to cooperate, logic dictates that the persecution is on account of the individual's political opinion.” . See *Martinez-Buendia v. Holder*, 616 F.3d 711, 718 (7th Cir. 2010), also *Jabr v. Holder*, 711 F.3d 835 (7th Cir. 2013).

# HELPFUL POINTERS:

---

**NOTE: WHERE POSSIBLE, OBTAIN PSYCHOLOGICAL EXAM TO SUPPORT APPLICANT'S CLAIM OF HOW PERSECUTION HAS RESULTED IN A NEGATIVE IMPACT ON THE APPLICANT.**

**NOTE: MAKE SURE APPLICANT CAN PROVE MEMBERSHIP IN RACE, RELIGION, OR POLITICAL PARTY (USE MEMBERSHIP CARD, AFFIDAVITS FROM GROUP LEADERS, BAPTISMAL CERTIFICATES, OTHER RELIGIOUS OR POLITICAL DOCUMENTS)**

# Questions?

---