

The Green Card

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

H. RAYMOND FASANO, SECTION CHAIR

Quote of the Month

"It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood."

—James Madison

From the Chair

With my second term about to expire Sept. 30, I want to take this opportunity to thank the section for asking me to serve one more year as Section Chair. When I was honored with the position as Section Chair, following the footsteps of Judge Larry Burman, I committed to one year of service. My first year as Chair was a labor of love committing myself to expanding on Judge Burman's leadership and the vision that Barry Frager had for our Section. My goals were to bring national attention to the ILS and having an active Board whose objective would be to put forward the purpose of the Federal Bar Association. As I reflect on the time that I held the position as Chair and prepare to pass my responsibilities to Judge Robin Feder, I believe I have accomplished what I have set out to do and have furthered the legacies of Barry Frager and

Judge Burman.

Some of the highlights of my tenure include a fulfillment of my goal that the ILS expand its CLE focus. We have done that by making the Memphis CLE a success and expanding the quality of speakers that we present. We created the annual Barry Frager Service Award to a member of the ILS who has demonstrated outstanding service to the FBA and the ILS. The Barry Frager Award will be a permanent fixture at all ILS Annual Meetings. Through the hard work of Mark Shmueli and the committee that volunteered to work with him on the Asylum Symposium held at American University, the ILS presented a successful day-long seminar on asylum in February. The seminar was presented by leading practitioners, law professors, government lawyers and judges from across the nation. I hope that the seminar can be repeated in 2015. The ILS gave support, both financially and with manpower, to the section's Rome CLE held in September 2013. Through the hard work of Peggy McCormick, the seminar was a success and presented and attended by a broad spectrum of international lawyers, judges, government personnel and students. I look forward to attending and presenting at this year's Rome Conference that will be held in September 2014.

I also wanted to get more publications accomplished by the ILS and we succeeded in this respect. Under Judge Burman's guidance, the Green Card has been an award winning publication that draws contributions from leading government policy makers, judges and lawyers as well as from lead-

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ing private lawyers. We have succeeded in having our articles accepted on a regular basis by *The Federal Lawyer*, through the hard work and efforts of Board member Alicia Triche.

Our Board has been active locally in D.C. with the leadership of Board member Prakash Khatri and the Leadership Luncheons he has hosted that feature the leading policy makers in government. These intimate settings offer ILS and FBA members and opportunity to speak one-on-one with policy makers such as Juan Osuna and Peter Vincent. I am humbled by Prakash's ability to secure these high profile speakers on a regular basis.

Our Board member Christine Poarch was successful in organizing our social media efforts and launched our ILS Facebook page.

One of the biggest successes of the ILS since I became Chair would be the FBA's adoption of our Section Article I proposal for Immigration Courts. The proposal was accepted as a legislative agenda item by the FBA, and would create an independent judiciary instead of leaving EOIR as an agency under the control of the Department of Justice. The success of the Article I proposal being an agenda issue could not be possible without the leadership and vision of Judge Burman, FBA Legislative Counsel Bruce Moyer, and the assistance of the Board members who served on our Article I committee.

I want to thank our Board members who unselfishly devoted their time, energy and ideas to the ILS Board on a monthly basis. On a moment's notice our dedicated Board members made themselves available when the need was there. It was a privilege to have worked with such an esteemed Board.

It has been an honor serving the Section and the FBA. I wish Judge Feder all the success in the world and look forward to her leadership. ♦

All the Best,
H. Raymond Fasano, Section Chair

From the Editor

Please send all news items to me at LBurman@aol.com. We really want to know what is happening in the Section, and in the professional lives of our members. We especially would appreciate photographs. Kindly send submissions in Word format.

Larry Burman, editor

Section Leadership

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For more information about the section, please visit www.fedbar.org/Sections/Immigration-Law-Section.aspx.

Section news

WASHINGTON, DC: The Section, in conjunction with American University's Washington College of Law, conducted an asylum symposium on Feb. 21, 2014. This symposium involved two tracks: a basic course for new or pro bono attorneys who are interested in asylum law, and an advanced track for the seasoned asylum practitioner. Presenters included many immigration judges, law professors, lawyers from DHS and the Office of Immigration Litigation, and top practitioners. Regina Germain, of the Asylum Office, was the keynote speaker. All panels were extremely well received by the varied audience, ranging from law students to law firm principals. In particular, mention is due to Mark Shmueli, who organized the event, and to Dean Claudio Grossman of AU, for his personal participation and incredible level of logistical support.

MEMPHIS, TN: The Section's Annual Meeting was held in conjunction with our traditional Immigration Law Seminar, May 16-17, 2014. All nominated candidates for office were elected by acclamation:

President: Hon. Robin Feder (Massachusetts)

Vice President: Eileen M. G. Scofield (Georgia)

Treasurer: Hon. Mimi Tsankov (Colorado)

Secretary: Margaret McCormick (Illinois)

Section awards were presented to:

H. Raymond Fasano (The Barry Frager Award for Service to the Section)

Hon. Dorothy Harbeck

Prakash Khatri

Margaret McCormick

Certificates of appreciation were also presented to:

Hon. Rebecca Holt (U.S. Immigration Judge, Memphis TN)

Tom Gould (Chief Clerk, U.S. District Court, WD TN)

As always, CLE coordinator Barry Frager presented his patented amalgam of intellectual and gustatory thrills. This year, there were six (!) tracks for each time slot, making course selection even more difficult than usual. Food and snacks were endless, and delicious. The evenings were not left to chance either, with a bountiful dinner on Thursday night, the choice

between a Mississippi River Cruise/buffet and a night at the International BBQ Festival on Friday, and a cocktail party at the Belz Museum of Oriental and Judaic Art on Saturday night. Attendees were unanimous in proclaiming this seminar the best ever. The Board has not yet set a date for the 2015 seminar. Stay tuned and don't miss the next one.

WASHINGTON, DC: Monthly FBA Immigration Leadership Luncheons in the Nation's Capital. The FBA Immigration Law Section and the Washington D.C. Chapter have co-sponsored monthly luncheons in downtown Washington, D.C. for over one year now. The luncheons began in February 2013. The luncheons are generally held on the second Wednesday of each month. A number of law firms have been sponsoring tables, which has allowed the sponsors to offer some unfilled seats to nonprofit lawyers in the area. The next luncheon will be on Wednesday, June 11, 2014. The luncheon will feature two speakers, the USCIS Disciplinary Counsel and the EOIR Disciplinary Counsel who will discuss the various ways in which lawyers could be disciplined for activities before USCIS and EOIR.

The luncheons have featured some senior leaders in government who have a connection to immigration. The following is a list of featured speakers:

April 2014 - Megan H. Mack Officer for Civil Rights and Civil Liberties Department of Homeland Security

March 2014 - Michael Falcone, Chief, Homeland Security Investigations Law Division.

February 2014 - Dave Horton, Director, International Individual Compliance, Internal Revenue Service

December 2013 - Hon. Paul Schmidt, Immigration Judge, Arlington, VA

November 2013 - Stephen Cohen, Associate Director, Enforcement Division, Securities and Exchange Commission

October 2013 - Raphael Choi, Chief Counsel (WAS), Immigration and Customs Enforcement

September 2013 - Elizabeth Stevens, Assistant Director, Department of Justice, Office of Immigration Litigation

June 2013 - Robin M. Stutman, Chief Administrative Hearing Officer (CAHO), Executive Office for Immigration Review

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Will Asylum Become a Victim of Its Own Success

BY JASON DZUUBOW

Lately, I've been worrying that asylum might become a victim of its own success. Thanks to lawyers pushing the law, the number and categories of people eligible for asylum has increased pretty dramatically: Victims of FGM and domestic violence, LGBT individuals, certain victims of crimes. This is a good thing, as many lives have been saved. But it has started to attract the attention of immigrant restrictionists, who think the asylum system is too generous. Could the tide be shifting? Might we be on the verge of a backlash?

There's precedent for such fear dating back to antiquity. When the Roman Empire conquered Greece, the various city-states had a well-developed system of temple asylum. In short, if you were a slave fleeing abuse, you could go for protection to a Greek temple. Over time, the types of people who could claim protection in Greek temples expanded, so that basically anyone, including rebels and common criminals, could find refuge in a temple. The law-and-order Romans would have none of it. In 14 AD, Emperor Tiberius ordered the temples to produce evidence of their right to offer asylum. Most temples could not do so, and so Tiberius's little bureaucratic maneuver essentially ended asylum in the Greek city-states. So much for the history lesson.

In December 2013, House Judiciary Committee Chairman Bob Goodlatte (R-Va.), Immigration and Border Security Subcommittee Chairman Trey Gowdy (R-S.C.), and Congressman Jason Chaffetz (R-Utah) held a hearing on asylum and credible fear "abuse" by people arriving in the U.S. via Mexico. The press announcement for the hearing set the tone of the event:

It's outrageous that members of Mexican drug cartels and others involved in illicit activity are so easily able to exploit our asylum laws and live in the U.S. virtually undetected. Our asylum laws are in place to help individuals who are facing truly serious persecution in their countries. However, dangerous criminals are gaming the system by claiming they have a 'credible fear' of persecution when often they've been the perpetrators of violence themselves. Their claims almost always get rubberstamped by the Obama Administration and once these individuals are in the U.S., the illegal activity doesn't stop. Unfortunately, it appears the Obama Administration is compromising our national security and the safety of our communities for its political agenda. The House Judiciary Committee plans to hold a hearing soon to closely examine this egregious abuse to see what can be done to put an end to it.

Over the last year, there has been a large influx of asylum seekers at the border, and there certainly seem to be issues

that require attention. That's why it's disappointing that this hearing was so overtly political.

As we continue to examine the issue of issue of asylum seekers, I thought I would raise some issues that the Judiciary Committee might explore in going forward:

- **We need accurate statistics about who is seeking asylum and why:** It is very difficult to know who seeks asylum, who receives it, who receives other relief, and who is denied. One problem is that the two agencies that track asylum cases,—DOJ and DHS—use different metrics for calculating their numbers. Another problem is that there are no stats available on people who receive Withholding of Removal and Torture Convention relief (two benefits that are similar, though inferior, to asylum). Congress should mandate better record keeping on asylum cases: Where do asylum seekers come from? What is the basis for their grants or denials? How many are detained? How many leave of their own volition after receiving a denial? How many are deported? How many cases are re-opened for fraud or due to criminal convictions? Such information will allow us to improve our policy-making and will hopefully lead to a better and more secure system.

- **We need to make some decisions about how to treat asylum applicants at the borders:** There has been a significant increase in asylum applicants arriving at our Southern border. Currently, most are detained and, if they pass a credible fear interview, they are released with a date to return to Immigration Court. I have not seen specific examples of individuals who have entered the U.S. in this manner and then committed bad acts. But given the number of arrivals, the possibility for this to happen seems pretty high. So do we detain these asylum seekers until their cases are heard? Such an approach makes it much more difficult for them to prepare their asylum cases. It is also very expensive. Should each person be fitted with an ankle bracelet or some other tracking device? If we had more accurate data about asylum seekers, perhaps we could better answer these questions.

- **We must decide how to treat people fleeing persecution where that persecution is not based on a protected ground:** Many people arriving at the Southern border face real harm from gangs, cartels, and criminals. Many others face serious harm due to sexual violence. Often, such people do not fall neatly into one of the five protected categories. Most will not qualify for lesser forms of relief, such as the Convention Against Torture. So what to do with them? Of course, we could simply deport them as we are not obligated by our international agreements to protect them. But sending innocent people to their deaths seems not in keeping with our national values (or any other notion of morality). Could some-

thing be done for such people without creating an incentive for everyone South of the border to come to the United States?

- **We need to plan ahead to deal with a potentially large refugee flow from Mexico:** For years, we've been hearing discussion about the possibility of large refugee flows from Mexico due to the violence there. If this happens, our current asylum system will likely not handle the volume. Perhaps we need a contingency plan for how to deal with such refugees. Faced with refugee crises, other countries have created temporary camps for people, where they can stay until it is safe to return (though often that takes decades or longer, and then there is nowhere to return to). Maybe such a model would be appropriate if the situation in Mexico deteriorates further. Or maybe some type of TPS would be more appropriate. In any case, it seems to me that we can start thinking about this now, so that we are more prepared in case of a humanitarian disaster.

There is obviously more to say about these topics, and hopefully the Judiciary Committee will take up these and other important issues related to our asylum system in future hearings.

LAUGHING AT DEATH

Recently, two new clients hired me. Each told me a story that ranks among the worst I've heard since I've been practicing asylum law.

The first was an Iraqi grandmother. Her son worked for an international NGO and the family had received threats because of the son's work. One day, armed militiamen pulled the son from his car, and shot him to death in front of my client, her daughter-in-law (the son's wife), and the son's infant child. Later, the militia bombed my client's house and killed her elderly mother. Years before, my client lost her husband, when he was killed in a bombing raid during the Iran-Iraq War. My client's relative/translator explained, "This is Iraq."

The second client was from Afghanistan, and his story was not directly related to his current asylum claim. He told me that 20 years ago, he was going to a party at his relatives' house. For some reason, he was delayed, and before he arrived, the house was hit by a missile. He reached the scene moments later, and witnessed horrific carnage (I will spare you the details he told me). Suffice it to say, he saw many relatives and friends dead and dying. At the time, he was a teenager, and what he saw sent him into shock. He was physically unable to offer assistance, and he had to be carried back to his home. Relating the story many years later, he told me how the scene was still perfectly clear in his memory.

One thing that both clients have in common is that they laughed nervously and smiled while telling me their stories.

It seems to me that laughing and smiling in response to these stories is a very human reaction. Perhaps the normal emotions—anger, grief, shock—are simply inadequate to the task of recalling and relating such events. Or maybe my clients' embarrassed smiles are almost an apology for having to talk about such terrible stories. There is probably no appropri-

ate affect for telling personal stories of senseless violence and life-changing horror, and so maybe the default demeanor is a shy smile or a nervous laugh.

Of course, as an immigration lawyer, I am concerned that an "inappropriate" smile or laugh might create the impression that my clients are not credible. Although they have often reacted this way during our practice sessions, my clients seldom laugh or smile during actual trials or asylum interviews. And even if a client did show an "inappropriate" emotion, I suspect that most decision makers would see the reaction for what it was, and I doubt credibility would be negatively impacted.

I also sometimes wonder about how these stories affect the people that hear them. One study I found (Secondary Trauma in Asylum Lawyer, *Benders Immigration Bulletin*, March 1, 2009) about secondary trauma in asylum lawyers found that lawyers were at some risk of secondary trauma, and the risk increased with the amount of time the lawyers worked on asylum cases. Another study, which originally appeared in the *Georgetown Immigration Law Journal* (*Inside the Judges' Chambers*, volume 23:57), found that Immigration Judges suffered from secondary trauma and "more burnout than has been reported by groups like prison wardens or physicians in busy hospitals."

I've always been a bit skeptical that people in my line of work (or me specifically) suffer from secondary trauma. The difficulty for me comes not from hearing the clients' stories (which can be upsetting), but rather from overwork. Too many clients expect too much, too quickly. Maybe hearing terrible stories and working with people who have experience real trauma has an affect on us, but it is very hard—for me at least—to see this affect.

But of course, like my clients who laugh when they tell me their stories, I have my own ways of coping with stress. In my first job out of college, I helped find work for recently resettled refugees. Everywhere I went, I asked about employment opportunities. Finally, I decided that I could not continue that way. There was a time for work, and a time for not working. If you can't separate the two, you ultimately won't be successful at either. Although it is more difficult now, with my own business, I still try to keep that separation. With that said, I'm off to the pub to do some more coping. Cheers. ♦



Jason Dzubow is a partner in Dzubow & Pilcher PLLC, an immigration law firm in Washington DC. His blog, "The Asylumist," is the only blog in the United States devoted to asylum law.

COURTSIDE: Time to Fix Our Immigration Courts

BY JOHN F. GOSSART JR.

It remains to be seen whether the United States Congress can muster the responsibility and will to do what is right and achieve comprehensive immigration reform this year. Republican leadership in the House of Representatives continues to hold immigration reform hostage, most recently justifying inaction by blaming President Obama's alleged track record on failing to enforce our immigration laws. Perhaps those in Congress should come and sit inside the many immigration courtrooms throughout the country for a fact check on this unfounded assertion.

In my thirty-one years as a United States immigration judge, I have never had as many people come through my courtroom as I have over the last six years. During this time, there has been a dramatic increase in the number of non-citizens that the United States detains and deports, and the detained number of individuals appearing in immigration courts today is unprecedented. The administration has indisputably increased immigration enforcement in communities across the country, partnering with local law enforcement to pursue an aggressive deportation program that has resulted in nearly 2 million deportations in the last six years.

As these men and women came through my courtroom, I was extremely limited in my ability to consider each case and make a determination as to whether they should remain in the United States or should be deported. Coming to the best decision for each individual in a very limited amount of time can hardly be seen as justice. And for non-citizens who have been living in this country for years or even a lifetime, the system can even be crueler.

Consider the case of Lundy Khoy, who came to the United States at the age of one with her parents, fleeing genocide in Cambodia. Upon arrival to the United States, they were granted refugee status and then legal permanent residence. Lundy grew up as many American children do, going to school, playing sports and preparing for college. While a college student, Lundy was arrested for possession of several pills of ecstasy and, at her lawyer's advice, pled guilty and spent three months in jail, released early for good behavior. She moved back in with her parents, resumed her studies and worked hard to make up for the time lost. At the end of her probation period she met with her probation officers to proudly show off her grades only to be met by immigration officials who, to her surprise, sent her to a county jail where she was held for nine months.

Her single 12-year-old drug conviction constituted an aggra-

vated felony offense under today's immigration laws and put her in line for mandatory detention and deportation. In such cases, judges are not allowed to consider a person's individual circumstances. Our hands are tied and we are forced to order automatic deportation. We aren't allowed to consider the fact that Lundy has no family in Cambodia, is a successful college student, works at a university as a guidance counselor and volunteers in her community. As judges, we are not allowed to consider her rehabilitation or grant her a second chance.

Congress stripped immigration judges of much of their discretionary authority under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. Under this law, we are no longer allowed to grant most forms of relief for those with an aggravated felony conviction on their record, no matter how minor or old the offense. The term aggravated felony may sound like a big deal, but in fact the category is a term of art that includes a long list of minor and non-violent offenses that are not felonies under the law.

Today's immigration laws are enforced so consistently that our immigration courts face crushing caseloads and chronically insufficient resources. The current backlog of 360,000+ cases means an average wait of 573 days before a case is resolved, and the majority of people coming into immigration courts do so without lawyers, despite the high stakes and incomprehensible nature of our immigration law.

There's no question about it—the United States needs immigration reform and needs it now. Reform must enhance the courts' resources and allow immigration judges to consider the individual circumstances unique to each case, and it must include fairness and opportunity for those who seek to become a part of the American dream. Our leaders, to be true leaders, cannot continue to delay, putting partisan politics above the needs of our country. The rigorous enforcement of current immigration law has resulted in thousands of families being separated and has perpetuated a system that keeps millions of people living in the shadows with no legal recourse to remain in the United States with their families. Now is the time to strike a legislative balance so that those deserving can become part of our heritage to make our country stronger. ♦

Judge Gossart is a retired judge from the U.S. Immigration Court in Baltimore and an adjunct professor at the University of Baltimore School of Law. This article originally appeared in The Hill blog.

Persecution by Non-Governmental Actors (“NGAs”): Some Practical Pointers For Immigration Court

BY HON. PAUL WICKHAM SCHMIDT

I. INTRODUCTION

Good afternoon, and thanks for inviting me to speak. As we get started, please listen very carefully to the following important message.

I appear today solely in my personal capacity. Please keep in mind that the views I express during this presentation and the following question and answer session are mine and do not represent the official position of the Attorney General, the Executive Office for Immigration Review, the Office of the Chief Immigration Judge, my colleagues at the Arlington Immigration Court, or anyone else of any importance whatsoever. They also do not represent my position on any case that I decided in any capacity in the past, that is pending before me, or that might come before me in the future. With that disclaimer in mind, I am going to offer you some practical pointers on presenting an asylum case involving non-governmental actors (“NGAs”) in Immigration Court.

As a special bonus gift, your course materials contain a copy of my comprehensive two-page treatise entitled “Practical Tips for Presenting an Asylum Case in Immigration Court.”¹ While our topic this afternoon is somewhat more focused, many of the following pointers are covered in “Practical Tips.”

I also give you my absolute, unconditional, money-back guarantee that my presentation this afternoon will be completely free from computer-generated slides, PowerPoints, or any other type of distracting modern technology that might interfere with your total comprehension or listening enjoyment. In other words, I am the “power point” of this presentation

II. PRACTICAL POINTERS

My first point is that, although initially perhaps an area of some controversy, the concept of persecution by NGAs as a basis for asylum under the Immigration and Nationality Act (“INA”), as amended by the Refugee Act of 1980, is now firmly established. In fact, my most notable asylum case, *Matter of Kasinga*,² essentially involved a young female respondent who feared persecution in the form of female genital mutilation (“FGM”) at the hands of NGAs – in that case members of her family and tribe.

My favorite NGA case, the one that I find most instructive, is *Matter of O-Z- & I-Z-*,³ or “Matter of Oz and Iz” as it is sometimes affectionately known. Then Board Member Gerald S. Hurwitz wrote that unanimous opinion for a three-Member panel that also included then Board Member Lory D. Rosenberg and me. Today, I am going to use that decision as a “teaching vehicle.”

Second, the key concept in an NGA case is to show that the foreign government is “unwilling or unable to control” the persecutor. For example, *O-Z- & I-Z-* involved attacks on respondents of Jewish nationality by members of “a nationalistic, pro-Ukrainian independence movement”⁴ who, according to our panel, were beyond the control of the Ukrainian Government.⁵

Third, police reports can play a critical role in establishing the government’s unwillingness or inability to control an NGA. Logically, DHS counsel can be expected to raise the difficulties in expecting a foreign government to control NGA activities that have never been brought to the attention of any responsible official. Introducing copies of police reports and evidence of any response thereto are ways of addressing such concerns.

For instance, in *O-Z- & I-Z-*, in rejecting the Government’s argument that the Ukrainian Government had not “condoned” the nationalist NGAs’ actions, our panel found it significant that the respondents had reported a burglary and two assaults to the police and that the police failed to take any meaningful action to investigate.⁶ Our panel also noted that the respondents’ account was consistent with the Country Report indicating that the Ukrainian Government routinely failed to prosecute anti-Semitic acts.⁷

A corollary fourth consideration is that the absence of police reports needs to be satisfactorily explained, and where possible documented, by the respondent. For example, if the respondent claims that others similarly situated have unsuccessfully reported incidents to the police, that assertion should be documented with evidence such as testimony, affidavits, newspaper accounts, or other reports.

Fifth, the harm inflicted by, or feared from, the NGAs must “rise to the level” of persecution. This was a major issue in *O-Z- & I-Z-*. In opposing the asylum claim, the Government asserted, among other things, that the respondents were merely “victim[s] of discrimination and harassment in an area that is growing increasingly dangerous.”

Unfortunately, neither the INA nor the Board precedents offers a comprehensive definition of the differences among the concepts of “discrimination, harassment, and persecution.” I have to admit that our panel in *O-Z- & I-Z-* likewise failed to provide a specific definition of “persecution.”

Fortunately, all is not lost. In the absence of such a universal definition, the Seventh Circuit Court of Appeals has provided some helpful guidance as to the meaning of these terms. In *Stanojkova v. Holder*,⁹ that court, in an opinion written by

the famous Judge Richard Posner, stated:

[Discrimination] refers to unequal treatment, and is illustrated historically by India's caste system and the Jim Crow laws in the southern U.S. states. Discrimination normally does not involve the application of physical force, except as punishment for violation of the discriminatory laws.

Harassment involves targeting members of a specified group for adverse treatment, but without the application of significant physical force. Had [the alleged persecutors] followed [the respondent's] taxi . . . and ticketed him whenever he exceeded the speed limit by one mile per hour, that would be an example of harassment. A common form of sexual harassment is pestering a subordinate for a date or making lewd comments on her appearance, or perhaps hugging her, which is physical but generally not violent.

Persecution involves, we suggest, the use of significant physical force against a person's body, or the infliction of comparable physical harm without direct application of force (locking a person in a cell and starving him would be an example), or nonphysical harm of equal gravity—that last qualification is important because refusing to allow a person to practice his religion is a common form of persecution even though the only harm it causes is psychological. Another example of persecution that does not involve actual physical contact is a credible threat to inflict grave physical harm, as in pointing a gun at a person's head and pulling the trigger but unbeknownst to the victim the gun is not loaded.¹⁰

Notably, in light of these suggested definitions, *O-Z- & I-Z-* involved a number of examples of significant physical force and psychological harm, including several beatings, an assault which required the younger respondent to have surgery, and an incident at school where the younger respondent was forced to remove his pants to show his circumcision.¹¹ This last event humiliated him to the point where he dropped out of school.

Sixth, cumulative events can be most significant, as they were in *O-Z- & I-Z-*, in establishing that harm rises to the level of “persecution,” rather than being merely “discrimination or harassment.” In *O-Z- & I-Z-*, our panel found that the combination of beatings, several handwritten anti-Semitic threats, vandalism, and humiliation constituted harm that rose to the level of past persecution.

Seventh, when past persecution has been established, as it was in *O-Z- & I-Z-*, it triggers a regulatory presumption of a future well-founded fear of persecution that shifts the burden of proof to the DHS.¹² At this point, the DHS can rebut the presumption only by showing by a preponderance of the evidence either a fundamental change in circumstances or the existence of a reasonably available internal relocation alternative that would eliminate that well-founded fear.¹³

In *O-Z- & I-Z-*, the Government asserted that conditions had changed because the Ukrainian Government no longer made

anti-Semitism an official policy. Significantly, however, our panel found that such a “generalized statement” was insufficient to rebut the regulatory presumption.¹⁴ In other words, general improvements in country conditions do not automatically eliminate an individualized well-founded fear.

In cases where the DHS attempts to rebut the presumption by showing a reasonably available internal relocation alternative, the regulations list a number of non-exclusive factors that the Immigration Judge should consider, such as ongoing civil strife, infrastructure, and geographical limitations.¹⁵ For example, things like problems caused by natural disasters could be considered in assessing the reasonableness of internal relocation.

Normally, in cases involving persecution by NGAs, the respondent would bear the burden of establishing that the fear of persecution was countrywide.¹⁶ This can be challenging in NGA cases because many NGA persecutors, such as gangs or hate groups, tend to operate on a localized basis. Consequently, establishing past persecution and thereby shifting the burden of proof on internal relocation to the DHS can be particularly important for respondents in NGA cases.

Eighth, even if the DHS rebuts the presumption, a respondent who has suffered past persecution can still succeed in obtaining asylum under certain circumstances. Such a respondent might qualify for a discretionary grant of asylum even in the absence of a current well-founded fear of future persecution if he or she can show “compelling reasons” arising out of the severity of the past persecution or a reasonable possibility of suffering “other serious harm” if removed to that particular country.¹⁷

This is sometimes referred to as “humanitarian asylum.” Notwithstanding this name, however, Immigration Judges are not allowed to grant asylum to sympathetic, but unqualified, applicants on a generalized humanitarian basis. Rather, “humanitarian asylum” only applies where 1) the applicant has suffered past persecution, 2) the DHS rebuts the regulatory presumption, and 3) the applicant meets one of the two specific conditions that I am about to discuss.

The first condition, a discretionary grant based on “compelling reasons,” is sometimes called a “*Chen* grant,” after a famous BIA precedent *Matter of Chen*.¹⁸ The compelling reasons must specifically relate to incidents of severe past persecution on account of a protected ground. Usually, “compelling reasons” involve “egregious” past persecution where it would simply be inhumane or unconscionable to require the respondent to return to the persecuting country even under improved conditions. For example, in *Chen*, the severe past persecution of the respondent and his family during the Cultural Revolution in the People's Republic of China had resulted in continuing disabilities for the respondent, including partial loss of hearing and lingering suicidal tendencies as well as the death of his father and the absence of any other family members in China.

The alternative second ground for a discretionary grant, “other serious harm,” is a later addition to the regulations.¹⁹ The leading interpretation of this provision is the BIA's relatively recent precedent *Matter of L-S-*.²⁰

In *L-S-*, the BIA said that, unlike “compelling reasons,” the

“other serious harm” can be unrelated to a protected ground. In other words, there is no requirement of a “nexus” to the acts of past persecution. However, the harm must be equal in severity to persecution. For example, the BIA indicated that adjudicators may focus on factors like “civil strife, extreme economic deprivation beyond economic disadvantage, or situations where the claimant could experience severe mental or emotional harm or physical injury.”²¹ These types of factors might well be present in some NGA cases.

Ninth, as in any asylum case, establishing past or future persecution by an NGA requires a nexus to one of the five protected grounds – race, religion, nationality, membership in a particular social group, or political opinion. This can be a particular challenge because NGAs often may be identified with motives such as common crime, greed, lust, envy, gratuitous violence, general mayhem, societal disorder, and civil strife, that usually are considered unrelated to any protected grounds.

For example, in *O-Z- & I-Z-*, although the senior respondent’s woes began with an attack at a political rally where he was a speaker, the Government argued, albeit unsuccessfully, that the harm consisted merely of “acts of random violence perpetrated by unknown individuals.”²² Our panel eventually found that the respondents had suffered past persecution on account of “Jewish nationality” as argued by the respondents. However, *O-Z- & I-Z-* also plausibly might have been argued on race, religion, political, or even particular social group grounds.

Tenth, even if your respondent has not personally suffered harm or received individualized threats from NGAs, you might still succeed if you can establish a “pattern or practice” of persecuting “similarly situated” individuals under the regulations.²³ While this provision is relatively rarely invoked, it could be useful in an appropriate case. For example, an alternative argument for the respondents in *O-Z- & I-Z-* might have been that there was a “pattern or practice” of anti-Semitic persecutions carried out by ultra-nationalist groups in the Ukraine.

Eleventh, in light of all of the foregoing points, evidence of country conditions, is likely to play a supremely important role in NGA cases. Normally, the best source of country condition information is the relevant *Country Report* issued by the U.S. Department of State. For example, in *O-Z- & I-Z-*, our panel cited extensively from the relevant Country Report on the Ukraine in approving the respondents’ claims. Interestingly, but perhaps not unusually, both sides had cited the *Country Report* in support of their opposite positions. But, our panel concluded that the *Country Report* was more supportive of the respondents’ position.

Moreover, if the *Country Report* does not support your claim, is inconclusive, or your NGA is not well-known, additional country information from sources like qualified expert witnesses and other reputable groups might be essential. When seeking to introduce expert testimony in support of an application, it is always prudent to file a detailed affidavit or declaration for the Immigration Judge and the DHS Assistant Chief Counsel to review well in advance of the merits hearing.

Twelfth, and finally, it is always wise to have “Plan B.” As

my remarks today might suggest, there are lots of potential ways for an NGA claim to “go south.” If you have any doubt about this, you should read the BIA’s recent precedent decisions *Matter of W-G-R*²⁴ and *Matter of M-E-V-G*²⁵ which describe in exhaustive detail the many potential pitfalls in making gang-related “particular social group” claims. Therefore, when faced with an NGA case, it is a good idea to think in advance of viable alternatives to asylum.

Some examples of “Plan Bs” include prosecutorial discretion (“PD”); DACA, which is essentially PD for certain early childhood arrivals; T and U nonimmigrant visas for trafficking victims and certain victims of crimes, respectively; and Special Immigrant Juvenile (“SIJ”) status for certain unaccompanied minors. We do not have enough time to discuss these alternative forms of relief, available through the DHS, but you should definitely check them out.

III. CONCLUSION

In conclusion, I have described twelve non-profound, yet practical, pointers that can help you present NGA asylum cases: 1) the concept of NGA persecution is now well-established; 2) the key concept is the government’s unwillingness or inability to control the NGA; 3) police reports are important; 4) the absence of police reports must be explained; 5) harm must “rise to the level” of persecution; 6) consider cumulative harm; 7) recognize the many potential benefits of establishing past persecution; 8) humanitarian asylum might be available in some cases of past persecution even where there is no current well-founded fear; 9) nexus to a protected ground is an important requirement; 10) do not forget the possibility of a “pattern or practice” claim; 11) country condition information plays a critical role in NGA cases, and 12) it is always wise to have “Plan B.” I have also introduced you to my favorite NGA precedent *Matter of O-Z- & I-Z-*.

If you have paid attention, you now should have the “toolbox” necessary to construct an effective NGA-based asylum presentation in Immigration Court. Thanks for listening, and I would be pleased to answer your questions following my fellow panelists’ presentations. ♦

The foregoing was presented at the Immigration Law Section’s Asylum Seminar, American University, Feb. 21, 2014

Paul Wickham Schmidt was appointed a U.S. Immigration Judge in 2003. Previously, he was the Chairman and a Member of the Board of Immigration Appeals, the Deputy General Counsel and the Acting General Counsel of the Immigration and Naturalization Service, the managing partner of the Washington, D.C. office of Fragomen, Del Rey, and Bernsen, and a partner at Jones Day. He was also a founding member of the International Association of Refugee Law Judges and teaches refugee and asylum law as an Adjunct Professor at Georgetown Law. The views in this article are his views, and do not represent the official position of the Attorney General, the Executive Office for Immigration Review, the Office of Chief Immigration Judge, my colleagues at the Arlington Immigration Court, or

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Why The Intent Element of Discrimination Under of INA 1324b Matters

BY EILEEN M.G. SCOFIELD

Tellingly, the initially proposed legislative language of 8 U.S.C. § 1324b(a)(6), would expand the unlawful acts to now include a “request for a specific document”. This new additional unlawful act was contained in both President Obama’s version of this section, released via the white house “leak” in the April 2012, and too in the initial version of the Senate’s SB744 Senate. Not only was this language added, but removed from both proposals as well was the current intent element required for the act to be unlawful, “*if made for the purpose or with the intent of discriminating against an individual*”. Evidence of the act and the intent of discrimination are both required for the act to be unlawful. The intent element was later added back to the proposed Senate version of the legislation, and for many reasons, it should remain in the statute. Its removal would revoke established case law, and create a strict liability unlawful standard.

Federal law requires that all newly hired workers, both citizens and non-citizens, prove both their identity and employment authorization in order to be employed. This can be done through the production of a “List A” document alone (which establishes both identity and employment authorization), or through the production of a “List B” Document (which establishes identity only) **and** the production of a “List C” document (which establishes employment authorization only). A common example of a List A document is a U.S. passport, or certain foreign passports with attachments. But as well, a I-551 permanent resident card “green card”(which is possessed by lawful permanent resident (LPR)s who are authorized to live and work in the U.S.) is another common example of a “List A” document. For those people in the U.S. familiar with this process, frequently this process is also satisfied through the production of the combination of a driver’s license (which is a List B document) and a social security card (which is a List C document).

Although employees are required to provide sufficient documentation in order to be employed, federal law does not allow employers to engage in intentional discrimination of a type known as “document abuse.” This provision of the law prohibits employers from refusing to accept or request more or different documents from the list of acceptable documents **if** that demand is being done for the purpose of, or with the intent to, intentionally discriminate against non-citizens in the hiring process. This is codified at 8 U.S.C. § 1324b(a)(6), which provides:

A person’s or other entity’s request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are

required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related practice *if made for the purpose or with the intent of discriminating against an individual (emphasis added)* in violation of paragraph (1).

This statute means what it says. This statutory language as well is key to the a successful employment verification process in the U.S.. A request for specific documents is not in and of itself illegal; an intent to discriminate, along with a request for a specific document, must be proven under the current law in order to show a wrongful act. Evidence of an employer’s request or demand for a specific document, is not an unlawful event unless it is accompanied as well with evidence of the employer’s intent to discriminate against a person on the basis of their citizenship status.

The Court with primary jurisdiction over cases of this type, the Office of the Chief Administrative Hearing Officer (OCAHO), confirmed that the statute means what it says in the seminal case of *United States of America v. Diversified Technology & Services of Virginia, Inc.*, 9 OCAHO no. 1095 (2003).. In *Diversified*, among other notable holdings, the court holds that “it is not intentional document abuse which the statute now prohibits; it is intentional discrimination.” *Id.* at 17. Although a prior version of the document abuse statute did not contain the “intent” element, Congress purposely and specifically added that intent element in 1996 and, as the court determined, that element cannot be ignored and is clearly part of the statutory scheme. Document abuse is not a strict liability offense.

The Ninth Circuit further confirmed that the government must prove an intent to discriminate in *Robison Fruit Ranch, Inc. v. United States*, 147 F. 3d 798 (9th Cir. 1998) (rejecting the government’s attempt to interpret the statute as one that would “mechanically subject employers to liability for naming documents when in fact the employer was attempting to assist the applicant in satisfying the requirements of Form I-9.”).

In the last few years the recent trend has been for the US Department of Justice, Office of Special Counsel, (subset of the US DOJ Office of Civil Rights) to ignore the intent element. It ignores *Diversified* and *Robison*. In both investigations and litigation, it seeks to step back in time to 1995 or before and once again treat document abuse as a strict liability offense. The court though, in the matters that have come before the court, has made crystal clear, that this proposed position is not permissible: “If there is one thing that is crystal clear from the amending language, it is that

document abuse can no longer be treated as a strict liability offense. While pre-amendment cases may have held that a showing of discrimination is not required in order to establish liability for document abuse, this principle no longer applies. I conclude, therefore, that the facts in a document abuse case must now be examined in the same manner and with the same approach as is taken in any other intentional discrimination case.” *Diversified*, 9 OCAHO no. 1095 at 18. “The document requests made here in these situations may have been wrong, but there is no indication that they were intended to impede any individual, or that they did so.” *Id.* at 31.

With the advent of employer’s making greater use of E-Verify as a means of better confirming the identity and work authorization of its workers, and hence both protecting jobs for US workers, and reducing the attraction to the US by illegal workers seeking to cross the border, the DOJ Office of Special Counsel has gone fishing for data in E-Verify. It’s recent predilections for evidence of document abuse is often based statistics alone. For example, recently a DOJ Office of Special Counsel legal representative stated that the Office of Special Counsel will investigate an employer, based on its view that the employer is discriminating against non-citizens in the hiring process because the data indicates that approximately 70% of the non-citizen employees provided a List A document (usually a green card) in the verification process. This statistical conclusion ignores, amongst other factors, the fact that federal law requires green card holders to carry their green card on their person at all times, so it is logical to assume that these employees would not produce the green card to satisfy the verification process. The OCAHO court rejected the government’s attempt to carry its burden of proving intentional discrimination through statistics in *Diversified*, : “I cannot find that the statistical analysis has any probative value either way as to the issue of intent to discriminate.” *Id.* at 29. Yet, statistics are used by the US DOJ OSC for the basis of investigations and fining employers as well.

But even to assume for purposes of discussion the court were to decide that statistics alone can be indicative of intentional discrimination, and as well further assume that some percentage of use of List A documents sufficient to satisfy the first prong of a prima facie case, under guiding law, an employer is allowed the opportunity to articulate legitimate, non-discriminatory reasons for the alleged discriminating action. *Id.* at 14.

There are ample factors available of such legitimate reasons. Some, but certainly not all, of those reasons can and may include:

1. There may have been concerns respecting the validity of documents initially presented and therefore the employee was directed to present different documents instead.
2. There may have been suspicions, based on circumstantial evidence and facts, about the applicant’s employment authorization and accordingly, the employee chose to present a List A document.

3. Every lawful permanent residents is required by federal statute to carry their List A I551 lawful permanent resident card at all times, therefore every non-US citizen Lawful Permanent Resident has a List A document on their body at work.
4. The Social Security Administration directs that individuals are not to carry their original social security card (the social security card is a List C document), and that they keep it in a safe place, therefore every alien authorized to work and lawful permanent resident is advised by the SSA to not carry a List C document.
5. In light of state “immigration” laws, many of which require proof of identity and or legal status in the U.S., or the perception of such by non-US citizens lawfully in the United States, many individuals often feel safer carrying their I-551 card instead of just a driver’s license, as a form of identity. In addition, the driver’s license generally is not evidence of legal status in the U.S., so again the I551 is better for many reasons.
6. Language, and as well overall communication, issues often occur with regard to the review of original documents for identity and employment authorization purposes.
7. The inability to read English may too effects presentation of any or the best documentation of both identify and employment authorization. ◆

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USCIS Gets an EB-5 Earful at Immigration Listening Session

BY ANGELO A. PAPARELLI

On April 23, 2014, U.S. Citizenship and Immigration Services (USCIS)—the component of the Department of Homeland Security (DHS) that administers the EB-5 Immigrant Investor Program—held an important "Listening Session" with the stakeholder community.

EB-5 Program Chief, Nicholas Colucci, flanked by representatives of the Offices of Policy, Chief Counsel and Public Engagement, and by Dr. Winslow Sargent, Chief Counsel to the SBA's Office of Advocacy, explained that the session is a prelude to the promulgation of new EB-5 regulations. These new rules, he noted, would enhance program predictability and consistency by better defining substantive eligibility requirements and establishing consistent filing requirements. He added that the new regulations are but one step in transforming the EB-5 program, noting that the agency concurred in the December 2013 recommendations of the DHS Office of Inspector General that USCIS take additional measures, which he did not describe, to address EB-5 fraud and national security concerns.

The Listening Session -- which Mr. Colucci noted was held in deference to Executive Order 13563 ("Improving Regulation and Regulatory Review") -- covered a wide array of suggestions including proposals for new legal rights and interpretations, greater access to accurate program data and improvements in investor protection, the impact of immigrant visa quota backlogs and the need for greater speed and predictability of adjudications.

Legal Rights and Interpretations

Private attorneys and others on the call made a number of suggestions:

1. Allow each party with a material stake in the outcome of an EB-5 adjudication -- an I-924 request for designation as a regional center or amendment; an I-526 immigrant investor petition to be found classifiable as a qualifying EB-5 investor; and an I-petition to remove conditions on permanent residence -- to have a right to be heard before the agency and to be represented by separate counsel (at present only a regional center is represented in an I-924 proceeding, and only the immigrant investor is represented in I-526 and I-829 petition).
2. Allow investors who are members of limited liability companies (LLCs) to be treated on par with limited partners in establishing that "the petitioner is or will be engaged in the management of the new commercial enterprise" under 8 CFR § 204.6(j)(5)(iii).
3. Interpret the corporate restructuring or reorganization provision of 8 CFR § 204.6(h), which holds that a

new commercial enterprise may consist of the "purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results," consistently with traditional notions of corporate law allowing the formation and recognition of a new legal entity that acquires a predecessor's assets, and thus overrule contrary interpretations found in *Matter of Soffici*, 22 I&N 158 (Assoc. Comm'r, Examinations 1998) [the caller mistakenly referred to *Matter of Izummi*, a different precedent decision] and the May 30, 2013 USCIS EB-5 policy memorandum. In other words, as another attorney later noted, asset acquisitions should be treated as new commercial enterprises.

- Given the delays of adjudication and the need for careful due diligence on potential investments, allow prospective EB-5 investors to enter as B-1 business visitors and provide them with work and travel-abroad permission while they evaluate and make a suitable employment-creation investment.
- Allow an investor to cure a perceived problem with the investment subscription documents, say, a prohibited redemption right that would deny the "at risk" nature of the investment, by permitting amendments to these documents rather than denying the case entirely, or, requiring a refiling and payment of a duplicate filing fee.
- Take into account and adjust for the foreseeable impact of immigrant visa quota backlogs that artificially change the measuring period in which the jobs per EB-5 investor must be created and prolong project liquidation and ultimate distributions to EB-5 investors beyond the prevalent five year holding period. The caller also suggested that the measuring periods for the I-526 approval (2-1/2 years) and the I-829 approval (up to 3 years) need to be reconciled.
- Revise the current Targeted Employment Area (TEA) concept involving discrete areas within counties as determined by state officials into a regional TEA principle based on the recognition that "where jobs are created [is] not necessarily where people live." Also, extend TEA designation authority to all U.S. territories and to federally recognized Indian nations.
- The validity of a TEA determination should also be extended beyond the one-year period currently permitted.
- Reconsider the Tenant Occupancy concept so that retained jobs are considered acceptable.
- Make clear that the EB-5 program as provided by

statute is only concerned with the fact that jobs are created and not with the duration of jobs once they have been created.

- Allow investors to port an approved project to a different regional center in case an existing regional center loses its designation.
- Create an administrative presumption that the infusion of investment funds would create a presumed number of jobs or use more flexibility in accepting job-creation methodology.
- Change the definition of how net losses are determined for a troubled business by moving away from Generally Accepted Accounting Principles (GAAP) which are prohibitively expensive to document for small businesses because GAAP will be phased out in favor of international financial reporting standards.
- Clarify that investors in a direct EB-5 project who receive a salary are not necessarily receiving a redemption or return of their investment.
- Allow investors whose I-824 petition for removal of conditions USCIS has denied to file motions to reconsider and/or reopen (MTRs) with the regional service center and appeal to the USCIS Administrative Appeals Office (AAO) rather than require immediate referral to an immigration judge at a removal hearing. The caller noted that the immigration courts are backlogged for months or years, thus leaving the conditional permanent resident in a legal limbo for an inordinate period. The caller could have also noted that the regional service centers and the AAO presumably would have more time and greater expertise in EB-5 issues than the Immigration and Customs Enforcement Trial Attorneys and the Immigration Judges who deal with a plethora of other immigration factual and legal issues in removal proceedings. The caller could also have observed that, since the issues at the I-824 stage often involve a regional center, the center should likewise have the right to file an MTR or an AAO appeal.

Investor Protections and Anti-Fraud Measures

Various callers expressed concern about the need to stem fraud and enhance the protection of EB-5 investors, urging the adoption of specific regulations:

- Hold regional centers liable for misrepresentations by overseas brokers and require the centers to maintain and monitor marketing materials.
- Monitor changes and amendments to governing subscription and operating documents and allow investors to object in writing to USCIS.
- Extend the same benefit of counting indirectly created jobs accorded regional centers to direct EB-5 investors.
- Require USCIS to mount an investor education initiative through U.S. embassies and consular posts and to release more regional center performance data and approval/denial outcomes. One caller, however,

expressed concern that release of such data would likely be misleading because of the widespread "rent-a-regional-center" practice, and because some approvals have led to projects that failed. Investors should be encouraged to investigate the project rather than the regional center. Regional center metrics would not address that issue. The caller also worried that new and more innovative regional centers would likely lose out in investor attention to long-established centers.

- Verify source of funds documentation by the issuing bank or other authority rather than accepting such documentation at face value.
- Provide a remedy for investors who are victims of fraud in cases where the I-526 is approved and the investor has become a conditional permanent resident (assuming that the invested funds have been lost or depleted and investors lack the financial ability to invest in another regional center).
- Instructions to EB-5 forms should outline the most common types of requests for additional evidence to help investors and the regional centers submit information likely to lead to approval and project success. The forms, another caller noted, should not request burdensome and irrelevant information.

Processing times, Rulemaking Process and Adjudication Procedures

Many callers expressed process concerns:

- Allow the use of the Premium Processing Service to speed all adjudications and create sufficient funds to ensure and enhance program integrity. Faster adjudications winnow out weak projects and facilitate the success of projects with solid prospects by leading to the speedier release of escrowed funds.
- Charge a substantial annual regional center recertification fee to weed out inactive centers and help investors more readily identify successful centers and projects.
- Institutionalize the informal process of email clarification of specific issues of concern in lieu of issuing long and burdensome requests for additional evidence.
- Give priority adjudication processing to investors in the U.S. on work visas.
- Once a set number of approvals of I-526s have been issued, e.g., three approvals, expedite the adjudication of all similar cases for investors in the same project.
- Maintain the integrity of USCIS published processing times by publishing actual rather than targeted processing times.
- Expedite I-924 adjudications for regional centers seeking to expand into contiguous areas to enhance investor confidence that a new project in an adjoining area will be approved.

* * *

As can be seen, USCIS has much to digest from the Listening Session's cornucopia of proposed changes. As two callers urged, however, USCIS should not rush to publish proposed rules without first engaging in the kind of "iterative process" or sounding out of concepts and lines of thinking with the stakeholder community -- just as occurred with the May 30, 2013 policy memorandum -- a document largely praised as providing practical and clear adjudication guidance. ♦

Angelo A. Paparelli, a partner in the 800-lawyer firm Seyfarth Shaw LLP, practices immigration law in Los Angeles and

New York. His full-service practice emphasizes business immigration and the EB-5 visa category. He founded the Alliance of Business Immigration Lawyers, a worldwide alliance of leading immigration lawyers. A Calif.-Certified Immigration & Nationality Law Specialist, he has been rated three times as the World's Leading Immigration Lawyer by the International Who'sWho of Corporate Lawyers, and a Star Individual by Chambers in several annual rankings. A recipient of AILA's Edith Lowenstein Award, he blogs on our dysfunctional immigration system at www.nationofimmigrants.com and co-authors the Immigration Column for the New York Law Journal.

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May 2013 - Maria Odom, CIS Ombudsman, U.S. Department of Homeland Security

April 2013 - Jeffrey Gorsky, Chief, Legal Advisory Opinion Section, Visa Office, Bureau of Consular Affairs, U.S. Department of State

March 2013 - Peter S. Vincent, Principal Legal Advisor, U.S. Immigration and Customs Enforcement

February 2013 - Juan P. Osuna, Director, Executive Office for Immigration Review

The luncheons have been chaired by Prakash Khatri, who is on the Board of Directors of both the FBA DC Chapter and the Immigration Law Section. He welcomes inquiries from

members from other jurisdictions who may be interested in organizing breakfast or lunch meetings with local Immigration leaders. Prakash Khatri can be reached at prakash@khatrilaw.com.

ROME, ITALY: Save the date—Sept. 23, 2014, for the Section's third annual seminar on World Citizenship. Margaret (Peggy) McCormick will, once again, lead a pilgrimage to the Eternal City, for an intellectually stimulating CLE. This event attracts an incredibly varied and fascinating group, and is complemented by fine dining and socializing. ♦

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anyone else of any importance whatsoever. They also do not represent the author's position on any case that he decided in any capacity in the past, that is pending before him, or that might come before him in the future. © 2014 by Paul Wickham Schmidt.

Endnotes

¹See "Practical Tips for Presenting an Asylum Case in Immigration Court," *The Federal Lawyer*, Vol. 59, No. 2, at 34 (March 2012).

²21 I&N Dec. 357 (BIA 1996).

³22 I&N Dec. 23 (BIA 1998).

⁴*Id.* at 24.

⁵*Id.* at 26.

⁶*Id.* at 27.

⁷*Id.*

⁸*Id.* at 25.

⁹645 F.3d 943, 947-48 (7th Cir. 2011).

¹⁰*Id.*

¹¹23 I&N Dec. at 24.

¹²8 C.F.R. § 1208.13.

¹³8 C.F.R. § 1208.13(b)(1)(i).

¹⁴23 I&N Dec. at 26.

¹⁵8 C.F.R. § 1208.13(b)(3).

¹⁶8 C.F.R. § 1208.13(b)(3)(i).

¹⁷8 C.F.R. § 1208.13(b)(1)(iii).

¹⁸20 I&N Dec. 16 (BIA 1989).

¹⁹8 C.F.R. § 1208.13(b)(1)(iii)(B).

²⁰25 I&N Dec. 705 (BIA 2012).

²¹*Id.* at 714.

²²22 I&N Dec. at 25.

²³8 C.F.R. § 1208.13(b)(2)(iii).

²⁴26 I&N Dec. 208 (BIA 2014).

²⁵26 I&N Dec. 227 (BIA 2014).

Political Violence and Repression on the Rise in Bangladesh

By JOSEPH K. GRIEBOSKI

Introduction

Bangladesh's ruling party the Awami League has a long history in the country, but the political party and its leader, Prime Minister Sheikh Hasina, has jeopardized the state of Bengali democracy. Historically, the Awami League's early leaders were the driving force behind Bangladesh's War of Independence from Pakistan; while today's opposition party Jamaat-e-Islami (JI) developed out of those who were non-separatists. After the war was over and Bangladesh became a separate country, the Awami League remained a powerful institution in the government for most of Bangladesh's modern history. Although the Awami League was not the ruling party for a brief period, they fully regained control of the government in 2009. Since then, the Awami League has increasingly abused its power to attack the political opposition, mainly the Bangladesh National Party (BNP) and JI.

In addition to rigged elections and overtly biased media coverage, the Awami League has been involved in systematic extrajudicial killings of political opposition through a combined unit of police and military officials known as the Rapid Action Battalion (RAB) as well as politicized trials and cover-ups of illegal activities.

Bangladesh is plagued by riots caused both by political tensions as well as ethnic and religious intolerance. The country's Hindu minority is often the target of violence, is not provided adequate protection by state security and police forces, and is instead used as a political pawn of the Awami League in efforts to discredit the opposition.

As opposition members of JI and BNP are on the run from the ongoing threat of violence, JI leaders are unable to return to the country due to death sentences that they have received, and the persecution against minority groups are on the rise, the number of individuals fleeing from Bangladesh and seeking asylum in the United States may rise substantially in the coming months.

Elections

In January 2014, the Bangladesh general elections were boycotted by almost all opposition parties, including BNP and JI, resulting in an alarming 22% voter turnout rate in Dhaka, the nation's capital.¹ When compared to the city's 87% turnout rate during the previous round of general elections, the precipitous drop in voter confidence under the Awami League is apparent.

Reports of the Awami League bribing adults and children in return for votes, intimidating the population to vote in favor of the ruling party, and manipulation of vote counts by election officials at polling stations. Despite these attempts at controlling the democratic system for their own benefit, both BNP and JI received a substantial number of votes in the subsequent sub-district elections resulting in a number of their leaders being elected to office. While much

of the public took great personal risk to participate in democratic elections, the resulting violence against the elected opposition leaders demonstrated the ruling government's unwillingness to allow true democracy to flourish. Since their election, reports have surfaced that a number of these opposition leaders were arrested on their way to take the oath of office; while another was killed. The ruling party has made it clear that these elected officials will risk both their personal freedom and their life to take their rightful place in the government.

Political Violence

The Awami League's attempts to break down political opposition include extrajudicial killings, arbitrary detentions, and unjust trials.² Political violence is common and security forces within Bangladesh are responsible for a number of human rights abuses. Government agencies often report murders committed by the security forces as "cross-fire killings" or place the blame on their political opposition. Due to widespread corruption among government officials, security forces are able to commit crimes with relative impunity; the government rarely conducts comprehensive investigations or prosecutions of these crimes.

Particularly egregious are the crimes of the RAB which is regularly responsible for disappearances and extrajudicial killings, mainly of political opposition leaders. Human rights organizations believe RAB soldiers to be responsible for the abusive treatment of detainees and even instances of torture. Despite U.S. assistance in the establishment of an internal investigative unit, no member of the RAB has ever faced prosecution for human rights violations.³

International Crimes Tribunal

The International Crimes Tribunal (ICT) was established in 2009 to investigate and prosecute crimes committed by both sides during the 1971 Bangladesh War of independence, and it was originally met with strong support from the international community and rights organizations. However, the ICT has since become a tool used by the Awami League to quite literally eliminate their political opposition. The ICT has only investigated crimes committed by leaders of the current political opposition even though these individuals were not a part of the 1971 war, and has sentenced multiple people to death for crimes allegedly committed forty years ago. ICT trials have been criticized by many human rights groups for their failure to eliminate political influence, acceptance of rumors and news reports as evidence, and lack of a robust witness protection program to prevent the harassment of witnesses and investigators working for the defense.⁴ In addition to the unjust nature of the ICT's proceedings, those convicted and sentenced to death are not permitted to appeal the decision.⁵

The ICT has attempted to silence all criticism of its procedures, pursuing domestic and foreign journalists, as well as bloggers. Last year, the ICT sought to charge Human Rights Watch with contempt after the watchdog organization criticized the court's unjust proceedings.

Hindu Minority Violence

Bangladesh's Hindu minority, which comprises 8.5% of the nation's population, has been the target of often politically motivated violence in many regions of the country that has resulted in the destruction of Hindu homes, businesses, and temples. Reports have stated that violence towards these minorities groups are being conducted by Awami League controlled forces in order to create violence that they can attempt to blame on the opposition parties in further effort to discredit them and label their followers as terrorists based on false charges.

Further reports and pictures have actually shown members of JI surrounding Hindu temples to protect them from the violence and destruction. Despite these good will actions of JI supporters, they are still blamed by the Awami League for the violence.

Conclusion

With continued manipulation of democracy and the court system underway in Bangladesh, political violence, and increased persecution of minority Hindu groups, the landscape is becoming more and more hostile for those residing in Bangladesh. Furthermore, intense media repression and control ensures that these reports do not reach the West with the urgency that they should be. As an increase in asylum cases from Bangladesh and the region are seen, it is essentially that we take the necessary steps to protect a population who is no longer safe at home. ♦

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Endnotes

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Moncrieffe v. Holder: Exploring the Legal Landscape of Section 101(a)(43)(B) of the Act

BY SAM CHOW, RACHAEL DIZARD, AND CINDY HEIDELBERG

The recent decision of the United States Supreme Court in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), resolved a Federal circuit split regarding the aggravated felony defined as “illicit trafficking in a controlled substance” under section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B). Specifically, the Supreme Court considered whether a State criminal conviction is for an aggravated felony under section 101(a)(43)(B) when the State statute of conviction covers both felony and misdemeanor conduct under the Federal statutory scheme. The Court determined that under the categorical approach, such convictions are not for aggravated felonies because the minimum conduct necessary to sustain a conviction would not be punishable as a Federal felony. This article explores the pre-*Moncrieffe* landscape and then examines the reasoning in *Moncrieffe* to elucidate its potential implications.

Background

Under section 101(a)(43)(B) of the Act, an aggravated felony includes “illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substance Act, including a ‘drug trafficking’ crime (as defined in [18 U.S.C. § 942(c)]).” A State drug conviction is for an aggravated felony when the State offense includes all the elements of a crime that could be punishable as a felony “under the Controlled Substances Act (21 U.S.C. § 801 et seq.)” (“CSA”). *Lopez v. Gonzalez*, 549 U.S. 47, 60 (2006).¹ The State’s categorization of the offense as a misdemeanor or a felony is irrelevant, as long as the hypothetical Federal conviction would be for a felony under Federal law.²

The concept is relatively straightforward when applied to convictions for manufacturing, distributing, or dispensing (or possessing with intent to manufacture, distribute, or dispense) a controlled substance other than marijuana, which likely carry terms of imprisonment of more than 1 year under the CSA. See 21 U.S.C. §§ 812, 841. The more difficult issue, confronted in the cases leading up to *Moncrieffe*, involves a single State conviction for a marijuana distribution crime. The CSA, in 21 U.S.C. § 841(a)(1), makes it an offense to “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.” Under 21 U.S.C. § 841(b)(1)(D), this offense is punishable by up to 5 years’ imprisonment, making it a Federal felony. However, under 21 U.S.C. § 841(b)(4) marijuana distribution is only punishable as a Federal misdemeanor if the offense involves “a small amount of marihuana [distributed] for no remuneration.”

The issue before the Board of Immigration Appeals and circuit courts leading up to *Moncrieffe* was how to treat the Federal misdemeanor in relation to the Federal felony in 21 U.S.C. § 841 and whether the burden is on the Government or the alien to demonstrate that the conduct falls within the definition of the Federal felony.

Exploring the Circuit Split: Minimum Conduct Versus Felony Default Approach

Prior to *Moncrieffe*, each court that considered the issue acknowledged that the misdemeanor contained in 21 U.S.C. § 841(b)(4) is an exception to the related Federal felony. The Second and Third Circuits considered the entire continuum of conduct criminalized in *both* the misdemeanor exception and the felony provision and looked to whether the “minimum criminal conduct” contained in the State statute falls within the Federal misdemeanor. The First, Fifth, and Sixth Circuits and the Board considered how 21 U.S.C. § 841 is prosecuted in criminal proceedings and concluded that because the offense is a felony by default, it should be so deemed in the immigration context as well. Similarly, because the misdemeanor sentencing provision is an exception to be proven by the criminal defendant in criminal proceedings, the burden must be mirrored in the immigration context. The article refers to these as the “minimum conduct” approach and the “Federal default” approach, respectively.

Minimum Criminal Conduct Approach

The “minimum conduct” approach was adopted by both the Second and Third Circuits. Unlike those circuits adopting the “Federal default approach,” the Second and Third Circuits did not assume that State offenses that *could be* felonies under the CSA actually *were* aggravated felonies under the Act. By avoiding this presumption, these circuits declined to place the burden on the alien to prove that his or her State conviction qualified for the Federal misdemeanor exception and therefore was not for the Federal felony.

In *Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2003), the Third Circuit was the first circuit court to hold that a conviction under a broad State criminal drug statute could not be analogized to the Federal felony contained in 21 U.S.C. § 841(b)(1)(D). The petitioner in *Wilson* was a native and citizen of Jamaica who entered the United States unlawfully in 1989. In 1995, he was convicted after entering a guilty plea to violating section 2C:35-5b(11) of the New Jersey Statutes Annotated.³ After marrying a U.S. citizen in 1996, the petitioner attempted to adjust his status to that of a lawful permanent resident but was placed into removal proceedings as a result of his 1995

State drug conviction. He was charged with removability as an alien convicted of an aggravated felony.

Applying the categorical approach to Wilson’s conviction, the Third Circuit held that “[b]ecause the state statute under which [the petitioner] pled guilty does not contain sale for remuneration as an element, we cannot determine from the state court judgment that [the petitioner’s] conviction necessarily entails a finding of remuneration.” *Wilson*, 350 F.3d at 381. The court declined the Government’s request to explore the specific facts underlying the petitioner’s State conviction, concluding that “[w]e rely on ‘what the convicting court must necessarily have found to support the conviction and not to other conduct in which the defendant may have engaged in connection with the offense.’” *Id.* at 382 (quoting *Steele v. Blackman*, 236 F.3d 130, 136 (3d Cir. 2001)).⁴ The court extended the same rationale in *Jeune v. Attorney General of U.S.*, 476 F.3d 199 (3d Cir. 2007), to a similar Pennsylvania statute in title 35, section 780-113(a)(30) of the Pennsylvania Statutes Annotated.

In *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008), the Second Circuit held that criminal sale of marijuana in the fourth degree in violation of section 221.40 of the New York Penal Law, a State misdemeanor, is not an offense punishable as a Federal felony. The petitioner had been a lawful permanent resident since 1989 and was placed in removal proceedings following two convictions for violating section 221.40. The petitioner sought cancellation of removal before the Immigration Judge, a form of relief that is unavailable to aliens convicted of an aggravated felony.

Under section 221.40, “[a] person is guilty of criminal sale of marihuana in the fourth degree when he knowingly and unlawfully sells marihuana except as provided in section 221.35 of this article.” Correspondingly, section 221.35 of the New York Penal Law applies to certain conduct involving less than 2 grams, or one cigarette, of marijuana. “Sale” under New York law includes any form of transfer of a controlled substance, regardless of whether money was involved. Therefore, the petitioner’s conviction could have been for any form of nonremunerative transfer of as little as 2 grams of marijuana.

The Second Circuit concluded that “[a]s the categorical approach requires, we look no further than to the fact that [the petitioner’s] conviction could have been for precisely the sort of nonremunerative transfer of small quantities of marihuana that is only a federal misdemeanor under 21 U.S.C. § 841(b)(4).” *Martinez*, 551 F.3d at 120.

The court accepted that 21 U.S.C. § 841(b)(4) provides an exception to the Federal felony. Nevertheless, it concluded that the minimum conduct necessary to sustain a conviction under the New York statute would have been a misdemeanor under Federal law. Accordingly, such a conviction could not be deemed to be for an aggravated felony under the categorical approach for Federal immigration purposes.

The Government argued that the petitioner’s State convictions should be deemed to be for aggravated felonies for three reasons. First, it asserted that the Second Circuit had already decided the matter in *United States v. Simpson*, 319 F.3d 81 (2d Cir. 2002). The *Martinez* court concluded that while

Simpson did hold that a violation of section 221.40 was an aggravated felony under section 101(a)(43)(B) of the Act, that holding was distinguishable because it applied in the context of sentencing factors. In fact, the court in *Simpson* had specified that the crimes were aggravated felonies “for purposes of sentencing under the Guidelines.” *Id.* at 85. In *Martinez*, the Second Circuit further noted that *Simpson* apparently did not utilize the categorical approach, rendering that decision inapposite in the immigration context. *Martinez*, 551 F.3d at 120-21.

Second, the Government argued that it was the petitioner’s burden to prove the necessary facts to establish that his conviction would be punishable as a Federal misdemeanor only. The Second Circuit rejected this argument and determined that placing the burden on the petitioner would require factual inquiries not appropriate under the categorical approach. Finally, the Government argued that because the petitioner was seeking the relief of cancellation of removal, it was his burden to demonstrate eligibility for relief, including the fact that he had not been convicted of an aggravated felony. Again, the Second Circuit rejected this argument as an inappropriate departure from the categorical approach. The court concluded that while the petitioner indeed bore the burden of proving that he had not been convicted of an aggravated felony, he could do so by “showing that the minimum conduct for which he was convicted was not an aggravated felony” and he did not need to prove the specific facts of his criminal conduct. *Id.* at 122.

Felony Default Approach

In contrast to the minimum conduct approach adopted by the Second and Third Circuits, the First, Fifth, and Sixth Circuits, along with the Board, have held that an alien’s State conviction for possession of marijuana with intent to distribute is presumed to be for a Federal felony. Each court reasoned that 21 U.S.C. § 841(b)(4) is not a stand-alone misdemeanor provision involving relevant “minimum criminal conduct” but rather is more akin to a mitigating sentencing provision. They concluded that the alien’s offense is presumed to be analogous to the Federal felony, and the alien has the burden to demonstrate that he or she falls within the misdemeanor exception in 21 U.S.C. § 841(b)(4) for “distributing a small amount of marihuana for no remuneration.”

In *Julce v. Mukasey*, 530 F.3d 30 (1st Cir. 2008), the First Circuit considered the alien’s Massachusetts conviction for possession of marijuana with intent to distribute.⁵ The lawful permanent resident petitioner sought review of the decisions of the Immigration Judge and Board denying his application for cancellation of removal based on their findings that he was convicted of an aggravated felony.

The First Circuit noted at the outset that it had previously held in *Berhe v. Gonzalez*, 464 F.3d 74 (1st Cir. 2006), that the Massachusetts crime of possession with intent to distribute marijuana is punishable as a felony under the CSA and is thus an aggravated felony. The court then considered Julce’s argument, not raised in *Berhe*, that because the State marijuana statute encompasses conduct that *could* constitute a Federal misdemeanor under 21 U.S.C. § 841(b)(4), the Government

must prove that his conviction involved more than a small amount of marijuana or that he intended to distribute for remuneration.

The First Circuit, looking to how violations of 21 U.S.C. § 841 are prosecuted under Federal criminal law, stated that § 841(b)(4) “does not create a stand-alone misdemeanor offense. Rather it is best understood as a mitigating sentencing provision.” *Julce*, 530 F.3d at 35. The court held that under Federal criminal law, it is the defendant’s burden to demonstrate that the offense should be reduced to a misdemeanor under § 841(b)(4), and it saw “no reason to adopt a different rule for purposes of defining an ‘aggravated felony’ under immigration law.” *Id.*

In *Garcia v. Holder*, 638 F.3d 511 (6th Cir. 2011), the Sixth Circuit considered a similar Michigan marijuana distribution statute and came to the same conclusion as the First Circuit. Citing to *Julce*, the Sixth Circuit held that § 841(b)(4) is a “mitigating sentencing provision” rather than a stand-alone misdemeanor statute, and the criminal defendant bears the burden of producing mitigating evidence. *Id.* at 516 (citing *Julce*, 530 F.3d at 35).

The Sixth Circuit acknowledged the contrary decisions of the Second and Third Circuits holding that the “minimum criminal conduct” could fall within the Federal misdemeanor exception. However, the court relied on its controlling decision in *United States v. Bartholomew*, 310 F.3d 912 (6th Cir. 2002), a criminal sentencing case holding that the amount of marijuana need not be proven to convict under § 841(a) or to punish as a felony under § 841(b)(1)(D) and that the default punishment is as a felony where the amount of marijuana is not proven. The Sixth Circuit thus held that even looking to the minimum conduct necessary to sustain a conviction, “because the amount of marijuana is not an element of the relevant federal felony, Garcia’s state conviction is an aggravated felony under the categorical approach.” *Garcia*, 638 F.3d at 518.

The Board was the last adjudicatory body to weigh in prior to the Supreme Court’s decision in *Moncrieffe*. In *Matter of Castro Rodriguez*, 25 I&N Dec. 698 (BIA 2012), a lawful permanent resident was charged with removability as an alien convicted of an aggravated felony on the basis of his conviction under section 18.2-248.1(a)(1) of the Virginia Code Annotated for possession with the intent to distribute less than half an ounce of marijuana. The Board reaffirmed its 2008 decision in *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008), and addressed the additional question whether the alien may present evidence outside the record of conviction to show that a State offense was within the misdemeanor provision of § 841(b)(4).

In *Matter of Aruna*, the Board held that absent controlling circuit precedent to the contrary, “a State law misdemeanor offense of conspiracy to distribute marijuana qualifies as an ‘aggravated felony’ under section 101(a)(43)(B) of the Act where its elements correspond to the elements of the Federal felony offense of conspiracy to distribute an indeterminate quantity of marijuana, as defined by 21 U.S.C. §§ 841(a)(1) and (b)(1)(D).” *Matter of Castro Rodriguez*, 25 I&N Dec. at 701 (discussing *Matter of Aruna*). The Board rejected the

argument that marijuana distribution under the relevant State crime did not correspond to the Federal felony because it could include conduct contained in the Federal misdemeanor exception. As in *Julce* and *Garcia*, the Board held that § 841(b)(4) does not define elements of an offense of “misdemeanor marijuana distribution” but rather “defines a ‘mitigating exception’ to the otherwise applicable 5-year statutory minimum.” *Id.* It is the criminal defendant’s burden to prove that the amount of marijuana was “small” and was for no remuneration.

In *Matter of Castro Rodriguez*, 25 I&N Dec. at 702, the Board further held that “in accord with the Immigration Judge and the majority of the courts of appeals that have considered the issue,” the respondent bears the burden of proving that his State law conviction for distribution of marijuana involved a small quantity for no remuneration pursuant to § 841(b)(4) in order to avoid a finding that his conviction is for an aggravated felony. As to the question whether it is permissible to look beyond the record of conviction, the Board concluded that because the “smallness” of the marijuana and lack of remuneration are not elements of the felony offense, the categorical approach is not applicable to determine these facts; rather, the inquiry is “of a ‘circumstance-specific’ nature,” and the alien may introduce in Immigration Court evidence outside the record of conviction to prove that his conviction falls within § 841(b)(4). *Id.* (citing *Nijhawan v. Holder*, 557 U.S. 29 (2009)).

Procedural History of *Moncrieffe*

In the case that made its way to the Supreme Court, the Fifth Circuit followed the First and Sixth Circuits, adopting a felony default approach. *Moncrieffe v. Holder*, 662 F.3d 387 (5th Cir. 2011), *rev’d*, 133 S. Ct. 1678. The procedural history of the case follows.

Adrian Moncrieffe is a native and citizen of Jamaica who entered the United States in 1984 at the age of 3 as a lawful permanent resident. On June 30, 2008, he pleaded guilty to possession of marijuana with intent to distribute in violation of section 16-13-30(j) of the Georgia Code Annotated.⁶ In April 2010, the Department of Homeland Security charged Moncrieffe with removability as, *inter alia*, an alien convicted of an aggravated felony as that term is defined in section 101(a)(43)(B) of the Act. On May 26, 2010, an Immigration Judge found that Moncrieffe’s conviction was for an aggravated felony and ordered him removed from the country.

The Board dismissed Moncrieffe’s appeal on September 20, 2010.⁷ In its decision, the Board found no merit to the respondent’s argument that his conviction was not for an aggravated felony. The Board held that “the elements of the respondent’s offense correspond to the elements of the Federal felony offense of possession with intent to distribute an indeterminate quantity of marijuana,” citing *Matter of Aruna*, 24 I&N Dec. 452, and *Lopez*, 549 U.S. 47 (holding that a State drug offense only equates to a felony under the CSA if it proscribes conduct that is punishable as a felony under the CSA). *Matter of Moncrieffe*, A038 581 600, 2010 WL 8751124 (BIA Sept. 20, 2010). Thus the Board agreed with the Immigration Judge’s finding that Moncrieffe’s conviction was for a drug trafficking

aggravated felony.

Moncrieffe petitioned the Fifth Circuit for review of the Board's dismissal of his appeal, arguing that because the Georgia criminal statute covers conduct that constitutes both a felony and a misdemeanor under the CSA, a violation of the statute is not categorically a Federal felony. *Moncrieffe*, 662 F.3d at 390.

Acknowledging that possession of a controlled substance with the intent to distribute covers conduct that is both felonious and misdemeanor under the CSA, the Fifth Circuit reviewed the then-circuit split on the question "whether the conviction, if lacking specifics of the underlying criminal conduct, should be treated as a felony or a misdemeanor" under the categorical approach. *Id.* at 391. The Fifth Circuit declined to follow its own prior unpublished case and adopted the felony default approach of the First and Sixth Circuits. The court accepted the Sixth Circuit's reasoning in *Garcia* that the CSA itself defaults to a felony charge and that the misdemeanor provision "is 'best understood as a mitigating sentencing provision' and not 'a stand alone misdemeanor offense.'" *Id.* (quoting *Garcia*, 638 F.3d at 516) (internal quotation marks omitted). Citing to its earlier decisions, the court rejected the "minimum conduct" approach of the Second and Third Circuits. *Id.* at 392. It held that *United States v. Walker*, 302 F.3d 322 (5th Cir. 2002), established the default sentencing range under the CSA to be the felony provision and reasoned that § 841 of the CSA should be treated identically for immigration and sentencing purposes.

The Fifth Circuit concluded that even if the Georgia criminal statute *could* cover conduct that would be considered a misdemeanor under the CSA, Moncrieffe, and not the Government, bore the burden of proving as much. Without meeting that burden, Moncrieffe's conviction was for a drug trafficking aggravated felony.

Examining the Reasoning in *Moncrieffe*: Abandoning the "Felony Default" Approach and Returning to the Classic Categorical Approach

Moncrieffe filed a petition for writ of certiorari which the Supreme Court granted to resolve a conflict among the Courts of Appeals with respect to whether a conviction under a statute that criminalizes conduct described by both [the CSA's] felony provision and its misdemeanor provision, such as a statute that punishes all marijuana distribution without regard to the amount or remuneration, is a conviction for an offense that 'proscribes conduct punishable as a felony under' the CSA.

Moncrieffe, 133 S. Ct. at 1684 (quoting *Lopez*, 549 U.S. at 60). The Court, like all of the circuit courts before it, affirmed its application of the categorical approach to the State criminal statute at issue. The remainder of the Court's analysis clarifies what the application of that approach means in practice.

The Court held that when a State statute contains several different crimes, each described separately, it is appropriate to analyze the record of conviction—including the charging

document and, in the case of a guilty plea, the plea colloquy, plea agreement, or "some comparable judicial record"—to first determine of which particular offense the alien was convicted. *Id.* (quoting *Nijhawan*, 557 U.S. at 35 (quoting *Shepard v. United States*, 544 U.S. 13, 26 (2005)) (internal quotation marks omitted)). The Court considered Moncrieffe's record of conviction in light of the Georgia statute and found that the plea agreement established that he was specifically convicted of possessing marijuana with intent to distribute.

The Court then limited the analysis to a determination whether "'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony." *Id.* (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)). A State offense meets the definition of a Federal offense only if it "'necessarily' involved . . . facts equating to [the] generic [federal offense]." *Id.* (quoting *Shepard*, 544 U.S. at 24) (alteration in original) (internal quotation marks omitted). Importantly, the Court reiterated that the categorical approach is limited to an analysis of the minimum criminal conduct, or the "'least of th[e] acts' criminalized," that is necessary to sustain a conviction under the State statute. *Id.* (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)) (alteration in original). The Court emphasized that there must be a realistic probability—not a mere theoretical possibility—that the State would apply its statute to conduct falling outside of the generic definition of a crime in order to sustain a finding that the State offense is not categorically equivalent to the Federal offense. *Id.* at 1685 (citing *Duenas-Alvarez*, 549 U.S. at 193).

The Court then focused its discussion on the specific aggravated felony at issue: illicit trafficking in a controlled substance under section 101(a)(43)(B) of the Act. Citing to *Nijhawan*, 557 U.S. at 37, it found that such an aggravated felony was a "generic crim[e]," requiring the application of the categorical approach. The Court then reasoned under *Lopez*, 549 U.S. at 60, that illicit drug trafficking aggravated felonies encompass "all state offenses that 'proscrib[e] conduct punishable as a felony under [the CSA].'" *Id.* It further held that in order for a State offense to constitute illicit trafficking in a controlled substance (1) it must necessarily proscribe conduct that is an offense under the CSA, and (2) the CSA must necessarily prescribe felony punishment for that conduct.

Under the first prong of the analysis, the Court determined that possession of marijuana with intent to distribute necessarily proscribes conduct that is an offense—either a felony or a misdemeanor—under the CSA. The crux of the Court's analysis occurs under the second prong—determining whether or not the CSA necessarily treats the offense as a felony.

The Court noted that the CSA's felony provision is located in a section titled "Unlawful acts," and the misdemeanor provision is located in the "Penalties" section of the statute. *Id.* at 1685-86; *see also* 21 U.S.C. §§ 841, 844. Despite their disparate placement within the CSA, the Court found that "[t]hese dovetailing provisions create two mutually exclusive categories of punishment for CSA marijuana distribution offenses: one a felony, and one not. The only way to know whether a marijuana distribution offense is 'punishable as a

felony’ under the CSA . . . is to know whether the conditions described” in the misdemeanor provision, that is, distribution of a small amount of marijuana for no remuneration, are present or not. *Id.* at 1886 (citation omitted).

The Court determined that Moncrieffe’s marijuana distribution conviction under the Georgia statute is not for a felony under the CSA because it does not *necessarily* involve either remuneration or more than a small amount of marijuana. There is a “reasonable possibility” that a defendant will be convicted for possession of a small amount of marijuana with intent to distribute for no remuneration, which the Court held would be treated as a misdemeanor under the CSA. Under the categorical approach, ambiguity under the second prong compels the legal conclusion that the marijuana distribution offense at issue is not an aggravated felony. *Id.* at 1686-87; *see also* 21 U.S.C. §§ 812(c), 841(a)(1).

The Court rejected the following arguments by the Government as bases for finding that Moncrieffe’s conviction was for an aggravated felony: (1) § 841(b)(4) is a mitigating sentencing provision and therefore irrelevant to a categorical analysis of the elements of a crime and; (2) in Federal criminal prosecutions, because marijuana distribution offenses are presumed to be felonies under the CSA, any State offense with the same elements should presumptively be an aggravated felony.

The Court noted that the Government’s first argument is inconsistent with *Carachuri-Rosendo*, 130 S. Ct. 2577 (2010), in which the Court “recognized that when Congress has chosen to define the generic federal offense by reference to punishment, it may be necessary to take account of federal sentencing factors too.” *Moncrieffe*, 133 S. Ct. at 1687. With respect to the aggravated felony at issue, not only must the State statute contain the “elements” of the generic Federal offense, but “the CSA must punish that offense as a felony.” *Id.* The Court thus held that in order to sustain a finding that a State offense is for a drug trafficking aggravated felony, “a conviction for the predicate offense must necessarily establish” the presence of “factors that are not themselves elements of the crime”—that is, the sentencing factors that make the crime punishable as a felony and not a misdemeanor. *Id.*

With respect to the Government’s second argument, the Court rejected outright the contention that a marijuana distribution offense is presumptively a felony. *Id.* (stating “that is simply incorrect, and the Government’s argument collapses as a result”). The Court emphasized the text of the CSA, which “creates no default punishment,” over the Federal criminal prosecution practices referred to by the Government. *Id.* at 1688. The Court further rejected the Government’s reliance on sentencing cases, clarifying that those cases are analyzed in light of Sixth Amendment concerns not relevant here, and that the applicable approach in the immigration context for this specific aggravated felony under section 101(a)(43)(B) of the Act considers the “generic” Federal offenses as defined in the statute, not criminal prosecutions. Importantly, the Court reversed the presumption promoted by the Government and instead relied on the rule of lenity, holding that “ambiguity in criminal statutes referenced by the [Act] must be construed in the noncitizen’s favor,” even if it results in underinclusive-

ness. *Id.* at 1693.

The Court additionally rejected the Government’s proposal—and the Board’s in *Matter of Castro Rodriguez*—to allow the alien to submit factual evidence in Immigration Court to rebut the presumption that his marijuana distribution crime is an aggravated felony. The Court found this practice to be inconsistent with its understanding of the categorical approach and the text of the Act (which refers to “convictions” and not conduct) and to risk inefficient relitigation of facts long after convictions have been entered in criminal court. *See Matter of Castro Rodriguez*, 25 I&N Dec. 698.

Justice Alito’s Dissent in *Moncrieffe*

Justice Alito authored a thorough dissent in *Moncrieffe*, a summary of which is useful in fully elucidating the concerns, holding, and reasoning in the case. First, Justice Alito disputed that the majority’s holding stemmed from a proper application of the “pure categorical approach.” *Id.* at 1698. Specifically, he disagreed that both § 841(b)(1)(D) and § 841(b)(4) should be considered when comparing the conduct necessary for the State conviction to the elements of the Federal felony under § 841(a). Rather, Justice Alito stated that the CSA “does not contain any such two-tiered provision . . . [a]nd § 841(b)(4) does not alter the elements of the § 841(a) offense” because it is merely a mitigating sentencing guideline. *Id.* He cited to the Court’s decision in *Carachuri-Rosendo* as an example of a “faithful[]” application of the pure categorical approach. *Id.* at 1699.

Second, Justice Alito surmised that the majority’s holding rests not on solid analytical ground, but on the belief—which he shares—that a proper application of the categorical approach would lead to unnecessarily harsh results, which Congress “surely did not intend” and which are out of step with the punishments prescribed in the CSA. *Id.* at 1699. He warned that the majority’s holding would lead to significant disparities between equally culpable defendants convicted in different States. *Id.* at 1700. As a solution, Justice Alito suggested that “departures from the categorical approach are warranted” and that in determining whether a State conviction is punishable as a Federal felony, it would be appropriate—as the Board held in *Matter of Castro-Rodriguez*—to look beyond the record of conviction to the facts admitted or proven in criminal court. *Id.* at 1701.

How *Moncrieffe* Changes the Landscape

The obvious consequence of *Moncrieffe* is that the felony default approach is rejected and the categorical approach as it is understood in the Second and Third Circuits, namely as focusing on the minimum criminal conduct, is reaffirmed. While the general analytical approach is now clear, the practical effects and scope of the decision are less obvious. Particularly relevant for adjudicators is the effect *Moncrieffe* may have on burdens of proof—specifically, which party must demonstrate that a conviction is or is not for an aggravated felony and what evidence may be considered in meeting that burden.

In *Moncrieffe*, the Court answered these questions in the context of removability. That is, when the Government charg-

es an alien with removability as an aggravated felon, it bears the burden of proving the charge by clear and convincing evidence, except in the case of an arriving alien. *See* 8 C.F.R. § 1240.8(a)-(b); *see also* section 240(c)(3)(A) of the Act. The Government's burden is not met if the alien demonstrates that the minimum criminal conduct for which he *may* have been convicted is not an aggravated felony. The Court also rejected the Government's proposed reliance on the particular facts underlying the conviction in meeting this burden.

One remaining open question pertains to the application of the categorical approach when an applicant for relief from removal must prove eligibility for relief by establishing, by a preponderance of the evidence, that he has not been convicted of an aggravated felony. *See* 8 C.F.R. § 1240.8(d); *see also* section 240(c)(4)(A) of the Act. In *Martinez*, 551 F.3d 113, the Second Circuit directly addressed this issue, affirming that for relief applications, the applicant bears the burden of establishing that he has not been convicted of an aggravated felony. The court stated that the applicant's burden is met if he can establish that the least culpable conduct for which he *could have* been convicted is not an aggravated felony. In other words, it is not the applicant's burden to show that he *could not* have been convicted of an aggravated felony, only that he *may not* have been.

As a related matter, it should be noted that while the Second Circuit accepted that § 841(b)(4) is a sentencing exception under criminal law, which the defendant bears the burden of proving, the court did not impose the criminal law burden on the applicant for immigration relief. That is, burdens in criminal proceedings are not necessarily applicable in the immigration context, despite the now rejected felony default approach rationale. The Supreme Court held the same in the context of removability in *Moncrieffe*.

These questions are not directly addressed in *Moncrieffe*, and they remain relevant in the face of a seemingly different approach taken by several circuits and the Board prior to *Moncrieffe*. In *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012), the Ninth Circuit held that an alien with a prior conviction cannot carry his or her burden of demonstrating eligibility for cancellation of removal by establishing that the relevant record of conviction is inconclusive as to whether the conviction is for an aggravated felony. In contrast to the Second Circuit's approach in *Martinez*, the Ninth Circuit focused on the burden-shifting framework in the Act, concluding that because "it is possible that the [alien]'s prior conviction constitutes an aggravated felony" and the alien "bears the burden of demonstrating that he was *not* convicted of an aggravated felony," the alien failed to carry his burden. *Id.* at 990. Noting the split from the Second Circuit's approach, the Ninth Circuit agreed with the Fourth Circuit's conclusion in *Salem v. Holder*, 647 F.3d 111, 115 (4th Cir. 2011), that fidelity to Congress's plainly expressed intent requires that the alien, as the party bearing the burden of proof, suffer the detriment of an inconclusive record of conviction where eligibility for relief is at issue.

The Tenth Circuit and Board have taken a similar approach, albeit in a different context. In a case involving whether the alien had been convicted of a crime involving moral turpi-

tude, which would bar him from seeking relief, the Tenth Circuit held that the alien could not sustain his burden by submitting an inconclusive record of conviction because allowing otherwise would "effectively nullif[y] the statutorily prescribed burden of proof." *Garcia v. Holder*, 584 F.3d 1288, 1289-90 (10th Cir. 2009). Similarly, the Board held in *Matter of Almanza*, 24 I&N Dec. 771, 776 (BIA 2009), that the alien could not satisfy his burden "by producing the inconclusive portions of a record of conviction, and by failing to comply with an appropriate request from the Immigration Judge to produce the more conclusive portions of that record." The Board left open the possibility that the alien could have met that burden if he had provided a more complete criminal record of conviction, which was available in that case. While not directly dispositive, the alternative approaches taken by the Tenth Circuit and the Board in the moral turpitude context and the Second Circuit in the aggravated felony context highlight the questions regarding the categorical approach that remain unanswered in *Moncrieffe*.

Applying the Supreme Court's reasoning in *Moncrieffe* to the relief stage, it appears that the alien may meet his burden by establishing that the least culpable conduct would not render him ineligible for relief. In other words, it appears that the alien's burden may be to establish only that the conviction is not categorically for an aggravated felony, rather than that it is categorically not for an aggravated felony. However, and quite importantly, the Supreme Court does not address whether its analysis would apply to the relief stage, or whether it would differ if all available documents in the criminal record of conviction were not submitted to the Immigration Court in applying for relief.

A final point of potential conflict arises as a result of the Supreme Court's determination in *Moncrieffe* that the relevant Georgia criminal statute is divisible because it "contain[s] several different crimes, each described separately." *Moncrieffe*, 133 S. Ct. at 1684. That interpretation of divisibility is narrower than the approach taken by the Board in *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012) (holding that a criminal statute is divisible, regardless of its structure, if, based on the elements of the offense, some but not all violations of the statute give rise to grounds for removal or ineligibility for relief). In that case, the Board stated that "divisibility would be permitted in 'all statutes of conviction . . . regardless of their structure, so long as they contain an element or elements that could be satisfied either by removable or non-removable conduct.'" *Id.* at 727 (quoting *Lanferman v. Bd. of Immigration Appeals*, 576 F.3d 84, 90 (2d Cir. 2009)). Under the Board's approach, even if a statute was not obviously divisible into concrete offenses, it may be deemed divisible if the terms of the statute necessarily include a broad range of conduct, some of which is conduct for which an alien may be removable and some of which is not. The Board further noted that while the broader approach to divisibility may be different from that taken in the criminal context, it is permissible in the immigration context. *Id.* at 728. However, the Supreme Court appeared to disagree with this bifurcation in *Moncrieffe*.

More recently, in *Descamps v. United States*, 133 S. Ct. 2276 (2013), a sentencing case decided in the context of the

Armed Career Criminal Act, 18 U.S.C. § 924(e), the Supreme Court held that the modified categorical approach does not apply to statutes like section 459 of the California Penal Code which contained only a single, indivisible set of elements.⁸ The Court concluded that it would be impermissible for sentencing courts to make factual findings in order to determine the underlying basis of a defendant's conviction. *Id.* at 2287-90 (citing *Shepard*, 544 U.S. at 25). In so holding, the Court rejected the application of an immigration case, *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011), in the sentencing context because its application of the categorical and modified categorical approaches was broader than, and did not align with, that articulated in *Descamps*. The approach taken in *Descamps* is also in conflict with that taken by the Board in *Lanferman*.

These are questions that are not conclusively answered in *Moncrieffe* but have important implications in immigration proceedings.

Conclusion

Moncrieffe resolved a long-standing circuit split on an issue that has important consequences for many aliens with drug convictions, and it did so solidly in the alien's favor. In the process, the Supreme Court left open many other questions regarding the scope of its decision to other aggravated felonies and crimes involving moral turpitude, and to questions of eligibility for relief. The resolution of these questions will be of continuing importance to adjudicators. ♦

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Endnotes

¹A State drug conviction is also for an aggravated felony if it contains a trafficking element and is a felony under State law. *Lopez*, 549 U.S. at 57.

²An offense is a felony under the CSA if the maximum term of imprisonment authorized by the CSA is more than 1 year. See 18 U.S.C. § 3559(a)(5).

³Section 2C:35-5a provides that it shall be unlawful for any

person knowingly or purposely:

(1) To manufacture, distribute or dispense, or to possess or have under his control with intent to manufacture, distribute or dispense, a controlled dangerous substance or controlled substance analog; or

(2) To create, distribute, or possess or have under his control with intent to distribute, a counterfeit controlled dangerous substance.

The subsection describing the relevant controlled substance in the petitioner's case is found in section 2C:35-5b(11), which states:

Any person who violates subsection a. with respect to:

Marijuana in a quantity of one ounce or more but less than five pounds including any adulterants or dilutants, or hashish in a quantity of five grams or more but less than one pound including any adulterants or dilutants, is guilty of a crime of the third degree....

⁴The Third Circuit in *Wilson* remanded the case to the district court to consider whether Wilson's conviction is for an aggravated felony as a State felony conviction that contains a trafficking element. *Id.* at 382.

⁵The Massachusetts statute makes it a crime when any person "knowingly or intentionally manufactures, distributes, dispenses or cultivates, or possesses with intent to manufacture, distribute, dispense or cultivate [marijuana]." Mass. Gen. Laws Ann. ch. 94C, § 32C (2003).

⁶At the time of Moncrieffe's conviction, section 16-13-30(j)(1) of the Georgia Code Annotated provided: "It is unlawful for any person to possess, have under his control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana."

⁷The decisions of the Immigration Judge, the Board, and the Fifth Circuit were issued prior to the issuance of *Matter of Castro Rodriguez*.

⁸The California statute states in pertinent part: "Every person who enters any house . . . or other building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." Cal. Penal Code § 459 (West 2010).